

Excerpt from

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### *Categorical Approach*

After concluding that a particular person has in fact been convicted for immigration law purposes, the next step in the analysis is to determine whether that conviction constitutes a removal offense. This step appears complicated because the analytical method prescribed by the Supreme Court—the categorical approach—is not intuitive. Fortunately, the actual analysis required is not beyond reach.

Courts have needed an method of determining whether a migrant will suffer immigration consequences of conviction since the late nineteenth century when Congress first linked immigration status to criminality. Since that time they have used a categorical analysis, meaning that the immigration judge or reviewing court only analyzes the statutory definition of the crime.<sup>1</sup> The court does not explore the facts underlying the conviction.

Though courts have long used the categorical approach in immigration law, today courts usually credit a pair of Supreme Court decisions about criminal sentencing law with providing its modern foundation. The first of these two cases, *Taylor v. United States*,<sup>2</sup> explained what the categorical approach requires, but in a case concerning a sentencing enhancement under the Anti-Drug Abuse Act of 1986.<sup>3</sup> According to the *Taylor* Court, the categorical approach “generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.”<sup>4</sup> The second case, *Shepard v. United States*, added that when the statute of conviction can be divided into discrete prongs, some of which would result in a sentencing enhancement while others would not, courts may also examine the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”<sup>5</sup> *Shepard*’s expansion is referred to as the “modified categorical approach.”

In effect, this means that attorneys and courts must perform a three-step analysis. First, it is necessary to identify the federal immigration category or categories relevant to a migrant’s situation. This requires perusing the INA for potentially applicable bases of removal. In a case involving a Georgia conviction for possession of marijuana with intent to distribute, for example, DHS contended that the migrant was removable for having been convicted of “illicit trafficking in a controlled substance,” a type of aggravated felony.<sup>6</sup> Now comes the most important part of the first step—determining what Congress meant by “illicit trafficking in a controlled substance.” To do this, courts examine the elements of a crime in the abstract without considering the facts that led to conviction, what is called the “generic” definition of that crime category.<sup>7</sup> In *Taylor*, the sentencing case that launched the modern categorical approach framework, the Court

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<sup>1</sup> See Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1688 (2011) (2011); see also *id.* at 1749-60 (collecting federal court, Attorney General, and BIA opinions beginning in 1913)

<sup>2</sup> 495 U.S. 575 (1990).

<sup>3</sup> Pub. L. 98-473, ch. 18, 98 Stat. 2185.

<sup>4</sup> *Taylor v. United States*, 495 U.S. 575, 602 (1990).

<sup>5</sup> 544 U.S. 13, 16 (2005).

<sup>6</sup> See *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

<sup>7</sup> See *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

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grappled with what Congress meant when it used the word “burglary” in a sentencing enhancement statute. Because Congress did not specify how it construed “burglary,” the Court concluded “that Congress meant by ‘burglary’ the generic sense in which the term is now used in the criminal codes of most States.” As used in most state penal codes, the Court added, “burglary” consists of the following elements: unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime. Interpreting “burglary” for federal law purposes to have a certain set of elements gives it a “uniform definition independent of the labels employed by the various States’ criminal codes.”<sup>8</sup> In other words, the generic definition means that a defendant will be considered to have been convicted of a “burglary” and receive the sentencing enhancement required by federal law if the state offense of conviction contains the elements the Court identified and only that. The same holds true of terms used in the INA.

The categorical approach’s second step requires examining the conduct that is necessarily required for a conviction to occur under the statute of conviction. To do this, courts identify the elements of an offense by turning to the text of the statute that the migrant was convicted of violating, as well as case law interpreting that statute. In particular, when dealing with a state law offense immigration courts look to see how the courts of the state in which the migrant was convicted interpret the offense. Immigration courts rely on state legislatures and state courts because the states, and not Congress or the federal courts, are authorized to enact and interpret state criminal laws. Indeed, federal courts, including federal administrative agencies such as the immigration courts, have no authority to contradict state courts’ interpretation of state criminal law. State courts, therefore, are the final authority on the meaning of state law. As an illustration of the states’ primacy in interpreting their own state law, even the U.S. Supreme turned to the Florida penal code and Florida Supreme Court when trying to identify the elements of Florida’s statute criminalizing driving under the influence of alcohol. The statute, the Court explained, provided basic information about the crime’s elements, while the state supreme court added key information about the lack of mental state required for a conviction.<sup>9</sup>

