

***Making Drug-Related Deportability 1914 Again?* How a Strict “Categorical Approach” to the CSA Would Eliminate Unpredictable Agency Interpretation of the Immigration and Nationality Act**

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ABSTRACT

*The Controlled Substance Act (“CSA”) of 1970 serves as a near midpoint for considering a century of drug regulation, dating to the Harrison Narcotic Tax Act (1914), the now-quaint first federal step in this field, i.e. of taxing the sale of (but not outright criminalizing) cocaine and opium. The early cases construing the Harrison Act are similarly anachronistic. Bundled as “public welfare cases” and including *United States v. Balint*,¹ in those early days, the Supreme Court was willing to forego requiring the element of “criminal intent” to be read into general and novel statutes like the Harrison Narcotic Tax Act, and in *Balint* yielded to apparent congressional wisdom to punish controlled substance violations without an impediment of traditional *mens rea*.*

*This logic would seem to have been explicitly “firewalled” to its bygone era by *Morissette v. United States* (1952),² particularly in light of the*

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¹ *United States v. Balint*, 258 U.S. 250 (1922) (an 886-word, conclusory opinion of Chief Justice Taft, often referenced as one of “the public welfare cases,” in conjunction with *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910) and/or *United States v. Behrman*, 258 U.S. 280 (1910)).

² *Morissette v. United States*, 342 U.S. 246 (1952) (explaining the narrow limits of the logic of the public welfare cases and approving them only the circumstances in which they were made).

modern, comprehensive CSA subsequently “clearing the field” in 1970. Convicted immigrants only wish they were so lucky.

In a parallel track, use of the “categorical approach” in modern criminal³ and immigration⁴ law has evolved to require strict comparison of federal and state definitions of criminal offenses in order for those offenses to trigger sentencing or deportation consequences. This implies that both state drug offenses and drug definitions also require a literal federal analogue, under the CSA, to prompt collateral federal treatment. Again, convicted immigrants only wish it were so simple.

The Board of Immigration Appeals (BIA), part of the U.S. Department of Justice, has repeatedly invoked the “public welfare cases” to justify removal of immigrants for drug offenses in the absence of proof of their criminal intent.⁵ In 2019, the BIA had further telegraphed reluctance to requiring strict uniformity in state drug definitions vis-à-vis the federal enumerated standard substance before permitting an immigration consequence to flow from a related offense.⁶

The author has written on, and litigated—both successfully⁷ and unsuccessfully,⁸ and in pending matters⁹—these issues as both primary counsel and for amici curiae. This article develops the interconnectedness of the above two topics, in order to comprehensively discuss the immigration consequences of drug convictions, particularly as evolved since 1996 and to attempt to reconcile 1) tracks of Supreme Court civil

³ See, e.g., *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 136 S.Ct. 2243 (2016).

⁴ See, e.g., *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Mellouli v. Lynch*, 575 U.S. 798 (2015); *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017).

⁵ See, e.g., *Matter of Esqueda*, 20 I. & N. Dec. 850 (BIA 1994) (possessory context); *Matter of L-G-H-*, 26 I. & N. Dec. 365 (BIA 2014) (aggravated felony context).

⁶ See *Matter of Navarro-Guadarrama*, 27 I. & N. Dec. 560 (BIA 2019) (acknowledging the dissonance between the Florida and federal definitions of cannabis, in that Florida criminalizes all parts of the cannabis plant, but still finding a Florida conviction triggered an immigration consequence because the immigrant had failed to meet their burden of proof to establish that Florida actually prosecutes offenders in incidents that relate *only* to parts of the plant (such as stalks) that could not be the basis of a federal prosecution).

⁷ *Donawa v. U.S. Att’y Gen.*, 735 F.3d 1275 (11th Cir. 2013) (holding that a state scheme missing a *mens rea* requirement cannot trigger immigration treatment as a “drug trafficking crime” “aggravated felony,” because without a *mens rea* element it is not the equivalent of any federal offense).

⁸ *Choizilme v. U.S. Att’y Gen.*, 886 F.3d 1016 (11th Cir. 2018) (giving deference to an agency’s interpretation of an ambiguous statutory term and holding that a state scheme missing a *mens rea* requirement can trigger immigration treatment as a “illicit trafficking” “aggravated felony,” because “illicit trafficking” has no generic definition).

⁹ See, e.g., BIA Amicus Invitation 18-02-28.

and criminal jurisprudence regarding *mens rea* and 2) the collision course of the “categorical approach” with the interpretive principles of *Chevron*.¹⁰ In doing so, the article makes recommendations for a more consistently principled, predictable, and uniform intersection of the CSA and the Immigration and Nationality Act (INA).

While this paper mostly deals with highly technical explanations of legal theories¹¹ in the criminal-immigration universe, it should not be lost on the reader just how out of touch the legalese gets from reality. In a way, it is a microcosm of the larger social problem. America’s cultural duality is on display—with our aspirational decadence conflicting with our puritanical roots—and we struggle to balance these extreme polarities. If controlled substances were regulated from a holistic public health perspective, if our laws were not so dissonant with our culture’s appetites, or even if drugs were taxed (not outright banned) as in 1914, we could avoid much of the technical jousting of the following pages. However, as it is, we have serious legal “apex” scenarios—criminal sentence enhancements and deportation—in which society’s wrath bares down on individuals, typically with consequences disproportionate to the “harm” (if any) they inflicted upon society. With the stakes so raised, the esoteric legal analysis is the necessary antidote and justified defensive tool to a ludicrously over-punitive, unrealistic, and hypocritical criminal scheme.

I. INTRODUCTION

We have all been bombarded by recent political rhetoric, labeling immigrants as “rapists and murderers,”¹² the undocumented as likely to drive while intoxicated,¹³ and DACA recipients (aka “DREAMers”) as “hardened criminals.”¹⁴ This is counter-factual, of course, as empirical data shows that the immigrant population

¹⁰ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹¹ As such, and in the interest of focus and brevity, the reader will notice that this is purposefully an exploration of primary materials—cases—and the theories contained therein, not of academic commentary upon those cases.

¹² See, e.g., Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), https://time.com/4473972/donald-trump-*/ (“‘They are not our friend, believe me,’ he said, before disparaging Mexican immigrants: ‘They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.’”).

¹³ Alex Nowrasteh & Andrew C. Forrester, *Do Illegal Immigrants Increase Drunk Driving Deaths?*, CATO INSTITUTE (Oct. 18, 2019), <https://www.cato.org/blog/do-illegal-immigrants-increase-drunk-driving-deaths> (summarizing media and political rhetoric assigning disproportionate responsibility to undocumented immigrants).

¹⁴ Aaron Rugar, *Trump’s Attempt to Smear DACA Recipients as “Hardened Criminals” is Untethered From Reality*, VOX (Nov. 12, 2019), <https://www.vox.com/policy-and-politics/2019/11/12/20961139/trump-daca-tweet-hardened-criminals-scotus>.

commits criminal offenses at a rate below that of the native born,¹⁵ that there is no statistical correlation between the undocumented population and DUI offenses,¹⁶ and by definition not only do DACA recipients have to be nearly crime-free,¹⁷ but their loss of status based on criminality is nearly non-existent, at a mere 0.3 percent over five years.¹⁸

Nonetheless, this labeling and fearmongering pervades the national dialogue and dictates some policy outcomes. Under every executive, but particularly under the Trump administration, the Department of Justice and its administrative court system—the Executive Office for Immigration Review and its component immigration courts and BIA—continue a one-way ratcheting of interpretations of the Immigration and Nationality Act (INA) that consistently increase the challenges for immigrants to escape deportability for any criminal activity.¹⁹ The Justice Department has invented new schemes for penalizing DUI in the contexts of bond hearing²⁰ and applications for discretionary relief;²¹ expanded the contexts for theft-

¹⁵ Robert Farley, *Is Illegal Immigration Linked to More or Less Crime*, FACTCHECK.ORG (June 27, 2018), <https://www.factcheck.org/2018/06/is-illegal-immigration-linked-to-more-or-less-crime/> (“[T]here aren’t readily available nationwide crime statistics broken down by immigration status. But the available research that estimates the relationship between illegal immigration and crime generally shows an association with lower crime rates.”).

¹⁶ Nowrasteh & Forrester, *supra* note 13 (“We find no statistical evidence to suggest that places with more illegal immigrants are more at risk for drunk driving deaths Although our regressions results are correlative and not causal in nature, they suggest that illegal immigrants do not affect overall drunk driving deaths.”).

¹⁷ See Janet Napolitano, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (barring such discretion in the case of otherwise qualifying individuals with one felony or three or more misdemeanor convictions).

¹⁸ Miriam Valverde, *Donald Trump Says Some DACA Recipients are ‘Very Tough, Hardened Criminals.’ That’s False*, POLITIFACT (Nov. 14, 2019), <https://www.politifact.com/factchecks/2019/nov/14/donald-trump/donald-trumps-label-some-daca-recipients-very-tough/> (“660,880 people (on average in their mid 20s) were protected from deportation under the program. Immigrants are ineligible for the program if they have been convicted of a felony, a significant misdemeanor, or three or more misdemeanor offenses We found that in a five-year period, officials ended about 2,130 DACA protections. The majority of the terminations were for arrests or convictions unrelated to gang activity; fewer than 70 terminations were related to gang membership or affiliation, and they did not involve convictions or arrests The top three offenses for those arrests were driving-related (excluding DUI), immigration-related (such as visa overstays), and ‘theft, larceny, etc.’”).

¹⁹ Others have written on this issue in a variety of contexts, but for this author’s overview, see, e.g., Michael Vastine, *An Immigration Lawyer Walked into a Barr: The Impact of Trump’s Justice Department on the Defense of Criminal Immigrants*, 25 BARRY L. REV. 57 (2020).

