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

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

Alina Das^{*}

For over a century, immigrants have faced adverse immigration consequences if convicted of certain types of offenses in criminal court. Many types of criminal convictions carry severe immigration penalties, including deportation, detention, and the denial of status like asylum or 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 their guilty pleas in criminal court. Yet there is little clarity as to how one determines whether a particular conviction triggers an immigration penalty. Historically, courts have applied a categorical analysis for assessing the immigration consequences of a criminal conviction. Under a categorical analysis, an immigration official determines the penalties based on an assessment of the statutory definition of the offense, not the factual circumstances of the crime. However, 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, recent decisions have invented a new approach for how past criminal convictions are assessed in the immigration context that now permits a circumstance-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 account for facts that were not proven or pleaded in the criminal court proceeding. This article argues that this shift in analysis 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. The article further argues that, because of the flaw in the current debate, courts have failed to consider the negative impact that the erosion of categorical analysis

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has on the functioning of the current immigration and criminal justice systems. The rationales meriting categorical analysis apply with even greater force today than they did when categorical analysis was first articulated nearly a century ago.

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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 conviction are so “intimately related” to the criminal court process that defense attorneys have a constitutional duty to advise noncitizen defendants of the immigration consequences of their guilty pleas.⁴ Given the severity of deportation as a penalty for a crime, noncitizen defendants may be more concerned with the possibility of exile from the United States than a potential jail sentence or other criminal sanctions.⁵ The Court observed that “informed consideration” of adverse immigration consequences would thus encourage both the defendant and the prosecution to “reach agreements that better satisfy the interests of both parties” in the plea-bargaining process.⁶

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, immigration law is incredibly complex.⁷ 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 the types of offenses that lead to these penalties has lengthened over the years—with immigration law labels such as “crimes involving moral turpitude,” “controlled substance offenses,” and more recently “aggravated felonies.” Changes to federal immigration law in 1996 further expanded these criminal grounds, adding nearly two dozen new categories and subcategories of offenses.⁸ Many of these categories and

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) and other cases. Other scholars have made similar observations about the unique nature of deportation among other civil consequences, most recently in Professor Peter Markowitz’s forthcoming piece, *Deportation is Different*, Benjamin N. Cardozo School of Law Jacob Burns Institute for Advanced Legal Studies, Working Paper No. 308 (August 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666788.

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 1438.

⁶ *Id.* at 1486.

⁷ *Id.* at 1488.

⁸ Illegal Immigration Reform and Immigrant Responsibility Act (IRRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 309 (Sept. 30, 1996); Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996); see also Human Rights Watch, *Forced Apart: Families Separated and Immigrants*

subcategories of offenses not only trigger the possibility of deportation but also eliminate the possibility of any exercise of discretion, essentially turning deportation into a “mandatory minimum” penalty for many types of criminal convictions. At the same time, the sheer number of adjudications within the immigration system as a whole has grown, resulting in thousands of administrative decisions each year to deport, detain, and deny status based on criminal convictions.

As the categories of offenses and number of administrative decisions leading to these immigration consequences have expanded, reviewing courts have increasingly grappled with the question of how the agency must assess whether a conviction fits a certain criminal ground of removal under federal immigration law.⁹ A New York drug conviction may or may not be an “illicit trafficking aggravated felony.” A California assault conviction may or may not be a “crime involving moral turpitude.” 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.¹⁰ 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. The resolution of these issues, for most of the last century of immigration law, has been to follow a categorical analysis of criminal convictions in immigration adjudications.¹¹ Under a categorical analysis, “it is the nature of the crime, as defined by statute and interpreted by the courts and as limited

Harmed by U.S. Deportation Policy, July 16, 2007, at 18 (describing changes in the criminal grounds under IRRIRA and AEDPA) (hereinafter “Forced Apart”).

⁹ 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 the immigration caseload. In fiscal year 2008, federal circuit courts experienced a thirteen percent increase in appeals from Board of Immigration Appeals decisions alone. Karen Redmond, News Release: Workload of the Federal Courts Grows in Fiscal Year 2008, at http://www.uscourts.gov/Press_Releases/2009/caseload.cfm (last visited Jan. 27, 2010).

¹⁰ 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.” *Matter of Solon*, 24 I&N Dec. 239, 240 (BIA 2007) (internal 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.

¹¹ See *infra* Part II (discussing historical basis for categorical analysis in immigration law).

and described by the record of conviction which determines whether an alien falls within the reach of that law.”¹² The key limitation being that, when a categorical analysis applies, immigration adjudicators may not consider extrinsic evidence beyond the record of conviction.¹³ 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. To constitute a “crime involving moral turpitude” under the federal immigration statute, case law tells us that an assault offense must involve immoral intent, i.e., intentional physical injury rather than, for example, negligent or unintentional injury.¹⁴ If applying a categorical analysis to the assault conviction, an immigration official would begin by looking to the statutory definition of the assault offense. If the statute defines assault in subparts, some of which include intentional physical injury and some which do not, an immigration official would examine the record of conviction to determine which part of the statute was applied in this case. But at no time would the immigration official turn to facts outside the record—no testimony or police reports would trump what the statute defines as the offense. If the record demonstrates that the immigrant was convicted of intentional physical injury, an immigration official cannot consider testimony that the immigrant actually committed a negligent offense. Similarly, if the record demonstrates that the immigrant was convicted of negligent physical injury, a police report alleging that the immigrant actually committed an intentional offense would be irrelevant. At bottom, this categorical analysis limits an immigration official to assessing the statutory offense and does not permit any retrial of facts.

Both the immigration agency and federal courts have applied categorical analysis to crimes under the immigration statute for nearly a century.¹⁵ 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. The agency and the courts

¹² *Matter of Pichardo-Sufren*, 21 I & N Dec. 330, 334 (BIA 1996).

¹³ *Id.*; see also *Matter of Torres-Varela*, 23 I & N Dec. at 84-85 (“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.” (citation omitted)).

¹⁴ See *Solon*, 24 I&N Dec. at 240 (providing a definition of “crime involving moral turpitude” in the assault context).

¹⁵ See *infra* Part II (discussing the historical origins of categorical analysis).

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. As such, immigration officials must limit their assessments to the records already before them and save any fact-finding for decisions committed to agency discretion, such as decisions to waive or cancel deportation orders in light of particular equities.

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 have largely been forgotten. As the criminal grounds for immigration consequences dramatically expanded, 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, 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. In 1990, the Supreme Court applied a categorical approach to the assessment of whether a prior conviction triggers a sentencing enhancement under a federal criminal statute in *Taylor v. United States*.¹⁶ By the time that litigation over the 1996 immigration reform laws' expansion of immigration penalties for criminal convictions skyrocketed, federal courts 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.¹⁷

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

¹⁶ *Taylor v. United States*, 495 U.S. 575 (1990).

¹⁷ The Supreme Court and federal circuit courts now cite to *Taylor* when applying categorical analysis in immigration cases. See, e.g., *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Martinez v. Mukasey*, 519 F.3d 532, 540 (5th Cir. 2008); *Rashid v. Mukasey*, 531 F.3d 438, 447 (6th Cir. 2008); *Dulal-Whiteway v. DHS*, 501 F.3d 116, 131 (2d Cir. 2007); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1127 (9th Cir. 2007); *Gradiz v. Gonzales*, 490 F.3d 1206, 1211 (10th Cir. 2007); *Jeune v. AG*, 476 F.3d 199, 202 (3d Cir. 2007); *Berhe v. Gonzales*, 464 F.3d 74, 85 (1st Cir. 2006); *Soliman v. Gonzales*, 419 F.3d 276, 279 (4th Cir. 2005); *Jaggernaut v. United States AG*, 432 F.3d 1346, 1353 (11th Cir. 2005); *Bazan-Reyes v. INS*, 256 F.3d 600, 606 (7th Cir. 2001).

Criminal Act.¹⁸ 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.¹⁹ 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 no factual inquiry beyond the record was permitted.²⁰ In these key concepts, the *Taylor* approach and immigration law’s categorical analysis are the same.

However, 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 fit as neatly onto the immigration statute. The immigration statute contains numerous grounds of removability that are not as easily defined in terms of strict “elements.” Some of the provisions in immigration law include more ambiguous terminology. Noting these and other differences, courts and the agency began to carve out exceptions to the categorical approach for certain immigration law provisions that appear to include “non-elements” or “qualifiers.”²¹ At first, these exceptions affected a hodgepodge of some of the less common grounds of removal.²²

However, in *Ali v. Mukasey*, the Seventh Circuit expanded the debate to crimes involving moral turpitude.²³ 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 how to classify a conviction as a crime involving moral turpitude because “moral turpitude” was not typically an element of a criminal offense.²⁴ In so holding, the Seventh Circuit distinguished *Taylor* and

¹⁸ *See id.*

¹⁹ *See id.* at 602.

²⁰ *See id.*

²¹ *See, e.g., Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003); (relationship to victim for “crime of domestic violence”); *Espinoza-Franco v. Ashcroft*, 394 F.3d 461 (7th Cir. 2004) (age of victim for “sexual abuse of a minor” aggravated felony); *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (the loss threshold for “fraud or deceit” aggravated felonies); *Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007) (the “commercial advantage” requirement for prostitution transportation aggravated felony), *overruled by Gertsenshteyn v. United States Dep’t of Justice*, 544 F.3d 137 (2d Cir. 2008).

²² *See, e.g., Matter of Babaisakov*, 24 I&N Dec. at 306 (addressing the loss threshold for the fraud aggravated felony); *Matter of Gertsenshteyn*, 24 I&N Dec. at 111 (addressing the prostitution transportation aggravated felony).

²³ *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008).

²⁴ *Id.* at 741-42.

criticized courts for applying the *Taylor* categorical approach to the immigration context for crimes involving moral turpitude.²⁵ No mention was made of the pre-*Taylor* use of categorical analysis in immigration law or its rationales, and thus no consideration was given to the implications that the departure from categorical analysis would have for the immigration system.

This view of categorical analysis has since quickly spread. 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*, and essentially adopted the Seventh Circuit’s reasoning in *Ali* as the new agency position.²⁶ The Attorney General, like the Seventh Circuit, failed to acknowledge or explain the departure from the longstanding use of categorical analysis in immigration law.

Most notable is the Supreme Court’s deviation from categorical analysis in *Nijhawan v. Holder*.²⁷ *Nijhawan* addressed the applicability of categorical analysis for determining whether a person has been convicted of a “fraud or deceit” aggravated felony—“an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds \$ 10,000.”²⁸ 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.”²⁹ The Court explained that an immigration court may therefore consider the facts and circumstances underlying a fraud conviction to determine the amount of loss, and suggested that other subcategories of the aggravated felony provisions may similarly be subject to a circumstance-specific inquiry.³⁰ The Court did not discuss each aggravated felony provision and did not explain whether or how the analysis in *Nijhawan* would apply to crimes involving moral turpitude or other types of removable offenses that are 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.”³¹ With one sentence, the Court

²⁵ *Id.* at 741.

²⁶ *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

²⁷ *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009).

²⁸ 8 U.S.C. § 1101(a)(43)(M)(i).

²⁹ *Nijhawan*, 129 S. Ct. at 2300.

³⁰ *Id.* at 2300-2301.

³¹ *Id.* at 2300-2303.

wiped away a century of precedent that held, long before *Taylor*, that a categorical analysis applied to limit the evidentiary scope for assessing convictions in the immigration context.

