

Sample Full Board Decisions

“Answer” Key

Slide Hypotheticals:

(b) (5)



Full Decisions:

(b) (5)



Overview: Admissions

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What we will cover today

- Quick background on the definition of admission in the INA
- Admission scenarios
- Admissions issues in current litigation
- Special issues related to returning LPRs

Review of the Historical Context:

From Entry to Admission

The Illegal Immigration Reform and Immigration Responsibility Act of 1996 created a single unified removal proceeding and aimed to replace the concept of entry with that of admission.

Pre-IIRIRA

- Exclusion or Deportation
- “Entry” is key

Post-IIRIRA

- Removal proceedings
- “Admission” is key

The definition of “admission”

“The lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” INA § 101(a)(13)(A)

- Although IIRIRA aimed to replace admission with entry remains in the current definition, the term entry is not defined in the INA

Procedurally regular vs substantively lawful admissions

Section 101(a)(13)(A) defines admission as lawful entry, not as a particular legal status afterward.

By adopting the procedural definition of admission, the admission is complete after “an inspection and authorization by an immigration officer.”

So an alien can be admitted but not have any substantively lawful status in the United States.

Importance of Admission Issues

- Practical impact
 - Differences in charging grounds
 - Eligibility for Relief
 - Burden of Proof
 - Due Process safeguards
- Aliens in removal proceedings are subject to removability under either INA § 212 (grounds of inadmissibility) or § 237 (grounds of removability).
- Generally, aliens want to be admitted for the greater protections under § 237.
- The greater protections afforded to admitted aliens are intended to recognize their greater ties to the United States.

Importance of Admissions: A foundational issue for our practice

REMOVAL

Standard INA §
240, 8 U.S.C. 1229a
Proceedings

Admitted Aliens
(charged under
INA § 237, 8
U.S.C. § 1227)

Immigrants

Nonimmigrants

Arriving aliens
(charged under INA
§ 212, 8 U.S.C. §
1182)

Aliens present
without admission
or parole (charged
under INA § 212, 8
U.S.C. § 1182)

Alternative
Removal
Proceedings

Expedited

Administrative

Reinstatement

Importance of Admissions: Charging for removal grounds - Crimes Involving Moral Turpitude

Inadmissibility: 212(a)(2)(A)(i)(I)	Deportability: 237(a)(2)(A)(i)
<ul style="list-style-type: none"> • No conviction required (admission of facts that constitute the crime is sufficient) • Only need one! • Conviction or commission of the crime at any time 	<ul style="list-style-type: none"> • Requires a conviction • If a single CIMT, must be within 5 years of admission PLUS a sentence of 1 year+ • Or, must be 2 or more CIMTs (not arising out of a single scheme)

Importance of Admissions: Burdens of Proof In Removal Proceedings

Arriving aliens

The **alien** has the burden to prove “that the alien is **clearly and beyond doubt** entitled to be admitted and is not inadmissible.” INA § 240(c)(2)(A) , 8 U.S.C. § 1229a(c)(2)(A); 8 C.F.R. § 1240.8(b)

Present without admission

DHS must first show alienage. Then, **burden shifts to alien** to demonstrate by **clear and convincing** evidence that he or she is either “lawfully in the United States **pursuant to a prior admission**,” or “**clearly and beyond a doubt** entitled to be admitted to the United States and is not inadmissible as charged.” 8 U.S.C. § 1229a(c)(2), 8 C.F.R. § 1240.8(c)

Burdens of Proof

Admitted aliens

DHS has burden to show removability by **clear and convincing** evidence. 8 U.S.C. § 1229a(c)(3); 8 C.F.R. § 1240.08(a)

Returning LPRs

DHS has burden by **clear and convincing** evidence that a returning LPR is seeking admission, i.e., fits in one of the exceptions at 101(a)(13)(C)



Admitted or not?



Admitted or Not?

Frank enters the United States at the Miami International Airport on a student visa.

Was Frank admitted?

- A. Yes
- B. No
- C. Unclear from the facts

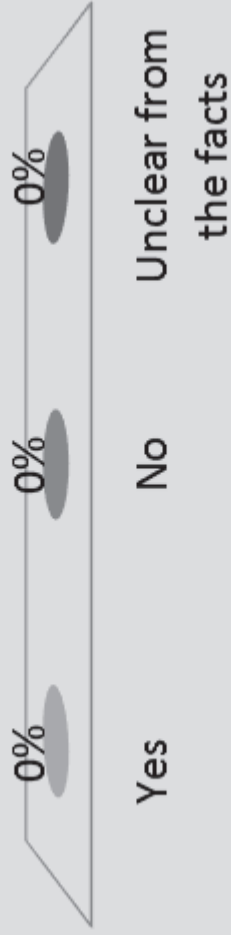


Admitted or Not?

- Paul crosses the United States border through an uninhabited desert at night and continues to live and work in the United States for 10 years, marries, and has two U.S. citizen children.
 - 8 U.S.C. § 212(a)(6)(A)(i)

Was Paul admitted?

- A. Yes
- B. No
- C. Unclear from the facts



Admitted or Not?

- Sandra disembarks at the Los Angeles International Airport with no documents and is immediately taken to secondary inspection. She tells the agency she barely escaped her home country, having been beaten, arrested, and detained by the police. The agency believes Sandra might have a viable asylum claim and paroles her into the United States.
 - 8 U.S.C. § 1101(a)(13)(B)
 - 8 U.S.C. § 1182(d)(5)(A)

Was Sandra admitted?

- A. Yes
- B. No
- C. Unclear from the facts

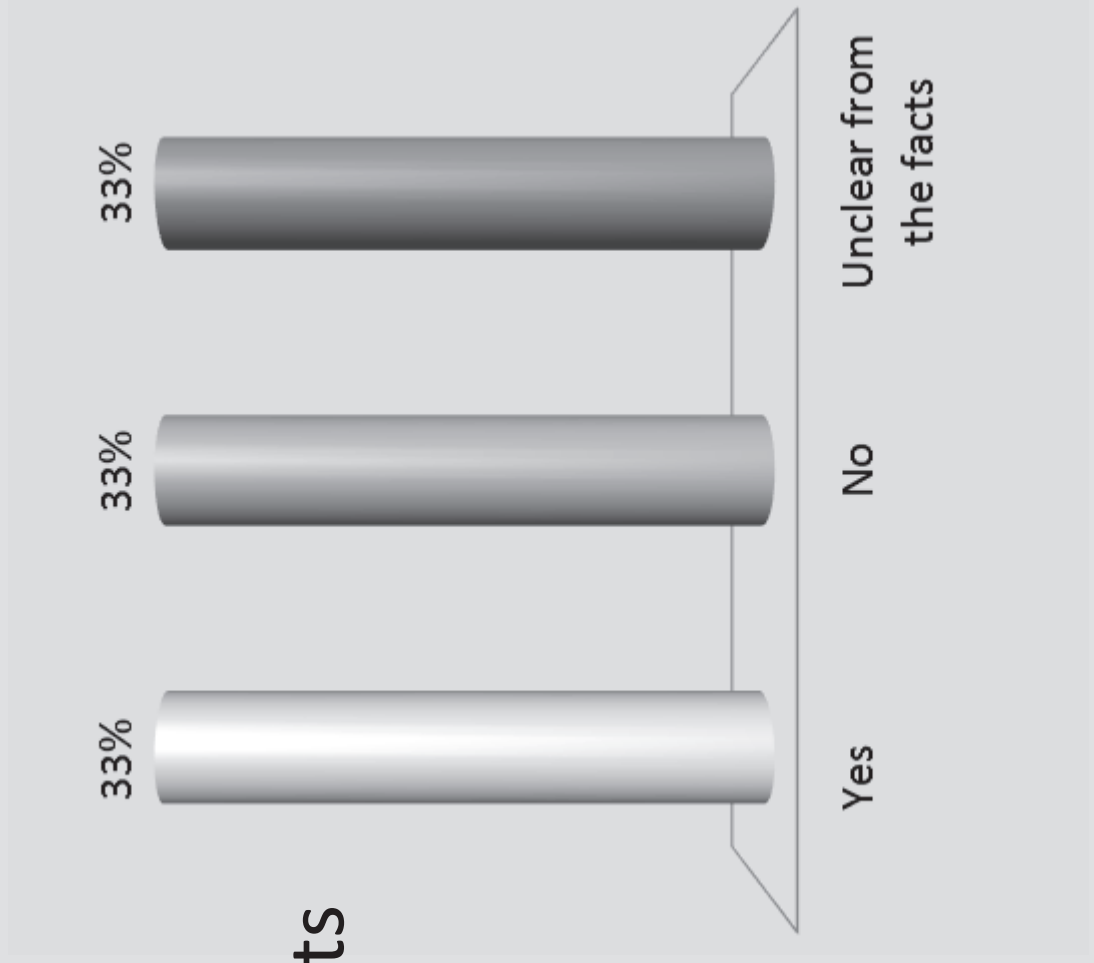


Admitted or not?

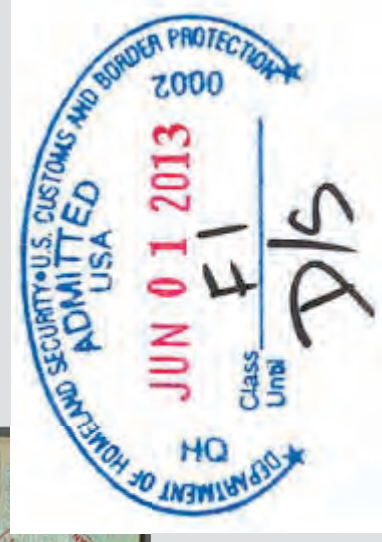
- Annie adjusts her status from within the United States to that of a lawful permanent resident.
 - 8 U.S.C. § 1255(a)

Was Annie Admitted?

- A. Yes
- B. No
- C. Unclear from the facts



An alien can have multiple admissions.



Admission Issues in Litigation Generally

(b) (5)



(b) (5)

This is because:

(b) (5)

Example: § 237(a)(2)(A)(i) litigation

§ 237(a)(2)(A)(i) references “the date of admission” singular

A CIMT triggers removability under § 237(a)(2)(A)(i) only if the crime was committed within 5 years after the date of the admission **by virtue of which the alien was then in the United States.**

Matter of Alyazji, 25 I. & N. Dec. 397 (BIA 2011).

If an alien adjusts after illegal entry, the adjustment starts the five-year clock.

If an alien adjusts after admission, the adjustment does not reset the five year clock.

In *Sijapati v. Boente*, 848 F.3d 210 (4th Cir. 2017), the Fourth Circuit held that the Board’s construction of § 237(a)(2)(A)(i) in *Matter of Alyazji*, was reasonable and entitled to *Chevron* deference.

Example: § 238(b)(2)(B) administrative removal

- LPRs are not subject to administrative removal for an aggravated felony under § 238(b)(2)(B).
 - But § 238(b)(2)(B) states that administrative removal applies to non-LPRs deportable under § 237(a)(2)(A)(iii).
 - § 237(a)(2)(A)(iii) states that any alien who is convicted of an aggravated felony at any time after admission is deportable.
- Multiple courts have found that this administrative removal procedure is applicable to parolees and aliens who enter without inspection despite that the statute appears to suggest that it only applies to aggravated felony convictions after admission.

Bamba v. Riley, 366 F.3d 195 (3d Cir. 2004); *U.S. v. Hernandez-Vermudez*, 356 F.3d 1011 (9th Cir. 2004); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001).

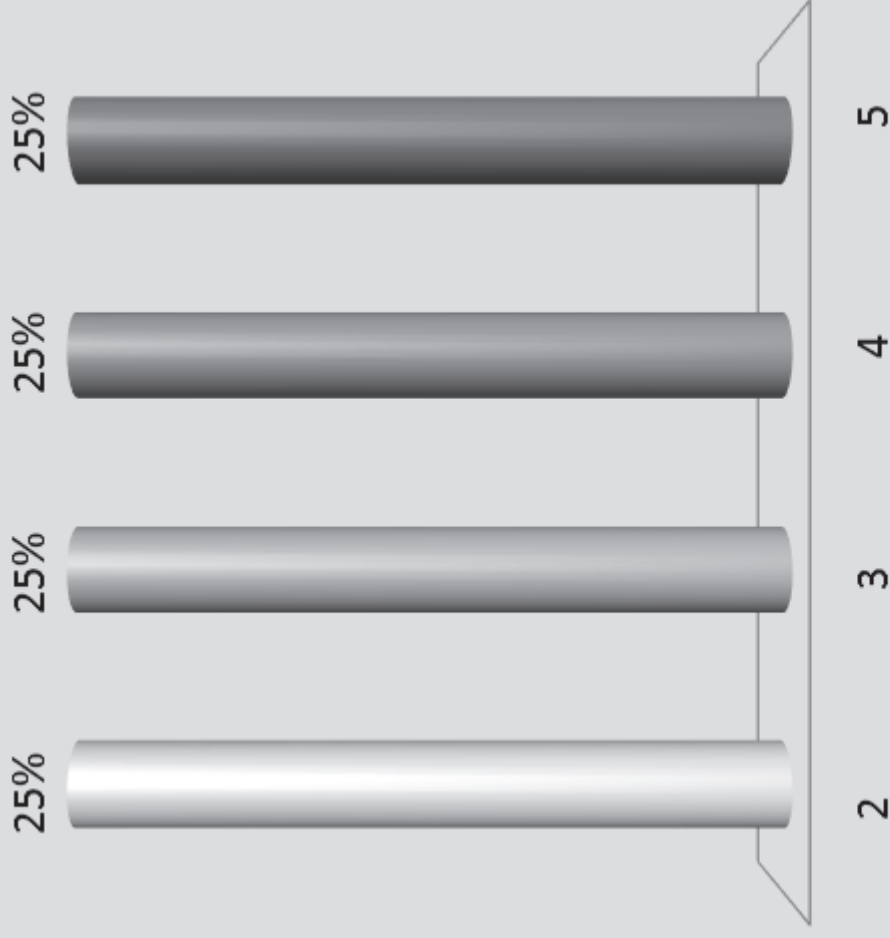
How many admissions?

Elizabeth first enters the U.S. on a student visa in 2002. After graduation, she departs the U.S. and returns to the U.S. five years later in 2007 on an employment visa. After a meet-cute, spilled coffee, and exchange of glances, Elizabeth marries a U. S. citizen. Elizabeth then departs the U.S. and consular processes into the United States as a lawful permanent resident in 2012. At which point the newlyweds embark on an international honeymoon and return to the United States in 2013.

How many times has Elizabeth been

admitted?

- A. 2
- B. 3
- C. 4
- D. 5



Imagine Elizabeth committed a CIMT in 2018. A CIMT triggers removability under § 237(a)(2)(A)(i) only if the crime was committed within 5 years after the date of the admission by virtue of which the alien was then in the United States, when did the 5-year clock start?

When did the five-year clock start?

- A. 2002
- B. 2007
- C. 2012
- D. 2013



ADJUSTMENT OF STATUS: a thorny admissions issue

It is accepted that LPRs in the U.S., who adjusted their status, are admitted for purposes of removability under § 237.

This is because for aliens who entered illegally, the adjustment is the first point at which the alien is lawfully in the United States and to find otherwise would exempt illegal-entrant LPRs from removal and, paradoxically, provide them greater rights than lawful immigrants.

The Board sought to have adjustment considered an admission in all cases.

Matter of Alyazji, 25 I. & N. Dec. 397 (BIA 2011);

Ultimately, Courts have rejected a *per se* rule. Entry (considered the physical act of entry) is still an operational phrase in the admission definition.

Example: § 212(h) litigation

Section 212(h) waivers are not available to aggravated felons who have “previously been admitted to the United States as an alien lawfully admitted for permanent residence”

The Board initially found that adjustment was an admission for purposes of § 212(h) until all but one circuit held otherwise.

Then the Board issued precedent that the § 212(h) waiver bars did not apply to LPRs who adjusted.

Matter of J-H-J-, 26 I. & N. Dec. 563 (BIA 2015)

Special issues related to returning LPRs

Pre-IIRIRA

Returning LPRs not seeking entry for innocent, casual, and brief excursions
Rosenberg v. Fleuti, 374 U.S. 449 (1963).

Post-IIRIRA

Returning LPRs are not seeking admission unless an exception at INA § 101(a)(13)(C) applies.

- Returning LPRs are generally not applicants for admission. INA § 101(a)(13)(C) provides six circumstances in which LPRs are seeking admission:
 - Abandoned LPR status
 - Absent for more than 180 days
 - Engaged in illegal activity after departing US
 - Departed from US while in removal proceedings
 - Committed certain criminal offenses under § 212(a)(2) (unless granted a § 212(h) waiver)
 - Attempting to enter an undesignated point or not inspected and authorized by immigration officer

Although the *Fleuti* doctrine was eliminated with the passage of IIRIRA in 1996, see *Matter of Collado-Munoz*, 21 I. & N. Dec. 1061, 1063-66 (BIA 1998), OIL still continues to see cases where the issue arises.

For instance, in *Gomez-Heredia v. Sessions*, 865 F.3d 60 (2d Cir. 2017), the Court held that post-IIRIRA, a lawful permanent resident must seek formal admission—even if returning from a brief trip abroad—if he has committed a drug offense.

Also, in *Centurion v. Sessions*, 860 F.3d 69 (2d Cir. 2017), the Court held that § 101(a)(13)(c)'s requirement that an LPR seek formal admission after returning from brief trip abroad if he had committed a drug offense, did not apply retroactively when the criminal conduct occurred prior to the enactment of IIRIRA.

Returning LPRs as applicants for admission

Who bears the burden of proof to show a returning LPR is an applicant for admission?

- DHS bears burden of proving by “clear and convincing evidence” that a returning LPR is to be treated as seeking admission (*i.e.*, fits in one of the exceptions). *Matter of Benno Rivens*, 25 I. & N. Dec. 623 (BIA 2011)

Inadmissible LPRs can be paroled in to the United States for prosecution

- *Matter of Valenzeula-Felix*, 26 I. & N. Dec. 53 (BIA 2012) (DHS is required to meet burden of clear and convincing evidence that a returning LPR is seeking admission; DHS can parole returning LPR’s until criminal charges resolved).

Returning LPRs as applicants for admission

When must DHS satisfy its burden of proving a returning LPR is an applicant for admission?

- Board’s position is that DHS must satisfy burden in proceedings.
 - *Matter of Valenzeula-Felix*, 26 I. & N. Dec. 53 (BIA 2012).
 - *Munoz v. Holder*, 755 F.3d 366 (5th Cir. 2014) (agreeing with the Board).
- *Doe v. Att’y Gen. of U.S.*, 659 F.3d 266 (3d Cir. 2011), the Court held that, at the border, DHS must have probable cause that a crime has been committed.

Returning LPR Hypo #1

Sally adjusts to LPR status in 1999. In 2010, she is convicted in the U.S. of solicitation to possess marijuana for sale. She leaves the United States for one week in 2017 and attempts to reenter.

Is she seeking admission?

Is Sally seeking admission?

- A. Yes
- B. No
- C. Unclear from the facts

Returning LPR Hypo #2

Max adjusts to LPR status in 1989. He pleads guilty to counterfeiting in 1994. In 2016, he travels to Greece for a two-week vacation.

Upon returning, is he seeking admission?

Is Max Seeking Admission?

- A. Yes
- B. No
- C. Unclear from the facts



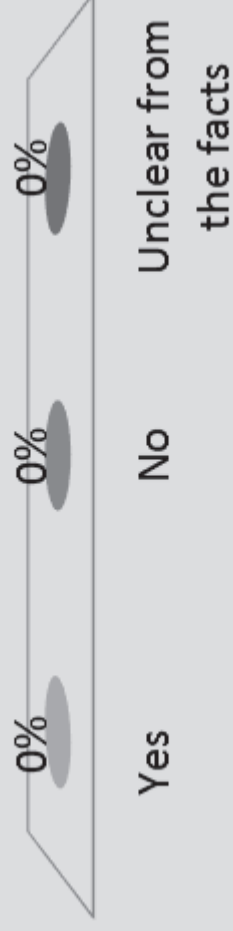
Returning LPR Hypo #3

Bruce adjusts to LPR status in 1990 through his marriage to Patty, a U.S. citizen. However, at the time of his marriage to Patty, Bruce was actually still married to Julianne, also a U.S. citizen. In 2000, Bruce travels to Italy for a month-long vacation. Upon Bruce's return to the United States, the border agent becomes aware of both ongoing marriages, is he seeking admission?

Is he seeking admission?

Is Bruce seeking admission?

- A. Yes
- B. No
- C. Unclear from the facts



Returning LPR Hypo #4

Same hypo as above. But, during his trip to Italy, Bruce's LPR card is stolen. Upon attempted return to the US, Bruce's only documentation is a police report detailing the theft of his LPR card.

Is he seeking admission now?

Now, is Bruce seeking admission?

