CATEGORICAL ANALYSIS OF CRIMINAL CONVICTIONS

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Agenda

1. The “Categorical Approach” and Overbroad Statutes
2. What is the Minimum Conduct?
3. The Modified Categorical Approach – Divisible Statutes and Means vs. Elements
4. Examining the Record of Conviction
5. “Realistic Probability” and How to Show it (If Necessary)
6. Charges and Bars that are NOT Categorical
7. Example NY Offenses
What is the “categorical approach”?

- Most (but not all) criminal grounds of removability are premised on CONVICTIONS, not CONDUCT.

- Example: “Any alien who is convicted of an aggravated felony at any time after admission is deportable.”

- As opposed to “Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted...is deportable.” – FACT BASED

- We need a way to determine what the client was convicted of, not what he “really did.”
As SCOTUS Says:

- To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case.

Strict categorical analysis

Three Steps

1. What is the federal immigration category being charged or analyzed (the “generic” removal ground)?

2. What is the minimum conduct required under the elements of the state or federal statute of conviction?

3. Is there a complete (i.e., “categorical”) match?

If YES – the conviction triggers the removal ground or bar.

If NO – the conviction either does not trigger the bar, or more analysis may be needed (more to come)
Categorical Match

It is not possible to be convicted of the elements of the state offense without being found guilty of conduct falling within the removal ground. The offense triggers deportability.
When the criminal statute defines the offense more broadly than the immigration definition at issue, the conviction will not trigger the immigration penalty... EVEN IF the person “actually committed” conduct that seems to fall under the removal ground.
What is the “generic ground” of removal?

❖ Might be defined in the INA/Federal law
  • INA 237(a)(2)(B)(i): Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

❖ Might be defined through case law
  • “A theft offense is a crime involving moral turpitude if it involves a taking or exercise of control over another’s property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner’s property rights are substantially eroded.” Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016).
What is the “minimum conduct”?  

■ To find the area of “mismatch,” find the conduct in the state statute that falls outside the immigration ground – the “minimum conduct” you can commit and still get convicted of the crime – the “least of the acts” criminalized. Moncrieffe, 569 U.S. at 191.
A crime counts as “burglary” under the Act if its elements are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA “burglary”—even if the defendant's actual conduct (i.e., the facts of the crime) fits within the generic offense's boundaries.

[Mathis v. United States, 136 S. Ct. 2243, 2248 (2016)]
The Match Game

Is there a categorical match?

- **Generic offense**
  - Deportable firearms offense = “owning, carrying, or selling a firearm or destructive device as defined in 18 USC 921(a).”

- **Statutes**
  - **Statute A**: Carrying a firearm as defined in 18 USC 921(a)
  - **Statute B**: Carrying a weapon
  - **Statute C**: Riding in a car with a firearm as defined in 18 USC 921(a)
  - **Statute D**: Carrying a firearm as defined in 18 USC 921(a) while under the influence of alcohol.
Burden of proof

Who has to prove that there is/is not a match?
- INA 212 – we have the burden
- INA 237 – DHS has the burden
- Eligibility for relief – we have the burden
  - *What if the exact statute of conviction is inconclusive?*
    - That is NOT enough to satisfy R’s burden 😞
    - *Pereida v. Wilkinson, 141 S. Ct. 754 (2021)*
What’s the least you can do?

Me after a long day of doing the bare minimum
What’s the minimum conduct of... NY Petit larceny?

<table>
<thead>
<tr>
<th>State Offense Definition</th>
<th>Generic Offense Definition</th>
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</thead>
<tbody>
<tr>
<td>A person is guilty of petit larceny when he steals property. N.Y. Penal Law 155.25</td>
<td>“The phrase ‘crime involving moral turpitude’ describes a class of offenses involving</td>
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<td>‘reprehensible conduct’ committed with some form of ‘sciente’—that is, with a culpable</td>
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<td>mental state, such as specific intent, deliberateness, willfulness, or recklessness.</td>
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<td>Conduct is ‘reprehensible’ if it is ‘inherently base, vile, or depraved, and contrary</td>
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<td>to the accepted rules of morality and the duties owed between persons or to society in</td>
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<td>“[A] theft offense is a crime involving moral turpitude if it involves an intent to</td>
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<td>deprive the owner of his property either permanently or under circumstances where the</td>
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<td>owner's property rights are substantially eroded.” Id. at 853.</td>
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</table>
### What’s the minimum conduct of... NY Assault in the 3rd