²⁰ See *Matter of Siniaukas*, 27 I. & N. Dec. 207 (BIA 2018) (finding that DUI offense creates presumption of dangerousness, negating most applicants’ eligibility for bond).

²¹ See *Castillo-Perez*, 27 I. & N. Dec. 664, 670 (AG 2019) (“Multiple DUI convictions represent

related and prostitution offenses²² to trigger immigration treatment; and eliminated or severely truncated the bases for giving full faith and credit to state criminal court judgements that vacate,²³ modify or clarify convictions,²⁴ revise sentencing, or reinstate late filed appeals.²⁵

A closer look shows that these outcomes are based on both supposed *Chevron* step one decisions, with the administrative agency determining congressional purpose, via its words, to have negative results for immigrants, and in *Chevron* step two, where the agency claims license to freely interpret the statute based on its assertion that Congress intended as much, and thus for courts to subsequently defer to any “reasonable” interpretation in this scheme. Of course, this is no Maginot Line between the application of the two techniques under *Chevron*, rather an opaque and highly contested division, a turf battle between the agency and the federal courts.²⁶ The agency offers its preferred reading of a statute under *Chevron* step one, which the federal courts then must reassess under a non-deferential *de novo* standard.²⁷ The agency also offers its interpretations under step two, and as those interpretations must typically receive judicial deference, litigation in the courts of appeals turns on whether the statute had *really* been subject to agency interpretation in the first place, or whether congressional intent could have been gleaned through well-established canons of statutory interpretation. At stake are fundamental questions of separation of powers, particularly the overreach of the executive branch to bend the words of Congress without check by the judiciary.²⁸

a repeated failure to meet the community’s moral standards, rather than a ‘single lapse’ that would be less probative of moral character.”). Thus under A.G. Barr, virtually all DUI convictions bar a showing of “good moral character” required for long-term undocumented persons to qualify for the discretionary relief of cancellation of removal, pursuant to INA § 240A(b). Ironically, while a blight on modern life, DUI has no *moral* element; in fact, DUI offenses typically lack a culpable *mens rea* at all.

²² Matter of Ding, 27 I. & N. Dec. 295 (BIA 2018) (departing from Gonzalez-Zoquiapan, 24 I. & N. Dec. 549, 553 (BIA 2008), to redefine the term “prostitution” for purposes of deportability, expanding it to included conduct other than intercourse, even where this creates dissonant definitions of the term “prostitution” within the INA).

²³ See Matter of Marquez-Conde, 27 I. & N. Dec. 251 (BIA 2018).

²⁴ See Thomas and Thompson, 27 I. & N. Dec. 674 (A.G. 2019).

²⁵ J.M. Acosta, 27 I. & N. Dec. 420 (BIA 2018).

²⁶ See, e.g., Baez-Sanchez v. Barr, 947 F.3d 1033 (7th Cir. 2020) (expressing incredulity and threatening disciplinary consequences for members of the BIA who repeatedly failed to implement the decision of the Seventh Circuit, made at *Chevron* step one (via a reading of the parameters of the “U-visa” statute), where the BIA maintained that it was entitled to deference in an exercise of *Chevron* step two interpretive authority, notwithstanding the Circuit’s order: “In sum, the Board flatly refused to implement our decision We have never before encountered defiance of a remand order, and we hope never to see it again. Members of the Board must count themselves lucky that Baez-Sanchez has not asked us to hold them in contempt, with all the consequences that possibility entails.”).

²⁷ See INA § 242(b)(4), 8 U.S.C. § 1252(b)(4).

²⁸ See, e.g., Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch,

If any lessons have been learned from the first three years of the Trump administration, it is that it will be immodest in its assertion of its claim to power, relative to the coequal branches of government. It has been unambiguous since the start that it would rule on issues without deference to historic agency norms and read (or re-read) the Immigration and Nationality Act and its own regulations through a restrictionist lens. It has also been crystal clear since 2016, even before taking office, that the administration's immigration team would be ambitious in the breadth and depth of its reimagination of the immigration world, and it has made one substantive change to immigration policy every workday that Trump has been in office.²⁹

It is against this backdrop of political agenda, administrative law norms, and constitutional structure that this article will address the contemporary treatment of the immigration consequences of drug offenses. Being as the article was first presented, and is now subsequently compiled, with a broad array of thoughtful articles, essays, and speeches that all address a conference theme of *The Controlled Substance Act at 50 Years*, I will try to “stay in my lane” and out of others' areas of writing and expertise.

II. IMMIGRATION 101: DRUG OFFENSES AND INTERFACE WITH INADMISSIBILITY, DEPORTABILITY, AND RELIEF FROM REMOVAL

Readers outside the immigration practice area may underappreciate the scope of immigration problems triggered by violations of controlled substance-related statutes. *Everything* causes trouble. Non-citizens seeking to enter the United States, either temporarily or permanently, are “inadmissible” (a term of art) based on *any* controlled substance offense.³⁰ Disqualifying convictions can be via guilty pleas or findings of guilt (by judge or jury), which are easily discovered through mandatory criminal background checks during the application process. “Convictions” under the INA also include the less severe criminal outcomes of “withheld adjudications,”³¹ a

concurring) (calling for a more assertive role for courts to provide oversight, rather than recurring deference to politically motivated executive with changing views, depending on electoral outcomes).

²⁹ Immigration Policy Tracking Project, <https://immpolicytracking.org> (last visited Apr. 5, 2020) (reporting 800 announced new immigration policies, not including those reported changes that were not formally announced) (click “Enter Tracking Project” and enter information to request access).

³⁰ INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A), Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

[...]

(II) 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).

³¹ 8 U.S.C. § 1101(a)(48)(A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo

common tool utilized in the criminal courts for mitigating the impact of first or (typically) minor offenses.

Drug violations do not necessarily require a conviction at all in order to metastasize into an immigration problem, as inadmissibility can also be triggered by an *admission* of the underlying misconduct. These “admissions” can be in a criminal court diversionary context, such as a rehabilitative “drug court” program,³² and the paper trail from the criminal court subsequently alerts an immigration officer to the evidence of the formal admission in the court proceeding.³³ Immigration officials can also discover misconduct through arrest records and rap sheets. Even if the conduct did not lead to a prosecution or conviction, it may generate interest in the immigration interview, where questioning prompts admissions directly to an immigration or consular officer. An “admission” may also be rooted in a statement to a physician conducting the required medical examination to determine health-related grounds of inadmissibility.

Further, immigration application forms, reviewed under oath in interviews, are repetitive and thorough, asking in several different ways whether the applicant has criminal conduct or contact with the criminal system. In addition to requiring disclosure of arrests and convictions (“Have you **EVER** violated (or attempted or conspired to violate) any controlled substance law or regulation of a state, the United States, or a foreign country?”³⁴), the process also requires answers about previously undetected bad acts (“have you ever committed an offense for which you were not arrested?”) followed shortly with the question about candor to immigration officials (“Have you **EVER** lied about, concealed, or misrepresented any information on an

contendere or has admitted sufficient facts to warrant a finding of guilt, and
(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

³² See, e.g., *Diversion Programs in America’s Criminal Justice System: A Report by the Center for Prison Reform*, Center of Prison Reform (Aug. 2015), <https://centerforprisonreform.org/wp-content/uploads/2015/09/Jail-Diversion-Programs-in-America.pdf>, at 7–9 (“In 1968, the President’s Commission on Prisoner Rehabilitation and then the Comprehensive Drug Abuse Prevention and Control Act of 1970 recommended that US states use diversion programs for drug offenses. The first federal program was established through the Pretrial Services Act of 1982. By 2010, 45 US states had 80 diversion laws and 298 diversion programs.”); See *Matter of Mohammed*, 27 I. & N. Dec. 91, 95 (BIA 2017) (with the BIA electing to include admissions in the diversionary context as basis for satisfying the INA term “conviction,” in case of immigrant who successfully completed a drug court program, resulting in the charges against him being dropped).

³³ See, e.g., *Martinez v. U.S. Att’y Gen.*, 577 Fed. Appx. 969 (11th Cir. 2014) (Citing an admission made in the context of a diversionary program and rejecting argument that an admission for inadmissibility purposes carries immigration consequences only if the immigrant is presented the essential elements of the offense and concedes violation of each element, and instead holding that an admission in a diversionary program is properly a basis of a finding of inadmissibility and ineligibility for discretionary relief.).

³⁴ USCIS, Form I-485 Application to Register Permanent Residence or Adjust Status, page 10 (emphasis in original).

application or petition to obtain a visa, other documentation required for entry into the United States, admission to the United States, or any other kind of immigration benefit?”). In other words, everyone who has ever committed *any* misdeed either admits it or risks making their case even worse by triggering additional inadmissibility by lying about it.³⁵ This puritanical approach—that any person that has committed any drug offense should never be permitted to enter U.S. society—is inherently self-defeating, as it incentivizes lying, but it would take an act of Congress to ratchet down the consequences, and despite the occasional proposal,³⁶ such progress reform is not on the horizon.

Separately, immigration officials can allege additional inadmissibility via a separate ground, for having “reason to believe” that a person is (or has been) a trafficker in controlled substances.³⁷ Thus, a non-citizen might defeat a serious-sounding allegation at trial—on technicalities of constitutional or practical consideration, based on high burden of proof, or because of actual innocence—and still face a bar to entry. This “reason to believe” bar even extends to family members who have recently benefitted financially from the alleged wrongdoer.³⁸

At the “admissibility” phase, the sole drug crime that may be waived under the INA is a single offense relating to³⁹ simple possession of thirty grams or less of

³⁵ With experimental drug use being widespread, statistically speaking, misrepresentation must be a recurring problem. *See, e.g.,* Mary Emily O’Hara, *New Study Finds Majority of Americans Have Smoked Marijuana*, NBC NEWS (Apr. 17, 2017), <https://www.nbcnews.com/news/us-news/new-poll-finds-majority-americans-have-smoked-pot-n747476>.

