Domestic Violence Laws & the INA: How Domestic Violence Perpetrators Attain Immigration Benefits

By: George Emmons

Every 24 minutes, someone is the victim of domestic violence.¹ Even more shocking is that 1 in 4 women and 1 in 7 men have been victims of severe physical abuse by an intimate partner in their lifetime.² More than 4,000 women each year are killed by their partners.³ Domestic violence also takes tolls on children. Often, 30 to 60% of children in violent households are also the victims of domestic violence and 1 in 4 have witnessed physical violence of their mother, father and their intimate partners.⁴

Domestic violence is a serious problem for our country. Domestic violence perpetrators inflict significant harm on their partners and are more likely than other violent offenders to be re-arrested for violent offenses against the original victim.⁵ There are several reasons for this high level of recidivism. According to a 2004 Canadian study analyzing recidivism in domestic violence arrests, substance abuse and financial and economic instability were some of the factors that led to higher recidivism rates amongst domestic violence perpetrators.⁶ Also, a study conducted in Federal Probation found that 41% of domestic violence perpetrators that were assigned to domestic violence counseling and probation reoffended before then end of their 24

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⁵ Richard R. Johnson, Correlates of Re-Arrest for Felony Domestic Violence Probationers, 72-DEC FED. PROBATION 42 (2008) (discussing levels of recidivism in felony domestic violence probationers)
month probation term. This study also found that domestic violence counseling has had limited success in deterring domestic batterers.

However, despite the harm domestic violence perpetrators inflict on our society, our laws do not hold domestic violence perpetrators accountable for their actions. Specifically, in the immigration context, many who have been convicted of domestic violence crimes are not removable from the United States and some are allowed to garner significant immigration benefits.

Domestic violence perpetrators are allowed to escape the immigration consequences of their convictions and garner immigration benefits due to differences in state domestic violence statutes and federal definitions of crimes of violence and domestic violence. To be removable, a state conviction must match the federal definition of a crime. Courts compare these states to ensure that their elements match. Courts use a categorical approach to determine that these convictions match and whether the state conviction carries immigration consequences.

If the statute does not categorically match the federal definition, courts utilize a modified categorical approach, and consider a limited number of court documents in the record of conviction to determine if the state conviction matches the federal definition for a certain offense. However, this current system of matching statutes to federal definitions does not

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9 See eg., In re Sanudo, 23 I&N Dec. 968, (BIA 2006); Matter of Velasquez, 25 I&N Dec. 278 (BIA 2010); Fernandez-Ruiz v. Gonzalez, 466 F. 3d 1121, 1125 (9th Cir. 2006); Cisneros Perez v. Gonzalez, 465 F.3d 386, 388 (9th Cir. 2006). See also 8 U.S.C §1229 (b) (cancellation removal for certain non-permanent residents).
12 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 388 (9th Cir. 2006).
guarantee that domestic violence perpetrators and the domestic violence crimes they commit are removable offenses or bars to certain immigration benefits.

There currently is a problem in our federal immigration system: violent domestic violence perpetrators are not removable for their acts of domestic violence. The categorical and modified categorical approaches focus on the elements of a statute, not the stories of the victims and the actual harm that they suffer. Oftentimes, police reports are not relevant in immigration proceedings when determining the severity of a crime.\(^\text{14}\) Sadly, these reports are often the only time that the story of a victim can be heard and the only statement that can demonstrate the severity of the crime committed.

This paper will explore domestic violence laws and how they are viewed in the context of federal immigration law and the Immigration and Nationality Act ("INA"). Part 1 will discuss current domestic violence laws and how states have attempted to take action against domestic violence perpetrators, specifically California’s presumption against an award of child custody to a parent who has committed an act of domestic violence. Part 2 will discuss federal immigration law and how certain domestic violence crimes render aliens in removal proceedings removable from the United States or ineligible for certain immigration benefits, while other crimes do not. Part 2 will also analyze various crimes that bar immigration relief and their definitions under the INA and discuss established presumptions regarding criminal convictions, specifically the presumption that certain drug trafficking crimes are bars to immigration relief.

Part 3 will discuss how federal definitions and state criminal statutes are compared using the categorical and modified categorical approach and how this has affected domestic violence statutes and how they are applied in immigration proceedings. Part 4 will offer a solution to the present problem in immigration law regarding domestic violence convictions and advocate for a

\(^{14}\) See In re Sanudo, 23 I&N Dec. 968, 974-975 (BIA 2006).
presumption for certain domestic violence crimes as offenses that render an alien who commits them removable or ineligible for certain forms of immigration relief. Part 4 will also advocate that the present categorical and modified categorical approach be abandoned when analyzing domestic violence crimes and a real world conduct approach is used in immigration proceedings. This real world conduct approach will determine whether a domestic violence crime is a removable offense in immigration proceedings or should bar certain immigration benefits.

