

REEVALUATING THE ADJUDICATION OF CRIMES INVOLVING
MORAL TURPITUDE

by
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Criminalizing immigration status has tainted the lives of permanent residents in the United States for years. A minor misdemeanor conviction imposes the threat of extreme penalties for noncitizens and their continued residence in the United States. Specifically, a conviction of a crime involving moral turpitude can prevent a noncitizen from seeking admission, threaten deportation proceedings, and jeopardize his or her ability to naturalize as a United States citizen. Crimes involving moral turpitude remain undefined in the Immigration and Nationality Act, causing courts to adjudicate the crimes arbitrarily.

In the absence of statutory or administrative direction, jurisdictions across the United States generally employ a two-step categorical approach to analyze the definition of moral turpitude and to adjudicate the associated crimes. First, the court identifies the requisite elements of the state statutory conviction. Second, the court compares the state statutory elements of the conviction to the generic federal crime. A crime of moral turpitude is determined if all state statutory elements are a categorical match to the generic federal counterpart.

The employed categorical approach appears facially determinable. Yet criminal convictions for similar crimes continue to elicit varying immigration consequences due to the swing of the political pendulum. Attorneys general introduce loopholes into the traditional two-step categorical approach effectively altering the outcome of a conviction which would otherwise not be considered a crime involving moral turpitude. This Note describes the traditional categorical approach and explores the modifications proposed, exercised, or rejected as the approach continues to evolve. Finally, this Note proposes a solution to adjudicate crimes involving moral turpitude.

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INTRODUCTION

Imagine the story of Rosa. Rosa immigrated to the United States from Mexico as a child. She became a lawful permanent resident as a maturing adolescent. Rosa has since lived in the United States for 40 years. Rosa has four children and works full-time pumping gas to put food on the table for her family. One late night, Rosa was working alone at the pump station and recognized a car slowly pull forward. It was her childhood friend. Rosa's friend stepped out of her car and walked up to Rosa with tears in her eyes. She only had five dollars, but desperately needed gas to return home to her one-year-old baby and food to hold them over until payday in two days. Rosa felt deeply saddened to see her friend in need. Rosa filled her friend's gas tank, washed her car, and loaded two bags filled with bagels and bananas into her friend's car. Rosa accepted her friend's five dollars, contributed ten dollars of her own, and wrote off the remaining balance.

At the end of every month, Rosa's station manager records inventory and balances the station's account. Upon calculation this month, Rosa's manager recognized a deviation in the account's receivables. Rosa, along with a couple of other employees who independently engaged in similar behavior, confessed to their actions of unlawfully assisting guests. All guilty employees were fired from their jobs, reported to the California police department, and charged with theft pursuant to California Penal Code § 484(a),¹ which criminalizes the intent to permanently deprive the owner of his or her property or services. The charged employees face

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charges including a fine potentially exceeding \$1,000 and imprisonment for up to one year. Rosa and her colleagues pled guilty, and the judge sentenced them to ten months of probation and community service—no jail time.

Rosa's now former colleagues are United States citizens. The conviction left them with new jobs and tainted resumes. Unfortunately, Rosa was not so lucky. About a month later, she received a Notice to Appear in Immigration Court. After living in the United States for over 40 years, Rosa faced potential deportation for having committed a crime involving moral turpitude.

* * *

Rosa's hypothetical account is just one illustration of how a single criminal conviction has the potential to impose extremely adverse immigration consequences on noncitizens. Despite establishing roots and maintaining residencies in the United States for several decades, noncitizens face the threat of mandatory deportation upon conviction of a criminal offense, even for a minor misdemeanor.²

A conviction of a minor offense could have "disastrous consequences for a person's immigration status."³ As United States citizens, Rosa's former colleagues were able to continue their residence in the United States and remain with their families. Since Rosa was born across the border, in a land foreign to her as an adult, she could be forced to leave the country she considers home.

A criminal conviction may compromise a noncitizen's legal immigration status in a number of ways. Some compromises are strictly defined and unambiguous,⁴ while others are not as easily recognizable. Crimes involving moral turpitude are not specifically defined in the Immigration and Nationality Act (INA).⁵ Consequently, adjudicators and advocates alike face decades of controversy and debate while the courts attempt to strictly define which crimes fall involve "moral turpitude."

¹ CAL. PENAL CODE § 484(a) (West 2019) ("Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.")

² Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 378 (2006).

³ Erin McKee & Joseph Justin Rollin, *Crimmigration: Where Immigration Law and Criminal Law Meet*, 64 MULTNOMAH B. ASS'N: MULTNOMAH LAW., May 2018, at 14.

⁴ The INA defines several criminal offences which unambiguously list specific actions that fall within the purview of the crime. See *id.* § 1227(a)(2)(E) (crime of domestic violence); *id.* § 1227(a)(2)(B) (crime of controlled substances). See generally Immigration and Nationality Act § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2012) (aggravated felony crimes).

⁵ *Id.* §§ 1101–1537.

Considering the extreme immigration implications noncitizens face as a result of a criminal conviction, it is important to understand the process adjudicators use to determine a noncitizen's fate. Immigration courts continuously modify the evaluation process for determining which crimes involve moral turpitude and which do not. Traditionally, courts administer a two-step approach which first attempts to identify a categorical match to the generic federal definition of the crime, and second, in divisible statutes only, attempts to "discern whether the [noncitizen's] conviction can be narrowed to the qualifying crime."⁶ In 2008, United States Attorney General Mukasey modified the traditional two-step categorical approach to include a third step.⁷ The third step permitted the evaluation of evidence historically barred from entering the analysis.⁸ In 2015, Attorney General Holder vacated the 2008 decision noting that the "third step of Attorney General Mukasey's framework [was] contrary to the unambiguous language of the statute."⁹

In April 2018, the Supreme Court employed the categorical analysis to a conviction ultimately determined too vague to satisfy a categorical match presumption.¹⁰ There, the Court employed the categorical approach to determine "whether 'the ordinary case' of an offense poses the requisite risk" for the generic federal standard of conviction.¹¹ In evaluating the requisite risk, the Court evaluates the "nature of the offense[,] generally speaking."¹²

While the courts continuously attempt to define crimes involving moral turpitude, the noncitizens bearing the weight of the experimentation often have created a family, livelihood, and substantial stake in the United States. In an effort to make outcomes more uniform and certain, the adjudication of crimes involving moral turpitude should be modified in two respects. First, the INA should provide a clear definition for crimes involving moral turpitude. Second, immigration courts should only use the traditional categorical approach, eliminate the independent evaluation of divisible elements, and continue to reject the analysis of extrinsic evidence.

This Note examines the interrelated effects of criminal law and immigration law. Part I begins by explaining the relationship between immigrants and crime. It next describes the creation of what is known as "crimmigration"—a term used to describe the intersection of two distinct bodies of law merging on various adjudicative platforms.

⁶ *Barrera-Lima v. Sessions*, 901 F.3d 1108, 1115 (9th Cir. 2018).

⁷ *See generally In re Silva-Trevino (Silva-Trevino I)*, 24 I. & N. Dec. 687 (A.G. 2008), *vacated*, 26 I. & N. Dec. 550 (A.G. 2015).

⁸ *Id.* at 690.

⁹ *In re Silva-Trevino (Silva-Trevino II)*, 26 I. & N. Dec. 550, 552 (A.G. 2015) (citing *Silva-Trevino v. Holder*, 742 F.3d 197, 203 (5th Cir. 2014)).

¹⁰ *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018).

¹¹ *Id.* at 1211 (quoting *James v. United States*, 550 U.S. 192, 208 (2007)).

¹² *Id.* (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004)).

Part II introduces crimes involving moral turpitude and provides an overview of the controversial definition, effects of a conviction, and the analytic approach an adjudicator will use to determine whether a crime involves moral turpitude.

Part III details the categorical analysis employed to determine whether a crime involves moral turpitude. This Part uses the hypothetical scenario of Rosa to assist in describing the process. Part III also addresses the seminal case of *In re Silva-Trevino* to discuss the proposed, and eventually rejected, third step of the categorical analysis.¹³

Part IV proposes a solution to define the ambiguous crimes involving moral turpitude and suggests an approach to make uniform all future analyses related to evaluating crimes involving moral turpitude.

I. RELATIONSHIP WITH IMMIGRANTS AND CRIME

During the Civil Rights Era, immigration was viewed as a powerful tool to encourage the protection of refugees and undocumented workers in order to combat the racial discrimination to which they fell victim.¹⁴ This movement has since dramatically shifted scope.¹⁵ The current perception of immigration is subjectively framed to illustrate United States citizens as victims who need protection from immigrants.¹⁶ This illustration consequently encourages the public to frame its view of

¹³ In 2015, the court vacated *Silva-Trevino I*, removing the third step of the categorical approach analysis. *Silva-Trevino II*, 26 I. & N. Dec. at 553. Under the Trump administration, the possibility of reviving the *Silva-Trevino I* third step is potentially forthcoming. We will explore the third step and the implications it might raise should the Trump administration wish to reinstate a holding similar to *Silva-Trevino*'s original decision.

¹⁴ Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 615 (2003).