³⁶ *See, e.g.,* American Families United Act, H.R. 1036, 115th Cong. (2017) (providing broad discretion to immigration judges and also limiting the types of convictions that would count for immigration purposes).

³⁷ INA § 212(a)(2)(C), 8 U.S.C § 1182(a)(2)(C), Controlled substance traffickers.

Any alien who the consular officer or the Attorney General knows or has reason to believe.

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

³⁸ *See id.*

³⁹ Also, prosecutions for multiple counts, such as both possession of cannabis and possession of paraphernalia, although the immigrant bears the burden of proof to establish, through a “circumstance specific” test, that the counts related to a single offense. *Matter of Davey* 26 I. & N. Dec. 37 (BIA 2012) (the phrase “a single offense involving possession for one’s own use of thirty grams or less of marijuana” calls for a circumstance-specific inquiry into the character of the alien’s unlawful conduct on a single occasion, not a categorical inquiry into the elements of a single statutory crime. An alien convicted of more than one statutory crime may be covered by the exception to deportability for an alien convicted of “a single offense involving possession for one’s own use of thirty grams or less of marijuana” if all the alien’s crimes were closely related to or connected with a single incident in which the alien possessed 30 grams or less of marijuana for his or her own use, provided

marijuana. And that waiver is discretionary. Further, unless the offense was over fifteen years old, the waiver requires a threshold factual showing of risk of “extreme hardship” to a qualifying relative—a U.S. citizen or resident spouse, parent, or child—in the event of the denial of the waiver, prior to the officer or immigration judge considering the exercise of their discretion.

Once an immigrant is admitted to the United States, they remain subject to strict rules regarding controlled substance convictions.⁴⁰ The only non-deportable drug offense is simple possession of less than thirty grams of cannabis. A second possessory offense triggers removability, as does any conviction relating to any drug other than cannabis and any offense that is not “possessory” in nature.

Separately, the INA makes deportable any drug offense classified as an “aggravated felony,”⁴¹ defined as “illicit trafficking in a controlled substance”—a term not explicitly defined in the statute or, as yet, by the Supreme Court (as discussed, *infra*), other than being “commercial in nature.”⁴² The aggravated felony definition also includes any “drug trafficking crime,” defined as an offense (including an analogous state offense) that is felony under the federal Controlled Substances Act.⁴³ Of course, under this counter-intuitive system, some of those “drug trafficking” crimes are not trafficking at all.

There are two preferred ways for curing a controlled substance conviction. First, if the immigrant has had their residency for over five years and had been in the United States for seven years—subsequent to a lawful entry in any visa status *prior to* the date of the commission of a disqualifying crime—they may request discretionary relief, but only if they have no offense that is considered an aggravated felony. Thus, for purposes of the present discussion, any drug offense within seven years of a first admission into the United States will disqualify relief. Any federal drug felony (or the state equivalent thereof), or commercial offense also will disqualify.

Second, if the conviction date is prior to April 24, 1996, different rules apply, as the offender is grandfathered into a scheme that existed prior to the amendments

that none of those crimes was inherently more serious than simple possession.”).

⁴⁰ INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B), Controlled substances

(i) Conviction

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.

⁴¹ See INA § 101(a)(43)(B), 8 U.S.C. 1101(a)(43)(B) (enumerating the aggravated felony “illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18”).

⁴² See Lopez, *supra* note 4.

⁴³ See *id.*

to the INA via the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), in which deportability was expanded and discretionary relief from removal was restricted.⁴⁴

Finally, all of this changes if the immigrant travels abroad at any time before they naturalize. Upon her return, she becomes re-subjected to the higher test of inadmissibility.⁴⁵ For example, a cannabis possession offense (i.e. simple possession, under thirty grams) that did not trigger deportability now causes inadmissibility. Further, if the commission of that offense was within the first seven years of her initial entry to the U.S., it now bars cancellation of removal, under the “stop-time” rule.⁴⁶ In this instance, the immigrant’s only recourse is the INA § 212(h) waiver of inadmissibility, which in the case of lawful permanent residents has a “stop-time” rule that requires seven years of resident status, but “runs” until the initiation of proceedings. Thus, some residents may be eligible for this waiver (and its heightened requirement of showing “extreme hardship, prior to a discretionary consideration) who are not eligible for cancellation of removal, under that different “stop-time” rule (tolling at commission of the offense).

Unfortunately for the immigrant, this issue dovetails with the modern detention scheme. Congress approved a system of mandatory detention in IIRIRA which, after two years of delays, went into effect on October 8, 1998.⁴⁷ Under this mandate, immigrants “arriving” at the border found inadmissible for criminal reasons must be detained and are ineligible for bond.

III. IMMIGRATION 201: THE “CATEGORICAL APPROACH” FOR DETERMINING WHETHER AN OFFENSE TRIGGERS A REMOVAL CONSEQUENCE.

Based on the harsh realities of the immigration law, after 1996, more and more immigrants find themselves dependent upon hyper-technical arguments related to the examination of statutes, via the “categorical approach” (an elements-based test,

⁴⁴ See INA § 240A(a), 8 U.S.C. § 1229b(a) Cancellation of Removal (the post-1996 program for discretionary relief from removal, requiring five years of lawful permanent residency, seven years continuous residence *in any status* subsequent to any entry (with the clock starting at admission and stopping at commission of a deportable offense), and no “aggravated felony;” *c.f.* INA § 212(c) (repealed), codified at 8 C.F.R. § 212.3, which before 1990 permitted waiver of any offense and after 1990 permitted waiver of any offense with less than a five year sentence served, so long as the permanent resident had maintained a continuous domicile in the United States for seven years prior to the date of the adjudication of the waiver request).

⁴⁵ See INA § 101(a)(13)(c) (enumerating scheme where permanent residents re-become vulnerable “arriving aliens” after travel).

⁴⁶ A further question recently resolved by the Supreme Court, approved of *hypothetical* (non-factual) inadmissibility serving to trigger stop-time. See *Barton v. Barr*, 140 S. Ct. 1442 (2020) (Whether a lawfully admitted permanent resident who is not seeking admission to the United States can be “render[ed] . . . inadmissible” for the purposes of the stop-time rule.).

⁴⁷ *Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999).

in which the state statute of conviction must necessarily match each element of a generic federal standard),⁴⁸ in order to prevent certain removal or establish eligibility for relief. Again, this requires close analysis of state crimes when compared to a federal standard. If the elements of the state offense are not *necessarily* the equivalent of the generic standard, the offense escapes federal immigration treatment.⁴⁹ Over the years, it has become bedrock principle that the Court does not prioritize state definitions over uniform federal standards derived from the statutory text and prevailing national norms.

⁴⁸ See, e.g., *Taylor v. United States*, 495 U.S. 575 (1990); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016) (in perhaps the best explanation of the technique, reiterating that the inquiry is one of strict “elemental” nature, without regarding to underlying facts:

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. Distinguishing between elements and facts is therefore central to ACCA’s operation. ‘Elements’ are the ‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction.’ At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty. Facts, by contrast, are mere real-world things—extraneous to the crime’s legal requirements. (We have sometimes called them ‘brute facts’ when distinguishing them from elements.) They are ‘circumstance[s]’ or ‘event[s]’ having no ‘legal effect [or] consequence’: In particular, they need neither be found by a jury nor admitted by a defendant. And ACCA, as we have always understood it, cares not a whit about them. 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.).

See also *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017) (explaining that to determine the generic federal offense for comparison in the categorical approach, congressional understanding of a term it used is surmised by looking to prevailing norms throughout the states).

⁴⁹ See *Taylor*, *supra* note 48, at 590 (in the foundational case on this subject, this Court established why the Eleventh Circuit was there wrong to defer a state standard: “It seems to us to be implausible that Congress intended the meaning of “burglary” for purposes of § 924(e) to depend on the definition adopted by the State of conviction.”).

Repeated precedent of the Court, applying *Taylor*, further illustrates the fallacy of the various Circuit’s willingness to eliminate elements of “generic” crimes in order for state offenses to trigger federal sentencing treatment. For example, under some Circuits’ logic, a federal enhancement for “burglary” would apply to state offenses that lacked elements of “unlawful entry” or a necessary relation to a “structure,” if Congress did not explicitly enumerate elements of “burglary” when it utilized the term. In addition to *Taylor*, this Court rejected those ideas in *Descamps v. United States*, 570 U.S. 254 (2013) (California burglary, not requiring unlawful entry) and *Mathis v. United States*, 136 S.Ct. 2243 (2016) (Iowa burglary, allowing non-“structure” locus of offense), both of which held that a state offense must match the elements of the federal generic crime to trigger sentence enhancement. Similarly, federal deportability as “aggravated felonies” would attach to state simple possession cases, if the state treated this conduct as a felony. As discussed, the Supreme Court rejected that state-centric logic in *Lopez*.

Remarkably, thus far, every post-IIRIRA drug case to reach the Supreme Court has been resolved in favor the immigrant, proving a trend—regardless of administration—that the Department of Justice tends to overreach in this context, erroneously assigning removability in an impermissibly over-expansive reading of the INA.

