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THE IMMIGRATION PENALTIES OF CRIMINAL CONVICTIONS: RESURRECTING CATEGORICAL ANALYSIS IN IMMIGRATION LAW

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For over a century, noncitizens in the United States have faced adverse immigration consequences if convicted of certain types of offenses in criminal court. Many criminal convictions carry severe immigration penalties, including deportation, detention, and the denial of statuses like asylum and U.S. citizenship. The Supreme Court recently recognized that these penalties are so intimately tied to criminal court adjudications that criminal defense attorneys have a duty to advise noncitizen defendants of the immigration consequences of a conviction before the entry of a guilty plea in criminal court. Yet there is little clarity about how to determine whether a particular conviction triggers an immigration penalty. Historically, courts and immigration officials have applied a categorical analysis to assess the immigration consequences of a criminal conviction. Under a categorical analysis, a court or immigration official determines the penalties based on an examination of the statutory definition of the offense, not the factual circumstances of the crime. However, several recent Supreme Court, federal court, and agency decisions have ignored this longstanding analysis and have instead examined these issues through the lens of Taylor v. United States, a criminal sentencing case that adopts a categorical analysis in a different context. Distinguishing Taylor and its criminal sentencing rationales, these decisions have invented a new approach to assessing past criminal convictions in the immigration context. That approach now permits a circumstance-

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specific inquiry into facts beyond the criminal court's findings in some immigration cases. Under these recent decisions, the immigration consequences of a criminal conviction no longer turn on the criminal court adjudication alone, but may also be determined by facts that were not proven or pleaded in the criminal court proceeding. This Article argues that this shift in approach is based on a fundamental misunderstanding of the origins of categorical analysis in immigration law and its independent rationales, including its promotion of notice and an opportunity to be heard, uniformity, predictability, efficiency, and judicial review in the administrative agency context. This Article further argues that, because of this flaw in the current debate, courts have failed to consider the negative impact of the erosion of categorical analysis on the functioning of the current immigration and criminal justice systems. The rationales for categorical analysis apply with even greater force today than they did when categorical analysis was first articulated nearly a century ago. Rather than erode categorical analysis, courts and the agency should require its robust application in light of its longstanding rationales and modern-day implications.

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INTRODUCTION

Deportation is different.¹ Of the plethora of “civil” consequences stemming from a criminal conviction, deportation is a particularly severe penalty, “the equivalent of banishment or exile,”² which may result in the “loss . . . of all that makes life worth living.”³ In *Padilla v. Kentucky*, the Supreme Court held that the civil immigration penalties for a criminal conviction are so “intimately related”⁴ to the criminal court process that defense attorneys have a constitutional duty to advise noncitizen defendants of the immigration consequences of their guilty pleas.⁵ Given the severity of deportation as a penalty, noncitizen defendants may be more concerned with the possibility of exile from the United States than a potential jail sentence or other criminal sanctions.⁶ The Court observed that “informed consideration” of adverse immigration consequences would thus encourage both defen-

¹ This sentiment echoes the Supreme Court’s observations about the death penalty in comparison to other criminal punishments, as stated in *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (discussing the Court’s recognition in *Furman v. Georgia*, 408 U.S. 238, 286–91 (1972) (Brennan, J., concurring), that the penalty of death is unique). Other scholars have made similar observations about the unique nature of deportation among other civil consequences—most recently, Professor Peter L. Markowitz in his piece, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011) (critiquing the characterization of deportation consequences as purely civil in nature and proposing a more principled approach to determining the rights of noncitizens facing deportation).

² *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947).

³ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

⁴ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

⁵ *Id.* at 1478, 1482, 1486.

⁶ *Id.* at 1483 (citing *I.N.S. v. St. Cyr*, 533 U.S. 289, 322–23 (2001)).

dants and prosecution to “reach agreements that better satisfy the interests of both parties” in the plea-bargaining process.⁷

Achieving “informed consideration”—at least in its most meaningful sense—is easier said than done. As Justice Alito points out in his concurring and dissenting opinion in *Padilla*, immigration law is often extremely complex.⁸ For over a century, federal immigration law has used categories of crimes to trigger penalties, without cross-referencing specific state or local criminal statutes. The list of offenses that lead to these penalties has lengthened over the years—with the development of new immigration law labels such as “crime involving moral turpitude,” “controlled substance” offense, and, more recently, “aggravated felony.”⁹ Changes to federal immigration law in 1996 further expanded these criminal grounds, adding nearly two dozen new categories and subcategories of offenses that trigger immigration consequences in the Immigration and Nationality Act (INA).¹⁰ Many of these categories and subcategories of offenses not only trigger the possibility of deportation but also eliminate the possibility of any exercise of agency discretion, essentially turning deportation into a “mandatory minimum” penalty for many types of criminal convictions.¹¹ At the same time, the sheer number of adjudications within

⁷ *Id.* at 1486.

⁸ *Id.* at 1488 (Alito, J., concurring in part and dissenting in part) (“[P]roviding advice on whether a conviction for a particular offense will make an alien removable is often quite complex.”).

⁹ These labels appear throughout federal immigration law, including in the statutory provisions that list the grounds of removal. *See, e.g.*, 8 U.S.C. §§ 1182(a)(2)(A), 1227(a)(2)(A)(i)–(ii) (2006) (“crime involving moral turpitude”); §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i) (“violation of . . . any law or regulation . . . relating to a controlled substance (as defined in section 802 of title 21)”); § 1227(a)(2)(A)(iii) (“aggravated felony”). As discussed below, *see infra* note 16, the term “crime involving moral turpitude” is not defined in the statute. The term “aggravated felony” is partially defined by a list of subcategories. *See, e.g.*, 8 U.S.C. § 1101(a)(43) (listing twenty-one types of offenses that constitute an aggravated felony under immigration law). But some of those subcategories have no statutory definition. *See, e.g.*, § 1101(a)(43)(A) (“murder, rape, or sexual abuse of a minor”); § 1101(a)(43)(G) (“a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [sic] at least one year”).

¹⁰ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); *see, e.g.*, Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C.) (expanding the criminal grounds of deportability and inadmissibility); Illegal Immigration Reform and Immigrant Responsibility Act (IRRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.) (same); *see also* HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY U.S. DEPORTATION POLICY 18–20 (2007), available at http://www.hrw.org/sites/default/files/reports/us0707_web.pdf (describing changes to the criminal grounds of removal under AEDPA and IRRIRA).

¹¹ Many categories of criminal convictions bar a noncitizen’s eligibility to seek relief from deportation, making deportation mandatory in such cases. *See, e.g.*, 8 U.S.C.

the immigration system as a whole has grown,¹² resulting in thousands of administrative decisions each year to deport, detain, and deny status to individuals based on their criminal convictions.

As the categories of offenses and the number of administrative decisions leading to these immigration consequences have multiplied, reviewing courts have increasingly grappled with the question of how federal immigration officials should assess whether a particular conviction falls within any of the criminal grounds for removal under federal immigration law.¹³ A New York drug conviction may or may not be an “illicit trafficking” aggravated felony.¹⁴ A California assault conviction may or may not be a “crime involving moral turpitude.”¹⁵ Criminal grounds like “crime involving moral turpitude” and “aggravated felony” have definitions, whether specified in the federal immigration statute or developed over time in the case law.¹⁶ But how did Congress intend for immigration officials to determine whether any particular federal, state, or local criminal offense falls within one of these categories? What evidence should immigration officials consider?

These issues, while complex, are as old as the laws predicating immigration penalties on criminal convictions. To resolve these issues,

§ 1158(b)(2)(B)(i) (2006) (aggravated felony bar to asylum); *id.* § 1182(h) (controlled substance bar to waiver of inadmissibility necessary for adjustment of status to lawful permanent residence, except for a single offense of simple possession of thirty grams or less of marijuana); *id.* § 1229b(a)(3) (aggravated felony bar to cancellation of removal).

¹² See *infra* notes 325–27 and accompanying text (documenting the increased caseload of immigration judges).

¹³ While there is no data specifying the number of federal cases involving questions about how criminal convictions are categorized, the federal circuit courts have experienced an overall surge in their immigration caseloads. In Fiscal Year 2008, federal circuit courts experienced a thirteen percent increase in appeals from decisions of the Board of Immigration Appeals. Press Release, Karen E. Redmond, U.S. Courts, Workload of the Federal Courts Grows in Fiscal Year 2008 (Mar. 17, 2009), *available at* http://www.uscourts.gov/news/NewsView/09-03-17/Workload_of_the_Federal_Courts_Grows_in_Fiscal_Year_2008.aspx.

¹⁴ 8 U.S.C. § 1101(a)(43)(B) (identifying illicit trafficking in a controlled substance as an aggravated felony).

¹⁵ *Id.* §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)–(ii) (listing a “crime involving moral turpitude” as a potential ground of inadmissibility and deportability).

¹⁶ A “crime involving moral turpitude” has long been defined in case law as a crime that “shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” Solon, 24 I. & N. Dec. 239, 240 (B.I.A. 2007) (internal citation and quotation marks omitted). An “aggravated felony” is defined in the INA by reference to twenty-one subcategories of offenses, 8 U.S.C. § 1101(a)(43)(A)–(U), each of which in turn has either a generic or statutory definition. *Compare* § 1101(a)(43)(A) (including “murder, rape, or sexual abuse of a minor” among offenses that constitute aggravated felonies), *with* § 1101(a)(43)(F) (listing “a crime of violence (as defined in section 16 of title 18 . . .)” among the offenses constituting an aggravated felony).

for most of the last century, immigration adjudicators have adopted a categorical analysis of criminal convictions.¹⁷ Under a categorical analysis, “it is the nature of the crime, as defined by statute and interpreted by the courts and as limited and described by the record of conviction which determines whether an alien falls within the reach of that law.”¹⁸ The key limitation is that, when a categorical analysis applies, immigration adjudicators may not consider extrinsic evidence beyond the record of conviction.¹⁹ This is true whether the underlying facts help or hurt the immigrant; factual assertions regarding innocent motive or lack of actual harm are irrelevant to the inquiry.

Consider, for example, an immigrant with a state assault conviction. According to case law, to constitute a “crime involving moral turpitude” under the federal immigration statute, an assault offense generally must involve immoral intent, i.e., intentional physical injury rather than, for example, negligent or unintentional injury.²⁰ Applying a categorical analysis to the assault conviction, an immigration official would begin by looking to the statutory definition of the assault offense to determine if it requires an intentional physical injury. If the statute defines assault in subparts, some of which require intentional physical injury and some of which do not, an immigration official would examine the record of conviction to determine which part of

¹⁷ See *infra* Part II (discussing the historical basis for categorical analysis in immigration law).

¹⁸ Pichardo-Sufren, 21 I. & N. Dec. 330, 335 (B.I.A. 1996). In modern parlance, some courts refer to categorical analysis as encompassing two steps, the “categorical approach” and, when necessary, a “modified categorical approach.” See, e.g., *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007) (discussing how courts describe the steps of categorical analysis). The categorical approach refers to the step in categorical analysis in which immigration adjudicators examine the statutory definition of the offense to determine if it corresponds to a removable offense. If the statutory definition consists of both removable and non-removable subparts, then the modified categorical approach applies: Immigration adjudicators may consult the official record of conviction to determine which part of the statute serves as the basis for the immigrant’s conviction. When I refer to “categorical analysis,” I refer to both steps collectively—i.e., the overall method of assessing a conviction in terms of its statutory definition and, where necessary, the record of conviction, rather than the facts and circumstances of the underlying crime.

¹⁹ Pichardo-Sufren, 21 I. & N. Dec. at 335. In *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (B.I.A. 2001), the Board of Immigration Appeals (BIA or Board) explained how categorical analysis applies to the assessment of whether a conviction constitutes a crime involving moral turpitude:

The crime must be one that necessarily involves moral turpitude without consideration of the circumstances under which the crime was, in fact, committed. It is therefore necessary to engage in an objective analysis of whether the elements necessary to obtain a conviction under the particular statute render the offense a crime involving moral turpitude.

Id. at 84–85 (citation omitted).

²⁰ See *Solon*, 24 I. & N. Dec. at 240 (describing the development of the “crime involving moral turpitude” category in the assault context).

the statute was applied in that case. But at no time would the immigration official turn to facts outside the record—testimony or police reports would not trump the statutory definition of the offense. If the record of conviction demonstrated that the immigrant was convicted of intentional physical injury under the criminal statute, an immigration official could not consider testimony that the immigrant actually committed a negligent offense. Similarly, if the record of conviction demonstrated that the immigrant was convicted of negligent physical injury under the criminal statute, a police report alleging that the immigrant actually committed an intentional offense would be irrelevant. Essentially, categorical analysis would limit an immigration official to assessing the statutory offense and would not permit any retrial of the facts.

Both the immigration agency²¹ and federal courts have applied categorical analysis to crimes under the immigration statute for nearly a century.²² In justifying this approach, they examined the context in which deportation decisions are made and the role that categorical analysis plays in promoting the fair, uniform, and efficient administration of immigration law.²³ The agency and the courts have recognized that immigration officials are not criminal court judges—they act within an administrative system addressing the federal statutory consequences of convictions that criminal court judges have already adjudicated.²⁴ As such, immigration officials must limit their assessments to the records already before them and save any fact-finding for

²¹ When I refer to the immigration agency, I generally refer to those parts of the executive branch charged with adjudicating immigration law. In the current administrative immigration system, the U.S. Attorney General and the BIA (part of the U.S. Department of Justice's Executive Office of Immigration Review) are the entities within the executive branch charged with setting precedent for agency interpretation of the laws governing removal. Since the formation of the BIA, the Attorney General has rarely exercised his power to decide removal cases, but has done so in one recent case addressing categorical analysis. See *infra* notes 223–30 and accompanying text (discussing the Attorney General's decision in *Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008)). The U.S. Department of Homeland Security is charged with enforcing immigration law and also engages in the administrative adjudication of applications for admission, various forms of immigration status, and naturalization. See *infra* Part I (providing background on the administrative immigration system and the role that criminal convictions play).

²² See *infra* Part II.A–B (discussing the historical origins of categorical analysis).

²³ See *infra* Part II.A–B (demonstrating federal court and agency application of categorical analysis since the early twentieth century and prior to the modern era).

²⁴ See, e.g., *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914) (“[T]he immigration officers act in an administrative capacity. They do not act as judges of the facts . . .”).

decisions committed to agency discretion, such as decisions to waive or cancel deportation orders in light of particular equities.²⁵

Nearly a century of precedent has turned categorical analysis into well-settled law in the immigration context. In recent years, however, the independent rationales for the use of categorical analysis in immigration law largely have been forgotten. As the criminal grounds triggering immigration consequences have expanded dramatically, federal courts and the agency have had to address the issue of how to assess criminal convictions in scores of contexts and, in some ways, have reinvented the analysis. Rather than looking to the development and reasoning behind the use of categorical analysis in the immigration law context, courts turned to parallel considerations in criminal sentencing law for guidance. In the 1990 case of *Taylor v. United States*, the Supreme Court applied a “categorical approach” to the assessment of whether a prior conviction triggers a sentencing enhancement under a federal criminal statute.²⁶ When litigation skyrocketed following the expansion of immigration penalties for criminal convictions under the 1996 immigration reform laws,²⁷ federal courts by then had become comfortable with the application of the *Taylor* categorical approach and imported its reasoning into the immigration context. Few cases discussed the longstanding pre-*Taylor* basis for categorical analysis in immigration law, and the *Taylor* categorical approach became synonymous with categorical analysis in immigration law.²⁸

²⁵ See, e.g., 8 U.S.C. § 1182(h) (2006) (permitting the discretionary grant of waivers necessary for adjustment of status to lawful permanent residence); *id.* § 1229b(a) (permitting the discretionary grant of cancellation of removal).

²⁶ 495 U.S. 575, 600–02 (1990).

²⁷ See *supra* note 10 and accompanying text (describing 1996 reforms).

²⁸ The Supreme Court and federal circuit courts now cite *Taylor* when applying categorical analysis in immigration cases. See, e.g., *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185–87 (2007) (discussing lower courts’ uniform application of the categorical approach used in *Taylor* when assessing whether a conviction falls within a criminal grounds of removal under immigration law); *Martinez v. Mukasey*, 519 F.3d 532, 540 (5th Cir. 2008) (employing “the categorical approach provided in *Taylor*” to determine whether an offense constitutes an aggravated felony); *Rashid v. Mukasey*, 531 F.3d 438, 447 (6th Cir. 2008) (citing *Taylor* in support of the categorical approach); *Dulal-Whiteway v. Dep’t of Homeland Sec.*, 501 F.3d 116, 131 (2d Cir. 2007) (holding that the BIA may rely only on information in the record of conviction that would be permissible under the “*Taylor-Shepard* approach”); *Jeune v. Att’y Gen.*, 476 F.3d 199, 201–02 (3d Cir. 2007) (explaining the presumptive application of the categorical approach set forth in *Taylor*); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1127 (9th Cir. 2007) (citing *Taylor* for the framework and two-step test under which a court determines whether a conviction is an aggravated felony); *Gradiz v. Gonzales*, 490 F.3d 1206, 1210–11 (10th Cir. 2007) (citing *Taylor* for the parameters of which evidence and documents a court may examine when assessing a criminal conviction); *Berhe v. Gonzales*, 464 F.3d 74, 85 (1st Cir. 2006) (citing *Taylor* when restricting the inquiry to the record of conviction); *Soliman v. Gonzales*, 419 F.3d 276, 279 (4th Cir. 2005) (citing *Taylor* as the basis of the categorical approach); *Jaggernaut v. Att’y*

At first, this reframing had little practical effect. The *Taylor* categorical approach is similar to the longstanding application of categorical analysis in immigration law. *Taylor* resolved the question of how to determine whether a criminal conviction serves as a predicate “violent felony” for a sentencing enhancement under the Armed Career Criminal Act.²⁹ The Supreme Court held that sentencing courts were limited to assessing whether the elements of the defendant’s prior statutory offense fit within the generic definition of the offense that triggers the sentencing enhancement.³⁰ The Court further explained that where it was unclear which of the provisions of the criminal statute was the basis of conviction, the sentencing court was permitted to consider portions of the record of conviction, such as the jury verdict, to determine the relevant statutory provision, but it could not conduct any factual inquiry beyond the record.³¹ In these key concepts, the *Taylor* approach and immigration law’s categorical analysis are the same.

However, over time, federal courts and the agency began to notice key differences between the criminal sentencing context in *Taylor* and the immigration context. *Taylor*, with its emphasis on comparing the elements of a crime with the elements of a generic sentencing term, does not apply neatly to the immigration statute. The immigration statute contains numerous grounds of removal that are not easily defined in terms of strict elements. Some of the provisions in immigration law include more ambiguous terminology.³² Noting these and other differences, federal courts and the agency began to carve out exceptions to categorical analysis for certain immigration law provisions that appear to include “non-elements” or

Gen., 432 F.3d 1346, 1353 (11th Cir. 2005) (citing *Taylor* when looking first to the fact of conviction and statutory definition of the offense to determine its immigration consequences); *Bazan-Reyes v. INS*, 256 F.3d 600, 606 (7th Cir. 2001) (citing *Taylor* for guidance regarding when it is permissible to look past the statutory definition of a crime to assess the immigration consequences of a conviction).

²⁹ See *Taylor*, 495 U.S. at 581–82 (explaining the legislative developments that gave rise to the question at issue in the case of whether a burglary conviction constitutes a “violent felony” triggering a sentence enhancement) (citing Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (current version at 18 U.S.C. § 924(e)(1) (2006))).

³⁰ See *id.* at 602 (holding that an offense constitutes a burglary for the purposes of sentence enhancement if its statutory definition substantially corresponds to generic burglary).

³¹ See *id.* (noting that the sentencing court may look beyond the fact of conviction in a narrow range of cases).

³² See *infra* notes 238–45 and accompanying text (discussing the Supreme Court’s analysis of provisions in the aggravated felony statute).

“qualifiers.”³³ At first, these exceptions affected a hodgepodge of some of the less common grounds of removal.³⁴

However, in *Ali v. Mukasey*, the Seventh Circuit expanded the debate to crimes involving moral turpitude.³⁵ Reversing course from its own prior precedent, the Seventh Circuit held that courts may consider a wider array of evidence beyond the record of conviction to determine whether to classify a conviction as a crime involving moral turpitude, because “moral turpitude” was not typically an element of a criminal offense.³⁶ In so holding, the Seventh Circuit distinguished *Taylor* and criticized courts for applying the *Taylor* categorical approach to the immigration context for crimes involving moral turpitude.³⁷ The court did not mention the pre-*Taylor* use of categorical analysis in immigration law or its rationales, and thus did not consider the implications that the departure from categorical analysis would have for the immigration system.

This view of categorical analysis has spread quickly. A few months after *Ali* was decided, then-Attorney General Michael Mukasey addressed the issue in a precedent-setting agency decision, *Matter of Silva-Trevino*, in which he essentially adopted the Seventh Circuit’s reasoning in *Ali* as the new agency position.³⁸ Like the Seventh Circuit, the Attorney General failed to acknowledge or explain the departure from the longstanding use of categorical analysis in immigration law prior to *Taylor*.

³³ See, e.g., *Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 465 (7th Cir. 2004) (taking into account the age of the victim for “sexual abuse of a minor” aggravated felonies); *Flores v. Ashcroft*, 350 F.3d 666, 668, 670–71 (7th Cir. 2003) (allowing the court to consider the accused’s relationship to the victim for “crime[s] of domestic violence”); *Babaisakov*, 24 I. & N. Dec. 306, 307, 320–21 (B.I.A. 2007) (citing the loss threshold for “fraud or deceit” aggravated felonies as a non-element to be determined through factual inquiry); *Gertsenshteyn*, 24 I. & N. Dec. 111, 115 (B.I.A. 2007) (looking outside the record of conviction for evidence that the “commercial advantage” requirement for prostitution-transportation aggravated felonies was satisfied), *overruled by* *Gertsenshteyn v. U.S. Dep’t of Justice*, 544 F.3d 137 (2d Cir. 2008).

³⁴ See, e.g., *Babaisakov*, 24 I. & N. Dec. 306 (addressing the loss threshold for a fraud aggravated felony); *Gertsenshteyn*, 24 I. & N. Dec. 111 (addressing the prostitution-transportation aggravated felony).

³⁵ 521 F.3d 737, 741–42 (7th Cir. 2008).

³⁶ *Id.*

³⁷ *Id.* at 741.

³⁸ 24 I. & N. Dec. 687 (A.G. 2008). The Attorney General may certify cases to herself for decision, which binds the BIA and immigration courts in every jurisdiction where there is no conflicting federal circuit precedent. See 8 C.F.R. § 1003.1(h)(1) (2010) (describing the certification process). The Attorney General issued *Silva-Trevino* through the certification process. A subsequent BIA decision reiterated the broad applicability of *Silva-Trevino* in jurisdictions lacking contravening circuit law. *Guevara Alfaro*, 25 I. & N. Dec. 417, 420 (B.I.A. 2011).

The Supreme Court's decision in *Nijhawan v. Holder*³⁹ is the most notable among the recent cases deviating from categorical analysis. *Nijhawan* addressed the applicability of categorical analysis to the determination of whether a person has been convicted of what is considered a "fraud or deceit" aggravated felony under immigration law—"an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000."⁴⁰ In resolving a split among the federal courts, the Supreme Court held that the question of loss to the victim, which is not typically an element of criminal fraud offenses, "calls for a 'circumstance-specific,' not a 'categorical,' interpretation."⁴¹ The Court explained that an immigration judge may therefore consider the facts and circumstances underlying a fraud conviction to determine the amount of loss. The Court also suggested that other subcategories of the aggravated felony provisions may similarly be subject to a circumstance-specific inquiry.⁴² The Court did not discuss each aggravated felony provision in the INA and did not explain whether or how the analysis in *Nijhawan* would apply to crimes involving moral turpitude or other types of removable offenses predicated on convictions.

The Supreme Court's departure from categorical analysis in *Nijhawan* was notable in part because of its statement regarding the role of categorical analysis in immigration law. While acknowledging the application of categorical analysis in sentencing law through *Taylor* and its progeny, the Supreme Court stated that it "found nothing in prior law that so limits the immigration court."⁴³ With one sentence, the Court wiped away a century of precedent. It disregarded years of case law that held, long before *Taylor*, that a categorical analysis limits the evidentiary scope for assessing convictions in the immigration context.

Categorical analysis in the immigration context has been left in disarray. With as many as 128,000 removals and numerous other administrative immigration decisions predicated on criminal convictions each year,⁴⁴ confusion over the scope of inquiry has profound implications for the immigration and criminal justice systems. Recent

³⁹ 129 S. Ct. 2294 (2009).

⁴⁰ 8 U.S.C. § 1101(a)(43)(M)(i) (2006).

⁴¹ *Nijhawan*, 129 S. Ct. at 2300.

⁴² *Id.* at 2300–01; *see also supra* note 16 (discussing the subcategories); *infra* notes 238–45 and accompanying text (discussing the Court's interpretation of the aggravated felony provisions in *Nijhawan*).

⁴³ *Nijhawan*, 129 S. Ct. at 2303.