Now 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, confusion over the scope of inquiry has deep implications for the immigration and criminal justice systems.³² Recent decisions provide little guidance to immigrants, their criminal defense or immigration attorneys, prosecutors, immigration officials, and others on how to determine whether a conviction will result in a specific immigration penalty. Because these decisions overlook the development of categorical analysis in the immigration law context, their holdings fail to account for the full implications that eroding categorical analysis will have for the immigration and criminal justice systems. Moreover, despite the important repercussions of this debate, this area of immigration law has been vastly unexplored in scholarly literature.³³

In this article, I expose the fundamental flaw in the debate over categorical analysis in immigration law. I begin by providing an overview of the context 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

³² Office of Immigration Statistics, U.S. Dep't of Homeland Security, *Immigration Enforcement Actions: 2009* (August 2010) at 1.

³³ Categorical analysis is an area of immigration law that is ripe for exploration. The most thorough discussion of categorical analysis in the literature thus far is Professor Rebecca Sharpless's piece on *Taylor* and how its "elements" approach should apply to the assessment of criminal convictions in immigration law. See Rebecca Sharpless, *Towards a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979 (2008). I agree with many of Professor Sharpless's insights on how courts should strictly apply a categorical analysis in immigration law. In this article, however, I seek to move the debate beyond *Taylor*. This article provides an independent historical and contextual lens for examining the origins and rationales for categorical analysis in immigration law as a critique of the current debate, which I contend has relied too heavily on *Taylor* in recent years. Many of my insights in this piece were initially formed through my work in litigating these issues, including amicus briefing to seek reconsideration from the Attorney General following his decision in *Matter of Silva-Trevino*. See Brief of Amici Curiae American Immigration Lawyers Ass'n, Florence Immigrant and Refugee Rights Project, Immigrant Defense Project of the N.Y. State Defenders Ass'n, Immigrant Legal Resource Ctr., Nat'l Immigration Project of the Nat'l Lawyers Guild, Nat'l Immigrant Justice Ctr., Refugio del Rio Grande, Inc., and Washington Defenders Ass'n Immigration Project in Support of Reconsideration of *Matter of Silva-Trevino* (filed Dec. 5, 2008), available at http://www.immigrantdefenseproject.org/docs/08_SilvaTrevinoAmicusBrief.pdf (last visited Oct. 8, 2010).

immigration law, analyzing a century of precedent to establish the origins and rationales behind the use of categorical analysis within the immigration context. I argue 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 critique recent courts’ failure to acknowledge this context and history. I argue that 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, courts have misconstrued Congress’s 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. I argue that, 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 their current constraints. 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 status they receive, when that status may be revoked, who may be detained in immigration jail pending these determinations, and who may be deported from the United States. 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.³⁴ Instead, immigration decisions are made within a civil administrative system, with limited judicial review in federal court.³⁵ The vast majority of

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

³⁵ 8 U.S.C. § 1252 (governing judicial review of orders of removal and providing limits on review of various types of determinations and orders).

these decisions are made by front-line immigration officials—naturalization officers, asylum officers, detention and removal officers, and immigration judges (administrative employees of the federal executive branch)—in a variety of contexts 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, must generally provide information about 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.”³⁶ The same inadmissibility laws trigger bars to noncitizens within the United States who are seeking lawful permanent residence (i.e., a green card).³⁷ Immigrants who have already been lawfully admitted to the United States are subject to criminal grounds of “deportability,” which include some, but not all, of the grounds of inadmissibility, plus additional grounds including “aggravated felonies.”³⁸ Deportability 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 are identified as deportable while in criminal custody. Together, the grounds of inadmissibility and deportability 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 discretionary—current law includes criminal bars to most forms of discretionary relief from removal. Lawful permanent residents are barred from seeking cancellation of removal if convicted of an “aggravated felony.”³⁹ Immigrants who wish to adjust their status to permanent residence but need a waiver of inadmissibility are barred if they have been convicted of nearly any “controlled substance offense.”⁴⁰

³⁶ 8 U.S.C. § 1182(a)(2) (providing the criminal grounds of inadmissibility).

³⁷ 8 U.S.C. § 1244(a) (noting that a person must be admissible to the United States in order to adjust their status to that of a lawful permanent resident).

³⁸ 8 U.S.C. § 1227(a)(2) (providing the criminal grounds of deportability).

³⁹ 8 U.S.C. § 1229b(A).

⁴⁰ 8 U.S.C. § 1182(h).

For these individuals and others, criminal convictions turn deportation into a mandatory minimum consequence of their offense.

Along with deportation itself, of course, the federal immigration statute presents additional immigration penalties for criminal convictions. A conviction for an “aggravated felony” bars asylum status⁴¹ and, in cases involving convictions after November 29, 1990, bars a lawful permanent resident from naturalizing as a United States citizen.⁴² “Aggravated felonies,” “controlled substance offense,” and in some cases “crimes involving moral turpitude” can trigger mandatory detention under the federal immigration statute, i.e., a bar to seeking a bond to be released from immigration jail while in removal proceedings.⁴³

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. As noted, these categories overlap in some, but not all, respects. Convictions for “crimes involving moral turpitude” and “controlled substance offenses” trigger both inadmissibility and deportability (albeit with some differences in each context).⁴⁴ 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 ground of inadmissibility. It does, however, constitute a ground of deportability and bars a noncitizen from seeking cancellation of removal, asylum, and a finding of good moral character necessarily for naturalization.

Despite the stakes triggered by criminal convictions, however, the assessment of the immigration consequences of these convictions is not made through an independent judicial system. Affirmative applications to enter the country on a visa, seek asylum or lawful permanent resident status, or naturalize are adjudicated by front-line immigration officers based largely on paper applications and nonadversarial interviews. These officers review the conviction records and have the power to deny these applications based on their assessment of the conviction record. These officers are also the ones who may make the initial decision 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

⁴¹ 8 U.S.C. § 1158(b)(2)(B)(i).

⁴² 8 U.S.C. § 1101(f)(8).

⁴³ 8 U.S.C. § 1226(c)(1).

⁴⁴ Compare 8 U.S.C. § 1182(a)(2) with 8 U.S.C. § 1227(a)(2).

of determining whether a removal proceeding will be initiated and therefore little notice or opportunity to be heard on the other consequences that attach to that decision.

For example, once ICE officials begin the removal process, they also must decide whether to detain the immigrant in an immigration jail and whether the immigrant is eligible for bond to be released from detention. The question of whether an immigrant is subject to mandatory detention depends in part on whether any prior convictions fall within the criminal grounds enumerated in the detention statute.⁴⁵ 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 record—also relies in part of the assessment of the immigrant’s conviction record.

Most immigrants facing detention and deportation—with some notable exceptions⁴⁶—have the right to an administrative hearing through an immigration court where their convictions will be assessed by an immigration judge in an adversarial context. These immigration court hearings operate under typical administrative agency constraints, however. 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.⁴⁷ As a result, the majority of noncitizens in removal proceedings are *pro se*, with the percentage of *pro se* litigants highest (over eighty percent) among the detained population.⁴⁸ Thus, even within the adversarial administrative hearing process, noncitizens facing removal tend to have the least resources and no attorney to contest the assessment of their conviction record.

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

⁴⁵ 8 U.S.C. § 1226(c) (predicating mandatory detention in part on whether person’s prior convictions fall within certain enumerated grounds of removability).

⁴⁶ See *infra* note 50 and accompanying text.

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

⁴⁸ Amnesty International, *Jailed without Justice: Immigration Detention in the USA 30* (2009) (citing Executive Office for Immigration Review, Department of Justice, *FY 2007 Statistical Yearbook G1* (2008), available at <http://www.usdoj.gov/eoir/statpub/fy07syb.pdf>).

authentication of documents.⁴⁹ Immigration judges do not generally exercise their ability to permit discovery, thus parties are generally left to seek out their own evidence.⁵⁰ Immigrants may move to suppress evidence against them, but the standard for suppression is significantly higher in immigration court than in criminal court proceedings.⁵¹

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.⁵² 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.⁵³ However, federal immigration law strips federal courts of judicial review of any final order of removal against a noncitizen who is removable based on certain types of criminal grounds,⁵⁴ except for constitutional claims and questions of law.⁵⁵ Discretionary determinations are unreviewable.⁵⁶

In some cases, agency officials' 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 an aggravated felony.⁵⁷ These proceedings are based on the officer's assessment of a paper record and do not involve an impartial adjudicator.⁵⁸

One might wonder why, if the immigration penalties for criminal convictions are so severe, these decisions are made solely within the administrative immigration system rather than the criminal court system. The Supreme Court has long recognized that, despite the severity of the

⁴⁹ See, e.g., *Solis v. Mukasey*, 515 F.3d 832, 835-36 (8th Cir. 2008); *Vatyan v. Mukasey*, 508 F.3d 1179, 1185 (9th Cir. 2007); *Yongo v. INS*, 355 F.3d 27, 30-31 (1st Cir. 2004).

⁵⁰ See C. Gordon et al., *Immigration Law & Procedure* § 3.07 (2008).

⁵¹ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (exclusionary rule not applicable unless egregious or widespread violations).

⁵² 8 C.F.R. § 1240.15.

⁵³ 8 U.S.C. § 1252(b)(1).

⁵⁴ 8 U.S.C. § 1252(a)(2)(C).

⁵⁵ 8 U.S.C. § 1252(a)(2)(D).

⁵⁶ 8 U.S.C. § 1252(a)(2)(B) (stripping review of decisions to deny discretionary relief under specified sections of the INA); 8 U.S.C. § 1252(a)(2)(C)-(D) (stripping review of removal orders for immigrants removable under specified criminal grounds, except for constitution claims or questions of law).

⁵⁷ 8 U.S.C. § 1228(b).

⁵⁸ *Id.*; American Bar Association, *American Justice Through Immigrant Eyes* 7, 17-18 (2004), available at http://www.civilrights.org/publications/american-justice/american_justice.pdf (discussing expedited administrative removal).

consequence, deportation laws are civil and not criminal in nature and that the various protections provide in criminal court processes do not apply.⁵⁹ In a series of cases, the Court rejected immigrant petitioners' attempts to import the protections of criminal law into the immigration system.⁶⁰ In the early years of 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.⁶¹ As the grounds of deportation expanded and immigration became more controversial, Congress eliminated the JRAD provision.⁶² 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 immigrants of the immigration consequences of their guilty pleas.⁶³ The immigration agency—through its administrative structure—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 expedited removal, eligible for discretionary relief from removal, and able to seek judicial review of the removal order. As part of a civil, rather than criminal, system, these assessments are made under considerable administrative constraints. Immigration officials and administrative judges must make the assessments on paper records and through quasi-judicial processes in which immigrants may have little access to legal resources and information to defend their cases for status or relief from deportation. 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

⁵⁹ 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 Peter Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. REV. 1 (2008).

⁶⁰ See Markowitz, *supra* note 58, at 12-21 (collecting cases).

⁶¹ See *Padilla*, 130 S.Ct. at 1479-1480 (discussing the history of JRAD in federal immigration law).

⁶² *Id.*

⁶³ *Id.*

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.⁶⁴ Within years of the enactment of these laws, the agency—and the federal courts that review agency decisionmaking—had to address how immigration adjudicators were to assess whether an immigrant’s 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 as assessment of the facts underlying the crime. Federal court and agency decisions repeatedly reaffirmed the statutory and contextual basis for categorical analysis for decades following these early decisions in immigration law.

This history—and its lessons for the current debate—have been largely ignored in modern case law and scholarship on the immigration penalty of crimes. In this part of the article, I resurrect the origins of categorical analysis by establishing 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 have long recognized that Congress intended to place limits on the scope of immigration adjudicators’ ability to probe the circumstances underlying a criminal conviction in the agency context, 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 immigration agency context.

⁶⁴ Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.