I. DOMESTIC VIOLENCE: PRESUMPTION AGAINST CHILD CUSTODY FOR DOMESTIC VIOLENCE PERPETRATORS

Domestic violence statutes have not always been protective of victims. In fact, for several decades, the laws were historically hands off in the domestic violence context. Domestic violence was not considered a crime or codified in statutes. Domestic violence was considered normal and something that women should tolerate. Police did not intervene and tended to ignore calls for help from victims. Police would view domestic violence as a personal issue between married couples and were historically hands off until domestic violence was codified in


After domestic violence was codified in law, the private nature of this harm became a public concern. In recent years, police have become the first responders on domestic violence calls. Arrests and prosecutions have increased as the change of societal views of domestic violence has changed.

As views of domestic violence changed and laws were enacted to protect domestic violence victims, views on child custody evolved as well. Prior to the 1970s, parental morality was the focus of child custody decisions. In the 1950s and 60s, the courts often found that the

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best interests of the child were for the parents to sacrifice their own happiness to provide for the child.\textsuperscript{25} In the 1970s, this evolved to making sure that the parents were happy and if not, then divorce was preferable for the best interests of the child.\textsuperscript{26} The 1980s saw an emergence of joint custody and gender neutral child custody determinations.\textsuperscript{27} Since then, the best interest of the child has been the standard for determining child custody.\textsuperscript{28}

Many states have created laws to protect the best interests of the child.\textsuperscript{29} Specifically, California enacted Family Code § 3011 and § 3044 in 1993.\textsuperscript{30} These statutes\textsuperscript{31} create a “rebuttable presumption that an award of legal or joint custody to a parent who perpetuated domestic violence is detrimental to the best interests of the child.\textsuperscript{32} This presumption is applied when a parent committed an act of domestic violence against a spouse within the past 5 years.\textsuperscript{33} This presumption is determined by weighing several factors including:

1) whether the perpetrator has demonstrated that giving sole or joint custody... is in the best interests of the child
2) whether the perpetrator has successfully completed a batterers treatment program...
3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate
4) Whether the perpetrator has successfully completed a parenting class...
5) whether the perpetrator is on probation or parole and whether he or she complied with the terms and conditions of probation
6) whether the perpetrator is restrained by a protective order or restraining order and whether he or she complied...
II. IMMIGRATION LAW AND CRIMES OF DOMESTIC VIOLENCE

The INA provides that certain crimes render an alien removable from the United States and others bar an alien from eligibility for certain immigration benefits. There are several categories of removable offenses enumerated in the INA as well as offenses that render aliens inadmissible to the United States. Domestic violence crimes are one of these categories along with a litany of others, including drug crimes and many felonies.

The Immigration and Nationality Act, (“INA”), addresses domestic violence crimes, under the federal definition of crimes of domestic violence… There are two types of domestic violence crimes enumerated in the INA: 1) crimes of domestic violence and 2) violation of a protective order. Crimes of domestic violence and violations of protective orders are removable offenses and render undocumented aliens and legal permanent residents subject to immigration removal proceedings. Depending on the length of sentence imposed, some crimes of domestic violence are considered aggravated felonies.

A crime of domestic violence means “any crime of violence as that defined in 18 U.S.C. 16 that is committed by a specified person against one of a defined set of victims.”

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34 See Cal. Fam. Code § 3044(a) (2012); See also In re marriage of Fajota, 230 Cal App. 4th at 1498.
36 See 8 U.S.C. § 1101(a)(43) (enumerated aggravated felonies under INA); see also 8 U.S.C. § 1227(a)(2)(A)(deportable offenses for lawfully admitted aliens); see also 8 U.S.C. § 1182(a)(2)(crimes that render aliens inadmissible to the United States). This paper will focus on removable offenses. However, crimes of inadmissibility and removability are relatively similar. The differences between these two grounds are outside the scope of this paper.
39 See 8 U.S.C. § 1227 (a)(2)(E)(ii). While violation of a protective order is a removable offense, it is outside the scope of the present paper.
violence is defined two separate ways under federal law. The first is that the “offense... has an element the use, attempted use, or threatened use of physical force against the person.” The second is “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person... may be used in the course of committing the offense. A crime of domestic violence also requires the victim have a specific relationship to the accused and be a crime of violence. The person must be “1) a current or former spouse; 2) person who shares a child in common; 3) an individual cohabitating with the person as a spouse; 4) an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction.

