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Analyzing Washington Theft Offenses after *Matter of Diaz-Lizarraga* 26 I&N Dec. 847 (BIA 2016) and *Matter of Obeya* 26 I&N Dec. 856 (BIA 2016) -- January 2017

When Blackstone wrote his treatise lauding the justice and reason of the English law, there were, as I recall it, something like 120 capital offenses in England, including larceny of property worth 5 shillings. It was one of the most brutal systems of law ever in force in any land at any time. Blackstone's assumption of personal knowledge from 'the Great Lawgiver' as to what offenses are mala in se and can 'contract no additional turpitude from being declared unlawful by the interior Legislature,' I think absurd. Nothing could be more chaotic, illogical and unethical than our prevailing views and practices as to property rights. Essentially, our legal and economic structure is predatory. We do not attempt to co-ordinate acquisition with useful productivity. Our common methods of 'big money making' always involve getting the results of other people's productive labor. On any sound and ethical theory of property rights, winnings at gambling—even stock-gambling—are as unjustifiable as many kinds of takings condemned by statute as larcenies.

Until our code of property rights and wrongs bears more relation to anti-social methods of acquisition, I think the moral turpitude taboo should not be extended to cover such trifling offenses as this....

Tillinghast v. Edmead, 31 F.2d 81, 84–85 (1st Cir. 1929) (Anderson, J., dissenting).

I. Moral Turpitude and Theft Prior to *Diaz-Lizarraga (11-16-2016)*

Under the well-established definition of a "crime of moral turpitude" ("CIMT") used for theft cases, Theft as defined in Revised Code of Washington (RCW) 9a.56.020 and employed in other Washington theft statutes using the same definition, is not a crime involving moral turpitude.

To qualify as a CIMT under that definition, a theft must involve an intent to permanently deprive a person of his or her property. *Matter of Guillermo Diaz-Lizarraga,* 26 I. & N. Dec. 847, 849 (BIA 2016) ("From the Board's [of Immigration Appeals] earliest days we have held that a theft offense categorically involves moral turpitude--if and only if--it is committed with the intent to *permanently* deprive an owner of property.").[1] A predicate offense is insufficient if it criminalizes "a taking with intent to deprive the owner of his property only temporarily." *Almanza-Arenas v. Holder,* 771 F.3d 1184 (9th Cir. 2014) (quoting *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009)).

In *State v. Komok*, 113 Wash. 2d 810, 783 P.2d 1061 (Wash. 1989), the Washington Supreme Court clarified that intent to permanently deprive is not an element of theft under Washington law.[2] Immigration courts and the BIA recognized that Theft in Washington therefore was not a CIMT, and this was acknowledged in decisions by immigration judges and the BIA decisions as well as in DHS briefs.[3]

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[1] *Matter of Grazley* 14 I. & N. Dec. 330, 333 (BIA 1973); *In Re V-Z-S-*, 22 I. & N. Dec. 1338, 1361 n.12 (BIA 2000).

[2] *State v. Crittenden*, 146 Wash. App. 361, 370, 189 P.3d 849, 853 (2008).

[3] *See, e.g., In Re Jose De Jesus Rizo-Vargas*, 2009 WL 3713318 *1 (BIA 2009); *United States v. Cazaras,* No. 4:15-CR-6024-EFS, 2015 WL 5838826 at *2 (E.D. Wash. Oct. 7, 2015).

II. The Board Created a New Definition of Moral Turpitude for Theft Cases

On November 16, 2016, the BIA issued two new precedent decisions revising and "updating" the definition of a crime involving moral turpitude. The Board did not announce that a new rule was pending, request comment, or seek briefing by amicus curiae.

The Board held that the new definition is based on the Model Penal Code's (MPC) definition of theft[4] and the fact that "[o]nly five States have retained the intent to permanently deprive an owner of property as an explicit statutory requirement." The BIA therefore stated that it had to update its existing case-law to keep pace with modern developments.[5] According to the BIA, most states have adopted something very close to the MPC definition either by statute or by case-law.[6]

The new definition offered by the BIA is that "a theft offense is a crime involving moral turpitude if it involves an intent to deprive the owner of his property either permanently or **under circumstances where the owner's property rights are substantially eroded.**"[7] This coincides with the Board's view of the "mainstream, contemporary understanding" of theft itself.[8] The Board perceives the older, bright-line definition to be in decline. However, the Board's new standard is much more vague.

III. Does Washington's Definition of Theft Match the BIA's New Definition of Moral Turpitude?

A. The BIA Recognizes Washington Is an Exception.

Answer: *No.* According to *Diaz-Lizarraga,* of the 18 states that define theft without an explicit statutory provision concerning the duration of the intended deprivation, 15 have adopted the MPC definition. In a footnote to the survey, the Board notes:

> Two of the remaining three States provide, in case law, that a temporary deprivation is sufficient. *Bennett v. State*, 871 N.E.2d 316, 322 (Ind. Ct. App. 2007); ***State v. Komok*, 783 P.2d 1061, 1063-64 (Wash. 1989) (en banc).**

Diaz-Lizarraga, 26 I. & N. Dec. at 852 n.6 (emphasis added). So the Board itself appears to identify Washington as an outlier in its survey of state statutes and case-law.