⁴⁴ OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2009, at 1 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf.

decisions provide little guidance to immigrants, their criminal defense or immigration attorneys, prosecutors, and immigration officials on how to determine whether a conviction will result in a specific immigration penalty. Because decisions like *Ali*, *Silva-Trevino*, and *Nijhawan* overlook the development of categorical analysis in the immigration law context, their holdings fail to account for how the erosion of categorical analysis will affect the immigration and criminal justice systems. Moreover, despite the important repercussions of this debate, scholarly literature has not adequately explored this area of immigration law.⁴⁵

In this Article, I expose the fundamental flaw in the current debate over categorical analysis in immigration law. I begin by providing a contextual overview in Part I, describing the important role that criminal convictions play within the administrative immigration system. In Part II, I resurrect the forgotten history of categorical analysis in immigration law, analyzing a century of precedent to establish the origins and rationales behind the use of categorical analysis within the immigration context. I demonstrate that early federal court and agency decisions interpreted federal immigration law as requiring a categorical analysis of criminal convictions, both as a reflection of Congress's intent and as a necessary rule given the longstanding constraints of the administrative immigration system. In Part III, I

⁴⁵ Categorical analysis is an area of immigration law that is ripe for exploration. Recent scholarship has addressed categorical analysis primarily through the lens of *Taylor*. See, e.g., Doug Keller, *Causing Mischief for Taylor's Categorical Approach: Applying "Legal Imagination" to Duenas-Alvarez*, 18 GEO. MASON L. REV. 625 (2011) (arguing that a recent Supreme Court decision on categorical analysis is an extension of, rather than a departure from, the categorical analysis in *Taylor*); Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979 (2008) (providing an in-depth analysis of how the "elements test" in *Taylor* applies in the immigration context). I agree with these scholars' insights into how courts should strictly apply a categorical analysis in immigration law. They also acknowledge the longstanding application of the categorical analysis and some of its modern rationales while using the *Taylor* lens. See Keller, *supra*, at 632 n.40 (citing scholarly commentary on the categorical analysis); Sharpless, *supra*, at 994–96, 1031–34 (discussing the historical application and current fairness and efficiency rationales of categorical analysis). My Article moves the debate beyond *Taylor* and the rationales for adopting its approach. I provide an independent historical and contextual lens through which to examine the origins and rationales for categorical analysis in immigration law as a critique of the current debate, which has begun to rely on *Taylor* as a means for eroding the approach. I initially formed many of the insights in this piece through my work litigating these issues, including submitting an amicus brief to seek reconsideration from the Attorney General following his decision in *Matter of Silva-Trevino*. See generally Brief for American Immigration Lawyers Ass'n et al. as Amici Curiae Supporting Reconsideration, *Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008) (No. A013 014 303), available at http://www.immigrantdefenseproject.org/docs/08_SilvaTrevinoAmicusBrief.pdf (arguing that the Attorney General's decision should be withdrawn).

critique recent courts' failure to acknowledge this context and history. These courts have relied too heavily on criminal sentencing principles to limit the applicability of categorical analysis in immigration law, based on the false assumption that there is no independent basis for categorical analysis in the immigration context. As a result, these courts have misconstrued congressional intent and invented a new methodology for analyzing convictions that is fundamentally at odds with the rationales underlying categorical analysis in immigration law. In Part IV, I explore the implications of this shift in analysis for both the immigration and criminal justice systems. Under both systems' current constraints, the independent rationales for advancing categorical analysis in immigration law are even more relevant to the functioning of these systems today than they were when the approach was first articulated. These systems can survive without categorical analysis—but only if fundamental changes are made to alleviate existing limitations. In the absence of such changes, courts and the agency should continue to ensure that immigration adjudicators apply a categorical analysis to their assessment of criminal convictions.

I

THE CONTEXT: CRIMINAL CONVICTION ASSESSMENTS WITHIN THE FEDERAL IMMIGRATION SYSTEM

Federal immigration law dictates who may enter the United States, what immigration status they receive, when that status may be revoked, who may be detained in immigration jail pending these determinations, and who may be deported. A person's criminal record is relevant to each of these determinations and serves as a basis for the system's most severe penalties, including mandatory detention and deportation. Yet, despite the critical role of convictions within the system and the severity of the potential penalties, few of the protections available in the criminal court process—such as the right to government-appointed counsel—apply in the immigration system.⁴⁶ Instead, immigration decisions are made within a civil administrative system with limited judicial review in federal court.⁴⁷ The vast majority of these decisions are made by frontline immigration officials—naturalization officers, asylum officers, detention and removal officers, and immigration judges (administrative employees of the

⁴⁶ 8 U.S.C. § 1229a(b)(4)(A) (2006) (providing noncitizens with the right to counsel at no expense to the government). *See also infra* notes 61–66 and accompanying text (describing the limitations on due process in adversarial administrative immigration proceedings).

⁴⁷ *See* 8 U.S.C. § 1252 (2006) (governing judicial review of orders of removal and limiting review of various types of determinations and orders).

federal executive branch)—in a variety of settings that range from informal to quasi-judicial. In this Part of the Article, I briefly explain this context and the role that criminal convictions play within the administrative immigration system.

As a practical matter, the assessment of criminal convictions in the immigration system is triggered by background checks, which are required at every stage of the immigration process. An immigrant who wishes to enter the United States, for example, generally must provide information about her criminal history. At this initial stage, noncitizens seeking admission to the United States are governed by the laws of “inadmissibility” (formerly known as the laws of exclusion), which bar entry based on criminal grounds such as “crimes involving moral turpitude” and “controlled substance offenses.”⁴⁸ The same inadmissibility laws trigger bars to lawful permanent residence (i.e., a green card) for noncitizens within the United States.⁴⁹ Immigrants who already have been lawfully admitted to the United States are subject to criminal grounds of deportation, which include some, but not all, of the grounds of inadmissibility, as well as additional grounds including “aggravated felonies.”⁵⁰ Deportation law is often invoked when immigrants submit to background checks as part of an application to renew their permanent resident cards or to naturalize, or when they are identified as deportable while in criminal custody.⁵¹ Together, the grounds for deeming someone inadmissible or deportable make up the grounds of “removal”—the current legal term for deportation.

Once a person has been identified as removable, criminal convictions also affect his or her ability to seek relief from deportation. While the removal process was historically a two-step process—with immigration judges first determining if a person was deportable under the law and then deciding whether to waive or cancel that deportation as an exercise of discretion—current law includes criminal bars to

⁴⁸ See *id.* § 1182(a)(2) (providing the criminal grounds of inadmissibility).

⁴⁹ See *id.* § 1255(a) (noting that a person must be admissible to the United States in order to adjust her status to that of a lawful permanent resident).

⁵⁰ See *id.* § 1227(a)(2) (providing the criminal grounds of deportability).

⁵¹ Interior immigration enforcement has expanded exponentially in recent years, leading to the identification of an increasing number of immigrants as deportable. See *infra* notes 319–27 and accompanying text (describing increased enforcement actions). Many current enforcement programs focus specifically on targeting immigrants who may have criminal convictions. For example, the federal government is currently implementing a new program, “Secure Communities,” which automatically links Department of Homeland Security immigration records to the fingerprint checks that routinely occur when a person is arrested and booked for a criminal offense, allowing immigration officials to identify individuals who may be removable. See *Secure Communities*, U.S. DEP’T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Oct. 24, 2011).

most forms of discretionary relief from removal. Lawful permanent residents are barred from seeking cancellation of removal if convicted of an “aggravated felony.”⁵² Immigrants who wish to adjust their status to permanent residence but need a waiver of inadmissibility⁵³ are barred if they have been convicted of nearly any “controlled substance offense.”⁵⁴ For these individuals and others, criminal convictions turn deportation into a mandatory minimum consequence of their offense.

Along with deportation itself, the federal immigration statute presents additional immigration penalties for criminal convictions. A conviction for an “aggravated felony” bars asylum status⁵⁵ and, in cases involving convictions after November 29, 1990, bars a lawful permanent resident from naturalizing as a United States citizen.⁵⁶ “Aggravated felonies,” “controlled substance offenses,” and, in some cases, “crimes involving moral turpitude” can trigger mandatory detention under the federal immigration statute (i.e., they prohibit seeking release from immigration jail on bond while in removal proceedings).⁵⁷ Federal immigration law is thus replete with penalties based on criminal convictions, both in terms of the triggers for removal and the bars to status and relief from removal.⁵⁸

⁵² See 8 U.S.C. § 1229b(a) (2006) (providing for cancellation of removal for certain permanent residents).

⁵³ When an individual seeks to become a lawful permanent resident but is deemed “inadmissible” due to a past criminal conviction, she may apply for a waiver of “inadmissibility” so that she may adjust her status. See *id.* § 1182(h) (providing the Attorney General with discretion to waive certain grounds of inadmissibility).

⁵⁴ See *id.* (establishing a controlled substance bar to the waiver of inadmissibility). The only exception to the drug bar pertains to “a single offense of simple possession of 30 grams or less of marijuana.” *Id.*

⁵⁵ See *id.* § 1158(b)(2)(B)(i) (establishing bars to asylum).

⁵⁶ See *id.* § 1101(f)(8) (providing that an individual with an aggravated felony conviction will not be found to be of good moral character). The effective date of the statutory provision barring naturalization to individuals with aggravated felony convictions is November 29, 1990. Immigration Act of 1990 § 509, Pub. L. No. 101-649, 104 Stat. 4978, 5051.

⁵⁷ See 8 U.S.C. § 1226(c)(1) (2006) (providing the criminal grounds of mandatory detention).

⁵⁸ As noted, these categories overlap in some respects, but not all. Convictions for “crimes involving moral turpitude” and “controlled substance offenses” trigger both inadmissibility and deportability (albeit with some differences in each context). Compare *id.* § 1182(a)(2) (referring to inadmissibility based on one crime involving moral turpitude, subject to certain exceptions, and any controlled substance offense), with *id.* § 1227(a)(2) (referring to deportability based on one crime involving moral turpitude within five years of admission, with no exceptions, or two crimes involving moral turpitude at any time, and any controlled substance offense except a one-time possession of less than thirty grams of marijuana). Other criminal grounds of removal are unique to either deportability or inadmissibility. A conviction for an “aggravated felony” (a vast category of offenses that includes misdemeanors and non-aggravated offenses, like shoplifting) does not constitute a

Despite the stakes triggered by criminal convictions, however, the immigration consequences of criminal convictions are not assessed through an independent judicial system. Rather, frontline immigration officers adjudicate affirmative applications to enter the country on a visa, seek asylum or lawful permanent resident status, or naturalize, based largely on paper applications and nonadversarial interviews. These officers review applicants' conviction records and have the power to deny applications based on their assessment of the convictions. These same officers also have the power to commence or refer a case for removal proceedings, the enforcement of which is carried out by Immigration and Customs Enforcement (ICE), a bureau of the U.S. Department of Homeland Security. Immigrants generally have no input in the process of determining whether a removal proceeding will be initiated and therefore little notice or opportunity to be heard regarding the other consequences that attach to such a decision.

For example, once ICE officials begin the removal process, they must decide whether to detain the immigrant in an immigration jail and whether the immigrant is eligible to be released from detention on bond. The question of whether an immigrant is subject to mandatory detention depends in part on whether any of her prior convictions fall within the criminal grounds enumerated in the detention statute.⁵⁹ Thus, the initial decision to detain an immigrant without the possibility of bond—made in the first instance by an ICE officer based on a paper record⁶⁰—also relies in part on the assessment of the immigrant's conviction record.

ground of inadmissibility. It does, however, constitute a ground of deportability and bar a noncitizen from seeking cancellation of removal, asylum, and a finding of good moral character necessary for naturalization. *See id.* § 1227(a)(2)(A)(iii) (aggravated felony ground of deportability); *id.* § 1229b(a)(3) (aggravated felony bar to cancellation of removal); *id.* § 1158(b)(2)(B)(i) (aggravated felony bar to asylum); *id.* § 1101(f)(8) (aggravated felony bar to good moral character).

⁵⁹ *See* 8 U.S.C. § 1226(c) (predicating mandatory detention in part on whether a person's prior convictions fall within certain enumerated grounds of removability); *see, e.g.,* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010) (discussing mandatory detention and other aspects of the federal immigration detention scheme).

⁶⁰ Regulations deprive an immigration court of jurisdiction to hold a bond hearing for a noncitizen who is subject to mandatory detention. *See* Joseph, 22 I. & N. Dec. 799, 802 (B.I.A. 1999) (explaining that an immigration judge may not set bond for an individual subject to mandatory detention but may determine whether the individual is properly included within the regulations that deprive the judge of jurisdiction over custody (citing 8 C.F.R. § 3.19(h)(2)(ii) (1999))). A noncitizen may seek review of the determination that he or she is properly subject to mandatory detention, but under BIA case law, the noncitizen must meet a high burden to prevail. *Id.* at 800 (placing the burden on a noncitizen to show that "the Service is substantially unlikely to establish, at the merits hearing, the charge or charges that subject the alien to mandatory detention").

With some notable exceptions,⁶¹ most immigrants facing detention and deportation have the right to an administrative hearing in immigration court where their convictions will be assessed by an immigration judge through an adversarial proceeding. However, they may be detained before the hearing on the basis of an immigration officer's interpretation of their prior convictions. The immigration court hearings operate under typical administrative agency constraints. Both the immigration judge and the government representative are employed by the executive branch; the judge is an employee of the U.S. Department of Justice and the government attorney is an employee of the U.S. Department of Homeland Security. The immigrant may retain counsel at his or her own expense, but there is no statutory right to government-appointed counsel.⁶² As a result, the majority of noncitizens in removal proceedings are pro se litigants, with the highest percentage of pro se litigants among the detained population.⁶³ Thus, even within the adversarial administrative hearing process, noncitizens facing removal tend to have the fewest resources and least access to attorneys to contest the assessment of their conviction records.

The rules of evidence are also more lax in immigration court than in state and federal courts. For example, immigration courts typically permit hearsay evidence and apply lower standards for the authentication of documents.⁶⁴ Because immigration judges frequently do not exercise their ability to permit discovery, parties are generally left to seek out their own evidence.⁶⁵ Immigrants may move to suppress

⁶¹ See *infra* notes 71–73 and accompanying text (discussing limitations on judicial review of discretionary agency decisions on removal and relief).

⁶² See *supra* note 46 (citing an INA provision pertaining to noncitizens' right to counsel in removal proceedings).

⁶³ Over eighty percent of detained noncitizens in removal proceedings are pro se litigants. AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 30 (2009), available at <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf> (citing NINA SIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM (2008), available at <http://www.vera.org/download?file=1780/LOP%2BEvaluation...final...>).

⁶⁴ See, e.g., *Solis v. Mukasey*, 515 F.3d 832, 835–36 (8th Cir. 2008) (noting the admissibility of hearsay evidence in immigration proceedings); *Vatyan v. Mukasey*, 508 F.3d 1179, 1185 (9th Cir. 2007) (noting the broad authority of immigration judges to determine the authenticity of documents); *Yongo v. INS*, 355 F.3d 27, 30–31 (1st Cir. 2004) (describing the flexible rules for authentication of documents).

⁶⁵ See 1 CHARLES GORDON ET AL., IMMIGRATION LAW & PROCEDURE § 3.07[3][b][ii][A] (2011) (noting the “traditional reluctance to permit discovery” in immigration matters).

evidence against them, but the standard for suppression is significantly higher in immigration court than in criminal court proceedings.⁶⁶

Once an immigration judge makes a decision, the avenues for independent review are slim. Either party may appeal an adverse immigration court decision to the Board of Immigration Appeals (BIA or Board).⁶⁷ If the Board affirms the immigration judge's order of removal, a noncitizen's only opportunity for federal court review is to appeal directly to the federal circuit court within thirty days of the final agency decision.⁶⁸ However, federal immigration law strips federal courts of judicial review of any final order of removal against a noncitizen who is deportable based on certain types of criminal grounds,⁶⁹ except for constitutional claims and questions of law.⁷⁰ Discretionary determinations, such as those granting certain types of relief or ordering removal on certain grounds, are unreviewable.⁷¹

In some cases, immigration officials' initial assessment of an immigrant's criminal conviction may actually divert the immigrant from any adversarial hearing process altogether. In the 1990s, Congress created a system of "expedited" administrative removal proceedings for certain noncitizens convicted of aggravated felonies.⁷² These proceedings are based on a frontline immigration official's assessment of a paper record and do not involve an impartial adjudicator.⁷³

If the immigration penalties for criminal convictions are so severe, one might wonder why these decisions are made solely within the administrative immigration system rather than the criminal court

⁶⁶ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (finding the exclusionary rule inapplicable unless there are egregious or widespread violations).

⁶⁷ See 8 C.F.R. § 1240.15 (2010) (establishing a procedure for appeal to the BIA).

⁶⁸ See 8 U.S.C. § 1252(b)(1) (2006) (providing for appeal procedures). The Attorney General may also certify certain BIA decisions for further decision making. See 8 C.F.R. § 1003.1(h)(1) (2010) (describing which cases the Board shall refer to the Attorney General for review). This is the process that led to *Matter of Silva-Trevino*. See 24 I. & N. Dec. 687, 687 (A.G. 2008) (explaining how the case came before the Attorney General).

⁶⁹ 8 U.S.C. § 1252(a)(2)(C).

⁷⁰ § 1252(a)(2)(D).

⁷¹ See, e.g., § 1252(a)(2)(B) (stripping federal courts of judicial review of decisions to deny discretionary relief under specified sections of the INA); § 1252(a)(2)(C)–(D) (stripping federal courts of judicial review of removal orders for immigrants removable under specified criminal grounds, except for constitutional claims or questions of law).

⁷² *Id.* § 1228 (providing for "expedited proceedings" under which the Attorney General may initiate and conclude removal proceedings for noncitizens convicted of an aggravated felony before their release from criminal custody).

⁷³ § 1228(b)(1) (providing the Attorney General with the authority to determine the deportability of a noncitizen subject to expedited removal based on streamlined procedures set forth in 8 U.S.C. § 1228(b)(4)); ABA, AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES 7, 17–18 (2004), available at http://www.protectcivilrights.org/pdf/reports/american-justice/american_justice.pdf (discussing administrative removal).

system. The Supreme Court has recognized that, despite their severe consequences, deportation laws are civil and not criminal in nature, and that the various protections provided in criminal court processes do not apply to immigration proceedings.⁷⁴ The Court has repeatedly rejected immigrant petitioners' attempts to import the protections of criminal law into the immigration system.⁷⁵

In the early years of federal immigration law, however, Congress did provide some protections within the criminal system to address immigration issues. From 1917 to 1990, criminal sentencing judges in both state and federal cases had the authority to issue a Judicial Recommendation Against Deportation (JRAD), which would prevent immigration officials from using the underlying criminal conviction as a basis for deportation.⁷⁶ As the grounds of deportation expanded and immigration became more controversial, Congress eliminated the JRAD provision.⁷⁷ Now the only direct role that criminal courts play in addressing immigration consequences is to ensure that defense attorneys comply with their constitutional duty to advise noncitizens of the immigration consequences of a conviction prior to the entry of a plea.⁷⁸ Through its administrative structure, the immigration agency is the only entity empowered to apply (or decline to apply) these consequences to noncitizens with criminal convictions.

Criminal convictions thus play a critical role in the assessment of immigration consequences throughout the immigration system. The nature of a person's conviction will dictate if he or she is eligible for immigration status, inadmissible or deportable from the United States, subject to mandatory detention, subject to administrative removal, eligible for discretionary relief from removal, and able to seek judicial review of a removal order. As part of a civil, rather than

⁷⁴ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038–39 (1984) (“Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”). For a discussion and critique of the rationale behind this theory, see generally Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008) (critiquing the blanket designation of all removal proceedings as “civil” in nature, which fails to register the distinction between exclusion and expulsion proceedings, and arguing that the procedural protections afforded defendants in criminal trials should extend to individuals facing expulsion).

⁷⁵ See Markowitz, *supra* note 74, at 300–07 (collecting cases that reject importation of criminal law protections into immigration law).

⁷⁶ See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1479–80 (2010) (discussing the history of JRAD in federal immigration law and the congressional revocation of criminal courts' discretion).

⁷⁷ See *id.* (same).

⁷⁸ See *id.* at 1483 (describing the duty of private practitioners to advise clients about the risk of deportation and other adverse immigration consequences as a result of criminal conviction and to provide correct advice when those consequences are clear).

criminal, system, these assessments are made under considerable administrative constraints. Immigration officials and administrative judges must make determinations on the basis of paper records and through quasi-judicial processes in which immigrants may have little access to legal resources and information to defend their cases. The criminal court process does little more than adjudicate the conviction at issue and, through the assurance of constitutionally adequate defense representation, provide the immigrant with some sense of the immigration penalties he or she will face due to the conviction. The immigration system—with all of its constraints—is left to mete out the immigration penalties.

II

THE ORIGINS OF CATEGORICAL ANALYSIS IN IMMIGRATION LAW: PLACING LIMITATIONS ON THE POWER OF THE IMMIGRATION AGENCY

The prominent role of criminal convictions within the federal immigration law scheme is not new. Since 1891, Congress has predicated immigration consequences on whether noncitizens have been convicted of certain types of criminal offenses.⁷⁹ Within years of the enactment of this law, the agency and the federal courts reviewing agency decision making had to address how immigration adjudicators should assess whether an immigrant's criminal conviction fit within the new federal immigration penalties. In light of the context in which those conviction assessments were made and Congress's chosen statutory scheme, the federal courts and the agency applied a categorical analysis—one that limited the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense rather than a review of the facts underlying the crime. As discussed below in Parts II.A and B, federal court and agency decisions repeatedly reaffirmed the statutory and contextual basis for categorical analysis for decades following these early decisions in immigration law.⁸⁰

⁷⁹ Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (providing for the exclusion of individuals “who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude”). Congress later authorized the deportation of noncitizens who were convicted of certain crimes in the United States. *See* Immigration and Nationality Act of 1917, ch. 29, § 17, 39 Stat. 874, 889 (authorizing deportation of “any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States” and any noncitizen with two such convictions for crimes involving moral turpitude).

⁸⁰ *See infra* Appendix (listing pre-*Taylor* federal court, Attorney General, and agency decisions that applied categorical analysis in immigration law).

Modern case law and scholarship on the immigration penalties of crimes have largely ignored this history and its lessons for the current debate. In this Part, I resurrect the origins of categorical analysis by revealing the century of precedent that fleshes out the contours and rationales for this approach. As I demonstrate below, the early decisions reveal that (a) courts and the agency long have recognized that Congress intended to limit the ability of immigration adjudicators to probe the circumstances underlying a criminal conviction in assessing immigration penalties; and (b) the cornerstone of categorical analysis is its view that the factual circumstances beyond the record of conviction are never relevant to the inquiry. In defending this rule, the federal courts and the agency recognized the important role that categorical analysis plays in ensuring the fair, uniform, and efficient administration of immigration laws, and restricting the role of immigration adjudicators in meting out deportation penalties—rationales that are specific to the immigration agency context.

A. *Categorical Analysis at the Turn of the Century*

The assessment of criminal convictions has been a necessary feature of the federal immigration system for over a century. The term “convicted” appeared in immigration law as early as 1891, when Congress first legislated removability based on convictions “involving moral turpitude.”⁸¹ The statute dictated the exclusion of “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.”⁸² Congress reenacted this provision in 1903, 1907, and 1917, expanding the language to include the exclusion or deportation of any noncitizen who has been “convicted” of or who “admits” the commission of a crime or misdemeanor involving moral turpitude.⁸³

In examining this language under these early immigration statutes, federal courts concluded that Congress used the terms “convicted” and “admits” as distinct means of limiting the power of immigration officers to find an individual removable on criminal grounds. Early federal court decisions considering the “admits”

⁸¹ Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084; *see also* *Jordan v. De George*, 341 U.S. 223, 229–30 & n.14 (1951) (noting the legislative history of the term “moral turpitude”).

⁸² § 1, 26 Stat. at 1084.

⁸³ Act of Mar. 3, 1903, ch. 1021, § 2, 32 Stat. 1213, 1214 (including “moral turpitude” language); Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898, 899 (expanding grounds of exclusion to noncitizens “convicted” of, or who “admit” to the commission of, a crime involving moral turpitude); Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874, 889 (creating a ground of deportability for a noncitizen convicted of a crime involving moral turpitude in the United States in some circumstances).

language concluded that Congress intended its application where there was no conviction to prevent immigration officials from trying facts and underlying conduct. As the First Circuit explained in its 1925 decision in *Howes v. Tozer*,

Congress, by the enactment of this provision, has required the alien's own admission of guilt as proof of the commission of this class of crimes, and has deprived the immigration authorities of the right to try the question of guilt; that the statute contemplates a voluntary admission; and that evidence of facts stated by the alien from which an inference of his guilt might be inferred is not competent.⁸⁴

As another court similarly explained, "This provision must have been intended as a limitation upon the power of the immigration authorities. It deprives them of the right to try the question of guilt at all. So it is a privilege to aliens because it insures them against any such trial."⁸⁵

Similarly, federal courts concluded that Congress sought to limit immigration officers' power to determine whether persons were "convicted" of crimes involving moral turpitude. Federal district courts were the first to review the agency's decisions to exclude or deport noncitizens from the United States based on their convictions.⁸⁶ In the 1913 case *United States ex rel. Mylius v. Uhl*, a noncitizen challenged his detention and exclusion from the United States on the basis of a prior conviction for criminal libel in England.⁸⁷ Immigration officials had concluded that the petitioner's conviction involved moral turpitude by reviewing reports of the trial and the underlying facts that gave rise to his conviction.⁸⁸ Judge Noyes, writing for the federal district court in the Southern District of New York, concluded that the immigration officials erred under the statute by not confining their review to the inherent nature of the statutory offense of criminal libel.⁸⁹ Judge Noyes explained that "the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules."⁹⁰ Under such standards,

⁸⁴ 3 F.2d 849, 852 (1st Cir. 1925).

⁸⁵ *United States ex rel. Castro v. Williams*, 203 F. 155, 156–57 (S.D.N.Y. 1913).

⁸⁶ Until 1952, habeas corpus in federal district court provided an immigrant's only avenue for federal review of an agency deportation order. See *Heikkila v. Barber*, 345 U.S. 229, 230, 235–37 (1953) (finding that deportation orders were only assailable via habeas corpus but recognizing Congress's power to prescribe other procedures for contesting deportation). Today, noncitizens may seek limited review of an agency deportation order through a petition for review to the U.S. Courts of Appeals. 8 U.S.C. § 1252 (2006).

