Implications for Immigration Relief After *Mathis v. US* and *Gomez-Perez v. Lynch*: How to Address Crimes Involving Moral Turpitude in the Fifth Circuit

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In *Esparza-Rodriguez v. Holder*,[1] the Fifth Circuit found that, for immigration purposes, a Class A misdemeanor assault conviction under Texas Penal Code § 22.01(a)(1) was a crime involving moral turpitude. In so doing, it blurred the lines between simply taking note of the *fact of* a conviction, as directed by the categorical approach, and considering the *facts about* the conviction, which is not permissible.

Four years later, in *Gomez-Perez v. Lynch*,[2] the Fifth Circuit returned to § 22.01(a)(1), reversing *Esparza-Rodriguez* and reorienting its application of the categorical approach. This opinion followed *Mathis v. United States*,[3] the latest in a series of Supreme Court opinions that chastised circuit courts for allowing an assessment of the facts to creep into their analysis.

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[1] *Esparza-Rodriguez v. Holder*, 699 F.3d 821 (5th Cir. 2012).

[2] *Gomez-Perez v. Lynch*, No. 14-60808, 2016 U.S. App. LEXIS 12751 (5th Cir. Jul. 11, 2016).

[3] *Mathis v. United States*, 579 U.S. ___, ___ (2016).

Gomez-Perez changed the landscape of how crimes of moral turpitude are assessed in the Fifth Circuit. However, it left open two important questions: whether *Gomez-Perez* and *Esparza-Rodriguez* have overruled BIA case law permitting a finding that, in certain circumstances, a CIMT can be committed through mere recklessness; and what happens when the alien bears the burden of proof regarding a past conviction, and the conviction record does not reveal whether the conviction qualifies under the categorical approach as a CIMT (or other disqualification for immigration relief). I will address these questions, and examine the implications of *Gomez-Perez* more broadly, after explaining the recent jurisprudence and its legal background.

TABLE OF CONTENTS

I. Background: the categorical approach 4

A. The categorical approach as established by the Supreme Court 7

B. The modified categorical approach 11

II. The Fifth Circuit's application of the categorical approach to § 22.01(a), and the Supreme Court cases that have made it change course 13

A. The Fifth Circuit's 2012 opinion in *Esparza-Rodriguez* 13

B. The Supreme Court's 2013 opinion in *Descamps* 18

C. The Supreme Court's 2016 opinion in *Mathis* 20

D. The Fifth Circuit's 2016 opinion in *Gomez-Perez* 24

III. Assessing the implications of *Gomez-Perez* 27

A. Whether a reckless assault can be a CIMT post-*Gomez-Perez* 28

B. What to do when the record is inadequate 32

C. The role of facts post *Gomez-Perez* 45

IV. Conclusion: How *Gomez-Perez* will affect the landscape of CIMT cases 55

I. Background: the categorical approach

The Immigration and Nationality Act (INA) contains a number of provisions that render a non-citizen who has been convicted of certain kinds of crimes inadmissible, removable, or ineligible for relief from removability.[4] Of particular interest in this paper is the class of crimes described in the INA as crimes involving moral turpitude (CIMTs) — a term of art not defined in the INA, but interpreted by the Board of Immigration Appeals (BIA) as:

> 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.[5]

The method by which it is determined whether a particular criminal conviction is for a CIMT is the *categorical approach*, which focuses

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[4] *See, e.g.* 8 U.S.C. § 1227(a)(2)(A) (stating that an alien, even if a lawful permanent resident, is subject to removal if he or she has been convicted of an aggravated felony, a crime relating to a controlled substance, a crime of domestic violence, or a crime involving moral turpitude, subject to a few exceptions); 8 U.S.C. § 1182(a)(2)(A)(i) (rendering an alien inadmissible for having been convicted of, having committed, or having engaged in the essential elements of a crime of moral turpitude or a crime relating to a controlled substance).

[5] *Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir. 1996) (citations omitted).

exclusively on the nature of the crime of conviction rather than the underlying facts in a particular case.[6]

The Supreme Court has informed us (within the context of criminal sentencing enhancements,[7] which are governed by the same analysis[8]) that applying a categorical approach, rather than a fact-based inquiry, serves several interests. The categorical approach carries out Congress's intent that it be the *conviction*, not the underlying acts leading to the conviction, which determines the defendant's fate. It does not undercut a plea bargain by bypassing the crime pleaded to and looking anew at the activity that gave rise to the criminal charge. And it spares the courts the burden of re-litigating the case, an activity that, in addition to being time-consuming and costly, could be significantly compromised by the vagaries of past records.[9]

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[6] *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (BIA 2008) ("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*. In accordance with this longstanding body of circuit precedent, we have from our earliest days espoused the same principle, resulting in an analytical approach that is essentially identical to the 'categorical approach' adopted by the Supreme Court in both the sentencing and immigration contexts.").

[7] Specifically, enhancements under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), for defendants with three prior convictions for a violent felony or serious drug offense, or both, are analyzed using the categorical approach.

[8] *See, e.g., Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-87 (2007) (applying ACCA precedent to an immigration case).

[9] *Taylor v. United States*, 495 U.S. 575, 589-90, 600-02 (1990).

Courts have applied the categorical approach for over a century, in both criminal and immigration contexts. The resulting case law is rich and occasionally contradictory. Exceptions abound. Still, there are consistent threads that run through these court opinions, originating with two seminal criminal cases, *Taylor v. United States* and *Shepard v. United States*.[10]

In summarizing the essential holdings of these two cases, I will refrain from delving too deeply into their facts or even their context (a sentencing enhancement for armed career criminals[11]) as that ground has been well covered elsewhere. But I do need to establish a few nomenclature conventions to clarify the discussion.

The *crime of conviction* is the prior conviction that may bring adverse criminal or immigration consequences, such as a sentence enhancement, removal from the United States, or denial of relief from removal. It is also referred to as the *predicate conviction*, and it is often, but not always, a state conviction.

The *generic crime* is the crime named in the federal criminal or immigration statute which imposes the adverse criminal or immigration consequence on the party. For a sentencing enhancement, the generic crime is usually either a "violent felony" or a "serious drug offense," each of which is

[10] *Taylor*, 495 U.S. 575*; Shepard v. United States*, 544 U.S. 13 (2005).
[11] *See* footnote 8.

further described in the federal statute as including certain more specifically named crimes, such as "burglary." In immigration law, the three main categories of generic crimes are aggravated felonies, serious drug offenses, and CIMTs. In this paper, I focus on the immigration law's generic CIMT.

1. The categorical approach as established by the Supreme Court

It was in *Taylor* that the Supreme Court first held that Congress intended that the federal criminal sentence-enhancement statute, nicknamed the ACCA, incorporate the "generic, contemporary meaning" of its terms, not state-by-state definitions.[12] By applying the generic meaning, the Court decoupled the defendant's sentencing enhancement from the various ways in which the same terms can be differently used by state legislatures. Without such a rule, under the federal sentence enhancement for "burglary," a defendant convicted in one state could receive an enhancement for shoplifting because that state's "burglary" statute encompasses shoplifting, while a defendant convicted in another state might not face an enhancement at all because that state does not have a "burglary" statute, punishing "breaking and entering" instead.

Taylor held that, to determine if a federal sentence enhancement under ACCA applies to a defendant, the sentencing court must compare the

[12] *Taylor*, 495 U.S. at 598.

defendant's crime of conviction to ACCA's generic crime. This analysis ordinarily results in one of three possible outcomes:

1. The crime of conviction does not match the generic crime at all. Thus the enhancement cannot be applied. For example, the Fifth Circuit has held that the crime of structuring a financial transaction is not a CIMT, as it is not inherently fraudulent and does not include "an activity that itself appears criminal."[13]
2. The crime of conviction perfectly matches the generic crime. Thus the enhancement always applies. For this to be true, the statute of conviction must be identical to or narrower than the generic crime.[14] For example, the Fifth Circuit has held that "[c]onvictions for making false statements under oath necessarily involve moral turpitude."[15]
3. The crime of conviction matches the generic crime only in part. This can follow from two scenarios: Either the statute can be *overbroad*, criminalizing some conduct that involves moral turpitude and some

[13] *Smalley v. Ashcroft*, 354 F.3d 332, 338 (5th Cir. 2003).

[14] *Taylor*, 495 U.S. at 599 ("If the state statute is narrower than the generic view, *e.g.*, in cases of burglary convictions in common-law States or convictions of first-degree or aggravated burglary, there is no problem, because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary. And if the defendant was convicted of burglary in a State where the generic definition has been adopted, with minor variations in terminology, then the trial court need find only that the state statute corresponds in substance to the generic meaning of burglary.") (internal citations omitted).

[15] *Amouzadeh v. Winfrey*, 467 F.3d 451, 457 (5th Cir. 2006).

that does not, or the statute can identify multiple *separate* crimes, some of which involve moral turpitude and some of which do not.

It is the third case—the mixed case—that causes the most difficulty.

Take as an example of an overbroad statute an assault crime of "causing serious physical injury with a dangerous instrument."[16] Does such a conviction qualify for the sentence enhancement, which extends to crimes "involving the use or carrying of a firearm, knife, or destructive device"?[17] The answer is *no*. Federal statute makes clear that a "destructive device" does not include "any device which is neither designed nor redesigned for use as a weapon."[18] The definition of a "dangerous instrument" under the crime of conviction encompasses items that are not firearms, knives, or destructive devices, such as a curling iron,[19] a frozen leg of lamb,[20] or even wadded-up paper towels.[21] Since the crime of conviction encompasses behavior that falls

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[16] *See., e.g.*, New York Penal Law § 120.10(1) ("A person is guilty of assault in the first degree when, with intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument.").