<table>
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<tr>
<th>State Offense Definition</th>
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<tbody>
<tr>
<td>A person is guilty of assault in the third degree when:</td>
<td>“The crime of assault includes a broad spectrum of misconduct, ranging from relatively minor offenses, e.g., simple assault, to serious offenses, e.g., assault with a deadly weapon. We have held that assault may or may not involve moral turpitude. Simple assault is not considered to be a crime involving moral turpitude. However, assault with a deadly weapon has been held to be a crime involving moral turpitude.” Matter of Fualaau, 21 I&amp;N Dec. 475, 477 (BIA 1996)</td>
</tr>
<tr>
<td>1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or</td>
<td>“We have held that an analysis of an alien's intent is critical to a determination regarding moral turpitude. In order for an assault of the nature at issue in this case to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury.” Id. at 478.</td>
</tr>
<tr>
<td>2. He recklessly causes physical injury to another person; or</td>
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<tr>
<td>3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.</td>
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<tr>
<td>N.Y. Penal Law 120.00</td>
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Determining minimum conduct

In determining what the minimum conduct under a given criminal law is,

- May not use pure “legal imagination” to conjure up scenarios – can’t just be crazy law school hypos 😞

- Must show a “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime”


(More later on this very tricky concept...)
Your Leading Citations on Cat. Analysis

- Matter of Chairez, 27 I&N Dec. 21 (BIA 2017) ("Chairez IV")
- Matter of Silva-Trevino, 26 I&N Dec. 826 (BIA 2016)
- Harbin v. Sessions, 860 F.3d 58 (2d Cir. 2017)
- Hylton v. Sessions, 897 F.3d 57 (2d Cir. 2018)
- Williams v. Barr, 960 F.3d 68 (2d Cir. 2020)
- Jack v. Barr, 966 F.3d 95, 98 (2d Cir. 2020)
- Stay tuned for Bermudez-Paiz (cocaine isomer argument)
THE MODIFIED CATEGORICAL APPROACH
The Modified Categorical Approach

- When a state statute defines only one crime, and that crime is broader than the generic ground, categorical analysis ends: the immigration consequence is not triggered.

- But what about statutes that seem to define more than one crime?

It shall be a crime to possess:

- a. A gravity knife, or
- b. A pistol, or
- c. A chuka star
Modified Categorical Approach

- A statute that defines more than one crime is “divisible”, and the factfinder may apply the “modified categorical approach.”

- Under the MCA, the factfinder may consider a limited set of official court documents to determine which of the several crimes defined under the state law was the basis of conviction
  - Charging document, plea transcript/jury charge; judgment of conviction

- That is the only purpose of consulting these documents

- STILL can’t find what the person “actually did.”
“For divisible statutes, we instead apply the modified categorical approach. That approach permits consideration of certain materials that reveal which of a statute's separate offenses served as the basis for the defendant's conviction.”

Harbin v. Sessions, 860 F.3d 58, 64 (2d Cir. 2017)
When is a statute divisible?

- A divisible statute lists **elements** in the alternative or disjunctive, so it actually lists multiple offenses in the same statute.

- At least one, but not all, of the offenses created by these alternatives is a categorical match to (comes within) the generic definition.
  - if they are all categorical matches, it doesn’t matter
  - if all are overbroad, it doesn’t matter

- It does not matter how the statute is formatted (commas, numbers, the word “or”); it matters if the “options” are elements of the crime that the jury must find in order to convict.

- A statute may instead list “means of commission” that are not alternative elements.
We cannot use means of commission to render a statute divisible because every crime contains:

“an infinite number of sub-crimes corresponding to all the possible ways an individual can commit it. (Think: Professor Plum, in the ballroom, with the candlestick?; Colonel Mustard, in the conservatory, with the rope, on a snowy day, to cover up his affair with Mrs. Peacock?)”

Descamps, 570 U.S. at 273.

Then everything would be divisible and there would be no regular categorical analysis at all, which can’t be, because the categorical approach is great.
There's still one thing I don't understand...

one thing?
Poll

Is divisibility of a statute of conviction good or bad for a respondent facing removal based on that conviction?
Poll

Is divisibility of statute good or bad for a criminal defendant contemplating a guilty plea under that statute?
Answer:

We want our clients to plead guilty to a statute that is:

- Overbroad and indivisible, (e.g. 220.31) **OR**;
- Overbroad, divisible, and the modified categorical approach will show that the client pleaded guilty to the non-removable portion of the statute, (e.g. 120.00(2)) **OR**;
- Overbroad, divisible, and the modified categorical approach will not be clear to which portion of the statute the client pleaded guilty (e.g. 265.01, no subsection), but **only if** the burden is on the government (Pereida v. Wilkinson, 141 S. Ct. 754 (2021)).
Is this statute divisible as to whether it is a “crime involving moral turpitude”?

