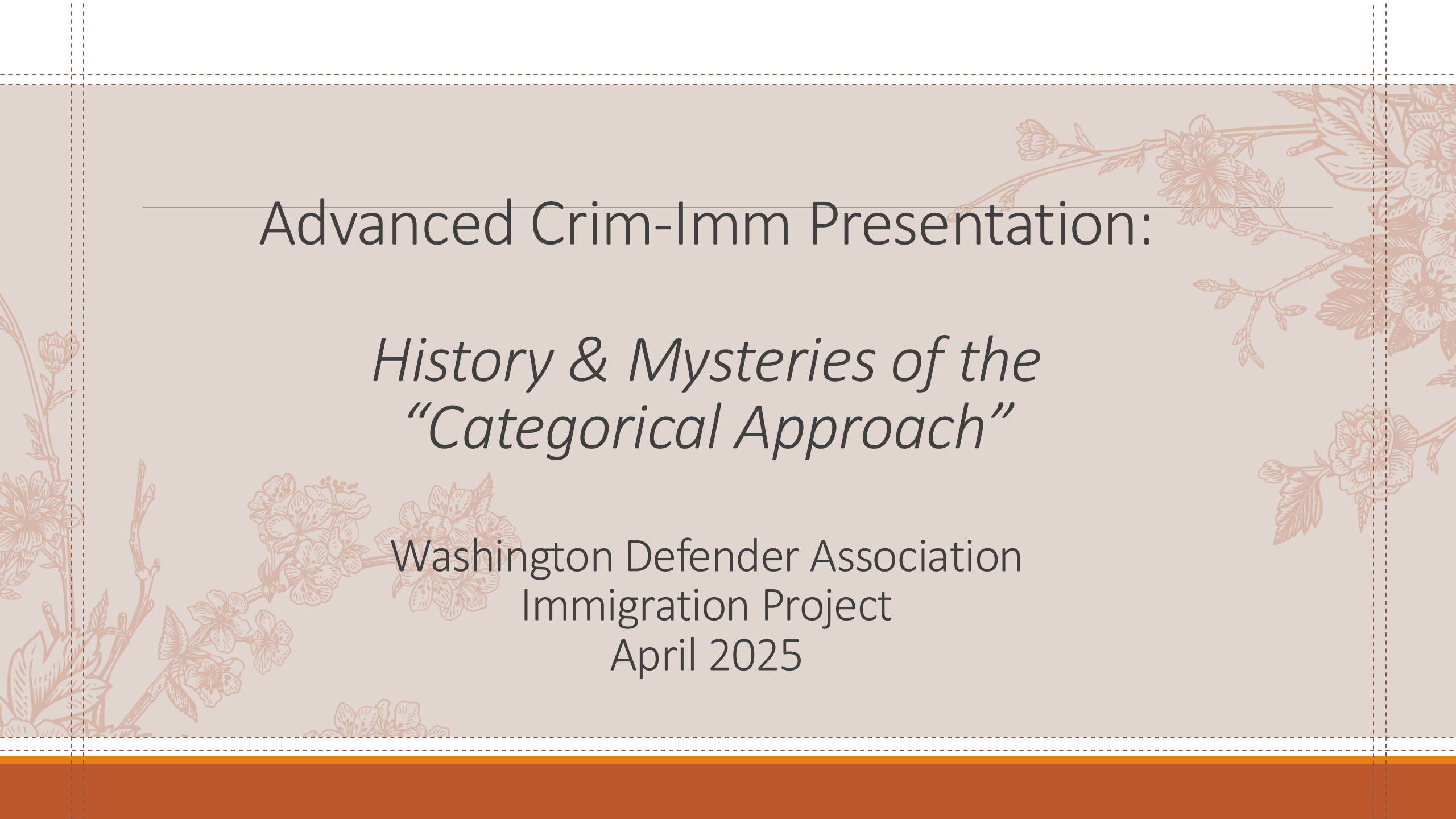


A decorative border featuring stylized floral and branch motifs in a light brown color, framing the central text area.

Advanced Crim-Imm Presentation:

History & Mysteries of the “Categorical Approach”

Washington Defender Association
Immigration Project
April 2025

***Mysteries of the
Categorical Approach***

FIRST: 5 types of removal

1. Immigration Judge (IJ) (INA 239-240)
2. Stipulated removal by IJ (INA 240(d))
3. Expedited removal (INA 235(b))
4. Administrative (expedited) removal of criminal aliens (INA 238(b-c¹); and
5. Judicial Removal by US District Court (INA 238(c²))



Agencies

DHS-- Citizenship & Immigration Services (CIS)
Immigration & Customs Enforcement (ICE + ERO & HSI)
Customs & Border Patrol (CBP)

DOJ-- Immigration Judges (IJs)— Board of Immigration Appeals

DOS- Consular immigrant and non-immigrant visa processing

Origins of the categorical approach

Th[e] categorical approach has a long pedigree in our Nation's immigration law. See *Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L.Rev. 1669, 1688–1702, 1749–1752 (2011) (tracing judicial decisions back to 1913).

Moncrieffe v. Holder, 569 U.S. 184, 191 (2013); see also citation in *Mellouli v. Lynch*, 575 U.S. 798, 805 (2015)

The Penal Colony

In the 1600s and 1700s, England routinely sent people convicted of a broad set of crimes abroad, including to its colonies in America, as an alternative to execution. The colonies reacted by enacting orders and resolutions to block or otherwise regulate the immigration of people with certain criminal records to their lands.

In 1717, however, Great Britain enacted a Transportation Act to give English courts the direct authority to sentence people to “transportation” abroad for felonies. Tens of thousands of people with felony convictions were transported to America under this law.

The practice formally ended in 1776, resuming on a smaller scale from various European countries after the Revolutionary War.

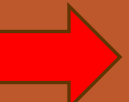
A black and white photograph of a prison cell with a barred window, overlaid with the title 'The Penal Colony' by Franz Kafka. The image is dark and moody, with the light from the window creating a strong contrast.

Franz Kafka
The Penal Colony

Naturalization for free white people

The word citizen excluded, and no doubt intended to exclude, foreigners who had not become citizens of some one of the States when the Constitution was adopted; and also every description of persons who were not fully recognized as citizens in the several States. This, upon any fair construction of the instruments to which we have referred, was evidently the object and purpose of this change of words.

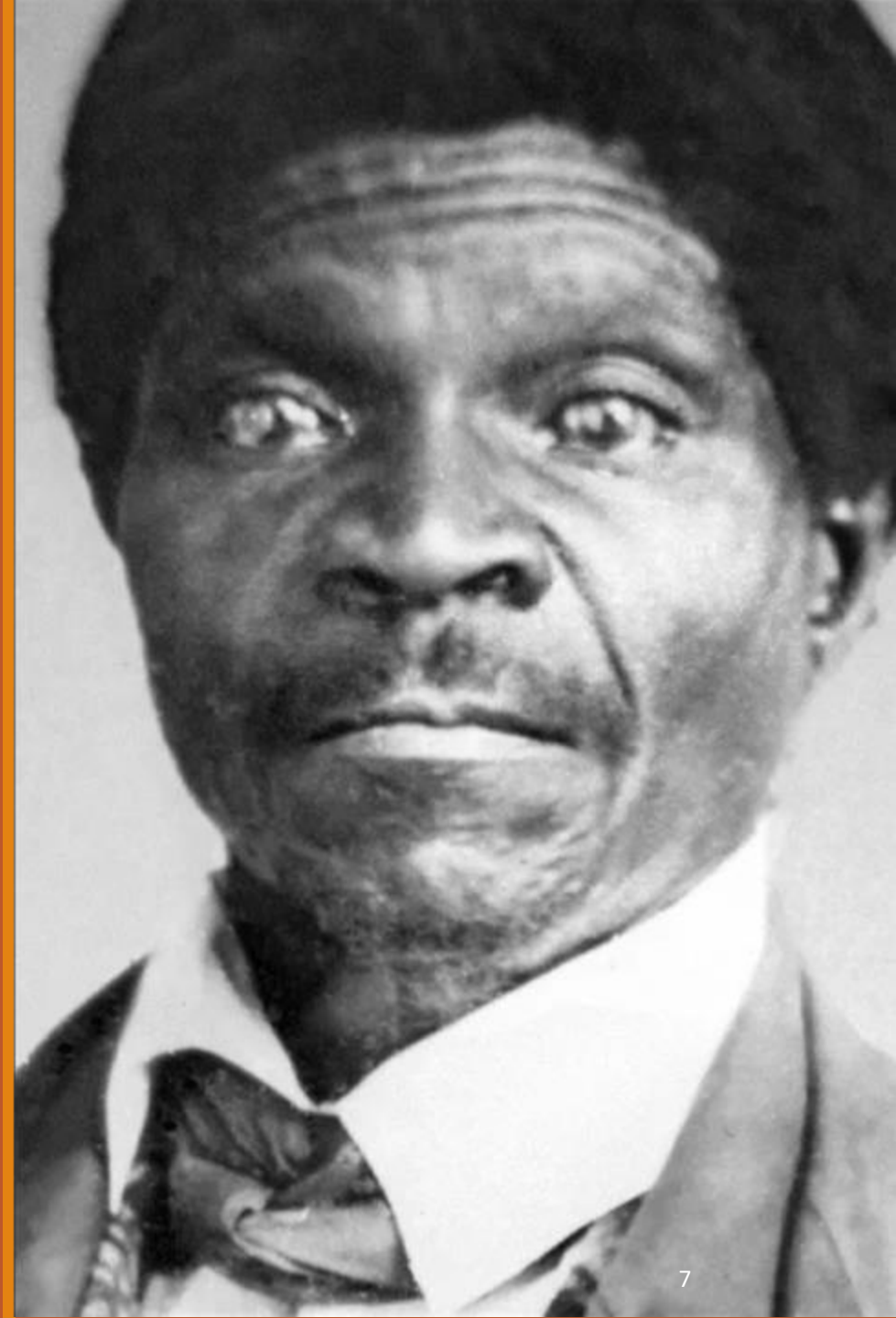
. . . Three laws, two of which were passed almost immediately after the Government went into operation, will be abundantly sufficient to show this. The two first are particularly worthy of notice, because many of the men who assisted in framing the Constitution, and took an active part in procuring its adoption, were then in the halls of legislation, and certainly understood what they meant when they used the words “people of the United States” and “citizen” in that well-considered instrument.