- A. Yes
- B. No
- C. Unclear from the facts



LPRs and the stop-time rule

- Courts have been divided on the issue of whether, for purposes of cancellation of removal, the stop-time rule is triggered by an offense that “renders the alien inadmissible” 8 U.S.C. § 1229b(d)(1), when the alien is an LPR who is not seeking admission.
- *Compare Nguyen v. Sessions*, 901 F.3d 1093 (9th Cir. 2018) (holding the stop-time rule is not triggered), *with Barton v. Att’y Gen.*, 904 F.3d 1294 (11th Cir. 2018) (holding and LPR need not be seeking admission to the United States in order to be rendered inadmissible) cert. granted.

Cancellation of Removal: “Admitted in any status”

- Generally, “admitted in any status” for purposes of § 1229b is broader than the definition of “admission” at § 101(a)(13)(A)
- “The clause ‘in any status’ has been interpreted to create alternative methods for aliens, who do not enter after inspection and authorization . . .” *Matter of Rosas-Ramirez*, 22 I. & N. Dec. 616 (BIA 1999)

(b) (5)



Cancellation of Removal Eligibility

“Admitted in any status”

- A “wave through” at the border

Tula Rubio v. Lynch, 787 F.3d 288 (5th Cir. 2015);

Saldivar v. Sessions, 877 F.3d 812 (9th Cir. 2017)

- Parole for adjustment as Special Juvenile Immigrant

Garcia v. Holder, 659 F.3d 1261 (9th Cir. 2011)

Cancellation of Removal Eligibility

Not “admitted in any status”

- Family unity benefits
Matter of Reza-Murillo, 25 I. & N. Dec. 296 (BIA 2010); *Medina-Nunez v. Lynch*, 788 F.3d 1103 (9th Cir. 2015)
- An unemancipated minor child seeking to impute parents’ admission
Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2012
- Filing or approval of an I-130
Vasquez de Alcantar v. Holder, 645 F.3d 1097 (9th Cir. 2011)
- Parole into the United States under 8 U.S.C. § 1182(d)(5),
Alanniz v. Barr, 924 F.3d 1061 (9th Cir. 2019)
- Grant of employment authorization
Guevara v. Holder, 649 F.3d 1086 (9th Cir. 2011)

Cancellation of Removal Eligibility and No Status or Illegal Status

In removal proceedings arising outside the Fifth and Ninth Circuits, “admitted in any status” under section 240A(a)(2), requires some form of *lawful* immigration status at the time of admission. *Matter of Castillo Angulo*, 27 I. & N. Dec. 194 (BIA 2018).

In the Fifth Circuit and Ninth Circuit a procedurally regular admission that is not substantively lawful, such as a “wave through” at the border, is an admission in any status under the reasoning that an admission in no status or unlawful status satisfies the “any status” requirement. See *Saldivar v. Sessions*, 877 F.3d 812 (9th Cir. 2017); *Tula-Rubio v. Lynch*, 787 F.3d 288 (5th Cir. 2015).

Wave-through admissions

Admissions under INA § 101(a)(13) require only procedural regularity, and need not be substantively lawful.

A wave-through at the border is an admission because it is procedurally regular. But that person does not have legal status.

- *Matter of Quilantan*, 25 I. & N. Dec. 285 (BIA 2010).

A procedurally-regular, illegal reentry following removal does not preclude reinstatement of the prior order of removal.

- *Mendoza v. Sessions*, 891 F.3d 672 (7th Cir. 2018); *Cordova-Soto v. Holder*, 659 F.3d 1029, 1033 (10th Cir. 2011).

Spot the Issue(s)

Joe, married to a U.S.C. with an I-130 pending, is charged as removable under 212(a)(6)(A)(i) (present without admission). Before the Immigration Judge, Joe claims he was waved through at the Canadian border. The IJ finds he failed to satisfy his burden to show the wave through occurred and denies cancellation of removal based on a lack of GMC. The Board assumes Joe is waved through, but finds his admission is not substantively lawful, and affirms the denial of cancellation of removal.

Any problems in the IJ's decision? In the Board's decision? In the removability charge?

TPS as an admission

An applicant for adjustment of status must have been “inspected and admitted or paroled.” INA § 245(a)

“for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of the title, the alien shall be considered as being in, and maintaining lawful status as a nonimmigrant.” INA § 244(f)(4)

Relevant TPS cases

- District Court litigation
 - *Medina v. Beers*, 65 F.Supp.2d 419 (E.D. Pa. 2014)
- Circuit Court litigation
 - TPS is an admission in the 9th and 6th Circuits.
Ramirez v. Brown, 852 F.3d 954, 964 (9th Cir. 2017);
Flores v. USCIS, 718 F.3d 548 (6th Cir. 2013)
 - TPS is **not** an admission in the 11th Circuit. *Serrano v. U.S. Att’y Gen.*, 655 F.3d 1260 (11th Cir. 2011).

FINAL THOUGHTS

Disputed admissions cases are increasing and often involve unusual fact patterns and issues of first impression.

(b) (5)



(b) (5)



Consult your reviewers, team leaders, and current case law as the issue is rapidly developing.

CONSTITUTIONAL CLAIMS IN IMMIGRATION PROCEEDINGS

AIMEE CARMICHAEL, ASHLEY MARTIN, & JESI CARLSON

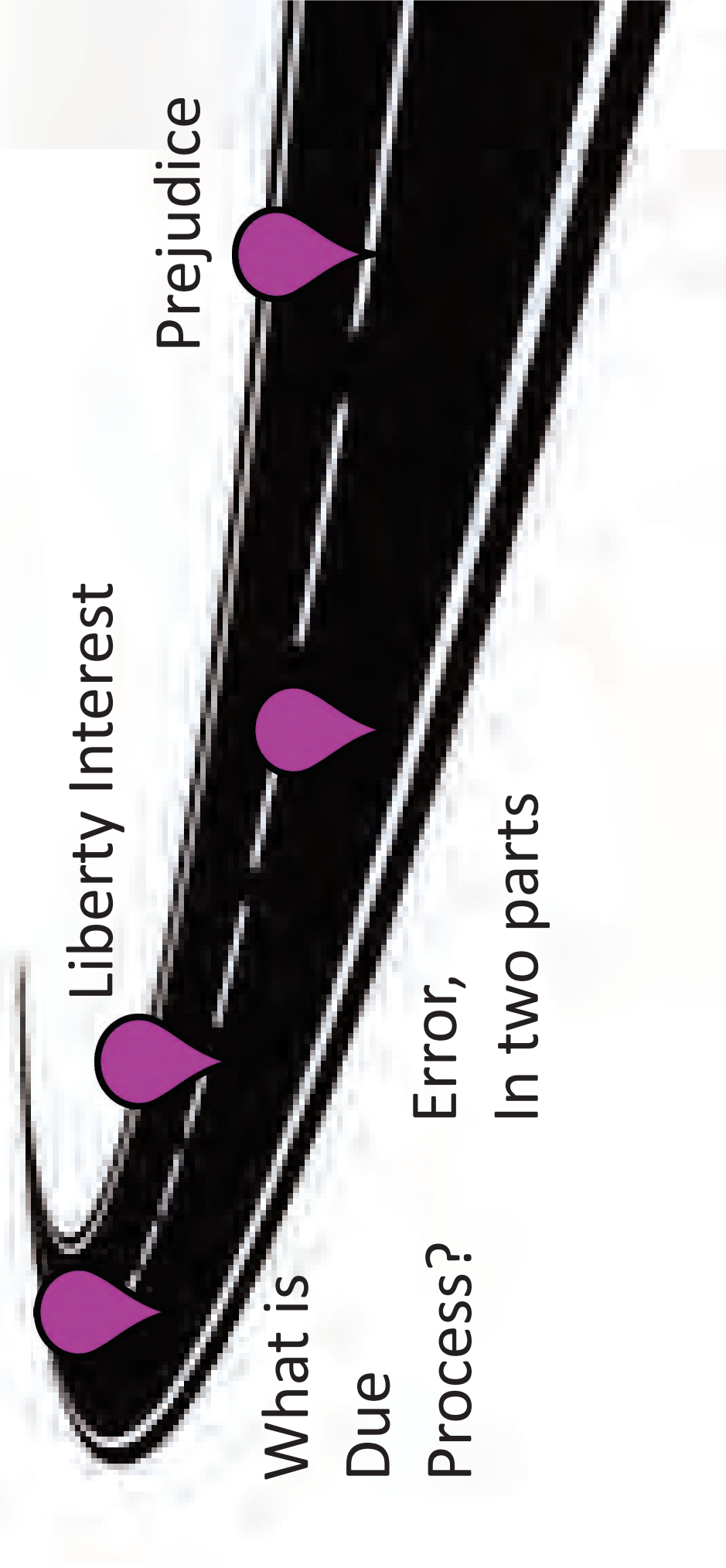


PART ONE

Procedural Due Process



Where we're heading



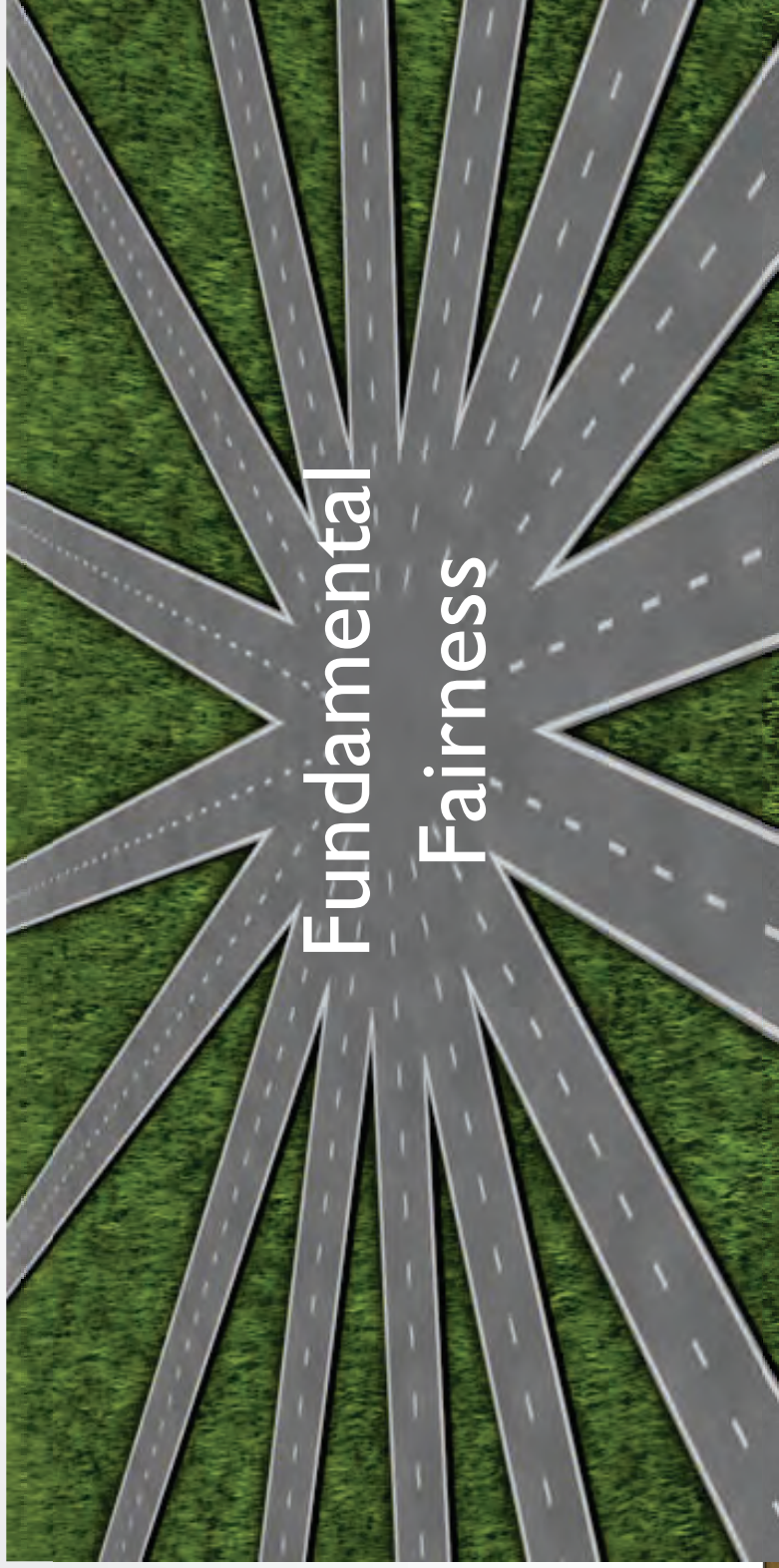
What is
Due
Process?

Liberty Interest

Prejudice

Error,
In two parts

ALL ROADS LEAD TO ...



WHAT IS DUE PROCESS?

And why are we here?



THE AMOUNT OF PROCESS DUE

- Procedural, not substantive
- Constitutional minimum
- Governed by statute and regulations



**“THE FUNDAMENTAL
REQUIREMENT OF DUE
PROCESS IS THE
OPPORTUNITY TO BE
HEARD AT A MEANINGFUL
TIME AND IN A
MEANINGFUL MANNER.”**

**MATHEWS V. ELDRIDGE, 424 U.S. 319,
333 (1976).**



LIBERTY INTEREST

+

ERROR

+

PREJUDICE

=

DUE PROCESS CLAIM

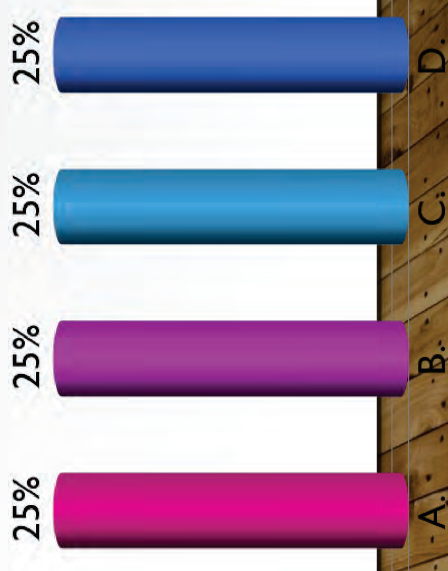
LIBERTY INTEREST

- Not just a subjective expectation but an objective entitlement
- There IS a liberty interest in whether an alien is removable or entitled to mandatory relief.
- There IS NOT a liberty interest in discretionary relief.



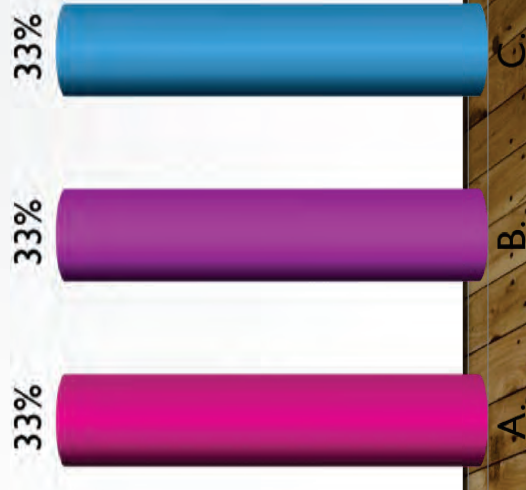
ARIEL CONCEDES REMOVABILITY AND SEEKS CANCELLATION OF REMOVAL. THE IJ SAYS ALL EVIDENCE MUST BE IN TWO WEEKS BEFORE TRIAL. ON THE DAY OF HER HEARING, ARIEL SEEKS TO SUBMIT EVIDENCE ON HARDSHIP AND THE IJ REFUSES TO ADMIT IT. ARIEL ALLEGES THIS DENIED HER DUE PROCESS. DID IT?

- A. Yes, if Ariel had a good reason for submitting the evidence late.
- B. Yes, if the evidence demonstrates hardship.
- C. No, because she failed to comply with the IJ's deadline.
- D. Just no.



WHEN ARIEL BEGAN TESTIFYING ABOUT HARDSHIP TO HER USC CHILD, THE IJ SAID “I DON’T WANT TO HEAR ABOUT YOUR STUPID KID.” ARIEL RAISES A DUE PROCESS CLAIM. DO WE DEFEND THE CASE?

- A. Yes, because Ariel has no liberty interest.
- B. Yes, if you think Ariel’s child wouldn’t meet the hardship standard.
- C. Just no.



LIBERTY INTEREST

+

ERROR

+

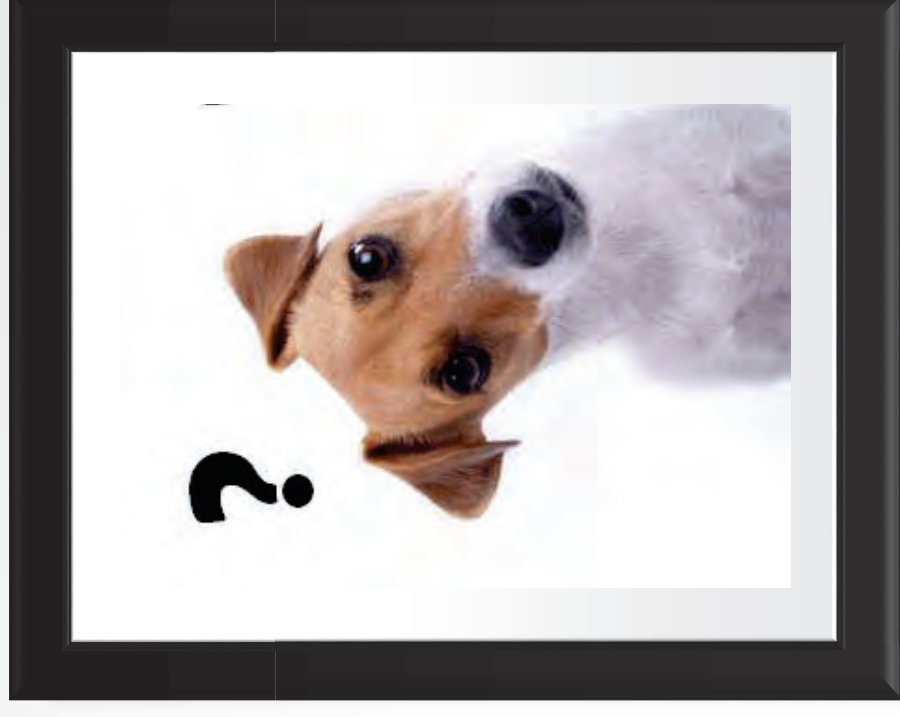
PREJUDICE

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DUE PROCESS CLAIM

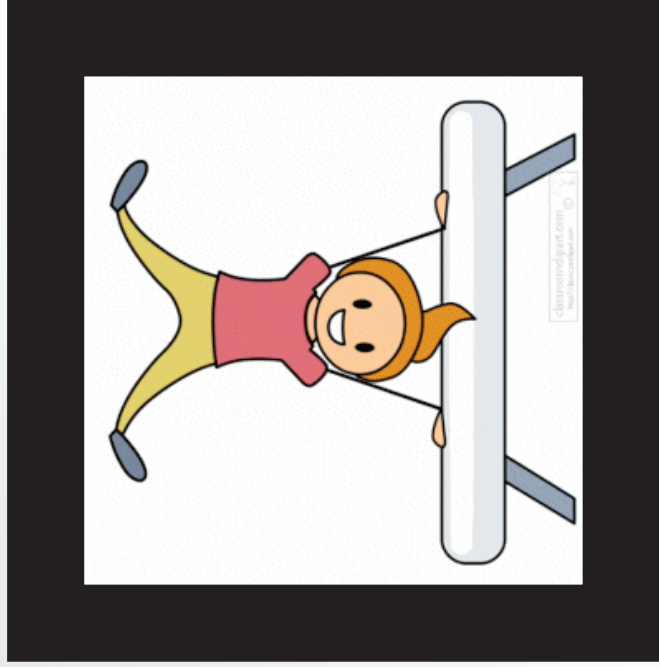
ERROR PART I

What process is due?



THE MATHEWS BALANCING TEST

- What is the **private interest** that will be affected by the official action?
- What is the **risk of an erroneous deprivation** of such interest with the current safeguard(s) & value of proposed safeguard(s)?
- What is the **burden** on the Government? Fiscal or administrative?



BELLE (AN AGGRAVATED FELON) IS MANDATORILY DETAINED. SHE HAS A FINAL ORDER OF REMOVAL AND A PENDING PETITION FOR REVIEW. SHE HAS BEEN DETAINED FOR OVER FOUR YEARS WITH NO BOND HEARING AND FILES A HABEAS PETITION SEEKING RELEASE OR A BOND HEARING. HAVE HER PROCEDURAL DUE PROCESS RIGHTS BEEN VIOLATED?