⁸⁷ 203 F. 152, 153 (S.D.N.Y. 1913).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

immigration law cannot permit a rule that, “where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other.”⁹¹ The court held that “the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it.”⁹²

Applying this standard to the crime at issue, criminal libel, Judge Noyes concluded that the nature of the offense did not inherently involve moral turpitude.⁹³ He noted that a person may be convicted of libel under the statute through negligence and without having knowledge that the information he printed or distributed was not true.⁹⁴ He therefore ordered the petitioner to be released from detention and admitted to the United States.⁹⁵

In affirming Judge Noyes’s decision on appeal, the Second Circuit expounded upon the principles supporting what has become modern-day categorical analysis in immigration law.⁹⁶ First, the court emphasized the importance of limiting the role of immigration officers to those of administrators instead of judges:

[T]he immigration officers act in an administrative capacity. They do not act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude. . . . [T]his question must be determined from the judgment of conviction.⁹⁷

The court also emphasized the role of categorical analysis in ensuring the uniform administration of immigration law:

[T]he law must be uniformly administered. It would be manifestly unjust so to construe the statute as to exclude one person and admit another where both were convicted of criminal libel, because, in the opinion of the immigration officials, the testimony in the former case showed a more aggravated offence than in the latter.⁹⁸

Based on these rationales, the Second Circuit applied a categorical analysis and affirmed the district court’s conclusion that the crime of libel for which the noncitizen was convicted did not inherently involve moral turpitude. Following this decision, other courts applied

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 155.

⁹⁴ *Id.* at 154.

⁹⁵ *Id.* at 155.

⁹⁶ *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914).

⁹⁷ *Id.*

⁹⁸ *Id.*

similar rules, holding that the statute required adjudicators to assess the inherent nature of the offense of conviction and ignore the underlying facts, whether good or bad for the noncitizen.⁹⁹

This reasoning was further refined by Judge Learned Hand in a series of decisions in the 1930s. In *United States ex rel. Robinson v. Day*, Judge Hand applied the reasoning of *Mylius* to the case of an individual facing deportation for his conviction of forgery under New York state law.¹⁰⁰ Judge Hand observed that the provisions of the New York forgery statute all require intent to deceive, and therefore the noncitizen's forgery offense was inherently a crime involving moral turpitude.¹⁰¹ Judge Hand reiterated the principle underlying categorical analysis:

Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral. Conversely, when it does, no evidence is competent that he was in fact blameless.¹⁰²

⁹⁹ See, e.g., *United States ex rel. Meyer v. Day*, 54 F.2d 336, 337 (2d Cir. 1931) (“We cannot go behind the judgment of conviction to determine the precise circumstances of the crime for which the alien was sentenced.”); *United States ex rel. Portada v. Day*, 16 F.2d 328, 329 (S.D.N.Y. 1926) (“This court is bound by the record, and it is not open to question that such an act is one involving moral turpitude.”).

¹⁰⁰ 51 F.2d 1022, 1022–23 (2d Cir. 1931).

¹⁰¹ *Id.* at 1022.

¹⁰² *Id.* at 1022–23 (citations omitted). The application of this rule—that facts could not be considered even with respect to an individual's blameworthiness—was subject to criticism in at least one dissenting opinion during this time period. In *Tillinghast v. Edmead*, 31 F.2d 81 (1st Cir. 1929), the First Circuit held that an immigrant's conviction for larceny was a crime involving moral turpitude because the larceny offense, by definition, was an intentional act to defraud or deprive a person of his or her property permanently. *Id.* at 84. In dissent, Judge Anderson asserted that immigration officials should be able to consider the circumstances of the offense, noting that a mother stealing milk for her child or a “foolish college student” stealing a sign would not be committing immoral acts. *Id.* at 84–85 (Anderson, J., dissenting). However, Judge Anderson's critique could be recast as a criticism of the First Circuit's conclusion that larceny crimes always by definition involve moral turpitude. If it were accepted that larceny convictions are defined more broadly to encompass acts with and without moral turpitude, the court would proceed to examine whether there was any evidence from the record of conviction to demonstrate that the person was convicted of the necessary immoral intent. See *infra* note 267 (discussing how courts' concerns regarding categorical analysis may relate to the concept of the “divisibility” of the statutory definition of criminal offenses). *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir. 1939), presents one example of a more critical analysis of a statute's definition in light of the breadth of punishable offenses. See *infra* notes 103–06 and accompanying text (discussing *Guarino* and the court's acknowledgment that a broadly written criminal statute may result in findings of non-deportability under a categorical analysis).

A few years later, in *United States ex rel. Guarino v. Uhl*,¹⁰³ Judge Hand reaffirmed this logic again in a case of a noncitizen facing deportation under the Immigration Act of 1917 based on his New York conviction for possession of a jimmy, a burglar's tool. Judge Hand explained that "unless the possession of the jimmy with intent to use it for any crime at all, was 'necessarily', or 'inherently', immoral, the conviction did not answer the demands of § 19 of the act of 1917."¹⁰⁴ Applying this reasoning, Judge Hand held that the conviction did not inherently involve moral turpitude and reiterated the principle that adjudicators cannot look into the facts underlying the offense. In so doing, Judge Hand noted how the rule protected immigrants from facing severe immigration penalties for offenses that may, by definition, include minor conduct. Speaking of the offense at issue, possession of an instrument that could be used to open doors and windows, Judge Hand stated,

Such crimes by no means 'inherently' involve immoral conduct; boys frequently force their way into buildings out of curiosity, or a love of mischief, intending no more than to do what they know is forbidden. . . . [I]t would be to the last degree pedantic to hold that it involved moral turpitude and to visit upon it the dreadful penalty of banishment, which is precisely what deportation means to one who has lived here since childhood.¹⁰⁵

At the same time, Judge Hand recognized that, by focusing on the definition of the offense rather than the factual circumstances, a categorical rule may permit immigrants who have actually committed more serious offenses to avoid deportation consequences. Noting that it was unlikely that the defendant in the case at bar possessed the jimmy for innocent purposes, Judge Hand nonetheless maintained that "[deportation] officials may not consider the particular conduct for which the alien has been convicted; and indeed this is a necessary corollary of the doctrine itself."¹⁰⁶

As jurisprudence on categorical analysis doctrine developed, courts began to address the question of when, if ever, an immigration adjudicator could consider criminal records in assessing whether an offense inherently involves moral turpitude. In *United States ex rel. Zaffarano v. Corsi*, a noncitizen faced deportation under a provision of the Immigration Act of 1917 applicable to any noncitizen convicted of two or more crimes involving moral turpitude and sentenced for

¹⁰³ 107 F.2d 399.

¹⁰⁴ *Id.* at 400.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

each to more than one year of imprisonment.¹⁰⁷ The noncitizen argued that one of his convictions—second degree assault under New York law—was not a crime involving moral turpitude.¹⁰⁸ In considering this argument, the court observed that New York law defined second degree assault through five subdivisions—only some of which inherently involved moral turpitude.¹⁰⁹ The court noted that the government had not submitted the indictment in the noncitizen’s criminal case, so the immigration officials had been unable to determine under which subdivision of the statute the noncitizen was convicted.¹¹⁰ The court held that “in determining whether the crime of which an alien stands convicted is one ‘involving moral turpitude,’ neither the immigration officials nor the courts sitting in review of their action may go beyond the record of conviction.”¹¹¹ The court thus remanded the case for a “fair hearing” on whether the record of conviction—if the indictment were supplied—demonstrated that the noncitizen’s second degree assault offense was a crime involving moral turpitude.¹¹²

The noncitizen petitioned for rehearing, arguing that the decision in his case, which permitted immigration officials to look at the indictment, was contrary to the Second Circuit’s prior precedent in *Robinson*.¹¹³ The court rejected the petition for rehearing, noting that resorting to review of the record of conviction would not change the fact that immigration officials should not consider whether “*in the particular instance* the alien’s conduct was immoral.”¹¹⁴ Instead, immigration officials could examine the record of conviction, i.e., “the charge (indictment), plea, verdict, and sentence,” only to determine “the specific criminal charge of which the alien is found guilty and for which he is sentenced.”¹¹⁵ In other words, “[i]f an indictment contains several counts, one charging a crime involving moral turpitude and others not, the record of conviction would, of course, have to show conviction and sentence on the first count to justify deportation.”¹¹⁶ However, nothing in this decision changed the rule that immigration officials cannot consider the underlying facts of the offense.¹¹⁷ This

¹⁰⁷ 63 F.2d 757, 757 (2d Cir. 1933) (per curiam).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 758.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 757–58.

¹¹² *Id.* at 758.

¹¹³ *Id.* at 758–59; see *supra* notes 100–02 and accompanying text (discussing *Robinson*).

¹¹⁴ *Zaffarano*, 63 F.2d at 759 (emphasis added).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ As the *Zaffarano* court noted, the purpose of reviewing the official record of conviction is only to determine which subsection of a criminal statute gave rise to a person’s conviction. *Id.* Documents that might have been created or considered at various

view was widely adopted among the federal circuits in subsequent years.¹¹⁸

Thus, by the first decades of the 1900s, the doctrine of categorical analysis was already well established. The early federal court decisions made clear their understanding that Congress intended immigration officials to limit their review to the offense of conviction and to determine whether the offense for which an immigrant was convicted inherently involves moral turpitude, according to its definition, without regard to the underlying factual circumstances. Only if the offense of conviction is defined in multiple subdivisions, may immigration officials consult the record of conviction to determine whether the subdivision under which the person was convicted inherently involves moral turpitude. But in no way were immigration officials permitted to try facts, consider testimony, or look at evidence outside the record of conviction. Such factual evidence was irrelevant to the inquiry and beyond the scope of immigration officials' administrative capacity. The rule was widely recognized as being integral to preserving limits on the role of immigration officials as administrative agents and to ensuring uniformity across classes of immigrants who have been convicted of the same offenses.¹¹⁹

B. *The Agency's Early Endorsement of Categorical Analysis*

The federal courts' view of Congress's intent behind the statute was also adopted by the United States Attorney General on behalf of the agency in one of his first decisions interpreting the immigration statute. In 1933, the United States Secretary of State requested that Attorney General Cummings issue his "opinion concerning the proper interpretation"¹²⁰ of the provision of Section 3 of the Immigration Act of 1917, which provides for the exclusion of immigrants who have been "convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude."¹²¹ In response, Attorney General Cummings issued a decision explaining the definition of

points in the criminal court process but do not officially establish the offense for which the person was ultimately convicted are not relevant to the inquiry. For example, police reports, witness statements, or presentence reports are not considered as part of the official record of conviction under a categorical analysis. *See, e.g., Dickson v. Ashcroft*, 346 F.3d 44, 53–54 (2d Cir. 2003) (rejecting reliance on a presentence report); *Sanudo*, 23 I. & N. Dec. 968, 974–75 (B.I.A. 2006) (rejecting reliance on a police report narrative).

¹¹⁸ *See infra* Appendix Part A (indexing federal court decisions applying categorical analysis in immigration law prior to the Supreme Court's decision in *Taylor*).

¹¹⁹ *See infra* Appendix (noting extensive case law applying categorical analysis).

¹²⁰ *Immigration Laws—Offenses Involving Moral Turpitude*, 37 Op. Att'y Gen. 293, 293 (1933).

¹²¹ Ch. 29, § 3, 39 Stat. 874, 875.

“offenses involving moral turpitude”¹²² as well as the methodology for determining whether a noncitizen’s conviction constitutes such a crime. On the latter issue, the Attorney General adopted the reasoning of Judge Noyes in his 1913 *Mylius* decision, holding that “[i]f the alien has been convicted of a crime such as indicated and the conviction is established, it is not the duty of the administrative officer to go behind the judgment in order to determine purpose, motive, and knowledge, as indicative of moral character.”¹²³

The Attorney General went on to adopt the reasons specified by Judge Noyes as the agency’s reasons for using a categorical analysis, acknowledging not only the nonjudicial nature of the agency and the need for uniformity, but also efficiency concerns. Specifically, the Attorney General repeated four rationales for the categorical analysis: (1) “immigration authorities act in an administrative and not in a judicial capacity,” such that “[t]heir function is not . . . to go behind judgments of conviction and determine with respect to the acts disclosed by testimony the question of purpose, motive and knowledge”; (2) immigration authorities “must follow definite standards and apply general rules”; (3) to apply the law differently based on outside evidence that is not always available would be “to depart from the uniformity of treatment” by having different outcomes even “where two aliens are shown to have been convicted of the same kind of crime”; and (4) this rule is “necessary for the efficient administration of the immigration laws.”¹²⁴ The Attorney General later applied categorical analysis in a series of decisions in the 1930s, affirming that immigration adjudicators may not go behind the judgment and record of conviction to assess the facts and circumstances of a noncitizen’s particular offense.¹²⁵

In 1940, Congress created the Board of Immigration Appeals, an adjudicative body within the Department of Justice that would address appeals from immigration judge decisions on behalf of the agency, subject to possible review by the Attorney General or appeal to federal court.¹²⁶ Within the first few years of its existence, the BIA

¹²² 37 Op. Att’y Gen. at 293.

¹²³ *Id.* at 294–95.

¹²⁴ *Id.* at 295 (citation omitted).

¹²⁵ See *infra* Appendix Part B (indexing Attorney General decisions applying categorical analysis in immigration law prior to the Supreme Court’s decision in *Taylor*).

¹²⁶ Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502 (Sept. 4, 1940) (codified at 8 C.F.R. §§ 90.9–90.10 (1941)) (creating the BIA). After Congress enacted the INA in 1952, the Attorney General promulgated regulations defining the powers and appellate jurisdiction of the BIA. See Immigration and Nationality Regulations, 17 Fed. Reg. 11,469, 11,475 (Dec. 19, 1952) (codified as amended at 8 C.F.R. § 1003.1 (2011)) (setting forth the scope of the BIA’s authority).

adopted and explained the categorical inquiry as “settled judicial principles” in an opinion later affirmed by the Attorney General.¹²⁷ The BIA held that if a crime “as defined . . . does not inherently or in its essence involve moral turpitude, then no matter how immoral the alien may be, or how iniquitous his conduct may have been in the particular instance, he cannot be deemed to have been guilty of base, vile, or depraved conduct.”¹²⁸ The BIA then adopted a method of analyzing broad criminal statutes that focused on whether or not a given statute included offenses that involved moral turpitude. It reasoned that if those offenses that involve immoral conduct are “defined in divisible portions of a statute,” which are separate and severable from those portions of the statute defining offenses which do not involve immoral conduct, then an adjudicator could look at the record of conviction, including “the indictment (complaint or information), plea, verdict and sentence” to ascertain under which divisible portion of the statute the noncitizen was convicted, and whether the crime involved moral turpitude.¹²⁹ The scope of inquiry under the BIA’s analysis thus continued to be defined narrowly.

In its first decade of adjudications, the BIA applied this formulation of categorical analysis to the assessment of convictions in at least a dozen cases under the early immigration statutes.¹³⁰ It recognized, as Judge Learned Hand had before it, that the rule could sometimes result in odd outcomes. In *Matter of T*—, for example, the BIA observed that “in some cases this rule results in the deportation of an alien who has committed a petty offense which does not necessarily indicate moral obliquity and in a finding of nondeportability in some very few cases where the offense is indicative of bad character.”¹³¹ Nonetheless, the agency accepted these outcomes as a natural result of “the use of fixed standards . . . necessary for the efficient administration of the immigration laws.”¹³² These cases repeatedly explained the basis for this rule as respecting the limits of agency power and the need for fixed and efficient standards in the administration of immigration law.

¹²⁷ S—, 2 I. & N. Dec. 353, 357 (A.G. 1945) (citations omitted) (defining a crime involving moral turpitude as constituting base, vile, or depraved conduct).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See *infra* Appendix Part C (indexing BIA decisions applying categorical analysis in immigration law prior to the Supreme Court’s decision in *Taylor*).

¹³¹ T—, 3 I. & N. Dec. 641, 642–43 (B.I.A. 1949).

¹³² *Id.* at 643 (quoting *United States ex rel. Mylius v. Uhl*, 203 F. 152, 153 (S.D.N.Y. 1913), *aff’d*, 210 F. 860 (2d Cir. 1914)) (internal quotation marks omitted).

C. *Categorical Analysis in the Modern Era*

Categorical analysis, as articulated in the early federal and agency cases, survived most of the second half of the twentieth century—beyond the creation of the modern-day Immigration and Nationality Act in 1952,¹³³ the expansion of the various criminal grounds of removal, and the drastic changes to the availability of judicial review and judicial discretion within the immigration system.¹³⁴ Repeatedly, federal courts, the agency, and policymakers defended the basic rule as being necessary for ensuring the appropriate role of immigration officials and promoting uniformity and efficiency in the administration of immigration laws.¹³⁵ The decisions underscored a view that Congress intended a categorical analysis to apply wherever it predicated immigration penalties on convictions.

Categorical analysis was already a half-century old when Congress debated what would become the modern-day Immigration and Nationality Act in 1952. The debate sheds some light on Congress's view of the importance of conviction assessments for preserving review of agency decisions. The Senate version of the bill initially proposed a significant change to the criminal grounds of deportability for convictions. In addition to the longstanding grounds for deporting an immigrant who was "convicted" of a crime involving moral turpitude, section 241(a)(4) of the Senate bill proposed removal of an immigrant who, "at any time after entry is convicted in the United States of any criminal offense, not comprehended within any of the [foregoing crimes involving moral turpitude], if the Attorney General in his discretion concludes that the alien is an undesirable resident of the United States."¹³⁶ Senators objected to this language, asserting that it would permit the immigration agency to deport a person based on a discretionary view of the desirability of the immigrant rather than the conviction at issue.¹³⁷ As Senator Douglas explained,

The phrase is "in his discretion"—that is, in the discretion of the Attorney General. In other words, frequently the test is not the fact,

¹³³ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

¹³⁴ See *supra* note 10 and accompanying text (discussing the 1996 immigration law reforms).

¹³⁵ See *infra* Appendix (listing federal court, BIA, and agency decisions applying categorical analysis).

¹³⁶ S. 2550, 82d Cong. § 241(a)(4) (1952).

¹³⁷ See 98 CONG. REC. 5420-21 (1952) (statements of Sens. Herman Welker and Howard Douglas) (expressing concerns regarding the discretion afforded the Attorney General in assessing criminal convictions and the lack of recourse afforded noncitizens to challenge the Attorney General's determination).

but whether the Attorney General might with some reason conclude that deportation was proper. [Senator Welker] has quite properly pointed out that this leaves only a very narrow question for the courts to decide on review, and the alien has almost no protection. A lawsuit is no protection if the matter to be received is as vague and variable and arbitrary as the Attorney General's conclusion about a person's undesirability.¹³⁸

Thereafter, amendments to the Senate bill eliminated this portion of the bill and left the conviction-based grounds.¹³⁹

Since 1952, federal courts and the BIA have continued to apply categorical analysis to determinations of whether a conviction constitutes a basis for deportation and exclusion, including but not limited to the context of crimes involving moral turpitude.¹⁴⁰ It is in these decisions that the agency's view of congressional intent in the statute is most prominent. In *Matter of Pichardo-Sufren*, for example, the BIA held that the agency's and federal courts' longstanding approach to assessing whether a conviction is a crime involving moral turpitude applies "with equal force" to the "firearms" ground of deportability under the 1994 Immigration and Nationality Act.¹⁴¹ The BIA held that "it is the nature of the crime, as defined by statute and

¹³⁸ *Id.* at 5421 (statement of Sen. Howard Douglas).

¹³⁹ Immigration and Nationality Act of 1952 § 241(a)(4), Pub. L. No. 82-414, 66 Stat. 163, 204 (delineating grounds of deportation based on convictions for crimes of moral turpitude).

¹⁴⁰ See *infra* Appendix Parts A, C (indexing cases applying categorical analysis in immigration law prior to the Supreme Court's decision in *Taylor*, including post-1952 federal court and BIA decisions). However, categorical analysis has not gone unchallenged during this time period, albeit in dissent. In *Marciano v. INS*, for example, the majority held that a Minnesota conviction for statutory rape was, by definition, a crime involving moral turpitude. 450 F.2d 1022, 1025 (8th Cir. 1971). Judge Eisele dissented, asserting that a factual approach would be preferable because it would be the only way to determine whether the offense did in fact involve moral turpitude. *Id.* at 1026 (Eisele, J., dissenting). Unlike the majority, he concluded that the traditional rule of categorical analysis—one that would look to whether the offense inherently involved moral turpitude—was not ideal because it was often possible to find examples where statutes could be broadly construed, and immigrants who had in fact committed crimes involving moral turpitude could escape the reach of the deportation provision. *Id.* at 1027. At the same time, he criticized the majority for adopting a variant of the rule that only looked to whether the offense "generally" or "commonly" involved moral turpitude, noting that such a rule would include individuals who had not in fact committed immoral acts. *Id.* at 1028. Judge Eisele concluded that only a factual approach would achieve the appropriate results. However, no majority decision adopted this position until recently, and it has only been adopted in cases where a factual approach would not result in favorable outcomes for the immigrant litigants. I critique these recent courts' assertions regarding the relative value of a factual approach in Parts III and IV. For further discussion of *Marciano*, see the case notes in STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 567–69 (5th ed. 2009).

¹⁴¹ *Pichardo-Sufren*, 21 I. & N. Dec. 330, 334–35 (B.I.A. 1996) (discussing the application of the categorical analysis to the determination of whether a conviction

interpreted by the courts and as limited and described by the record of conviction, which determines whether an alien falls within the reach of that law.”¹⁴² It held that the INA’s provision for the firearms ground of deportability, like the crime-involving-moral-turpitude ground, “relates to convictions” by the terms of the statute and thus “mandates a focus on an alien’s conviction, rather than his conduct.”¹⁴³

Similarly, in *Matter of Velazquez-Herrera*, the BIA applied a categorical analysis to another 1996 addition to the INA that makes a noncitizen who is convicted of a “crime of child abuse” deportable.¹⁴⁴ In rejecting the government’s argument that categorical analysis should not apply to this provision, the BIA explained that the statute’s requirements were unambiguous. While the BIA agreed with the Department of Homeland Security that Congress intended the deportability ground based on a crime of child abuse to be construed broadly, it stated that “the statute’s general purpose cannot supersede its language, which plainly focuses on those crimes of which an alien has been ‘convicted.’”¹⁴⁵ The BIA noted that Congress’s repeated decisions to predicate some of the more recent additions to the deportability grounds on convictions should not be disregarded. At the time the child abuse ground of deportability was enacted in 1996,

different variations of the ‘categorical’ approach had been applied in immigration proceedings for more than 80 years, and we must presume that Congress was familiar with that fact when it made deportability under section 237(a)(2)(E)(i) depend on a ‘conviction.’ Had Congress wished to predicate deportability on an alien’s actual conduct, it would have been a simple enough matter to have done so.¹⁴⁶

The agency’s view of the statutory “conviction” language was not the only basis for its embrace of categorical analysis. The new grounds of deportation also led the BIA to echo previous courts regarding the efficiency concerns promoted by categorical analysis. In *Pichardo-Sufren*, the BIA stated that a categorical analysis is “the only workable approach in cases where deportability is premised on the existence of a conviction.”¹⁴⁷ By contrast, adopting a factual inquiry “essentially would be inviting the parties to present any and all

constitutes a firearms violation under § 241(a)(2)(C) of the Immigration and Nationality Act).

¹⁴² *Id.* at 335.

¹⁴³ *Id.*

¹⁴⁴ 24 I. & N. Dec. 503, 513 (B.I.A. 2008).

¹⁴⁵ *Id.* at 515.

¹⁴⁶ *Id.* (citation omitted).

¹⁴⁷ 21 I. & N. Dec. 330, 335 (B.I.A. 1996).

evidence bearing on an alien's conduct leading to the conviction, including possibly the arresting officer's testimony or even the testimony of eyewitnesses who may have been at the scene of the crime."¹⁴⁸ There would be "no clear stopping point where [the agency] could limit the scope of seemingly dispositive but extrinsic evidence" on deportability.¹⁴⁹ Such a factual inquiry would be not only at odds with streamlined immigration adjudication, the agency reasoned, but "inconsistent . . . with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence."¹⁵⁰

This longstanding precedent may provide some insight into Congress's intent as it made other changes to immigration law. Congress has amended the grounds of deportability and inadmissibility over fifty times since 1952.¹⁵¹ It has expanded the criminal grounds of removal to add more categories of offenses, but it has not inserted explicit language in the statute to modify the categorical analysis articulated and applied by the BIA and federal courts. Moreover, it appears to have rejected at least one attempt to alter the analysis. In 2007, Congress declined to vote on a proposed amendment that would have redefined aggravated felonies as the offenses described in the INA, regardless of the particular criminal statute under which the individual was convicted, and placed the burden on the noncitizen to prove that "the particular facts underlying the offense do not satisfy the generic definition of that offense."¹⁵² The basic structure of the immigration statute—predicating certain immigration penalties on convictions—has remained unchanged since courts first articulated categorical analysis in the early twentieth century.

As this history demonstrates, categorical analysis has had a long-standing and important role in the immigration context. The earliest cases observed that Congress predicated deportation on convictions, not conduct, in order to ensure that immigration officials would act in an administrative rather than judicial capacity when determining the immigration penalties for convictions. In defending this view, federal courts and the agency emphasized the role that categorical analysis plays in promoting the fair, uniform, and efficient administration of immigration law. Congress has declined to legislate changes to the contrary. This understanding of congressional intent and the long-standing rationales for categorical analysis provide the appropriate

¹⁴⁸ *Id.* at 335.

¹⁴⁹ *Id.* at 336.

¹⁵⁰ *Id.* at 335.

¹⁵¹ See 8 U.S.C. § 1182 note (2006) (listing amending acts); *id.* § 1229a note (same).

¹⁵² Border Enforcement, Employment Verification, and Illegal Immigration Control Act, H.R. 4065, 110th Cong. § 201(a)(3)(iii) (2007).

lens through which to assess whether categorical analysis remains applicable within immigration law today.

