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Crimes Involving Moral Turpitude: Determining Authority towards a Strictly Categorical Approach and Demonstrating Potential Plea Bargain Implications

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CRIMES INVOLVING MORAL TURPITUDE: DETERMINING AUTHORITY TOWARDS A STRICTLY CATEGORICAL APPROACH AND DEMONSTRATING POTENTIAL PLEA BARGAIN IMPLICATIONS

Although it is not likely that a criminal will carefully consider the text of the law before [he or she commits a crime], it is reasonable that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed.¹

I. INTRODUCTION

In 2012, an estimated 11.7 million undocumented immigrants were living in the United States.² Due to the continued growth of the immigrant population, state criminal defense attorneys, judges, and prosecutors are increasingly faced with difficult decisions concerning the federal immigration consequences of a state criminal conviction, specifically deportation.³ Today, given the severity of deportation as a civil penalty, noncitizens may be more concerned with the possibility of exile versus a criminal conviction.⁴

When classifying repercussions of criminal convictions, the phrase “crimes involving moral turpitude” (“CIMT”) has been utilized in immigration law for over one hundred years without a statutory definition,

³ See id (discussing deportations have risen with immigrants violating United States laws).
⁴ See Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (discussing severity of deportation when defendant believes himself citizen); see also Padilla v. Kentucky, 559 U.S. 356, 377-78 (2010) (Alito, J., concurring in part and dissenting in part) (“[P]roviding advice on whether a conviction for a particular offense will make an alien removable is often quite complex.”). The Supreme Court has explained that, “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” Padilla, 559 U.S. at 364. Additionally, in Padilla the Supreme Court held that the Sixth Amendment requires defense counsel to advise noncitizen defendants about the deportation consequences of a guilty plea. Id. at 372 (discussing holding).
continuously blurring the borders between criminal and immigration law. With significant immigration reform on the forefront of the Obama Administration’s agenda, the importance of outstanding ambiguities surrounding CIMTs emerge from the limelight once again. Current immigration statutes still lack a concrete legal standard for classifying what crimes involve moral turpitude and, accordingly, fail to inform non-citizens what crimes constitute deportable offenses. Adding to the confusion, the United States Courts of Appeals remain split as to what the correct methodology is to determine what constitutes moral turpitude, applying either the categorical approach, the modified categorical approach, or the Silva-Trevino Doctrine.

While the Supreme Court rejected to define moral turpitude or otherwise find the terminology void for ambiguity, the Supreme Court did uphold the application of the categorical approach in immigration proceedings in Moncrieffe v. Holder. Following the Moncrieffe decision, the ongoing validity of Silva-Trevino and certain Board precedent is questionable. Additionally, the Ninth Circuit’s recent decision in Olivas-Motta v. Holder and the Fifth Circuit’s opinion vacating Silva-Trevino, widened the circuit split toward a strict application of the categorical approach, directly rejecting the Attorney General’s realistic probability test.

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8 See infra Parts II-III (examining how varying approaches are utilized by different courts).
9 See Moncrieffe v. Holder, 133 S. Ct. 1678, 1686-87 (2013) (upholding strict categorical approach fully applicable in immigration proceedings). Notably, this decision discussed the applicability to the strict categorical approach in regards to determining whether a crime constituted an aggravated felony and not in the context of CIMTs. See id. at 1689.
10 See infra Part III.B (discussing impact of Silva-Trevino on Supreme Court rulings).
11 See Olivas-Motta v. Holder, 746 F.3d 907, 916 (9th Cir. 2013) (discussing analysis of circuit split); see also Silva-Trevino v. Holder, 742 F.3d 197, 201 (5th Cir. 2014) (holding judge may not look at extrinsic evidence to determine if defendant’s conviction was CIMT). Procedurally, even though the Fifth Circuit has remanded the very case in which the Attorney General established the realistic probability approach, which permits examination of evidence
Part II of this Note will discuss the historical background of CIMTs, including immigration statutory reform, various definitions adopted by courts when referring to a CIMT, and the different approaches available to determining authority when prosecutorial discretion is required. Part III will address the impact of Moncrieffe and Olivas-Motta on the Silva-Trevino approach and the divide in the circuit courts. Finally, Part IV will discuss impending immigration law reform's potential implications for practitioners, specifically in the context of negotiating plea bargains.

