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CATEGORICAL APPROACH OR CATEGORICAL CHAOS?
A CRITICAL ANALYSIS OF THE INCONSISTENCIES IN
DETERMINING WHETHER FELONY DWI IS A CRIME OF VIOLENCE
FOR PURPOSES OF DEPORTATION UNDER 18 U.S.C. § 16

I. INTRODUCTION

United States policy allows aliens to enter the country and enjoy many of the rights and privileges associated with American citizenship.¹ Nevertheless, the United States government has made it clear that it will not tolerate certain offenses committed by alien criminals and the authorities have shown a willingness to resort to permanent removal when aliens commit such crimes.² Determining what crimes are serious enough to warrant removal has caused division among the courts and nowhere is this division more evident than in felony driving while intoxicated convictions.³ Resolving this issue will fulfill the need to secure a level of uniformity in United States immigration law.⁴

1. See Close Up Foundation, *available at* <http://www.closeup.org/immigrant.htm#overview> (last modified Dec. 9, 1999) (providing overview of United States immigration policy). The United States admits approximately 900,000 legal immigrants every year. See *id.* (estimating yearly immigration statistics).

2. See Brent K. Newcomb, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 697, 702-03 (1998) (stating that aliens can be removed for any reason Congress determines is in best interest of United States government). In July 2002, the Immigration and Naturalization Service deported 12,405 aliens from the United States, of who 5,573 were criminals. See INS, *Removal Statistics*, United States Dep't of Justice, at <http://www.ins.usdoj.gov/text/aboutins/statistics/msrjuly02/REMOVAL.HTM> (last visited Sept. 13, 2002) (providing INS removal statistics).

3. Compare *Omar v. INS*, 298 F.3d 710, 715-17 (8th Cir. 2002) (holding that intent is not required for offense to be considered crime of violence if injury to another occurs), and *Tapia-Garcia v. INS*, 237 F.3d 1216, 1222-23 (10th Cir. 2001) (holding Idaho felony DWI is crime of violence), with *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (maintaining felony DWI is not crime of violence), *Bazan-Reyes v. INS*, 256 F.3d 600, 607 (7th Cir. 2001) (deeming that in Indiana, Illinois and Wisconsin felony DWI is not crime of violence), *Dalton v. Ashcroft*, 257 F.3d 200, 207-08 (2d Cir. 2001) (determining New York felony DWI is not crime of violence), and *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001) (finding Texas felony DWI is not crime of violence). For a detailed analysis of these holdings, see *infra* notes 34-67 and accompanying text.

4. See Julie Anne Rah, *The Removal of Aliens Who Drink and Drive: Felony DWI as a Crime of Violence under 18 U.S.C. § 16(b)*, 70 FORDHAM L. REV. 2109, 2148 (2002) (arguing that felony DWI is violent and dangerous enough to justify deportation as crime of violence). But see Michael G. Salemi, *DUI as a Crime of Violence Under 18 U.S.C. 16(b); Does a Drunk Driver Risk "Using" Force?*, 33 LOY. U. CHI. L.J. 691, 744-45 (2002) (arguing that DUI is not crime of violence because drunk drivers do not risk use of intentional force). For the purposes of this Note, "DUI" and "DWI" will be used interchangeably. For a further discussion on the need to amend immigration law to establish uniformity, see *infra* notes 95-163 and accompanying text.

The United States government may deport any alien convicted of an aggravated felony that is classified as a crime of violence.⁵ Nevertheless, the federal circuit courts diverge over the issue of whether felony driving while intoxicated (felony DWI), an offense for which state law determines the elements, constitutes a “crime of violence” under 18 U.S.C. § 16.⁶ Part of this disparity rests in the fact that state felony DWI statutes fluctuate dramatically, requiring a minimum of one and up to four prior DWI convictions to trigger a felony DWI.⁷ For example, Indiana requires only one prior DWI conviction to elevate an offense to felony status; however, a person in Texas commits a felony DWI when, after two prior DWI convictions, he/she operates a vehicle while intoxicated.⁸ Even more striking, DWI does not amount to a felony in North Dakota until a *fifth* conviction.⁹

5. See 8 U.S.C. § 1227(a)(2)(A)(iii) (2002) (authorizing government to deport aliens convicted of aggravated felonies). An “aggravated felony” is defined as a “crime of violence.” 8 U.S.C. § 1101(a)(43)(F) (2002). For a further discussion on federal deportation authority, see *infra* notes 19-25 and accompanying text. The Immigration and Nationality Act uses the term “removable” for, among other things, situations where an alien has been admitted to the United States and the alien is deportable. See 8 U.S.C. § 1229(a)(e)(2) (2002) (defining “removable”). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) eliminated a previous legal distinction between removal and deportation. See *United States v. Pantin*, 155 F.3d 91, 92 (2d Cir. 1998) (per curiam) (citing IIRIRA §§ 304, 306) (codified at 8 U.S.C. §§ 1229-1229c, 1252 (2002)) (eliminating distinction between removable and deportable). For purposes of this Note, “removal” and “deportation” will be used interchangeably.

6. For a detailed discussion of the circuit split regarding whether felony DWI is a crime of violence, see *infra* notes 34-67 and accompanying text.

7. See Rah, *supra* note 4, at 2110 n.8, 2141 n.264 (analyzing different state determinations of felony DWI based on various prior drunk driving convictions).

8. See *id.* (avowing felony DWI in Indiana when defendant was previously convicted of DWI). In Indiana, a person commits a Class D DWI felony if: (1) the person has a previous conviction of operating a vehicle while intoxicated; and (2) the previous conviction of operating while intoxicated occurred within the five years immediately preceding the occurrence of the violation of section 1 or 2 of the statute. See *Bazan-Reyes*, 256 F.3d at 603 n.1 (citing IND. CODE § 9-30-5-3 (1998)) (holding Indiana felony DWI is not crime of violence). Sections 1 and 2 of the statute provide a minimum blood alcohol level of 0.10 required for a DWI conviction. See *id.* (citing IND. CODE § 9-30-5-1 (1998)) (defining minimum blood alcohol levels under DWI statute). A third DWI conviction amounts to a felony in Texas. See *Chapa-Garza*, 243 F.3d at 927 (explaining Texas determination of felony DWI on third conviction).

9. See Rah, *supra* note 4, at 2110 n.8 (emphasis added) (citing N.D. CENT. CODE 39-08-01(2) (1997)) (explaining North Dakota determination of felony DWI on fifth conviction). In Idaho, a DUI offense qualifies as a felony if the defendant pleaded guilty to or was found guilty of two or more previous violations for DUI within five years. See *id.* (citing IDAHO CODE 18-8005(5) (Mitchie 2000)) (explaining Idaho determination of felony DWI on third conviction within five years). In New York, a defendant's third conviction within ten years results in a felony DWI. See *Dalton v. Ashcroft*, 257 F.3d 200, 202 (2d Cir. 2001) (citing N.Y. VEH. & TRAF. LAW § 1192.1(c)(ii) (McKinney 2001)) (enhancing DWI with two priors within ten years to felony in NY). In California, because the defendant in *Montiel-Barraza* had four prior DUI convictions under CAL. VEH. CODE § 23151 within the past seven years, his latest DUI conviction was elevated to a felony. See *Montiel-Barraza v. INS*,

In light of these state law discrepancies that affect the crime of violence determination, immigration law must change to reflect a consistent standard for removal.¹⁰

This Note addresses whether felony DWI constitutes a crime of violence for purposes of deportation.¹¹ Part II of this Note surveys Congress's broad power over immigration and the government's role in deportation.¹² Part III identifies the standard categorical approach to felony DWI offenses employed by both the courts and the Board of Immigration Appeals (BIA) in removal proceedings and analyzes the various conclusions that the courts have reached when interpreting a "crime of violence" under 18 U.S.C. § 16(b).¹³ Part IV evaluates an apparent departure from the implementation of this categorical approach in *Dalton v. Ashcroft*,¹⁴ proposing that this departure results from the vagueness of the "crime of violence" definition and the extreme discrepancies in various state determinations of what constitutes a felony DWI.¹⁵ Part V contends, based on current immigration law, that felony DWI is a crime of violence due to the lack of specific intent language in the defining statute.¹⁶ Additionally, Part V proposes an amendment to 18 U.S.C. § 16(b) that will define the necessary characteristics of a felony DWI when dealing with noncitizens.¹⁷ Finally, Part VI argues for the adoption of an amendment

275 F.3d 1178, 1179 (9th Cir. 2002) (per curiam) (stating that if person is convicted of fourth DUI offense within seven year period it can be elevated to felony). In Wisconsin, homicide by intoxicated use of a vehicle is required to elevate a DWI conviction to an aggravated felony. See *Bazan-Reyes*, 256 F.3d at 603 n.2 (citing Wis. STAT. § 940.09 (1996)) ("Homicide by intoxicated use of vehicle or firearm (1) Any person who does any of the following is guilty of a Class C felony: (a) Causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant; (b) Causes the death of another by the operation of a vehicle while the person has a prohibited alcohol concentration, as defined in § 340.01(46m)."). In Alabama, a felony DWI occurs upon the fourth DWI conviction. See *Rah*, *supra* note 4, at 2110 n.8 (citing ALA. CODE § 32-5A-191(h) (1975)) (stating that fourth violation elevates offense to Class C felony).

10. For a discussion of the amendment to immigration law proposed by this Note, see *infra* notes 152-63 and accompanying text.

11. For the definition of "crime of violence" under 18 U.S.C. § 16, see *infra* note 25 and accompanying text.

12. For a discussion of federal authority over deportation proceedings, see *infra* notes 19-25 and accompanying text.

13. For a discussion of the categorical approach to statutory interpretation, see *infra* notes 29-33 and accompanying text. For a discussion of the various circuit court decisions on the issue of whether felony DWI is a crime of violence, see *infra* notes 34-67 and accompanying text.

14. 257 F.3d 200 (2d Cir. 2001).

15. For a discussion of *Dalton* and inconsistencies in implementing the categorical approach, see *infra* notes 68-94 and accompanying text.

16. For a discussion of the proposed interpretation of the mens rea element of 18 U.S.C. § 16, see *infra* notes 101-19 and accompanying text.

17. For a discussion of the proposed amendment to immigration law, see *infra* notes 152-63 and accompanying text.

to refocus the power over immigration to the federal government and establish uniformity in deportation proceedings.¹⁸

II. BACKGROUND: CONGRESSIONAL POWER OVER IMMIGRATION

Numerous constitutional sources support broad congressional power over immigration.¹⁹ Congress also has implied powers based on the sovereignty of the United States.²⁰ Further, the federal legislature has passed several acts limiting the grounds for immigration and providing guidelines for removal or exclusion.²¹ Moreover, the courts have routinely upheld the plenary powers of the federal legislature over immigration in determining that Congress may impose certain conditions on resident alien privileges that it may not impose on citizens.²²

Congress authorizes the Immigration and Naturalization Service (INS), pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), to deport “any alien who is convicted of an aggravated felony any time after his admission.”²³ 8 U.S.C. § 1101(a)(43)(F) defines an “aggravated felony” as a “crime of violence.”²⁴ 18 U.S.C. § 16 defines a “crime of violence” as:

- a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or

18. For a further discussion of the need for an amendment to immigration law to establish uniformity, see *infra* notes 95-163 and accompanying text.

19. See Newcomb, *supra* note 2, at 701 (outlining broad constitutional power over immigration); see also, e.g., U.S. CONST. art. I, § 8, cl. 3 (stating Congress may “regulate commerce with foreign nations”); U.S. CONST. art. I, § 9, cl. 1 (defining congressional power over migration and importation of persons); U.S. CONST. art. I, § 8, cl. 4 (defining congressional power to “establish a uniform rule of naturalization”); see also Daniel R. Dinger, *When We Cannot Deport, Is It Fair to Detain?: An Analysis of the Rights of Deportable Aliens Under 8 U.S.C. § 1231(a)(6) and the 1999 INS Interim Procedures Governing Detention*, 2000 BYU L. REV. 1551, 1554-63 (discussing Congress’s plenary power over immigration); Kathleen O’Rourke, *Deportability, Detention and Due Process: An Analysis of Recent Tenth Circuit Decisions in Immigration Law*, 79 DENV. U. L. REV. 353, 353 (2002) (same).