The first of these acts is the naturalization law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens “to *aliens being free white persons.*”

Now, the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of any one, of any color, who was born under allegiance to another Government. But the language of the law above quoted, shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.

Dred Scott v. Sandford, 60 U.S. 393, 419–20, 15 L. Ed. 691 (1857), superseded (1868)

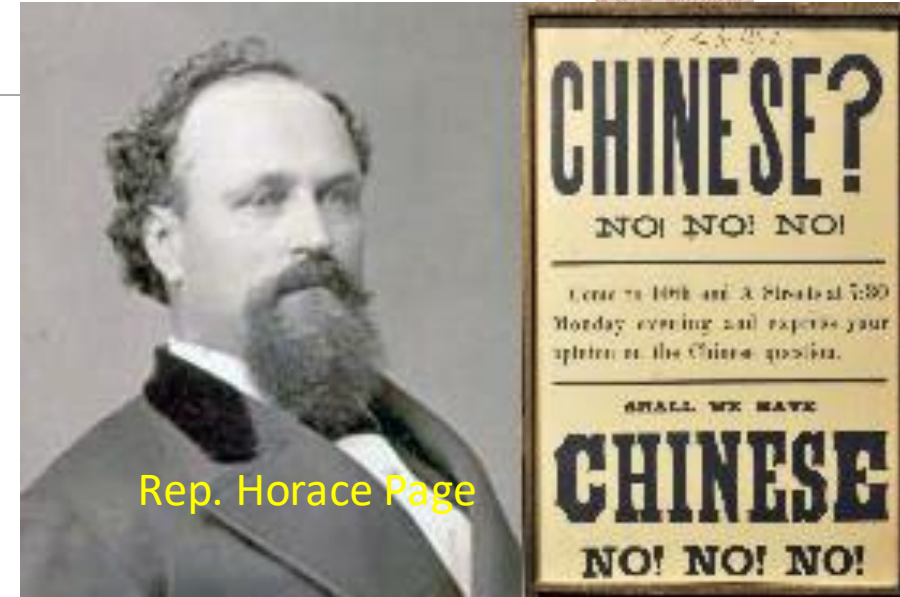


As the colonies began to exert their independence, they attempt to quell the tide of deportation to America. In 1788, after ratifying the Constitution, the US Continental Congress urged states to adopt laws excluding “convicted malefactors” from their borders. During this early period of state immigration regulation, numerous states passed laws barring “convicts” from entering their borders, and exercising the right to fine ships that brought such individuals into the United States.

These laws were initially deemed constitutional, and when the federal government assumed its plenary power over immigration in a contest with the states, it too assumed the power to exclude people with convictions.

In 1875, Congress passed the Page Act, excluding “prostitutes” and people with felony convictions. It effectively prohibited the entry of Chinese women, marking the end of open borders. (Widely recognized as the first restrictive immigration law, the Page Act of 1875 was preceded only by the short-lived Aliens Act of 1798, which criminalized reentry after removal but was never apparently applied to anyone.)

Seven years later, the 1882 Chinese Exclusion Act banned immigration by Chinese men as well.



Crim-Imm Begins...

Thus began a long line of legislative acts that used criminal records to exclude or deport immigrants from the United States, or used immigration status to create criminal acts to prosecute and incarcerate immigrants within the United States.

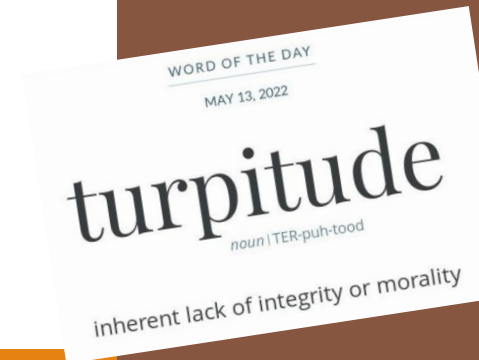
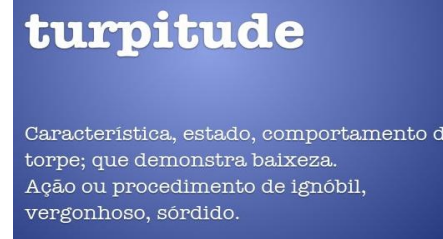
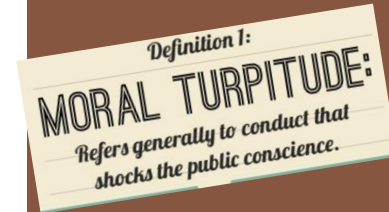
In 1891, Congress passed a law that excluded immigrants convicted of crimes “involving moral turpitude.” This is the first immigration-law use of the term.

In 1917, Congress expanded crimes involving moral turpitude from a ground of exclusion to the United States, into a ground of deportation from the United States.

In 1922, Congress first made offenses related to narcotics grounds for deportation.

In 1929, Congress made unauthorized entry a federal crime punishable by up to one year in prison, or two years for one who had been previously deported.

Over the next fifty years, each of these provisions have been amended and expanded several times, leading finally to the explosion of immigration and criminal provisions that came in the 1980s and 1990s.



Preserving “the racial status quo.”

Until 1965, federal immigration contained explicit racialized barriers to immigration and to citizenship. The infamous Chinese Exclusion Act of 1882 excluded Chinese laborers from entering the United States for ten years and was later expanded.

By the 1920s, eugenicist efforts were underway to create a quota system, culminating in the **National Origins Act of 1924**. The Act numerically restricted immigration outside the Western hemisphere to 155,000 persons annually, and divided those numbers by country of origin, permitting each country up to 2 percent of their foreign born population in the United States as of 1890, and barring immigration by those ineligible to naturalize.

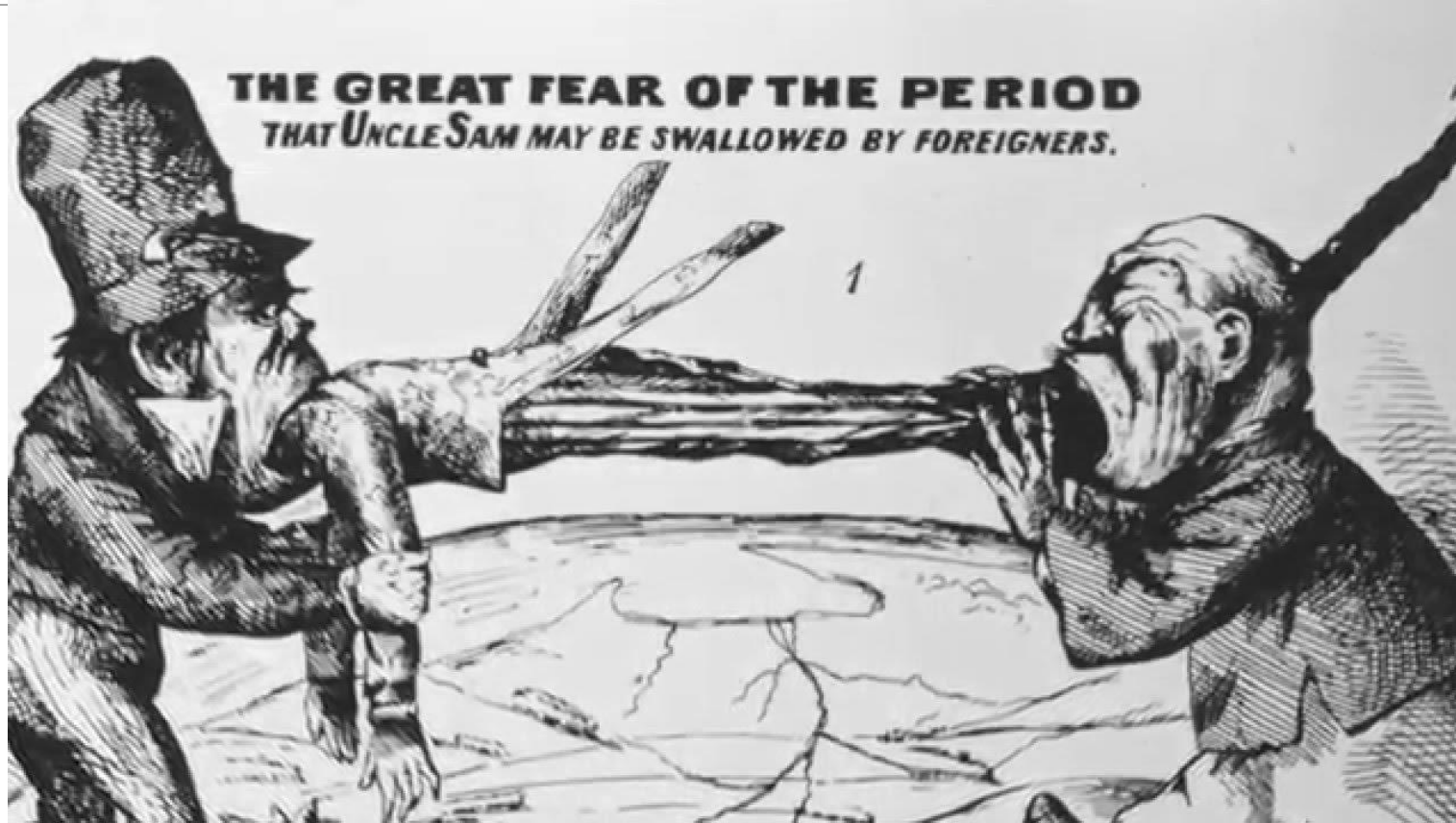
As a result, immigration from southern and eastern Europe, Africa, and the rest of the world beyond the western hemisphere was vastly limited; Asians, ineligible for citizenship, were barred. The door closed on mass Jewish immigration from eastern Europe, and stayed closed, through the Holocaust.