Under current immigration law, some domestic violence perpetrators, who have been convicted in a state court, are found to not have been convicted of a removable offense. In other words, certain aliens, who have been convicted of a crime of domestic violence, are found to be improperly in immigration proceedings because their domestic violence conviction is not a removable offense. In these instances, the alien’s removal proceedings are terminated and they are allowed to stay in the United States.

Some domestic violence perpetrators are allowed to seek immigration relief. In fact, depending on the type of conviction, these perpetrators are eligible for legal permanent resident

43 See 18 U.S.C § 16.
44 See 18 U.S.C. 16 § A; See also Matter of Velasquez, 25 I&N at 280.
45 See 18 U.S.C. 16 § B; See also Matter of Velasquez, 25 I&N at 280. Section B, known as the residual definition of the crime of violence, has been ruled to be unconstitutionally vague and overbroad as of the Supreme Court ruling in Sessions v. Dimaya 138 S.Ct 1204 (2018). This however, is beyond the scope of my paper.
46 See 18 U.S.C § 16; See also Matter of Estrada, 26 I&N Dec. 749, 750 (BIA 2016).
47 See Matter of Estrada, 26 I&N at 750.
48 See generally In re Sanudo, 23 I&N Dec. 968 (BIA 2006).
49 See generally In re Sanudo, 23 I&N Dec. 968 (BIA 2006).
50 See generally In re Sanudo, 23 I&N Dec. 968 (BIA 2006).
status.\textsuperscript{51} As stated above, unless the alien is convicted of an enumerated aggravated felony or particularly serious crime, they are allowed to seek all forms of immigration relief.\textsuperscript{52}

The current situation in immigration law related to domestic violence crimes leads to questionable results. While a criminal who commits an act of domestic violence may not be removable or barred from immigration relief, a criminal who violates a protective order, in any way, is removable from the United States. What’s more is that domestic violence perpetrators take away opportunities for undocumented aliens who have not committed any crimes to receive certain immigration benefits.\textsuperscript{53} Specifically, in the case of cancellation of removal, only a certain number of applications can be granted each year.\textsuperscript{54} This means that someone who has not committed a crime may not be offered a grant of permanent resident status under this program because a domestic violence perpetrator was granted his application before them.

\textbf{III. DETERMINING WHETHER A STATE CRIMINAL CONVICTION IS A REMOVABLE OFFENSE OR BAR TO IMMIGRATION RELIEF}

In order to determine whether a crime is a removable offense or a crime that bars immigration relief, the Courts are tasked with comparing state criminal statutes to federal definitions of crimes to determine if the state statute is within the federal definition of a crime.\textsuperscript{55} This is a difficult task. This process involves two conflicting ideals: 1) the law enforcement objectives of the government in removing violent and dangerous people and 2) the rights of people in immigration proceedings to ensure that their due process rights are upheld.\textsuperscript{56} In the

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  \item \textsuperscript{51} See Cisneros Perez v. Gonzalez, 465 F.3d 386, 388 (9th Cir. 2006). This case will be further discussed in Part 3.
  \item \textsuperscript{52} See 8 U.S.C. § 1101(a)(43) (enumerated aggravated felonies under INA); see also 8 U.S.C. § 1227(a)(2)(A)(deportable offenses for lawfully admitted aliens); see also 8 U.S.C. § 1182(a)(2)(crimes that render aliens inadmissible to the United States).
  \item \textsuperscript{53} See generally 8 C.F.R. §1240.20-1240.24 (codifying limits to the annual number of cancellation of removal for non-permanent resident petitions that may be granted).
  \item \textsuperscript{54} See generally 8 C.F.R. § 1240.20-1240.24.
  \item \textsuperscript{55} Taylor v. U.S, 495 U.S. 575, 599-601 (1990).
  \item \textsuperscript{56} Taylor v. U.S, 495 U.S. 575, 599-601 (1990).
\end{itemize}
criminal context, the importance ensuring state statutes meet federal definitions is apparent. If a state crime does not meet the federal definition of a crime, a defendant spends less time in jail. This can also frustrate law enforcement, where an otherwise dangerous person could spend less time in jail even though he committed a serious crime that harmed people or property.

A. Categorical Approach

In order to determine whether a state statute matches a federal definition, courts have long applied a categorical approach. The categorical approach looks to the statutory definition of the offense. The court does not take into account the facts of the case or any other documents on the record, and only determines if the state statute matches the federal statute.

This approach requires the comparison of the elements of a state statute and its federal definition counterpart. In some instances, the state statute and federal definition have the same essential elements or the federal definition is broader than the federal definition. When this occurs, there is no further inquiry needed since the state statute matches the federal definition or its elements are within the “generic definition” of a federal crime. However, when the federal definition and state law have differences, or the state definition of a crime is broader than the federal definition, the court must look further.