20. See Newcomb, *supra* note 2, at 702 (explaining how Congress has used its sovereign powers to create immigration principles); see also Rah, *supra* note 4, at 2113 (finding congressional power over immigration in sovereign right to control its borders).

21. See Newcomb, *supra* note 2, at 702 (citing *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 315-18 (1936)) (determining that Congress has extra-constitutional federal power to manage external affairs).

22. See Newcomb, *supra* note 2, at 702 (citing *McJunkin v. INS*, 579 F.2d 533 (9th Cir. 1978)) (holding Congress can compel stipulations on rights of resident aliens that could not be imposed on United States citizens).

23. See 8 U.S.C. § 1227(a)(2)(A)(iii) (2002) (authorizing government to deport aliens convicted of aggravated felonies).

24. See 8 U.S.C. § 1101(a)(43)(F) (2002) (defining “aggravated felony”).

property of another may be used in the course of committing the offense.²⁵

III. CIRCUIT ANALYSES IN DETERMINING WHETHER FELONY DWI IS A CRIME OF VIOLENCE

The federal circuits agree on a categorical approach to statutory interpretation in the context of crime of violence determinations.²⁶ Nevertheless, the courts have disagreed on whether felony DWI constitutes a crime of violence for purposes of deportation.²⁷ A pronounced circuit split has resulted from this disparity, causing ambiguity and uncertainty in the field of immigration law.²⁸

A. *The Categorical Approach to Interpreting Crimes of Violence Under 18 U.S.C. § 16*

While the circuits agree that the standard set forth in 18 U.S.C. § 16(a) requires an intent to use force, they have offered mixed views when interpreting the definition of a "crime of violence" under 18 U.S.C. § 16(b).²⁹ The courts have yielded varied interpretations, despite the application of an agreed upon categorical approach.³⁰ Applying this categorical approach, the courts look at whether the offender disregards a substantial risk of injury to others by the *general nature* of the crime he/she

25. 18 U.S.C. § 16 (2002).

26. For a complete discussion of the categorical approach in crime of violence determinations, see *infra* notes 29-33 and accompanying text.

27. For a complete discussion of the varied interpretations of a "crime of violence" under § 16(b), see *infra* notes 34-67 and accompanying text.

28. For a detailed discussion of this circuit split on whether felony DWI is a crime of violence, see *infra* notes 34-67 and accompanying text.

29. For a discussion of the varied interpretations of a "crime of violence" under § 16(b), see *infra* notes 37-67 and accompanying text.

30. See *Bazan-Reyes v. INS*, 256 F.3d 600, 606 (7th Cir. 2001) (applying categorical approach in deciding whether offense constitutes crime of violence); *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) (finding that language of § 16(b) requires categorical approach focused on "intrinsic nature of the offense rather than on the factual circumstances surrounding any particular violation"); *Eun Kyung Park v. INS*, 252 F.3d 1018, 1024 n.7 (9th Cir. 2001) (distinguishing between § 16(a) and (b) by reasoning that § 16(a) requires use of force to be proven against defendant personally, while § 16(b) focuses on *nature* of felony); *Tapia-Garcia v. INS*, 237 F.3d 1216, 1221-22 (10th Cir. 2001) (calling for categorical approach in determining whether crime is crime of violence); *United States v. Velazquez-Overa*, 100 F.3d 418, 420-21 (5th Cir. 1996) (deciding that § 16(a) applies only when physical force is clearly element of crime and that pursuant to § 16(b) "court need only consider the fact that [the defendant] was convicted and the inherent nature of the offense"); *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993) (reasoning that court must look only to definition under statute, not underlying circumstances, when determining whether offense is "by its nature" crime of violence under § 16(b)); *United States v. Rodriguez*, 979 F.2d 138, 140-41 (8th Cir. 1992) (noting that sentencing court is not required to consider underlying circumstances of offense).

commits and not to the specific circumstances surrounding the crime at issue.³¹ Specifically, the courts ask whether the generic elements of the statute constitute a crime of violence and examine the alien's specific conduct only if it is otherwise impossible to determine into what class the offense falls.³² All circuits that have addressed the question of whether felony DWI is a crime of violence have adopted this categorical approach, but implementing this approach has resulted in vastly different conclusions for noncitizens in deportation cases.³³

31. See *Tapia-Garcia*, 237 F.3d at 1221-22 (defining categorical approach in determining whether crime is crime of violence). The court's refusal to consider the DWI offense in light of the particular facts of the defendant's case was based on BIA precedent, which called for a categorical approach to "crime of violence" analysis under 18 U.S.C. § 16(b), requiring "the offense be a felony and, if it is, that the nature of the crime—as elucidated by the generic elements of the offense—is such that its commission would ordinarily present a risk that physical force would be used against the persons or property of another irrespective of whether the risk develops or harm actually occurs." See *id.* (citing *Matter of Magallanes*, Interim Dec. 3341, 1998 BIA LEXIS 2 (BIA Mar. 19, 1998)) (quoting *Matter of Alcantar*, Interim Dec. 3220, 1994 BIA LEXIS 4 (BIA May 25, 1994)) (outlining categorical approach to statutory interpretation). For a discussion of the facts and analysis in *Tapia-Garcia*, see *infra* 37-43 and accompanying text.

32. See *Bazan-Reyes*, 256 F.3d at 606 (citing *Lara-Ruiz v. INS*, 241 F.3d 934, 941 (7th Cir. 2001)) (describing categorical approach to statutory interpretation). In *Lara-Ruiz*, the crime at issue was sexual abuse of a minor. See *Lara-Ruiz v. INS*, 241 F.3d 934, 937 (7th Cir. 2001) (appealing decision of Board of Immigration Appeals removing him from United States for committing aggravated felony). The court held that it would apply a categorical approach in analyzing whether Congress intended the phrase "sexual abuse of a minor" to include conduct punished pursuant to a specific state statute. See *id.* at 941 (citing *United States v. Shannon*, 110 F.3d 382, 384-85 (7th Cir. 1997)). The court stated that in applying the approach it would "consider only whether the elements of the state offense of which the alien was convicted—together with the language of the indictment—constitute sexual abuse of a minor, rather than whether the alien's specific conduct could be characterized as sexual abuse of a minor." See *id.* (citing *United States v. Shannon*, 110 F.3d 382, 384-85 (7th Cir. 1997)) (describing court's application of categorical approach). The BIA looked beyond the Illinois statutory definition of sexual assault and beyond the indictment to determine that *Lara-Ruiz* had sexually assaulted a minor. See *id.* at 940 (rationalizing decision "because the statute of conviction did not list any particular age of the victim or even the victim's status as a 'minor' as an element of the offense"). The court found that it was not improper for the BIA to look beyond the statutory elements and the charging documents in this case. See *id.* at 940-41 (finding charging document contained no clear answer). First, the statute under which *Lara-Ruiz* was convicted covered conduct including sexual abuse of a minor and conduct that did not include sexual abuse. See *id.* (allowing court to look at other documents, such as criminal complaint). In such circumstances, sentencing courts may look to the charging instrument and if that yields no clear answer, they may look beyond such documents, provided that doing so would not require evidentiary hearings into contested issues of fact. See *id.* at 941 (citing *Xiong v. INS*, 173 F.3d 601, 605 (7th Cir. 1999)) (illustrating courts looking beyond statutes of conviction and related indictments). But see *Dalton*, 257 F.3d at 204-07 (supporting opinion for determining *Dalton*'s third conviction of DWI in New York was not crime of violence because broad New York statute encompassed both crimes that are and are not "crimes of violence").

33. Compare *Omar v. INS*, 298 F.3d 710, 715 (8th Cir. 2002) (finding that intent is not required for offense to be considered crime of violence if injury to

B. *The Circuit Court Split Regarding Whether Felony DWI Constitutes a Crime of Violence Under 18 U.S.C. § 16(b)*

The Tenth and Eighth Circuit Courts of Appeals have recently held that felony DWI equates to a crime of violence, while the Fifth, Seventh, Ninth and Second Circuits have disagreed.³⁴ The disagreement among the circuits primarily arises over whether the language of 18 U.S.C. § 16(b) requires a mens rea of intent to use physical force on the person or property of another.³⁵ The following sections explore the opinions of the various circuits regarding whether felony DWI is a crime of violence for purposes of deportation.³⁶

1. *Circuits Holding Felony DWI is a Crime of Violence*

The Tenth Circuit, in *Tapia-Garcia v. INS*,³⁷ faced the appeal of Jose G. Tapia-Garcia, a Mexican citizen and permanent resident of the United States, who received a driving under the influence (DUI) conviction in Idaho in 1998.³⁸ The Tenth Circuit confronted the central issue of

another results), and *Tapia-Garcia*, 237 F.3d at 1222-23 (holding Idaho felony DWI is crime of violence because no intent is required for this determination), with *Montiel-Barraza v. INS*, 275 F.3d 1178, 1179-80 (9th Cir. 2002) (deciding felony DWI not crime of violence based on lack of intent), *Bazan-Reyes*, 256 F.3d at 607 (holding that word "use" requires intentional physical force and thus prohibits finding drunk driving as a crime of violence under § 16(b)), *Dalton*, 257 F.3d at 204 (finding that "risk of the use of physical force" and "risk of injury" cannot be interpreted same way and concluding that DWI conviction does not satisfy elements of crime of violence under § 16(b)), and *United States v. Chapa-Garza* 243 F.3d 921, 924-27 (5th Cir. 2001) (determining Texas felony DWI is not crime of violence). For a detailed account of this circuit split, see *infra* notes 34-67 and accompanying text.

34. Compare *Omar*, 298 F.3d at 717 (deciding that intent is not required for offense to be considered crime of violence if injury to another results), and *Tapia-Garcia*, 237 F.3d at 1222-23 (holding Idaho felony DWI is crime of violence), with *Montiel-Barraza*, 275 F.3d at 1180 (maintaining felony DWI is not crime of violence), *Bazan-Reyes*, 256 F.3d at 607 (deeming that in Indiana, Illinois and Wisconsin felony DWI is not crime of violence), *Dalton*, 257 F.3d at 207-08 (determining New York felony DWI is not crime of violence), and *Chapa-Garza* 243 F.3d at 927 (finding that Texas felony DWI is not crime of violence). For a detailed analysis of these holdings, see *infra* notes 34-67 and accompanying text.

35. See *Rah*, *supra* note 4, at 2126 (centering circuit split around specific intent requirement).

36. For a further discussion of specific circuit decisions on whether felony DWI is a crime of violence, see *infra* notes 37-67 and accompanying text.

37. 237 F.3d 1216 (10th Cir. 2001).

38. See *id.* at 1217 (discussing Tapia-Garcia's latest DUI conviction under IDAHO CODE § 18-8004(5) (Mitchie 2002)). The INS commenced deportation proceedings against him based on his conviction for an "aggravated felony" pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). See *id.* (discussing INS proceeding that termed Tapia-Garcia's DUI an "aggravated felony" for purposes of deportation). The immigration judge found that Tapia-Garcia's DUI offense satisfied the "crime of violence" category of the "aggravated felony" conviction and ordered his removal to Mexico. See *id.* (ordering Tapia-Garcia's removal). The BIA affirmed the judge's finding and dismissed Tapia-Garcia's appeal, issuing a final removal order that re-

whether Idaho's DUI offense constituted an "aggravated felony," and would thus render Tapia-Garcia subject to removal under 8 U.S.C. § 1227(a)(2)(A)(iii).³⁹

The court held that "drunk driving is a *reckless* act that often results in injury," and to determine the offense as a crime of violence requires no element of intent.⁴⁰ The Tenth Circuit relied on the United States Sentencing Guidelines (U.S.S.G.), under which DUI constitutes a "crime of violence," and determined the language of the relevant Guideline provision as similar enough to 18 U.S.C. § 16.⁴¹ Thus, the court reasoned that a DUI offense may also constitute a crime of violence under § 16(b) be-

sulted in Tapia-Garcia's deportation. *See id.* (dismissing Tapia-Garcia's BIA appeal, as BIA agreed with immigration judge that Tapia-Garcia's DUI offense was crime of violence).