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. Congress’s “convicted” language first appeared in immigration law as early as 1891, when Congress first legislated removability based on convictions “involving moral turpitude.” The statute dictated the exclusion of “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.”⁶⁵ Congress reenacted this provision in 1903, 1907, and 1917, expanding the language to include the exclusion or deportation of certain classes of noncitizens who has been “convicted” of or who “admits” the commission of a crime or misdemeanor involving moral turpitude.⁶⁶

In examining this language under these early immigration statutes, federal courts concluded that Congress used the terms “convicted” and “admits” as two distinct means of limiting the power of immigration officers to find individual removable on criminal grounds. Early federal court decisions considering the “admits” 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.”⁶⁷ As another court similarly explained, “[t]his 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.”⁶⁸

Similarly, federal courts held 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.⁶⁹ In the

⁶⁵ Act of March 3, 1891, 26 Stat. 1084 (emphasis added); see also *Jordan v. De George*, 341 U.S. 223, 230 n.14 (1951).

⁶⁶ Act of March 3, 1903, 32 Stat. 1213; Act of Feb. 20, 1907, 34 Stat. 898; Act of February 5, 1917, 39 Stat. 889.

⁶⁷ *Howes v. Tozer*, 3 F.2d 849, 852 (1st Cir.1925).

⁶⁸ *United States ex rel. Castro v. Williams*, 203 F. 155, 156-57 (S.D.N.Y. 1913).

⁶⁹ 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, 235 (1953).

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.⁷⁰ The immigration officials had concluded that the petitioner’s conviction “involve[ed] moral turpitude” by reviewing reports of the trial and the underlying facts that gave rise to his conviction.⁷¹ 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.⁷² 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.”⁷³ Under such standards, immigration 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.”⁷⁴

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.”⁷⁵

Applying this standard to the crime at issue, criminal libel, Judge Noyes concluded that the nature of the offense did not did not inherently involve moral turpitude.⁷⁶ 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.⁷⁷ He therefore ordered the petitioner to be released from detention and admitted to the United States.⁷⁸

The government appealed the case to the Second Circuit. In affirming Judge Noyes’s decision, the Second Circuit expounded upon the principles supporting what has become the modern-day categorical approach in immigration law.⁷⁹ 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

⁷⁰ *United States ex rel. Mylius v. Uhl*, 203 F. 152 (S.D.N.Y. 1913).

⁷¹ *Mylius*, 203 F. at 153.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 155.

⁷⁹ *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914).

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 [sic] does or does not involve moral turpitude. . . . [T]his question must be determined from the judgment of conviction.”⁸⁰ 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 [sic] than in the latter.”⁸¹ 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 similar rules, holding that the statute required an assessment of the inherent nature of the offense of conviction and required adjudicators to ignore underlying facts, whether good or bad for the noncitizen.⁸²

This reasoning was further refined under the jurisprudence of 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 convicted of forgery under New York state law challenging his order of deportation.⁸³ Judge Hand observed that the provisions of the New York forgery statute all require an intent to deceive and therefore the noncitizen’s forgery offense was inherently a crime involving moral turpitude.⁸⁴ In so stating, Judge Hand reiterated the principle that “[n]either 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.”⁸⁵

A few years later, in *United States ex rel. Guarino v. Uhl*, Judge Learned Hand reaffirmed this reasoning 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

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See, e.g., *United States ex rel. Meyer v. Day*, 54 F.2d 336 (2d Cir. 1931); *United States ex rel. Portada v. Day*, 16 F.2d 328, 329 (S.D.N.Y. 1926).

⁸³ *United States ex rel. Robinson v. Day*, 51 F.2d 1022 (2d Cir. 1931) (L. Hand, J.)

⁸⁴ *Id.* at 1022.

⁸⁵ *Id.* at 1023.

for any crime at all, was ‘necessarily’, or ‘inherently’, immoral, the conviction did not answer the demands of § 19 of the act of 1917.”⁸⁶ 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 that “[s]uch 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 [t]hey 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.”⁸⁷ 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: “It is quite true that in the case at bar other circumstances make it highly unlikely that this alien had possession of the jimmy for any such relatively innocent purpose; but that is quite irrelevant. . . . [D]eporting 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.”⁸⁸

As jurisprudence on this doctrine developed, courts began to address the question of when, if ever, an immigration adjudicator could consider criminal records in assessing whether an offense is inherently involves moral turpitude. In *United States ex rel. Zaffarano v. Corsi*, the Second Circuit addressed the case of a noncitizen facing deportation under a provision of the Immigration Act of 1917 that makes deportable any noncitizen convicted of two or more crimes involving moral turpitude and sentenced on each to more than one year of imprisonment.⁸⁹ The noncitizen contested that one of his convictions, second degree assault under New York law, was a crime involving moral turpitude.⁹⁰ 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

⁸⁶ *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.) (citation omitted).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. Mar. 13, 1933).

⁹⁰ *Id.* at 757.

turpitude.⁹¹ The court noted that the government had not submitted the indictment in his case, so the immigration officials had been unable to determine which offense the noncitizen was convicted.⁹² 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.”⁹³ The court thus remanded the case for a “fair hearing” on whether the record of conviction—if the indictment is supplied—demonstrates that the noncitizen’s second degree assault offense is a crime involving moral turpitude.⁹⁴

The noncitizen petitioned for rehearing, arguing that the decision in his case—permitting immigration officials to look at the indictment—was contrary to the Second Circuit’s prior precedent in *Robinson*. The court rejected the petition for rehearing, noting that resort to a review of the record of conviction did not change the fact that immigration officials were not to consider whether “in the particular instance conduct was immoral.”⁹⁵ 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.”⁹⁶ In other words, “if 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.”⁹⁷ However, nothing in this decision changed the rule that immigration officials cannot consider the underlying facts of the offense. This view was widely adopted among the federal circuits in subsequent years.⁹⁸

Thus, within the first decades of the 1900s, the doctrine of categorical analysis was already well established. The early federal court decisions made clear their view that Congress intended for immigration officials to limit their review to the offense of conviction and determine whether the offense by definition inherently involves moral turpitude, without regard to the underlying factual circumstances.

⁹¹ *Id.* at 758.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 759 (2d Cir. Mar. 30, 1933) (per curium).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *infra* Appendix I (index of federal court decisions applying categorical analysis in immigration law prior to the Supreme Court’s decision in *Taylor*).

If the offense of conviction is defined in multiple subdivisions, immigration officials may consult the record of conviction to determine whether the subdivision of the offense that the person was convicted of by definition 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 convicted of the same offenses.

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” 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.”⁹⁹ In response, Attorney General Cummings issued a decision explaining the definition of “crime . . . involving moral turpitude” 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.”¹⁰⁰

The Attorney General went on to adopt the reasons specified by Judge Noyes in his decision as the agency’s reasons for adopting a categorical analysis, acknowledging not only the nonjudicial nature of the agency and the need for uniformity, but also emphasizing efficiency concerns. Specifically, the Attorney General repeated four rationales: (1) that “immigration authorities act in an administrative and not 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) that

⁹⁹ *Op. of Hon. Cummings*, 37 Op. Atty Gen. 293 (BIA 1933).

¹⁰⁰ *Id.*

immigration authorities “must follow definite standards and apply general rules”; (3) that 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) that this rule is “necessary for the efficient administration of the immigration laws.”¹⁰¹ The Attorney General later applied this rule in a series of decisions in the 1930s, in each case reiterating the rule that immigration adjudicators may not go behind the judgment and record of conviction to assess the facts and circumstances of the noncitizen’s particular offense.¹⁰²

In 1940, Congress created the Board of Immigration Appeals (“BIA”) as an adjudicative body within the Department of Justice to address appeals from immigration judge decisions on behalf of the agency, subject to possible review by the Attorney General or appeal to federal court.¹⁰³ Within the first few years of its existence, the BIA adopted and explained the categorical inquiry as “settled judicial principles” in an opinion later affirmed by the Attorney General.¹⁰⁴ 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.”¹⁰⁵ The BIA then adopted the method of analyzing broad criminal statutes, specifying that 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.”¹⁰⁶ The scope of inquiry under the BIA’s analysis therefore continued to be narrowly defined.

In its first decade of adjudications, the BIA applied this formulation of categorical analysis to the assessment of convictions in at

¹⁰¹ *Id.* (citation omitted).

¹⁰² See *infra* Appendix II (index of Attorney General decisions applying categorical analysis in immigration law prior to the Supreme Court’s decision in *Taylor*).

¹⁰³ 5 Fed. Reg. 3503 (Sept. 4, 1940).

¹⁰⁴ *Matter of S---*, 2 I & N Dec. 353, 357 (BIA, AG 1945) (citations omitted).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

least a dozen cases under the early immigration statutes.¹⁰⁷ 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.”¹⁰⁸ 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.”¹⁰⁹ 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.

C. Categorical analysis in the modern era

Categorical analysis, as articulated in the early federal and agency cases, continued to survive through most of the second half of the twentieth century— beyond the creation of the modern-day Immigration and Nationality Act in 1952, the expansion of the various criminal grounds of removal beyond the longstanding “crimes involving moral turpitude,” and drastic changes to the availability of judicial review and judicial discretion within the immigration system. Repeatedly, federal courts, the agency, and policymakers defended the basic rule as being necessary for ensuring the appropriate role of immigration officials, as well as promoting uniformity and efficiency in the administration of immigration laws. In doing so, 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

¹⁰⁷ See *infra* Appendix III (index of BIA decisions applying categorical analysis in immigration law prior to the Supreme Court’s decision in *Taylor*).

¹⁰⁸ *Matter of T---*, 3 I & N Dec. 641, 642-643 (BIA 1949).

¹⁰⁹ *Id.*

concludes that the alien is an undesirable resident of the United States.”¹¹⁰ 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.¹¹¹ 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, but whether the Attorney General might with some reason conclude that deportation was proper. The Senator (Mr. 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.¹¹²

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

Since 1952, federal courts and the BIA have continued to apply categorical analysis to determinations of whether a conviction constitutes a ground of deportation and exclusion, including but not limited to the crimes involving moral turpitude context.¹¹³ 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 INA, such that “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.”¹¹⁴ 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

¹¹⁰ See Section 241(a)(4), Senate Bill 2550, 82d Cong., 2d sess.

¹¹¹ 98 Cong. Rec. 5420, 5421 (1952).

¹¹² *Id.*

¹¹³ See *infra* Appendix III (index of BIA decisions applying categorical analysis in immigration law prior to the Supreme Court's decision in *Taylor*). The BIA continued to apply a categorical analysis in a number of cases following *Taylor*, but as discussed in Part III of this article, began to depart from categorical analysis in some removal cases in recent years.

¹¹⁴ *Matter of Pichardo-Sufren*, 21 I. & N. Dec. 330, 335 (BIA 1996).

thus “mandates a focus on an alien’s conviction, rather than his conduct.”¹¹⁵

Similarly, in *Matter of Velazquez-Herrera*, the BIA applied a categorical analysis to another 1996 addition to INA that makes deportable a noncitizen who is convicted of a “crime of child abuse.”¹¹⁶ In rejecting the government’s argument that the categorical approach should not apply to this provision, the BIA explained that the statute’s requirements were unambiguous: “[W]hile we agree with the [Department of Homeland Security] that Congress intended [the crime of child abuse deportability ground] to be construed broadly, the statute’s general purpose cannot supersede its language, which plainly focuses on those crimes of which an alien has been ‘convicted.’”¹¹⁷ 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.”¹¹⁸

In addition to the agency’s view of the statutory “convicted” language, the new grounds of deportability also provided the BIA with the opportunity to expound on previous courts’ references to 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.”¹¹⁹ By contrast, if adopting a factual inquiry, the agency “essentially would be inviting the parties to present any and all 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” and there would be “no clear stopping point where [the agency] could limit the scope of seemingly dispositive but extrinsic evidence” on deportability.¹²⁰ Such a factual inquiry would be “inconsistent both with the streamlined adjudication that a deportation hearing is intended

¹¹⁵ *Id.*

¹¹⁶ *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008).