B. Language Approximating "Substantial Erosion of Property Rights" Does Not Appear in the Washington Statute or Case-Law.

No similar phrase appears in criminal pattern jury instructions (WPIC).[9] Case-law does not use the term "substantial erosion of property rights" either. In *State v. Komok,* 113 Wash. 2d 810, 814–15, 783 P.2d 1061, 1063 (1989), the Washington Supreme Court said:

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[4] "Deprive" means: (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it." Model Penal Code § 223.0(1).

[5] *Diaz-Lizarraga,* 26 I. & N. Dec. at 852.

[6] 39 states, following the Board's arithmetic. *Diaz-Lizarraga,* 26 I. & N. Dec. at 851-52.

[7] *Id.* at 853. The Board apparently equates "withholding property of another permanently or for so extended a period as to appropriate a major portion of its economic value" with "circumstances where the owner's property rights are substantially eroded," although the latter phrase is less specific.

[8] *Id*. at 854.

[9] *See, e.g.,* WPIC 70.11 Theft—Third Degree—Elements; WPIC 79.01 Theft—Definition; WPIC 79.02 Wrongfully Obtains—Exerts Unauthorized Control—Definition; WPIC 79.05 Appropriate Lost or Misdelivered Property or Services—Definition.

> In the statutory definition of "deprive," the legislature made no reference to the common law requirement of intent to "permanently deprive," but acknowledged that the word retains its common meaning in cases not involving theft of intellectual property. RCW 9A.56.010(5). . . . Under the statute, then, "deprive" retains its common meaning.

Id.; *accord State v. Cuthbert*, 154 Wash. App. 318, 337–38, 225 P.3d 407, 418 (2010);[10] *State v. Crittenden*, 146 Wash. App. 361, 369–70, 189 P.3d 849, 853 (2008).[11] *State v. Miller*, 92 Wash. App. 693, 964 P.2d 1196 (1998).[12]

C. There Is No Durational or Intended Durational Requirement for Washington Theft as Long as There is Some Intent to Deprive.

Washington law does not contain a durational element. For example:

> Royal argues that Officer Jones's "momentary, temporary loss of possession" was insufficient to constitute a theft. . . . He concedes that intent to "permanently" deprive is not an element of theft. . . . He argues, however, that "there must be an intent to deprive that is more than fleeting seconds." . . . Neither case [cited] supports Royal's argument.

State v. Royal, 179 Wash. App. 1043, *review denied*, 180 Wash. 2d 1024, 328 P.3d 903 (2014) (unpublished) (internal citations omitted). Discussing the difference between Theft of a Motor Vehicle and Taking a Motor Vehicle Without Permission, the *Royal* Court explained:

> **[T]he court did not hold that the theft statute has a duration requirement**. . . . According to *Komok*, the common meaning of "deprive" is "[t]o take something away from"; "[t]o keep from having or enjoying"; or "[t]o take." *Komok*, 113 Wash.2d at 815 n.4 (final alteration in original) (citing Webster's II New Riverside University Dictionary 365 (1984); Black's Law Dictionary 529 (4th ed. 1968)).

Id. (boldface added). "[P]roof of duration is not required as an element."[13]

D. The Meanings of "Deprive" and "Appropriate" Inform How *Diaz-Lizarraga* Applies to Washington Theft.

Washington Theft has two substantive terms that require definition: "deprive" and "appropriate."

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[10] "We give the word 'deprive' its common meaning: 'to take away' or 'to take something away from.' Webster's Third New International Dictionary 606 (2002)." *Cuthbert*, 154 Wash. App. at 337–38, 225 P.3d at 407, 418.

[11] "Crittenden appeals the court's refusal to give the jury his proffered instruction on 'intent to deprive.' . . . Crittenden's proffered instruction reads as follows: '"Intent to Deprive" means intent to permanently deprive or intent to deprive for a continued and substantial period of time.' . . . Crittenden's proposed instruction was not a fully accurate reflection of the law." *Id.* at 369–70, 853.

[12] *State v. Miller*, 92 Wash. App. 693, 964 P.2d 1196 (1998), *as amended, review denied* 137 Wash. 2d 1023, 980 P.2d 1282 (In statute defining theft, word "deprive" is given its common meaning, except in cases involving intellectual property).

[13] *State v. Edwards*, 147 Wash. App. 1003 (2008) (unpublished). *See also State v. Rogers*, 138 Wash. App. 1024 (2007) (unpublished) ("[P]roof that an item has been taken for a substantial period of time may help to establish the intent element of theft, but proof of duration is not required as an element.").

See also State v. Gallagher, 87 Wash. App. 1092 (1997) (unpublished) ("Gallagher called the police to complain about the woodcutters. When police arrived he returned the [woodcutters'] tools. . . . Gallagher argues . . . that he merely took the tools in order to give them to police because he believed the woodcutters were using them to commit a crime. . . . The woodcutters did not give Gallagher permission to take them. . . . Thus, the State presented sufficient evidence that Gallagher intended to deprive the woodcutters of their tools, if only for a short time.").

