

Presented:

38th Annual Conference on Immigration and Nationality Law

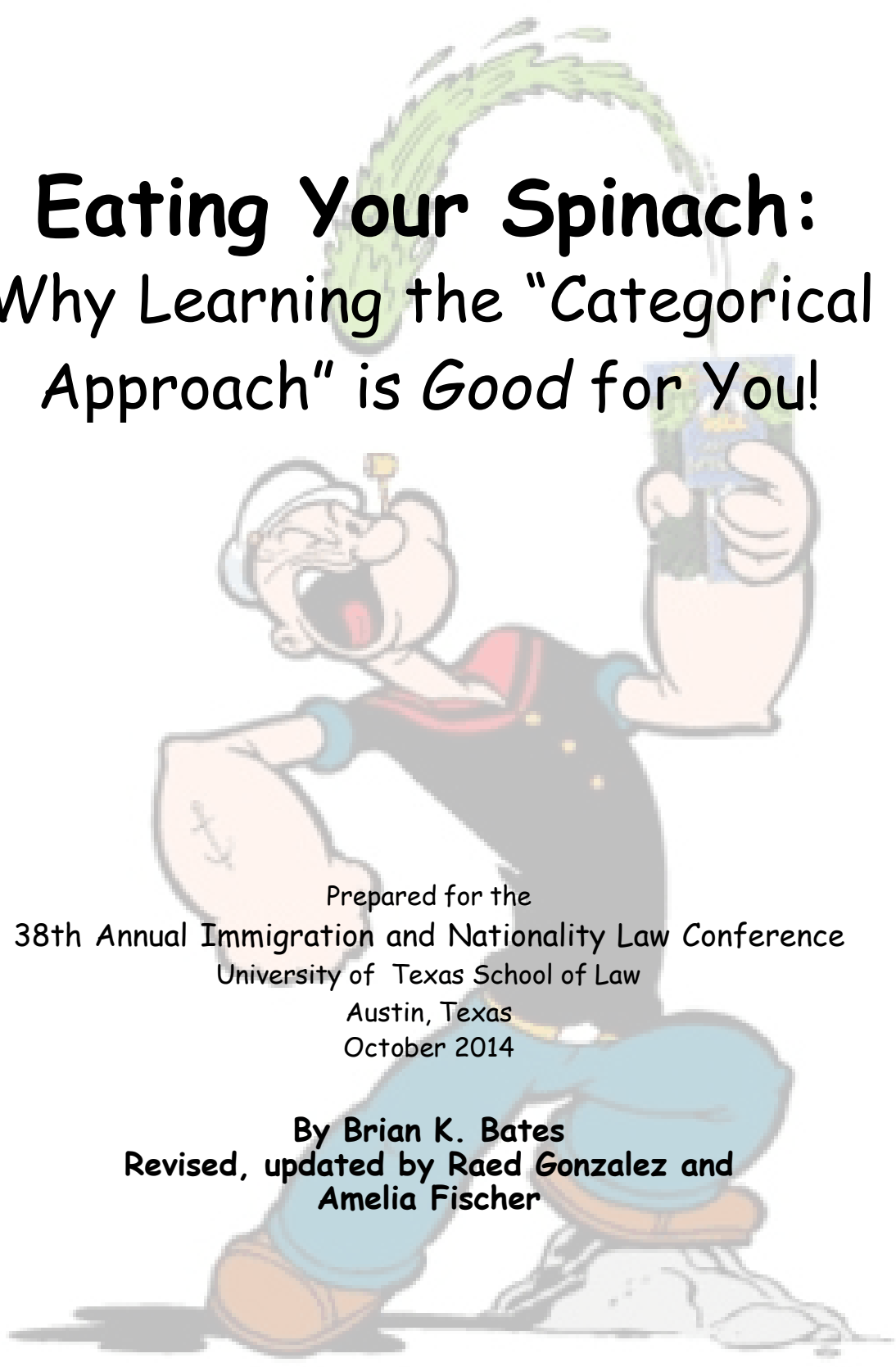
October 16-17, 2014
Austin, Texas

**Eating Your Spinach:
Why Learning the “Categorical
Approach” is *Good* for You!**

Brian K. Bates

Amelia Ruiz Fischer

Raed Gonzalez



Eating Your Spinach: Why Learning the "Categorical Approach" is *Good* for You!

