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# The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino

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# NOTE

## THE CATEGORICAL APPROACH FOR CRIMES INVOLVING MORAL TURPITUDE AFTER *SILVA-TREVINO*

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*A conviction for a crime involving moral turpitude (CIMT) can result in harsh immigration penalties such as removal from the United States for noncitizens. The designation of a crime as a CIMT depends on whether moral turpitude inheres in its elements. Administrative adjudicators and federal courts have thus been using a categorical approach that focuses on the elements of a crime to determine whether it is a CIMT. Although variations in the categorical approach have developed among the circuits, the categorical approach has customarily employed two steps, both focusing on the elements of the conviction rather than the actions of the noncitizen. In 2008 in* Matter of Silva-Trevino, *the Attorney General added a third step to the categorical approach that permits adjudicators to consider the acts of the noncitizen convicted of the crime. This Note analyzes the circuit split that widened after* Silva-Trevino, *focusing on the variations in the first two steps of the categorical approach and on the Attorney General's novel third step. This Note ultimately rejects* Silva-Trevino*'s third step and concludes that adjudicators should adopt a uniform categorical approach to safeguard noncitizens from erroneous deportation and to ensure consistent application of the immigration laws throughout the nation.*

### INTRODUCTION

A crime involving moral turpitude (CIMT) is a crime that is inherently wrong and has been committed with scienter; that is, a crime which is morally objectionable.[1] CIMTs have had ramifications in the immigration context for over one hundred years.[2] Today, a conviction for a CIMT can result in harsh immigration penalties such as deportation.[3]

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1. For example, premeditated murder is a CIMT because it necessarily includes an aspect of moral culpability; passing a bad check, however, is not if intent to defraud is not a required element. See U.S. Dep't of State, Defining "Moral Turpitude," 9 Foreign Affairs Manual (FAM) 40.21(a), N2.3-1, N2.3-3 (2010), available at http://www.state.gov/documents/organization/86942.pdf (on file with the *Columbia Law Review*) (stating "passing bad checks (where intent to defraud not required)" "do[es] not fall within the definition of moral turpitude" whereas murder does); see also infra notes 30–32 and accompanying text (providing definition of CIMT); infra note 32 (discussing "scienter" requirement of CIMTs).

2. See Jordan v. De George, 341 U.S. 223, 229 n.14 (1951) (describing Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084, and accompanying immigration consequences for convictions for CIMTs).

3. For a list of immigration consequences for a CIMT conviction, see infra notes 20–27 and accompanying text.

The number of noncitizens charged with CIMTs in removal proceedings has been steadily increasing.[4]

For almost a century, adjudicators in the Department of Justice and the federal courts of appeals[5] have used some form of the categorical approach to determine whether a crime is a CIMT. The categorical approach focuses on the *elements* of the criminal conviction, rather than the *acts* underlying the conviction, to determine whether a particular conviction constitutes a CIMT for immigration purposes.[6] The categorical approach considers whether moral turpitude necessarily inheres in the elements of the offense for which the noncitizen was convicted, without considering her actual actions.[7] The categorical approach has evolved to consist of two customary steps: the traditional categorical approach and the modified categorical approach.[8]

In 2008, the Attorney General dramatically changed firmly established CIMT jurisprudence in *Matter of Cristoval Silva-Trevino*.[9] The framework promulgated in *Silva-Trevino* eviscerated the categorical nature of the CIMT inquiry by adding a third step that permits adjudicators to look beyond the elements of a criminal conviction and to consider any facts "necessary or appropriate" to determine whether the acts of the noncitizen involved moral turpitude.[10] Although the Attorney General claimed to be providing a uniform method to remedy the "patchwork of different approaches" across the federal circuits,[11] his approach in *Silva-Trevino* has actually created more discord in CIMT jurisprudence.

Since *Silva-Trevino*, the federal circuit courts have had to decide whether to defer to the Attorney General's approach and change their established CIMT jurisprudence. While the Seventh Circuit has affirmed *Silva-Trevino*, and several other circuits have followed portions of the Attorney General's approach, the Third and Eighth Circuits have ex-

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4. Transactional Records Access Clearinghouse, Syracuse Univ., Individuals Charged with Moral Turpitude in Immigration Court (2008) [hereinafter TRAC, Individuals Charged], available at http://trac.syr.edu/immigration/reports/moral_turp.html (on file with the *Columbia Law Review*).

5. Deciding whether a noncitizen's conviction is for a CIMT occurs initially in administrative removal proceedings conducted by the Department of Justice. The results of these proceedings can be appealed to the federal circuit courts. See infra Part I.A.2 (describing adjudication process for CIMTs).

6. United States ex rel. Mylius v. Uhl, 210 F. 860, 862 (2d Cir. 1914) (describing categorical nature of CIMT inquiry and using categorical approach in 1914); see infra note 64 (describing history of categorical approach).

7. See infra Part I.B (detailing categorical approach for CIMTs).

8. The first step of the categorical approach is called the "traditional categorical approach." The second step is referred to as the "modified categorical approach." The two-step process in its entirety is called the "categorical approach." See infra Part I.B (describing categorical approach).

9. 24 I. & N. Dec. 687 (Op. Att'y Gen. 2008); see also infra Part II.A (detailing background and framework of *Silva-Trevino*).

10. *Silva-Trevino*, 24 I. & N. Dec. at 708.

11. Id. at 688–89.

pressly rejected it as an impermissible reading of the Immigration and Nationality Act (INA) and as poor policy.[12]

This Note addresses the split between the Department of Justice and the federal circuits after the Attorney General's decision in *Silva-Trevino*. It considers the variations in the categorical approach that have developed among the circuits and the Department of Justice and suggests a uniform solution for all adjudicators to adopt. More specifically, Part I analyzes the concept of moral turpitude in immigration law and the variations within the two steps of the categorical approach to determine whether a criminal conviction is for a CIMT. Part II discusses the Attorney General's novel framework in *Silva-Trevino* and examines the responses of the federal circuits. Part III proposes a uniform categorical approach that rejects *Silva-Trevino*'s third step. This solution not only promotes equal application of immigration laws across the United States, but also addresses policy concerns to balance accuracy in immigration proceedings with protections for noncitizens in light of the severity of removal as a consequence for CIMT convictions.

## I. CRIMES INVOLVING MORAL TURPITUDE AND THE CATEGORICAL APPROACH

A conviction for a CIMT results in adverse immigration consequences, including removal, for a noncitizen under the INA. "Moral turpitude"[13] is not defined in the INA; rather, the definition is provided by Department of Justice decisions from the Board of Immigration Appeals (BIA) and the Attorney General. Adjudicators have determined whether a conviction involves moral turpitude using a categorical approach, with some variations among the Department of Justice and the federal circuit courts regarding the first two steps of this approach.

### A. *Crimes Involving Moral Turpitude in Immigration Law*

Moral turpitude is a term that has been used for over one hundred years in the immigration context.[14] Moral turpitude is increasingly used as grounds on which to remove noncitizens from the United States.[15] The term was first used in an 1891 federal immigration statute "direct[ing] the exclusion of 'persons who have been convicted of a felony

12. See infra Part II.B (describing circuit approaches after *Silva-Trevino*).

13. See infra text accompanying note 30 (defining moral turpitude).

14. See Jordan v. De George, 341 U.S. 223, 229 n.14 (1951) (describing Act of Mar. 3, 1891, which "directed the exclusion of 'persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude'" (quoting Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084)). Aside from the immigration context, the concept of moral turpitude is also used for disbarring attorneys, revoking medical licenses, disqualifying and impeaching witnesses, calculating the amount of contribution between joint tortfeasors, and determining whether language is slanderous. Id. at 227.

15. See TRAC, Individuals Charged, supra note 4 (illustrating upward trend from 1996 to 2006 in number of noncitizens charged with CIMTs in immigration courts).

or other infamous crime or misdemeanor involving moral turpitude.'"[16] Congress continued to enact similar language in subsequent immigration legislation.[17] Versions of the INA from 1952 onward also included penalties for turpitudinous conduct.[18]

1. *Moral Turpitude in the Immigration and Nationality Act.* — The current INA imposes severe immigration penalties on a noncitizen, including a lawful permanent resident (LPR), for a CIMT conviction,[19] such as inadmissibility, deportation, and ineligibility for discretionary adjustment of status.[20] A noncitizen may be denied admission[21] into the United States for a conviction for a CIMT, either by being denied a visa or by being denied entry at the border.[22] If an immigrant who has been con-

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16. *Jordan*, 341 U.S. at 229 n.14 (quoting Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084).

17. See id. (describing Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213 and Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898, which reenacted language of Act of Mar. 3, 1891). The 1917 Act also provided consequences for individuals with CIMT convictions. Immigration Act of 1917, ch. 29, 39 Stat. 874, 889 (repealed 1952); see also Brian C. Harms, Redefining "Crimes of Moral Turpitude": A Proposal to Congress, 15 Geo. Immigr. L.J. 259, 260–64 (2001) (tracing history of immigration consequences for CIMTs).

18. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, § 241, 66 Stat. 163, 204 (codified as amended in scattered sections of 8 U.S.C.). See generally Thomas Alexander Aleinikoff et al., Immigration and Citizenship 178–82 (6th ed. 2008) (describing immigration developments at turn of twenty-first century); Lawrence H. Fuchs & Susan S. Forbes, Immigration and U.S. History—The Evolution of the Open Society, *in* U.S. Immigration Policy and the National Interest, Staff Report of the Select Commission on Immigration and Refugee Policy 161, 161–216 (1981) (detailing history of immigration in United States).

19. Although a noncitizen can admit to committing a CIMT or admit to committing acts which constitute a CIMT for inadmissibility purposes, see INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i) (2006), this Note addresses only criminal *convictions* as the basis for a CIMT. A conviction is defined in the INA as:

> [A] formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

For a detailed list of dispositions that do and do not constitute convictions in the immigration context, see Norton Tooby & Jennifer N. Foster, Crimes of Moral Turpitude 7–43 (2002).

20. See Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms, 64 Wash. & Lee L. Rev. 469, 482–83 (2007) (describing various ways "criminal conviction can damage one's immigration status").

21. Admission is defined under the INA as "lawful entry of the alien into the United States after inspection and authorization by an immigration official." INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A).

22. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i). This section provides that "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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime" is inadmissible. Id. For two exceptions to this rule, see section 212(a)(2)(A)(ii) of the INA, 8 U.S.C. § 1182(a)(2)(A)(ii) (providing exceptions for one conviction for a petty offense and for minors).

victed of a CIMT is admitted to the United States without detection of the CIMT conviction, she may nonetheless be removed for inadmissibility at the time of entry.[23] Additionally, a noncitizen who is inadmissible at the time of entry on CIMT grounds will not be eligible for other immigration benefits which require admissibility. For example, a noncitizen may be unable to establish good moral character.[24] As a result, she may be precluded from such immigration benefits as eligibility for voluntary departure, cancellation of removal for nonpermanent residents, and naturalization.[25] Noncitizens who have been admitted to the United States and subsequently commit a CIMT may be deported.[26] Furthermore, nonci-

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23. Exclusion, which is an immigration consequence of inadmissibility, is separate from deportation. Prior to 1996, deportation proceedings were used for any noncitizen who had physically entered the United States. Noncitizens that made an "entry" included not only individuals who had been inspected and admitted at an official port of entry, but also those who had illegally crossed the border into the United States. Exclusion was used only to deny noncitizens admittance into the United States at the border. See Aleinikoff et al., supra note 18, at 508.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) modified the distinction between exclusion and deportation. Pub. L. No. 104-208, div. C., 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.). The application of either inadmissibility grounds or deportation grounds now depends on whether a noncitizen has been admitted into the United States, rather than if she has entered. See supra note 21 (defining "admission"). The most significant functional difference is that after IIRIRA, inadmissibility, rather than deportation, applies to unlawful entrants. Therefore, if a noncitizen avoids detection of a CIMT when being inspected for admission, even though she may physically be in the United States, she is inadmissible instead of deportable because she entered the United States unlawfully. See Catholic Legal Immigr. Network, Inc., Representing Clients in Immigration Court 2–3 (2009) ("[F]oreign nationals who are apprehended inside the United States, and who were not lawfully admitted to the country, are deemed to be applicants for admission subject to the grounds of inadmissibility rather than the grounds of deportability.").

24. INA § 101(f)(3), 8 U.S.C. § 1101(f)(3). Although the INA does not define good moral character, it provides categories of conduct that preclude a noncitizen from demonstrating good moral character. INA § 101(f)(1)–(9), 8 U.S.C. § 1101(f)(1)–(9). Section 101(f)(3) of the INA states that noncitizens described in section 212(a)(2)(A) of the INA, which includes noncitizens convicted of a CIMT, may not demonstrate good moral character. See also Tooby & Foster, supra note 19, at 60 (noting that CIMT precludes finding of good moral character).

25. Tooby & Foster, supra note 19, at 60. For an exhaustive list of preclusion from immigration benefits as a result of being inadmissible on CIMT grounds, see id. at 76–78.

26. INA § 237(a)(2)(A)(i)–(ii), 8 U.S.C. § 1227(a)(2)(A)(i)–(ii). This section provides that

> "[a]ny alien who . . . is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title [INA § 245(j)]) after the date of admission, and . . . is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable."

INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). Also, "[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable." INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).

tizens who are inadmissible or removable due to a CIMT conviction may face mandatory detention while removal proceedings are pending.[27]

Despite its severe ramifications and long history, moral turpitude is not defined in the INA. The legislative history of federal immigration statutes using the term suggests that the precise definition should be formulated by administrative and judicial decisions.[28] The BIA in its case law has distinguished between crimes that are wrong in themselves, malum in se, and crimes that are wrong because of positive government enactment, malum prohibitum. CIMTs fall in the former category of acts that are viewed as morally wrong regardless of statutory prohibition.[29] In addition to the aforementioned distinction between different types of crimes, courts often base their definitions of "CIMT" on the following description of "moral turpitude":

> [An] act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man. . . . [An a]ct or behavior that gravely violates moral sentiment or accepted moral standards of

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The BIA has stated that an adjustment to LPR status by an individual initially admitted as a nonimmigrant constitutes an admission. See Shanu, 23 I. & N. Dec. 754, 756–57 (B.I.A. 2005) ("[W]e conclude that the term 'date of admission' in section 237(a)(2)(A)(i) refers to, among other things, the date on which an alien is lawfully admitted for permanent residence by means of adjustment of status."). Therefore, a noncitizen "may be rendered removable under section 237(a)(2)(A)(i) based on a [CIMT] committed within 5 years after *any* admission to the United States, whether it be the first or any subsequent admission." Id. at 764. But see Aremu v. DHS, 450 F.3d 578, 581 (4th Cir. 2006) (declining to follow BIA's decision in *Shanu*); Abdelqadar v. Gonzales, 413 F.3d 668, 672–74 (7th Cir. 2005) (declining to accept BIA's interpretation that "every new admission resets the clock"); Shivaraman v. Ashcroft, 360 F.3d 1142, 1146 (9th Cir. 2004) ("[W]e conclude that the BIA erred in determining that the five-year period began to run from the date on which [the noncitizen's] status was adjusted to [LPR] rather than from the date on which he lawfully entered the United States . . . ."). An LPR who leaves the United States is not treated as seeking admission, except under exceptional circumstances. INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (listing exceptions).

A noncitizen can avoid removal if she is eligible for cancellation of removal, even if she has been convicted of one or more CIMTs. INA § 240A(a), 8 U.S.C. § 1229b(a); see Tooby & Foster, supra note 19, at 99–101.

27. INA § 236(c)(1), 8 U.S.C. § 1226(c)(1). A noncitizen faces mandatory detention if she is inadmissible by reason of any crime-related ground, deportable for multiple CIMT convictions, or deportable for a conviction for a CIMT where she had been sentenced to imprisonment for at least one year. Id.

28. See Cabral v. INS, 15 F.3d 193, 194–95 (1st Cir. 1994) (analyzing legislative history of federal immigration statutes including Immigration Act of 1917 and concluding despite realizing confusion surrounding term "moral turpitude," Congress left meaning of phrase to courts and administrative agencies); see also Restriction of Immigration: Hearing on H.R. 10384 Before the H. Comm. on Immigration and Naturalization, 64th Cong. 8 (1916) (statement of Rep. Adolph Sabath) ("[A] crime involving moral turpitude has not been defined. No one can really say what is meant by saying a crime involving moral turpitude.").