39. *See id.* (phrasing issue as whether felony DUI is "aggravated felony" for deportation purposes). Tapia-Garcia contended that Idaho's DUI offense does not satisfy the statutory definition of a crime of violence because it does not "*by its nature*, involve a substantial risk that physical force . . . may be used in the course of committing the offense." *See id.* (citing 18 U.S.C. § 16) (emphasis in original) (arguing that, categorically, felony DWI is not crime of violence). The Idaho Code broadly encompasses both violent and nonviolent crimes, thus, Tapia-Garcia argued that the court should delve into the underlying facts of his case in determining whether his offense constituted a crime of violence. *See id.* at 1221 n.5 (describing relevant part of Idaho law explaining breadth of statute).

40. *See Rah, supra* note 4, at 2134 (emphasis added) (citing *Tapia-Garcia*, 237 F.3d at 1222) (quoting *United States v. Farnsworth*, 92 F.3d 1001, 1008-09 (10th Cir. 1996)) (holding no intent was required for crime of violence determination). The court rejected Tapia-Garcia's claim, declining to consider the particular facts of his case, and instead employed the categorical approach "that considers only the generic elements of the offense." *See Tapia-Garcia*, 237 F.3d at 1221-22 (citing *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993)) (holding that, in analyzing what constitutes crime of violence under 18 U.S.C. § 16(b), "a court must only look to the statutory definition, not the underlying circumstances of the crime, to make this determination."). In a decision clarifying its categorical approach, the BIA held that a state offense for operating a vehicle while under the influence of alcohol constitutes a crime of violence, provided it rises to a felony under state law. *See id.* (citing *Matter of Puente-Salazar-Salazar*, Interim Dec. 3412, 1999 BIA LEXIS 40, *11-13 (BIA Sept. 29, 1999)) (applying and clarifying categorical approach). Thus, the court held that the BIA reasonably construed 18 U.S.C. § 16(b) to include an offense for driving under the influence of alcohol. *See id.* at 1222 (stating that BIA reasonably construed 18 U.S.C. § 16(b) to include DWI offense); *see also Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000) ("To determine whether an alien has committed an aggravated felony, courts look to the text of the statute violated, not the underlying factual circumstances."). For a further discussion of the categorical approach to statutory interpretation, *see supra* notes 29-33 and accompanying text.

41. *See Tapia-Garcia*, 237 F.3d at 1222 (stating U.S.S.G. includes DWI as crime of violence). *But see Bazan-Reyes v. INS*, 256 F.3d 600, 608 (7th Cir. 2001) (noting substantial differences between U.S.S.G. and § 16(b)). Section 4B1.2(1) of the sentencing guidelines provides that:

(1) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

cause the generic elements of the offense present a "substantial risk that physical force . . . may be used."⁴² Applying the categorical approach and comparing the federal sentencing guidelines with § 16(b), the court concluded that an Idaho DUI offense constituted a "crime of violence" within the aggravated felony definition and rendered *Tapia-Garcia* subject to deportation proceedings.⁴³

While the specific vehicular crime differs, the rationale in *Omar v. INS*⁴⁴ resembles that of the Tenth Circuit in *Tapia-Garcia*, as the Eighth Circuit held that determining whether an offense is a crime of violence does *not* require intent.⁴⁵ The INS convicted Mahad Mohammed Omar on two counts of criminal vehicular homicide.⁴⁶ The circuit court held on

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.

U.S.S.G. § 4B1.2(1) (2002) (emphasis added). Initially, this provision was identical to 18 U.S.C. § 16(b) because the U.S.S.G. defined crime of violence by incorporating the definition found in § 16(b). See *Bazan-Reyes*, 256 F.3d at 608 (citing United States Sentencing Guidelines Manual, app. C at 106-07 (1991)) (finding U.S.S.G. previously defined crime of violence referring to § 16(b)). But, in 1989, the Sentencing Commission adopted the definition reproduced above. See *id.* (citing United States Sentencing Guidelines Manual, app. C at 106-07 (1991)) (stating change in U.S.S.G. definition of crime of violence). Comparing the current provision with that of § 16, the first prong of U.S.S.G. § 4B1.2(1) is virtually identical to § 16(a), but the second prong is different than § 16(b), in that the U.S.S.G. does not require a felony offense and calls for only a "risk of physical injury to another," while § 16(b) requires "substantial risk that physical force against the person or property of another *may be used in the course of committing the offense*." See *id.* (recognizing difference between U.S.S.G. § 4B1.2(1)(ii) and 18 U.S.C. § 16, whereby DUI involves a "risk of physical injury to another," but does not involve "substantial risk that physical force against the person or property of another may be used in the course of committing the offense"); see also Katherine Brady & Erica Tomlinson, *Intent Requirement of the Aggravated Felony "Crime of Violence"*, 4 BENDER'S IMMIGR. BULL. 421 para. 5 n.6 (1999) (explaining distinction between U.S.S.G. § 4B1.2(1)(ii) and 18 U.S.C. § 16).

42. See *Tapia-Garcia*, 237 F.3d at 1222-23 (citing *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244 (10th Cir. 1998)) (recognizing definitions differ but finding rationale of case involving 18 U.S.C. § 16(b) persuasive in analyzing whether offense constitutes crime of violence under U.S.S.G. § 4B1.2).

43. See *id.* at 1223 (concluding *Tapia-Garcia* was subject to deportation because felony DUI is crime of violence).

44. 298 F.3d 710 (8th Cir. 2002).

45. See *id.* at 715 (emphasis added) ("Nothing in 16(b) indicates that a determination of the subjective intent of an offender or of a class of offenders is necessary for an offense to qualify as a crime of violence.").

46. See *id.* at 712 (citing MINN. STAT. § 609.21 (2001)) (defining criminal vehicular homicide in Minnesota). Criminal vehicular homicide is a felony under Minnesota law. See MINN. STAT. § 609.02, subd. 2 (2001) (defining criminal vehicular homicide as felony). Omar picked up nine or ten friends at the airport and subsequently got in an accident. See *Omar*, 298 F.3d at 712 (stating facts). Two passengers were killed, while another was badly injured and Omar's blood-alcohol content exceeded the legal limit. See *id.* (same). The INS found Omar removable because he was convicted of aggravated felonies and the BIA affirmed, holding that criminal vehicular homicide involves a substantial risk that physical force may

appeal that an offense might qualify as a crime of violence if injury results without any intent by the offender to employ force on another or on his/her property.⁴⁷ Explaining that a vehicle can exert physical force, the court concluded that a legally intoxicated driver "in control of such physical force" presents a substantial risk that physical force may be used against a person or his/her property.⁴⁸

be used against the person or property of another and thus is a crime of violence. *See id.* (describing procedural history). On appeal, Omar claimed that a crime of violence includes the element of intentional mens rea and that the statute under which he was convicted is a strict liability offense that does not require intent. *See id.* (citing *Bazan-Reyes*, 256 F.3d 600; *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001)) (claiming that crime of violence requires intent). Omar claimed that the language "risk that physical force may be used" shows congressional intent to include only those crimes in which there is intent to use physical force against a person or property. *See id.* (citing *Bazan-Reyes*, 256 F.3d at 611) (interpreting Congressional aim to include only intentional conduct as crimes of violence). The INS countered that § 16(b) does not require the intentional use of force and argued that the required mens rea is at most recklessness. *See id.* at 713 (citing *United States v. Moore*, 38 F.3d 977 (8th Cir. 1994)) (concluding that involuntary manslaughter, which does not require intent, is crime of violence). The Minnesota offense of criminal vehicular homicide is committed if an individual:

causes the death of a human being not constituting murder or manslaughter as a result of operating a motor vehicle: (1) in a grossly negligent manner; (2) in a negligent manner while under the influence of alcohol; (3) while having an alcohol concentration of 0.10 or more; [or] (4) while having an alcohol concentration of 0.10 or more, as measured within two hours of the time of driving.

MINN STAT. § 609.21, subd. 1 (2001).

Omar was convicted under the statute of causing the death of two persons while operating a vehicle with an alcohol concentration of 0.11. *See Omar*, 298 F.3d at 715 (stating Omar's specific conviction). The Eighth Circuit pointed out that the Minnesota Supreme Court had concluded that DWI meets the recklessness standard. *See id.* at 713 (citing *State v. Bolslinger*, 221 Minn. 154 (Minn. 1946)) (holding DWI meets recklessness standard). The court also noted that the Sixth Circuit held that drunk driving homicide is a crime of violence under § 16(b). *See id.* (citing *United States v. Santana-Garcia*, 2000 WL 491510, at *2-3 (6th Cir. 2000)) (holding drunk driving homicide is crime of violence). *But see Bazan-Reyes*, 256 F.3d at 606-12 (including drunk driving homicide offense in group of crimes court held were not crimes of violence).

47. *See Omar*, 298 F.3d at 715 (holding unintentional force may qualify as crime of violence). The court concluded that, because the statute was unambiguous, the Rule of Lenity was not implicated. *See id.* (citing *INS v. St. Cyr*, 533 U.S. 289, 320 (2001)) (holding ambiguities in deportation statutes are to be construed in favor of alien). For a further discussion of the Rule of Lenity, see *infra* note 128.

48. *See Omar*, 298 F.3d at 717 (holding that criminal vehicular homicide, by its nature, involves substantial risk that physical force may be used). The court failed to explain how criminal vehicular homicide differs from other drunk driving offenses other than stating that it always involves the killing of a person. *See id.* (citing *United States v. Moore*, 38 F.3d 977 (8th Cir. 1994)) (likening criminal vehicular homicide to voluntary manslaughter in that it "by its nature inherently involves a substantial risk that physical force may be used against a person in its commission"). While a more general discussion of this crime of violence issue would include the Eleventh Circuit in the group of circuits holding felony DWI is a crime of violence, this Note does not detail that circuit because that circuit ad-

2. *Circuits Holding Felony DWI is Not a Crime of Violence*

The Fifth Circuit, in *United States v. Chapa-Garza*,⁴⁹ consolidated the appeals of five defendants separately convicted of unlawful presence in the United States after being deported.⁵⁰ The decision addressing the validity of their initial removal rested on whether a conviction for a state felony DWI charge constituted a crime of violence under 18 U.S.C. § 16(b).⁵¹

Applying the categorical approach, the Fifth Circuit reasoned that the language in § 16(b) ("substantial risk that physical force . . . may be used") considers only reckless disregard for the chance that intentional force

dresses 18 U.S.C. § 16(a), not § 16(b). Furthermore, the Eleventh Circuit did not even reach the point of analyzing § 16(b) in *Duan Le v. United States* because the court found that driving under the influence and inducing serious bodily injury satisfied the definition of a crime of violence under § 16(a), because one element of the offense includes the actual use of physical force. *See Duan Le v. United States*, 196 F.3d 1352, 1354 (11th Cir. 1999) (holding that DUI with serious bodily injury was crime of violence under § 16(a)).

49. 243 F.3d 921 (5th Cir. 2001).

50. *See id.* at 923 (explaining how sole issue raised by each defendant on appeal was whether Texas felony DWI is aggravated felony, which is defined as crime of violence). All five defendants pleaded guilty to unlawfully being in the United States after they had been deported, violating 8 U.S.C. § 1326(a). *See id.* (explaining violation). For this violation, U.S.S.G. § 2L1.2 provides for a penalty increase if the defendant's deportation came as the result of an aggravated felony conviction. *See U.S.S.G. § 2L1.2* (2001) (defining penalty increase for alien criminals). The issue on appeal was whether the defendants had been removed for an aggravated felony, namely felony DWI, to determine whether the penalty increase applied. *See id.* (stating facts).