1. Deprive. In addition to the above definition used by the Supreme Court, that "'deprive' retains its common meaning," the only statutory definition is at RCW 9A.56.010(6).[14] That says: "'Deprive' in addition to its common meaning means to make unauthorized use or an unauthorized copy of records, information, data, trade secrets, or computer programs." The additional meaning of *unauthorized use of information*, data, records or a computer program explicitly lifts the burden from the State to prove any intent to "deprive" beyond that of an intent to use information without permission. Neither commercial use, deprivation for any quantum of time, or substantial erosion of the owner's rights need to be intended.

Since the BIA uses the term "deprive" to cover both "substantial and reprehensible deprivations" and those which are not, the common meaning of "deprive" in the Board's own lexicon *if unqualified*, must be broader than the definition it uses for moral turpitude. Taking "under circumstances where the owner's property rights are substantially eroded" is not the common meaning of "to deprive."

2. Appropriate. The Washington statutory definition of "[to] appropriate," means "obtaining or exerting control over the property or services of another" and does not state an intended durational or substantial effect element.[15] Theft by appropriation of misdelivered property requires proof of the intent merely to deprive, at any time the property is appropriated.[16] **"Wrongfully obtains" or "exerts unauthorized control"** are terms RCW 9A.56.020 defines as principally

- "[t]o take the property or services of another," or
- "to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto."[17]

A person commits theft when he exerts unauthorized control over the property of another.[18] Intending to exert control over, or to appropriate property or services, for a very short period or without substantially interfering with the owner's use or enjoyment, is *not* a defense to theft.[19] "[T]he crime is completed at the time of conversion. . . ." *State v. Grimes*, 111 Wash. App. 544, 556, 46 P.3d 801, 807 (2002), *as amended* May 2, 2002.

In Washington *the prosecution is relieved from having to prove* that the intent to deprive extends either to permanent deprivation or to deprivation under circumstances causing a substantial erosion of property rights or significant interference with the owner's use or enjoyment.

E. Cases Defining the Minimum Culpable Conduct and Intent Requirement for Theft in Washington Involving Theft of Services Highlight the Lack of Any "Substantial Erosion of Property Rights" Standard or Additional, Minimum Requirement for Criminal Intent.

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[14] *State v. Komok*, 113 Wash. 2d 810, 815 n.4, 783 P.2d 1061, 1063 n.4 (1989) ("See Webster's II New Riverside University Dictionary which defines 'deprive' as: 1. To take something away from. 2. To keep from having or enjoying. Webster's II New Riverside University Dictionary 365 (1984). See also Black's Law Dictionary, which in simple terms merely defines 'deprive' as '[t]o take.' Black's Law Dictionary 529 (4th ed. 1968)'").

[15] *See also* RCW 9A.56.010(2) ("'Appropriate lost or misdelivered property or services' means obtaining or exerting control over the property or services of another...").

[16] *State v. Woll*, 35 Wash. App. 560, 565–67, 668 P.2d 610, 613–14 (1983).

[17] RCW 9A.56.010 (22).

[18] *State v. Mermis*, 105 Wash. App. 738, 747, 20 P.3d 1044, 1048 (2001).

[19] *See* RCW 9a.56.020(2); *see also State v. Nudo*, 126 Wash. App. 1043 (unpublished) (2005) ("Nudo admitted that he refused to return the hat when Hull asked for it. Instead, he held onto it for a period of time before returning it to Hull's car. This alone indicates that he intended to take the hat from Hull, even if it was only for a short period. The trial court did not err in finding sufficient evidence of Nudo's intent to deprive Hull of the hat.").

According to Washington courts, simply intending to make an unpermitted phone call, or to use electricity to watch a video, can constitute intent to commit theft of services.[20] (Little legal imagination is required to see how such conduct could occur without substantially eroding the property rights, or interfering with the use or enjoyment of the owner, and without necessarily intending to do so.) Intending to use a VCR without permission is enough to constitute intent to commit theft. If that is true for theft of services, then it is analytically true for theft as a whole, since theft of "property or services" is one indivisible element of theft in Washington.

Of course, the minimum offense elements in such cases could also be described as a taking of property: the cost of the electricity. [21] However the cost of the amount of electricity involved in making a phone call is *de minimis* beyond dispute.[22] It is unlikely that the *intent* was to deprive the owner of a tiny fraction of a cent's worth of electricity, as opposed to the intent to make the unpermitted use of a device, which would be all that prosecution requires.

An administrative agency such as the BIA can issue a new interpretation that will receive deference from the courts under *Chevron* and *Brand X*, if the agency adequately explains the reasons for its reversal**.** However if the BIA attempts to apply *Diaz-Lizarraga* to Washington theft, it should not receive *Chevron* deference where the BIA's analysis is based on a mistake by the Board about *the elements* of a criminal statute, such as Washington theft.[23] Immigration counsel should be prepared to fight an erroneous holding into U.S. Circuit Court.