Equipped with an understanding of what Congress meant when it included a particular term in its list of crimes that can result in removal and an understanding of what the legislature and courts of the jurisdiction in which a migrant was convicted required for a conviction, courts can move to the third step of the categorical approach: identifying whether a match exists between the federal immigration category and the statute of conviction. This is the most important and complicated step in the categorical analysis. A court must decide whether all conduct punishable under a given state statute (the outcome of step 2) meets the generic definition of the federal immigration category (the outcome of step 1). If there is a “realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime” as used for immigration law purposes, then it is not possible to conclude that the migrant has been convicted of a removable offense.<sup>10</sup>

The Supreme Court illustrated this mismatch and its effect in *Descamps v. United States*, a decision about whether “burglary” under California law constitutes “burglary”

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<sup>8</sup> Taylor v. United States, 495 U.S. 575, 592, 598-99 (1990).

<sup>9</sup> Leocal v. Ashcroft, 543 U.S. 1, 6 (2004).

<sup>10</sup> Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).

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under the Armed Career Criminal Act, a sentencing enhancement statute.<sup>11</sup> The Court held that it did not because the state statute, as interpreted by California courts, “‘defines burglary more broadly’ than the generic offense” used for federal immigration law purposes.<sup>12</sup> Specifically, California’s burglary offense punishes entry into specified locations with the intent to commit larceny or any felony. Importantly, the state crime includes punishment of lawful entries done with this intent, for example entering a store during business hours with the intent to shoplift. In contrast, the generic definition of “burglary” used for immigration law purposes requires an unlawful entry. Because the state punishes conduct that is not a removable offense, there is no match between the state crime and the federal immigration category.<sup>13</sup>

The categorical approach becomes complicated when a state statute provides multiple alternative paths to a conviction, but only the conduct required for a conviction under some paths constitutes a removable offense. California’s statute criminalizing theft of a vehicle, for example, punishes acting as a principal or an accessory.<sup>14</sup> According to the U.S. Court of Appeals for Ninth Circuit, engaging in this prohibited conduct as a principal is a theft offense for which the term of imprisonment is at least one year, a type of aggravated felony, but doing so as an accessory is not.<sup>15</sup> Unlike California’s burglary offense that simply reaches more broadly than the generic definition used for immigration law purposes, the state’s vehicular theft statute imposes alternative elements. As a result, it is possible to treat the alternative paths to a vehicular theft conviction effectively as “several different crimes, each described separately,” even though they are all listed within a single subsection of the penal code.<sup>16</sup>

To decide whether a convicted migrant is removable, an immigration judge, therefore, must determine under which alternative set of elements the migrant was convicted.<sup>17</sup> In these situations, courts may “examine a limited class of documents to determine which of a statute’s alternative elements formed the basis of the defendant’s prior conviction.”<sup>18</sup> This analytical framework is called the “modified categorical approach,” and allows courts to consider “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” It cannot, however, consider police reports or complaints.<sup>19</sup>

Two unique departures from the categorical approach exist that merit special attention. First, the Supreme Court has adopted a “circumstance-specific” analysis when examining the fraud or deceit type of aggravated felony. This provision encompasses an offense that “involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000.”<sup>20</sup> If courts were to apply the usual categorical or modified categorical

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<sup>11</sup> 133 S. Ct. 2276, 2281-82 (2013).

<sup>12</sup> *Id.* at 2285 (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)).

<sup>13</sup> *See Descamps*, 133 S. Ct. at 2285-86.

<sup>14</sup> Cal. Penal Code § Ann. §10851(a).

<sup>15</sup> *Duenas-Alvarez v. Holder*, 733 F.3d 812, 814-15 (9th Cir. 2013).

<sup>16</sup> *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009).

<sup>17</sup> *See Nijhawan v. Holder*, 557 U.S. 29, 35 (2009).

<sup>18</sup> *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013).

<sup>19</sup> *Shepard v. United States*, 544 U.S. 13, 16 (2005); *see Matter of Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

<sup>20</sup> INA § 101(a)(43)(M)(i).

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approach described above, the fraud or deceit category would have “little, if any, meaningful application” because, at the time that Congress enacted this financial threshold, only eight states had fraud or deceit offenses that include as an element of the crime a financial loss in the vicinity of \$10,000, as the Court recognized in *Nijhawan v. Holder*.<sup>21</sup> Congress, the Court concluded, would not have meant for this basis of removal to apply in “so limited and so haphazard a manner.”<sup>22</sup> Instead, the Court went on, Congress must have intended for courts to examine “the specific way in which an offender committed the crime on a specific occasion.”<sup>23</sup> Granting immigration courts the power to “look to the facts and circumstances underlying an offender's conviction” represents a dramatic and important move away from courts’ traditionally steadfast reliance on the categorical approach.<sup>24</sup> To date, however, the circumstance-specific analysis has not been applied to other grounds of removal.