II. HISTORICAL AND PROCEDURAL BACKGROUND OF MORAL TURPITUDE IN THE IMMIGRATION LAW CONTEXT

A. The History of Statutory Moral Turpitude

The term CIMT first appeared in the immigration context in 1891, when an act made aliens excludable if convicted of a “crime involving moral turpitude”. In 1903 and 1907, Congress expanded this provision to encompass exclusion or deportation of noncitizens that had been either convicted of or admitted to the commission of a crime or misdemeanor involving moral turpitude. Subsequently, in response to public concern with alien criminal activity, the Immigration Act of 1917 was established and for the first time CIMTs were used to trigger deportation actions. The phraseology has continued to appear in immigration statutes, with

outside the record of conviction, the Attorney General’s decision still stands. See infra note 72 and accompanying text (noting Seventh and Eighth Circuits adopted Attorney General’s opinion as reasonable interpretation).

See infra Part II (discussing historical background of CIMT in Immigration Law).

See infra Part III (detailing CIMT circuit split).

See infra Part IV (explaining impact of CIMT on immigration reform and plea bargains).

Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084, 1084 (issuing exclusion of aliens “who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude”). The purpose of the 1891 Act was to more clearly distinguish desirable from undesirable immigrants, however, with all relevant immigration laws lacking a concrete definition of what constitutes an offense of CIMT to trigger deportability, this purpose may be inherently frustrated. See Brian C. Harms, Redefining “Crimes of Moral Turpitude”: A proposal to Congress, 15 GEO. IMMIGR. L.J. 259, 263-64 (2001) (discussing how 1891 Act left CIMT undefined and history of common law failures to define).

See Act of Mar. 3, 1903, ch. 1021, § 2, 32 Stat. 1213, 1214 (adding “moral turpitude” language to classes of aliens excluded from United States admission); Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898, 899 (broadening grounds by excluding noncitizens convicted of or admitting to CIMT).

application in both exclusion and deportation actions.\textsuperscript{18}

The Immigration and Nationality Act of 1952 ("INA") initiated the modern era of immigration reform.\textsuperscript{19} The INA was designed to give structure to what was previously an ad hoc assortment of immigration standards, and today stands as the basis for all federal immigration policy.\textsuperscript{20} The INA was an unprecedented revision of existing immigration law, largely devised in response to fears of communist infiltration.\textsuperscript{21} It decreased executive access to suspend deportation actions and severely broadened what made an alien eligible for deportation.\textsuperscript{22} The INA once again addressed moral turpitude, modifying provisions of prior Acts and removing references to the specific crimes that involve moral turpitude.\textsuperscript{23}

In 1983, the Department of Justice established the Executive Office for Immigration Review ("EOIR"), which reorganized the Board of Immigration Appeals ("BIA") by combining their review with the

\textsuperscript{18} See id. at 263 (examining immigration law from 1917 to present).


\textsuperscript{21} Kati L. Griffith, Article, Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents, 18 GEO. IMMIGR. L.J. 273, 280 (Winter 2004) (stating INA significantly expanded crimes and misdemeanors making alien excludable from entry and deportable). The initial legislative purpose of the INA in the context of impending legislative reform as the need for immigration regulation has changed. See id. at 286 ("[P]rivate bills tended to decrease after loosening of restrictive immigration laws."); see also HUTCHINSON, supra note 20, at 80.

\textsuperscript{22} See Griffith, supra note 21, at 280 (addressing effects of INA on immigrants and executive action).