¹¹⁷ *Id.* at 515.

¹¹⁸ *Id.* at 515.

¹¹⁹ *Pichardo-Sufren*, 21 I & N Dec. at 335-336.

¹²⁰ *Id.*

to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence.”¹²¹

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 forty times respectively since 1952.¹²² 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 approach as articulated by the BIA and federal courts. Moreover, it appears to have rejected at least one attempt to alter the analysis. In 2003, it rejected a proposed amendment that would have redefined aggravated felonies as offenses “described in [the INA] even if the statute setting forth the offense of conviction sets forth other offenses not described in this paragraph, unless the alien affirmatively shows . . . that the particular facts underlying the offense do not satisfy the generic definition of that offense.”¹²³ The basic structure of the immigration statute, predicating certain immigration penalties on convictions, has remained unchanged since categorical analysis was first articulated by courts in the early twentieth century.

As this history demonstrates, categorical analysis has had a longstanding and important role in the immigration context. The earliest cases observed that Congress predicated deportation on convictions rather than conduct in order to ensure that immigration officials would act in an administrative rather than judicial capacity in 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. This view of Congressional intent and longstanding rationales for categorical analysis provide the appropriate lens for assessing whether a categorical analysis continues to apply to various provisions 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

¹²¹ *Id.*

¹²² See 8 U.S.C. § 1182 (historical notes); 8 U.S.C. § 1229a (historical notes).

¹²³ See Border Enforcement, Employment Verification, and Illegal Immigration Control Act, 110th Congress, 1st Session, H.R. 4065 (2007) (proposing failed amendment).

categorical analysis of “crimes involving moral turpitude” to permit an immigration adjudicator to assess “any additional evidence of factfinding the adjudicators determines is necessary or appropriate to resolve accurately the moral turpitude question.”¹²⁴ In its 2009 decision in *Nijhawan v. Holder*, the Supreme Court held that immigration adjudicators may undertake a “circumstance-specific” inquiry into the facts underlying the loss caused by a fraud conviction to determine if an immigrant has been convicted of a fraud “aggravated felony” under the INA.¹²⁵ Neither of these decisions contend with the history of categorical analysis in immigration law, and both challenge the notion that any such 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 have left the question of how to determine the immigration penalties of criminal convictions in disarray.

What happened? The answer lies with a 1990 criminal sentencing case, *United States v. Taylor*, and its recent progeny. In *Taylor*, the Supreme Court issued its first decision articulating the basis for a categorical analysis of criminal convictions, but in the context of how a sentencing court determines whether a conviction fits within a criminal sentencing enhancement under a federal criminal statute.¹²⁶ The decision came just a few years before 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, immigrant litigants and courts began to use *Taylor* to justify the use of categorical analysis in scores of immigration cases in the years that followed the decision. 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. Yet immigrant litigants continue to rely on *Taylor* to defend the use of categorical analysis even as the Supreme Court, lower courts, and the agency have begun to use it to depart from categorical analysis altogether.

In this part of the article, I explain how reliance on *Taylor* by both sides of the current debate is flawed in light of the independent rationales for categorical analysis in the immigration context. I begin by

¹²⁴ *Matter of Silva-Trevino*, 24 I&N Dec. 687, 690 (A.G. 2008).

¹²⁵ *Nijhawan*, 129 S. Ct. at 2298-2299.

¹²⁶ *Taylor*, 495 U.S. at 577.

discussing *Taylor* and the rationales that the Supreme Court articulated for applying a categorical analysis in the sentencing context. I then address how the Supreme Court, some federal courts, and even the agency itself have improperly relied on *Taylor* to assess the question of how immigration adjudicators must determine the immigration penalties of criminal convictions in a number of recent decisions, creating a sea change in the law. I argue that *Taylor* is a flawed lens that 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 the rationales that courts and the agency first articulated nearly a century ago.

A. *Taylor* and the rationales for categorical analysis in the criminal sentencing context

The Supreme Court first opined about categorical analysis in the context of criminal sentencing cases that address the application of a sentencing enhancement provision under the Armed Career Criminal Act (“ACCA”).¹²⁷ Under the ACCA, 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 which constitute a “violent felony.”¹²⁸ 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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”¹²⁹

In *Taylor v. United States*, the Supreme Court addressed the question of whether a criminal defendant’s prior burglary convictions constitute a “violent felony” under the ACCA.¹³⁰ While the ACCA listed “burglary” under the definition of “violent felony,” it did not define the term “burglary” and listed other provisions. 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.¹³¹

¹²⁷ 18 U.S.C. § 924(e)

¹²⁸ *Id.*

¹²⁹ *Id.* § 924(e)(B).

¹³⁰ *Taylor*, 495 U.S. at 577.

¹³¹ *Id.* at 579.

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.¹³² The Court concluded that Congress used “burglary” in the ACCA in its 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.”¹³³ The Court held that a prior offense must correspond to these basic elements of the generic definition in order to be considered a “burglary” for purposes of the ACCA enhancement.¹³⁴ 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 may make that assessment—should they look to the underlying facts to determine if a burglary conviction fits the generic definition under the ACCA? Or should they be confined to an assessment of the statute or conviction record? The *Taylor* Court rejected a factual approach in favor of a categorical approach. Under this approach, a sentencing court would be limited to “look only to the fact of conviction and the statutory definition of the prior offense.”¹³⁵ For statutory definitions that are broader than the generic definition, courts are permitted under the categorical approach 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.”¹³⁶ No further inquiry beyond the statute and record of conviction to consider underlying facts for which the defendant was not convicted is permitted.¹³⁷

In articulating this rule, the Court presented three principle rationales that continue to guide the application of the categorical approach 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—not people who had “committed”—certain offenses, and that the definition of “violent felony” refers to “elements” rather than what may be involved in a particular case.¹³⁸ The Court concluded that the text of the ACCA enhancement “generally supports the inference that Congress intended the sentencing court to

¹³² *Id.* at 602.

¹³³ *Id.* at 598.

¹³⁴ *Id.*

¹³⁵ *Id.* at 602.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 600.

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” because it “most likely refers to the elements of the statute of conviction, not to the facts of each defendant's conduct.”¹³⁹

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 discussions of factfinding.¹⁴⁰ 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.”¹⁴¹

Third, the Court noted that “the practical difficulties and potential unfairness of a factual approach are daunting.”¹⁴² The Court described a number of problematic questions that would arise if a factual approach were used. A noncategorical approach might permit parties to produce new evidence at sentencing, including new testimony, witnesses, or trial transcripts that go beyond the issues decided when the defendant was first convicted.¹⁴³ The Court was also concerned that a sentencing court’s independent conclusion that a defendant committed a generic burglary may implicate the defendant’s right to a jury trial.¹⁴⁴ The Court recognized a categorical approach avoided these difficulties. It also emphasized the issues of fairness, particularly with respect to the plea bargain process underlying most convictions: “[I]n cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.”¹⁴⁵ 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.

In a subsequent decision, the Supreme Court provided an additional rationale for its approach in ACCA cases. In *United States v. Shepard*, the Court rejected the government’s argument that a sentencing

¹³⁹ *Id.* at 600-601.

¹⁴⁰ *Id.* at 601.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 601-602.

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.¹⁴⁶ In declining to permit reliance on factual information, the Court reiterated the principles described in *Taylor* for limiting the evidentiary inquiry, but also went a step further in articulating a Sixth Amendment rationale its conclusion.¹⁴⁷ 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.¹⁴⁸ 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.”¹⁴⁹

These rationales for the categorical approach, expressed in *Taylor* and *Shepard*, have been since applied in a number of cases raising more difficult questions under the ACCA.¹⁵⁰ 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.

¹⁴⁶ *Id.* at 16.

¹⁴⁷ *Id.* at 20-23.

¹⁴⁸ *Id.* at 24 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999)).

¹⁴⁹ *United States v. Shepard*, 544 U.S. 13, 26 (2005).

¹⁵⁰ For example, in *James v. United States*, the Supreme Court applied *Taylor* to another provision of the violent felony definition—an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” *James v. United States*, 550 U.S. 192 (2007). 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 201-202. Similarly, in *Chambers v. United States*,¹⁵⁰ the Court declined to depart from the categorical approach even where the underlying offense has proved difficult to characterize. 129 S. Ct. 687 (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 690-692. Most recently, in *Johnson v. United States*, the Supreme Court applied the categorical approach to conclude that a state offense that proscribes an intentional “touching” does not categorically contain an element of the use of physical force within the meaning of the “violent felony” provision of the ACCA, and cabined any further inquiry to the record of conviction. *Johnson v. United States*, 130 S. Ct. 1265 (2010).

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 provisions of the ACCA and the INA, and certainly the outcome sought by immigrant litigants and criminal sentencing defendants in their cases is the same—to limit review of prior convictions to their statutory definitions rather than their factual basis. Nonetheless, many of the rationales for *Taylor* do not translate as neatly onto the immigration context. Both sides of the debate 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.¹⁵¹ The INA provides a specific list of documents that suffice as evidence of proof of the fact of a conviction but, like the ACCA, does not explicitly specify how adjudicators should determine whether a conviction meets a particular criminal ground under the statute.¹⁵² Like the ACCA's 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

¹⁵¹ Professor Sharpless's piece provides an overview of these arguments, criticizing the erosion of categorical analysis through the lens of the *Taylor* framework. See Sharpless, *supra* note 33.

¹⁵² 8 U.S.C. § 1229a(c)(3)(B): "Proof of convictions. In any proceeding under this Act, 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."

types of crimes.¹⁵³ 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 reasoning 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.¹⁵⁴

Picking up on this and other similarities, immigrant litigants advocated for the application of *Taylor* to the immigration context, and courts responded favorably. In *Dulal-Whiteway v. Department of Homeland Security*, for example, the Second Circuit went through a detailed analysis of how the reasons articulated in *Taylor* apply with equal force in the immigration context. The Second Circuit 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.¹⁵⁵ Second, the Second Circuit observed “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. We have emphasized that the BIA and reviewing courts are ill-suited to readjudicate the basis of prior criminal convictions.”¹⁵⁶ Third, the Second Circuit concluded that constitutional principles of fairness—expressed in Sixth Amendment terms in sentencing cases—also apply in the immigration context.¹⁵⁷ 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,” and moreover, “*Taylor* was motivated not only by the Sixth Amendment but by general conceptions of fairness.”¹⁵⁸ As example, the Second Circuit noted that categorical analysis promotes predictability and notice of consequences in the immigration context, using the language of *Taylor*: “If 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

¹⁵³ See, e.g., 8 U.S.C. §§ 1182(a)(2) (criminal grounds of inadmissibility), 1226(c)(1) (criminal grounds of mandatory detention), 1227(a)(2) (criminal grounds of deportability). Bars to relief from removal predicated on criminal convictions are found throughout the statute.

¹⁵⁴ See *supra* Part II.

¹⁵⁵ See *Dulal-Whiteway v. DHS*, 501 F.3d 116, 131-132 (2d Cir. 2007).

¹⁵⁶ *Id.* at 132.

¹⁵⁷ See *id.*

¹⁵⁸ *Id.* at 132&n.14, 133.

offense, our holding promotes the fair exercise of the removal power.”¹⁵⁹ Based on these principles, the Second Circuit applied the categorical approach to the fraud aggravated felony loss provision, a provision of the INA that required mandatory deportation for a lawful permanent resident convicted of fraud offenses in which the loss to the victim exceeds \$10,000.¹⁶⁰

Other courts—including the Supreme Court—have also used *Taylor* to justify the use of categorical analysis for the assessment of a variety of provisions under the INA. 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.¹⁶¹ In so doing, the Court began by noting that federal circuit courts had uniformly applied a categorical approach under *Taylor* to the assessment of whether convictions constitute aggravated felonies under the INA.¹⁶² 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.¹⁶³ 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.¹⁶⁴ In so doing, the Court treated the issue no differently than it had addressed 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, however, 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

¹⁵⁹ *Id.* (internal quotation marks, citation, and brackets omitted).