- A. Yes, because everyone is always entitled to a bond hearing.
- B. Yes, because a bond hearing is minimal and her detention was long.
- C. No, because she's detained under a statute that requires her detention without a bond hearing.
- D. No, because DHS provided her with sufficient process.



A. B. C. D.

HYPOTHETICAL ANALYSIS

PRIVATE INTERESTS

- Freedom from imprisonment, government custody, detention or other forms of physical restraint

GOVERNMENT INTERESTS

- Risk of flight
- Risk to public safety
- Administrative burden
- Removal



HYPOTHETICAL ANALYSIS

CURRENT SAFEGUARDS

- Initial hearing to determine detention authority/status
- Administrative review
- Judicial Review

PROPOSED SAFEGUARDS

- Bond Hearing



IMMIGRATION CASE EXAMPLES

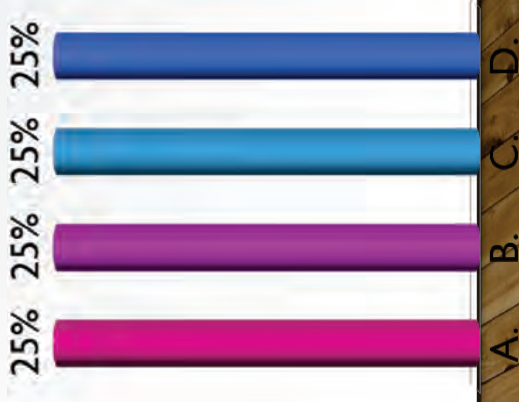


- Government required to allow oral testimony in asylum hearing where eligibility turns on credibility
- Alien entitled to notice that pending Board appeal may be deemed withdrawn under 8 C.F.R. § 1003.4 if alien briefly departs the United States
- I-130 petitioner and alien spouse entitled to a hearing with an opportunity to cross-examine witnesses
- Government was NOT required to provide interpreters for Special Agricultural Worker applicants
- Detention / Habeas Cases – bond hearings, burden



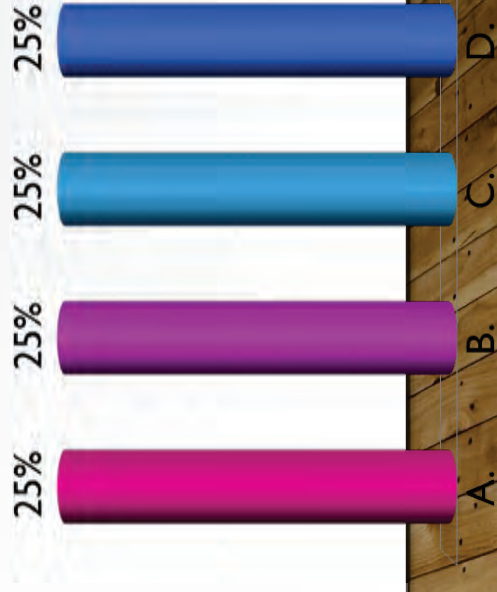
CINDY WAS PREVIOUSLY REMOVED PURSUANT TO AN IJ ORDER, UNLAWFULLY REENTERED THE US, AND DHS REINSTATED HER PRIOR REMOVAL ORDER. CINDY CLAIMS THAT SHE WAS DENIED DUE PROCESS BECAUSE SHE WAS NOT ALLOWED TO APPEAR BEFORE AN IJ. WAS SHE DENIED DUE PROCESS?

- A. Yes, because she was denied a hearing on the merits.
- B. Yes, if she made a reasonable legal challenge to the reinstatement.
- C. No, because aliens do not have a Constitutional right to a hearing.
- D. No, because DHS provided her with sufficient process.



DHS PROVIDED CINDY WITH ALL THE PROCEDURES REQUIRED UNDER THE REINSTATEMENT STATUTE. CINDY CLAIMS THAT AN ADDITIONAL PROCEDURE WOULD HAVE MADE THE PROCESS MORE FAIR. DID SHE EXPERIENCE A DUE PROCESS VIOLATION?

- A. No, because DHS complied with the statute.
- B. Yes, if the additional procedure is not onerous.
- C. Yes, if Cindy is correct that the process would be more fair.
- D. No, if DHS could demonstrate that the outcome would be the same.

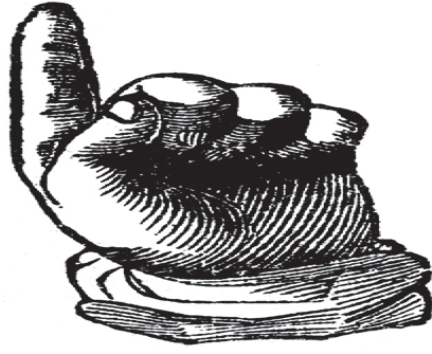


ERROR PART II

Did something go wrong?



Please Notice This



NOTICE

**“Due process always requires,
at a minimum, notice and
opportunity to respond.”**

Cleveland Bd. of Educ. v. Loudermill, 470 U.S.
532, 542 (1985)

ERIC IS SERVED WITH A NOTICE TO APPEAR FOR IMMIGRATION PROCEEDINGS. THE NOTICE INCLUDES THE CHARGES BEING LODGED AGAINST HIM, BUT FAILS TO INCLUDE THE DATE, TIME, OR LOCATION OF HIS HEARING. DOES THIS OMISSION VIOLATE ERIC'S PROCEDURAL DUE PROCESS RIGHTS?

- A. No, because he is on notice of the charges.
- B. Yes, because he has no way of knowing where to go.



DHS SENDS ERIC AN UPDATED NOTICE WITH A TIME AND LOCATION. ERIC DOES NOT RECEIVE THE NOTICE BECAUSE HE MOVED AND DID NOT PROVIDE A FORWARDING ADDRESS. ERIC IS ORDERED REMOVED IN ABSENTIA. WAS THIS A DUE PROCESS VIOLATION?

- A. Yes, because it was error to exclude the time and date from the original notice.
- B. Yes, because he did not receive actual notice.
- C. No, because Eric failed to provide his new address to the agency, which he was required to do.
- D. No, because the original notice was sufficient.



OTHER NOTICE ISSUES IN IMMIGRATION CASES

- **Deadlines**
- **Evidentiary Requirements**
- **Intervening law**
- **Right to Appeal**



REMEDIES TO NOTICE PROBLEMS

- Updates
- Motion to Reopen
- Remand



LIBERTY INTEREST

+

ERROR

+

PREJUDICE

=

DUE PROCESS CLAIM

DUE TO ATTORNEY ERROR, DINAH DID NOT FILE A CAT APPLICATION. SHE MOVED FOR REOPENING, CLAIMING IAC AND A FEAR OF TORTURE IN MEXICO BASED ON HER TESTIMONY AGAINST GANG MEMBERS. THE BOARD DENIED THE MOTION, FINDING A LACK OF PREJUDICE. WILL DINAH PREVAIL IN THE ENSUING PFR?

- A. No, because the CAT claim had no likelihood of success.
- B. No, because Dinah's evidence does not meet the CAT burden.
- C. Yes, because the CAT claim is plausible.
- D. Yes, because prejudice is presumed.



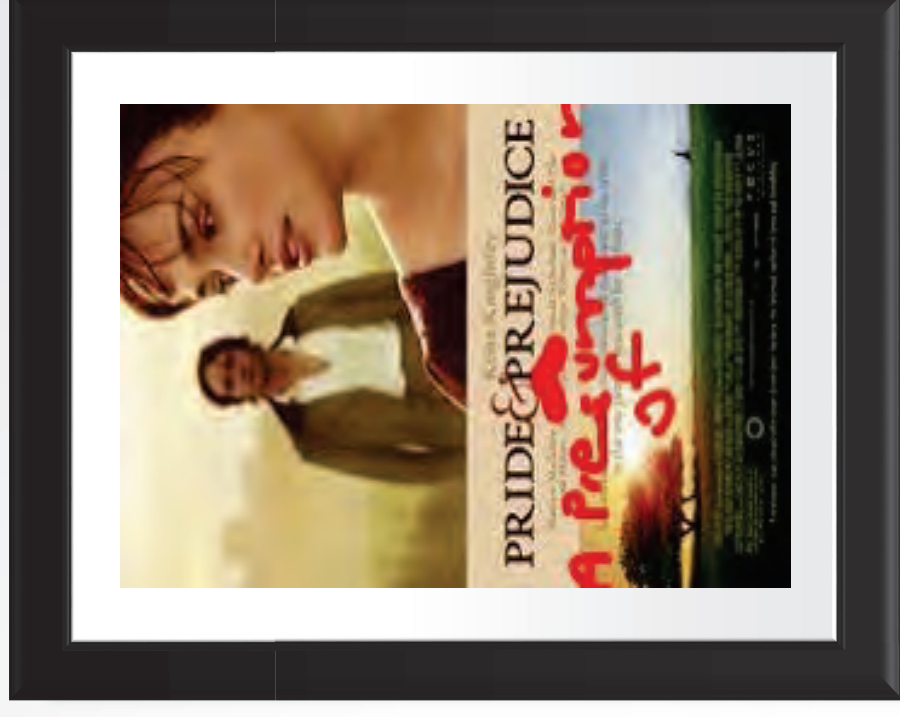
PREJUDICE STANDARDS BY CIRCUIT

Actual Prejudice/ Outcome Would Have Been Different	Likely to Have Affected the Outcome	Reasonable Likelihood of a Different Result	Actually had the potential to affect the outcome (possibility not probability)	Outcome may have been affected
2d, 5th, 6th, 8th, 11th	1st, 4th	3d, 10th	7th	9th



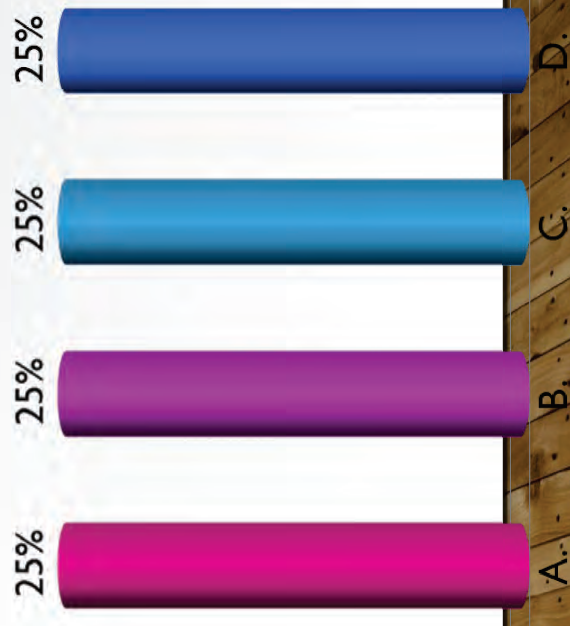
WHEN IS PREJUDICE PRESUMED?

- Prevented from presenting evidence
- Lack of counsel
- Deprived of appeal
- Violation of fundamental right or statutory violation (certain circuits)



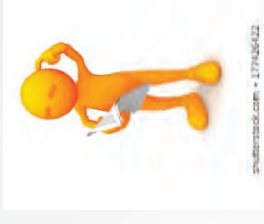
ELSA APPEARED BEFORE THE IJ IN A GROUP HEARING AND ASKED FOR TIME TO GET COUNSEL. THE IJ GRANTED 2 WEEKS. AT THE NEXT HEARING, ELSA DOES NOT HAVE COUNSEL AND ASKS FOR MORE TIME. IJ FORCES ELSA TO PROCEED. ELSA CONCEDES REMOVABILITY AND SEEKS CANCELLATION, WHICH IS DENIED. DOES ELSA HAVE A DUE PROCESS CLAIM?

- A. No, because she has no liberty interest.
- B. No, because she got one continuance.
- C. Yes, if the denial was an error.
- D. Yes, because prejudice is presumed, the inquiry ends.



INEFFECTIVE ASSISTANCE OF COUNSEL

Is it a Constitutional claim?



- Eight circuits say yes, rooted in Due Process
- The Board has declined to decide whether it's constitutional
- It rarely (if ever) makes a difference, because the Board's analysis is the same, regardless of whether IAC is a constitutional issue
- **Elements:** Due Diligence + *Lozada* + Attorney Error + Prejudice

IAC PREJUDICE BY CIRCUIT

But For/ Entitled	Reasonable Probability	Substantial Prejudice	No Particular Standard*	May Have Affected	Actually had the potential to affect the outcome (possibility not probability)
6 th Cir.	1 st , 3 rd , 8 th , 10 th , 11 th	5 th Cir.	2 nd , 4 th	9 th Cir.	7 th Cir.

*refer to general prejudice chart

(b) (5)

BRIEFING TIPS:

(b) (5)





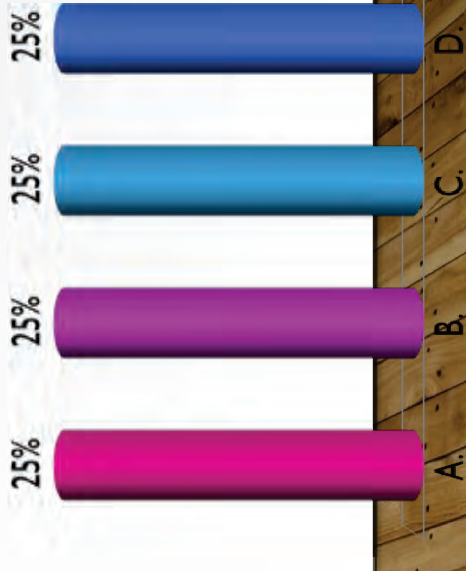
PART TWO

The Constitutional Kitchen Sink



FLYNN IS AN LPR WHO IS REMOVABLE DUE TO AN AGGRAVATED FELONY. HE CLAIMS HE SHOULD NOT BE REMOVED BECAUSE REMOVAL IS A PENALTY DISPROPORTIONATE TO HIS CRIME. WILL HE PREVAIL?

- A. Yes, because banishment is “cruel and unusual” under the Eighth Amendment.
- B. Yes, if the Immigration Judge failed to conduct a proportionality analysis.
- C. No, because aggravated felonies are sufficiently serious.
- D. No, because the Eighth Amendment does not apply to immigration proceedings.

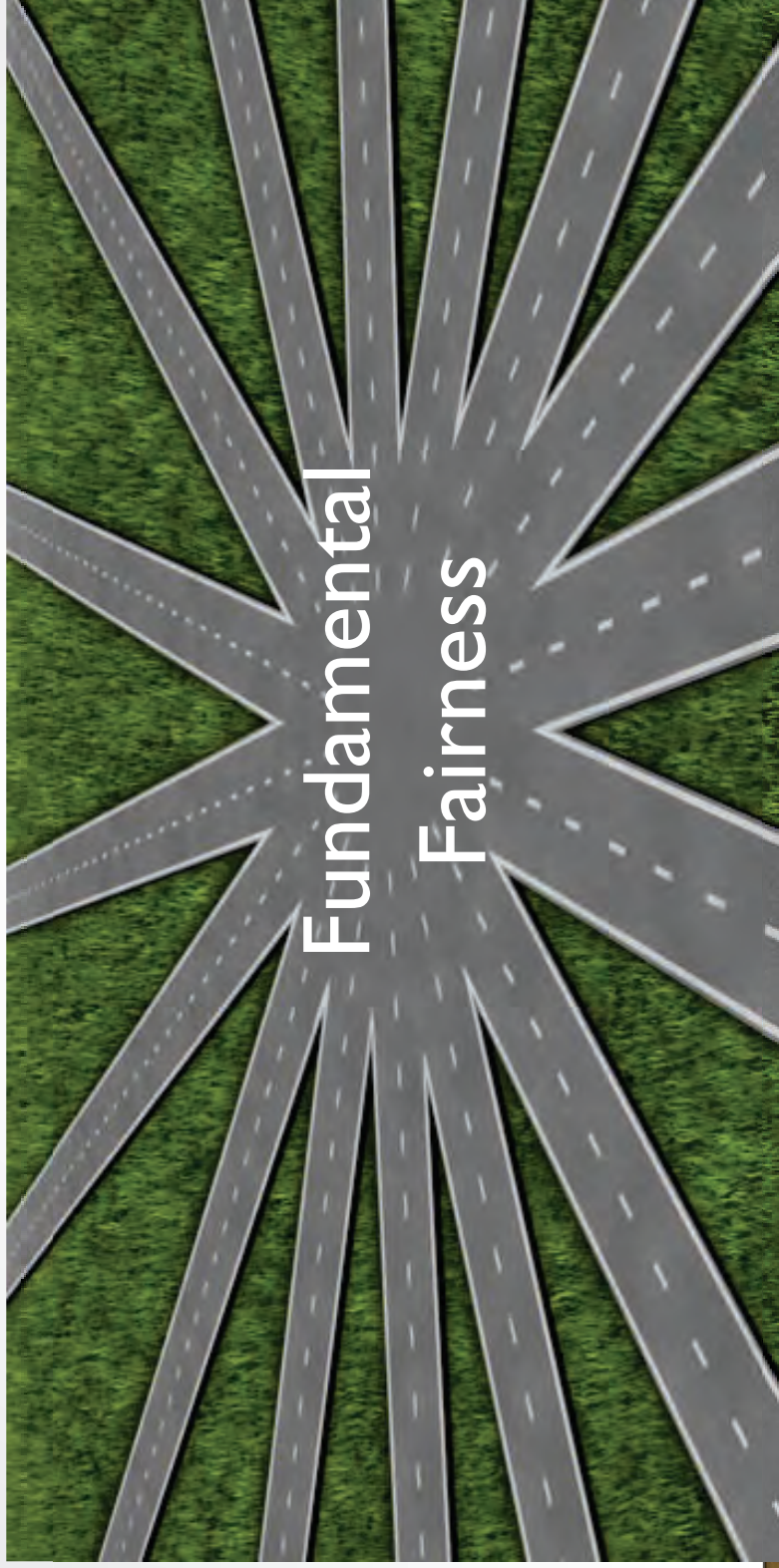


PROTECTION FOR CRIMINALS

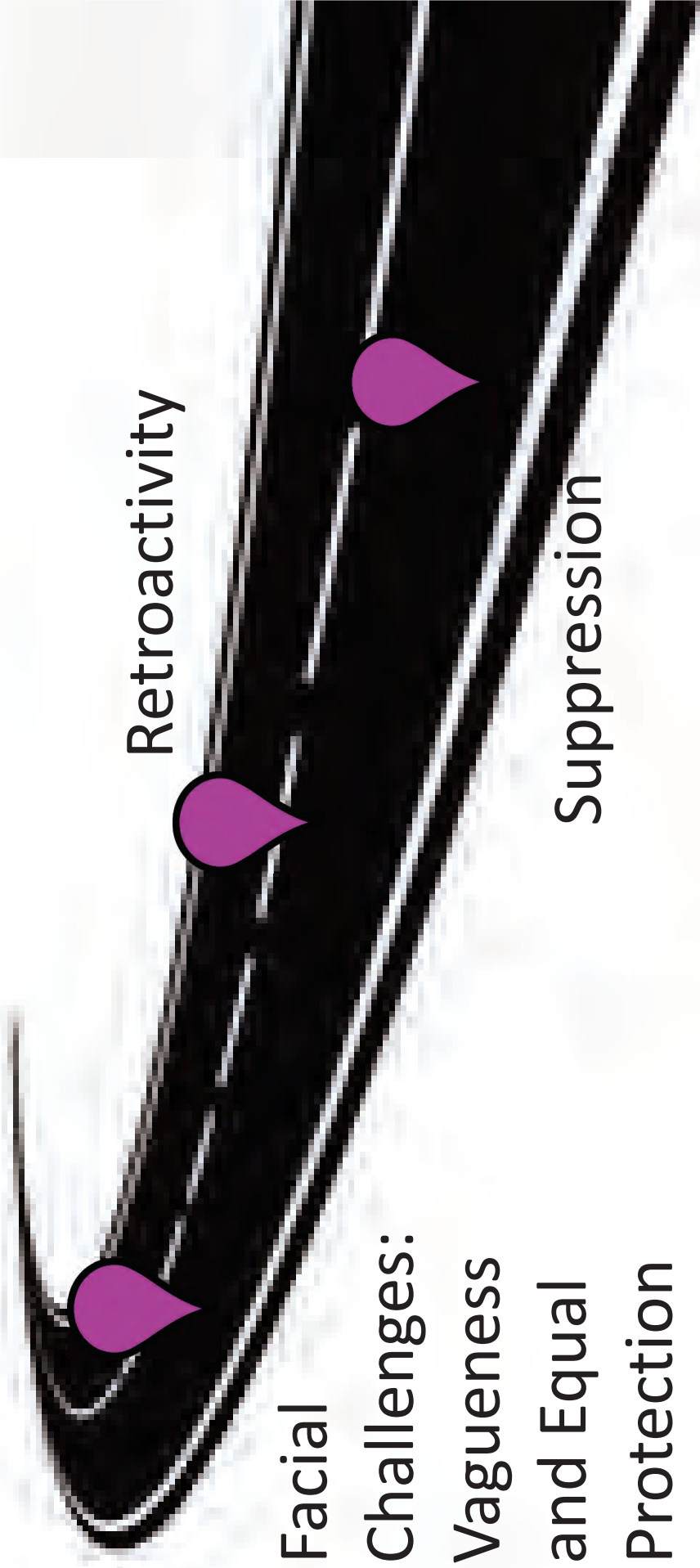
- Prohibition of *ex post facto* laws
- Regulation of Search & Seizure
- Right to Due Process
- Right to Counsel
- Prohibition of Cruel & Unusual Punishment



ALL ROADS LEAD TO ...