The second peculiar departure from the categorical approach also allows courts to consider the facts underlying a conviction. In *Matter of Silva-Trevino*, Attorney General Michael Mukasey, having directed the BIA to refer the case to him,<sup>25</sup> announced a new method of determining whether a conviction constitutes a crime involving moral turpitude. In addition to using the categorical and modified categorical approach, the attorney general instructed immigration judges to “consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question.”<sup>26</sup> This additional step in the analysis represents a significant deviation from the categorical approach’s focus on the statute of conviction and the modified categorical approach’s recognition that a small set of documents created by or at the direction of the criminal court may shed light on the particular elements of a crime that the migrant was convicted of. It is not, however, without limit. In a subsequent case, the BIA explained that *Silva-Trevino* does not permit an immigration judge to “leapfrog” over the modified categorical approach “to rely on sources outside the record of conviction, even though the record of conviction evidence fully resolves the issue.”<sup>27</sup> Instead, *Silva-Trevino*’s “additional evidence” prong is available only “[w]hen the record of conviction is inconclusive.”<sup>28</sup>

For all the dramatic change that *Silva-Trevino* promised to bring to the traditional analytical approach used in immigration courts, the federal courts have significantly muted its impact. Several circuits have refused to adopt the Attorney General Mukasey’s approach, including, notably, the Fifth Circuit in *Silva-Trevino*’s own appeal.<sup>29</sup> In its decision, the Fifth Circuit explained that it would not follow the attorney general’s framework because there was nothing ambiguous about the INA’s requirement that removability turn on whether a migrant was “convicted of” a crime involving moral

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<sup>21</sup> 557 U.S. 29, 39-40 (2009).

<sup>22</sup> *Nijhawan v. Holder*, 557 U.S. 29, 40 (2009).

<sup>23</sup> *Nijhawan v. Holder*, 557 U.S. 29, 33 (2009).

<sup>24</sup> *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009).

<sup>25</sup> See 8 C.F.R. § 1003.1(h)(1)(i).

<sup>26</sup> *Matter of Silva-Trevino*, 24 I&N Dec. 687, 704 (A.G. 2008).

<sup>27</sup> *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 468 (BIA 2011).

<sup>28</sup> *Matter of Silva-Trevino*, 24 I&N Dec. 687, 690 (A.G. 2008).

<sup>29</sup> See *Silva-Trevino v. Holder*, 2014 WL 341213 (5th Cir. Jan. 30, 2014); *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Fajardo v. U.S. Attorney General*, 659 F.3d 1303 (11th Cir. 2011); *Jean-Louis v. Attorney General of U.S.*, 582 F.3d 462 (3d Cir. 2009).

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turpitude. Congress, after all, defined the term “conviction” in the INA. Moreover, courts have long used the categorical approach to glean what a person was convicted of and, as a general matter of statutory interpretation, Congress is presumed to know how the courts have interpreted a term. Congress can surely allow immigration judges to go beyond the categorical and modified categorical approaches by considering evidence outside the record of conviction by simply amending the INA, but it has not done so. Instead, at every turn it has either reiterated its reliance on convictions or, as it did in 1996 when it adopted the statutory definition of “conviction,” actually further cemented its support for a formal adjudication of guilt rather than allowing immigration judges to conduct fact-finding inquiries as the attorney general’s decision instructs. Meanwhile, a small number of circuits have adopted the *Silva-Trevino* analysis as a reasonable interpretation of a statute within the agency’s expertise.<sup>30</sup>

The categorical approach’s “focus on the elements, rather than the facts, of a crime,” as the Supreme Court explained the categorical approach in *Descamps*, strikes many attorneys as odd.<sup>31</sup> Shouldn’t a migrant face immigration consequences if she did something Congress deems worthy of removal, rather than subject a migrant to these consequences only if attorneys and courts can hash out the meaning of a statute and limited set of documents obtained from the criminal court? The Court’s answer is a resounding “no,” and it has provided three reasons in support. First, the categorical and modified categorical approach emphasizes Congress’s decision to trigger removal upon a “conviction” for a removable offense. Congress has the ability to tie removal to commission of certain conduct or an exploration of the facts surrounding a conviction—and indeed has done so in some situations<sup>32</sup>—but when it uses the word “conviction” courts must give meaning to that term. Doing this ensures that everyone convicted of the same removable offense is treated identically instead of removal turning on what someone did and could have been convicted of.<sup>33</sup>

