Categorical and Divisible: The Knotty Adjectives

Simon M Azar-Farr®
April 2016
2313 North Flores, San Antonio, Texas 78212, (210) 736-4122
www.simonazarfarr.com or simon@simonazarfarr.com

BRIEF (or quickie) OUTLINE

So how to apply all these rules in practice? The most important advice I can give you is that you should not prematurely concede that a certain criminal conviction will give rise to inadmissibility or removability (or render an alien ineligible for immigration benefits). Rather, I would encourage you to analyze whether the criminal conviction categorically matches the INA ground according to the most recent precedents. The zig-zag nature of the history of the jurisprudence of categorical method means that decisions prior to 2014 from both the Fifth Circuit and the BIA should be very closely examined to assess whether they remain good law. The shift of terms' meaning in these cases, the difficulty of applying the analysis in practice, and the complexity of the interaction of state statutes with the INA, it seems to me, give rise to important legal issues, enabling ample challenges to any categorical finding in immigration cases.

That said, here is a step-by-step guide for how to apply the categorical analysis to your client's case. As with all short guides, this is not an exhaustive outline.

Step 1) Ascertain your client's criminal history
  a) Obtain a copy of the judgment
  b) Examine the language of the statute under which the judgment was entered

Step 2) Assess whether the conviction may have immigration consequences
  a) For example, certain convictions give rise to grounds of inadmissibility or removability
  b) Other convictions may also affect an alien's eligibility for immigration benefits, such as adjustment of status and cancellation of removal

Step 3) If so, determine whether the immigration provision at issue must be analyzed under the categorical approach, or whether the court may examine the specific offense conduct
  a) CIMTs must be analyzed with the categorical approach
  b) Certain aggravated felonies must be analyzed with the categorical approach, while others invite specific inquiry into the facts behind convictions.[1]

Step 4) If the categorical approach applies, then:

[1] Detailing the many and various applications of the law under Steps 2 and 3 is beyond the scope of this outline (see my paper), but practitioners may consult immigration treatises or case law for information pertaining to the specifics of their case.

a) Examine INA definitions and case law to determine the essential elements of the immigration provision at issue
b) Examine the statutory language of your client's criminal offense, as well as judicial interpretations of the statute's essential elements
    i) Restrict your analysis to the statute's essential elements
    ii) Do not, at this stage, examine the charging documents or other court documents except as necessary to ascertain which statute your client was convicted under, or pleaded guilty to.
c) Does the criminal statute have a "reasonable probability" of reaching conduct that goes outside the bounds of the essential elements of the immigration provision?
    i) If not, then the immigration provision applies under the categorical approach.
    ii) If so, is the statute set out disjunctively?[2]
        (1) If not, then the immigration provision does not apply under the categorical approach.
        (2) If so, then proceed to Step 5.

Step 5) Apply the modified categorical approach:
a) Examine the record of conviction:
    i) If your client was found guilty by jury, then examine the statutory definition of the crime, charging document, and jury instructions.
    ii) If your client was found guilty by a judge, then examine the statutory definition of the crime, charging document, and the "bench-trial judge's formal rulings of law and findings of fact."
    iii) If your client pleaded guilty, then examine "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**."
b) Assess whether the specific provision of the state statute that your client was found guilty of (or pleaded guilty to) reached conduct extending beyond the essential elements of the immigration provision
    i) If not, then the immigration provision applies
    ii) If so, then it does not.

[2] Note that the question of what is a divisible statute is a difficult one. You should embrace this complexity, as it can give rise to good legal issues on appeal (thus giving you *de novo* review rights before the BIA and jurisdiction to appeal to the appropriate federal circuit court). In view of the restrictive notion of divisibility applied in *Descamps*, you may have grounds to argue that formerly settled precedent as to divisibility is no longer good law.

Categorical and Divisible: The Knotty Adjectives©

Simon Azar-Farr
September 2015
2313 North Flores, San Antonio, Texas 78212, (210) 736-4122
www.simonazarfarr.com

INTRODUCTION

Immigration attorneys are likely to encounter a method of legal analysis called the *categorical approach*. This method of analysis is typically applied to determine if an alien with a criminal conviction falls under one of the provisions of the Immigration and Nationality Act (the INA) that would trigger the potential removal of the alien from the United States.

The categorical approach had its genesis in criminal sentencing law. Understanding its history within the criminal sentencing realm is essential for its successful application in the immigration field in part because federal courts are quite familiar with the application of this approach in the criminal sentencing context, and criminal sentencing cases serve as authoritative precedent even in the immigration context. In the first section of this article, I explain the criminal sentencing background. In the second section, I examine how the categorical approach, as developed in the criminal sentencing realm, is applied in the immigration realm — both in situations in which the courts follow the criminal sentencing precedents, and in situations in which immigration law diverges from criminal law— with a specific focus on the law of the United States Court of Appeals for the Fifth Circuit.

Before delving into the details, a brief introduction is appropriate.

A. Criminal-sentencing background: a brief introduction

The Armed Career Criminal Act of 1984 (ACCA), added a sentencing enhancement provision to the U.S. Code.[1] The law requires imposition of a 15-year minimum sentence if the defendant has three previous convictions for a "violent felony" or a "serious drug offense," terms that are each defined in the ACCA.[2] Thus for these provisions to apply, the sentencing court must determine — for each of the three prior convictions brought up by the prosecution — if each conviction is for either a violent felony or a serious drug offense (the "ACCA offense").

---

[1] Pub. L. 98-473, ch. 18, 98 Stat. 2185, 18 U.S.C. App. § 1202(a) (1982 ed., Supp. III) (repealed in 1986 by Pub. L. 99-308, § 104(b), 100 Stat. 459), *codified at* 18 U.S.C. § 924(e).

[2] *Id*. § 924(e)(2).

Some of these inquiries are simple, such as where the ACCA offense is specified by federal statute, as in "an offense under the Controlled Substances Act (21 U.S.C. 801 *et seq*.)… for which a maximum term of imprisonment of ten years or more is prescribed by law."[3] Others have generated the rich case law described in this article: *e.g*., whether the predicate conviction is for a crime that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[4]

In the latter cases, two possible inquiries could be made: either the sentencing court could ask whether the defendant's actual *behavior* in the prior conviction conforms to the ACCA — a fact-based inquiry — or whether the *elements* described in the statute of conviction necessarily include behavior which conforms to the ACCA offense — a law-based inquiry. Early on, the Supreme Court determined that Congress intended for the law-based inquiry to govern application of the sentencing enhancement, a method of legal analysis called the *categorical approach*.

This method of legal analysis asks if all convictions under the criminal statute in question necessarily meet the ACCA's definition of either a violent felony or a serious drug offense. If so, the sentencing enhancement applies. Otherwise, it does not.

Subsequent case law has also addressed two large questions. One question has dealt with what documents the courts can rely on to determine the nature of the predicate offense. The second question has dealt with what statutory analysis courts should use to determine if the predicate offense qualifies as a violent felony or a serious drug offense under the ACCA.

B. Porting the categorical approach to immigration law

Having established the categorical approach under the ACCA, the Supreme Court deemed that precedent applicable to immigration law, an area of jurisprudence that also had a long history of interpreting certain laws categorically. Under the INA, various federal and state convictions can render an alien removable or ineligible for relief from removal. The categorical approach is used to determine whether a particular state or federal conviction brings an alien under the scope of one of these provisions of the INA.

---

[3] *Id*. § 924(e)(2)(A)(i).
[4] *Id*. § 924(e)(2)(B)(ii).

The categorical approach appears fairly straightforward at first glance. But, naturally, in actual practice trying to apply definitions from the ACCA and the INA to myriad federal and state criminal offenses has given rise to a rich — and sometimes confusing — jurisprudence. Below, I give a review of the modern history of the categorical approach, exceptions to its application, and guidelines for practitioners. Attorneys with criminal and immigration practices will benefit from understanding this complex and important area of law.

SECTION ONE: The categorical approach in criminal sentencing law

A. The genesis of the categorical approach: *Taylor v. United States*

1. The ACCA

The ACCA imposes a mandatory minimum sentence of 15 years for unlawful possession of a firearm if the defendant had "three prior convictions for serious drug offenses or violent felonies."[5]

The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another….[6]

The ACCA defines a "serious drug offense" as:

> (i) an offense under the Controlled Substances Act, the Controlled Substances Import and Export Act, or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

[5] *Id*. § 924(e)(1).
[6] *Id*. § 924(e)(2)(B).

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act), for which a maximum term of imprisonment of ten years or more is prescribed by law.[7]

2. The categorical approach's reference to generic crimes

The Supreme Court first took up the question of how to apply the ACCA in 1990 in the seminal case *Taylor v. United States*.[8] In *Taylor*, the prosecution sought to enhance the defendant's sentence based in part on his two burglary convictions, since the ACCA explicitly defines a violent felony to include "burglary."[9] Mr. Taylor argued that "his burglary convictions should not count for enhancement, because they did not involve 'conduct that presents a serious potential risk of physical injury to another,' under § 924(e)(2)(B)(ii)."[10]

The Eighth Circuit had ruled that "because the word 'burglary' in § 924(e)(2)(B)(ii) means 'burglary' however a state chooses to define it, the District Court did not err in using Taylor's Missouri convictions for second-degree burglary to enhance his sentence."[11] The Supreme Court reversed.

The Court held that the ACCA did not look to the terminology used in state law for classification of a crime as a burglary. Instead, the Supreme Court reasoned, the ACCA required a more consistent application across the states:

> The word "burglary" has not been given a single accepted meaning by the state courts; the criminal codes of the States define burglary in many different ways.... It seems to us to be implausible that Congress intended the meaning of "burglary" for purposes of § 924(e) to depend on the definition adopted by the State of conviction. That would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct,

---

[7] *Id*. § 924(e)(2)(A) (citations to statutes omitted)

[8] *Taylor v. United States*, 495 U.S. 575 (1990).

[9] *Id*. at 579 (interpreting 18 U.S.C. § 924(e)(2)(B)(ii)).

[10] *Id*.

[11] *Id*. (internal quotation marks omitted) (quoting *United States v. Taylor*, 864 F. 2d 625, 627 (1989)).

depending on whether the State of his prior conviction happened to call that conduct "burglary."[12]

Having rejected applying a state-by-state definition of the crime of burglary for federal sentencing, the Court then asked: if Congress had intended that a uniform definition of burglary be applied, "was that definition to be the traditional common-law definition, or one of the broader 'generic' definitions articulated in the Model Penal Code and in a predecessor statute to § 924(e), or some other definition specifically tailored to the purposes of the enhancement statute?"[13]

After a review of the extensive legislative history of § 924(e), the Court concluded that Congress "had in mind a modern 'generic' view of burglary, roughly corresponding to the definitions of burglary in a majority of the States' criminal codes."[14] Relying on the Model Penal Code, the Court held that, "Although the exact formulations vary, the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[15]

Although the *Taylor* Court's discussion of legislative history suggested that the opinion referred only to "burglary," and not to the other crimes specified under the statute, a subsequent case clarified that "our holding in *Taylor* covered other predicate ACCA offenses."[16] The context in which this footnote was dropped makes it clear that the Court was referring to its holding regarding the application of a generic, Model Penal Code-based definition to the crimes named in the ACCA, not just to its holding regarding the use of a law-based, categorical approach.

3. If the statute of conviction is broader than the generic crime

The *Taylor* Court next addressed the issue of how to determine whether a given conviction met the generic definition of burglary. First, *Taylor* explained that the ACCA clearly applies to a state crime if the state crime matches the generic definition of burglary, or if the state definition of burglary is narrower than

---

[12] *Id*. at 580, 590-91.

[13] *Id*. at 580.

[14] *Id*. at 589.

[15] *Id*. at 598 (citing W. LaFave & A. Scott, Substantive Criminal Law, n.3, § 8.13(a), p. 466; § 8.13(c), p. 471; § 8.13(d), p. 474).

[16] *Shepard v. United States*, 544 U.S. 13, 17, n.2 (2005) (citing *id*. at 600).

the generic definition, such as with first-degree or aggravated burglary, which meet all the elements of generic burglary and may impose additional elements.[17] In such a case, the state crime penalizes *only* behavior that falls under the generic definition of burglary.