In the “aggravated felony” context, the Supreme Court has unambiguously held that to be a “drug trafficking crime” (a term of art both torturing semantics and including every federal drug-related felony, regardless of whether “trafficking” is involved), a state offense must necessarily be the equivalent of a federal felony, regardless of the state punishing scheme.⁵⁰ The Court later held that this could not be based on a “hypothetical” prosecution, reiterating that the categorical inquiry is regarding the elements of the statute charged, not what crime theoretically *could* have been charged.⁵¹ The Court expanded this logic to the inverse. Thus, because the federal statute treats *almost* all “delivery” offenses as felonies, but has a limited exception (for social sharing of a small amount of cannabis for no remuneration), a state offense that lacks that same exception will necessarily be over-inclusive and fail to trigger aggravated felony treatment.⁵² Finally, the Court held that the drug involved in the conviction must necessarily relate to one in the federal controlled substance act and where the drug’s identity is ambiguous, the offense may avoid immigration treatment at all.⁵³ Outside of the paraphernalia context, however, the identity of the controlled substance is typically an element of the offense.⁵⁴

⁵⁰ See *Lopez*, *supra* note 4.

⁵¹ See *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (rejecting theory that two separate state possessory offenses, combined, could trigger aggravated felony treatment as the equivalent of the federal felony of recidivist possession, where the federal “recidivist” offense—the one possessory offense the federal government treats as a felony—has an *element* of the existence of a prior conviction, but the state offense did not).

⁵² See *Moncrieffe*, *supra* note 4 (rejecting Georgia delivery offense as “drug trafficking” (federal felony) aggravated felony, where federal CSA has carve-out for misdemeanor treatment of social sharing of small amount of marijuana for no remuneration, but Georgia does not, i.e. the state treated *all* delivery offenses as felonies, so was overinclusive).

⁵³ See *Mellouli*, *supra* note 4 (holding that where a Kansas paraphernalia conviction did not require the identification of the specific drug involved—just that the conviction related to “a controlled substance” as defined by Kansas—and where the Kansas schedule of controlled substances was broader than the federal CSA, the elements of the paraphernalia offense categorically failed to establish the offense necessarily violated the federal CSA and thus escaped immigration consequences). Since 1965, the BIA has also recognized that the immigration consequences triggered by drug convictions and controlled substances offenses listed in the INA, reach only those substances that are regulated by the federal law. See *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965) (terminating proceedings because conviction was based on state law that included some drugs not penalized as narcotics under federal law).

⁵⁴ See *Guillen v. U.S. Att’y Gen.*, 910 F.3d 1174 (11th Cir. 2018) (holding that the identity of a controlled substance is an element of an offense where a state defendant may be charged with two counts of possessing different drugs, in a single indictment relating to a single set of facts (i.e. having two types of illegal drugs in one’s pocket at the same time is two crimes, not one)). Citing *United States*

Determining if this is true, in a particular state scheme, requires analysis of state appellate decisions, often not an easy task.⁵⁵

IV. CRIMMIGRATION: MODERN PROBLEMS (ADVANCED STUDIES)

With past as preamble, we arrive back at the thesis of the article, a framing of remaining modern novel theories for the uniform and accurate application of the CSA and the INA to satisfy congressional intent and generate proper outcomes for convicted immigrants. The author teaches and litigates from Florida, which happens to have been the epicenter of two major schools of legal challenges that have national importance. The former, regarding the equivalency of drug definitions, reached its agency apex in Summer 2019, with the BIA rendering a published decision rejecting a theory that dissonance between the Florida and federal cannabis definitions should result in non-deportability for the immigrant. This topic has now launched into the Circuit Courts, and proper outcomes are discussed, *infra*.

The latter topic has to do with proper determination of whether drug-related deportation grounds must be construed as having a *mens rea* requirement. This issue has roots in the 1914 Harrison Narcotic Tax Act, but in 2014, the BIA revived and invoked archaic pre-CSA standards to reject immigrants' arguments that *mens rea* is an essential element for "aggravated felony" treatment. In a parallel case, the Supreme Court has taken up the question—of the significance of *mens rea* as an element of a state offense, in order to trigger federal consequences—in the context of an ACCA sentencing enhancement, in *Shular v United States*.⁵⁶ With briefing,

v. Dixon, 509 U.S. 688 (1993), the court reasoned that because double jeopardy prohibits being charged twice for the same offense, the identity of the substance must be an element, concluding, "in short, because the Florida Supreme Court has told us that the elements of possession of marijuana and possession of a hallucinogen are different, it has implicitly told us that the identity of the substance possessed is an element of possession."); *see also* Bah v. Barr, 950 F.3d 203, 209 (4th Cir. 2020) (finding similarly, citing Virginia case where "the defendant was prosecuted for two counts of drug possession where he had possessed a single capsule that contained two controlled substances, heroin and fentanyl.").

⁵⁵ *See Bah, supra* note 54, at 212 (Thacker, J., dissenting) (Revealing the complexity of answering this question, particularly where state precedent is underdeveloped or ambiguous: "In my view, the majority opinion improperly truncates the proper analysis here at the very first step, by concluding that Virginia courts have clearly spoken on the issue at hand, that is, whether controlled substance identity is an element of Appellant's offense of conviction. In support of the opinion that controlled substance identity is an element, the majority leans on Virginia case law. But, respectfully, a single *ambiguous* published state appellate court decision paired with an *unpublished* appellate memorandum decision do not clearly state anything definitive. To the contrary, here, where we cannot be certain as to whether the specific identity of a controlled substance is an element of Virginia law, we cannot determine that Petitioner's prior offense is a categorical match to the INA-defined offense. Therefore, we cannot allow the Virginia offense to trigger federal immigration consequences. This is too harsh a consequence in the face of such ambiguity.").

⁵⁶ *Shular v. United States*, 140 S.Ct. 779 (2020).

argument, and decision in *Shular* coinciding with the drafting of this article, the present moment constitutes a last chance to pontificate on formerly-valid theories and first chance to reframe the decision and its revised implications for immigrants.

A. Federalism Means That States Are Free to Create Their Own Unique Definitions of Controlled Substances, but Shouldn't These Choices Then Be Acknowledged and Credited by the Federal Government?

Throughout the INA, wherever Congress references “controlled substances,” it does so very specifically, by cross-referencing its own list of drugs, which is “defined in section 802 of title 21.”⁵⁷ As discussed, the Supreme Court has taken up the question of state statutes that are *silent* on the identity of the controlled substance involved in a conviction. In that context, the element of the crime is merely that the conduct related to *any* controlled substance (typically in a paraphernalia prosecution, as in *Mellouli*, *supra*, in which the facts related a drug stored in the defendant’s sock), as defined by the state. Thus, it is relevant whether the state schedules of controlled substances align with the federal schedules. If a state’s schedules are broader—over-inclusive in any way—the immigrant gets the benefit of a presumption that their conviction rested upon this “least culpable” conduct, i.e. the controlled substance *not* on the federal schedules, and thereby avoid immigration consequences. The underlying facts do not matter, because this is a legal question.

The federal immigration scheme has an interest in uniformity, or at least having a national minimum legal floor which must be reached before a state offense triggers a federal consequence. Unfortunately, as the 50 states have legislated for themselves in the 50 years since the passage of the CSA, the national non-uniformity in criminal definitions is significant. States have adopted ingenious and interesting variations on every aspect of crimes, based on each state’s respective local interests. These variations extend past the lists of controlled substances, down to the minutiae of how

⁵⁷ See e.g. 8 U.S.C. §1182(a)(43)(B) (the type of drug subject to the aggravated felony definition); 8 U.S.C. §1182(a)(2)(A)(i)(II) (inadmissibility for “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)”; 8 U.S.C. §1227(a)(2)(B)(i) Conviction (“[a]ny 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.”); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 100 Stat. 3207-1, 3207-47 (1986) (codified as amended at 8 U.S.C. 1182) (which “substituted ‘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)’ for ‘any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate.”)).

each controlled substance is defined. This section addresses the consequence of state election to adopt unique definitions of common drugs, and how and why that should impact immigration consequences.

B. The Cocaine Example: When a State Makes a Chemically Distinct (and Highly Technical) Definition for Purposes of the State Offense

In 2018, the BIA singled out an aggressive challenge to deportability predicated upon a Florida conviction for possession of cocaine. The BIA published a call for *amicus curiae* parties to join in a round of supplemental briefing.⁵⁸ The respondent disputed that his conviction for violation of Florida Statute §§ 893.13(6)(a) and 893.101 constituted a controlled substances offense, i.e. that it related to a controlled substance, “as enumerated in 21 U.S.C. § 802,” the link between the federal immigration laws and the federal CSA.⁵⁹ Of course, his conviction record established that he was convicted of something Florida called “cocaine,” but the question was whether it necessarily was *cocaine*.

The theory built upon the Supreme Court’s unambiguous holding in *Mellouli* that removability is not triggered where “the state law under which he was charged categorically ‘relat[ed] to a controlled substance,’ but was not limited to substances defined in [21 U.S.C. §802].”⁶⁰ Florida defines the controlled substance of “cocaine” in a manner that is distinctly broader than the federal definition. Because removal grounds are “limited to substances ‘defined’ in 21 U.S.C. § 802” and there is no ambiguity that the word “defined” should be strictly construed, the immigrant argued that the Florida cocaine offense is not analogous to the federally defined controlled substance. The overbreadth would dictate that the immigrant would win.⁶¹

Florida Statutes establish a state definition of cocaine as: “Cocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine.”⁶²

⁵⁸ Ultimately, briefs in support were filed by the American Immigration Lawyers Association (AILA) and the George Washington University School of Law Immigration Clinic; a brief in opposition was filed by the restrictionist group Federation for American Immigration Reform (FAIR). Copies in possession of author.

⁵⁹ See 8 U.S.C. § 1182 (a)(2)(A)(i)(II).

⁶⁰ *Mellouli*, 135 S.Ct. at 1988.