[17] 18 U.S.C. § 924(e)(2)(B).

[18] 18 U.S.C. § 921(a)(4).

[19] *See, g.e.* http://www.cbsnews.com/news/alexandra-kogut-murder-ny-man-admits-he-snapped-beat-girlfriend-with-curling-iron-police-say/.

[20] Roald Dahl, "Lamb to the Slaugter." *Harper's Magazine*, Sept. 1953. (*See* https://en.wikipedia.org/wiki/Lamb_to_the_Slaughter.)

[21] *See, e.g., People v. Owusu,* 93 N.Y.2d 398 (N.Y. Ct. App. 1999) (describing items held to be dangerous instruments as including a sidewalk against which the victim's head was smashed, wadded-up paper towels stuffed in the victim's mouth, and a belt wrapped around the assailant's fist).

outside the bounds of the generic crime (in other words, it is *broader* than the generic crime), the sentence enhancement cannot apply.[22]

Note that, in this example, it is possible that the crime of conviction could *in fact* have fallen within the generic definition—the defendant could have used a firearm—but *Taylor* emphasized that the court could not peer into the defendant's record to determine what "dangerous instrument" he actually used.[23] Instead, the court must assume that the defendant was convicted of the least of the crimes prohibited by the statute, even if it is readily apparent from his record of conviction that this was not true.[24] Since the least of the crimes does not come within the sentence enhancement, then the enhancement cannot be applied, no matter what the actual facts were. Thus, logic would tell you, two defendants convicted under the same state statute—one who had caused bodily injury with a leg of lamb and another who had caused bodily injury with a firearm—would both be spared the

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[22] *See Taylor v. United States*, 495 U.S. 575, 599 (1990) ("A few States' burglary statutes, however, as has been noted above, define burglary more broadly….").

[23] *Taylor*, 495 U.S. at 599 ("The Courts of Appeals uniformly have held that § 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions. We find the reasoning of these cases persuasive.") (internal citations omitted).

[24] *Johnson v. United States*, 559 U.S. 133, 137 (2010) ("nothing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts") (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005) (plurality opinion)). The circumstances in which a court *is* allowed to examine the record of conviction are explained in the next section.

sentence enhancement, maintaining consistency of sentencing for those convicted under the same statute.

2. The modified categorical approach

So far so good, but the picture becomes more complicated as the statutes do. Much of the trouble applying the categorical approach comes in with the second scenario of the mixed case, in which the statute proscribes multiple separate crimes, some of which involve moral turpitude and some of which do not.[25] It is common for both state and federal statutes to criminalize several alternative behaviors, phrased in the disjunctive. For example, the Texas assault statute criminalizes "intentionally, knowingly, or recklessly caus[ing] bodily injury to another . . . or . . . intentionally or knowingly caus[ing] physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative."[26] If a court is trying to determine whether a defendant convicted under this statute qualifies for a sentencing enhancement that applies to convictions for causing bodily injury, but not for mere offensive contact, the fact that the statute sets out two alternative sets of elements—in

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[25] *Taylor*, 495 U.S. at 602 ("This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary. For example, in a State whose burglary statutes include entry of an automobile as well as a building….").

[26] Texas Penal Code § 22.01(a)(1), (a)(3).

effect, creates two separate crimes—is crucial, for it renders the statute *divisible*, meaning that each subsection may be examined by the court as if it were a separate statute. Thus, even though § 22.01 as a whole is overbroad, a conviction for § 22.01(a)(1), which requires bodily injury, could (all other things being equal) qualify for the sentence enhancement, while § 22.01(a)(3), which describes offensive physical conduct, clearly would not.[27]

But what if it is not clear which portion of the statute applies to the conviction? Here, *Taylor* instructs that the court may peer into the defendant's record of conviction, but *only* for the purpose of determining which of the sub-sections he was convicted under.[28] The emphasis remains on whether the statute itself is a categorical match, not whether the facts of the defendant's crime are.

Taylor and *Shepard* identified which parts of the defendant's record of conviction could be consulted. Court records such as the indictment, a plea colloquy, or jury instructions are permissible, but not police reports or similar non-judicial records.[29] *Shepard* also reemphasized that the purpose of peeking into the defendant's record is *only* to narrow down which subsection

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[27] *Taylor*, 495 U.S. at 602; *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); *Shepard*, 544 U.S. at 25-26.

[28] *Taylor*, 495 U.S. at 602.

[29] *Shepard*, 544 U.S. at 26 (limiting consultation to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.").

of a divisible statute the defendant was convicted of violating. If that subsection is fully encompassed by the generic crime, the enhancement applies.[30] This method is called the *modified categorical approach*, and it has caused significant confusion in the lower courts.

II. The Fifth Circuit's application of the categorical approach to § 22.01(a), and the Supreme Court cases that have made it change course

A. The Fifth Circuit's 2012 opinion in *Esparza-Rodriguez*

In *Esparza-Rodriguez v. Holder*, the Fifth Circuit upheld the BIA's conclusion that a Class A misdemeanor assault conviction under Texas Penal Code § 22.01(a)(1) constituted a crime involving moral turpitude under the Immigration and Nationality Act.[31] In so doing, the Fifth Circuit misapplied the modified categorical approach, eliding a necessary part of the divisibility analysis and focusing improperly on the facts rather than the elements of the crime of conviction.

Mr. Esparza-Rodriguez was placed into removal proceedings on the grounds that his assault conviction under § 22.01 constituted a CIMT. The Immigration Judge (IJ) found him removable, and also denied his application for cancellation of removal, a form of relief from removal that is not available

[30] *Id*. at 22-23.
[31] *Esparza-Rodriguez v. Holder*, 699 F.3d 821 (5th Cir. 2012).

for aliens who have been convicted of a CIMT.[32] The BIA affirmed, and Mr. Esparza-Rodriguez appealed to the Fifth Circuit.

The court began its analysis by noting that it must apply *Chevron* deference to the BIA's definition of CIMTs (quoted in Section I), which is an uncontroversial holding of long standing.[33] The court also applied *Chevron* deference to the BIA's interpretation of "the general categories of offenses which constitute CIMTs."[34]

The BIA had previously noted that the term "assault" captures "a broad spectrum of misconduct, ranging from relatively minor offenses, *e.g*., simple assault, to serious offenses, *e.g*. assault with a deadly weapon."[35] Because of this range of seriousness, the BIA found that "determining whether an assault statute is a CIMT requires 'an assessment of both the state of mind and the level of harm required to complete the offense.'"[36] Offenses characterized as "simple assaults" are generally not considered to be crimes involving moral turpitude.[37] "This is so because they require general intent

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[32] 8 U.S.C. § 1229b(b)(1)(C) (providing that cancellation of removal is available for an alien who "has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) [8 USCS § 1182(a)(2), 1227(a)(2), or 1227(a)(3)]"); 8 U.S.C. § 1182(a)(2)(A)(i) (describing crimes of moral turpitude).

[33] *Esparza-Rodriguez*, 699 F.3d at 823.

[34] *Id*.

[35] *Matter of Fualaau*, 21 I. & N. Dec. 475, 477 (BIA 1996).

[36] *Esparza-Rodriguez*, 699 F.3d at 824 (quoting *Matter of Solon*, 24 I. & N. Dec. 239, 242 (BIA 2007)).

[37] *Matter of Solon*, 24 I. & N. Dec. at 241 (citing *Matter of Perez-Contreras*, 20 I. & N. Dec. 615 (BIA 1992), *Matter of Short*, 20 I. & N. Dec. 136, 139 (BIA 1989)).

only and may be committed without the evil intent, depraved or vicious motive, or corrupt mind associated with moral turpitude."[38] Black's Law Dictionary defines "general intent" as "[t]he state of mind required for the commission of certain common-law crimes not requiring specific intent or not imposing strict liability," and explains that it usually "takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)."[39] In addition, "Many simple assault statutes prohibit a wide range of conduct or harm, including de minimis conduct or harm, such as offensive or provocative physical contact or insults, which is not ordinarily considered to be inherently vile, depraved, or morally reprehensible."[40] The Fifth Circuit concluded from this that, to constitute a CIMT, the assault statute must (1) establish a scienter of specific intent, *i.e*. knowledge or intent; and (2) require "a meaningful level of harm" going beyond "mere offensive touching."[41]

The Fifth Circuit then applied this law to the crime of conviction, § 22.01(a).[42] The court found that the Texas statute was divisible, since it

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[38] *Matter of Solon*, 24 I. & N. Dec. at 241 (citing *Matter of J—,* 4 I. & N. Dec. 512, 514 (BIA 1951); *Matter of J—,* 4 I. & N. Dec. 26, 27 (BIA 1950); *Matter of O—,* 3 I. & N. Dec. 193, 194-95 (BIA 1948)).

[39] BLACK'S LAW DICTIONARY 813 (7th Ed. 1999).

[40] *Matter of Solon*, 24 I. & N. Dec. at 241.

[41] *Esparza-Rodriguez*, 699 F.3d at 824 (quoting *Matter of Solon*, 24 I. & N. Dec. at 241-42).

[42] Note that the *Chevron* deference ends here. "We give *Chevron* deference to the BIA's interpretation of the term 'moral turpitude' and its guidance on the

contained "multiple subsections or an element phrased in the disjunctive, such that some violations of the statute would involve moral turpitude and others not."[43] In particular, the Fifth Circuit observed that § 22.01(a)(3) criminalizes offensive or provocative physical contact, which falls outside the BIA's requirement that the act must result in a meaningful level of harm beyond mere offensive touching. The court therefore held that it was appropriate to apply the modified categorical approach, reviewing "the record of conviction to determine under which subsection the alien was convicted and which elements formed the basis for the conviction."[44] Notably, the court did *not* assess whether the three subsections of § 22.01(a) were themselves divisible.