51. *See Chapa-Garza*, 243 F.3d at 923 (asking whether felony DWI qualifies as crime of violence). Similar to the Tenth Circuit, the court determined that the words "by its nature" under 18 U.S.C. § 16 require courts to employ a categorical approach in determining whether a certain crime is a crime of violence. *See id.* at 924 (citing *United States v. Velazquez-Overa*, 100 F.3d 418, 420-21 (5th Cir. 1996)) (determining that § 16(b) requires categorical approach); *see also Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000) (observing that courts look to text of statute under which defendant was convicted, not underlying circumstances of offense, to determine whether alien has committed aggravated felony); *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993) (holding that court must look to statutory definition, not underlying circumstances of crime, to determine what constitutes crime of violence under § 16(b)). The Fifth Circuit reasoned that a crime of violence is either violent by its nature, or it is not. *See Chapa-Garza*, 243 F.3d at 924 (citing *United States v. Velazquez-Overa*, 100 F.3d at 420-21) (reasoning that certain crime is violent "by its nature"). The Fifth Circuit held that a crime cannot be a crime of violence "by its nature" in some cases, but not in others, and thus there is no need to consider the conduct underlying the defendant's conviction. *See Velazquez-Overa*, 100 F.3d at 420-21 (stating no need to consider underlying circumstances). Thus, the particular facts of the defendant's conviction do not matter, as the proper inquiry is whether a particularly defined offense, in the abstract, is a crime of violence under 18 U.S.C. § 16(b). *See Chapa-Garza*, 243 F.3d at 924 (holding particular facts of defendant's conviction do not matter in crime of violence determination). The court said, for example, that it would be irrelevant whether the defendant actually did use force against the person or property of another to commit the offense. *See id.* (holding circumstances of offense irrelevant).

"may be employed."⁵² Thus, the court concluded that the word "use" in § 16(b) requires recklessness in regard to the substantial probability that the offender will *intentionally* employ force to commit the crime.⁵³ Under the U.S.S.G., however, a crime of reckless endangerment involving a serious risk of physical injury to another person, but not necessarily involving intent to use force, can qualify as a crime of violence.⁵⁴ The court distinguished the definition of crime of violence found in the U.S.S.G. (which considers the effect of the defendant's conduct) from 18 U.S.C. § 16(b) (which is applied categorically) and concluded that this change in definition suggests that the two standards require different interpretations.⁵⁵

Additionally, the court held that the language "in the course of committing the offense" refers only to physical force that *may be used to carry out the offense* and thus requires an *intentional use of force* against the person or

52. See *Chapa-Garza*, 243 F.3d at 926 (holding that "may be used" refers only to intentionally employed force). Thus, the criterion that defendant use physical force refers to intentional, not accidental, action. See *id.* (requiring intentional force). The court cited THE AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1997), which defines the verb "use" as:

1. To put into service or apply for a purpose; employ. 2. To avail oneself of; practice: *use caution*. 3. To conduct oneself toward; treat or handle: *used his colleagues well*. 4. To seek or achieve an end by means of, exploit: *felt he was being used*. 5. To take or consume; partake of: *She rarely used alcohol*.

Chapa-Garza, 243 F.3d at 926 (alterations in original).

The court concluded that the "four relevant definitions indicate that 'use' refers to volitional, *purposeful*, not accidental, employment of whatever is being 'used'." *Id.* (citing THE AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1997)) (emphasis in original).

53. See *id.* at 927 (defining "use" under § 16(b)). See also Brady & Tomlinson, *supra* note 41, at n.16 (citing *United States v. Rutherford*, 43 F.3d 370, 372-73 (7th Cir. 1995)) (holding drunk driving does not involve use of force, noting "a drunk driver who injures a pedestrian would not describe the incident by saying he 'used' his car to hurt someone"). But see Rah, *supra* note 4, at 2139 (comparing *Chapa-Garza*, 243 F.3d 921, with *United States v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999)) (noting that *Chapa-Garza* seemed to contradict earlier Fifth Circuit decision in holding that "use" only referred to intentional acts). *United States v. Galvan-Rodriguez* relied on the risk that physical force may be accidentally used during unauthorized operation of a vehicle offense, such that the offense is a crime of violence. See *Galvan-Rodriguez*, 169 F.3d at 219-20 (operating vehicle without consent risks lives of others and thus intent is not requisite to determine offense is crime of violence).

54. See *Chapa-Garza*, 243 F.3d at 927 (distinguishing § 16(b) from U.S.S.G. § 4B1.2); see also National Immigration Law Center, *U.S. v. Chapa-Garza: 5th Circuit Holds That Texas Felony DWI Is Not A Crime of Violence*, IMMIGR. RTS. UPDATE Vol. 15, No. 2 (Mar. 29, 2001), available at <http://www.nilc.org/immlawpolicy/removcrim/removcrim051.htm> (citing *Chapa-Garza*, 243 F.3d at 926) (citing *United States v. Parson*, 955 F.2d 858, 865-66 (3d Cir. 1992)) (stating definition in U.S.S.G. could include unintentional reckless conduct, while definition in § 16(b) requires intentional acts of physical force).

55. See *Chapa-Garza*, 243 F.3d at 924 (concluding that change in definition must have some effect other than restatement of § 16(b)).

property of another.⁵⁶ The Fifth Circuit deduced that while a victim may sustain injury from physical force by an automobile operated by an intoxicated individual, the driver has not intentionally used force in perpetration of the crime; thus felony DWI does not qualify as a crime of violence.⁵⁷

56. *See id.* at 927 (interpreting “in the course of committing the offense” as intentional force upon another or their property).

57. *See id.* (holding force of automobile collision in drunk driving accident unintentional). The court noted that Texas felony DWI is committed when an intoxicated defendant with two prior convictions “begins operating a vehicle” and intentional force is rarely used to commit this offense. *See id.* (noting intentional force rarely used when beginning to operate vehicle). The government, in seeking deportation of the alien criminals, argued that felony DWI was a crime of violence because of the substantial risk that drunk driving would result in an automobile accident and urged that anytime an offense involves substantial risk of harm, that offense is a crime of violence. *See id.* at 924 (stating government argument that any offense involving substantial risk of harm, even if accidental, is crime of violence). For further support of this government position, see *United States v. Velazquez-Overa*, 100 F.3d 418, 421 (5th Cir. 1996) (citing *United States v. Rodriguez-Guzman*, 56 F.3d 18, 21 n.4 (5th Cir. 1995)) (“If a crime by its nature presents a substantial risk that force will be used against the property [or person] of another, then it falls within the ambit of § 16(b) whether [or not] such force was actually used in the crime.”). The court disagreed with this contention of the government for three reasons, which this Note will discuss below. First, it would require the court to construe § 16(b) in the same manner as U.S.S.G. § 4B1.2(a)(2), which now contains significantly broader language. *See Chapa-Garza*, 243 F.3d at 924 (holding that new Sentencing Guidelines “crime of violence” definition is broader than 18 U.S.C. § 16 and can no longer be considered identical). Prior to 1989, the U.S.S.G. § 4B1.2 referred to 18 U.S.C. § 16 for the definition of crime of violence. *See id.* (citing previous version of U.S.S.G. § 4B1.2, which referenced § 16(b)). *But see* *Tapia-Garcia v. INS*, 237 F.3d 1216, 1222 (10th Cir. 2001) (ruling that new U.S.S.G. definition, although slightly different, was interchangeable with that of 18 U.S.C. § 16(b) in felony DWI situation in Tenth Circuit). For a further discussion of the Tenth Circuit’s determination that there are such slight variations in the crime of violence definition in the Sentencing Guidelines and in immigration law, see *supra* notes 40-43 and accompanying text.

Second, “‘substantial risk that physical force . . . may be used’ contemplates only reckless disregard for the probability that intentional force may be employed.” *See Chapa-Garza*, 243 F.3d at 924 (stating that language of § 16(b) requires intent). Section 16(b) requires that physical force be applied “in the course of committing the offense.” *Id.* at 927 (quoting § 16(b) in part). This phrase allowed the Fifth Circuit to determine, “[T]he touchstone of ‘violence’ . . . is the risk that physical injury will result, rather than the risk that physical force may be used to carry out the offense.” *Id.* (quoting *Velazquez-Overa*, 100 F.3d at 421 n.4). Thus, § 16(b) only refers to physical force that may be used to perpetrate the offense and the offender must “intentionally” use this force against the person or property of another. *See id.* (emphasis in original) (holding § 16(b) refers only to intentional force).

Lastly, the physical force described in § 16(b) is that “used in the course of committing the offense,” not force that could result from the offense being committed. *See id.* (stating force must be used in perpetrating the offense). The court explained that, although a victim of a drunk driver may sustain injury from force on his person by the driver’s automobile, this force has not been “intentionally used” against the victim. *See id.* (requiring intentional force). Further, the Fifth Circuit held that the crime of felony DWI is committed when the defendant begins operating a vehicle while intoxicated and intentional force against a person’s body

Almost simultaneously, the Seventh Circuit, in *Bazan-Reyes v. INS*,⁵⁸ consolidated the appeals of three resident aliens convicted of state drunk driving offenses under Indiana, Illinois and Wisconsin laws.⁵⁹ Engaging in an analysis of the Sentencing Guidelines and the immigration law definitions of a crime of violence similar to that in *Chapa-Garza*, the court refused to agree with the government that § 16(b) equates to U.S.S.G. § 4B1.2(1)(ii).⁶⁰ The court reasoned that, if it had agreed with the government's position, almost any felony offense involving a substantial risk of physical harm (even accidental acts) would constitute a crime of violence under § 16(b) "because physical harm is nearly always a result of some type of physical force."⁶¹

The court observed that the word "use" requires intentional physical force and thus prohibits finding drunk driving a crime of violence under § 16(b).⁶² The Seventh Circuit agreed with the petitioners' construction

is never employed to commit such an offense. *See id.* (reasoning that intentional force is never used when beginning to operate vehicle). *But see* United States v. Chapa-Garza, 262 F.3d 479, 483 (5th Cir. 2001) (denial for rehearing en banc) (Barksdale, J., dissenting) ("The definition employed in *Chapa-Garza*, replacing 'use' with 'intentional use', is particularly troubling in the context of DWI, which is criminalized not because of what the driver intends to do (operate a vehicle while intoxicated) but rather because of the unintended consequences of that action (great risk to people and property).").

58. 256 F.3d 600 (7th Cir. 2001).

59. *See id.* at 602 (stating procedural history of each defendant's conviction). The Court rejected decisions from the INS and BIA, which called for removal in determining that the DWI offenses constituted crimes of violence under 18 U.S.C. § 16. *See id.* at 603-04 (stating procedural history). Bazan-Reyes, a Mexican citizen, appealed from an INS decision, while Maciasowicz, a citizen of Poland, and Gomez-Vela, a citizen of Mexico, appealed from BIA decisions. *See id.* at 602 (providing factual background). In a notice of intent to issue a final removal order, the INS alleged that Bazan-Reyes was guilty of an aggravated felony and thus removable. *See id.* at 603 (stating procedural history of Bazan-Reyes' appeal). At BIA hearings, Immigration Judges found Maciasowicz guilty of an aggravated felony (homicide by intoxicated use of a vehicle) and Gomez-Vela guilty of aggravated DUI, both of which were considered crimes of violence triggering deportation. *See id.* at 604 (stating procedural history of Maciasowicz's and Gomez-Vela's appeals).

60. *See id.* at 610 (dismissing argument by government that § 16(b) covers all felonies involving substantial risk of object exerting force on another, thus paralleling § 16(b) with U.S.S.G. § 4B1.2(1)(ii)). For a further discussion of the definitional distinctions between the U.S.S.G. and § 16(b) in *Chapa-Garza*, see *supra* notes 52-57 and accompanying text.

61. *See Bazan-Reyes*, 256 F.3d at 610 (foreseeing broad implications of § 16(b) if interpreted as equivalent to U.S.S.G. § 4B1.2(1)(ii)). The court gave an example of the potential ramifications in applying the government's interpretation: a felony conviction for involuntary manslaughter that was the result of speeding would become a crime of violence. *See id.* (providing example of what would result if court applied government interpretation). While Congress may have intended to reach conduct that is normally non-violent (such as speeding), the court refused to make such a finding when the "plain language of the statute" did not support this interpretation. *See id.* (holding plain language of statute did not illustrate that Congress intended to include normally non-violent conduct under § 16(b)).