¹⁵ Simon Butler & Ian Angus, *People Are Not Pollution: Population Limits Are Not Green*, GREEN LEFT WKLY. (Jan. 31, 2010), <https://www.greenleft.org.au/content/people-are-not-pollution-population-limits-are-not-green> (refuting the shifting argument suggesting that "immigrants should be kept out because their way of life is a threat to our environment"); Muzaffar Chishti et al., *Shifting Gears, Trump Administration Launches High-Profile Worksite Enforcement Operations*, MIGRATION POL'Y INST. (Jan. 24, 2018), <https://www.migrationpolicy.org/article/shifting-gears-trump-administration-launches-high-profile-worksite-enforcement-operations> (declaring the Trump administration's efforts to place fear in working-class immigrants as signaling that "the workplace is not a safe space"); Ali Vitali et al., *Trump Referred to Haiti and African Nations as "Shithole" Countries*, NBC NEWS (Jan. 12, 2018), <https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946> (reporting on President Trump's dismissal of immigrants from "shithole" countries and his view that the U.S. is threatening thousands of American lives by welcoming the immigrants and their drugs).

¹⁶ Miller, *supra* note 14, at 615.

“the immigrant as a criminal versus the immigrant as a member of society.”¹⁷ Despite popular belief, this perception of immigrants as criminals is vastly misleading. In fact, quite the opposite is true.¹⁸

Immigrants, whether or not with documents, “do not increase local crime rates and are less likely to cause crime than their native-born peers.”¹⁹ Furthermore, “natives are more likely to be incarcerated than immigrants.”²⁰ Despite this fact, efforts to bring immigrants into court have increased.²¹ Criminal law has consequently become a part of the conversation in immigration court.

A. *Crimmigration: The Immigration Law and Criminal Law Merger*

The controversial weight of criminal convictions on noncitizens has interlaced immigration law and criminal law. Legal scholars describe this overlap as the “criminalization of immigration law.”²² Criminalization of immigration law, or “crimmigration law,”²³ depicts the invasion of criminal law into immigration law, which was historically categorized as civil law.

¹⁷ Stumpf, *supra* note 2, at 375.

¹⁸ WALTER EWING ET AL., AM. IMMIGR. COUNCIL, *THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 1* (2015) (concluding that native-born individuals are more likely to engage in criminal behavior and become incarcerated than are immigrants); Julia Dahl, *How Big a Problem Is Crime Committed by Immigrants?*, CBS NEWS (Jan. 27, 2017), <https://www.cbsnews.com/news/illegal-immigrants-and-crime-how-big-a-problem-is-crime-committed-by-immigrants/> (pointing to the American Immigration Council’s findings that “1.6 percent of immigrant males age 18-39 are incarcerated, compared to 3.3 percent of the native-born”).

¹⁹ MICHELANGELO LANDGRAVE & ALEX NOWRASTEH, CATO INST., *CRIMINAL IMMIGRANTS: THEIR NUMBERS, DEMOGRAPHICS, AND COUNTRIES OF ORIGIN 1* (2017).

²⁰ *Id.*

²¹ REFUGEES INT’L, *REPORT CARD: THE TRUMP ADMINISTRATION’S PERFORMANCE ON REFUGEE AND HUMANITARIAN PROTECTION 4* (2018), <https://www.refugeesinternational.org/reports/2018/6/19/report-card-on-the-trump-administrations-performance-on-refugee-and-humanitarian-protection> (giving the Trump Administration an unsatisfactory grade (F) related to the “criminal prosecution of asylum seekers and imposition of criminal sentences prior to consideration of any claims for asylum”); Tal Kopan, *Arrests of Immigrants, Especially Non-Criminals, Way Up in Trump’s First Year*, CNN POLITICS (Feb. 23, 2018), <https://www.cnn.com/2018/02/23/politics/trump-immigration-arrests-deportations/index.html> (identifying a substantial increase in arrests of immigrants under President Trump’s direction to “cast[] a wide net to catch undocumented or deportable immigrants”); Dara Lind, *Around the Country, ICE Is Arresting Immigrants When They Show Up to Court*, VOX (Aug. 7, 2017), <https://www.vox.com/policy-and-politics/2017/4/11/15180140/immigrants-arrested-courthouses-ice> (verifying the Trump administration’s effort to target immigrants for deportation proceedings in local courthouses for unrelated matters, including green card application submissions and offering to provide witness testimony, among others).

²² Miller, *supra* note 14, at 613.

²³ Stumpf, *supra* note 2, at 376.

According to Professor Juliet Stumpf, criminal law and immigration merge in three respects:

- (1) the substance of immigration law and criminal law increasingly overlaps,
- (2) immigration enforcement has come to resemble criminal law enforcement, and
- (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure.²⁴

Immigration proceedings have gravitated to parallel the criminal justice system both procedurally and substantively,²⁵ most notably in enforcing consequences of criminal offenses.²⁶ As the legal disciplines intersect, minor convictions can lead to adverse immigration consequences.

The breadth of offenses that threaten immigration status expands as crimmigration becomes more prevalent. Arguably, the most complicated aspect of immigration law involves calculating the immigration consequences imposed due to a criminal conviction. Punishment for a mere misdemeanor conviction could now result in mandatory deportation proceedings.²⁷

Consider Rosa. Rosa's United States citizen former colleagues faced criminal charges and subsequent penalties for their conviction. Yet their case ended there. But not Rosa's. Rosa will now face an immigration judge to adjudicate the consequences of her criminal conviction.

II. CRIMES INVOLVING MORAL TURPITUDE

Unlike its lengthy catalogue of crimes identified as aggravated felonies,²⁸ the INA does not list crimes that involve moral turpitude.²⁹ Without a definition, statutory interpretation is required to determine whether or not a crime falls within the

²⁴ *Id.* at 381 (footnote omitted).

²⁵ *Id.* at 376.

²⁶ Immigration consequences are employed only when an immigrant has been *convicted* of a criminal offense. The INA defines the term "conviction" as a "formal judgment of guilt . . . entered by a court . . . or . . . where . . . a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted to sufficient facts to warrant a finding of guilt." 8 U.S.C. § 1101(a)(48)(A)(i) (2012).

²⁷ Stumpf, *supra* note 2, at 378.

²⁸ 8 U.S.C. § 1101(a)(43) (providing an extensive list of crimes classified as aggravated felonies).

²⁹ *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 10, 2019), <https://www.uscis.gov/laws/immigration-and-nationality-act>. Please note that the INA refers to noncitizens as "aliens." In an effort to maintain sensitivity in the use of offensive labeling, this Note will instead refer to noncitizens as "noncitizens," unless citing to specific language in the INA.

category of morally turpitudinous conduct.³⁰ However, unequivocally, the lack of a clear definition of crimes involving moral turpitude leads to varying evaluations and conflicting interpretations across jurisdictions. Legal scholars describe the classification of a crime involving moral turpitude as “maddeningly vague and the cases just as maddeningly intricate.”³¹ The vagueness causes advocates and adjudicators alike difficulty in analyzing what constitutes a crime involving moral turpitude and what falls short.

The likely explanation for the lack of a workable definition is “because its limits are charted by human experience.”³² As a result of a loosely defined description and absent a clear procedure for what constitutes a crime involving moral turpitude, courts are forced to deploy a case-by-case analysis. Consequently, inconsistent applications of the analysis continues to produce varying results for like circumstances.³³ The inconsistencies could lead to mandatory deportation in one jurisdiction and no deportation in another.³⁴

A. Framing a Loose Definition

Courts have uniformly held that crimes involving moral turpitude are “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”³⁵ Decisions rendered by the Board of Immigration Appeals (BIA) and the Attorney General constructed this working definition.³⁶ Authorities continue to describe crimes involving moral turpitude as “anything done contrary to justice, honesty, principle, or good morals” and “an act of baseness, vileness, or depravity.”³⁷ Alternative versions of the definition describe a crime involving moral turpitude as one that is “inherently wrong and

³⁰ Cate McGuire, *An Unrealistic Burden: Crimes Involving Moral Turpitude and Silva-Trevino's Realistic Probability Test*, 30 REV. LIT. 607, 609 (2011).

³¹ T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 680 (8th ed. 2016).

³² *Id.* (quoting 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05(1)(d)(i) (2015)).

³³ Patrick J. Campbell, Note, *Crimes Involving Moral Turpitude: In Search of a Moral Approach to Immoral Crimes*, 88 ST. JOHN'S L. REV. 147, 148 (2014).

³⁴ *Id.* at 163.

³⁵ *Silva-Trevino I*, 24 I. & N. Dec. 687 (A.G. 2008) (quoting *Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir. 1996)); see also *Jordan v. De George*, 341 U.S. 223, 226 (1951); *Marmolejo-Campos v. Holder*, 555 F.3d 903, 910 (9th Cir. 2009); *Hernandez-Perez v. Holder*, 569 F.3d 345, 347 (8th Cir. 2009); *Mendez v. Mukasey* 547 F.3d 345, 347 (2d Cir. 2008); *Rodriguez v. Gonzalez*, 451 F.3d 60, 63 (2d Cir. 2006); *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d Cir. 2004).

³⁶ Pooja R. Dadhanian, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 315 (2011).