120.00 **Assault in the third degree.**
A person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

2. He recklessly causes physical injury to another person; or

3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.
Means vs. Elements

- How do we know what’s an element?
- Where DHS bears the burden to show removability, they have to show alternatives are elements not means (absent contrary circuit law). Chairez I, 26 I&N Dec. at 355.
What is an element?

- In a divisible statute, something the prosecutor must elect or specify from a list of alternatives for an indictment/charging instrument to be sufficiently definite. 133 S. Ct. at 2290.

- Something the jury must be instructed they have to find beyond a reasonable doubt to convict. *Id.*

- Something the jury must find unanimously
Elements

- *Harbin* (CSO) and *Mathis* (drug trafficking) provide useful guidance on how to determine means vs. element:
  1. Look first to the text of the statute itself
  2. “if statutory alternatives carry different punishments, they must be elements.” 136 S. Ct. at 2256, if all the penalties are the same this supports the argument that not elements, *Harbin*
  3. State Court decisions
  4. Jury instructions ONLY if all other sources are unclear and then only if part of the ROC of that case
The Record of Conviction

- The ROC includes:
  - the statutory definition,
  - charging document,
  - written plea agreement,
  - transcript of plea colloquy,
  - and any explicit factual finding by the trial judge to which the defendant assented (i.e., documents stipulated to as factual basis for plea, certain notations on abstract or minute order), *Shepard v. United States*, 544 U.S. 13, 16 (2005).
  - Jury instructions IN that case, see *Taylor v. United States*, 495 U.S. 575, 602 (U.S. 1990)

These documents are sometimes called the “Shepard” or “Shepard-Taylor” docs.
The Record of Conviction

- What is NOT in the ROC – anything not on the list above – some examples:
  - *Statements by the prosecutor*, see *Matter of Cassissi*, 120 I&N Dec. 136 (BIA 1963)
  - *Police reports, probation or “pre-sentence” reports*, see *Abreu-Reyes v. INS*, 350 F.3d 966 (9th Cir. 2003)
  - *Statements by the noncitizen or witnesses outside of the plea* (e.g., statements to police, immigration authorities, or the immigration judge). *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004)
  - *Information from a criminal charge absent adequate evidence that the defendant pled to the charge as written*
  - *Information from a dropped charge or Information from a co-defendant’s case*, *Abreu-Reyes v. INS*, 350 F.3d 966 (9th Cir. 2003), *James v. Mukasey*
The ROC is used ONLY for the limited purpose of identifying which offense the client was convicted of.

- “The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant’s conviction...” Descamps v. United States, 136 S.Ct. at 2281, 2285, see also Dickson v. Ashcroft, 347 F.3d 44 (2d Cir. 2003)

Consult the ROC to determine what was “actually and necessarily pleaded to” not dismissed allegations, see James v. Mukasey, 511 F.3d 102, “Non-element facts” - Descamps
Ambiguity in the ROC

■ What if the exact statute of conviction is inconclusive?
  - SCOTUS recently ruled that ambiguity in the ROC is not enough to satisfy Respondent’s burden of proof for eligibility for relief. *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021)
  - Prior to this there was a bunch of good circuit law, including in 2d Cir. ☹️ (*Martinez v. Mukasey*)
  - IDP has a good practice advisory on this issue (and many others!)
Realistic Probability test: What has SCOTUS said?

“to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007)
What about the Second Circuit?

- **Hylton v. Sessions, 897 F.3d 57, 59 (2d Cir. 2018)**
- Conviction for criminal sale of marihuana in the 3rd (§221.45) Specifically at issue in his case was whether this offense is a drug trafficking aggravated felony barring 42A

- NY defines “sale” to reach nonremunerative transfers so the offense may not be deemed an aggravated felony as only reaching offenses involving remuneration. The question for the 2nd Cir then became whether NYPL §221.45 also only involves offenses involving more than a “small” amount of marijuana.

- In a unanimous panel opinion, held that an ounce, or roughly 30 grams, is a small amount with the meaning of 21 U.S.C. §841(b)(4). Thus, the Court found the minimum conduct reached precludes such an offense from being deemed a drug trafficking aggravated felony
In doing so, the Court rejected the government’s argument that Mr. Hylton did not show a realistic probability that the state would apply its statute to such overbroad transfers.