The indictment from Mr. Esparza-Rodriguez's record of conviction charged him with "intentionally or knowingly caus[ing] bodily injury to the victim…." The court noticed the similarity of this language to § 22.01(a)(1)—"intentionally, knowingly, or recklessly causes bodily injury to another." Furthermore, the judgment and sentence showed that Mr. Esparza-Rodriguez's conviction was a Class A misdemeanor, and § 22.01(a)(1) is the

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general categories of offenses which constitute CIMTs, but we review *de novo* the BIA's determination of whether a particular state or federal crime qualifies as a CIMT." *Esparza-Rodriguez*, 699 F.3d at 823-24 (citing *Smalley v. Ashcroft*, 354 F.3d 332, 335-36 (5th Cir. 2003)).

[43] *Esparza-Rodriguez*, 699 F.3d at 825.

[44] *Id.* (footnote omitted).

only subsection of the statute that gives rise to a Class A misdemeanor charge without aggravating circumstances. Therefore, the court concluded that the predicate conviction must have been under that subsection.[45]

The court then "review[ed] the BIA's conclusion that this subsection is a CIMT."[46] It had already observed that Mr. Esparza-Rodriguez had pleaded guilty to "an intentional or knowing assault, and an assault which, statutorily, did cause bodily injury beyond an offensive touching—indeed, did cause pain, illness or impairment," and on this basis approved the BIA's finding that the record of conviction "shows that his offense was committed with the requisite level of scienter … and involved conduct that is 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons and to society in general.'"[47] Note the court's ingenious (some may say sly) switch here to describing his *actual* conviction—the scienter involved in *his* crime—and away from the scienter set out in the statutory provision, which included recklessness.

Finally, the Fifth Circuit concluded, "Even if we were to question the wisdom of the BIA's considered determination that an assault with intent to cause more than *de minimus* injury is a CIMT, 'our inquiry here centers on the reasonableness of the BIA's conception of the term "moral turpitude," an

[45] *Id.* at 825-26.
[46] *Id.* at 826.
[47] *Id.*

inquiry that is necessarily and unavoidably constrained by the principles of *Chevron* deference.'"[48] It therefore affirmed the BIA's decision as reasonable.

B. The Supreme Court's 2013 opinion in *Descamps*

Eight months after *Esparza-Rodriguez* was published, the Supreme Court issued its opinion in *Descamps v. United States,* in which it unequivocally declared that certain lower courts were misapplying its *Taylor-Shepard* holdings regarding the modified categorical approach.[49]

Descamps, which arose from the Ninth Circuit, concerned a defendant with a state burglary conviction. The question before the Supreme Court was whether the California state conviction matched the generic "burglary" definition, which would allow a federal sentence enhancement to apply. In *Taylor* and *Shepard*, the Court had held that one of the elements of the generic definition of burglary is unlawful entry, or breaking and entering. Mr. Descamps argued that his conviction did not qualify for a sentencing enhancement because the California statute of conviction did not contain an element of unlawful entry, meaning that it would cover shoplifting by someone who had lawfully entered a store during normal business hours.

The case hinged on the concept of "divisibility." The California statute of conviction did not have discrete subsections that laid out alternate

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[48] *Id.* (quoting *Mustafaj v. Holder*, 369 F. App'x 163, 169 (2d Cir. 2010) (unpublished) (summary order)).

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

methods of committing a crime. Nevertheless, the District Court determined that the modified categorical approach permitted the court to examine certain documents (those identified in *Shepard*) to discover whether Descamps had *in fact* admitted to the elements of a generic burglary when he entered his guilty plea. Because the record of conviction showed Mr. Descamps had pleaded guilty to breaking and entering into a grocery store (and not shoplifting), the judge held that he qualified for the sentencing enhancement. The Ninth Circuit affirmed, reasoning (astonishingly) that when a sentencing court considers a conviction under *any statute that is categorically broader than the generic offense*, it may scrutinize certain documents to determine the factual basis of the conviction.[50]

The Supreme Court said, quite sharply, *no it may not*. Relying on its opinions in *Taylor* and *Shepard*, the Court declared, "the modified approach serves a limited function: It helps effectuate the categorical approach when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction."[51] The point of the modified approach is not to uncover the facts of the particular crime committed, but to clarify which statutory subsection applied.[52] Since

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[50] *Id.* at 2282-83.

[51] *Id.* at 2283.

[52] *Id.* at 2285 ("That is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the crime of

the state law before the Ninth Circuit did not define burglary with multiple alternative elements, it was not divisible, meaning that the modified approach "has no role to play."[53]

The Supreme Court pointed out, "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," since 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."[54] This holding was grounded in the Sixth Amendment's guarantee of a jury trial, and avoids, as the Court explained, having sentencing courts make findings of fact that properly belong to juries.[55]

C. The Supreme Court's 2016 opinion in *Mathis*

The categorical approach still proved problematic, however, particularly in its application to statutes containing disjunctive lists of weapons, locations, and other aspects of a crime. Are all such statutes divisible, allowing examination of the record of conviction under the modified

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conviction so that the court can compare it to the generic offense.").

[53] *Id.*

[54] *Id.* at 2290 (citations omitted).

[55] *Id.* at 2287.

categorical approach, or is some of that verbiage simply extraneous description? The Supreme Court shed light on this point in a 2016 case, *Mathis v. United States*.[56]

Mathis addressed whether an Iowa burglary conviction qualified as a predicate crime for ACCA. The Iowa statute proscribed unlawful entry into not just the "building or other structure" encompassed by the generic crime of burlary, but "any building, structure, [or] land, water, or air vehicle."[57]

A simple application of the structural analysis described by *Descamps* and applied by *Esparza-Rodriguez* would suggest that this list, phrased as it is in the disjunctive, renders the statute divisible, such that courts could apply the modified categorical approach. Not so. Relying on Iowa case law, the Court announced:

> [T]hose listed locations are not alternative elements, going toward the creation of separate crimes. To the contrary, … [e]ach of the terms serves as an "alternative method of committing [the] single crime" of burglary, so that a jury need not agree on which of the locations was actually involved. In short, the statute defines one crime, with one set of elements, broader than generic burglary—while specifying multiple means of fulfilling its locational element, some but not all of which (*i.e.*, buildings and other structures, but not vehicles) satisfy the generic definition.[58]

The multiple "means" could have no bearing on the analysis, for they refer to specific *facts* of commission, which need not be charged, and do not

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[56] *Mathis v. United States*, 579 U.S. ___, ___ (2016) (slip op., at 5).
[57] *Id.* (quoting Iowa Code § 702.12 (2013)) (alteration in the original).
[58] *Id.* at 6.

require a unanimous finding by the jury, or admission by the defendant. On the other hand, if the alternative locations had constituted different *elements*, then the district court and the Eighth Circuit would have been correct to consult the defendant's criminal record and discover that he was actually convicted of burglarizing structures, rather than vehicles or land or water or airplanes.

The Eighth Circuit had held that the elements-means analysis was ultimately irrelevant:

> "Whether [such locations] amount to alternative elements or merely alternative means to fulfilling an element," the Eighth Circuit held, a sentencing court "must apply the modified categorical approach" and inspect the records of prior cases. If the court found from those materials that the defendant had *in fact* committed the offense in a way that satisfied the definition of generic burglary—here, by burgling a structure rather than a vehicle—then the court should treat the conviction as an ACCA predicate.[59]

In effect, this transformed "ACCA's usual elements-based inquiry" into "a facts-based one."[60]

The Supreme Court said that this was dead wrong. The categorical approach "treats such facts [*i.e.*, the means of committing the crime] as irrelevant: Find them or not, by examining the record or anything else, a court still may not use them to enhance a sentence."[61] A court may not

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[59] *Id*. at 6-7 (quoting 786 F. 3d 1068,1074-75 (2015)) (emphasis added).
[60] *Id*.
[61] *Id*. at 12.

"repurpose[]" the modified categorical approach "as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that also could have satisfied the elements of a generic offense."[62]

In a footnote, the Court illustrated the importance of consulting the statute rather than factual allegations by referring to the immigration consequences of the very statute at issue in this article. The Court remarked:

> To see the point most clearly, consider an example arising in the immigration context: A defendant charged under a statute that criminalizes "intentionally, knowingly, or recklessly" assaulting another—as exists in many States, see, *e.g.*, Tex. Penal Code Ann. §22.01(a)(1)—has no apparent reason to dispute a prosecutor's statement that he committed the crime intentionally (as opposed to recklessly) if those mental states are interchangeable means of satisfying a single *mens rea* element. But such a statement, if treated as reliable, could make a huge difference in a deportation proceeding years in the future, because an intentional assault (unlike a reckless one) qualifies as a "crime involving moral turpitude," and so requires removal from the country. *See In re Gomez-Perez*, No. A200–958–511, p. 2 (BIA 2014).[63]

A defendant might not want to aggravate the prosecutor by contesting an allegation, such as scienter, that had no bearing on the criminal case—or he might even be prevented from doing so by the judge, on relevancy grounds. As a result, the record of conviction might well contain a number of "facts"

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[62] *Id*.
[63] *Id*. at 11 n.3.

that are dead wrong. But their impact could be immense if later used to exile the alien defendant from the country.