This was intentional: as one Congressional report stated, the purpose of the quotas was “to preserve, as nearly as possible, the racial status quo in the United States.”

As Mae Ngai has written, “the law constructed a white American race” and “transform[ed] immigration law into an instrument of mass racial engineering.”

Over the next few decades, the National Origins Quota System effectively stemmed immigration from the disfavored groups outside the Western hemisphere. The Western hemisphere was exempted from restrictions in light of demands for cheap, mostly agricultural labor. But the racially “undesirable” among these immigrants—namely, Mexicans—were controlled in other ways when their labor was no longer valued.

The National Origins Act of 1924

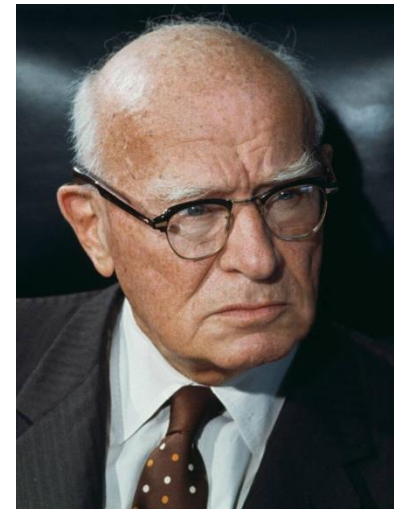


Immigration Act of 1965

Only in 1965 was the National Origins Quota eliminated. The system that replaced it was far from perfect; the visa allocation system that Congress formulated still relies on numerical restrictions that have a disparate impact on Mexico and certain Asian countries.

Nonetheless, the Immigration Act of 1965 is a celebrated moment in United States immigration history, heralded as the time when we finally repealed the most overly racist screening requirements for immigration to the United States. But by the 1980s, more draconian, crime-based immigration policies take root.

Rep. Emanuel Celler made his first important speech on the House floor during consideration of the *Johnson-Reed Immigration Act* of 1924. Three years earlier, Congress had imposed a quota that limited immigration for persons of any nationality to 3 percent of that nationality present in the United States in 1910, with an annual admission limit of 356,000 immigrants. This national origin system was structured to preserve the ethnic and religious identity of the United States by reducing immigration from Eastern and Southern Europe, thereby excluding many Jews, Catholics, among others. The 1924 law Celler was vehemently opposed to the *Johnson-Reed Act*, which passed the isolationist Congress and was signed into law. Celler had found his cause and for the next four decades he vigorously spoke out in favor of eliminating the national origin quotas as a basis for immigration restriction.



Did it all begin with *Taylor*(???) 1990

In this case we are called upon to determine the meaning of the word “burglary” as it is used in § 1402 of Subtitle I (the Career Criminals Amendment Act of 1986) of the Anti–Drug Abuse Act of 1986, 18 U.S.C. § 924(e). This statute provides a sentence enhancement for a defendant who is convicted under 18 U.S.C. § 922(g) (unlawful possession of a firearm) and who has three prior convictions for specified types of offenses, including “burglary.”

Taylor v. United States, 495 U.S. 575, 577–78, 110 S. Ct. 2143, 2147 (1990)

The word “burglary” has not been given a single accepted meaning by the state courts; the criminal codes of the States define burglary in many different ways. . . . On the face of the federal enhancement provision, it is not readily apparent whether Congress intended “burglary” to mean whatever the State of the defendant's prior conviction defines as burglary, or whether it intended that some uniform definition of burglary be applied to all cases in which the Government seeks a § 924(e) enhancement. And if Congress intended that a uniform definition of burglary be applied, was that definition to be the traditional common-law definition,³ or one of the broader “generic” definitions articulated in the Model Penal Code and in a predecessor statute to § 924(e), or some other definition specifically tailored to the purposes of the enhancement statute?

Taylor, 495 U.S. at 580.

Tailored by Taylor



Nor is there any indication that Congress ever abandoned its general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law.

Taylor, 495 U.S. at 590.

We conclude that a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having **the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.**

Taylor, 495 U.S. at 599.

“Burglary” is a deportable “aggravated felony”

ACCA: 18 USC 924(e)(2)(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is **burglary**, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

INA 8 USC 1101(a)(43)(G) an “aggravated felony” is...

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year.

“Crime of Violence” has many definitions

18 USC 924(e)(2)(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

INA 101(a)(43)(F) an aggravated felony is. . . a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at³ least one year;

18 USC 16(a) says that the term “crime of violence” means--

(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 . . .

More *Taylor*-ing



There remains the problem of applying this conclusion to cases in which the state statute under which a defendant is convicted varies from the generic definition of “burglary.” If the state statute is narrower than the generic view, *e.g.*, in cases of burglary convictions in common-law States or convictions of first-degree or aggravated burglary, there is no problem, because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary . . .

A few States' burglary statutes, however, as has been noted above, define burglary more broadly, *e.g.*, by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings. One of Missouri's second-degree burglary statutes Also, there may be offenses under some States' laws that, while not called “burglary,” correspond in substantial part to generic burglary. We therefore must address the question whether, in the case of a defendant who has been convicted under a nongeneric-burglary statute, the Government may seek enhancement on the ground that he actually committed a generic burglary.

This question requires us to address a more general issue—whether the sentencing court in applying § 924(e) must look only to the statutory definitions of the prior offenses, or whether the court may consider other evidence concerning the defendant's prior crimes. The Courts of Appeals uniformly have held that § 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions. . . . We find the reasoning of these cases persuasive.

Taylor, 495 U.S. at 599–600

Reasons why factual retrials of a criminal case would be a nightmare

[T]he practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of burglary, the trial court would have to determine what that conduct was. In some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury. In other cases, however, only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic burglary. **Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed generic burglary? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?** Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.

Taylor, 495 U.S. at 601–02

“Modified categorical” approach—*the mod-cat*

We think the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense. **This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary.** For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

Taylor, 495 U.S. at 602



Taylor & Shephard

Shepard v. United States, 544 U.S. 13 (2005) outlined the “record of conviction” documents used to identify generic convictions in cases of divisible statutes.

Doing the Mod Cat:

*Police reports by themselves are **not** part of the judicially reviewable record of conviction.*

We hold that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is **limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.**

Shepard, 544 U.S. at 13, 26.

Long before *Taylor*, a categorical approach to deportations based on convictions was well established.

We think the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense. This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary. For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

We therefore hold that an offense constitutes “burglary” for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to “generic” burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant.

Taylor, 495 U.S. at 575, 602

Th[e] categorical approach has a long pedigree in our Nation's immigration law. *See Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L.Rev. 1669, 1688–1702, 1749–1752 (2011) (tracing judicial decisions back to 1913).

Moncrieffe v. Holder, 569 U.S. 184, 191, 133 S. Ct. 1678, 1685(2013); *see also* citation in *Mellouli v. Lynch*, 575 U.S. 798, 805, 135 S. Ct. 1980, 1986 (2015)

Here we consider a “generic” federal offense in the abstract, not an actual federal offense being prosecuted before a jury. Our concern is only which facts the CSA relies upon to distinguish between felonies and misdemeanors, not which facts must be found by a jury as opposed to a judge, nor who has the burden of proving which facts in a federal prosecution.

Moncrieffe, 569 U.S. at 184, 198

Many conservative judges seem to *hate* the categorical approach

Because "[t]he categorical approach requires us to perform absurd legal gymnastics," *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149 (9th Cir. 2020) (Graber, J., concurring), it is no surprise that scholars have asked whether this is a "categorical approach or categorical chaos."

Other circuits have observed that the categorical approach "push[es] us into a catechism of inquiry that renders these approaches ludicrous." *United States v. Williams*, 898 F.3d 323, 337 (3d Cir. 2018) (Roth, J., concurring).