Where we're heading



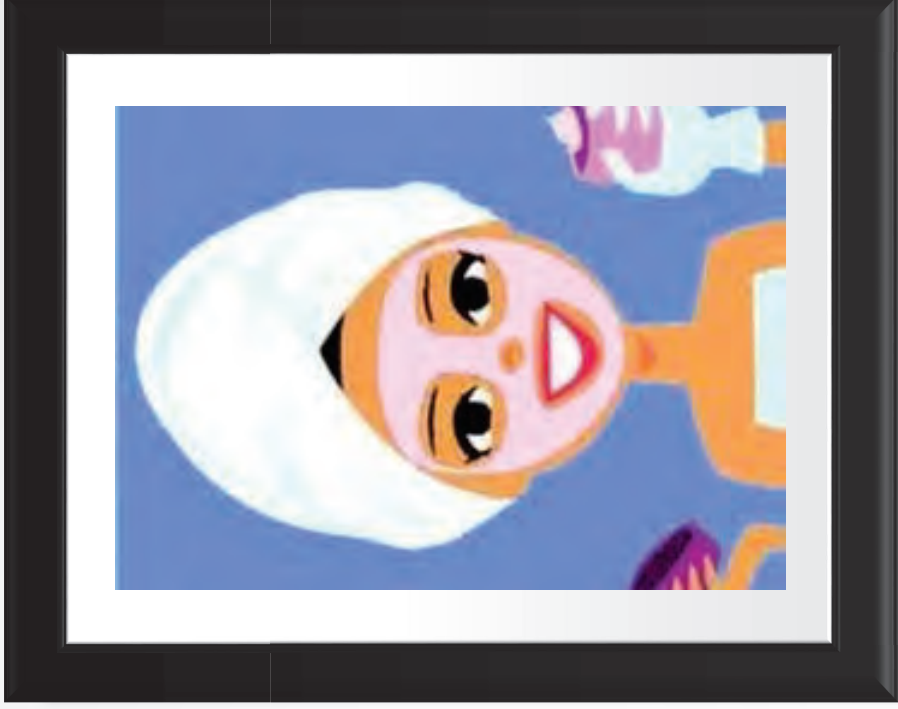
Retroactivity

Facial
Challenges:
Vagueness
and Equal
Protection

Suppression

FACIAL CHALLENGES

We're not trying to be vague.



VAGUENESS

- The statute “fails to provide a person of ordinary intelligence fair notice of what is prohibited.”
 - The statute is so “standardless that it authorizes or encourages seriously discriminatory enforcement.”
- FCC v. Fox Tel. Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012).

IT MIGHT BE VAGUE IF...

- No way to define or persistent failed efforts to define a standard
- Statutory text provides no indications of what the test should be
- Layers of speculation required



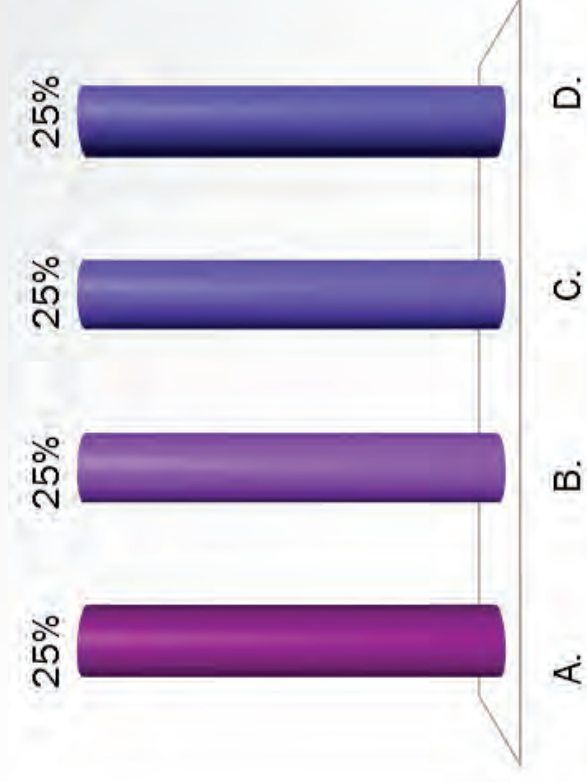
IT MIGHT BE AMBIGUOUS IF ...

- Consistent historical use that provides clues for interpretation
- Multiple ways (rather than no way) to define the terms
- Statutory text provides parameters that need clarification



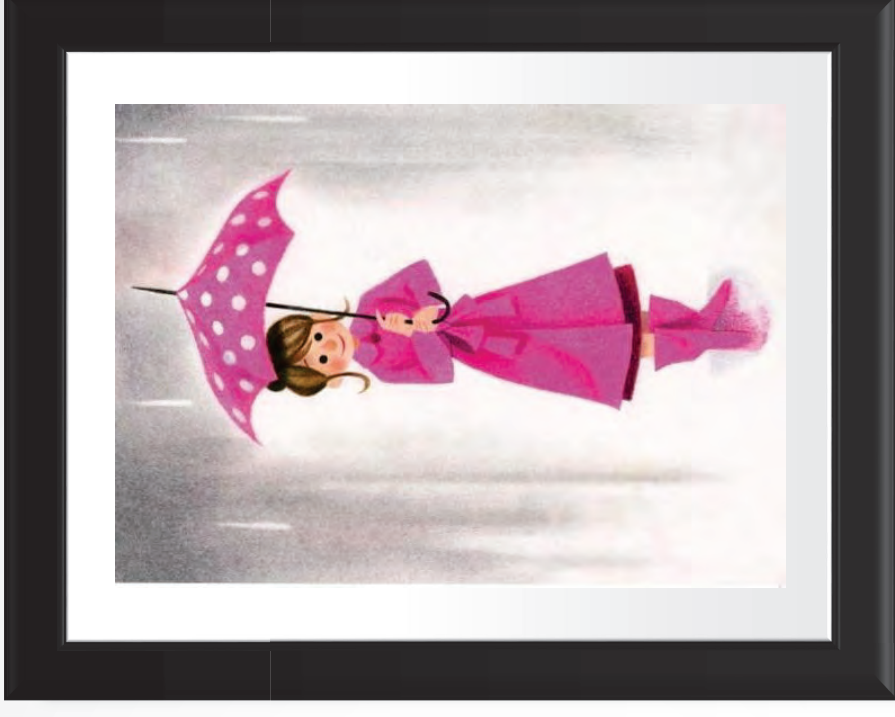
GASTON WAS CONVICTED OF DEFRAUDING A BANK. HE IS ORDERED REMOVED FOR A CIMT. HE ARGUES THAT CIMT IS VAGUE. WILL HE SUCCEED?

- A. Yes, because no one knows what turpitude is.
- B. Yes, because what is morality?
- C. No, because everyone agrees fraud is evil.
- D. No, because the vagueness doctrine does not apply to civil statutes.



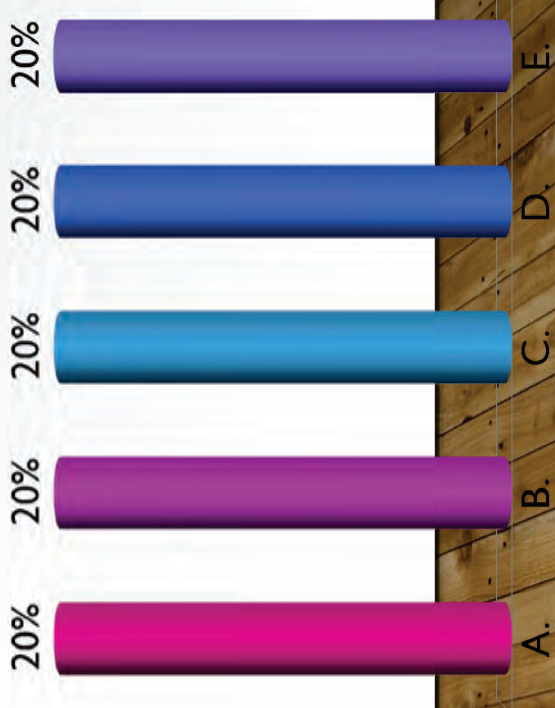
CLEARLY COVERED CONDUCT

- Statute is **not vague** where there is a clear core, but difficulty at the margins.
- Statute **is vague** where there is conduct at the margins/extreme that is clearly covered, but that conduct does not provide guidance as to the parameters of the definition.



GASTON WAS CONVICTED FOR COCKFIGHTING. HE WAS REMOVABLE AS AN EWI, AND WAS DENIED CANCELLATION ON THE BASIS OF A CIMT. HE ARGUES CIMT IS VAGUE. WILL HE SUCCEED?

- A. Yes, but only in an as applied challenge.
- B. Yes, because of *Dimaya*.
- C. No, because cancellation is discretionary relief.
- D. No, because of *Jordan*.
- E. I was told there would be cookies.



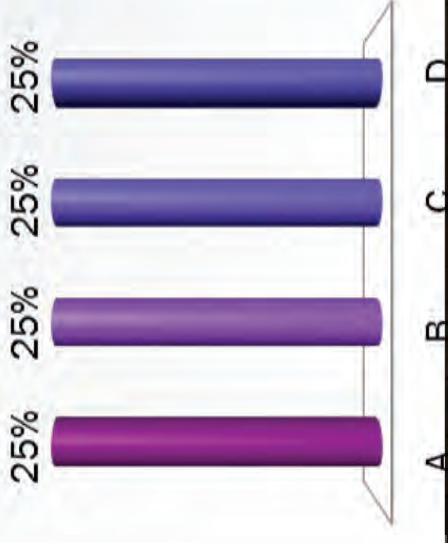
EQUAL PROTECTION



- Fifth not Fourteenth
- Different treatment of two similarly situated groups
- Examine government purpose in treating them differently

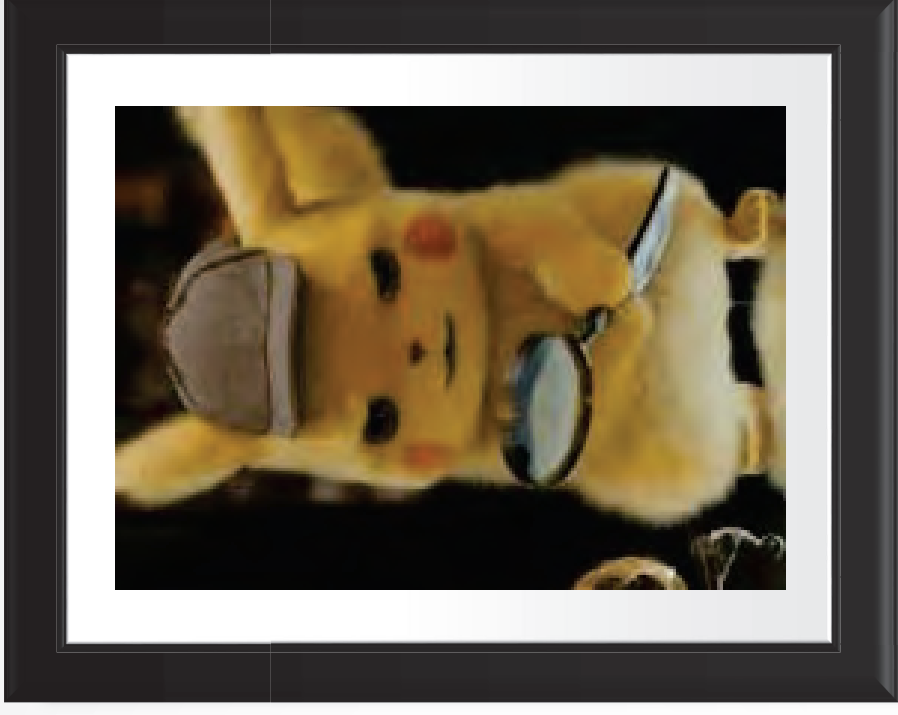
HANS WAS FOUND TO LACK GMC BECAUSE HE IS A HABITUAL DRUNKARD. HE ALLEGES AN EQUAL PROTECTION VIOLATION, ARGUING THERE WAS NO BASIS TO DISTINGUISH ALCOHOLISM FROM OTHER MEDICAL CONDITIONS BASED ON LIFESTYLE CHOICES. DOES THIS SUCCEED?

- A. No, if Congress explained why it included “habitual drunkard.”
- B. No, because alcoholism has a high social cost.
- C. Yes, because there is no plausible reason to treat alcoholism differently than heart disease.
- D. Yes, because alcoholism is involuntary.



SCRUTINY

- Rational basis
- Heightened scrutiny
- Strict scrutiny



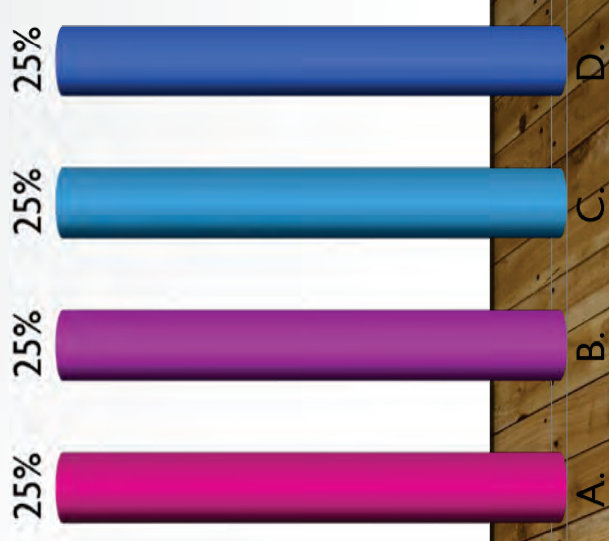
ANNA WAS BORN ABROAD TO A USC FATHER AND ALIEN MOTHER WHO WERE NOT MARRIED. ANNA ARGUES THAT THE DIFFERENT PHYSICAL PRESENCE REQUIREMENTS BETWEEN UNWED FATHERS AND UNWED MOTHERS TO TRANSMIT CITIZENSHIP VIOLATES EQUAL PROTECTION. DOES ANNA PREVAIL?

- A. Yes, unless there is an important government interest related to the distinction.
- B. Yes, unless there is a legitimate government interest related to the distinction.
- C. No, because Anna has no fundamental right to citizenship.
- D. No, if Anna was outside the United States at the time she made her claim.



PHILLIP WAS ADOPTED FROM ABROAD BY A USC. HE FAILED TO COMPLETE THE CITIZENSHIP PROCESS. HE ALLEGES AN EQUAL PROTECTION VIOLATION BECAUSE A BIOLOGICAL PARENT CONFERS CITIZENSHIP AUTOMATICALLY BUT AN ADOPTIVE PARENT MUST PETITION. DOES HE PREVAIL?

- A. Yes, if there is no important reason to force an adoptive parent to petition.
- B. Yes, if the citizenship process is unduly onerous.
- C. No, if there is a legitimate reason to distinguish between adoptive and biological parents.
- D. No, because he is not claiming to be a citizen by birth.



RETROACTIVITY

You can't change your past.



CONSTITUTIONAL FOUNDATIONS

- *Ex Post Facto* clause in Art. I § 9, 10
- In civil cases, the “constitution’s restrictions ... are of limited scope.” *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)
- Roots in Due Process & Equal Protection



SEPARATION OF POWERS

LEGISLATIVE

JUDICIAL

- Presumed prospective
- Prevent the abuse of political power
- Presumed retroactive
- Announcing what the law is (and always has been)

LANDGRAFTEST

- Does the provision attach new legal consequences to a completed action?
- Is there a clear indication from Congress that the provision is intended to apply retroactively?



DORY IS AN LPR. SHE WAS CONVICTED OF A CIMT IN 1993. THE CRIME DOES NOT RENDER HER REMOVABLE. IN 2009, SHE LEFT THE US FOR TWO WEEKS. BECAUSE OF THE CIMT, SHE WAS REQUIRED TO SEEK ADMISSION, BASED ON A PROVISION ADDED TO THE LAW IN 1996. IS THIS IMPERMISSIBLY RETROACTIVE?

- A. No, because the relevant act was her 2009 reentry.
- B. No, because she has no cognizable right to admission.
- C. Yes, because the change in law attached a new disability to her conviction.
- D. Yes, if she demonstrated that she relied on the pre-1996 law in negotiating her plea deal.



RETROACTIVITY AND CHEVRON

- The Board serves a quasi-judicial function, deciding cases or controversies
- The agency has rule-making authority using powers delegated from Congress
- The Board may carry out this policy function through case-by-case adjudication



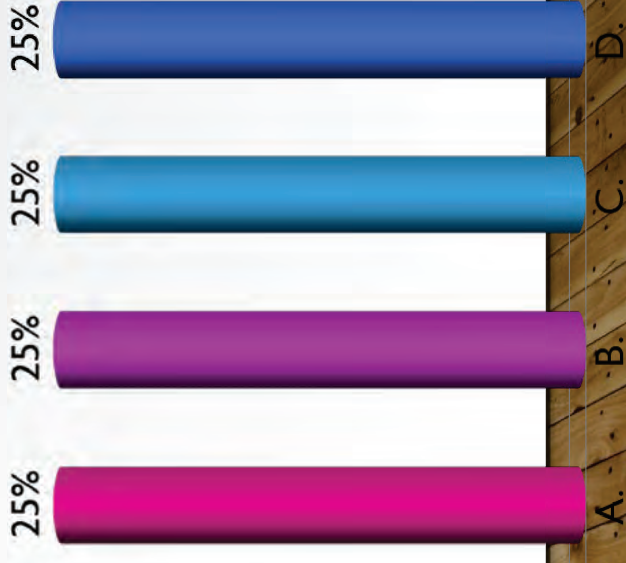
FIVE FACTOR TEST

- Matter of first impression
- Abrupt departure from the well-established practice
- Reliance
- Burden of imposing the rule retroactively
- Statutory interest



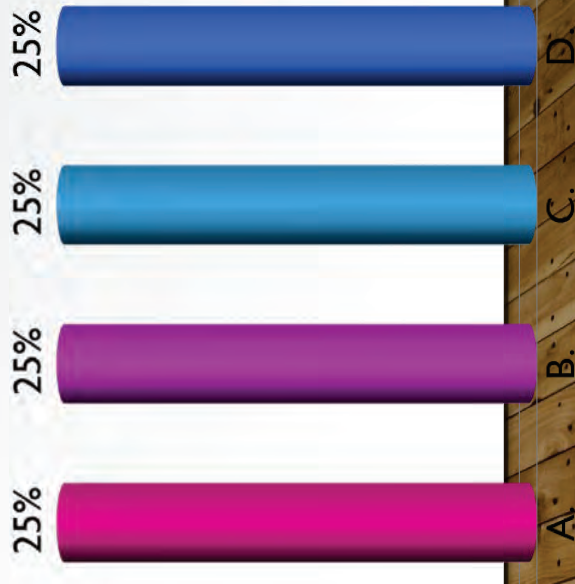
ALI WAS CONVICTED OF THEFT UNDER A STATUTE ALLOWING A PERMANENT OR TEMPORARY TAKINGS IN 2011. IN 2016, THE BOARD ANNOUNCED TEMPORARY TAKINGS QUALIFIED AS CIMTS. IN 2019, ALI APPLIED FOR CANCELLATION AND WAS DENIED BECAUSE HIS CRIME IS A CIMT. WAS THIS INAPPROPRIATELY RETROACTIVE?

- A. No, because Ali has no liberty interest.
- B. Yes, because it attaches a new disability to his conviction.
- C. No, because the relevant action was his application for cancellation.
- D. Yes, but only if Ali pleaded guilty.