¹⁶⁰ 8 U.S.C. § 1101(a)(43)(M)(i).

¹⁶¹ *Duenas-Alvarez*, 549 U.S. 183.

¹⁶² *Id.* at 185-186 (“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)).

¹⁶³ *Id.* at 189-190.

¹⁶⁴ *Id.* at 190-194.

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 of 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 Gertsenshteyn*, the BIA concluded that language within the “prostitution transportation” aggravated felony provision called for a factual, rather than a categorical, analysis.¹⁶⁵ The provision, which applied to certain federal prostitution offenses “if committed for commercial advantage,” struck the BIA as being different than the generic “burglary” offense examined in *Taylor*. 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.¹⁶⁶ 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 definitively whether “whether the categorical and modified categorical approaches, which were developed in the criminal case context, are fully portable into the immigration arena.”¹⁶⁷ At no point did the BIA note its own development of categorical analysis from its prior immigration case law.

Thus begun a string of cases that treated categorical analysis as solely a creation of criminal law. In *Matter of Babaisakov*, the BIA opined on the question—previously addressed in *Dulal-Whiteway* and later resolved by the Supreme Court in *Nijhawan v. Holder*—of whether the categorical approach applies to the loss threshold in the ‘fraud or deceit’ aggravated felony provision, i.e., an offense that involves fraud or deceit “in which the loss to the victim or victims exceeds \$10,000.”¹⁶⁸ 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.”¹⁶⁹ 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.”¹⁷⁰ The BIA recognized that, in its previous unpublished decisions, it has previously applied a

¹⁶⁵ 8 U.S.C. § 1101(a)(43)(K)(ii).

¹⁶⁶ *Id.* at 113-114.

¹⁶⁷ *Id.*

¹⁶⁸ 8 U.S.C. § 1101(a)(43)(M)(i).

¹⁶⁹ *Matter of Babaisakov*, 24 I&N Dec. at 311.

¹⁷⁰ *Id.* at 312 (quoting *Singh v. Ashcroft*, 383 F.3d 144, 161 (3d Cir.2004)).

categorical analysis—limiting review to the record of conviction—to find such qualifying information.¹⁷¹ 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.¹⁷²

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.”¹⁷³ In so holding, the Seventh Circuit concluded that the rationales of *Taylor* did not apply. According to the Seventh Circuit, the rationales of *Taylor* are two-fold. First, the Seventh Circuit noted that *Taylor* promoted “the benefits of simple application, so that sentencing not be burdened by a retrial of the original prosecution.”¹⁷⁴ Second, the Seventh Circuit noted that sentencing courts apply a categorical analysis to ensure the proper “allocation of tasks between judge and jury under the sixth amendment” 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.”¹⁷⁵ The Seventh Circuit then rejected the applicability of either of those reasons for immigration cases, stating that immigration proceedings “are not criminal prosecutions, so the sixth amendment and the doctrine of *Apprendi v. New Jersey*, do 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.”¹⁷⁶ The Seventh Circuit applied the agency’s reasoning in *Matter of Babaisakov* to conclude that it was permissible for the immigration court to use a presentence report to conclude that a noncitizen’s conviction involved fraudulent conduct and was therefore a crime involving moral turpitude.¹⁷⁷

Other federal courts similarly carved out exceptions to categorical analysis in immigration cases by distinguishing *Taylor*,¹⁷⁸ and it did not take long for these decisions to gain further traction. In a rare reversal of BIA decisionmaking by an Attorney General, Attorney

¹⁷¹ *Id.* at 113-114.

¹⁷² *Id.*

¹⁷³ *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008).

¹⁷⁴ *Id.* at 741.

¹⁷⁵ *Id.* at 741.

¹⁷⁶ *Id.* at 741.

¹⁷⁷ *See id.* at 741-742.

¹⁷⁸ *See, e.g., Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003); (relationship to victim for “crime of domestic violence”); *Espinoza-Franco v. Ashcroft*, 394 F.3d 461 (7th Cir. 2004) (age of victim for “sexual abuse of a minor” aggravated felony).

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 ‘third step’ to the categorical approach for “crimes involving moral turpitude.”¹⁷⁹ The Attorney General began by describing first and second steps for assessing whether a conviction is a crime involving moral turpitude, steps that mirrored, to some extent, the categorical approach articulated under *Taylor*: 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.¹⁸⁰ However, the Attorney General then explained that where 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,” i.e., “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.¹⁸¹ This third step essentially collapses the inquiry into a noncategorical approach by removing the key limitation of the second step, which would be to limit review to the record of conviction.

In doing so, the Attorney General disavowed the application of *Taylor* to the crime involving moral turpitude inquiry. Relying heavily on *Ali*, the Attorney General held “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.”¹⁸² 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.¹⁸³ On the latter point, the Attorney General explained that he did not agree with the “suggest[ion]” 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 often the factual inquiry would be “simple.”¹⁸⁴

While the question of the applicability of categorical analysis to crimes involving moral turpitude after *Matter of Silva-Trevino* and *Ali* is in flux across circuits,¹⁸⁵ the issue addressed in *Dulal-Whiteway* and

¹⁷⁹ *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)

¹⁸⁰ *Id.* at 690.

¹⁸¹ *Id.* at 690, 704.

¹⁸² *Id.* at 701.

¹⁸³ *Id.* at 702.

¹⁸⁴ *Id.* at 702-703.

¹⁸⁵ Several federal circuit courts applied a categorical approach to the crime involving moral turpitude inquiry prior to *Matter of Silva-Trevino*. See, e.g., *Wala v. Mukasey*,

Matter of Babaisakov has been resolved by the Supreme Court, with *Taylor* playing prominent role in the analysis. In *Nijhawan v. Holder*, the Supreme Court addressed the question of whether the categorical approach applies to the loss threshold within the fraud aggravated felony definition. Writing for a unanimous Court, Justice Breyer explained that the question depended on whether the loss threshold was part of the generic definition of the 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.¹⁸⁶

To answer the question of whether a categorical or circumstance-specific inquiry applies, the Court compared the aggravated felony statute and the ACCA, the statute at issue in *Taylor* line of cases. First, the Court noted 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 that have “an element” of the use or threatened use of force.¹⁸⁷ While acknowledging that “other, more ambiguous language” in the ACCA—referring to crimes 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.¹⁸⁸

Turning to the aggravated felony statute, the Court noted that the statute defines aggravated felonies in a long list of subdivisions, only some of which appear to be generic offenses.¹⁸⁹ The Court noted 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.¹⁹⁰ However, the Court noted that “the ‘aggravated felony’ statute differs from ACCA in that it lists

511 F.3d 102, 107-108 (2d Cir. 2007); *Vuksanovic v. United States AG*, 439 F.3d 1308, 1311 (11th Cir. 2006); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006); *Jaadan v. Gonzales*, 211 Fed. Appx. 422, 427 (6th Cir. 2006); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017-1020 (9th Cir. 2005); *Partyka v. AG of the United States*, 417 F.3d 408, 411-412 (3d Cir. 2005); *Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2005); *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003); *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999). At least one federal circuit court has explicitly rejected the reasoning of *Matter of Silva-Trevino* after its issuance, see *Jean-Louis v. AG of the United States*, 582 F.3d 462, 473 (3d Cir. 2009), but *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*.

¹⁸⁶ *Nijhawan* 129 S. Ct. at 2298-2299.

¹⁸⁷ *Id.* at 2299.

¹⁸⁸ *Id.* at 2300.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

certain other ‘offenses’ using language that almost certainly does not refer to generic crimes but refers to specific circumstances.”¹⁹¹ The Court then listed 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. As an example, the Court cited subparagraph (P), “falsely making, forging, counterfeiting, mutilating, or altering a passport . . . except in the case of a first offense for which the alien . . . committed the offense for the purpose of assisting . . . the alien’s spouse, child, or parent . . . to violate a provision of this chapter.”¹⁹² 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. That is because there is no such generic crime; there is no criminal statute that contains any such exception. Thus if the provision is to have any meaning at all, the exception must refer to the particular circumstances in which an offender committed the crime on a particular occasion.”¹⁹³ The Court noted similarly qualifying language in other subparagraphs of the aggravated felony statute, such as subparagraph (N) (listing the same exception clause as in (P)), subparagraph (K)(ii) (an offense described in specified federal prostitution transportation statutes “if committed for commercial advantage”), subparagraph (M)(ii) (an offense described in specified federal tax evasion statutes “in which the revenue loss to the Government exceeds \$10,000”).¹⁹⁴ The Court therefore concluded that “the ‘aggravated felony’ statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed.”¹⁹⁵

Turning to the fraud loss provision, the Court concluded that the provision, unlike the provisions of the ACCA, did not refer to a generic offense and therefore permitted a circumstance-specific inquiry into loss.¹⁹⁶ In distinguishing the provision from the ACCA, the Court noted that the provision 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 element of the crime.¹⁹⁷ The Court thus rejected the petitioner’s argument that immigration courts be limited to reviewing the elements of the fraud offense for determination loss.

The Court also rejected the petitioner’s alternative argument that even when loss is not an element of the offense, *Taylor* dictates that the

¹⁹¹ *Id.*

¹⁹² *Id.* (emphasis in original, quoting 8 U.S.C. § 1101(a)(43)(P)).

¹⁹³ *Id.* at 2300-2301.

¹⁹⁴ *Id.* at 2301.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 2301-2302.

¹⁹⁷ *Id.*

immigration court’s inquiry would at the very least be limited only to documents within the record of conviction, such as a plea transcript, jury verdict, or other such documents demonstrating what the person pleaded to or was found guilty of in criminal court.¹⁹⁸ In doing so, the Court made clear its view that immigration law created no such limitations: “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 covers several different generic crimes) covered a prior conviction.”¹⁹⁹ The Court thus permitted immigration courts to review a broader set of documents to determine the amount of loss, including post-conviction sentencing documents and any “conflicting evidence,” which would not be permitted under *Taylor* and *Shepard*.²⁰⁰

Following *Nijhawan*, 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—a distinction drawn from *Taylor* and the Court’s analysis of the ACCA. Such an approach offers little guidance to immigrants or the immigration adjudicators who must determine when a categorical analysis applies. In the next case that raised this issue to the Supreme Court, *Carachuri-Rosendo v. Holder*, both parties attempted to use *Nijhawan* to explain why a categorical analysis would or would not apply to the provision at issue—how the “illicit trafficking aggravated felony” provision applies to cases involving “recidivist” drug offenses.²⁰¹ 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.²⁰² Attorneys for the petitioner argued that “illicit trafficking” describes a generic offense for which the *Taylor* categorical analysis applies and that courts should be limited to the record of conviction in determining whether the criminal court applied a recidivist enhancement.²⁰³ 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*.²⁰⁴ But the debate

¹⁹⁸ *Id.* at 2302-2303.

¹⁹⁹ *Id.* at 2303.

²⁰⁰ *Id.*

²⁰¹ *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010).

²⁰² Brief of Respondent Eric Holder, *Carachuri-Rosendo v. Holder*, 2009 U.S. Briefs 60, 28 n.12 (U.S. Mar. 1, 2010).

²⁰³ Brief of Petitioner Jose Carachuri-Rosendo, *Carachuri-Rosendo v. Holder*, 2009 U.S. Briefs 60, 25-26 (U.S. Jan. 28, 2010).

