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Driving down the Wrong Road: The Fifth Circuit's Definition of Unauthorized Use of a Motor Vehicle as a Crime of Violence in the Immigration Context.

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DRIVING DOWN THE WRONG ROAD: THE FIFTH CIRCUIT'S DEFINITION OF UNAUTHORIZED USE OF A MOTOR VEHICLE AS A CRIME OF VIOLENCE IN THE IMMIGRATION CONTEXT

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I. INTRODUCTION

People make bad choices. Sometimes the choices people make lead to criminal activity. The consequences for this criminal activity can vary, depending upon the citizenship of the individual. If the individual is not a United States citizen and the criminal activity is violent or severe, the noncitizen is likely to be deported

and thereafter inadmissible for life.[1] But noncitizens can also be deported for minor criminal activity that did not cause serious harm or damage. In these cases, deportation is an extreme punishment that is out of proportion to the offense.[2] The immigration laws show little sympathy for such noncitizens' situations and the impact on their families.[3] Deportation and lifetime reentry bans should be punishments reserved for perpetrators of serious crimes because these punishments separate families and destroy the futures of the noncitizen and his family.

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1. *See* Immigration and Nationality Act (INA) § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii) (2000) ("Any alien not described in clause (i) who ... has been ordered removed ... and who seeks admission ... at any time in the case of an alien convicted of an aggravated felony[] is inadmissible."). If the noncitizen is deported for an aggravated felony, he is barred from legally entering the United States for life and is ineligible for most forms of relief afforded close relatives of United States citizens. The stakes are extremely high. Waivers are available for some inadmissible immigrants if they are the spouse, parent, or child of a citizen of the United States, but these forms of relief are not available for a noncitizen convicted of an aggravated felony. *See, e.g.*, INA §212(h), 8 U.S.C. § 1182(h) (restricting the Attorney General's ability to waive punishments for certain aliens).

2. *See, e.g.*, Rogelio Ramirez, 2004 WL 1167357, at *1 (Bd. of Immigration Appeals (BIA) Jan. 28, 2004) (ordering a lawful permanent resident deported based on unauthorized use of a motor vehicle). The Supreme Court has been hesitant to find that deportation is a punishment, arguably since it would implicate constitutional rights and remedies, but members of the Court have noted that it has harsh consequences. *Compare* Carlson v. Landon, 342 U.S. 524, 533, 537–38 (1952) (proffering that detention before deportation is not a "punishment" under the Fifth and Eighth Amendments' protections, but nonetheless noting that "deportation is a particularly drastic remedy where aliens have become absorbed into our community life"), *with* Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("Deportation is punishment. It involves-First, an arrest, a deprival of liberty; and, second, a removal from home, from family, from business, from property.... [I]t needs no citation of authorities to support the proposition that deportation is punishment."), *and* Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 246 (2004) (footnote omitted) ("[D]eportation can be ... more severe than confinement because removal from home, family, and country can mean permanent exile, in some cases to a country the deportee may have never actually known.").

3. *See* INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (providing that once an alien has been deported, they cannot seek admission into the United States for at least five years); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (supplying several criminal grounds for deportation of aliens); *see also* Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 255 (2004) (discussing the former relief available to noncitizens under INA § 212(c) where the Attorney General had discretion to waive deportation of a noncitizen under a deportation order).

Unauthorized use of a motor vehicle (UUMV) is an example of a crime that can be committed without serious harm or damage, but which can carry, depending upon where the crime is committed, the punishment of deportation. The Fifth Circuit has regularly sustained decisions where a noncitizen convicted of UUMV was sentenced to deportation, a lifetime reentry ban, and all the collateral consequences associated with the punishments. However, UUMV is not a serious, heinous crime; its perpetrators can commit the crime with no intent to harm, steal, or commit violence.

For example, Rogelio Ramirez came to the United States at the age of seven, and now, after having lived in the United States for twenty-five years, he faces deportation and a lifetime ban on reentry.[4] In 1992, at the age of eighteen, he was indicted for automobile theft and UUMV. The prosecution dropped the automobile theft charge; Ramirez pled guilty to one count of UUMV; he received eight years probation and deferred adjudication.[5] Four years later, in 1996, he pled guilty to the misdemeanor crime of burglary of a motor vehicle and was sentenced to sixty days imprisonment.[6] Because the second misdemeanor was a violation of his parole, the prior deferred adjudication became a conviction for UUMV, and Ramirez was sentenced to two years in a state prison.[7] During his imprisonment, Immigration and Customs Enforcement (ICE) initiated removal proceedings. Under the immigration laws, an "alien," albeit a lawful permanent resident (LPR),[8] who is convicted of an aggravated felony is deportable and permanently excludable from the United States.[9] In Ramirez's case, the government argued that

4. *See* Brief of Petitioner at 3–4, Ramirez v. Gonzales, 187 F. App'x 384 (5th Cir. 2005) (No. 05-60696) (per curiam) (outlining Ramirez's history in the United States).

5. *Rogelio Ramirez*, 2004 WL 1167357, at *1.

6. Brief of Petitioner at 4, Ramirez v. Gonzales, 187 F. App'x 384 (5th Cir. 2005) (No. 05-60696).

7. *Id.*

8. *Rogelio Ramirez*, 2004 WL 1167357, at *1 ("[Ramirez] became a lawful permanent resident in 1990 . . . .").

9. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2000) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii) (specifying conditions, such as an aggravated felony conviction, that trigger inadmissibility; if the noncitizen is deported for an aggravated felony, he is barred from legally entering the United States for life and is ineligible for most forms of relief afforded close relatives of United States citizens).

UUMV fell within the definition of a "crime of violence," a category of aggravated felony.[10] Ramirez was ordered deported.[11]

In Ramirez's notice to appear, UUMV was the only charge listed. Had Ramirez been convicted of automobile theft, a more serious charge than UUMV,[12] his crime could be classified as a crime involving moral turpitude, and he would have been allowed to apply for relief from deportation.[13] Had he been convicted of UUMV in other circuits he would not have been ordered removed—he would have served his time in prison and eventually returned to his life in the United States.[14] Instead, he was ordered

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10. *See* INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (defining an aggravated felony as "a crime of violence (as defined in section 16 of title 18, [United States Code] . . .) for which the term of imprisonment [is] at least one year").

11. *Rogelio Ramirez*, 2004 WL 1167357, at *1.

12. Griffin v. State, 614 S.W.2d 155, 158 n.4 (Tex. Crim. App. 1981) (stating that UUMV is a lesser included offense of theft, and theft is a lesser included offense of aggravated robbery).

13. *See id.* (holding that UUMV was not a crime of moral turpitude). Ramirez's crimes occurred before the 1996 changes to the INA which repealed relief from deportation available under § 212(c). *See* INA § 212(c), 8 U.S.C. § 1182(c), *repealed by* Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009-597 (eliminating formerly available relief). In 2001, the Supreme Court held that although Congress had repealed § 212(c) relief, the relief would be available to noncitizens ordered removed for offenses committed before the date of repeal, September 30, 1996, since the repeal could not be applied retroactively if there were equivalent grounds of excludability or inadmissibility for crimes involving moral turpitude. INS v. St. Cyr, 533 U.S. 289, 326 (2001). Theft offenses have been found to have the equivalent grounds to crimes involving moral turpitude. *See* De Jesus Gonzalez-Garcia v. Gonzales, 166 F. App'x 740, 745 (5th Cir. 2006) (holding that theft offenses could allow a request for discretionary relief under INA § 212(c)); Arina v. Gonzales, 162 F. App'x 695, 696 (9th Cir. 2006) ("'[T]heft is a crime of moral turpitude.'" (quoting United States v. Villa-Fabela, 882 F.2d 434, 440 (9th Cir. 1989))), *overruled on other grounds by* United States v. Proa-Tovar, 975 F.2d 592, 595 (9th Cir. 1992) (en banc).

14. *See, e.g.*, Penuliar v. Ashcroft, 395 F.3d 1037, 1046 (9th Cir. 2005) (determining that UUMV was not a theft offense and thus not a crime of violence), *vacated by* Gonzales v. Penuliar, 127 S. Ct. 1146 (2007). A review of decisions in other circuits only indicates UUMV as an accompanying crime to the crime for which the noncitizen is being deported, but no other circuit has found UUMV a crime of violence or an aggravated felony. *Id. Penuliar* stated: "The charging documents, coupled with the abstracts of judgment, simply do not prove that Penuliar actually took and exercised control over a stolen car. On the basis of the record, it is equally plausible that Penuliar pled guilty to the charges based on his activity as an accomplice." *Id.* The *Penuliar* decision was recently vacated and remanded "for further consideration in light of *Gonzales v. Duenas-Alvarez*." Gonzales v. Penuliar, 127 S. Ct. at 1146. *Duenas-Alvarez* found the crime of aiding and abetting theft fell under the deportation umbrella of 8 U.S.C. § 1101(a)(43)(G), removal for "a theft offense." Gonzales v. Duenas-Alvarez, 127 S. Ct. 815, 818 (2007). Interestingly, the

deported and barred from returning to the United States, without regard to his family ties and without hope of relief from any immigration statute.

Under the Immigration and Nationality Act (INA), a crime of violence is an aggravated felony for which the noncitizen is subject to deportation and a lifetime ban on reentry.[15] Some of the most controversial and inconsistent court rulings have involved decisions as to whether a specific crime is a crime of violence and thus an aggravated felony.[16] In the midst of this debate, the United States Supreme Court in *Leocal v. Ashcroft*[17] reviewed whether the crime of driving under the influence should be considered a crime of violence under the INA and found that this crime, even when it resulted in injury or death, should not.[18] The Court noted that a crime of violence does not encompass every crime that risks harm[19] and also noted that the term crime of violence was intended for serious and violent offenses.[20] In deciding the issue,

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Supreme Court decided not to address the arguments relating to whether "joy riding" should be included as a theft offense without the mens rea of intent to steal. *Id.* at 822–23; *see also* Nugent v. Ashcroft, 367 F.3d 162, 174 (3d Cir. 2004) (noting, in its discussion of a case where a noncitizen was charged with writing bad checks, that UUMV is a theft offense; the court does not cite a case where it is used as a ground for deportation).