63 Taylor v. U.S, 495 U.S. 575, 599 (1990) (noting that when the statute is narrower than the generic definition then there is no problem because the conviction necessarily implies that the defendant committed generic burglary. Also, where generic definition has been adopted, then there is no further inquiry needed).
The court then must determine if the elements of the state crime are broader than the federal definition.66 If the state statute is broader, then the court must find that the state statute is not a match with the federal definition because it is broader than the federal definition.67 In other words, the state statute criminalizes conduct that is not a part of the federal definition.68 This means that the perpetrator of a state crime would not have been found guilty under the federal definition because they jury, or judge, would not have needed to find an essential element of the state crime in order to convict the perpetrator.69

B. Supreme Court Application of the Categorical Approach in Immigration Law

The Supreme Court has long utilized the categorical approach in criminal and immigration contexts.70 In Moncrieffe v. Holder, the Court used the categorical approach to determine if a criminal conviction was an aggravated felony and a bar to immigration relief.71 Justice Sonya Sotomayor, writing for the majority, held that the conviction of the petitioner, namely a possession with intent to distribute conviction, was not an aggravated felony under the INA.72 She noted that the alien’s actual conduct is irrelevant to the inquiry, “as the adjudicator must presume that the conviction rested upon nothing more than the least of the acts criminalized under the state statute”.73 The court pointed to many instances in the past that utilized the categorical approach in immigration proceedings and its long standing history.74

The Court held that Georgia statute for possession with intent to distribute was not an aggravated felony because there was no evidence that a felony drug trafficking offense under the

Controlled Substances Act ("CSA") involved a small amount of marijuana.\textsuperscript{75} Since the petitioner was convicted of a misdemeanor and the CSA would not punish the Georgia statute as a felony, it was not an aggravated felony under the federal definition of a drug trafficking offense.\textsuperscript{76}

Justice Alito issued a dissenting opinion that called into question the courts default use of the categorical approach.\textsuperscript{77} He argued that while well intentioned, the categorical approach has led to results incompatible with Congresses objectives, especially in regard to the INA.\textsuperscript{78}

Justice Alito did not agree that the petitioner should be found to have committed an aggravated felony.\textsuperscript{79} He believed that the petitioner had not committed an aggravated felony due to the small amount of marijuana that he had.\textsuperscript{80} He concluded, however, that the Court did not apply a pure categorical analysis and instead had departed from it to achieve this result.\textsuperscript{81}

He acknowledged the difficulty of making federal law dependent on state convictions and the sometimes harsh results that come from a categorical inquiry.\textsuperscript{82} However, he reasoned that under a pure categorical approach, the petitioner would have been convicted of an aggravated felony since the essential elements of the Georgia statute, namely knowledge, possession of marijuana and the intent to distribute, are in the federal definition of drug trafficking and therefore are a match with the state statute of conviction.\textsuperscript{83}

Justice Alito reasoned that the Court’s decision that the petitioner’s conviction was not an aggravated felony was not supported by the language of the INA.\textsuperscript{84} He reasoned that the INA

\textsuperscript{75} See Moncrieffe v. Holder, 569 U.S 184, 194 (2013).
\textsuperscript{76} See Moncrieffe v. Holder, 569 U.S 184, 194-195 (2013).
sought to punish conduct, not convictions. If conduct was punishable as a felony under the CSA, then it was a felony under federal law and the INA.

Justice Alito suggested the Court apply a different approach to ensure more just results and that the categorical approach was not the be all and end all approach. Justice Alito articulated how the pure categorical analysis frustrates what Congress intended by leading to varying results. In fact, he noted the anomaly that the Court’s decision, using the categorical approach would create: some state convictions would render an alien removable and other similar state statutes, criminalizing the same behavior, would not be removable. Some state crimes are defined so broadly as to encompass both very serious and much less serious conduct.

Justice Alito suggested the court apply a real-world conduct, or conduct specific approach, in order to avoid the unintended results of the categorical approach. Since the INA was drafted to “identify categories of criminal conduct that evidence such a high degree of societal danger that an alien found to have engaged in such conduct should not be allowed to obtain permission to remain in this country”, the Court should look to other ways to identify these crimes. Justice Alito argued that in cases where “the state conviction at issue was based on a state statute that encompasses both a substantial number of cases that qualify under the federal standard and a substantial number that do not” it is appropriate to consider the facts that

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were admitted in a state court, or were clearly proved.\footnote{See Moncrieffe v. Holder, 569 U.S 184, 220 (2013) (Alito, J., dissenting).} Alito also illustrated how this approach would allow the court to consider relatively minor offenses under a statute and more serious crimes under a statute to determine if they were aggravated felonies or involved conduct that fell into a category of minor offenses that were not as serious.\footnote{See Moncrieffe v. Holder, 569 U.S 184, 220 (2013) (Alito, J., dissenting).}