III

THE FLAW IN THE CURRENT DEBATE: RELIANCE ON CRIMINAL SENTENCING LAW IN CONSIDERING CATEGORICAL ANALYSIS IN THE IMMIGRATION CONTEXT

Recent decisions have taken a sharp turn away from the century of precedent on categorical analysis. In his 2008 decision in *Matter of Silva-Trevino*, the Attorney General added a third step to the categorical analysis of “a crime involving moral turpitude”¹⁵³: to permit an immigration adjudicator to assess “any additional evidence or factfinding the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question.”¹⁵⁴ In its 2009 decision in *Nijhawan v. Holder*, the Supreme Court held that immigration adjudicators may inquire into the facts underlying the loss caused by a fraud to determine if an immigrant found guilty of fraud has been convicted of an “aggravated felony” under the INA.¹⁵⁵ Neither of these decisions contends with the history of categorical analysis in immigration law, and both challenge the notion that any such categorical limitations on the assessment of criminal convictions exist in the immigration context. These decisions, and others like them, represent a significant departure from categorical analysis, and they have left the framework for determining the immigration penalties of criminal convictions in disarray.

What happened? The answer lies with a 1990 criminal sentencing case, *United States v. Taylor*,¹⁵⁶ and its recent progeny. In *Taylor*, the Supreme Court first articulated the basis for a categorical analysis of criminal convictions, but in the context of determining whether a conviction fits within a criminal sentencing enhancement under a federal criminal statute. The decision came just a few years before the immigration law reforms of 1996 vastly expanded the immigration penalties associated with criminal convictions. Because the categorical analysis of *Taylor* mirrored so closely the categorical analysis long applied in immigration law—and came from the country’s highest court—immigrant litigants and courts invoked *Taylor* to justify the use of categorical analysis in scores of cases in the years that followed the

¹⁵³ *Silva-Trevino*, 24 I. & N. Dec. 687, 689–90, 704 (A.G. 2008) (enumerating the three steps that should be taken to determine whether a conviction constitutes a “crime involving moral turpitude”).

¹⁵⁴ *Id.* at 704.

¹⁵⁵ *Nijhawan v. Holder*, 129 S. Ct. 2294, 2298–302 (2009).

¹⁵⁶ 495 U.S. 575 (1990).

decision.¹⁵⁷ Now, however, reliance on the Supreme Court's criminal sentencing jurisprudence has overtaken the debate in immigration law completely. Courts began to note the differences between the sentencing and immigration contexts and, in distinguishing *Taylor*, invented an entirely new approach to criminal conviction assessments in immigration cases that ignores the independent basis for categorical analysis in immigration law. Even as immigrant litigants continue to rely on *Taylor* to defend the use of categorical analysis, the Supreme Court, lower courts, and the agency have begun to use it to depart from categorical analysis altogether.

In this Part, I explain how reliance on *Taylor* by both sides of the current debate—those who favor strict adherence to categorical analysis and those who depart from it to allow broader factual inquiry—is flawed in light of the independent rationales for categorical analysis in the immigration context. I begin by discussing *Taylor* and the rationales that the Supreme Court articulated for applying a categorical analysis in the sentencing context. I then address how, in a number of recent decisions, the Supreme Court, some federal courts, and even the agency itself have improperly relied on *Taylor* to assess how immigration adjudicators must determine the immigration penalties of criminal convictions, thus creating a sea change in the law. I contend that *Taylor* is a flawed lens through which to view the constraints on assessing criminal convictions under immigration law. It has allowed courts and the agency to misconstrue congressional intent and ignore the independent rationales for categorical analysis in the immigration context. The result is a messy, bifurcated approach that permits fact finding for some criminal grounds but not for others—an approach to criminal conviction assessments that misses the point of categorical analysis and its longstanding rationales.

A. *Taylor and the Rationales for Categorical Analysis in the Criminal Sentencing Context*

When the Supreme Court first opined about categorical analysis in *Taylor*, it was in the context of criminal sentencing cases that address the application of a sentencing enhancement provision

¹⁵⁷ Following the expansion of criminal grounds of removal in 1996, federal immigration officials increasingly charged noncitizens with removability based on their past convictions. *See infra* notes 323–28 and accompanying text (describing the exponential increase in removal proceedings based on criminal grounds). While there is no evidence to demonstrate how often immigration officials sought to use extrinsic factual records in order to prove their charges, the increased number of civil removal proceedings no doubt contributed to noncitizen litigants' increased reliance on *Taylor*, as recent Supreme Court precedent, to support their claims that their convictions did not, as a matter of law, fit within the new grounds of removal.

enacted under the Armed Career Criminal Act (ACCA).¹⁵⁸ Under the ACCA, as amended and codified at 18 U.S.C. § 924(e), a defendant who is convicted of unlawful possession of a firearm under 18 U.S.C. § 922(g) faces a sentencing enhancement if she has three prior convictions for any offense that constitutes a “violent felony.”¹⁵⁹ The ACCA defines “violent felony” as a “crime punishable by imprisonment for a term exceeding one year” that also either “(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another”¹⁶⁰

In *Taylor*, the Supreme Court addressed the question of whether a prior burglary conviction constitutes a “violent felony” under sentencing enhancement provisions enacted under the ACCA.¹⁶¹ The ACCA listed “burglary” under the definition of “violent felony,” but did not define the term.¹⁶² The defendant in *Taylor* sought to avoid a sentencing enhancement in his case by arguing that neither of his prior burglary convictions under Massachusetts state law qualified as a violent felony under the ACCA.¹⁶³

The Supreme Court ultimately determined that the defendant’s state burglary convictions did not necessarily correspond to “burglary” under the ACCA and remanded for further proceedings.¹⁶⁴ The Court concluded that Congress used “burglary” in the ACCA in the modern, generic sense used in most state criminal codes, i.e., “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.”¹⁶⁵ The Court held that a prior offense must correspond to these basic elements in order to be

¹⁵⁸ 18 U.S.C. § 924(e) (2006); *see also Taylor*, 495 U.S. at 581–82 (describing the history of the sentencing enhancements enacted under the Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185 (codified at 18 U.S.C. App. § 1202(a) (1982 ed. Supp. III)), which was later repealed by Pub. L. No. 99-308, § 104(b), 100 Stat. 459 (1986), recodified as 18 U.S.C. § 924(e), and amended into its present form by § 1402 of Subtitle I (the Career Criminals Amendment Act of 1986) of the Anti-Drug Abuse Act of 1986, 100 Stat. 3207–39).

¹⁵⁹ § 924(e).

¹⁶⁰ § 924(e)(2)(B).

¹⁶¹ 495 U.S. at 577–80 (explaining that the Court granted certiorari to resolve the question of the definition of “burglary” for purposes of § 924(e) regarding conviction for a “violent felony”).

¹⁶² *See* 18 U.S.C. § 924(e)(2)(B)(ii) (listing burglary among offenses constituting a “violent felony” without defining burglary); *see also Taylor*, 495 U.S. at 580 (discussing the lack of clarity regarding what Congress intended “burglary” to mean).

¹⁶³ 495 U.S. at 579.

¹⁶⁴ *Id.* at 602.

¹⁶⁵ *Id.* at 598.

considered a “burglary” for purposes of the ACCA enhancement.¹⁶⁶ A person convicted under a statute that defines burglary more broadly would not necessarily be subject to an enhancement.

The remaining question became how sentencing courts should assess whether a defendant’s burglary conviction fit the generic definition intended under the ACCA provision. Should they look to the underlying facts of the crime, or should they be confined to an assessment of the statute under which the individual was convicted and the conviction record? The *Taylor* Court rejected a factual approach in favor of a categorical approach. Under this approach, a sentencing court is limited to “look[ing] only to the fact of conviction and the statutory definition of the prior offense.”¹⁶⁷ For statutory definitions that are broader than the generic definition, courts are permitted to go beyond “the mere fact of conviction” to assess the indictment or jury instructions to determine what elements a jury was “actually required to find.”¹⁶⁸ The Court did not permit further inquiry into the underlying facts for which the defendant was not convicted.¹⁶⁹

In articulating this rule, the Court presented three principal rationales that continue to guide the application of the categorical analysis in current sentencing law: statutory language, legislative intent, and practical difficulties and potential unfairness. First, the Court looked to the statutory language within the relevant provision of the ACCA, 18 U.S.C. § 924(e). It noted that § 924(e)(1) refers to people with “previous *convictions*” for certain offenses—not people who had “committed” those offenses.¹⁷⁰ The Court clarified that the definition of “violent felony” refers to categorical elements rather than the circumstances of a particular case.¹⁷¹ Based on the text of the ACCA, the Court concluded, “Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.”¹⁷²

Second, the Court examined the legislative history of the ACCA and concluded that Congress favored a categorical approach to predicate offenses. The Court noted that the legislative debate concerned the list of predicate offenses and their definition rather than

¹⁶⁶ *Id.* at 599.

¹⁶⁷ *Id.* at 602.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 600 (emphasis added); *see also* 18 U.S.C. § 924(e)(1) (2006) (“In the case of a person who violates section 922(g) of this title and has three previous *convictions* . . . for a violent felony or a serious drug offense, or both” (emphasis added)).

¹⁷¹ *Taylor*, 495 U.S. at 600.

¹⁷² *Id.*

discussions of fact-finding.¹⁷³ The Court concluded that “[i]f Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant’s prior offenses, surely this would have been mentioned somewhere in the legislative history.”¹⁷⁴

Third, the Court described the “daunting” practical difficulties and potential unfairness that would arise under a factual approach.¹⁷⁵ A factual approach might permit parties to produce new evidence at sentencing, including new testimony, witnesses, or trial transcripts that went beyond the issues decided when the defendant was first convicted.¹⁷⁶ The Court was also concerned that a sentencing court’s independent conclusion that a defendant committed a generic burglary might implicate the defendant’s right to a jury trial.¹⁷⁷ The Court recognized that a categorical approach avoided these difficulties. It also emphasized fairness, particularly with respect to the plea bargain process underlying most convictions. The Court noted that cases resolved by guilty plea frequently lack a record of the underlying facts, and that even if the government could prove those facts, it would be unfair to impose a sentence enhancement based on the facts of a crime when the defendant had pled to a lesser offense.¹⁷⁸ Based on these three principles, the Court concluded that sentencing courts must apply a categorical approach to determine whether a predicate conviction fits within categories of offenses that trigger an enhancement under the ACCA.¹⁷⁹

In *Shepard v. United States*,¹⁸⁰ the Supreme Court provided an additional rationale for its approach in ACCA cases. The Court rejected the government’s argument that a sentencing court should be able to rely on a police report to determine whether a person’s past conviction constitutes a predicate violent felony under the ACCA.¹⁸¹

¹⁷³ *Id.* at 601.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (“If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?”).

¹⁷⁸ *Id.* at 601–02.

¹⁷⁹ *See id.* at 602 (“[A]n offense constitutes ‘burglary’ for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to ‘generic’ burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant.”).

¹⁸⁰ 544 U.S. 13 (2005).

¹⁸¹ *Id.* at 16 (holding that a court may not look to police reports or complaint applications in assessing whether an earlier guilty plea supported a generic burglary conviction for immigration purposes).

In declining to permit reliance on factual information, the Court not only reiterated the principles described in *Taylor* for limiting the evidentiary inquiry, but also went a step further in articulating a Sixth Amendment rationale for its conclusion.¹⁸² The Court noted that, under the Sixth Amendment, any fact other than a prior conviction that would raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant.¹⁸³ The Court concluded that such Sixth Amendment concerns similarly “counsel[] us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implication of a jury’s verdict.”¹⁸⁴

The rationales for the categorical approach expressed in *Taylor* and *Shepard* have been applied in a number of cases raising more difficult questions under the ACCA.¹⁸⁵ The Court has strictly adhered to a categorical analysis and reiterated its reasoning behind the approach. These are the principles that have since been imported into the immigration context—and now serve as the primary basis for the erosion of categorical analysis in immigration law.

B. *The Taylor Debate in Immigration Law*

Discussion of *Taylor* has saturated the debate over categorical analysis in immigration law in recent years, and not without reason. There is some similarity between the ACCA and the INA, and

¹⁸² *Id.* at 20–23, 24–26 (discussing the categorical approach applied in *Taylor* and the protections afforded by the Sixth and Fourteenth Amendments).

¹⁸³ *Id.* at 24 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

¹⁸⁴ *Id.* at 26.

¹⁸⁵ For example, in *James v. United States*, the Supreme Court applied *Taylor* to another provision of the violent felony definition—offenses that “otherwise involv[e] conduct that presents a serious potential risk of physical injury to another.” 550 U.S. 192, 197 (2007) (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2006)) (internal quotation marks omitted). The Court held that this clause, though not as apt to be described as a generic term like “burglary,” still called for a categorical approach such that the sentencing court must “consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.” *Id.* at 201–02. Similarly, in *Chambers v. United States*, the Court declined to depart from the categorical approach even where the underlying offense has proved difficult to characterize. 129 S. Ct. 687, 690–91 (2009). The *Chambers* Court resolved a circuit split on whether the offense of “failure to report” for imprisonment should be considered a violent felony predicate under the ACCA, and assessed the nature of the offense as a general matter rather than turning to the underlying facts of the particular defendant’s circumstances. *Id.* at 690–93. Most recently, in *Johnson v. United States*, the Supreme Court applied the categorical approach to conclude that a state offense proscribing “intentionally touch[ing]” another person does not categorically contain an element of the use of physical force within the meaning of the “violent felony” provision of the ACCA. 130 S. Ct. 1265, 1268–74 (2010). The Court thus cabined any further inquiry into the record of conviction.

certainly the outcome sought by most immigrant litigants and criminal sentencing defendants in their cases is the same: to limit review of their prior convictions to the statutory definitions of the offenses rather than their factual bases. Nonetheless, many of the rationales for *Taylor* do not translate as neatly onto the immigration context. Advocates on both sides of the debate—those who favor strict adherence to the categorical analysis and those who favor broader fact-based inquiry—now use *Taylor* as their primary weapon in defending their view of whether categorical analysis should apply in immigration law. But by doing so, both sides have allowed the independent rationales for categorical analysis in the immigration context to disappear from the debate entirely.

1. *Defending Categorical Analysis Through Taylor*

There is a natural synergy between the reasoning in *Taylor* and reasons for categorical analysis in the immigration context, which helps explain why courts and immigrant litigants have relied on *Taylor* in immigration cases.¹⁸⁶ The INA provides a specific list of documents that suffice as evidence of proof of the fact of a conviction,¹⁸⁷ but, like the ACCA, it does not explicitly specify how

¹⁸⁶ Professor Sharpless's piece provides a thorough overview of the arguments for why *Taylor* should apply in the immigration context, and it criticizes the erosion of categorical analysis through the lens of the *Taylor* framework. See Sharpless, *supra* note 45 (defending application of the *Taylor* framework to the assessment of criminal convictions in immigration cases).

¹⁸⁷ 8 U.S.C. § 1229a(c)(3)(B) (2006) ("Proof of Convictions") provides:

In any proceeding under this Chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

- (i) An official record of judgment and conviction.
- (ii) An official record of plea, verdict, and sentence.
- (iii) A docket entry from court records that indicates the existence of the conviction.
- (iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.
- (v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.
- (vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
- (vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

adjudicators should determine whether a conviction meets a particular criminal ground under the statute. Like the ACCA's sentencing consequences for persons with "violent felony" convictions, the INA predicates deportation, mandatory detention, ineligibility for certain forms of status, and numerous other consequences on whether a noncitizen has been "convicted" of certain types of crimes.¹⁸⁸ The statutory language—the first reason the Supreme Court provided for applying a categorical approach in the ACCA context—is thus the same. Indeed, this emphasis on the text itself echoes one of the longstanding reasons that federal courts and the immigration agency have asserted that Congress intended a categorical analysis of criminal convictions in the immigration context.¹⁸⁹

Moreover, there are several provisions within the immigration law that also have criminal sentencing implications. In 1988, Congress amended the law governing illegal entry prosecutions to provide a twenty-year sentencing enhancement if the defendant had been previously deported based on an "aggravated felony" conviction.¹⁹⁰ Defendants in illegal reentry cases argued that *Taylor* should apply in determining whether a past conviction triggered the aggravated felony sentencing enhancement, and courts agreed.¹⁹¹ Immigrant litigants in removal cases began to argue that the treatment of these provisions should be the same in both the immigration and sentencing contexts.¹⁹²

Picking up on these arguments, courts began to cite *Taylor* as the basis for categorical analysis in the immigration context.¹⁹³ Some courts merely imported *Taylor* into immigration decisions without much discussion, while others provided a lengthy defense of its use. In

¹⁸⁸ See, e.g., *id.* §§ 1182(a)(2), 1226(c)(1), 1227(a)(2) (establishing, respectively, criminal grounds of inadmissibility, mandatory detention, and deportability). Bars to relief from removal predicated on criminal convictions are found throughout the statute.

¹⁸⁹ See *supra* Part II.A–B (discussing the courts' and immigration agency's emphasis on the textual basis for categorical analysis in the immigration context).

¹⁹⁰ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345(a), 102 Stat. 4181, 4471 (codified at 8 U.S.C. § 1326(b)(2) (2006)).

¹⁹¹ See, e.g., *United States v. Londono-Quintero*, 289 F.3d 147, 151–52 & n.3 (1st Cir. 2002) (applying *Taylor* in the illegal reentry context); *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999) (same); *United States v. Amaya-Benitez*, 69 F.3d 1243, 1248 (2d Cir. 1995) (same); *United States v. Lomas*, 30 F.3d 1191, 1193 (9th Cir. 1994) (same); *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993) (same).

¹⁹² This argument gained particular traction with courts addressing various provisions within the INA that cross-reference criminal sentencing laws. See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 4 & n.1, 6–7 (2004) (discussing the inclusion of the federal criminal law definition of "crime of violence" within the INA "aggravated felony" definition in 1990); see also Sharpless, *supra* note 45, at 1012–13 & n.154 (discussing *Leocal* and other criminal sentencing provisions referenced in the INA).

¹⁹³ See *supra* note 28 (collecting cases citing *Taylor* in the immigration context).

Dulal-Whiteway v. Department of Homeland Security, the Second Circuit provided a detailed analysis of how the reasons articulated in *Taylor* apply with equal force in the immigration context.¹⁹⁴ The court began by noting that the INA, like the ACCA, had predicated consequences on whether a person had been “convicted” of—not whether she had “committed”—the relevant offense.¹⁹⁵ Second, the court observed that “the *Taylor* and *Shepard* Courts’ concern about the ‘daunting’ practical difficulties associated with scrutinizing the facts underlying a conviction is equally applicable in the removal context,” and emphasized that “the BIA and reviewing courts are ill-suited to readjudicate the basis of prior criminal convictions.”¹⁹⁶ Third, the Second Circuit concluded that constitutional principles of fairness—expressed in Sixth Amendment terms in sentencing cases—also apply in the immigration context.¹⁹⁷ While acknowledging that there is no right to a jury trial in immigration cases, the Second Circuit cautioned against reading the Supreme Court’s fairness concerns too narrowly, noting that “the concept of a ‘conviction’ does carry with it the assurance that the convicted individual was accorded constitutional protections before a judgment was imposed against him.”¹⁹⁸ Moreover, “*Taylor* was motivated not only by the Sixth Amendment but by general conceptions of fairness.”¹⁹⁹ As an example, the Second Circuit used *Taylor*’s language to explain that categorical analysis promotes predictability and notice of consequences in the immigration context:

“[I]f a guilty plea to a lesser, [non-removable] offense was the result of a plea bargain, it would seem unfair to [order removal] as if the defendant had pleaded guilty to [a removable offense].” By permitting the BIA to remove only those aliens who have actually or necessarily pleaded to the elements of a removable offense, our holding promotes the fair exercise of the removal power.²⁰⁰

Based on these principles, the Second Circuit applied a categorical analysis to the fraud aggravated felony loss provision, a provision of the INA that requires mandatory deportation for a lawful permanent

¹⁹⁴ 501 F.3d 116 (2d Cir. 2007).

¹⁹⁵ See *id.* at 131–32 (“8 U.S.C. § 1227(a)(2)(A)(iii), ‘renders deportable an alien who has been ‘convicted’ of an aggravated felony, not one who has ‘committed’ an aggravated felony.’” (quoting *Sui v. INS*, 250 F.3d 105, 117 (2d Cir. 2001) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)))).

¹⁹⁶ *Id.* at 132.

¹⁹⁷ *Id.* at 132–33.

¹⁹⁸ *Id.* at 132 n.13.

¹⁹⁹ *Id.* at 132 & n.14, 133.

²⁰⁰ *Id.* at 133 (citation omitted) (quoting *Taylor*, 495 U.S. at 601–02).

resident convicted of fraud offenses in which the loss to the victim exceeds \$10,000.²⁰¹

Other courts, including the Supreme Court, have also used *Taylor* to justify the application of categorical analysis to a variety of immigration law provisions. In *Gonzales v. Duenas-Alvarez*, the Supreme Court applied *Taylor-Shepard* to the question of whether a California conviction for aiding and abetting theft was properly categorized as a “theft aggravated felony” under the INA.²⁰² In so doing, the Court began by noting that federal circuit courts had uniformly applied the categorical approach under *Taylor* to the assessment of whether convictions constitute aggravated felonies under the INA.²⁰³ The Court then applied *Taylor*, describing the generic definition of a theft offense and comparing it to the offense for which the noncitizen was convicted.²⁰⁴ It concluded that aiding and abetting a theft under the California statute does fall within the generic definition of the crime, and rejected the noncitizen’s attempt to suggest that the statute could be interpreted more broadly than generic theft without citation to any such case law interpretation.²⁰⁵ In so doing, the Court treated the issue no differently than it had similar issues in the context of the ACCA.

2. *Departing from Categorical Analysis Through Taylor*

Somewhere along the road of citing *Taylor* as a reason for requiring a categorical analysis in immigration law, courts and the agency began to forget that there is an independent basis for categorical analysis within the immigration context. Had the trajectory of the case law proceeded along the lines of *Dulal-Whiteway* and *Duenas-Alvarez*, this fading history would be of little concern to the debate. As it turned out, however, this omission created space for courts and the agency to depart from categorical analysis upon concluding that the reasoning in *Taylor* did not so clearly apply.

The shift in the agency’s view on this issue became apparent in a series of cases involving relatively unique provisions within the “aggravated felony” statute in the INA. First, in *Matter of*

²⁰¹ See 8 U.S.C. § 1101(a)(43)(M)(i) (2006) (listing the types of fraud or deceit offenses that constitute an “aggravated felony” for purposes of immigration law).

²⁰² *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2006) (discussing provisions 8 U.S.C. §§ 1101(a)(43)(G), 1227(a)(2)(A) (2000 & Supp. IV 2005)).

²⁰³ *Id.* at 185–86 (“In determining whether a conviction (say, a conviction for violating a state criminal law that forbids the taking of property without permission) falls within the scope of a listed offense (e.g., ‘theft offense’) [in the INA], the lower courts uniformly have applied the approach this Court set forth in *Taylor*” (citations omitted)).

²⁰⁴ *Id.* at 189–90, 193–94.

²⁰⁵ *Id.* at 193–94.

Gertsenshteyn, the BIA concluded that language within the “prostitution transportation” aggravated felony provision called for a factual, rather than a categorical, analysis.²⁰⁶ The provision, which applied to certain federal prostitution offenses “if committed for commercial advantage,”²⁰⁷ struck the BIA as being different than the generic “burglary” offense examined in *Taylor*.²⁰⁸ The BIA focused on the unique “committed” language within this part of the INA and concluded that Congress intended a factual approach for this provision.²⁰⁹ But for a single statement made by the BIA purporting to limit the reach of its decision, this reasoning might have been unremarkable. However, in issuing its decision, the BIA stated that it was declining to address definitely “whether the categorical and modified categorical approaches, *which were developed in the criminal case context*, are fully portable into the immigration arena.”²¹⁰ At no point did the BIA note its own development of and rationale for categorical analysis in its prior immigration case law.

Thus began a string of cases that treated categorical analysis as solely a creation of criminal law. In *Matter of Babaisakov*,²¹¹ the BIA opined on whether categorical analysis applies to the monetary loss threshold in the INA’s “fraud or deceit” aggravated felony provision, an offense that involves fraud or deceit “in which the loss to the victim or victims exceeds \$10,000.”²¹² The BIA held that the categorical analysis does not apply to the issue of loss. In doing so, the BIA observed that, under *Taylor*, sentencing courts are concerned exclusively with the elements of the offense and will review the record only “as part of a search for the *elements* that led to a prior conviction, not the *facts* that were involved in the crime.”²¹³ The BIA stated that some of the provisions in the INA, like the fraud-aggravated felony provision, include a “nonelement qualifier” that “would ‘invite inquiry into the facts underlying the conviction at issue,’ because ‘it expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue.’”²¹⁴ The BIA recognized that, in its prior unpublished decisions, it has applied a modified categorical analysis—limiting

²⁰⁶ *Gertsenshteyn*, 24 I. & N. Dec. 111 (B.I.A. 2007).

²⁰⁷ 8 U.S.C. § 1101(a)(43)(K)(ii) (2006).

²⁰⁸ *Gertsenshteyn*, 24 I. & N. Dec. at 113.

²⁰⁹ *Id.* at 113–14.

²¹⁰ *Id.* at 113 n.1 (emphasis added).

²¹¹ 24 I. & N. Dec. 306 (B.I.A. 2007).

²¹² 8 U.S.C. § 1101(a)(43)(M)(i). This provision was also examined in *Dulal-Whiteway v. Dep’t of Homeland Sec.*, 501 F.3d 116 (2d Cir. 2007), and later resolved by the Supreme Court in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009).

²¹³ *Babaisakov*, 24 I. & N. Dec. at 311.