³⁷ *In re Serna*, 20 I. & N. Dec. 579, 582 (B.I.A. 1992) (emphasis omitted) (quoting 37 Op. Att'y Gen. 293, 294 (1933)).

has been committed with scienter; that is, a crime which is morally objectionable.”³⁸ The ambiguous and indefinite definition of moral turpitude receives harsh criticisms as being open-ended, unsettling, vague, and subjective in nature.³⁹

Courts have, however, agreed that crimes involving moral turpitude are innately immoral. Adjudicators categorize moral turpitude offenses as *malum in se*, referring to the nature of the crime as reprehensible and inherently wrong, as opposed to *malum prohibitum*, which refers to crimes that are statutorily prohibited.⁴⁰ *Malum in se* crimes require scienter and knowledge of the criminal statute committed. Similarly, the BIA’s constructed definition of crimes involving moral turpitude requires corrupt scienter.⁴¹ Adjudicators consider the determination as a question of the “offender’s evil intent or corruption of the mind.”⁴² Generally, a crime will involve moral turpitude if such evil intent is “implicit in the nature of the crime” regardless of whether “the statute requires proof of evil intent.”⁴³

Notwithstanding the unclear, intangible definition provided in the INA, courts have agreed that continuing to enforce against crimes involving moral turpitude is an effective foundation for removal proceedings against noncitizens.⁴⁴ Adjudicators have divided crimes involving moral turpitude into three broad categories of convictions:⁴⁵ (1) crimes against the person (including domestic violence,⁴⁶ murder,

³⁸ Dadhania, *supra* note 36, at 313.

³⁹ Campbell, *supra* note 33, at 153.

⁴⁰ Nadine Wettstein, *The Consequences for Immigrants of Crimes Involving Moral Turpitude*, IMMIGR. BRIEFINGS, Feb. 2013, at 2, WL 13-02 IMMIGRBRIEF 1; *see also* Ruiz-Lopez v. Holder, 682 F.3d 513, 519 (6th Cir. 2012) (“[O]ffenses that can be classified as ‘malum in se’ generally do involve moral turpitude, while those classified as ‘malum prohibitum’ do not.” (citing Torres-Varela, 23 I. & N. Dec. 78, 84 (B.I.A. 2001))).

⁴¹ *Ruiz-Lopez*, 682 F.3d at 519 (“[M]oral turpitude under the [INA] requires that a perpetrator have committed the reprehensible act with some form of scienter; thus, ‘where knowledge is a necessary element of a crime under a particular criminal statute, moral turpitude inheres in that crime’ if the crime also involves some sort of reprehensible conduct.” (quoting *Silva-Trevino I*, 24 I. & N. Dec. 687, 706 n.5 (A.G. 2008))); *see also* Michel v. Immigration & Naturalization Serv., 206 F.3d 253, 263 (2d Cir. 2000) (determining that “knowledge is a requisite element . . . and corrupt scienter is the touchstone of moral turpitude”); Perez-Contreras, 20 I. & N. Dec. 615, 618 (B.I.A. 1992) (identifying a crime involving moral turpitude as an act “accompanied by a vicious motive or corrupt mind . . . [w]here knowing or intentional conduct is an element” (citations omitted)).

⁴² Serna, 20 I. & N. Dec. 579, 581 (B.I.A. 1992).

⁴³ *Gonzalez-Alvarado v. Immigration & Naturalization Serv.*, 39 F.3d 245, 246 (9th Cir. 1994).

⁴⁴ Dadhania, *supra* note 36, at 315.

⁴⁵ ALEINIKOFF ET AL., *supra* note 31, at 680.

⁴⁶ *See* Tokatly v. Ashcroft, 371 F.3d 613, 616 (9th Cir. 2004).

rape, aggravated assault, sexual battery,⁴⁷ kidnapping, and solicitation of prostitution⁴⁸); (2) crimes against property (including arson, burglary,⁴⁹ and embezzlement⁵⁰); and (3) crimes with an element of fraud.⁵¹ It is important to note, however, that multiple convictions for a crime that is not considered to be one involving moral turpitude do not compound into such a crime in the aggregate.⁵²

B. *The Effect of a Conviction for a Crime Involving Moral Turpitude*

Adjudicating and predicting the consequences of an immigrant's criminal conviction are some of the most complicated features of immigration law.⁵³ As illustrated in the hypothetical case of Rosa, a permanent resident legally residing within the United States for a substantial period of time may nevertheless face removal proceedings for a conviction of a benign violation of the law.⁵⁴

The analysis for determining the immigration effects, if any, on a noncitizen who has committed a criminal offense begins, throughout all grounds of removability, with the declaration of a conviction.⁵⁵ The court's adjudication process regarding whether a criminal offense involves moral turpitude commences exclusively on the recognition that the individual was convicted of a criminal offense. The INA defines a conviction as an admission or "judgment of guilt."⁵⁶ It is important to note

⁴⁷ See *Gonzalez-Cervantes v. Holder*, 709 F.3d 1265, 1267 (9th Cir. 2013).

⁴⁸ See *Rohit v. Holder*, 670 F.3d 1085, 1090 (9th Cir. 2012).

⁴⁹ See *Uribe v. Sessions*, 855 F.3d 622, 624 (4th Cir. 2017).

⁵⁰ See *Delgado-Chavez v. Immigration & Naturalization Serv.*, 765 F.2d 868, 869 (9th Cir. 1985).

⁵¹ See *Tijani v. Holder*, 628 F.3d 1071, 1075–76 (9th Cir. 2010).

⁵² *Wettstein*, *supra* note 40, at 2 ("A crime that does not involve moral turpitude does not become a [crime involving moral turpitude] through repetition."); see also *Short*, 20 I. & N. Dec. 136, 139 (B.I.A. 1989) ("Moral turpitude cannot be viewed to arise from some undefined synergism by which two offenses are combined to create a crime involving moral turpitude, where each crime individually does not involve moral turpitude.").

⁵³ This complex overlap between immigration law and criminal law led to the holding in *Padilla v. Kentucky*, wherein the Court held that defense counsel's failure to advise the noncitizen defendant of the adverse consequences of his immigration status was ineffective assistance of counsel. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1494 (2010). The aftermath of *Padilla* created a requirement that criminal defense attorneys advise their immigrant clients of the potential adverse immigration consequences of their criminal convictions or plea deals. *Id.* at 1483.

⁵⁴ *Campbell*, *supra* note 33, at 147.

⁵⁵ See 8 U.S.C. § 1101(a)(48)(A) (2012).

⁵⁶ The INA explicitly defines a "conviction" as follows:

The term "conviction" means, with respect to an alien, 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.

the significance between an individual who has *committed* a criminal offense versus an individual who has been *convicted* of a criminal offense. The INA focuses the inquiry strictly on what crime the noncitizen was convicted of, not what acts he or she committed.⁵⁷ If a noncitizen commits a criminal offense but is never convicted in a criminal court of law, his or her immigration status will not be implicated. Alternatively, if the noncitizen's criminal actions are adjudicated in a criminal court of law and a judgment or decision is rendered, his or her immigration status will be analyzed for potential implications.

Evaluating of the consequences following receipt of a criminal conviction must begin with the language of the INA. Pursuant to the INA, a conviction of a crime involving moral turpitude has the ability to cause astringent adverse immigration consequences, regardless of the noncitizen's immigration status.⁵⁸ Due to the ambiguous and controversial nature of the evaluation for a crime involving moral turpitude, the repercussions may vary dramatically, and consequently lead to disproportionate outcomes.⁵⁹

A conviction for a crime involving moral turpitude leads to considerably detrimental consequences for noncitizens and their continued residence in the United States. The conviction of a crime involving moral turpitude can prevent a noncitizen from seeking admission,⁶⁰ threaten both lawful permanent residents and visa holders with deportation proceedings,⁶¹ and jeopardize a noncitizen's ability to establish good moral character,⁶² which is required as circumstantial evidence to supplement

Id.

⁵⁷ See *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (“The reason is that the INA asks what offense the noncitizen was ‘convicted’ of, not what acts he committed. ‘[C]onviction’ is ‘the relevant statutory hook.’” (alteration in original) (citations omitted)).

⁵⁸ The distinction between identifying whether a noncitizen will be punished by deportation or by inadmissibility relies on the noncitizen's entry into the United States. Noncitizens who have been inspected and admitted into the United States by an Immigration Officer at a port of entry are subject to deportation grounds pursuant to 8 U.S.C. § 1227(a). Conversely, those noncitizens who were not inspected and admitted into the United States are subject to inadmissibility grounds pursuant to 8 U.S.C. § 1182(a).

⁵⁹ Maureen Sweeney, *Categorical Analysis of Immigration Consequences 7 28 14*, YOUTUBE (July 28, 2014), <https://www.youtube.com/watch?v=eDA-wVIedT0>.

⁶⁰ 8 U.S.C. § 1182(a)(1) (identifying aliens convicted of a crime involving moral turpitude as a classification of individuals ineligible for visas or admission into the United States).

⁶¹ *Id.* § 1227(a)(2)(A)(i) (determining a classification of aliens deportable as: “[a]ny alien who—(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed”).

⁶² *Id.* § 1101(f) (describing actions or characteristics that disqualify a noncitizen from establishing good moral character).

an application to naturalize as a United States citizen.⁶³ Further, a conviction of a crime involving moral turpitude may prevent a noncitizen's eligibility for cancellation of removal, voluntary departure, or other relief benefits facing removal.⁶⁴

Noncitizens are deportable if they are convicted of a *single* crime involving moral turpitude within five years from their date of admission⁶⁵ for which an adjudicator can impose a potential sentence of imprisonment for at least one year.⁶⁶ *Multiple* convictions of crimes involving moral turpitude arising from separate criminal schemes will subject a noncitizen to removability regardless of the date of conviction or sentence of incarceration.⁶⁷

C. *The Adjudication Process*

Once the noncitizen is convicted,⁶⁸ the ambiguous approach to the adjudication process creates uncertainty in predicting the consequences. The immigration judge (IJ), the adjudicator sitting in the administrative courts for the Department of Justice, maintains authority to determine whether or not the nonimmigrant will be subject to removal proceedings.⁶⁹ The dissatisfied party can appeal the IJ's decision to the BIA.⁷⁰ During the appeal process, the Attorney General has authority to directly assign the case to herself.⁷¹ Decisions published by the BIA or the Attorney

⁶³ *Id.* § 1229b(b)(1)(B).

