

# **Introduction to the Categorical Analysis**

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# Resources

- ILRC Practice Advisory: § N.3 How to Use the Categorical Approach Now (2021)
  - <https://www.ilrc.org/how-use-categorical-approach-now-2021>
- NIPNLG Practice Advisory: “Realistic Probability” in Immigration Categorical Approach Cases
  - [https://www.nipnlg.org/PDFs/practitioners/practice\\_advisories/crim/2021\\_06Jun\\_realistic\\_probability\\_PA.pdf](https://www.nipnlg.org/PDFs/practitioners/practice_advisories/crim/2021_06Jun_realistic_probability_PA.pdf)
- ILRC California Crimes Chart
  - <https://calchart.ilrc.org/new-chart/>
- Why categorical analysis? See: An Ode to the Categorical Approach
  - <https://www.uclalawreview.org/an-ode-to-the-categorical-approach/>

# Questions

- Use the chat box for questions during the presentation.
- Will try to save time for more general questions at the end.

# Preview

- What is categorical analysis used for?
- What is it?
- How do we use it?
  - Outline of steps
  - Examples:
    - Penal Code § 245(a)(4): categorical analysis.
    - Health & Safety Code § 11377(a): categorical analysis with a divisible statute.
- The impact of the burden of proof.
- Will *Pereida v. Wilkinson* change anything?

# What Is Categorical Analysis Used for?

- Determining whether a conviction makes a noncitizen:
  - Inadmissible (ineligible for admission, a visa, or adjustment of status).
  - Deportable (subject to removal after admission).
  - Statutorily barred from demonstrating good moral character for naturalization or other benefits.
  - Ineligible for certain benefits (non-permanent resident cancellation of removal, TPS, DACA, etc.).
- Also used in federal criminal cases for determining applicable sentencing guidelines and Armed Career Criminal Act (ACCA) sentencing enhancements.

What is categorical analysis?

Determining whether a conviction necessarily satisfies the generic definition of a crime.

“Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction ‘rested upon [nothing] more than the least of th[e] acts’ criminalized, and then determine whether even those acts are encompassed by the generic federal offense.”

*Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013) (citing *Johnson v. United States*, 559 U.S. 133, 137 (2010)).



# How to Use Categorical Analysis

- Step 1: Does the statute of conviction penalize more conduct than the generic definition? Is it overbroad?
- Step 2: If the statute is overbroad, is it divisible into multiple discrete crimes?
- Step 3: If the statute is divisible, does the record of conviction establish which crime the person was convicted of?

Is the statute of conviction broader than the generic definition?

No



Immigrant loses.

Yes



Is the statute of conviction divisible into discrete crimes?

No



Immigrant wins.

Yes



Does the record of conviction clearly show the discrete crime of conviction?

No



Party with the burden of proof loses.

Yes



Immigrant wins if not a match to the generic definition.  
Loses if it is.

# Step 1

Is the conviction a categorical match to the generic definition?

1. What is the generic definition?
2. What are the elements of the statute of conviction?
3. What is the minimum conduct that would satisfy the elements and that has a reasonable probability of being prosecuted?
4. Is that minimum conduct the same as or narrower than the generic definition?

See *Descamps v. US*, 133 S. Ct. 2276 (2013).

## Example: PC § 245(a)(4)

- Factual scenario:
  - Ben is a permanent resident.
  - He got in an argument with his girlfriend and punched her in the back of the head. She fell down and experienced a concussion. Arrested for felony Penal Code § 245(a)(4) and convicted of it as a misdemeanor.
  - ICE charged Ben with deportability for conviction of a crime of domestic violence:
    - Convicted of a crime of violence as defined by 18 USC § 16, AND
    - Committed against a current or former spouse, parent of a common child, or other domestic-type victim (a determination not subject to categorical analysis).

## Example: PC § 245(a)(4) (cont.)

### 1. What is the generic definition of “crime of violence”?

- Use, attempted use, or threatened use of physical force against the person or property of another. 18 U.S.C. § 16(a). (Ignore paragraph (b) of § 16—it’s unconstitutional.)
- Must require “violent force”; simple battery not sufficient. See *Johnson v. U.S.*, 559 U.S. 133 (2010); *Matter of Dang*, 28 I&N Dec. 541 (BIA 2022)
- Must be committed with a mental state of intent or knowledge; reckless or negligent use of force not sufficient. See *Borden v. U.S.*, 141 S. Ct. 1817 (2021); *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

## Example: PC § 245(a)(4) (cont.)

### 2. What are the elements of § 245(a)(4)?

- Defendant did an act that by its nature would directly and probably result in application of force to a person;
- The force was likely to produce great bodily injury;
- Defendant acted willfully; AND
- Defendant aware of facts that would lead a reasonable person to realize the act would directly and probably result in the application of force to someone.
- See Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 875 (2021).