\textsuperscript{23} See Derrick Moore, Note, "Crimes Involving Moral Turpitude": Why the Void-For-Vagueness Argument is Still Available and Meritorious, 41 CORNELL INT'L L.J. 813, 822 (2008) (discussing important changes Congress made to INA in 1952); see also Alina Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U. L. Rev. 1669, 1674-75 (2011) (indicating rationales for categorical analysis apply with even greater force today than when first introduced). In removing references to the specific crimes that involve moral turpitude, the 1952 Act thereby established moral turpitude as the new standard for determining denial of entry or removal. See Nathaniel C. Crowley, Comment, Naked Dishonesty: Misuse of a Social Security Number for an Otherwise Legal Purpose May Not Be a Crime Involving Moral Turpitude After All, 15 SAN DIEGO INT'L L.J. 205, 214 (2013) (recognizing "moral turpitude became the single highest cause of visa refusals" following 1952 Act). "Additionally, the act broadened the power to exclude; aliens who had committed acts which constitute the essential elements of crimes of moral turpitude became inadmissible." Id. (internal quotation marks omitted).
Immigration Judge function previously performed by the former Immigration and Naturalization Service (“INS”). The EOIR administers the United States’ immigration court system and primarily decides whether foreign-born individuals, who are charged by the Department of Homeland Security (“DHS”) with violating immigration law, should be ordered removed from the United States. Removal proceedings may be initiated against a noncitizen with certain criminal convictions and are the starting point of the adjudication process for determining whether the crime involved moral turpitude. Under current immigration standards, a single offense of CIMT is considered a deportable offense if the crime was committed within five years after entry and resulted in a minimum sentence of at least one year. Additionally, under the INA, an alien may be deported if convicted of two or more CIMTs regardless of the length of time spent in the United States, so long as the crimes did not arise out of a “single scheme of criminal misconduct.”

B. Differing Definitions of Moral Turpitude

Despite the detrimental deportation implications of a CIMT conviction, there have been no statutory modifications to the INA to include a clear definition. In the absence of congressional guidance, immigration officers, the Board of Immigration Appeals (“BIA”), and federal courts make the determination whether a convicted alien’s crime

25 See id. (giving general overview of immigration removal proceedings). The BIA is the highest administrative body for interpreting and applying immigration laws and has nationwide jurisdiction to hear appeals from certain decisions rendered by immigration judges. See Board of Immigration Appeals, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REV., http://www.justice.gov/eoir/biainfo.htm (last updated Feb. 6, 2015). BIA decisions are binding on immigration judges unless overruled by the Attorney General or a federal court. Id. Most BIA decisions are subject to judicial review in the federal courts. Id.
28 See § 1227(a)(2)(A)(ii); see also Harms, supra note 15, at 263-64 (articulating different contexts CIMT is used in INA).
29 See Jordan v. De George, 341 U.S. 223, 230-32 (1951) (acknowledging difficulty of CIMT definition while still finding fraud always qualifies). The Court also noted that despite the fact that the “void for vagueness” test only applies to criminal statutes, they would apply the analysis to this case due “the grave consequences of deportation.” Id. at 231.
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does or does not involve moral turpitude according to their respective definitions. However, in accordance with *Chevron v. Natural Resource Defense Council*, because the statute does not implicitly state which crimes constitute a CIMT, Congress implicitly left the scope of the phrase for the BIA to establish.

While judges typically frown upon using generic dictionary definitions in courtrooms, they provide a necessary starting point when examining what constitutes a CIMT. Merriam-Webster Dictionary defines moral turpitude as an inherent baseness or depravity, while *Black’s Law Dictionary* defines CIMTs as conduct that is contrary to justice, honesty, or morality. Although Congress failed to offer a precise definition of “moral turpitude,” most courts define 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.”

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31. *See Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984) (announcing deference principle courts must use when reviewing construction administrative agencies gives to statutes). Under Chevron, if Congress has directly addressed the issue, its intent controls. Id. at 842-43. However, if Congress has not directly addressed the issue, the court must look to the “administrative interpretation” and decide whether their ruling lends itself to a “permissible construction of the statute.” Id. at 843. Only if there is no administrative interpretation may the court prescribe their own. Id. Agency decisions are afforded deference by the courts, so in order for courts to reject the Attorney General’s interpretation of the INA, they must determine if the interpretation was arbitrary and capricious, or vague. *See Dadhania, supra note 26, at 322 n.48 (discussing statutory interpretation of CIMT). Where a statute is ambiguous and an 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.” Id. at 322 n.46. Therefore, because Congress has clearly delegated the authority to interpret the INA to the Attorney General, circuit court precedent will not prevail over his interpretation. *See id. at 323 (providing basis for Congress’s delegation of power to Attorney General); see also Harms, supra note 15, at 274-75 (discussing *Chevron* deference). Arguably, Congress has refused to define CIMTs, the responsibility to provide a definition was passed on to the INS. *See Harms, supra note 15, at 274 (arguing INS bears responsibility of defining “crimes involving moral turpitude”).
33. *See id.
34. *ALR, supra note 30 (citing definition cited by First, Second Third, Fifth, Seventh, and Ninth Circuits). The long-established BIA definition includes a crime committed recklessly and with a conscious disregard of a substantial and unjustifiable risk to the life and safety of others. Id.*
While determining authority frequently references in its decisions that the term CIMT is ambiguous, the Supreme Court concluded it was not void due to this ambiguity.\textsuperscript{35}