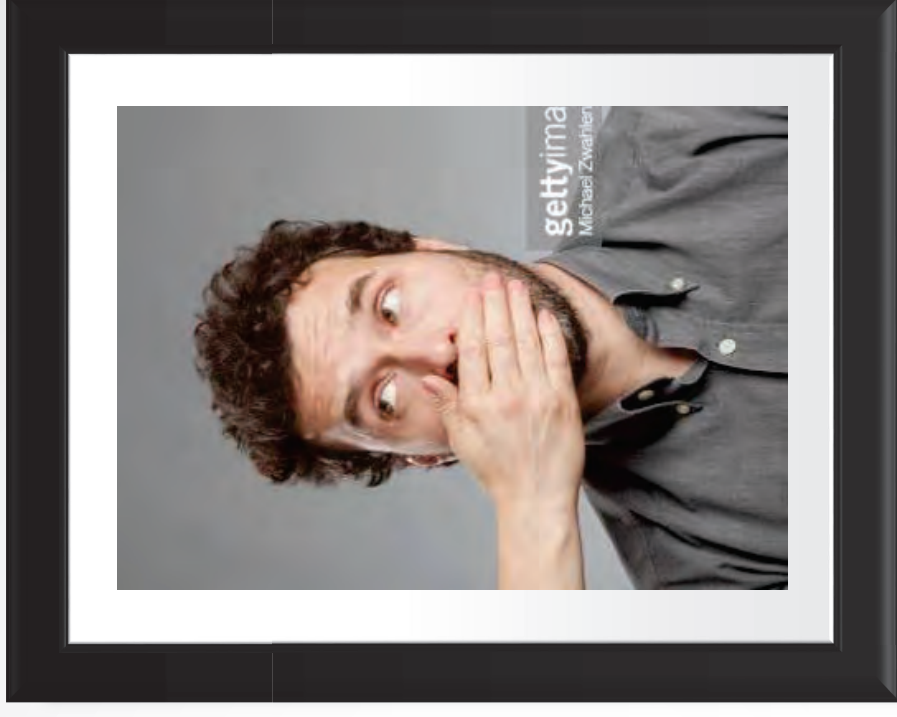
NICK WAS CONVICTED OF INDECENT EXPOSURE IN 2009. IN 2010, THE 9TH RULED THE STATUTE WAS NOT A CIMT. THE BOARD EXERCISED ITS BRAND X AUTHORITY IN 2013 TO REVERSE. ALI WAS HELD REMOVABLE IN 2019. WAS THIS IMPERMISSIBLY RETROACTIVE?

- A. Yes, because the Board was exercising its policymaking authority.
- B. Yes, because Nick had a settled expectation based on the 9th's decision.
- C. No, because immigration rules should be applied consistently nationwide.
- D. No, because Nick could not have relied on the 9th's rule.



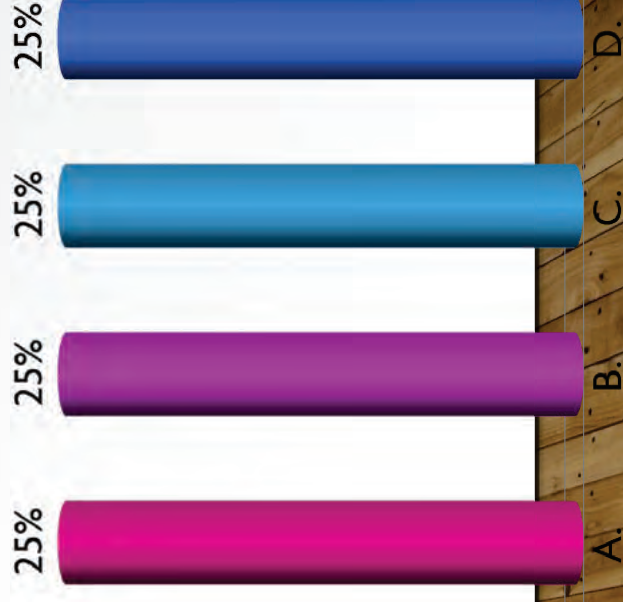
SUPPRESSION

You have the right to remain silent.



BUZZ CLAIMS THAT DHS OFFICERS STOPPED AND QUESTIONED HIM BASED SOLELY ON HIS HISPANIC APPEARANCE. DURING QUESTIONING, HE ADMITTED HE IS A MEXICAN CITIZEN WHO ENTERED WITHOUT INSPECTION. BUZZ NOW SEEKS TO SUPPRESS HIS STATEMENTS. WHAT SHOULD HE ARGUE?

- A. The stop violated the 4th Amendment.
- B. The use of his statements violates the 5th Amendment.
- C. The stop was an egregious 4th Amendment violation.
- D. Either B or C, depending on the venue.



EGREGIOUS FOURTH AMENDMENT VIOLATION?



NINTH CIRCUIT:

- a deliberate violation; or
- a reasonable officer should have known that his or her actions violated the Fourth Amendment

OTHER CIRCUITS:

- Totality of the circumstances:
 - Physical abuse?
 - Intent?
 - Racial profiling?
 - Widespread violations?



MECHANICS FOR RAISING A SUPPRESSION CLAIM

Alien's Burden

- ✓ • Detailed affidavit with specific facts establishing a prima facie case for suppression

- ✓ • Supporting testimony

- Detailed affidavit + Testimony = Suppression Hearing



Government's Burden

The government must justify the manner in which it obtained the evidence

EXCEPTIONS TO THE EXCEPTION

The Exclusionary Rule Does Not Apply

EXCEPT

Fundamental Fairness and/or Egregious Fourth Amendment
Violations

BUT EVEN THEN...

Independent Source

No Termination of the Removal Proceeding



STATE OFFICERS STOPPED AND QUESTIONED BUZZ BASED ON HIS HISPANIC APPEARANCE, AND CONTACTED DHS AFTER HE ADMITTED ALIENAGE AND UNLAWFUL ENTRY. BASED ON THE STATE OFFICERS' REPORT, DHS ARRESTED BUZZ AND REFERRED HIM INTO REMOVAL PROCEEDINGS. BUZZ NOW SEEKS TO SUPPRESS HIS STATEMENTS TO THE STATE OFFICERS. WHAT SHOULD HE ARGUE?

- A.** The statements are the fruit of the state officers' unlawful stop.
- B.** The use of his statements violates the 5th Amendment.
- C.** The DHS officers committed an egregious 4th Am. violation when they arrested him.
- D.** The state officers' conduct was egregious.



QUESTIONS?

CONTACT US:

(b) (6)



Convention Against Torture

ELIZABETH K. FITZGERALD-SAMBOU

Overview of Presentation

- o Background
- o Jurisdiction to review CAT claims
- o Burden of proof
- o Elements of a CAT claim

BACKGROUND

Convention Against Torture Treaty

Ratified by the US in 1994 subject to reservations, understandings, and declarations

FARRA (1998) authorized implementation through regulations at 8 C.F.R. §§ 208.16-18 and 1208.16-18 (1999)

Convention Against Torture Treaty

Purposes:

- End torture in signatory countries (Article 2); and
- Prohibit signatory countries from returning individuals to countries where there are “substantial grounds” for believing the individual would be tortured (Article 3) (*non-refoulement*)

Nature of Protection

- Protection is mandatory if applicant shows eligibility
- Solely prevents removal to that specific country (DHS can remove to a safe third country)
- No derivative benefits for family members

Nature of Protection

- No path to permanent immigration status
- Subject to termination by: (1) DHS via motion to terminate status; (2) alien's request; or (3) country of removal's "sufficiently reliable" diplomatic assurances

Mandatory Grounds for Denial of Withholding of Removal

- Particularly serious crime conviction
- Serious nonpolitical crime abroad
- Persecutor of others
- Danger to national security
- Participated in Nazi persecution, genocide, torture, or extrajudicial killing

JURISDICTION

Jurisdiction

Sole method of obtaining
judicial review of CAT claim is
via petition for review of final
order of removal

8 U.S.C. § 1252(a)(4)

Jurisdiction

But 8 U.S.C § 1252(a)(2)(C) deprives courts of jurisdiction to review petitions filed by certain criminal aliens

Courts retain jurisdiction to review constitutional claims and questions of law under 8 U.S.C. § 1252(a)(2)(D)

Majority Position

1252(a)(2)(C) criminal alien bar bars review of CAT claims

Court only has jurisdiction to review constitutional claims and questions of law under 1252(a)(2)(D)

Ninth Circuit

“On the merits” exception to criminal alien bar

No jurisdiction to review denials based on the criminal conviction, but can review merits-based denials (regarding facts)

Seventh Circuit

Deferral of removal is “final enough to permit judicial review,” but is not “the kind of ‘final’ order covered by § 1252(a)(2)(C)”

Limited to deferral of removal claims

Standard of Review

Majority of courts apply
substantial evidence standard of
review

Likelihood of torture is a factual
finding

Standard of Review

But Third & Fourth Circuits hold that CAT claims are mixed questions of fact & law

- What is likely to happen = factual
- Whether likely conduct amounts to torture = legal

Question 2 – Agency denies CAT withholding because alien committed particularly serious crime, and CAT deferral because no likelihood of torture, and criminal alien bar applies. Which circuits would exercise jurisdiction to review the CAT withholding claim?

- A. 7th & 9th Circuits
- B. 3rd & 4th Circuits
- C. 3rd, 4th, 7th, & 9th Circuits
- D. 3rd, 4th, & 7th Circuits
- E. 3rd, 4th, & 9th Circuits



BURDEN OF PROOF

Burden of Proof

- Applicant bears the burden of proof to show that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal”
- Aggregate risk is considered
- Credible testimony alone may be sufficient

Relevant Factors

- (1) Past torture
- (2) Applicant's ability to internally relocate to avoid torture
- (3) Human rights violations within the country
- (4) Other country conditions evidence

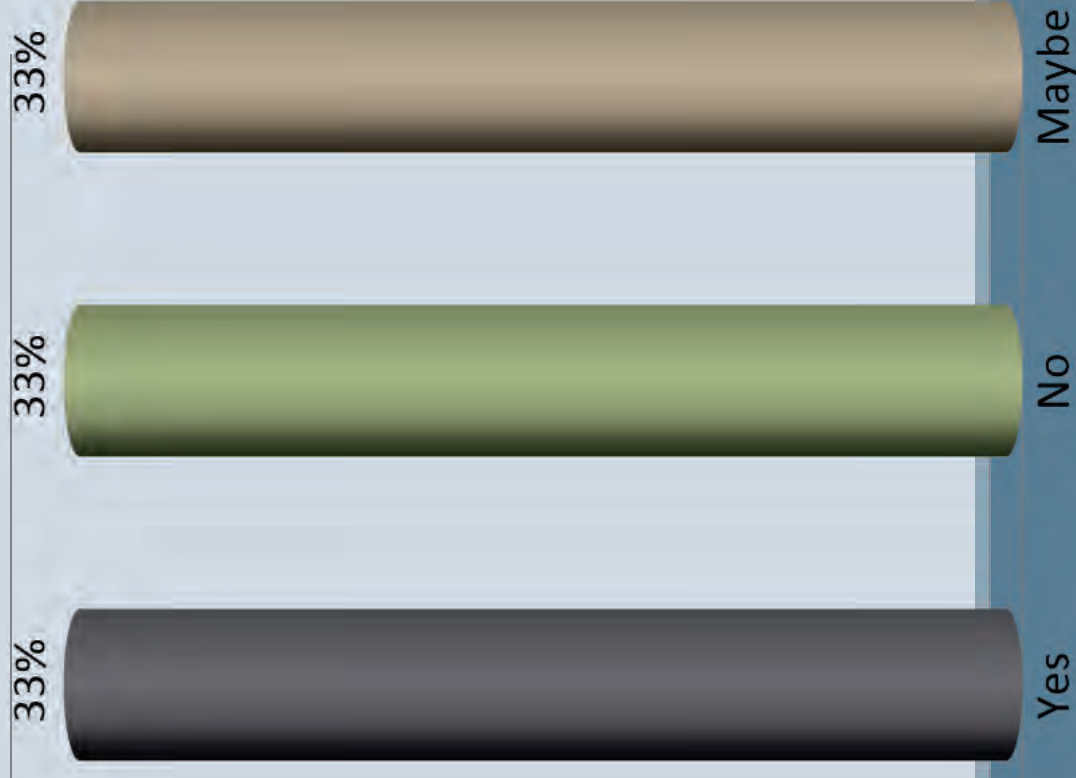
Past Torture

Past torture does not create
presumption of future torture (and
there is no burden shifting to
Government)

But it is given significant weight

Question 3—Alien fears torture from gang members, cartel members, and corrupt officials. Agency finds it 20% likely that she will be tortured by each source. Did alien meet her burden of showing torture more likely than not to occur?

- A. Yes
- B. No
- C. Maybe



ELEMENTS

Definition of Torture

- Set forth in 8 CFR 1208.18
- Torture does not include pain or suffering arising from lawful sanctions
- Noncompliance with legal procedural standards does not per se constitute torture

Elements of Torture

- Severity of harm
- Torturer
 - Specific intent
 - Proscribed purpose
 - Custody or control
- State actor

Element #1 – Severity of Harm

Severity of Harm

- “Extreme form of cruel and inhuman treatment” that does not encompass “lesser forms of cruel, inhuman or degrading treatment or punishment”

Severity of Harm

- Physical pain and/or mental pain

(b) (5)



Severity of Harm

Mental harm must be prolonged and caused by:

- (1) Intentional or threatened infliction of severe physical pain;
- (2) Actual or threatened use of mind altering substances;
- (3) Threat of imminent death; or
- (4) Threat that any of the above will be done to another person

Element #2 – Torturer Requirements

Torturer Requirements

Torturer must have:

- Specific intent to cause severe harm;
- For a proscribed purpose; and
- Custody or control of the victim

Specific Intent

- Torturer must “specifically intend[] to inflict severe physical or mental pain or suffering”
- Therefore, an “act that results in unanticipated or unintended severity of pain and suffering does not constitute torture”

Proscribed Purpose

- o Motive requirement
- o Torturer must have a specific illicit purpose for the severe harm, such as:
 - o Obtaining information or confession
 - o Punishment
 - o Intimidation or coercion
 - o Discrimination

Custody or Control

Only torture if the act is
“directed against a person
in the offender’s custody or
physical control”

Element #3 – State Actor Requirements

State Actor

Only torture if the harm is
“inflicted by or at the
instigation of or with the
consent or acquiescence of a
public official or other person
acting in an official capacity”

The Actor

Who Counts as a State Actor

Officials within a *de facto* government do not count (e.g. Somalia with no functioning government, but de factor government controls area)

The Conduct

Types of Conduct

Only torture if the state actor:

- (1) Inflicts torture;
- (2) Instigates torture;
- (3) Consents to torture; or
- (4) Acquiesces to torture

Acquiescence

Requires that a “public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal duty to intervene to prevent such activity”

Acquiescence

Essentially includes a:

(b) (5)



Questions?

Elizabeth Fitzgerald-Sambou

Trial Attorney

(b) (6)

(b) (6)

Criminal Immigration Nuts & Bolts

Case Study: Following a non-citizen through the litigating process

Overview: You will be asked to get into small groups. You will review a decision by the Board of Immigration Appeals ordering the petitioner removed on criminal grounds, and will consider his challenges to the findings and determine whether they are defensible in the court of appeals.

You will analyze the crime under different INA grounds and theories of culpability. This case study primarily involves the categorical approach.

About the Non-Citizen and His Crime

•••

Mr. Smith is a fictional international art thief who, up until his most recent crime, has never been caught. He has lived in the United States lawfully for 4 years.

After much searching, Mr. Smith located the whereabouts of a famous painting that had been stolen and passed into the hands of a criminal syndicate. Seizing on the opportunity, Mr. Smith took the painting from an associate of the syndicate by force on a city street in broad daylight.

Much to his chagrin, Mr. Smith was caught by authorities and convicted of robbery amongst other crimes.



Carel Fabritius, *The Goldfinch*
1654. Oil on canvas. Image from
Wikimedia Commons



Board Decision



The Criminal Statute

State Stat. § 164.395 Robbery in the third degree

(1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft as defined in Stat. § 164.015 the person intentionally uses or threatens the immediate use of physical force upon another person with the intent of:

(a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or

(b) Compelling the owner of such property or another person to deliver the property.

Robbery in the third degree is a Class C felony.

(2) If in committing the crime of robbery, a person carries, or uses or attempts to use a dangerous weapon, it shall be considered a Class B felony.

Terms Defined

Stat. § 164.015 (Theft):

A person commits theft when with intent to deprive another person of property, the person:

(1) Commits theft by taking;

(2) Commits extortion by compelling the delivery of property;

(3) Commits theft by deception;

(4) Commits theft by receiving.

Stat. § 164.04 (Deprive):

To deprive means to withhold property of another permanently or temporarily.

State v. LeBlanc ("physical force"):

"The degree of force necessary to constitute robbery can be established without a showing of physical injury. The focus is on the perpetrator's intent while using force to prevent or overcome any resistance, not on whether the victim feels any force. The perpetrator could use force to prevent resistance by acting so quickly that there is no time for the victim to resist."



Relevant Immigration Statutes

8 U.S.C. § 1227(a)(2)(A)(i) Crimes of moral turpitude (CIMT)

(i) Crimes of moral turpitude

Any alien who--

(I) is convicted of a crime involving moral turpitude committed within five years after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

8 U.S.C. § 1227(a)(2)(A)(iii) Aggravated felony

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. § 1101(a)(43) "Aggravated felony" means

(F) a crime of violence for which the term of imprisonment is at least one year.

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

Terms Defined



Crime involving moral turpitude:

"Moral turpitude is conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed to other persons." *Matter of Tejwani*, 24 I. & N. Dec. 97 (BIA 2007).

Aggravated Felony Theft:

A theft offense under 1101(a)(43)(G) is the taking of, or exercise of control over, property without consent when there is criminal intent to deprive the owner of ownership, even if such deprivation is less than total or permanent. *Matter of Garcia-Madruga*, 24 I. & N. Dec. 436, 440 -41 (BIA 2008).

Crime of Violence:

8 U.S.C. § 1101(a)(43)(F) cross-references 18 U.S.C. § 16(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.



Phase One

Examine the Board's determination that Mr. Smith's conviction for third-degree robbery under Stat. § 164.395(1) is an aggravated felony theft.

1. What are the elements of aggravated felony theft?
2. What are the elements of the state's third-degree robbery offense?
3. What element does Mr. Smith assert is broader in the state statute than in generic theft, and how?

(b) (5)

5. How does the Board address this apparent overbreadth?

(b) (5)



Phase Two

(b) (5)



1. Recall the elements of the state statute. Based on the above, identify the CIMT category the Board applied in its decision.
2. What are the elements of a theft CIMT? How does the generic definition of theft aggravated felony compare to the generic definition of theft CIMT?
3. What are the elements of the state statute that are relevant to a theft CIMT analysis?
4. What is the least culpable conduct of the state statute? Do you think that this crime is categorically a theft CIMT? Why or why not?

Crime Involving Moral Turpitude



General Requirements:

- Culpable Mental State
 - Intentionally, Knowingly
 - Recklessly
 - General Intent, Strict Liability (maybe if aggravator)
 - Negligently (not sufficient)
- Reprehensible conduct:
 - Varies based on type of offense and culpable mental state

3 Types of CIMTs:

(1) Theft CIMT:

- Mental State: Intent to deprive the owner of the property either
 - Permanently, or
 - Under circumstances where the owner's property rights are substantially eroded
- Reprehensible Conduct: Any under statute (generally, taking or exercising control over) (*Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016))

continued on next page ...



Phase Two contd.

5. Assume the Board analyzed the crime as an assault/battery CIMT. What elements of the state statute are relevant to whether it is a CIMT?

(b) (5)



(b) (5)



(b) (5)



Types of CIMTs contd:



(2) Assault/Battery CIMT:

- Intentional conduct
- Meaningful level of harm
-- more than offensive touching (simple battery/assault not enough unless aggravating factor) (*see Matter of Wu, 27 I. & N. Dec. 8 (BIA 2017)*)

*Sliding scale --mental state/conduct

*Aggravating factors:

- serious harm
- use of deadly or dangerous weapon
- protected class of victim

(3) Robbery CIMT:

"robbery is universally recognized as a crime involving moral turpitude"
Matter of Martin, 18 I. & N. Dec. 226 (BIA 1982).

REMINDER: Level of force for state statute:

- need not establish victim injured
- focus is on defendant's intent to prevent or overcome resistance, not on victim's experience of the force.



Phase Two contd.

You've come to the end of your categorical analysis and have determined that Mr. Smith's conviction is not categorically a CIMT in any category. But you've not lost hope because now you turn to a divisibility analysis to see if the modified categorical approach can be applied.

9. Under the assault/battery CIMT category, what part of the state statute do we need to focus on to determine divisibility?

-- Do you think you could argue that the statute is divisible as to subsection (2)? Why or why not?

10. Do you think "carries, or uses or attempts to use a dangerous weapon" would be an aggravating factor that would make the crime a CIMT? What more might you need to know about how the state interprets the statute to make your decision?

Recall:

Assault/Battery CIMT:

- Intentional conduct
- Meaningful level of harm --more than offensive touching (simple battery/assault not enough unless aggravating factor) (see *Matter of Wu*, 27 I. & N. Dec. 8 2017))
- Sliding scale -- mental state/conduct

Aggravating factors:

- serious harm
- use of deadly or dangerous weapon
- protected class of victim

State Stat. § 164.395

(1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft as defined in Stat. § 164.015 the person intentionally uses or threatens the immediate use of physical force upon another person with the intent of:

(a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or

(b) Compelling the owner of such property or another person to deliver the property.