Second, using the categorical and modified categorical analysis prevents sentencing courts and immigration courts from treading on findings of fact that the Sixth Amendment reserves to juries and judges in criminal proceedings. For a criminal penalty to attach to any conduct, the Sixth Amendment requires that a jury or judge determine beyond a reasonable doubt that the defendant actually engaged in that conduct, and then repeat this finding for conduct that satisfies every element of a crime. Except for finding that a defendant was previously convicted of a crime, a finding by a lower standard of proof or by another party would not meet constitutional muster.<sup>34</sup> That constitutional problem means, the Court explained, “counsel against allowing a sentencing court to ‘make a disputed’ determination ‘about what the defendant and state judge must have understood as the factual basis of the prior plea,’ or what the jury in a prior trial must

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<sup>30</sup> See *Bobadilla v. Holder*, 679 F.3d 1052 (8th Cir. 2012); *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008).

<sup>31</sup> *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013).

<sup>32</sup> See, e.g., INA § 212(a)(2)(A)(i) (providing that a migrant who is “convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of” a crime involving moral turpitude or controlled substance offense is inadmissible); *Nijhawan v. Holder*, 557 U.S. 29, 36 (2009) (adopting the “circumstance-specific” approach for the fraud or deceit type of aggravated felony).

<sup>33</sup> *Descamps v. United States*, 133 S. Ct. 2276, 2287-88 (2013).

<sup>34</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

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have accepted as the theory of the crime.”<sup>35</sup> In overturning a Ninth Circuit decision allowing sentencing courts to look beyond the conviction statute and records, the Court added, “The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances.”<sup>36</sup> The same reasoning applies to the immigration context.

Third, allowing immigration courts to venture beyond the categorical and modified categorical approach would require them to conduct mini-trials that they are not equipped to do. It would be possible to allow immigration judges to ask respondents in removal proceedings about what happened that led to their criminal law problems. Immigration judges could ask the same thing of complainants, witnesses, and arresting police officers. In effect, immigration judges could take all manner of evidence about the facts underlying a conviction. But doing this would simply reproduce the criminal court’s work. Furthermore, criminal courts are designed to hear testimony, make credibility determinations, and weigh evidence. Immigration courts, in contrast, are poorly equipped to do this. They lack the detailed procedures that criminal courts rely on to increase the reliability of their adjudications and decrease the likelihood that a criminal proceeding will be driven by little more than intuition. There is nothing about immigration courts that inherently prevents them from becoming indistinguishable from criminal courts. But Congress has not done this and the Supreme Court has shown no interest in forcing immigration courts to engage in high-stakes analyses that they are not prepared to do.

**Problem 1.** Sam pleaded guilty to aggravated criminal sexual abuse in Illinois. At the time of his conviction, the state statute provides: “A person commits aggravated criminal sexual abuse if that person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is at least 5 years older than the victim.” After some legal research you learn that, for purposes of federal law, a minor is commonly defined as someone less than 16 years old. To prepare your legal strategy you need to determine whether this is an indivisible statute requiring use of the categorical approach only or a divisible statute allowing use of the modified categorical approach as well.

*This is almost certainly an indivisible statute, thus only the categorical approach is permissible to analyze whether it will result in removability. The Illinois statute clearly states that the offense punishes certain sexual acts against a person in the 13 to 17 year old age range. According to the Ninth Circuit, this age range includes people who are not similarly protected by federal law. United States v. Acosta-Chavez, 727 F.3d 903, 908-09 (9th Cir. 2013). Though it is possible that the victim of Sam’s*

<sup>35</sup> Descamps v. United States, 133 S. Ct. 2276, 2289 (2013) (quoting Shepard v. United States, 544 U.S. 13, 25 (2005) (plurality opinion)).

<sup>36</sup> Descamps v. United States, 133 S. Ct. 2276, 2288 (2013).

*actions was less than 16 years old, as the state statute is written there is no way to disaggregate the victim’s age from the statutory age range without exploring the underlying facts. Those facts might reveal more about the victim’s age, but they would not tell an immigration court whether the state judge who accepted Sam’s guilty plea necessarily pinned down the victim’s age. The Illinois legislature could have written the statute as a series of alternatives—for example, by defining a minor as a person who is 13, 14, 15, or 16—but it did not. Instead, it defined a minor as someone within a multi-year age range, some of which come within the federal definition of minor and others who do not. Thus the immigration judge cannot determine whether Sam was convicted of engaging in this conduct against a person defined as minor for purposes of federal law or whether he was convicted of engaging in this conduct against a person who Illinois defines as a minor but federal law does not. As such, this is an indivisible statute.*