62. *See id.* at 608 (determining that DWI cannot be crime of violence due to lack of intent). The BIA argued that a crime of violence is not limited to inten-

of § 16(b) and concluded that DWI offenses generally do not involve intentional violent force, or even a substantial risk of intentional violent force, and thus are not crimes of violence.⁶³

Most recently, the Ninth Circuit held that felony DWI is not a crime of violence in *Montiel-Barraza v. INS*.⁶⁴ The BIA had found Montiel-Barraza removable as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii) for his California DUI conviction given his prior convictions of the past seven years.⁶⁵ Based on circuit precedent, the court ruled that a violation of a lesser offense, where no injuries occurred due to Montiel-Barraza's drunk driving offense, could not logically amount to an aggravated felony, even for a recidivist.⁶⁶ The court concluded that the California enhancement statute did not alter the elements of the underlying offense and thus the BIA had not convicted Montiel-Barraza of a crime of violence.⁶⁷

tional acts under § 16(b), but that it includes reckless (and possibly negligent) behavior, while Bazan-Reyes, Maciasowicz and Gomez-Vela argued that § 16(b) requires a substantial risk of intentional force, which was not present in their DWI convictions. *See id.* at 607 (outlining opposing arguments as to whether DWI is crime of violence under § 16(b)).

63. *See id.* at 606 (stating petitioners' argument that § 16(b) requires at least some substantial risk of intentional force). The court held that petitioners' use of intentional force to press on the accelerator did not satisfy § 16(b)'s intentional force requirement. *See id.* at 611 (finding that pressing on accelerator did not qualify as intentional force for purposes of § 16(b)). The court stated that for physical force to "be used in the course of committing the offense" it must be accompanied by an intent to use that force. *See id.* (quoting 18 U.S.C. § 16(b)) (stating physical force must "be used in the course of committing the offense").

64. 275 F.3d 1178, 1180 (9th Cir. 2002).

65. *See id.* at 1179 (stating procedural history). Montiel-Barraza had four previous DWI convictions within the seven years prior to his current offense, elevating his crime to a felony. *See id.* (citing CAL. VEH. CODE §§ 23152, 23175 (West 2001)) (defining California enhancement regulations). Montiel-Barraza's conviction at issue was DWI without injury. *See id.* at 1180 (citing CAL. VEH. CODE § 23152 (West 2001)) (defining crime of DWI without injury).

66. *See id.* (holding that if DUI with injury to another does not amount to aggravated felony, then DUI without injury cannot qualify as aggravated felony). The court had previously held that DUI with injury was violated through negligence alone under California law and thus could not be a crime of violence due to the lack of the requisite mens rea. *See United States v. Trinidad-Acquino*, 259 F.3d 1140, 1146 (9th Cir. 2001) (holding crime "need not be committed purposefully or knowingly, but it must be committed at least recklessly" to be crime of violence and DWI with injury to another can be committed negligently). The Ninth Circuit did not hold that Trinidad-Acquino's offense involved a mens rea of negligence, but that the state DUI statute as a whole allowed for a conviction for mere negligence. *See id.* (holding state statute allowed for conviction with negligent mens rea). Thus, categorically, the court held that a DUI conviction under California law was insufficient to deport Trinidad-Acquino for an "aggravated felony." *See id.* (choosing not to consider underlying facts of Trinidad-Acquino's offense).

67. *See Montiel-Barraza*, 275 F.3d at 1180 (citing *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001), *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001), *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001)) (supporting statement that enhancement statute does not alter elements of underlying offense and thus felony DWI is not crime of violence); *see also United States v. Pedroza-Ballina*, 39 Fed. Appx. 552, 554 (9th Cir. 2002) (holding felony DWI not crime of violence). The Ninth Cir-

IV. AN APPARENT DEPARTURE FROM IMPLEMENTING THE CATEGORICAL APPROACH IN *DALTON V. ASHCROFT*⁶⁸

The Second Circuit, in *Dalton*, relied on the breadth of the relevant state felony DWI statute, as well as its interpretation of “use of physical force,” to find that felony DWI is not a crime of violence for purposes of deportation.⁶⁹ A critical assessment of this decision evinces no discussion of the mens rea requirement for a crime of violence and hesitancy in applying the broad categorical approach.⁷⁰ The following sections thoroughly survey *Dalton* and conclude that, under the current application of

cuit followed *Montiel-Barraza* in holding that Pedroza’s DUI conviction, as a third time offense, was not a crime of violence due to a lack of intent. *See id.* (holding that DUI conviction with injury is not a crime of violence, even for recidivists). Pedroza was simply treated as a recidivist under an enhancement statute and circuit precedent held that multiple prior convictions did not elevate DUI to an aggravated felony constituting a crime of violence. *See id.* (citing *Montiel-Barraza*, 275 F.3d at 1180) (citing *United States v. Trinidad-Acquino*, 259 F.3d at 1146) (holding that determination in *Trinidad-Acquino* that DUI with injury to another person is not crime of violence applies equally to recidivists); *see also* *Cuevas-Diaz v. Ashcroft*, 37 Fed. Appx. 935, 939 (9th Cir. 2002) (finding that BIA’s determination that DWI with priors constituted aggravated felony as crime of violence conflicted with *Montiel-Barraza*, which extended *Trinidad-Acquino* to recidivists). *But see* *Tapia-Garcia v. INS*, 237 F.3d 1216, 1222 (10th Cir. 2001) (holding felony DWI under Idaho enhancement statute is crime of violence). The California enhancement statute under which Montiel-Barraza was punished provides that a person convicted of three or more separate violations of DUI within seven years is punishable by imprisonment of up to one year. *See Montiel-Barraza*, 275 F.3d at 1180 (citing CAL. VEH. CODE § 23550 (West 2001)) (outlining California’s enhancement policy for multiple DUI convictions).

68. 257 F.3d 200 (2d Cir. 2001). Thomas Anthony Dalton, a native and citizen of neighboring Canada, had lived in the United States as a permanent resident since 1958 when he was convicted of his third DWI in the state of New York. *See id.* at 202 (stating factual background). Dalton became a permanent resident in the United States when he was a young child. *Id.* (detailing facts). Additionally, Dalton’s immediate relatives were living in the United States at the time of the decision. *Id.* (same). Due to his two DWI convictions within the previous ten years, his recent conviction for DWI under N.Y. VEH. & TRAF. LAW § 1192.3 was enhanced to a felony under New York’s recidivist statute. *Id.* (citing N.Y. VEH. & TRAF. LAW § 1192.1(c)(ii) (McKinney 2000)) (noting enhancement of DWI offense). Introducing the discussion, the Second Circuit explained that it would review the BIA’s interpretation of federal or criminal statutes *de novo*. *See id.* at 203 (indicating standard of review). Ordinarily, the Court would apply deference to the BIA’s definition. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (deferring to agency when agency decision is not arbitrary or capricious). However, “because the INS defines an ‘aggravated felony’ in § 1101(a)(43)(F) by reference to a ‘crime of violence’ in 18 U.S.C. § 16, the Court reviewed *de novo* the question of whether N.Y. VET. & TRAN. LAW § 1192.3 constitutes a ‘crime of violence’ that in turn, constitutes a deportable ‘aggravated felony’ under the INA.” *See Dalton*, 257 F.3d at 203-04 (explaining scope of judicial review of BIA decisions).

69. For a further discussion of the Second Circuit’s conclusion that felony DWI is not a crime of violence, see *infra* notes 72-82 and accompanying text.

70. For a detailed analysis of the Second Circuit’s rationale in holding that felony DWI is not a crime of violence, see *infra* notes 72-82 and accompanying text.

the categorical approach, state felony DWI determinations improperly affect an area of law that lies within the domain of Congress.⁷¹

A. *The Second Circuit's Hesitant Deduction that, Categorically, Felony DWI is Not a Crime of Violence*

The Second Circuit outlined the categorical approach used in criminal statutory interpretation and determined that "the singular circumstances of an individual petitioner's crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant."⁷²

The New York DWI statute provides, in its entirety, that "no person shall operate a motor vehicle while in an intoxicated condition."⁷³ The Second Circuit, in making its determination in *Dalton*, relied on a recent New York Court of Appeals decision, which pronounced the breadth of this New York DWI statute.⁷⁴ For example, a person in New York could be found guilty of DWI if he/she simply sleeps in the driver seat of a car, even if evidence proves that the vehicle never moved.⁷⁵ Furthermore, a person can receive a DWI conviction without having the knowledge of how to drive.⁷⁶ Even if the vehicle itself is inoperable, a defendant can receive a DWI conviction.⁷⁷ Identifying no risk of force or resultant injury at such a minimum threshold, the Second Circuit could not recognize the afore-

71. For a further discussion of the argument that state felony DWI laws are inappropriately affecting immigration law, see *infra* notes 95-163 and accompanying text.

72. *Dalton*, 257 F.3d at 204 (quoting *Michel v. INS*, 206 F.3d 253, 270 (2d Cir. 2000)) (Calabresi, J., dissenting) (defining categorical approach to criminal statutory interpretations). For a further discussion of the categorical approach, see *supra* notes 29-33 and accompanying text. Additionally, the court particularly noted the appropriateness of a categorical approach in the current context due to the fact that the background elements of the case may be up to ten years old and may never have been developed in a trial court. See *Dalton*, 257 F.3d at 205 (citing N.Y. VEH. & TRAF. LAW § 1193(c)(ii) (McKinney 2000)) (citing sparse nature of facts from previous convictions).

73. N.Y. VEH. & TRAF. LAW § 1192.3 (McKinney 2000) (defining DWI in New York).

74. See *Dalton*, 257 F.3d at 205 (citing *People v. Prescott*, 95 N.Y.2d 655 (N.Y. 2001)) (clarifying breadth of New York DWI law). In *People v. Prescott*, the court held that attempted DWI is not at all distinct from the substantive crime of DWI because the crime of attempt is already encompassed in the statute. See *Dalton*, 257 F.3d at 205 (citing *Prescott*, 95 N.Y.2d at 782) (defining N.Y. VEH. & TRAF. LAW § 1192.3 as "sweeping").

75. See *id.* (citing *People v. Marriot*, 37 A.D.2d 868 (N.Y. App. Div. 1971)) (illustrating breadth of New York DWI statute).

76. See *id.* (giving example of broad reach of New York DWI statute).

77. See *id.* (citing *People v. David "W"*, 83 A.D.2d 690 (N.Y. App. Div. 1981)) (holding that testimony regarding inoperability of vehicle on which defendant was slumped over in intoxicated state was irrelevant to question of guilt under statute).

mentioned DWI situations as crimes of violence, even if the situations occurred on three separate occasions.⁷⁸

Additionally, the Second Circuit held that the “use of physical force” was not the equivalent of an accident, as an accident, by common usage, is “something that is neither planned nor foreseen—except perhaps in hindsight.”⁷⁹ The court stated that numerous crimes involve a substantial risk of injury but do not involve the use of physical force.⁸⁰ It noted that the U.S.S.G. recognized this difference between “use of force” and “risk of injury” in broadly defining “crimes of violence” under § 4B1.2(a)(2) by the offense’s resultant injury rather than by the use of force.⁸¹ The court agreed with the Fifth Circuit’s determination that “risk of the use of physical force” and “risk of injury” demand different interpretations and concluded that Dalton’s DWI conviction did not satisfy the elements of a crime of violence under 18 U.S.C. § 16(b).⁸²

78. *See id.* at 205-06 (holding that some DWI offenses involve no risk that force may be used or that injury may result). The government contended that this requisite minimum conduct always presents a substantial risk that physical force may be used because the conduct focuses on the defendant’s intention. *See id.* at 206 (outlining government’s position). The government’s argument continued, alleging that an intent to drive while intoxicated always poses the forceful risk of collisions and injuries inherent in drunk driving. *See id.* (stating government’s position). The Second Circuit disagreed with this position, stating that hypothetical harms are not within the risks defined in 18 U.S.C. § 16(b). *See id.* (holding hypothetical harms not within reach of statute). In supporting the government’s opinion, one commentator stated, for example, that the possibility of an intoxicated person, who had passed out at the wheel, awakening and starting to drive while still legally intoxicated seemed quite plausible. *See Rah, supra* note 4, at 2141-42 (disputing Second and Seventh Circuits’ determination that certain DWI offenses involve little or no risk).

79. *See Dalton*, 257 F.3d at 206 (reasoning that physical force *used* cannot reasonably be interpreted as pressing accelerator or steering wheel) (emphasis added). “Although an accident may properly be said to involve force, one cannot be said to *use* force to pry open a heavy, jammed door.” *Id.* at 206 (emphasis in original).