⁶⁴ *Id.* (describing establishment of good moral character as a ground to give the Attorney General the ability to cancel removal of a noncitizen); *id.* § 1229c(b)(1)(B) (describing establishment of good moral character as a ground to authorize the Attorney General to permit an alien to voluntarily depart the United States).

⁶⁵ *Id.* § 1227(a)(2)(A)(i). The five-year clock begins to run from the date the noncitizen was inspected and authorized entrance by an immigration officer. *Id.* The noncitizen must maintain continuous lawful presence in the United States thereafter. If the noncitizen is admitted and later adjusts his status, the clock does not restart once the noncitizen's status is adjusted so long as, prior to adjustment, he maintained continuous residence in the United States. The clock remains effective from the initial date of inspection and authorization. If the noncitizen entered without inspection (EWI) and subsequently adjusted his status, the clock will begin to run once the adjustment is granted. *See Shivaraman v. Ashcroft*, 360 F.3d 1142, 1148–49 (9th Cir. 2004).

⁶⁶ 8 U.S.C. § 1227(a)(2)(A)(i).

⁶⁷ *Id.* § 1227(a)(2)(A)(ii).

⁶⁸ *See id.* § 1101(a)(48)(A)(i) (defining "conviction").

⁶⁹ *Id.* § 1001.1(l) (defining "immigration judge").

⁷⁰ *Id.* § 1003.1(b) (authorizing the BIA to hear appeals for cases including, but not limited to, exclusion cases, deportation cases, removal proceedings, asylum, rescission of adjustment of status, etc.).

⁷¹ *Id.* § 1003.1(h)(1) (providing three individuals with the power to refer an appealed case directly to the Attorney General: the Attorney General herself, the Chairman of the BIA, and the Security of Homeland Security or specific officials within the Department of Homeland Security under the direction of the Secretary).

General create binding precedent in all proceedings of similar issues.⁷² In limited circumstances, and subject to restrictions, a noncitizen may challenge an order of removal issued or reinstated on appeal.⁷³

As a threshold matter, the court first looks to the BIA's prior decisions to determine if the noncitizen's criminal conduct was deemed morally turpitudinous in a prior decision.⁷⁴ This precedential preview is known as *Chevron* deference.⁷⁵ *Chevron* deference is applied to determine an agency's construction of a statute.⁷⁶ First, the court looks to the INA to determine if the conduct is deemed morally turpitudinous explicitly in the statute.⁷⁷ If the INA is silent on the particular crime, *Chevron* deference refers the court to the agency's "permissible construction of the statute."⁷⁸

Adjudicators use the framework of the *Chevron* approach to decipher ambiguous statutes in the immigration context. The BIA accords *Chevron* deference to provide otherwise "ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'"⁷⁹ A decision is entitled to *Chevron* deference "when it relies on a precedential BIA decision to determine that certain conduct is morally turpitudinous."⁸⁰ However, a decision is not entitled to *Chevron* deference if the court erroneously applied the prior precedent or if the prior decision "provided no reasoned explanation for its conclusion."⁸¹

⁷² *Id.* § 1003.1(g) (confirming designated decisions which establish precedential value).

⁷³ *Id.* § 1252 (providing for judicial review of orders of removal in limited circumstances). Among other limitations, the INA precludes judicial review requested for judgments against criminal aliens. *Id.* § 1252(a)(2)(C). Alternatively, claims challenging constitutional liberties and questions of law permit judicial review. The evaluation of determining whether or not a crime involves moral turpitude is a question of law. Consequently, despite the claims having been rooted in criminal grounds, federal courts may review the case. See Dadhanian, *supra* note 36, at 321.

⁷⁴ *Rivera v. Lynch*, 816 F.3d 1064, 1070 (9th Cir. 2016).

⁷⁵ *Id.*

⁷⁶ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

⁷⁷ *Id.* Deference is limited, however, to interpreting the criminal offense as provided in the INA. See *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 466 (3d Cir. 2009) ("Although we defer to the agency's determination of whether an offense constitutes a [crime involving moral turpitude], we accord no deference to its construction of a state criminal statute, as to which it has no particular expertise."); *Omagah v. Ashcroft*, 288 F.3d 254, 258 (5th Cir. 2002) ("[D]etermining a particular federal or state crime's elements lies beyond the scope of the BIA's delegated power or accumulated expertise.").

⁷⁸ *Chevron*, 467 U.S. at 843.

⁷⁹ *Immigration & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 448–49 (1987)).

⁸⁰ *Barrera-Lima v. Sessions*, 901 F.3d 1108, 1117 (9th Cir. 2018).

⁸¹ *Rivera v. Lynch*, 816 F.3d 1064, 1070 (9th Cir. 2016); see also *Barrera-Lima*, 901 F.3d at 1118 (determining that due to the BIA's erroneous application of the prior criminal offense, *Chevron* deference was inapplicable).

D. Initial Adjudication Landscape

Jurisdictions across the United States customarily follow a universal two-step approach to analyze the precedent defining moral turpitude and review its characteristics. This method is known as the categorical approach. In 1994, the BIA first outlined a proposal for the categorical approach analysis in *In re Alcantar*,⁸² a case involving the conviction of an aggravated felony. The BIA introduced the categorical approach to compare the generic federal definition of the crime with the state statutory crime of conviction. The comparison does not consult the underlying facts of the conviction, but instead focuses on the elements of the crime and resulting harm.

Similar to a conviction for an aggravated felony, adjudicators attempt to determine whether a criminal conviction involves moral turpitude by applying the categorical approach. Once the noncitizen is convicted of a criminal offense, the categorical approach focuses on “whether moral turpitude necessarily inheres in the elements of the offense,” rather than whether the noncitizen’s actions gave rise to the conviction.⁸³ Accordingly, the analysis requires a legal evaluation because it considers the elements of the statute of conviction.⁸⁴ A factual evaluation would require the court to consider the actual conduct of the noncitizen, which the categorical approach precludes. For example, if a noncitizen is convicted of theft, the court will consider the statutory *elements* of the theft: (1) taking, appropriating, or obtaining property; (2) deprivation of property without consent of owner; and (3) intent to deprive another.⁸⁵ The court will not consider *facts* related to the offense, such as the time of day, relationship of parties involved, or circumstances surrounding the event.⁸⁶

The seminal case responsible for creating considerable debate and for reframing the categorical approach is *Silva-Trevino I*.⁸⁷ The defendant in *Silva-Trevino I* was a Mexican national who became a permanent resident of the United States in 1962. Over 40 years later, on October 6, 2004, he was convicted and entered a plea of no contest to indecency with a child under Texas law.⁸⁸ The court accepted Silva-Trevino’s plea and punished him with a fine of \$250, five years of community supervision, and mandatory attendance to sex offender counseling.⁸⁹ The Department of

⁸² *In re Alcantar*, 20 I. & N. Dec. 801, 809–13 (B.I.A. 1994).

⁸³ Dadhania, *supra* note 36, at 314.

⁸⁴ Lee A. O’Connor, *Understanding the Categorical and Modified Categorical Test*, 57 FED. LAW. Nov./Dec. 2010, at 48.

⁸⁵ See, e.g., OR. REV. STAT. § 164.015 (2017) (Oregon theft statute).

⁸⁶ A more in-depth discussion differentiating an elemental evaluation and a factual evaluation is addressed *infra* Part III.

⁸⁷ *Silva-Trevino I*, 24 I. & N. Dec. 687 (A.G. 2008).

⁸⁸ *Id.* at 688.

⁸⁹ *Id.* at 691.

Homeland Security initiated removal proceedings to deport Silva-Trevino to Mexico given his aggravated felony conviction.⁹⁰ Consequently, Silva-Trevino lost his permanent resident status.⁹¹ Silva-Trevino applied for an adjustment of status pursuant to section 245(a) of the INA, requesting discretionary relief from removal on the basis that he was convicted of an aggravated felony, not a crime involving moral turpitude, and therefore remained eligible to adjust his immigration status.⁹²

The court applied the categorical approach to evaluate Silva-Trevino's claim to determine if he was in fact convicted of a crime involving moral turpitude. For over a decade, the categorical approach followed a two-step approach adopted by the evaluation of aggravated felonies. During adjudication of *Silva-Trevino I*, the Attorney General proposed a highly controversial third step, dramatically changing the landscape for nonimmigrants in criminal court. The court has since vacated the three-step approach proposed in *Silva-Trevino I*⁹³ and instead has focused primarily on the elements of the conviction. President Trump continues to threaten a stricter immigration policy, instilling fear in not only immigrants seeking refuge in the United States but also in noncitizens currently residing in the United States with the requisite documents.⁹⁴

III. THE CATEGORICAL APPROACH

Many advocates and adjudicators have grappled with the categorical approach over the past several decades. Courts employ a uniform two-part analysis for evalu-

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *Silva-Trevino II*, 26 I. & N. Dec. 550, 552 (A.G. 2015); see also *Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013) (confirming the “relevant INA provisions ask what the noncitizen was ‘convicted of,’ not what he did” (quoting 8 U.S.C. § 1227(a)(2)(A)(iii))); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581–82 (2010) (holding that courts are not permitted to consider extrinsic evidence such as conduct and facts outside the record of conviction to satisfy the categorical approach).