**C. Modified Categorical Approach and its Application**

After applying the categorical approach, if the state and federal statutes do not match or the elements are not the same, a modified approach is taken.\footnote{See Carly Self, DOMESTIC VICTIMS AREN'T THE ONLY VICTIMS: DEPORTING ALIENS WHO COMMIT VIOLENT CRIMES, REGARDLESS OF THE VICTIM’S RELATIONSHIP TO THE OFFENDER, 93 N.D. L. REV. 87, 93 (2018).} The modified approach allows the court to consider certain documents based on the conviction.\footnote{See Carly Self, DOMESTIC VICTIMS AREN'T THE ONLY VICTIMS: DEPORTING ALIENS WHO COMMIT VIOLENT CRIMES, REGARDLESS OF THE VICTIM’S RELATIONSHIP TO THE OFFENDER, 93 N.D. L. REV. 87, 93 (2018).} The documents are limited and include: “the indictment, the judgment of conviction, jury instructions, signed guilty plea, or transcript from the plea proceeding.”\footnote{Tokalty v. Ashcroft, 371 F. 3d 613, 620 (9th Cir. 2004) (quoting U.S. v Rivera-Sanchez, 247 F. 3d 905(9th Cir. 2001); see also Carly Self, DOMESTIC VICTIMS AREN'T THE ONLY VICTIMS: DEPORTING ALIENS WHO COMMIT VIOLENT CRIMES, REGARDLESS OF THE VICTIM’S RELATIONSHIP TO THE OFFENDER, 93 N.D. L. REV. 87, 93 (2018).} Even at this stage, however, the specific facts of the underlying offense are not considered.\footnote{Tokalty v. Ashcroft, 371 F.3d 613, 620 (9th Cir. 2004); see also Carly Self, DOMESTIC VICTIMS AREN'T THE ONLY VICTIMS: DEPORTING ALIENS WHO COMMIT VIOLENT CRIMES, REGARDLESS OF THE VICTIM’S RELATIONSHIP TO THE OFFENDER, 93 N.D. L. REV. 87, 93 (2018).} The police report and other testimonial evidence outside the record of conviction or specific facts are not considered.\footnote{See also Carly Self, DOMESTIC VICTIMS AREN'T THE ONLY VICTIMS: DEPORTING ALIENS WHO COMMIT VIOLENT CRIMES, REGARDLESS OF THE VICTIM’S RELATIONSHIP TO THE OFFENDER, 93 N.D. L. REV. 87, 93 (2018).}

The Board of Immigration Appeals\footnote{The Board of Immigration Appeals is the court of first appeal in an immigration proceeding. See 8 C.F.R. 1003.0(A). After an alien’s case is heard by an immigration judge, the alien has the right to appeal his case to the} and various courts of appeals, have applied the modified categorical approach to varying results.\footnote{Tokalty v. Ashcroft, 371 F.3d 613, 624 (9th Cir. 2004).} In the case of domestic violence crimes, the
modified categorical approach has found on numerous occasions that convictions under state domestic violence statutes are not crimes of domestic violence under the INA.\footnote{See generally In re Sanudo, 23 I&N Dec. 968 (BIA 2006); See generally Matter of Velasquez, 25 I&N Dec. 278, 283 (BIA 2010); See generally Fernandez-Ruiz v. Gonzalez, 466 F. 3d 1121 (9th Cir. 2006).}

Domestic violence statutes that do not require a violent act are not considered crimes of domestic violence.\footnote{See Matter of Velasquez, 25 I&N Dec. 278, 278 (BIA 2010).} In Matter of Velasquez, the BIA held that because a Virginia statute did not require a “violent act” the crime was not a crime of domestic violence, even after an analysis of the relevant criminal statute.\footnote{See Matter of Velasquez, 25 I&N Dec. 278, 279 (BIA 2010).} The court reached this conclusion despite the fact that the petitioner was convicted of harming his girlfriend, given conditions for his release and given a no contact order.\footnote{See Matter of Velasquez, 25 I&N Dec. 278, 279 (BIA 2010).}