Sometimes, however, the state definition is broader than the generic definition—*i.e.*, the state penalizes behavior that does not fall within the definition of generic burglary. For example, a state statute might not require that the entry be unlawful, or it might cover places other than buildings, such as automobiles and vending machines.[18] In that case, determining whether the state conviction brings the ACCA sentence enhancement provision into play would appear to invite an inquiry into the specifics of the defendant's conviction, in order to decide whether a defendant's particular criminal behavior met the definition of the generic crime.[19] Yet, this seemed precisely what *Taylor* held that a sentencing court must *not* do. Instead, *Taylor* required that the sentencing court must look at the defendant's state conviction *categorically*, by examining the legal requirements of the state statute — the "statutory definition" of the crime — rather than delving into the specific facts that gave rise to the conviction.[20]

The Court offered several reasons for choosing a categorical approach. First, the ACCA's statutory language "refers to 'a person who…has three previous convictions' for — not a person who has committed — three previous violent felonies or drug offenses."[21] Likewise, the ACCA refers to the crime's "elements," not to whether a crime in a particular case involves force. And to hold otherwise would suggest that "a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case."[22] Consequently, the ACCA's language requires a categorical inquiry. Second, *Taylor* concluded that the legislative history of the statute reflects that throughout debate Congress always viewed this as a categorical inquiry.[23]

Third, *Taylor* noted "the practical difficulties and potential unfairness of a factual approach are daunting."[24] The Court was concerned that a contrary ruling

---

[17] *Taylor*, 495 U.S. at 600.
[18] *Id*. at 599.
[19] *Id*.
[20] *Id*. at 600.
[21] *Id*. (quoting 18 U.S.C. § 924(e)(1)).
[22] *Id*. at 601.
[23] *Id*.
[24] *Id*.

would prompt mini-trials, distracting from the regular work of the district courts. It may also prove especially difficult to obtain the relevant information regarding past state criminal proceedings, given the vagaries of the preservation of records by the states. The Court discerned (presciently, given the later rulings in *Jones* and *Apprendi*[25]) that the defendant could argue that his right to a jury trial had been abridged if the sentencing court made findings about the character of his earlier conviction beyond the mere fact of his conviction. Finally, the Court believed that it would be unfair to impose the sentence enhancement provision based upon a case's specific facts if a defendant had entered a plea bargain for a lesser offense.[26]

4. Holding

Based upon these reasons, the Supreme Court concluded that "an offense constitutes 'burglary' for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant."[27] If neither the statutes nor the papers narrowed the offense to the generic definition, then the crime cannot count as a predicate under the ACCA.

The second half of the holding in *Taylor*, in which it states that the court can look to "the charging paper and jury instructions" to determine which elements the jury was required to find in order to convict the defendant, has given rise to a prodigious body of knotty jurisprudence attempting to define the limits and the proper application of what has come to be termed "the modified categorical approach." Thus *Taylor* not only set out the categorical approach but crafted its first exception, whose functioning the Court later explained in *Shepard v. United States*:

> In Taylor we read the listing of "burglary" as a predicate "violent felony" (in the ACCA) to refer to what we called "generic burglary," an "unlawful or unprivileged entry into, or remaining in, a building or

---

[25] *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Court later congratulated itself for "anticipat[ing] the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant." *Shepard*, 544 U.S. at 24.

[26] *Taylor*, 495 U.S. at 601-02.

[27] *Id.* at 602.

> structure, with intent to commit a crime." Because statutes in some States (like Massachusetts) define burglary more broadly, as by extending it to entries into boats and cars, we had to consider how a later court sentencing under the ACCA might tell whether a prior burglary conviction was for the generic offense. We held that the ACCA generally prohibits the later court from delving into particular facts disclosed by the record of conviction, thus leaving the court normally to "look only to the fact of conviction and the statutory definition of the prior offense." We recognized an exception to this "categorical approach" only for "a narrow range of cases where a jury [in a State with a broader definition of burglary] was actually required to find all the elements of" the generic offense…. Only then might a conviction under a "nongeneric" burglary statute qualify as an ACCA predicate.[28]

In Mr. Taylor's case, the defendant had been convicted under a statutory scheme, since repealed, which had several types of burglary, some of which corresponded with the generic definition of burglary and others of which went beyond it. As it was unclear from the record which statute he had been convicted under, his case was remanded.

Thus both the foundational nature of the categorical approach and the existence of a narrow exception to it were established in *Taylor*, and as we shall see the Supreme Court returns to *Taylor*'s fundamentals time and time again as it applies the law, and as it attempts to carve out further exceptions when new complexities arise.

B. Application of the categorical approach: classifying the predicate offense

1. Divisibility of the statute

Statutes often list multiple ways of committing violations. When a statute sets out one or more elements of the offense in the alternative — for example, stating that burglary involves entry into a building *or* an automobile — it is said to be "divisible." *Taylor* provided a "modified categorical approach" for such situation, allowing examination of "the indictment or information and jury instructions" to show that "the jury necessarily had to find an entry of a building to convict…."[29]

---

[28] *Shepard*, 544 U.S. at 17 (citations and footnote removed).
[29] *Taylor*, 495 U.S. at 602.

In the 2009 case *Chambers v. United States*,[30] the Court considered *how* to parse a state statute to determine if the statute's language, on its face, established multiple crimes, some of which triggered the ACCA and others of which did not. The sentencing judge had applied the ACCA to Mr. Chambers in part based on a conviction for escape.

The facts of the case showed that Mr. Chambers' sentence for a 1998 crime required him to report to a local prison for 11 weekends of incarceration. He failed to report for weekend confinement on four occasions, and for those failures, he was convicted of "escape", specifically for failing to report to a penal institution.[31] The Court noted that the state-court record showed that Mr. Chambers had "pleaded guilty to 'knowingly fail[ing] to report' for periodic imprisonment 'to… a penal institution.'"[32]

The Illinois statute under which Mr. Chambers had been convicted placed together in a single numbered statutory subsection several different kinds of behavior. It separately described those behaviors as (1) escape from a penal institution, (2) escape from the custody of an employee of a penal institution, (3) failing to report to a penal institution, (4) failing to report for periodic imprisonment, (5) failing to return from furlough, (6) failing to return from work and day release, and (7) failing to abide by the terms of home confinement.[33] The district court classified Mr. Chambers' crime of conviction as the Illinois crime of "escape from [a] penal institution," which it found to be a violent felony under the ACCA.[34]

The Supreme Court held that to choose the right category, "[t]he nature of the behavior that likely underlies a statutory phrase matters…."[35] The Court related that in *Shepard* it "found that the behavior underlying, say, breaking into a building differs so significantly from the behavior underlying, say, breaking into a vehicle that for ACCA purposes a sentencing court must treat the two as different crimes."[36]

---

[30] *Chambers v. United States*, 555 U.S. 122 (2009).
[31] *Id*. at 124-25.
[32] *Id*. at 126.
[33] Ill. Comp. Stat., ch. 720, § 5/31-6(a).
[34] *Chambers*, 555 U.S. at 125.
[35] *Id*. at 126.
[36] *Id*.

In *Chambers* the Supreme Court found the seven enumerated behaviors in the Illinois statute to be so different as to require separate treatment. It considered failure to report (encompassed by provisions 3-6) as "a separate crime" from escape (provisions 1 and 2) and "failure to abide by the terms of home confinement" (provision 7), finding failure to report "less likely to involve a risk of physical harm."[37] It noted also that the Illinois statute itself listed and penalized the two types of behavior differently. *Chambers* thus "treat[ed] the statute for ACCA purposes as containing at least two separate crimes, namely escape from custody on the one hand, and a failure to report on the other."[38] Because "failure to report" did not meet the definition of a "violent felony" under the ACCA, the enhancement provision did not apply.[39]

By contrast, in *Descamps v. United States*, the Supreme Court held that the underlying statute in question is not divisible.[40] Mr. Descamps had pleaded guilty to a California statute which penalized entry of certain locations "with intent to commit grand or petit larceny or any felony."[41] The statute did not require the entry to be unlawful — an element of the generic crime of burglary. The sentencing judge — relying on the *Shepard* holding permitting use of the plea colloquy to determine if the defendant had admitted to each element of a generic burglary — looked to the plea colloquy, in which Mr. Descamps admitted to breaking and entering. The sentencing judge thus found that the ACCA did apply, and the Ninth Circuit agreed.

The Supreme Court disagreed, stating that the modified categorical approach may not be applied unless the statute "list[s] potential offense elements in the alternative."[42] Because Mr. Descamps' conviction did not rest upon one of several alternative elements but upon an indivisible definition of the crime that was broader than the generic definition, applying the modified categorical approach was inappropriate, regardless of "whether he ever admitted to breaking

---

[37] *Id*. at 127.

[38] *Id*.

[39] *Id*. at 130. The Court's recent finding that this portion of the ACCA is void for vagueness, and its criticism of the inconsistency with which its own precedents attempted to interpret that clause, *see* Part II(B)(4), overrules the specifics of this reasoning, but *Chambers* is still instructive as to the process through which courts apply the categorical approach.

[40] *Descamps v. United States,* 133 S. Ct. 2276 (2013).

[41] California Penal Code Ann. §459 (West 2010).

[42] *Descamps,* 133 S. Ct. at 2283.

and entering" in actual fact.[43] The Ninth Circuit erred because, "[i]nstead of reviewing documents like an indictment or plea colloquy only to determine 'which statutory phrase was the basis for the conviction,'" it "look[ed] to those materials to discover what the defendant actually did."[44]

The Court instructed that the modified categorical approach should be seen not as an "exception" to the categorical approach,

> but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates 'several different… crimes.' If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense.[45]

Descamps thus sought to return the modified categorical approach to a narrower range of cases and a strict focus on the statutory language.

The Court reiterated the essential ruling of *Taylor:* the categorical approach is an elements-based inquiry, not an evidence-based inquiry. The modified categorical approach is used to determine *which element* was charged and the basis of conviction, not *which facts* underlay the conviction. The Court dismissed the Ninth Circuit's finding that there is no "real distinction between divisible and indivisible statutes" because, as the Supreme Court saw it, "[a divisible statute] creates an explicitly finite list of possible means of commission, while [an indivisible one] creates an implied list of every means of commission that otherwise fits the definition of a given crime."[46]

The Court further asserted, "only divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime. A prosecutor charging a violation

---

[43] *Id*. at 2285.
[44] *Id*. at 2287.
[45] *Id*. at 2285 (internal citations omitted) (alteration in the original).
[46] *Id*. at 2290.

of a divisible statute must generally select the relevant element from its list of alternatives… [a]nd the jury… must then find that element, unanimously and beyond a reasonable doubt."[47] Thus if the statute is divisible, "[a] later sentencing court need only check the charging documents and instructions ('Do they refer to a gun or something else?') to determine whether… the jury necessarily found that he committed the ACCA-qualifying crime," whereas under an indivisible statute there is no such certainty.[48]

2. Documents the court can use

Taylor limited the sentencing court to reviewing the statutory definition of the predicate crime, but stated that if the state statute of conviction is broader than the generic definition of the crime, and identifies multiple offenses at least one of which is not a qualifying crime, then the court can turn its attention to reviewing the charging paper and jury instructions for the limited purpose of determining whether the alien's conviction was under the branch of the statute that qualifies as a generic offense.[49] What other conviction-specific documents can courts review to address this situation without conducting mini-trials? The Court addressed this first in *Shepard v. United States*.[50]

The defendant, Mr. Shepard, had pleaded guilty under a Massachusetts statute that defined burglary more broadly than the generic definition by also penalizing entry into boats and cars. The state criminal complaint had merely tracked the language of the state statute, and therefore did not clarify whether Mr. Shepard's crime involved entry into a structure, as required by the generic definition of burglary under federal law, or whether his crime instead involved entry into a boat or a car, which would not constitute burglary under the ACCA. Furthermore, Mr. Shepard had entered a guilty plea, so "there were of course no jury instructions that might have narrowed the charges to the generic limit."[51]

The government argued that police reports submitted with the criminal complaint application could be relied upon to shed light on this issue. The First Circuit agreed and decided that police reports were "sufficiently reliable," and

---

[47] *Id*.
[48] *Id*.
[49] *Taylor*, 495 U.S. at 602.
[50] *Shepard*, 544 U.S. at 15.
[51] *Id*. at 17.

focused on whether "the government and the defendant shared the belief that the defendant was pleading guilty to a generically violent crime."[52]

The Supreme Court disagreed. After first confirming that *Taylor* applies to plea-bargain cases as well as jury-tried cases, the Court turned to the issue of which documents a sentencing court could examine in that "narrow range of cases" in which it must look beyond the statutory definition.[53] The Court drew from the *Taylor* Court's "pragmatic conclusion about the best way to identify generic convictions in jury cases," namely referring *only* to "charging documents filed in the court of conviction, or to recorded judicial acts of that court limiting convictions to the generic category, as in giving instruction to the jury."[54] The analogs in plea bargain cases, the Court held, were:

- a bench-trial judge's formal rulings of law and findings of fact,
- the statement of factual basis for the charge shown by a transcript of plea colloquy or by written plea agreement presented to the court, or
- a record of comparable findings of fact adopted by the defendant upon entering the plea.[55]

Shepard referred to these sorts of documents as "judicial record evidence," and found that these documents could inform the sentencing court of "whether the plea had 'necessarily' rested on the fact identifying the burglary as generic, just as the details of instructions could support that conclusion in the jury case, or the details of a generically limited charging document would do in any sort of case."[56]

Shepard drew a distinction, however, between "conclusive records made or used in adjudicating guilt and… documents submitted to lower courts even prior to charges."[57] It found that relying upon the latter documents, as with relying upon trial transcripts, would "ease away from the *Taylor* conclusion, that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State."[58]

---

[52] *United States v. Shepard*, 231 F.3d 56, 70 (1st Cir. 2000).