⁹⁴ Following the recent decision of *Sessions v. Dimaya*, 138 S. Ct. 1204, 1207 (2018) in which the Court held that a federal statute (18 U.S.C. § 16(b)) defining certain aggravated felonies was unconstitutionally vague for purposes of the INA, President Trump published two tweets declaring his ambition to close any potential “loopholes” allowing criminal immigrants to remain in the United States. President Trump's tweets read as follows:

Today's Court decision means that Congress must close loopholes that block the removal of dangerous criminal aliens, including aggravated felons. This is a public safety crisis that can only be fixed by . . . Congress — House and Senate must quickly pass a legislative fix to ensure violent criminal aliens can be removed from our society. Keep America Safe!

Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 17, 2018, 2:34 PM), <https://twitter.com/realDonaldTrump/status/986357228306354178>.

ating whether a conviction involves a crime of moral turpitude. First, courts “identify the requisite elements for conviction under the statute.”⁹⁵ Second, courts then “apply the categorical approach to determine whether the elements of the conviction match the generic definition of a crime involving moral turpitude.”⁹⁶ A modified categorical approach is applied only “when the statute is divisible into multiple crimes.”⁹⁷ While the underlying principles remain uniform across all jurisdictions, some minor variations in procedural application occur in different courts.

A. Step I: The Traditional Categorical Approach

With the exception of a minor, albeit distinctive, adaptation to step one, the first two steps of the categorical approach remain unchanged following the Attorney General’s mandated three-step approach in *Silva-Trevino I*. The first step is the traditional categorical approach, which recognizes the alleged state crime and identifies the corresponding generic federal definition of the criminal offense, sometimes known as the federal standard.⁹⁸ Identifying the general federal definition allows the adjudicator to determine whether a conviction of the federal standard will constitute either an inadmissible or deportable offense.⁹⁹ The adjudicator compares the elements of the state statutory conviction with the elements of the generic federal crime and determines whether moral turpitude necessarily inheres in the elements.¹⁰⁰

Consistent with the primary focus in the categorical approach, it is important to recognize the necessary distinction between elements and facts. Elements are necessary legal requirements that the “prosecution must prove to sustain a conviction.”¹⁰¹ Alternatively, facts relate to specific events or circumstances that occurred, which “hav[e] no ‘legal effect or consequence’” in the categorical approach evaluation.¹⁰² The court’s evaluation is strictly limited to comparing the *elements* to the generic federal definition rather than the *factual* allegations.¹⁰³

During her comparison, the adjudicator analyzes whether the state statute defining the crime “categorically fits within the ‘generic’ federal definition” of the

⁹⁵ *Barrera-Lima v. Sessions*, 901 F.3d 1108, 1115 (9th Cir. 2018).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See O’Connor, *supra* note 84, at 48 (referring to the “federal standard”).

⁹⁹ See *supra* note 58 (identifying the distinction between inadmissibility and deportability).

¹⁰⁰ *Jean-Louis v. Att’y Gen. of U.S.*, 582 F.3d 462, 465, 480 (3d Cir. 2009).

¹⁰¹ *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (citing *Elements*, BLACK’S LAW DICTIONARY 634 (10th ed. 2014)).

¹⁰² *Id.* (citing *Fact*, BLACK’S LAW DICTIONARY 709 (10th ed. 2014)).

¹⁰³ *Id.* (determining that the courts “focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the] generic [offense], while ignoring the particular facts of the case”).

criminal offense.¹⁰⁴ The primary focus on the evaluation of the state statute is to determine if all violations of the criminal conviction will result in morally turpitudinous conduct. If all elements of every potential conviction of the statutory offense “involve[] turpitudinous conduct, then [the] noncitizen’s conviction would necessarily involve moral turpitude.”¹⁰⁵ Accordingly, the court will find the defendant had committed a crime involving moral turpitude.

Adjudicators identify the elements provided in the state offense. The identified elements are then compared to the elements provided in the federal definition as defined in the INA. If all state elements are encompassed in the generic federal definition, there is a “categorical match” and a crime involving moral turpitude exists.¹⁰⁶ The court in *Descamps v. United States* confirms that a “prior conviction qualifies as [a match] only if the statute’s elements are the same as, or narrower than, those of the generic offense.”¹⁰⁷ Consequently, if all of the state statutory elements fit within the generic federal elements, then the noncitizen is convicted of a crime involving moral turpitude, and is, accordingly, vulnerable to immigration consequences imposed by the conviction.

Unless all violations involve moral turpitude, the noncitizen will prevail.¹⁰⁸ If the state conviction contains elements not identified in the generic federal definition, the state conviction is categorically overbroad and therefore ineligible for consideration as a crime involving moral turpitude.¹⁰⁹ Overbroad statutes do not establish a categorical match and “cannot serve as a predicate for removal.”¹¹⁰ While overbroad statutes establish a ground for a conviction of the state criminal offense, they remain beyond the elements necessary for a federal conviction of moral turpitude and do not establish a ground for immigration consequences on morally turpitudinous grounds.¹¹¹

¹⁰⁴ *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

¹⁰⁵ *Dadhania*, *supra* note 36, at 325–26.

¹⁰⁶ *See Sweeney*, *supra* note 59.

¹⁰⁷ *Descamps v. United States*, 579 U.S. 254, 257 (2013); *cf. Rendon v. Holder*, 764 F.3d 1077, 1084 (9th Cir. 2014) (determining that the state statute “is not a categorical match to the federal, generic crime . . . because [the state statute] punishes a broader range of conduct than a generic . . . offense”).

¹⁰⁸ *O’Connor*, *supra* note 84, at 52.

¹⁰⁹ *See Sweeney*, *supra* note 59.

¹¹⁰ Brief of the Am. Immigration Lawyers Ass’n et al. as Amici Curiae at 3, *In re Amicus Invitation*, No. 17-06-12 (Aug. 4, 2017) (AILA No. 17080403) (citing *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017)).

¹¹¹ Divisible statutes trigger a second step in the categorical approach evaluation for the state to suggest immigration implications on the basis of an overbroad state statute. *See infra* Part III.B for a detailed description of divisible statutes.

Take, for example, the hypothetical case of Rosa. Rosa was convicted of theft pursuant to California Penal Code section 484¹¹² for providing free goods and services, which are commonly distributed in exchange for monetary value, to a customer. The Ninth Circuit, along with the BIA, has described the generic definition of theft as “the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.”¹¹³ The BIA has consistently held that the generic federal crime of theft is a crime involving moral turpitude only if committed with the intention to deprive one of his or her property *permanently*.¹¹⁴

The traditional categorical approach requires the court to compare the generic federal definition of theft with the charged state statutory definition. The element of permanence listed in the generic federal definition is absent in the state definition of the crime of theft.¹¹⁵ Therefore, the state conviction is overbroad because it allows for less than permanent deprivation of an individual’s property. When the state conviction is overbroad, the adjudicator must determine if the minimum conduct of the criminal offense involves theft as defined in the generic federal definition.

There are two methods that courts use for this evaluation: the least culpable conduct test and the realistic probability test. To formulate a consistent comparison, courts employ one of the two tests to analyze the criminal statute under the first step of the categorical analysis. The tests differ with regard to the varying degrees of proof necessary to evaluate whether or not the state statutory definition is overbroad. The least culpable conduct test asks whether moral turpitude is inherent in the “minimum conduct sufficient to satisfy the elements of the offense,” while the realistic probability test considers if there is a “hypothetical probability” that the criminal statute “could be applied to conduct that does not involve moral turpitude.”¹¹⁶

1. Least Culpable Conduct Test

The least culpable conduct test, also known as the minimum conduct approach, assists in determining whether the minimum conduct required to convict a

¹¹² CAL. PENAL CODE, STAT. § 484(a) (West 2019); see *supra* note 1 for the full statutory language.

¹¹³ *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007) (quoting *Penuliar v. Gonzales*, 435 F.3d 961, 969 (2006)).

¹¹⁴ See *In re Grazley*, 14 I. & N. Dec. 330, 333 (B.I.A. 1973); *In re H*, 2 I. & N. Dec. 864, 865 (B.I.A. 1947).

¹¹⁵ See *supra* note 1 (providing the California Penal Code definition of “theft”).

¹¹⁶ Julia Myers, *Crimes Involving Moral Turpitude: Determining Authority Towards a Strictly Categorical Approach and Demonstrating Potential Plea Bargain Implications*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 314, 321 (2015).

noncitizen of the offense necessarily meets all of the essential elements of the federal definition.¹¹⁷

Courts use the least culpable conduct test to determine whether or not moral turpitude could exist permanently within the identified minimum conduct required to satisfy a conviction of the criminal statute.¹¹⁸ For the conviction to involve moral turpitude, every possible circumstance with the potential to violate the criminal statute must involve moral turpitude.¹¹⁹ If the minimum conduct of the state offense does not include every element of the generic federal offense, the categorical analysis is complete and the noncitizen has not been convicted of a crime involving moral turpitude.¹²⁰

2. *Realistic Probability Test*

The second test used to analyze the criminal statute under the first step of the categorical analysis is the realistic probability test. The realistic probability test determines whether or not moral turpitude could exist permanently within an act “that would realistically be prosecuted under the statute.”¹²¹ The court may consider a crime outside the listed elements of the federal standard so long as it requires “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition.”¹²² The standard of proof requires the noncitizen to direct the court to at least one other case in which the state court “appl[ied] the statute in the special (nongeneric) manner for which he argues.”¹²³ If the noncitizen is unable to identify a case wherein the criminal conduct committed falls outside the generic federal definition, the court cannot find that the state statutory offense creates a “subspecies” of the generic federal crime.¹²⁴ Accordingly, the noncitizen fails the realistic probability test and the court will determine that the crime constitutes a crime involving moral turpitude.