“The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the corresponding federal offense.”

“Since the elements of NYPL § 221.45 are broader than the corresponding federal felony, Hylton has satisfied any requirement to show that ‘New York would apply its statute to conduct that falls outside’ the definition of a federal felony, and within the federal misdemeanor provision.”
Matthews v. Barr, 927 F.3d 606, 610 (2d Cir. 2019)

Second Circuit found 260.10 (endangering the welfare of a child) to be a categorical CAC

- “This is not a situation, therefore, in which the state statute, on its face, stretches further than the BIA’s definition; instead, the state statute and the BIA’s definition appear to be a categorical match”

- Where a statute is not facially overbroad, the realistic probability approach requires a noncitizen to demonstrate “that the State actually prosecutes the relevant offense in cases” that fall outside the federal definition. Moncrieffe, 569 U.S. at 206. Matthews must “at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.” Duenas-Alvarez, 549 U.S. at 193.

- There is no question that the statute, as interpreted by the New York Court of Appeals, is a categorical match with the BIA’s definition, and there is no New York appellate decision cited by the dissent that has upheld a conviction that sweeps more broadly than the BIA definition. The dissent notes correctly that the Supreme Court has yet to articulate the contours of the “realistic probability” test to argue that our analysis is not so limited, but it is for this precise reason that we find ourselves constrained from reading these cases as contravening the interpretation espoused by New York’s highest court.
Acevedo v. Barr, 943 F.3d 619 (2d Cir. 2019)

- BDS case involving convictions for attempted oral or anal sexual conduct with a person under the age of fifteen, N.Y.P.L. §§ 110.00, 130.45(1), and for sexual contact with a person under the age of fourteen, N.Y.P.L. § 130.60(2)

- Disappointing and confusing decision from a bad panel finding that NYPL 130.45(1) to be a SAM ag fel as it is somehow both a strict liability offense and also one that “realistically” requires a heightened mens rea of knowing criminal conduct.

- “Although Petitioner is likely correct that N.Y.P.L. § 130.45 is a strict liability crime in some sense, he neither points to a single case nor posits any realistic hypothetical situation in which an individual could be convicted under this provision without knowingly committing the sexual act. Likewise, we can think of no factual situation that could realistically lead to conviction under this statute that would involve a perpetrator with a less than “knowing” mens rea as to the conduct involved.”

- Unclear how they can square this with Hylton or if changes RP landscape in 2d Cir
Williams v. Barr, 960 F.3d 68 (2d Cir. 2020)
Jack v. Barr, 966 F.3d 95, 98 (2d Cir. 2020)

• Connecticut (Williams) and New York (Jack) offenses involving firearms are overbroad on their face and therefore no RP test required

• Under Jack, this is true under the definitional language despite the contrast in textual contrast to provisions like controlled substance offenses, for example
Step 1: What is the generic removal ground?

INA 237(a)(2)(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.
The term “firearm” means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.
Step 2: What is the minimum conduct of 265.03 (3)?

A person is guilty of criminal possession of a weapon in the second degree when:

- ...(3) such person possesses any loaded firearm. ...
265.00 (definitional provision)

■ 3. "Firearm" means (a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length; or (d) any weapon made from a shotgun or rifle whether by alteration, modification, or otherwise if such weapon as altered, modified, or otherwise has an overall length of less than twenty-six inches; or (e) an assault weapon. For the purpose of this subdivision the length of the barrel on a shotgun or rifle shall be determined by measuring the distance between the muzzle and the face of the bolt, breech, or breechlock when closed and when the shotgun or rifle is cocked; the overall length of a weapon made from a shotgun or rifle is the distance between the extreme ends of the weapon measured along a line parallel to the center line of the bore. Firearm does not include an antique firearm.

■ 14. "Antique firearm" means: Any unloaded muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade.
Poll

Does 265.03(3) criminalize possession of a loaded antique firearm?
The BIA?


- On June 11, 2019, the BIA issued a decision holding that a noncitizen convicted of violating a state drug statute that includes a controlled substance not on the federal schedule must establish a realistic probability that the state would actually apply the language of the statute to prosecute conduct involving that substance.


- The BIA obviously knows about Harbin/Hylton, so....

  “should be applied in any circuit that does not have a binding legal authority requiring a contrary interpretation.”
Is that REALLY the minimum conduct under the statute?
How do we show realistic probability?