[53] *Shepard*, 544 U.S. at 17, 19.

[54] *Id.* at 20.

[55] *Id.* (citing to Fed. Rule Crim. Proc. 11(a)(3) for the statement of factual basis for the charge).

[56] *Id.* at 20-21 (citing *Taylor* at 602).

[57] *Id.* at 21.

[58] *Id.* at 23.

The *Taylor-Shepard* categorical approach thus limits to "judicial record evidence" the types of documents proving the existence of a qualifying predicate conviction that the sentencing court can consider when determining if the statute of conviction falls under the ACCA.

3. Broadening the statutory definition to include state supreme courts' holdings

Under *Taylor-Shepard*, the first and best source for determining if a predicate conviction is categorically a crime falling under the provisions of the ACCA is the statute of the crime itself. But as the reader is no doubt aware by now, a statute does not exist in a vacuum; its meaning is often determined by the courts. Thus even before examining the limited records permitted under *Shepard*, a state statute that appears to be broader than the generic crime or other ACCA provision, and thus not applicable to a particular conviction, might not be broader in practice because whether it is actually so broad is a matter interpreted by the state supreme court.

In *James v. United States*,[59] the question arose whether *attempted* burglary falls into the ACCA's purview. After holding that attempted burglary does not meet the generic definition of burglary, as that requires an actual unlawful or unprivileged entry, the Supreme Court addressed the question if attempted burglary instead fell under the ACCA's residual clause: "conduct that presents a serious potential risk of physical injury to another."[60] The defendant, Mr. James, argued, among other things, that the Florida statute under which he was convicted could not be considered a predicate offense under the residual clause because it swept too broadly, including as it did "merely preparatory activity that poses no real danger of harm to others — for example, acquiring burglars' tools or casing a structure while planning a burglary."[61]

The Court disagreed with Mr. James's argument, finding instead that the Florida statute *as interpreted by the Florida Supreme Court* encompassed only attempted burglary, and did not encompass mere preparatory actions. The Court explained that, "while the statutory language is broad, the Florida Supreme Court

---

[59] *James v. United States*, 550 U.S. 192 (2007).

[60] 18 U.S.C. § 924(e)(2)(B)(ii) ("[T]he term 'violent felony'… is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another….").

[61] *James*, 550 U.S. at 202.

has considerably narrowed its application in the context of attempted burglary, requiring an overt act directed toward entering or remaining in a structure or conveyance. Mere preparation is not enough."[62]

The Supreme Court also rejected Mr. James's argument that the categorical approach barred application of a statute unless all possible scenarios that could be prosecuted under the statute involve a risk of physical injury to others:

> [T]he proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another. One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury — for example, an attempted murder where the gun, unbeknownst to the shooter, had no bullets…. But that does not mean that the offenses of attempted murder or extortion are categorically nonviolent. As long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of § 924(e)(2)(B)(ii)'s residual provision.[63]

(As an interesting aside, I note that while the Court's immigration decisions applying the categorical approach have been based on the precedent established in sentencing enhancement cases, *James* is a sentencing enhancement case that relies upon precedent set by an immigration case (*Gonzalez v. Duenas-Alvarez*).[64])

James remains good law for the two principles just discussed: that a state's high court opinions can narrow an offense's statutory language for purposes of the categorical approach, and that assessments under the categorical approach need focus only on the ordinary case. However, the classification of the crime as a predicate offense under the residual clause is no longer valid, as discussed in the next section.

Johnson v. United States[65] further bounded *James* by reaffirming that, if there is a substantial risk that offense conduct under the state criminal statute sweeps more broadly than the ACCA definition, then it cannot be used as a predicate offense. *Johnson* concerned a Florida battery statute violation of which

---

[62] *Id*. (internal quotation marks and citation omitted).

[63] *Id*. at 208-09.

[64] *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). For a discussion of the case, see Part II(C).

[65] *Johnson v. United States*, 559 U.S. 133 (2010).

the government argued was a "violent felony" under the ACCA.[66] Under the statute, a battery occurs when a person either "[a]ctually and intentionally touches or strikes another person against the will of the other," or "[i]ntentionally causes bodily harm to another person."[67] The Florida Supreme Court had established that "[t]he most 'nominal contact,' such as a 'ta[p]… on the shoulder without consent,' establishes a violation under the Florida statute."[68] And, of course, federal courts are "bound by the Florida Supreme Court's interpretation of state law…."[69]

Mr. Johnson's record of conviction did not distinguish between the two acts listed in the statute, and so the Court found that it must assume that his conviction "rested upon … the least of these acts."[70] Because under Florida law, intentional touching may carry no connotation of force (i.e., simple taping on the shoulder without consent would suffice), the Court declined to hold that the statute qualified as a violent felony.[71]

4. Vagueness and the categorical approach

Despite the conceptual clarity of the categorical approach, circuit courts and the Supreme Court itself have often struggled with its application, particularly in less clearly defined areas, such as ACCA's residual clause. Recall that ACCA requires a sentencing enhancement for offenders with three prior convictions for serious drug offenses or violent felonies. ACCA defines a violent felony as:

> any crime punishable by imprisonment for a term exceeding one year… that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.[72]

---

[66] *Id*. at 136.

[67] Fla. Stat. § 784.03(1)(b).

[68] *Johnson*, 559 U.S. at 138 (quoting *State v. Hearns*, 961 So. 2d 211, 219 (Fla. 2007)) (citation omitted).

[69] *Id*.

[70] *Id*. at 137.

[71] *Id*. at 141-42.

[72] 18 U.S.C. § 924(e)(2)(B) (emphasis added).

The italicized portion is commonly referred to as the "residual clause."

The Supreme Court has repeatedly wrestled with how to craft a principled method for determining which crimes fit within the residual clause. The Court has addressed the issue four times since 2007, applying somewhat different tests each time.[73] In June of 2015, the Court finally admitted it could not adequately define this category, and found that the residual clause was unconstitutionally vague.[74]

The Court had originally accepted the case, which, confusingly, is also captioned *Johnson v. United States*, in order to determine whether the residual clause applied to a Minnesota crime of unlawful possession of a short-barreled shotgun.[75] The Court then asked the parties to argue whether the residual clause could survive the Fifth Amendment's prohibition against vague criminal laws.[76]

In attempting to apply the residual clause to a crime using *Taylor*'s categorical approach, the Supreme Court admitted that it had required the lower courts to "picture the kind of conduct that the crime involves in 'the ordinary case,' and [] judge whether that abstraction presents a serious potential risk of physical injury."[77] This is a problem for two reasons, the Court conceded. First, unlike the ordinary application of the categorical approach, in which the court must consider whether something—here, "creation of risk"—is an *element* of the crime, "the residual clause asks whether the crime '*involves conduct*' that presents

---

[73] *James*, 550 U.S. at 192 (deciding whether ACCA's residual clause reaches a Florida offense of attempted burglary); *Begay v. United States*, 553 U.S. 137 (2008) (a New Mexico crime of driving under the influence); *Chambers*, 555 U.S. at 122 (an Illinois crime of failure to report to a penal institution); and *Sykes v. United States*, 564 U.S. 1 (2011) (an Indiana offense of vehicular flight from a law-enforcement officer). The Court later complained that "in each case we found it necessary to resort to a different ad hoc test to guide our inquiry." *Johnson v. United States*, 192 L. Ed. 2d 569, 579 (2015).

[74] *Johnson*, 192 L. Ed. 2d at 579 ("this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy.").

[75] *Id*. at 577.

[76] *Id*. ("The Fifth Amendment provides that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.' Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.").

[77] *Id*. at 578.

too much risk of physical injury"—a much looser concept.[78] Tying "the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements," renders the residual clause vague, as there is no principled way for a judge to "go about deciding what kind of conduct the 'ordinary case' of a crime involves."[79]

Second, "the residual clause forces courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives," but "these offenses are 'far from clear in respect to the degree of risk each poses.'"[80] The fact that burglary and extortion are specified as examples demonstrates that the court must not just assess the chance that "the physical acts that make up the crime" will involve risk, but imagine a more attenuated causality as well, such as "risk of injury [that] arises because the extortionist might engage in violence *after* making his demand or because the burglar might confront a resident in the home *after* breaking and entering."[81] "The inclusion of burglary and extortion among the enumerated offenses suggests that a crime may qualify under the residual clause even if the physical injury is remote from the criminal act. But how remote is too remote? Once again, the residual clause yields no answers."[82]

The combined effect of these two factors is that "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony," since the analysis requires application of an abstraction ("an imprecise 'serious potential risk' standard") to an abstraction (the "judge-imagined" ordinary case of the crime).[83]

The Court noted that its previous cases could not establish a consistent standard to clarify application of the residual clause, concluding, "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates."[84] The Court concluded "that the indeterminacy of the

---

[78] *Id*. (emphasis in the original).
[79] *Id*.
[80] *Id*. at 579 (quoting *Begay*, 553 U.S. at 143).
[81] *Id*. at 578 (emphasis in the original).
[82] *Id*. at 581.
[83] *Id*. at 579.
[84] *Id*. at 579, 580 ("Common sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated crimes; there is no reason to

wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges."[85]

Johnson's reach may extend beyond ACCA. The INA's definition of an "aggravated felony" includes felony "crimes of violence," defined as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[86]

This language is substantially similar to the residual clause held unconstitutional in ACCA, with one important exception: it does not include the enumerated examples that in the residual clause contributed to the confusion. *Johnson* claimed that this would preserve many laws from invalidation under its precedent:

> Almost none of the cited laws [claimed by the dissent to be vulnerable to invalidation after *Johnson*] links a phrase such as "substantial risk" to a confusing list of examples. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so.[87]

---

expect it to fare any better with respect to thousands of unenumerated crimes. All in all, *James*, *Chambers*, and *Sykes* failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition."). The Court also noted that the residual clause "has 'created numerous splits among the lower federal courts,' where it has proved 'nearly impossible to apply consistently,'" creating "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Id*. at 581 (quoting *Chambers*, 555 U.S. at 133 (Alito, J., concurring in judgment)).

[85] *Id*.

[86] 18 U.S.C. § 16, and INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (including in the aggravated felony definition "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").

[87] *Johnson*, 192 L. Ed. 2d at 582 (quoting *James*, 550 U.S. at 230 n.7 (Scalia, J., dissenting)) (emphasis in the original).

Nevertheless, the INA still requires application of a vague standard to an idealized crime. Subsection (b) of the crimes of violence definition quoted above does not inquire as to a crime's elements but its "nature"—precisely the type of rudderless inquiry that invited the Court's invalidation. Thus this definition of an aggravated felony may be vulnerable as well.