29. See, e.g., L-V-C, 22 I. & N. Dec. 594, 603 (B.I.A. 1999) (distinguishing CIMTs from other crimes on basis of malum in se and malum prohibitum).

> community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others. . . . The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita.[30]

Case law has defined a CIMT as involving conduct that is "inherently base, vile, or depraved,"[31] and is committed "with some form of scienter."[32]

There is no fixed list of crimes constituting CIMTs; rather the classification of a crime as a CIMT depends on society's changing morals.[33] However, robust case law has developed regarding whether a particular crime is a CIMT.[34] Common law has reached a consensus as to whether most crimes constitute CIMTs: Offenses that have an element of fraud, larceny, or intent to harm persons or property generally involve moral turpitude.[35]

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30. Black's Law Dictionary 1008–09 (6th ed. 1990) (internal citations omitted); see also Harms, supra note 17, at 264 (citing definition of "moral turpitude" from sixth edition of Black's Law Dictionary).

31. Knapik v. Ashcroft, 384 F.3d 84, 89 (3d Cir. 2004); see also Marciano v. INS, 450 F.2d 1022, 1025 (8th Cir. 1971) (describing conduct involving moral turpitude as "'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man'" (quoting Ng Sui Wing v. United States, 46 F.2d 755, 756 (7th Cir. 1931))).

32. Silva-Trevino, 24 I. & N. Dec. 687, 706 (Op. Att'y Gen. 2008); see, e.g., Michel v. INS, 206 F.3d 253, 263 (2d Cir. 2000) (stating "corrupt scienter is the touchstone of moral turpitude"); Abreu-Semino, 12 I. & N. Dec. 775, 777 (B.I.A. 1968) (stating "moral turpitude normally inheres in the intent"). *Silva-Trevino* provides that a crime involves moral turpitude if it encompasses "both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness." 24 I. & N. Dec. at 689 n.1. Scholars contend that this definition of CIMT may be different from that used prior to *Silva-Trevino*. See Nat'l Lawyers Guild, Immigration Law and Crimes, Moral Turpitude—Change in Definition of Moral Turpitude § 6:3 (2010), available at Westlaw IMLC ("In *Matter of Silva-Trevino*, the Attorney General changed the definition of a crime involving moral turpitude . . . .").

33. "Since 'moral turpitude' refers to moral standards, rather than legal standards, its definition necessarily changes over time and from place to place." Harms, supra note 17, at 265; see also United States ex rel. Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947) (stating "moral turpitude" reflects changing moral standards); Skrmetta v. Coykendall, 16 F.2d 783, 784 (N.D. Ga. 1926) (stating moral turpitude is "measured by the general moral standards of the time and country").

34. See 6 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 71.05[1][d][iii] (2009) (listing various crimes that are CIMTs); Tooby & Foster, supra note 19, at 209–353 (same); What Constitutes "Crime Involving Moral Turpitude," 23 A.L.R. Fed. 480 §§ 10–13.5 (2011), available at Westlaw ALRFED (same).

35. See U.S. Dep't of State, Defining "Moral Turpitude," 9 FAM 40.21(a), N2.2 (2010), available at http://www.state.gov/documents/organization/86942.pdf (on file with the *Columbia Law Review*) ("The most common elements involving moral turpitude are: (1) [f]raud; (2) [l]arceny; and (3) [i]ntent to harm persons or things." (emphasis omitted)); see also, e.g., Vuksanovic v. U.S. Att'y Gen., 439 F.3d 1308, 1312 (11th Cir. 2006) (holding second-degree arson under Florida law is CIMT); Goldeshtein v. INS, 8 F.3d 645, 647 (9th Cir. 1993) (stating if crime involves intent to defraud as essential

2. *Adjudication of Crimes Involving Moral Turpitude.* — Removal proceedings, which can be initiated against a noncitizen with certain criminal convictions, are the starting point of the adjudication process for determining whether a crime is one that involves moral turpitude.[36] This determination occurs in administrative courts in the Department of Justice under the Executive Office for Immigration Review (EOIR) before an immigration judge (IJ).[37] An IJ's decision can be appealed to the BIA.[38]

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element, then it necessarily involves moral turpitude); Guerrero de Nodahl v. INS, 407 F.2d 1405, 1406–07 (9th Cir. 1969) (determining that beating child is CIMT); Sanudo, 23 I. & N. Dec. 968, 971–73 (B.I.A. 2006) (contending that simple assaults, including domestic violence, generally are not CIMTs).

CIMTs can be divided into four general categories: (1) crimes against the person; (2) crimes against property; (3) sex crimes and crimes involving family relationships; and (4) crimes against the government or its authority. 6 Gordon, Mailman & Yale-Loehr, supra note 34, § 71.05[1][d][iii]; see Maryellen Fullerton & Noah Kinigstein, Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys, 23 Am. Crim. L. Rev. 425, 433–36 (1986) (describing seven categories of CIMTs). For a comprehensive list of specific crimes that generally do and do not involve moral turpitude, see U.S. Dep't of State, Common Crimes Involving Moral Turpitude, 9 FAM 40.21(a), N2.3, available at http://www.state.gov/documents/organization/86942.pdf (on file with the *Columbia Law Review*).

36. See U.S. Dep't of Justice, Exec. Office for Immigr. Rev., EOIR at a Glance 1–2 (2010) [hereinafter EOIR at a Glance] (on file with the *Columbia Law Review*) (describing removal proceedings in Department of Justice). An IJ inquires into whether a noncitizen falls under a ground of inadmissibility or deportability, including for CIMTs, at a removal proceeding. INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2006). Inquiry into whether a noncitizen has committed a CIMT also occurs when she is seeking admission into the United States. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i). Admission can include not only initially applying to enter the United States, but also certain cases when an LPR returns to the United States, see INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C), and when a noncitizen subject to removal adjusts status to LPR, see INA § 240A(b), 8 U.S.C. § 1229b(b).

Before initially coming to the United States, this determination happens first at a consular interview at a State Department consulate office abroad. Aleinikoff et al., supra note 18, at 650 (describing consular officers' consideration of admissibility when issuing visas). Customs and Border Patrol (CBP), under the Department of Homeland Security, again considers whether the noncitizen is admissible when she arrives at the border of the United States. See id. at 270 (describing role of CBP).

37. The EOIR encompasses both IJs and the BIA. EOIR at a Glance, supra note 36, at 1, 3 (providing organizational information about EOIR). The INA mandates that removal proceedings must take place before an IJ. INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1). For the history and development of the IJ position, see Aleinikoff et al., supra note 18, at 278–81.

38. 8 C.F.R. § 1003.1(b) (2010) (describing appellate jurisdiction of BIA). The creation of the BIA has been by regulations, and not under the INA. 8 C.F.R. § 1003.1(a) and (d), respectively, describe the organization and power of the BIA, including the scope of review of appeals to the BIA. 8 C.F.R. § 1003.1(b) describes appellate review by the BIA. The BIA can designate certain decisions as having precedential value. 8 C.F.R. § 1003.1(g); see also Aleinikoff et al., supra note 18, at 281–84 (describing creation, evolution, and organization of BIA).

The Attorney General has the authority to review cases before the BIA, and may do so under three circumstances: (1) when the Attorney General directs the BIA to refer a case to her, (2) when the Chairman or a majority of the BIA decides that a case should be referred, or (3) when the Secretary of Homeland Security or designated officials request referral to the Attorney General.[39] Decisions issued by the Attorney General have precedential authority within the Department of Homeland Security and for IJs.[40]

A noncitizen can challenge decisions by the BIA to the federal circuit courts, subject to several restrictions:[41] First, judicial review is precluded for most criminal grounds of deportability and many discretionary decisions.[42] Further, even when judicial review is permitted, it is extremely deferential to agency decisions.[43] Despite the limitations on judicial review, it is nevertheless available for constitutional challenges and for questions of law.[44] Because the question whether a criminal statute encompasses a CIMT is a question of law, federal courts may review these cases even though the underlying claim for removal is based on a criminal ground.[45]

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39. 8 C.F.R. § 1003.1(h)(1) (describing referral of cases to Attorney General).

40. 8 C.F.R. § 1003.1(g); see also INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) ("[D]etermination and ruling by the Attorney General with respect to all questions of law shall be controlling.").

41. See INA § 242, 8 U.S.C. § 1252 (regarding judicial review of orders of removal); see also Aleinikoff et al., supra note 18, at 291–93, 1148–57) (describing history of judicial review and current review standards for immigration decisions).

42. INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C). Judicial review is not precluded for deportation under section 237(a)(2)(A)(i) of the INA, 8 U.S.C. § 1227(a)(2)(A)(i) as a result of a single CIMT. Id. However, many discretionary decisions are not subject to judicial review, such as certain waivers of inadmissibility and deportability grounds, relief from removal, discretionary adjustment to LPR status, and decisions listed under the INA to be made in the discretion of the Attorney General, except grants of asylum. See INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (providing references to nonreviewable discretionary actions).

43. INA § 242(b)(4), 8 U.S.C. § 1252(b)(4) (describing scope and standard for review by federal circuit courts). When IIRIRA consolidated deportation and exclusion into removal proceedings, see supra note 23, it also curbed judicial review. See Aleinikoff et al., supra note 18, at 292 (describing changes in judicial review under IIRIRA, which "established or strengthened deferential review standards"). Under IIRIRA's deferential standards, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B). For exclusion decisions, "a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law." INA § 242(b)(4)(C), 8 U.S.C. § 1252(b)(4)(C).

44. INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D). This provision, introduced into the INA by the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (codified as amended in scattered sections of 8 and 49 U.S.C.), retains judicial review for questions of law and constitutional claims even for factual and discretionary decisions under the INA. For a discussion of what constitutes a question of law in the immigration context, see Chen v. U.S. Dep't of Justice, 471 F.3d 315, 324–30 (2d Cir. 2006).

45. See, e.g., United States v. Chu Kong Yin, 935 F.2d 990, 1003 (9th Cir. 1991) ("[W]e have frequently determined in reviewing deportation proceedings that the

Even though federal courts may review CIMT cases, *Chevron* deference requires that courts of appeals defer to agency determinations of what conduct encompasses moral turpitude,[46] which has resulted in the

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question whether a conviction under a statute constitutes a conviction of a crime involving moral turpitude is a question of law.").

46. Because the INA is ambiguous regarding the question of what behavior constitutes a CIMT, *Chevron* deference compels courts to respect the Department of Justice's construction of the statute. See, e.g., Franklin v. INS, 72 F.3d 571, 572–73 (8th Cir. 1995) (applying *Chevron* deference in CIMT context). *Chevron* outlines a two-step process for reviewing an agency's construction of a statute:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (footnotes omitted). *National Cable & Telecommunications Ass'n v. Brand X Internet Services* states that "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." 545 U.S. 967, 980 (2005); see also United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (noting that "administrative implementation of a . . . provision qualifies for *Chevron* deference when . . . Congress delegated authority to the agency," such as through "an agency's power to engage in adjudication or . . . rulemaking," and "the agency interpretation claiming deference was promulgated in the exercise of that authority").

Thus, in the immigration context, federal courts must defer to the Attorney General's and BIA's permissible interpretations of the INA. See INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) (holding "the [lower] court should have applied the principles of deference described in *Chevron*" when examining serious nonpolitical crime exception to withholding of removal); Jean-Louis v. Att'y Gen., 582 F.3d 462, 469 (3d Cir. 2009) ("We normally defer to the agency as to what conduct constitutes a CIMT."); Bolvito v. Mukasey, 527 F.3d 428, 435 (5th Cir. 2008) ("We defer to the BIA's interpretation of immigration regulations if the interpretation is reasonable."); Ali v. Mukasey, 521 F.3d 737, 739 (7th Cir. 2008) (stating because Department of Justice is "both required and entitled to flesh out [CIMT's] meaning . . . and as the [Department of Justice] has done this through formal adjudication the agency is entitled to the respect afforded by the *Chevron* doctrine"); see also John W. Guendelsberger, Judicial Deference to Agency Decisions in Removal Proceedings in Light of *INS v. Ventura*, 18 Geo. Immigr. L.J. 605, 617–26 (2008) (describing *Chevron* deference to agency determinations for statutory interpretation of INA).

*Brand X* also states that a court's interpretation of a statute before the agency has spoken to a particular issue should be reconsidered once the agency issues an interpretation. 545 U.S. at 982–83. The federal court's prior judicial construction will override the agency's construction only if the court's decision holds that the statute is unambiguous, and thus deference to the agency is not necessary. Id.; see infra text accompanying note 112 (discussing Attorney General's use of *Brand X* in *Silva-Trevino* to justify new administrative framework for CIMTs). For a practical discussion on how the BIA is using *Brand X* to argue that circuit court decisions should be reconsidered in light of new precedential BIA decisions, see Jeff Joseph, Mary Holper & Gerald Seipp, The

"insulat[ion of] the BIA's interpretation of the [INA]" and, in particular, the insulation of its definition of CIMT.[47] However, it is important to note that although federal courts must defer to the Department of Justice's interpretation of what crimes involve moral turpitude, they do not defer to the agency's reading of a particular criminal statute.[48] Thus, the courts of appeals defer to the agency's determination of what conduct constitutes moral turpitude, but review de novo the agency's interpretation of the criminal statute at issue to ascertain whether the elements of the statute meet that standard.[49] This "approach provides both consistency—concerning the meaning of moral turpitude—and a proper regard for the BIA's administrative role—interpretation of federal immigration laws, not state and federal criminal statutes."[50]

The INA provides neither a definition for CIMTs, nor a method to determine whether a particular conviction involves moral turpitude.[51] Although immigration adjudicators have been using some form of the categorical approach for CIMTs, the lack of guidance in the INA, coupled with the fact that the Department of Justice had not provided an authoritative methodology for the categorical approach prior to *Silva-Trevino*, caused discord to develop across the circuits regarding the different steps of the inquiry.[52] The BIA "typically employ[ed] the [law] endorsed by the circuit in which a case ar[ose]" because "the Department [had] not adopted a preferred methodology for conducting [the] categorical inquiry."[53] Now that the Attorney General has promulgated a new

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Importance of Finding the "Right" Circuit for Your Immigration Case, Immigr. Briefings, Apr. 2009, at 1, 3.

47. Harms, supra note 17, at 270.

48. Federal courts do not defer to the agency's interpretation of criminal statutes because the agency holds no particular expertise in interpreting such criminal statutes. See, e.g., *Jean-Louis*, 582 F.3d at 466 ("Although we defer to the agency's determination of whether an offense constitutes a CIMT, we accord no deference to its construction of a state criminal statute, as to which it has no particular expertise."); Knapik v. Ashcroft, 384 F.3d 84, 87–88 (3d Cir. 2004) ("[I]n determining what the elements are of a particular criminal statute deemed to implicate moral turpitude, we do not defer to the BIA.").

49. See, e.g., Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006) ("[W]e review de novo whether the elements of the state or federal [offense at issue] fit the BIA's definition of a [CIMT]." (quoting Smalley v. Ashcroft, 354 F.3d 332, 335–36 (5th Cir. 2003))).

50. Id. (citation omitted).

51. Silva-Trevino, 24 I. & N. Dec. 687, 693 (Op. Att'y Gen. 2008) (stating INA is "silent on the precise method that immigration judges and courts should use to determine if a prior conviction is for a [CIMT]").

52. Id. at 695–96 ("Although to date the Department generally has deferred to the relevant circuit court in deciding which approach to use in a given case, providing a consistent, authoritative, nationwide method for interpreting and applying ambiguous provisions of the immigration laws, such as [for CIMTs], is one of the Department's key duties.").