⁶¹ If the BIA reviewed the Florida definition of a “cocaine” and determined that the statute categorically included “cocaine” that is outside the federal definition, the “least culpable conduct” test would dictate the result: the Florida offense is categorically not a “controlled substance” offense as defined by the CSA. See also *Moncrieffe*, 569 U.S. at 1684 (“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.”).

⁶² Fla. Stat. § 893.03(a)(4) (2019) (emphasis added).

In contrast, the Federal statute defines cocaine as: “Cocaine, its salts, optical and geometric isomers, and salts of isomers.”⁶³

The argument was that a plain reading of the statute establishes that Florida proscribes a class of substances broader than the federal definition, namely “compounds,” “derivatives,” and “preparations” of cocaine, that the Florida statute contemplates as distinct from “isomers” and “salts.” Because the statute uses the conjunctive “and,” the statute clearly contemplates that the “salt, compound, derivative, or preparation” is a separate, non-redundant class of substances that is distinct from “stereoisomers.” Similarly, it would render the distinction “salt, compound, derivative, or preparation” superfluous, if all four categories constituted “salts.”

Even if he threaded this needle, to prevail, the immigrant also had to distinguish the listing of cocaine within the federal drug schedules enumerated at 21 U.S.C. § 812, which are incorporated by reference within 21 U.S.C. § 802. This definition is arguably broader, as it relates to, *inter alia*: “Cocaine, its salts, optical and geometric isomers and salts of isomers [. . .] or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.”⁶⁴

As happened in that case, the immigration judge acknowledged that, even accounting for the broader sweep of the second definition from Schedule II, there is *still* distinguishing language between the federal and the Florida definitions.⁶⁵ Despite that, the judge had dismissed any substantive analysis, opining “the Court firmly believes that Congress does not expect the Court to conduct a comparison of the chemical composition of a cocaine mixture versus the chemical composition of a cocaine derivative. *Immigration Judges are not chemists.*”⁶⁶

That may be the case, but of course, chemists *are* chemists, so rather than rely on the mere semantics of the respective definitions, the immigrant filed an explanation of a chemist, Dr. Douglas Heller, PhD,⁶⁷ explaining and illustrating (complete with molecular modeling graphics) the reasons by which the Florida definition is overinclusive relative to the federal definition, particularly as it relates to various isomers.

⁶³ 18 U.S.C. § 802(17)(D).

⁶⁴ 21 U.S.C. § 812, Schedule II(a)(4).

⁶⁵ *Matter of C-* (unpublished), transcript on file with the author, who co-represented the case at the trial and BIA, including the aforementioned round of supplemental briefing (emphasis added).

⁶⁶ *Id.*

⁶⁷ PhD, University of Chicago; author of textbook, *Visualizing Everyday Chemistry* (John Wiley and Sons, 2016).

As Prof. Heller explained, there are aspects of the definitions that align, but others that do not:

1. [T]here is no distinguishing between the two definitions on the basis of salts;
2. [T]he Florida definition provides for *any* derivative of cocaine whereas the federal definition does not. A large number of compounds, therefore, fall under the Florida definition of cocaine but not under the federal definition;
3. The federal definition of cocaine specifies “optical and geometric isomers” whereas the Florida definition specifies “stereoisomers”. Stereoisomers come in two varieties: enantiomers, also known as optical isomers, and diastereomers, of which geometric isomers are a subtype, as shown in the diagram at the top of the next page. Since there are diastereomers that are not geometric isomers, the Florida definition of cocaine, which encompasses all stereoisomers of cocaine, is broader than the federal definition, which encompasses optical isomers and geometric isomers (a subtype of diastereomer)[.]”

Prof. Heller’s findings were consistent with the peer-reviewed evidence regarding scientific nomenclature cited by *amici*.⁶⁸

Despite all objective evidence supporting the technical overbreadth of the Florida statute, the BIA still rejected the argument, but in an unpublished opinion. The BIA noted that the defense theory was reminiscent of the “isomer defense”⁶⁹ which Congress had taken steps to undermine, in 1984, by amending the definition of cocaine to incorporate the various isomers.

Admittedly, the scientific discussion is a difficult one, so the cocaine example may not have been the ideal test case for the theory that state deviation from CSA definitions should have consequences. Put another way, as the BIA noted,

[T]he chemist conclusively states that Florida’s definition of cocaine is broader than cocaine, but gives no examples of an actual isomer that is a diastereomer but not a geometric isomer of cocaine [. . . Further,] the record does not establish a realistic probability, not a theoretical

⁶⁸ D. Burke and D.J. Henderson, *Chirality: a blueprint for the future*, *British J. of Anesthesia* 88 (4): 563-76 (2002) (illustrating fundamental distinctions in nomenclatures, i.e. “chirality” (e.g. scientific terms of art, assigned the use of the terminology of the International Union of Pure and Applied Chemistry (IUPAC)) of various distinct chemical isomers), to prove, *inter alia*, that the Florida inclusion of stereoisomers establishes that the Florida scheme is broader than the federal scheme, which includes the narrower categories of “optical and geometric isomers.”

⁶⁹ See *United States v. Ross*, 719 F.2d 615 (2nd Cir. 1983) (accepting that cocaine’s former definition, i.e. the § 802 definition, *supra* note 63, lacked reference to specific isomers and was susceptible to challenge).

possibility, that the State would apply its statute to the non-generic conduct.⁷⁰

C. The Cannabis Example (Stalks, Salts, and Seeds): When a State Abandons the Federal Definition in an Easily Comprehensible Way

Fortunately, in parallel litigation the BIA was forced to confront an easier question to visualize: the consequences of Florida's distinct definition of cannabis. Unfortunately, the BIA ruled against that immigrant as well, in the published decision *Matter of Navarro Guadarrama*.⁷¹ The BIA there also noted that Navarro had failed to show it was realistic—through an exemplar decision, his own or another case—that the State would prosecute and convict *solely* based on non-generic substance.⁷²

“Cannabis” presents an ideal test case for the federal courts to address this question of dissonant drug definitions. Florida formerly shared the CSA definition, but in 1979 departed from the federal (and Uniform Controlled Substances Act) definitions. Florida now categorically defines “cannabis” in broader terms than used at 21 U.S.C. § 802. Florida courts unambiguously acknowledge this change.⁷³ The new language is obvious and purposeful:

“Cannabis” means all parts of any plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin.

The federal substance is enumerated as follows:

(16) The term ‘marihuana’ means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. *Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature*

⁷⁰ See *Matter of C-* (unpublished).

⁷¹ *Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019).

⁷² *Id.* at 562-563.

⁷³ See *c.f.* *Purifoy v State*, 359 So.2d 446 (Fla. 1978); *Jordan v. State*, 419 So.2d 363 (Fla. Dist. Ct. App. 1982).

*stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.*⁷⁴

Under Florida's former scheme (until 1979, when it still conformed with the CSA definition), the police had to separate the legal parts of the plant from the prohibited parts and weigh the contraband, prior to submitting to case for prosecution. This is no longer so. One might assume that political determinations, like Florida's, to adopt a "special" definition beyond the prevailing national norm, must be reflected in the outcomes in immigration proceedings.⁷⁵ The BIA would say "no."

If there is a silver lining to *Navarro*, it is that if an immigrant presents an exemplar prosecution that explicitly related to "stalks" or "stems," they would escape immigration treatment, even under *Navarro*'s holding. A criminal defense attorney could aid in shaping such a specific plea.⁷⁶ Further, just as the INA requires a conviction of over 30 grams of cannabis to trigger deportability, Florida makes distinctions in weight, resulting in misdemeanor (20 grams or less) and felony (over 20 grams) charges. The BIA acknowledged in *Navarro* that "[i]n addition to expanding the definition of cannabis, the legislature increased the misdemeanor/felony threshold for simple possession from 5 to 20 grams to make allowances for the possible weight of stalks and stems."⁷⁷ Being as Florida and the BIA agree that any weight of cannabis includes non-federally proscribed parts of the plant, it would seem obvious that an immigration judge could never find clear and convincing evidence that a conviction *necessarily* related to over 30 grams of federally-defined cannabis. Any weight would be adulterated in non-criminal material. Thus, while an immigrant might never be able to prove a conviction *only* relates to federal cannabis (for inadmissibility purposes, where *any* violation bars admission), the government could similarly never meet the threshold showing of 30 grams (for deportability, where a first offense escapes removal consequences, if under this limit), since Florida law enforcement has to always weigh the good, mixed with the bad, so the exact ratio is always ambiguous.⁷⁸

⁷⁴ 21 U.S.C. § 802(16) (emphasis added).

⁷⁵ See *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017) (addressing that a state offense is "special" relative to the majority-state generic standard, it categorically fails to satisfy that standard and serve as basis for immigration consequence).

⁷⁶ Indeed, defense counsel likely needs to try to cultivate this outcome, given their need to effectively counsel and advocate for their immigrant client in a way informed by the fragility of immigration status. See *Padilla v. Kentucky*, 559 U.S. 356 (2010) (finding constitutional right to effective criminal counsel extended to accurate advice regarding immigration consequences.).

⁷⁷ See *Navarro Guadarrama*, at 562, n.3.