C. Synthesis

To summarize, the categorical approach requires an abstract investigation of the nature of the criminal conviction, with attention to the details of the offender's crime only insofar as it is necessary to ascertain what statute, or statutory subsection, his conviction was obtained.[88] A sentencing court may not try to ascertain the parameters of the defendant's actual criminal behavior, not even to determine "what the defendant and state judge must have understood as the factual basis of the prior [conviction or] plea."[89] As the Fifth Circuit related, "*Descamps* makes pellucidly clear that while conduct can be 'in essence' a crime of violence, a *conviction* is a crime of violence (or not) based only on its underlying elements."[90]

To implement the categorical approach, the sentencing court must first ascertain the essential elements of the crime described in the ACCA; second, the sentencing court must ascertain the elements of the statute of conviction; and third, it must then determine whether the latter necessarily includes all the elements required by the former.[91] "[A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense 'necessarily involved… facts equating to [the] generic [federal offense].'"[92]

---

[88] *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

[89] *Shepard*, 544 U.S. at 25; *see also United States v. Carrasco-Tercero*, 745 F.3d 192, 195 (5th Cir. 2014) ("[W]e examine the elements of the offense, rather than the facts underlying the conviction or the defendant's actual conduct, to determine whether" the provision applies) (alteration in the original) (internal quotation marks omitted).

[90] *United States v. Carrillo-Rosales*, 536 Fed. Appx. 478, 481 (5th Cir. 2013) (per curiam) (unpublished) (emphasis in the original).

[91] *Descamps*, 133 S. Ct. at 2281 (instructing the sentencing court to "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood.").

[92] *Moncrieffe*, 133 S. Ct. at 1684 (alterations in original) (quoting *Shepard*, 544 U.S. at 24 (plurality opinion)) (internal quotation marks omitted).

This analysis requires an inquiry into the entire scope of the statute of conviction:

> Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, and then determine whether even those acts are encompassed by the generic federal offense.[93]

If the most minimal conduct that can be penalized by the statute of conviction still falls within the generic provision, then the provision applies regardless of the factual details of the defendant's conviction.[94]

But this is subject to an important caveat. There must be "a realistic probability" that the "least of the acts" conceivably punishable under the criminal statute would actually be prosecuted. "To show [a] realistic probability, an offender… must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special… manner for which he argues."[95]

Moreover, if the statute is "divisible," meaning that it lists alternate means of committing a crime, some of which do and some of which do not fall within the provision of the ACCA, then "the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction."[96] The court may not refer to them "to determine 'what the defendant and state judge must have understood as the factual basis of the prior plea,' but only to assess whether the plea was to the version of the crime in the [state] statute… corresponding to the generic offense."[97] This approach "serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which elements played a part in the defendant's conviction."[98]

---

[93] *Id*. (quoting *Johnson*, 559 U.S. at 137) (alteration in the original).

[94] *Taylor*, 495 U.S. at 599.

[95] *Carrasco-Tercero*, 745 F.3d at 198 (alterations in original); *see also United States v. Teran-Salas*, 767 F.3d 453 (5th Cir. 2014) (citations omitted); *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014).

[96] *Descamps*, 133 S. Ct. at 2281.

[97] *Id*. at 2284 (quoting *Shepard*, 544 U.S. at 25-26 (plurality opinion)).

[98] *Descamps*, 133 S. Ct. at 2283.

SECTION TWO: The categorical approach in immigration law

Even before it was described in *Taylor* and its criminal-sentencing progeny, the categorical approach had long been applied to a number of questions arising under the Immigration and Nationality Act (INA).[99] As the Board of Immigration Appeals (BIA, or Board) explained:

> For nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a "conviction" for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*.[100]

The categorical approach is applied in two main areas in the immigration context: to determine if a criminal conviction renders an alien removable,[101] or if he is ineligible for certain forms of relief.[102] The majority of case law analyzes two categories of crimes: crimes involving moral turpitude (CIMTs) and aggravated felonies, which would include crimes of violence (COVs) and illicit drug trafficking.

---

[99] *See Duenas-Alvarez*, 549 U.S. at 186 (citing, with approval, *Soliman v. Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Abimbola v. Ashcroft*, 378 F.3d 173, 176-177 (2d Cir. 2004); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886-888 (9th Cir. 2003); *Hernandez-Mancilla v. INS*, 246 F.3d 1002, 1008-1009 (7th Cir. 2001)). *See also Silva-Trevino v. Holder*, 742 F.3d 197, 201-02 (5th Cir. 2014).

[100] *Matter of Velazquez-Herrera*, 24 I. &. N. Dec. 503, 513 (BIA 2008) (emphasis added). *Accord Nijhawan v. Holder*, 557 U.S. 29, 32 (2009); *Duenas-Alvarez*, 549 U.S. at 185–187.

[101] *See* INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (identifying grounds of inadmissibility); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (identifying grounds of deportability).

[102] *See* INA § 240A(c)(4), 8 U.S.C. § 1229b(c)(4) (identifying qualifications for cancellation of removal); INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (identifying qualifications for voluntary departure); INA §§ 245(a), 245(i)(2)(A), 8 U.S.C. §§ 1255(a), 1255(i)(2)(A) (identifying qualifications for adjustment of status).

A. Crimes described in the INA

1. Crimes of moral turpitude and crimes of violence

Determining whether a conviction involves moral turpitude or violence always requires application of the categorical approach.[103] The Board of Immigration Appeals (BIA), in *Hamdan v. INS*, defined moral turpitude as follows:

> Moral turpitude refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the appreciated rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind.[104]

The Fifth Circuit and the BIA have both long held that determining "[w]hether a crime involves moral turpitude depends upon the inherent nature of the crime, as defined in the statute concerned, rather than the circumstances surrounding the particular transgression."[105]

> [T]he Board and the Federal courts… generally agree that in deciding whether an alien's prior criminal conviction constitutes a conviction for a crime involving moral turpitude — that is, whether moral turpitude 'necessarily inheres' in a violation of a particular State or Federal criminal statute — immigration judges and the Board should engage in a 'categorical' inquiry and look first to the statute of conviction rather than to the specific facts of the alien's crime.[106]

---

[103] *Amouzadeh v. Winfrey*, 467 F.3d 451, 456 (5th Cir. 2006).

[104] *Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir. 1996) (quoting approvingly the BIA's decision in that case) (citations omitted).

[105] *Okabe v. Immigration & Naturalization Service*, 671 F.2d 863, 865 (5th Cir. 1982) (citing *Forbes v. Brownell*, 149 F. Supp. 848, 849 (D.D.C. 1957); *Amouzadeh*, 467 F.3d at 455).

[106] *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 697-98 (A.G. 2008) (citation omitted).

In *Amouzadeh v. Winfrey*, the alien, Mr. Amouzadeh, was charged with a violation of 8 U.S.C. § 1425(a), which criminalizes the knowing misrepresentation of a criminal record in a naturalization hearing.[107] Although Mr. Amouzadeh argued that this section is broad enough to punish behavior that is not accompanied by a vicious motive or a corrupt mind, such as an innocent misstatement, the court found that to sustain a conviction under this section, the government must prove that the defendant acted with a culpable state of mind: "To accept Amouzadeh's argument, this court would have to read the term 'knowingly' in section 1425(a) as imposing no *mens rea* requirement, other than the requirement of knowingly applying for naturalization."[108] It thus held that his conviction was for a crime involving moral turpitude (CIMT).

Similarly, determining whether a conviction is for a crime of violence (COV) also requires the application of the categorical approach, assessing whether a defined offense is, in the abstract, a COV without looking to the underlying facts of the conviction.[109] Where the statute of conviction provides alternative means of committing an offense, the court may look to the charging papers to determine which statutory alternative formed the basis for the conviction.[110]

It is important to note that an alien can be found to be inadmissible to the United States not only for having been convicted of a crime involving moral turpitude, but also if he or she "admits having committed, or [] admits committing *acts* which constitute the essential *elements* of a crime involving moral turpitude… or an attempt or conspiracy to commit such a crime."[111] Even so, the categorical approach requires that an alien not be rendered inadmissible by the mere admission of acts which are "inherently base, vile, or depraved, and contrary to the appreciated rules of morality and the duties owed between persons or to society in general." Instead, the actual crime involving moral turpitude must be identified, in the jurisdiction where the admitted acts occurred; the categorical approach is then applied to that statute and not to the factual admissions made by the alien.[112]

---

[107] *Amouzadeh*, 467 F. 3d at 456.

[108] *Id*. at 456-57.

[109] *United States v. Charles*, 301 F.3d 309, 313-14 (5th Cir. 2002); *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir. 2001).

[110] *United States v. Calderon-Pena*, 383 F.3d 254, 258 (5th Cir. 2004), *cert. denied*, 543 U.S. 1076 (2005).

[111] INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (emphasis added).

[112] *See, e.g. Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1213 (9th Cir. 2002).

(Quite specific rules regarding the use of an alien's admission additionally govern this area of law, but that is beyond the scope of this article.[113])

2. Aggravated felonies

An alien convicted of an aggravated felony at any time after admission is deportable,[114] and ineligible for several forms of relief from removal.[115] The INA defines which crimes constitute aggravated felonies in § 101(a)(43).[116] Determining whether a conviction qualifies as an aggravated felony under the INA has received a great deal of attention at all judicial levels.

For many decades, a purely categorical approach was applied to the question of aggravated felonies, and the usual complications associated with this approach are found in immigration case law, as they are found in criminal case law. Under current law, only some aggravated felonies require application of the categorical approach.[117]

B. Agency deference

Immigration law, of course, creates an additional complication not present in the federal criminal context: that of agency deference. The Fifth Circuit has resolved this by applying a two-part standard of review to the BIA's conclusion that an alien has committed a crime involving moral turpitude:

> First, we accord substantial deference to the BIA's … definition of the phrase "moral turpitude." Second, we review *de novo* whether the elements of a state or federal crime fit the BIA's definition of a CIMT. Importantly, this two-step approach provides both consistency—concerning the meaning of moral turpitude—and a proper regard for the

---

[113] *See, e.g., Matter of K—*, 7 I. & N. Dec. 597 (BIA 1957); *Matter of L—*, 2 I. & N. Dec. 486 (BIA 1946).

[114] INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

[115] INA §§ 208(b)(2)(A)(ii), (B)(i), 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i); INA §§ 240A(a)(3), (b)(1)(C), §§ 1229b(a)(3), (b)(1)(C).

[116] INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

[117] *Compare Moncrieffe*, 133 S. Ct. at 165 *with Nijhawan*, 557 U.S. at 32; *see* Part II(C)(4).

> BIA's administrative role—interpretation of federal immigration laws, not state and federal criminal statutes.[118]

This resolution has been uncontroversial.

C. Application of the categorical approach

1. Observing the practical realities of prosecution

As in the criminal sentencing context, the practical realities of how a particular statute is actually prosecuted is relevant in the immigration realm. Of particular influence in the categorical-approach case law is the case *Gonzales v. Duenas-Alvarez*.[119] Here, a legal permanent resident had been placed into removal proceedings for having been convicted in California of violating a California statute, which states:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, *or any person who is a party or an accessory to or an accomplice in* the driving or unauthorized taking or stealing, is guilty of a public offense.[120]

The question before the agency was whether this conviction qualified as the aggravated felony of a "theft offense," defined in the INA as "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."[121] The Supreme Court was tasked with deciding whether the state statute "sweeps more broadly than generic theft" because of its inclusion of aiding and abetting conduct.[122] In so doing, the Court cautioned that due attention be paid to *practical realities*.

The Court first dispensed with the Ninth Circuit's belief that generic theft did not encompass aiding and abetting, since "the law of all States and federal

---

[118] *Smalley v. Ashcroft*, 354 F.3d 332, 335-36 (5th Cir. 2003) (internal citations omitted)).

[119] *Duenas-Alvarez*, 549 U.S. at 185-87.

[120] Cal. Veh. Code Ann. § 10851(a) (West 2000) (emphasis added).

[121] INA §101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

[122] *Duenas-Alvarez*, 549 U.S. at 188 ("The question before us is whether one who aids or abets a theft falls, like a principal, within the scope of this generic definition.").

jurisdictions… now uniformly treats… the criminal activities of these aiders and abettors of a generic theft… [as falling] within the scope of the term 'theft.'"[123] The Court further held that Mr. Duenas-Alvarez had failed to show that there was anything "*special* about California's version of the doctrine — for example, that California in applying it criminalizes conduct that most other States would not consider 'theft.'"[124] The Court advised that the categorical approach requires attention to how a state statute is actually prosecuted.