F. Theft in Washington is Indivisible and Lacks the New *Diaz-Lizarraga* Element.

Theft in Washington is defined by statute and interpreted by case-law as one offense having three alternate means of commission.[24] Each of those means involves the single, indivisible element of "property or services" as the object of theft.[25] Under the categorical method of analysis, clarified in cases such as *Descamps v. United States*, 133 S.Ct. 2276 (2013), *Mathis v. United States*, 136 S. Ct. 894 (2016), *Rendon v. Holder*, 764 F.3d

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[20] "[B]urglary requires only intent to commit 'a crime' in the premises. Here, it continues, regardless of the evidence that the television was removed, the evidence was clear that Springer intended to use the telephone, which constitutes theft of services. *See State v. Black*, 86 Wash. App. 791, 938 P.2d 362 (1997) (entry to use VCR was burglary because he intended to use electricity); *State v. Kolisynk*, 49 Wash. App. 890, 894, 746 P.2d 1224 (1987) (entering building to use electricity for outdoor service delivery system sufficient)"; *State v. Springer*, 135 Wash. App. 1046 (2006) (unpublished); *State v. Brunson*, 76 Wash. App. 24, 31, 877 P.2d 1289, 1293 (1994), *aff'd*, 128 Wash. 2d 98, 905 P.2d 346 (1995) ("An unpermitted use of the telephone nevertheless amounts to a theft of services.").

[21] "Black's own statement on plea of guilty ... admitted that he broke into a home intending to use the VCR. . . . [U]nder *State v. Kolisynk* 'electricity is property that can be stolen.' Black's admission . . . reveals unambiguously that Black intended to commit a theft when he committed the prior burglary. *State v. Black*, 86 Wash. App. 791, 794, 938 P.2d 362, 364 (1997). In *State v. Pollnow*, the intended theft was releasing one's own dog from pound without (or before) paying off-leash fine. *State v. Pollnow*, 69 Wn. App. 160, 484 P.2d 1265 (1993).

[22] Average prices for electricity in the U.S. were about $.012 per kilowatt hour from 2012-2016 (less in the Seattle, Washington area), according to the U.S. Dept. of Labor Bureau of Labor Statistics. *See* https://www.bls.gov/regions/west/news-release/averageenergyprices_seattle.htm. According to a 2013 article in Forbes, it takes about 1 KWH to power an iPhone or Android for one year, and that costs about 12 cents. If one used 2 KWH hours per year the cost would come to about $.25 *per year.* So the actual cost of electricity involved in one phone call is an extremely small fraction of a cent.

According to the website EnergyUseCalculator, http://energyusecalculator.com/electricity_phone.htm, "An older style phone that directly connects to phone line and has no power supply costs you nothing in electricity, because the power it receives is coming directly from the phone line and is normally not monitored or charged to the consumer." (All URLs in this footnote accessed on 12/28/16). Further research on the topic is encouraged, but the point is that as an intended permanent deprivation of property, equivalent to a microscopic fraction of a cent, the amount would be *de minimis ad absurdum.*

[23] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 838 (1984); *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009).

[24] *State v. Linehan*, 147 Wash. 2d 638, 56 P.3d 542 (2002).

[25] RCW 9A.56.020(1)(a-c), defining theft.

1077 (9th Cir. 2014); and *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016) (en banc), statutorily defined alternate ways of committing an offense do not make the offense divisible into separate crimes, if a jury does not have to be unanimous when selecting between those alternate means.[26] State courts are the ultimate authorities on what the elements are, and what are alternate means of satisfying an element of a state offense.[27]

IV. The *Matter of Obeya*, 26 I.&N. Dec. 856 (BIA 2016) Interpretation of *Diaz-Lizarraga*

In *Matter of Obeya,* 26 I. & N. Dec. 856 (BIA 2016), issued on the same day as *Diaz-Lizarraga*, the BIA found a New York petit larceny statute to be a CIMT based on statutory language and case-law. The BIA noted that NYPL §155.00(4)(a) requires an intent that loss be permanent or such that the "major portion of its economic value or benefit" is lost, and would "likely" meet the *Diaz-Lizarraga* definition. The plain language of §155.00(4)(b) did not address the duration or extent of the requisite intended loss and was not enough. The BIA sought the answer in case-law. *Obeya* found that New York's highest court has determined that larceny requires proof of an intent "to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof."[28]

By contrast, the Washington Supreme Court endorsed the plain dictionary meaning of the word "deprive." Legal imagination is not required to see that Washington explicitly defines theft and the requisite intent to deprive "more broadly than the generic definition." Its greater breadth is evident from its text.[29]

See the Appendix at page 12 for a comparison of the New York statutory provisions cited in *Obeya* with comparable Washington provisions, revealing that the revised definition of theft in *Diaz-Lizarraga* is not a match to Washington State's definition.

V. The BIA's Use of a "Substantial Taking" vs. "*De Minimis* Taking" Distinction for CIMTs is Misleading

In *Diaz-Lizarraga* and *Obeya* the Board distinguishes between substantial and "*de minimis"* takings as though that distinction were the basis for the BIA's definition of moral turpitude: "We continue to believe that it is appropriate to distinguish between substantial and *de minimis* takings when evaluating whether theft offenses involve moral turpitude," since "lawmakers and judges across the country have come to recognize that many temporary takings are as culpable as permanent ones."[30] Apparently only the most inconsequential or trivial takings remain uncovered by the Board's "substantial erosion" of property rights definition:

> A careful examination of our early cases reflects that our purpose in adopting the "intent to permanently deprive" requirement was to distinguish between substantial and reprehensible deprivations of an owner's property on the one hand and, on the other, mere de minimis takings in which the owner's property rights are compromised little, if at all.[31]

The use of the term *de minimis* to describe the taking involved in "joy-riding," versus that of theft with a more substantial intent to deprive, might be confusing. A *de minimis* violation is by definition a violation of a law. If intended conduct lacked an element of an offense it would not be a *de minimis* violation—it would not be any violation at all. All "joy-riding" offenses are not *de minimis*, even if they are not intended thefts; "joy-riding" is a

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[26] *See* Washington Pattern Criminal Jury Instruction (WPIC) 70.11, on the elements of Theft in the 3rd Degree: "To return a verdict of guilty, the jury need not be unanimous as to which of alternatives [(1)(a)] [(1)(b)] or [(1)(c)] has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt."