Prepared for the
38th Annual Immigration and Nationality Law Conference
University of Texas School of Law
Austin, Texas
October 2014

By Brian K. Bates
Revised, updated by Raed Gonzalez and
Amelia Fischer

Eating Your Spinach: Why Learning the "Categorical Approach" is Good for You!

By Brian K. Bates¹

Reviewed and Updated by Raed
Gonzalez² and Amelia Fischer³

For those too young to remember, Popeye the Sailor was an iconic comic character in the past, featured on the comics page and in animated films. His cartoons invariably followed a formula: Someone, usually a huge bully named Bluto or perhaps a gang of pirates or other hostiles, threatened Popeye and/or his helpless girlfriend, Olive Oyl. Popeye would try to resist these unwanted attentions, with the result that he would get the ever-loving snot beat out of him for three quarters

¹ **BRIAN K. BATES** is the managing partner of the Houston office of Reina & Bates. He received his undergraduate and legal education at Southern Methodist University (BS 1976, JD 1979). He is Board Certified In Immigration and Nationality Law by the Texas Board of Legal Specialization. He is the author of "Good Ideas Gone Bad: Plea Bargains and Resident Aliens," 66 Texas Bar Journal 878 (November 2003), "A Brief Tour of Wonderland: A Practical Introduction to Exclusion Proceedings," 90-1 IMMIGRATION BRIEFINGS (January 1990), and co-author with B. Hake of "A Tale of Two Cities: Due Process and the Plenary Power Doctrine," 92-4 IMMIGRATION BRIEFINGS (April 1992). He is a past Chair of the Texas Chapter, American Immigration Lawyers Association, and the recipient of two AILA Texas Chapter Litigation Awards (1988, 1996) and the 1998 Sam Williamson Mentor Award from AILA. Despite his humble and shy personality, he has been known to refer to himself in the third person in biographical footnotes.

² **RAED O. GONZALEZ** was born in Puerto Rico and is the founder and Senior Attorney at Gonzalez Olivieri, LLC in Houston, TX. He earned his B.A. (1992) and J.D. (1996) from the Inter American University of Puerto Rico in San Juan, P.R. where he was also associate editor of the law review. He studied at the University of Barcelona (Spain) in 1995 and finished his JD at the American University of Puerto Rico with Honors. He is admitted to practice in TX and PR among other courts. He received his L.L.M. in Health Law from the University of Houston Law Center (1998). He has considerable litigation experience, representing clients in immigration hearings throughout the United States, as well as in the federal district and appellate courts. Mr. Gonzalez published precedent decisions include *Manuel Flores Ledezma v. Gonzalez*, 415 F.3d 375, 380 (5th Cir. 2005), the first case to interpret the Real ID Act in the 5th Circuit, and also represented the alien in *Perez-Pimentel v. Mukasey*, 530 F.3d 321 (5th Cir. 2008), *McCarthy v. Mukasey*, 555 F.3d 459, 462 (5th Cir. 2009) all published as precedents. Most notably, in a groundbreaking decision issued June 16, 2008, the U.S. Supreme Court granted and remanded the case of *Dada v. Mukasey* 554 U.S. 1, 14 (2008) and most recently on his second grant of certiorari before the Supreme Court of the United States on a collaborative effort in *Alexis v. Holder*, No. 09-955, unpublished (June 21, 2010).