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires 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. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.[125]

As I mentioned above, the Supreme Court's opinion in *James* — a criminal sentencing case — was based on the analysis employed in *Duenas-Alvarez*.[126]

2. Wrestling with state and federal definitions of drug crimes

a) Felonies v. misdemeanors

In *Lopez v. Gonzales*, the Court addressed the issue of how to classify drug crimes that were punishable as misdemeanors under the Controlled Substances Act (CSA), but were felonies under state law.[127] Mr. Lopez was convicted under South Dakota law of "helping someone else possess cocaine," the equivalent of drug possession.[128] The crime of possession was punishable under the CSA, but only as

---

[123] *Id*. at 190.
[124] *Id*. at 191.
[125] *Id*. at 193.
[126] *See* n.64, above.
[127] *Lopez v. Gonzales,* 549 U.S. 47 (2006).
[128] *Id*. at 53.

a misdemeanor.[129] Nevertheless, the government argued that because the offense was a felony under state law, it still counted as an aggravated felony.[130]

The applicable aggravated felony definition in the INA is "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)."[131] The referenced federal drug trafficking statute, in turn, defines drug trafficking crimes as "any felony punishable under the Controlled Substances Act [CSA] (21 U.S.C. 801 et seq.)."[132] A felony offense under the CSA is any offense punishable by a term of imprisonment longer than one year.[133]

The Supreme Court refused to parse the clause "any felony punishable under the Controlled Substances Act" in such a way that the term "felony" referred to state law and the term "punishable" referred to the CSA. It held that a straightforward reading of the INA required that the offense conduct be punishable *as a felony* under the CSA. Because Mr. Lopez's conviction was not in fact so punishable, it was not an aggravated felony, regardless of the classification of his state sentence.

The Court found that the government's reading would violate "any commonsense conception of 'illicit trafficking,'"[134] subvert the ordinary meaning of the statutory phrase,[135] and "render the law of alien removal, and the law of sentencing for illegal entry into the country, dependent on varying state criminal

---

[129] 21 U.S.C. § 844(a).

[130] *Lopez*, 549 U.S. at 53 ("That is enough, says the Government, because § 924(c)(2) requires only that the offense be punishable, not that it be punishable as a federal felony. Hence, a prior conviction in state court will satisfy the felony element because the State treats possession that way.").

[131] INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

[132] 18 U.S.C. § 924(c).

[133] 18 U.S.C. § 3559(a).

[134] *Lopez*, 549 U.S. at 53-54 ("[O]rdinarily 'trafficking' means some sort of commercial dealing. Commerce, however, was no part of Lopez's South Dakota offense of helping someone else to possess, and certainly it is no element of simple possession, with which the State equates that crime.… Reading § 924(c) the Government's way, then, would often turn simple possession into trafficking, just what the English language tells us not to expect, and that result makes us very wary of the Government's position.") (citations omitted).

[135] *Id*. at 55.

classifications even when Congress has apparently pegged the immigration statutes to the classifications Congress itself chose."[136]

Strangely, the Fifth Circuit struggled with how to implement this holding. In *Carachuri-Rosendo v. Holder,* it concluded that *Lopez* called for a "hypothetical approach," under which "if the *conduct* proscribed by the state offense could have been prosecuted as a felony under the CSA, then the state conviction qualifies as an aggravated felony…."[137] The Fifth Circuit believed that *Lopez* required lower courts to "look beyond the text of the state statute violated—a departure from the categorical approach, which confines courts to that text."[138] The upshot of this interpretation is that "any 'conduct' that 'hypothetically' 'could have been punished as a felony' 'had [it] been prosecuted in federal court' is an 'aggravated felony' for federal immigration law purposes."[139]

Carachuri-Rosendo involved an alien who had been charged with removability on the basis of two very minor Texas drug possession charges. The alien was convicted, on separate occasions, of possession of less than two ounces of marijuana and possession without a prescription of one tablet of anti-anxiety medication, for which he received sentences of 20 days and 10 days in jail, respectively.[140] Despite the fact that both charges were misdemeanors under state law, the court found that the second qualified as an aggravated felony, since the CSA allows drug possession to be charged as a felony if the defendant is a recidivist.[141] Texas also provided the option for charging such offenders as recidivists, but the alien in this case had not been charged as a recidivist under Texas law. Nevertheless, the Fifth Circuit held that because the alien *could* have been prosecuted as a recidivist under federal law had he been prosecuted in federal court and thereby *could* have received a felony conviction under federal law, his state simple misdemeanor conviction—which had no recidivist enhancement—constituted an aggravated felony under the INA.

The Supreme Court reversed.[142] The Court warned that the text of the INA "indicates that we are to look to the conviction itself as our starting place, not to

---

[136] *Id*. at 58 (citations omitted).

[137] *Carachuri-Rosendo v. Holder*, 570 F. 3d 263, 267 (5th Cir. 2009) (emphasis in the original).

[138] *Id*.

[139] *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 572-73 (2010).

[140] *Carachuri-Rosendo*, 570 F. 3d at 264.

[141] *Id*. at 265 (citing 21 U.S.C. § 844(a)).

[142] *Carachuri-Rosendo*, 560 U.S. at 563.

what might have or could have been charged."[143] Because the alien was not actually convicted of a recidivist offense, the immigration court "cannot, *ex post*, enhance the state offense of record just because facts known to it would have authorized a greater penalty under either state or federal law."[144] In effect, the Fifth Circuit had confused what was necessary with what was sufficient. The Court agreed that "to qualify as an 'aggravated felony' under the INA, the conduct prohibited by state law must be punishable as a felony under federal law."[145] But that is not enough. The alien "must *also* have been *actually convicted* of a crime that is itself punishable as a felony under federal law. The mere possibility that the defendant's conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command…."[146]

Carachuri-Rosendo made it clear that in order to implement the federal recidivist provision, certain safeguards must be followed: the prosecutor must "charge the existence of the prior simple possession conviction before trial, or before a guilty plea," and afford the defendant "an opportunity to challenge the validity of the prior conviction used to enhance the current conviction."[147] The Fifth Circuit's interpretation bypassed all of this procedure, the Court declared. It contravened the statutes' plain language, and it was fundamentally inconsistent with the categorical approach itself.

> Not only does the Government wish us to consider a fictional federal felony — whether the crime for which Carachuri-Rosendo was actually convicted would be a felony under the Controlled Substances Act — but the Government also wants us to consider facts not at issue in the crime of conviction (*i.e.*, the existence of a prior conviction) to determine whether Carachuri-Rosendo *could have* been charged with a federal felony. This methodology is far removed from the more focused, categorical inquiry employed in *Lopez*.[148]

Finally, *Carachuri-Rosendo* observed that the government's approach ignored the realities of federal court practice, as it "is quite unlikely that the

---

[143] *Id*. at 576.
[144] *Id*. at 576-77.
[145] *Id*. at 581.
[146] *Id*. at 581-82.
[147] *Id*. at 568-69.
[148] *Id*. at 580.

'conduct' that gave rise to Carachuri-Rosendo's conviction would have been punished as a felony in federal court."[149]

The Court corrected the Fifth Circuit again in 2013, regarding whether another minor state offense could constitute an "aggravated felony" under the INA. In *Moncrieffe v. Holder*, the alien had pled guilty to a Georgia offense of "possession of marijuana with intent to distribute."[150] Because the defendant was a first-time offender, the judge "withheld entering a judgment of conviction or imposing any term of imprisonment, and instead required that Moncrieffe complete five years of probation, after which his charge will be expunged altogether."[151]

Moncrieffe began with a discussion of the meaning of "generic," now far removed from the ACCA context of *Taylor*. It stated, "By 'generic,' we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison."[152] The Court reiterated that "a state offense is a categorical match with a generic federal offense only if a conviction of the state offense 'necessarily' involved… facts equating to [the] generic [federal offense]. Whether the noncitizen's actual conduct involved such facts is quite irrelevant."[153]

In *Moncrieffe*, the issue was whether "illicit drug trafficking offenses… extends to the social sharing of a small amount of marijuana."[154] Under the Georgia statute, a conviction of possession with intent to distribute marijuana "does not reveal whether either remuneration or more than a small amount of marijuana was involved."[155]

This fact is important because the CSA provision criminalizing drug possession "is divided into two subsections," one detailing the elements of the crime, and one setting out the penalties.[156] The penalties section establishes that

---

[149] *Id*.

[150] *Moncrieffe*, 133 S. Ct. at 1682 (interpreting Ga. Code Ann. § 16-13-30(j)(1) (2007)).

[151] *Id*. at 1683.

[152] *Id*. at 1684.

[153] *Id*. (quoting *Shepard*, 544 U.S. at 24 (plurality opinion)) (quotation marks omitted).

[154] *Id*. at 1682.

[155] *Id*. at 1686.

[156] *Id*. (describing 21 U.S.C. § 841(b)).

possession of marijuana is generally a felony, but it also creates an exception under which "distributi[on of] a small amount of marihuana for no remuneration shall be treated as" simple drug possession, which is a misdemeanor.[157] Georgia did in fact prosecute possession in both scenarios.[158]

The government pointed out that the elements of possession in the Georgia statute matched those of the CSA, and that courts presume that the offense is a felony, leaving it to the defendant to argue that the exception applies.[159] Consequently, the government argued that the Georgia conviction was an aggravated felony, even though it could have extended to conduct punishable as a misdemeanor under the CSA.

The Supreme Court disagreed. It reiterated that *Lopez* had established that, "to satisfy the categorical approach, a state drug offense must meet two conditions: It must 'necessarily' proscribe conduct that is an offense under the CSA, and the CSA must 'necessarily' prescribe felony punishment for that conduct."[160] It is not enough, then, to refer simply to the elements of the federal offense; the court must also look to the penalties to establish whether the conviction "is 'necessarily' conduct punishable as a felony under the CSA."[161] Because "Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor… the conviction did not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA."[162] Thus Moncrieffe's conviction was not an aggravated felony.

As to the argument that the government's reading was consistent with federal practice (an argument accepted by both the Fifth Circuit and the BIA), *Moncrieffe* reasoned,

> We cannot discount § 841's text … which creates no default punishment, in favor of the procedural overlay or burdens of proof that would apply in a hypothetical federal criminal prosecution. In *Carachuri-Rosendo*, we rejected the Fifth Circuit's "'hypothetical approach,'" which examined

---

[157] *Id*.
[158] *Id*.
[159] *Id*. at 1683, 1687, 1689 n.9.
[160] *Id*. at 1685.
[161] *Id*. The Court cited *Carachuri-Rosendo* for the proposition that "when Congress has chosen to define the generic federal offense by reference to punishment, it may be necessary to take account of federal sentencing factors too." *Id*. at 1687.
[162] *Id*. at 1686-87.