The upshot of all this is that if a statute lists potential alternatives, some of which fit a generic description of a crime and some of which do not, the court must determine whether the alternatives are elements or means. If elements, then the court can apply the modified categorical approach and ascertain which apply to the charges against the defendant. If means, then the statute is overbroad and the penalty cannot apply.[64]

D. The Fifth Circuit's 2016 opinion in *Gomez-Perez*

Just two weeks after *Mathis* came down, the Fifth Circuit decided *Gomez-Perez v. Lynch*, completely repudiating *Esparza-Rodriguez* based on the new guidance provided by the Supreme Court.[65]

Mr. Gomez-Perez, after being placed into removal proceedings because of his lack of status, applied for relief in the form of cancellation of removal. The IJ found him not eligible based on an old conviction for misdemeanor assault under § 22.01(a)(1). Recall that cancellation of removal is not available for aliens who have been "convicted of … a crime involving moral

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[64] *Id*. at 16; *see also id.* at 7 ("[T]he elements of Mathis's crime of conviction (Iowa burglary) cover a greater swath of conduct than the elements of the relevant ACCA offense (generic burglary). Under our precedents, that undisputed disparity resolves this case.") (citation omitted).

[65] *Gomez-Perez v. Lynch*, No. 14-60808, 2016 U.S. App. LEXIS 12751 (5th Cir. Jul. 11, 2016).

turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime."[66] The IJ determined that the assault was "a turpitudinous crime," and the BIA affirmed.[67]

The BIA apparently accepted that if the assault had been committed recklessly, it could not constitute a CIMT.[68] However, it reasoned that § 22.01(a)(1) was divisible, permitting it to examine the record of conviction under the modified categorical approach to identify the level of scienter in Mr. Gomez-Perez's conviction. Unfortunately, Mr. Gomez-Perez's criminal record, unlike Esparza-Rodriguez's, was inconclusive as to the particulars of his conviction. The Board held that because Mr. Gomez-Perez carried the ultimate burden of showing eligibility for cancellation, he bore the burden "to establish that his offense involved the lesser conduct that would not meet the disqualifying classification"—in other words, that he had been convicted of

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[66] 8 U.S.C. § 1229b(b)(1)(C) (providing that cancellation of removal is available for an alien who "has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3)"); 8 U.S.C. § 1182(a)(2)(A)(i) (describing a CIMT).

[67] *Gomez-Perez*, 2016 U.S. App. LEXIS 12751, at *3.

[68] *Id.* at *3-4 ("Both sides agree that the Texas assault statute viewed as a whole does not qualify as a crime involving moral turpitude because it applies to acts that are not intentional. *See Esparza-Rodriguez v. Holder*, 699 F.3d 821, 824-25 (5th Cir. 2012) (citing *In Re Solon*, 24 I. & N. Dec. 239, 241-42 (BIA 2007)) (recognizing that the Board requires an intentional act for a conviction to ordinarily qualify as a crime of moral turpitude, and holding that the Texas assault statute is not so limited).").

acting recklessly rather than with intent or knowledge.[69] Because he could not do that, it assumed that he was found guilty of a CIMT.

The Fifth Circuit reversed on the divisibility question, relying on *Mathis*. It appeared to take as a given the question that *Esparza-Rodriguez* bypassed: notably, whether to apply the divisibility analysis to § 22.01(a)(1) itself, and not just to § 22.01(a) as a whole. The subsection sets out three possible mental states for commission of the crime: intent, knowledge, and recklessness. *Gomez-Perez* assessed the nature of this list under *Mathis*'s means v. elements test. Consulting Texas case law, *Gomez-Perez* concluded that "the three culpable mental states in section 22.01(a)(1) are 'conceptually equivalent' means of satisfying the intent element, so jury unanimity as to a particular one is not required."[70] This confirmed *Mathis*'s footnote discussion of the Texas statute:

> Indeed, *Mathis* recognized this feature of the Texas assault statute in identifying the Board's decision in Gomez's case as one that turned on the means versus elements distinction. *Mathis*, 2016 WL 3434400, at *8 n.3 (discussing this very case and recognizing that simple reckless assault does not qualify as a crime involving moral turpitude).[71]

As a result, the Fifth Circuit determined that *Mathis* had held "that a statute like Texas's assault offense that merely offers alternative means of

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[69] *Gomez-Perez*, 2016 U.S. App. LEXIS 12751, at *4.

[70] *Id.* at *8 (citing *Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008)).

[71] *Id.* at *9.

committing an offense does not allow application of the modified categorical approach."[72]

Without the modified categorical approach, the court could not consult record documents to ascertain which of the mental states was actually involved. Since the Fifth Circuit agreed with the apparently uncontested point that recklessness was not enough to qualify as a CIMT, the statute was overbroad, and consequently could not support a finding of a CIMT.[73]

III. Assessing the implications of *Gomez-Perez*

Gomez-Perez, I believe, has changed the landscape of CIMTs, recognizing that *Esparza-Rodriguez* could not survive *Mathis* and dramatically curtailing the extent to which the actual facts of a crime could be considered. It did leave a couple of questions unanswered, however. The first is whether it overruled the BIA case law finding that a recklessly committed assault can sometimes qualify as a CIMT. The second concerns the consequences of an insufficient record on an alien's request for relief from removal.

[72] *Id*. at *10.
[73] *Id*.

A. Whether a reckless assault can be a CIMT after *Gomez-Perez*

Mathis, *Gomez-Perez* and *Esparza-Rodriguez* together may have created a loose end concerning the degree of intent required to render an assault conviction a CIMT. These cases appear to assume that a reckless assault can never be a CIMT, but this contradicts well established BIA case law.

While the state of the law may not have been perfectly consistent pre-*Esparza-Rodriguez*,[74] in general, BIA case law assumed that the degree of scienter and the level of injury worked in a complementary fashion: the more of one, the less a showing of the other was required. Thus, while recklessness might be insufficient to make an ordinary simple assault a CIMT, recklessness combined with serious injury or other aggravating factors could.

For instance, in *Matter of Fualaau*, the BIA held that assault could qualify as a CIMT even if committed recklessly, if the offense "involve[ed] the infliction of serious bodily injury."[75] Eleven years later, in *Matter of Solon*,

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[74] *Esparza-Rodriguez v. Holder*, 699 F.3d 821, 824 n.6 (5th Cir. 2012) (noting inconsistency in the published opinions).

[75] *Matter of Fualaau*, 21 I. & N. Dec. 475, 478 (BIA 1996). *See also Matter of Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976) (the "presence or absence of a corrupt or vicious mind is not controlling," meaning that a defendant may have committed a CIMT by criminally reckless behavior), *aff'd sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977); *Matter of Torres-Varela*, 23 I. & N. Dec. 78, 83 (BIA 2001)) ("Furthermore, although crimes involving moral turpitude often involve an evil intent, such a specific intent is not a prerequisite to finding that a crime involves moral turpitude."). By contrast, a simple assault with no aggravating

the BIA explained, "neither the offender's state of mind nor the resulting level of harm, alone, is determinative of moral turpitude."[76] The analysis may be conceived of as a sliding scale.

> Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, *i.e.*, from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.[77]

Both *Esparza-Rodriguez* and *Gomez-Perez* cited this law, but their treatment of the issue actually muddied the water. *Gomez-Perez* hastily cited both *Esparza-Rodriguez* and *Matter of Solon* for the proposition "that the Board requires an intentional act for a conviction to ordinarily qualify as a crime of moral turpitude…."[78] Apparently the government had conceded this fact, because the court remarked, "Both sides agree that the Texas assault statute viewed as a whole does not qualify as a crime involving moral turpitude because it applies to acts that are not intentional."[79]

Esparza-Rodriguez summarized the state of the law thus:

> To rise to the level of a CIMT, the BIA has held that an assault statute must have at least two characteristics. First, the scienter

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factors would not be sufficient for a CIMT, if the scienter was recklessness. *Matter of Fualaau*, 21 I. & N. Dec. at 478.

[76] *Matter of Solon*, 24 I. & N. Dec. 239, 241 (BIA 2007).

[77] *Id.* at 242.

[78] *Gomez-Perez*, 2016 U.S. App. LEXIS 12751, at *3-4.

[79] *Id.* at *3.

> element must require specific intent, or, put another way, the *actus reus* must be accompanied by "the evil intent, depraved or vicious motive, or corrupt mind associated with moral turpitude." Second, the assault statute must require "a meaningful level of harm, which must be more than mere offensive touching." Several courts, but not all, and the BIA, but not always, require also an aggravating element indicative of the inherent vileness of the prohibited conduct.[80]

Mathis also waded into this water, stating in a footnote that a recklessly committed assault could not qualify as a CIMT.[81]

The breadth of this language seems to contradict the BIA's holdings in *Matter of Fualaau* and *Matter of Solon*, among other cases, that an assault committed recklessly *can* be a CIMT, in the presence of an aggravating factor.[82] On the other hand, it is probably correct that a reckless assault under § 22.01(a)(1) does not meet the BIA's threshold for a CIMT, since that portion of the statute requires only "bodily injury," not "serious bodily

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[80] *Esparza-Rodriguez*, 699 F.3d 821, 824 (5th Cir. 2012) (quoting *Matter of Solon*, 24 I. & N. Dec. at 242) (footnote omitted).

[81] *Mathis v. United States*, 579 U.S. ___, ___ (2016) (slip op., at 11 n.3).