²¹⁴ *Id.* at 312 (citing *Singh v. Ashcroft*, 383 F.3d 144, 161 (3d Cir. 2004)).

review to the record of conviction—to find such qualifying information.²¹⁵ Nonetheless, the BIA held that such an evidentiary limitation was without basis in the statute and thus permitted a factual inquiry into documentary evidence and testimony outside the record of conviction to determine loss in fraud or deceit cases.²¹⁶

Other courts swiftly adopted the BIA's reasoning and its view of *Taylor* in cases involving different criminal grounds of removal. In *Ali v. Mukasey*, the Seventh Circuit applied *Matter of Babaisakov* to hold that immigration courts may go beyond the record of conviction to determine if a person's offense is a "crime involving moral turpitude."²¹⁷ In so holding, the Seventh Circuit concluded that the *Taylor* rationales did not apply. According to the Seventh Circuit, the rationales for the categorical approach in *Taylor* are twofold. First, *Taylor* promoted "the benefits of simple application, so that sentencing not be burdened by a retrial of the original prosecution."²¹⁸ Second, sentencing courts apply a categorical analysis to ensure the proper "allocation of tasks between judge and jury under the [S]ixth [A]mendment" by "prevent[ing] the sentencing judge in the new case from assuming a role that the Constitution assigns to the jurors in the first case."²¹⁹ The Seventh Circuit then rejected the applicability of either of these reasons for immigration cases, stating that immigration proceedings "are not criminal prosecutions, so the [S]ixth [A]mendment . . . do[es] not come into play. And how much time the agency wants to devote to the resolution of particular issues is, we should suppose, a question for the agency itself rather than the judiciary."²²⁰ Applying the Board of Immigration Appeals's reasoning in *Matter of Babaisakov*, the Seventh Circuit concluded that it was permissible for the immigration court to use a presentence report as the basis for finding that a noncitizen's conviction involved fraudulent conduct and was therefore a crime involving moral turpitude.²²¹ The court did not address the agency's longstanding pre-*Taylor* precedent requiring a categorical analysis in cases concerning crimes involving

²¹⁵ See *id.* at 311–12 ("Our unpublished cases undoubtedly include decisions in which we applied a 'modified categorical approach' to search for conviction record 'facts' that may not have been 'elements' necessary for conviction under the pertinent criminal statute.").

²¹⁶ *Id.* at 312, 317, 321 (reasoning that the loss threshold is not an element of the crime but a qualifying or aggravating factor, and that nothing in the statute nor any legal principle constrains inquiry to the record of conviction).

²¹⁷ *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008).

²¹⁸ *Id.* at 741.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See *id.* at 742–43 (holding that the agency "has the discretion to consider evidence beyond the charging papers and judgment of conviction" and condoning the agency's consultation of a presentence report to assess whether an offense involved deceit).

moral turpitude and other categories of removability in immigration law.

Other federal courts similarly carved out exceptions to categorical analysis in immigration cases by distinguishing *Taylor*,²²² and it did not take long for these decisions to gain further traction. In a rare reversal of BIA decision making by an Attorney General, Attorney General Mukasey issued a precedential decision in *Matter of Silva-Trevino* in 2008, essentially adopting the reasoning in *Ali* as agency precedent and permitting a circumstance-specific factual inquiry as a third step in categorical analysis for “crimes involving moral turpitude.”²²³ The Attorney General began by describing first and second steps for assessing whether a conviction is a crime involving moral turpitude. These steps mirrored, to some extent, the categorical and modified categorical approaches articulated under *Taylor* and its progeny: Immigration adjudicators would be required to assess the statutory definition of the offense first, and if that does not resolve the question, to review the record of conviction.²²⁴ However, the Attorney General then explained that if the statutory definition and record of conviction are “inconclusive” as to whether the person has been convicted of a crime involving moral turpitude, “judges may, to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction.”²²⁵ This includes “any additional evidence of factfinding the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question,” including seeking testimony by the immigrant in immigration court.²²⁶ This third step essentially collapses the inquiry into a noncategorical analysis by removing the limiting feature that distinguishes categorical analysis from a factual approach: the confinement of review to the record of conviction.²²⁷

²²² See, e.g., *Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 465 (7th Cir. 2004) (allowing consideration of the victim’s age when assessing whether an offense constitutes an aggravated felony involving “sexual abuse of a minor”); *Flores v. Ashcroft*, 350 F.3d 666, 668, 670–71 (7th Cir. 2003) (permitting consideration of a defendant’s relationship to the victim in the assessment of a “crime of domestic violence” as an exception to categorical analysis).

²²³ See *Silva-Trevino*, 24 I. & N. Dec. 687, 689–90 (A.G. 2008).

²²⁴ *Id.* at 690.

²²⁵ *Id.*

²²⁶ *Id.* at 690, 704.

²²⁷ In a subsequent decision, the BIA explained that an Immigration Judge may not, however, skip directly to the third step of categorical analysis. If the statute and record of conviction conclusively demonstrate that the offense is not a crime involving moral turpitude, an Immigration Judge may not go outside the record of conviction to consider evidence that contradicts what the statute and record demonstrate. See *Ahortalejo-Guzman*, 25 I. & N. Dec. 465, 468 (B.I.A. 2011) (finding that the Immigration Judge erred in applying the third step of *Silva-Trevino* to consider alleged facts of family violence when the record of the immigrant’s conviction demonstrated that he was convicted of a simple

The Attorney General thus disavowed the application of *Taylor* to the crime involving moral turpitude inquiry. Relying heavily on *Ali*, the Attorney General held that “the rationale for the limits *Taylor* and *Shepard* impose on factual inquiries in criminal sentencing cases does not carry over to the immigration question at hand.”²²⁸ The Attorney General agreed with the Seventh Circuit that a Sixth Amendment rationale had no applicability in the immigration context and that any concerns about the burden of relitigating facts is a question for the agency to decide.²²⁹ On the latter point, the Attorney General explained that he did not agree with the suggestion in prior cases that a noncategorical inquiry would be burdensome and unworkable for the agency, and instead asserted that immigration judges were “well versed in case management” and that the factual inquiry often would be “simple.”²³⁰

While the question of the applicability of categorical analysis to crimes involving moral turpitude is in flux across circuits after *Matter of Silva-Trevino* and *Ali*,²³¹ the issue addressed in *Dulal-Whiteway*

assault offense that did not involve family violence). Nonetheless, “where the record does not conclusively demonstrate whether an alien was convicted of engaging in conduct that constitutes a crime involving moral turpitude,” the Immigration Judge should apply the third step and consider extrinsic facts. *Id.* at 469; *see also* Guevara Alfaro, 25 I. & N. Dec. 417, 424–25 (B.I.A. 2011) (remanding case to Immigration Judge where judge failed to apply the third step of *Silva-Trevino* to consider admissions outside the record of the immigrant’s statutory rape conviction regarding whether he knew the age of the victim).

²²⁸ *Silva-Trevino*, 24 I. & N. Dec. at 700.

²²⁹ *Id.* at 701.

²³⁰ *Id.* at 703, 709.

²³¹ Several federal circuit courts applied a categorical analysis to the crime-involving-moral-turpitude inquiry prior to *Matter of Silva-Trevino*. *See, e.g.*, *Wala v. Mukasey*, 511 F.3d 102, 107–09 (2d Cir. 2007) (applying categorical analysis to the crime-involving-moral-turpitude inquiry); *Vuksanovic v. Att’y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (same); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006) (same); *Jaadan v. Gonzales*, 211 Fed. App’x 422, 427 (6th Cir. 2006) (same); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017–20 (9th Cir. 2005) (same); *Partyka v. Att’y Gen.*, 417 F.3d 408, 411–12 (3d Cir. 2005) (same); *Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2005) (same); *Smalley v. Ashcroft*, 354 F.3d 332, 335–36 (5th Cir. 2003) (same); *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999) (same). At least two federal circuit courts have explicitly refused to follow the reasoning of *Matter of Silva-Trevino* after its issuance. *Sanchez Fajardo v. Att’y Gen.*, Nos. 09-12962 and 09-14845, 2011 U.S. App. LEXIS 20685, at *19 n.9 (11th Cir. Oct. 12, 2011) (“[W]e hold *Silva-Trevino* is contrary to the unambiguously expressed intent of Congress”); *Jean-Louis v. Att’y Gen.*, 582 F.3d 462, 472–74 (3d Cir. 2009) (“We conclude that we are not bound by the Attorney General’s view [in *Silva-Trevino*] because it bottomed on an impermissible reading of the statute, which, we believe, speaks with requisite clarity.”); *see also* *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010) (noting that the court would adhere to prior circuit law to the extent *Silva-Trevino* is inconsistent). However, *Ali v. Mukasey* still stands in support of a noncategorical inquiry in the Seventh Circuit and other circuits have yet to address the issue post-*Matter of Silva-Trevino*.

and *Matter of Babaisakov*²³² has been resolved by the Supreme Court, with *Taylor* playing a prominent role in the analysis. In *Nijhawan v. Holder*, the Supreme Court addressed whether categorical analysis applies to the loss threshold within the statutory fraud aggravated felony definition.²³³ Writing for a unanimous Court, Justice Breyer explained that the question depended on whether the loss threshold was part of the generic definition of fraud aggravated felony or instead referred to the specific circumstances of the offense. If the latter, a “circumstance-specific” rather than categorical inquiry would apply.²³⁴

Discussing whether to apply a categorical or circumstance-specific inquiry, the Court compared the aggravated felony statute and the ACCA, the statute at issue in the *Taylor* line of cases.²³⁵ First, the Court noted that the language of the ACCA defines the predicate “violent felony” provision with a list of generic crimes, such as “burglary, arson, or extortion” and crimes with an element that involves the use or threatened use of force.²³⁶ While acknowledging that “other, more ambiguous language” in the ACCA—referring to “‘crime[s]’ that ‘*involv[e] conduct* that presents a serious potential risk of physical injury to another’”—presents “greater interpretive difficulty,” the Court explained that it has treated that definitional language as also describing “generic” offenses.²³⁷

Turning to the aggravated felony statute, the Court noted that it defines aggravated felonies in a long list of subdivisions, only some of which appear to be generic offenses.²³⁸ The Court distinguished the aggravated felony statute from the ACCA because “it lists certain other ‘offenses’ using language that almost certainly does not refer to generic crimes but refers to specific circumstances.”²³⁹ The Court then pointed to some of the provisions within the aggravated felony statute that first refer to generic offenses but then provide some kind of qualifying clause or exception. For example, subparagraph “P” makes it a crime to fraudulently make or alter a passport, “*except in the case of a*

²³² See *supra* notes 194–201 and accompanying text (describing *Dulal-Whiteway*); *supra* notes 211–16 and accompanying text (describing *Babaisakov*).

²³³ *Nijhawan v. Holder*, 129 S. Ct. 2294, 2298–99 (2009).

²³⁴ *Id.*

²³⁵ *Id.* at 2299–300.

²³⁶ *Id.*

²³⁷ *Id.* at 2300.

²³⁸ The Supreme Court explained that several categories “must refer to generic crimes,” such as the aggravated felony of “murder, rape, or sexual abuse of a minor,” “illicit trafficking in a controlled substance,” “illicit trafficking in firearms or destructive devices,” and various provisions that refer to offenses “described in” specific sections of federal criminal law. *Id.*

²³⁹ *Id.*

first offense” if committed “*for the purpose of assisting . . . the alien’s spouse, child, or parent.*”²⁴⁰ The Court concluded that, while the initial clause of the subparagraph may refer to a generic crime, the exception “cannot possibly refer to a generic crime.”²⁴¹ Because there is no criminal statute with such an exception, the exception must “refer to the particular circumstances in which an offender committed the crime on a particular occasion.”²⁴² The Court noted similarly qualifying language in other subparagraphs of the aggravated felony statute.²⁴³

Turning to the statute’s language on fraud loss, the Court concluded that the provision did not refer to a generic offense and therefore permitted a circumstance-specific inquiry into loss.²⁴⁴ In distinguishing the statutory provision in question from the ACCA, the Court noted that it could refer to conduct involved in the commission of the crime—not the elements of the offense—and that most fraud statutes do not include loss as an element of the crime.²⁴⁵ The Court thus rejected the petitioner’s argument that immigration judges should be limited to reviewing the elements of the fraud offense for determination of loss.

The Court also rejected the petitioner’s alternative argument that *Taylor* limits an immigration court’s inquiry to documents within the record of conviction, even when loss is not an element of the offense.²⁴⁶ Materials within the record of conviction include the plea transcript, jury verdict, or other such documents demonstrating the plea and final disposition of the case in criminal court.²⁴⁷ In refusing this application of *Taylor*, the Court made clear its view that immigration law created no such limitation:

For one thing, we have found nothing in prior law that so limits the immigration court. *Taylor*, *James*, and *Shepard*, the cases that developed the evidentiary list to which petitioner points, developed that list for a very different purpose, namely that of determining which statutory phrase (contained within a statutory provision that

²⁴⁰ *Id.* (quoting 8 U.S.C. § 1101(a)(43)(P) (2006)) (internal quotation marks omitted).

²⁴¹ *Id.*

²⁴² *Id.* at 2301.

²⁴³ *Id.* (citing as examples, the following subparagraphs of 8 U.S.C. § 1101(a)(43): (N) (the same exception clause as in (P)), (K)(ii) (an offense described in specified federal prostitution transportation statutes “if committed for commercial advantage”) (emphasis omitted), and (M)(ii) (an offense described in specified federal tax evasion statutes “in which the revenue loss to the Government exceeds \$10,000”) (emphasis omitted)).

²⁴⁴ *Id.* at 2301–02.

²⁴⁵ *Id.* at 2302.

²⁴⁶ *Id.* at 2302–03.

²⁴⁷ *Id.*

covers several different generic crimes) covered a prior conviction.²⁴⁸

The Court thus permitted immigration courts to look beyond the record of conviction and review a broader set of documents to determine the amount of loss, including post-conviction sentencing documents and any “conflicting evidence.”²⁴⁹ Such an expansive inquiry would not be permitted under *Taylor* and *Shepard*.

Based on the Court’s reasoning, it appears that the touchstone for whether categorical analysis applies to a criminal ground of removal turns on whether that ground describes a “generic” rather than “circumstance-specific” offense. However, this distinction, drawn from *Taylor* and the Court’s analysis of the ACCA, is far from clear cut. Such an approach offers little guidance to immigrants or the immigration adjudicators who must determine when a categorical analysis applies. In *Carachuri-Rosendo v. Holder*, the next case that raised this issue to the Supreme Court, both parties attempted to use *Nijhawan* to explain why a categorical analysis should or should not determine whether the illicit-trafficking aggravated felony provision applies to cases involving “recidivist” drug offenses.²⁵⁰ Attorneys for the government noted that “recidivism” is not easily categorized as an element of most state drug offenses and, therefore, a *Taylor* categorical analysis was not appropriate.²⁵¹ Attorneys for the petitioner argued that *Nijhawan* supports the notion that the categorical approach applies to “illicit trafficking” because it is a generic offense and that courts should be limited to the record of conviction in determining whether the criminal court applied a recidivist enhancement.²⁵² In the end, the petitioner’s arguments prevailed. The Supreme Court noted that “illicit trafficking” describes a generic offense, distinguishable from the circumstance-specific provision at issue in *Nijhawan*.²⁵³ But the debate will undoubtedly continue for other provisions within the INA, since the generic versus circumstance-specific line of *Taylor* and *Nijhawan* does not provide much clarity to litigants or to the immigration adjudicators who must make these determinations in the first instance.

²⁴⁸ *Id.* at 2303.

²⁴⁹ *Id.* (condoning the immigration judge’s reliance on documents outside the record of conviction to determine loss). As discussed in greater detail in Part III.C, the Court’s failure to consider the independent and longstanding precedent requiring categorical analysis in the immigration context led to a flawed analysis of the issue.

²⁵⁰ *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2583, 2586 nn.11–12 (2010).

²⁵¹ Brief for Respondent at 28 n.12, *Carachuri-Rosendo*, 130 S. Ct. 2577 (No. 09-60).

²⁵² Brief for Petitioner at 24–26, *Carachuri-Rosendo*, 130 S. Ct. 2577 (No. 09-60).

²⁵³ *Carachuri-Rosendo*, 130 S. Ct. at 2586–87 n.11.

C. *Breaking Out of the Taylor Framework*

These recent decisions—in *Silva-Trevino*, *Ali*, and *Nijhawan*—demonstrate the increasingly prominent view that the applicability of *Taylor* or lack thereof dictates whether a categorical analysis must apply in the immigration context. The Supreme Court’s statement in *Nijhawan*—that there is “nothing in prior law that so limits the immigration court” to a categorical analysis—is particularly telling.²⁵⁴ None of these recent decisions account for the basis for categorical analysis in immigration law. Instead, they address the issue as if starting from a blank slate, reading immigration provisions and assessing how well they fit within the “elements” analysis used in *Taylor*.

As a result, neither approach taken in recent court decisions—using *Taylor* as a sword for, or as a shield against, the application of categorical analysis in the immigration context—gives due consideration to the independent basis for categorical analysis in immigration law. At best, *Taylor* is instructive as to how courts should approach this question, i.e., by looking to the statutory language, legislative history, and context in which categorical analysis operates in immigration law, as the Supreme Court did for criminal sentencing law. Instead, courts and the Agency now begin and end their analysis with a discussion of whether *Taylor* applies, resulting in a fundamentally flawed view of when and why categorical analysis should or should not apply.

In *Nijhawan*, the Supreme Court relied heavily on the language that Congress chose in defining the removable offense—i.e., a fraud offense “in which the loss to the . . . victims exceeds \$10,000.”²⁵⁵ As the BIA aptly pointed out when it interpreted the same phrase, the “in which” clause “begs” an adjudicator to look at the facts underlying the fraud offense to determine loss.²⁵⁶ Where, then, is the basis for limiting the analysis of loss to the statutory definition of the offense and the record upon which an individual was specifically convicted?

The Court was correct to hold that the answer does not necessarily lie with *Taylor*, which addressed different language in a different context: the text of the ACCA as applied to criminal sentencing enhancements. Many of the ACCA’s provisions lack the type of qualifying language found in certain provisions of the INA,²⁵⁷ and the

²⁵⁴ *Nijhawan v. Holder*, 129 S. Ct. 2294, 2303 (2009).

²⁵⁵ *Nijhawan v. Holder*, 129 S. Ct. 2294, 2297–98 (2009) (citing 8 U.S.C. § 1101(a)(43)(M)(i) (2006)).

²⁵⁶ *Babaisakov*, 24 I. & N. Dec. 306, 312 (B.I.A. 2007) (quoting *Singh v. Ashcroft*, 383 F.3d 144, 161 (3d Cir. 2004)).

²⁵⁷ The ACCA does present some sentencing enhancement provisions that arguably include similar qualifying language. In *James v. United States*, the Supreme Court

sentencing court's role in determining facts is subject to a set of limitations unique to the sentencing context. The problem with the Court's analysis, however, is that it did not assess the independent basis for categorical analysis in immigration law. Since 1913, courts have held that Congress intended a categorical analysis to apply to the assessment of convictions because it sought to limit the authority of immigration adjudicators, given their positions as administrative rather than judicial officials.²⁵⁸ This limitation was based in part on Congress's chosen statutory language—its reliance on the term “convicted” as opposed to “committed” in meting out immigration consequences.²⁵⁹ As the BIA once stated, “Had Congress wished to predicate deportability on an alien's actual conduct, it would have been a simple enough matter to have done so.”²⁶⁰ When Congress

addressed a provision within the ACCA that defines violent felonies as offenses that “otherwise involv[e] conduct that presents a serious potential risk of physical injury to another.” 550 U.S. 192, 197 (2007). The Court held that this clause, though not as readily described as a generic term like “burglary,” still calls for a categorical approach such that the sentencing court must “consider whether the elements of the offense are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.” *Id.* at 201–02 (emphasis omitted).

²⁵⁸ See *supra* Part II.A (discussing the earliest cases applying categorical analysis in immigration law).

²⁵⁹ See *supra* notes 81–106 and accompanying text (discussing courts' analysis of the statutory “convicted” language).

²⁶⁰ Velazquez-Herrera, 24 I. & N. Dec. 503, 515 (B.I.A. 2008); see also *supra* notes 145–46 and accompanying text (discussing the agency's view of the statutory “convicted” language). Indeed, the INA includes other provisions that specify when something short of a conviction—such as an admission of having committed an offense—may serve as grounds for removal. See 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006) (applying inadmissibility grounds to “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). The “convicted” and “admits” clauses each create separate requirements for immigration officials that are not interchangeable. For example, when a person has been convicted, courts may not use admissions to find the individual removable based on an offense for which she was not convicted. See, e.g., Seda, 17 I. & N. Dec. 550, 554 (B.I.A. 1980) (“[W]here a plea of guilty results in something less than a conviction, . . . the plea, without more, is not tantamount to an admission of commission of the crime for immigration purposes.”); Winter, 12 I. & N. Dec. 638, 642 (B.I.A. 1967) (“Where . . . the ultimate disposition of [an alien's criminal] charges by the court falls short of a conviction . . . the ‘admission’ provisions cannot be called into play to give the intermediate step of pleading a stronger effect than the ultimate disposition could have under the immigration laws.”), *aff'd on reh'g*, 12 I. & N. Dec. 638, 643–45 (1968). Moreover, where removability is based on admission of conduct rather than a conviction, immigration officials are held to a strict standard for relying on the immigrant's statements—a separate set of rules aimed at limiting immigration officials' authority to order a person removed based on her testimony. See *supra* Part II.A (discussing early cases opining on congressional intent in including the “admits” language in the immigration statute); see also K—, 9 I. & N. Dec. 715, 717 (B.I.A. 1962) (holding that an individual must be provided with the definition of the crime before making the alleged admission upon which an immigration official can rely under these provisions); E— N—, 7 I. & N. Dec. 153, 155 (B.I.A. 1956) (holding that an individual must admit all

added the fraud aggravated felony provision to federal immigration law in 1994, and then again when it amended that provision by lowering the fraud loss threshold in 1996, it predicated removal consequences only on whether a person has been “convicted” of such an offense.²⁶¹ Thus, as a basic principle of statutory interpretation, courts may presume that Congress, in specifying “conviction” and not conduct, intended a categorical analysis to apply.²⁶²

The *Nijhawan* Court did not address this textual basis for categorical analysis when addressing the fraud aggravated felony provision. Instead, the Court jumped immediately to considering Congress’s use of the “in which” language in the loss portion of the fraud aggravated felony provision, holding that this language indicated the necessity of fact finding under the statute. However, history demonstrates the fallacy of that assertion as well. Nothing in the

factual elements of the crime under these provisions to be removable); G—, 1 I. & N. Dec. 225, 227 (B.I.A. 1942) (holding that admission under these provisions must have been voluntarily given); 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 40.21(a) note 5.9 (2010) (stating that an agency officer must ensure an admission is developed to the point where “there is no reasonable doubt that the alien committed the crime in question” in order to trigger these provisions). These distinct sets of rules underscore why the recent erosion of categorical analysis—particularly in terms of allowing consideration of testimony outside the record of conviction—disrupts longstanding case law on how to approach other removability provisions.

²⁶¹ 8 U.S.C. § 1251(a)(2)(A)(iii) (1994) (predicating deportability in relevant part on whether a person “is convicted of an aggravated felony”); 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. II 1997) (same); Immigration and Nationality Technical Corrections Act of 1994 § 222(M), Pub. L. No. 103-416, 108 Stat. 4305, 4322 (adding a fraud aggravated felony provision for people convicted of “an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds \$200,000”); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 321, Pub. L. No. 104-208, 110 Stat. 3009, 3627–28 (lowering loss threshold for fraud aggravated felony from \$200,000 to \$10,000). Congress’s expansion of provisions within the aggravated felony definition might be deemed to indicate its intent to move away from a categorical analysis. However, such an expansion of *categories*—rather than a legislative change to the “convicted” language or any other explicit change to the manner in which convictions are assessed—might indicate congressional intent to keep the focus of the inquiry on the categories of offenses rather than the factual circumstances underlying such an offense. The Supreme Court made a similar observation in holding that a categorical analysis applies in the sentencing context. In *Taylor v. United States*, 495 U.S. 575 (1990), the Court found:

[T]he legislative history of the enhancement statute shows that Congress generally took a categorical approach to predicate offenses. . . . [N]o one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case. If Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant’s prior offenses, surely this would have been mentioned somewhere in the legislative history.

Id. at 601.

²⁶² See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”).

century of precedent on categorical analysis in immigration law has ever carved out exceptions based on the way the removal term is described within the immigration statute. Rather, for myriad terms both narrowly and broadly defined, the only indicator that categorical analysis applies has been if the statute predicates consequences on a person having been “convicted” of, rather than having “committed,” the offense.²⁶³ The distinction drawn in ACCA cases by examining the definition of the predicate offense for its generic or non-generic nature thus lacks any basis in past precedent on the application of categorical analysis in immigration law.

The flawed analysis in *Matter of Silva-Trevino* underscores the problem with focusing on the definition of the removal term rather than the “convicted” language. In *Matter of Silva-Trevino*, the Attorney General applied the same analysis articulated by the Supreme Court in *Nijhawan* to depart from categorical analysis for “crimes involving moral turpitude.” Specifically, the Attorney General focused on the language in the text of the removal ground, stating that “use of the word ‘involving’” and the term “moral turpitude” indicate that courts must look into the facts of the actual conduct, since “moral turpitude is not an element of an offense.”²⁶⁴ Just as the Supreme Court later observed that loss, as a non-element, is unlikely to be determined by reviewing the record of a person’s conviction for a fraud offense, so too did the Attorney General reason that “[t]o limit the information available to immigration judges in such cases means that they will be unable to determine whether an alien’s crime actually ‘involv[ed]’ moral turpitude.”²⁶⁵

However, unlike the fraud aggravated felony context, which is a relatively new addition to the criminal grounds in the INA, there is a century of precedent demonstrating the flaws in the Attorney General’s assertions about crimes involving moral turpitude. First, courts have discerned moral turpitude from the records of conviction of thousands of immigrants facing removal on that ground.²⁶⁶ It has not mattered that moral turpitude is not a stated element of most crimes because courts may still assess the nature of those offenses as they are defined and, where necessary, consult the record of

²⁶³ See *supra* notes 81–106 and accompanying text (discussing the history of categorical analysis and courts’ emphasis on Congress’s “convicted” language in the immigration statute).