³ **AMELIA FISCHER** Amelia is a staff attorney and formal Equal Justice Works Fellow at the Texas Civil Rights Project, a non-profit organization in Austin, Texas that litigates civil rights cases on behalf of low-income people. Amelia graduated from the University of Texas School of Law in May of 2012, where she was deeply involved in the law school's Immigration Clinic.

During her time at TCRP, she litigated a case that brought a complete end to a county's compliance with ICE detainers in its jail and detention facilities, and has helped start and coordinate a local advocacy campaign, along with directly affected immigrant community members, that seeks to end Travis County's cooperation with ICE. Amelia is also heading TCRP's Deferred Action for Childhood Arrivals (DACA) Project, in which she reaches rural Texas communities and, through free legal clinics, assists undocumented young people with their applications for immigration relief. Amelia is fluent in Spanish, her native language. In her spare time, she enjoys being with her brothers and sister, who also live in Austin, going to Barton Springs and concerts, and spending time with her husband and their two children (read: puppies), Addie and Galco. Her heroes include Maria del Carmen Martinez Fischer, Richard S. Fischer, Barbara Hines, and Judge William Wayne Justice, who have inspired her more than they could ever imagine.

of the feature. BUT, when he was on the verge of annihilation, Popeye would pop open a can of spinach, down it in one gulp (usually without chewing the contents), and instantly become a superhuman dynamo, vindicator for all that is good and just. He would quickly dispatch Bluto, rescuing himself and his friends while leaving the miscreants in a slumped heap with little tweeting birds circling their heads.

One of the reasons Popeye was a popular character is that his cartoons had at least one message that someone wanted to get across: **Spinach is good for you.** But spinach - at least cooked spinach⁴ is really hard for most of us to swallow without gagging. That is probably why Popeye gulped it down without chewing. Little children forced to eat the vile stuff were coaxed by parents urging that “Popeye *loves* spinach,” and “you want to be strong like Popeye, right?” Surprisingly, that didn’t actually make it taste any better.

So what does this have to do with the categorical approach of analyzing criminal records to determine their immigration consequences? Well, the categorical approach can be really confusing. The more you study it, the more confusing it can become until your brain gags on it and you start looking for something more palatable to ingest. **But it’s good for you.** More importantly, it’s good for your *clients*. Properly understood and applied, the categorical approach can be like Popeye’s can of spinach - it can *dramatically* reverse the beating you have been taking in Immigration Court into outright victory for you and your client.

When I say “dramatically,” I mean just that - there are many, many crimes that have been accepted for years as grounds of deportability, or inadmissibility, or aggravated felonies that may now be challenged successfully because of changes and clarifications in the application of the categorical approach. I will offer some examples later in this paper, and they may surprise you. And there are even more crimes that, while they may still be found deportable or inadmissible offenses by the BIA or a skeptical Immigration Judge, are nonetheless subject to *serious* challenge on legal grounds, enhancing your prospects on appeals to the BIA or the Court of Appeals.

When you start thinking about all the ways the categorical approach can be employed in cases you thought were hopeless, you will be ready to wolf the stuff down and get that power working for you and your clients. Like Popeye’s spinach, it’s amazing stuff!

I. Introduction

The categorical approach is the means by which a criminal conviction is determined to be within the class of offenses described in the Immigration and Nationality Act. If you don’t understand it, **you can’t possibly know** whether a conviction makes your client deportable, or inadmissible, or ineligible for relief or naturalization. It’s like having an excellent recipe and all the ingredients you need to make a beautiful Spanish paella - but you have no idea what to do with those ingredients **because you can’t read the recipe!** If you represent respondents with criminal convictions, understanding the categorical approach is every bit as important as knowing how to read. Some people read better, or faster or with greater comprehension than others, but being unable to read *at all* is a severe handicap!

Simply put, the categorical approach examines the statutory elements of the criminal offense

⁴ To this day, the only cooked spinach I can stand—and I love it—is served in Indian restaurants.