Domestic violence statutes that only require negligence or recklessness are not considered crimes of domestic violence.\footnote{Fernandez-Ruiz v. Gonzalez, 466 F. 3d 1121, 1125 (9th Cir. 2006); Cisneros Perez v. Gonzalez, 465 F.3d 386, 388 (9th Cir. 2006).} In fact, recklessness is not enough to make a domestic violence crime a crime of violence.\footnote{Fernandez-Ruiz v. Gonzalez, 466 F. 3d 1121, 1129 (9th Cir 2006).} The Ninth Circuit held that since an Arizona statute permitted a conviction for domestic violence when a defendant “recklessly but unintentionally causes physical injury to another” and the record of conviction did not demonstrate the petitioner intentionally caused injuries to the victim, the crime was not a crime of violence for purposes of removal in immigration proceedings.\footnote{Fernandez-Ruiz v. Gonzalez, 466 F. 3d 1121, 1123 (9th Cir 2006).}
Some domestic violence laws are not removable offenses because the statute and criminal records do not make the crime a crime of moral turpitude or crime of domestic violence. In the BIA case of *In re Sanudo*, the BIA held that a conviction under California Penal Code § 243 was not crime of moral turpitude or crime of domestic violence. The court reasoned that since the statute did not require actual infliction of injury, the crime was not a crime of violence as defined in federal law. Since a petitioner could be convicted for an intentional touching under the statute, it encompassed more conduct than the federal definition of a crime of violence and therefore was not a qualifying conviction. The court also noted that the crime of domestic violence did not have the aggravating factors that were usually necessary for determining that a crime was so reprehensible as to be considered a crime involving moral turpitude.

In applying the modified categorical approach, the court only considered certified copies of the criminal complaint, the plea agreement and the criminal judgement. In looking at these documents, they did not find that these documents demonstrated that the requisite infliction of harm was required in proving a conviction under Cal Penal Code § 243. The court did not consider the police report, which was a part of the conviction record. The court reasoned that since “there was no indication that [the police report] was incorporated into the charging instrument under the convicting state’s rules of criminal procedure, that it was “not admissible to prove the nature of the respondent’s conviction.”

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110 While a crime of moral turpitude is not defined in the INA, it has referred to certain reprehensible conduct outside the norm of societal behavior. See *In re Sanudo*, 23 I&N Dec. 968, 970-971 (BIA 2006).
111 See *In re Sanudo*, 23 I&N Dec. 968, 972, 975 (BIA 2006).
112 See *In re Sanudo*, 23 I&N Dec. 968, 972, 975 (BIA 2006).
113 See *In re Sanudo*, 23 I&N Dec. 968, 972 (BIA 2006).
118 See *In re Sanudo*, 23 I&N Dec. 968, 974-975 (BIA 2006).
D. Cisneros Perez v. Gonzalez: How a Domestic Violence Perpetrator Garnered Eligibility for Immigration Relief

As discussed above, the current system of using the categorical and modified categorical approach has allowed domestic violence perpetrators to not only escape removal, but has allowed them to gain lawful permanent resident status. The Ninth Circuit case of Cisneros Perez v. Gonzalez illustrates this problem all too well and demonstrates the real world consequences of our current system.119

Cisneros Perez married his wife Megali Garcia, a lawful permanent resident.120 Perez entered without inspection and was an undocumented alien.121 After having two kids, he was accused of many crimes, notably crimes of domestic violence against his wife, under Cal Penal Code § 243(e)(1), Cal Penal Code § 273.5 and Cal Penal Code § 59122.123 Perez pled guilty to simple battery under Cal Penal Code § 242 and the original three charges against him were dropped.124 Perez was sentenced to three years’ probation, thirty eight days in jail, time served, and one year of domestic violence counseling as well as substance abuse and parenting counseling.125

After being placed in removal proceedings, Cisneros applied for cancellation of removal for certain non-permanent residents.126 The immigration judge found Cisneros Perez ineligible for cancellation of removal for certain nonpermanent residents because he had been convicted of

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119 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 388 (9th Cir. 2006).
120 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 388 (9th Cir. 2006).
121 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 388 (9th Cir. 2006).
123 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 388-389 (9th Cir. 2006).
124 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 388-389 (9th Cir. 2006).
125 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 389 (9th Cir. 2006).
126 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 388 (9th Cir. 2006).
a crime of domestic violence. The immigration judge based this holding on Perez’s criminal complaint and judgment of record.

On appeal, the Ninth Circuit found insufficient documents to establish that Cisneros was found guilty of a crime of domestic violence under the INA. The court held that the conviction documents on record were insufficient to demonstrate Perez was found guilty of a crime of domestic violence. Even though the administrative record of the immigration proceedings indicated that Megali Garcia was Perez’s wife, the court declined to use this information because the name of the spouse was not listed in the criminal complaint and the complaint was withdrawn when Perez pled to a lesser charge. The court only considered Perez's plea, which was not to a crime of violence, but rather a simple battery.