## Example: PC § 245(a)(4) (cont.)

3. What is the minimum conduct that would satisfy the elements of § 245(a)(4) and that has a reasonable probability of being prosecuted?
  - Published cases involve relatively violent use of force (compare with § 243(d)).
  - May be examples of less violent use of force among unpublished appellate decisions or cases that were not appealed or your client's own case.

## Example: PC § 245(a)(4) (cont.)

4. Is the minimum conduct for a § 245(a)(4) conviction the same as or narrower than the generic crime of violence definition?
- Yes, according to the case law.
    - The force required is sufficiently violent. *See U.S. v. Grajeda*, 581 F. 3d 1186 (9th Cir. 2009).
    - The use of force must be intentional (although the awareness of probable contact need only be reasonably foreseeable). *See U.S. v. Vasquez-Gonzalez*, 901 F.3d 1060 (9th Cir. 2018).
  - BUT look for prosecutions of conduct outside the generic definition.



## Example: PC § 245(a)(4) (cont.)

- Step 1: Is the statute of conviction overbroad? NO
- ~~Step 2: If the statute is overbroad, is it divisible into multiple discrete crimes?~~
- ~~Step 3: If the statute is divisible, does the record of conviction establish which crime the person was convicted of?~~

Is the statute of conviction broader than the generic definition?

No



Immigrant loses.

Yes



~~Is the statute of conviction divisible into discrete crimes?~~

No



Immigrant wins.

Yes



~~Does the record of conviction clearly show the discrete crime of conviction?~~

No



~~Party with the burden of proof loses.~~

Yes



~~Immigrant wins if not a match to the generic definition. Loses if it is.~~

## Step 2

If the statute of conviction is overbroad, determine whether the statute is “divisible” into multiple discrete offenses.

1. Statute must be phrased in the alternative; AND
2. At least one, but not all, of the statutory alternatives is a categorical match to the generic definition; AND
3. The alternatives must describe elements that a jury must find unanimously to convict (not alternative means of committing a single element).

*See Mathis v. United States*, 136 S. Ct. 2243 (2016).

## Example: HS § 11377(a)

- Factual scenario:
  - Jenny is an 33-year-old permanent resident with a methamphetamine problem.
  - Neighbor called the police when Jenny was acting erratically. Arrested and convicted for Health & Safety (HS) § 11377(a) (possession of a controlled substance). Completed Prop. 36 program and stopped using meth.
  - Jenny traveled abroad and CBP put her in removal proceedings upon return for being inadmissible for conviction of a controlled substance offense.

## Example: HS § 11377(a) (cont.)

- Step 1: Is the statute of conviction overbroad?

1. Generic definition:

- “[A] violation of (or conspiracy or attempt to violate) any law or regulation... relating to a controlled substance (as defined in section 802 of title 21).”
- A “controlled substance” is “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V” of the controlled substance schedules published by the DEA.

## Example: HS § 11377(a) (cont.)

- Step 1 (cont.):

- 2. What are the elements of the HS § 11377(a)?

- The defendant unlawfully possessed a controlled substance;
    - The defendant knew of its presence;
    - The defendant knew of the substance's nature or character as a controlled substance;
    - The controlled substance was <insert type of controlled substance regulated by HS § 11377(a)>; AND
    - The controlled substance was in a usable amount.
    - See CALCRIM No. 2304.

## Example: HS § 11377(a) (cont.)

- Step 1 (cont.):
  3. What is the minimum conduct that would satisfy the elements and that has a reasonable probability of being prosecuted?
    - Knowing unlawful possession of a usable amount any one of numerous substances regulated by HS § 11377(a).
  4. Is that minimum conduct the same as or narrower than the generic definition?
    - No, Ninth Circuit has held that § 11377(a) regulates substances not regulated by 21 U.S.C. § 802. See *Coronado v. Holder*, 759 F. 3d 977 (9th Cir. 2014) (HS § 11377(a) regulates possession of khat and chorionic gonadotropin, which are not federal controlled substances).

## Example: HS § 11377(a) (cont.)

- Step 2: Is HS § 11377(a) divisible?

1. Does the statute set out multiple discrete statutory phrases in the alternative?

- “every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f) of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished...”



## Example: HS § 11377(a) (cont.)

- Step 2 (cont.)
  2. Is at least one, but not all, of the alternative statutory phrases a categorical match to the controlled substance definition at 21 U.S.C. § 802?
    - Yes. Most, but not all, of the alternatives are a match: khat and chorionic gonadotropin are not federal controlled substances according to *Coronado v. Holder*, 759 F. 3d 977 (9th Cir. 2014). (But substances in the khat plant and metabolites of it are federal substances.)