53. Id. at 688, 693; see also Anselmo, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) ("Where we [the BIA] disagree with a court's position on a given issue, we decline to follow it outside the court's circuit. But, we have historically followed a court's precedent in cases arising in that circuit.").

framework for the categorical approach in *Silva-Trevino*, the circuit courts must decide whether to afford it deference.[54]

### B. *The Categorical Approach*

Whether a particular crime involves moral turpitude is determined not by the name of the crime in the statute, but rather by the elements of the crime as defined in the statute.[55] To determine whether a particular crime is a CIMT, adjudicators have historically employed some form of the categorical approach, focusing mainly on the "inherent nature" of the conviction, rather than the particular circumstances of the noncitizen's actions.[56] The categorical approach involves two steps.[57] The first step, called the traditional categorical approach,[58] considers the criminal statute of conviction to see if moral turpitude necessarily inheres in the elements. If the state criminal statute is ambiguous as to whether all convictions under it involve moral turpitude using the first step, courts proceed to the second step, termed the modified categorical approach.[59] At this second stage in the categorical approach, adjudicators are permitted to consider the noncitizen's record of conviction to see if it sheds light on the moral turpitude inquiry.[60] The Supreme Court, the federal circuit

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54. See Ali v. Mukasey, 521 F.3d 737, 742–43 (7th Cir. 2008) ("[Prior decisions] require reexamination [if the Department of Justice] has fully developed its own position, for administrative discretion belongs to the agency rather than to the court." (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005))); infra notes 111–112 and accompanying text (describing Attorney General's rationale for giving *Silva-Trevino* deference). But see infra notes 173–175 and accompanying text (providing Third Circuit's rationale for not deferring to *Silva-Trevino* approach).

55. See Taylor v. United States, 495 U.S. 575, 590–93 (1990) (stating states' labels for "burglary" do not control in federal sentencing enhancement context); United States ex rel. Valenti v. Karmuth, 1 F. Supp. 370, 375–76 (N.D.N.Y. 1932) ("[T]he question of moral turpitude is not determined by the name of the crime, but by the nature of the crime as defined in the statute and alleged in the indictment."); see also Sharpless, supra note 56, at 993 ("[W]hen determining whether a particular crime falls within a ground of deportation or inadmissibility[,] . . . [s]tate definitions and labels do not control.").

56. See R—, 6 I. & N. Dec. 444, 447–48 (B.I.A. 1954) ("The test requires us . . ., without regard to the act committed by the alien, to decide whether that law inherently involves moral turpitude . . . ."). In 1994, the BIA first used the term "categorical approach" in Alcantar, 20 I. & N. Dec. 801, 809 (B.I.A. 1994). See Rebecca Sharpless, Toward a True Elements Test: *Taylor* and the Categorical Analysis of Crimes in Immigration Law, 62 U. Miami L. Rev. 979, 1000 n.70 (2008) ("The first use of the term 'categorical approach' by the BIA appears to be in *Matter of Alcantar*." (citation omitted)).

57. But see *Silva-Trevino*, 24 I. & N. Dec. at 699 (creating novel third step for categorical approach for CIMTs); infra notes 118–119 and accompanying text (describing *Silva-Trevino*'s third step).

58. "Traditional categorical approach" is a term of art in the CIMT context that refers to the first step of the categorical approach.

59. "Modified categorical approach" is a term of art in the CIMT context that refers to the second step of the categorical approach.

60. See *Taylor*, 495 U.S. at 602 (permitting use of record of conviction for modified categorical approach). A criminal statute can be ambiguous when, for example, it is "divisible" and some convictions under the statute involve moral turpitude whereas others

courts, and the BIA all apply some variation of the categorical approach to determine whether a crime involves moral turpitude.[61]

The courts and the BIA have advanced efficiency and consistency rationales for using the two-step categorical approach. The categorical approach was developed as a federal standard to ensure that state law determinations of crimes did not control in the immigration context.[62] The BIA stated:

> The rule set forth exists because a standard must be supplied to administrative agencies; it eliminates the burden of going into the evidence in a case; it eliminates the situation where a nonjudicial agency retries a judicial matter; and it 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.[63]

1. *The First Step: The Traditional Categorical Approach.* — The first step in the analysis, referred to as the traditional categorical approach, considers whether the offenses defined under the criminal statute in question "necessarily" involve moral turpitude by considering the elements of conviction.[64] That is, if every conviction under the criminal statute involves

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do not. See Sharpless, supra note 56, at 997–99 (providing definition and various examples of "divisible" statutes); infra note 77 (discussing second step of categorical approach for divisible statutes).

61. *Silva-Trevino*, 24 I. & N. Dec. at 688; Brief for Am. Immigr. Lawyers Ass'n et al. as Amici Curiae in Support of Reconsideration at 13–15, Silva-Trevino, 24 I. & N. Dec. 687 (No. A013 014 303) (listing cases from Supreme Court, each circuit, and BIA to demonstrate that all follow some version or combination of traditional categorical approach and modified categorical approach for immigration cases).

Although all of the federal circuits follow the traditional categorical and modified categorical approaches in the immigration context, the Fourth and Tenth Circuits have not explicitly adopted this method for analyzing CIMTs. See id. at 14–15 (listing circuits that have applied traditional categorical approach and modified categorical approach for determining whether conviction is for CIMT: First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh).

62. See Nehme v. INS, 252 F.3d 415, 429 (5th Cir. 2001) ("To avoid leaving the requirements for citizenship to state control, the court devised a federal standard to determine whether the petitioner had committed acts constituting a crime of moral turpitude.").

63. R—, 6 I. & N. Dec. 444, 448 n.2 (B.I.A. 1954) (citation omitted).

64. This traditional categorical approach was established in *Taylor*, 495 U.S. at 600–02. Although *Taylor* dealt primarily with the sentencing enhancement for violent felonies, the Supreme Court explicitly imported the categorical approach into the immigration context in Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185–87 (2007), to determine whether a conviction was a theft offense and thus an aggravated felony. The categorical approach is now also used for crimes of violence and CIMTs in the immigration arena. See, e.g., United States v. Diaz-Ibarra, 522 F.3d 343, 348 (4th Cir. 2008) (using *Taylor*'s categorical approach to determine if conviction is for crime of violence); Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1067 (9th Cir. 2007) (using *Taylor* framework to determine if conviction involved moral turpitude); see also Sharpless, supra note 56, at 1008 n.124 (describing application of *Taylor*'s categorical approach in CIMT context).

turpitudinous conduct, then a noncitizen's conviction would necessarily involve moral turpitude, and would thus be for a CIMT.[65] Therefore, if convictions under the statute only encompass acts that involve moral turpitude, then a convicted noncitizen would face immigration penalties under the moral turpitude provisions of the INA.

The majority of the circuits use one of two tests for the first step of the categorical approach to determine if a criminal statute necessarily involves moral turpitude: the least culpable conduct test or the realistic probability test.[66] The tests differ in how they analyze the criminal statute of conviction. The least culpable conduct test considers whether moral turpitude would inhere in the minimum conduct sufficient to satisfy the elements of the offense. The realistic probability test, on the other hand, considers if moral turpitude inheres in those acts that would realistically be prosecuted under the statute.

The Second, Third, and Fifth Circuits use the least culpable conduct test for the first step in the categorical approach. The Eleventh Circuit may also use this approach.[67] Under this test, the criminal statute is read

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Even before *Taylor* used the term categorical approach, the federal courts had been using a comparable approach to determine whether a conviction was one that involved moral turpitude. United States ex rel. Mylius v. Uhl, 210 F. 860, 862 (2d Cir. 1914) (framing question for determining if crime involved moral turpitude by asking if it "necessarily involve[s] moral turpitude").

65. But see infra text accompanying notes 66–76 (describing two main variations in first step of categorical approach: one variation looks at all possible convictions under criminal statute, whereas other considers only conduct that has actually been prosecuted using criminal statute).

66. A third variation that is less frequently used is the ordinary or common case approach adopted from James v. United States, 550 U.S. 192, 208 (2007). This approach, developed in the "violent felony" context for the Armed Career Criminal Act, focuses on the "the conduct encompassed by the elements of the offense, in the ordinary case." Id. *James* states that although one can imagine a hypothetical situation at the margins where a typically violent crime may not present a real risk or injury, it does not mean that the offense is not categorically violent. Id. As an example, *James* cites an attempted murder where the gun in fact had no bullets, unbeknownst to the person wielding it. This particular circumstance is still attempted murder, even though it does not present a genuine risk of injury. Id. Even though it can encompass a situation with no risk of injury, under the *James* common case approach, attempted murder is categorically violent, because it, "by its nature, presents a serious potential risk of injury to another." Id. at 208–09.

Although *James* involves determining which crimes constitute crimes of violence, it seems like the Sixth Circuit has borrowed this approach for CIMTs. Although the Sixth Circuit cites the realistic probability test by name, its description of the test seems to more closely resemble *James*'s common case approach. See Serrato-Soto v. Holder, 570 F.3d 686, 690 (6th Cir. 2009) (holding that noncitizen "was convicted of a crime that, *in the ordinary case*, involves dishonesty as an essential element" (emphasis added)).

67. Some circuits refer to this test as the minimum conduct approach. Although the circuits use different names, the approaches are essentially the same. See, e.g., Mendez v. Mukasey, 547 F.3d 345, 348 (2d Cir. 2008) ("Under the categorical approach, we look only to the minimum criminal conduct necessary to satisfy the essential elements of the crime, not the particular circumstances of the defendant's conduct."); Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006) ("Under the categorical approach, we read the statute at

"at its minimum, taking into account 'the minimum criminal conduct necessary to sustain a conviction under the statute.'"[68] Every situation that could violate the criminal statute of conviction must involve moral turpitude for the statute to categorically involve moral turpitude. If the least culpable conduct that can sustain a conviction under the criminal statute does not necessarily involve moral turpitude, then the statute does not categorically involve moral turpitude.[69] If the least culpable conduct does involve moral turpitude, then the conviction in question, and any conviction under the statute, is for a CIMT. "[P]roof of actual application of the statute of conviction to the [minimum criminal] conduct asserted is unnecessary;" a purely hypothetical fact pattern that could sustain a conviction under the statute is sufficient.[70] Inquiry into the actual conduct of the noncitizen is not permitted.[71]

A different version of the first step of the categorical approach uses the "realistic probability" test, established by the Supreme Court in *Gonzales v. Duenas-Alvarez* in the context of aggravated felonies.[72] Under the realistic probability test, adjudicators consider whether there is a "realistic probability," not just a hypothetical possibility, that the criminal statute in question could be applied to conduct that does not involve

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its minimum, taking into account 'the minimum criminal conduct necessary to sustain a conviction under the statute.' An offense is a crime involving moral turpitude if the minimum reading of the statute necessarily reaches only offenses involving moral turpitude." (quoting Hamdan v. INS, 98 F.3d 183, 189 (5th Cir. 1996))); Partyka v. Att'y Gen., 417 F.3d 408, 411 (3d Cir. 2005) ("Under this categorical approach, we read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute."). The Eleventh Circuit has conflicting precedent, but may use the least culpable conduct test. See Keungne v. U.S. Att'y Gen., 561 F.3d 1281, 1284 n.3 (11th Cir. 2009) ("In the [first step of the] categorical approach, we analyze whether the least culpable conduct necessary to sustain a conviction under the statute meets the standard of a crime involving moral turpitude."). But see infra notes 146–147 and accompanying text (describing inconsistency in Eleventh Circuit's first step of the categorical approach); infra note 179 (same).

This Note will refer to the test as the "least culpable conduct" test.

68. *Amouzadeh*, 467 F.3d at 455 (quoting *Hamdan*, 98 F.3d at 189).

69. For an illustration of the least culpable conduct test applied to a criminal statute, see infra note 108 and accompanying text (detailing BIA's application of least culpable conduct test to Texas criminal statute).

70. Jean-Louis v. Att'y Gen., 582 F.3d 462, 471 (3d Cir. 2009).

71. See, e.g., *Partyka*, 417 F.3d at 411 ("Whether an alien's crime involves moral turpitude is determined by the criminal statute and the record of conviction, not the alien's conduct.").

72. 549 U.S. 183, 193 (2007). Several circuits, as well as the Attorney General, have adopted the realistic probability test from *Duenas-Alvarez* for CIMTs. See infra note 114 and accompanying text (describing Attorney General's adoption of realistic probability test in *Silva-Trevino*); see also infra Part II.B.1.a (listing circuits that follow realistic probability test for first step of categorical approach). However, some circuits have not imported this test into the CIMT context. See supra note 67 and accompanying text (listing circuits that use least culpable conduct test for CIMTs); see also infra text accompanying notes 169–172 (describing Third Circuit's rationale for rejecting realistic probability test in favor of least culpable conduct test).

moral turpitude.[73] Adjudicators focus on the actual scope of the statute of conviction by asking whether any actual case exists where the criminal statute was applied to conduct that was not turpitudinous. A noncitizen must provide evidence of an actual case where the statute in question was used to prosecute conduct not involving moral turpitude.[74] Acceptable forms of evidence are published decisions, unpublished decisions, and plea transcripts, including those from a noncitizen's own criminal case.[75]

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73. Silva-Trevino, 24 I. & N. Dec. 687, 689–90 (Op. Att'y Gen. 2008) ("[I]n evaluating whether an alien's prior offense is one that categorically involves moral turpitude, immigration judges must determine whether there is a realistic probability, not a theoretical possibility, that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude." (internal quotation omitted)).

74. Id. In practice, there are slightly different versions of the realistic probability test. Compare United States v. Grisel, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), with United States v. Ramos-Sanchez, 483 F.3d 400, 402–04 (5th Cir. 2007). The Ninth Circuit's view is that the realistic probability test does not apply to offenses that are described by the plain language of a criminal statute. *Grisel*, 488 F.3d at 850 (holding parties are not required to show realistic probability of prosecution when "a state statute explicitly defines a crime more broadly than the generic definition"). In other words, "where divisibility is due to express statutory language, courts presume that the state will prosecute all of the multiple offenses contained in the statute." Sharpless, supra note 56, at 1005 n.109. On the other hand, when the elements of a criminal statute are more ambiguous and can be satisfied by a range of conduct, the realistic probability test plays a role in determining if some of those actions would actually be prosecuted under the statute. Although *Grisel* arose in the Armed Career Criminal Act "violent felony" context, the realistic probability test it articulates is the *Duenas-Alvarez* test, which is also used for CIMTs. *Grisel*, 488 F.3d at 850 ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' . . . is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." (citing *Duenas-Alvarez*, 549 U.S. at 193)).

Although not used for CIMTs, the Fifth Circuit's realistic probability test for ascertaining whether a conviction is for a crime of violence for sentencing enhancement purposes requires actual evidence of realistic probability, regardless of the wording of the statute. See *Ramos-Sanchez*, 483 F.3d at 404. In *Ramos-Sanchez*, the Fifth Circuit held that a noncitizen must prove that statutory rape involving consensual sex had actually been prosecuted under the statute to satisfy the realistic probability test. Id.

75. Nat'l Lawyers Guild, supra note 32, § 6:3. However, because *Duenas-Alvarez* does not explicitly state which documents may be used as evidence, the realistic probability test presents some ambiguity. See Nicanor-Romero v. Mukasey, 523 F.3d 992, 1005 (9th Cir. 2008), overruled on other grounds by Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009) ("[T]he [*Duenas-Alvarez*] opinion fails to specify what type of evidence may be used to satisfy the 'realistic probability' requirement."). For a discussion of the ambiguity regarding who bears the burden of "demonstrating a 'realistic probability' that conduct reached by a statute falls within the scope of a" CIMT under the test created by *Duenas-Alvarez*, see id. at 1004–05.

If a noncitizen uses her own case to demonstrate that the criminal statute has been applied to conduct that does not involve moral turpitude, the court must determine whether her actions involved moral turpitude, arguably going beyond a categorical approach. Although the categorical approach generally forbids inquiry into the facts underlying a conviction, the realistic probability test would permit such an inquiry under these circumstances.

If the criminal statute, in practice, has not been applied to nonturpitudinous conduct, the adjudicator's inquiry ends with a determination that all convictions under the statute are for CIMTs, and that the noncitizen's conviction is thus for a CIMT.[76]

2. *The Second Step: The Modified Categorical Approach.* — If the first step of the categorical approach is unable to elucidate whether the criminal statute at issue involves moral turpitude, the adjudicator moves to the second step—the modified categorical approach.[77]

Under the modified categorical approach, adjudicators are authorized to consult the noncitizen's record of conviction to determine, at a minimum, under which portion of the statute she was convicted to ascertain whether convictions under that portion necessarily involve moral turpitude.[78] The record of conviction consists of, inter alia, the charging

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76. *Silva-Trevino*, 24 I. & N. Dec. at 697 ("If the statute has not been . . . applied in any case (including the alien's own case) [to conduct that does not involve moral turpitude], the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.").