[82] *Matter of Solon*, 24 I. & N. Dec. at 240 ("Moral turpitude may also inhere in criminally reckless conduct, *i.e.*, conduct that reflects a conscious disregard for a substantial and unjustifiable risk."); *Matter of Fualaau*, 21 I. & N. Dec. 475, 478 (BIA 1996) ("Although the Board has issued precedents holding that a conviction involving reckless conduct … may form the basis for a determination that a crime involves moral turpitude, we have never held that a crime involving reckless conduct is per se a crime involving moral turpitude. In order for an assault of the nature at issue in this case to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury.") (citations omitted).

injury,"[83] and sets out no particular aggravating factors, such as "use of a deadly weapon."[84]

So what is the state of the law regarding a statute that contains a reckless scienter but also includes an element of serious bodily injury or other relevant aggravating factors? Say, for example, the Texas aggravated assault statute, which states, *inter alia*, that:

> (a) A person commits an offense if the person commits assault as defined in Section 22.01 and the person:
>
> (1) causes serious bodily injury to another, including the person's spouse; or
>
> (2) uses or exhibits a deadly weapon during the commission of the assault.[85]

Although all three cases contain strong language suggesting that reckless assaults can never be considered CIMTs, all of those pronouncements are actually dicta. *Mathis* was not even an immigration case, and did not concern the Texas assault statute. *Esparza-Rodriguez* did

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[83] "'Bodily injury' is defined under Texas law as 'physical pain, illness, or any impairment of physical condition.' This 'purposefully broad' definition of bodily injury encompasses 'even relatively minor physical contacts so long as they constitute more than mere offensive touching.'" *Esparza-Rodriguez*, 699 F.3d at 824 (quoting Tex. Penal Code Ann. § 1.07(a)(8) and *Morales v. State*, 293 S.W.3d 901, 907 (Tex. Crim. App. 2009).

[84] *Matter of Fualaau*, 21 I. & N. Dec. at 478 (citing *Matter of Medina*, 15 I. & N. Dec. 611 (BIA 1976), *aff'd sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977)).

[85] Tex. Penal Code § 22.02(a). Note, however, that it is not clear under BIA case law whether "exhibiting" a deadly weapon would qualify as a CIMT. *But see Matter of Danesh*, 19 I. & N. Dec. 669, 673 (BIA 1988) (finding § 22.02(a)(2)(A) (an aggravated assault on a peace officer) to be a CIMT).

not engage meaningfully with the question since, having decided that § 22.01(a) as a whole was divisible, it impermissibly consulted the record of conviction, determined that the alien had been charged with knowledge or intent, and thereafter abandoned any discussion of recklessness.[86] The issue was central to the analysis in *Gomez-Perez*, but in that case, the issue was not contested (and, as explained above, probably could not have been, given the wording of § 22.01(a)(1)). Given this poor pedigree, I would contend that a properly supported argument by the government could convince the court that an assault statute that requires a unanimous finding of a serious level of harm or another aggravating factor may well constitute a CIMT, even if it may be committed with a reckless state of mind. This is particularly true since *Esparza-Rodriguez* expressly deferred to the BIA as to the "interpretation of the term 'moral turpitude.'"[87]

B. What to do when the record is inadequate

The second question left open by *Gomez-Perez* is what to do when the alien has requested relief from removal, but the record of conviction is ambiguous as to whether a CIMT (or aggravated felony or drug crime) renders the alien ineligible. Remember, the BIA held that, since the petitioner bore the burden of proof in establishing his relief from removal,

[86] *Esparza-Rodriguez*, 699 F.3d at 825-26.
[87] *Id.* at 823.

any ambiguity in the record must be resolved against eligibility—meaning that, if decades-old state criminal records are lost or incomplete, an alien cannot receive relief.[88]

In *Gomez-Perez*, the Fifth Circuit did not reach the issue of whether this was appropriate; because the statute was overbroad, the court could not consult the record at all.[89] But I am afraid the issue is certain to come up in the future.

1. The state of the law constraining the Fifth Circuit

First, it is useful to examine the cases upon which any further Fifth Circuit ruling will be based. The primary Supreme Court opinion grounding this inquiry is *Moncrieffe v. Holder*.[90] The government initiated removal proceedings against Mr. Moncrieffe on the grounds that his prior conviction qualified as an aggravated felony. The statute of conviction, however, encompassed behavior that fell both inside and outside the definition of an

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[88] *Gomez-Perez v. Lynch*, No. 14-60808, 2016 U.S. App. LEXIS 12751, at *4-5 (5th Cir. Jul. 11, 2016) ("Although the indictment and judgment in this case do not tell us whether Gomez's assault conviction involved intentional, knowing, or reckless conduct, the Board concluded that once it is established that the offense of a prior conviction is divisible, then the person seeking cancellation has the burden to establish that his offense involved the lesser conduct that would not meet the disqualifying classification."); *see also Matter of Almanza-Arenas*, 24 I. & N. Dec. 771, 776 (BIA 2009) ("Simply put, we do not believe that a respondent, bound by the requirements of the REAL ID Act, can satisfy his burden of proof by producing the inconclusive portions of a record of conviction….").

[89] *Id.* at *5-6 ("Under *Mathis*, Gomez is correct about his first contention, so we need not reach the burden of proof question.").

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

aggravated felony. Noting 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],'" the Court established a presumption "that the conviction rested upon [nothing] more than the least of th[e] acts criminalized," requiring courts to assess "whether even those acts are encompassed by the generic federal offense."[91] Any uncertainty as to whether a prior conviction qualified under the categorical approach—because the statute of conviction is broader than the generic offense—"means that the conviction did not 'necessarily' involve facts that correspond to" the generic offense (the aggravated felony definition, in *Moncrieffe*) and that therefore, the penalty could not be applied.[92]

Moncrieffe was a removal case, in which the government bore the burden of proof. The Court signaled that its analysis did not turn on this point, however. In a footnote, it justified a citation to *Carachuri-Rosendo v. Holder*,[93] a cancellation of removal case, by explaining that since the statutory language is the same in both contexts, focusing on what the alien was "convicted of,"[94] that the "analysis is the same" as well.[95]

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[91] *Id*. at 1684 (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion) and *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (internal quotation marks omitted) (alterations in the original).

[92] *Moncrieffe*, 133 S. Ct. at 1687.

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

[94] 8 U.S.C. § 1229b(b)(1)(C) ("The Attorney General may cancel removal of ... an alien who is inadmissible or deportable from the United States if the alien ... (C)

The Fifth Circuit has dismissed this statement as dicta, refusing to apply *Moncrieffe* in the context of a request for relief from removal.[96] However, the court has admitted:

> While *Moncrieffe* does not control here, this case does not turn on the examination of the elements of an identified statute of conviction and therefore does not require us to apply the categorical or modified categorical approach. We do not reach whether *Moncrieffe* affected how courts should apply the modified categorical approach to determine whether a prior conviction disqualifies a noncitizen from relief from removal when the record of conviction is ambiguous as to whether the elements of the crime correspond to a disqualifying offense.[97]

Nevertheless, the court has determined that the alien bears "the initial burden of production of evidence" supporting his eligibility for relief from removal.[98] This may mean that he must at least produce copies of his record of conviction, if it is likely to be at issue in the case.

In short, while the Fifth Circuit has not foreclosed a holding that ambiguity of the record, when analyzed under the modified categorical

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has not been *convicted of* an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title.") (emphasis added); 8 U.S.C. § 1227(a)(2)(A)(i) ("Any alien who—(I) is *convicted* of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is *convicted* of a crime for which a sentence of one year or longer may be imposed, is deportable.") (emphasis added).

[95] *Moncrieffe*, 133 S. Ct. at 1685 n.4.

[96] *Le v. Lynch*, 819 F.3d 98, 107 (5th Cir. 2016).

[97] *Id.* at 107 n.5.

[98] *Vasquez-Martinez v. Holder*, 564 F.3d 712, 716 (5th Cir. 2009) (interpreting 8 U.S.C. § 1229a(c)(4)(A)(i) and 8 C.F.R. § 1240.8(d), which both assign the burden of proof to the alien for requests of relief from removal).

approach, should not be held against an alien even when she bears the burden of proof, it seems likely to regard that argument with some skepticism. Turning to other circuits for guidance may prove helpful to future litigants.

2. The state of the law in other circuits

Unfortunately, there is no clear national consensus to this question. The topic, arcane as it may seem, has produced a messy split of precedent between and even within circuits.

The Fourth, Seventh, and Tenth Circuits have held that an alien fails to support her case for relief from removal if the criminal record cannot be shown, under the categorical approach, *not* to be disqualifying.[99] The First and Second Circuits have held the contrary.[100] The Third Circuit initially

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[99] *Sanchez v. Holder*, 757 F.3d 712, 720 n.6 (7th Cir. 2014) ("[W]e, the Fourth, the Ninth, and the Tenth Circuits all agree that if the analysis has run its course and the answer is still unclear, the alien loses by default."); *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011) ("Presentation of an inconclusive record of conviction is insufficient to meet a noncitizen's burden of demonstrating eligibility, because it fails to establish that it is more likely than not that he was not convicted of an aggravated felony."); *Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009) ("The fact that Mr. Marquez is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief. Because it is unclear from his record of conviction whether he committed a CIMT, we conclude he has not proven eligibility for cancellation of removal, temporary protected status, or voluntary departure.").

[100] *Sauceda v. Lynch*, 819 F.3d 526, 528 (1st Cir. 2016); *Martinez v. Mukasey*, 551 F.3d 113, 121 (2d Cir. 2008) ("The very basis of the categorical approach is that the sole ground for determining whether an immigrant was convicted of an aggravated felony is the minimum criminal conduct necessary to sustain a conviction under a given statute. This does not require Martinez to prove how little

joined the second position,[101] but seems to have—equivocally—switched to the first.[102] The Ninth first took the latter position, and then, in a fractured

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marihuana he had or the nature of the transfer, so long as his conviction could have been based on a nonremunerative transfer of a small amount of marihuana. Placing the burden on Martinez, instead, necessarily requires looking into evidence of Martinez's actual conduct, evidence that may never have been seen by the initial convicting court. It was the desire to avoid such particular inquiries—whether designed to show that a specific defendant was less or more culpable than what his actual conviction required—that led us and the Supreme Court to focus on categorical analysis.") (citation omitted).