Once the appropriate definition of moral turpitude is ascertained with respect to corresponding federal law, it is applied in the context of immigration removal proceedings.\textsuperscript{36} If an alien has been convicted of a state crime, an officer of Homeland Security reviews the conviction.\textsuperscript{37} The Code of Federal Regulations ("CFR") indicates that the reviewing officer must base classification on "the moral standards generally prevailing in the United States."\textsuperscript{38} An alien is then permitted to appeal a determination of a CIMT to the BIA and may further appeal the BIA decision to the corresponding federal district court.\textsuperscript{39} If the district court holds that a finding of CIMT was improper—procedurally or otherwise—the alien is no longer subject to deportation.\textsuperscript{40}

C. The Determining Authority's Methodology for Classifying CIMT

Immigration courts do not typically conduct an independent investigation of criminal conduct, but rather rely on what happened in a criminal court as the basis for deportation.\textsuperscript{41} With determining authority still lacking a concrete definition of moral turpitude, they employ different modern approaches to determining its presence.\textsuperscript{42}

First, the categorical approach examines the generic definition of the offense committed by the alien as defined by the statute.\textsuperscript{43} In this first

\textsuperscript{35} See Jordan v. De George, 341 U.S. 223, 232 (1951) (holding CIMT not void for vagueness).

\textsuperscript{36} See infra Part II.C (describing different approaches to applying CIMT analysis and variations by circuit).

\textsuperscript{37} See 8 U.S.C. § 1101(f) (2012). While the INA does not define good moral character, it provides categories of conduct that preclude a noncitizen from demonstrating good moral character. See id. (providing categories).

\textsuperscript{38} See 22 C.F.R. § 40.21(a)(1) (2006). The requirement by the CFR naturally invites an evolutionary definition of CIMTs, with morality standards constantly changing in the United States. See Heifetz, supra note 32 (citing necessity for concrete definition of CIMT).

\textsuperscript{39} See EOIR at a Glance, supra note 24.

\textsuperscript{40} See id.


\textsuperscript{42} See Crowley, supra note 23, at 214-17 (describing statutory reform of moral turpitude in INA of 1952).

\textsuperscript{43} See Katherine Brady, Moncrieffe and Olivas-Motta: Fourteen Crim/Imm Defenses in the
step of analysis, as outlined in the Supreme Court’s decision in Taylor v. United States, considers only the statutory elements of the crime. Accordingly, the classification of CIMT does not depend on facts from the alien’s record of conviction, but rather “whether the statute of conviction necessarily, in every case, requires a finding of conduct that triggers the later federal consequence.” Under this standard, the full range of conduct penalized by the criminal statute must fall within the meaning of the generic definition for a finding of CIMT. In other words, the elements of the crime convicted of must necessarily inhere moral turpitude.

How to determine whether a crime necessarily inhere moral turpitude differs jurisdictionally, as the majority of circuits apply either the least culpable conduct test or the realistic probability test. The least culpable conduct test considers whether moral turpitude would inhere in the minimum conduct sufficient to satisfy the elements of the offense. Alternatively, the realistic probability test, first established by the Supreme Court in Gonzales v. Duenas-Alvarez, considers whether there is more than a hypothetical probability that the criminal statute could be applied to conduct that does not involve moral turpitude. Significantly, the test

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44 See Taylor v. United States, 495 U.S. 575, 592-94 (1990) (justifying differing definitions of term burglary from criminal code); see also Crowley, supra note 23, at 218 (emphasizing pure categorical inquiry of first part of analysis). “The goal of the categorical approach is to effectuate a federal standard to ensure that state law does not take precedence in immigration proceedings.” Crowley, supra note 23, at 218 (noting purpose of categorical approach); see Das, supra note 23, at 1676-77 (outlining Court’s application of categorical approach in Taylor).