77. The posture for reaching the modified categorical approach will be different depending on which test the adjudicator uses for the traditional categorical approach. Rather than viewing it as a second step, some courts—generally those that use the least culpable conduct test for the first step of the categorical approach—have referred to the second step as "[a]n exception to [the categorical approach] . . . if the statute is divisible into discrete subsections of acts that are and those that are not CIMTs." Hamdan v. INS, 98 F.3d 183, 187 (5th Cir. 1996); see also Jean-Louis v. Att'y Gen., 582 F.3d 462, 466 (3d Cir. 2009) ("Where a statute of conviction contains disjunctive elements, some of which are sufficient for conviction of the . . . offense and others of which are not, we have departed from a strict categorical approach."); Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006) ("If the statute is divisible, 'we look at the alien's record of conviction to determine whether he has been convicted of a subsection that qualifies as a [CIMT].'" (quoting Smalley v. Ashcroft, 354 F.3d 332, 336 (5th Cir. 2003))).

For courts that use the realistic probability test, however, the modified categorical approach is treated more like a second step in the CIMT inquiry, and is used when the first step, the traditional categorical approach, is inconclusive. See *Silva-Trevino*, 24 I. & N. Dec. at 708 (treating modified categorical approach as second step in CIMT inquiry).

The modified categorical approach is used when crimes that both do and do not involve moral turpitude can realistically be prosecuted under the criminal statute as a result of broad statutory language. Additionally, like with adjudicators who use the least culpable conduct test, those using the realistic probability test will proceed to the modified categorical approach when a statute is divisible.

78. See, e.g., Kellermann v. Holder, 592 F.3d 700, 703 (6th Cir. 2010) ("[W]e must first examine the statute itself to determine whether the inherent nature of the crime involves moral turpitude. If the statute defines a crime in which moral turpitude necessarily inheres, then the conviction is for a [CIMT] . . . and our analysis ends. However, if the statute contains some offenses which involve moral turpitude and others which do not, it is . . . a 'divisible' statute, and we look to the record of conviction . . . ." (quoting Ajami, 22 I. & N. Dec. 949, 950 (B.I.A. 1999)) (citations omitted)).

A divisible statute is one that has multiple sections or uses disjunctive language to define multiple offenses. The sections or language can be separated and each be made into stand-alone statutes with its own elements. See T—, 2 I. & N. Dec. 22, 23 (B.I.A. 1944) ("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.");

document, a written plea agreement, a verdict or judgment of conviction, a record of the sentence, a plea colloquy transcript, and any explicit factual finding by a trial judge or a jury.[79] Adjudicators are not permitted, however, to consider facts underlying the noncitizen's conviction that are extrinsic to the record of conviction.[80] If the record of conviction demonstrates that the particular offense for which the noncitizen was convicted involves moral turpitude, then the noncitizen's conviction is for a CIMT.[81] If the record of conviction is ambiguous, however, the categorical inquiry ends, and an adjudicator cannot conclude that the noncitizen was convicted of a CIMT.

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Sharpless, supra note 56, at 996 ("A divisible statute is one that can be broken down and rewritten into multiple statutes, each with its own set of elements."). For an illustration of the modified categorical approach, both using an abstract example and an example involving driving with a suspended license, see id. at 997–98. A statute does not need to be formally divided into subsections; "[r]ather, the key is whether the provision is disjunctive in a relevant sense" in that a statute may be broad enough to encompass conduct that does and does not involve moral turpitude. Garcia v. Att'y Gen., 462 F.3d 287, 293 n.9 (3d Cir. 2006). Although *Garcia* dealt with aggravated felonies, *Jean-Louis* affirmed that this approach is also applicable in the CIMT context. See *Jean-Louis*, 582 F.3d at 466 (applying modified categorical approach from *Garcia* "when clear sectional divisions do not delineate the statutory variations").

If a statute is divisible, it may be difficult to ascertain what would be the least culpable conduct punishable under it. An adjudicator would thus need additional information regarding the noncitizen's conviction to determine under which subsection of the statute she was convicted in order to ascertain whether a conviction under that portion of the statute necessarily involves moral turpitude. In such an instance, the court would proceed to the modified categorical approach to determine under which subsection the noncitizen was convicted.

Some courts, however, allow the factfinder to consider the record of conviction for purposes other than simply ascertaining under which portion of the statute the noncitizen was convicted. See infra notes 86–90 and accompanying text (describing broader inquiry permitted by BIA, First Circuit, and Seventh Circuit).

79. Shepard v. United States, 544 U.S. 13, 26 (2005) (permitting use of not only "charging document" but also "terms of a plea agreement," "transcript of colloquy between judge and defendant," or "some comparable judicial record" regarding "factual basis for the plea" in nonjury cases); Taylor v. United States, 495 U.S. 575, 602 (1990) (permitting use of, for example, "the indictment or information and jury instructions"); see also Wala v. Mukasey, 511 F.3d 102, 108 (2d Cir. 2007) ("The record of conviction includes, inter alia, the charging document, a plea agreement, a verdict or judgment of conviction, a record of the sentence, or a plea colloquy transcript." (internal quotation omitted)).

80. See Sweetser, 22 I. & N. Dec. 709, 714 (B.I.A. 1999) ("Where a statute under which an alien was convicted is divisible, we look to the record of conviction . . . . This approach does not involve an inquiry into facts previously presented and tried. Instead the focus is on the elements required to sustain the conviction."). Although *Sweetser* is an aggravated felony case, the fact that the modified categorical approach is limited to the record of conviction is the same for CIMT cases. See *Jean-Louis*, 582 F.3d at 472 ("[W]e review[ ] only the record of the conviction to ascertain the particular variation of the statute under which the defendant was convicted.").

81. See, e.g., *Kellerman*, 592 F.3d at 704 (stating under modified categorical approach, "the court conducts a limited examination of documents in the record [of conviction] to determine whether the particular offense for which the alien was convicted constitutes a CIMT").

In practice, there are two versions of the second step used by the BIA and the federal circuits that differ in the scope of their consideration of the record of conviction. The majority approach uses the record of conviction only for a narrow purpose: to ascertain under what portion of the statute the noncitizen was convicted, in order to determine if those elements necessarily involve moral turpitude.[82] The most basic example is a divisible statute, where an adjudicator consults the record of conviction to determine under which subsection the noncitizen was convicted. Another example is in the burglary context where not all of the acts encompassed by a burglary statute necessarily involve moral turpitude, with the inquiry often turning on the underlying crime the noncitizen intended to commit upon entry.[83] In such a situation, the factfinder may be permitted to proceed to the second step to determine whether the noncitizen pleaded guilty to or the factfinder found elements constituting a CIMT for the crime she intended to commit after entering.[84]

The First and Seventh Circuits, and occasionally the BIA in practice,[85] permit broader use of the record of conviction because the elements of a CIMT may not necessarily be elements for conviction under

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82. See, e.g., Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1169 (9th Cir. 2006) (articulating that record of conviction should be used to see if noncitizen "'pled guilty to elements that constitute a [CIMT]'" (quoting Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1020 (9th Cir. 2005))); Vargas v. Dep't of Homeland Sec., 451 F.3d 1105, 1109 (10th Cir. 2006) (describing *Taylor*'s modified categorical approach as inquiry into whether jury had to find elements of underlying offense that would constitute CIMT); see also Sharpless, supra note 56, at 1006–08 (describing courts' application of narrow categorical approach).

83. Under Washington law, for example, a person can be found guilty of burglary if he "enters or remains unlawfully in a dwelling" with an "intent to commit a crime." *Cuevas-Gaspar*, 430 F.3d at 1019 (quoting Wash. Rev. Code § 9A.52.025(1) (2009)). The *Cuevas-Gaspar* court stated that the act of entering is not itself "base, vile or depraved," but that the particular crime that the noncitizen intends to commit after entering is what determines whether the burglary offense involves moral turpitude. Id. (quoting M., 2 I. & N. Dec. 721, 723 (B.I.A. 1946)). When considering whether a burglary is a CIMT, the court provided the following example to show that not all of the actions encompassed by the burglary statute would necessarily involve moral turpitude:

> [A] group of boys opening the unlocked door of an abandoned barn with the intention of playing cards in violation of one of the many New York wagering laws, could all be convicted of third degree burglary. Yet, we do not think that such persons should be deemed to be base, vile or depraved.

Id. (quoting *M.*, 2 I. & N. Dec. at 723).

84. *Cuevas-Gaspar*, 430 F.3d at 1020–21 (stating under modified categorical approach, court must "determine whether the record of conviction shows that [the noncitizen] pled guilty to elements that constitute a [CIMT]"). The noncitizen admitted in his signed plea statement that "[he] helped another person take property without permission from a residence where no one was home." Id. at 1020. Using the guilty plea, the court concluded that his conviction was a CIMT using the modified categorical approach. Id. at 1020–21.

85. The BIA generally applies the law of the circuit in which the case arises. See supra notes 52–53 and accompanying text.

the criminal statute.[86] The First and Seventh Circuits have stated that the *Taylor v. United States*[87] categorical framework, originally designed for the criminal sentencing context,[88] need not be transplanted exactly into the civil removal context.[89] Consequently, the government need not demonstrate that "the jury in the prior criminal case necessarily found (or, where a guilty plea has taken place, that the defendant necessarily admitted) every element of an offense" that triggers removal; it is sufficient that these facts, demonstrating that the conviction involved moral turpitude, are in the record of conviction.[90]

## II. *MATTER OF SILVA-TREVINO* AND DISCORD ACROSS THE CIRCUITS

The Attorney General proposed a new approach for determining whether a conviction is one that involves moral turpitude in *Matter of Silva-Trevino*.[91] He explicitly adopted the realistic probability test for the first step of the categorical approach and added a third step that permits factfinders to consider evidence extrinsic to the record of conviction, changing the customary two-step categorical approach.[92] Since *Silva-Trevino*, circuits have remained split over the use of the realistic probability test or the least culpable conduct test for the first step of the

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86. For example, many burglary statutes do not require a finding that there has been a permanent taking to sustain a conviction. In Grazley, 14 I. & N. Dec. 330 (B.I.A. 1973), the statute of conviction criminalized both temporary and permanent takings. However, in order for burglary to be a CIMT, the taking must be permanent. Id. at 333. Even though the charged offense was not explicitly a permanent taking, the BIA, using the modified categorical approach, inferred that the taking was permanent because the stolen property was cash. Id. The BIA thus strayed from using the record of conviction solely for the purpose of determining the prior crime committed; instead, it used the record to assess the underlying conduct even though it was not a necessary element in the criminal conviction. See Sharpless, supra note 56, at 1009 (providing examples in which "[t]he BIA has strayed from the majority, elements approach when analyzing whether particular theft offenses constitute crimes involving moral turpitude").

87. 495 U.S. 575 (1990).

88. See supra note 64 (describing *Taylor*'s development of categorical approach in federal sentencing context).

89. Ali v. Mukasey, 521 F.3d 737, 741 (7th Cir. 2008) (holding protections from *Taylor* and *Shepard*, which are sentencing enhancement cases, that "prevent[ ] the sentencing judge . . . from assuming a role that the Constitution assigns to the jurors" are not present in immigration proceedings because they "are not criminal prosecutions"); Conteh v. Gonzales, 461 F.3d 45, 55–56 (1st Cir. 2006) ("[W]e . . . see no warrant for applying an exact replica of the *Taylor-Shepard* categorical approach in the immigration context."); see also Fong Yue Ting v. United States, 149 U.S. 698, 729–30 (1893) (holding constitutional protections afforded criminal defendants are not applicable to noncitizens in deportation proceedings because deportation is not itself punishment for a crime). Although *Conteh* is an aggravated felony case, its reasoning that a removal proceeding is not a criminal proceeding carries over for removal based on a conviction for a CIMT.

90. *Conteh*, 461 F.3d at 55.

91. 24 I. & N. Dec. 687 (Op. Att'y Gen. 2008).

92. Id. at 688–90.

categorical approach.[93] At present, only the Seventh Circuit uses the third step of *Silva-Trevino*.[94] Both the Third[95] and Eighth Circuits[96] have refused to apply the *Silva-Trevino* approach in its entirety.

### A. *The Attorney General's New Framework in* Silva-Trevino

*Silva-Trevino* dramatically changed the analysis to determine whether a criminal conviction is for a CIMT for the purpose of removal decisions. The Attorney General announced a novel three-step framework in *Silva-Trevino* for making this determination in response to the "patchwork of different approaches" across the federal circuit courts, which was leading to inconsistent results when courts identified whether a conviction was for a CIMT.[97]

1. *Background of the Case.* — Cristoval Silva-Trevino was a citizen of Mexico who was admitted to the United States as an LPR in 1962. On October 6, 2004, he pled nolo contendere to the Texas criminal offense of "indecency with a child."[98] The Texas state court accepted Silva-Trevino's plea and fined him $250, placed him under community supervision for five years, and directed him to participate in sex offender counseling.[99]

The Department of Homeland Security subsequently initiated removal proceedings against Silva-Trevino based on his conviction for an aggravated felony.[100] The IJ ruled that Silva-Trevino's conviction for "sex-

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93. See supra note 67 (listing circuits that use least culpable conduct test); infra Part II.B.1.a (detailing circuits that use realistic probability test).

94. Mata-Guerrero v. Holder, 627 F.3d 256, 260 (7th Cir. 2010) ("We defer to the Attorney General's decision in *Silva-Trevino*.").

95. Jean-Louis v. Att'y Gen., 582 F.3d 462, 470 (3d Cir. 2009) ("We conclude that deference is not owed to *Silva-Trevino*'s novel approach and thus will apply our established methodology.").

96. Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010) (declining to follow *Silva-Trevino* to extent "inconsistent" with circuit precedent).

97. *Silva-Trevino*, 24 I. & N. Dec. at 688–89; see also supra note 39 and accompanying text (describing Attorney General's authority to review BIA cases).

98. *Silva-Trevino*, 24 I. & N. Dec. at 690 (citing Silva-Trevino, A13 014 303, at 1 (B.I.A. Aug. 8, 2006); Silva-Trevino, A13 014 303, at 3 (Oral Dec. of Immigr. Judge (IJ) Feb. 9, 2006)) (internal quotation marks omitted).

The offense of "Indecency With a Child," Tex. Penal Code Ann. § 21.11 (West 2003) (amended 2009), criminalizes "sexual contact" with any individual under seventeen years of age who is not the person's spouse, unless the person is "not more than three years older than the victim and of the opposite sex." The statute defines "sexual contact" as "any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child" or "any touching of any part of the body of a child, including through clothing, with the anus, breast, or any part of the genitals of a person" if "committed with the intent to arouse or gratify the sexual desire of any person." Id. § 21.11(c).

99. *Silva-Trevino*, 24 I. & N. Dec. at 690–91 (citing *Silva-Trevino*, A13 014 303, at 3–4 (IJ)).

100. See INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

ual abuse of a minor" was an aggravated felony, which rendered him removable under the INA.[101] Silva-Trevino subsequently sought to adjust his status to re-obtain LPR status to avoid removal.[102] He contended that the grounds for inadmissibility in section 212(a)(2) of the INA, 8 U.S.C. § 1182(a)(2), which includes conviction for CIMTs, did not bar his adjustment of status.[103] Silva-Trevino argued that:

> [The] State conviction should not be considered a conviction for a [CIMT] because (1) both the [BIA] and the United States Court of Appeals for the Fifth Circuit focus on whether the entire category of offenses covered by a State criminal statute involves moral turpitude; and (2) the Texas statute under which he was convicted does not require "that a person have knowledge that the individual with whom the perpetrator has sexual contact is a child" and thus permits convictions in cases that do not involve moral turpitude where the defendant honestly and reasonably believed his sexual conduct was with a consenting adult.[104]

Nevertheless, the IJ denied the petition for adjustment of status and ordered his removal to Mexico, holding that offenses under the Texas criminal statute categorically were CIMTs because they were "analogous to a statutory rape offense," which the BIA has held to categorically involve moral turpitude regardless of whether an element of the crime was that the defendant knew or should have known the victim's age.[105] As a result, Silva-Trevino was ineligible for the discretionary relief of adjustment of status.[106]

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101. *Silva-Trevino*, 24 I. & N. Dec. at 691 (citing *Silva-Trevino*, A13 014 303, at 5–6 (IJ)). Aggravated felonies are defined in section 101(a)(43) of the INA, 8 U.S.C. § 1101(a)(43).