⁷⁸ This theory, regarding the combined weight of contraband and legal parts of the cannabis plant, has relatively broad applicability. Bermuda, for example, has an irregular definition, as Colorado formerly did. See *Bermuda Misuse of Drugs Act 1972* : 159(1) ("'cannabis' (except in the expression 'cannabis resin') means any plant or part thereof within the botanically designated genus *Cannabis*, but does not include any fiber produced from the stalk of the plant," thereby permitting convictions for

Admittedly, it doesn't really have to be this complicated. The commonsense approach would be to look at the behavior of Florida and similar states. If a state government purposefully broadens a criminal definition to include behavior that the federal doesn't criminalize, the federal government should listen, and not give any full faith and credit to these state decisions. It would be federalism in action.⁷⁹

D. *The Supreme Court Takes on Mens Rea Requirements*

1. The Mind Must Be Culpable for The Act to Be Criminal? A Short History of Drugs and *Mens Rea*, In Statutory Interpretation and Before the Supreme Court

Returning to the title of this article, it may come as a surprise to the reader that the BIA has declared that immigrants are rendered deportable and would-be immigrants are inadmissible based on state controlled substance offenses that lack an element of culpable knowledge by the defendant that they knew they were possessing any illicit substance. This section will explore the intellectual honesty of this position in a variety of contexts. The BIA has published decisions regarding *mens rea* in possessory and "illicit trafficking" aggravated felony charges.⁸⁰ The U.S. Supreme Court presently has *Shular* under consideration.

At issue are the *mens rea* requirements of Subtitle M of the Anti-Drug Abuse Act of 1986, entitled the "Narcotics Traffickers Deportation Act,"⁸¹ which amended the drug exclusion ground in (former) § 212(a)(23) of the Immigration and Nationality Act ("INA," "Act"), now located at INA § 212(a)(2)(A)(i)(II).⁸² In the same general era, Congress passed the Immigration and Nationality Act Amendments of 1981 (providing a waiver of inadmissibility for a single possessory

ungerminated seeds, etc.); C.R.S. 18-18-102(18) (permitting convictions for stalks).

⁷⁹ It also would be consistent with every Supreme Court addressing drug deportability. *See e.g. Lopez, Carachuri-Rosendo, Mellouli, Moncrieffe.*

⁸⁰ *See Matter of Esqueda; Matter of L-G-H-.* *Matter of L-G-H-* was taken up by the BIA immediately adjacent to the BIA being reversed by the Eleventh Circuit in *Matter of Donawa*, on account of the Florida "sale or delivery" statute being rejected as the equivalent of the federal offense, based on the *mens rea* requirement. The BIA considered the meaning of "illicit trafficking in a controlled substance, and finding it ambiguous, imputed a *mens rea* requirement. The BIA failed to canvas jurisdictions to determine the prevailing norms at the time of modification of the INA, as it had done in every other aggravated felony that it has considered.

⁸¹ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §100 Stat. 3207-1, 3207-47 (1986) (codified as amended at 8 U.S.C. §1182).

⁸² 8 U.S.C. §1182(a)(2)(A)(i)(II) (inadmissibility triggered by: "[A] violation of, or a conspiracy 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 102 of the Controlled Substances Act (21 U.S.C. § 802)).").

offense involving cannabis),⁸³ and the Immigration Act of 1990,⁸⁴ but neither of these statutes affirmatively addressed *mens rea* requirements, although these statutes also impacted the immigration consequences of controlled substances convictions.

Federal law has evolved to include *mens rea* requirements in drug offenses. In 1922, when the sale and consumption of cocaine was regulated incidentally via a tax statute (in what, with help of retrospect, were curiously permissive times for drug use), the Harrison Narcotic Tax Act (1914),⁸⁵ the Supreme Court permitted “drug” (really tax violation) convictions in the absence of *mens rea*.⁸⁶ The Supreme Court has never blindly adhered to its holding in *Balint*. Instead, the Court has critically discussed it and explicitly limited its application to the context of the times in which it was decided, noting “the conclusion reached in [] *Balint* [] has our approval and adherence for the circumstances to which it was there applied.”⁸⁷

By 1952, the Supreme Court concluded that *Balint* was legitimate only because at the time, the regulation of controlled substances was novel. Congress was thus legislating on a blank slate, rather than against a well-developed backdrop of state law jurisprudence that could inform its intent:

Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite

⁸³ Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 95 Stat. 1611, 1616 (1981) (codified as amended in 8 U.S.C. §1182).

⁸⁴ Immigration Act of 1990, Pub. L. No. 101-649, § 104 Stat. 4978 (1990) (codified as amended in 8 U.S.C. 1101).

⁸⁵ See generally Harrison Narcotics Tax Act of 1914, Pub. L. No. 63-223, § 38 Stat. 785 (1915) (regulated sale of, but not criminalizing, cocaine); see also Lisa N. Sacco, Cong. Research Serv., R43749, *Drug Enforcement in the United States: History, Policy, and Trends* 3 (2014) (“Under the Harrison Act, practitioners were authorized to prescribe opiates and cocaine[.]”).

⁸⁶ See *Balint*, at 251-52.

⁸⁷ *Morissette*, at 260. As the Eastern District of New York has explained, [T]he statute [at issue in *Balint*] must be understood in context. It predated the era during which all possession and sale of drugs came to be regarded as serious crimes. Aside from its penalty, it fairly can be characterized as a regulation. It required manufacturers and distributors of certain narcotics [including opium and cocaine] to register with the IRS, pay a special tax of *one dollar* per year and record all transactions on forms provided by the IRS.

Id. §§ 1-3 and 8.

As a case about strict liability and narcotics, *Balint* has no application today. Prior to the Harrison Act, narcotics had been freely available without prescription. This change by tax statute was a first modest transitional step towards the present complex and serious criminal statutes dealing with narcotics offenses. They have come to be treated as among the most serious of crimes in the federal criminal code. See, e.g., 21 U.S.C. §§ 960 (mandatory minimum sentences as high as 10 years for certain drug offenses); 848(e) (possible sentence of death for drug offenses in which killing results). *United States v. Cordoba-Hincapie*, 825 F.Supp. 485, 507 (E.D.N.Y. 1993) (emphasis added).

contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act . . . [T]he offense before this Court in the *Balint* [] case [was] of this latter class⁸⁸

By 1986, Congress was no longer legislating against a blank slate when it came to criminalizing controlled substance violations. In the 64 years that had passed between *Balint* (1922) and the 1986 amendments to the ACCA, states and the federal government had developed a wide-ranging compendium of criminal laws governing controlled substance offenses. As the *Morissette* court noted, in 1952:

Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.⁸⁹

In modern criminal and immigration legislation, Congress was well aware that drug offenses included a *mens rea* element, as Congress itself made clear by 1970 when it passed the federal CSA and President Nixon then subsequently exercised the authority under the CSA to create the Drug Enforcement Agency, in 1973, exclusively to enforce those laws.⁹⁰

Unfortunately, instead of using these modern norms that had informed Congress, the BIA has done the opposite. In the possessory context, in 1994, the BIA based its decision in *Matter of Esqueda* on the public welfare cases, making deportable drug offenses lacking a *mens rea* element and rejecting arguments that *mens rea* was a necessary element of an offense.⁹¹ There is no argument that the aged cases the BIA cited, *Balint* (1922), and *Shevlin-Carpenter* (1910) were (or are) relevant, accurate, and not superseded by more pertinent statutes. The counterargument is simply overwhelming, evidenced by the Uniform Controlled Substances Act, the laws of 48 state jurisdictions, and the federal CSA, all of which establish a requirement of culpable *mens rea* for possessory controlled substance offenses.

⁸⁸ *Morissette*, at 262.

⁸⁹ *Morissette*, 342 U.S. at 263.

⁹⁰ Sacco, *supra* note 83, at 5-6.

⁹¹ See *Matter of Esqueda*, at 861-862 (while addressing the immigration consequences of the California scheme that was merely *silent* regarding *mens rea*, the BIA mused upon the subject of the immigration consequences of a presumptive scheme as well.).

Of course, the modern criminal scheme regarding controlled substances has long superseded its primeval beginnings and mere “incidental purpose” to tax law, fully mooted the utility of *Balint*.⁹²

Shular presented a great vehicle to correct the record. It arose in the federal sentencing context, which shares its analytical jurisprudence with immigration cases.⁹³ As further evidenced by the Uniform Controlled Substances Act and the laws of all 50 state jurisdictions (in 1986), the “widely accepted definition”—at the time that Congress created the § 924(e)(2) 15-year minimum sentence for those previously convicted of “serious drug offenses”—was the universal requirement of culpable *mens rea* for all elements in controlled substance trafficking offenses.⁹⁴ It was under this understanding of the uniform national landscape, in 1986, that Congress enacted the term “serious drug offense” in § 924(e)(2).

2. Shouldn’t You Have to *Mean* to Commit a Drug Offense? The Florida Anomaly: The Road to *Shular*

“[T]he requirement of some *mens rea* for a crime . . . is the rule of, rather than the exception to, Anglo-American criminal jurisprudence.”⁹⁵ When it comes to state statutes penalizing the sale of controlled substances, Florida is decidedly the exception.⁹⁶ Among the States, Florida alone presumes a culpable *mens rea* regarding the illicit nature of a controlled substance.⁹⁷ Under this statute, innocence

⁹² *Balint*, 258 U.S. at 253 (emphasis added). It further must not go unremarked upon that *Balint* is a thinly reasoned decision, remarkable for its brevity and oversimplification of the issues presented. See *Morrisette*, 342 U.S. at 252 n.10 (1952) (acknowledging “overstatement” by Chief Justice Taft, in *Balint*).

⁹³ See, e.g. *Descamps*, at 266 n.3 (Citing *Moncrieffe*, an immigration case, to support reasoning in decision regarding the ACCA); *Mathis*, at 2255 n. 5 (same); *Shular*, at 783 (relying on analysis in immigration cases *Esquivel-Quintana*, 137 S.Ct. at 1572 (2017), and *Kawashima v. Holder*, 565 U.S. 478, 132 S. Ct. 1166, 182 L. Ed. 2d 1 (2012)).