15. INA § 237 (a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2000) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

16. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43) (including in its definition of aggravated felony "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year"); *see also* Kathryn Harrigan Christian, Comment, *National Security and the Victims of Immigration Law: Crimes of Violence*, 35 STETSON L. REV. 1001, 1011–14 (2006) (discussing crimes of violence and deportation); Stanley Mailman & Stephen Yale-Loehr, *Supreme Court Shortens Reach of "Aggravated Felonies,"* 12-1 BENDER'S IMMIGR. BULL. 3 (Jan. 1, 2007) (addressing aggravated felonies). *Compare* Sareang Ye v. INS, 214 F.3d 1128, 1134 (9th Cir. 2000) (deciding that "vehicle burglary is not a crime of violence under [INA § 1101(a)(43)(F)]" because there are non-violent means to enter a vehicle and "the legislative history does not indicate that Congress intended to include vehicle burglaries" as a crime of violence), *with* De La Paz Sanchez v. Gonzales, 473 F.3d 133, 135 (5th Cir. 2006) (per curiam) (citing *In re* Brieva-Perez, 23 I. & N. Dec. 766, 767–70 (BIA June 7, 2005)) ("[A] Texas UUMV conviction was a crime of violence under § 16(b) and therefore an aggravated felony.").

17. Leocal v. Ashcroft, 543 U.S. 1 (2004).

18. *See id.* at 11 ("Section 16 therefore cannot be read to include petitioner's conviction for DUI causing serious bodily injury.").

19. *Id.* at 10 n.7 ("[Section] 16(b) plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct. The 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct.").

20. *See id.* at 11 ("The ordinary meaning of [crime of violence], combined with § 16's

the Court looked to the specific elements in the criminal statute at issue, the seriousness of the crime, and the meaning of crime of violence under the INA.[21] However, the Court did not set forth a specific test to apply to determine whether other offenses are crimes of violence, thus providing the opportunity for lower courts to interpret the decision narrowly.

Consequently, the Fifth Circuit continues to rule that UUMV is a crime of violence and that this determination is in line with *Leocal*.[22] Currently, Fifth Circuit courts alone have found UUMV is a crime of violence, although other circuits may yet follow this decision.[23] Several decisions issued by the Board of Immigration Appeals (BIA) under the Fifth Circuit's jurisdiction have followed the Fifth Circuit's ruling that UUMV is a crime of violence.[24]

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emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses.").

21. *Id.* at 8–12.

22. *See, e.g.*, Ramirez v. Gonzales, 187 F. App'x 384, 384 (5th Cir. 2006) (per curiam) (dismissing an appeal "to determine whether [a] conviction for UUMV is a crime of violence in light of *Leocal*"). The opinion reasoned: "This court's pre-*Leocal* jurisprudence was consistent with *Leocal*'s holding related to 18 U.S.C. § 16(b). Therefore, Ramirez's petition fails to 'present[] grounds that could not have been presented in the prior judicial proceeding.'" *Id.* at 384 (alteration in original) (citation omitted); *see also* De La Paz Sanchez v. Gonzales, 473 F.3d 133, 135 (5th Cir. 2006) ("Sanchez's argument that Texas's UUMV offense does not constitute a crime of violence under 18 U.S.C. § 16(b) is foreclosed . . . .").

23. *Compare* Penuliar v. Ashcroft, 395 F.3d 1037, 1046 (9th Cir. 2005) (holding that UUMV was not a crime of violence), *with* United States v. Galvan-Rodriguez, 169 F.3d 217, 220 (5th Cir. 1999) (holding that UUMV qualified as a crime of violence). The BIA has made clear that it will follow "the authoritative decisions of the federal circuit courts of appeals" in the circuit where the case is being litigated, even if that leads to a problem of uniformity across the United States. Yanez-Garcia, 23 I. & N. Dec. 390, 396 (BIA May 13, 2002). Although keeping the determinations of particular immigration issues separated by circuit often leads to a problem of uniformity, the policy is based on deference to immigration judges and the understanding that immigration is under the executive branch, not within the traditional legal precedent system. Steve Y. Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 YALE L. & POL'Y REV. 430, 431–32 (1991).

24. *See* Serna-Guerra, 2006 WL 2427888, at *1 (BIA July 24, 2006) ("Pursuant to relevant precedents of the United States Court of Appeals for the Fifth Circuit, unauthorized use of a motor vehicle is categorically considered to be a crime of violence for immigration purposes."); *In re* Brieva-Perez, 23 I. & N. Dec. 766, 769–70 (BIA June 7, 2005) (agreeing with a Fifth Circuit district court decision finding that UUMV is a crime of violence despite the *Leocal* decision). The Fifth Circuit upheld the BIA's ruling in *In re Brieva-Perez* in a recent decision. Brieva-Perez v. Gonzales, 482 F.3d 356, 360 (5th Cir. 2007) (affirming the BIA's decision that UUMV is a crime of violence).

Defining UUMV as a crime of violence is at odds with *Leocal*'s guiding principles and with the reasoning of the criminal and immigration statutes at issue. The end result of the Fifth Circuit's error is lifetime bans of noncitizens for conduct that has none of the characteristics of a crime of violence.

This article will review the erroneous application of crime of violence in the case of UUMV by the Fifth Circuit. Section II will describe the evolution of the term crime of violence and the Fifth Circuit's determination that UUMV is a crime of violence under the INA. Section III will illustrate the Fifth Circuit's erroneous application of the term crime of violence for UUMV. Section IV will argue that the Fifth Circuit should heed the warnings of the Supreme Court in how to interpret the aggravated felony/crime of violence determination. Section V will suggest congressional action to remove the term crime of violence and set forth specific crimes that trigger the lifetime ban. Congress's enumeration of offenses would remove ambiguity, place people on notice of crimes that impose deportation, and ultimately lead to more uniform court rulings. Until Congress acts, courts' decisions as to whether a given crime is a crime of violence should be based on the guidance provided by *Leocal* and on traditional canons of statutory construction.

II. DEFINING CRIMINAL NONCITIZENS AND THE CONSEQUENCES

A. *Aggravated Felonies Within Immigration Legislation*

Criminal enforcement has become a controlling feature in immigration law over the last twenty-five years, from the focus on deporting criminal noncitizens to the detention of immigration violators in prison.[25] During the 1980s, the rise of noncitizens in

25. Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 647 (2003). Miller stated, "To the extent that a crime fighting agenda has redefined the priorities of the immigration system in the past twenty years, immigration law is 'governing through crime.'" *Id.* The author further explained:

> Fifty-five hundred detainees were held in INS custody in 1994. In 1997, as the rapid increase in the number of federal and state inmates actually slowed—to 5.2% from a decade-long average of 7% growth—the number of detainees in INS custody rose to 16,000, representing a tripling over a period of five years.

the criminal justice system became a focus of attention for Congress.[26] The Department of Justice indicated that the number of noncitizens prosecuted in the federal criminal justice system increased by 10% annually between 1984 and 1994, whereas during the same time the annual rise in overall prosecutions was only 2%.[27] Congress reacted between 1988 and 1994 by focusing immigration legislation on the deportation of criminal noncitizens.[28]

First, in 1988, Congress created additional restrictions and penalties for noncitizens convicted of crimes considered aggravated felonies.[29] The 1988 Act defined an aggravated felony specifically to include only murder, drug trafficking, firearms or explosive trafficking, and any attempt to commit those enumerated crimes in

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Id. at 649.

26. *See* Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 590 (1998) (noting the substantial "rise in the number of non-citizens incarcerated for criminal offenses during the 1980s"); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 372–73 (1999) ("Congress began investigating the problem [of criminal noncitizens and low deportation rates] in 1985, and politicians and reporters have emphasized it ever since."); Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reason*, 28 ST. MARY'S L.J. 883, 929–30 (1997) (citing H.R. REP. NO. 104-469, pt. 1, at 118 (1996)) (detailing the rise of incarcerated noncitizens from 4% of federal inmates in the early 1980s to 23% of federal inmates in 1997).

27. John Scalia, *Bureau of Justice Statistics, Special Report, Noncitizens in the Federal Criminal Justice System*, 1984–94, at 1 (Aug. 1996), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/nifcjs.pdf.

28. Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1438 (1997) ("Congress was also growing concerned over the numbers of noncitizens convicted of crimes, noncitizens incarcerated in state and federal prisons, and the relatively low number of deportations of convicted criminals. In a series of bills from 1988 to 1994, Congress amended the grounds of deportability to increase the ability of the INS to deport noncitizens.").

29. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–73 (1988) (defining the term aggravated felony and authorizing the detention and deportation of noncitizens convicted of aggravated felonies); CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, 6 IMMIGRATION LAW & PROCEDURE § 71.05 (Bender 2005) (discussing the development of deportation law based on aggravated felonies). While Congress focused on the problem of drug trafficking, it added the term "aggravated felony" to INA § 101(a), 8 U.S.C. § 1101(a) and defined the term simply as "murder, any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States." Anti-Drug Abuse Act of 1988 § 7342.

the United States.[30] Only the worst offenses were deemed aggravated felonies because the consequences were extreme—deportation with expedited proceedings while the noncitizen was incarcerated for the crime.[31]

Congress's next piece of legislation regarding criminal noncitizens came in 1990 when it added the term crime of violence to the INA.[32] With this change, a crime of violence became an aggravated felony.[33] The statutory definition of a crime of violence did not enumerate specific offenses to which the term applied but instead incorporated the definition in section 16 of title 18 of the United States Code.[34] The 1990 Act was intended to address the increase in the number of noncitizens in the United States prison system for drug offenses.[35] The Department of

30. Anti-Drug Abuse Act of 1988 § 7342.

31. *Id.* § 7347 (detailing the expedited deportation procedures for noncitizens convicted of aggravated felonies).

32. Immigration and Nationality Act of 1990 (INA), Pub. L. No. 101-649, § 501, 104 Stat. 4979, 5048 (1990); *see* INA § 101(h), 8 U.S.C. § 1101(h) (2000) (including in its definition of "'serious criminal offense' . . . any crime of violence, as defined in section 16 of Title 18"); Timothy B. Jafek, *Noncitizens, Guilty Pleas, and Ineffective Assistance of Counsel Under the Arizona Constitution,* 42 ARIZ. L. REV. 549, 557–58 (2000) (noting the expanded definition of aggravated felon); *see also* Karen Crawford & Thomas Hutchins, *Ignoring Congress: The Board of Immigration Appeals and Crimes of Violence in* Puente *and* Magallanes, 6 BENDER'S IMMIGR. BULL. 65, 67–78 (Jan. 15, 2001) (providing that INA § 101(h) is not a definition of an aggravated felony but a definition of a serious crime under § 212(a)(2)(E) that was enacted as a "response to the problem of diplomatic immunity from prosecution for the commission of certain crimes"). INA § 101(a)(43)(F) was also added, specifically making a crime of violence "as defined in section 16 of title 18" an aggravated felony. INA § 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F).