²⁶⁴ *Silva-Trevino*, 24 I. & N. Dec. 687, 693, 699 (A.G. 2008) (quoting 8 U.S.C. § 1182(a)(2) (2006)).

²⁶⁵ *Id.* at 699 (quoting 8 U.S.C. § 1182(a)(2)).

²⁶⁶ See *supra* Part II (discussing cases enforcing categorical analysis for crimes involving moral turpitude from 1913 through 2008).

conviction.²⁶⁷ Second, longstanding precedent on crimes involving moral turpitude demonstrates that, in fact, courts have never premised their reading of Congress's intent on the language within the text of that criminal ground of removal. Instead, courts explicitly have held that categorical analysis applies to determinations of whether convictions are crimes involving moral turpitude based on Congress's choices to predicate consequences on whether people have been "convicted" of such offenses.²⁶⁸ Despite numerous cases on this issue over a century, at no point did Congress change the language of the statute to reflect its desire to move away from this approach to crimes involving moral turpitude. Thus the Attorney General's focus on the language within the crime-involving-moral-turpitude ground is merely a red herring: It fails to account for all of the precedent establishing

²⁶⁷ This is demonstrated by the many cases in which courts have found moral turpitude by reviewing statutes and court records. *See supra* Part II (discussing cases in which courts applied a categorical analysis and found the noncitizen respondent removable). Of course, this assertion does not address the much more technical question of "divisibility." In some cases, a court must stop at the first step of categorical analysis, which involves analyzing the definition of the criminal statute at issue to determine whether it covers removable conduct. In other cases, if the statute is "divisible," meaning that it encompasses both removable and nonremovable conduct, a court must proceed to the second step and consult the record of conviction to determine whether the person was convicted of the removable conduct. *See, e.g.,* United States v. Aguila-Montes de Oca, No. 05-50170, 2011 WL 3506442, at *10–12 (9th Cir. Aug. 11, 2011) (en banc) (per curiam) (discussing "divisible statutes" and resolving, in a divided en banc decision, the question of when courts may proceed to the second step of categorical analysis and consult the record of conviction); James v. Mukasey, 522 F.3d 250, 255–56 (2d Cir. 2008) (describing, without resolving, different ways in which a statute could be deemed "divisible" so as to allow a court to consult the record of conviction to determine if a person has been convicted of a removable offense). Courts could require a much more stringent divisibility analysis at the first step and not permit consultation of the record of conviction unless the removable conduct is specifically enumerated as an element of a subsection of a criminal offense. Such an approach might render some grounds of removal meaningless (such as the fraud aggravated felony provision, since loss is seldom an element of a fraud offense) and could thus present a more difficult question as to whether Congress would have intended such a result. But that is a separate issue from whether categorical analysis should apply at all. Decisions like *Matter of Silva-Trevino* seem to conflate the divisibility question with the question of whether the second (and much more foundational) aspect of categorical analysis applies—the limitation of the court's review to the record of conviction. Confining review to the record of conviction itself does not necessarily render grounds of removal meaningless; court records often reference facts that are not strict elements of a crime but demonstrate the basis of the conviction. It therefore makes little sense for courts to abandon categorical analysis altogether in order to avoid the consequences of adhering to a strict divisibility rule. Moreover, as will be discussed in greater detail below, departing from categorical analysis to give more life to certain removal provisions imposes its own separate costs on the administrative immigration system. *See infra* Part IV (asserting that the consequences of departing from categorical analysis are worse than the consequences of limiting courts' review to the record of conviction).

²⁶⁸ *See supra* notes 140–52 and accompanying text (discussing the courts' and the agency's interpretation of the statutory "convicted" language).

that categorical analysis stems from the “convicted” language—not the definition of any particular removal term.

In addition to neglecting the statutory basis for categorical analysis in the INA, the decisions that have departed from categorical analysis of convictions have also failed to give necessary consideration to the overall reasons why, according to early decisions, Congress chose a categorical analysis. While it is true, for example, that the Sixth Amendment rationale for categorical analysis in sentencing cases does not translate into the immigration context, there are independent reasons for upholding categorical analysis in the immigration context. Certainly, the historical context demonstrates that the administrative rather than criminal nature of immigration proceedings is actually a reason to apply a categorical analysis. Early courts emphasized that Congress intended for immigration adjudicators to act in an administrative, not judicial, capacity.²⁶⁹ They viewed categorical analysis as a necessary rule for the fair, uniform, and efficient administration of immigration laws by the agency.²⁷⁰ While there may be a question as to whether these and other legitimate rationales apply with equal force to the immigration context today—an issue addressed in Part IV of this article—the lack of consideration of these factors underscores the flaws in the current debate over categorical analysis in immigration law.

In this context, *Taylor* has done little more than cloud the debate over categorical analysis. While the law on the loss issue for fraud aggravated felonies is settled after *Nijhawan*, courts will continue to grapple with the implications of a non-categorical analysis for immigration adjudications. They will need to decide how to address the issue for several dozen other criminal provisions within the INA.²⁷¹ Taking a step outside the *Taylor* framework allows courts to address these issues through the proper lenses: the text of the immigration statute itself, the longstanding precedent on its interpretation, and the

²⁶⁹ See *supra* Part II.A (outlining early immigration decisions applying categorical analysis).

²⁷⁰ See *supra* Part II.A (same).

²⁷¹ The Supreme Court has addressed the method of analysis for only a handful of grounds of removal. See, e.g., *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2586 n.11 (2010) (applying categorical analysis to the “illicit trafficking” aggravated felony); *Nijhawan v. Holder*, 129 S. Ct. 2294, 2298–300 (2009) (applying a circumstance-specific inquiry to the fraud-loss requirement for the “fraud or deceit” aggravated felony); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185–86 (2007) (applying categorical analysis to the “theft or burglary” aggravated felony); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (applying a categorical analysis to the “crime of violence” aggravated felony). Many other provisions in the INA are still subject to debate. See, e.g., *Nijhawan*, 129 S. Ct. at 2300–01 (discussing subsections of the “aggravated felony” definition that appear to include qualifying language calling for a “circumstance-specific” inquiry).

context in which these provisions operate. It was through this analysis that the early federal court and agency decisions first arrived at their conclusion that a categorical analysis must apply. Shifting the analysis back to this framework, instead of relying on the inapt comparison to criminal sentencing law, will allow courts to account for the full implications of eroding categorical analysis in immigration law.

IV

THE IMPLICATIONS OF DEVIATING FROM A CATEGORICAL ANALYSIS IN IMMIGRATION LAW FOR TODAY'S IMMIGRATION AND CRIMINAL JUSTICE SYSTEMS

Ignoring the history of categorical analysis in immigration law has permitted the Supreme Court and other bodies to deviate from categorical analysis without fully considering the implications of their decision and why the alternatives they propose create more problems than they solve. The Supreme Court's current approach—to permit a circumstance-specific factual inquiry for some criminal grounds of removal while preserving categorical analysis for criminal grounds deemed sufficiently “generic” in nature—offers little guidance to immigrants, their attorneys, the agency, and reviewing courts as they struggle to determine the immigration penalties of prior convictions. Today, federal immigration law is filled with categories of offenses that arguably straddle the line of what is generic and what calls for a factual inquiry.²⁷² Furthermore, enforcement of all of these criminal grounds is rapidly expanding.²⁷³ The temptation for immigration officials to continue to erode categorical analysis in order to give more life to various removal provisions is great. Why not look beyond the record of conviction to find facts evincing moral turpitude? Why not take testimony to determine the facts missing from the criminal conviction that the statute appears to make necessary to deport a non-citizen? Conceptually, an expansion of the Supreme Court's circumstance-specific approach could lead to “better” immigration

²⁷² See *supra* notes 238–53 and accompanying text (examining the Supreme Court's discussion of the applicability of a categorical analysis to some aggravated felony grounds of removal and a fact-specific inquiry to others).

²⁷³ See ARNOLD & PORTER LLP, ABA COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM 1-33 (2010), available at http://www.americanbar.org/content/dam/aba/administrative/immigration/coi_complete_full_report.authcheckdam.pdf (noting that from September 2006 to September 2007 alone, the Department of Homeland Security “placed 164,000 noncitizens with criminal convictions in removal proceedings,” more than double the 64,000 noncitizens with criminal convictions placed in removal proceedings the year before).

law outcomes—people receiving penalties for the acts they actually commit, rather than the convictions they receive.²⁷⁴

Such a conclusion, however, ignores the realities of the immigration adjudicative system—the realities that have motivated the use of categorical analysis in immigration law for nearly a century and that apply with even greater force today. Scholars and policy organizations alike have recognized that the current immigration adjudicative system is in crisis.²⁷⁵ The principles that typically guide agency norms and values in light of administrative constraints present many of the same rationales for why courts and the agency had until recently favored a categorical, rather than factual, analysis in immigration law: the preservation of notice and an opportunity to be heard, uniformity, predictability, efficiency, and judicial review of agency decision making.²⁷⁶ In this Part, I examine the implications of departing from categorical analysis in light of these rationales today.

²⁷⁴ At first blush, this debate between a categorical versus factual analysis seems to echo the broader debate between rules and standards. See generally Colin Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983) (proposing a norm of efficiency as the way to strike the proper balance between under-precision and excessive rigidity in administrative rulemaking); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (discussing the costs and benefits of rules versus standards and how these factors influence the design and desirability of rules and standards). Categorical analysis presents the hallmarks of a rule. It creates a sharp evidentiary line, and carries the advantages and disadvantages of a rule: promoting clarity, accuracy, and consistency, while potentially resulting in both under-inclusiveness and, to a lesser extent, over-inclusiveness. One could argue that a factual, circumstance-specific analysis comes closer to a standard, expanding the adjudicator's authority to find and assess facts to determine removability. However, both modes of analysis are akin to rules. A factual analysis does not permit a free-for-all inquiry into the circumstances of an offense; facts that contradict a conviction cannot be considered. See, e.g., *Ahortalejo-Guzman*, 25 I. & N. Dec. 465, 468 (B.I.A. 2011) (rejecting review of facts where the conviction record resolves the removability question); *Silva-Trevino*, 24 I. & N. Dec. 687, 703 & n.3 (A.G. 2008) (explaining that a factual inquiry is “not an invitation to relitigate the conviction,” and that an immigration judge may rely on the fact of conviction as proof of its elements). Given this overarching constraint, a factual analysis merely expands the rule in one direction: It allows immigration officials to examine evidence of removability they otherwise would not be permitted to consider under a categorical analysis. Thus, the critical question addressed in this Part is which mode of analysis presents the better rule.

²⁷⁵ See, e.g., Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1651–76 (2010) (arguing that the current immigration adjudication system is fundamentally flawed in terms of norms of accuracy, efficiency, acceptability, and consistency); see also ARNOLD & PORTER LLP, *supra* note 273 (discussing the myriad problems with the current adjudicative model).

²⁷⁶ Formulations of these norms have been discussed in a variety of administrative law contexts, including recent critiques of the immigration system. See, e.g., Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 633 & n.245 (2009) (describing accuracy, efficiency, and acceptability as administrative process norms); Legomsky, *supra* note 275, at 1651 (finding that the immigration adjudication system is “fundamentally flawed” when measured against the norms of accuracy, efficiency, acceptability, and consistency); see also Michael Asimow, *The Scope of Judicial*

I assert that the independent rationales for a categorical analysis in immigration law are even more relevant to the functioning of the system today than they were when the approach was first articulated nearly a century ago. The immigration system has expanded, and convictions play an increasingly important role in delineating the extent of judicial discretion and judicial review over high-stakes questions regarding deportation and detention. Frontline immigration officials make thousands of these assessments every day in a variety of contexts that provide immigrants with little notice, predictability, or opportunity to contest the findings against them. Criminal defense attorneys are constitutionally charged with the responsibility of identifying immigration penalties, advising noncitizen defendants, and using that knowledge to pursue appropriate outcomes in criminal cases. For these reasons, courts should, wherever possible, limit further erosion of categorical analysis in immigration law. The principles that governed its origins in immigration law and related rationales explain why categorical analysis continues to play a crucial role in the functioning of the current immigration and criminal justice systems today.

A. Deviating from Categorical Analysis in an Era of Expanding Immigration Enforcement: Implications for the Administrative Immigration System

The role that criminal convictions play in the immigration system has never been more critical. Over time, Congress has expanded the immigration penalties for convictions, placed increasing authority for such assessments into the hands of frontline immigration officials, and largely eliminated the availability of judicial discretion and judicial review for individuals whose convictions fall within the myriad categories of removal.²⁷⁷ These changes have increased both the prevalence and the relative importance of threshold conviction assessments within the immigration system. In doing so, these changes further

Review of Decisions of California Administrative Agencies, 42 UCLA L. REV. 1157, 1160–61 (1995) (describing accuracy, efficiency, acceptability, and political theory and separation of powers as fundamental values of the administrative system); Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249, 299 (1991) (describing accuracy, consistency, predictability, rationality, and efficiency as criteria for assessing agencies); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 280 (1978) (describing fairness, efficiency, and satisfaction as criteria for assessing agencies).

²⁷⁷ See, e.g., Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 731–66 (1997) (discussing limits on judicial review); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1975–89 (2000) (discussing Congress's attempts to restrict judicial review through immigration law reforms in 1996).

highlight the important role that categorical analysis plays in ensuring notice and an opportunity to be heard, uniformity, predictability, efficiency, and the availability of judicial review necessary to the functioning of the current immigration system. The erosion of categorical analysis threatens each of these norms.

1. *Notice and an Opportunity To Be Heard*

The executive's fair exercise of removal power depends in part on providing immigrants with notice and an opportunity to be heard on the immigration penalties that the agency is enforcing against them.²⁷⁸ This is particularly important given the severity of the consequences—deportation and detention—and the context of the proceedings. As noted in Part I, immigration adjudications do not operate on a level playing field between the parties. Noncitizens in removal proceedings face deportation and may be detained pending such determinations, and they lack any statutory right to government-appointed counsel.²⁷⁹ As a result, the majority of noncitizens in removal proceedings are pro se.²⁸⁰ Moreover, for those who are detained, the government may transfer detainees to facilities anywhere in the country, far from legal services, family support, and access to necessary records.²⁸¹ Immigration courts do not typically exercise subpoena power or otherwise assist unrepresented immigrant detainees in obtaining evidence.²⁸²

Given these constraints, categorical analysis plays an important role in ensuring some modicum of due process within the system. By limiting review to the record of conviction, categorical analysis provides noncitizens with notice of what evidence will serve as the basis for their removal proceedings—the criminal disposition as adjudicated

²⁷⁸ See, e.g., *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–97 (1953) (holding that due process in the removal context requires notice and an opportunity to be heard).

²⁷⁹ 8 U.S.C. § 1229a(b)(4)(A) (2006) (providing noncitizens with the right to counsel at no expense to the government).

²⁸⁰ AMNESTY INT'L, *supra* note 63, at 30 (citing EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUSTICE, FY 2007 STATISTICAL YEARBOOK G1 (2008), available at <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf>).

²⁸¹ See, e.g., OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS, OIG-10-13, at 1–4 (2009), available at http://www.dhs.gov/xoig/assets/mgmt_rpts/OIG_10-13_Nov09.pdf (finding that transfer determinations are not made in a consistent manner and frequently impair individuals' legal representation, ability to appear in court, and access to personal records, evidence, and witnesses); HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES (2009), available at <http://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf> (examining the scope and human rights impact of transfers to U.S. immigration detention facilities).

²⁸² See CHARLES GORDON ET AL., *supra* note 65, at § 3.07[3][b][ii][A] (noting the “traditional reluctance to permit discovery” in immigration matters).

by the criminal court—and an opportunity to be heard on whether that evidence establishes their removability and eligibility for status or establishes relief from removal. It creates a closed universe of documents representing the official record of conviction, previously tested by a criminal court process. Those documents can be decisive for the threshold inquiry of whether a noncitizen is subject to deportation, eligible for status or relief from removal, eligible for bond from detention, and numerous other determinations.

By contrast, a circumstance-specific approach provides noncitizens with little notice as to what the government may allege as the basis of their removal proceedings, and hampers their ability to contest such allegations at the removal hearing. One might assume the opposite to be true—that a noncitizen would be better able to explain and contest factual allegations about his or her past conduct than engage in a legal battle over whether a past conviction by definition fits with a criminal ground of removal. This might be the case if the inquiry came down to testimony alone—that is, if the government based its allegations, and the judge made her determination, solely upon the noncitizen's recollection of her conduct. But a circumstance-specific approach allows the government to base its allegations not only on the noncitizen's testimony, but also on a potentially endless set of documents like police reports, witness statements, and other factual allegations that may have been untested or even contradicted in the previous criminal court process. Given the constraints in the immigration system—particularly noncitizens' lack of access to counsel, family, records, and evidentiary protections—it is hard to imagine noncitizens having comparable capacity to produce the types of documents that would be necessary to contest the government's allegations under a circumstance-specific approach.²⁸³

These concerns are even more acute in the context of nonadversarial adjudications for immigration or citizenship status, which are based largely on paper records and interviews. Noncitizens who affirmatively apply for asylum²⁸⁴ or naturalization²⁸⁵ will have little

²⁸³ See Sharpless, *supra* note 45, at 1032 (“While it is reasonable to expect noncitizens to be on notice regarding the immigration consequences of the facts necessary to the offense, it is unreasonable to expect noncitizens to be on notice that facts outside the elements of the crime will later be used against them.”).

²⁸⁴ Asylum officers must determine whether a person is barred from asylum due to an aggravated felony conviction under 8 U.S.C. § 1158(b)(2)(B)(i) (2006).

²⁸⁵ Naturalization officers must determine whether a person is barred from naturalization due to an aggravated felony conviction under 8 U.S.C. §§ 1101(f)(8), 1427(a)(3). See also 8 C.F.R. § 316.10(b)(1)(ii) (2010) (providing that an applicant will be found to be lacking good moral character if convicted of an aggravated felony on or after November 29, 1990).

basis of knowing what documents the government might consult in deciding to deny their applications (and possibly refer them to removal proceedings) when there are no limits on a factual inquiry. As such, they will have little ability to anticipate what types of evidence they should submit to support their applications, and no practical opportunity to contest the government's later submissions.

Recent changes in the immigration system have only heightened these concerns. The immigration system increasingly relies on nonadversarial conviction assessments to determine some of the most severe consequences under immigration law. First, consider the rapid expansion of mandatory detention. While the detention of arriving immigrants was a common feature of the early immigration system, it was seldom used as a tool of enforcement. Indeed, the federal government largely suspended immigrant detention from the 1950s through the 1980s.²⁸⁶ In 1988, however, Congress enacted the first "mandatory detention" statute, requiring immigration officials to detain without bond noncitizens who have been convicted of aggravated felonies, regardless of their actual flight risk or potential danger to the community, upon their release from their criminal sentences.²⁸⁷ Over the years, Congress expanded the mandatory detention statute to be predicated on other categories of removable offenses, including controlled substance offenses and multiple crimes involving moral turpitude. At the same time, it expanded the list of offenses included within the aggravated felony category.²⁸⁸ As a result of these changes—and the corresponding increase in funding for the required detention space—the immigration detention system has grown rapidly. In 2008, for example, immigration officials within the Department of Homeland Security made decisions to detain 378,582 noncitizens, representing a 22% increase from just the previous year.²⁸⁹ A majority of these current detainees are transferred away from the communities in which

²⁸⁶ See *The History of the Immigration Detention System in the U.S.*, DETENTION WATCH NETWORK, <http://www.detentionwatchnetwork.org/node/2381> (last visited Oct. 24, 2011) (noting that the federal government largely suspended immigration detention from the 1950s through the 1980s, and that the system has rapidly grown only in recent years).

²⁸⁷ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343, 102 Stat. 4181, 4470 (codified at 8 U.S.C. § 1252(a)(2) (1988)) ("The Attorney General *shall* take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction." (emphasis added)).

²⁸⁸ See *supra* notes 9–10 and accompanying text (describing Congress's expansion of the list of criminal grounds of deportation).

²⁸⁹ OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 3 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

they are initially detained to isolated facilities in the southern and southwestern United States.²⁹⁰

In a civil administrative system handling an increasing number of cases involving detainees,²⁹¹ the role of categorical analysis in promoting some modicum of notice and an opportunity to be heard is particularly evident. The decision to detain an immigrant without the possibility of bond rests in the first instance with frontline immigration officials. These officials, deportation officers within the U.S. Department of Homeland Security, will access the immigrant's criminal history based on a paper record and decide whether the convictions trigger mandatory detention under the statute, with no notice to the noncitizen prior to the determination.²⁹² The only recourse for noncitizens who are detained without a bond determination based on their criminal convictions is to seek a special hearing with an immigration judge.²⁹³ However, it may take days or even weeks before a noncitizen is informed that immigration officials have deemed her ineligible for bond, and days after that for an immigration judge to schedule a hearing on whether the noncitizen is properly included within the mandatory detention statute. In that time, the noncitizen may already be transferred far from the resources she needs to meet her burden of establishing that her conviction does not trigger mandatory detention. Moreover, in such hearings, the burden is onerous. According to agency interpretation, the noncitizen bears the burden of demonstrating that the government is "substantially unlikely to prevail" in establishing the criminal basis for the noncitizen's mandatory detention that was identified by the frontline immigration official.²⁹⁴ Thus, much rests on this initial decision by the frontline immigration official.

A categorical analysis provides some notice and an opportunity to be heard in this process. It helps to ensure that the initial decision

²⁹⁰ See OFFICE OF INSPECTOR GEN., *supra* note 281, at 4 (explaining that many detainees "are sent from eastern, western and northern state detention facilities to locations in the southern and southwestern United States"); *Huge Increase in Transfers of ICE Detainees*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Dec. 2, 2009), <http://trac.syr.edu/immigration/reports/220/> (concluding, based on analysis of transfer records obtained by FOIA from DHS, that "[d]uring the first six months of FY 2008, the latest period for which complete data are available, the majority (52.4%) of detainees were transferred" such that they were moved "from their point of initial ICE detention to many different locations—often over long distances and frequently to remote locations").

²⁹¹ See Kalhan, *supra* note 59, at 42–46 (describing increases in detention).

²⁹² See 8 C.F.R. § 1003.19 (2010) (establishing the procedure for custody determinations).

²⁹³ See *id.* (describing the procedures whereby a noncitizen may request a special hearing).

²⁹⁴ Joseph, 22 I. & N. Dec. 799, 807 (B.I.A. 1999).

by the frontline immigration official to detain an immigrant without the possibility of bond and the ultimate decision on review by an immigration judge will be based on the same evidence—an assessment of the criminal statute under which the noncitizen was convicted and a review of a limited set of documents within the criminal record. It also eliminates subjectivity in the analysis, ensuring that convictions are characterized based on their inherent nature and official record, rather than on potentially disputed facts. As such, categorical analysis provides a better benchmark for immigration officials to determine whether or not to detain immigrants under the mandatory detention statute, and provides immigrants with better notice of whether a prior conviction will make them ineligible for bond. Most importantly, categorical analysis ensures that an immigrant will be less likely to be deprived of liberty based solely on factual evidence proffered by the agency that the immigrant may have difficulty contesting while in detention.

A circumstance-specific inquiry, by contrast, leaves room for a subjective assessment of facts, which may subject a noncitizen to mandatory detention without prior notice. It opens the door for a deportation officer to consider facts culled from any number of sources, regardless of their accuracy—whether police reports, presentence investigation notes, corrections or probation officers' records, or other evidence untested by a criminal court process. To base mandatory detention decisions on such a factual inquiry is untenable given the liberty interests at stake in such determinations.

Similar stakes are apparent in another growing feature of the modern immigration system: administrative removal. Administrative removal permits immigration officials to deport certain immigrants without providing them a hearing before an immigration judge. The applicability of this process turns in part on whether the immigrant has been convicted of an aggravated felony.²⁹⁵ A frontline immigration officer assesses the conviction on the basis of her review of a paper record.²⁹⁶ A noncitizen will receive a "Notice of Intent" specifying the charges and the government's conclusion that he or she is subject to administrative removal,²⁹⁷ but the noncitizen "need not even be provided with a copy of the evidence on which the charges are

²⁹⁵ 8 U.S.C. § 1228(b) (2006) (specifying the statutory requirements for administrative removal).

²⁹⁶ *Id.*; ABA, *supra* note 73, at 7, 17–18 (discussing administrative removal); ARNOLD & PORTER LLP, *supra* note 273, at 1-34 to -36 (same).

²⁹⁷ See ARNOLD & PORTER LLP, *supra* note 273, at 1-34 to -36 (describing the administrative removal process for unlawful permanent residents alleged to be removable on grounds of an aggravated felony conviction).

based, and the failure to respond on time automatically results in a final deportation order whether or not the allegations are true.”²⁹⁸ While drastic in nature, over half of all removal orders based on convictions deemed “aggravated felonies” are issued through this process.²⁹⁹

As with the initial decision to detain, applying a categorical analysis to the determination of whether a conviction is an aggravated felony for the purposes of administrative removal helps to ensure some level of notice and an opportunity to be heard in an already questionable process for ordering deportations outside an adversarial context. A factual inquiry would all but eliminate any ability for a noncitizen to predict and prepare for such consequences, such as in the plea stage, let alone attempt to defend against removal. When the stakes are so high, a minimally fair process centered on facts would need to provide some opportunity for fact-finding by both sides of the dispute. But the structure of the administrative immigration system as a whole lacks even such minimal guarantees.