⁹⁴ See Controlled Substances Act of 1970; the federal Controlled Substances Analogue Enforcement Act of 1986 (both requiring element of *mens rea* in federal offenses); see also *Dawkins v. State*, 313 Md. 638 (Md. 1988), *State v. Adkins*, 96 So.3d 412 (Fla. 2012), *State v. Cleppe*, 96 Wn.2d 373 (Wash. 1981); *State v. Bradshaw*, 152 Wash. 2d 528, 541, 98 P.3d 1190, 1196 (2004) (referencing or cataloging the rapid adoption, by 48 states, of the Uniform Controlled Substances Act, and cataloguing uniform *mens rea* requirement in all 50 states, prior to Florida’s changes in 2002, in which the sole statutes lacking *mens rea* requirements were for the crimes of possession in Washington and North Dakota).

⁹⁵ *Staples v. United States*, 511 U.S. 600, 605 (1994).

⁹⁶ See *id.*

⁹⁷ Fla. Stat. § 893.101 (1-3) (2002) states the following:

(1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So.2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.

is an affirmative defense, which triggers a reiterated presumption of guilt if raised. Since Florida created this unique scheme in 2002, the statute has been the subject of extensive litigation in the constitutional,⁹⁸ criminal,⁹⁹ and immigration¹⁰⁰ arenas. These have taken on national importance, based on being the subject of published decisions by the BIA and Eleventh Circuit, and now, a pending decision of the U.S. Supreme Court.

It is uncontroverted that Florida is the only jurisdiction in the country to presume culpable *mens rea* regarding the illicit nature of a controlled substance in criminal prosecutions for drug sales.¹⁰¹ It also is unambiguous. Since the scheme's enactment in 2002, Florida courts have predictably and consistently reiterated that culpable *mens rea* of illicitness is always presumed. To prove a cocaine possession charge, the state must prove that the defendant knew that he possessed a substance, which was in fact cocaine, but the state does not have to prove that the defendant knew it was cocaine.¹⁰² Instead, the defendant may raise by affirmative defense the claim that he did not know the substance was cocaine. Similarly, a Florida defendant can concede all the elements of the offense, i.e., possession of a specific substance and knowledge of the presence of the substance, and still be able to assert the defense that he did not know of the illicit nature of the specific substance.¹⁰³

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- (2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.
 - (3) In those instances, in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

⁹⁸ See *Shelton v. Sec'y, Dep't of Corr.*, 691 F.3d 1348, 1354–55 (11th Cir. 2012) (reversing the district court's finding of unconstitutionality and holding that under AEDPA, deference to the state supreme court and state legislature are required absent controlling Supreme Court precedent); see also *State v. Adkins*, 96 So.3d 412 (Fla. 2012) (rejecting due process challenge).

⁹⁹ *United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014) (internal citation omitted).

¹⁰⁰ See generally *Donawa; Choizilme*.

¹⁰¹ See, e.g., *Adkins*, 96 So. 3d at 423 n.1 (Fla. 2012) (“A national survey reveals that Florida's drug law is clearly out of the mainstream. Except for Washington, which eliminates *mens rea* for simple drug possession offenses, and now Florida, the remaining forty-eight states require knowledge to be an element of a narcotics possession law, either by statute or by judicial decision”); *Dawkins*, at 647 n.8; 649 n.10 (noting broad adoption of Uniform Controlled Substances Act and canvassing jurisdictions with explicit *mens rea* requirements).

¹⁰² See, e.g., *Miller v. State*, 35 So.3d 162, 163 (Fla. Dist. Ct. App. 2010).

¹⁰³ *Burnette v. State*, 901 So. 2d 925, 927 (Fla. Dist. Ct. App. 2005).

The Circuits have recognized that Florida's reversal of the *mens rea* presumption in Fla. Stat. § 893.101 clashes with the federal offense of sale of a controlled substance, 21 U.S.C. § 941(a).¹⁰⁴ These outcomes are clearly correct, as the Supreme Court in *McFadden* unanimously held that the federal offense *does* have a *mens rea* element requiring that defendants either knew the identity of the drug involved or knew that the substance they possessed (perhaps with the exact identity unknown) was listed on the federal schedules of controlled substances and their analogues.¹⁰⁵

Because the current Florida scheme clashes with both the federal scheme and the schemes of the 49 other states, the implications of this divergence have been and continue to be explored through various litigation. The Eleventh Circuit has addressed two of those questions thus far. First, the court held that the terms “serious drug offense[s]” and “controlled substance offenses” under the Armed Career Criminal Act (“ACCA”) sentencing provision at 18 U.S.C. § 924(e)(2)(A) do not include a *mens rea* element:

No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by either definition. We look to the plain language of the definitions to determine their elements, and we presume that Congress and the Sentencing Commission “said what [they] meant and meant what [they] said.”¹⁰⁶

In other words, the Eleventh Circuit believed that, to impose a *mens rea* requirement, Congress would have had to *affirmatively* say so, which is the complete opposite of six decades (at least) of Supreme Court precedent. Thus, the Circuit found Florida convictions constituted predicate offenses for federal sentencing purposes, notwithstanding the Fla. Stat. § 893.101 elimination of the traditional *mens rea* requirement that contributed to those convictions. In so holding, the Eleventh Circuit failed to apply (or at least distinguish) the Supreme Court's precedent requiring the opposite, as the Court has “repeatedly held that ‘mere omission from a criminal enactment of any mention of criminal intent’ should not be read ‘as dispensing with it.’”¹⁰⁷

¹⁰⁴ See *Donawa*, at 1281 (11th Cir. 2013) (“it is clear that the ‘least of the acts criminalized’ by Fla. Stat. § 893.13(1)(a)(2) does not necessarily violate 21 U.S.C. § 841(a)(1)”). Shortly thereafter, the Fifth Circuit followed suit in *Sarmientos v. Holder*, 742 F.3d 624, 630–31 (5th Cir. 2014).

¹⁰⁵ See *McFadden v. United States*, 135 S. Ct. 2298 (2015); cf. *Miller*, 35 So.3d at 163; *Burnette*, 901 So. 2d at 927. In *McFadden*, Chief Justice Roberts issued a separate opinion suggesting the federal offense requires an *even higher* standard, that “a defendant needs to know more than the identity of the substance; he needs to know that the substance is *controlled*.” See *McFadden*, 135 S. Ct. at 2307 (Roberts, C.J., concurring in part and concurring in the judgment).

¹⁰⁶ See *Smith*, 775 F.3d at 1267.

¹⁰⁷ See, e.g., *Elonis v. United States*, 135 S. Ct. 2001, 2009 (quoting *Morissette*, 342 U.S. at 250).

Next, the Eleventh Circuit held that 8 U.S.C. § 1101(a)(43)(B)'s term "illicit trafficking in a controlled substance," as added to the Immigration and Nationality Act in 1990, also does not require an element of *mens rea* to trigger immigration aggravated felony treatment, accepting the argument that:

[T]here was no reason to believe that Congress intended to impose a specific *mens rea* requirement, and thereby exclude state drug-trafficking crimes from the aggravated-felony definition solely because they did not require knowledge of the illicit nature of the substance involved.¹⁰⁸

In a seemingly assailable opinion,¹⁰⁹ the Circuit deferred to an agency interpretation of the federal statute, rather than defining the statutory term itself, ostensibly per "principles of deference articulated in *Chevron*."

Neither *Smith* nor *Choizilme* offered any further analysis of the statute or any canvassing of the national norms at the time of the enactment of the relevant statute. Of course, in 1986 and in 1990 (the relevant dates for those inquiries), precisely zero (0) jurisdictions—federal or state—reversed the presumption of criminal *mens rea* in drug sale offenses, so Congress could not have imagined a world in which its laws—and heavy sanctions—would be applied to conduct criminalized with no *mens rea* element. It is counter-intuitive to consider that Congress would (or even *could*) *implicitly* take the drastic step to eliminate culpable *mens rea* for predicate convictions when creating the sentencing enhancement for prior "serious drug offenses" in the ACCA or "illicit trafficking offenses" in the INA. As explored, *infra*, this would be counter to decades of Supreme Court precedent.

A culpable mind is so central to Anglo-American jurisprudence that the Court has consistently found that *mens rea* requirements must be read into (and not implicitly read out of) statutes that are otherwise silent regarding scienter.¹¹⁰ The

¹⁰⁸ *Choizilme*, 886 F.3d at 1024.

¹⁰⁹ In *Choizilme*, the absence of a Florida *mens rea* requirement should have led to a holding in favor of the petitioner, at *Chevron* "step one." The Court has recently directed that *Chevron* does not invite agency interpretation at every turn, noting that "the type of reflexive deference exhibited in some . . . cases is troubling." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). The Court has indicated it will not defer to an agency, per *Chevron*, where "the statute, read in context, unambiguously forecloses the [agency's] interpretation." *Esquivel-Quintana*, 137 S.Ct. at 1572 (noting that although a term may not be defined in a specific statutory section, the BIA and the courts should use prevailing definitions of terms to determine what Congress meant, at the time of passing the legislation). In 2016, then-Circuit Judge Gorsuch further explained that proper checks and balances are compromised where courts do not determine the meaning of statutory language, but instead defer to agency interpretation:

The problem remains that *courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them [. . .] [made] by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day.

Gutierrez-Brizuela, 834 F.3d at 1153 (Gorsuch, concurring).