45 Dan Kesselbrenner et al., Decamps v. United States and the Modified Categorical Approach, NAT'L IMMIGR. PROJECT (July 17, 2013), http://www.nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Depends_Practice_Advisory_7-17-2013.pdf (sharing individual record of conviction not relevant in determining CIMT, but statute); see Brady, supra note 43 (explaining basic application of categorical approach).


47 See Dadania, supra note 26, at 326 (discussing circuit split).


49 See id. (recognizing Second, Third, and Fifth Circuit decisions).

determining authority applies impacts the ease that the government may deport aliens, as the realistic probability test is more favorable towards a finding of CIMT.\footnote{51}

If under the applicable standard, the determining authority cannot categorically make a finding of CIMT after examining the criminal statute alone, the analysis proceeds using a modified categorical approach.\footnote{52} This occurs when a noncitizen is convicted of a multi-offense statute as determining authority cannot perform a categorical analysis without establishing which particular offense the alien committed.\footnote{53} If all of the offenses contained within the statute may separately be categorically recognized as a CIMT, no further inquiry by determining authority is necessary.\footnote{54}

However, if even one crime in a multi-crime statute fits the generic definition, the investigation proceeds and determining authority may look to the alien’s reviewable record of conviction.\footnote{55} This modified categorical approach permits determining authority to look beyond the plain language of the statute, but not to facts outside of the record of conviction.\footnote{56} The sole purpose of looking at the record of conviction must be to determine which offense within the statute was committed.\footnote{57} Despite the Taylor decision and over one hundred years of authority, several circuits have applied a less stringent standard that permitted use of some facts from the record of conviction.\footnote{58} Other courts carved out exceptions to the

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\footnote{51} See Koh, supra note 48, at 283-85 (explaining impact of different approaches on deportation).

\footnote{52} See Kesselbrenner et al., supra note 45 (discussing impact of Descamps v. United States on modified categorical approach).

\footnote{53} See id.

\footnote{54} See Dadhania, supra note 26, at 326-27 (explaining CIMT procedure). The lack of ambiguity in a criminal statute, even if it is divisible, necessitates a finding of CIMT, which may be appealed if the alien so choses. Id.

\footnote{55} See Brady, supra note 43, at 5 (indicating what documents permitted for review as part of record of conviction).

\footnote{56} See Crowley, supra note 23, at 220 (characterizing differences between categorical approach and modified categorical approach). A record of conviction includes documents such as the indictment, judgment of conviction, jury instruction, plea, or plea transcript. See id.

\footnote{57} See Brady, supra note 43, at 5 (describing how Moncreiffe reaffirmed permissibility to review record of conviction when criminal statutes contains multiple crimes).

\footnote{58} See Koh, supra note 48, at 283-85 (listing circuit courts with misguided application of categorical approach in classifying CIMTs). In light of the lax application of Taylor, the Supreme Court issued several decisions clarifying their intent that a strict categorical approach should be utilized in agency adjudications. See Nijhawan v. Holder, 557 U.S. 29, 34-41 (2009) (creating framework for more general application of categorical approach in removal proceedings); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189-90 (2007) (citing lower courts' consistent application of Taylor categorical approach when assessing whether convictions
categorical approaches by distinguishing *Taylor* in the immigration context, allowing consideration of limited facts outside the record of conviction.\(^{59}\)

In 2008, in an attempt to clarify the confusion surround CIMTs, the *Silva-Trevino* decision, issued by the Attorney General, offered a standard definition of a CIMT, redefined the term “conviction,” and, most notably, instituted a third step to the categorical approach.\(^{60}\) The Attorney General found ambiguity in section 212(a)(2)(A)(i)(I) of the INA, allowing the agency to exercise its duty to provide an authoritative interpretation of the statute.\(^{61}\)

First, the Attorney General acknowledged that while the BIA has attempted to fill the statutory gaps which lack a definition of what constitutes a CIMT, some courts still believe that their guidance has not been clear enough.\(^{62}\) Accordingly, the decision qualifies a CIMT as involving “both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.”\(^{63}\)