Following the Attorney General’s decision in *Silva-Trevino I*, the adjudicator was only required to find one possible violation of moral turpitude rather than follow the prior standard wherein *all* elements must be morally turpitudinous. Consequently, the noncitizen would prevail only if *none* of the possible violations involved moral turpitude. Prior to *Silva-Trevino I*, the threshold for the noncitizen’s burden

¹¹⁷ See *Mendez v. Mukasey*, 547 F.3d 345, 348 (2d Cir. 2008) (“[W]e 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.”).

¹¹⁸ Dadhania, *supra* note 36, at 326.

¹¹⁹ *Id.* at 326–27.

¹²⁰ *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016).

¹²¹ Dadhania, *supra* note 36, at 326.

¹²² *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (establishing the realistic probability test while adjudicating a conviction in the context of an aggravated felony).

¹²³ *Id.*

¹²⁴ *Id.* at 193–94.

of proof rested on locating one instance of a violation to prevail. If the noncitizen raised one element in the criminal statute where a violation would not involve moral turpitude, then the conviction in its entirety did not involve moral turpitude.¹²⁵ However, post-*Silva-Trevino I*, instead of requiring just one instance of a turpitudinous violation, the noncitizen was required to prove that *all* possible violations did not involve moral turpitude. The Attorney General's modification inverted the burden of proof. *Silva-Trevino III* determined that when applying the framework of the realistic probability test, the adjudicator "focus[es] on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the [noncitizen's] particular violation of that statute."¹²⁶ The adjudicator discontinues the evaluation if *none* of the circumstances will result in a violation involving moral turpitude.¹²⁷

Prior to *Silva-Trevino I*, courts were divided on how to apply the two tests. The Second, Third, and Fifth Circuits applied the least culpable conduct test,¹²⁸ while the Ninth Circuit strictly employed the realistic probability test.¹²⁹ The Eleventh

¹²⁵ McGuire, *supra* note 30, at 622 (describing the requirement *Silva-Trevino I* imposed on the noncitizen to identify precedent wherein an element of the convicted statute "applies to conduct outside the definition of a [crime involving moral turpitude]").

¹²⁶ *Id.*; *Silva-Trevino (Silva-Trevino III)*, 26 I. & N. Dec. 826, 831 (B.I.A. 2016).

¹²⁷ O'Connor, *supra* note 84, at 52 (citing *Silva-Trevino I*, 24 I. & N. Dec. 687, 699 n.2 (A.G. 2008)).

¹²⁸ See *Mendez v. Mukasey*, 547 F.3d 345, 348 (2d Cir. 2008) ("[W]e 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."); see also *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.'") (quoting *Hamdan v. Immigration & Naturalization Serv.*, 98 F.3d 183, 189 (5th Cir. 1996)); *Partyka v. Att'y Gen. of the U.S.*, 417 F.3d 408, 412 (3d Cir. 2005) (determining that third degree aggravated assault fails to meet the "minimum culpable conduct required to commit simple assault" and therefore is not a crime involving moral turpitude); *Michel v. I.N.S.* 206 F.3d 253, 270 (2d Cir. 2000) (confirming that the first step of the categorical approach "is simply asking the BIA to consider what the minimum conduct needed to violate a statute is, and to decide whether *that* conduct is morally turpitudinous"). *Amouzadeh v. Winfrey* further confirms that "[a]n offense is a crime involving moral turpitude if the minimum reading of the statute necessarily reaches only offenses involving moral turpitude." *Amouzadeh*, 467 F.3d at 455.

¹²⁹ See *Gonzalez-Cervantes v. Holder*, 709 F.3d 1265, 1267 (9th Cir. 2013) (comparing defendant's conviction of a misdemeanor for sexual battery with case law to determine that there was no realistic probability that the defendant's "conduct [would fall] outside the generic federal definition of moral turpitude"); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009) (identifying that the defendant had proven "that there [was] a 'realistic probability' that a defendant who acted with general criminal intent, but with the intent to deprive the owner of possession only temporarily, might be held liable").

Circuit occasionally employs the least culpable conduct test as well.¹³⁰ Following the decision in *Silva-Trevino I*, the Attorney General removed the option of allowing courts to exercise their ability to employ the least culpable conduct test and instead required adjudicators to evaluate the criminal statute under the first step using only the realistic probability test.¹³¹ In 2015, Attorney General Holder vacated the holding of *Silva-Trevino I*, abolishing the requirement that courts only apply the realistic probability test.¹³² However, with a conservative and unpredictable executive branch currently overseeing the Attorney General's office, we may see revival of *Silva-Trevino I*'s methodology.

Rosa's conviction of theft under California law is comprised of a number of alternative elements, including taking personal property of another; appropriating property which was entrusted to her; knowingly defrauding another person of his or her money, labor, or property; or causing others to report falsely of their wealth.¹³³ Rosa took goods and services from the gas station and gave the products to her friend. Rosa's actions satisfy the first alternative element listed in California's theft statute. Accordingly, the minimum conduct or realistic probability of committing the federal offense of theft has been met because one of the possible violations involves moral turpitude.

If the adjudicator determines that the criminal statute of conviction necessarily inheres moral turpitude, the evaluation ends and the conviction is a crime involving moral turpitude. Alternatively, if comparison of the elements remains uncertain or the statute is overbroad, the adjudicator proceeds to the second step in the categorical analysis: the modified categorical approach.

B. Step II: The Modified Categorical Approach

Generally, if the elements of the state criminal offense are not a categorical match with the generic federal definition, the conviction is not a crime involving moral turpitude and will not trigger adverse immigration consequences. However, despite finding a nonconformity between the generic federal definition and the state statutory offense in some matters, adjudicators note an alternative ground permit-

¹³⁰ See *Keungne v. U.S. Att'y Gen.*, 561 F.3d 1281, 1286 (11th Cir. 2009) (applying the least culpable conduct test to determine whether a noncitizen was convicted of a crime involving moral turpitude when the defendant performed criminally reckless conduct).

¹³¹ McGuire, *supra* note 30, at 611.

¹³² *Silva-Trevino v. Holder*, 742 F.3d 197, 201 (5th Cir. 2014).

¹³³ CAL. PENAL CODE § 484(a) (West 2019); see *supra* note 1 for the complete language of statute.

ting the evaluation to continue despite the state statute being overbroad. The alternative ground is the modified categorical approach. The modified categorical approach is only permitted if the underlying conviction is a divisible statute.¹³⁴

Determining divisibility is a “purely legal question” for the adjudicator, independent of any additional fact-finding.¹³⁵ A divisible statute is “one that sets out one or more of the elements in the alternative.”¹³⁶ While the focus remains on the elements of the crime, the modified categorical approach allows the court to break apart a statute, effectively creating a number of separate crimes and proceeding with the evaluation independently for each element.¹³⁷ Divisible statutes contain alternative or “disjunctive elements” that can easily be divided into multiple categories of criminal conduct, “some of which are sufficient for conviction of the federal offense and others of which are not.”¹³⁸ The term “or” is a common indicator of alternative elements within a statute because it is used to divide discrete elements.¹³⁹

Once the divided elements are identified, the adjudicator then consults a “limited class of documents . . . to determine what crime, with what elements, a defendant was convicted of.”¹⁴⁰ Consulting the limited set of documents allows the sentencing court to identify which of the crimes in the divisible statute “formed the basis of the defendant’s prior conviction.”¹⁴¹ The permitted class of documents is known as the record of conviction. The record of conviction includes the “charging document, a written plea agreement, verdict or judgment of conviction, a record of the sentence, a plea colloquy transcript,” and as a catchall, “any explicit factual finding by a trial judge or a jury.”¹⁴² The adjudicator is not permitted to consider any information gathered extrinsic to the record of conviction, including the facts of the case, the noncitizen’s conduct, arrest reports, presentence investigations, or testimony of witnesses.¹⁴³

¹³⁴ *Descamps v. United States*, 570 U.S. 254, 278 (2013) (“A court may use the modified categorical approach only to determine which alternative element in a divisible statute formed the basis of the defendant’s conviction.”).

¹³⁵ *Medina-Lara v. Holder*, 771 F.3d 1106, 1117 (9th Cir. 2014).

¹³⁶ *Wade v. United States*, 242 F. Supp. 3d 974, 980 (C.D. Cal. 2017) (citing *Descamps*, 570 U.S. at 257).

¹³⁷ *Descamps*, 570 U.S. at 264 (citing *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)).

¹³⁸ *Jean-Louis v. Att’y Gen. of U.S.*, 582 F.3d 462, 466 (3d Cir. 2009).

¹³⁹ KATHERINE BRADY, IMMIGRANT LEGAL RES. CTR., HOW TO USE THE CATEGORICAL APPROACH NOW 4 (2017).

¹⁴⁰ *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

¹⁴¹ *Descamps*, 570 U.S. at 254.

¹⁴² *Dadhania*, *supra* note 36, at 329–30 (citing *Shepard v. United States*, 544 U.S. 13, 36 (2005); *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

¹⁴³ *O’Connor*, *supra* note 84, at 49 (citing *Shepard*, 544 U.S. at 17; *United States v. Kovac*, 367 F.3d 1116, 1120 (9th Cir. 2004)).