80. *See id.* at 207 (exhibiting crimes that involve risk of injury but do not involve use of force). The government equated the risk of the “use of physical force” with the risk of injury, but the Court disagreed, giving several examples of crimes that involve a substantial risk of injury but do not involve the use of physical force (listing crimes including leaving an infant by a pool or possession of dangerous drugs). *See id.* (choosing not to equate risk of injury with risk of use of force).

81. *See id.* (citing *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir.2001); *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992)) (explaining how U.S.S.G. defines crime of violence by offense’s resultant injury rather than by use of its force). For a further discussion of the definitional change in the U.S.S.G., see *supra* notes 40-43, 52-57, 79-82 and accompanying text.

82. *See Dalton*, 257 F.3d at 207-08 (concluding that Dalton’s DWI conviction was not crime of violence, thus vacating his deportation order).

B. *Examining the Dalton Conclusion*

A strong dissent accompanied *Dalton*, a two to one Second Circuit decision.⁸³ The dissent reasoned that, even if the word “use” involved specific intent, driving does involve some use of intentional force, as the driver “necessarily intends to use mechanized force to propel the vehicle to its destination.”⁸⁴ Thus, but for a driver’s use of force to propel the vehicle, a collision cannot occur.⁸⁵ Furthermore, all driving involves some risk that physical force may be used and driving while under the influence of alcohol “makes this risk ‘substantial.’”⁸⁶ Finally, the dissent concluded that the courts should apply a broad, “common sense” categorical approach that considers the risks associated with the offense under the relevant statute.⁸⁷

The *Dalton* majority also indicated a desire to depart from the broad categorical approach in citing the minimum threshold of New York’s DWI statute to illustrate that there are some circumstances when a DWI does not constitute a crime of violence.⁸⁸ This illustration implies that the Court believed that there are circumstances when DWI *does* constitute a crime of violence.⁸⁹ The Second Circuit may have wanted to distinguish between the two classes of DWI it proposed, but faced the restriction of the categorical approach.⁹⁰ The court unveiled a flaw in the shining armor of the categorical approach, which the Fifth, Seventh, Ninth and Tenth Circuits had strictly applied to that point.⁹¹ Thus, *Dalton* begs the

83. *See id.* at 209 (Walker, C.J., dissenting) (stating that driving involves intentional use of force and thus reasoning that felony DWI should be considered crime of violence).

84. *See id.* (Walker, C.J., dissenting) (maintaining that all driving involves some risk that physical force may be used against another and DUI makes that risk substantial).

85. *See id.* (Walker, C.J., dissenting) (contending that force does not stop being “used” until collision results).

86. *See id.* at 209-10 (Walker, C.J., dissenting) (arguing that driving while intoxicated increases risk to “substantial” that “physical force may be used against the person or property of another”).

87. *See id.* at 209 (Walker, C.J., dissenting) (concluding it was use of force upon innocent victims by drunk drivers that lead to legislation). One commentator, however, called for the demise of the entire categorical approach when deportation is at stake. *See* Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law’s New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 618-19 (1998) (arguing that certain individual circumstances should be considered by adjudicator before criminal aliens are deported).

88. *See Dalton*, 257 F.3d at 205 (“[A] person can be convicted under NYVTL § 1192.3 even when there is no risk that force may be used or that injury may result.”).

89. *See id.* (delineating court’s analysis).

90. For a further discussion of the categorical approach that is to be employed in crime of violence determinations, see *supra* notes 29-33 and accompanying text.

91. For examples of the implementation of the categorical approach across various circuits, see *supra* notes 34-67 and accompanying text.

question: if Congress legislates the criminal acts of aliens, how can the states fairly exhibit such control over the definition of felony DWI, given its far-reaching effects on determining when, under immigration law, the "crime of violence" determination occurs?⁹² While states have jurisdiction to make their own DWI laws, Congress must amend immigration law to include a felony DWI definition for purposes of deportation.⁹³ Such an amendment would demonstrate Congress's authority over removal proceedings and would provide a uniform standard for noncitizens to recognize and follow, or, in the alternative, face punishment for noncompliance.⁹⁴

V. A REMEDY TO ELIMINATE THE INCONSISTENT INTERPRETATIONS
OF 18 U.S.C. § 16(b)

In light of the preceding analysis, this Part argues that the Tenth and the Eighth Circuits have correctly concluded that a crime of violence determination under 18 U.S.C. § 16(b) does not include a mens rea of specific intent.⁹⁵ Thus, a felony DWI constitutes a crime of violence under the immigration statute.⁹⁶ Nevertheless, due to the extreme variations in state determinations of what constitutes a felony DWI, uniformity throughout deportation proceedings can only occur through a federally defined felony DWI for noncitizens.⁹⁷ First, this Part will discuss the interpretation of the mens rea element in 18 U.S.C. § 16(b).⁹⁸ Then, this Part will address limitations of the current application of the categorical approach.⁹⁹ Finally, this Part will support the need for defining felony DWI in the deportation context and propose a potential remedy.¹⁰⁰

92. For a discussion of Congress's plenary power over immigration, see *supra* notes 19-25 and accompanying text.

93. *Cf.* U.S. CONST. amend. X (stating that, if power to legislate offenses (such as DWI) is not delegated to federal government, it is reserved to states).

94. For a further discussion of the proposed amendment, see *infra* notes 152-63 and accompanying text.

95. For a detailed discussion of the Tenth and Eighth Circuit decisions holding that felony DWI is a crime of violence, see *supra* notes 37-48 and accompanying text.

96. For a discussion of the mens rea element of 18 U.S.C. § 16(b), see *infra* notes 101-19 and accompanying text.

97. For a discussion of the variations in state felony DWI statutes, see *supra* notes 7-10 and accompanying text.

98. For a further discussion of the mens rea element in § 16(b), see *infra* notes 101-19 and accompanying text.

99. For a further discussion of limitations of the categorical approach to statutory interpretation in the context of felony DWI, see *infra* notes 120-51 and accompanying text.

100. For a further discussion of the proposed amendment to immigration law, see *infra* notes 152-63 and accompanying text.

A. *Mens Rea Element of 18 U.S.C. § 16(b)*

The circuit courts concluding that felony DWI was not a crime of violence focused on the language “physical force against the person or property of another may be used” in holding that 18 U.S.C. § 16(b) required a specific intent to employ physical force.¹⁰¹ Nevertheless, the lack of a more decisive phrase implies that the legislature meant to include uses of force in addition to intentional force.¹⁰² The Seventh Circuit stated, “[A] drunk driving accident is not the result of plan, direction, or purpose but of recklessness at worst and misfortune at best.”¹⁰³ With 17,448 alcohol-related traffic fatalities in 2001 alone, it seems difficult to label a drunk driving accident a “misfortune.”¹⁰⁴ Lawmakers enacted drunk driving statutes to protect others on the road, so therefore separating intent to operate a vehicle from intent to use force on another belittles the purpose of drunk driving legislation.¹⁰⁵ The purpose of DWI law is to protect lives, and the risk of violent force exerted on another in committing a drunk driving offense, even if accidental, constitutes reckless disregard of this purpose and is a crime of violence.¹⁰⁶

101. See, e.g., *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (holding felony DWI not crime of violence based on lack of intent); *Bazan-Reyes v. INS*, 256 F.3d 600, 609 (7th Cir. 2001) (holding that word “use” requires intentional physical force and thus prohibits finding drunk driving as crime of violence under § 16(b)); *Dalton v. Ashcroft*, 257 F.3d 200, 207-08 (2d Cir. 2001) (finding “risk of the use of physical force” and “risk of injury” cannot be interpreted same way and concluding that DWI conviction does not satisfy elements of crime of violence under 18 U.S.C. § 16(b)). For a detailed account of these decisions, see *supra* notes 49-67 and 74-89 and accompanying text.

102. See *United States v. Myers*, 104 F.3d 76, 81 (5th Cir. 1997) (stating that when legislature has not identified specific intent terms, courts should not presume crime requires specific intent element); see also *Park v. INS*, 252 F.3d 1018, 1024 (9th Cir. 2001) (holding reckless mens rea was sufficient to constitute crime of violence under 18 U.S.C. § 16(a) and (b) and no specific intent was needed for deportation); *United States v. Lewis*, 780 F.2d 1140, 1142-43 (4th Cir. 1986) (holding that legislature requires, at most, general intent when not using words of specific intent). In *Park*, the court stated that the issue was not whether the offender's actual conduct constituted a felony but whether the full range of conduct encompassed by the statute constituted an aggravated felony, which the court held it did. See *Park*, 252 F.3d at 1021 (discussing appropriate standard in determining whether defendant acted feloniously).

103. *Bazan-Reyes*, 256 F.3d at 612 (quoting *United States v. Rutherford*, 54 F.3d 370, 372 (7th Cir. 1995)); see also *Dalton*, 257 F.3d at 207-08 (citing *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001)) (reasoning that drunk driving accident is not planned).

104. See *Mothers Against Drunk Driving, Latest Government Statistics Showing Growing Number of People Killed in Alcohol-Related Traffic Crashes*, available at <http://madd.org/news/0,1056,4808,00.html> (last visited Oct. 3, 2002) (estimating alcohol-related traffic fatalities in 2001).

105. See *Dalton*, 257 F.3d at 209 (Walker, C.J., dissenting) (concluding it was “use of force upon innocent victims by drunk drivers” that lead to DWI legislation).

106. See *id.* (Walker, C.J., dissenting) (stating purpose of DWI legislation).

18 U.S.C. § 16(b) also requires the use of force “in the course of committing the offense.”¹⁰⁷ The Fifth Circuit found this language to require force that is necessary to perpetrate the offense, as a person commits a DWI when he begins to operate a vehicle, an act that “virtually never” includes *intentional* force.¹⁰⁸ One commentator labeled this Fifth Circuit interpretation “disturbing.”¹⁰⁹ As the New York statute in *Dalton* details, DWI is sometimes committed before a vehicle is even started and thus cannot mean that the offense also ends at that point.¹¹⁰ “A driver exerts personal effort not only when he begins operation of the vehicle but also ‘while’ he operates it.”¹¹¹

Finally, the offense under 18 U.S.C. § 16(b) must “by its nature, involve . . . substantial risk.”¹¹² The language “by its nature” requires application of the categorical approach.¹¹³ Thus, the courts have held that “substantial risk” does not require the risk to “occur in every instance; rather, a substantial risk requires only a strong probability that the event, in this case the application of physical force during the commission of the crime, will occur.”¹¹⁴ Hence, the determination for the courts is whether, categorically, felony DWI offenses include a strong possibility that the application of physical force will occur.¹¹⁵

Repeat convictions for DWI offenses do create a “strong probability that . . . the application of physical force . . . will occur.”¹¹⁶ Although prior convictions do not increase the chance that a particular incident of drunk driving will cause injury to another or their property, the net risk that the

107. See 18 U.S.C. § 16(b) (2002) (defining “crime of violence”).

108. See *Chapa-Garza*, 243 F.3d at 927 (determining operating vehicle while intoxicated does not involve *intentional* force); see also *Bazan-Reyes*, 256 F.3d at 611 (finding intentional force used to press accelerator pedal does not constitute requisite physical force for crime of violence).

109. See Rah, *supra* note 4, at 2140 (considering Fifth Circuit determination “disturbing” that operating vehicle while intoxicated does not involve intent).

110. See *Dalton*, 257 F.3d at 205-06 (outlining New York DWI statute). For a further discussion of the New York DWI statute and *Dalton*, see *supra* notes 73-78, 88-94 and accompanying text.

111. *United States v. Chapa-Garza*, 262 F.3d 479, 484 (5th Cir. 2001) (Barksdale, J., dissenting).

112. See 18 U.S.C. § 16(b) (2002) (defining “crime of violence”).

113. For a further discussion of the categorical approach in the context of defining a crime of violence, see *supra* notes 29-33 and accompanying text.

114. *United States v. Velazquez-Overa*, 100 F.3d 418, 420 (5th Cir. 1996) (quoting *United States v. Rodriguez-Guzman*, 56 F.3d 18, 20 (5th Cir. 1995)); see also *United States v. Alas-Castro*, 184 F.3d 812, 813 (8th Cir. 1999) (defining “substantial risk”).

115. See Rah, *supra* note 4, at 2142 (citing *Rodriguez-Guzman*, 56 F.3d at 20) (stating determination for courts is whether strong probability of use of force exists).