Because courts are required to parse numerous state statutes in applying immigration and criminal law, often leading to inconsistent conclusions, it is no wonder "the categorical approach has developed a reputation for crushing common sense." *United States v. Escalante*, 933 F.3d 395, 406 (5th Cir. 2019).

While I join the majority opinion because it correctly applies our precedent, I do not agree that our precedent is correct. Under the current framework, hardened criminals avoid removal due to the vagaries of one state's law, while much softer individuals get shipped overseas because of the indictment template used in a different office. The only consistency in these cases is their arbitrariness. The bedeviling "modified categorical approach" will continue to spit out intra- and inter-circuit splits and confusion, which are inevitable when we have hundreds of federal judges reviewing thousands of criminal state laws and certain documents to determine if an offense is "categorically a crime involving moral turpitude." Almost every Term, the Supreme Court issues a "new" decision with slightly different language that forces federal judges, litigants, lawyers and probation officers to hit the reset button once again.

A better mousetrap is long overdue. Rather than compete with Rube Goldberg, we instead should look to a more objective standard, such as the length of the underlying sentence, before deciding if someone should be removed from our country. While no regime is foolproof, this approach cannot be worse than what we have now.

To make this happen, we need Congress's attention.

Almanza-Arenas v. Lynch, 815 F.3d 469, 483 (9th Cir. 2016) Owen, J, concurring



Mylius v. Uhl

In *Mylius v. Uhl*, 203 F. 152 (SDNY 1913), Immigration officials had concluded that the petitioner's conviction involved moral turpitude by reviewing reports of the trial and the underlying facts that gave rise to his conviction.

Judge Noyes, of US District Court in the Southern District of New York, concluded that the immigration officials erred under the statute by not confining review to the inherent nature of the statutory offense of criminal libel. He explained that “the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules.” Immigration law cannot permit a rule that, “where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other.”

The court held that “the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it.”

United States ex rel. Mylius v. Uhl, 203 F. 152 (S.D.N.Y. 1913)

In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judgments of conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion **when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it.** I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular acts evidence no immorality and that some who have been convicted of slight offenses may be admitted although the facts surrounding their commission may be such as to indicate moral obliquity. **But such results always follow the use of fixed standards and such standards are, in my opinion, necessary for the efficient administration of the immigration laws.**

Mylius, 210 F. at 860

First. That the immigration officers act in an administrative capacity. They do not act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude.

Second. That this question must be determined from the judgment of conviction and not from the testimony adduced at the trial. . . .

Third. That the law must be administered upon broad general lines and if a crime does not in its essence involve moral turpitude, a person found guilty of such crime cannot be excluded because he is shown, aliunde the record, to be a depraved person.

Fourth. That the law must be uniformly administered. It would be manifestly unjust so to construe the statute as to exclude one person and admit another where both were convicted of criminal libel, because, in the opinion of the immigration officials, the testimony in the former case showed a more aggravated offence than in the latter.

Fifth. That the crime of publishing a criminal libel does not necessarily involve moral turpitude. It may do so, but moral turpitude is not of the essence of the crime.

Immigration Laws--Offenses Involving Moral Turpitude, 37 Op. Att'y Gen. 293, 294-95 (1933) (citation omitted) (quoting *Mylius*)

If the alien has been convicted of a crime such as indicated and the conviction is established, it is not the duty of the administrative officer to go behind the judgment in order to determine purpose, motive, and knowledge, as indicative of moral character. The ordinary rule is indicated by the following statement of Judge Noyes in *United States v. Uhl*:

In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judgments of conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts.

United States ex rel. Robinson v. Day, 51 F.2d 1022-23 (2d Cir. 1931) J. Learned Hand

Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral.

United States ex rel. Meyer v. Day, 54 F.2d 336, 337 (2d Cir. 1931)

We cannot go behind the judgment of conviction to determine the precise circumstances of the crime for which the alien was sentenced.

United States ex rel. Guarino v. Uhl, 107 F.2d 399, 400 (2d Cir. 1939)

Hence, in accordance with the doctrine, which we have several times announced, unless the possession of the jimmy with intent to use it for any crime at all, was “necessarily”, or “inherently”, immoral, the conviction did not answer the demands of § 19 of the act of 1917.

United States ex rel. Zaffarano v. Corsi, 63 F.2d 757, 757-58
(2d Cir. 1933) (citations omitted)

We have heretofore held that, in determining whether the crime of which an alien stands convicted is one “involving moral turpitude,” neither the immigration officials nor the courts sitting in review of their action may go beyond the record of conviction. They must look only to the inherent nature of the crime or to the facts charged in the indictment upon which the alien was convicted, to find the moral turpitude requisite for deportation for this cause. In the case at bar the indictment is not in the record.

A few more examples wouldn't hurt...

Wadman v. INS, 329 F.2d 812, 814 (9th Cir. 1964)

[T]he immigration officers and courts, while precluded from considering the evidence, may examine the “record of conviction” (including the indictment or information, plea, verdict or judgment and sentence) to determine the crime of which the alien actually was convicted.

Rassano v. INS, 377 F.2d 971, 974 (7th Cir. 1966)

The orderly administration of justice requires that the INS and the reviewing court go no further than the record of conviction (the indictment, plea, verdict and sentence) to determine whether an alien is deportable . .

Okabe v. INS, 671 F.2d 863, 865 (5th Cir. 1982) (citation omitted)

Whether a crime involves moral turpitude depends upon the inherent nature of the crime, as defined in the statute concerned, rather than the circumstances surrounding the particular transgression.



Parade of BIA cases establishing strict categorical approach

Matter of B--, 1 I. & N. Dec. 52 (A.G. 1941)

The Circuit Court of Appeals in *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758, dealing with a statute quite similar to that of Minnesota, stated that second-degree assault with a dangerous weapon would involve moral turpitude, but, since the record did not indicate the specific offense charged or whether any weapon had been used, the court concluded that the offense could have been without moral turpitude and that upon the record before it the issue must be found in favor of the alien.

Here the question is much the same. The offense charged against the respondent in the 1931 indictment—second degree assault with an unknown weapon, and therefore conceivably not a dangerous weapon—did not necessarily involve moral turpitude.

Parade of BIA cases establishing strict categorical approach

Matter of S--, 2 I. & N. Dec. 353, 357 (B.I.A. 1945) (citations omitted) (internal quotation marks omitted)

Under settled judicial principles, the presence or absence of moral turpitude, which has been said to be an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or society, must be determined in the first instance from a consideration of the crime as defined by the statute. **If, as defined, it does not inherently or in its essence involve moral turpitude, then no matter how immoral the alien may be, or how iniquitous his conduct may have been in the particular instance, he cannot be deemed to have been guilty of base, vile, or depraved conduct.** It is only where the statute includes within its scope offenses which do and some which do not involve moral turpitude, and is so drawn that the offenses which do embody moral obloquy are defined **in divisible portions of the statute** and those which do not in other such portions, that the record of conviction, i.e., the indictment (complaint or information), plea, verdict and sentence is examined to ascertain therefrom under which divisible portion of the statute the conviction was had and determine therefrom whether moral turpitude is involved.

Parade continues!

Matter of T--, 2 I. & N. Dec. 22 (B.I.A. 1944) (citations omitted)

[I]t is not permissible to consider circumstances under which the crime was committed. The inquiry is limited to the inherent nature of the crime as defined by the statute and established by the record of conviction. If the crime as defined does not necessarily involve moral turpitude, the alien cannot be excluded because in the particular instance his conduct was immoral. Conversely, if the crime as defined necessarily involves moral turpitude, no evidence is competent to show that moral turpitude was not involved.



T--, 2 I. & N. Dec. at 22

If one statute defines several crimes, some of which involve moral turpitude and some of which do not, and the statute is divisible, it is permissible to ascertain by examination of the record of conviction whether the particular offense involved moral turpitude. **The record of conviction means the charge (indictment), plea, verdict, and sentence As application of the rule must be uniform, the statute must be taken at its minimum unless its provisions are divisible, and if divisible--one or more of its provisions describing offenses involving moral turpitude, and others describing offenses not involving that element--the charge as shown by the record of conviction is controlling as to which provision of the statute is involved.** If the particular provision describes an act involving moral turpitude, other evidence may not be received to show that turpitude was not involved; and, on the contrary, if the charge relates to a provision which describes an act not involving moral turpitude, extraneous evidence may not be received to show that moral turpitude was in fact involved.

Even more cases...



Matter of D--S--, 3 I. & N. Dec. 502, 504 (B.I.A. 1949) (citations omitted)

It is well settled in immigration proceedings that the nature of the crime is conclusively established by the record of conviction consisting of the charge or indictment, the plea, the verdict and sentence. We are not permitted to go behind this record to determine purpose, motive, or facts, either favorable or unfavorable to the alien.

Matter of P--, 5 I. & N. Dec. 582, 584 (B.I.A. 1953)

In determining whether a particular offense involves moral turpitude, the scope of inquiry is limited to the statute, the regulations issued thereunder, and the record of conviction including the complaint information or indictment, the plea, verdict and sentence. The question as to whether or not a certain crime involves moral turpitude must be determined from the judgment of conviction, and if a crime does not in its essence involve moral turpitude, resort cannot be had to evidence outside the record to show that the offense involved moral turpitude.