[27] *Schad v. Arizona*, 501 U.S. 624, 636, 111 S.Ct. 2491, 2499 (1991).

[28] *Obeya*, 26 I. & N. Dec. at 858-60.

[29] *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007).

[30] *Diaz-Lizarraga*, 26 I. & N. Dec. at 851.

[31] *Id.* at 850.

different offense, not a *de minimis* one. For example, returning an unlawfully borrowed vehicle undamaged is not a requirement of RCW 9A.56.075, Taking a Motor Vehicle Without Permission in the 2nd degree (TMV 2). Like theft, TMV 2 may involve a taking. Unlike theft, it does not require *any* intent to deprive, as an element which the State must prove. So it is less serious than theft, yet it is not a *de minimis* theft, as making an unpermitted phone call arguably is. TMV2 can still involve vehicle damage, or be committed in tandem with other offenses such as malicious mischief. But that does not transform the intent requirement for TMV 2 into the intent requirement for theft.

> In noting that those offenses were not crimes involving moral turpitude because they involved merely "temporary" deprivations, we made no attempt to distinguish between such de minimis takings and those more serious cases in which property is taken "temporarily" but returned damaged or after its value or usefulness to the owner has been vitiated.[32]

This discussion confuses the element of intent with that of actual conduct or the outcome of conduct. Under the Board's case-law, property damage occurring through conduct with a non-turpitudinous *mens rea*— e.g., negligence— does not rise to the level of a CIMT. The difference between a turpitudinous taking and one that is not, could not be based on damage to property alone, without regard to intent. *Cf. Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir.1995) (felony property damage not a CIMT).

According to *Diaz-Lizarraga*, a "joyriding offense, by definition, is one in which the offender intends and has the means to return the vehicle to the rightful owner, unconditionally and promptly." 26 I. & N. Dec. at 854, n.10.[33] However, "joyriding" is defined in Black's Law Dictionary, 6th Ed., West Publishing (1990), as "the temporary taking of an automobile without the intent to deprive the owner permanently of vehicle." An affirmative intent to return the car "promptly and unconditionally" is the Board's own addition, not heretofore required for a car-taking offense to be deemed non-turpitudinous.[34]

The RCW describes a *de minimis* violation as one "where the violation of law is only technical or insubstantial and where no public interest or deterrent purpose would be served by prosecution."[35] It gives prosecutors the explicit discretion not to charge, on a case-by-case basis, in such individual cases. (This is in contrast with the MPC definition, which by the use of the word "shall" would create a statutory defense.[36]) The theft statutes of the 39 states that incorporate the MPC or BIA's definition should also have *de minimis* violations, which may or may not be prosecuted.

VI. The "Reasonable Probability" Test Cannot Be Used to Avoid an Elements-Based Analysis

A. The "Reasonable Probability" Test Could Be Met, Although it is Inapposite.

DHS might argue that in practice Washington really *only* prosecutes thefts that do have intent to "substantially erode property rights," in spite of footnote 6 of *Diaz-Lizarraga*. But to argue there is no reasonable probability of prosecution in a case that lacks such intent, regardless of how intent is defined, shifts the burden to the immigrant to prove that the State courts actually mean what they say. The BIA may intend to imply that all contemporary theft statutes that have intent to deprive as an element involve moral turpitude, regardless of the

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[32] *Id.* at 854.

[33] "Such conduct cannot be prosecuted as shoplifting." *Id.* Indeed, one must join the Board's observation. It *is* difficult to shoplift a motor vehicle. *But see* "One Piece at a Time," by Wayne Kemp, as performed by Johnny Cash and the Tennessee Three: https://www.youtube.com/watch?v=rWHniL8MyMM

[34] *See* characterizations of joyriding in, *e.g., In Re V-Z-S-*, 22 I. & N. Dec. 1338, 1348 (BIA 2000), *In the Matter of P--*, 2 I. & N. Dec. 887, 887 (BIA 1947); *In the Matter of H--*, 2 I. & N. Dec. 864, 866 (BIA 1947) *Matter of T--*, 2 I. & N. Dec. 22, 26–27 (BIA 1944).

[35] RCW 9.94A.411(1)(c): . . . A prosecuting attorney **may** decline to prosecute, **even though technically sufficient evidence to prosecute exist** . . . where the violation of law is only technical or insubstantial and where no public interest or deterrent purpose would be served by prosecution.