The court held that conviction documents must be such that “a later court could generally tell whether the plea ‘necessarily rested on the fact identifying the crime of conviction as the generically defined crime.’” For this reason, under the modified categorical approach, the court found there were insufficient documents on record to find that the respondent was guilty of a crime of domestic violence. Even though Perez was charged under several domestic violence statutes, the conviction record did not demonstrate that Perez plead to a domestic violence crime. Furthermore, even though Perez was sentenced to domestic violence counseling and a stay away order was issued, the court found this still did not demonstrate Perez was guilty of a crime of domestic violence.

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127 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 389 (9th Cir. 2006).
128 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 389 (9th Cir. 2006).
129 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 393 (9th Cir. 2006).
130 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 392 (9th Cir. 2006).
131 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 393 (9th Cir. 2006).
132 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 393 (9th Cir. 2006).
133 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 393 (9th Cir. 2006).
134 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 393 (9th Cir. 2006).
135 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 393 (9th Cir. 2006).
The court reasoned that since California does not forbid these forms of punishment for other non-domestic violence crimes, Perez’s sentence alone did establish that Cisneros committed a crime of domestic violence.137

IV. PROPOSED SOLUTION

The time is now for a new approach to domestic violence convictions and how they are addressed in federal immigration law. In fact, this sentiment is held by two Ninth Circuit Appeals Court Judges.138 In a recent Ninth Circuit decision Menendez v. Whitaker, the Ninth Circuit held that a conviction under California Penal Code 248 for lewd and lascivious acts with a minor was found not to be a crime of child abuse.139 In a concurring opinion, Justice Callahan and Justice Owen expressed concern over the current use of the categorical approach.140 The Court went so far as to implore Congress or the Supreme Court to fix the current system.141 The court argued that the current system focuses on the breadth of a given statute that no state legislator ever intended.142 The actual criminal conviction has nothing to do with the analysis of the court and the present system forces the parsing of state statutes that lead to uneven results.143

I agree with the Ninth Circuit and believe that the time has come for a new approach to determine whether state convictions carry federal immigration consequences for domestic violence crimes. There are countless examples of domestic violence perpetrators being given immigration benefits despite their record of domestic violence as well as domestic violence perpetrators not being subject to removal from the United States.

136 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 393 (9th Cir. 2006).
137 See Cisneros Perez v. Gonzalez, 465 F.3d 386, 393 (9th Cir. 2006).
138 See Menendez v. Whitaker, 908 F.3d 467, 475 (9th Cir. 2018) (Callahan J., and Owens J., concurring).
139 Menendez v. Whitaker, 908 F.3d 467, 475 (9th Cir. 2018) (Callahan J., and Owens J., concurring). See also Cal Pen. Code §288.
140 Menendez v. Whitaker, 908 F.3d 467, 475 (9th Cir. 2018) (Callahan J., and Owens J., concurring).
141 Menendez v. Whitaker, 908 F.3d 467, 475 (9th Cir. 2018) (Callahan J., and Owens J., concurring).
142 Menendez v. Whitaker, 908 F.3d 467, 475 (9th Cir. 2018) (Callahan J., and Owens J., concurring).
143 Menendez v. Whitaker, 908 F.3d 467, 475 (9th Cir. 2018) (Callahan J., and Owens J., concurring).
The cases discussed above demonstrate unintended consequences of applying the categorical approach to domestic violence crimes. Under the categorical approach, Courts do not take in account the severity of the domestic violence crimes that are before them. Courts do not discuss the underlying facts of a crime or the severity of the harm that was committed against a victim. The Courts instead compare the elements of a statute to determine if a domestic violence crime was committed.

The above mentioned cases demonstrate that each petitioner was found guilty of a violent crime and committed acts of domestic violence. They were convicted in courts of law for harming their spouses or significant others. While it is true that the statute they were convicted under or plead to might not have fit the exact federal definition of a crime of domestic violence, the facts of the case, and what actually happened, paint a different picture. Facts uncovered during immigration proceedings and present in police reports demonstrated, in some instances, that a petitioner committed an act of domestic violence. However, the Court rejected these facts as evidence outside the record of conviction.

The fact that domestic violence perpetrators are able to garner immigration benefits and escape the immigration consequences for their acts of domestic violence is an issue that must be resolved. This issue must be resolved to protect victims and hold perpetrators accountable for their actions. It is also important to ensure the integrity of our immigration system and to ensure that well deserving immigrants are afforded the opportunity to garner immigration benefits that they deserve.

There are several ways that our government, including the Executive Branch, through the Attorney General and the Judicial Branch, through the Supreme Court can address this issue.\textsuperscript{144}

\textsuperscript{144} The Legislative Branch, namely Congress and the Senate, can also do a great deal to solve the present issue. However, this inquiry goes outside the scope of my paper.
First, the Court should discard the categorical approach when analyzing domestic violence laws in the context of federal immigration proceedings and instead apply a real world conduct, or conduct specific approach, as articulated by Justice Alito. Victims of domestic violence are often severely injured by domestic violence perpetrators. The conduct involved in each crime should be used to determine whether a crime qualifies as a crime of domestic violence. The categorical approach forces Courts into an idealized world, which does not adequately account for the real world conduct of a defendant.