102. *Silva-Trevino*, 24 I. & N. Dec. at 691 (citing *Silva-Trevino*, A13 014 303, at 9–12 (IJ)). An LPR who falls under a ground for removal can adjust her status to re-obtain LPR status under section 245(a) of the INA, 8 U.S.C § 1255(a) to obtain relief from removal. However, she must meet the requirements set forth in this section, the most difficult being a showing of admissibility.

Silva-Trevino was ineligible for cancellation of removal and adjustment of status under section 240A(a) of the INA, 8 U.S.C. § 1229b(a), the more widely used provision to obtain relief from removal for LPRs, because the statute excludes relief for noncitizens convicted of aggravated felonies. See supra text accompanying note 101 (classifying Silva-Trevino's conviction for sexual abuse of minor as aggravated felony).

103. *Silva-Trevino*, 24 I. & N. Dec. at 691.

104. Id. (citing *Silva-Trevino*, A13 014 303, at 9 (IJ) (citing Tex. Penal Code Ann. § 21.11 (West 2003) (amended 2009))). Silva-Trevino's argument was consistent with Fifth Circuit precedent, which used the least culpable conduct test for the first step of the categorical approach. See, e.g., Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006) ("Under the categorical approach, we read the statute at its minimum, taking into account the minimum criminal conduct necessary to sustain a conviction under the statute." (internal quotation marks omitted)).

105. *Silva-Trevino*, 24 I. & N. Dec. at 691 (quoting *Silva-Trevino*, A13 014 303, at 9–10 (IJ)); see also Torres-Varela, 23 I. & N. Dec. 78, 84 (B.I.A. 2001) (arguing statutory rape involves moral turpitude even though it does not require intent).

106. *Silva-Trevino*, 24 I. & N. Dec. at 691 (citing *Silva-Trevino*, A13 014 303, at 12 (IJ)).

Silva-Trevino appealed to the BIA, which reversed the IJ's determination and held that Fifth Circuit law, which directs adjudicators to "consider the minimum circumstances possible for a conviction," must be followed.[107] Because not every possible conviction under the Texas statute involved turpitudinous conduct, the BIA held that Silva-Trevino's conviction should not categorically be considered to involve moral turpitude, regardless of the actual circumstances surrounding his conviction.[108] The BIA vacated the IJ's decision and remanded the case.

While the remand was pending before the IJ, Attorney General Alberto Gonzales directed the BIA to refer the *Matter of Silva-Trevino* to him sua sponte on July 10, 2007.[109] On November 7, 2008, Attorney General Michael Mukasey issued an opinion that reversed the BIA's deci-

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107. Id. at 692 (quoting Silva-Trevino, A13 014 303, at 3–4 (B.I.A. Aug. 8, 2006) (citing Rodriguez-Castro v. Gonzales, 427 F.3d 316, 320 (5th Cir. 2005))).

108. Id. (citing *Silva-Trevino,* A13 014 303, at 4 (B.I.A.)). The BIA concluded:

> In contrast to statutory rape, . . . which typically involves penetration or something similar, the sexual conduct encompassed by [Texas Penal Code] § 21.11(a)(1) potentially involves much less intrusive contact. For example, a defendant in Texas has been convicted under the statute for touching the chest/breast of a 10-year-old boy. See Sullivan v. State, 986 S.W.2d 708 (Tex. Crim. App. 1999). This raises the possibility that a 20-year-old woman dancing suggestively with a youth just under the age of 17, who represents himself as older and can reasonably be believed to be such, could be liable under the statute if she acted on a desire to arouse herself or a spectator. This is so even if she touched the victim through his clothing. This does not strike us as the type of behavior which would be classified as involving moral turpitude under the [INA].

Id. (quoting *Silva-Trevino,* A13 014 303, at 3–4 (B.I.A.) (footnote omitted)).

109. Id. at 687. Under 8 C.F.R. § 1003.1(h)(1)(i) (2007), the Attorney General has the authority to direct the BIA to refer a matter to him to review the BIA's decision. See supra note 40 and accompanying text (discussing Attorney General's authority to review immigration decisions).

There is some controversy surrounding the Attorney General's referral. Both the amici and *Jean-Louis* mention that the circumstances surrounding the Attorney General's sua sponte certification were not transparent:

> Despite requests by Silva-Trevino's counsel, the Attorney General refused to identify the issues to be considered, to define the scope of his review, to provide a briefing schedule, or to apprise counsel of the applicable briefing procedure. . . . [N]either the IJ decision nor the Attorney General's certification order were made publicly available, thus denying stakeholders, including immigrant and refugee advocacy organizations, the opportunity to register their views. As a result, the first opportunity of amici curiae to file comment was after entry of the Attorney General's opinion.

Jean-Louis v. Att'y Gen., 582 F.3d 462, 470–71 n.11 (3d Cir. 2009); see also Brief for Am. Immigr. Lawyers Ass'n et al. as Amici Curiae in Support of Reconsideration, supra note 61, at 7–11 (questioning Attorney General's sua sponte certification). A letter from the Immigrant Rights Clinic at Washington Square Legal Services, the Immigration Justice Clinic at Cardozo School of Law, and IDEAS Consultation to Attorney General Eric Holder to withdraw *Silva-Trevino* also stressed the impropriety of Attorney General Mukasey's decision. Letter from Alina Das, Immigrant Rights Clinic, Wash. Square Legal Servs., Inc. et al., to Eric H. Holder, Jr., U.S. Att'y Gen. 3–6 (Feb. 9, 2009), available at http://www.immigrantdefenseproject.org/docs/20090210LettertoHolderFINALSIGNED.pdf (on file with the *Columbia Law Review*) (arguing *Silva-Trevino* was "issued without minimal

sion and outlined a novel three-step inquiry.[110] The Attorney General held that the INA and agency deference permitted him to create a uniform approach to decide whether a particular conviction involved moral turpitude.[111] He also cited *Brand X* as providing authority to agencies, not courts, to "fill statutory gaps" in ambiguous statutes.[112]

2. Silva-Trevino's *Three-Step Approach.* — The Attorney General in *Silva-Trevino* stated:

> [In order] to determine whether an alien's prior conviction triggers application of the [INA]'s moral turpitude provisions, adjudicators should: (1) look first to the statute of conviction under the categorical inquiry set forth in this opinion and recently applied by the Supreme Court in *Duenas-Alvarez*; (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question.[113]

The Attorney General in *Silva-Trevino* explicitly adopted the realistic probability test from *Duenas-Alvarez* for the first step of the categorical approach.[114] If realistically prosecuted acts unambiguously either always or never involve moral turpitude, the factfinder's inquiry ends.

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procedures to allow for meaningful participation by Mr. Silva-Trevino's attorney and other interested parties").

110. Attorney General Gonzales resigned on September 17, 2007. Letter from Alberto R. Gonzales, Att'y Gen., to President George W. Bush (Aug. 26, 2007), available at http://www.justice.gov/archive/ag/speeches/2007/ag_resign_letter.pdf (on file with the *Columbia Law Review*). Attorney General Michael Mukasey was confirmed by the Senate on November 8, 2007. Michael B. Mukasey, Att'y Gen., Prepared Remarks at His Installation Ceremony (Nov. 14, 2007), available at http://www.justice.gov/archive/ag/speeches/2007/ag_speech_071114.html (on file with the *Columbia Law Review*).

111. *Silva-Trevino*, 24 I. & N. Dec. at 688–89. The Attorney General stated that the INA gives the "Department of Justice—the agency charged with interpreting and implementing many of its provisions—the authority to craft such an approach." Id. at 688. The Attorney General held that this authority is derived from section 103(a)(1) of the INA, 8 U.S.C. § 1103(a)(1) (2006), which provides that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." *Silva-Trevino*, 24 I. & N. Dec. at 688–89 (quoting INA § 103(a)(1), 8 U.S.C. § 1103(a)(1)).

112. *Silva-Trevino*, 24 I. & N. Dec. at 689 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)); see supra note 46 (describing deference to agency decisions under *Brand X*). But see infra note 173 (describing Third Circuit's position that ambiguity in statute was created by Attorney General himself).

113. *Silva-Trevino*, 24 I. & N. Dec. at 704.

114. Id. at 689–90 (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). The factfinder needs to determine whether there is a "realistic probability, not a theoretical possibility" that acts actually prosecuted under the criminal statute do not involve moral turpitude. *Duenas-Alvarez*, 549 U.S. at 193. For a further discussion of the realistic probability test, see supra notes 72–76 and accompanying text.

If the answer is ambiguous and crimes that both do and do not involve moral turpitude are realistically prosecuted under the statute, the analysis continues to the second step, the modified categorical approach. This step permits a factfinder to consider the record of conviction to see if these documents shed light on whether the conviction covers conduct involving moral turpitude.[115] The Attorney General's second step in *Silva-Trevino* suggests that the record of conviction can be mined for any facts that could shed light on the circumstances underlying the criminal conviction.[116] This view rejects the majority position that the record of conviction should only be used to determine under which portion of the statute the noncitizen was convicted.[117]

Under the *Silva-Trevino* approach, the CIMT inquiry proceeds to a third step if the record of conviction does not clearly indicate whether the noncitizen was convicted of a CIMT.[118] This novel third step proposed by the Attorney General gives the factfinder considerable discretion by permitting her to consider any other evidence beyond the record of conviction that she determines is "necessary or appropriate" to resolve the CIMT question.[119] However, the Attorney General suggested that this discretion is not unbounded. An adjudicator may not relitigate facts decided by the criminal court.[120] Furthermore, the third step is limited to the CIMT context.[121]

The Attorney General suggested that the language of the INA permits inquiry into additional evidence beyond what was customarily authorized by the first and second steps of the categorical approach. The Attorney General's rationale in permitting courts to consider extrinsic evidence comes primarily from the "ambiguity" in the statutory language of the INA.[122] He argued that the statutory text "cuts in different directions" regarding the method to determine whether particular conduct involves moral turpitude.[123] Although the use of "convicted of" rather than "committed" in section 212(a)(2)(A)(i) of the INA, 8 U.S.C.

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115. *Silva-Trevino*, 24 I. & N. Dec. at 698–99; see supra Part I.B.2 (describing modified categorical approach).

116. *Silva-Trevino*, 24 I. & N. Dec. at 708 ("[A]n adjudicator should engage in a modified categorical inquiry, considering whether the *facts* of the alien's prior conviction in fact involved moral turpitude." (emphasis added)); see supra notes 82–90 and accompanying text (describing variations of modified categorical approach).

117. See supra notes 82–84 and accompanying text (discussing majority approach).

118. See *Silva-Trevino*, 24 I. & N. Dec. at 708 (noting adjudicator may consider "additional evidence or factfinding" after reviewing record of conviction).

119. Id.

120. Id. at 704.

121. Id. For example, adjudicators use a version of the categorical approach to determine whether a conviction is for an aggravated felony for immigration purposes. See infra notes 181–186 and accompanying text (comparing categorical approach in CIMT and aggravated felony contexts). The third step would not be applied to the categorical approach for aggravated felonies.

122. *Silva-Trevino*, 24 I. & N. Dec. at 693.

123. Id.

§ 1182(a)(2)(A)(i), suggests the use of a categorical approach, the Attorney General stated that other language indicates that inquiry into the particularized facts of a noncitizen's actions is permitted. He specifically cited "the reference in § 212(a)(2)(A)(i)(I) to aliens who admit 'committing' certain 'acts.'"[124] He also pointed to the use of "involving" in the term "CIMT." Finally, he concluded that since "moral turpitude is not an element of an offense," courts should be permitted to consider the actual facts.[125] Because the text "contemplate[s] a finding that the particular alien did or did not commit a crime involving moral turpitude before immigration penalties are or are not applied," he argued that restricting the inquiry to the record of conviction "is hard to square with the text of the [INA]."[126]

3. *Application of the Three-Step Approach in* Silva-Trevino. — The Attorney General vacated the BIA's decision that Silva-Trevino's conviction did not involve moral turpitude and remanded the case to be decided consistent with the new approach he outlined in *Silva-Trevino*. He applied the first two steps of his new framework in his opinion and remanded the case to the BIA to apply the third step.

Before proceeding to the categorical approach, however, the Attorney General made a determination that any sexual contact with a minor, if "the perpetrator knew or should have known that the victim was a minor," involves moral turpitude.[127] He reversed the holding of the BIA that the "severity of the sexual contact" was the determinative factor for whether a conviction involves moral turpitude, focusing instead on the age of the victim.[128] The fact that the perpetrator knew or should

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124. Id.

125. Id. at 699.

126. Id. The amici curiae, who filed a brief in response to *Silva-Trevino* and argued for reconsideration of the decision, are not persuaded by the Attorney General's argument that the statutory language permits inquiry into facts outside the record of conviction. Brief for Am. Immigr. Lawyers Ass'n et al. as Amici Curiae Supporting Respondent, supra note 61, at 22–24. The amici argue that the Attorney General's reasoning is not persuasive because language relating to "'admissions,' 'commissions' and 'acts' does not alter the requirements surrounding 'convictions'" because "where Congress does predicate immigration consequences on 'convictions,' it seeks to confine courts' review to the individual's conviction, not his or her conduct or separate admissions." Id. The amici also cite the use of different requirements when relying on statements of admission by noncitizens. Id. at 23. The amici discount the Attorney General's argument that the use of "involving" suggests that an inquiry into extrinsic facts is proper by pointing out that "crime involving moral turpitude" is a "legal term of art" that has been in use for approximately a century. The amici suggest that the Attorney General's "dissection" of the term is nothing more than a "red herring . . . contrary to the history of jurisprudence on the term." Id. at 23–24.

127. *Silva-Trevino*, 24 I. & N. Dec. at 705.

128. Id. The BIA concluded that the Texas statute did not categorically involve moral turpitude because it encompasses sexual contact with minors that is far less intrusive than rape. Id. The Attorney General, on the other hand, posited that "so long as the perpetrator knew or should have known that the victim was a minor, *any* intentional sexual contact by an adult with a child involves moral turpitude" because "[s]uch contact is

have known that the victim was a minor supplies the requisite scienter to be a CIMT.[129] In other words, the Attorney General held that intentional sexual contact with a person that the perpetrator knew or should have known was a minor involves moral turpitude.[130]

Next, the Attorney General applied the categorical approach and considered whether there was a realistic probability that the Texas criminal statute would be applied to reach conduct not involving moral turpitude under the first step, the traditional categorical approach.[131] After examining prior convictions under the statute, he found that there was a realistic probability that the statute could be applied to reach nonturpitudinous conduct—where the perpetrator neither knew nor had reason to know the victim's age.[132] Therefore, the first step of the categorical approach did not establish that Silva-Trevino's conviction categorically involved moral turpitude.

The Attorney General then proceeded to the second step of the analysis. He agreed with the BIA's finding that the record of conviction did not contain any information pertaining to Silva-Trevino's actual conduct.[133] The BIA had ended its inquiry at this point because under the categorical approach prior to *Silva-Trevino*, it was barred from considering evidence extrinsic to the record of conviction. Thus, the Attorney General remanded the case to the BIA for further consideration consistent with the third step of his new approach to determine whether Silva-Trevino knew or should have known the victim's age.[134]

The Attorney General then provided suggestions for the application of the third step to the case at hand. He suggested that simple questioning of Silva-Trevino to see whether he knew or should have known the victim's age would resolve the inquiry of whether his conduct involved

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'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'" Id. (quoting Hamdan v. INS, 98 F.3d 183, 185–86 (5th Cir. 1996)).

129. Id. at 706 ("A finding of moral turpitude under the [INA] requires that a perpetrator have committed the reprehensible act with some form of scienter."); see also Michel v. INS, 206 F.3d 253, 263 (2d Cir. 2000) ("[W]here knowledge is a necessary element of a crime under a particular criminal statute, moral turpitude inheres in that crime.").

130. *Silva-Trevino*, 24 I. & N. Dec. at 707.