The adjudicator consults the record of conviction to assist in identifying which alternative element provided the basis for the noncitizen's criminal conviction.¹⁴⁴ Consequently, the modified categorical approach "acts not as an exception" for the adjudicator to investigate beyond the elements of the case "but instead as a tool" to "focus on the elements, rather than the facts, of a crime."¹⁴⁵ An adjudicator's exploration into the record of conviction "does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one."¹⁴⁶

Although proven helpful in determining elements of a conviction, investigation into the record of conviction may only be applied with divisible statutes. If the criminal offense statute is indivisible, consideration of the record of conviction is inadmissible. An indivisible statute is one that does "not contain[] alternative elements."¹⁴⁷ Indivisible statutes that are overbroad will not satisfy the categorical approach because they "criminalize[] a broader swath of conduct than the relevant generic offense."¹⁴⁸ Consequently, the modified categorical approach inquiry will end because "an indivisible, overbroad statute can *never* serve as a predicate offense."¹⁴⁹

If the record of conviction conclusively identifies a categorical match of at least one divisible element from the statutory offense that provided a basis for the noncitizen's conviction, then the crime committed involves moral turpitude and subjects the noncitizen to either deportation or inadmissibility on that ground.¹⁵⁰ If evaluation of the record of conviction is inconclusive and therefore not a categorical match, the adjudicator cannot conclude that the noncitizen was convicted of a crime involving moral turpitude.

Returning to Rosa's hypothetical, the California theft crime as defined in Penal Code section 484 is a divisible statute because it includes, arguably, the following four alternative elements: (1) taking personal property of another; (2) appropriating property which was entrusted to her; (3) knowingly defrauding another person of his or her money, labor, or property; or (4) causing others to report falsely of their

¹⁴⁴ *Id.* at 53.

¹⁴⁵ *Descamps*, 570 U.S. at 263.

¹⁴⁶ *Id.* at 278.

¹⁴⁷ *Id.* at 258.

¹⁴⁸ *Id.*

¹⁴⁹ *Medina-Lara v. Holder*, 771 F.3d 1106, 1112 (9th Cir. 2014) (citing *Descamps*, 570 U.S. at 264).

¹⁵⁰ See *United States v. Rios*, 201 F. Supp. 3d 1266, 1274 (E.D. Wash. 2016) (confirming that a conviction "qualifies as a predicate offense only if those documents reveal that the defendant was convicted of a version of the crime that fits within the definition of the generic offense"); see also *Descamps*, 570 U.S. at 264 ("If at least one, but not all of those crimes matches the generic version . . . [t]hat is the job . . . of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense.").

wealth.¹⁵¹ California's alternative statutory elements are then compared to the generic federal elements. The Ninth Circuit and BIA have accepted the generic federal definition of theft as "the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent."¹⁵²

Considering the accepted generic federal definition of theft, the statute arguably contains two divisible elements: (1) taking of property or (2) exercising control of property. The remaining clauses in the statute are not alternative elements; instead, they are attendant circumstances. The modified categorical approach requires a comparison of the divisible elements to locate a categorical match. The first divisible element in each definition addresses the act of taking property. In California's statute, the property must be personal property, while the generic federal statute does not specify ownership.

Rosa would likely argue that by including "personal," the legislature specifies a particular type of property. The specification is absent in the generic federal definition and, therefore, it is not a categorical match. The state would likely argue that the ownership specification in the California statute causes the statute to be narrower than the generic federal definition. Consequently, the state statute cannot be deemed overbroad. Thus, the California statute falls within the purview of the generic federal definition and is therefore a categorical match.

Prior to the Attorney General's ruling in *Silva-Trevino I*, at this juncture, courts were forced to conclude their evaluations and determine whether or not the criminal offense committed involved moral turpitude. The Attorney General in *Silva-Trevino I* altered this narrative. Invoking his right provided pursuant to federal immigration regulations,¹⁵³ the Attorney General manufactured a third step to the categorical approach, permitting the evaluation to continue despite failing to identify a categorical match at the close of the modified categorical approach.

C. Step III: Examination of Extrinsic Evidence

In 2008, the Attorney General determined that the existing analysis of the categorical approach was problematic. More specifically, the Attorney General noted that the existing two-step approach "result[ed] in a patchwork of conflicting legal and evidentiary standards."¹⁵⁴ He therefore invoked a third step in the categorical

¹⁵¹ See *supra* note 1 for the complete language of the statute.

¹⁵² *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007) (quoting *Penuliar v. Gonzales*, 435 F.3d 961, 969 (9th Cir. 2006)).

¹⁵³ See *supra* notes 70–72 (describing the Attorney General's authority to act under 8 C.F.R. § 1003.1(b) (2019)).

¹⁵⁴ *Silva-Trevino I*, 24 I. & N. Dec. 687, 688 (A.G. 2008), *vacated*, 26 I. & N. Dec. 550 (A.G. 2015).

inquiry to promote uniform procedures and consistent results. The Attorney General justified his third step by declaring that it was “administratively workable, and further[ed] the policy goals underlying the [INA].”¹⁵⁵

The third step of the categorical approach was extremely controversial and has been highly debated since it was initially proposed.¹⁵⁶ It allowed the analysis to proceed despite failing to uncover sufficient proof of morally turpitudinous conduct in the second step. The second step permits an adjudicator to consult the record of conviction to aid in discovering a categorical match among the divided elements. The third step was introduced when the examination into the record of conviction did not yield a conviction for a crime involving moral turpitude.¹⁵⁷ The Attorney General’s third step provided the adjudicator with additional authority to consider any extrinsic evidence, including evidence beyond the record of conviction, which the adjudicator deems necessary and appropriate to classify a conviction as a crime involving moral turpitude.¹⁵⁸ Suggested extrinsic evidence for evaluation includes birth certificates of the parties involved to reveal ages, testimonies of all parties involved, any evidence regarding a potential relationship between the involved parties, and actions leading up to the events of the crime.¹⁵⁹

The final step differs from the first and second steps because it permits a conduct-related evaluation rather than an element-based analysis. Effectively, the Attorney General granted the adjudicator permission to retry the facts of the case, despite claiming that “[t]he sole purpose of the inquiry is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself.”¹⁶⁰ This step causes controversy because the evaluation of extrinsic evidence occurs when the matter is up for review. At this point, the noncitizen is unable to defend herself and the adjudicator examines the entire case, including extrinsic evidence, without a defense.

In 2015, the third step of the inquiry was vacated and is no longer good law.¹⁶¹ With a conservative and arguably anti-immigration executive branch sitting in office, it is foreseeable that the disputed third step of the categorical approach could be revisited and potentially reinstated. This would lead to permitting a review of the noncitizen’s prior conduct as an additional path to increase deportation in the United States.

¹⁵⁵ *Id.*

¹⁵⁶ Dadhania, *supra* note 36, at 342–46.

¹⁵⁷ *Silva-Trevino I*, 24 I. & N. Dec. at 699.

¹⁵⁸ *Id.* at 704.

¹⁵⁹ *Id.* at 709.

¹⁶⁰ *Id.* at 703.

¹⁶¹ See *Silva-Trevino II*, 26 I. & N. Dec. 550, 552 (A.G. 2015).

IV. PROGRESSING TO A UNIFORM FUTURE

The controversial identity of a crime involving moral turpitude has invoked uncertainty and ambiguity for advocates defending noncitizens. In an effort to make the approach more uniform and predictable, the process for evaluating crimes involving moral turpitude should be modified in two respects. First, the INA should distinctly define moral turpitude and specifically illustrate a conviction for a crime involving moral turpitude. Second, the process for determining whether a crime involves moral turpitude should be minimized to the traditional categorical approach, without an independent evaluation of divisible elements. Courts should continue to reject the *Silva-Trevino I* option for an analysis of extrinsic evidence beyond the record of conviction.

A. Defining a Crime Involving Moral Turpitude

Silva-Trevino I described a crime involving moral turpitude as a crime that “involve[s] both reprehensible conduct and some degree of scienter.”¹⁶² Despite the many variations, adjudicators agree that morally turpitudinous crimes involve pre-conceived intent and knowledge of reprehensible actions. Accordingly, a constructed definition within the INA should contain an element of scienter for reprehensible actions.

In the legal context, *moral* is defined as “[p]ertaining or relating to the conscience or moral sense or to the general principles of right conduct.”¹⁶³ *Turpitude* is Latin for “baseness” and “immorality.”¹⁶⁴ Legal scholars examine case law to determine the court’s interpretation of a crime involving moral turpitude.¹⁶⁵ The progression of the definition has sometimes included language requiring that the criminal offense was conducted with violence toward another person.¹⁶⁶ Nevertheless, without a distinct definition, elements of a crime involving moral turpitude vary and the evaluation becomes more ambiguous, producing the potential for conflicting outcomes.

¹⁶² *Silva-Trevino I*, 24 I. & N. Dec. at 689 n.1.

¹⁶³ *Moral*, LAW DICTIONARY, <https://thelawdictionary.org/moral/> (last visited Sept. 26, 2019).

¹⁶⁴ *Turpitude*, LAW DICTIONARY, <https://thelawdictionary.org/turpitude/> (last visited Sept. 26, 2019).

¹⁶⁵ See Campbell *supra* note 33, at 148 (noting that courts struggle to identify a precise definition for “moral turpitude” and the “lack of a definition . . . has led courts to adopt a wide range of approaches for defining the term”); McGuire, *supra* note 30, at 609 (stating that “the term ‘crime involving moral turpitude’ is not defined in the immigration statute, nor has it ever been clearly defined by any court,” yet a general description can be maintained by examining case law interpretation).

¹⁶⁶ See *supra* notes 46–48.