Matter of R--, 6 I. & N. Dec. 444, 448 (B.I.A. 1954) (citations omitted) (internal quotation marks omitted)

The test requires us to first determine what law or specific portion thereof has been violated, and then, without regard to the act committed by the alien, to decide whether that law inherently involves moral turpitude; that is, whether violation of the law under any and all circumstances, would involve moral turpitude. If we find that violation of the law under any and all circumstances involves moral turpitude, then we must conclude that all convictions under that law involved moral turpitude although the particular acts evidence no immorality. If, on the other hand, we find that the law punishes acts which do not involve moral turpitude as well as those which do involve moral turpitude, then we must rule that no conviction under that law involves moral turpitude, although in the particular instance conduct was immoral.

Matter of Pichardo-Sufren, 21 I&N Dec. 330 (BIA 1996)

The respondent did not admit to the truth of the Service's factual allegation that he was convicted of a firearms violation. He did not concede his . . . nor did he at any point in the hearing testify that he was convicted of a firearms violation. However, the respondent did testify to the underlying conduct which gave rise to his weapons conviction and admitted in the course of that testimony that the weapon involved was a gun. It is the Immigration Judge's use of this extrinsic testimonial evidence to find the respondent deportable which is being contested by the respondent and which we now address on appeal.

By its very terms, . . . the Act renders deportable only aliens who have been convicted of firearms violations. Thus, an alien who may have committed a firearms violation but was never convicted of such a violation does not fall within the purview of section 241(a)(2)(C) of the Act.

There is no dispute that the respondent pled guilty to and was convicted of criminal possession of a weapon in the third degree. In fact, this conviction may support a finding of deportability . . . , but only if the record contains clear, unequivocal, and convincing proof that possession of a firearm was an integral element of the offense that the respondent was convicted of committing . . . other words, the evidence of record must establish that the respondent was, in fact, convicted of criminally possessing a firearm within the meaning of section 241(a)(2)(C) of the Act.

Pichardo at 333.

In *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (B.I.A. 2001), the Board of Immigration Appeals (BIA or Board) explained how categorical analysis applies to the assessment of whether a conviction constitutes a crime involving moral turpitude:

The crime must be one that necessarily involves moral turpitude without consideration of the circumstances under which the crime was, in fact, committed. It is therefore necessary to engage in an objective analysis of whether the elements necessary to obtain a conviction under the particular statute render the offense a crime involving moral turpitude.

Id. at 84-85 (citation omitted).

BTW, *this is case that says that plain old DUIs are **not** CIMTs.*



As this Board and the courts have consistently held in cases addressing the issue of whether an alien is deportable . . . for having been convicted of a crime involving moral turpitude, it is the nature of the crime, as defined by statute and interpreted by the courts and as limited and described by the record of conviction, which determines whether an alien falls within the reach of that law. *See Gonzalez-Alvarado v. INS*, 39 F.3d 245 (9th Cir.1994); *Cabral v. INS*, 15 F.3d 193 (1st Cir.1994); *Okabe v. INS*, 671 F.2d 863 (5th Cir.1982); *United States ex rel. Giglio v. Neelly*, 208 F.2d 337 (7th Cir.1953); *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir.1939); *Matter of Franklin*, 20 I & N Dec. 867 (BIA), *aff'd*, 72 F.3d 571 (8th Cir.1995); *Matter of Serna*, 20 I & N Dec. 579 (BIA 1992); *Matter of Short*, *supra*; *Matter of Danesh*, 19 I & N Dec. 669 (BIA 1988); *Matter of Khalik*, 17 I & N Dec. 518 (BIA 1980); *Matter of Esfandiary*, *supra*; *Matter of McNaughton*, 16 I & N Dec. 569 (BIA 1978).

Since section 241(a)(2)(C), like section 241(a)(2)(A)(i) of the Act, which relates to convictions for crimes involving moral turpitude, mandates a focus on an alien's conviction, rather than his conduct, we believe the same rationale which limits our scope of inquiry to the record of conviction when determining whether an alien has been convicted of a crime involving moral turpitude applies with equal force here. . . .

We will therefore limit our inquiry to the respondent's Certificate of Disposition, despite his testimony that the weapon in his possession at the time of his arrest was a gun, since it is the crime that he actually was convicted of rather than a crime that he may have committed which is the determinative issue to be resolved here.

Moreover, the principle of not looking behind a record of conviction provides this Board with the only workable approach in cases where deportability is premised on the existence of a conviction. If we were to allow evidence that is not part of the record of conviction as proof of whether an alien falls within the reach of section 241(a)(2)(C) of the Act, we essentially would be inviting the parties to present any and all evidence bearing on an alien's conduct leading to the conviction, including possibly the arresting officer's testimony or even the testimony of eyewitnesses who may have been at the scene of the crime. Such an endeavor is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence.

Pichardo-Sufren, 21 I. & N. Dec. at 335

Analyzing a state statute:

Gonzales v. Duenas-Alvarez, 549 US 183 (2007)

Finding a way that the statute does not match the generic definition requires more than “legal imagination” (altho that helps)

Gonzales v. Duenas-Alvarez, 127 S.Ct. 815 (2007), *U.S. v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (*en banc*) .

Issue: Does ‘aiding or abetting’ a theft offense without taking or controlling property fall within generic aggravated felony theft?

Duenas agreed that California & generic theft appeared to be a categorical match but tried to show CA theft was overbroad as applied (CA criminal liability for unintended conduct).

Court said: to succeed noncitizen must show something special about State’s prosecution of the offense – i.e. that it criminalizes conduct that most other States would not consider “theft.”

“[T]o find that a state statute creates a crime outside the generic definition ... requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.”

“To show that realistic possibility, an offender ... must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner”

The BIA employs the “realistic probability” test & it metastasizes:

(a) Applying the “realistic probability” test *before* finding a categorical match and

(b) applying a burden of proof when there should be none.

- “[T]his ‘realistic probability test’ is part of the initial inquiry that an Immigration Judge must undertake when applying the categorical approach.” *Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014) (emphasis added).
- “Given ... *Moncrieffe* ... the application of the realistic probability test is necessary to prevent the categorical approach from eliminating the immigration consequences for many State drug offenses, including trafficking crimes.” *Id.* at 421 (emphasis added).
- “...an alien must establish ... that the State would apply its statute to conduct that falls outside the generic definition of a crime.” *Matter of Navarro-Guadarrama*, 27 I&N Dec. 560, 562 (BIA 2019).

The BIA applies the “ordinary case” test

“[T]he application of the realistic probability test is necessary to prevent the categorical approach from eliminating the immigration consequences for many State drug offenses.” *Matter of Ferreira*, 26 I&N Dec. 415, 421 (BIA 2014).

Even if a state-controlled substances statute is facially overbroad since it includes substances not federally listed, noncitizen still bears burden to establish a realistic probability of prosecution with the unlisted substance. *Matter of Navarro-Guadarrama*, 27 I&N Dec. 560 (BIA 2019).

7th Cir: BIA erred by holding that showing one’s *own* case was not turpitude was insufficient and noncitizen must also show *other* cases reached non-turpitudinous conduct. *Garcia-Martinez v. Barr*, 921 F.3d 674 (7th Cir. 2019).

9th Circuit Limits RPT

United States v. Grisel, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (noncitizen need not meet *Duenas* realistic probability of prosecution test for crimes where "a state statute explicitly defines a crime more broadly than the generic definition.").

BIA Incursions on the Cat Approach

In a pair of 2007 decisions, the BIA departed from precedent to limit the application of the categorical approach. In *Matter of Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007) the BIA-- addressing the same issue later treated by the Supreme Court in *Nijhawan v. Holder*-- found that the amount of monetary loss required for a fraud offense to be an “aggravated felony” under immigration law does not need to be an element of the statute of conviction, but may be proved by evidence outside the record of conviction.

In *Matter of Gertsenshteyn*, 24 I. & N. Dec. 111 (BIA 2007), *rev’d*, 544 F.3d 137 (2d Cir. 2008). the BIA found that “any available probative evidence” could be used to determine whether a given prostitution offense was “committed for commercial advantage,” making it an aggravated felony

In *Babaisakov* and *Gertsenshteyn*, the Board drew a distinction between criminal removability grounds that demand exclusive focus on the elements of the prior conviction, therefore requiring a categorical inquiry, and those grounds that include requirements “not tied to the elements of any State or Federal criminal statute” — so-called “nonelement” requirements for removability.

Nijhawan v. Holder, 557 U.S. 29 (2009)

For one thing, **we have found nothing in prior law that so limits the immigration court.** *Taylor, James*, and *Shepard*, the cases that developed the evidentiary list to which petitioner points, developed that list for a very different purpose, namely that of determining which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction. . . . For another, petitioner's proposal itself can prove impractical insofar as it requires obtaining from a jury a special verdict on a fact that . . . is not an element of the offense. . . . Further, a deportation proceeding is a civil proceeding in which the Government does not have to prove its claim “beyond a reasonable doubt.”

Nijhawan, 557 U.S. at 41–42

Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically, i.e., to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion.