[101] *Thomas v. AG of the United States*, 625 F.3d 134 (3d Cir. 2010) (reversing the BIA's denial of an alien's application for cancellation of removal since an incomplete criminal record meant that the court could not "conclusively determine" that his conviction fell within the definition of an aggravated felony. "In the absence of judicial records to establish such a finding, we conclude that Thomas's misdemeanor convictions under § 221.40 were not drug trafficking crimes under 8 U.S.C. § 1101(a)(43)(B).").

[102] In *Syblis v. AG of the United States*, 763 F.3d 348, 357 (3d Cir. 2014), the court stated, ringingly, "We now hold that an inconclusive record of conviction does not satisfy a noncitizen's burden of demonstrating eligibility for relief from removal." It justified its departure from *Thomas* by pointing out that its own analysis did not employ the categorical approach, as *Thomas* did, but also took issue with the prior opinion's lack of emphasis on the alien's burden of proof. The case did not address *Moncrieffe*.

Syblis has been cited as establishing the Third Circuit's position in this debate. However, a line of unpublished cases continues to follow *Thomas*. *See Johnson v. AG of the United States*, 605 F. App'x 138, 142 (3d Cir. 2015) (unpublished) (vacating the BIA's denial of a petitioner's asylum claims when the record of conviction failed to clarify whether he had committed a disqualifying offense); *Mattie v. AG of the United States*, 585 F. App'x 821, 823 (3d Cir. 2014) (per curiam) (unpublished) ("The IJ again held that Mattie had the burden of proof to show that possession with intent to deliver was not categorically an aggravated felony, citing with approval *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012), *Salem v. Holder*, 647 F.3d 111, 115 (4th Cir. 2011), and *Garcia v. Holder*, 584 F.3d 1288, 1289-90 (10th Cir. 2009). However, under *Moncrieffe*, Mattie need only show that the least culpable conduct to support a conviction under § 2C:35-5(b)(11) would not qualify as an aggravated felony."); *see also Hernandez v. AG of the United States*, 527 F. App'x 130, 135 (3d Cir. 2013) (per curiam) (unpublished) ("Because we cannot determine whether Johnson's criminal offense qualifies as an aggravated felony and must assume Johnson's conduct was the bare minimum necessary to trigger the statute, the BIA erred in concluding Johnson's conviction was an aggravated

en banc opinion, reversed course and adopted the former.[103] Two years later, a panel held that the en banc opinion had been overruled by the Supreme Court's ruling in *Moncrieffe*, but that decision was vacated after the case was itself reheard en banc.[104] Though the final opinion was decided on different grounds and so did not reach the issue of burden of proof, one of the concurrences warned, "[b]oth the government's argument and our decision in *Young* are fundamentally incompatible with the categorical approach, especially after *Descamps* and *Moncrieffe* clarified the elements-focused nature of the inquiry"—suggesting that the Ninth Circuit may (re)join the First and Second Circuits after all.[105] The issue is certainly on the Court's radar screen.[106]

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felony."). It is therefore unclear which side the Third Circuit really comes down on, particularly as *Syblis* does not address *Moncrieffe*.

[103] *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130 (9th Cir. 2007) ("By submitting an inconclusive record of conviction, Lua has affirmatively proven under the modified categorical analysis that he was not necessarily 'convicted of any aggravated felony.'") (citing 8 U.S.C. § 1229b(a)(3)); *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012) (en banc) (overruling *Sandoval*).

[104] *Almanza-Arenas v. Holder*, 771 F.3d 1184, 1192-94 (9th Cir. 2014), *en banc reh'g granted*, 785 F.3d 366 (May 8, 2015) ("*Moncrieffe* overrules *Young*'s holding that to be eligible for cancellation of removal, an alien must conclusively show that his conviction did not include the elements of the federal disqualifying offense."); *Almanza-Arenas v. Lynch*, 815 F.3d 469, 489 (9th Cir. 2016) (deciding the statute was not divisible and so not reaching the question of burden of proof, which was relevant under the modified categorical approach).

[105] *Almanza-Arenas v. Lynch*, 815 F.3d 469, 489 (9th Cir. 2016) (Watford, J., concurring).

[106] *See, e.g.*, *Rendon v. Holder*, 764 F.3d 1077, 1083 n.6 (9th Cir. 2014) (explaining that it did not reach the issue of "whether *Young* is incompatible with *Moncrieffe*" in another case involving an overbroad statute).

The first position, which I will call the "burden of proof" position, reasons simply that since the alien bears the burden of proof to establish eligibility for relief from removal, he must establish that his convictions do not disqualify him from that relief. If the record is inconclusive, then he cannot satisfy his burden—end of story.

Several judges have pointed out the unfairness of this approach, noting that state records are often partial or incomplete, not to mention at times difficult or expensive to obtain. They admonish that requiring an alien to procure them when the alien might be impecunious, incarcerated, unfamiliar with the legal system, unrepresented, and unable to speak competent English is asking too much, particularly when the government *is* in a position to obtain the records.[107] Rather than incentivize government attorneys to obtain records, however, the "burden of proof" rule creates an invidious situation:

> [T]he government may produce only minimal state court records sufficient to show that a person is removable on some ground other than conviction for an aggravated felony—for example, conviction for a drug crime. The burden then shifts to the legal permanent resident

[107] *Young*, 697 F.3d at 991-92 (Fletcher, J., concurring in part and dissenting in part) ("The decision to remove a lawful permanent resident from this country should not turn on the vagaries of state court record keeping. Even in cases where there exist state court records conclusively showing that a conviction was not for an aggravated felony, applicants may be unable to obtain them for a variety of reasons—for example, because of language barriers, a lack of information about the court system, their detained status, or an inability to pay fees for copies of court records."); *id.* at 998, 1003 (Ikuta, J., concurring in part and dissenting in part) (decrying the "patent unfairness" of the "burden of proof" approach).

> to prove a negative—that he has not been convicted of an aggravated felony. The government can stand by as the lawful permanent resident attempts to produce further records of conviction, which the government may already have or be able to obtain more easily….
>
> My concern…is what will happen in a future case where a transcript or other state court record contains information helpful to a pro se detained immigrant. Suppose a lawful permanent resident pleaded guilty to a charging document alleging that he did A and B, where only B would constitute an aggravated felony. There is a plea transcript that makes clear that the lawful permanent resident pleaded guilty to A but not B. If the government does not produce that transcript, which its attorneys may have no reason to do, how will the lawful permanent resident be able to locate it, or even know that it exists? That lawful permanent resident will be denied the opportunity to even try to show that he merits a favorable exercise of the attorney general's discretion through a grant of cancellation of removal. Congress cannot have intended such an arbitrary result.[108]

The Supreme Court itself has echoed these concerns, noting that "during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention, where they have little ability to collect evidence."[109]

In *Nijhawan*, the Court held that the INA "foresees the use of fundamentally fair procedures, including procedures that give an alien a fair opportunity to dispute a Government claim" regarding the implications of a prior conviction.[110] There, as it was a removal case, everyone agreed that ambiguity would be construed against the government, meaning that "uncertainties caused by the passage of time are likely to count in the alien's

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[108] *Id.* at 991-92 (Fletcher, J., concurring in part and dissenting in part).
[109] *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690-91 (2013).
[110] *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009).

favor."[111] In *Moncrieffe*, the Court advised, "we err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor."[112]

Importantly, most of the "burden of proof" cases cited above predate *Moncrieffe*, and those that come after do not even mention the case. Although the First Circuit may be in the minority (depending on how one counts the Third and Ninth Circuits), I believe that the its opinion, which focuses on *Moncrieffe*, best harmonizes the Supreme Court jurisprudence, and, not incidentally, accommodates some (though not all) of the fairness concerns noted above.

In *Sauceda v. Lynch*,[113] a Honduran national had applied during removal proceedings for cancellation of removal, but his record of conviction did not "definitively show" whether he had been convicted of a "crime of domestic violence" under federal law, which would render him ineligible for relief.[114] The agency "held that because Peralta Sauceda had failed to produce *Shepard* documents showing that his 2006 assault conviction was

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[111] *Id.* at 42.

[112] *Moncrieffe*, 133 S. Ct. at 1693.

[113] *Sauceda v. Lynch*, 819 F.3d 526, 528 (1st Cir. 2016).

[114] 8 U.S.C. §§ 1227(a)(2)(E)(i), 1229b(b)(1)(C). Crimes of domestic violence are a separate disqualifying ground for cancellation of removal. 8 U.S.C. § 1229b(b)(1)(C).

not a 'crime of domestic violence,' he had failed to meet his burden of proving eligibility for cancellation of removal."[115]

The court of appeals reversed, stating:

> In *Moncrieffe*, the Supreme Court established a presumption that dictates the outcome of this case: "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."[116]

Admittedly, *Moncrieffe*'s presumption was not absolute, meaning that examination of the *Shepard* documents could rebut the presumption. In a case like *Sauceda*, however, in which the documents did not answer the question, "the *Moncrieffe* presumption must stand since it cannot be rebutted."[117] This is so because the issue is not what the alien was convicted of as a factual matter, but what was the nature of the conviction as a matter of law.

> We hold that since all the *Shepard* documents have been produced and the modified categorical approach using such documents cannot identify the prong of the divisible Maine statute under which Peralta Sauceda was convicted, the unrebutted *Moncrieffe* presumption applies, and, as a matter of law, Peralta Sauceda was not convicted of a "crime of domestic violence."[118]

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[115] *Sauceda*, 819 F.3d at 530.

[116] *Id.* at 531 (quoting *Moncrieffe*, 133 S. Ct. at 1684) (alterations in the original).