[36] Model Penal Code § 2.12. De Minimis Infractions.

language or the definition of intent. But then the specific, updated definition deployed in *Diaz-Lizarraga* would be rendered nugatory.[37]

A realistic probability can be based on a combination of statutory language and the logic expressed in case-law.[38] In the Washington case-law cited above, courts identified the minimum conduct. Washington courts have held that an admission of intent to make an unpermitted telephone call is admitting intent to commit theft, *without more*, and is enough to support a burglary conviction. There is therefore a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition" of a CIMT.[39]

Washington's definition of theft *frees the prosecution from the burden* of proving beyond a reasonable doubt that the taking was committed with intent to deprive, either permanently or for so long or in such a way as to substantially erode the property rights of the owner.

B. If DHS Argues That Lack of a Permanent or Extended Intent Element is Irrelevant, Because in Most Cases Such Intent Arguably *Could Have Been* Established, It Violates a Fundamental Tenet of the Categorical Approach.

The categorical approach considers a generic offense "in the abstract."[40] A definition that allows an immigration judge not only to consider the crimes of which an immigrant has been convicted, but also to consider crimes she may have committed but of which she was not convicted, is erroneous.[41] A CIMT is "a generic crime whose description is complete unto itself" and moral turpitude is an *element* of the crime, or it is not.[42] The realistic probability test did not arise in order to make an end-run around the categorical approach in such a manner, or to go behind the judgment of conviction to determine the precise circumstances of a conviction.[43]

Revealingly, the Board admitted that in the past it has attempted to "finesse this distinction" in just such a way, by making a *presumption*—"absent evidence to the contrary"—of an intent to permanently deprive for certain types of thefts, despite the lack of such intent as an element and "without the necessity of affirmative proof."[44]

> However, in light of the increasing strictures of the categorical approach in cases such as *Mathis v. United States*, 136 S. Ct. 2243 (2016), we recognize that the validity of the *Grazley* and *Jurado* "assumption" may be called into serious doubt unless the moral turpitude standard for theft offenses is updated to more accurately distill the state of the criminal law in this area.[45]

If intended deprivation under circumstances equaling "substantial erosion of property rights" is neither a required element nor an alternate means of committing (i.e., of intending to commit) theft, and is found in neither statute nor case-law, it cannot be "presumed" into Washington's defintion of intent to deprive.

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[37] Nugatory: having a creamy nougat center. (Nougat is a confection of nuts or fruit pieces in a sugar paste. https://www.merriam-webster.com/dictionary/nougat.)

[38] *Leal v. Holder*, 771 F.3d 1140, 1145 (9th Cir. 2014) ("This 'realistic possibility' can be established 'based … on statutory language and the logic of published opinions, or some combination thereof.' *Nicanor–Romero v. Mukasey*, 523 F.3d 992, 1005 (9th Cir. 2008), *overruled on other grounds by Marmolejo–Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (en banc).").

[39] *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815 (2007).

[40] *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1688-89 (2013).

[41] *Olivas-Motta v. Holder*, 746 F.3d 907, 911 (9th Cir. 2013).

[42] *Id.* at 916.

[43] *U.S. ex rel. Meyer v. Day*, 54 F.2d 336, 337 (2d Cir. 1931).

[44] *Diaz-Lizarraga*, 26 I. & N. Dec. at 850.

[45] *Id.* at 855, n.11. *See also Matter of Jurado*, 24 I. & N. Dec. 29 (BIA 2006); *Matter of Grazley*, 14 I. & N. Dec. 330 (BIA 1973).

VII. Is Washington Possession of Stolen Property (PSP) a CIMT? Answer: *No.*

A. In *Castillo-Cruz v. Holder,* the 9th Circuit Ruled That a Conviction for Receipt of Stolen Property is Not Categorically a CIMT if it Does Not Require Intent to Permanently Deprive the Owner of Property.[46]

The Ninth Circuit's decision in *Castillo-Cruz* that Receipt of Stolen Property is not a categorical CIMT was based on deference to the BIA's definition of moral turpitude, that "in the context of theft offenses, such as receipt of stolen property, the BIA has interpreted this baseness to be evinced in the offender's 'intention to permanently deprive the owner of his property.'"[47] If DHS were to argue that PSP in Washington is now a CIMT, because *Diaz-Lizarraga* is an intervening authority that must receive deference under *Brand X,* the first obstacle is that Washington theft is not a match to the *Diaz-Lizarraga* rule, so there is no justification for automatically applying it to Washington PSP offenses.

B. Under BIA Case-Law Possession of Stolen Property Has Been Deemed a CIMT Because the *Initial Taking* Involved the Intent to Permanently Deprive, *and* the Property Was Known to Have Been Taken Illegally.

In *Matter of G—,* 2 I. & N. Dec. 235, 237–38 (BIA 1945), the BIA distinguished between an original theft by which the property was taken "depending upon whether the intent of the theft was to deprive the owner of his property permanently or temporarily" and found that if "[m]oral turpitude was . . . involved in the original theft" then "the appellant's retention of the goods with knowledge that it had been so obtained likewise involves moral turpitude." In later cases the Board has repeated that "[c]onviction under this statute is a conviction for a crime involving moral turpitude, as it specifically requires knowledge of the stolen nature of the goods." *Matter of Salvail,* 17 I. & N. Dec. 19, 20 (BIA 1979).