- Start by arguing you don’t need to! If clear on face of the statute, no need for showing of RP
  - *Harbin* did not mention RP
  - *Hylton* then explicitly finds that it is not necessary for a noncitizen to show a “realistic probability” of actual state prosecutions or convictions for conduct falling outside the immigration law classification at issue where the state statute expressly covers the conduct, such as any New York controlled substance offense that reaches a non federally controlled substance.

- If have to go there:
  - point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues. 549 U.S. at 193.

- Example:
  - Fed. firearm definition excludes an antique if state law does not exempt antique firearms, must show realistic probability that state prosecutes them to establish overbreadth

- Usually we are citing state case law OR attaching state criminal case documents (complaints, press releases) to show prosecution of certain facts
Other DHS arguments...

- Requires proof of convictions, not just prosecutions. See Matter of Mendez Osorio, 26 I&N 703 (BIA 2016) ; Matthews

- Requires more than one case

- Requires a >50% “probability” that a given case includes nongeneric conduct

- What is the “ordinary case” – Dimaya rejects this for crimes of violence (and hopefully that means for everything)
RP test: pushing back

- No deference to BIA
- Hark back to purpose of the test as defined by SCOTUS
- Statutory language explicitly covers overbroad conduct, no legal imagination required, see *Hylton v. Sessions*, 897 F.3d 57, 59 (2d Cir. 2018); *Ramos v. Att’y Gen.*, 709 F.3d 1066 (11th Cir. 2013); *Jean-Louis v. Att’y Gen.*, 582 F.3d 462 (3d Cir. 2009); *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007); *United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. 2014), but see 5th Cir.
- More CA2: *Mellouli v. Lynch, Harbin*- no discussion of realistic probability
- *Moncrieffe* uses language “actually prosecutes” (not convicts)
- After *Johnson* “ordinary case” analysis not acceptable
THE CATEGORICAL ANALYSIS IN PRACTICE
Removal Grounds and Bars that are NOT Categorical

- Aspects of certain aggravated felony grounds, e.g.
  - 101(a)(43)(M)(i) [loss amt for fraud or deceit crimes]. Nijhawan v. Holder, 129 S. Ct. 2294 (2009);
  - Matter of Garza-Olivares, 26 I&N Dec. 736 (BIA 2016) (bail jumping AFs)
Limits on categorical analysis

■ Particularly Serious Crimes, *Matter of Frentescu*
■ Any non-conviction based removal or inadmissibility ground, i.e., Reason to Believe Drug Trafficker
Analysis of New York Offenses
Is CPL 265.01 a firearm offense?

Step 1: What is the generic removal ground?

- INA 237(a)(2)(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.
Step 2: What is the minimum conduct?

NYPL 265.01

A person is guilty of criminal possession of a weapon in the fourth degree when:

(1) He or she possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or "Kung Fu star"; or...
Poll

Is there any conduct criminalized that does not fit the federal definition?
Answer

- Make multiple arguments!
  - 1) The statute is indivisible and overbroad
    - Overbroad because it covers possession of non-firearms
    - Indivisible because the weapon possessed is a means of commission of the offense, not an element
  - 2) Even if it is divisible, it is overbroad
    - Jack v. Barr antique firearms exception
  - 3) Realistic probability
    - Not required for same reasons in Jack v. Barr
    - Even if it were, we have People v. Mott (conviction for loaded antique firearm
NYPL § 130.20 Sexual misconduct

A person is guilty of sexual misconduct when:

1. He or she engages in sexual intercourse with another person without such person's consent; or
2. He or she engages in oral sexual conduct or anal sexual conduct with another person without such person's consent; or
3. He or she engages in sexual conduct with an animal or a dead human body. Sexual misconduct is a class A misdemeanor.
Always check definitional provisions!

- 130.05
  (2) Lack of consent results from:
    (a) Forcible compulsion; or
    (b) Incapacity to consent; ...etc
  (3) A person is deemed incapable of consent when he or she is:
    (a) Less than seventeen years old; or
    (b) Mentally disabled; or
    (c) Mentally incapacitated; or
    (d) Physically helpless; or... etc
- Is Sexual Misconduct a CIMT?
- Is Sexual Misconduct a sex abuse of a minor aggravated felony (see Esquivel Quintana v. Sessions)
- Remember to go through the steps:
  - *What is the generic removal ground?*
  - *What is the minimum conduct?*
  - *Is the statute divisible? Why?*
  - *If divisible, MCA. What documents will be used?*
QUESTIONS?

HAVE FUN

STORMING THE CASTLE
Individual Case Consultations for SAFE & NYIFUP

- safecitiesconsult@bds.org
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