33. INA § 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F); *see also* Mark Bradford, *Deporting Nonviolent Violent Aliens: Misapplication of 18 U.S.C. § 16(b) to Aliens Convicted of Driving Under the Influence*, 52 DEPAUL L. REV. 901, 910–11 (2003) (discussing how in order for a crime "to be classified as an aggravated felony, it must fall within a more generalized subcategory of the aggravated felony provision, a crime of violence").

34. INA § 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F) (defining a crime of violence by pointing to the definition in 18 U.S.C. § 16).

35. *See* President George H.W. Bush, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990), http://bushlibrary.tamu.edu/research/public_papers.php?id=2514&year=1990&month=11 ("The legislation meets several objectives of this [a]dministration's domestic policy agenda—cultivation of a more competitive economy, support for the family as the essential unit of society, and swift and effective punishment for drug-related and other violent crime."); *see also* Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 300–01 (2003) (commenting on the dramatic increase in the number of imprisoned undocumented noncitizens in the years prior to the 1990 Act, the vast majority of whom were convicted of narcotics crimes). The 1990 Act

Justice noted there was a marked increase in noncitizens in prison for criminal drug offenses between 1984 and 2000.[36]

The most severe provisions involving broadening of the aggravated felony term were incorporated in 1996. Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[37] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[38] (together the 1996 Acts). The AEDPA added less serious crimes to the list of crimes that were considered aggravated felonies, without any further explanation as to what a crime of violence would entail.[39] In addition, it drastically cut the length of the prison sentence necessary to constitute an element of a crime of violence. Originally, for a crime to be considered a crime of violence a minimum sentence of five years was necessary; after AEDPA, the

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elevated certain drug offenses committed by an alien to the same level as murder:

> Congressional initiatives in 1988 amended the INA to place aliens convicted of certain drug offenses alongside those convicted of murder . . . [as] aggravated felons . . . . Not too long thereafter, the Immigration Act of 1990 greatly expanded the number of crimes that were considered to be aggravated felonies and . . . made clear Congress's position that the aggravated felony provisions applied to those convicted of either federal or state drug offenses.

Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 876–77 (2005).

36. *See* John Scalia & Marika F.X. Litras, *Bureau of Justice Statistics, Special Report, Immigration Offenders in the Federal Criminal Justice System, 2000*, at 1 (Aug. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/iofcjs00.pdf ("Between 1985 and 2000 the number of noncitizens prosecuted by the U.S. attorneys for drug trafficking offenses increased from 1,799 to 7,803."). In a chart titled *Noncitizens in Federal Prisons, by the Most Serious Offense for Which They Were Sentenced, 1985–2000,* the figures for 1990 show 9,284 noncitizens were sentenced for drug offenses, 1,515 were sentenced for immigration offenses, and 1,550 were placed in the "other" category. *Id.* at 11.

37. Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276–77 (1996). This statute was enacted in the aftermath of the Oklahoma City bombing, when the country feared foreign terrorists on our soils. The only person convicted and punished for the crime was a native-born citizen, Timothy McVeigh. *See* Lenni Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1441 & n.154 (1997) (discussing the enactment of the AEDPA occurring on the anniversary of the Oklahoma City bombing).

38. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

39. Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 305 (2003).

necessary sentence became one year.[40] The IIRIRA applied the AEDPA retroactively.[41] The 1996 Acts also removed remedies previously available to deportable noncitizens.[42] If the noncitizen was found to be an aggravated felon, he would be deportable, ineligible for traditional forms of relief such as discretionary relief, and forever banned from the United States.[43]

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40. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2000) (amended by IIRIRA, Pub. L. No. 104-208, § 321(a)(3), 110 Stat. 3009-546, 3009-627 (1996)); *see* Mark Bradford, *Deporting Nonviolent Violent Aliens: Misapplication of 18 U.S.C. § 16(b) to Aliens Convicted of Driving Under the Influence*, 52 DEPAUL L. REV. 901, 908 (2003) ("First, the AEDPA reduced the minimum sentence upon which non-enumerated offenses could be classified as aggravated felonies from five years to one year. Second, the AEDPA eliminated the requirement that a judge impose actual incarceration for a convicted alien to be considered an aggravated felon.").

41. *See* INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); *see also* Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 305 (2003) ("Six months after the passage of AEDPA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which further exacerbates the consequences of an aggravated felony conviction by applying the provision retroactively.").

42. *See* INA § 212(c), 8 U.S.C. 1182(c), *repealed by* IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-597 (1996); *see also* Lenni Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1441–42 (1997) (citations omitted) ("The statute ... eliminates several forms of relief from deportation, restricts preexisting waivers and discretionary forms of relief, creates new bars to political asylum, including a time limit of one year from entry for such applications, and attempts to remove federal court review of administrative action or severely curtail the scope and type of review available."); Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 305 (2003) ("Whereas the Immigration Act of 1990 had allowed aggravated felons who spent less than five years in prison to apply for a waiver of deportation, AEDPA explicitly bars any aggravated felon from applying for § 212(c) discretionary relief.").

43. *See* INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (providing grounds for inadmissibility); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (supplying criminal grounds for deportation). Once a noncitizen is deported for an aggravated felony, they become inadmissible and relief is unavailable. INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i). This becomes especially difficult when the noncitizen has spent many years in the United States, has developed family connections with their community, and has very little connection to their home country. *See* J. Ryan Moore, *Reinterpreting the Immigration and Nationality Act's Categorical Bar to Discretionary Relief for "Aggravated Felons" in Light of International Law: Extending* Beharry v. Reno, 21 ARIZ. J. INT'L & COMP. L. 535, 538 (2004) (discussing the inflexibility of the deportation orders).

> Under the immigration law, aggravated felons are, *inter alia*: (1) presumed to be deportable; (2) ineligible for asylum, cancellation of removal, and voluntary departure; and (3) subject to mandatory detention without bond. Aggravated felons are not entitled to judicial review of deportation orders based on such convictions and

In the 1996 Acts, Congress greatly expanded the category of noncitizens who could be deported as aggravated felons, and, as a consequence, expanded the number of people who might face a lifetime ban regardless of their ties to the United States or lack of ties to their "home" countries.[44] But the battle to define exactly what criminal offenses lead to lifetime bans has reached the courthouse steps. Although Congress has not defined what constitutes a crime of violence, leaving courts to decide what the vague term will include, Congress has left a trail of historical use of the term that the courts should consider.[45]

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are permanently banished from the United States absent advance permission.

Id.; see also Michael Maggio, Larry S. Rifkin & Sheila T. Starkey, *Practicing Law in the Americas: The New Hemispheric Reality: Immigration Fundamentals for International Lawyers*, 13 AM. U. INT'L L. REV. 857, 867 (1998) (commenting on the unlikelihood of successfully challenging a deportation order).

> [T]he definition of the worst kind of immigration crime, those crimes defined as an aggravated felony, has been dramatically expanded by the new law. If you are an aggravated felon, generally you do not need a lawyer, you need a travel agent, because it is very unlikely that you are going to be able to stay even if you are a long-term permanent resident married to an American.

Michael Maggio, Larry S. Rifkin & Sheila T. Starkey, *Practicing Law in the Americas: The New Hemispheric Reality: Immigration Fundamentals for International Lawyers*, 13 AM. U. INT'L L. REV. 857, 867 (1998).

44. *See* Michael Maggio, Larry S. Rifkin & Sheila T. Starkey, *Practicing Law in the Americas: The New Hemispheric Reality: Immigration Fundamentals for International Lawyers*, 13 AM. U. INT'L L. REV. 857, 867 (1998) ("Prior to the new law, to be an aggravated felon, you had to do what it sounded like—crimes of violence, drug offenses, and similar crimes .... Now the definition of an aggravated felony is so broad that virtually everyone with a criminal record is included."). An examination of crimes newly qualifying for the penalty of deportation reveals that they are neither "aggravated" nor "felonies." Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 257 (2004). "The term 'aggravated,' for example, when describing a crime, denotes that the criminal activity has been made worse, more severe, or less excusable. Some of the offenses included do not involve any violence, and thus seem to be far from 'aggravated.'" *Id.*

45. What is devastating is that even if the noncitizen is deported based on this erroneous definition of a crime of violence, and a future case successfully challenges that erroneous definition, it does not retroactively protect those who have been deported. *See generally* United States v. Madrid-Manriquez, 117 F. App'x 367, 367 (5th Cir. 2004) (exemplifying a situation in which future changes in the law do little to remedy cases erroneously decided in the past). Mr. Madrid-Manriquez challenged his deportation for driving while intoxicated (DWI) in 1997 at a hearing challenging his illegal re-entry. *Id.* After his deportation, the offense was found not to be a deportable offense. *Id.* If he was never deported, his illegal reentry would not have been illegal. *Id.* The court decided that his due process rights were not violated at the first hearing for the DWI, and so refused to decide on whether there was any issue over his deportation for a crime erroneously

B. *The Amorphous Term Crime of Violence*

The term crime of violence is not based on a common law category of illegal conduct; rather, it is a legislative term Congress created in the District of Columbia's Bail Reform Act of 1970 (the 1970 Act).[46] In 1970, Congress was explicit about the definition of a crime of violence:

> The term "crime of violence" means murder, forcible rape, carnal knowledge of a female under the age sixteen, taking or attempting to take immoral, improper or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses . . . if the offense is punishable by imprisonment for more than one year.[47]

The 1970 Act allowed criminal defendants to be held for sixty days before trial if they were charged in federal court with serious offenses.[48] The categories of detainable offenders were limited to those whose crimes "involve the threat of serious bodily injury or death" and those who would be repeat offenders.[49]

Congress again incorporated the term into legislation in the Comprehensive Crime Control Act of 1984 (the 1984 Act).[50] The 1984 Act was a nationwide bail reform act and included a

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defined by the Fifth Circuit that led to his deportation. *Id.* at 368.

46. District of Columbia Court Reform and Procedural Act of 1970 (the 1970 Act), Pub. L. No. 91-358, § 210, 84 Stat. 473, 604 (1970); *see* Mark Bradford, *Deporting Nonviolent Violent Aliens: Misapplication of 18 U.S.C. § 16(b) to Aliens Convicted of Driving Under the Influence*, 52 DEPAUL L. REV. 901, 936 (2003) ("Congress originally incorporated the phrase 'crime of violence' into a bail-reform law for the District of Columbia in 1970."); Karen Crawford & Thomas Hutchins, *Ignoring Congress: The Board of Immigration Appeals and Crimes of Violence in* Puente *and* Magallanes, 6 BENDER'S IMMIGR. BULL. 67, 68 (Jan. 15, 2001) (noting that while Congress first included the term crime of violence in the D.C. bail reform law, it had been a term of art for quite some time).