The BIA could also "update" its definition of moral turpitude in PSP cases. For instance the Board could follow *Diaz-Lizarraga* with a new rule for PSP, where knowledge that property was taken unlawfully would be the sole test, regardless of whether or not the original theft involved moral turpitude, or the intended degree of deprivation. But it has not done so yet. Or it could formulate a test similar to that of intent to withhold or deprive property under circumstances that "substantially erode the property rights of the owner." But that is not an element of PSP in Washington.

C. The Definition of Possession of Stolen Property in Washington.

Possessing stolen property in Washington is defined as "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto."[48] To convict a person of possession of stolen property, the State is required to prove both: 1) actual or constructive possession of the property that has been stolen, and 2) actual or constructive knowledge that the property has been stolen.[49]

While bare possession of recently stolen property alone is not sufficient to justify a conviction, "slight corroborative evidence" of other inculpatory circumstances tending to show guilt will allow an inference of constructive knowledge of the theft.[50] The essence of the crime is the knowledge that the property was stolen, or of facts sufficient to put one on notice that it was stolen.[51]

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[46] *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159–60 (9th Cir. 2009).
[47] *Id.*
[48] RCW 9A.56.140(1) (West).
[49] WPIC 77.11.
[50] *State v. Garfield,* 185 Wash. App. 1030 (2015); *State v. Couet*, 71 Wash. 2d 773, 775, 430 P.2d 974, 975–76 (1967).
[51] *Garfield,* 185 Wash. App. at 1030.

There is not a durational requirement for the possession, other than that it be sufficient to establish control over the property—which is what the element of possession requires. "The duration of the handling, however, is only one factor to be considered in determining whether control, and therefore possession, has been established."[52] Although pattern jury instructions do list "withheld or appropriated the property to the use of someone other than the true owner" as an element, the Washington Supreme Court explicitly has held that "withhold or appropriate" is definitional, and not itself an essential element of the crime of possession of a stolen vehicle.[53] And in any case there is no intended durational requirement to the withholding or appropriation— time is only an indicator of actual control over the property, which combined with knowledge of sufficient facts to be on notice it was stolen, is enough for a conviction.

Immigration counsel should not concede that Possession of Stolen Property is a CIMT.

VIII. If *Matter of Diaz-Lizarraga* Made RCW Thefts into CIMTs, Would the Holding Be Retroactive?[54]

Answer: *NO*. *Diaz-Lizarraga* should *not* be retroactive in those places where it works a change. However, remember that the following are legal arguments that ICE may contest.

A. *Diaz-Lizarraga* Is a New Rule.

Prior to *Diaz-Lizarraga,* the Washington Defender Association Immigration Project (WDAIP) and other Washington immigration attorneys consistently advised criminal defense lawyers that RCW theft was not a CIMT.[55] If *Diaz-Lizarraga* changes the immigration consequences of Washington theft convictions, it amounts to a new rule. The decision itself is clear that it is promulgating a new rule and changing a well-established definition.

If DHS argues that *Diaz-Lizarraga* converted Washington theft into a CIMT, counsel should argue that, even assuming it were so, it would not apply to pre-November 16, 2016, convictions. The Board is quite clear that it is changing a well-established definition of moral turpitude and promulgating a new rule.[56] A statute, order, or edict "operates retroactively" when it imposes "new legal consequences to events completed before its" announcement.[57]

B. The Presumption Against Retroactivity Applies Equally to Decisions of Administrative Tribunals, Such as Those of the Board of Immigration Appeals.

The strong presumption against retroactive laws is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). This principle ensures that new obligations, duties, or disabilities are not attached to past conduct, and is "informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations."[58] In the context of statutory retroactivity, the "essential inquiry" has always been "whether the new provision attaches new legal consequences to events completed before its enactment." *Vartelas v. Holder*, 132 S. Ct. 1479, 1491 (2012). *Vartelas* confirmed that the presumption against retroactive application of statutes does not require a showing of detrimental reliance. *Id.* at 1490.

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[52] *State v. Staley*, 123 Wash. 2d 794, 802, 872 P.2d 502, 506 (1994).

[53] WPIC 77.11; *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016), *passim.*

[54] Thanks to Kara Hartler for letting us use some of her ideas and writing.

[55] *See* WDAIP advisories Defending Noncitizens Charged With Washington Theft Offenses (February 2014); and Analyzing Selected Washington Property Crimes After Moncrieffe and Descamps (September 2013) at www.defensenet.org

[56] *Diaz Lizarraga*, 26 I. & N. Dec at 852.

[57] *INS v. St. Cyr*, 533 U.S. 289, 325, 121 S. Ct. 2271, 2293 (2001).

[58] *St. Cyr*, 533 U.S. at 321 (internal quotations omitted).