> whether conduct "'could have been punished as a felony' 'had [it] been prosecuted in federal court.'" The outcome in a hypothetical prosecution is not the relevant inquiry. Rather, our "more focused, categorical inquiry" is whether the record of conviction of the predicate offense necessarily establishes conduct that the CSA, on its own terms, makes punishable as a felony.[163]

The Court also chastised the government (and by implication the Fifth Circuit and the BIA) for the repeated "fundamental flaw" of their analysis "render[ing] even an undisputed misdemeanor an aggravated felony."[164] It noted:

> This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as "illicit trafficking in a controlled substance," and thus an "aggravated felony." Once again we hold that the Government's approach defies "the 'commonsense conception'" of these terms. Sharing a small amount of marijuana for no remuneration, let alone possession with intent to do so, "does not fit easily into the 'everyday understanding'" of "trafficking," which "'ordinarily… means some sort of commercial dealing.'" Nor is it sensible that a state statute that criminalizes conduct that the CSA treats as a misdemeanor should be designated an "aggravated felony." We hold that it may not be.[165]

Moncrieffe has had a somewhat dubious afterlife in the criminal sentencing context. Relying on that precedent, an alien challenged application of a 16-level enhancement under the sentencing guidelines for the crime of illegal reentry pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(i), arguing that the same Georgia crime does not qualify as a "drug trafficking offense" as required by the enhancement.[166] The Fifth Circuit disagreed, finding the language of the sentencing provision's Application Note to "precisely" match the Georgia offense.[167] While *Moncrieffe* was obligated by the aggravated felony provision of the INA to inquire as to "whether the state offense would constitute a felony under the federal drug laws," no such limitation bound the court in the sentencing context. The court was not troubled by the fact that, since the Guidelines impose an 8-level enhancement for prior aggravated felonies, its holding would "impose the greater 16-point

---

[163] *Id*. at 1688 (citations and footnote omitted).
[164] *Id*.
[165] *Id*. at 1693-1694 (citations omitted).
[166] *United States v. Martinez-Lugo*, 782 F.3d 198 (5th Cir. 2015).
[167] *Id*. at 201-02.

enhancement for a Georgia conviction when it would not qualify for the lesser 8-point enhancement under *Moncrieffe*," though that aberration seems to position the court for yet another rebuke by the Supreme Court for imposition of overly severe penalties.[168]

b) Parsing elements of the offense

The Fifth Circuit returned to the illicit trafficking provision once again in *United States v. Sarmientos*.[169] There, the BIA had held that a Florida controlled-substances statute was similar enough to the CSA for a conviction to constitute an aggravated felony as a "drug trafficking crime."[170] This definition of an aggravated felony, found at INA § 101(a)(43)(B), explicitly incorporates the CSA, thus requiring a categorical match between it and the state statute.[171]

However, the Florida statute required no showing of the defendant's *mens rea*; instead, it allowed the defendant to argue his state of mind regarding the substance's illegality (*i.e.*, his ignorance) as an affirmative defense. By contrast, under the CSA, the defendant's *mens rea* is an element of the offense.[172] The Fifth Circuit vacated the BIA's ruling, holding that the conviction could not categorically be termed an aggravated felony "because although a person could be convicted under the Florida statute without any knowledge of the illicit nature of the substance he possesses, the same person could not be convicted of drug trafficking under 21 U.S.C. § 841(a)(1)."[173] Accordingly, "the 'least of the acts criminalized' [by the Florida statute] does not necessarily violate 21 U.S.C. § 841(a)(1)."[174]

By contrast, in *Matter of L-G-H-*, the BIA addressed whether a conviction under the same Florida statute could be considered to be the aggravated felony of

---

[168] *Id.* at 204.
[169] *United States v. Sarmientos*, 742 F.3d 624 (5th Cir. 2014).
[170] *Id.* at 627 (interpreting Fla. Stat. Ann. § 893.13(1)(a)(1)).
[171] *Id.* at 627-28.
[172] *Id.* at 627.
[173] *Id.* at 631.
[174] *Id.* For a pre-*Shepard* treatment of *mens rea* that essentially applies the same analysis without the discussion of the categorical method, see *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (holding that a Florida DUI conviction could not constitute an aggravated felony as a crime of violence because state DUI offenses, which contained no *mens rea* or only a showing of negligence, did not fall within the "use of physical force" definition incorporated into the aggravated felony provision).

"illicit trafficking" under the same provision in the INA.[175] The BIA held that it could, as "illicit trafficking," unlike "drug trafficking," did not include (through incorporation of the CSA) a *mens rea* component.[176]

c) Overbreadth of state controlled substance definitions

The interplay of state and federal drug designations has also created trouble when state law criminalizes more substances than federal law. For example, in *Matter of Ferreira*, the respondent, a legal permanent resident who pleaded guilty to a Connecticut offense of selling illegal drugs, was charged with removability under both INA § 237(a)(2)(A)(iii) (aggravated felonies) and INA § 237(a)(2)(B)(i) (controlled substance offenses).[177] "Both of these removability provisions incorporate the definition of a 'controlled substance' in section 102 of the Controlled Substances Act ('CSA'), which is codified as 21 U.S.C. § 802 (2012)."[178] The respondent argued that the Connecticut offense was too broad for those provisions to be invoked under the categorical approach, as it criminalized the sale of substances not listed in the federal Controlled Substances Act (CSA)—meaning that at least theoretically, a conviction under Connecticut law could be for a substance not referenced by the immigration provisions.

The BIA, applying the "least of the acts criminalized" approach set out in *Moncrieffe,* agreed that if the alien could show that Connecticut ever prosecuted individuals on the basis of non-CSA substances, either by reference to the alien's own case or others, he could succeed in challenging the statute as too broad for application of the removability provisions under the categorical approach.[179]

---

[175] *Matter of L-G-H-*, 26 I. & N. Dec. 365 (BIA 2014). The INA defines an aggravated felony as, *inter alia*, "*illicit trafficking* in a controlled substance (as defined in section 802 of title 21), including a *drug trafficking crime* (as defined in section 924(c) of title 18)." INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (emphasis added).

[176] *Matter of L-G-H-*, 26 I. & N. Dec. at 369.

[177] *Matter of Ferreira,* 26 I. & N. Dec 415 (BIA 2014).

[178] *Id*. at 416.

[179] *Id*. at 419, 421-22. *See also Matter of Chairez-Castrejon*, 26 I. & N. Dec. 349, 355–58 (BIA 2014) (interpreting removability for illicit trafficking in firearms, INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C), and holding that "a State firearms statute that contains no exception for 'antique firearms' [in contrast to the federal statute explicitly referenced by the INA provision] is categorically overbroad relative to section 237(a)(2)(C) of the Act only if the alien demonstrates that the State statute has, in fact, been successfully applied to prosecute offenses involving antique firearms."); *Carrasco-Tercero*, 745 F.3d at 197-98 (applying the realistic probability test).

Consequently, it remanded the case so that the Immigration Judge could engage in a realistic probability test.[180]

The Supreme Court took this holding one step further in a recent case issued in June of 2015. In *Mellouli v. Lynch*, a legal permanent resident was placed into removal proceedings on the basis of a Kansas misdemeanor conviction for possession of drug paraphernalia.[181] This state law renders it illegal to "possess with intent to use any drug paraphernalia to … store, contain, conceal" a controlled substance, as defined by Kansas's own drug schedules.[182] At the time of Mr. Mellouli's conviction, Kansas listed nine substances on its controlled substances schedules that were not controlled by the federal government.[183] The INA requires the removal of any alien convicted under "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (*as defined in section 802 of Title 21*)."[184] BIA precedent would thus seem to hold that the Kansas conviction would not give rise to the immigration violations under the categorical approach, since the least of the acts criminalized—possessing paraphernalia for a drug proscribed by Kansas but not by the federal government—would not relate to a federal controlled substance.

However, the BIA had previously created new precedent carving out drug-paraphernalia cases for special treatment. In *Matter of Martinez Espinoza*, the BIA concluded that paraphernalia statutes relate to "the drug trade in general," and thus to "any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used.[185] "Under this reasoning, there is no need to show that the type of controlled substance involved in a paraphernalia conviction is one defined in § 802."[186]

---

[180] The Fifth Circuit recently applied essentially the same analysis, without the assessment of probability, to the determination of whether a prior state conviction qualified as a "drug trafficking offense" under an enhancement provision in the U.S. Sentencing Guidelines. *United States v. Gomez-Alvarez*, 781 F.3d 787 (5th Cir. 2015).

[181] *Mellouli v. Lynch*, 575 U.S. _____ (2015). The paraphernalia was a sock into which he had stuffed four tablets of Adderall, according to a probable cause affidavit from the prosecution. *Id.* at 1983. The charging documents and plea agreement did not allege the substance. *Id.*

[182] Kan. Stat. Ann. §§ 21–5709(b); § 21–5701(a).

[183] *Mellouli*, 575 U.S. at ?.

[184] INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i)) (emphasis added).

[185] *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (2009).

[186] *Mellouli*, 575 U.S. at ? (citing *id.* at 120-21).

The Immigration Judge applied *Martinez Espinoza* in finding Mr. Mellouli removable, quoting that opinion's statement that "the requirement of a correspondence between the Federal and State controlled substance schedules … has never been extended to other contexts by the Board."[187] The BIA and the Eighth Circuit affirmed this ruling, agreeing that paraphernalia convictions are for crimes that are "associated with the drug trade in general."[188]

The Supreme Court roundly rejected this reasoning. It pointed out that it created "the anomalous result that minor paraphernalia possession offenses are treated more harshly than drug possession and distribution offenses," even though they penalize conduct that is "less grave…. The incongruous upshot is that an alien is not removable for possessing a substance controlled only under Kansas law, but he is removable for using a sock to contain that substance."[189] Based on the absurdity of that result, the Court refused to accord deference to the BIA's interpretation of the law.[190]

After a long passage extolling the history and virtues of the categorical approach in immigration law, the Court applied the same analysis that the BIA had followed in *Matter of Ferreira*, concluding that "Mellouli's drug-paraphernalia conviction does not render him deportable," since although "the state law under which he was charged categorically 'relat[ed] to a controlled substance,'" it "was not limited to substances 'defined in [§ 802].'"[191]

The Eighth Circuit had attempted to further support the BIA's holding by pointing out that "there is 'nearly a complete overlap' between the drugs controlled under state and federal law," but the Court held that this "scarcely explains or ameliorates the BIA's anomalous separation of paraphernalia possession offenses from drug possession and distribution offenses."[192] The government argued that the overlap justified "the removal of aliens convicted of any drug crime, not just paraphernalia offenses," since the state laws "criminalize hundreds of federally controlled drugs and a handful of similar substances," and therefore, according to the government, can be defined as "'laws "relating to"

---

[187] *Id*. (quoting *Martinez Espinoza*, 25 I. & N. Dec. at 121).

[188] *Id*.; *Mellouli v. Holder*, 719 F.3d 995, 1000 (8th Cir. 2013).

[189] *Mellouli*, 575 U.S. _____.

[190] *Id*. (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 843 (1984)).

[191] *Id*. at 1986-88.

[192] *Id*. at 1989 (citing *Mellouli*, 719 F.3d at 1000).

federally controlled substances.'"[193] The Court rejected this argument too, pointing out that "[t]he historical background of § 1227(a)(2)(B)(i) demonstrates that Congress and the BIA have long required a direct link between an alien's crime of conviction and a particular federally controlled drug," and holding that the government's "position here severs that link by authorizing deportation any time the state statute of conviction bears some general relation to federally controlled drugs."[194] Consequently, the government's position is unfaithful to the text of the INA.[195]

Mellouli thus joins the line of recent Supreme Court cases that attempt to restrain the federal courts from using—or departing from—the categorical approach in ways that dramatically extend punitive provisions of the INA to relatively minor crimes.

3. Divisibility

a) Divisibility before Descamps

For many years, immigration judges were required to faithfully adhere to the guidelines for the categorical approach that were developed by the Supreme Court in the context of criminal sentencing. Then, in 2012, the BIA declared that "the categorical approach itself need not be applied with the same rigor in the immigration context as in the criminal arena, where it was developed."[196] In part based on this holding, the BIA declared that immigration courts should regard "all statutes of conviction" as divisible "regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct."[197] In other words, the BIA held that any unified statute that swept more broadly than the immigration provision at issue could still be analyzed via the modified categorical approach.

In taking this position, the BIA specifically rejected as "too formulaic" the Fifth Circuit precedent applying a structural approach to the divisibility analysis.[198] That precedent held that, "As a general rule, if a statute encompasses both acts that

---

[193] *Id*. (quoting Brief for Respondent at 17).
[194] *Id*. at 1990.
[195] *Id*.
[196] *Matter of Lanferman*, 25 I. & N. Dec. 721, 728 (BIA 2012).
[197] *Id*. at 727.
[198] *Id*. at 725 (citing *Amouzadeh*, 467 F.3d at 455; *Larin-Ulloa v. Gonzales*, 462 F.3d 456 (5th Cir. 2006)).

do and do not involve moral turpitude, the BIA cannot sustain a deportability finding on that statute. An exception to this general rule is made if the statute is divisible into discrete subsections of acts that are and those that are not CIMTs."[199]

The legal question before the BIA was an unusual one. The BIA asked if the alien was removable under INA § 237(a)(2)(C), which renders an alien removable if he is convicted under any law for possession or use of "a firearm or destructive device."[200] The alien had been convicted under New York State law of menacing in the second degree — a statute with three enumerated sections, which, as the BIA noted, "is not a pure firearms statute that outright punishes possessing or carrying a firearm."[201] Only section (1) of the New York State statute specifically involves firearms, and criminalizes "intentionally plac[ing] or attempt[ing] to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm."[202]

As the plain text of the statute makes clear, the deadly-weapon element need not involve a firearm or destructive device — it could involve a knife or even an automobile — and thus the state statute encompasses behavior that is not a ground of removal. Under *Taylor*'s categorical approach, the alien cannot be removed on this ground. Yet since the BIA had determined that, in the immigration context, *all* statutes could be read as divisible, regardless of their structure, it determined that the alien was removable under § 237(a)(2)(C) for having violated a statute for possession of a firearm. It read the New York statute's language of "deadly weapon [or] dangerous instrument" as divisible into firearms and non-firearms, and looked to the complaint and plea colloquy to determine that the alien had been convicted of the firearm alternative buried within the meaning of "deadly weapon [or] dangerous instrument."[203]

---

[199] *Hamdan*, 98 F.3d at 187 (internal citation omitted); *see also Amouzadeh*, 467 F.3d at 455; *Larin-Ulloa*, 462 F.3d at 464.