Additionally, the Attorney General sought to redefine the term “conviction” to include conduct “committed” by the alien.\(^{64}\) Under § 1227(a)(2)(A)(i-ii), an alien is deportable only if he has been “convicted of” CIMTs. By redefining the term “conviction,” the Attorney General reasoned that the immigration court could look outside the record of conviction for evidence of CIMTs a noncitizen may have committed.\(^{65}\)

The most controversial aspect of the Attorney General’s decision is the departure from well-established precedent to now permit immigration judges to look at evidence outside the record of conviction.\(^{66}\) The ruling laid out that immigration courts should continue to apply *Taylor* to determine whether a crime is categorically a CIMT and, if the crime is not

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59 See Espinosa-Franco v. Ashcroft, 394 F.3d 461, 465 (7th Cir. 2004) (considering victim’s age when assessing whether offense constituted aggravated felony).


63 See id.

64 See id.

65 See id. at 697.

categorically a CIMT, may apply the modified categorical approach to
determine if the conviction carries immigration consequences.\textsuperscript{67} However, the decision instituted a third step—a step beyond the modified categorical approach—allowing administrative courts to rely on alleged facts about the alien’s criminal conduct that were never established in the criminal case record.\textsuperscript{68} If the question of whether a CIMT was committed remained unanswered, judges could now, “to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction... [including] any additional evidence of factfinding the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question.”\textsuperscript{69}

III. OLIVAS-MOTTA AND THE DIVIDE AMONG THE CIRCUIT COURTS

A. Olivas-Motta and the Fifth Circuit: Conviction = Conviction

The goal of the Attorney General in \textit{Silva-Trevino} was to standardize the patchwork of approaches to CIMT analysis across the nation.\textsuperscript{70} Despite the Attorney General’s efforts, the decision had the opposite effect, causing five federal circuit courts to directly reject the contention that relevant provisions of the \textit{INA} are ambiguous and, therefore, do not owe \textit{Chevron} deference to the decision.\textsuperscript{71} To date, only the Seventh and Eighth Circuits have adopted the Attorney General’s opinion after finding the CIMT provision to be ambiguous and the interpretation reasonable.\textsuperscript{72}

\textsuperscript{67} \textit{See In re Silva-Trevino}, 24 I. \& N. Dec. at 689-90 (adopting radically new framework for determine whether conviction is one of moral turpitude).
\textsuperscript{68} \textit{See Circuit Split: Looking Beyond the Record to Determine Whether a Conviction Involves “Moral Turpitude”, FEDERAL EVIDENCE REVIEW} (May 23, 2013), http://federalevidence.com/blog/2013/may/circuit-split-looking-beyond-record-administrative-proceedings (detailing circuit split concerning application of Attorney General’s decision in \textit{Silva-Trevino}). A later decision explained that immigration adjudicators would still be required to assess the statutory definition of the offense first, then review the record of conviction before instituting. \textit{See In re Abortalejo-Guzman, 25 I. \& N. Dec.} 465, 468 (B.I.A. 2011) (holding immigration judges may not skip directly to third step of “categorical analysis”).
\textsuperscript{69} \textit{In re Silva-Trevino}, 24 I. \& N. Dec. at 690.
\textsuperscript{70} \textit{See DeSalvo, supra note 61, at 2 (discussing Attorney General’s decision as attempt to unify Circuits).}
\textsuperscript{71} \textit{See supra notes 66-69 and accompanying text (discussing Silva-Trevino). Thus far, the Ninth, Third, Fourth, Fifth, and Eleventh Circuits have all concluded that Silva-Trevino was wrongly decided. See supra note 48 (detailing different circuits decisions expressly rejecting Silva-Trevino’s third step).}
\textsuperscript{72} \textit{See Bobadilla v. Holder, 679 F.3d 1052, 1055 (8th Cir. 2012) (holding because moral}
Olivas-Motta is arguably the most significant decision since Silva Trevino.\textsuperscript{73} At the time the decision was rendered, the Ninth Circuit joined the Third, Fourth, and Eleventh Circuit, holding that the Silva-Trevino application allowing immigration judges, in the absence of a categorical approach, to “consult evidence outside the record of conviction in determining whether an alien has been ‘convicted of’ a CIMT.”\textsuperscript{74} The Ninth Circuit specifically found that even if an ambiguity exists about a crime, immigration courts may not look beyond the record of conviction to determine whether the crime involves moral turpitude.\textsuperscript{75} The decision expressly stated that under the administrative deference framework announced in Chevron, the Attorney General had no choice but to do as Congress mandated.\textsuperscript{76}