47. District of Columbia Court Reform and Procedural Act of 1970, Pub. L. 91-358, § 210, 84 Stat. 473, 604 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 551, 764.

48. *See generally* John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969) (discussing the history of the 1970 Act and the executive's role in drafting the legislation).

49. *Id.* at 1235.

50. Comprehensive Crime Control Act of 1984 (1984 Act), Pub. L. No. 98-473, § 1001(a), 98 Stat. 1837, 2136 (1984) (defining a crime of violence).

definition of the crime of violence under 18 U.S.C. § 16.[51] Although Congress did not specify what crimes would be included in the 1984 Act's definition, the Senate report noted that the same crimes listed in the 1970 Act should be included under the 1984 Act.[52] The term in the 1984 Act was to have "essentially the same" meaning as the 1970 Act.[53] In order to determine whether the specific crime was a crime of violence, the focus was on assessing whether there was a risk of force being used when committing the offense.[54] The intent was to include serious crimes.[55]

In 1994, the United States Sentencing Commission defined crime of violence with an emphasis on serious crimes and dangerous actions; the definition included burglary, extortion, arson,

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51. 18 U.S.C. § 16 (2000).

> The term 'crime of violence' means—
> (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 property of another may be used in the course of committing the offense.

Id.

52. *See* S. REP. NO. 98-225, at 20–21 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3203–04 (referencing the offenses detailed in the 1970 Act). *See generally* United States v. Yeaple, 605 F. Supp. 85, 87 (D. Pa. 1985) (addressing the Bail Reform Act of 1983, and its use of the term crime of violence). The court, frustrated with the lack of definition by Congress on what is a crime of violence, stated:

> The absence of a requirement that the judicial officer actually conclude that the crime involved in the case is one of violence creates a considerable ambiguity .... It is abundantly clear, however, that the focus and concern of the Congress in enacting the legislation was the safety of people and the community, and the legislative history indicates that "safety" is not limited to an absence of physical violence. In our opinion this expression of legislative intent justifies a more searching examination of the circumstances than simply determining whether the crime charged is, in fact, one of physical violence.

Id. (citations omitted).

53. S. REP. NO. 98-225, at 20, *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3203 ("These offenses are essentially the same categories of offenses described in the District of Columbia code by the terms 'dangerous crime' and 'crime of violence.'").

54. The 1984 Act, 18 U.S.C. § 16(b); *see also* Michael G. Salemi, Comment, *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, 702 (2002) ("Section 16(b)'s definition of crime of violence focuses on whether there is a risk that force will be used in the course of committing an offense.").

55. John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1235–36 (1969); *see also* Leocal v. Ashcroft, 543 U.S. 1, 10 (2004) (rearticulating the level of seriousness of the offense).

and use of explosives.[56] Under the sentencing guidelines, the potential of violence used against another is a factor in determining whether there would be an upward or downward departure for sentencing purposes.[57] A crime of violence is one factor used in determining whether a defendant was a career offender and a basis for an upward departure.[58]

C. *The Supreme Court Narrows the Application of Crime of Violence in Immigration Law*

The Supreme Court provided some direction as to what offenses constitute a crime of violence under the INA. In *Leocal v. Ashcroft* the Court decided that the offense of driving while under the influence causing serious bodily injury, as defined in the criminal statute, should not be considered a crime of violence under 18 U.S.C. § 16.[59] The *Leocal* Court stated that review must be of the "elements and the nature of the offense," not the particular facts of the case.[60] The Florida statute at issue in *Leocal* did not require a mens rea for conviction of the offense.[61] When reviewing the Florida statute and 18 U.S.C. § 16(b), the

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56. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (1994), *available at* http://www.ussc.gov/1994guid/chapt4.htm (stating that a crime of violence "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (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").

57. *Id.*

58. *Id.* § 4B1.1 (defining the term "career offender").

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Id.

59. Leocal v. Ashcroft, 543 U.S. 1, 10 (2004).

60. *Id.* at 7 (citations omitted) ("In determining whether petitioner's conviction falls within the ambit of § 16, the statute directs our focus to the 'offense' of conviction .... This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.").

61. FLA. STAT. § 316.193 (2005) (regulating driving under the influence); *see also Leocal*, 543 U.S. at 7 (addressing driving under the influence, consequently causing serious bodily injury to another because of the intoxication). "The Florida statute, while it requires proof of causation of injury, does not require proof of any particular mental state." *Leocal*, 543 U.S. at 7.

Court noted that § 16(b) does not cover all negligent behavior but only behavior that might require physical force against another.[62] The Court appeared to single out harm to another person rather than harm to the vehicle or property when interpreting § 16(b)[63] and noted that § 16(b) does not cover all offenses that risk harm.[64] In fact, the Court observed that the term crime of violence was intended for serious and violent offenses.[65] The Court explained that the statute has both immigration and criminal law applications, which must be decided consistently.[66] When reviewing an offense in the ambit of immigration law's crime of violence, courts should follow the *Leocal* decision.

III. FIFTH CIRCUIT DECIDES UUMV IS A CRIME OF VIOLENCE

A person is guilty of UUMV if it is shown "he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner."[67] The crime

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62. *Leocal*, 543 U.S. at 10 ("The reckless disregard in § 16 relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime.").

63. *See id.* at 7–13 (reasoning that because the Court only reviews elements of the offense, the Court did not even note possible harm to a vehicle which could also be at issue with driving while under the influence of alcohol).

64. *Id.* at 10 n.7 ("[Section] 16(b) plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct. The 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct.").

65. *Id.* at 11 ("The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses.").

66. *Id.* at 12 ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

67. TEX. PENAL CODE ANN. § 31.07 (Vernon 2003). A review of insurance lawsuits gives good illustrations of UUMV. One case proceeded as follows:

> In the early morning hours, the owner's 15-year-old son took the automobile without the knowledge or permission of his parents, who were sleeping. The son then fell asleep at the wheel and was involved in an accident .... [T]he taking that occurred in the case came under the criminal code definition of "unauthorized use of a vehicle," which was a felony.

Christopher H. Hall, Annotation, *What Constitutes Theft Within Automobile Theft Insurance Policy—Modern Cases*, 67 A.L.R.4TH 82 (1989) (citation omitted). Another example of UUMV took place in the context of the workplace:

is a state felony, with no equivalent federal crime.[68] The law regarding civil forfeiture, before the 2000 amendments that removed the defense of unauthorized use of the property, provides the closest comparison to a federal law with similar elements.[69] Some Texas state courts have found this crime to be a lesser included offense of both theft[70] and aggravated robbery.[71] The Fifth Circuit originally interpreted UUMV as similar to burglary of a vehicle,[72] which was considered a crime of violence.[73]

> On a Friday, the owner instructed his employee to take a specific truck the next morning and move[] the household belongings of the owner's mother. The next day, the employee performed the assigned task with a companion although he took a different truck than that indicated by the owner. Both trucks were kept in a garage that was locked at 7 p.m. each evening. There was no evidence indicating whether the employee returned the truck to the garage after completing the move on Saturday. At 1 a.m. on Sunday, the truck driven by the employee was damaged when it overturned. The owner testified that the employee had no permission to take the truck after 7 p.m. on Saturday, although there was testimony of other witnesses that the employee had used the truck at night for several months prior to the accident.

Id. (citation omitted).

68. TEX. PENAL CODE ANN. § 31.07 (Vernon 2003).

69. *See* United States v. One 1978 Chrysler Le Baron Station Wagon, 531 F. Supp. 32, 34 (E.D.N.Y. 1981) (involving an allegedly unauthorized use of a motor vehicle in an illegal drug sale).

> For an owner to sustain a defense to a forfeiture action based on unauthorized use of the vehicle, however, he has to establish not only that the user was in possession of the vehicle unlawfully, but in addition, he must show that the user acquired possession of the vehicle by a criminal act.

Id. An amendment to 18 U.S.C. § 881 removed the defense. Civil Asset Forfeiture Reform Act of 2000, H.R. 1658, 106th Cong. § 2(c)(2) (2000) (amending 21 U.S.C. § 881(a)(4) (2000)).

70. *See, e.g.*, Musgrave v. State, 608 S.W.2d 184, 190 (Tex. Crim. App. 1980) (citing Neely v. State, 571 S.W.2d 926 (Tex. Crim. App. 1978)) (noting that *Neely* found UUMV to be a lesser included offense of theft), *overruled on other grounds by* Gardner v. State, 780 S.W.2d 259 (Tex. Crim. App. 1989).

71. Griffin v. State, 614 S.W.2d 155, 158 n.4 (Tex. Crim. App. 1981) (stating that UUMV is a lesser included offense of theft, and theft is a lesser included offense of aggravated robbery).

72. United States v. Galvan-Rodriguez, 169 F.3d 217, 219 (5th Cir. 1999). The court stated:

> [Because] the risks of physical force being exerted during the commission of the burglary of a vehicle are substantially similar to the risks of such force occurring while operating a vehicle without the owner's consent, we hold that the offense of unauthorized use of motor vehicle is a crime of violence within the intendment of 18 U.S.C. § 16.

Id.

73. *See* United States v. Ramos-Garcia, 95 F.3d 369, 372 (5th Cir. 1996) ("The change

The Fifth Circuit interpreted UUMV as a crime of violence in two contexts, under the U.S. Sentencing Guidelines (for both career-offender sentencing enhancement determinations and sentencing for immigration violations) and under the INA § 16.[74] Courts began the review of this issue in the context of the Sentencing Guidelines enhancement.[75] In their original decisions, the courts relied on an understanding that in the two contexts the definition of a crime of violence was the same.[76] Eventually, the courts separated the application of the term crime of violence when applying it to the offense of UUMV.[77] UUMV is not considered a crime of violence under the Sentencing Guidelines for career-offender sentencing enhancement in both criminal[78] and immigration violation[79] situations but is considered such under 18 U.S.C. § 16 (and thus the INA).[80]

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in Texas law reclassifying burglary of a vehicle from a felony to a misdemeanor does not change the nature of the crime as a crime of violence."); United States v. Rodriguez-Guzman, 56 F.3d 18, 20 (5th Cir. 1995) (holding that burglary of a non-residential dwelling or a vehicle was a crime of violence).

74. *See Galvan-Rodriguez*, 169 F.3d at 218–19 (holding UUMV is a crime of violence).

75. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2006), *available at* http://www.ussc.gov/2006guid/CHAP2-4.pdf (describing the immigration violation sentence enhancement category); U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2006), *available at* http://www.ussc.gov/2006guid/CHAP4.pdf (describing the criminal conviction sentencing enhancements). Under the career enhancement Sentencing Guidelines there are two categories of offenders that relate to the term crime of violence: people convicted of immigration violation convictions, U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2006), *available at* http://www.ussc.gov/2006guid/CHAP2-4.pdf, or of criminal convictions, U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2006), *available at* http://www.ussc.gov/2006guid/CHAP4.pdf.

76. *Galvan-Rodriguez*, 169 F.3d at 220.

77. *See generally* United States v. Charles, 301 F.3d 309, 312–14 (5th Cir. 2002) (severing the INA definition of crime of violence from the sentencing enhancement definition outside the context of UUMV crimes). When deciding whether automobile theft was a crime of violence under the Sentencing Guidelines for career-offender sentencing enhancement, the court specifically noted that the application of 18 U.S.C. § 16's crime of violence was separate. *Id.* ("To the extent that our prior cases have conflated the § 16(b) and § 4B1.2(a)(2) definitions of 'crime of violence,' they are overruled.... [W]e limit our holding in *United States v. Galvan-Rodriguez* to its property aspects and to § 16 cases." (citation omitted)).

78. *Id.* at 314.

79. United States v. Rodriguez-Rodriguez, 388 F.3d 466, 469 (5th Cir. 2004). The court appeared concerned that without having to prove intent, there was too broad a category of people who would get caught within the definition of crime of violence in situations where there was no intent to use force. *Id.*

80. Ramirez v. Ashcroft, 361 F. Supp. 2d 650, 655–56 (S.D. Tex. 2005).

United States v. Galvan-Rodriguez[81] was the first case in the Fifth Circuit to decide whether UUMV qualified as a crime of violence under § 16.[82] The determination was made in the career enhancement for immigration violations context, in which a crime of violence was defined in 18 U.S.C. § 16.[83] The court compared UUMV with the crime of burglary of a vehicle and found precedent that the burglary offense was a crime of violence under the Sentencing Guidelines dealing with immigration offenses and therefore applied the label to UUMV.[84] However, the precedent relied on by the court had actually interpreted the Sentencing Guidelines definition of crime of violence when applied to the criminal context.[85]

The *Galvan-Rodriguez* court placed the Sentencing Guidelines definition of crime of violence next to the § 16 definition and attempted to apply the term consistently to two different offenses (burglary and UUMV), each with different elements, while noting that an analysis of whether the crime should be considered a crime of violence does not focus on a review of the specific facts of the case at issue.[86] The court did not look to the actual elements of

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81. United States v. Galvan-Rodriguez, 169 F.3d 217 (5th Cir. 1999).

82. *Id.* at 218.

83. *Id.* ("According to U.S.S.G. § 2L1.2, when a defendant has been deported and unlawfully reenters the United States, his offense level will be increased by 16 levels if he had been previously convicted of an 'aggravated felony.'").

84. *Id.* at 219; *see also* United States v. Ramos-Garcia, 95 F.3d 369, 372 (5th Cir. 1996) (holding that, if the crime of burglary of a vehicle is a misdemeanor, it would still be considered an aggravated felony); United States v. Rodriguez-Guzman, 56 F.3d 18, 21 (5th Cir. 1995) (holding that burglary of a non-residential dwelling or a vehicle was a crime of violence). "The change in Texas law reclassifying burglary of a vehicle from a felony to a misdemeanor does not change the nature of the crime as a crime of violence . . . ." *Ramos-Garcia*, 95 F.3d at 372.

85. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (1997), *available at* http://www.ussc.gov/1997guid/chap2-4.pdf (providing the 1997 definition of crime of violence). In 1997 the definition of a crime of violence under the Sentencing Guidelines for immigration violations referred to the definition in the Sentencing Guidelines for criminal violations of § 4B1.2. *Id.* The 2006 definition reads as follows:

> *"Crime of violence" means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.*

U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2006), *available at* http://www.ussc.gov/2006guid/CHAP2-4.pdf.

86. *Galvan-Rodriguez*, 169 F.3d at 219 ("The phrase 'by its nature' in subsection (b)

the offense of UUMV separately or compared to burglary of a vehicle, but determined that UUMV was a crime of violence based on *hypothetical* dangerous scenarios, finding a substantial risk of harm to the car during the commission of a UUMV from possible vandalizing or dangerous and irresponsible driving.[87]

Later, the circuit court created a fork in the road: down one path (the Sentencing Guidelines), the conduct involved in a UUMV "cannot be said . . . [to present] a serious potential risk of injury to another";[88] and down the other (18 U.S.C. § 16 and under the INA), the behavior carries with it a "substantial risk that the vehicle might be [damaged, as well as a substantial risk of] personal injuries to innocent victims as well."[89] After the Supreme Court decided *Leocal*, the district court and the BIA in the Fifth Circuit did not revisit the definition of UUMV as a crime of violence under 18 U.S.C. § 16 but continued to apply the earlier circuit precedents.

Post-*Leocal*, the Fifth Circuit pressed its understanding by continuing to find UUMV a crime of violence in the district court decision of *Ramirez v. Ashcroft*.[90] The BIA quickly followed the district court decision of *Ramirez* and also determined that UUMV is a crime of violence.[91] The most recent post-*Leocal* decisions to hold that UUMV is a crime of violence are the Fifth Circuit's denial of the *Ramirez* decision when asked to apply

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requires courts to employ a categorical approach—without examining the underlying facts surrounding the conviction—in determining whether an offense constitutes a crime of violence.").

87. *Id.*

> [T]he unauthorized use of a vehicle likewise carries a substantial risk that the vehicle might be broken into, "stripped," or vandalized, or that it might become involved in an accident, resulting not only in damage to the vehicle and other property, but in personal injuries to innocent victims as well.

Id.

88. *See* United States v. Charles, 301 F.3d 309, 314 (5th Cir. 2002) (applying this standard); *see also* United States v. Lee, 310 F.3d 787, 791 (5th Cir. 2002) (dealing with the issue of UUMV under the Sentencing Guidelines, the court made clear that the crime would not be considered a crime of violence). It is also interesting that the court noted UUMV is a lesser offense of theft, and arguably burglary: "The Texas Court of Criminal Appeals has held that UUMV is a lesser included offense of theft. This would suggest that, because simple theft is not a crime of violence under *Charles*, UUMV—as a lesser included offense of theft—could not be a crime of violence either." *Id.* (citation omitted).

89. *Galvan-Rodriguez*, 169 F.3d at 219.

90. Ramirez v. Ashcroft, 361 F. Supp. 2d 650, 657 (S.D. Tex. 2005).

91. *In re* Brieva-Perez, 23 I. & N. Dec. 766, 770 (BIA June 7, 2005).

Leocal consistently[92] and the affirmation of the *Brieva-Perez* decision.[93] It is only in the Fifth Circuit that the courts have found UUMV a crime of violence.[94]

The district court determined that UUMV is a crime of violence under the INA in *Ramirez v. Ashcroft.* Mr. Ramirez challenged his deportation, but the immigration judge determined that UUMV was a crime of violence, a decision affirmed by the BIA.[95] Mr. Ramirez petitioned the Fifth Circuit Court of Appeals which found that it did not have jurisdiction to review the decision.[96] Mr. Ramirez then filed a writ of habeas corpus in the Southern District of Texas; however, the district court dismissed the petition.[97] In dismissing the habeas petition, the court noted that the Fifth Circuit's earlier decision in *Galvan-Rodriguez* had declared a per se rule that UUMV was a crime of violence.[98]

In the time between *Galvan-Rodriguez* and *Ramirez*, the Supreme Court decided *Leocal,* forcing a re-review of the *Galvan-*

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92. Ramirez v. Gonzales, 187 F. App'x 384, 384 (5th Cir. 2005).

93. Brieva-Perez v. Gonzales, 482 F.3d 356, 360 (5th Cir. 2007).

94. *See, e.g.*, Rogelio Ramirez, 2004 WL 1167357, at *1 (BIA Jan. 28, 2004) (holding that UUMV is a crime of violence). On the other hand, a few circuits have considered whether burglary of a vehicle is a crime of violence, and there appears to be a split in the circuits. *Compare* United States v. Guzman-Landeros, 207 F.3d 1034, 1035 (8th Cir. 2000) (finding burglary of a vehicle is a crime of violence), *and* United States v. Alvarez-Martinez, 286 F.3d 470, 476 (7th Cir. 2002) (reviewing specific facts of the offense to determine that burglary of a vehicle was a crime of violence), *with* Sareang Ye v. INS, 214 F.3d 1128, 1134 (9th Cir. 2000) (holding that burglary of a vehicle is not a crime of violence). It appears from the *Alvarez-Martinez* decision that if there were no actual violence to the vehicle, the court would not have found the burglary a crime of violence; the court noted cases to this effect. *Alvarez-Martinez*, 286 F.3d at 474–75.

> The act of prying open the window of a locked vehicle qualifies as a use of physical force against the property of another, as 18 U.S.C. § 16(a) uses the term—this was not a case in which the car owner carelessly left her doors unlocked and returned to find her collection of compact discs stolen, all with no damage to the car.

Id. at 476.

95. *Ramirez,* 361 F. Supp. 2d at 652; *see also* Brief of Petitioner at 4, Ramirez v. Gonzales, 187 F. App'x 384 (5th Cir. 2005) (No. 05-60696) (recounting facts leading to initiation of deportation proceedings in Ramirez's case).

96. *Ramirez*, 187 F. App'x at 384 ("[T]his court would have jurisdiction over this petition only if 'the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.'"). The court held that "Ramirez fail[ed] to make such a showing." *Id.*

97. *See* Brief of Petitioner at 1, Ramirez v. Gonzales, 187 F. App'x 384 (5th Cir. 2005) (No. 05-60696) (noting the district court's denial of Ramirez's immigration petition for habeas corpus).

98. *Ramirez,* 361 F. Supp. 2d at 653.