Nijhawan, 557 U.S. at 40

Major Offensive against the Cat Approach, 2008: *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008)

Decision direct from from Mukasey, Bush's AG

Ali- 7th Circuit, then:

Matter of Silva-Trevino (“T]he documents generally considered part of the formal record of conviction typically focus only on the charging elements of a specific criminal offense. *But moral turpitude is not an element of an offense*” *Id.* at __) creates a “third step.”

If the crime is not a CIMT under the modified categorical approach, the IJ moves to the final step. At this third step, the IJ may consider evidence outside the record of conviction. In the words of Silva–Trevino, “[w]hen the record of conviction is inconclusive, judges may, to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction.”

Olivas-Motta v. Holder, 746 F.3d 907, 910–11 (9th Cir. 2013) citing *Silva Trevino*

Missing Element and *Silva-Trevino*

Matter of Silva-Trevino ignored the entire concept of a “missing element,” for CMT purposes only.

It held that where a lewd intent with a minor offense does not require knowledge that the victim was a minor, the IJ should take new evidence such as testimony to see if in fact the respondent did have guilty knowledge.

Silva-Trevino

First, see if the state offense categorically is, or is not, a CMT based on the elements. If this is answered one way or the other, the inquiry ends.

Next apply the modified categorical analysis to a divisible statute

If that doesn't resolve it, and IJ finds it necessary and appropriate, IJ can review *any* reasonable evidence. . . . ?!

Matter of Silva-Trevino 24 I. & N. Dec. 687 (A.G. 2008)

The U.S. Court of Appeals for the Third Circuit has rejected the approach set out by the Attorney General in *Matter of Silva-Trevino* for determining whether a crime is a crime involving moral turpitude (CIMT). It instead has relied upon its established method for making such a determination and ruled in the instant case that the crime was not a CIMT.

Jean-Louis v. Attorney General of U.S., 2009 WL 3172753 (3d Cir. 2009) 86 No. 39 Interpreter Releases 2538

The Attorney General held in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G.2008), that an IJ may rely on evidence outside the record of conviction to determine whether a petitioner has been “convicted of” a CIMT. **We join the Third, Fourth, and Eleventh Circuits in holding that Silva-Trevino was wrongly decided. We hold that an IJ and the BIA are confined to the record of conviction in determining whether an alien has been convicted of a CIMT.**

Olivas-Motta v. Holder, 746 F.3d 907, 908 (9th Cir. 2013)

On January 30, 2014, the Fifth Circuit rejected Attorney General Mukasey's opinion as contrary to the plain language of the statute, vacated the Board's decision, and remanded this matter to the Board for further proceedings consistent with the court's opinion. See *Silva-Trevino v. Holder*, 742 F.3d 197, 200-06 (5th Cir. 2014). For the reasons stated herein, **I have determined that it is appropriate to vacate Attorney General Mukasey's November 7, 2008, opinion in this matter.**

Matter of Silva-Trevino, 26 I. & N. Dec. 550, 550 (A.G. 2015)

The BIA wants to get around the law....

Excerpts from BIA training PowerPoint:

AVOIDING THE USE OR MITIGATING THE EFFECT OF THE CATEGORICAL APPROACH

Presented by Board Member Roger A. Pauley

Four Ways to Avoid Using, or Mitigate the Effect of, the Categorical Approach

- 1) Correctly concluding that the issue is one where it is not necessary to apply the categorical approach *at all*,
- 2) Finding the issue is governed by the so-called "circumstance-specific" approach,
- 3) Apply the doctrine that *requires an alien* to show that, where the charge is based on conviction for an aggravated felony, there is a "realistic probability" that his offense comes within the scope of the charge, and
- 4) Mitigating the effect of the categorical approach by applying it in a manner that permits a sensible result to be reached

Next big attack is“AMDO”

U.S. v. Aguila-Montes de Oca, 655 F.3d 915 (9th Cir. 2011)

9th Circuit *en banc* attack on the Cat, authored by Judge Bybee (of BUSH OLC fame)

Indeed, accepting the Ninth Circuit's contrary reasoning would altogether collapse the distinction between a categorical and a fact-specific approach. After all, the Ninth Circuit's “weapons” example is just the tip of the iceberg: Courts can go much further in reconceiving indivisible statutes as impliedly divisible ones. In fact, every element of every statute can be imaginatively transformed as the Ninth Circuit suggests—so that every crime is seen as containing an infinite number of sub-crimes corresponding to “all the possible ways an individual can commit” it. *Aguila–Montes*, 655 F.3d, at 927. **(Think: Professor Plum, in the ballroom, with the candlestick?; Colonel Mustard, in the conservatory, with the rope, on a snowy day, to cover up his affair with Mrs. Peacock?)**

Descamps v. United States, 570 U.S. 254, 273, 133 S. Ct. 2276, 2290–91 (2013)



The Glorious Trifecta

Moncrieffe April 2013 INA

Descamps June 2013 ACCA

Mathis 2016 ACCA

Mathis probably the high point of the resurgence of the categorical approach

Moncrieffe v. Holder, 133 S.Ct. 1678 (2012)

When the Government alleges that a state conviction qualifies as an “aggravated felony” under the INA, we generally employ a “categorical approach” to determine whether the state offense is comparable to an offense listed in the INA. See, e.g., *Nijhawan v. Holder*, 557 U. S. 29, 33–38 (2009); *Gonzales v. Duenas-Alvarez*, 549 U. S. 183, 185–187 (2007). Under this approach we look “not to the facts of the particular prior case,” but instead to whether “the state statute defining the crime of conviction” categorically fits within the “generic” federal definition of a corresponding aggravated felony. *Id.*, at 186 (citing *Taylor v. United States*, 495 U. S. 575, 599–600 (1990)). **By “generic,” we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense “ ‘necessarily’ involved . . . facts equating to [the] generic [federal offense].”** *Shepard v. United States*, 544 U. S. 13, 24 (2005) (plurality opinion). Whether the noncitizen’s actual conduct involved such facts “is quite irrelevant.” *United States ex rel. Guarino v. Uhl*, 107 F. 2d 399, 400 (CA2 1939) (L. Hand, J.).

Descamps v. U.S., 570 U.S. 254, 133 S. Ct. 2276 (2013)

Shrinks the mod-cat

We have previously approved a variant of this method—labeled (not very inventively) the **“modified categorical approach”**—when a prior conviction is for violating a so-called “divisible statute.” That kind of statute sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building or an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime.

This case presents the question whether sentencing courts may also consult those additional documents when a defendant was convicted under an “indivisible” statute—i.e., one not containing alternative elements—that criminalizes a broader swath of conduct than the relevant generic offense. That would enable a court to decide, based on information about a case's underlying facts, that the defendant's prior conviction qualifies as an ACCA predicate even though the crime fails to satisfy our categorical test. Because that result would contravene our prior decisions and the principles underlying them, we hold that **sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.**

Descamps, 570 U.S. at 257–58.

Mathis v. Holder, 579 U.S. 500, 136 S. Ct. 2243 (2016)

Under *Mathis*, where a statute lists alternatives that merely reflect “illustrative examples” of how the offense may be committed, then those alternatives are means, not elements. Thus, the statute is indivisible, and the modified categorical approach does not apply. By contrast, if different parts of a statute are subject to different sentences, then those parts are elements of an offense, and the statute is divisible.



Where a state statute and case law do not resolve the issue of elements versus means, then a review of the record of conviction is allowed to identify the statute's elements. If the record of conviction does not identify clearly alternative facts as elements of the offense, then the statute is not divisible. In reviewing the *Mathis* decision, the Board held that, where state law does not resolve the question of whether statutory alternatives define elements or means, an immigration judge may consider or “peek” at the record of conviction.

§ 2:6. Proof of convictions and the categorical approach, Immigr. Law & Crimes § 2:6

Mathis = high point of cat analysis



The Supreme Court, Justice Kagan, held:

- 1) A prior conviction does not qualify as the generic form of a predicate violent felony offense listed in the ACCA if an element of the crime of conviction is broader than an element of the generic offense because the crime of conviction enumerates various alternative factual means of satisfying a single element, abrogating *United States v. Ozier*, 796 F.3d 597, and *United States v. Trent*, 767 F.3d 1046; and
- 2) Iowa's burglary statute had a broader locational element than generic burglary

Mathis v. United States, 579 U.S. 500, 136 S. Ct. 2243 (2016)



Elements vs. means: *the peek*

This threshold inquiry—elements or means?—is easy in this case, as it will be in many others. Here, a state court decision definitively answers the question: The listed premises in Iowa's burglary law, the State Supreme Court held, are “alternative method[s]” of committing one offense, so that a jury need not agree whether the burgled location was a building, other structure, or vehicle. . . . When a ruling of that kind exists, a sentencing judge need only follow what it says. . . . Likewise, the statute on its face may resolve the issue. If statutory alternatives carry different punishments, then under *Apprendi* they must be elements.

Mathis, 579 U.S. at 517–18

Elements vs. means: *the peek*

And if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself. As Judge Kozinski has explained, such a “**peek at the [record] documents**” is for “the sole and limited purpose of determining whether [the listed items are] element[s] of the offense.” . . . Suppose, for example, that one count of an indictment and correlative jury instructions charge a defendant with burgling a “building, structure, or vehicle”—thus reiterating all the terms of Iowa's law. That is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt. So too if those documents use a single umbrella term like “premises”: Once again, the record would then reveal what the prosecutor has to (and does not have to) demonstrate to prevail. . . . Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime. Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy “*Taylor* 's demand for certainty” when determining whether a defendant was convicted of a generic offense.