Under a conduct specific or real world conduct approach, police reports would always be used in domestic violence cases, regardless of their incorporation into a conviction record or criminal document. Police reports are often the only way for victims to be heard in immigration proceedings and police reports are often informative as to the severity of a crime of domestic violence.

Also, all relevant facts would be admissible in the determination of a serious crime. Facts that are elicited during proceedings, either through witness testimony or admission, would be used to determine the severity of a domestic violence crime. The Immigration Judge would then determine whether the crime was a crime of domestic violence and then whether the crime was so serious as to bar certain forms of immigration relief.

There are several reasons that a real world, or conduct specific approach, is warranted in immigration proceedings for domestic violence crimes and would be a worthwhile approach. A real world approach would balance the enforcement interests of the government and the due process rights of an alien. If the conduct involved in a particular case was not severe or did not result in significant injury, the alien would be allowed the opportunity to provide court records and other conviction documents and reports to demonstrate that the crime was not so severe as to
warrant adverse immigration consequences. At the same time, the government would also be
able to produce police reports and other evidence to demonstrate the severity of the alien’s crime.

A real world conduct approach would avoid the unintended consequences that the present
categorical approach has created. The purpose of the INA is to punish and rid our country of
those aliens who commit certain serious offenses that are harmful to the United States, not aliens
who have committed minor crimes or infractions. By using the categorical approach, this
purpose is frustrated and instead the opposite occurs. The wording of a statute could make a
minor crime so serious as to warrant negative immigration consequences. At the same time, a
statute could make a serious crime not subject to negative immigration consequences.

Finally, using a real world conduct approach will not overly complicate or burden courts
in determinations of whether a crime, based on its conduct, is a crime of domestic violence. The
three factors the court would consider are: 1) does the record indicate the perpetrator committed
an act of violence; 2) that caused injury to the victim and 3) the victim held a special relationship
to the perpetrator. These three questions can be easily discerned from the record and conviction
documents, including police reports, and do not require extensive fact finding. On the contrary,
this approach would appear simpler to apply than the categorical approach, where Courts must
consider the specific statutes of each state in our country.

There is long standing precedent to hold domestic violence perpetrators accountable for
their actions and deny them certain benefits due to their violent conduct. California has done this
in the child custody arena and forced domestic violence perpetrators prove that they have sought
help for their problem and have not committed further acts of domestic violence.

These factors should also be applied in immigration proceedings for domestic violence
perpetrators who are seeking immigration benefits. This is especially important to uphold the
integrity of our immigration system and make sure that the most deserving individuals are given the immigration benefits that they deserve. When only a handful of legal permanent resident cards are given out annually to undocumented aliens seeking lawful status in the United States, perpetrators of domestic violence should be given the burden to demonstrate their commitment to rehabilitation and that they are deserving of the immigration benefits that they seek.

In immigration proceedings, the alien should have the burden to prove that he has been rehabilitated and there is no further risk of domestic violence. Some factors should include 1) passage of time from prior crime 2) whether drugs or alcohol were aggravators in the crime 3) whether the alien still uses said aggravators 3) nature and severity of the harm or injuries 4) was the incident the only incident of domestic violence and 5) remorse for prior act of violence.

This approach does not eliminate an alien’s ability to seek and gain immigration relief. In fact, an alien could demonstrate that his crime was not particularly serious through the above mentioned factors. The factors above only shift the burden to the domestic violence perpetrator to demonstrate that the person has made changes and has been rehabilitated or taken steps to correct his prior behavior and habits.

V. CONCLUSION

The above mentioned solutions are only a start. There is much that can be done to combat the harm that domestic violence has caused our society. That being said, our country can take steps to ensure that domestic violence perpetrators do not gain benefits they have not demonstrated they deserve. Domestic violence harms victims and their children and this behavior should hold consequences for perpetrators. Many laws have been enacted to shift the burden to the perpetrator to ensure that they demonstrate rehabilitation before they are eligible for certain benefits.
Our federal government will be better equipped to determine who deserves certain immigration benefits with the above mentioned reforms. By considering the real world conduct of perpetrators and making their domestic violence crimes presumptive bars to immigration relief, our government will be able to better consider these crimes and vet whether each perpetrator is deserving of immigration benefits. The statistics and studies demonstrate the urgency for our government to take steps to address this issue. By taking action against domestic violence perpetrators, our government can begin to address the issue of domestic violence in our society and take additional steps to solve a problem that has caused harm to so many.