A crime involving moral turpitude, much like an aggravated felony, a drug offense, or good moral character, should have an explicit definition provided in the INA. Considering the variety of definitions that adjudicators across jurisdictions employ, the INA should define a crime involving moral turpitude as: “an action taken towards another, with the intention or scienter, to defy moral conduct and act in opposition of a civil manner.” This proposed definition provides certainty and incorporates the aforementioned elements in a single definition.

Further, the INA should provide a list of crimes that, if convicted, are crimes involving moral turpitude. A proposed list is not unprecedented in the INA. For example, the INA lists the crimes identified as aggravated felonies.¹⁶⁷ Comparatively, in refining the scope of establishing good moral character, the INA provides a list of disqualifying actions.¹⁶⁸ Composing a similar list related to crimes involving moral turpitude is a matter of examining past precedent. The courts have prepared a scope of actions that constitute crimes involving moral turpitude including theft, burglary, murder, rape, aggravated assault, sexual battery, kidnapping, solicitation of prostitution, and fraud.¹⁶⁹

Defining crimes involving moral turpitude in more tangible terms will alleviate hardship on both of the advocating parties as well as the adjudicators. Furthermore, it creates a concrete analysis and more predictable outcomes. Creating a concrete definition of moral turpitude and listing specific crimes involving morally turpitudinous conduct will alleviate much of the burden in analyzing the categorical approach.

B. Minimizing the Categorical Approach

In the event that the crime presented to an adjudicator is not on the provided list of crimes, the adjudicator needs an analytic process to determine if the conviction involves moral turpitude.

1. Maintain the Traditional Categorical Approach

The traditional categorical approach is efficient and should remain in effect. Comparing the state statutory definition of the criminal offense against the generic federal definition eliminates consideration of the facts and focuses solely on the elements of the crime. Focusing only on the elements eliminates the impression of bias in a controversial case-by-case analysis and it considers only the necessary elements in a neutral forum.

¹⁶⁷ See 8 U.S.C. § 1101(a)(43) (2012).

¹⁶⁸ See *id.* § 1101(f).

¹⁶⁹ See *supra* notes 44–52.

2. *Eliminate the Modified Categorical Approach*

The modified categorical approach should be eliminated. It was created to divide a statute and independently investigate alternative elements. Effectively, the courts created a number of separate statutes. If the legislature intended to create separate statutes, it would have done so explicitly. Since the legislature maintained the alternatives in one single statute, it should be evaluated accordingly. The separate levels of evaluation in the modified categorical approach create unpredictable outcomes that the uniformity of the traditional categorical approach was designed to avoid. The modified categorical approach could potentially create several different immigration outcomes for a single state statutory criminal conviction.

Consider Rosa's conviction of theft. If the adjudicator considers all alternative elements of the California statute separately, Rosa could potentially be convicted of a crime involving moral turpitude under one or more of the alternative elements but not under others. Consequently, Rosa is convicted and suffers the consequences of violating the entire statute when she only violated a portion of it. Alternatively, if the statute were considered as a whole, Rosa would either be convicted of the statute in its entirety or not at all. This proposed black and white interpretation of the statute provides certainty, transparency, and predictability.

Interpreting the statute as a whole will also create uniformity among jurisdictions across the country. For instance, if alternative elements differ in each state, the convictions will consequently differ. An individual convicted of theft under one of the alternatives will face the criminal punishment of a conviction under the entire statute. If some states define theft more broadly than do other states, a conviction of theft in one state may criminalize conduct that a conviction of theft in another does not.

For example, consider a scenario wherein neighboring states vary with regard to deprivation of property: one state criminalizes both temporary and permanent deprivation of property, while the neighboring state only criminalizes permanent deprivation of property. The court categorizes the generic federal definition of theft as a crime involving moral turpitude only if committed with the intention to deprive one of his or her property *permanently*.¹⁷⁰ Therefore, a noncitizen's immigration implications will vary depending on in which state the crime occurred. Accordingly, the state statute criminalizing both temporary and permanent deprivation of property is overbroad, and the noncitizen will not be convicted of a crime involving moral turpitude in that state. The neighboring state statute, which criminalizes only permanent deprivation of property, is a categorical match with the generic federal definition and therefore constitutes a crime involving moral turpitude.

Furthermore, penalties are assessed based on consideration of the criminal statute in its entirety. To promote uniformity, the evaluation of the statute should also

¹⁷⁰ See *supra* note 114.

be addressed in its entirety. Potential penalties for theft in California pursuant to Penal Code section 484 are determined by the amount of goods or services deprived from the property owner.¹⁷¹ If the deprived property retains a higher value, it will induce more extreme penalties.¹⁷² Convictions are not severed into segments to consider theft of services compared to theft of property or a temporary deprivation as opposed to a permanent deprivation. The only consideration when imposing penalties is the amount in controversy. Consequently, consideration for a conviction of the criminal statute should be evaluated based on the same standard.

If the state statutory definition in its entirety can fit within the elements of the generic federal definition, then the penalties are easy to assess: the court should apply the penalty for the federal conviction. If the state statutory definition has extraneous elements—elements not listed in the generic federal definition—then the state statute is overbroad. It is too difficult to ascertain the criminal penalties for elements not addressed specifically in the INA; in other words, it is too difficult to ascertain criminal penalties from overbroad statutes. Therefore, the state statutory definition for the criminal offense is not a categorical match, and thus is not a crime involving moral turpitude.

3. *Continue to Reject the Attorney General's Proposed Third Step*

The controversial third step established by *Silva-Trevino I* promoted consideration of evidence beyond the record of conviction. This step was proposed and vacated a number of years after its implementation. Courts should refrain from bringing back this third step despite a conservative and anti-immigration government.

The proposed third step of the categorical approach created inconsistencies, contradicted the INA, and exposed biased outcomes. The Attorney General intended to promote consistency in the categorical approach with this third step but instead caused significant frustration.¹⁷³

The proposed solution was to allow an investigation into the noncitizen's specific actions leading up to and regarding the criminal offense rather than limiting the investigation to the prescribed legal evaluation of the elements of the crime. As a result of permitting the examination of extrinsic evidence, the scope of the analysis drifted away from evaluating legal elements and instead invited prejudicial evaluations based on specific facts of each case.

This consideration was applied in “every instance in which a categorical analysis [was] not conclusive as to whether the alien was convicted of a [crime involving

¹⁷¹ See CAL. PENAL CODE §§ 484, 487–490 (West 2019) (describing the possible penalties imposed upon an individual convicted of petty theft or grand theft based on the property value determined by the property taken).

¹⁷² *Id.* § 484.

¹⁷³ See O'Connor, *supra* note 84, at 56 (describing the third step of the categorical approach as a “radical departure from 80 years of law in evaluating the immigration consequences of a criminal conviction”).

moral turpitude].”¹⁷⁴ Following a failed attempt to locate a crime involving moral turpitude during the modified categorical approach, the Attorney General permitted an “individualized moral turpitude inquiry,” which intended a more consistent outcome to “resolve accurately the moral turpitude question.”¹⁷⁵ The results created by this approach were biased because the adjudicator was not restricted by any evidentiary limit in order to discover a crime involving moral turpitude. Furthermore, the limitless evidentiary support was examined without the consent or the defense of the noncitizen. The increased bias, in turn, fostered inconsistent results in the categorical analysis for like convictions.

Finally, the third step of *Silva-Trevino I* contradicted the language of the INA. Courts uniformly commence the categorical approach exclusively on the “relevant INA provisions ask[ing] what the noncitizen was ‘convicted of,’ not what he did.”¹⁷⁶ By examining the facts of the case and the conduct of the noncitizen rather than focusing on the elements of the conviction, “two noncitizens, each ‘convicted of the same offense, might obtain different [federal offense] determinations depending on what evidence remains available or how it is perceived by an individual immigration judge.”¹⁷⁷ The Court determined that this “potential unfairness” is precisely what the “categorical approach was designed to avoid.”¹⁷⁸

Accordingly, the Attorney General’s proposal of an extrinsic evidentiary inquiry into the facts of each case is a contradiction to the language of the INA. For the reasons stated, courts should continue to reject the *Silva-Trevino I* third step of the categorical analysis.

CONCLUSION

Crimmigration has become a greater part of legal debate as adjudicators determine the fate of noncitizens convicted of a criminal offense. The threat of extreme penalties for minor misdemeanors highlights the importance of a consistent adjudication process with unbiased results. In an effort to make the approach more transparent and uniform, the evaluation of determining a crime involving moral turpitude should be more concise in several respects.

The INA should adopt a generic federal definition for a crime involving moral turpitude. This adoption would promote transparency and predictability for adjudicators and advocates alike in evaluating the categorical approach. Similarly, the

¹⁷⁴ *Jean-Louis v. Att’y Gen. of U.S.*, 582 F.3d 462, 472 (3d Cir. 2009) (quoting *Silva-Trevino I*, 24 I. & N. Dec. 687, 700 (A.G. 2008)) (internal quotes omitted).

¹⁷⁵ *Id.*

¹⁷⁶ *Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013) (quoting 8 U. S. C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3) (2012)).

¹⁷⁷ *Id.* at 201.

¹⁷⁸ *Id.* (citing *Taylor v. United States*, 495 U.S. 575, 601 (1990)).

categorical approach should be minimized to an evaluation based solely on the first step: the traditional categorical approach. The evaluation for determining whether a crime involves moral turpitude should be limited to an inquiry into the state statutory elements of the conviction compared to the generic federal definition. An approach limited to the elements will produce more consistent, unbiased results and prevent ambiguity.