116. *Id.* (quoting *Rodriguez-Guzman*, 56 F.3d at 20); see also *Alas-Castro*, 184 F.3d at 813 (applying same rationale to sexual abuse case); *Velazquez-Overa*, 100 F.3d at 420-21 (reasoning repeat DWI convictions illustrate strong probability of use of force).

defendant will cause injury in one of his/her drunk driving incidents is higher than if he/she had committed the offense only once.¹¹⁷ Forty percent of the total traffic fatalities in 2000 were alcohol-related and an average of one alcohol-related death occurred every thirty-two minutes.¹¹⁸ Accordingly, it is undeniable that drunk driving involves a “substantial” risk of the use of physical force against the person or property of another and therefore the more accurate interpretation of 18 U.S.C. § 16(b) is that felony DWI constitutes a crime of violence.¹¹⁹

B. *Limitations in Applying the Categorical Approach*

In light of the aforementioned circuit split, the categorical approach limits circuit courts in their review of BIA decisions.¹²⁰ This Section addresses the constraints on circuit courts in applying the categorical approach.¹²¹ A recent interim decision of the BIA attempted to, but did not, resolve the indistinctness surrounding categorical interpretations under § 16(b).¹²² This Section also contends that, unfortunately, this interim

117. See *Dalton v. Ashcroft*, 257 F.3d 200, 210 (2d Cir. 2001) (Walker, C.J., dissenting) (“[T]he risk that injury will occur on one of three occasions is greater than on any one occasion considered alone.”).

118. See Rah, *supra* note 4, at 2143 (estimating alcohol-related fatalities). Additionally, drivers with prior convictions for DWI are over-represented among drivers in fatal crashes, as drivers convicted of alcohol-impaired driving in the past three years are at least 1.8 times as likely to be involved in fatal crashes as intoxicated drivers with no prior convictions during the same time period. See Mothers Against Drunk Driving: *Stats and Resources, Statistics, Repeat Offenders*, available at <http://madd.org/stats/0,1056,4542,00.html> (last visited Oct. 3, 2002) (illustrating over-representation of repeat offenders in fatal accidents).

119. For a detailed discussion supporting the claim that the mens rea element of a crime of violence under § 16(b) is not specific intent, see *supra* notes 95-115 and accompanying text.

120. See 8 U.S.C. § 1252 (2002) (barring circuit review of final removal order if criminal was alien and crime he/she committed was aggravated felony). Courts have jurisdiction to review cases to determine if it is indeed barred from review. See, e.g., *Bell v. Reno*, 218 F.3d 86, 89 (2d Cir. 2000) (determining that courts have jurisdiction to decide whether petitions are procedurally barred). In other words, a court has jurisdiction to determine that the BIA was incorrect in determining that an offense is a crime of violence and only if the court decides that the agency's ruling that the offense is a crime of violence was correct would the removal order be barred from judicial review. See *id.* (deciding court had jurisdiction to determine whether Bell was alien and, if so, whether he committed enumerated offense that would satisfy barring of judicial review of final removal order); see also *Dalton*, 257 F.3d at 203 (ruling that court retained jurisdiction to determine whether, as matter of law, Dalton had committed aggravated felony); *Tapia-Garcia v. INS*, 237 F.3d 1216, 1219 (10th Cir. 2001) (citing *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997)) (holding that court is only able to determine whether petitioner is “(i) an alien (ii) deportable (iii) by reason of a criminal offense listed in the statute,” thus limiting judicial review).

121. For a detailed discussion of the constraints on the circuit courts, see *infra* notes 126-36 and accompanying text.

122. For a discussion of the holdings in these BIA interim decisions, see *infra* notes 135-40 and accompanying text.

decision only furthers the disparity among the federal circuits.¹²³ Finally, this Section analyzes specific state felony statutes that include offenses that do and do not involve crimes of violence and argues that the categorical process of interpreting such statutes falls short of the necessary uniformity in immigration law.¹²⁴

1. *Constraints on Circuit Courts*

In addition to the above analysis of the mens rea element of the crime of violence statute, a critique of the categorical approach is in order prior to proposing an amendment to immigration law.¹²⁵ A categorical approach asks whether state defined felony DWIs, as a whole, fall in the category of a crime of violence, yet the *Dalton* court seemed to imply in dicta that some felony DWIs would fall within the crime of violence definition and some would not.¹²⁶ Nevertheless, because it had to rule categorically, the Second Circuit held that all felony DWIs were not crimes of violence.¹²⁷ Reaching this conclusion, the court faced a fear of including some offenses that were not crimes of violence in with a categorical determination of all felony DWIs as crimes of violence.¹²⁸ Thus, the court interpreted § 16(b) in favor of the alien in light of the ambiguous construction of the statute.¹²⁹

The Fifth Circuit's conclusion in *Chapa-Garza* also illustrates the constraints of the categorical approach: "We hold that because intentional force against the person or property of another is seldom, if ever, employed to commit the offense of felony DWI, such offense is not a crime of violence within the meaning of 18 U.S.C. § 16(b)."¹³⁰ Notably, faced with the restriction of the categorical approach, the Fifth Circuit's language

123. For a detailed discussion of the claim that the BIA's recent interim decisions will widen the gap between the federal circuits, see *infra* notes 135-46 and accompanying text.

124. For a detailed discussion of state felony DWI statutes delineating crimes that do and do not involve crimes of violence, see *infra* notes 147-51 and accompanying text.

125. For a detailed discussion of the categorical approach, see *supra* notes 29-33 and accompanying text.

126. See *Dalton v. Ashcroft*, 257 F.3d 200, 205 (2d Cir. 2001) ("[A] person can be convicted under NYVTL § 1192.3 even when there is no risk that force may be used or that injury may result.").

127. See *id.* at 207-08 (vacating Dalton's deportation order after concluding that his DWI conviction was not crime of violence).

128. See *id.* at 205 (finding that person can be convicted of DWI even when there is no risk of force).

129. See *id.* at 207-08 (concluding that Dalton's DWI conviction was not crime of violence due in part to breadth of state felony DWI statute). The Rule of Lenity states that ambiguous statutes are to be interpreted to favor the alien. See *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (holding ambiguities in deportation statutes must be construed in alien's favor).

130. *United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001) (holding Texas felony DWI is not crime of violence because intentional force is seldom applied).

"seldom, if ever" indicates that the court believed there were circumstances when felony DWI would constitute a crime of violence.¹³¹

A final illustration of the constraints of the categorical approach is *Montiel-Barraza*, in which the court concluded that, because it had previously held that DUI with injury to another did not constitute a crime of violence, a violation of a lesser offense (where no injuries occurred due to Montiel-Barraza's drunk driving) could not logically amount to an aggravated felony, even for a recidivist.¹³² The court, constrained by the categorical approach, could not address any further circumstances of Montiel-Barraza's crime, even though his instances differed from the cited precedent because he was a repeat offender.¹³³ In light of the constraints discussed above, a congressional amendment to the federal immigration laws that includes the proper definition of felony DWI would remove this ambiguity and controversy when dealing with repeat DWI alien offenders and would preclude state laws' impacts in an area of law traditionally reserved for the federal government.¹³⁴

2. *Inadequacy of a Recent Change by the BIA in Applying the Categorical Approach*

The BIA recently withdrew from its decisions in *Matter of Puente-Salazar*¹³⁵ and *Matter of Magallanes*¹³⁶ to "ensure that aliens receive uniform treatment nationwide."¹³⁷ In *In re Ramos*,¹³⁸ the BIA concluded that where federal circuits have not decided whether DUI is a crime of violence under 18 U.S.C. § 16(b), an offense is a crime of violence if the perpetra-

131. See *id.* ("[I]ntentional force . . . is seldom, if ever, employed to commit the offense of felony DWI.").

132. See *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (holding that if DUI with injury to another does not amount to aggravated felony, then DUI without injury cannot qualify as aggravated felony).

133. See *id.* (declining to address circumstances of Montiel-Barraza's conviction). For a further discussion of *Montiel-Barraza*, see *supra* notes 64-67 and accompanying text.

134. For a further discussion of the proposed amendment, see *infra* notes 152-63 and accompanying text. For a further discussion of federal control over immigration and naturalization, see *supra* notes 19-25 and accompanying text.

135. Interim Dec. 3412, 1999 BIA LEXIS 40 (BIA Sept. 29, 1999).

136. Interim Dec. 3341, 1998 BIA LEXIS 2 (BIA March 19, 1998).

137. In *re Ramos*, Interim Dec. 3468, 2002 BIA LEXIS 7, *28-29 (BIA April 4, 2002) (en banc) (withdrawing from previous BIA rulings to establish uniformity in treatment of aliens). *Contra Puente-Salazar*, Interim Dec. 3412, 1999 BIA LEXIS 40, *16 (BIA Sept. 29, 1999) (holding felony DWI crime of violence); *Magallanes*, Interim Dec. 3341, 1998 BIA LEXIS at *9-11 (holding that 18 U.S.C. § 16(b) is not limited to crimes of specific intent and thus felony DWI is crime of violence). One commentator explained how this withdrawal "le[ft] the door open" for circuits who had not yet ruled on the issue to choose their own approach. See Daniel M. Kowalski, "But it was only a DWI . . ." (2002), available at <http://www.tindallfoster.com/dwi.html> (noting that *In re Ramos* decision "le[ft] door open" and therefore failed to establish absolute uniformity in deportation proceedings).

138. Interim Dec. 3468, 2002 BIA LEXIS 7 (BIA April 4, 2002) (en banc).

tor commits it at least *recklessly* and if it involves a substantial risk that he/she may resort to the use of force to carry out the crime.¹³⁹ Where the circuit court has ruled on the issue, however, the law of that circuit applies to BIA cases arising in that jurisdiction.¹⁴⁰

This characterization by the BIA does little to establish uniformity in removal law.¹⁴¹ First, it preserves the circuit split by holding that when the BIA makes a ruling in the jurisdiction of the Tenth Circuit it will follow *Tapia-Garcia* in holding felony DWI as a crime of violence, while in the Second, Fifth, Seventh and Ninth Circuits the BIA will not hold felony DWI as a crime of violence.¹⁴² This will likely create pockets of alien criminals across the latter circuits, for these aliens will recognize the consequences as not nearly as severe in those regions. Moreover, this will actually *broaden* the division among the federal circuits, for the BIA will use a standard similar to the one that caused the initial circuit split and certainly defendants will bring appeals in those circuits that have not yet ruled on the issue to secure a furtherance of the divergence.¹⁴³

This new BIA standard differs from the circuit court opinions in that it includes the mens rea of recklessness, not intent, as interpreted under 18 U.S.C. § 16(b) by most of the latter circuits.¹⁴⁴ Nevertheless, while this process appears to settle the mens rea issue, it also requires “a substantial

139. *See id.* at *28-29 (emphasis added) (setting new standard). The BIA held that the Massachusetts felony offense of operating a motor vehicle while under the influence of alcohol is not a crime of violence, because the circuit in which they were sitting had already ruled on the issue. *See id.* at *25 (citing *United States v. Trinidad-Acquino*, 259 F.3d 1140, 1145-46 (9th Cir. 2001)) (holding crime “must at least be committed recklessly” to be crime of violence and concluding that felony DWI is not crime of violence because it can be committed negligently).

140. *See id.* at *28-29 (holding that when BIA sits in circuit that has addressed issue of whether DUI is crime of violence, existing circuit decisions will serve as BIA precedent).

141. *See id.* at *34-35 (Filppu, Board Member, concurring) (“The principal concern I have with the majority’s ruling is that it once again can be seen to announce *the Board’s* reading of criminal law for Immigration Judges and the parties to follow in removal cases, if there is no controlling law in the particular circuit in which the case arises.”).

142. *Compare* *Tapia-Garcia v. INS*, 237 F.3d 1216, 1222-23 (10th Cir. 2001) (holding Idaho felony DWI is crime of violence), *with* *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (maintaining felony DWI is not crime of violence), *Dalton v. Ashcroft*, 257 F.3d 200, 207-08 (2d Cir. 2001) (determining New York felony DWI is not crime of violence), *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001) (holding Texas felony DWI is not crime of violence), *and* *Bazan-Reyes v. INS*, 256 F.3d 600, 609 (7th Cir. 2001) (deciding that Indiana, Illinois and Wisconsin felony DWI is not crime of violence). For a detailed analysis of these holdings, see *supra* notes 34-67 and accompanying text.