Following the Ninth Circuit’s decision, the Fifth Circuit recently remanded the very case the Attorney General predicated his third step of
reasoning upon. In Silva-Trevino, the Fifth Circuit reiterated reasoning derived from Chevron, explaining that where a statute is ambiguous and an implementing agency’s construction is reasonable, courts are required to accept the agency’s interpretation even if it is different from what the court believes. “Therefore, because Congress has clearly delegated to the Attorney General the authority to resolve questions of law regarding the INA, [court] precedent will prevail over his interpretation only if our construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” The Fifth Circuit went beyond simply rejecting the Attorney General’s reasoning that the court should defer to his interpretation of INA § 212(a)(2)(A)(i) in the interest of uniform application of the law and further declared that the objective has been counterproductive—replacing prior judicial accord with a circuit split.

Practically, one of the most significant changes brought about by the elimination of the third step of the Silva-Trevino analysis is that determining authority can no longer rely on police reports when deciding whether a conviction constitutes a CIMT.

B. The Impact of Silva-Trevino on Supreme Court Rulings

The Attorney General’s decision has also had a significant impact on recent Supreme Court rulings. In Moncrieffe, the U.S. Supreme Court reaffirmed that the full categorical approach applies in immigration

77 See Silva-Trevino v. Holder, 742 F.3d 197, 200 (5th Cir. 2014) (holding Silva-Trevino approach inconsistent with unambiguous language of INA by permitting extrinsic evidence outside conviction record).
78 See id. at 199 (agreeing that Chevron deference to AG’s opinion in Silva-Trevino is not owed).
80 See Silva-Trevino, 742 F.3d at 205 (holding no Chevron deference where statute in question is unambiguous).
81 See DeSalvo, supra note 61, at 2-3 (analyzing use of documents outside record of conviction).
82 See Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) (reaffirming categorical approach); Descamps v. United States, 133 S. Ct. 2276 (2013) (cautioning of limited circumstances under which modified categorical approach should be applied).
proceedings. Under the Moncrieffe standard, unless the criminal statute is an exact categorical match with the applicable generic definition, the inquiry into whether the alien committed a CIMT stops and the alien prevails. The Court, however, did not expressly rule on whether courts can review evidence outside the record of conviction to determine if a noncitizen is eligible for relief when the record of conviction is ambiguous.

In Descamps, the Supreme Court granted certiorari to resolve the question of whether the modified categorical approach applies to statutes that contain a single “indivisible” set of elements sweeping more broadly than the corresponding generic offense. The Court found that the Ninth Circuit’s broad application of the modified categorical approach violated the statutory requirement of a conviction and that “Congress intended the sentencing court to look only to the fact that the defendant has been convicted of crimes falling within certain categories, and not the facts underlying the prior convictions.”

IV. IMMIGRATION REFORM AND WHY COURTS MUST CONSIDER PLEA BARGAIN IMPLICATIONS

With five circuits now directly rejecting the Attorney General’s holding that evidence outside of the record of conviction is permissible in situations where the modified categorical approach fails to reveal if the offense necessarily inheres moral turpitude, the discussion may justifiably switch to what will occur if all circuits align against the decision. There is still a distinct possibility that every circuit may eventually come to the same conclusion that INA § 212(a)(2)(A)(i) is unambiguous and, therefore, not owe the decision deference under Chevron. Despite the Seventh and Eighth Circuits utilization of the Attorney General’s decision, it is applied