¹¹⁰ *See, e.g.*, *Dean v. United States*, 556 U.S. 568, 575 (2008) (citing *Staples*, 511 U.S. at 606,

Court has further instructed that courts must ordinarily read each phrase in a federal statute enumerating elements of a crime as if the word “knowingly” applied to each element.¹¹¹

The Court has further consistently crafted implicit *mens rea* requirements in a wide variety of federal criminal and civil¹¹² statutes, including firearms offenses,¹¹³ fraud crimes,¹¹⁴ and interstate threats via the internet.¹¹⁵ It was in the latter context that Chief Justice Roberts reiterated “the basic principle that ‘wrongdoing must be conscious to be criminal,’ and that a defendant must be ‘blameworthy in mind’ before he can be found guilty” and that the Court “interprets criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.”¹¹⁶ Of course, in 2015, a unanimous Supreme Court decided *McFadden*, noting that where the federal drug delivery statute was facially ambiguous a *mens rea* requirement implicitly required, so the defendant must be proven to know either the identity or the illicit nature of the substance to satisfy the federal offense.

for the principle that “[s]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.”).

¹¹¹ See *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009) (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring) (applying same in context of transmission of sexually illicit materials), and referencing *Liparota v. United States*, 471 U.S. 419 (1985) (applying the “intent must adhere to each element” concept to food stamp fraud)). *Flores-Figueroa* is particularly instructive because the statute at issue required an element of intentional possession of a false document, but not an element of knowledge that the identification was real (or that it related to a real person), which is dispositive in the criminality of the action. *Flores-Figueroa*, 556 U.S. at 656–57. This is directly analogous to the Fla. Stat. § 893.101 scheme at issue in *Shular*, where a defendant is proven to knowingly have *something*, but is never proven culpable of knowing the identity or illicit nature of that *something*. See, e.g., Fla. Stat. § 893.13(1)(a)(1); cf. Fla. Stat. § 893.101 (1-3).

¹¹² See, e.g., *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 764-66 (2011) (imputing a “willful blindness” requirement into an element of a patent infringement statute that was silent on *mens rea*).

¹¹³ *Rosemond v. United States*, 572 U.S. 65 (2014) (imputing a *mens rea* requirement of knowing that a conspirator would have a gun, in order to be convicted of aiding and abetting a firearm offense).

¹¹⁴ *Loughrin v. United States*, 573 U.S. 351 (2014) (imputing an intent—specifically, the purpose to defraud a bank—to a fraudulent check scheme facially ambiguous on whether the ultimate victim is intentionally a financial institution), but only imputing a lesser-than-full *mens rea* requirement because the statute elsewhere contained a traditional element establishing that the defendant was willfully culpable of reprehensible criminal activity); see also *id.*, at 371 (Alito, J., concurring in part and in the judgment) (critically noting that this aspect of the holding was *dicta* and that the *higher mens rea* of “willfulness” should be imputed to *all* facially ambiguous elements in future cases).

¹¹⁵ *Elonis v. United States*, 135 S.Ct. 2001 (2015).

¹¹⁶ *Id.*

This brings us to the dilemma in *Shular* and its implications for immigration cases. Mr. Shular is serving a federal sentence, enhanced by 15 years, based on his Florida convictions, which in turn did not require a culpable mind. Similarly, Mr. Choizilme and other immigrants convicted in Florida are subject to removal as “aggravated felons” barred from discretionary relief. In every other context, the Supreme Court would hold that the categorical approach requires identifying a generic standard for the relevant terms, and that that standard is determined by canvassing state norms at the time of congressional usage of the terms “serious drug offense” (ACCA) and “illicit trafficking” (INA), as measured by their respective years. Of course, when Congress used those terms, it could not have considered that a state—Florida, in 2002—would later explicitly remove a *mens rea* requirement. Perhaps this does not matter; Congress uses terms as it knows them, and also anticipates that the Supreme Court imputes a *mens rea* wherever it is absent.

Again, *Shular* presented, an excellent vehicle for this question—of whether national canvassing is necessary to determine if *mens rea* is an element of the generic offense of “serious drug crime”—because Mr. Shular’s lengthy prison sentence implicated a very compelling liberty interest.¹¹⁷ The one weakness to Mr. Shular’s argument is that his statute has a phrase “involving” various *actus rea* options, and the term softens the literalism of the subsequent phrases.¹¹⁸ As the Solicitor General argued, “The contrast between that text and Section 924(e)(2)(A)(ii)’s “involving” language indicates that Congress did not intend courts to apply the same generic-analogue analysis.” In the Solicitor General’s view, “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance” does not require direct comparison to a generic offense.¹¹⁹

¹¹⁷ See *Shular*, at 782-783 (explaining his prior convictions could dramatically change his sentence, as a felon possessing a firearm, from a ten-year maximum to a fifteen-year minimum term of imprisonment.)

¹¹⁸ 18 U.S.C. 924(e)(2)(Q)(i)(ii) As used in this subsection—

(A) the term “serious drug offense” means—

- (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
- (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

¹¹⁹ Transcript of Oral Argument, *Shular v. United States*, 140 S.Ct. 779 (2020) (No. 18-662) at 57, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-6662_k536.pdf:

JUSTICE GORSUCH:

I wonder whether you’ll also keep in mind this—this question about involves, you know, the use and carry provision of 924 has kept courts awfully busy, right, what is a “use”? Are we going to, you know, what is our assurance we’re not going to have similar amounts of concern and litigation about what’s an “involving?”

Significantly, the Solicitor General took the firm position *that but for* the “involving” language, such canvassing would be required. The transcript reflects the Court’s concern that interpreting the meaning of “involving” sale would be more onerous than determine generic of offense.¹²⁰ Justice Kavanaugh gets the Solicitor General to concede that, in the absence of the word “involve,” the Court would “read in” a mens rea requirement.¹²¹

This is exactly what has now happened. On February 26, 2020, the Court unanimously ruled against Shular, in an opinion that turned on the idea that “serious drug offense” is description of types of qualifying conduct, *not a fixed term of art with a generic definition*, and thus escaped requiring the strict application of the categorical approach, i.e. the analysis that would have spared Shular the sentence enhancement.

However, the Court also recognized the using “involving” rather than “is” was dispositive. The term “is” would have locked down the term drug offense as a generic term of art.¹²² The Court explicitly said this. The upside here is that by ruling against Shular, the court has clarified that the sole reason (not to canvass the states for the generic meaning of controlled substance offenses for *mens rea* requirements) was the presence of the diluting word, “involving.”

Significantly, in order to win the case in front of it, the Solicitor General had to concede this point—that the absence of the term “involving” would lead to the opposite approach, as the term “drug offense” would then be a generic crime. This dictates that the opposite outcome is required in the immigration context and now requires reversal of *Choizilme* and *Matter of L-G-H-*. The immigration term “illicit trafficking in a controlled substance lacks diluting language, i.e. has the equivalent of the term “is” in front of the term “illicit trafficking.”¹²³ Words matter.

¹²⁰ *See id.*

¹²¹ *See id.* at 36-37:

JUSTICE KAVANAUGH:

If we—if we had a federal statute, not a recidivist statute, but a straight up federal statute that said it's unlawful to manufacture, distribute or possess with intent to manufacture, distribute a controlled substance, it is 100 percent, or close to it, that we would require *mens rea* and knowledge of the substance. Don't you agree with that?

MR. BOND [Jonathan C. Bond, Assistant to the Solicitor General]:

So, we agree that ordinarily you would read in a—you would presume a *mens rea* requirement. Exactly how that would apply across the different elements—

JUSTICE KAVANAUGH:

So, you—so if you agree, if this were a straight up federal statute, that *mens rea* would be read in, why not read it in to a recidivist statute?

¹²² *Shular*, 140 S.Ct. at 786 (2020) (“Using ‘involving’ rather than ‘is’ does not clarify that the terms are names of offenses; quite the opposite.”).

¹²³ *See* 8 U.S.C. § 1101(a)(43)(B).

V. CONCLUSION

The foregoing exploration is to both document the Department of Justice's positions interpreting the Immigration and Nationality Act, and whether it ultimately gives consistent and credible interpretation to the Controlled Substances Act. As the conference revealed, it would be more productive for a broad coalition of fields to be tasked with revisiting the origins of the CSA, recognize the long-term shortcomings of a philosophy of modern total prohibition, and then reimagine a more holistic, less punitive, and more realistic (and less costly, in forms of "cost") approach to regulation. However, despite some sentencing reform and steps toward legalization, society is not there, not quite yet.

Until then, mitigating the harsh consequences of our drug scheme will continue to take place in the courts. And in this endeavor, Congress' words, and those of state legislatures, should have value. They should be read consistently to give a principled application of those words to each and every criminal defendant and immigrant. When Congress repeatedly invokes the drug definitions "as defined at 21 U.S.C. § 802" throughout the INA, that choice must be applied literally. When states choose to deviate from uniform or federal definitions, that is an exercise of legislative will, and it must be recognized as such, INA and ACCA consequences be damned. It is not credible for the courts to read the CSA definitions out of the statute. Similarly, it is not credible to torture the reading of "illicit trafficking in a controlled substance" to eliminate a *mens rea* element, when doing so is contrary to the last decades of consistent Supreme Court opinions.

As remarked, immigrants have largely won all questions regarding drugs and deportability, once those questions have reached the Supreme Court. As Martin Luther King invoked, "the arc of the moral universe is long, but it bends toward justice."¹²⁴ That curve continues, in an ever-narrowing series of questions regarding immigrants and controlled substances. One gets the distinct impression that if the intellectually honest position prevailed—rather than an outcome-determinative reading—we would have a more consistently principled, predictable, and uniform intersection of the CSA and the Immigration and Nationality Act.

¹²⁴ The quote was memorialized in a rug in the Oval Office during the Barack Obama presidency, but the succinct and artful language of Dr. King is a reworking of a quote of 19th century minister Theodore Parker. See e.g. *Theodore Parker And The 'Moral Universe'*, National Public Radio, (Sept. 2, 2010, 3:00 PM), <https://www.npr.org/templates/story/story.php?storyId=129609461>.