[117] *Sauceda*, 819 F.3d at 531-32.

[118] *Id.* at 532.

The court was not troubled by the fact that the alien bears the burden of proof, since "the categorical approach … answers the purely 'legal question of what a conviction necessarily established.' As a result, the question of the allocation of the burden of proof when the complete record of conviction is present does not come into play."[119]

The First Circuit's approach preserves the categorical approach by not inviting testimony or other evidence outside the record of conviction, protects the alien from suffering on account of the vagaries of state record keeping (particularly when records are decades old), and brings this type of case in line with Supreme Court jurisprudence. Note, however, that the court did "not reach the nettlesome question, posed in our order granting rehearing, of whether and to what extent the government bears a burden of *production* under 8 C.F.R. § 1240.8(d) in the case of a divisible state statute."[120]

3. Projections for the Fifth Circuit

Despite the evident inequity of the parties regarding their ability to obtain court records, I believe that the Fifth Circuit is unlikely to depart from its precedent and place the burden of production on the government. Thus if the alien admits or the government points out that the alien has a prior conviction that may disqualify her from immigration relief, I believe the court

[119] *Id.* at 533-34 (quoting *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015)).
[120] *Id.* at 532 n.8 (emphasis added).

will require the alien to produce as much of the record as necessary (or possible) to ascertain its significance under the categorical or modified categorical method.

If the alien has produced all the relevant records and they are inconclusive, how will the Fifth Circuit take the next step? I believe that it will be strongly tempted to follow the Fourth, Seventh, and Tenth Circuits in simply relying on the alien's "burden of proof" approach to deny relief. However, to my knowledge, no court that has taken the "burden of proof" approach has squarely grappled with the implications of *Moncrieffe*. In a case in which the modified categorical approach clearly applies, if forced by counsel to address that holding, I believe there is a good chance that the Fifth Circuit will join the First Circuit in holding that the Court has foreclosed the contrary view. The Court has rebuked the Fifth Circuit's aggressive stance on immigration before (including in *Moncrieffe*),[121] and the Fifth Circuit's abrupt about-face between *Esparza-Rodriguez* and *Gomez-Perez* suggests that it does not wish to be chastised again. Thus counsel should be ready to argue this issue if it arises.

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[121] *See, e.g*, *Moncrieffe*, 133 S. Ct. at 1688 (chastising 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."); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010) (finding that the Fifth Circuit's interpretation bypassed federal procedure, contravened the statutes' plain language, and was fundamentally inconsistent with the categorical approach itself).

C. The role of facts after *Gomez-Perez*

One important implication of *Gomez-Perez* is the degree to which it reins back the tendency for a focus on facts to sneak into what is supposed to be a categorical analysis. This has happened not only in BIA decisions but in Fifth Circuit case law as well—including, most importantly for this paper, in *Esparza-Rodriguez*.

As explained above, once it turned to the defendant's record of conviction, *Esparza-Rodriguez* began to stray into a consideration of what the defendant actually did, rather than of what crime he was convicted. This is apparent in the fact that the opinion discusses the charging language of knowledge and intent, rather than the statutory mens rea of recklessness; and in the court's description of the actual crime, rather than the pure language of the statute.[122]

Equally important is a footnote that seems to suggest that courts may examine the record of conviction in order to find facts supporting a CIMT. The court remarked:

> [INA] [s]ection 212(a)(2)(A)(i)'s CIMT focus is on "acts which constitute the essential elements of…a crime involving moral turpitude," and to that extent, acts charged and admitted to or

[122] *Esparza-Rodriguez v. Holder*, 699 F.3d 821, 826 (5th Cir. 2012) (deferring to the BIA's conclusion "that Rodriguez's record of conviction shows that *his offense was committed* with the requisite level of scienter…and involved conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons and to society in general.") (internal quotation marks omitted) (emphasis added).

> proven, and in the record of conviction, as delimited by federal law governing the modified categorical approach, might properly be considered when the BIA makes its CIMT determination.[123]

In other words, the record of conviction would be used not just to identify the relevant statutory provision in order to identify elements of the crime of conviction, but also to investigate whether the criminal acts constituted a CIMT.

This, of course, violates the categorical approach, whose emphasis is always on identifying the relevant statutory provision, and then assessing the fit with the generic crime from the statute. Therefore, even if a court only examined *Shepard* documents and only assessed facts "charged and admitted to or proven," it still was focusing on the wrong thing. The modified categorical approach allows attention to facts only insofar as they point to the relevant statute that the court must interpret. Once that provision is identified, the focus returns to the language of the statute itself, not the details of the actual crime.

Focusing on facts seems almost irresistible at times to courts and the BIA alike (the irresistibility nearly always runs in the direction of finding the alien removable and not the other way around!). Despite the century-long history of applying the categorical approach to many immigration provisions in general and to CIMTs in particular—a history that long predates ACCA

[123] *Id.* at 825 n.8.

and its jurisprudence[124]—as recently as 2008 the Attorney General announced that immigration courts could go beyond even the record of conviction and admit extraneous evidence to assess whether an alien committed a CIMT.[125] The Fifth Circuit vacated the AG's opinion, and a later Attorney General followed suit.[126] Yet the urge to focus on facts rather than the statute lives on in both the immigration and criminal contexts, prompting increasingly testy corrections by the Supreme Court.[127]

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[124] *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (BIA 2008) ("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…resulting in an analytical approach that is essentially identical to the 'categorical approach' adopted by the Supreme Court in both the sentencing and immigration contexts."); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669 (2011) (collecting cases).

[125] *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 704 (AG 2008) ("In short, to determine whether an alien's prior conviction triggers application of the Act's moral turpitude provisions, adjudicators should: (1) look first to the statute of conviction under the categorical inquiry…; (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question."). Note that this formulation does not make any reference to divisibility, suggesting that the point of the second step is also to impermissibly troll the record for evidence of a CIMT.

[126] *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014); *Matter of Silva-Trevino*, 26 I. & N. Dec. 550 (AG 2015).

[127] *See, e.g., Descamps v. United States*, 133 S. Ct. 2276, 2288 (2013) ("Yet again, the Ninth Circuit's ruling flouts our reasoning—here, by extending judicial factfinding beyond the recognition of a prior conviction."); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 576-77 (2010) ("a federal immigration court…cannot, ex post, enhance the state offense of record just because facts known to it would have

There is some support for a looser interpretation of the categorical approach in the CIMT context. Recall that the justifications for the categorical approach in *Descamps* and Mathis included (1) statutory language focusing on a "conviction," rather than an act; (2) Sixth Amendment concerns; and (3) evidentiary and fairness concerns.[128] These justifications play rather differently in the immigration context.

First, it is well established that Sixth Amendment considerations do not apply to immigration proceedings, which are civil in nature.[129] *Nijhawan* nodded to the essential difference in the two types of proceedings when answering the alien's claim that fairness required universal application of the categorical approach.

> We agree with petitioner that the statute foresees the use of fundamentally fair procedures, including procedures that give an alien a fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims. But we do not agree that fairness requires the evidentiary limitations he proposes. For one thing, we have found nothing in prior law that so limits the immigration court. *Taylor, James*, and *Shepard*, the cases

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authorized a greater penalty under either state or federal law."); *Shepard v. United States*, 544 U.S. 13, 28 (2005) (THOMAS, J., concurring in part and concurring in judgment) ("In my view, broadening the evidence judges may consider when finding facts under Taylor—by permitting sentencing courts to look beyond charging papers, jury instructions, and plea agreements to an assortment of other documents such as complaint applications and police reports—would not give rise to constitutional doubt, as the plurality believes. It would give rise to constitutional error….").

[128] *Mathis v. United States*, 579 U.S. ___, ___ (2016) (slip op., at 9-11); *Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013).

[129] *Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001).

> that developed the evidentiary list to which petitioner points, developed that list for a very different purpose…. Further, a deportation proceeding is a civil proceeding in which the Government does not have to prove its claim "beyond a reasonable doubt."[130]

Second, while the text of some of the immigration statutes relating to CIMTs refer to convictions, the inadmissibility provision imposes consequences on "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of …a crime involving moral turpitude…."[131] This provision would appear to put the focus squarely back on facts. Indeed, arguably it may not even be necessary that a defendant have been charged with a crime, so long as he admitted to the facts of having committed a CIMT. As the Supreme Court has recognized, differences in statutory text can lead a court out of the categorical approach.[132]

Some provisions, such as the one governing cancellation of removal, incorporate this inadmissibility provision but impose a requirement that the alien have been convicted of the crime.[133] However, an alien seeking to

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[130] *Nijhawan v. Holder*, 557 U.S. 29, 41-42 (2009).

[131] 8 U.S.C. § 1182(a)(2)(A)(i).

[132] *Nijhawan*, 557 U.S. at 37 (recognizing that "the 'aggravated felony' statute differs from ACCA in that it lists certain other 'offenses' using language that almost certainly does not refer to generic crimes but refers to specific circumstances.").