²⁰⁴ *Carachuri-Rosendo*, 130 S. Ct. at 2586 n.11.

will undoubtedly continue for other provisions within the INA, as the generic versus circumstance-specific line of *Taylor* does not appear to provide much clarity to litigants or the immigration adjudicators who must make these determinations in the first instance.

C. Breaking out of the *Taylor* framework

These recent decisions demonstrate courts' and the agency's 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*—finding “nothing in prior law that so limits the immigration court” to a categorical analysis—is particularly telling. None of these decisions account for the basis of categorical analysis in immigration law. Instead, they address the issue as if starting upon 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 by recent court decisions—whether *Taylor* is ultimately used as a sword for or a shield against the application of categorical analysis in the immigration context—gives proper consideration to the independent basis for categorical analysis in immigration law. At most, *Taylor* is instructive on how courts should approach this question, i.e., by looking to the statutory language, legislative history, and the context in which categorical analysis operates in immigration law, as the Supreme Court did for criminal sentencing law. But instead, courts and the agency now begin and end their analysis with a discussion of whether *Taylor* applies. This has led to a fundamentally flawed view of when and why categorical analysis should or should not apply.

Take, for example, the Supreme Court's decision in *Nijhawan*. The Supreme Court relied heavily on the language that Congress chose in defining the removable categorical—i.e., a fraud offense “in which the loss to the victim . . . exceeds \$10,000.” As the BIA aptly pointed out when it addressed the same phrase, the “in which” clause does appear to “beg” an adjudicator to look at the facts underlying the fraud offense to determine loss.²⁰⁵ Where, then, is the basis for limiting the analysis of loss to the statutory definition of the offense and the record of what the person was specifically convicted?

The Court was correct in holding that the answer does not necessarily lie with *Taylor*, which addressed different language—the text of the ACCA—in a different context—criminal sentencing

²⁰⁵ *Matter of Babaisakov*, 24 I&N Dec. at 306.

enhancements. Many of the ACCA’s provisions lack the type of “qualifying” language found in certain provisions of the INA,²⁰⁶ and the sentencing courts’ role in determining facts is subject to a set of limitations unique to the sentencing context. The problem, however, with the Court’s analysis is that it stopped there and 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 wished to limit the authority of immigration adjudicators as administrative rather than judicial officials.²⁰⁷ This analysis was based in part on Congress’s chosen statutory language—its reliance on the term “convicted” in meting out immigration consequences.²⁰⁸ As the BIA once stated, “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 Had Congress wished to predicate deportability on an alien’s actual conduct, it would have been a simple enough matter to have done so.”²⁰⁹ When Congress added the

²⁰⁶ The ACCA does present some sentencing enhancement provisions that arguably include similar qualifying language. In *James v. United States*, the Supreme Court addressed a provision within the ACCA that defines a violent felony as an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” *Id.*, 550 U.S. 192 (2007). 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 201-202.

²⁰⁷ See *infra* Part II (discussing the earliest cases applying categorical analysis in immigration law).

²⁰⁸ See *id.*

²⁰⁹ *Velazquez-Herrera*, 24 I. & N. Dec. at 515. Indeed, the INA includes other provisions within the statute that specify when something short of a conviction—such as an admission for committing an offense—may serve as a ground of removal. See 8 U.S.C. § 1182(a)(2)(A)(i)(I) (predicating “inadmissibility” for “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” provisions each create separate requirements for immigration officials that are not interchangeable. For example, where a person has been convicted, courts may not use admissions to find the individual removable based on an offense for which he was not convicted. See, e.g., *Matter of Seda*, 17 I. & N. Dec. 550, 554 (BIA 1980) (holding that “where a plea of guilty results in something less than a conviction, . . . the pleas, without more, is not tantamount to an admission of commission of the crime for immigration purposes”); *Matter of Winter*, 12 I. & N. Dec. 638, 642 (BIA 1967, 1968) (“Where, as here, an alien has been the subject of court proceedings on criminal charges and the ultimate disposition of those 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.”). Moreover, where removability is based on admissions rather than a conviction, immigration officials are held to 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 his or her testimony. See *supra*

fraud aggravated felony provision to the immigration statute 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.²¹⁰ Thus, as a basic principle of statutory interpretation, courts may presume that Congress intended a categorical analysis to apply.

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 within the loss portion of the fraud aggravated felony provision and held that this language indicated that fact-finding was necessary under the statute. However, history demonstrates the fallacy in that assertion as well. Nothing in the century of precedent on categorical analysis in immigration law has ever carved

Part II.A (discussing early cases on Congress’s intent in including the “admits” language in the immigration statute); *see also Matter of K---*, 9 I & N Dec. 715 (BIA 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); *Matter of E-N-*, 7 I & N Dec. 153 (BIA 1956) (holding that an individual must admit all factual elements of the crime under these provisions); *Matter of G---*, 1 I & N D Dec. 225 (BIA 1942) (holding that admission under these provisions must have been voluntarily given); Foreign Affairs Manual Note 5.11 to 22 C.F.R. § 40.21(a) (stating that an agency officer must ensure the 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.

²¹⁰ Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, sec. 222 (adding 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, Pub. L. No. 104-208, 110 Stat. 3009-546, sec. 321 (amending 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 Congress’s intent to move away from a categorical analysis. However, such an expansion of *categories*—rather a legislative change to the “convicted” language or any other explicit change to the manner in which convictions are assessed—might indicate Congress’s intention that the focus of the inquiry remain 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. *See Taylor*, 495 U.S. at 601 (“[T]he legislative history of the enhancement statute shows that Congress generally took a categorical approach to predicate offenses. There was considerable debate over what kinds of offenses to include and how to define them, but no 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.”).

out exceptions based on the way the removal term is described within the immigration statute. Rather, for a myriad of terms both narrowly and broadly defined, the only marker of whether a categorical analysis applies has been whether the statute predicates consequences on whether the person has been “convicted” of, rather than “committed,” the offense.²¹¹ The distinction drawn in ACCA cases by examining the definition of the predicate offense for its generic or non-generic nature thus finds no basis in past precedent on when a categorical analysis applies in immigration law.

The problem with focusing the definition of the removal term rather than the “convicted” language is underscored by the flawed analysis in *Matter of Silva-Trevino*. 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.”²¹² Just as the Supreme Court later observed that, as a non-element, loss 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.”²¹³

Unlike the fraud aggravated felony context, which is a relatively new addition to the criminal grounds of the INA, there is a century of precedent demonstrating the flaws in the Attorney General’s assertions on crimes involving moral turpitude. First, courts have long been able to discern moral turpitude from the record of conviction of thousands of immigrants facing removal on that ground.²¹⁴ It has not mattered that moral turpitude is not typically 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 conviction.²¹⁵ Second,

²¹¹ See *supra* Part II (discussing the history of categorical analysis and courts’ emphasize on Congress’s “convicted” language in the immigration statute).

²¹² *Matter of Silva-Trevino*, 24 I&N Dec. at 699.

²¹³ *Id.*

²¹⁴ See *supra* Part II (discuss cases enforcing categorical analysis for crimes involving moral turpitude from 1913 through 2008).

²¹⁵ This is demonstrated by the many cases in which courts have successfully found moral turpitude by reviewing statutes and court records, see *supra* Part II. Of course, this assertion does not address the much more technical question of “divisibility” that is presented by categorical analysis—when a court must stop at the first step of

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.²¹⁶ Despite numerous cases on this issue over a century, at no point did Congress choose to 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, failing to account for all of the precedent that establishes that categorical analysis stems from the “convicted” language and not the definition of any particular removal term.

In addition to a failure to address fully 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,

categorical analysis (analyzing the definition of the criminal statute at issue and determining whether it covers removable conduct) and not proceed to the second step (if that statute is “divisible,” i.e., covering removable and nonremovable conduct, consulting the record of conviction to determine whether the person was convicted of the removable conduct). *See James v. Mukasey*, 522 F.3d 250, 255 (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). One could require a much more stringent divisibility analysis at the first step and not permit the 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 be conflating the divisibility question with the question of whether the second (and much more foundational) aspect of categorical analysis applies—that when courts do seek more information about the facts underlying a crime to determine removability, they are limited to a review of the record of conviction. Limiting review to the record of conviction itself does not necessarily render grounds of removable 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 resolve the consequences of a strict divisibility rule by departing from categorical analysis altogether. Moreover, as will be discussed in greater detail below, departing from categorical analysis to give more life to certain removal provisions has its own separate costs to 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).

²¹⁶ *See supra* Part II.

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 onto the immigration context, that does not mean that there are no independent contextual 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.²¹⁷ They viewed categorical analysis as a necessary rule for the fair, uniform, and efficient administration of immigration laws by the agency.²¹⁸ While there may be a question as to whether these and other legitimate rationales still continue apply to the immigration context today—an issue addressed in the next part of this article—the lack of consideration of these factors underscores the flaws in the current debate over categorical analysis in immigration law.

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

IV. Deviating from a Categorical Analysis in Immigration Law: Implications 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 into some criminal grounds of

²¹⁷ See *supra* Part II.A.

²¹⁸ See *id.*

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, the statute is filled with categories of offenses that arguably straddle the line of what is generic and what calls for a factual-type of inquiry,²¹⁹ and enforcement of these criminal grounds is rapidly expanding.²²⁰ The temptation for immigration officials to erode categorical analysis further 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 noncitizen? Conceptually, an expansion of the Supreme Court’s circumstance-specific approach could lead to “better” immigration law outcomes—people receiving penalties for the acts they actually commit, rather than the convictions they receive.

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 apply with even greater force today. Scholars and policy organizations alike have recognized that the current immigration adjudicative system is in crisis.²²¹ The principles that typically guide agency norms and values in light of administrative constraints—the preservation of notice and an opportunity to be heard, uniformity, predictability, efficiency, and judicial review of agency decisionmaking²²²—present many of the

²¹⁹ *Nijhawan* 129 S. Ct. at 2300-2301 (discussing subsections of the “aggravated felony” definition that appear to include qualifying language calling for a “circumstance-specific” inquiry).

²²⁰ American Bar Association, *Reforming the Immigration System* (2010) at 1-33 (hereinafter “*Reforming the Immigration System*”), available at http://new.abanet.org/Immigration/PublicDocuments/complete_full_report.pdf (last visited Oct. 10, 2010) (noting that in 2007 alone, the Department of Homeland Security placed 164,000 noncitizens with criminal convictions into removal proceedings, more than double the 64,000 noncitizens with criminal convictions placed in removal proceedings the year before).

²²¹ See, e.g., Stephen H. Legomsky, *Immigration Law and Adjudication: Restructuring Immigration Adjudication*, 59 Duke L.J. 1635, 1651-1676 (2010) (arguing that the current immigration adjudication system is fundamentally flawed in terms of norms of accuracy, efficiency, acceptability, and consistency); see also *Reforming the Immigration System*, *supra* note 220 (discussing a myriad of problems with the current adjudicative model).

²²² Formulations of these norms have been discussed in a variety of administrative law contexts, including recent critiques of the immigration system. See Legomsky, *supra* note 221; Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIG. L. J. 595, 633&n.245 (2009) (describing accuracy, efficiency and acceptability as administrative process norms); see also Michael Asimow, *The Scope of*

same rationales for why courts and the agency had, until recently, favored a categorical, rather than factual analysis, in immigration law. In this part of the article, I examine the implications of departing from categorical analysis in light of these rationales today.

I assert that 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. Front-line 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, I argue that 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 front-line immigration officials, and largely eliminated the availability of judicial discretion and judicial review for individuals whose convictions fall within the myriad categories of removal.²²³ These changes have increased both the

Judicial Review of Decisions of California Administrative Agencies, 42 U.C.L.A. L. REV. 1157, 1160 (1995) (describing accuracy, efficiency, acceptability and political theory and separation of powers as fundamental values of the administrative system); Robert Glicksman & Christopher H. Schroeder, *Assessing the Environmental Protection Agency after Twenty Years: Law, Politics, and Economics*, 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).