131. Id. at 708.

132. Id. In *Johnson v. State*, the Texas statute was applied to conduct that did not involve moral turpitude. 967 S.W.2d 848, 849 (Tex. Crim. App. 1998) (en banc) (convicting nineteen-year-old of criminal sexual contact with child despite fact he did not know or have reason to know victim was child because victim and friend told him victim was seventeen, and because she looked older than her age). A conviction under this statute would only involve moral turpitude if the perpetrator knew or reasonably should have known the victim's age. See supra notes 128–130 and accompanying text (describing further that intentional sexual contact where perpetrator knows or should have known victim was minor involves moral turpitude).

133. *Silva-Trevino*, 24 I. & N. Dec. at 708.

134. Id. at 708–09.

moral turpitude.[135] Additionally, evidence as to whether Silva-Trevino and the victim had a prior relationship could be used to establish that he knew or should have known the victim's age.[136] The Attorney General's purpose for making these recommendations was to demonstrate that "[t]he inquiry on remand need not be administratively burdensome."[137]

### B. *Circuit Approaches after* Silva-Trevino

Since the Attorney General promulgated his new approach, the circuits have split on the adoption of the methodology outlined in *Silva-Trevino*. With regard to the first step, a number of circuits have followed *Silva-Trevino*'s use of the realistic probability test.[138] Only the Seventh Circuit follows *Silva-Trevino* in its entirety.[139] The Third and Eighth Circuits have expressly declined to follow the Attorney General's CIMT approach.[140] The other circuits have not yet confronted the question of whether to adopt *Silva-Trevino*'s three-step approach.[141]

1. *Circuits that Follow the* Silva-Trevino *Approach.* — Of the circuits that have addressed the issue of whether to follow *Silva-Trevino*, several have adopted or had already been using the realistic probability test for the first step of the categorical approach. Only the Seventh Circuit follows the Attorney General's third step, allowing factfinders to consider evidence beyond the record of conviction.[142]

a. *Circuits that Use the Realistic Probability Test.* — The Ninth and Seventh Circuits, as well as the Sixth and Eleventh Circuits—to a limited extent—use the realistic probability test as the first step to determine whether moral turpitude inheres in a particular conviction. The Ninth Circuit adopted the realistic probability test from *Duenas-Alvarez*,[143] which was used by the Attorney General in *Silva-Trevino*.[144] The Seventh Circuit

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135. Id. at 709.

136. Id.

137. Id.

138. See infra Part II.B.1.a (listing circuits that have adopted realistic probability test).

139. Mata-Guerrero v. Holder, 627 F.3d 256, 260 (7th Cir. 2010) ("We defer to the Attorney General's decision in *Silva-Trevino*."); Ali v. Mukasey, 521 F.3d 737, 743 (7th Cir. 2008) ("[To determine] whether the crime is one of 'moral turpitude,' the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction.").

140. Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010); Jean-Louis v. Att'y Gen., 582 F.3d 462, 470 (3d Cir. 2009).

141. See infra notes 155–161 and accompanying text (discussing circuits that have not yet considered *Silva-Trevino*'s third step).

142. See infra notes 149–154 and accompanying text (discussing Seventh Circuit's acceptance of using documents beyond record of conviction for CIMT inquiry).

143. See supra notes 72–75 and accompanying text (discussing realistic probability test established by Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).

144. See Nunez v. Holder, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Silva-Trevino* to support use of realistic probability test for first step of categorical approach); Castillo-Cruz v. Holder, 581 F.3d 1154, 1161 & n.9 (9th Cir. 2009) (using realistic probability test from *Duenas-Alvarez* to determine whether "there is a 'realistic probability' that [the criminal

affirmed the three-step *Silva-Trevino* approach, including the realistic probability test, in *Mata-Guerrero v. Holder*.[145] The Eleventh Circuit adopted the realistic probability test in a recent unpublished decision.[146] However, a few months prior to that decision, it used the least culpable conduct test in a precedential decision.[147] Thus, it is unclear which test the Eleventh Circuit will use in the future. The Sixth Circuit, although citing the *Duenas-Alvarez* realistic probability test, may in practice be following a different variation of the first step of the categorical approach, the common case approach.[148]

b. *Circuits that Follow* Silva-Trevino*'s Third Step.* — The Seventh Circuit is the only circuit that currently permits inquiry beyond the record of conviction to determine whether a conviction involves moral turpitude. Since the Attorney General promulgated his new approach in *Silva-Trevino*, the other circuits, aside from the Third and Eighth Circuits, have not yet addressed whether to apply his novel third step.

The Seventh Circuit, stating that the "Attorney General has abandoned" the categorical approach, explicitly affirmed *Silva-Trevino*'s three-step approach in *Mata-Guerrero*.[149] *Mata-Guerrero* recognized that even prior to *Silva-Trevino*, the Seventh Circuit allowed a factfinder to consider evidence extrinsic to the record of conviction.[150] *Ali v. Mukasey*[151] im-

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statute] has been and will be applied to conduct falling outside of the generic definition of a crime of moral turpitude").

145. Mata-Guerrero v. Holder, 627 F.3d 256, 260 (7th Cir. 2010) ("First, the immigration judge should focus on the statute's actual scope and application and ask whether, at the time of the alien's removal proceeding, any actual (not hypothetical) case existed in which the statute was applied to conduct that did not involve moral turpitude . . . .").

146. Destin v. U.S. Att'y Gen., 345 F. App'x 485, 487 (11th Cir. 2009) ("[The categorical] inquiry requires categorical comparison of the elements of the statute of conviction to the generic definition of moral turpitude and a determination of whether there is a realistic probability that [the criminal statute] would be applied to conduct that falls outside the generic definition of a [CIMT]."). *Destin* is an unpublished decision that does not have precedential value. 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent . . . .").

147. Keungne v. U.S. Att'y Gen., 561 F.3d 1281, 1284 n.3 (11th Cir. 2009) ("In the [first step of the] categorical approach, we analyze whether the least culpable conduct necessary to sustain a conviction under the statute meets the standard of a crime involving moral turpitude.").

148. Serrato-Soto v. Holder, 570 F.3d 686, 690 (6th Cir. 2009) (holding noncitizen "was convicted of a crime that, *in the ordinary case*, involves dishonesty as an essential element" (emphasis added)); see also supra note 66 (describing common case approach). Prior to *Duenas-Alvarez*, the Sixth Circuit used a different approach. See Patel v. Ashcroft, 401 F.3d 400, 409 (6th Cir. 2005) (citing approvingly Second Circuit's use of minimum criminal conduct test for aggravated felonies).

149. *Mata-Guerrero*, 627 F.3d at 260 ("We defer to the Attorney General's decision in *Silva-Trevino*.").

150. Id. (citing Babaisakov, 24 I. & N. Dec. 306 (B.I.A. 2007), "in which the [BIA] abandoned the categorical approach and decided that additional evidence could be taken by the immigration judge when necessary").

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

ported the idea of using evidence beyond the record of conviction from *In re Babaisakov*,[152] which held that such evidence could be used to determine the specific fact of whether monetary loss to the victim exceeded ten thousand dollars, which is a requirement for an aggravated felony.[153] The Seventh Circuit in *Ali* permitted consultation of the presentence report, which is not part of the record of conviction, to classify the noncitizen's offense as one that involves moral turpitude.[154]

Although other circuits have not yet decided whether to adopt the Attorney General's third step,[155] many circuits seem reluctant to add the third step to the categorical approach. Even though the Ninth Circuit has adopted the realistic probability test and the Attorney General's definition of moral turpitude from *Silva-Trevino*,[156] the Ninth Circuit's CIMT inquiry continues to be limited to the record of conviction.[157] The Ninth

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152. 24 I. & N. Dec. 306 (B.I.A. 2007). The Third Circuit, however, criticized the importation of *Babaisakov* into the CIMT context, stating that it "does not support the far-reaching inquiry that the court adopts in *Ali*." Jean-Louis v. Att'y Gen., 582 F.3d 462, 480 (3d Cir. 2009). The Third Circuit argued that the BIA in *Babaisakov* considered evidence outside the record of conviction only for the narrow purpose of seeing if the conviction met a particular aggravated felony requirement. Id. Because this particular requirement was not an element of any criminal statute, either federal or state, a pure categorical approach would have been "unworkable." Id. However, the Third Circuit contends that "[t]he practical impediments to application of the categorical approach identified in . . . *Babaisakov* . . . are not present in the CIMT context," and that adjudicators have been following a categorical approach for CIMTs for over a century. Id.

153. INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) (2006). The Fifth Circuit also follows the standard outlined in *Babaisakov*, but limits it to the aggravated felony context to determine if monetary loss exceeded ten thousand dollars. Arguelles-Olivares v. Mukasey, 526 F.3d 171, 177–80 (5th Cir. 2008) (considering presentence report to determine whether tax evasion was aggravated felony). The BIA also permits using evidence beyond the record of conviction in the aggravated felony context to determine whether an offense is "committed for commercial advantage" under section 101(a)(43)(K)(ii) of the INA, 8 U.S.C. § 1101(a)(43)(K)(ii). Gertsenshteyn, 24 I. & N. Dec. 111, 112 (B.I.A. 2007) ("We . . . conclude . . . that whether the offense was 'committed for commercial advantage' may be proved by any evidence, including evidence outside the record of conviction.").

154. *Ali*, 521 F.3d at 742–43 ("[W]e . . . conclude that when deciding how to classify convictions under criteria that go beyond the criminal charge—such as . . . whether the crime is one of 'moral turpitude', the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction.").

155. See, e.g., Castillo-Torres v. Holder, No. 09-9568, 2010 WL 3529413, at *2 (10th Cir. Sept. 13, 2010) ("[W]e need not address whether we agree with *Silva-Trevino* . . . ."); Destin v. U.S. Att'y Gen., 345 F. App'x 485, 488 n.2 (11th Cir. 2009) (stating that question presented was decided by considering first step of categorical approach, and thus not reaching second and third steps proposed by *Silva-Trevino*).

156. See Rivera-Delgado v. Holder, 320 F. App'x 567, 568–69 (9th Cir. 2009) (remanding case to BIA in light of new definition of CIMT in *Silva-Trevino*); Marmolejo-Campos v. Holder, 558 F.3d 903, 915 (9th Cir. 2009) ("[T]he Attorney General has declared the presence of scienter to be an essential element of a [CIMT]."); see also supra note 144 and accompanying text (describing use of realistic probability test in Ninth Circuit).

157. Nicanor-Romero v. Mukasey, 523 F.3d 992, 1007 (9th Cir. 2008) (limiting review to record of conviction).

Circuit in *Marmolejo-Campos v. Holder* explicitly reserved judgment on the question of considering any additional evidence that is "necessary and appropriate"[158] because "that question [was] not squarely before [the court]."[159] Ninth Circuit precedent, however, indicates a strong reluctance to consider evidence beyond the record of conviction in removal proceedings due to fears of inefficiency and of relitigating the underlying offense.[160] The Second Circuit may also be unlikely to adopt the third step of *Silva-Trevino* because past decisions demonstrate an unwillingness to expand the CIMT inquiry to include consideration of extrinsic evidence.[161]

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158. 558 F.3d at 907 n.6 (quoting Silva-Trevino, 24 I. & N. Dec. 687, 699 (Op. Att'y Gen. 2008)).

159. Id.

160. See Tokatly v. Ashcroft, 371 F.3d 613, 621 (9th Cir. 2004) ("If we were to allow evidence that is not part of the record of conviction as proof of whether an alien falls within the reach of [an INA removal provision], we essentially would be inviting the parties to present any and all evidence bearing on an alien's conduct leading to the conviction. . . . Such an endeavor is inconsistent . . . with the streamlined adjudication that a deportation hearing is intended to provide . . . ." (quoting Pichardo, 21 I. & N. Dec. 330, 335 (B.I.A. 1996))). Although the question presented in *Tokatly* dealt with whether the conviction was for a crime of domestic violence in the context of a removal proceeding, the court imported the categorical approach from *Taylor*. See id. at 615 (holding *Taylor* "categorical and modified categorical approach is applicable" to determining whether conviction is for "crime of domestic violence"). Given the similarity of the categorical approaches for CIMTs and crimes of violence and the need for administrative efficiency, the Ninth Circuit may be hesitant to expand inquiry to evidence extrinsic to the record of conviction for CIMTs.

161. Wala v. Mukasey, 511 F.3d 102, 109–10 (2d Cir. 2007) ("The BIA, by looking to the facts of Wala's conviction to infer such an intent [for a permanent taking], therefore transgressed the permitted scope of the modified categorical approach."). *Wala* indicates the Second Circuit's unwillingness to expand the CIMT inquiry. In the BIA decision on appeal in *Wala*, see Wala, No. A44 514 700 (B.I.A. Dec. 27, 2005), the BIA had inferred facts from a plea colloquy transcript, which was extrinsic to the record of conviction, to determine that the noncitizen had committed a CIMT rendering him removable. See *Wala*, 511 F.3d at 103–05 (describing BIA's reliance on plea colloquy transcript to infer intent for permanent taking).

In the aggravated felony context, the Second Circuit rejected the Seventh Circuit's approach in *Ali*, which permitted consideration of evidence outside the record of conviction. Gertsenshteyn v. U.S. Dep't of Justice, 544 F.3d 137, 146 n.9 (2d Cir. 2008) ("Our decision today is arguably in tension with *Ali v. Mukasey* . . . in which the Seventh Circuit 'conclude[d] that when deciding how to classify convictions under criteria that go beyond the criminal charge—such as the amount of the victim's loss, or whether the crime is one of 'moral turpitude,' the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction.'" (quoting Ali v. Mukasey, 521 F.3d 737, 743 (7th Cir. 2008))). Analyzing the nature of the noncitizen's underlying actions to see if they constitute an aggravated felony "undercuts the whole basis of the categorical approach, which is that what the alien was *convicted of* determines whether the felony is an aggravated one and not (unless it is needed to convict) the particular manner in which the crime was committed." Id. at 146. The same reasoning applies to determining whether actions constitute a CIMT because the INA uses the word "convicted" in both the aggravated felony and CIMT provisions. See INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006) (using "convicted" for CIMT); INA § 237(a)(2)(A)(i)(I), 8

2. *Express Rejection of the* Silva-Trevino *Approach.* — Both the Third and Eighth Circuits have expressly declined to apply the *Silva-Trevino* approach. The Third Circuit explicitly refused to follow this approach, opting instead to continue its own established methodology for determining whether a conviction involves moral turpitude: the least culpable conduct test, a limited modified categorical approach, and a prohibition on inquiry into evidence beyond the record of conviction.[162] The Eighth Circuit, citing the rationale of the Third Circuit, summarily held that it is not bound by the Attorney General's decision in *Silva-Trevino*.[163]

The Third Circuit rejected the realistic probability test for the first step of the categorical approach, and continues to employ the least culpable conduct test.[164] The Third Circuit also retained its restricted version of the second step,[165] limiting the use of the record of conviction only to the following situations: (1) when the criminal statute contains disjunctive elements,[166] or (2) to determine the least culpable conduct that will sustain a conviction under the statute at issue and whether the least culpable conduct is sufficient to meet the requisite depravity to be a CIMT.[167] Finally, the Third Circuit rejected the third step of *Silva-Trevino* and continues to forbid adjudicators from consulting evidence outside of the record of conviction.[168]

Rejecting the realistic probability test, the *Jean-Louis* court did not argue that it was an impermissible reading of the INA. Instead, it questioned the use of the realistic probability test from *Duenas-Alvarez* in the case before it.[169] The court highlighted the difference between the case before it and *Duenas-Alvarez*, where the hypothetical conduct presented by the noncitizen was ambiguous and not a clear violation of the criminal law at issue.[170] The case before the *Jean-Louis* court involved a simple

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U.S.C. § 1227(a)(2)(A)(i)(I) (same); INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony); see also Jean-Louis v. Att'y Gen., 582 F.3d 462, 473–75 (3d Cir. 2009) (arguing use of "convicted" in INA requires categorical approach).

162. *Jean-Louis*, 582 F.3d at 465–66, 470–73 (rejecting explicitly Attorney General's approach in *Silva-Trevino* and instead applying least culpable conduct test and limited inquiry into noncitizen's record of conviction); see also Tejwani v. Att'y Gen., 349 F. App'x 719, 722 (3d Cir. 2009) (affirming *Jean-Louis* and applying least culpable conduct test).

163. Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010).

164. *Jean-Louis*, 582 F.3d at 481–82.

165. Id. at 466 (describing "limited factual inquiry" of second step of categorical approach).

166. See Singh v. Ashcroft, 383 F.3d 144, 162 (3d Cir. 2004) (permitting limited factual inquiry into record of conviction when criminal statute contains disjunctive elements); see also *Jean-Louis*, 582 F.3d at 466 (same).

167. See *Jean-Louis*, 582 F.3d at 471–72 ("[O]ur inquiry [under the modified categorical approach] remain[s] a limited one, focused on the crime of conviction: we reviewed only the record of the conviction to ascertain the particular variation of the statute under which the defendant was convicted.").

168. Id. at 473–75.

169. Id. at 481 ("We seriously doubt that the logic of the Supreme Court in *Duenas-Alvarez* . . . is transferable to the CIMT context.").

170. Id.

assault statute where the elements were clear and did not require any "application of the legal imagination."[171] The second reason provided by the court to retain the least culpable conduct approach was to maintain predictability in the established body of case law for noncitizens facing immigration consequences from criminal convictions.[172]

The Third Circuit "conclude[d] that deference is not owed to *Silva-Trevino*'s novel [third step]" because it is based on an impermissible reading of the INA, which the Third Circuit found is clear in endorsing the categorical approach.[173] The *Jean-Louis* court focused on the use of "convicted" in the INA, and argued that it limits inquiry to the criminal *conviction* and not the specific *acts* underlying the conviction.[174] The Third Circuit reinforced its conclusion with the fact that "the BIA, prior attorneys general, and numerous courts of appeals have repeatedly held that the term 'convicted' forecloses individualized inquiry [into a noncitizen's] specific conduct and does not permit examination of extra-record evidence."[175]

The Eighth Circuit in *Guardado-Garcia v. Holder*, citing *Jean-Louis*, declined to apply the *Silva-Trevino* approach for CIMTs.[176] The *Guardado-Garcia* court concluded that it was "bound by [its] circuit's precedent, and to the extent *Silva-Trevino* [was] inconsistent, [the court] adhere[d] to circuit law."[177] The Eighth Circuit held that the petitioner's due pro-

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171. Id. (internal quotation marks omitted).

172. Id. at 481–82.

173. Id. at 470, 473–75. The *Jean-Louis* court maintained that any "ambiguity that the Attorney General perceives in the INA is an ambiguity of his own making, not grounded in the text of the statute, and certainly not grounded in the BIA's own rulings or jurisprudence of courts of appeals going back for over a century." Id. at 472–73 & n.12 (describing *Chevron* deference as not mandating deference to agency's construction of statute if "Congress has spoken clearly on the precise issue" or "where an agency interpretation reflects an impermissible construction of the statute"). For a more detailed explanation of *Chevron* deference, see supra note 46.

174. Id. at 474 ("[T]he CIMT determination focuses on the *crime* of which the alien was *convicted*—not the specific *acts* that the alien may have *committed*."); see INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2006) (defining "conviction"); INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (listing documents that constitute proof of criminal conviction); supra note 19 (providing definition of "conviction" under INA).

Other reasons advanced by the Third Circuit for its rejection of the *Silva-Trevino* approach were "the lack of transparency [regarding the Attorney General's certification], coupled with the absence of input by interested stakeholders." *Jean-Louis*, 582 F.3d at 471 n.11. For a further discussion of the lack of transparency surrounding the Attorney General's sua sponte certification, see supra note 109.

175. *Jean-Louis*, 582 F.3d at 473–74 (footnotes omitted); see also id. at 473–74 nn.14–16 (listing and describing precedent that does not permit inquiry into facts underlying conviction).

176. Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010).

177. Id. The *Guardado-Garcia* court simply cited the Third Circuit's conclusion that "deference is not owed to *Silva-Trevino*'s novel approach," without delving into the Third Circuit's rationale. Id. (quoting *Jean-Louis*, 582 F.3d at 470–73). The Eighth Circuit also did not elaborate on how *Silva-Trevino*'s approach is inconsistent with Eighth Circuit precedent. Id.

cess rights were not violated when the BIA did not follow *Silva-Trevino* in determining whether his crime was a CIMT because the BIA's analysis was consistent with Eighth Circuit precedent.[178]

## III. Realistic Probability Test, Narrow Modified Categorical Approach, and Rejection of the Third Step as a Uniform Solution

In light of the various approaches used by the federal circuit courts and the administrative courts to determine whether a particular conviction involves moral turpitude, this Note proposes uniform adoption of the realistic probability test from *Duenas-Alvarez* for the first step of the categorical approach, narrow use of the record of conviction for the second step, and outright rejection of the third step used by the Attorney General in *Silva-Trevino*. Because there is currently no uniform test for the categorical approach, noncitizens are subject to different standards for removal on CIMT grounds. The immigration consequences of criminal convictions should not depend on the jurisdiction in which the removal proceedings are initiated; rather, federal immigration consequences should be uniform across the country.

### A. *Step 1: Adjudicators Should Adopt the Realistic Probability Test*

To rectify the current inconsistency in the first step of the categorical approach,[179] the federal circuit courts and administrative courts should uniformly adopt the realistic probability test from *Duenas-Alvarez* for the first step of the categorical approach for the following reasons: The realistic probability test comports with Supreme Court immigration precedent and the statutory language of the INA, and it also improves the accuracy of determining whether a conviction involves moral turpitude while

178. Id. The petitioner claimed that his due process rights were violated when the BIA did not follow *Silva-Trevino*, which he argued it was bound to follow. He claimed that "its failure to do so [was] tantamount to an agency failing to follow its own rules." Id.

179. Circuits are currently inconsistent in their CIMT jurisprudence, articulating the use of one test for the categorical approach, but in practice occasionally using another. For example, the Eleventh Circuit, although generally using the minimum criminal conduct test for the categorical approach, has in some cases failed to consider the minimum criminal conduct that would sustain a conviction under the statute, instead opting for a test that more closely resembles the realistic probability test. See Sharpless, supra note 56, at 1015–16 (describing inconsistency in Eleventh Circuit's CIMT jurisprudence). For example, in Sosa-Martinez v. U.S. Att'y Gen., 420 F.3d 1338, 1341–42 (11th Cir. 2005), when considering a conviction for intentional battery, the court did not analyze whether the minimal conduct that could be convicted under the statute would necessarily involve moral turpitude. See Sharpless, supra note 56, at 1015–16. Another example is the Sixth Circuit, which states the realistic probability test by name but in fact uses a test that more closely resembles the common case approach. See supra note 148 and accompanying text (describing Sixth Circuit's "ordinary case" approach); see also supra note 66 (describing common case approach).

still affording requisite protection to a noncitizen to prevent unjustified removal.

Not only would standardized use of the realistic probability test decrease disparity among the circuits regarding CIMT jurisprudence, it would also make consistent the tests used for two criminal grounds for removal: CIMTs and aggravated felonies.[180] The realistic probability test for CIMTs follows Supreme Court precedent in *Duenas-Alvarez*, which used this test to determine whether a crime was an aggravated felony for immigration purposes.[181] Instead of increasing unpredictability, as contended by critics of the realistic probability test,[182] using the same test for aggravated felonies and CIMTs would likely decrease confusion in removal jurisprudence.[183] In fact, the realistic probability test is not new to

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180. For further discussion regarding the importance of uniformity when considering immigration consequences of state criminal convictions, see generally Iris Bennett, Note, The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions, 74 N.Y.U. L. Rev. 1696, 1701 n.19, 1712–14 (1999) (discussing importance of uniformity in light of naturalization clause of Constitution).

181. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007). A list of aggravated felonies is provided in section 101(a)(43) of the INA, 8 U.S.C. § 1101(a)(43) (2006). Aggravated felonies comprise a ground for removal under the INA. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). The categorical and modified categorical approaches from *Taylor*, which are used in the CIMT context, see supra Part I.B, are also used for determining whether a conviction is for an aggravated felony. See Gertsenshteyn v. U.S. Dep't of Justice, 544 F.3d 137, 146 (2d Cir. 2008) ("[T]he immigration court must look to what was *required to convict* the alien, *i.e.*, the elements of the crime of conviction."); United States v. Reyes-Castro, 13 F.3d 377, 379 (10th Cir. 1993) (using *Taylor*'s categorical approach for aggravated felonies under § 16(b) to determine if crime is aggravated felony in immigration context); Carachuri-Rosendo, 24 I. & N. Dec. 382, 393 (B.I.A. 2007) ("[T]he proper question is not whether the respondent's personal circumstances make him the type of person who could have been prosecuted as a Federal felon, but rather whether he has a State conviction for an offense that proscribes conduct punishable as a felony under Federal law." (internal quotation marks and citation omitted)).

Additionally, just as for CIMTs, if the criminal statute is divisible, the factfinder is permitted to consider the record of conviction to establish under which portion of the statute the noncitizen was convicted, in order to determine if the conviction is for an aggravated felony. See Sweetser, 22 I. & N. Dec. 709, 714 (B.I.A. 1999) ("Where a statute under which an alien was convicted is divisible, we look to the record of conviction . . . . This approach does not involve an inquiry into facts previously presented and tried. Instead the focus is on the elements required to sustain the conviction.").

However, there is no specific criminal ground of inadmissibility for aggravated felonies. Because aggravated felonies are generally CIMTs, the practical consequence of a noncitizen with an aggravated felony conviction who is seeking admission is that she would likely be inadmissible on CIMT grounds.

182. See *Jean-Louis*, 582 F.3d at 481–82 (holding that Third Circuit will continue to apply least culpable conduct test to maintain predictability); Patricia S. Mann, *Matter of Silva-Trevino*: An Update on Crimes Involving Moral Turpitude, *in* Basic Immigration Law 2009, at 247, 258 (2009) (arguing Attorney General's "new" realistic probability test overturns one hundred years of precedent); see also supra note 172 and accompanying text (describing Third Circuit's argument that *Silva-Trevino* approach is unpredictable).

183. Court opinions have occasionally cited aggravated felony and CIMT precedent interchangeably, citing for example, aggravated felony precedent in a CIMT case. For

the immigration context, as many circuit courts have explicitly adopted this test to determine whether a particular conviction is an aggravated felony or a CIMT.[184]

Although *Duenas-Alvarez* arose in the aggravated felony context, the categorical approach determining the immigration consequences for aggravated felonies and CIMTs should be identical because of the use of the word "convicted" for both in the INA. Under the INA, a noncitizen "convicted" of a CIMT or an aggravated felony will face removal.[185] The language of the INA does not suggest a reason why the categorical approaches should be different for aggravated felonies and CIMTs. In fact, the definition of "conviction" used in the INA is consistent across all types of removal proceedings.[186]

The realistic probability test is also consistent with the use of the word "convicted" in the CIMT provisions of the INA: The realistic probability test maintains the categorical nature of the inquiry because it does not permit consideration of the specific acts committed by the noncitizen.[187] Although the noncitizen can point to her own case to show that the statute has been applied to conduct that does not involve moral turpitude, the purpose of this inquiry is not to show that the nonci-

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instance, the Third Circuit in *Jean-Louis* cited Martinez v. Mukasey, 551 F.3d 113 (2d Cir. 2008), as a case that imported the realistic probability test into the CIMT context. 582 F.3d at 481. *Martinez*, however, is an aggravated felony case, not a CIMT case, that uses the least criminal conduct (or least culpable conduct) test. *Martinez*, 551 F.3d at 122 (holding "[u]nder the categorical approach, a showing that the minimum conduct for which [the noncitizen] was convicted was not an aggravated felony suffices" to show that he "has not been convicted of an aggravated felony").

184. See *Duenas-Alvarez*, 549 U.S. at 193 (establishing realistic probability test). The Fourth, Fifth, and Ninth Circuits have explicitly adopted the realistic probability test from *Duenas-Alvarez* for aggravated felonies: Ibeagwa v. Mukasey, 287 F. App'x 7, 9 (9th Cir. 2008) (citing *Duenas-Alvarez*'s realistic probability test for aggravated felonies); United States v. Diaz-Ibarra, 522 F.3d 343, 348 (4th Cir. 2008) (same); United States v. Ramos-Sanchez, 483 F.3d 400, 403–04 (5th Cir. 2007) (same). See also supra Part II.B.1.a (listing circuits that follow realistic probability test for first step of categorical approach for CIMTs).

185. INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I); INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). For a discussion of how use of the word "convicted" in the INA precludes consideration of the noncitizen's underlying conduct in favor of using the categorical approach, see supra notes 173–175 and accompanying text.

186. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (providing definition of "conviction"); see also supra note 19 (same).

187. As such, the realistic probability test does not uproot existing jurisprudence as suggested by the Third Circuit in *Jean-Louis*. See supra note 172 and accompanying text (describing Third Circuit's preference for least culpable conduct test because it maintains predictability). Inquiry into the noncitizen's underlying conduct is still not permitted under the realistic probability test. The third step of the *Silva-Trevino* approach is only used *after* the first and second steps of the categorical approach are inconclusive. Consideration of extrinsic evidence beyond the record of conviction is thus not permitted when analyzing the criminal statute under the realistic probability test. Cf. Silva-Trevino, 24 I. & N. Dec. 687, 690 (Op. Att'y Gen. 2008) (permitting judges to inquire "beyond the formal record of conviction" only when it is "inconclusive").

tizen's particular actions do not involve moral turpitude. Rather, the purpose is to show that since acts that do not involve moral turpitude are prosecuted under the criminal statute, convictions under the statute do not categorically involve moral turpitude.[188] Because the realistic probability test is a permissible reading of the INA, federal courts should defer to the Attorney General's construction of the INA regarding the first step of the categorical approach under *Chevron*.[189] In fact, the Third Circuit did not hold that the realistic probability test was an impermissible reading of the statute; instead it provided policy reasons for the outright rejection of the importation of the realistic probability test into the CIMT context.[190]

Policy considerations, however, weigh in favor of adopting the realistic probability test, as it balances both fairness and accuracy concerns by reducing the overinclusiveness of the common case approach and the underinclusiveness of the least culpable conduct test. The common case approach, another variant of the first step of the categorical approach, would sweep in convictions that do not involve moral turpitude by basing the determination on whether the common case prosecuted under the statute involves moral turpitude.[191] Although removal is not punitive in a criminal sense, its practical ramifications are severe. Therefore, adjudicators should ensure that convictions that do not actually involve moral turpitude are not treated as if they do.[192] The least culpable conduct test is

188. *Duenas-Alvarez*, 549 U.S. at 186, 193 (stating purpose of realistic probability test is to show "the State would apply its statute to conduct that falls outside the generic definition of a crime," not to consider "the facts of the particular prior case").

189. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding federal courts must defer to permissible agency interpretations of ambiguous statutes).

190. Jean-Louis v. Att'y Gen., 582 F.3d 462, 481–82 (3d Cir. 2009) (distinguishing *Duenas-Alvarez* and decrying unpredictability of realistic probability test); see supra notes 170–172 and accompanying text (describing Third Circuit's rationale for rejecting realistic probability test).

191. Under the common case approach, circumstances that may reduce a noncitizen's moral blameworthiness but are not reflected in a generic conviction under the statute will not be considered when determining whether the conviction is one that involves moral turpitude. See *Silva-Trevino*, 24 I. & N. Dec. at 697 (describing overinclusive nature of common case approach); see also supra note 66 (describing common case approach).