Robbery in the third degree is a class C felony.

(2) If in committing the crime of robbery, a person carries, or uses or attempts to use a dangerous weapon, it shall be considered a Class B felony.



Phase Three

You're almost done working through the Board's decision, but wait! There's one last ground of removability: DHS charged, and the agency found, that Mr. Smith's robbery conviction was for a crime of violence under 8 U.S.C. § 1101(a)(43)(F).

1. How does the force required for a crime of violence compare to the force required for an assault/battery CIMT?

(b) (5)



(b) (5)



Crime of Violence:

8 U.S.C. § 1101(a)(43)(F): 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 at least one year

18 U.S.C. § 16:

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.

Intent Required for a Crime of Violence

- Intentional/Knowing
- Reckless (in most circuits)

Level of Force Required for a Crime of Violence

- Violent force; capable of causing physical pain or injury; only that degree of force necessary to inflict pain (*Johnson I*)
- Force sufficient to overcome victim's resistance (*Stokeling*)
- *Stokeling* distinguished state statutes that require no resistance

Level of Force Required for the State Statute:

- need not establish victim was injured
- focus is on defendant's intent to prevent or overcome resistance, not on victim's experience of the force.

CRIMMIGRATION

Litigating the Immigration Consequences of Criminal Convictions



Jennifer J. Keeney & Erica Miles & Lindsay B. Glauner,
Criminal Immigration Team

Crimes and the INA

- How to Determine When Convictions Trigger Immigration Consequences
 - Categorical Approach
 - Divisibility
 - Modified Categorical Approach
- Foundations for the Nuts and Bolts of Litigating a Crimmigration Case
 - Aggravated Felony Theft
 - Aggravated Felony Crime of Violence
 - CIMTs

Categorical
Approach
with
modified
application
as
permitted

DETERMINING WHEN A CONVICTION TRIGGERS IMMIGRATION CONSEQUENCES

Jennifer J. Keeney, Assistant Director

Determining when a Conviction Triggers Immigration Consequences

Three
Possible
Steps

- Categorical Approach
- Divisibility
- Modified Categorical Approach

One
Potential
Repeat

Categorical Approach

**Important
Terminology**

- **Generic Definition**
- **Statute of Conviction**
- **Elements**

Categorical Approach

Look to
statute of
conviction
only – not
underlying
facts of
crime

Compare:

- Elements of criminal statute of conviction
- to
- Elements of generic definition

Categorical Approach

As Applied to Burglary

Elements of statute of conviction:

- Unlawful/
unprivileged
- Entry or remaining in
- A structure
- With intent to
commit a crime

Elements of generic definition:

- Unlawful/
unprivileged
- Entry or remaining in
- A building or
structure
- With intent to
commit a crime

Categorical Approach

Realistic Probability Test

- Focus on minimum conduct criminalized by statute - not invitation for “legal imagination”
- Must be “realistic probability” - not “theoretical possibility” - that State would apply statute to conduct outside generic definition

Categorical Approach

As Applied to Burglary

Elements of statute of conviction:

- Unlawful breaking or entering
- A building, ship, vessel, or vehicle
- With intent to commit a felony

Elements of generic definition:

- Unlawful or unprivileged entry or remaining in
- A building or structure
- With intent to commit a crime

Modified Categorical Approach

- When the mere fact of conviction is not a categorical match, one may (at times) consult limited criminal record
- Only resort to criminal record when statute of conviction is divisible
- Sole purpose of modified categorical approach - identify the alternative elements of the crime of conviction in order to compare those elements to the generic definition
- When statute is neither categorical nor divisible, inquiry ends (Government loses)



Determining Divisibility

Applying the Supreme Court's Rule

Divisibility: *Descamps v. United States*, 133 S. Ct. 2276 (June 20, 2013)

- **Holding:** Modified categorical approach only appropriate when statute divisible
- **Divisible:** Statute lists multiple, alternative elements creating several different crimes
- **Purpose:** Identify from alternative elements the crime of conviction to compare to generic definition

Divisibility: *Mathis v. United States*, 136 S. Ct. 2243 (June 23, 2016)

- Only alternative elements render a statute divisible:
 - Distinguishing between alternative elements and alternative factual means is central to the analysis
- *Elements v. Means*
 - Elements:
 - Statutory criteria that prosecutor must prove and (as a legal matter) jury must find beyond a reasonable doubt to convict
 - Factual Means:
 - Statutory criteria that (as a legal matter) a jury need not agree on to convict

Divisibility under *Descamps and Mathis:*

- First, determine if the statute of conviction lists alternative ways to commit the crime
- Second, determine if the alternatives are elements or means

Divisibility: Are alternatives Elements or Means?

Step 1:

- State case definitively answers question
- Statute, on its face, answers question
 - If statutory alternatives carry different punishment = element
 - If statutory alternatives offer “illustrative examples” = means

Divisibility:

Are alternatives Elements or Means?

Step 2: Other “authoritative sources of state law”?

- Instructive (as opposed to definitive) case law
- Pattern jury instructions
- Pleading and practice forms
- Other?

Divisibility:

Are alternatives Elements or Means?

- Step 3: If state law fails to provide answer- look to record of conviction itself
- ▣ Peek at criminal documents for sole and limited purpose of determining if statutory alternatives are elements


TIPS TO DETERMINING DIVISIBILITY


Elements v. Means


Determining Divisibility: Where to Start

(b) (5)


Determining Divisibility: Statutory Definition – Definitional Provisions

 **§ 487. "Grand theft" defined**
West's Annotated California Codes Penal Code Effective: January 1, 2014 (Approx. 2 pages)

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West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments (Refs & Annos)
Title 13. Of Crimes Against Property (Refs & Annos)
Chapter 5. Larceny [Theft] (Refs & Annos)

 **Proposed Legislation**

Effective: January 1, 2014
West's Ann.Cal.Penal Code § 487

§ 487. "Grand theft" defined

Currentness

Grand theft is theft committed in any of the following cases:

(a) When the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars (\$950), except as provided in subdivision (b).

NOTES OF DECISIONS (515)

Validity	Construction with other laws
Construction with other laws	Construction with federal law
Construction with federal law	Ex post facto
Ex post facto	Retroactivity
Retroactivity	Counsel, right to
Counsel, right to	Right to counsel
Right to counsel	Elements of offense, generally
Elements of offense, generally	Wobbler offenses
Wobbler offenses	Moral turpitude
Moral turpitude	Nature of offense
Nature of offense	Acts constituting offense, generally
Acts constituting offense, generally	Intent
Intent	Proof of intent
Proof of intent	Sufficiency of evidence
Sufficiency of evidence	Value
Value	Loss amount under threshold
Loss amount under threshold	Property subject to theft
Property subject to theft	Robbery distinguished

Determining Divisibility: Statutory Definition – Definitional Provisions

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§ 484. "Theft" defined

§ 484a. Repealed by Stats. 1967, c. 1395, p. 3258, § 1

§ 484b. Diversion of funds received to obtain or pay for services, labor, materials or equipment

§ 484c. Submission of false voucher to obtain construction loan funds

§ 484d. Definitions

§ 484e. Theft of access cards or account information

§ 484f. Forgery; access cards; design, alteration, or use

§ 484g. Fraudulent use of access cards or account information

§ 484h. Furnishing thing of value upon presentation of unauthorized access card; falsely presenting evidence of access card transaction

§ 484i. Forgery, access cards and information; equipment to make counterfeit cards

§ 484j. Publication of access card, number or code with intent to defraud another

§ 484.1. Pawnbrokers or secondhand dealers; false information or false verification of ownership of property to receive money or valuable consideration; restitution

Close

Determining Divisibility: Statutory Definition – Different Punishments

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All Content All State & Federal

§ 13-1203. Assault; classification Arizona Revised Statutes Annotated Title 13. Criminal Code (Approx. 2 pages)

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Arizona Revised Statutes Annotated

Title 13. Criminal Code (Refs & Annos)

Chapter 12. Assault and Related Offenses (Refs & Annos)

Unconstitutional or Preempted | Limitation Recognized by State v. Howard | Ariz.App. Div. 2 | Aug. 10, 2010

A.R.S. § 13-1203

§ 13-1203. Assault; classification

Currentness

A. A person commits assault by:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
3. Knowingly touching another person with the intent to injure, insult or provoke such person.

B. Assault committed intentionally or knowingly pursuant to subsection A, paragraph 1 is a class 1 misdemeanor. Assault committed recklessly pursuant to subsection A, paragraph 1 or assault pursuant to subsection A, paragraph 2 is a class 2 misdemeanor. Assault committed pursuant to subsection A, paragraph 3 is a class 3 misdemeanor.

NOTES OF DECISIONS (107)

Attempt
Battery
Construction and application
Double jeopardy
Elements of the offense
Evidence
Included offenses
Indictment and information
Instructions
Intent
Jury trial
Municipal court jurisdiction
Nature of offense
Recklessness
Sentence and punishment
Sufficiency of evidence
Verdict



Determining Divisibility: Statutory Definition – Illustrative Examples?

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Advanced

§ 53a-119. Larceny defined
Connecticut General Statutes Annotated | Title 53A. Penal Code | Effective: October 1, 2014 (Approx. 5 pages)

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Connecticut General Statutes Annotated
Title 53a. Penal Code (Refs & Annos)
Chapter 952. Penal Code: Offenses (Refs & Annos)
Part IX. Larceny, Robbery and Related Offenses (Refs & Annos)


Proposed Legislation

Effective: October 1, 2014
C.G.S.A. § 53a-119
§ 53a-119. Larceny defined
Currentness

NOTES OF DECISIONS (272)
IN GENERAL
METHODS OF COMMITTING LARCENY

A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to:

- (1) Embezzlement. A person commits embezzlement when he wrongfully appropriates to himself or to another property of another in his care or custody.
- (2) Obtaining property by false pretenses. A person obtains property by false pretenses when, by any false token, pretense or device, he obtains from another any property, with intent to defraud him or any other person.
- (3) Obtaining property by false promise. A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct,



Determining Divisibility: Jury Agreement

(b) (5)



Determining Divisibility: Jury Agreement

§ 484. "Theft" defined

West's Annotated California Codes Penal Code Effective: January 1, 2001 (Approx. 2 pages)

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West's Ann. Cal. Penal Code § 484

§ 484. "Theft" defined

Currentness

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

Elements of theft offense, generally

Acts constituting theft, generally

Taking

Community property

Property subject to theft

Fair market value

Value

Possession of stolen property

Carjacking, possession of stolen property

Inferences

Corroborating evidence, possession of stolen property

Sufficiency of evidence

Intent

Instructions

Larceny

Elements of offense

Larceny by trick

Grand larceny

Grand theft

Acts constituting

Determining Divisibility: Jury Agreement

(b) (5)




Determining Divisibility: Jury Agreement

§ 484. "Theft" defined
West's Annotated California Codes Penal Code Effective: January 1, 20

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 - 46.5. Included offenses
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Determining Divisibility: Jury Agreement

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Notes of Decisions (862)

779, 218 Cal.App.4th 1038, 2115, 2120

54. Verdicts

Juries need not specify the theory under which they return a conviction of grand theft, under California law, but at least one such theory must be supported by the record. *Harris v. Garcia*, N.D.Cal.2010, 734 F.Supp.2d 973.Criminal Law 881(1)Criminal Law 881(2) 

It is immaterial for theft conviction whether or not the jurors agreed as to the technical pigeonhole into which the theft fell. *People v. Fenderson* (App. 1 Dist. 2010) 116 Cal.Rptr.3d 17, 188 Cal.App.4th 625, review denied.Criminal Law 866 

Defendant's conviction for grand theft did not preclude jury from also finding financial gain special circumstance allegation true concerning murder charge; same evidence could be used to prove both crime of theft and financial gain circumstance when evidence showed defendant's expectation of financial gain at time of murder. *People v. Crew* (2003) 3 Cal.Rptr.3d 733, 31 Cal.4th 822, 74 P.3d 820, modified on denial of rehearing, certiorari denied 124 S.Ct. 2018, 541 U.S. 991, 158 L.Ed.2d 497, habeas corpus denied 127 Cal.Rptr.3d 285, 52 Cal.4th 126, 254 P.3d 320.Sentencing And Punishment 1660

Jury unanimity was not required as to form of theft after trial in which jury could have found defendant guilty of petty theft based on trick, or based on simple larceny by intimidating store employees, as end result was that defendant left store with property he had not paid for, where defendant pretended he was trying to return dress that he had just taken off rack, and was allowed to leave with dress by store employees. *People v. McLemore* (App. 1 Dist. 1994) 32 Cal.Rptr.2d 687, 27 Cal.App.4th 601, review denied.Criminal Law 872.5

Juries need not be concerned with technical differences between several types of theft, and jury can return a general verdict of guilty if they find that an unlawful taking has been proved. *People v. Woolson* (App. 2 Dist. 1960) 5 Cal.Rptr. 766, 181 Cal.App.2d 657.Larceny 82 

The offense of grand theft includes the crimes of larceny by trick and device and obtaining money by false pretenses and a judgment of conviction of grand theft based on a general verdict of guilty, can be sustained if the evidence discloses the elements of one of the two consolidated offenses. *People v. Robertson* (App. 1959) 167 Cal.App.2d 571, 334 P.2d 938.Criminal Law 881(4)

Determining Divisibility: Pattern Jury Instructions

§ 484. "Theft" defined

West's Annotated California Codes Penal Code Effective: January 1, 2001 (Approx. 2 pages)

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Treatises and Practice Aids (70)

- California Affirmative Defenses 2d § 25:20, Taking or Harming Personal Property: Three Years.
- California Construction Law Manual § 9:1, Diversion Of Funds.
- California Construction Law Manual § 9:2, False Vouchers.
- California Construction Law Manual § 9:3, Willful Diversion.
- California Construction Law Manual § 9:4, Advice to Divert.
- California Construction Law Manual § 4:11, Diversion Of Funds.
- California Jury Instructions - Criminal, 6th Ed. 14.00, Theft--Forms of.
- California Jury Instructions - Criminal, 6th Ed. 14.02, Theft by Larceny--Defined.
- California Jury Instructions - Criminal, 6th Ed. 14.07, Theft by Embezzlement--Defined.
- California Jury Instructions - Criminal, 6th Ed. 14.10, Theft by False Pretense--Defined and Elements.
- California Jury Instructions - Criminal, 6th Ed. 14.16, False Pretense--Continuing Effect Of Representation.
- California Jury Instructions - Criminal, 6th Ed. 14.26, Grand and Petty Theft--How Property Value Determined.



Modified Categorical Approach

Applies Only if Statute of Conviction is Divisible

Modified Categorical Approach

- Resort to criminal record when statute of conviction is divisible

(b) (5)



Modified Categorical Approach Applied to Burglary

Elements of statute of conviction:

- Unlawful breaking or entering
- A building, ship, vessel, or vehicle
- With intent to commit a felony

Elements of generic definition:

- Unlawful or unprivileged entry or remaining in
- A building or structure
- With intent to commit a crime

Modified Categorical Approach As Applied to Burglary

Elements of statute of conviction:

- Unlawful entry into
 - A shelter (defined *under case law to include a locked car*)
- With intent to commit a felony

Elements of generic definition:

- Unlawful/unprivileged entry or remaining in
 - A building or structure
- With intent to commit a crime

Modified Categorical Approach

Operation of Burden of Proof Provisions

(b) (5)





Foundations for the Nuts and Bolts of Litigating a Crimmigration Case

AGGRAVATED FELONIES

THEFT & CRIME OF VIOLENCE

Erica Miles, Senior Litigation Counsel

Overview



- Theft
 - ▣ Define elements
 - ▣ Examples of litigation over the elements
 - ▣ Theft vs. Fraud rule and issues
 - ▣ Subset: Receipt of stolen property (ROSP)
- Crime of Violence
 - ▣ Generic definition
 - ▣ Common 3 issues: Pivotal cases, ensuing litigation, and briefing tips



AGGRAVATED FELONY: THEFT

8 U.S.C. § 1101(a)(43)(G)

A theft offense (including receipt of stolen property)* or burglary offense for which the term of imprisonment [is] at least one year

*ROSP

Generic Definition of Aggravated Felony Theft

Taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent

Matter of V-Z-S-, 22 I. & N. Dec. 1338 (BIA 2000)

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

Elements of Ag Fel Theft:

- Taking or exercise of control
- Property
- Without consent
- Intent to deprive the owner of rights and benefits of ownership

Elements of Aggravated Felony Theft



**Examples of Contested Issues over
the Elements of Generic Theft**

Element: Taking or Exercise Control

Qualifies

- ❑ Possession (5th, 7th, 9th)
- ❑ Owning or operating a “chop shop” (9th)
- ❑ Obtaining/withholding/retaining/concealing/selling (9th, 11th)
- ❑ Aiding & abetting (9th post-Duenas-Alvarez)

Does Not Qualify

- ❑ Aiding and abetting theft (9th pre-Duenas-Alvarez)
- ❑ Identity theft (fake) (9th)
- ❑ Accessory after the fact (9th) (non-ROSP offenses)

Element: Property

Qualifies

- ❑ Labor & Services (1st, 2nd)
- ❑ Identity (real) (8th, IA statute)

Does Not Qualify

- ❑ Labor & Services (5th, 9th)
- ❑ Identity (fake) (9th, OR statute)

Element: Without Consent of Owner

Qualifies

- Non-voluntary consent through duress, coercion, force, threat (9th Cir., BIA)
- E.g., some robbery & extortion statutes)

Does Not Qualify

- Consent due to false pretenses/fraud/ deception (BIA, all circuits so far)
- Identity theft – use with consent (9th, OR statute)
- “Regardless of the manner”
- Embezzlement

Element: Intent to Deprive Owner

Qualifies

- Temporary deprivation
- Intent to appropriate (2nd)

Does Not Qualify

- Unauthorized Use offenses
 - De minimus deprivation
 - Glorified borrowing (use deviates slightly from scope of consent)
 - Joyriding – no intent to deprive element
- Intent to appropriate (11th)

Matter of Garcia-Madruga, 24 I. & N. Dec. 436 (BIA 2008)

Theft and Fraud aggravated felonies are distinct and separate:

- ▣ Theft aggravated felony requires a showing that the owner did not consent voluntarily to taking/control
- ▣ Fraud aggravated felony requires a showing of actual, voluntary consent to taking/control due to deceit

Issues Involving the Theft vs. Fraud Rule

(b) (5)

Issues Involving the Theft vs. Fraud Rule

#2 Hybrid offense argument: Where all offenses criminalized are either theft or fraud offenses, offenses are categorically aggravated felonies if meets both the 1 year (theft) or \$10K (fraud) requirements

Issues Involving the Theft vs. Fraud Rule

#2 Hybrid offense argument:

- ❑ Originated with 3d Cir. Nugent decision
- ❑ BIA arguably rejected Nugent in *Garcia-Madruga*
- ❑ En banc 3d Cir. overruled Nugent in *Al-Sharif*

(b) (5)



Issues Involving the Theft vs. Fraud Rule

#4 Realistic Probability non-theft offenses are prosecuted?

- ❑ Larceny statutes often appear to be overbroad
- ❑ Is it overbroad? Look at OR Robbery
- ❑ *Lopez-Aguilar v. Barr* 921 F.3d 898 (9th Cir. 2019) – statute *theoretically* covers consensual takings, but there is no realistic probability OR prosecutes such conduct
- ❑ Decision just vacated in August

8 U.S.C. § 1101(a)(43)(G) - ROSP offenses

- “Theft” and “receipt of stolen property” can be separate offenses
- Not necessary to establish elements of “theft” to demonstrate ROSP qualifies as aggravated felony under § 1101(a)(43)(G)

Matter of Cardiel-Guerrero, 25 I. & N. Dec. 12, 14 (BIA 2009)

8 U.S.C. § 1101(a)(43)(G) - ROSP offenses

- Covers act of receipt, and offenses that involve possession, concealment, or retention of stolen property after receipt
- Requires knowledge that property is stolen
- Less than knowledge (reason to believe) does not suffice

Matter of Sierra, 26 I. & N. Dec. 288 (BIA 2014)



**AGGRAVATED FELONY: CRIME OF
VIOLENCE**

8 U.S.C. § 1101(a)(43)(F)

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 [is] at least one year

Generic Definition of COV: 18 U.S.C. §

16

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, or . . .