Mathis, 579 U.S. at 518–19



After Mathis

Almanza-Arenas II

Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent **either to permanently or temporarily deprive** the owner..... Cal. Veh. Code § 10851

California Vehicle Code § 10851(a) is an indivisible statute, criminalizing both conduct that would and would not constitute a crime involving moral turpitude. Therefore, section 10851(a) cannot be a categorical match to a crime involving moral turpitude...

Almanza-Arenas v. Lynch, 809 F.3d 515, 519 (9th Cir. 2015)

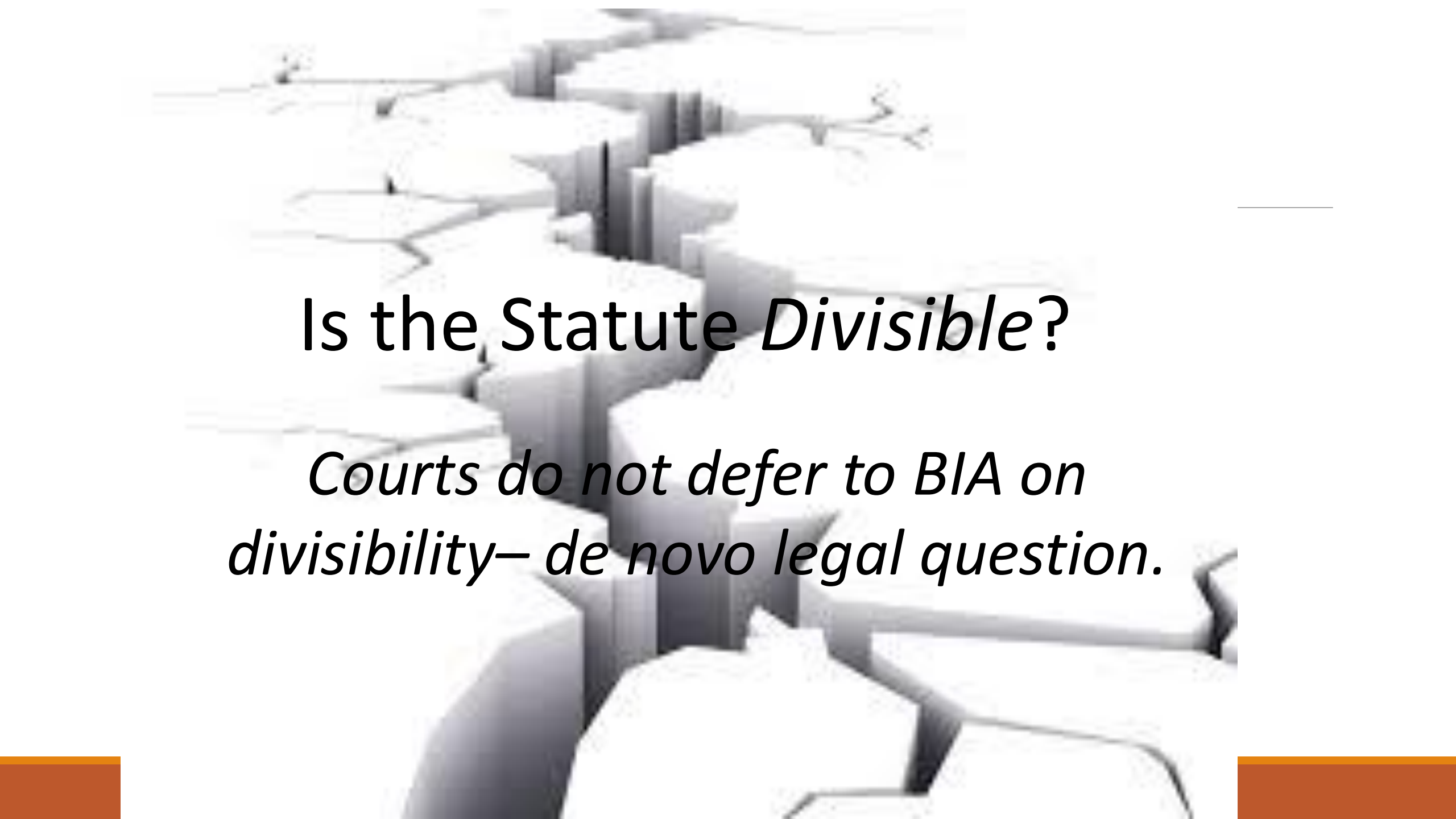
Mellouli (2015)

Because Congress predicated deportation “on convictions, not conduct,” the approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior. *Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1701, 1746 (2011). The state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law. *Ibid.* An alien's actual conduct is irrelevant to the inquiry, as the adjudicator must “presume that the conviction rested upon nothing more than the least of the acts criminalized” under the state statute. *Moncrieffe v. Holder*, 569 U.S. —, —, 133 S.Ct. 1678, 1684–1685, 185 L.Ed.2d 727 (2013) (internal quotation marks and alterations omitted).

The categorical approach “has a long pedigree in our Nation's immigration law.” *Id.*, at —, 133 S.Ct., at 1685. As early as 1913, courts examining the federal immigration statute concluded that Congress, by tying immigration penalties to convictions, “intended to ‘limi[t] the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense,’ and to disallow ‘[examination] of the facts underlying the crime.’” *Das*, *supra*, at 1688, 1690.

Rooted in Congress' specification of conviction, not conduct, as the trigger for immigration consequences, the categorical approach is suited to the realities of the system. Asking immigration judges in each case to determine the circumstances underlying a state conviction would burden a system in which “large numbers of cases [are resolved by] immigration judges and front-line immigration officers, often years after the convictions.” Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 Geo. Immigration L. J. 257, 295 (2012).

Mellouli v. Lynch, 575 U.S. 798, 805–06, 135 S. Ct. 1980 (2015) Justice Ginsburg.



Is the Statute *Divisible*?

*Courts do not defer to BIA on
divisibility— de novo legal question.*

Means vs. Elements

If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law.

Schad v. Arizona, 501 U.S. 624, 636, 111 S. Ct. 2491, 2499 (1991)

Is Statute Divisible?

If statute has no subsections and no “ors,” it’s not divisible. Then, if minimum statutory conduct is not within the generic definition, you win. Analysis stops. In theory.

If a statute has subsections, or is disjunctive (“this *or* that”), key task is to find out if those alternatives are:

- ❑ separate elements of distinct crimes, or
- ❑ alternative means of committing one crime.

Don’t assume the statute is divisible.

An element is something found by a jury unanimously—in every case.



“A single element must be part of a charged offense with which a jury necessarily found the defendant guilty”

“The Sixth Amendment contemplates that a jury [] will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances.”

Descamps, 133 S. Ct. at 2288

In the 9th Circuit, disjunctive phrasing does *not* automatically make a statute divisible

A jury must need to decide unanimously between these alternatives to convict.



Only when state law requires that in order to convict the defendant the jury must unanimously agree that he committed a particular substantive offense contained within the disjunctively worded statute are we able to conclude that the statute contains alternative *elements* and not alternative *means*.

Rendon v. Holder, 764 F.3d 1077, 1086 (9th Cir. 2014)

Burdens affect divisibility analysis

The Court first discussed the categorical approach in the criminal context, but it has since **migrated into our INA cases**

Pereida v. Wilkinson, 592 U.S. 224, 233, 141 S. Ct. 754, 762 (2021)

In the criminal context, this Court has said that judges seeking to ascertain the defendant's crime of conviction should refer only to a “limited” set of judicial records. . . . In part, the Court has circumscribed the proof a judge may consult out of concern for the defendant's Sixth Amendment right to a trial by jury. If a judge, rather than a jury, may take evidence and make findings of fact, the thinking goes, the proceeding should be as confined as possible. . . .

But Sixth Amendment concerns are not present in the immigration context. And in the INA, Congress has expressly authorized parties to introduce a much broader array of proof when it comes to prior convictions—indicating, for example, that a variety of records and attestations “shall” be taken as proof of a prior conviction. 8 U.S.C. § 1229a(c)(3)(B). **Nor is it even clear whether these many listed forms of proof are meant to be the only permissible ways of proving a conviction, or whether they are simply assured of special treatment when produced.**

Pereida, 592 U.S. at 242

9th Cir: *Young & Marinalarena* overruled

Young v. Holder & Marinalarena: Tie Goes to the Runner?

- ☐ Burden to establish *deportability* of person legally admitted: on DHS
- ☐ Burden to establish admissibility: on non-citizen
- ☐ Burden to establish *eligibility for relief*: on non-citizen

The record of conviction is inconclusive as to whether the conviction was for an aggravated felony; thus, Petitioner has not carried the burden of establishing his eligibility for cancellation of removal.