²²³ See, e.g., Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000); Daniel Kanstroom, *Surrounding the*

prevalence and the relative importance of threshold conviction assessments within the immigration system. In doing so, these changes further 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 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.²²⁴ 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. Although noncitizens in removal proceedings face deportation and may be detained pending such determinations, they lack any statutory right to government-appointed counsel.²²⁵ As a result, the majority of noncitizens in removal proceedings are *pro se*.²²⁶ Moreover, for those who are detained, the government may transfer detainees to facilities anywhere in the country, far from legal or family support and access to records.²²⁷ Immigration courts do not typically exercise subpoena power or otherwise assist unrepresented immigrant detainees in obtaining evidence, nor is there any rule that requires the government to provide exculpatory evidence to noncitizens in the removal context.²²⁸

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

Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law, 71 TUL. L. REV. 703, 704 (1997).

²²⁴ See, e.g., *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (holding that due process in the removal context requires notice and an opportunity to be heard).

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

²²⁶ Amnesty International, *Jailed without Justice: Immigration Detention in the USA 30* (2009) (citing Executive Office for Immigration Review, Department of Justice, *FY 2007 Statistical Yearbook G1* (2008), available at <http://www.usdoj.gov/eoir/statpub/fy07syb.pdf>).

²²⁷ See, e.g., Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* (Dec. 2, 2009); Office of Inspector General, Dep't of Homeland Security, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers*, OIG 10-13 (Nov. 2009).

²²⁸ See C. Gordon et al., *Immigration Law & Procedure* § 3.07 (2008).

removal proceedings—i.e., the criminal disposition as adjudicated by the criminal court—and an opportunity to be heard on whether that evidence establishes their removability and/or eligibility for status or relief from removal. It creates a closed universe of documents that represent the official record of conviction, previously tested by a criminal court process, which is relevant to 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 noncitizens' 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 comes down to testimony alone—if the government based its allegations, and the judge made his or her determination, solely upon the noncitizen's recollection of his or 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 system—particularly noncitizens' lack of access to counsel, family, records and evidentiary protections—it is hard to imagine noncitizens having comparable access to the types of documents that would be necessary to contest the government's allegations under a circumstance-specific approach.

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 asylum²²⁹ or naturalization²³⁰ will have little 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

²²⁹ 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).

²³⁰ 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) (applicant will be found to be lacking good moral character if convicted of an aggravated felony on or after Nov. 29, 1990).

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 is increasingly relying 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 suspended immigrant detention from the 1950s through the 1980s.²³¹ In 1990, however, Congress enacted the first “mandatory” detention statute, requiring immigration officials to detain noncitizens who have been convicted of aggravated felonies without bond, regardless of their lack of risk of flight or danger to the community, upon their release from their criminal sentences.²³² Over the years, Congress expanded the mandatory detention statute to be predicated on other categories of removable offenses, including controlled substances offenses and multiple crimes involving moral turpitude. At the same time, it expanded the list of offenses that are included within the aggravated felony category. As a result of these changes—and the corresponding increase in funding for the required detention space—the immigration detention system has rapidly grown. In 2008, for example, immigration officials within the Department of Homeland Security made decisions to detain 378,582 noncitizens, representing a 22 percent increase from just the previous year.²³³ A majority of these current detainees are transferred away from the communities in which they are initially detained, to isolated facilities in the southern and southwestern United States.²³⁴

²³¹ See Detention Watch Network, *The History of the Immigration Detention System in the U.S.* (2009) (noting that the federal government suspended immigration detention from the 1950s through the 1980s and the system has only rapidly grown in recent years).

²³² Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4470 (Nov. 18, 1990) (codified at 8 U.S.C. § 1252(a)(2)).

²³³ Office of Immigration Statistics, U.S. Dep’t of Homeland Security, *Immigration Enforcement Actions: 2008* (July 2009) 3, at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf (last visited Jan. 27, 2010).

²³⁴ See Transactional Records Access Clearinghouse, *Huge Increase in Transfers of ICE Detainees* (Dec. 2, 2009), available at <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 were available, the majority (52.4%) of detainees were transferred” such that they are moved “from their point of initial ICE detention to many different locations—often over long distances and frequently to remote locations”); Office of Inspector General, Dep’t of Homeland Security, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers*, OIG 10-13, 4 (Nov. 2009) (explaining that

In a civil administrative system handling an increasing number of detained cases, 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 front-line 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.²³⁵ 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.²³⁶ However, it may take days or even weeks before a noncitizen is informed that immigration officials have deemed him or 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 will need to meet her burden of establishing that her conviction does not trigger mandatory detention. Moreover, in such hearings, the burden is onerous—the noncitizen bears the burden of establishing that the government is “substantially unlikely to prevail” on establishing the criminal ground that that the front-line immigration official identified as the basis for subjecting the noncitizen to mandatory detention.²³⁷ Much rests on this initial decision by the front-line 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 by the front-line 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 eliminates subjectivity in the analysis, ensuring that convictions are characterized based on their inherent nature and official record rather than 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

many detainees “are sent from eastern, western and northern state detention facilities to locations in the southern and southwestern United States”).

²³⁵ See 8 C.F.R. § 1003.19.

²³⁶ *Id.*

²³⁷ *Matter of Joseph*, 22 I&N Dec. 3387 (BIA 1999) (describing standard for noncitizens to challenge government’s misapplication of mandatory detention statute).

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 that he or she may have difficulty contesting while in detention.

A circumstance-specific inquiry, by contrast, leaves room for a subjective assessment of facts that the noncitizen will have no notice may subject him or her to mandatory detention. 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, expedited removal. Expedited removal permits immigration officials to deport certain immigrants without providing them a hearing in front of an immigration judge. The applicability of this process turns in part on whether the immigrant has been convicted of an aggravated felony.²³⁸ This conviction assessment is made by a front-line immigration officer based on his or her assessment of a paper record.²³⁹ A noncitizen will receive a “Notice of Intent” specifying the charges and the government’s conclusion that he or she is subject to expedited removal, but the noncitizen “need not even be provided with a copy of the evidence on which the charges are based, and the failure to respond on time automatically results in a final deportation order whether or not the allegations are true.”²⁴⁰ While drastic in nature, over half of all removal orders based on convictions deemed “aggravated felonies” are issued through this process.²⁴¹

As with the initial decision to detain, applying a categorical analysis to the determination of whether a conviction is an aggravated

²³⁸ 8 U.S.C. § 1228(b).

²³⁹ *Id.*; American Bar Association, *American Justice Through Immigrant Eyes* 7, 17-18 (2004) (hereinafter “*American Justice*”), available at http://www.civilrights.org/publications/american-justice/american_justice.pdf (discussing expedited administrative removal); *Reforming the Immigration System*, *supra* note 220, at 1-34-1-36 (same).

²⁴⁰ *See American Justice*, *supra* note 230, at 7, 17-18; *Reforming the Immigration System*, *supra* note 220, at 1-34-1-36.

²⁴¹ Transactional Records Access Clearinghouse, *New Data on the Processing of Aggravated Felons--Administrative versus Immigration Court Orders* (2007), available at <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).

felony for the purposes of expedited 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, 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 such minimal guarantees are not inherent the structure of the administrative immigration system as a whole.

The expansion of mandatory detention and expedited 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 more protection for immigrants who will by definition and design have less access to the type of documents necessary to fight a designation of deportability 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,²⁴² but this statement evinces little understanding of the constraints within immigration courts or their 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 Congress must establish a “uniform rule of naturalization.”²⁴³ Because the immigration statute presents categories of criminal convictions as bars to naturalization as well as bars to admission and grounds of deportation, the assessment of those

²⁴² *Nijhawan*, 129 S. Ct. at 2303.

²⁴³ U.S. Const. Art. I, § 8, cl.4. Several scholars have discussed the necessity of uniformity in the immigration system. See James E. Pfander and Theresa R. Warden, *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 Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U.L. REV. 493, 533-535 (2002) (discussing the uniformity concerns related to the intersection of welfare and immigration law); 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).

convictions implicates how uniformly such actions are applied. A categorical approach 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.²⁴⁴

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.

²⁴⁴ See, e.g., *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (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.”); *Op. of Hon. Cummings*, 37 Op. Atty Gen. 293 (AG 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. 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.” (internal quotation marks and citations omitted)); *Matter of F---*, 8 I & N Dec. 469, 472 (BIA 1959) (“The immigration laws must be uniformly administered.”); *Matter of R---*, 6 I & N Dec. 444, 447-448 (BIA 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.”); *Matter of T---*, 3 I & N Dec. 641, 642-643 (BIA 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)); *Matter of T---*, 2 I & N Dec. 22 (BIA 1944) (“[A]pplication of the rule must be uniform.”).

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 front-line immigration officials who determine eligibility for asylum, lawful permanent residence, and naturalization, and 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.²⁴⁵ 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 2009.²⁴⁶ It is unlikely that the system can produce “factually uniform” results when the responsibility lies with thousands of decentralized, overburdened front-line officials who must choose how far to dig into the factual evidence behind each conviction record supplied on a paper application.

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 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, thousands of naturalization applications are adjudicated by officers based on paper records and a nonadversarial interview.²⁴⁷ During this process, applicants are asked to submit certificates of disposition for their convictions, and the naturalization officer must determine whether these convictions temporarily or permanently bar the applicant from naturalization under the statute.²⁴⁸ 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 also have to assess the conviction.²⁴⁹ The naturalization statute and the deportability statute both involve bars if an applicant has been convicted of an aggravated felony.²⁵⁰ A categorical

²⁴⁵ See *Reforming the Immigration System*, *supra* note 220, at 1-8-1-10 (describing the functions of officials within the Department of Homeland Security).

²⁴⁶ See *id.* at 1-13.

²⁴⁷ See 8 C.F.R. § 335.3; Office of Immigration Statistics, U.S. Department of Homeland Security, *2007 Year Book of Immigration Statistics* 52 (2008).

²⁴⁸ See 8 C.F.R. § 335.3; see also Michael Aytes, Assoc. Dir. for Domestic Operations, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, *Policy Memorandum 110: Disposition of Cases Involving Removable Noncitizens* (July 11, 2006).

²⁴⁹ See Aytes, *supra* note 247.

²⁵⁰ The aggravated felony bar to naturalization is listed under 8 U.S.C. §§ 1101(f)(8), 1427(a)(3). See also 8 C.F.R. § 316.10(b)(1)(ii) (applicant will be found to be lacking

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 statutory defined and limited by specified documents within 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 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. A categorical analysis pegs consequences to specific determinations made when the criminal case is adjudicated in criminal court. A noncitizen with an assault conviction, for example, will know how that conviction—as it is defined by the criminal statute and as 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 to another subsection will not. By contrast, under a factual approach, a noncitizen may be less able to predict how her criminal conduct will be assessed by an immigration official in the future. A noncitizen with an assault conviction, for example, 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 status or subject to deportation due to their conviction.

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

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).

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.²⁵¹ Otherwise the noncitizen, attorneys and service providers, and immigration officials will waste considerable time and resources on applications where the noncitizen is ineligible for any such relief or status. Similarly, immigration officials themselves must make initial, threshold decisions about whether to initial removal proceedings or detain a person based on the 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.²⁵²

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 an even wider scope of evidence,

²⁵¹ See Center for Battered Women's Legal Services, *The Role of the Categorical Approach in Assisting Victims of Domestic Violence and Other Crimes* (Feb. 25, 2009), at www.immigrantdefenseproject.org/docs/09_CenterBatteredWomen'sLegalServicesPolicyBrief.pdf (last visited Jan. 27, 2010) (explaining how categorical analysis ensures that legal service providers are better able to determine whether their clients are eligible for applications for status).