(b) [invalidated as unconstitutionally vague, *Dimaya*]

Elements Clauses

**INA: crime of
violence**

18 U.S.C. § 16(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”

**ACCA:
violent felony**

18 U.S.C. § 924(e)(2)(B)(i)

an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another”

Most Common Issues in Our COV Litigation

- **Level of physical force**
- **Use of force – direct vs. indirect;
omissions***
- **Recklessness mens rea offenses**

Level of Physical Force: The Game Changer



Stokeling v. United States, 139 S. Ct. 544 (2019)

A robbery statute that has as an element the use of force ***sufficient to overcome a victim's resistance*** necessarily involves the use of physical force required for a “violent felony” under the ACCA

Level of Physical Force

Old Standard

Johnson I (2010) (battery)

- Violent force
- Only that degree of force necessary to inflict pain
- Capable of causing physical pain or injury
- Mere touching/slight force does not qualify

New Standard

Stokeling (Robbery)

- Force Sufficient to overcome victim's resistance
- Resistance can be slight
- Capable of causing pain/injury
- Pulling hair pin w/ strands of hair out of victim qualifies

Level of Physical Force: *Johnson I* (2010)

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

- Examined “battery” as a “violent felony” under the ACCA
- Rejected common-law meaning of “force” for battery into ACCA’s definition because a “comical misfit” – defined force in a way sufficient for misdemeanors
- Violent force; capable of causing physical pain or injury; only that degree of force necessary to inflict pain

Level of Physical Force:

Interpretations of *Johnson I*

Courts of Appeals (examples)

- 9th Cir:
 - ▣ Force must be substantial and strong to be “violent force”
 - ▣ Mere potential for trivial pain or slight injury is insufficient
- 7th & 8th Cir.
 - ▣ Forceful acts beyond simple touching suffice because have capacity to inflict pain/cause injury

Level of Physical Force:

Interpretations of *Johnson I*

United States v. Castleman, 572 U.S. 157 (2014)

- “misdemeanor crime of domestic violence”
§921(a)(33)(A)
- Adopted common law meaning of “force” for battery
- Definition satisfied “by even the slightest offensive touching”

Level of Physical Force:

Interpretations of *Johnson I*

(cont...) *Castleman*, 572 U.S. 157

- *Johnson* dictated this result
- Same reasons common law definition does not apply for “violent felony” are why it does for “misdemeanor DV”
- 2 main reasons:
 - DV often prosecuted under generally applicable A&B statutes
 - “Violent’ . . . connotes a substantial degree of force”; “DOMESTIC Violence’ . . . is a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context”

Level of Physical Force:

Interpretations of *Johnson I*

Stokeling v. United States, 139 S. Ct. 544 (2019): Level of force is that sufficient to overcome a victim's resistance

- Consistent w/ common law robbery, the standard under original ACCA
- Differentiated common law robbery from common law battery
- Nominal force for misdemeanor battery contemplated and rejected by *Johnson* – which focuses on “unwanted nature” of touching – does not require overcoming resistance

Level of Physical Force: Briefing



(b) (5)



Level of Physical Force: Briefing



(b) (5)



Level of Physical Force: Briefing



(b) (5)



Although Stokeling changed “force”

game...

(b) (5)

Use of Force: Do indirect acts suffice?



- ❑ Post-*Johnson I*, there was much litigation
- ❑ Common example was use of poison argument
- ❑ What do you think?

Use of Indirect Force: The Decider

United States v. Castleman, 572 U.S. 157 (2014)

- Knowing/intentional application of force is “use” of force
- Using poison is knowingly employing it as device to cause physical harm
- Such indirectly caused harm is enough for “use” of force
- Consistent with *Leocal*:
 - ▣ “use” of force must entail “a higher degree of intent than negligent or merely accidental conduct”

Use of Indirect Force: The Decider

(cont...) *Castleman*, 572 U.S. 157

- All courts of appeals (1st-11th and DC) agree that *Castleman* settled that indirect use of force can qualify for COV offenses
- The decision expressly left open whether a reckless assault also qualifies as a “use” of force

***Final common issue: Recklessness in using
force***



Mens Rea for “Use” of Force:

Recklessness

Prior to 2016:

- *Leocal v. Ashcroft*, 543 U.S. 1 (2004)
 - §16 requires mens rea higher than negligent or accidental conduct
 - Explicitly left open question of recklessness
 - The Court again left the question open in *Castleman*

□ After *Leocal*

- Most courts said “recklessness” does not qualify for a § 16 COV
- 3rd, 4th, 6th, 7th, 8th, 9th, 10th, and 11th

The Supreme Court Throws a Wrench

Voisine v. United States, 136 S. Ct. 2272 (2016)

- Reckless domestic assault qualifies as a “misdemeanor crime of domestic violence” within the meaning of § 922(g)
- Reckless behaviors are “the result of a deliberate decision to endanger another” and is therefore not an “accident”
- Explicitly did not resolve whether 18 U.S.C. § 16 includes reckless behavior (fn 4)

Post-*Voisine* Outcomes: Recklessness and §16(a)

Courts of Appeals are split on wider applicability:

- 5th, 8th, 10th, and DC Circuits
- Recklessness suffices under similarly worded ACCA and Sentencing Guidelines provisions
- 1st, 6th, 8th, and 9th: *Voisine* is limited
- 4th concurring panel (dictum): *Voisine* is limited
- 11th Cir: pending en banc
- Rejected recklessness
- But it did not address *Voisine*, nor was it briefed

Briefing Recklessness:

(b) (5)

(b) (5)

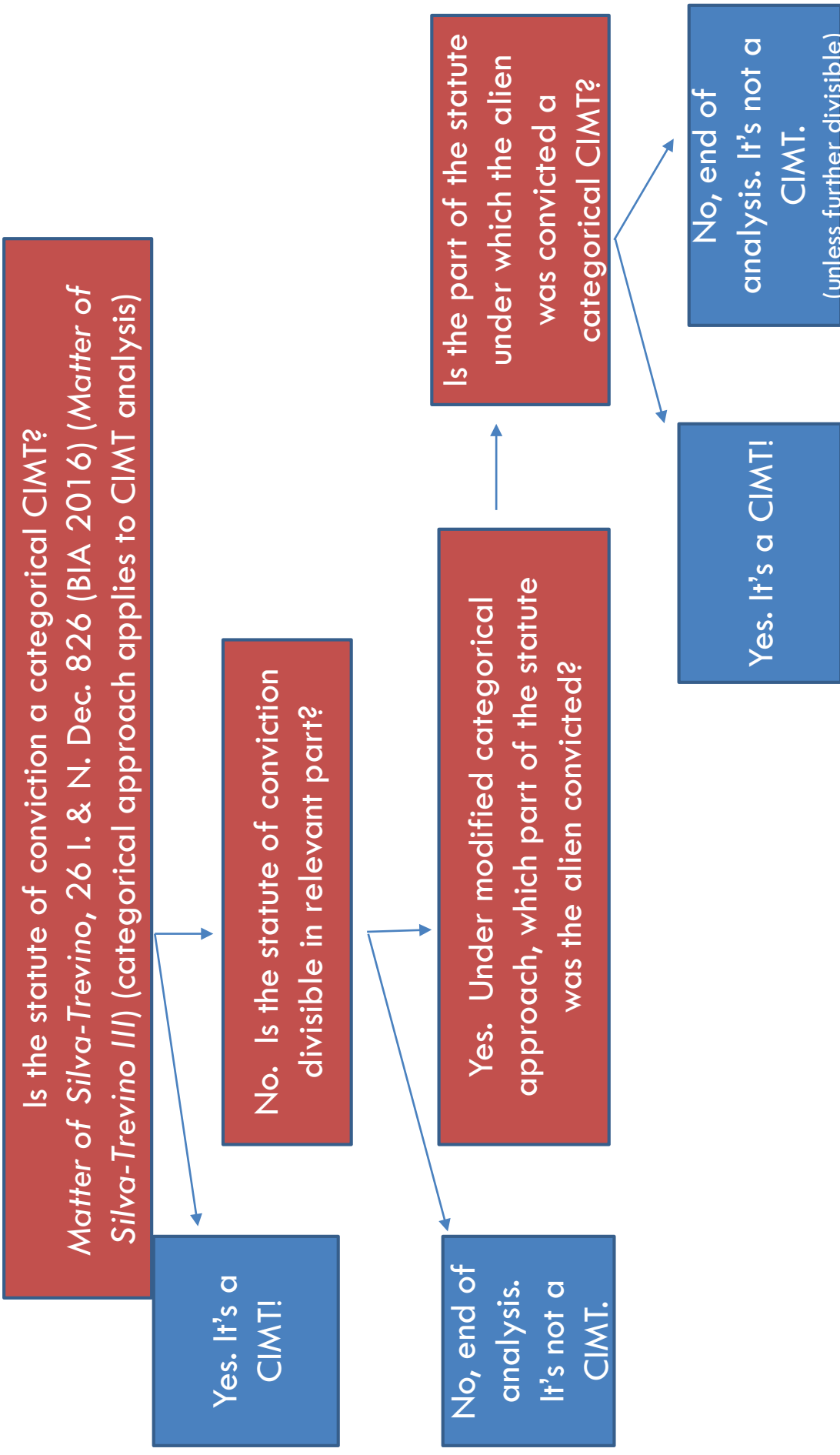
(b) (5)

CRIMES INVOLVING MORAL TURPITUDE

Lindsay B. Glauner, Senior Litigation Counsel

General Structure of Cat./Mod. Cat.

Analysis in Context of CIMTs



Categorical Approach in the Context of CIMTs

(b) (5)

Presentation Outline Focusing on the Second Step of the Categorical Approach

(b) (5)



Definition of CIMT

- ❑ “Moral turpitude is conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed to other persons.” *Matter of Tejwani*, 24 I. & N. Dec. 97 (BIA 2007)
- ❑ Not a good tool for analyzing whether convictions = CIMTs
- ❑ Void for vagueness? *Jordan v. De George*, 341 U.S. 956 (1951); see *Martinez-De Ryan v. Sessions*, 895 F.3d 1191 (9th Cir. 2018); *Moreno v. Att’y Gen.*, 887 F.3d 160 (3d Cir. 2018)

Two Basic Requirements for a CIMT vs.

Requirements for CIMT Categories

Two Basic Requirements:

“To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state.”

- When relevant?
- When applicable?

Matter of Silva-Trevino, 26 I. & N. Dec. 826 (BIA 2016); see also *Matter of Silva-Trevino*, 26 I. & N. Dec. 550 (A.G. 2015); *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008)

vs.

Requirements for certain categories of CIMTs:

Specific reprehensible conduct and specific culpable mental state.
- When applicable?

Requirement #1:

Reprehensible Conduct

- Varies greatly
- But, largely depends on offense / applicable CIMT category

Requirement #2:

Culpable Mental State

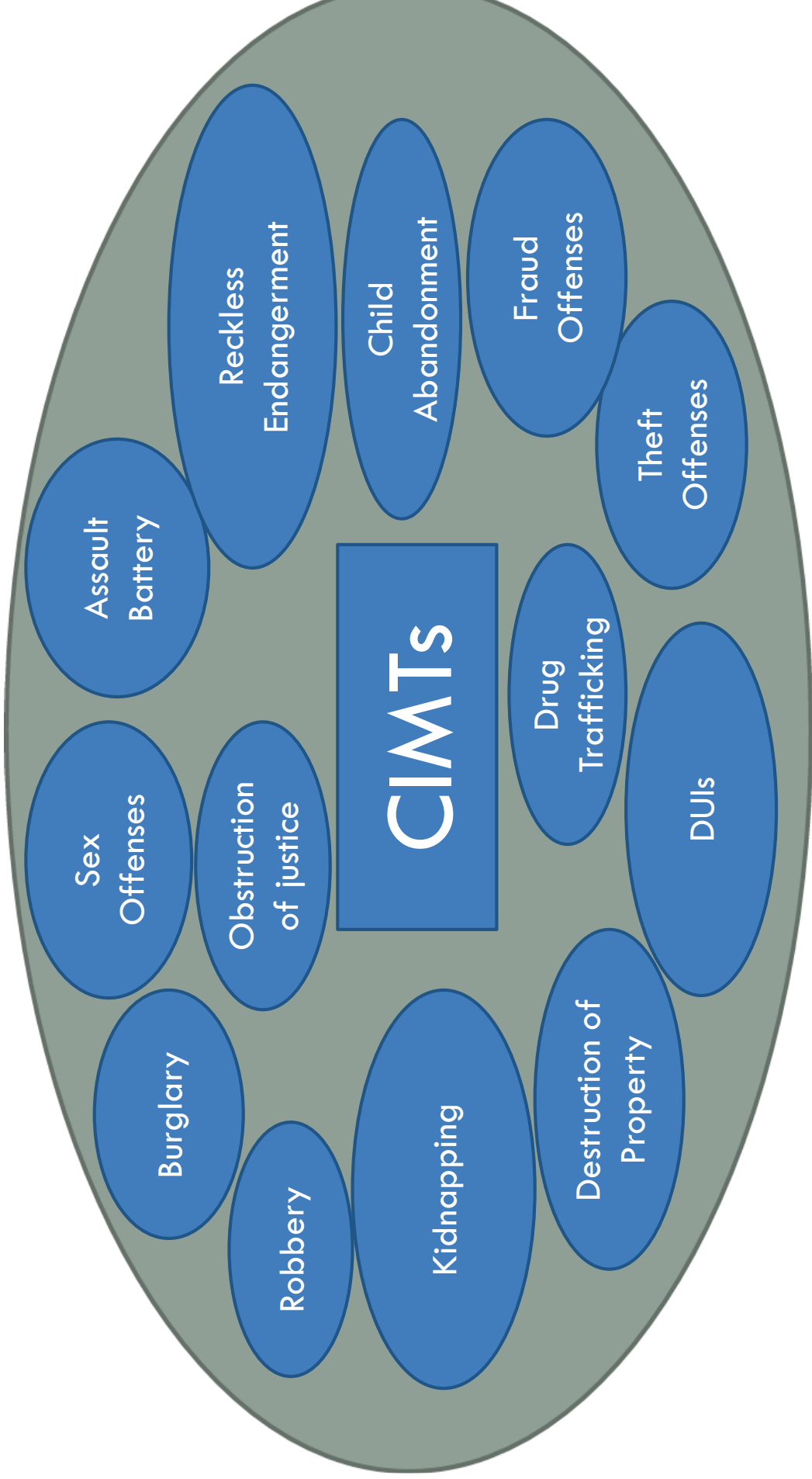
- Evil or malicious intent is said to be the essence of moral turpitude.” *Matter of Flores*, 17 I. & N. Dec. 225 (BIA 1980). But, not always.
- Types of Mental States:
 - Intentionally
 - Knowingly
 - Recklessly
 - Negligently
 - General Intent
 - Strict Liability

Requirement #2: Culpable Mental States – Sufficiently Culpable?

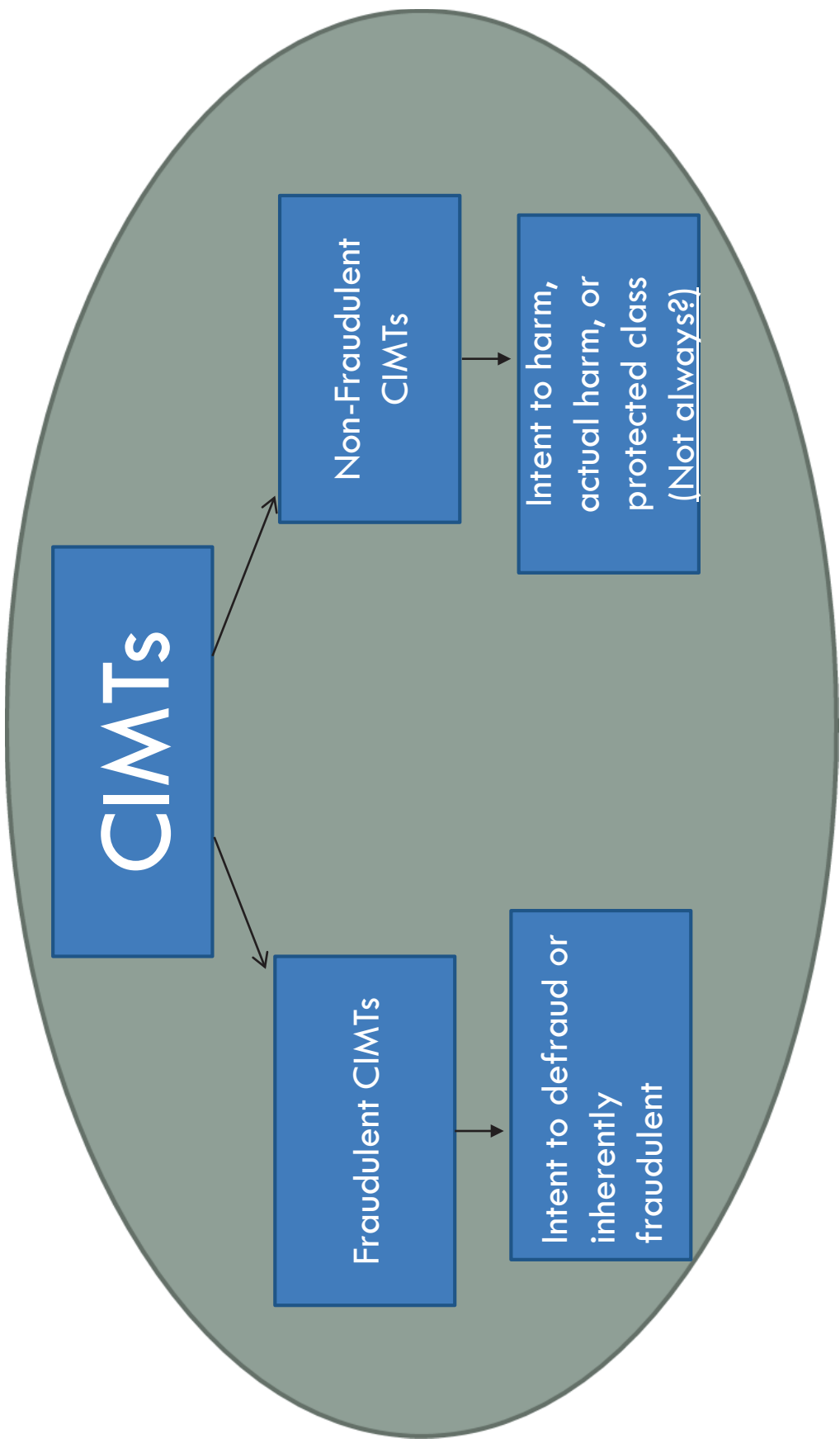
	Sufficient	Generally sufficient (but check case law)	Generally not sufficient, but may be if aggravator	Not sufficient
Intentionally	X			
Knowingly	X			
Recklessly		X		
Negligently				X
General Intent			X	
Strict Liability			X	

Some of the Board's Categories of

CIMTs



Ninth Circuit's Categories of CIMTs



Ninth Circuit’s “Almost-Always”

Requirement for Non-fraudulent CIMTs

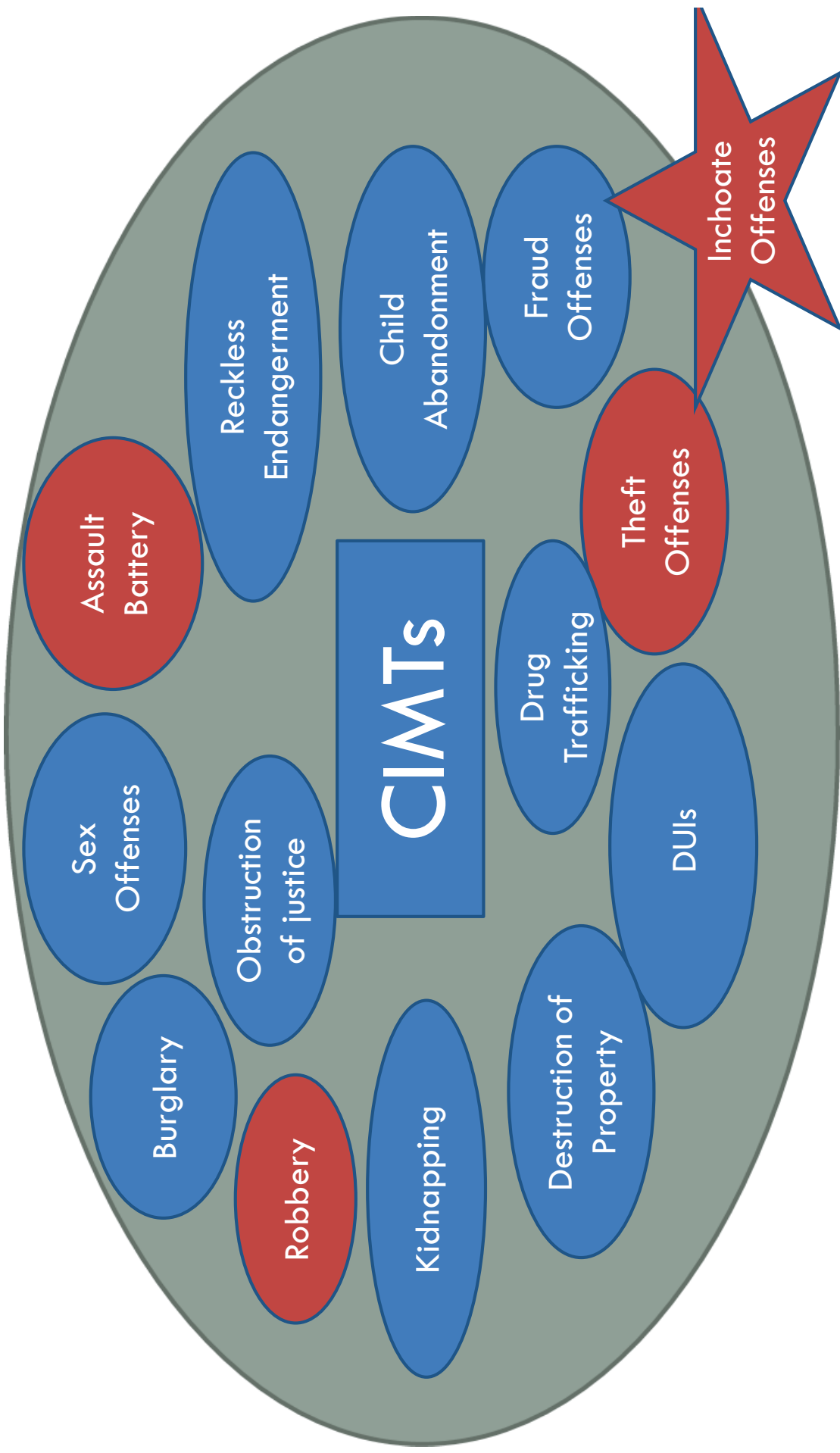
- Ninth Circuit has recognized that non-fraudulent CIMTs do not have to include intent to harm, actual harm, or a victim of a protected class. See *Nunez v. Holder*, 594 F.3d 1124, 1131 & n.4 (9th Cir. 2010).
- Ninth Circuit has found crimes to be CIMTs in absence of factors. See, e.g., *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc).
- Ninth Circuit’s “almost-always” requirement rejected by Board. See *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382 (BIA 2018).