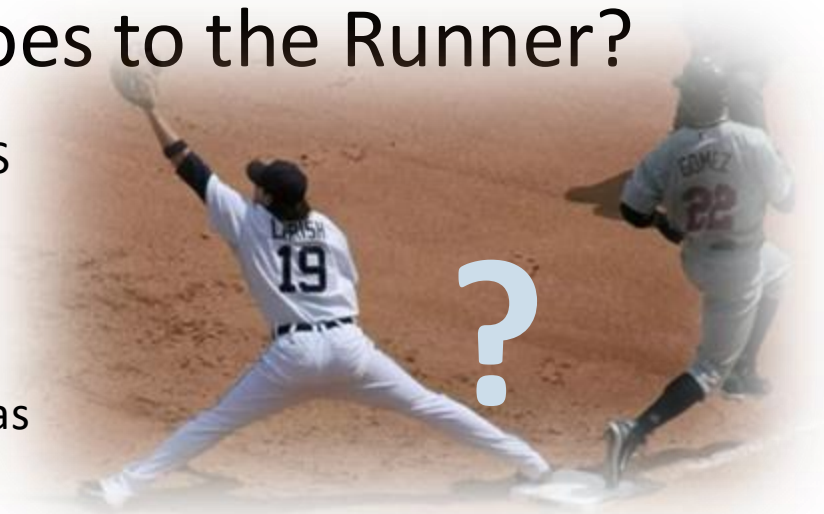
Young v. Holder, 697 F.3d 976, 982 (9th Cir. 2012), overruled by *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019)

[A] noncitizen's eligibility for cancellation of removal is not barred where the record is ambiguous as to whether a state-law conviction constitutes a predicate disqualifying federal offense, overruling *Young v. Holder*, 697 F.3d 976.

Marinelarena v. Barr, 930 F.3d 1039 (9th Cir. 2019), cert. granted, *judgment vacated sub nom. Wilkinson v. Marinelarena*, 141 S. Ct. 1512, 209 L. Ed. 2d 251 (2021)

Judgment vacated, and case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Pereida v. Wilkinson*, 592 U.S. —, 141 S.Ct. 754 (2021).

Wilkinson v. Marinelarena, 141 S. Ct. 1512 (2021)



The majority's response is that there is no limitation on the documents an immigration judge can look at when applying the categorical approach. That is because, **the majority says, the limitation was adopted in the criminal context out of a concern for Sixth Amendment rights that is not present in the immigration context.** I. . . That was not, however, our only, or even primary, reason for adopting the limitation. Rather, we limited the documents that a judge can review in order “to implement the object of the statute and avoid evidentiary disputes . . . To be sure, we were there referencing ACCA, not the INA. But the statutes share the relevant object (tying federal penalties to certain convictions, not certain conduct) signaled by the same statutory text (“conviction”). . . . The “central feature” of this statutory object is “a focus on the elements, rather than the facts, of a crime.” . . . Allowing review of a broad array of evidence is incompatible with this statutory object, even if the judge looks at the evidence only to determine the nature of the offense of which a noncitizen was convicted. . . . I see no reason for the categorical approach to apply differently under the INA than under ACCA given their shared text and purpose. The “ ‘long pedigree’ ” of the categorical approach in our immigration law further counsels against departing from how we have long understood that approach to work. *Mellouli*, 575 U.S., at 805–806, 135 S.Ct. 1980. Although this Court first applied the categorical approach in the criminal context, see ante, at 761–762, courts examining the federal immigration statutes concluded that Congress intended a categorical approach decades before Congress even enacted ACCA. See *Mellouli*, 575 U.S., at 805–806, 135 S.Ct. 1980.

Pereida v. Wilkinson, 592 U.S. at 255–56, Breyer, J. dissenting (citations omitted)

Washington elements and means

Unanimity. [J]urors [] need to be unanimous as to each of the elements of the charged offense in order to return a guilty verdict, [but] they need not be unanimous as to each of the **alternatives** within a particular element....

[I]n *State v. Ortega-Martinez*, 124 Wn.2d 702, 881 P.2d 231 (1994), [] the Supreme Court specifically held that jurors need not be unanimous as to **alternative means**, as long as sufficient evidence supports each of the **means** relied on by one or more jurors.

WPIC 4.23



"The jury foreman said that they are unanimously deadlocked."

WA jury instructions (WPICs) say criminal statutes divide into three groups:

(1) statutes with no elements that may constitute separate, distinct offenses or that may be satisfied by alternative means;

2) statutes with multiple offenses, each constituting a separate and distinct crime; and

(3) statutes setting forth a single offense that may be committed by alternative means or in more than one way.

Alternate means are not elements and do not make a statute divisible, under current case law.

- ❑ In alternative means cases, jury unanimity as to means not required if there is substantial evidence to support each of alternative means charged.
- ❑ Statutes defining *terms* do not create new alternative means of committing an offense.... No requirement that the jurors agree on facts supporting the alternative means.

State v. Linehan 147 Wash.2d 638, 56 P.3d 542 (2002)

See also 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.20 (3d Ed)

Deference? *Loper Bright* overturns *Chevron* and *Brand X*

Chevron has proved to be fundamentally misguided. Despite reshaping judicial review of agency action, neither it nor any case of ours applying it grappled with the APA—the statute that lays out how such review works. Its flaws were nonetheless apparent from the start, prompting this Court to revise its foundations and continually limit its application. . . For its entire existence, *Chevron* has been a “rule in search of a justification,”. . . , if it was ever coherent enough to be called a rule at all.

Experience has also shown that *Chevron* is unworkable.

Loper Bright Enters. v. Raimondo, 603 U.S. 369, 407–08, 144 S. Ct. 2244, 2270 (2024)



Loper-Bright and *stare decisis*

At least some of our prior decisions defining crimes as CIMTs were based on Chevron deference. After *Loper Bright*, those “prior cases that relied on the *Chevron* framework ... are still subject to statutory stare decisis despite our change in interpretive methodology.” 603 U.S. at 412, 144 S.Ct. 2244. Thus, our holdings “that specific agency actions are lawful” were not overruled by *Loper Bright* simply because they relied on *Chevron*. *Id.* (emphasis added). But, given *Loper Bright*'s clear instruction that we otherwise need no longer defer to the agency's interpretation, we take the Supreme Court to mean that although the holdings of our prior cases in which *Chevron* deference was applied remain precedential until overruled, we are not compelled to use them as analytical building blocks in every case to determine whether the BIA correctly found, in the case before us, that a previously untreated crime is a CIMT. . .

Murillo-Chavez v. Bondi, 128 F.4th 1076, 1087 (9th Cir. 2025)

A Loper Bright payoff—in reverse...

[W]e conclude that *Diaz-Lizarraga* is entitled to “*Skidmore* deference.” . . . Exercising our independent evaluation of the statute, we conclude that as applied to theft offenses, the statutory phrase “crimes involving moral turpitude,” 8 U.S.C. § 1227(a)(2)(A)(ii), encompasses offenses that require the government to prove the defendant acted with an intent to permanently deprive an owner's **property or substantially erode the owner's property rights**. Offenses that criminalize less culpable conduct, including temporary takings with the intent return to the owner shortly thereafter, however, are still categorically overbroad.

In reaching this conclusion, we are mindful that *Diaz-Lizarraga* overruled long-standing BIA precedent that created a sharp distinction between permanent and temporary property deprivations and holding that an intent to deprive permanently was a necessary element of a CIMT. (Citations omitted)

We have historically endorsed this BIA's prior interpretation under *Chevron*. See, e.g. *Castillo-Cruz*, 581 F.3d at 1160. Applying the prior BIA permanent deprivation requirement, for example, we held that state theft statutes that are broad enough to “penalize[] temporary takings” do not categorically describe CIMTs. (citations omitted) We have not yet, however, had occasion to decide whether the BIA's revised interpretation in *Diaz-Lizarraga* reflects the correct interpretation of “moral turpitude” in the context of theft offenses, nor whether it was entitled to *Chevron* deference. In light of the BIA's thoroughness, persuasive reasoning, and consistency with the longstanding distinction between substantial and de minimis takings, we conclude that the BIA's 2016 interpretation is correct.

Lopez v. Garland, 116 F.4th 1032, 1041 (9th Cir. 2024) (citations omitted)

The categorical approach for crim-imm faces an uncertain future

The Court first discussed the categorical approach in the criminal context, but it has since **migrated** into our INA cases.

Pereida v. Wilkinson, 592 U.S. 224, 233, 141 S. Ct. 754, 762 (2021)

(A bad omen? since so many of the Justices seem to accept cruelty to migrants)

In the criminal context, this Court has said that judges seeking to ascertain the defendant's crime of conviction should refer only to a “limited” set of judicial records. *Shepard*, 544 U.S., at 20–23, 125 S.Ct. 1254. In part, the Court has circumscribed the proof a judge may consult out of concern for the defendant's Sixth Amendment right to a trial by jury. If a judge, rather than a jury, may take evidence and make findings of fact, the thinking goes, the proceeding should be as confined as possible. . . . **But Sixth Amendment concerns are not present in the immigration context. And in the INA, Congress has expressly authorized parties to introduce a much broader array of proof when it comes to prior convictions**—indicating, for example, that a variety of records and attestations “shall” be taken as proof of a prior conviction. 8 U.S.C. § 1229a(c)(3)(B). Nor is it even clear whether these many listed forms of proof are meant to be the only permissible ways of proving a conviction, or whether they are simply assured of special treatment when produced.

Pereida, 592 U.S. at 242

The owl of Minerva takes its flight only when the shades of night are gathering.

--G.W.F. Hegel, *Philosophy of Right* (1820), "*Preface*";
translated by S.W. Dyde, 1896