Rodriguez decision.[99] When *Ramirez* reviewed *Leocal*'s requirement to look to whether the offense "categorically presents a substantial risk of the use of force," it found many of the factors used by the *Galvan-Rodriguez* court to be inapplicable.[100] Where *Galvan-Rodriguez* noted that the driver might be reckless in his driving of the car since he likely did not own the car or have the owner's permission, *Ramirez* admitted that this possible scenario could not be taken into account after *Leocal*.[101] *Ramirez* also questioned the *Galvan-Rodriguez* hypothesis that an "inexperienced or untrustworthy driver who has no pride of ownership" would allow the car to be vandalized or stripped.[102] Lastly, *Ramirez* scrutinized *Galvan-Rodriguez*'s discussion of irresponsible driving, where conceivably, an offender would be likely to run away from the police and participate in a dangerous high speed chase.[103]

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99. *See id.* at 654 (discussing the parties' competing arguments as to the effect of the Supreme Court's recent decision in *Leocal* upon *Galvan-Rodriguez*).

100. *Id.* at 655.

101. *See Ramirez*, 361 F. Supp. 2d at 655 (commenting on the reasoning in *Galvan-Rodriguez*). The district court noted:

> The [*Galvan-Rodriguez*] court first stated that UUMV creates a substantial risk that someone using a vehicle without the owner's authorization might do so recklessly, causing an accident that could result in damage to the vehicle or other property. Such a risk of negligence or recklessness does not result from the commission of the offense and does not make unauthorized use of a motor vehicle a crime of violence under *Leocal*.

Id. (citation omitted).

102. *Id.* As Judge Rosenthal reasons from the Supreme Court's holding in *Leocal*:

> The court in *Galvan-Rodriguez* also cited a "strong probability" of the use of physical force should an "inexperienced or untrustworthy driver who has no pride of ownership . . . expose the car to stripping or vandalism." Insofar as these are risks of negligence or recklessness resulting from the commission of the UUMV offense, under *Leocal*, they do not make unauthorized use of a motor vehicle a "crime of violence" under 18 U.S.C. 16(b).

Id. (alteration in original) (citation omitted).

103. Ramirez v. Ashcroft, 361 F. Supp. 2d 650, 655–56 (S.D. Tex. 2005).

> The *Galvan-Rodriguez* court also noted an additional "strong probability" of physical force should an unauthorized driver attempt "to evade the authorities by precipitating a high-speed car chase and thereby risk[] the lives of others, not to mention significant damage to the vehicle and other property." Like the risks from driving recklessly or exposing the vehicle to stripping and vandalism, the potential that an unauthorized driver may risk the use of force in fleeing police is a "possible effect of a person's conduct." *Leocal* clarifies that this is not the kind of substantial risk that determines whether a felony is a crime of violence under section 16(b).

The only original factor from *Galvan-Rodriguez* that the district court deemed proper in light of *Leocal* was the comparison of the risks associated with burglary and UUMV because the unauthorized driver would "likely" use force to enter the car thus creating a substantial risk that the property (the car) could be injured.[104] *Ramirez* even noted that the process of physically breaking into a car might not always be found in UUMV, especially where the driver has simply exceeded the scope of the owner's authorization for use.[105] The court, concerned with the actions possibly employed to gain entry to the vehicle, noted the possibility of an increased risk of "stripping the vehicle or vandalizing the vehicle in order to use it without the owner's consent" as justification to continue to hold that UUMV is a crime of violence.[106] The court did not address the differences in the language of the statutes that define burglary of vehicles and UUMV. The vehicular burglary offense has as an essential element, the actus reus of breaking into or entering the vehicle, while UUMV does not.[107] The language under UUMV does not indicate the offender ever enters the car or breaks into the car. The offender's only actus reus is to operate the vehicle.[108]

The BIA followed the reasoning of the circuit shortly thereafter in *In re Brieva-Perez*.[109] Relying almost entirely on *Galvan-Rodriguez* and the district court's analysis of the issue post-*Leocal* in *Ramirez*, the BIA determined that UUMV was a crime of violence.[110] The BIA held that the decisions made under the

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Id. (alteration in original) (citation omitted).

104. *Id.* at 656 ("An unauthorized driver is likely to use physical force to gain access to a vehicle and drive it. This is a sufficient risk of the use of physical force in the course of committing the offense.").

105. *Id.* at 656 n.2 ("This risk of physical force is typically not present in those UUMV cases where a driver exceeds the scope of a vehicle owner's authorization and does not use force to gain access to and use the vehicle.").

106. *Id.* at 657.

107. *Compare* TEX. PENAL CODE ANN. § 31.07 (Vernon 2003) (proscribing UUMV), *with id.* § 30.04 (proscribing burglary of vehicles).

108. *Id.* § 31.07 ("A person commits an offense if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner."); *see also* Brief of Petitioner at 9, Ramirez v. Gonzales, 187 F. App'x 384 (5th Cir. 2005) (No. 05-60696) (distinguishing breaking into a vehicle from the unauthorized operation of a vehicle).

109. *In re* Brieva-Perez, 23 I. & N. Dec. 766 (BIA June 7, 2005).

110. *Id.* at 769 ("Although *Galvan-Rodriguez* interpreted § 16(b) in the context of

Sentencing Guidelines differed with its determination but noted that the definition in career-offender sentencing enhancement context did not need to be consistent with the immigration context.[111] Using *Ramirez* the BIA noted that even after *Leocal*, UUMV would still be considered a crime of violence.[112]

The Fifth Circuit solidified the post-*Leocal* precedent again, and held firm to the reasoning of *Galvan-Rodriguez* and the circuit's now strong precedent when it affirmed *Brieva-Perez*.[113] The court explained that the holding was completely in line with *Leocal*. The court stated that determination of the mens rea element did not focus on the substantial risk that the perpetrator would use intentional force but that "the nature of the offense involves a substantial risk of the intentional use of force."[114] Instead of looking to the statute and whether there was an element of mens rea, the court once again relied on the nature of the crime and fantasy scenarios when defending the precedent.[115] The court noted it should not look to the facts of the case, where here there was no use of force, but to the nature of the crime at issue in determining whether a crime is a crime of violence.[116]

IV. LOST IN THE DEFINITION OF A CRIME OF VIOLENCE

A. *The Fifth Circuit's Wrong Turn*

Congress created a vague category within aggravated felonies described simply as a crime of violence, allowing different circuits

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the Sentencing Guidelines, the court's holding in that case is controlling in determining the scope of § 16(b) as referenced in the immigration laws at section 101(a)(43)(F) of the [Immigration and Nationality] Act.").

111. *Id.*

112. *Id.* at 769–70.

113. Brieva-Perez v. Gonzales, 482 F.3d 356, 360 (5th Cir. 2007) (dismissing the argument that UUMV was not properly classified as a crime of violence, which "has been and remains contrary to Fifth Circuit precedent").

114. *Id.* at 360–61 ("The Court interpreted § 16(b) to require a substantial risk of *intentional* use of force. This does not mean that a statute must have an element of intent to cause harm to another's person or property to be considered a crime of violence under § 16.").

115. *Id.* (citing the *Galvan-Rodriguez* scenario of vandalism, stripping, and accidents because of the unauthorized entry, even though in this case the crime involved "no actual use of force" and as discussed fully, neither does the statute).

116. *Id.*

to be variably aggressive about deporting people under this term. The ambiguous nature of the term has resulted in a series of inconsistent decisions; a criminal noncitizen convicted of a minor crime in one circuit is faced with the serious consequences of deportation and a lifetime ban, whereas in another circuit the crime would raise no immigration issues or only a temporary ban on reentry. Most recently, it took the Supreme Court to rein in aggressive circuits that had determined that driving while intoxicated was a crime of violence.[117] The Supreme Court has become the interpreter of the term.[118]

Courts' traditional deference to Congress and the executive branch in matters of immigration law makes the situation more dire. The Court has determined that immigration law should be within the plenary power of the executive branch, among other provisions, under the Take Care Clause of the Constitution.[119] Decisions regarding whom to admit or remove fall under this plenary power, and Congress is granted full authority to legislate

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117. *See* Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (holding that driving under the influence of alcohol is not a crime of violence). The Court stated: "In no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Id.*

118. *Id.* This is a terrible situation because of the many years it takes to develop cases that can be appealed to the Supreme Court. Even if the noncitizen had the resources to appeal, the Supreme Court only reviews a few cases every year. In 2004, the Supreme Court accepted eighty-seven cases for oral argument, although 7,496 appeals were filed. CHIEF JUSTICE JOHN ROBERTS, SUPREME COURT OF THE UNITED STATES, 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2006), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf. During the time it takes to appeal the decisions of the circuit courts, many noncitizens will be deported. Those who are deported will not necessarily be allowed to return even if the Supreme Court finds the term was erroneously applied to the crime.

119. Fong Yue Ting v. United States, 149 U.S. 698, 711–12 (1893) ("The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation . . . ."). The Court explained that the Constitution gave the President executive power "to take care that the laws be faithfully executed" and gave "[C]ongress the power to regulate commerce with foreign nations," as well as establishing a uniform immigration system. *Id.* The plenary power and hands off approach of the courts has been challenged. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 862 (1987) ("The doctrine that the Constitution neither limits governmental control over the admission of aliens nor secures the right of admitted aliens to reside here . . . is a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects.").

the grounds for deportability.[120] The history of the term crime of violence, and Congress's intent when it added the term to 18 U.S.C § 16 and the INA, should be reviewed by the courts when determining whether a particular crime is one of violence. The term crime of violence in immigration and criminal statutes stems from its use in the 1970 Act—thus the term should be defined consistently in criminal law cases and in immigration cases. The Fifth Circuit and the BIA have misused the term and cast too broad a net over the types of crimes they considered to be crimes of violence and thus aggravated felonies.[121]

The Fifth Circuit originally grouped UUMV with burglary of a vehicle without an in-depth analysis of the different elements of the crimes. The *Galvan-Rodriguez* court found that UUMV was a crime of violence based on precedent that found burglary of a vehicle to be a crime of violence.[122] The court simply determined that the two crimes, burglary of a vehicle and UUMV, were similar enough to place UUMV in the category of a crime of violence. This decision failed to take into account some very specific differences in the language of the two offenses.[123] Specifically, the burglary statute contains an element of breaking into or entering into the vehicle.[124] To be convicted of UUMV, a person merely

120. Bugajewitz v. Adams, 228 U.S. 585, 592 (1913) ("It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful.").

121. *See, e.g.*, United States v. Galvan-Rodriguez, 169 F.3d 217, 220 (5th Cir. 1999) (holding that UUMV qualified as a crime of violence); *In re* Brieva-Perez, 23 I. & N. Dec. 766, 769–70 (BIA June 7, 2005) (agreeing that UUMV is a crime of violence despite the *Leocal* decision). The most recent example of this is when the BIA and some circuit courts declared driving under the influence to be a crime of violence, and the Supreme Court decided that it was not. *Leocal*, 543 U.S. at 11 ("Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes.").