The expansion of mandatory detention and administrative removal are just two examples of how an erosion of categorical analysis may lead to drastically unfair results for immigrants facing serious consequences within the immigration system. Even immigration court proceedings themselves offer little protection for immigrants who will by design have less access to the type of documents necessary to fight deportation under the Supreme Court’s circumstance-specific approach. The Supreme Court suggested that an immigration court could offer a fundamentally fair hearing on factual issues under its circumstance-specific approach.³⁰⁰ However, this statement reflects little understanding of the constraints within immigration courts or the vast array of nonadversarial contexts in which these immigration decisions are made.

2. Uniformity

Uniformity is an important concern in the immigration context, derived not only from policy norms but from the Constitution. Article I of the Constitution provides that Congress must establish a “uniform

²⁹⁸ ABA, *supra* note 73, at 17–18.

²⁹⁹ *New Data on the Processing of Aggravated Felons*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Jan. 5, 2007), <http://trac.syr.edu/immigration/reports/175/> (reporting that, in Fiscal Year 2006, fifty-five percent of all removal orders under aggravated felony provisions were administrative orders issued by employees of Immigration and Customs Enforcement in the Department of Homeland Security).

³⁰⁰ See *Nijhawan v. Holder*, 129 S. Ct. 2294, 2303 (2009) (“We agree with petitioner that the [INA] foresees the use of fundamentally fair procedures, . . . [b]ut we do not agree that fairness requires the evidentiary limitations he proposes.”).

rule of naturalization.”³⁰¹ Because the immigration statute presents categories of criminal convictions as bars to naturalization and admission as well as grounds for deportation, the assessment of those convictions implicates how uniformly such actions are applied. A categorical analysis helps promote uniformity in two ways—by ensuring that two people convicted of the same crime will be treated similarly under the law, and by ensuring that a person’s conviction will be treated the same way whether assessed by an immigration official on a paper record or by an immigration judge in immigration court. As courts and the agency have long recognized, two people convicted under the same criminal statute should face the same consequences under the immigration statute.³⁰²

³⁰¹ U.S. Const. Art. I, § 8, cl. 4. Several scholars have discussed the necessity of uniformity in the immigration system. See generally Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions*, 74 N.Y.U. L. REV. 1696 (1999) (discussing the uniformity concerns related to aggravated felonies); James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359 (2010) (providing a historical overview of why the naturalization clause requires Congress to act with uniformity, transparency, and prospectivity in federal immigration law); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 533–35 (2002) (discussing the uniformity concerns related to the intersection of welfare and immigration law).

³⁰² See, e.g., F—, 8 I. & N. Dec. 469, 472 (B.I.A. 1959) (“The immigration laws must be uniformly administered . . .”); R—, 6 I. & N. Dec. 444, 448 n.3 (B.I.A. 1954) (“The rule set forth . . . prevents the situation occurring where two people convicted under the same specific law are given different treatment because one indictment may contain a fuller or different description of the same act than the other indictment; and makes for uniform administration of law.” (citations omitted)); T—, 3 I. & N. Dec. 641, 642–43 (B.I.A. 1949) (“This rule precludes inquiry outside the record of conviction as to facts favorable and unfavorable to the alien. It is true that in some cases this rule results in the deportation of an alien who has committed a petty offense which does not necessarily indicate moral obliquity and in a finding of nondeportability in some very few cases where the offense is indicative of bad character. ‘But such results always follow the use of fixed standards and such standards are . . . necessary for the efficient administration of the immigration laws.’” (citations omitted)); T—, 2 I. & N. Dec. 22, 25 (B.I.A. 1944) (“[A]pplication of the rule must be uniform . . .”); United States *ex rel.* Mylius v. Uhl, 210 F. 860, 862–63 (2d Cir. 1914) (“[T]he rule which confines the proof of the nature of the offense to the judgment is clearly in the interest of a uniform and efficient administration of the law and in the interest of the immigration officials as well, for if they may examine the testimony on the trial to determine the character of the offense, so may the immigrant.”); Immigration Laws—Offenses Involving Moral Turpitude, 37 Op. Att’y Gen. 293, 295 (1933) (“I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. . . . [S]ome aliens who have been convicted of high crimes may be excluded although their particular acts evidence no immorality and . . . some who have been convicted of slight offenses may be admitted although the facts surrounding their commission may . . . indicate moral obliquity. But such results always follow the use of fixed standards . . . necessary for the efficient administration of the immigration laws.” (internal quotation marks and citations omitted)).

Of course, categorical analysis also produces disuniformity. By definition, a categorical analysis means that factual distinctions beyond the criminal court disposition do not matter. Under a categorical analysis, two people who commit the same offense but are able to secure different plea deals or are prosecuted in jurisdictions that define the offense differently will face different immigration consequences. One could therefore argue that uniformity would be better served if immigration consequences were meted out based on the facts rather than criminal court dispositions.

Within the increasingly expansive and decentralized administrative immigration system, however, there is little potential to achieve greater uniformity through a factual assessment of convictions. Conviction assessments happen on a massive scale by frontline immigration officials who determine eligibility for asylum, lawful permanent residence, and naturalization, and determine whether to initiate removal proceedings. The authority to make these decisions within the U.S. Department of Homeland Security is strewn across three divisions that each have their own subparts: Customs and Border Patrol, Immigration and Customs Enforcement, and Citizenship and Immigration Services.³⁰³ The number of removal proceedings that have been initiated each year by these agencies has increased from 153,166 in 2004 to 221,484 in 2009.³⁰⁴ It is unlikely that the system can produce factually uniform results when thousands of decentralized, overburdened frontline officials must choose how far to dig into the factual evidence behind each conviction record supplied on a paper application. The concept of uniformity assumes some level of accuracy about how various individuals' crimes are characterized. Given the constraints of the system, it is easier to be accurate about what constitutes a person's past *conviction* than what constitutes a person's past *conduct*.³⁰⁵

Moreover, a categorical, rather than factual, analysis helps to ensure that a noncitizen's conviction will be uniformly interpreted whether by an immigration official on a paper record or an immigration judge in immigration court. This is particularly important given

³⁰³ See ARNOLD & PORTER LLP, *supra* note 273, at 1-8 to -10 (describing the functions of officials within the Department of Homeland Security).

³⁰⁴ *Id.* at 1-13.

³⁰⁵ The former inquiry (to determine the conviction) can be answered by a fixed statutory definition and a limited set of documents that has been previously verified through an adversarial criminal court process. The latter inquiry (to determine the conduct) is influenced by a limitless set of potentially contradictory documents and testimony about events that may have occurred months or years in the past. While neither approach is perfect, a categorical analysis is more likely to achieve uniformity than a factual analysis because it relies on a more accurate basis of comparison.

the variety of adjudicative contexts in which an immigration official could be making an assessment based on a noncitizen's conviction. For example, each year, officers adjudicate thousands of naturalization applications based on paper records and a nonadversarial interview.³⁰⁶ During this process, applicants are asked to undergo criminal background checks, and the naturalization officer must determine whether any past convictions temporarily or permanently bar the applicant from naturalization under the statute.³⁰⁷ If the officer denies the applicant, she may also decide to refer the applicant over to removal proceedings before an immigration judge, where that judge will then assess the conviction.³⁰⁸ The naturalization statute and the deportability statute both involve bars if an applicant has been convicted of an aggravated felony.³⁰⁹ A categorical analysis helps ensure a similar outcome in both contexts because the officer and the judge would be limited to the same inquiry, focused on the conviction as it is statutorily defined and limited by specified documents within the record of conviction. By contrast, a factual inquiry may very well lead to different results in immigration court than the naturalization process, because only immigration court would provide the noncitizen with the opportunity to present witnesses and testimony on the facts of her offense.

A categorical analysis provides a more definite standard for the various subparts of the immigration agency to apply. As the early court and agency decisions repeatedly explained, immigrants with the same conviction should be subject to the same consequences under

³⁰⁶ See 8 C.F.R. § 335.3 (2010) (describing the procedure by which an agency officer may grant or deny an application based on a review of documents and initial in-person examination); OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2007 YEAR BOOK OF IMMIGRATION STATISTICS 51–52 tbl.20 (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf (documenting the number of petitions for naturalization filed and denied annually for fiscal years 1907–2007).

³⁰⁷ See 8 C.F.R. § 335.2(b) (2010) (requiring immigration officers to notify naturalization applicants of their interviews only after reviewing a completed criminal background check of the applicant); see also Memorandum from Michael Aytes, Assoc. Dir. for Domestic Operations, U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., on Disposition of Cases Involving Removable Noncitizens (July 11, 2006) (specifying how U.S. Citizenship and Immigration Services (USCIS) officers should process cases in which a noncitizen appears to be removable).

³⁰⁸ See Memorandum from Michael Aytes, *supra* note 307, at 5–8 (describing circumstances in which USCIS officers may issue an applicant a Notice to Appear before an immigration judge, commencing removal proceedings, and when they may refer the case to ICE to determine whether and how to institute removal proceedings).

³⁰⁹ The aggravated felony bar to naturalization is listed under 8 U.S.C. §§ 1101(f)(8), 1427(a)(3) (2006). See also 8 C.F.R. § 316.10(b)(1)(ii) (2010) (providing that an applicant will be found to be lacking good moral character if convicted of an aggravated felony on or after Nov. 29, 1990). Persons convicted of an aggravated felony are also deportable under 8 U.S.C. § 1227(a)(2)(A)(iii) (2006).

immigration law. While there may be some disuniform results with respect to individuals' conduct, the gains to uniformity outweigh any losses under categorical analysis given the constraints of the agency.

3. *Predictability*

Categorical analysis also plays an important role in promoting predictability in the current immigration system. Categorical analysis pegs consequences to specific determinations made when the criminal case is adjudicated in criminal court. For example, a noncitizen with an assault conviction will know how that conviction—as it is defined by the criminal statute and limited by the record of her conviction—is categorized under the immigration statute. She can rely on past precedent to understand that, for example, a conviction under one subsection of the statute may lead to deportation consequences while a conviction under another subsection will not. By contrast, with a factual approach, a noncitizen may be less able to predict how an immigration officer will assess her criminal conduct. For example, a noncitizen with an assault conviction may not know if an immigration judge will view the underlying facts of her offense in a favorable or negative light. While such subjectivity is a common feature of the various discretionary determinations made in the immigration system, it has historically not been a part of the initial inquiry into whether a person is eligible for a particular status or subject to deportation due to her conviction(s).

The implications for the lack of predictability that stems from a factual approach are certainly felt within the criminal justice system itself, as will be discussed in more detail below. However, the lack of predictability also has negative repercussions for the functioning of the immigration system. The assessment of convictions is relevant not only to the ultimate outcome of a removal proceeding or application for status, but also to initial decisions made by various actors within the immigration system—decisions that by definition are made before evidence is fully available. For example, a noncitizen should be able to assess her own eligibility for status before submitting a paper application for such status, as should the attorneys or service providers assisting her in this process.³¹⁰ Otherwise the noncitizen, attorneys and service providers, and immigration officials will waste

³¹⁰ See CTR. FOR BATTERED WOMEN'S LEGAL SERVS., POLICY BRIEF: THE ROLE OF THE CATEGORICAL APPROACH IN ASSISTING VICTIMS OF DOMESTIC VIOLENCE AND OTHER CRIMES APPLY FOR U NONIMMIGRANT STATUS AND VAWA SELF-PETITIONS (on file with the *New York University Law Review*) (2009) (explaining how categorical analysis ensures that legal service providers are better able to determine whether their clients are eligible for applications for status).

considerable time and resources on applications when the noncitizen is ineligible for any such relief or status. Similarly, immigration officials themselves must make threshold decisions about whether to initiate removal proceedings or detain a person based on an assessment of criminal convictions. As discussed above, these determinations are increasingly common and occur on paper records. As with noncitizens themselves, immigration officials will also be guided by a categorical analysis because they can rely on prior determinations about how a specific criminal law provision or statute is treated under the law.

Of course, the predictability rationale has its limitations in this context. Even under a categorical analysis, immigration officials will be able to review documents within the record of conviction to assess whether a person was convicted under the portion of a divisible criminal statute that leads to negative immigration consequences. Thus, in some cases, the assessment of a conviction will turn on the government's ability to find and submit old documents—the availability of a plea transcript or jury instructions, for example. The passage of time that often occurs between an immigration interaction and a criminal justice interaction is often lengthy, and such documentary evidence may be lost or unavailable.³¹¹

However, any such predictability concerns are only exacerbated in the context of a factual inquiry. The government's ability to secure criminal court documents would affect a factual inquiry as well. Because a factual inquiry permits consideration of an even wider scope of evidence, including the witnesses, testimony, and documents outside the criminal record, the outcome of any factual assessment turns, at least in part, on the ability of both parties to obtain such evidence. Thus, a categorical analysis, while not resulting in perfect predictability, provides all parties involved a better sense of the potential outcomes by ensuring that the consequences are pegged to relatively fixed factors: the statutory definition of the offense and specified documents within the record of conviction.

4. *Efficiency*

Categorical analysis also plays an important role in preserving efficiency in this expanding system, particularly for the nation's immigration courts. Immigration judges typically hold multiple hearings to

³¹¹ These concerns also exist in the criminal sentencing context, as discussed in Professor Sarah French Russell's piece on *United States v. Shepard*, 544 U.S. 13 (2005), and drug enhancements. See Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1229 (2010) (noting that the applicability of an enhancement may turn on the availability of old documentation).

adjudicate a removal case, through multiple “master calendar hearings” possibly followed by an “individual hearing” on relief.³¹² Master calendar hearings are relatively short hearings at which the immigration judge may accept pleadings from the noncitizen on the charges of removability, determine whether the noncitizen is removable based on her conviction, and decide if the conviction further bars her from seeking discretionary relief from removal.³¹³ Individual hearings are longer hearings at which the immigration judge may consider applications for relief from removal, holding adversarial trials on the discretionary factors necessary to determine whether relief is merited in a particular case.³¹⁴ In these hearings, the immigration judge will take testimony and consider evidence relevant to discretionary factors (such as letters of support from family members and other character evidence, employment and tax payment information, expert reports, and country conditions information).³¹⁵

Under a circumstance-specific inquiry, immigration judges would need to hold hearings on the threshold legal questions in the case—whether a particular criminal conviction renders a noncitizen removable or ineligible for discretionary relief. This would involve the taking of testimony, a process that does not typically occur during initial master calendar hearings. A categorical analysis obviates the need for immigration judges to hold a trial-like individual hearing on these issues.³¹⁶ Instead, the immigration judge can use master calendar hearings to make those initial determinations through a legal analysis on the basis of a closed criminal record before proceeding to an individual hearing, if necessary.

As noted in Part II, the agency itself has observed the important role that categorical analysis plays in alleviating administrative burdens.³¹⁷ In a 1996 BIA opinion, the agency stated that there is “no clear stopping point” for the evidentiary inquiry if a factual approach is permitted, thus making categorical analysis “the only workable approach” for the assessment of prior criminal convictions.³¹⁸

³¹² See U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL ch. 4.15–.16, at 64–78 (2008), available at <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%204.pdf> (describing procedures for master calendar hearings and individual hearings).

³¹³ See *id.* at 64–75 (describing procedures for master calendar hearings).

³¹⁴ See *id.* at 75–78 (describing procedures for individual hearings).

³¹⁵ See *id.* (same).

³¹⁶ See Sharpless, *supra* note 45, at 1032 (discussing how categorical analysis helps the agency avoid “mini-trial[s]” and thereby increases efficiency).

³¹⁷ See *supra* notes 147–50 and accompanying text (describing a BIA opinion that highlighted the administrative concerns associated with moving beyond a categorical analysis).

³¹⁸ Pichardo-Sufren, 21 I. & N. Dec. 330, 335–36 (B.I.A. 1996).

The need for efficiency in the immigration system has only expanded in recent years. The federal government has created a number of initiatives aimed at identifying individuals who may be removable for criminal convictions, under the auspices of creating a more streamlined process of deportation. Cooperation between federal immigration authorities and state and local law enforcement has increased dramatically.³¹⁹ The Department of Homeland Security screens people held in some local jails and prisons on criminal charges to determine if they are deportable, issuing “detainers” (otherwise known as “immigration holds”) requesting that state or local facilities hold such individuals up to forty-eight hours past their release date so that federal immigration authorities may take them directly into custody.³²⁰ Federal enforcement programs like “Secure Communities” aim to automate this information-sharing at the point of arrest and booking by linking criminal fingerprint records to immigration databases.³²¹ Increasingly, immigrants are screened for criminal records in a variety of contexts outside the criminal justice system. Immigrants who return to the United States after traveling abroad, or who submit certain applications for status to federal immigration authorities (such as for asylum, lawful permanent residence, or citizenship), are routinely screened for criminal records and may be subjected to removal proceedings on that basis.³²²

As a result, deportations based on criminal grounds have expanded exponentially. In 1983, the federal government deported 863 people on criminal grounds.³²³ In 2008, the federal government deported 97,133 people on criminal grounds.³²⁴ Not surprisingly, immigration court caseloads have also increased dramatically. From fiscal years 2000 to 2005, immigration courts’ caseloads rose 39%,

³¹⁹ See ARNOLD & PORTER LLP, *supra* note 273, at 1-22 to -25 (describing more recent federal government initiatives to increase state and local involvement in immigration enforcement); see also Jennifer M. Chacon, *Immigration Law and Adjudication: A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1582–98 (2010) (same); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1084–88 (2004) (same).

³²⁰ See ARNOLD & PORTER LLP, *supra* note 273, at 1-24 to -25 (describing programs to identify immigrants in jails and prisons); Manuel D. Vargas, *Immigration Consequences of Guilty Pleas or Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 701, 707 (2006) (same).

³²¹ See *supra* note 51 (discussing expansion of immigration enforcement and Secure Communities).

³²² Vargas, *supra* note 320, at 704 (describing the trigger points for the commencement of removal proceedings).

³²³ See *id.* at 707 (providing historical statistics on criminal deportation).

³²⁴ OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008, at tbl.4 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

while the number of judges increased by only 3%.³²⁵ In fiscal year 2007, approximately 205 immigration judges carried a total caseload of over 330,000 matters, including removal cases, bond cases, and other determinations—permitting an average of only 74 minutes per matter.³²⁶ Many of these cases involved criminal convictions, including those involving criminal grounds for which the applicability of a categorical analysis is currently in dispute. For example, from fiscal years 1996 to 2006, immigration courts handled 136,896 cases that entailed charges of crimes involving moral turpitude (well over 10,000 per year).³²⁷ If the abandonment of a categorical analysis means even one additional hearing date or continuance in each of the thousands of cases each year, such a change would have a measurable impact on the efficiency of the removal system.³²⁸

The significant expansion in enforcement and caseloads demonstrates the heightened value that a categorical analysis has in today's immigration system. Immigration officials and immigration judges need to make efficient assessments of the consequences of convictions, because those assessments will determine whether a noncitizen will be able to proceed to apply for discretionary relief or status. Turning both stages of the process into fact-finding inquiries will further clog an already overburdened system.

5. *Judicial Review*

Finally, categorical analysis also plays an important role of preserving judicial review of agency decisions. First in 1996 and again in 2005, Congress enacted dramatic changes to the immigration laws, curtailing judicial review of immigration decisions.³²⁹ Federal circuit

³²⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT (2006), available at <http://www.gao.gov/new.items/d06771.pdf>.

³²⁶ *Improving the Immigration Courts: Effort To Hire More Judges Falls Short*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (July 28, 2008), <http://trac.syr.edu/immigration/reports/189/> (providing statistics on the average caseloads of immigration judges).

³²⁷ *Individuals Charged with Moral Turpitude in Immigration Court*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/immigration/reports/moral_turp.html (last visited Oct. 24, 2011) (reporting statistics on the number of CIMT cases handled in immigration courts annually).

³²⁸ See ARNOLD & PORTER LLP, *supra* note 273, at 1-39 (noting that the abandonment of categorical analysis for crimes involving moral turpitude raises efficiency concerns for an overburdened immigration court system).

³²⁹ In 1996, Congress restricted circuit court jurisdiction (through petitions for review of agency decisions) over a variety of issues, including review of conviction-based removal orders, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C.). In 2005, Congress partially restored jurisdiction to the circuit courts over legal and constitutional

courts do not have jurisdiction to review the removal order of any person who is removable based on a cross-referenced list of criminal offenses meriting removability.³³⁰ In such cases, federal courts' review is limited to questions of law or constitutional issues, and there is no review of discretionary determinations by the agency.³³¹

A categorical analysis—determining whether an offense as defined by a criminal statute, and as limited by the official record of conviction, constitutes a criminal ground under the INA—is precisely the type of legal issue fully reviewable by federal courts. A factual analysis—which may include credibility determinations regarding testimony and the weighing of contested evidence—provides a more awkward vehicle for judicial review and threshold jurisdictional questions. The INA provides an extremely deferential standard of review for agency fact-finding, stating that “administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”³³² If such facts become the basis of whether an offense falls into a criminal ground of removal that bars jurisdiction to review the removal order, and if a deferential standard of review then applies to that fact finding, the agency will wield too much power in determining the scope of judicial review. It could effectively insulate its decisions from any check by an impartial decision maker.

This is particularly troubling given the high stakes of the issues involved and the important role that judicial review has historically played in checking the executive's removal power. The penalties attached to criminal convictions are among the harshest consequences of immigration law. Categorical analysis ensures that noncitizens who face these consequences based on their prior criminal convictions will have access to independent Article III review.

B. Deviating from Categorical Analysis in a Post-Padilla World: Implications for the Criminal Justice System

At first blush, one may not immediately see the impact that the decline of categorical analysis has on the criminal justice system's treatment of noncitizens. After all, criminal courts are concerned primarily with reaching the appropriate result for the underlying offense based on traditional penal considerations. In a post-*Padilla* world, however, immigration consequences have been formally brought into

issues in the REAL ID Act, while simultaneously eliminating habeas jurisdiction in the district courts over removal orders. See REAL ID Act of 2005 §§ 102, 106, Pub. L. No. 109-13, 119 Stat. 302, 306, 310–11 (codified at 8 U.S.C. §§ 1103 note, 1252 (2006)).

³³⁰ 8 U.S.C. § 1252(a)(2)(C) (2006) (providing a list of offenses meriting removal).

³³¹ § 1252(a)(2)(D) (barring judicial review of agency determinations).

³³² § 1252(b)(4)(B).

the fold of factors that defendants and defense counsel must consider prior to the entry of any plea. By complicating this process, the abandonment of categorical analysis creates a host of problems for the various actors within the criminal justice system.

Padilla holds that defense counsel have a Sixth Amendment duty to advise noncitizens of the immigration consequences of their charges.³³³ When the immigration consequences under federal law are “succinct, clear, and explicit,” defense counsel must advise their clients of the precise consequences of their guilty pleas and potential convictions.³³⁴ Where the immigration consequences are not clear, defense counsel merely need to advise their clients that their pending criminal charges may carry a risk of deportation.³³⁵

One could read the holding of *Padilla* narrowly to conclude that the scope of the duty of defense counsel is quite limited. Under such a reading, the erosion of categorical analysis may actually ease the burden on defense counsel and otherwise have little effect on the system as a whole. If immigration consequences turn on facts and not the conviction record, then consequences would seldom be clear and succinct. One could argue that the erosion of categorical analysis obviates defense counsel’s duty to specify the precise immigration consequences, as they could merely advise their clients that deportation is a risk. No further ripple effect would be felt in the criminal system.

But such a view misreads the scope of the *Padilla* decision and the complexities created by the Supreme Court’s current approach to conviction assessments in immigration law. In *Padilla*, the Supreme Court recognized a Sixth Amendment duty, in part because defendants have an interest in avoiding deportation consequences and preserving their right to discretionary relief.³³⁶ The purpose of enforcing a duty to advise is not merely to ensure that the defendant is aware of the consequences of his or her conviction, but to provide the defendant with the opportunity to seek a more desirable result through a plea bargain.³³⁷ The Supreme Court noted that informed defendants may opt to seek an outcome that avoids deportability or at least

³³³ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

³³⁴ *Id.* at 1483.

³³⁵ *See id.* (“When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”).

³³⁶ *See id.* (recognizing that avoiding deportation and preserving the possibility of discretionary relief may be more important to a defendant than a jail sentence).

³³⁷ *Id.* at 1486 (noting that informed consideration of possible immigration consequences can enable the defense and prosecution to “reach agreements that better satisfy the interests of both parties”).

preserves an opportunity to seek discretionary relief.³³⁸ In the absence of such options, defendants may choose instead to go to trial.

The erosion of categorical analysis thus does not discharge defense counsel of the duty to determine the specific consequences of a plea for a defendant; it simply complicates the process.³³⁹ To determine whether deportation consequences are clear or not, defense counsel must first determine all the possible criminal grounds in immigration law that a conviction will trigger. With the erosion of categorical analysis, defense counsel will need to identify which of these potential grounds remain subject to a categorical analysis and which are instead subject to the Supreme Court's new circumstance-specific inquiry. Defense counsel must then advise the defendant accordingly. With respect to circumstance-specific grounds of removal, zealous defense counsel will need to explain that the defendant should worry not only about a conviction, but also about any negative factual statements or findings made by others, such as police reports, presentence reports, and testimony. In the face of such information, most defendants will seek a more secure plea—a plea to an offense that is clearly a nondeportable offense or at least preserves the argument under categorical analysis.

In the event that such an option is not available, a defendant will be left with two choices—to go to trial or to vigorously challenge factual statements made in documents that a defendant previously may have had less incentive to address, such as inaccuracies in presentence reports. Neither option is particularly appealing to the defendant. Going to trial carries significant risks, particularly in terms of jail time. Objecting to and correcting statements in presentence reports and other factual findings may be difficult, particularly for pre-trial documentation such as police reports and complaints. For a defendant who seeks to avoid deportation, these options will present the only opportunity to challenge what will become the basis for removability and other immigration penalties.³⁴⁰

³³⁸ *Id.* at 1483 (noting that the possibility of seeking discretionary relief from deportation and the preservation of the right to remain can be key factors for defendants when deciding whether to accept a plea or go to trial).