[133] 8 U.S.C. § 1229b(b)(1)(C) (providing that cancellation of removal is available for an alien who "has not been *convicted* of an offense" set out in, *inter alia*, 8 U.S.C. § 1182(a)(2)) (emphasis added).

adjust status will still be subject to the inadmissibility provision as written—meaning that this is a live issue for a number of immigration situations.[134]

If *Esparza-Rodriguez*'s footnote cracked the door to this kind of reasoning, *Gomez-Perez* slammed it shut. It did note that Sixth Amendment concerns do "not apply directly in the immigration context."[135] But it eschewed any suggestion that this could give rise to a different analysis, believing such a path foreclosed by the Supreme Court:

> But *Mathis* made clear that its clarification of the categorical approach also applies in the immigration context. As discussed below, it cited the Board's decision in this very case. And the methodology behind the categorical approach has never differed depending on whether it was being applied in the criminal or immigration context.[136]

Perhaps not, but the methodology *has* changed depending on the wording of the statute. *Mathis* did not say (and indeed, given the posture of the case, could not say) that all immigration cases must employ this approach. Instead, it simply explained that its "decisions applying the categorical approach outside the ACCA context—most prominently, in immigration cases" employed the same focus on elements rather than facts.[137]

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[134] 8 U.S.C. § 1255(a) (permitting an alien's status to "be adjusted…to that of an alien lawfully admitted for permanent residence if," inter alia, "the alien is eligible to receive an immigrant visa and *is admissible to the United States* for permanent residence") (emphasis added).

[135] *Gomez-Perez v. Lynch*, No. 14-60808, 2016 U.S. App. LEXIS 12751, at *8 n.4 (5th Cir. Jul. 11, 2016).

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

[137] *Mathis v. United States*, 579 U.S. ___, ___ (2016) (slip op., at *8-9 n.2).

This is not to say that all its immigration decisions apply the categorical approach, and indeed they have not.[138]

On the other hand, it is certainly true that *Mathis*'s third rationale—evidentiary and fairness concerns—does apply with great force in the immigration context. The Court pointed out that defendants' conviction records may contain allegations of "non-elemental fact," which "are prone to error precisely because their proof is unnecessary."[139] A prosecutor need not check his allegations against evidence he has no need to present at trial, and a defendant may not be motivated to challenge those facts, "may have good reason not to" challenge them, or even be prevented from challenging them by court rulings.[140] "When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected."[141] This is the context in which the Court held up § 22.01(a) as an example of potentially adverse immigration consequences deriving from unchallenged and potentially erroneous criminal allegations.

Moreover, there are other good reasons, aside from those set out in the ACCA cases, to adhere to the categorical approach for CIMTs and other

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[138] *See, e.g., Nijhawan v. Holder*, 557 U.S. 29, 37 (2009) (noting that the categorical analysis can apply to one part of one statutory subsection and not to an adjacent part).

[139] *Mathis*, 579 U.S. at ___ (slip op., at *10).

[140] *Id*.

[141] *Id*. at *10-11.

aspects of immigration law. These include limiting the power of administrators, and imposing efficiency and consistency on a system easily tipped away from both.[142]

Yet contrary voices (and confusion) remain, and the fact that the Supreme Court feels compelled to revisit the question of how to apply the categorical approach again and again suggests that the analysis may ultimately be unworkable. It is worth quoting nearly the entirety of one concurrence in a recent Ninth Circuit case:

> The only consistency in these cases is their arbitrariness. The bedeviling "modified categorical approach" will continue to spit out intra- and inter-circuit splits and confusion…. Almost every Term, the Supreme Court issues a "new" decision with slightly different language that forces federal judges, litigants, lawyers and probation officers to hit the reset button once again.
>
> A better mousetrap is long overdue. Rather than compete with Rube Goldberg, we instead should look to a more objective standard, such as the length of the underlying sentence, before deciding if someone should be removed from our country. While no regime is foolproof, this approach cannot be worse than what we have now.
>
> To make this happen, we need Congress's attention. And to get Congress's attention, the Supreme Court may need to wipe the slate clean by junking the current state of law. *See Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015) ("Nine years' experience trying to derive meaning from the residual clause [of the Armed Career Criminal Act] convinces us that we have embarked upon a failed enterprise.").

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[142] *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1691, 1698 (2011) (explaining immigration cases' rationales for imposing the categorical method throughout the last century).

We are way past that here.[143]

As the quoted language notes, the Supreme Court recently invalidated a portion of ACCA, finding that nearly a decade of continual attempts to clarify the provision had resulted only in confusion and inconsistency among not only the lower courts, but between Supreme Court opinions, as well.[144] A similar expression of defeat may emerge in the immigration context as well.

For years now Justice Alito, at least, has been trying to draw the Court away from a purely elements-based analysis and towards one incorporating the facts of the case. In *Marrero v. United States*, he filed a dissent, joined by Justice Kennedy, to the Court's grant of certiorari and vacatur of a Third Circuit opinion in light of *Descamps*.[145] I include the entire dissent here:

> The Court's decision to grant, vacate, and remand shows that the Court's elaboration of its "modified categorical" approach has completely lost touch with reality.
>
> In this case, the Court of Appeals for the Third Circuit held that petitioner qualifies as a career offender…based in part on a prior conviction under Pennsylvania law for simple assault, which applies to a defendant who "attempts to cause or intentionally, knowingly, or recklessly causes bodily injury to another." Based on what petitioner said when he pleaded guilty to this offense, the Court of Appeals concluded that petitioner had admitted—and thus had been convicted of—intentional or at least knowing conduct and not simply reckless conduct. I see nothing lacking in the Court of Appeals' analysis.

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[143] *Almanza-Arenas v. Lynch*, 815 F.3d 469, 483 (9th Cir. 2016) (Owens, J., concurring, joined by Tallman, Bybee, and Callahan, J.) (footnote omitted, parallel cite omitted).

[144] *Johnson v. United States*, 135 S. Ct. 2551, 2558-60 (2015).

[145] *Marrero v. United States*, 133 S. Ct. 2732 (2013).

> The Pennsylvania statute is "divisible" because it contains alternative elements. Under this Court's precedents, the modified categorical approach applies to divisible statutes, and courts applying that approach may consult the plea colloquy to "determin[e] which statutory phrase…covered a prior conviction."
>
> When petitioner pleaded guilty, this is what was said:
>
> > "'[Assistant District Attorney]: On…April 27, 2004,…[petitioner] grabbed Mrs. Marrero by the neck, attempting to drag her upstairs to the second floor. When she tried to make a phone call, he ripped the phone cord out of the wall as she was attempting to call 911.'"
> >
> > "'The Court: Do you admit those facts?'"
> >
> > "'The Defendant: Yes, Sir.'"
>
> In sending this back to the Third Circuit for a second look, this Court is apparently troubled by the possibility that the petitioner was convicted for merely reckless conduct, and it is of course true that he did not expressly say that he intentionally or knowingly grabbed Mrs. Marrero by the neck or that he intentionally or knowingly attempted to drag her up a flight of stairs. The Court may be entertaining the possibility that what petitioner meant was that he grabbed what he believed to be some inanimate object with a neck—perhaps a mannequin named Mrs. Marrero—and attempted to drag that object up the steps. In that event, his conduct might have been merely reckless and not intentional or knowing.
>
> The remand in this case is pointless. I would deny the petition and therefore dissent.[146]

Justices Alito's sarcasm and strong language illustrate his growing frustration with the Court's move away from permitting an evaluation of the facts. The outcome of the 2016 presidential election may determine whether he is crying in the wilderness, or the harbinger of things to come.

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[146] *Id*. at 2732 (internal citations omitted).

IV. Conclusion: How *Gomez-Perez* will affect the landscape of CIMT cases

For now, though—and "for now" is about the best one can do in this ever-shifting area of law—*Gomez-Perez* has firmly moved the inquiry away from what an offender's conviction *was for having done* to what *was charged*: from an attention to the specifics of his crime (even if proven by *Shepard* documents) back to a focus solely on the statutory language. In short, an offender's criminal history may be consulted only to determine what crime he was convicted of. If the statute is overbroad, then the criminal record may be consulted only to ascertain which subsection of the statute applies, and only insofar as the statute is divisible, using the means v. elements analysis. Once that subsection is identified, then the attention turns entirely to what elements it contains, regardless of what the defendant actually did—even if the record shows that facts making up the elements of a CIMT were actually proven or admitted in the alien's case. This is the biggest implication of *Gomez-Perez*: holding the line against fact-based inquiries within the categorical analysis.

The second implication is the court's adoption of *Mathis*'s clarification of what divisible actually means. A statute is not divisible merely by virtue of being overbroad, per *Descamps*, but it is also not divisible just because it lists a series of items (mental state, weapons, locations, or other aspects of

the crime) in the disjunctive. Instead, a court must look at what the essential elements of a crime are. Anything else is extraneous and must be disregarded—even if it would be relevant to the CIMT analysis.

Faithfully applying these two principles should limit the application of CIMT findings in straightforward removal cases, and even in some cases involving requests for relief from removal, as with Mr. Gomez-Perez himself. If the Fifth Circuit adopts the "burden of proof" rule, however, many aliens may be prevented from obtaining relief, either because state records do not contain the requisite level of clarity, or because the petitioners do not have the resources to obtain the necessary documents. As the list of CIMTs and other disqualifying crimes expands,[147] this could notably impact the immigration landscape in the future.

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[147] *See* Bill Ong Hing, *The Pressure Is On—Criminal Defense Counsel Strategies After* Padilla v. Kentucky, 92 DENV. U.L. REV. 835, 841 (2015) ("The list of aggravated felonies, expanded several times since 1988, is so broad that the current president of the National Association of Immigration Judges considers the category a 'misnomer that includes many offenses that are neither aggravated nor felonies.' ….[W]hat one might regard as minor crimes—for example, selling $10 worth of marijuana or 'smuggling' a baby sister across the border illegally—are aggravated felonies for deportation purposes."); Peter H. Schuck and John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367 (1999) (footnotes omitted) ("Having created the category of aggravated felony, Congress continued to expand it…. Congress also broadened the grounds for removal based on a crime of moral turpitude to include all such crimes for which a sentence of a year or more might have been imposed, rather than only those for which a sentence of a year or more had actually been imposed. This category includes some relatively minor offenses, including, in New York City, subway turnstile jumping.").