[200] INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C) ("Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.").

[201] *Lanferman*, 25 I. & N. Dec. at 25.

[202] New York Penal Law § 120.14(1).

[203] *Lanferman*, 25 I. & N. Dec. at 28-29.

The next year, 2013, the Supreme Court issued its opinion in *Descamps*, discussed above.[204] In a surprisingly forceful opinion, *Descamps* reversed a holding by the Ninth Circuit that was nearly identical to the BIA's holding in *Lanferman*:

> The Ninth Circuit defended its (excessively) modified approach by denying any real distinction between divisible and indivisible statutes extending further than the generic offense. "The only conceptual difference," the court reasoned, "is that [a divisible statute] creates an explicitly finite list of possible means of commission, while [an indivisible one] creates an implied list of every means of commission that otherwise fits the definition of a given crime." For example, an indivisible statute "requir[ing] use of a 'weapon' is not meaningfully different"—or so says the Ninth Circuit—"from a statute that simply lists every kind of weapon in existence … ('gun, axe, sword, baton, slingshot, knife, machete, bat,' and so on)." In a similar way, every indivisible statute can be imaginatively reconstructed as a divisible one. And if that is true, the Ninth Circuit asks, why limit the modified categorical approach only to explicitly divisible statutes?
>
> The simple answer is: Because only divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime. A prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives. And the jury, as instructions in the case will make clear, must then find that element, unanimously and beyond a reasonable doubt….
>
> None of that is true of an overbroad, indivisible statute….
>
> Indeed, accepting the Ninth Circuit's contrary reasoning would altogether collapse the distinction between a categorical and a fact-specific approach. After all, the Ninth Circuit's "weapons" example is just the tip of the iceberg: Courts can go much further in reconceiving indivisible statutes as impliedly divisible ones. In fact, every element of every statute can be imaginatively transformed as the Ninth Circuit suggests—so that every crime is seen as containing an infinite number of sub-crimes corresponding to "all the possible ways an individual can commit" it.

[204] Part I(B)(1).

> (Think: Professor Plum, in the ballroom, with the candlestick?; Colonel Mustard, in the conservatory, with the rope, on a snowy day, to cover up his affair with Mrs. Peacock?) If a sentencing court, as the Ninth Circuit holds, can compare each of those "implied… means of commission" to the generic ACCA offense, then the categorical approach is at an end. At that point, the court is merely asking whether a particular set of facts leading to a conviction conforms to a generic ACCA offense. And that is what we have expressly and repeatedly forbidden. Courts may modify the categorical approach to accommodate alternative "statutory definitions." … They may not, by pretending that every fact pattern is an "implied" statutory definition, convert that approach into its opposite.[205]

b) Divisibility after Descamps

The Board's old approach at times gave the unfortunate impression that it would keep trying different approaches until it found a way to make the alien's underlying criminal conduct divisible under the INA. But in 2014, after *Descamps*'s clear repudiation of its reasoning, the BIA backtracked on its conclusions in *Lanferman* and concluded that it lacked "the authority to continue to apply [*Lanferman*'s] divisibility analysis," noting that "*Descamps* itself makes no distinction between the criminal and immigration contexts and the circuit courts have held that the approach to statutory divisibility announced there applies in removal proceedings in the same manner as in criminal sentencing proceedings."[206] Consequently, the Board withdrew from *Matter of Lanferman* "to the extent that it is inconsistent with *Descamps*."[207] Since that time, the BIA has been much more restrictive in how to apply the categorical approach, and more willing to conclude that an offense does not trigger an INA provision despite negative underlying facts surrounding the conviction.

For example, the case that retreated from *Lanferman*, *Matter of Chairez-Castrejon*, employed a very straightforward analysis of whether a Utah charge of "felony discharge of a firearm" constituted the aggravated felony of a "crime of violence."[208] The Board began by noting that the categorical approach "requires us

---

[205] *Descamps,* 133 S. Ct. at 2289-91 (internal citations omitted).

[206] *Chairez-Castrejon*, 26 I. & N. Dec. at 354.

[207] *Id*.

[208] *Matter of Chairez-Castrejon*, 26 I. & N. Dec. at 350 (interpreting section 76-10-508.1 of the Utah Code, and INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) and INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2012)).

to focus on the minimum conduct that has a realistic probability of being prosecuted under section 76-10-508.1 of the Utah Code, rather than on the facts underlying the respondent's particular violation of that statute."[209]

The Utah statute was divided into three subsections, two of which the Board found to contain "as an element the deliberate 'use' of violent 'physical force' against the person or property of another, thereby qualifying them as categorical crimes of violence under 18 U.S.C. § 16(a)."[210] The first subsection, however, was not a crime of violence. The Board therefore held that the statute was divisible, and the modified categorical approach must apply.[211]

The Board further ruled that the immigration court could not further parse the first subsection "into several discrete offenses with distinct elements because they disjunctively enumerated intent, knowledge, and recklessness as alternative mental states," as it would have under *Lanferman*, because that kind of division is only justified in the case of a statute that sets out "disjunctive sets of 'elements,' more than one combination of which could support a conviction," elements being defined as "those facts about the crime which '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find… unanimously and beyond a reasonable doubt.'"[212] Because Utah law did not clearly require "jury unanimity regarding the mental state with which the accused discharged the firearm," then the different possible levels of *mens rea* were potentially "merely alternative 'means' by which a defendant can discharge a firearm, not alternative 'elements' of the discharge offense."[213] Accordingly, the BIA found that the government had failed to carry its burden of proof on the statute's divisibility, and thus the immigration court erred in "consult[ing] the respondent's conviction record in order to determine which mental state he possessed."[214]

The Fifth Circuit has also taken a very straightforward approach in two recent cases involving whether a sexual assault conviction categorically counted as an aggravated felony.[215] In *Perez-Gonzalez v. Holder*, an alien was convicted of a

---

[209] *Id*. at 351.
[210] *Id*.
[211] *Id*. at 351-52.
[212] *Id*. at 352-53 (alteration in the original).
[213] *Id*. at 354.
[214] *Id*. at 355.
[215] INA §§ 1101(a)(43)(A), (F), 8 U.S.C. §§ 1101(a)(43)(A), (F) (extending the definition of "aggravated felony" to "murder, rape, or sexual abuse of a minor" or "a

Montana offense of sexual intercourse without consent.[216] The issue was whether this offense fits within the INA definition of rape, which would render it an aggravated felony. The court held that the INA incorporated a generic definition of rape that was not coterminous with "sexual assault."[217] The Montana statute "has three parts, each with different elements… at least one of [which] does not fall within" the generic definition.[218] Because the alien's criminal record did not indicate which section his conviction fell within, it could not be considered an aggravated felony.[219]

At issue in *Rodriguez v. Holder* was whether a conviction for sexual touching "without consent" was a crime of violence.[220] The court defined the issue as "whether the crime inherently involves a substantial risk that intentional physical force may be used in the commission of the crime."[221] The court agreed with the alien that the answer was no, since a conviction could arise under the statute via the exploitation of the emotional dependency of the victim by a mental health worker or clergyman, which did not entail violence.[222]

Nevertheless, a 2014 opinion shows that the question of how to address divisibility remains somewhat open, even after *Descamps*. Traditionally, the Fifth Circuit has taken a restrictive approach to the divisibility analysis, identifying divisible statutes by focusing on the statute's grammar or structure to assess whether it breaks down into "discrete subsections" or disjunctive statements.[223]

---

crime of violence (as defined in [18 U.S.C. § 16]…) for which the term of imprisonment [is] at least one year.").

[216] *Perez-Gonzalez v. Holder*, 667 F.3d 622 (5th Cir. 2012).

[217] *Id.* at 625-27.

[218] *Id.* at 627.

[219] *Id.* at 628.

[220] *Rodriguez v. Holder*, 705 F.3d 207 (5th Cir. 2013).

[221] *Id.* at 212.

[222] *Id.* at 215-16. For two other recent cases straightforwardly applying the categorical approach in the context of criminal sentencing, see *United States v. Rodriguez-Negrete*, 772 F.3d 221 (5th Cir. 2014) and *United States v. Albornoz-Albornoz*, 770 F.3d 1139 (5th Cir. 2014) (per curiam). Though they do not touch upon immigration issues, they may be worth reading to see how the Fifth Circuit applies this analysis in an ordinary case. Moreover, *Rodriguez-Negrete* leads its discussion with a thorough explanation of the steps of the categorical approach.

[223] *See, e.g., Hamdan*, 98 F.3d at 187; *see also Teran-Salas*, 767 F.3d at 459 (holding that Texas statute Tex. Health & Safety Code § 481.112(a), under which "a person commits an offense if the person knowingly manufactures, delivers, or possesses

But *Franco-Casasola v. Holder* may signal a move away from that conservatism, and perhaps engender yet another rebuke from the Supreme Court.[224]

In *Franco-Casasola*, the Fifth Circuit returned once more to the definition of "illicit trafficking in firearms" under the INA provision whose torturous interpretational history is outlined above. The court this time addressed how to apply this clause to a conviction under 18 U.S.C. § 554(a), which penalized exporting "any merchandise, article, or object contrary to any law or regulation of the United States." The question was whether this statute, which did not penalize specific behavior but only incorporated other statutes by reference, was divisible, so that the modified categorical analysis would apply. The court concluded that it was in fact divisible, as the "laws and regulations" allegedly violated, as specified in the indictment, "can also be the subject of the modified categorical approach" — in other words, the statute refers to many other statutes, and even though these are not identified specifically, each hypothetical statute referenced constitutes a discrete sub-crime.[225]

Despite the similarity of this line of reasoning to the ill-fated weapons example provided by the Ninth Circuit, the Fifth Circuit emphasized that it sought to remain faithful to *Descamps*' description of the divisibility analysis:

> The Supreme Court warned against the Ninth Circuit's approach of reconceiving broad, indivisible statutes… into divisible ones; unlike statutes with explicitly finite lists of means of commission, indivisible statutes do not enable the conclusion that "a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime."[226]

By contrast, the Fifth Circuit held that all of the elements of an offense under Section 554(a) were determinate:

> It is true that Section 554(a) does not list various merchandise, articles, or objects, and does not list "firearms" as an alternative element of the offense. It does, however, create an explicitly finite list of merchandise, articles, and objects in that it requires the defendant's actions to be

---

with intent to deliver a controlled substance," is divisible, because it "criminalizes discrete acts—manufacturing, delivering, and possessing with intent to deliver").

[224] *Franco-Casasola v. Holder*, 773 F.3d 33 (5th Cir. 2014).

[225] *Id.* at 37.

[226] *Id.* at 38 (citation omitted).

> "contrary to any law or regulation of the United States." The statute thereby incorporates as divisible elements the finite, though lengthy, list of every statute and regulation of the United States that make facilitating the transportation of "merchandise, article[s], or object[s]" an act that is "contrary to any law[.]"[227]

The Fifth Circuit observed that, to charge a violation of Section 554(a), prosecutors must cite the underlying violations of law as well. This specificity, the Fifth Circuit claimed, avoids the problem identified in *Descamps*: "that the indictment could not narrow the overly-broad statute to a generic burglary because one element of generic burglary was not in the statute."[228] *Descamps* held that it was improper to go beyond the statutory definition by reference to the plea colloquy, since "[t]he colloquy…merely gave evidence of what Descamps factually had done and could not narrow the statutory crime…. Regardless of whether Descamps actually broke and entered and thereby committed generic burglary, the statute of conviction itself 'does not require the factfinder (whether jury or judge) to make that determination.'"[229] But since the elements of the other statutes allegedly violated under Section 554(a) must "themselves… be charged and proven to fact-finders," and ultimately found by a jury, the Fifth Circuit held that *Descamps* was satisfied.[230]

The length of this opinion, and the Fifth Circuit's repeated reaffirmation of its dedication to *Descamps*, does suggest that its analysis is not as straightforward as it wished. Indeed, the Fifth Circuit acknowledged that "Section 554(a) does not contain all the needed terms for our analysis of whether Franco-Casasola committed an aggravated felony"[231]—which typically ends the analysis under *Descamps*, which was not shy about holding that an overbroad provision would not apply regardless of the applicability of the underlying conduct. Nevertheless, the Fifth Circuit reasoned, "We have gone one step further than the Supreme Court has had to so far but have not strayed from the path it has marked."[232]

---

[227] *Id*. (alterations in the original).
[228] *Id*. at 39.
[229] *Id*.
[230] *Id*.
[231] *Id*. at 39-40.
[232] *Id*. at 42.