³³⁹

³⁴⁰ The Ninth Circuit recently recognized the adverse implications of eroding categorical analysis for the criminal justice system and for defense counsel obligations under *Padilla*. See *Hernandez-Cruz v. Holder*, No. 08-73805, 2011 WL 2652461, at *12–13 (9th Cir. July 8, 2011). In *Hernandez*, the government argued that immigration officials should be permitted to consider facts beyond the elements of the offense to which the immigrant ultimately pleaded. *Id.* at *12. The court rejected this argument, noting that doing so would “make a mockery of the affirmative obligation that criminal defense attorneys have to advise their non-citizen clients of the potential immigration consequences of accepting a

The implications for the criminal justice system as a whole may be significant, particularly in areas with a high noncitizen population. As the erosion of categorical analysis slowly eliminates “safe” pleas to nondeportable offenses, defendants will have fewer options for plea bargaining and more cases may go to trial. The efficiency costs to the system—particularly for misdemeanor courts and other criminal courts that are used to processing cases in a matter of minutes or hours rather than days and weeks—may be high. Those cases that proceed on guilty pleas may face these efficiency concerns at the sentencing stage as well, as defendants vigorously contest factual findings that may have otherwise gone unchallenged. In essence, criminal courts will be trying immigration cases, as defendants seek findings on facts not necessarily relevant to the penal outcomes of the cases, but potentially relevant to the immigration consequences.

Categorical analysis, by contrast, ensures reliance on the formal findings of guilt determined in criminal court and takes further pressure off the system. This is not to say that defendants do not still face problems under categorical analysis; defendants who know that the plea to a charge will carry an adverse immigration consequence will still attempt to plea bargain for a better outcome. But, overall, categorical analysis ensures more predictability in the system. Defendants, and their defense counsel, will know exactly what an immigration official will examine from their criminal record in deciding whether or not they are subject to an immigration penalty. Such predictability promotes the norm of “informed consideration” that the *Padilla* decision contemplates.³⁴¹

The shift from categorical analysis to a factual, circumstance-specific inquiry portends great problems for the immigration and criminal justice systems. The longstanding rationales for ensuring categorical analysis in the immigration context are even more relevant in the current system as immigration enforcement has expanded and the stakes of conviction assessments have become more serious. Given this context, the shift to a circumstance-specific inquiry undermines due process, uniformity, predictability, efficiency, and the role of judicial review in the immigration system. Moreover, it creates tensions within the criminal justice system, disrupting defense counsel’s ability to advise immigrant clients meaningfully and complicating the ability of all the actors in the system who want to seek more appropriate outcomes through plea-bargaining.

plea bargain (and of pleading guilty more generally).” *Id.* at *13 (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010)).

³⁴¹ *Padilla*, 130 S. Ct. at 1486 (discussing the value of “informed consideration” to the plea-bargaining process).

CONCLUSION

The decisions that have eroded the categorical analysis in immigration law are recent outliers in the context of the century-old body of immigration cases applying a categorical analysis. It serves important rationales within the immigration system—helping to ensure notice and an opportunity to be heard, uniformity, predictability, efficiency, and judicial review of agency decision making.

Rather than address the historical and contextual rationales for a categorical analysis in immigration law, recent critics of categorical analysis depend in large part on a flawed syllogism that focuses on distinguishing criminal sentencing cases. The outlier approach essentially avers this logic: (a) categorical analysis in immigration law was carried over from the categorical approach in criminal sentencing cases, (b) some of the reasons for the categorical approach in sentencing cases (such as the Sixth Amendment rationale) do not necessarily apply in the immigration context, and therefore (c) categorical analysis does not apply fully in the immigration context.

This logic, as history demonstrates, is wrong. Categorical analysis has a deep and principled history in immigration law, stemming from Congress's continuous use of "convicted" (as opposed to "committed") language in the immigration statute since at least 1891. Federal courts and the agency have recognized this approach—and its cornerstone principle that immigration adjudicators cannot look beyond the statute and record of conviction—for decades pre-dating *Taylor* and other Supreme Court precedent applying categorical analysis in the criminal sentencing context. The applicability of categorical analysis in immigration law has not varied based on the particular definition of the removable offense, but is based on a number of rationales central to considerations of the appropriate role of the agency, as an administrative body, in making these determinations.

In deviating from categorical analysis in immigration law without considering its rationales, these recent decisions create more problems than they solve. The new exceptions to categorical analysis do not correct a mistaken analogy to sentencing cases; they ignore a century of precedent and an interpretation of the statute that is central to the fair and efficient administration of immigration law by the agency. Eroding categorical analysis in immigration law may lead to alarming consequences in light of the increased prevalence and heightened stakes that conviction assessments have in the current immigration system—assessments that are increasingly made by decentralized, frontline immigration officials. Moreover, in a post-*Padilla* world, the erosion of categorical analysis also creates pressure on the actors

within the criminal justice system and complicates their ability to achieve informed consideration and appropriate outcomes in criminal cases. With the merger of the criminal justice and immigration systems, it becomes increasingly important to ensure that noncitizens are not stuck with the worst of both systems' constraints.

The debate on the applicability of categorical analysis is closed in the courts on one issue: the fraud loss question addressed by the Supreme Court in *Nijhawan*.³⁴² However, the government has also raised similar arguments, to greater and lesser extents, for a number of provisions within the INA. In these cases, the government has sought to introduce evidence outside the record of conviction for the offense at issue. Courts that are now addressing these arguments have the opportunity to do so in light of the history and principles behind categorical analysis in the immigration context. Policymakers may wish to consider strengthening or clarifying this approach, to the extent that continued litigation of these issues deems it necessary, in future legislation. These efforts should be focused on maintaining the cornerstone of categorical analysis—that factual circumstances should not be relevant to the inquiry of whether a person's conviction triggers immigration penalties under the current federal immigration scheme.

This is not to suggest that categorical analysis is, in and of itself, the best vehicle for promoting fair and appropriate outcomes for immigrants facing the burdens of both the criminal justice and immigration systems. The burdens on these systems, which categorical analysis only somewhat alleviates, could be much better eased through other means. Within the immigration system, policymakers could level the playing field by enacting more rigorous protections and standards, including the right to government-appointed counsel and stronger evidentiary rules. Policymakers could also alleviate the heightened stakes of criminal convictions by rolling back the criminal grounds associated with immigration penalties in immigration law. Within both the immigration and criminal justice systems, policymakers could address some of these tensions by simply restoring discretion—ensuring that all immigrants are eligible to seek discretionary waivers in the immigration system or by re-enacting and expanding a mechanism to permit criminal courts to issue judicial recommendations against deportation.

Until these fundamental reforms take place, however, categorical analysis continues to play an important role in preserving minimal agency norms—of due process, uniformity, predictability, efficiency, and judicial review—and alleviating some of the pressure that

³⁴² *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009); see *supra* notes 233–53 and accompanying text (discussing *Nijhawan*).

immigration penalties place on the criminal justice system. Given the constraints of the systems, and the problems created by adopting a factual approach, categorical analysis is the better rule.

APPENDIX:

DECISIONS APPLYING CATEGORICAL ANALYSIS IN IMMIGRATION
LAW PRIOR TO THE SUPREME COURT'S 1990 CRIMINAL SENTENCING
DECISION IN *UNITED STATES V. TAYLOR*

This Appendix contains the various federal court, Attorney General, and Board of Immigration Appeals decisions that have expounded on categorical analysis prior to the Supreme Court's sentencing decision in *United States v. Taylor*. Case citations are organized by court and then listed in chronological order. Each is followed by a relevant quote from the case. These cases demonstrate the longstanding history of categorical analysis in immigration law and illustrate some of its key rationales.

A. *Federal Court Decisions**United States ex rel. Mylius v. Uhl*, 203 F. 152, 153 (S.D.N.Y. 1913)

In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judgments of conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it. I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular acts evidence no immorality and that some who have been convicted of slight offenses may be admitted although the facts surrounding their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion, necessary for the efficient administration of the immigration laws.

United States ex rel. Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914)

First. That the immigration officers act in an administrative capacity. They do not act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude.

Second. That this question must be determined from the judgment of conviction and not from the testimony adduced at the trial. . . .

Third. That the law must be administered upon broad general lines and if a crime does not in its essence involve moral turpitude, a person found guilty of such crime cannot be excluded because he is shown, aliunde the record, to be a depraved person.

Fourth. That the law must be uniformly administered. It would be manifestly unjust so to construe the statute as to exclude one person and admit another where both were convicted of criminal libel, because, in the opinion of the immigration officials, the testimony in the former case showed a more aggravated offence than in the latter.

Fifth. That the crime of publishing a criminal libel does not necessarily involve moral turpitude. It may do so, but moral turpitude is not of the essence of the crime.

United States ex rel. Portada v. Day, 16 F.2d 328, 329 (S.D.N.Y. 1926)

This court is bound by the record, and it is not open to question that such an act is one involving moral turpitude.

Tillinghast v. Edmead, 31 F.2d 81, 84 (1st Cir. 1929)

The record of conviction in the state court was, in this proceeding under section 19, conclusive evidence of a conviction of the crime therein charged; the other evidence relating to the crime committed was improperly received and considered.

United States ex rel. Meyer v. Day, 54 F.2d 336, 337 (2d Cir. 1931)

We cannot go behind the judgment of conviction to determine the precise circumstances of the crime for which the alien was sentenced.

United States ex rel. Robinson v. Day, 51 F.2d 1022, 1022–23 (2d Cir. 1931)

Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral.

United States ex rel. Zaffarano v. Corsi, 63 F.2d 757, 757–58 (2d Cir. 1933) (citations omitted)

We have heretofore held that, in determining whether the crime of which an alien stands convicted is one “involving moral turpitude,” neither the immigration officials nor the courts sitting in review of their action may go beyond the record of conviction. They must look only to the inherent nature of the crime or to the facts charged in the indictment upon which the alien was convicted, to find the moral turpitude requisite for deportation for this cause. In the case at bar the indictment is not in the record.

United States ex rel. McKenzie v. Savoretti, 200 F.2d 546, 548 (5th Cir. 1952)

The moral turpitude referred to in Section 19 of the Immigration Act of February 5, 1917, 8 U.S.C.A. § 155, is determined without reference to the laws of foreign jurisdictions. In considering the question here presented, Immigration officials and courts sitting in review of their actions need only to look to the record and the inherent nature of the offense.

United States ex rel. Guarino v. Uhl, 107 F.2d 399, 400 (2d Cir. 1939) (Learned Hand, J.)

Hence, in accordance with the doctrine, which we have several times announced, unless the possession of the jimmy with intent to use it for any crime at all, was “necessarily”, or “inherently”, immoral, the conviction did not answer the demands of § 19 of the act of 1917.

United States ex rel. Giglio v. Neelly, 208 F.2d 337, 340–41 (7th Cir. 1953) (citations omitted) (quoting *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1022–23 (2d Cir. 1931)) (internal quotation marks omitted)

Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral. Conversely, when it does, no evidence is competent that he was in fact blameless.

Ablett v. Brownell, 240 F.2d 625, 627 (D.C. Cir. 1957)

For a conviction to warrant deportation under this section, moral turpitude must be inherent in, or an essential ingredient of, the crime. If a person not guilty of moral turpitude may nevertheless be convicted of the crime, the offense cannot be said to involve moral turpitude for purposes of Section 19, irrespective of whether or not

the conduct of the particular alien whose deportation is sought was immoral.

Wadman v. INS, 329 F.2d 812, 814 (9th Cir. 1964)

[T]he immigration officers and courts, while precluded from considering the evidence, may examine the "record of conviction" (including the indictment or information, plea, verdict or judgment and sentence) to determine the crime of which the alien actually was convicted.

Rassano v. INS, 377 F.2d 971, 974 (7th Cir. 1966)

The orderly administration of justice requires that the INS and the reviewing court go no further than the record of conviction (the indictment, plea, verdict and sentence) to determine whether an alien is deportable

Aguilera-Enriquez v. INS, 516 F.2d 565, 570 (6th Cir. 1975) (citations omitted)

The Immigration authorities must look to judicial records to determine whether a person has been 'convicted' of a crime. They may not determine on their own an alien's guilt or innocence.

Okabe v. INS, 671 F.2d 863, 865 (5th Cir. 1982) (citation omitted)

Whether a crime involves moral turpitude depends upon the inherent nature of the crime, as defined in the statute concerned, rather than the circumstances surrounding the particular transgression.

B. Attorney General Decisions

Immigration Laws—Offenses Involving Moral Turpitude, 37 Op. Att'y Gen. 293, 294–95 (1933) (citation omitted) (quoting *United States ex rel. Mylius v. Uhl*, 203 F. 152, 153 (S.D.N.Y. 1913))

If the alien has been convicted of a crime such as indicated and the conviction is established, it is not the duty of the administrative officer to go behind the judgment in order to determine purpose, motive, and knowledge, as indicative of moral character. The ordinary rule is indicated by the following statement of Judge Noyes in *United States v. Uhl*:

In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me,

to go behind judgments of conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it. I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular acts evidence no immorality and that some who have been convicted of slight offenses may be admitted although the facts surrounding [sic] their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion, necessary for the efficient administration of the immigration laws.

Immigration Laws—Offense Involving Moral Turpitude, 39 Op. Att’y Gen. 95, 96–97 (1937) (citations omitted)

Whether it is such a crime is a question which must be determined by standards prevailing in the United States; but in determining that question the existence of the crime and its nature as established and fixed by the decree of the Italian court must be accepted. It is not permissible to go behind the record of that court to determine purpose, motive, or knowledge as indicative of moral character.

Immigration Laws—Moral Turpitude—Political Offense—Abnormal Conditions in Foreign Jurisdiction, 39 Op. Att’y Gen. 215, 220 (1938) (citations omitted)

[N]either courts nor immigration officers may go outside such record to determine facts or whether in the particular instance the alien’s conduct was immoral. . . . It has been held that when, by its definition, the crime does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral; and, conversely, that when it does, no evidence is competent that he was in fact blameless.

B—, 1 I. & N. Dec. 52, 58 (A.G. 1941)

The Circuit Court of Appeals in *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758, dealing with a statute quite similar to that of Minnesota, stated that second-degree assault with a dangerous weapon would involve moral turpitude, but, since the record did not indicate the specific offense charged or whether any weapon had been used, the court concluded that the offense could have been without moral turpitude and that upon the record before it the issue must be found in favor of the alien.

Here the question is much the same. The offense charged against the respondent in the 1931 indictment—second-degree assault with an unknown weapon, and therefore conceivably not a dangerous weapon—did not necessarily involve moral turpitude.”

S—, 2 I. & N. Dec. 353, 357 (B.I.A. 1945) (citations omitted) (internal quotation marks omitted)

Under settled judicial principles, the presence or absence of moral turpitude, which has been said to be an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or society, must be determined in the first instance from a consideration of the crime as defined by the statute. If, as defined, it does not inherently or in its essence involve moral turpitude, then no matter how immoral the alien may be, or how iniquitous his conduct may have been in the particular instance, he cannot be deemed to have been guilty of base, vile, or depraved conduct. It is only where the statute includes within its scope offenses which do and some which do not involve moral turpitude, and is so drawn that the offenses which do embody moral obloquy are defined in divisible portions of the statute and those which do not in other such portions, that the record of conviction, i.e., the indictment (complaint or information), plea, verdict and sentence is examined to ascertain therefrom under which divisible portion of the statute the conviction was had and determine therefrom whether moral turpitude is involved.

C. Board of Immigration Appeals Decisions

W—, 1 I. & N. Dec. 485, 485–86 (B.I.A. 1943) (citations omitted)

It is well settled that the record of a foreign court showing conviction is to be taken as conclusive evidence of conviction of the crime disclosed by it.

T—, 2 I. & N. Dec. 22, 23, 25 (B.I.A. 1944) (citations omitted)

[I]t is not permissible to consider circumstances under which the crime was committed. The inquiry is limited to the inherent nature of the crime as defined by the statute and established by the

record of conviction. If the crime as defined does not necessarily involve moral turpitude, the alien cannot be excluded because in the particular instance his conduct was immoral. Conversely, if the crime as defined necessarily involves moral turpitude, no evidence is competent to show that moral turpitude was not involved.

If one statute defines several crimes, some of which involve moral turpitude and some of which do not, and the statute is divisible, it is permissible to ascertain by examination of the record of conviction whether the particular offense involved moral turpitude. The record of conviction means the charge (indictment), plea, verdict, and sentence As application of the rule must be uniform, the statute must be taken at its minimum unless its provisions are divisible, and if divisible—one or more of its provisions describing offenses involving moral turpitude, and others describing offenses not involving that element—the charge as shown by the record of conviction is controlling as to which provision of the statute is involved. If the particular provision describes an act involving moral turpitude, other evidence may not be received to show that turpitude was not involved; and, on the contrary, if the charge relates to a provision which describes an act not involving moral turpitude, extraneous evidence may not be received to show that moral turpitude was in fact involved.

P—, 2 I. & N. Dec. 117, 118–19 (B.I.A. 1944)

In determining whether a crime involves moral turpitude, we are limited in the first instance to an examination of the statute wherein the crime is defined. If the crime as defined does not necessarily of its essence comprehend moral turpitude, then the alien cannot be said to have committed a crime involving moral turpitude. Where, however, the statute is divisible or separable and so drawn as to include within its definition crimes which do and some which do not involve moral turpitude, the record of conviction, i.e., the information (complaint or indictment), plea, verdict and sentence, may be examined to ascertain therefrom whether the requisite moral obloquy is present.

E—, 2 I. & N. Dec. 328, 335 (B.I.A. 1945)

[T]he presence or absence of moral turpitude in any crime is to be judged solely from the definition of the offense (statutory or common law, as the case may be) plus, if necessary, the record of conviction. The particular conduct of the alien, no matter how base or depraved it might have been, is immaterial and irrelevant and under no circumstances, at least in domestic crimes, can it be considered in making a determination.

M—, 2 I. & N. Dec. 721, 724 (B.I.A. 1946) (citations omitted)

Whether in this case the particular violations of section 404 involve moral turpitude must, under the applicable and settled judicial precedents, be determined from an examination of the records of convictions. The hearing testimony and matters outside the records of conviction cannot be considered in making this determination.

R—, 2 I. & N. Dec. 819, 826 (B.I.A. 1947) (citations omitted) (internal quotation marks omitted)

Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral. The Courts have considered the record of conviction, which includes the indictment, plea, verdict and sentence, only where the statute is divisible, for the purpose of determining under which section or clause of the statute the conviction occurred.

P—, 3 I. & N. Dec. 56, 59 (B.I.A. 1948)

[A] crime must by its very nature and at its minimum, as defined by statute, involve an evil intent before a finding of moral turpitude would be justified.

P—, 3 I. & N. Dec. 290, 296–97 (B.I.A. 1948) (citations omitted)

It is well established that when we must decide whether a violation of such a statute as this is a crime involving moral turpitude and the statute is divisible or separable and so drawn as to include within its definition crimes which do and some which do not involve moral turpitude, the record of conviction, i.e., the information (complaint or indictment), plea, verdict and sentence, may be examined to ascertain therefrom whether the requisite moral obloquy is present. It is equally clear that the law must be uniformly administered.

T—, 3 I. & N. Dec. 641, 642–43 (B.I.A. 1949) (citations omitted) (internal quotation marks omitted)

In reaching a conclusion that this crime involves moral turpitude it is well settled that where a record of conviction is introduced in the immigration proceedings the nature of the crime is conclusively established by the record of conviction. This rule precludes inquiry outside the record of conviction as to facts favorable and unfavorable to the alien. It is true that in some cases this rule results in the deportation of an alien who has committed a petty offense which does not necessarily indicate moral obliquity and in a finding of nondeportability in some very few cases where the offense is indicative of bad character. But such results always follow the use of fixed

standards and such standards are . . . necessary for the efficient administration of the immigration laws.

D— S—, 3 I. & N. Dec. 502, 504 (B.I.A. 1949) (citations omitted)

It is well settled in immigration proceedings that the nature of the crime is conclusively established by the record of conviction consisting of the charge or indictment, the plea, the verdict and sentence. We are not permitted to go behind this record to determine purpose, motive, or facts, either favorable or unfavorable to the alien.

R—, 4 I. & N. Dec. 176, 179 (B.I.A. 1950)

We find no merit to counsel's argument that the conduct in question does not constitute a crime since it is well settled that where a record of conviction is introduced in the proceedings, the nature of the crime is conclusively established by that record. It is not permissible to go behind the record of conviction to determine the purpose, motive, or knowledge as indicative of moral character. This rule precludes inquiry outside the record of conviction as to facts favorable and unfavorable to the alien.

R—, 4 I. & N. Dec. 644, 647 (B.I.A. 1952)

It is well established that, for immigration purposes, in determining whether an offense involved moral turpitude, it is not permissible to consider the circumstances under which the crime was committed. The inquiry is limited to the inherent nature of the crime as defined by the statute and established by the record of conviction; i.e., the charge (indictment or complaint), plea, verdict, and sentence.

P—, 5 I. & N. Dec. 582, 584 (B.I.A. 1953)

In determining whether a particular offense involves moral turpitude, the scope of inquiry is limited to the statute, the regulations issued thereunder, and the record of conviction including the complaint information or indictment, the plea, verdict and sentence. The question as to whether or not a certain crime involves moral turpitude must be determined from the judgment of conviction, and if a crime does not in its essence involve moral turpitude, resort cannot be had to evidence outside the record to show that the offense involved moral turpitude.

S—, 5 I. & N. Dec. 576, 577 (B.I.A. 1953)

[W]e are precluded from going outside the record of conviction to consider . . . testimony.

B—, 5 I. & N. Dec. 538, 540 (B.I.A. 1953)

It is well settled that where a statute is sufficiently broad to include offenses which do and do not involve moral turpitude and the record of conviction fails to show with sufficient particularity what offense was actually committed, it may not be concluded that the offense for which the person was convicted involves moral turpitude.

C—, 5 I. & N. Dec. 65, 71 (B.I.A. 1953)

[I]n these broad divisible statutes which involve acts which do and acts which do not involve moral turpitude, while it is improper to go to testimony or evidence as to the nature of the particular act, it is entirely correct and eminently fitting to base a determination of moral turpitude upon the record of conviction, i.e., the complaint information or indictment, plea, verdict, and sentence. Indeed, we are precluded from going outside the record of conviction.

R—, 6 I. & N. Dec. 444, 448 (B.I.A. 1954) (citations omitted) (internal quotation marks omitted)

The test requires us to first determine what law or specific portion thereof has been violated, and then, without regard to the act committed by the alien, to decide whether that law inherently involves moral turpitude; that is, whether violation of the law under any and all circumstances, would involve moral turpitude. If we find that violation of the law under any and all circumstances involves moral turpitude, then we must conclude that all convictions under that law involved moral turpitude although the particular acts evidence no immorality. If, on the other hand, we find that the law punishes acts which do not involve moral turpitude as well as those which do involve moral turpitude, then we must rule that no conviction under that law involves moral turpitude, although in the particular instance conduct was immoral.

B—, 6 I. & N. Dec. 98, 107–08 (B.I.A. 1954)

It is well settled that the presence or absence of moral turpitude must be determined, in the first instance, *from a consideration of the crime as defined by the statute*; that we cannot go behind the judgment of conviction to determine the precise circumstances surrounding the commission of the crime; and that, if the offense, as defined in the statute, does not inherently or in its essence involve moral turpitude, then no matter how immoral the alien may be, or how iniquitous his conduct may have been in the particular instance, he cannot be deemed to have been guilty of base, vile or depraved conduct. It is only where the statute includes within its scope offenses which do and some which do not involve moral turpitude, and is so drawn that the offenses which do embody moral obloquy

are defined in divisible portions of the statute and those which do not in other such portions, that the record of conviction, that is, the indictment, plea, verdict and sentence may be examined to ascertain therefrom under which divisible portion of the statute the conviction was had and determine from that portion of the statute whether moral turpitude is involved.

H—, 7 I. & N. Dec. 616, 618 (B.I.A. 1957)

It is the inherent nature of the crime as defined by the statute or interpreted by the courts and as limited and described by the record of conviction which determines whether the offense is one involving moral turpitude.

F—, 8 I. & N. Dec. 469, 472 (B.I.A. 1959)

The immigration laws must be uniformly administered and immigration officers acting in an administrative capacity are in no position to go behind the record to inquire into the legal status of the tribunal whose judgment of conviction is before us.

V—D—B—, 8 I. & N. Dec. 608, 610 (B.I.A. 1960) (citations omitted)

We are not permitted to go behind the record of the judgment of conviction to determine the applicant's guilt or innocence of the offenses charged against him.

Lopez, 13 I. & N. Dec. 725, 726 (B.I.A. 1971) (citations omitted)

The presence or absence of moral turpitude must be determined in the first instance from a consideration of the crime as defined by the statute. It is only when the statute includes within its scope offenses which do and some which do not involve moral turpitude that we turn to a consideration of the indictment, plea, verdict and sentence. It is well settled that the definition of a crime must be taken at its minimum

Baker, 15 I. & N. Dec. 50, 51 (B.I.A. 1974) (citation omitted)

It is the inherent nature of the crime as defined by the statute or interpreted by the courts and as limited and described by the record of conviction which determines whether the offense is one involving moral turpitude.

Short, 20 I. & N. Dec. 136, 137–38 (B.I.A. 1989) (citations omitted)

In determining whether a crime involves moral turpitude, it is the nature of the offense itself which determines moral turpitude. It is the inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction which determines whether the offense is one involving moral turpitude. The statute under which the conviction occurred

controls. If it defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for the purposes of the deportation statute. Only where the statute under which the respondent was convicted includes some offenses which involve moral turpitude and some which do not do we look to the record of conviction, meaning the indictment, plea, verdict, and sentence, to determine the offense for which the respondent was convicted.