122. *See* United States v. Galvan-Rodriguez, 169 F.3d 217, 219 (5th Cir. 1999) (holding UUMV to be a crime of violence because "the risks of physical force being exerted during the commission of the burglary of a vehicle are substantially similar to the risks of such force occurring while operating a vehicle without the owner's consent").

123. *Compare* TEX. PENAL CODE ANN. § 31.07 (Vernon 2003) (proscribing UUMV), *with id.* § 30.04 (proscribing burglary of vehicles).

124. *Id.* (proscribing burglary of vehicles).

> (a) A person commits an offense if, without the effective consent of the owner, he breaks into or enters a vehicle or any part of a vehicle with intent to commit any felony or theft.
>
> (b) For purposes of this section, 'enter' means to intrude:
>
> (1) any part of the body; or

"operates another's" vehicle.[125] The elements of breaking or entering a vehicle relate directly to the actions that the Fifth Circuit was concerned would create a substantial risk of violence against the property. Conviction of UUMV does not require proof of force—a person is convicted only for operating the vehicle; the method of entering the vehicle does not relate to the crime.[126] UUMV was erroneously determined to be a crime of violence for both career criminal enhancements and the basis for determining whether a noncitizen has committed an aggravated felony by comparing these two dissimilar crimes.

The Fifth Circuit's determination that UUMV is a crime of violence under the INA has broadened the application of a crime of violence. By making UUMV a per se crime of violence, *Galvan-Rodriguez* effectively barred all discussion and all review of cases until the *Leocal* ruling.[127] However, when faced with other scenarios such as those involving Sentencing Guidelines with comparable definitions of crime of violence, the courts in the Fifth Circuit have rejected the finding that UUMV is a crime of violence.[128] The Fifth Circuit has ignored *Leocal* and the developments in the case law relating to the Sentencing Guidelines not finding UUMV to be a crime of violence, as well as basic canons of statutory construction. Noncitizens are being deported and barred for life based on this erroneous definition of a crime of violence.

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(2) any physical object connected with the body.

Id.

125. *See id.* § 31.07 ("A person commits an offense if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner."). The statute outlining the offense of UUMV does not address the method of entering the illegally operated motor vehicle. TEX. PENAL CODE ANN. § 31.07 (Vernon 2003).

126. *Id.*

127. *See Galvan-Rodriguez*, 169 F.3d at 220 (holding UUMV to be a crime of violence); *see also* Ramirez v. Ashcroft, 361 F. Supp. 2d 650, 653 (S.D. Tex. 2005) (stating *Galvan-Rodriguez* made UUMV "a *per se* crime of violence under 18 U.S.C. § 16").

128. *See, e.g.*, United States v. Rodriguez-Rodriguez, 388 F.3d 466, 469 (5th Cir. 2004) (per curiam) (stating that the definition of UUMV does not "*require*[] proof of use, attempted use, or threatened use of physical force in order to convict[,]" and consequently "the use of physical force cannot be a necessary or required element of [UUMV] and [does not constitute] a crime of violence that would support a sixteen-level crime-of-violence enhancement under [sentencing guidelines]"); United States v. Charles, 301 F.3d 309, 313–14 (5th Cir. 2002) (severing the INA definition of crime of violence from the sentencing enhancement definition outside the context of UUMV crimes).

When reviewing whether 18 U.S.C. § 16 applies, the relevant portion to consider is § 16(b). The offense can be classified as a crime of violence if the offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[129] Section 16(b) is substantially broader than the definition of § 16(a). The decisions of the Fifth Circuit have compared the language of § 16(b) with the language found in the Sentencing Guidelines. The Sentencing Guidelines have similar language but remove the element of harm to "property" and substitute "substantial risk" with "serious risk."[130] Before *Leocal*, driving while intoxicated (DWI) was not a crime of violence, and the Fifth Circuit actually indicated that courts should read the Sentencing Guidelines more broadly than § 16(b).[131] This determination should continue in the review of UUMV. Courts should read § 16(b) more narrowly than the Sentencing Guidelines, or at least consider the two statutes equally. Section 16(b) should not be read more broadly to include less serious crimes.

UUMV is not a serious or violent crime, and thus is likely not a crime the drafters of the statute intended to define as such.[132] Because the Fifth Circuit is the only circuit to find UUMV to be a crime of violence, a troubling scenario has arisen where affected immigration laws are not being applied consistently. Given the

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129. 18 U.S.C. § 16(b) (2000).

130. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (1994) (amended 1995), *available at* http://www.ussc.gov/1994guid/chapt4.htm (defining a crime of violence as an offense that "involves conduct that presents a serious potential risk of physical injury to another").

131. *See* United States v. Chapa-Garza, 243 F.3d 921, 924 (5th Cir. 2001) (rejecting a construction of § 16(b) making DWI a crime of violence given the broad language of statute). When deciding whether DWI was a crime of violence, the Fifth Circuit indicated that § 4B1.2(a)(2) was broader than § 16(b), and stated:

> [W]e refuse to read section 16(b) as we do guideline 4B1.2(a)(2), and hold, consonant with the ordinary meaning of the word "use," that a crime of violence as defined in 16(b) requires recklessness as regards the substantial likelihood that the offender will intentionally employ force against the person or property of another in order to effectuate the commission of the offense.

Id. at 927.

132. *See* Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) ("Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes.").

serious consequences of such an application, the vague term crime of violence requires a clear and consistent definition.

B. *Guidelines to Applying* Leocal

Leocal created some guidelines for determining whether an offense is a crime of violence, but provided no test.[133] The courts should consider only the elements of the offense—not the specific circumstances of the crime or hypothetical circumstances that could result from the crime.[134] Courts should be required to review how the offense is classified in the criminal context when deciding the classification in the immigration context.[135] Finally, the term should only be applied to offenses that are serious in their nature. The guidelines are easily explained away, differentiating the offense of DWI from the elements of UUMV or other crimes where *Leocal* might apply. In the short term, the Fifth Circuit needs to apply the foundations of *Leocal* to the decisions regarding UUMV.

The Supreme Court has indicated that when deciding whether a specific crime is a crime of violence, the review should not focus on the facts of the specific case before the court, but rather on the elements of the crime at issue.[136] Under 18 U.S.C. § 16(b), the

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133. *Id.* at 11–12 (providing an analysis of the statute).

134. *Id.*

135. *Id.* at 12 n.8. The Fifth Circuit stated in a recent opinion:

> To determine whether an alien's guilty plea conviction constitutes an aggravated felony for removal purposes, we apply a "categorical approach," under which we refer only to the statutory definition of the crime for which the alien was convicted (rather than attempt to reconstruct the concrete facts of the actual criminal offense) and ask whether that legislatively-defined offense necessarily fits within the INA definition of an aggravated felony.

Larin-Ulloa v. Gonzales, 462 F.3d 456, 463 (5th Cir. 2006).

136. *Leocal*, 543 U.S. at 11. This review of the language of the offense statute to determine whether Congress intended to include the specific offense in a broad category was applied in the Sentencing Guidelines decisions; most recently, the review was applied in the immigration context when determining whether a state offense for "burglary" counts as a "theft offense." Gonzales v. Duenas-Alvarez, 127 S. Ct. 815, 818 (2007) ("[W]hen a sentencing court seeks to determine whether a particular prior conviction was for a generic burglary offense, it should normally look not to the facts of the particular prior case, but rather to the state statute defining the crime of conviction."). The Court also explained that it could look to whether the jury was required to find the defendant guilty of all the elements of the generic crime. *Id.* If there was a non-jury conviction the Court could look to the indictment, plea agreement, and colloquy. *Id.* at 819.

court must determine whether there is a substantial risk that physical force will be used.[137] If the actual facts of the case should not be reviewed, it appears clear that hypothetical facts should not be considered either. In *Galvan-Rodriguez*, the Fifth Circuit did not review the facts of the specific criminal activity or the language of the offense underlying the conviction, but instead based its decision on fantasy scenarios of what *might* happen if a noncitizen committed the crime of UUMV.[138] Instead, the court should look at the penal law section at issue in the UUMV cases.[139] The focus should be on the offense at issue.[140]

By its terms, the statute is clear that a person may be convicted of UUMV without engaging in the hypothetical actions listed by *Galvan-Rodriguez*.[141] A person can be convicted if he "intentionally or knowingly operates another's . . . vehicle . . . without the effective consent of the owner."[142] Unlike burglary, upon which *Leocal*'s holding was based, UUMV statutes contain no element of "entry" to the vehicle, either forced or with consent, that would need to be proven for a conviction.[143] The language of the statute indicates nothing that would fulfill the language of the 18 U.S.C.

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137. *See Leocal*, 543 U.S. at 10 n.7 (citations omitted) ("[Section] 16(b) plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct. The 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct.").

138. United States v. Galvan-Rodriguez, 169 F.3d 217, 219 (5th Cir. 1999). In *Galvan-Rodriguez*, the court stated:

> [T]he unauthorized use of a vehicle likewise carries a substantial risk that the vehicle might be broken into, "stripped," or vandalized, or that it might become involved in an accident, resulting not only in damage to the vehicle and other property, but in personal injuries to innocent victims as well.

Id.

139. *See* TEX. PENAL CODE ANN. § 31.07 (Vernon 2003) (outlining elements for unauthorized use of a vehicle); *see also Leocal*, 543 U.S. at 7 ("In determining whether petitioner's conviction falls within the ambit of § 16, the statute directs our focus to the 'offense' of conviction.").

140. *See Leocal*, 543 U.S. at 7 ("This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.").

141. *See Galvan-Rodriguez*, 169 F.3d at 219–20 (explaining how UUMV presents substantial risk of certain actions constituting physical force against a person or property).

142. TEX. PENAL CODE ANN. § 31.07 (Vernon 2003).

143. *Leocal*, 543 U.S. at 10 ("A burglary would be covered under § 16(b) *not* because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.").