192. Cf. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) ("We have long recognized that deportation is a particularly severe penalty . . . ." (internal quotation omitted)); Jordan v. De George, 341 U.S. 223, 231 (1951) (recognizing "grave nature of deportation," and therefore applying vagueness doctrine to CIMTs even though not generally used in civil context); Fong Yue Ting v. United States, 149 U.S. 698, 739–40 (1893) (Brewer, J., dissenting) (stating deportation is "punishment cruel and severe"). In light of the harshness of deportation, another protection that is afforded in the immigration context but not generally in civil cases is the rule of lenity, whereby ambiguous statutory language in the deportation provisions of the INA is construed in favor of the noncitizen. See INS v. St. Cyr, 533 U.S. 289, 320 (2001) (recognizing "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987))); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)

underinclusive because if the statute encompasses conduct that does not involve moral turpitude, even hypothetical conduct that may never be prosecuted, then all convictions under that statute would categorically not involve moral turpitude.[193] *Duenas-Alvarez*'s realistic probability test seeks to end exercises in "legal imagination" when analyzing state criminal statutes.[194] Because some state statutes are drafted more broadly than others, a conviction under a more broadly drafted statute would not result in immigration consequences whereas a conviction under a more narrowly-written criminal statute would result in inadmissibility or deportability. The application of immigration laws should not depend on the wording of criminal statutes but on the nature of convictions under the statute.[195]

Furthermore, the realistic probability test does not impermissibly shift the burden of proof to the noncitizen because the government still has to show that the noncitizen satisfies the grounds for deportability.[196]

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(holding ambiguities should be resolved in favor of noncitizen "because deportation is a drastic measure and at times the equivalent of banishment or exile"). See generally Brian G. Slocum, The Immigration Rule of Lenity and *Chevron* Deference, 17 Geo. Immigr. L.J. 515, 519–25 (2003) (describing rule of lenity in immigration context).

Furthermore, because of the severity of deportation, the rationale behind not sweeping in convictions that do not involve moral turpitude is similar to the rationale for having a higher burden of proof for criminal cases. See Matthew C. Waxman, Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists, 108 Colum. L. Rev. 1365, 1372–74 (2008) (describing harsh penalties resulting from criminal convictions as part of rationale for avoiding false positives in criminal context).

193. See supra notes 98, 108, and accompanying text (illustrating application of least culpable conduct test to Texas criminal statute). The least culpable conduct test would allow noncitizens whose actions in fact do involve moral turpitude to enter or remain in the United States if the criminal statute does not categorically involve moral turpitude. See *Silva-Trevino*, 24 I. & N. at 697 (describing underinclusiveness of least culpable conduct test); supra notes 67–71 and accompanying text (describing least culpable conduct test).

194. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 192–93 (2007); see also *Silva-Trevino*, 24 I. & N. Dec. at 698 ("[T]he 'realistic probability' approach is grounded in the realization that immigration penalties ought to be based on criminal laws as they are actually applied."); Sharpless, supra note 56, at 1005 n.109 ("The [*Duenas-Alvarez*] court was simply making the unsurprising statement that, when relying on a state court interpretation of statutory elements, litigants must be able to point to case law to support their hypothetical prosecutions.").

195. See supra note 55 and accompanying text (listing case law that supports notion that state labels for crimes should not control inquiry for federal immigration consequences).

196. The burden of proof is on the noncitizen to demonstrate admissibility. In the case of a returning LPR, subsections 101(a)(13)(C)(iii) and (v) of the INA, 8 U.S.C. § 1101(a)(13)(C)(iii) and (v), state respectively that after "[engaging] in illegal activity after having departed the United States" or "[having] committed an offense identified in section 212(a)(2)," an LPR will be treated as seeking admission into the United States, putting the burden of proof on the noncitizen to show admissibility. See INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A) (2006) (providing that noncitizen applying for admission has burden of establishing that she "is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212"); 8 C.F.R. § 1240.8(c) (2010) (indicating a noncitizen not lawfully in the United States "pursuant to a prior

Critics of the realistic probability test have eschewed this test, arguing that it impermissibly shifts the burden for deportation because the noncitizen has to present cases showing that the statute was used to prosecute conduct that does not involve moral turpitude.[197] The burden of proof, however, remains with the government because the government needs to show by clear and convincing evidence that the noncitizen's conviction involves moral turpitude and that the statute has not been applied to conduct that does not involve moral turpitude.[198] By pointing to cases where the statute has been applied to prosecute conduct that does not involve moral turpitude, the noncitizen is rebutting the government's argument that all convictions under the criminal statute involve moral turpitude. The use of this evidence is similar to the use of hypothetical conduct that the criminal statute would reach under the least culpable conduct test.[199]

The Third Circuit also argued that the realistic probability test may be inapplicable in cases where the crime in question is unambiguously not a CIMT. That is, when the statute's plain language clearly encompasses conduct that does not involve moral turpitude, the adjudicator does not have to use the realistic probability test in the first step of the categorical approach to conclude that the crime cannot categorically involve moral turpitude.[200] The Third Circuit's reading, however, does not

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admission . . . must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged"); see also Rodriguez v. Mukasey, 519 F.3d 773, 776 (8th Cir. 2008) ("[The noncitizen] bore the burden of proving clearly and beyond doubt that he was not inadmissible."); *Silva-Trevino*, 24 I. & N. Dec. at 709 ("[T]he burden is on respondent to establish 'clearly and beyond doubt' that he is 'not inadmissible.'"). The burden of proof for deportation, however, is on the government. See INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) ("In [a deportation] proceeding the [government] has the burden of establishing by clear and convincing evidence that . . . the alien is deportable."). One criticism of *Silva-Trevino* is that the Attorney General did not address the fact that the INA puts the burden of proof on the government to show that a noncitizen is deportable. See infra note 197 and accompanying text (discussing possibility of impermissible burden shifting as result of *Silva-Trevino*).

197. See, e.g., Nat'l Lawyers Guild, supra note 32, § 6:3 ("[T]he decision in *Silva-Trevino* might be read as impermissibly placing the burden of proof on the noncitizen since the government bears the burden of proof to establish the ground of deportability under the INA."); Brief for Am. Immigr. Lawyers Ass'n et al. as Amici Curiae Supporting Respondent, supra note 61, at 18 n.11 ("[A]s the Attorney General himself acknowledges without resolving, the framework he posits calls into question the statutory burden of proof and will be more complicated in removal cases . . . ." (internal quotation marks omitted)).

198. See INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (providing government "has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable").

199. See supra note 70 and accompanying text (describing use of hypothetical convictions in least culpable conduct test).

200. Jean-Louis v. Att'y Gen., 582 F.3d 462, 481 (3d Cir. 2009); see United States v. Grisel, 488 F.3d 844, 845–46, 850 (9th Cir. 2007) (en banc) (holding that in "violent felony" context for Armed Career Criminal Act, realistic probability test does not apply if criminal offense is clearly delineated by plain language of statute). The Ninth Circuit, however, does use the realistic probability test for instances where the plain meaning of the

preclude the realistic probability test when the elements of a statute can be satisfied by a range of acts, some of which although not involving moral turpitude, would not actually be prosecuted under it.

### B. *Second Step: Adjudicators Should Uniformly Limit Their Use of the Record of Conviction*

The circuit courts and the BIA are currently inconsistent in their application of the second step of the categorical approach, even within a given circuit.[201] Adjudicators should uniformly use the record of conviction for the narrow purpose of determining under which portion of a criminal statute the noncitizen was convicted.[202] By limiting the use of the record of conviction to facts decided by the criminal adjudicator, the inquiry would be consistent with the use of "convicted" in the relevant INA provisions.[203]

Furthermore, adjudicators should bear in mind the severity of deportation and afford protections to noncitizens to avoid unfair application of the immigration laws by only allowing consideration of the record of conviction for this narrow purpose.[204] Facts in the record of conviction may not have been found by the criminal factfinder. If adjudicators in the immigration context relied on facts not necessarily found by the criminal factfinder, they would "inevitably [be] adjudicat[ing] the truth of these facts (i.e., the underlying conduct) in the first instance" without giving the noncitizen an adequate opportunity to defend against them.[205] The role of the adjudicator for immigration cases is not to determine guilt, but to decide if the facts found by the criminal adjudicator result in immigration consequences.[206]

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statute is not clear. See supra note 74 (comparing different applications of realistic probability test). The Third Circuit's language does not seem to explicitly preclude use of the realistic probability test when the plain meaning is not clear. See *Jean-Louis*, 582 F.3d at 481–82 (declining to use realistic probability test in case where elements of crime are "clear" and approvingly citing Ninth Circuit's reasoning in *Nicanor-Romero*).

201. See supra notes 82–90 and accompanying text (describing variations in modified categorical approach).

202. See supra notes 82–84 (discussing majority view of modified categorical approach, where record of conviction is used only to determine under what portion of statute noncitizen was convicted).

203. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i); INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I).

204. Because the text of the INA is ambiguous in regards to which method adjudicators should use to determine whether a conviction involves moral turpitude, the rule of lenity for the construction of ambiguous statutes in the immigration context provides that ambiguity should be resolved in favor of the noncitizen. See supra note 192 (discussing protections not generally offered to civil defendants but afforded to noncitizens in deportation proceedings because of severity of deportation as penalty).

205. Sharpless, supra note 56, at 1010–11.

206. See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (stating role of IJ is to "order deportation," and not to "adjudicate guilt"); see infra notes 212–213 and accompanying text (discussing role of IJ).

### C. Silva-Trevino*'s Third Step Should Be Rejected*

The Attorney General's third step, which permits inquiry into any additional evidence, should not be followed when determining whether a conviction involves moral turpitude. Because this third step is contrary to the use of "convicted" in the INA, federal circuit courts should not defer to this impermissible reading of the statutory language. The third step will also increase unfairness, inconsistency, and inefficiency in the application of the CIMT provisions of the INA.

Because the third step proposed by the Attorney General would allow consideration of the underlying actions of the noncitizen beyond the elements of the charged offense, it does not adhere to the language of the INA. As the Third Circuit in *Jean-Louis* concluded, the use of the word "convicted," as opposed to "committed," focuses the immigration inquiry on the *elements* of the statute and not the *actions* of the noncitizen.[207] Although the INA does use "committed" in section 212(a)(2)(A)(i) of the INA, 8 U.S.C. § 1182(a)(2)(A)(i), it is used in reference to noncitizens who admit to a crime, but not in reference to convictions. The Attorney General's third step veers away from the categorical approach by allowing the factfinder to see if the acts committed by the noncitizen, rather than the elements for conviction, involve moral turpitude. Therefore, as the Third Circuit found, the Attorney General's third step does not merit deference under *Chevron* because it is based on an impermissible reading of the INA: It disregards the clear language in the INA that focuses on a conviction for a CIMT.[208]

Similar to broad use of the record of conviction in step two of the categorical approach,[209] *Silva-Trevino*'s third step will also increase unfairness in removal proceedings by allowing "*de novo* fact finding on the conduct underlying the criminal court conviction," which is contrary to the general protections given to noncitizens in removal proceedings in light of the severity of deportation.[210] Noncitizens may not have had the op-

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207. Jean-Louis v. Att'y Gen., 582 F.3d 462, 473–74 (3d Cir. 2009) (explaining use of "convicted" in INA "explicitly limits the inquiry to the record of conviction or comparable judicial record evidence—that the CIMT determination focuses on the *crime* of which the alien was *convicted*—not the specific *acts* that the alien may have *committed*" (citation omitted)); see supra note 19 (providing definition of "conviction" in INA).

208. For a discussion of *Chevron* deference, see supra notes 46–50 and accompanying text. For the Third Circuit's argument against the adoption of *Silva-Trevino*'s third step, see *Jean-Louis*, 582 F.3d at 473–75; see also supra notes 173–175 and accompanying text (detailing reasoning of *Jean-Louis* court for not deferring to third step of *Silva-Trevino*).

209. See supra notes 204–206 and accompanying text (critiquing broad use of record of conviction in modified categorical approach).

210. See Letter from Carolyn B. Lamm, President, Am. Bar Assoc., to Eric H. Holder, U.S. Att'y Gen. 1–2 (Jan. 22, 2010), available at http://www.abanet.org/poladv/letters/immigration/2010jan26_silvatrevino_l.pdf (on file with the *Columbia Law Review*) ("It is fundamentally unfair to force immigrants to relitigate their criminal cases in immigration court hearings that are not governed by formal rules of evidence, where the Sixth Amendment rights to appointed counsel and to a trial by jury do not apply, and where the

portunity to challenge certain facts in a criminal proceeding if they were not essential elements of the conviction.[211] Furthermore, because these nonelement facts were not found by the criminal factfinder, the IJ would necessarily be deciding the truth of the underlying facts in the criminal conviction in the first instance, which is an impermissible role for an IJ.[212] The function of an IJ is not to determine guilt or innocence, or the truth of facts underlying the criminal conviction, but only to analyze a conviction by a criminal court for immigration consequences.[213]

The Attorney General's third step will amplify inconsistency in the application of the INA's CIMT provisions. For example, there will be increased discrepancy if some court records are more complete than others or if some IJs consider more external evidence than others.[214] Although the Attorney General in *Silva-Trevino* stated that criminal convictions may not be relitigated in immigration courts,[215] this restriction is insufficient. For example, in the second step of the inquiry, use of additional evidence is restricted to the record of conviction ensuring that adjudicators will use the same underlying documents to gather evidence. However, with very little limitation on the type of evidence that can be used in the third step of *Silva-Trevino*, discretion will be solely in the hands of IJs as to what evidence to consider.

Finally, the third step of the *Silva-Trevino* approach will increase inefficiency in CIMT adjudication in already overburdened courts.[216] One of

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Fourth Amendment exclusionary rule and Fifth Amendment privilege against self-incrimination do not apply with full force.").

211. See Sharpless, supra note 56, at 984–85 (stating because only element facts can lead to criminal conviction, "[a] defendant therefore has no reason to dispute (or to exclude from the record) nonelement facts").

212. See id. at 1032 ("[B]ecause immigration adjudicators have no statutory authority to adjudicate guilt or innocence, they cannot rely on facts unless they have already been proven beyond a reasonable doubt in the prior criminal proceeding. The role of adjudicators is appropriately limited to determining what was already decided in the prior proceeding." (citation omitted)).

213. United States ex rel. Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914); Immigration Laws—Moral Turpitude—Political Offense—Abnormal Conditions in Foreign Jurisdiction, 39 Op. Att'y Gen. 215, 220 (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.").

214. R—, 6 I. & N. Dec. 444, 448 n.2 (B.I.A. 1954) (arguing categorical approach "eliminates the situation where a nonjudicial agency retries a judicial matter . . . [and] 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").

215. *Silva-Trevino*, 24 I. & N. Dec. 687, 690 (Op. Att'y Gen. 2008) ("[The third step] is not an occasion to relitigate facts or determinations made in the earlier criminal proceeding.").

216. See Transactional Records Access Clearinghouse, Syracuse Univ., As FY 2010 Ends, Immigration Case Backlog Still Growing (2010), available at http://trac.syr.edu/immigration/reports/242/ (on file with the *Columbia Law Review*) (reporting "number of cases awaiting resolution before the Immigration Courts reached a new all-time high");

the underlying rationales for adopting a categorical approach was to ensure speedy proceedings and to avoid relitigating criminal convictions.[217] By allowing consideration of any additional evidence, instead of using a categorical approach focused on the statute of conviction, the CIMT inquiry will be greatly expanded to permit inquiry into the underlying actions of noncitizens in removal proceedings.

## CONCLUSION

The federal circuit courts and the administrative courts should uniformly adopt the realistic probability test as suggested by *Silva-Trevino*, but should reject the third step that considers evidence beyond the record of conviction. The deportation and inadmissibility provisions of the INA reflect a policy choice by Congress to prevent noncitizens with certain types of criminal convictions from entering and remaining in the United States. The realistic probability test is most able to give effect to that policy choice by increasing accuracy in the consideration of criminal convictions for immigration consequences without capturing noncitizens who have not in fact committed a CIMT.

Even though accuracy should be increased, protections for the noncitizen should not be sacrificed in light of the grave nature of deportation. Thus, adjudicators should reject *Silva-Trevino*'s third step to protect a noncitizen in removal proceedings from the use of facts that were not found in the criminal proceeding. A consistent approach among the administrative courts and the federal circuit courts would provide for a uniform application of the immigration laws. A uniform policy would ensure that immigration laws do not depend on the location of removal proceedings or on the wording of criminal statutes, but on a consistent nationwide application of the immigration laws.

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Transactional Records Access Clearinghouse, Syracuse Univ., Immigration Courts Taking Longer to Reach Decisions (2010), available at http://trac.syr.edu/immigration/reports/244/ (on file with the *Columbia Law Review*) (reporting "Immigration Courts took 20 percent longer to act on cases before them than they did the previous year"); see also supra note 15 and accompanying text (providing statistics for CIMT cases).

217. See supra notes 62–63 and accompanying text (providing rationale behind adoption of categorical approach).