Important Points on Identifying the CIMT Category

(b) (5)



Requirements for Some of the Different Categories of CIMTs



Category #1: Assault and Battery

CIMT Standard

- “**Intentional conduct** resulting in a meaningful level of **harm** . . . may be considered morally turpitudinous. [A]s the level of conscious behavior decreases, . . . , more serious resulting harm is required.” *Matter of Solon*, 24 I. & N. Dec. 239 (BIA 2007).
- Depending on level of harm and mental state, an **aggravating factor** may be necessary.
- Aggravating factor involving protected class (*i.e.*, child) – knowledge of victim’s membership?

Category #1: Assault and Battery

Sliding Scale Requirements

Contact/Harm + Mental State (+ Agg Factor?) = CIMT

Contact/Harm



	Contact causing (or likely to cause) serious physical harm	Contact causing (or likely to cause) physical harm	Any contact, even if slight
Intentional or Knowing	Green	Green	Yellow
Recklessness	Green	Yellow with dots	Red with diagonal lines
Negligence	Red	Red	Red

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Examples of Agg. Factors

- Deadly Weapon
- Member of a Protected Class (child, spouse, police officer)
- Serious bodily injury

Category #2: Theft Offenses

CIMT Standard

- Mental State: Intent to deprive the owner of the property either –
 - Permanently, or
 - Under circumstances where the owner’s property rights are substantially eroded
- Reprehensible Conduct: Any under statute (generally, taking or exercising control over)

Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847 (BIA 2016); *Matter of Obeya*, 26 I. & N. Dec. 856 (BIA 2016)



Retroactive? *Monteon-Camargo v. Barr*, 918 F.3d 423 (5th Cir. 2019); *Garcia-Martinez v. Sessions*, 886 F.3d 1291 (9th Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 573 (10th Cir. 2017); *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2017)

Category #2: Theft Offenses

Current Issues

- Which CLMT Theft Standard Applies?
 - *Diaz-Lizarraga* standard applies to all convictions
 - Exception: in the 2d, 5th, 9th, 10th circuits, pre-*Diaz-Lizarraga* standard applies to all convictions before November 16, 2016

Category #3: Robbery

Possible CIMT “Standards”


- Robbery “universally recognized” as CIMT
- Always bad. See *Casado v. Sessions*, 683 F. App’x 530 (7th Cir. 2017); *Matter of Martin*, 18 I. & N. Dec. 226 (BIA 1982)
- Robbery as a theft CIMT
- Must meet theft CIMT standards. See *Mendoza v. Holder*, 623 F.3d 1299 (9th Cir. 2010); *Matter of J*, 4 I. & N. Dec. 512 (BIA 1951); *Matter of C*, 2 I. & N. Dec. 716 (BIA 1946)

Category #3: Robbery

Possible CIMT “Standards” (con’t)

- Robbery as assault CIMT
- Assault (force or threatened use of force)
 - + aggravating factor (taking). See *Matter of Luis Minier Casado*, 2016 WL 8188639 (BIA 2016)

- Robbery as a crime against the person CIMT
- Inherent danger to victim’s person

-  Robbery as robbery CIMT
- Taking by force. See *Jaimes-Lopez v. U.S. Att’y Gen*, 675 F. App’x 870 (11th Cir. 2017)

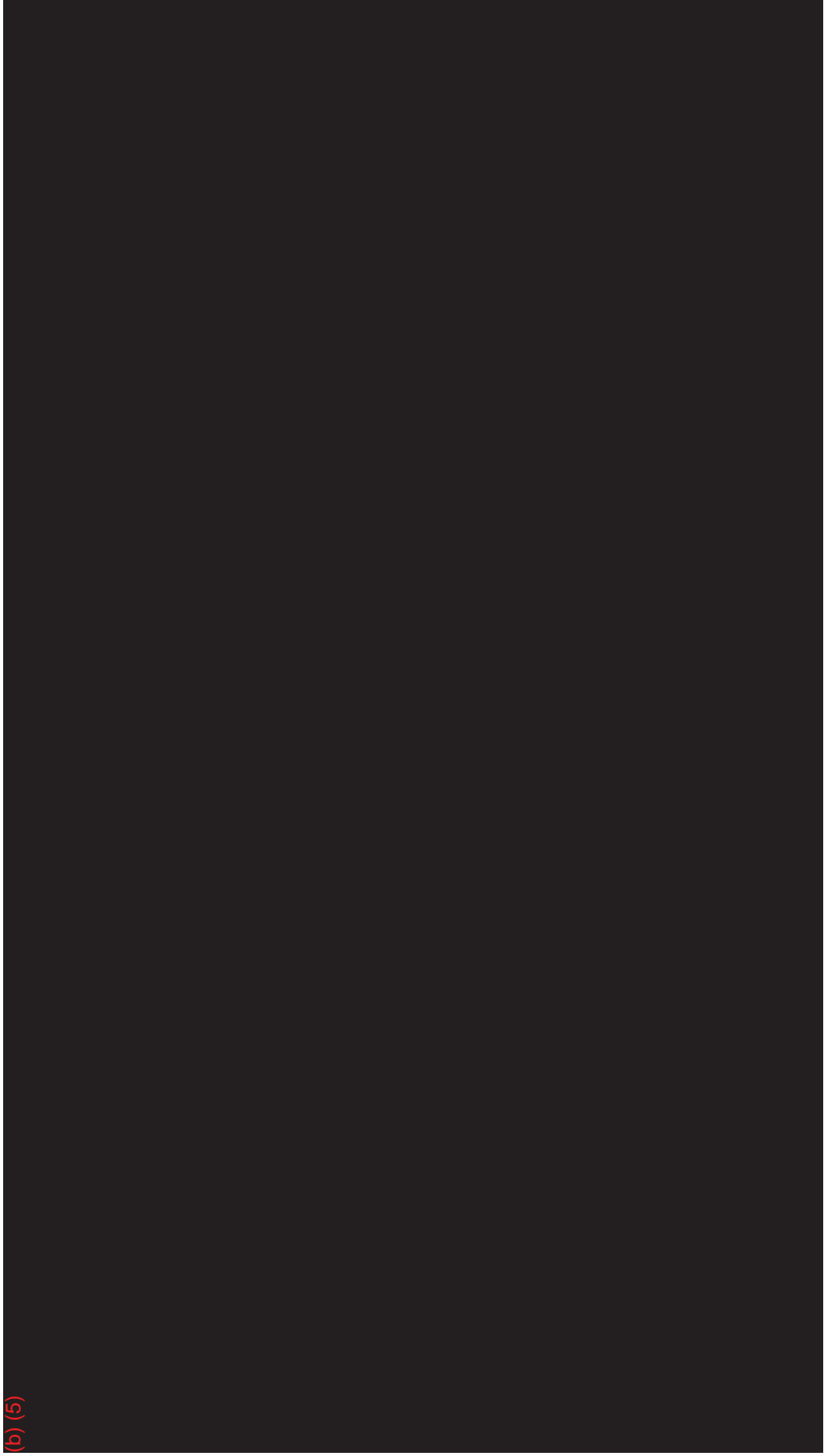
Inchoate Offenses

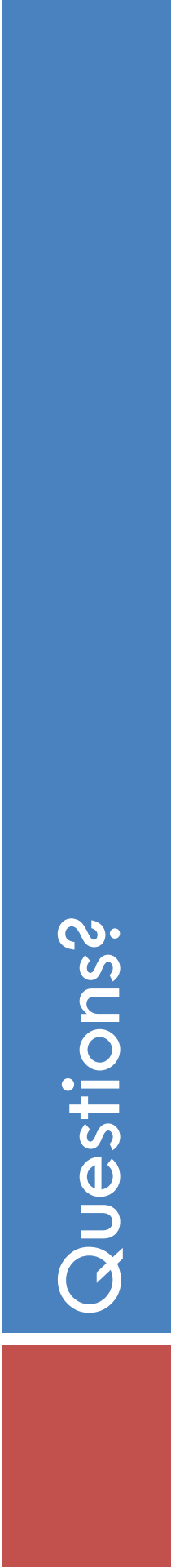
- No distinction between a substantive offense and an inchoate offense
- Look to substantive offense to determine whether an inchoate offense = a CIMT
 - ▣ Which inchoate offenses?
- Methodology applies to CIMTs under 8 U.S.C. § 1182 and 8 U.S.C. § 1227. See *Romo v. Barr*, 2019 WL 3808515 (9th Cir. 2019).

Conclusion



(b) (5)





Questions?

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DHS Removal Orders & Reasonable Fear Litigation

Anna Juarez & Allison Frayer

Objectives

1. Review DHS removal procedures
2. Identify emerging issues in reasonable fear cases

DHS Removal Procedures

- Expedited removal
 - 8 U.S.C. § 1225(b)(1)
 - Certain arriving aliens / inadmissible aliens
- Administrative removal
 - 8 U.S.C. § 1228(b)
 - Certain non-LPR aggravated felons
- Reinstatement of removal
 - 8 U.S.C. § 1231(a)(5)
 - Illegal reentrants

Snapshot Comparison

1229a Removal Proceedings

- EOIR issues the removal order
- De novo IJ hearing on removability
- Full opportunity to seek various forms of “relief”
- Proceedings last years
- Full judicial review

DHS Proceedings

- DHS issues the removal order
- No IJ hearing on removability
- “Relief” is restricted; often only “protection” available
- Streamlined processing
- Limited judicial review

Expedited Removal

8 U.S.C. § 1225(b)(1)(A)

8 C.F.R. § 235

Alien's Name: [REDACTED] File Number: [REDACTED] Date: [REDACTED]
Sigma Event: [REDACTED]

ON THE BASIS OF THE FOREGOING, IT IS CHARGED THAT YOU ARE SUBJECT TO REMOVAL FROM THE UNITED STATES PURSUANT TO THE FOLLOWING PROVISION(S) OF LAW:

212(a)(7)(A)(i) of the Immigration and Nationality Act (Act), as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document recognized by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act.

Signature: [REDACTED] Title: [REDACTED] CBP OFFICER

Event Number: [REDACTED] File No.: [REDACTED]
Sigma Event: [REDACTED] Date: [REDACTED]

In the Matter of: [REDACTED]

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1)), the Department of Homeland Security has determined that you are inadmissible to the United States under section(s) 212(a) (6)(C)(i); (6)(C)(ii); (7)(A)(i)(I); (7)(A)(i)(II); (7)(B)(3)(i); and/or (7)(B)(3)(ii) of the Act, as amended, and therefore are subject to removal, in that:

- 1) You are not a citizen or national of the United States.
- 2) You are a citizen and national of Mexico.
- 3) On or about September 2, 2013, you applied for admission into the United States from Mexico at the San Ysidro port of entry seeking asylum.
- 4) You are an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document as required by the Immigration and Nationality Act.

*** (CONTINUED ON I-851)

CBP OFFICER [REDACTED] Signature: [REDACTED]

ORDER OF REMOVAL UNDER SECTION 235(b)(1) OF THE ACT

Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

Signature of immigration officer: [REDACTED]
Signature and title of supervisor (if available): [REDACTED]
 Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty).

CERTIFICATE OF SERVICE
I personally served the original of this notice upon the above-named person on [REDACTED] (DATE)
Signature of immigration officer: [REDACTED]

Expedited Removal Basics

- Summary removal for some arriving aliens and some aliens who were not inspected/admitted
- Relief and protection limited to asylum, withholding, CAT - credible fear determination
- No IJ hearing on removability
 - Except for status claimants

Judicial Review of Expedited Removal Orders

- **NO** judicial review in the Circuit Courts!

(b) (5)

- Also no review of the negative **credible fear** determination because it is part of the expedited order
- Limited habeas jurisdiction in district court [see 8 U.S.C. § 1252(e)]

Administrative Removal

8 U.S.C. § 1228(b)

8 C.F.R. § 238.1

Final Administrative Removal Order

In removal proceedings under section 238(b) of the Immigration and Nationality Act

Event No:

FIN:

File Number

Date

To:

Address:

(Number, Street, City, State and ZIP Code)

Telephone:

(Area Code and Phone Number)

ORDER

Based upon the allegations set forth in the Notice of Intent to Issue a Final Administrative Removal Order and evidence contained in the administrative record, I, the undersigned Deciding Officer of the Department of Homeland Security, make the following findings of fact and conclusions of law. I find that you are not a citizen or national of the United States and that you are not lawfully admitted for permanent residence. I further find that you have a final conviction for an aggravated felony as defined in section 107(a)(43)(G) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1101(a)(43)(G), and are ineligible for any relief from removal that the Secretary of Homeland Security may grant in an exercise of discretion. I further find that the administrative record established by clear, convincing, and unequivocal evidence that you are deportable as an alien convicted of an aggravated felony pursuant to section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii). By the power and authority vested in the Secretary of Homeland Security, and in me as the Secretary's delegate under the laws of the United States, I find you deportable as charged and order that you be removed from the United States to:

Mexico

or to any alternate country prescribed in section 241 of the Act.

(Signature of Authorized Official)

(Title of Official)

(Date and Office Location)

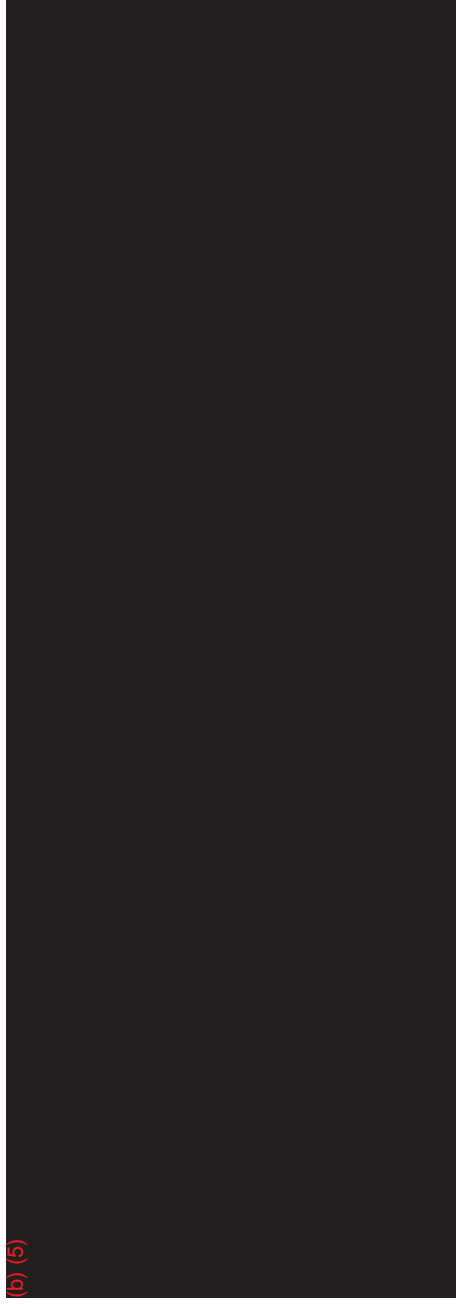
Administrative Removal Basics

- Summary removal for non-LPR aggravated felons
- No IJ review of removal order
- No “relief” available, but can seek withholding/CAT
- **Reasonable fear** process

Judicial Review

- Petition for review

(b) (5)



Current Issues

- Exhaustion Principles May Apply
 - Check circuit case law
- Motions to Reopen DHS Orders
 - Inherent authority to reopen
 - 8 C.F.R. § 103.5 does not provide reopening authority
- Right to counsel
- 10-day delay between NOI and FARO

Reinstatement of Removal

8 U.S.C. § 1231(a)(5)

8 C.F.R. § 241.8

Notice of Intent/Decision to Reinstate Prior Order

File No. A

Event No:

Date:

Name:

In accordance with section 241(a)(5) of the Immigration and Nationality Act (Act) and 8 CFR 241.8, you are hereby notified that the Secretary of Homeland Security intends to reinstate the order of Removal entered against you. This intent is based on the following determinations:

1. You are an alien subject to a prior order of deportation / exclusion / removal entered on [redacted] at [redacted] (Date)

FALLS CHURCH, VIRGINIA

(Location)

2. You have been identified as an alien who:

was removed on [redacted] pursuant to an order of deportation / exclusion / removal. (Date)

departed voluntarily on [redacted] pursuant to an order of deportation / exclusion / removal on or after the date on which such order took effect (i.e., who self-deported). (Date)

3. You illegally reentered the United States on or about [redacted] at or near [redacted] (Date) UNKNOWN PLACE (Location)

In accordance with Section 241(a)(5) of the Act, you are removable as an alien who has illegally reentered the United States after having been previously removed or departed voluntarily while under an order of exclusion, deportation or removal and are therefore subject to removal by reinstatement of the prior order. You may contest this determination by making a written or oral statement to an immigration officer. You do not have a right to a hearing.

Reinstatement Basics

- Summary removal for illegally reentering aliens
- Not automatic
- DHS determines
 - Identity / Alienage
 - Existence of prior removal order & departure from U.S.
 - Illegal reentry back into U.S.

Reinstatement Basics

- No reopening or review of underlying removal order
- No “relief” available but can seek withholding/CAT
 - **Reasonable fear** process
- No IJ hearing on removability

Judicial Review

- Petition for review
- Underlying removal order **not** on review
 - Statute prohibits reopening/review
 - Challenge would likely be untimely
- Review generally limited to:
 - Alien's identity
 - Existence of a prior removal order
 - Unlawful reentry
 - Where applicable, review also includes IJ negative reasonable fear determination or BIA denial of withholding/CAT

Reasonable Fear Proceedings

8 C.F.R. §§ 208.31, 1208.31

The Basics

Reasonable Fear proceedings arise only in 2 situations:

Reinstatement of removal

§ 1228(b) Administrative Removal (FARO)
(Non-resident Ag Fels)

8 C.F.R. § 1208.31(a).

Important Caveat

If you have a § 1225(b) expedited removal order with credible fear proceedings,

NONE OF THIS APPLIES

(b) (5)

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The Process - Step One

Alien expresses a fear of returning to the country of removal.

Asylum Officer conducts an interview to determine reasonable fear.

Reasonable possibility of persecution on account of a protected ground, or

Reasonable possibility of torture.

8 C.F.R. § 1208.31(c).

Standard of Proof

Reasonable possibility
= Asylum standard of proof

64 Fed. Reg. 8478, 8485 (Feb. 19, 1999).

Step Two – Reasonable Fear

Refer to Immigration Judge for
Withholding-only proceedings.

Full IJ hearing, appeal to the Board, PFR to
the Circuit.

Except

No discretionary relief,

Withholding /CAT only.

8 C.F.R. § 1208.31(e).

Step Two – No Reasonable Fear

Alien can request review by an Immigration Judge.

Asylum Officer refers the case to the Immigration Court.

IJ review should occur within 10 days.

No specific procedure for the IJ review.

8 C.F.R. § 1208.31(g).