§ 16(b) requirement of "substantial risk [of] physical force."[144] There is no element in UUMV that relates to the destruction of property even under the broad reach of 18 U.S.C. § 16(b).[145]

Based on the legislative history relating to the term "crime of violence," over thirty-five years of use in the criminal context, and the Supreme Court precedent of *Leocal*, only serious crimes should be considered crimes of violence. A higher threshold should apply to an offense that focuses on damaged property rather than harm to individuals, requiring an element of actual or attempted destruction of property. Under rules of statutory construction, a single term should not have different meanings under the Sentencing Guidelines and 18 U.S.C. § 16.[146] The courts should read the term crime of violence narrowly and with lenity towards the noncitizen.[147]

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144. *Compare* TEX. PENAL CODE ANN. § 31.07 (Vernon 2003) ("A person commits an offense if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner."), *with* 18 U.S.C. § 16(b) (2000) (providing that the definition of crime of violence includes "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

145. Larin-Ulloa v. Gonzales, 462 F.3d 456, 465 (5th Cir. 2006). Specifically, the court stated:

> While the inquiry under section 16(a) is limited to looking at the elements of the offense, section 16(b) "sweeps more broadly" to encompass those crimes that can perhaps be committed without the use of physical force, but that nevertheless always entail a substantial risk that physical force will be used.

Id.

146. *See id.* at 463 (describing how to interpret statutory language).

> To determine whether an alien's guilty plea conviction constitutes an aggravated felony for removal purposes, we apply a "categorical approach," under which we refer only to the statutory definition of the crime . . . and ask whether that legislatively-defined offense necessarily fits within the INA definition of an aggravated felony.

Id. (citation omitted).

147. Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 345–46 (2005).

> If [the first subsection of a statute] is ambiguous, the rule of lenity calls for it to receive a narrow construction, so that the public has fair warning of conduct that could result in a criminal sanction. In such a case, if the best understanding of [the first subsection] is broader, must courts nonetheless give the section a narrow construction, even in civil cases arising under [another subsection], so that the [entire statute] can have a single meaning? The most common answer given by courts and scholars is yes: the combined effect of the unitary principle and the rule of lenity requires narrow construction, even in civil cases, of ambiguous statutes that impose civil and criminal sanctions on the same conduct.

C. *Applying Traditional Rules of Interpretation*

When Congress's terms are vague, the court's role is to determine the meaning of those terms.[148] In an attempt to determine how to define a crime of violence, certain rules of statutory interpretation[149] might be useful.[150] One rule of statutory construction states that when words are used in a predecessor law and are then repeated in subsequent legislation where the purpose is similar, the presumption should be that the words have the same meaning as in the predecessor law.[151] Based on the evolution of the term crime of violence from the predecessor legislation of the 1970 Act—and the introduction into the 1984 Act—the meaning of crime of violence should be the same. The definition used in the

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Id.

148. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2104–05 (2002).

> If Congress uses a vague phrase ... without defining it, then courts must give the phrase content by bringing various tools of statutory interpretation to bear on the ambiguity .... Courts might look the words up in a dictionary. They might look to other uses of the phrase in the same statute or perhaps in other statutes and compare contexts. They might look to committee reports and other forms of legislative history.

Id.

149. Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1025 (1998) (recognizing that statutory construction has created lively debate between textualists—those who with Holmes say, "we do not inquire what the legislature meant; we ask only what the statute means"—and the faction that looks for the intention of the lawmakers and ways to implement that intent). This article does not side with either interpretation.

150. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002). Although statutory construction does not always lead to a consistent understanding of a term, if combined with the review of the criminal law statutes, a better understanding could emerge. *Id.* ("Gradually, case by case, courts have developed assorted tools of interpretation. Scholars, meanwhile, have conceived esoteric theories of how best to resolve statutory ambiguity. And the doctrine and the scholarship have become elaborate and sophisticated.").

151. *See* MICHAEL B.W. SINCLAIR, GUIDE TO STATUTORY INTERPRETATION 137 (LexisNexis 2000) (directing that if the term is used in different statutes the presumption should be that the legislature meant the same thing in all); Karen Crawford & Thomas Hutchins, *Ignoring Congress: The Board of Immigration Appeals and Crimes of Violence in* Puente *and* Magallanes, 6 BENDER'S IMMIGR. BULL. 65, 68 (Jan. 15, 2001) ("The [Immigration] Board adheres to the 'basic rule of statutory construction' that, when words used in a predecessor law 'are repeated in subsequent legislation with a similar purpose,' those words are presumed to be used in the same sense as in the predecessor law."); *see also* Leocal v. Ashcroft, 543 U.S. 1, 11–12 (2004) (looking to previously enacted legislation when interpreting the meaning of the term).

1970 Act indicates the seriousness of the crime and the similarity of the purposes.[152] The immigration context should not force a broader meaning of the term than situations when the courts are deciding enhanced punishments for a career offender. The terms are the same and the history of the term has its roots in the same act, the 1970 Act.

The rule of lenity has been applied to criminal statutes when courts are determining whether a criminal statute applies.[153] This has been extended to interpreting immigration statutes. The Supreme Court has declared that where there is ambiguity in an immigration statute, it should be read in favor of the noncitizen because of the dire consequences of deportation.[154] The term crime of violence is ambiguous; the doctrine of lenity should be applied and the term defined narrowly in favor of the noncitizen. Making UUMV a crime of violence makes the term extremely broad and potentially applicable to many traffic violations.[155]

The court should make sure the damage is serious and the actual offense has elements of a serious offense, especially when dealing with damage to property. The court's concerns of the possible damage to the property should not have been considered since the actions that it was concerned with, namely "stripping the vehicle, or vandalizing the vehicle in order to use it without the owner's consent," are not elements of UUMV and should be charged as a different offense, that of criminal mischief.[156] The offense of

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152. *See* District of Columbia Court Reform and Procedural Act of 1970, Pub. L. No. 91-358, § 210, 84 Stat. 473 (defining crime of violence).

153. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2097 (2002) (suggesting that the Due Process Clause requires this rule of statutory construction); *see also Leocal*, 543 U.S. at 12 (noting that the rule of lenity applied to a criminal statute even when construed in a civil setting).

154. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); *see also* Mark Bradford, *Deporting Nonviolent Violent Aliens: Misapplication of 18 U.S.C. § 16(b) to Aliens Convicted of Driving Under the Influence*, 52 DEPAUL L. REV. 901, 938 (2003) (recognizing that ambiguous deportation statutes are to be construed in favor of the alien). This is similar to the way criminal law statutes are to be read narrowly. MICHAEL B.W. SINCLAIR, GUIDE TO STATUTORY INTERPRETATION 137, 142 (LexisNexis 2000).

155. United States v. Charles, 275 F.3d 468, 470 (5th Cir. 2001) ("[M]ost traffic violations have been elevated to crimes of violence.").

156. *See, e.g.*, TEX. PENAL CODE ANN. § 28.03 (Vernon 2003) (providing separate offense for acts of criminal mischief). As provided by the statute:

> (a) A person commits an offense if, without the effective consent of the owner:
> (1) he intentionally or knowingly damages or destroys the tangible property of the owner;

criminal mischief has the element of intent to damage or destroy the property.[157] Under Texas Penal law, criminal mischief is a class A or class B misdemeanor and rises to a felony if the damage is over $1,500.[158] UUMV does not provide the elements to indicate any damage to the vehicle.

The Fifth Circuit should reevaluate its decisions in this area. The circuit should apply *Leocal* and the traditional rules of statutory construction by reviewing the elements of the crime of UUMV and not overestimating the seriousness of the crime with hypothetical scenarios. The punishment of deportation and a lifetime ban on entry should not be used for noncitizens convicted of UUMV.

V. DEFINING A CRIME OF VIOLENCE UNDER THE INA

The inconsistency of the Fifth Circuit with its interpretation of UUMV is only the latest in a series of conflicting understandings of what constitutes a "crime of violence." Congress needs to end the confusion and list the crimes that should be considered "crimes of violence" or eliminate the category. Congress drafted a statute without a specific and detailed definition of a "crime of violence," where in other sections of the INA defining aggravated felonies Congress has been explicit in defining terms.[159]

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(2) he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person; or

(3) he intentionally or knowingly makes markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of the owner.

Id.

157. *Id.*

158. *Id.*

159. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(m) (2005) (providing that a conviction of "fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an aggravated felony and has not led to the constant litigation that is inherent in the vague crime of violence term). The challenges to deportation involve questions of fact, such as whether the amount in question "exceeds $10,000," as well as a few decisions relating to intent. *See* Valansi v. Ashcroft, 278 F.3d 203, 211 (3d Cir. 2002) (finding that a conviction where "the defendant acted with the intent to defraud his or her employer qualifies as an offense" under the statute, whereas a "conviction establishing that the defendant acted only with an intent to injure his or her employer does not"); Nugent v. Ashcroft, 367 F.3d 162, 174 (3d Cir. 2004) (finding that "conviction for passing a bad check represents 'an offense involving fraud or deceit,'" however, the conviction did not fall under the statute because the value was less than $10,000); Li v. Ashcroft, 389 F.3d 892, 899 (9th Cir. 2004) ("[T]he

The courts have tried to decide whether each offense fits the definition of "crime of violence," but the determinations have been inconsistent. How the Fifth Circuit has dealt with the term UUMV sheds light on an extreme problem: each Circuit is making determinations of what crimes would constitute a crime of violence without guidance from the legislature or a unified method for determining these issues. Congress should be called upon to enumerate the specific offenses it deems serious enough for deportation and lifetime bans, or to specifically define "crime of violence."

VI. CONCLUSION

The simplest solution for this particular issue, without congressional action, is for the Supreme Court to step in as it did in *Leocal* and find that UUMV is not a "crime of violence." But further, what is needed is a test to determine whether a specific offense qualifies as a "crime of violence." Without this test, noncitizens will have to rely completely on the Supreme Court to determine whether each new offense charged as a crime of violence is appropriately charged.[160]

Although the Supreme Court did not provide a test to determine how to go forward with the review of whether a specific crime is a "crime of violence," the system and review it used in *Leocal* should be applied henceforth. The suggested guidelines for review by the court in determining whether UUMV is a crime of violence should be extended to all issues of whether a particular crime is a "crime of violence." The courts should look to how the offense at issue has been treated in criminal law and Sentencing Guidelines scenarios when determining whether a specific crime is a "crime of violence." The courts should also review the elements of the offense to determine if the term crime of violence should be used, only applying the term when the crime is serious. If this

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judgment in this record do[es] not demonstrate unequivocally that the jury found the amount of loss arising from Petitioner's fraud to be greater than $10,000.").

160. *See* CHIEF JUSTICE JOHN ROBERTS, SUPREME COURT OF THE UNITED STATES, 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2006), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf (presenting the annual report of cases accepted by the Supreme Court). The Supreme Court accepts a small ratio of cases that apply for certiorari. *Id.*

review provides ambiguous results, the term crime of violence should be read narrowly, in favor of the noncitizen. The courts are not entering the fray with a clean slate and without guidance. Their actions should be based on the roadmap created by Congress in enacting the statute and by the Supreme Court in *Leocal*.