143. *See Ramos*, 2002 BIA LEXIS 7, at *40 (Huritz, Board Member, dissenting) (citing lack of uniform approach in federal circuits and analyzing BIA majority’s new standard).

144. *See, e.g., Bazan-Reyes*, 256 F.3d at 609 (holding that word “use” requires intentional physical force and thus prohibits finding drunk driving as crime of violence under § 16(b)); *Montiel-Barraza*, 275 F.3d at 1180 (holding felony DWI not crime of violence based on lack of intent).

risk that the perpetrator may resort to the use of force to carry out the crime," thus allowing for continued disagreement as to the phrases "use of force" (and the mens rea required for this use) and "in the commission of the crime."¹⁴⁵ This standard will only continue to broaden the division among the courts and is not compatible with the amendment of 18 U.S.C. § 16(b) proposed below.¹⁴⁶

3. *The Categorical Approach Is Not Uniform: It Encompasses Offenses that Do and Do Not Involve Crimes of Violence*

State felony DWI statutes run the gamut from a minimum of one to a maximum of four prior convictions.¹⁴⁷ "As a general rule, if a statute encompasses both acts that do and do not involve moral turpitude, the BIA cannot sustain a deportability finding on that statute."¹⁴⁸ The *Dalton* court extended this rule to a crime of violence determination.¹⁴⁹ Nevertheless, if deportation of criminal aliens is such an important federal determination, why place this state-defined limitation upon its implementation by the BIA?¹⁵⁰ If this were the policy, state legislators would only have to write a broad DWI definition like New York to assure that aliens in their state would not face removal.¹⁵¹

C. *An Amendment Proposal for Immigration Law*

In the case of *Ramos*, two BIA Board Members relied on adverse appellate court rulings in abandoning BIA precedent, but reasoned that, "[i]f Congress wishes to overturn this outcome and to include negligent felony DUI offenses within the 'crime of violence' definition, it is of course free to do so."¹⁵² In light of the discrepancies in the current application

145. See *Ramos*, 2002 BIA LEXIS 7, at *28-29 (en banc) (setting new standard when circuit BIA sits in circuit that has not addressed whether DUI is crime of violence, requiring elements of offense to reflect "substantial risk that . . . perpetrators may resort . . . to use of force to carry out . . . crime").

146. For a further discussion of the amendment to immigration law proposed by this Note, see *infra* notes 152-63 and accompanying text.

147. See *Rah*, *supra* note 4, at 2111 n.8, 2141 n.264 (displaying different state determinations of felony DWI based on various prior drunk driving convictions). For a further discussion of the various state felony DWI statutes, see *supra* notes 7-10 and accompanying text.

148. *Hamdan v. INS*, 98 F.3d 183, 187 (5th Cir. 1996).

149. See *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) (citing *Michel v. INS*, 206 F.3d 253, 263 (2d Cir. 2000) (quoting *Hamdan*, 98 F.3d at 187)) (extending examination under statutes containing offenses that both do and do not involve crimes of moral turpitude to crime of violence analysis).

150. See *Newcomb*, *supra* note 2, at 702 (stating that aliens can be removed for any reason Congress determines is in best interest of United States government).

151. See *Dalton*, 257 F.3d at 205 (citing *People v. Prescott*, 95 N.Y.2d 655 (N.Y. 2001)) (clarifying breadth of New York DWI law). For a further discussion of New York's broad DWI statute, see *supra* notes 73-82 and accompanying text.

152. In re *Ramos*, Interim Dec. 3468, 2002 BIA LEXIS 7, at *39 (BIA April 4, 2002) (en banc) (Pauley, Board Member, with Scialabba, Acting Chairman, concurring) (abandoning BIA precedent in adopting prevailing circuit opinion, but

of the categorical approach in defining a crime of violence under 18 U.S.C. § 16(b), coupled with the foregoing dangers inherent in drunk driving, an amendment to § 16(b) is imperative.¹⁵³

When one considers that the risk of a driver with a 0.10 percent blood alcohol concentration dying in a car accident is at least twenty-nine times higher than that of a driver without alcohol in his/her system, it becomes clear that drunk driving is a nationwide problem of staggering proportions.¹⁵⁴ Drunk driving takes a large societal toll on human life and on the families and friends of both the criminals and the victims.¹⁵⁵ Given Congress's strong stance that it will not tolerate criminal activity by resident aliens, it must define felony DWI for purposes of deportation.¹⁵⁶ In a recent unpublished opinion, the Ninth Circuit outlined the rationale for such a definition, indicating that it is irrelevant whether the state labels the underlying crime "misdemeanor" or "felony," as the relevant question is whether the offense is an "aggravated felony" under federal law.¹⁵⁷

Federalism concerns with such an amendment are not compelling, as deportation is an exclusively federal area under constitutional text and practice.¹⁵⁸ In applying its plenary power by amending immigration law, Congress should provide a warning phase consisting of a specific number of DWI convictions (along with the applicable state punishments under

restating congressional authority in removal law); *see also* Salemi, *supra* note 4, at 745-46 (encouraging United States Supreme Court to settle felony DWI issue, or alternatively that Congress amend definition of crime of violence to specifically include or exclude DUI and related offenses).

153. For a further discussion of divergences in the current application of the categorical approach, *see supra* notes 26-67 and accompanying text.

154. *See* Rah, *supra* note 4, at 2143 (stating risk of driver being killed in car accident involving alcohol).

155. *See id.* (estimating some 310,000 people suffered injuries where police reported alcohol involvement).

156. *See* Newcomb, *supra* note 2, at 702-03 (stating that aliens can be removed for any reason Congress determines is in best interest of United States government). In July 2002, the Immigration and Naturalization Service deported 12,405 aliens from the United States, of whom 5,573 were criminals. *See* INS, *Removal Statistics*, United States Dep't of Justice, *available at* <http://www.ins.usdoj.gov/text/aboutins/statistics/msrjuly02/REMOVAL.HTM> (last visited Sept. 13, 2002) (stating deportation statistics for July 2002).

157. *See* United States v. Ayala-Ayala, 2002 U.S. App. LEXIS 19944, at *3 (9th Cir. Sept. 9, 2002) (citing United States v. Corona-Sanchez, 291 F.3d 1201, 1210 (9th Cir. 2002)) (en banc) (determining state law label irrelevant in federal sentencing).

158. For a discussion of Congress's plenary power over immigration, *see supra* notes 19-25 and accompanying text. One scholar noted that the reserved powers of the states are not implicated with such an amendment proposal, because "nothing that is done in the civil deportation context has any preemptive effects on questions of state law," whether it is the state right to characterize and prosecute felony DWI or any civil causes of action based on such conduct. E-mail from Antonio Fidel Perez, Professor, Catholic University Columbus School of Law, to Timothy M. Mulvaney, Student, Villanova School of Law (Sept. 17, 2002, 12:21 EST) (on file with author) (reasoning that reserved powers of states are not implicated by amendment to immigration law).

statute for these initial convictions), and subject any criminal alien to deportation proceedings for any subsequent conviction.¹⁵⁹ The variance of prior convictions among state determinations of felony DWI, as discussed above, is profound.¹⁶⁰ The most common state felony DWI offense, however, is on the third conviction.¹⁶¹ Thus, this seems a reasonable criterion, subject to further federal legislative investigation into relevant deterrent effects, for a felony DWI definition that constitutes a crime of violence in immigration law.¹⁶² Although this may seem harsh, the purpose in promulgating this standard would be to refocus the jurisdiction of immigration to the federal government, its proper place, and to preclude states from affecting the categorical approach that impacts an area of law outside their control.¹⁶³

VI. CONCLUSION

The difficulty in applying the categorical approach does not entirely lie in the interpretation of “use,” “in the course of committing” or “substantial risk of physical force,” or in distinguishing 18 U.S.C. § 16 from the U.S.S.G., but in the varied state statutes used to determine the exact defi-

159. For examples of the warning phases in current state felony DWI statutes, see *supra* notes 7-10 and accompanying text.

160. For a detailed discussion of the varied number of convictions required in state felony DWI statutes, see *supra* notes 7-10 and accompanying text.

161. For a discussion of the most common state requirement of two prior convictions before a DWI offense is elevated to a felony, see *supra* notes 7-10 and accompanying text.

162. For a discussion of some states, including Texas, Idaho and New York, that require two prior convictions before a DWI offense is elevated to a felony, see *supra* notes 8-10 and accompanying text.

163. See *Matter of L— G—*, Interim Dec. 3254, 1995 BIA LEXIS 19, at *30-32 (BIA Sept. 27, 1995) (holding state distinction of crime as felony irrelevant, as any other result would create disparate consequences for similarly situated aliens based solely on different state classifications of identical drug offenses). The INS employed similar reasoning in this drug trafficking case, holding that an offense classified by a state as a felony would only promote uniformity in immigration law if that offense would constitute a felony under federal law. See *id.* (reasoning that federal reliance on state felony determination promotes uniformity). But see Peter Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 121 (1994) (arguing for state-level law, policy and enforcement in immigration area). Because immigration issues are essentially irrelevant in many states, yet a sensitive conflict in states such as California and Florida, the scholar contends that states should have legislative responsibility in this field, given foreign nations' understanding of American federalism. See *id.* at 121-22 (claiming that individual state acts will not imply responsibility of federal government, given prevailing foreign understanding of American governing system). The scholar concluded that states could more rationally treat aliens under international norms than under current Constitutional constraints. See *id.* at 123 (alleging plenary power over immigration is no longer appropriate). This proposed state role in immigration and alienage has been widely criticized. See, e.g., Linda S. Bosniak, *Immigrants, Preemption, and Equality*, 35 VA. J. INT'L L. 179, 199 (1994) (“[W]hile Professor Spiro’s proposal means greater freedom of action for the states, it also means far fewer protections against government power for immigrants.”).

inition of a felony DWI.¹⁶⁴ The categorical approach clearly has not provided uniformity when each state statute differs in its definition of felony DWI.¹⁶⁵ Because the federal legislature cannot tell states what conduct should and should not fall within their DWI laws, Congress should specifically define a felony DWI for purposes of deportation.¹⁶⁶

"Congress regularly makes rules that would be unacceptable if applied to citizens."¹⁶⁷ That said, these rules must be consistently applied, yet they have certainly not been to this point.¹⁶⁸ Drunk driving is a serious matter, as there is no question that it "exact[s] a high societal toll in the forms of death, injury, and property damage."¹⁶⁹ As Chief Justice Walker stated in his dissent in *Dalton*, "[I]t surely was the risk of injury from the use of force upon innocent victims by drunk drivers on the road that animated the legislation in the first place."¹⁷⁰ Immigration law necessitates uniformity to accurately reflect this risk and a federally defined felony DWI offense must stand as the benchmark for a "crime of violence" for purposes of deportation. Otherwise, judicial proceedings contemplating the severe penalty of deportation for aliens convicted of felony DWI will continue to wallow in imprecision and uncertainty.

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164. For a detailed discussion of these definitional interpretation conflicts across the various circuits, see *supra* notes 34-67 and accompanying text. For a discussion of the various state definitions of felony DWI, see *supra* notes 7-10 and accompanying text.

165. For a detailed discussion of the varied number of convictions required in state felony DWI statutes, see *supra* notes 7-10 and accompanying text.

166. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

167. Rah, *supra* note 4, at 2148 n.305 (explaining how Congress can impose harsher restrictions on noncitizens than on citizens).

168. For a detailed discussion of the rulings in each specific circuit that has heard the issue of whether felony DWI is a crime of violence, see *supra* notes 34-67 and accompanying text.

169. See *Matter of Magallanes*, Interim Dec. 3341, 1998 BIA LEXIS 2, at *10-11 (BIA March 19, 1998) (citing *United States v. Rutherford*, 54 F.3d 370, 375-77 (7th Cir. 1995)) (emphasizing high societal toll of drunk driving).

170. *Dalton v. Ashcroft*, 257 F.3d 200, 209 (2d Cir. 2001) (Walker, C.J., dissenting) (concluding it was use of force upon innocent victims by drunk drivers that lead to legislation).