4. Venturing outside the categorical approach

a) Going beyond the categorical approach for some aggravated felonies

In general, in the Fifth Circuit, the categorical approach requires the following analysis:

> When determining whether a particular law meets the BIA's definition of [the immigration provision at issue], we employ a categorical approach that focuses "on the inherent nature of the crime, as defined in the statute…, rather than the circumstances surrounding the particular transgression." Under the categorical approach, we read the statute at its minimum, taking into account "the minimum criminal conduct necessary to sustain a conviction under the statute." An offense is a crime involving moral turpitude if the minimum reading of the statute necessarily reaches only offenses involving moral turpitude. However, "if the orbit of the statute may include offenses not inherently entailing moral turpitude," then the crime is not a crime involving moral turpitude." An exception to this general rule is made if the statute is divisible into discrete subsections of acts that are and those that are not [crimes involving moral turpitude]." If the statute is divisible, "we look at the alien's record of conviction to determine whether he has been convicted of a subsection that qualifies as a [crime involving moral turpitude]."[233]

This paragraph provides a nearly complete explanation of the application of the categorical approach in the Fifth Circuit … but the Supreme Court threw a monkey wrench in the mix in 2009.

In that year, the Supreme Court made a major change to how aggravated felonies are determined, in *Nijhawan v. Holder*.[234] Specifically, the Supreme Court drew a distinction between aggravated felony provisions that refer to "generic crimes," which require the categorical analysis, and those that seem to invite inquiry into the specific circumstances of the actual crime, for which additional fact-finding may be required. The Court wrote, "The interpretive difficulty before us reflects the linguistic fact that in ordinary speech words such as 'crime,' 'felony,' 'offense,' and the like sometimes refer to a generic crime, say, the crime of fraud or theft in general, and sometimes refer to the specific acts in which an

[233] *Amouzadeh*, 467 F.3d at 455 (footnotes omitted).
[234] *Nijhawan*, 557 U.S. at 32.

offender engaged on a specific occasion, say, *the* fraud that the defendant planned and executed last month."[235] And it concluded that, "[T]he 'aggravated felony' statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed."[236]

An example of a generic crime is the definition of an aggravated felony referring to "illicit trafficking in a controlled substance."[237] An example of a crime requiring a fact-specific examination is the classification of fraud and deceit crimes involving $10,000 or more.[238]

Courts have attended both to the primary question of whether a particular aggravated felony description is a generic offense at all, per *Nijhawan*, and to the secondary question of how to apply the categorical approach if it is indeed a generic offense.

Although the *Nijhawan* Court did not methodically categorize each aggravated felony described in the INA according to whether or not the categorical approach applies, it did provide the following guidance:

> The "aggravated felony" statute lists several of its "offenses" in language that must refer to generic crimes. Subparagraph (A), for example, lists "murder, rape, or sexual abuse of a minor." Subparagraph (B) lists "illicit trafficking in a controlled substance." And subparagraph (C) lists "illicit trafficking in firearms or destructive devices." Other sections refer specifically to an "offense described in" a particular section of the Federal Criminal Code. See, e.g., subparagraphs (E), (H), (I), (J), (L).[239]

The opinion contrasts these with several aggravated felonies described "using language that almost certainly does not refer to generic crimes but refers to specific circumstances," namely: subparagraphs (P) (which refers to the alien's relationship with the person benefitting from the alien's crime), (K)(ii) (which refers to the alien's purpose in committing the crime), and (M)(ii) (which refers to a specific amount of loss to the government due to the alien's crime).[240]

---

[235] *Id*. (emphasis in the original).
[236] *Id*. at 38.
[237] *Id*. at 37 (interpreting INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B)).
[238] *Id*. at 38 (interpreting INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i)).
[239] *Id*. at 37 (internal citations omitted).
[240] *Id*.

Nijhawan itself addressed sub-paragraph (M)(i), which it concluded is a circumstance-specific crime. Subparagraph (M)(i) refers to "an offense that…involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."[241] The Court found that no federal statute and only eight state statutes for fraud contained loss thresholds no higher than $10,000, and thus only these eight statutes would fully apply to (M)(i) under the categorical approach. Not believing that Congress "would have intended (M)(i) to apply in so limited and so haphazard a manner," the Court held that a non-categorical approach should apply, but exclusively to the question of the monetary loss. To find otherwise, the Court held, "would leave subparagraph (M)(i) with little, if any, meaningful application."[242]

The BIA first addressed how to determine whether an aggravated felony provision must be analyzed as a circumstance-specific crime in *Matter of Dominguez-Rodriguez*.[243] There the issue was whether the exception to removability for controlled substance offenses for "a single offense involving possession for one's own use of thirty grams or less of marijuana"[244] requires application of the categorical approach or "a circumstance-specific inquiry into the character of the alien's unlawful conduct on a single occasion."[245] The BIA noted that "[t]he language of the 'possession for personal use' exception [in the removability statute] is located in the text of the Act 'proper' and, by directing the adjudicator's attention to a set of very specific facts about an alien's crime, most naturally suggests that a circumstance-specific inquiry is contemplated."[246]

---

[241] INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).

[242] *Nijhawan*, 557 U.S. at 39.

[243] *Matter of Dominguez-Rodriguez,* 26 I. & N. Dec. 408 (BIA 2014).

[244] INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

[245] *Matter of Dominguez-Rodriguez*, 26 I. & N. Dec. at 408.

[246] *Id*. at 412. Accordingly, the Board reaffirmed *Matter of Davey*, 26 I. & N. Dec. 37 (BIA 2012), which applied a circumstance-specific approach to determine whether an Arizona drug conviction fell under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (excepting aliens convicted of "a single offense involving possession for one's own use of 30 grams or less of marijuana" from removability for crimes "relating to a controlled substance"). *See also Matter of Martinez Espinoza*, 25 I. & N. Dec. at 124 (finding that INA § 212(h), which provides a waiver for inadmissibility grounds for certain drug crimes "insofar as [the conviction] relates to a single offense of simple possession of 30 grams or less of marijuana," also requires a circumstance-specific inquiry instead of a categorical analysis). While the Supreme Court's ruling in *Mellouli* overturned *Martinez Espinoza*'s special treatment of paraphernalia offenses, *see* above, the BIA's application of the circumstance-specific approach remains viable.

In *Moncrieffe v. Holder*, the Supreme Court similarly expanded on the question of when to go outside of the categorical approach in the immigration context:

> We explained in *Nijhawan*, however, that unlike the provision there, "illicit trafficking in a controlled substance" is a "generic crim[e]" to which the categorical approach applies, not a circumstance-specific provision. That distinction is evident in the structure of the INA. The monetary threshold is a limitation, written into the INA itself, on the scope of the aggravated felony for fraud. And the monetary threshold is set off by the words "in which," which calls for a circumstance-specific examination of "the conduct involved 'in' the commission of the offense of conviction." Locating this exception in the INA proper suggests an intent to have the relevant facts found in immigration proceedings. But where, as here, the INA incorporates other criminal statutes wholesale, we have held it "must refer to generic crimes," to which the categorical approach applies.[247]

This discussion continues to inform criminal law. In April of 2015, the Fifth Circuit applied *Nijhawan* to determine whether to apply an eight-level enhancement pursuant to U.S.S.G. § 2L1.2(b)(1)(C), which increases the penalty for illegal reentry if the defendant had previously committed an aggravated felony, as defined by the INA.[248] The respondent argued that *Shepard* prohibited the district court from turning to the presentence report to show that the funds involved in his money laundering conviction exceeded $10,000. The court disagreed, holding that *Nijhawan* controlled, and *Nijhawan* allowed going outside the documents set out in *Shepard*.[249]

b) Attempting to go beyond the modified categorical approach for crimes of moral turpitude

In *Matter of Silva-Trevino*, Attorney General Michael Mukasey expressed his belief that the various means by which the categorical approach was applied by

---

[247] *Moncrieffe*, 133 S. Ct. at 1691.

[248] *United States v. Mendoza*, 783 F.3d 278 (5th Cir. 2015).

[249] *Id.* at 280-81. For another, more purely criminal case that applied *Nijhawan*'s circumstance-specific approach, see *United States v. Gonzalez-Medina*, 757 F.3d 425, 428-32 (5th Cir. 2014) (applying *Nijhawan* to a determination if a state sexual assault conviction triggered the federal Sex Offender Registration and Notification Act).

the circuit courts "do not adequately perform the function they are supposed to serve: distinguishing aliens who have *committed* crimes involving moral turpitude from those who have not."[250] Consequently, he tacked on to the modified categorical approach a third step permitting a court to accept "'evidence beyond the formal record of conviction' to the extent the judge deems 'necessary and appropriate'" to determine whether the conviction was a CIMT.[251] With this focus on whether the alien *committed* a CIMT — rather than was *convicted* of a CIMT — the new rule reversed the emphasis in the *Taylor-Shepard* line of cases on the elements of the crime of conviction and gave immigration judges the discretion to apply a fact-specific analysis. The AG was clearly aware of this, as he noted that:

> [T]he rationale for the limits *Taylor* and *Shepard* impose on factual inquiries in criminal sentencing cases does not carry over to the immigration question at hand.... Moreover, there is good reason not to apply *Taylor* and *Shepard* when assessing moral turpitude. Limiting inquiry to the record of conviction—and little else—makes some sense when a simple examination of the elements of a prior conviction usually will yield the necessary answer, as is true in the criminal sentencing cases governed by *Taylor* and *Shepard*. But limiting inquiry in that manner makes much less sense when the answer turns on factors beyond the elements of the prior crime.[252]

The Fifth Circuit vacated *Silva-Trevino* in 2014, dismissing the AG's assertion that the INA was ambiguous and therefore that the agency merited deference in its interpretation of it.[253] Emphasizing — again — that "to assume that 'convicted' connotes the same procedure as 'committed' is to strip the word of its statutory definition and render it superfluous."[254] Quoting *Moncrieffe*, the Fifth Circuit emphasized that a "'circumstance-specific examination' of conduct is not permitted in determining whether an immigrant was convicted of a generic crime."[255]

Regarding the Attorney General's argument that because moral turpitude is not an element of any crime, and thus its presence or absence may not be clear on the face of the charging documents, the Fifth Circuit was not persuaded. The rule

---

[250] *Matter of Silva-Trevino,* 24 I. & N. Dec. at 688 (emphasis added).
[251] *Id*. at 699.
[252] *Id*. at 700.
[253] *Silva-Trevino*, 742 F.3d at 200.
[254] *Id*. at 203-04.
[255] *Id*. at 204.

long established by precedent — that the BIA may not look beyond the conviction record to determine if the alien had been convicted of a crime involving moral turpitude — was reinstated for the Fifth Circuit, which joined four of the six circuits that had considered the matter and rejected the BIA's analysis.[256]

In April 2015, Attorney General Eric Holder vacated AG Mukasey's opinion in its entirety, leaving to the BIA the responsibility of determining how adjudicators are to determine whether a particular criminal offense is a crime involving moral turpitude under the INA, and when, and to what extent, adjudicators may use a modified categorical approach and consider a record of conviction in such a case.[257] These questions remain unanswered as of the date of this writing, but the grounding provided by *Taylor* and *Shepard*, and reiterated in *Moncrieffe*, is likely to be central to whatever the Board decides.

[256] *Id*. at 200, n.1 ("The Third, Fourth, Ninth, and Eleventh Circuits found the language unambiguous and thus withheld deference.").

[257] *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 553-54 (A.G. 2015).