The general framework for determining whether a new BIA decision applies retroactively is set forth in a five-factor test in *Montgomery Ward & Co. v. F.T.C.*, 691 F.2d 1322, 1333 (9th Cir. 1982).[59] The five-part test in *Montgomery Ward* leans heavily in defendants' favor, because at the time of the plea they can be presumed to have reasonably relied on a well-established unanimous rule of BIA case law holding that only theft with the element of the intent to permanently deprive was a CIMT. It burdens immigrants who relied on counsel in crafting immigration–safe pleas that are now invalidated and make immigrants potentially removable, and is beyond doubt an abrupt departure. Applying this change in law retroactively potentially imposes a severe burden on immigrants who may face deportation and permanent separation from close family. Deportation can permanently deprive a person of "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). It would have little impact on the Government, which can still apply this rule in all future cases.[60]

In *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007), the BIA's new rule for determining a "particularly serious crime" could not apply retroactively. Because the BIA could apply its rule to all new cases, *Miguel-Miguel* concluded that prohibiting its retroactive application "d[id] not severely limit [the Attorney General's] efforts to pursue the statutory mandate" because his interests were "substantially served by prospective application" of the rule. *Id. at* 952.

C. Strong Policy Reasons also Counsel Against Applying New Law to Noncitizens Who Pleaded Guilty in Reliance on the Immigration Consequences of an Offense.

Retroactive application of the Board's new law in the case of immigrants who pleaded guilty in reliance on the understood consequences of a theft offense is unfair and illogical because it would sharply undermine the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), and nullify thousands of previously knowing and intelligent pleas by noncitizens. In *Padilla*, the Supreme Court repeatedly stressed "the importance of accurate legal advice for noncitizens accused of crimes," which would allow noncitizens and their attorneys to "craft a conviction and sentence that reduce the likelihood of deportation." 559 U.S. at 364, 373 (emphasis added). A criminal defendant's right to a jury trial is a fundamental right guaranteed by the Sixth Amendment and can only be waived "voluntarily, knowingly, and intelligently." *United States v. Cochran*, 770 F.2d 850, 851 (9th Cir. 1985).

If the benefits of a noncitizen's carefully crafted plea could be easily undone by a change in case law, it would be as though the noncitizen had never been advised of the immigration consequences in the first place. The immigrant would be in the same position as a noncitizen who received *affirmative misadvice* from his criminal defense on a plea's immigration consequences, since both were told that the outcome ultimately would be different than it turned out to be. Because this is *precisely* the harm that *Padilla* sought to ameliorate, allowing new case law to be retroactively applied would dramatically undermine the intended effect of *Padilla*.[61]

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[59] *See Garfias-Rodriguez v. Holder*, 702 F.3d 504, 514 (9th Cir. 2012) (en banc) (finding that, when a court changes the law, the retroactivity test in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971), controls, but when an agency changes its law, the *Montgomery Ward* test applies). The five *Montomery Ward* factors are: 1. Whether the particular case is one of first impression; 2. Whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law; 3. The extent to which the party against whom the new rule is applied relied on the former rule; 4. The degree of the burden which the retroactive order imposes on a party; 5. The statutory interest in applying a new rule despite reliance of a party on the old standard. *Montgomery Ward*, 691 F.2d at 1333.

[60] Compare to *Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011), which deals with retroactivity of a judicial reinterpretation of a statute using the *Chevron Oil* test.

[61] *See also De Niz Robles v. Lynch*, 803 F.3d 1165, 1171–72, 1173 (10th Cir. 2015); *Lugo v. Holder*, 783 F.3d 119, 121-22 (2d Cir. 2015); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 580–81 (7th Cir. 2014), *reh'g denied* (Oct. 10, 2014).

Appendix: Comparison of Washington Definitions with the New York Laws Described in *Matter of Obeya*

NewYork Penal Law provisions cited in *Matter of Obeya* 26 I. & N. Dec. 856, 858–60 (BIA 2016)	Section 155.05(1) defines the term "larceny" as follows: A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.	NYPL 155.00(3) defines the term "deprive" as follows: **To "deprive" another of property means** (a) to withhold it or cause it to be withheld from him **permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him,** or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.	Section 155.00(4) of the New York Penal Law provides: To "appropriate" property of another to oneself or a third person means (a) to exercise control over it, or to aid a third person to exercise control over it, **permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit,** or (b) to dispose of the property for the benefit of oneself or a third person.
Revised Code of Washington provision	RCW 9a.56.020 Theft—Definition [ ] (1) "Theft" means: (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.	RCW 9A.56.010 (6) **"Deprive" in addition to its common meaning** means to make unauthorized use or an unauthorized copy of records, information, data, trade secrets, or computer programs; "*See Webster's II New Riverside University Dictionary* which defines 'deprive' as: 1. To take something away from. 2. To keep from having or enjoying. *Webster's II New Riverside University Dictionary* 365 (1984). *See also* Black's Law Dictionary, which in simple terms merely defines 'deprive' as '[t]o take.' Black's Law Dictionary 529 (4th ed. 1968)." *State v. Komok*, 113 Wash. 2d 810, 815 n.4, 783 P.2d 1061, 1063 (1989).	RCW 9A.56.010 (2) "Appropriate lost or misdelivered property or services" **means obtaining or exerting control over the property or services of another** which the actor knows to have been lost or mislaid, or to have been delivered under a mistake as to identity of the recipient or as to the nature or amount of the property; RCW 9A.56.010 (10) "Obtain control over" in addition to **its common meaning**, means: (a) In relation to property, to bring about a transfer or purported transfer to the obtainer or another of a legally recognized interest in the property; or (b) In relation to labor or service, to secure performance thereof for the benefits of the obtainer or another;