## Example: HS § 11377(a) (cont.)

- Step 2 (cont.):
  3. Do the statutory alternatives describe elements that a jury must find unanimously to convict?
    - Yes. Ninth Circuit has held (in unpublished decisions) that the finding in *Coronado v. Holder* that HS 11377(a) is divisible remains good law even after *Mathis v. United States*, emphasized that the statutory alternatives must be elements (not means).

- How to figure out whether alternative statutory phrases are elements or means:
  - Look for case law, both immigration cases applying the categorical analysis and criminal cases on jury instructions and unanimity. For criminal cases, look for:
    - Does the jury need to agree on whether the substance is methamphetamine or some other controlled substance?
    - Could a defendant be convicted and punished on two separate counts for simultaneously possessing methamphetamine and some other controlled substance?
  - Published jury instructions and supporting citations are a good place to start. CALCRIM at: <https://www.courts.ca.gov/partners/312.htm>.
  - Take a peek at the record of conviction.

- Taking a peek at the record:
  - Reviewing the record of conviction, especially the charging document, for an indication of whether discrete statutory phrases set out in the alternative are elements or means.
  - A charging document that alleges more than one of the discrete phrases indicates the phrases are “means” and that the offense is not divisible.
  - A charging document that alleges only one of the discrete phrases indicates the phrases are “elements” and that the offense is divisible.

# What does a peek look like?

influence of an alcoholic beverage

## SECOND COUNT

The Undersigned further deposes and says on Information and belief, that said [REDACTED] did, in the County of Alameda, State of California, on or about May 14, 2011, commit a Misdemeanor, to wit: POSSESSION OF A CONTROLLED SUBSTANCE, a violation of section 11377(a) of the HEALTH AND SAFETY CODE of California, in that said defendant(s) did unlawfully possess a controlled substance, to wit: METHAMPHETAMINE.

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THIRD COUNT

## Step 3

- Step 3: If the statute is divisible, does the record of conviction establish which crime the person was convicted of?
  - Record of conviction: Evidence in the court record of which elements the defendant pleaded to or that the jury found.
  - Permissible record of conviction documents:
    - Plea: transcript of defendant's plea, written plea form, clerk's minutes of the plea hearing, judgment, charging document + proof of count pleaded to, etc.
    - Jury trial: transcript of the verdict, jury instructions, verdict form, clerk's minutes of the verdict, etc.
  - Remember, you're still trying to determine what the defendant necessarily was convicted of, not what the defendant allegedly did.

# What if the record of conviction is inconclusive?

- The party with the burden of proof loses. See *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021).
- Government's burden:
  - Whether an admitted noncitizen is deportable.
  - Whether a permanent resident seeking entry to the U.S. after travel abroad is an "applicant for admission" and thus subject to the grounds of inadmissibility.
- Noncitizen's burden:
  - Eligibility for relief from removal (cancellation of removal, asylum, etc.).
  - Not inadmissible for a visa, admission, or adjustment of status.
  - Good moral character for relief from removal or naturalization.

## Example: HS § 11377(a) (cont.)

- Criminal complaint originally alleged violation of HS § 11377(a) for possession of “methamphetamine.”
- After plea negotiations, District Attorney agreed to amend the complaint by crossing out methamphetamine and substituting “controlled substance.”
- The plea transcript, clerk’s minutes, and other record of conviction documents likewise refer only to “controlled substance.”



## Example: HS § 11377(a) (cont.)

- Step 1: Are the elements of the statute of conviction the same as, or narrower than, the generic definition? NO
- Step 2: If the elements of the statute of conviction penalize conduct outside of the generic definition, is the statute divisible into multiple discrete offenses? YES
- Step 3: If the statute is divisible, does the record of conviction establish which offense the person was convicted of? NO

Is the statute of conviction broader than the generic definition?

No

Yes

~~Immigrant loses.~~

Is the statute of conviction divisible into discrete crimes?

No

Yes

~~Immigrant wins.~~

Does the record of conviction clearly show the discrete crime of conviction?

No

Yes

Party with the burden of proof loses.

~~Immigrant wins if not a match to the generic definition.~~  
~~Loses if it is.~~

## The Dicta in *Pereida v. Wilkinson*

- *Pereida* held that a noncitizen cannot meet the burden of proof to establish eligibility for relief based on an ambiguous record where a statute is divisible.
- Suggested in dicta at the end of the decision that a noncitizen could use evidence outside of the record of conviction to establish which part of a divisible statute they were convicted of, including testimony.
- If noncitizen can use evidence outside the record of conviction, then presumably ICE could too.

# Categorical Analysis if *Pereida* Dicta Became Law

Does reliable evidence establish the offense of conviction (including the discrete statutory alternative for a divisible offense)?

No

Party with the burden loses.

Yes

Is the statute of conviction broader than the generic definition?

No

Immigrant loses.

Yes

Immigrant wins.