²⁵² These concerns also exist in the criminal sentencing context, as discussed in Professor Sarah French Russell's piece on *Shepard* and drug enhancements. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1229 (2010).

including the witnesses, testimony, and documents outside the criminal record, the outcome of any factual assessment would thus turn at least in part on the ability of both parties to obtain such evidence. Thus, a categorical analysis, while not resulting in perfect predictability, allows all parties involved a better sense of the 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 adjudicate a removal case, through multiple “master calendar hearings” possibly followed by an “individual hearing” on relief. Master calendar hearings are relatively short hearings where 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 whether the conviction further bars her from seeking discretionary relief from removal. Individual hearings are longer hearings where 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. In these hearings, the immigration judge will take testimony and considering 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).

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 and/or ineligible for discretionary relief. This would involve the taking of testimony, a process that does not typically occur during master calendar hearings. A categorical analysis obviates the need for immigration judges to hold a trial-like individual hearing on these issues. Instead, the immigration judge can use master calendar hearings to make those initial determinations through a legal analysis on a closed record before proceeding to an individual hearing, if necessary.

As noted in part III, the agency itself has observed the important role that categorical analysis plays in alleviating administrative burden. 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 rule” for the assessment of prior criminal convictions.²⁵³

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.²⁵⁴ 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” or “immigration holds” requesting that state or local facilities hold such individuals up to 48 hours past their release date so that federal immigration authorities may take them directly into custody.²⁵⁵ In addition, immigrants increasingly 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 such as asylum, lawful permanent residence, or citizenship to federal immigration authorities are routinely screened for criminal records and may be subjected to removal proceedings on that basis.²⁵⁶

As a result, deportations based on criminal grounds have expanded exponentially. In 1983, the federal government deported 863 people on criminal grounds.²⁵⁷ In 2008, the federal government deported 97,133 people on criminal grounds.²⁵⁸ Not surprisingly, immigration court caseloads have also increased dramatically. From fiscal years 2000 to 2005, immigration courts’ caseloads rose 39 percent,

²⁵³ *Pichardo-Sufren*, 21 I & N Dec. at 335-336.

²⁵⁴ See *Reforming the Immigration System*, *supra* note 220, at 1-22-1-25 (describing more recent federal government initiatives to increase state and local involvement in immigration enforcement); see also Jennifer 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 (2010); Michael Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PENN. J. CONST. L. 1084 (2004).

²⁵⁵ See *Reforming the Immigration System*, *supra* note 220, at 1-24-1-25 (describing programs to identify immigrants in jails and prisons); Manuel Vargas, *Immigration Consequences of Guilty Pleas of Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 701, 704 (2006) (same).

²⁵⁶ Vargas, *supra* note 255.

²⁵⁷ See *id.* at 707.

²⁵⁸ Office of Immigration Statistics, U.S. Dep’t of Homeland Security, *Immigration Enforcement Actions: 2008* (July 2009) tbl.4, at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf (last visited Jan. 27, 2010).

while the number of judges increased by only 3 percent.²⁵⁹ In fiscal year 2007, approximately 205 immigration judges carried a total caseload of over 330,000 matters, including removal cases, bond cases, and others determinations—permitting an average of only seventy-four minutes per matter.²⁶⁰ 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 involving charges of crimes involving moral turpitude (well over 10,000 per year).²⁶¹ If the abandonment of a categorical approach means even one additional hearing date or continuance in each of the proceedings for thousands of cases each year, such a change would arguably have a measurable impact of the efficiency of the removal system.²⁶²

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 statute, curtailing judicial review of immigration decisions.²⁶³ Federal circuit

²⁵⁹ U.S. General Accounting Office, *Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement*, GAO-06-771 (August 11, 2006) available at www.gao.gov/products/GAO-06-771 (last visited Jan. 28, 2010).

²⁶⁰ Transactional Records Access Clearinghouse, *Improving the Immigration Courts: Effort to Hire More Judges Fall Short*, at <http://trac.syr.edu/immigration/reports/189/> (last visited Jan. 27, 2010).

²⁶¹ Transactional Records Access Clearinghouse, *Individuals Charged with Moral Turpitude in Immigration Court*, at http://trac.syr.edu/immigration/reports/moral_turp.html (last visited Jan. 27, 2010).

²⁶² See *Reforming the Immigration System*, *supra* note 220, at 1-39 (noting that the abandonment of categorical analysis for crimes involving moral turpitude raises efficiency concerns for an overburdened immigration court system).

²⁶³ 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 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. and other titles). In 2005, Congress partially restored jurisdiction to the circuit courts over legal and constitution issues in the REAL ID Act, while simultaneously eliminating habeas jurisdiction in the district courts over removal orders. The REAL

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.²⁶⁴ 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.²⁶⁵

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.”²⁶⁶ If such facts become the basis of whether an offense falls into a criminal ground of removal barring jurisdiction to review the removal order and if a deferential standard of review then applies to that fact-finding, the agency arguably has too much power in determining the scope of judicial review.

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 immigration penalties of 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 the fold of factors that defense and defense counsel must consider prior

ID Act, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Div. B, Pub. L. No. 109-13, 119 Stat. 231 (2005).

²⁶⁴ 8 U.S.C. § 1252(a)(2)(C).

²⁶⁵ 8 U.S.C. § 1252(a)(2)(D).

²⁶⁶ 8 U.S.C. § 1252(b)(4)(B).

to the taking 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.²⁶⁷ When the immigration consequences under the federal law are “succinct, clear, and explicit,” defense counsel must advise their clients of the precise consequences of their guilty pleas and convictions.²⁶⁸ Where the immigration consequences are not clear, defense counsel may merely advise their clients that their guilty plea may carry a risk of deportation.²⁶⁹

One could read the holding of *Padilla* narrowly to conclude that the scope of the duty of defense counsel is quite limited, and that the erosion of categorical analysis may actually ease the burden on defense counsel and otherwise have little affect 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 defense counsel would be obviated of the duty to specify the precise immigration consequences and 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.²⁷⁰ 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—to plea bargain.²⁷¹ The Supreme Court noted that informed defendants may opt to seek an outcome that avoids deportability or at least preserves an opportunity to seek discretionary relief. 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

²⁶⁷ *Padilla*, 130 S. Ct. at 1483.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *See id.* at 1486.

plea for a defendant, it simply complicates the process. To determine whether deportation consequences are clear or not, defense counsel must first determine all the possible criminal grounds in immigration law that a plea 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—for circumstance-specific grounds of removal, zealous defense counsel will need to explain that the defendant will need to worry not only about the plea, but also about any negative factual statements or findings made by others—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 previously a defendant 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, and is obviously time-intensive for the court system. 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.

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 the immigration case, as defendants seek findings on facts not necessarily relevant to the penal outcomes of the case 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.

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.

CONCLUSION

The decisions that have eroded the categorical analysis in immigration law are recent outliers in the context of the vast historical body of immigration cases applying a categorical analysis. Immigration adjudicators have been applying a categorical analysis for over a century. 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 decisionmaking.

Rather than address the historical and contextual rationales for a categorical analysis in immigration law, recent critics of the categorical approach 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” 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 prevalence and heightened stakes that conviction assessments have in the current immigration system—assessments that are increasingly made by decentralized front-line 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 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 on one issue—the fraud-loss issue addressed by the Supreme Court in *Nijhawan v. Holder*. 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 to evidence outside the record of conviction for the offense at issue. Courts that are now addressing this issue have the opportunity to do so in light of the history and principles behind the categorical approach 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 in the immigration and criminal justice systems for immigrants with criminal convictions. 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 a mechanism to permit criminal courts to issue a judicial recommendation against deportation in all criminal cases involving noncitizens. Until these fundamental reforms take place, however, categorical analysis continues to play an important role in preserving minimal agency norms and alleviating some of the pressure that immigration penalties create on the criminal justice system.

**APPENDIX: INDEX OF DECISIONS APPLYING
CATEGORICAL ANALYSIS IN IMMIGRATION LAW PRIOR
TO THE SUPREME COURT’S 1990 CRIMINAL SENTENCING
DECISION IN *UNITED STATES V. TAYLOR***

I. Federal Court Courts

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 to 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. Mass. 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, 1022-1023 (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, 757-758 (2d Cir. Mar. 13, 1933) (“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.” (citations omitted))

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) (L. 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. Neely, 208 F.2d 337, 340-341 (7th Cir. 1953) (“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.” (internal quotation marks and citations omitted))

Wadman v. Immigration & Naturalization Service, 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. Immigration & Naturalization Service, 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) (“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. Immigration & Naturalization Service, 671 F.2d 863, 865 (5th Cir. 1982) (“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.”)

II. Attorney General Decisions

Op. of Hon. Cummings, 37 Op. Atty Gen. 293 (BIA 1933) (“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, supra*: ‘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.’”)

Op. of Hon. Cummings, 39 Op. Atty Gen. 95 (AG 1937) (“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.”)

Op. of Hon. Cummings, 39 Op. Atty Gen. 215 (AG 1938) (“[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.” (citations omitted))

Matter of B---, 1 I. & N. Dec. 52 (AG 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.”)

Matter of S---, 2 I & N Dec. 353, 357 (BIA, AG 1945) (“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.” (internal quotation marks and citations omitted))

III. Board of Immigration Appeals Decisions

Matter of W---, 1 I & N Dec. 485 (BIA 1943) (“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.”)

Matter of T---, 2 I & N Dec. 22 (BIA 1944) (“[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.” (citations omitted))

Matter of P---, 2 I & N Dec. 117 (BIA 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.”)

Matter of E---, 2 I & N Dec 328, 335 (BIA 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 . . . can it be considered in making a determination.”)

Matter of M---, 2 I & N Dec. 721, 724 (BIA 1946) (“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.” (citations omitted))

Matter of P---, 1 I & N Dec. 48 (BIA 1947) (“[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.”)

Matter of R---, 2 I & N Dec. 819 (BIA 1947) (“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.” (citations omitted))

Matter of P---, 3 I & N Dec. 290, 296-297 (BIA 1948) (“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.” (citations omitted))

Matter of T---, 3 I & N Dec. 641, 642-643 (BIA 1949) (“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.’” (citations omitted))

Matter of D-S-, 3 I & N Dec. 502, 504 (BIA 1949) (“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.” (citations omitted))

Matter of R---, 4 I & N Dec. 176, 179 (BIA 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.”)

Matter of R---, 4 I & N Dec. 644, 647 (BIA 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.”).

Matter of P---, 5 I & N Dec. 582, 584-585 (BIA 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.”)

Matter of S---, 5 I & N Dec. 576, 577 (BIA 1953) (“[W]e are precluded from going outside the record of conviction to consider [] testimony.”); *Matter of B-*, 5 I & N Dec. 538, 540 (BIA 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.”)

Matter of of C---, 5 I & N Dec. 65, 71 (BIA 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.”)

Matter of R---, 6 I & N Dec. 444, 447-448 (BIA 1954) (“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.” (citations omitted))

Matter of B---, 6 I & N Dec. 98, 108 (BIA 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.”)

Matter of F---, 8 I & N Dec. 469, 472 (BIA 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.”)

Matter of V-D-B-, 8 I & N Dec. 608, 610 (BIA 1960) (“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.”)

Matter of H---, 7 I & N Dec. 616, 618 (BIA 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”)

Matter of Lopez, 13 I & N Dec. 725, 726 (BIA 1971) (“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” (citations omitted))

Matter of Baker, 15 I & N Dec. 50, 51 (BIA 1974) (“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.”)

Matter of Short, 20 I & N Dec. 136, 137-138 (BIA 1989) (“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.” (citations omitted))