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83 See Moncrieffe, 133 S. Ct. at 1690 (reasoning full categorical approach consistent with text of INA).
84 See Brady, supra note 43, at 4-5 (describing how Moncrieffe reaffirmed permissibility to review conviction record when criminal statutes contains multiple crimes).
85 See Descamps, 133 S. Ct. at 2293 (“A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant’s conviction.”).
86 Id. (outlining Court’s reasoning); see Kesselbrenner et al., supra note 45, at 7 (discerning Congress’s intent behind Descamps).
87 See Circuit Split, supra note 68 (referring to holding of Olivas-Motta).
88 See supra note 74 and accompanying text (listing majority of circuits reject Attorney General’s application of CIMT analysis). Now that the very decision which incited the Attorney General’s decision to apply a third step to the categorical approach has been over turned, it is likely that the remaining circuits employing the third step will cease its practice as well. Cf. Silva-Trevino v. Holder, 742 F.3d 197, 201 (5th Cir. 2014)
only through procedural necessity.  

Additionally, Moncrieffe and Descamps go a long way towards clarifying the acceptable manners in which to apply the modified categorical approach in the immigration context. Because the Supreme Court never discussed the BIA or deference in their ruling in Moncrieffe, the applicability of their ruling in the immigration context becomes questionable. The BIA has worked around similar reasoning in Taylor, asserting in a footnote that “Taylor . . . is not necessarily controlling on the BIA because the BIA is entitled to deference on its interpretation of an immigration statute, as long as it is reasonable.”

There are already indications that certain courts will not strictly follow Descamps with the BIA permitting evidence outside of the record of conviction and the Ninth Circuit supporting a more relaxed interpretation of the modified categorical approach. As seen in Lanferman, the BIA decided that it could use the modified categorical approach more widely in the immigration context than in the criminal context. Courts will likely argue that immigration cases are distinguishable from the circumstances in Descamps as they were applied by the Armed Career Criminal Act (“ACCA”). However, courts will have a harder time distinguishing the result from Moncrieffe, as this case occurred within the immigration context.

While the categorical approach in immigration proceedings similarly relates to penalties that arise out of a conviction of certain types of crimes, the BIA in Lanferman held that they could apply the modified categorical approach broadly even in situations where doing so would be impermissible under the ACCA. Accordingly, it will be necessary for
individual circuit courts to address the applicability of Descamps in the immigration context if the Immigration Courts do not align the Supreme Court’s decision and this criminal case is equally applicable to the categorical approach used in immigration proceedings.\(^9^8\)

While neither Olivas-Motta nor the Fifth Circuit in Silva-Trevino directly relied on either Moncrieffe or Descamps in reaching their decisions, the findings are consistent, fundamentally undercutting the Attorney General’s decision.\(^9^9\) Due to Congress’ plenary power to control immigration, “[t]he scope of judicial inquiry into immigration legislation is exceedingly narrow.”\(^1^0^0\) The Supreme Court has been extremely cautious when addressing constitutional claims in the immigration context stating, “immigration is a sovereign prerogative, largely within the control of the executive and the legislature.”\(^1^0^1\) Another contributing factor is that the BIA does not have the authority to rule on the constitutionality of the statutes and regulations that they administer.\(^1^0^2\)

With circuit courts trending towards deference to hundreds of years of precedent in support of a categorical approach, there is a distinct possibility that the Supreme Court may finally give a directed opinion on whether courts may examine evidence outside the record of conviction when, after applying a modified categorical approach and ambiguity still exists, a CIMT has occurred.\(^1^0^3\) However, the Supreme Court will likely not consider the issue ripe until significant immigration reform occurs with the potential to completely change the realm of CIMTs.\(^1^0^4\)

The discord between criminal defense attorneys and immigration counsel is also not a new problem, however, modern immigration reform makes the consequences more severe and the benefits of “good moral character” more appealing.\(^1^0^5\) The Deferred Action for Childhood
Arrivals, a memorandum authorized by the Obama Administration, allows aliens under age thirty, provided they meet certain requirements, to live and work in the United States for a period of two years and after two years, may re-apply for an additional two-year period. However, these conditions stipulate that you are not qualified to receive protection against deportation if you obtain a conviction of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses. This implies that even crimes that do not constitute CIMTs can have negative deportation consequences if not properly advised by counsel.

Often times, immigration practitioners do not get involved until after a judgment has been entered, which may be too late to effectively halt deportation proceedings. Notably, while Padilla held that the Sixth Amendment requires defense counsel to advise noncitizen defendants about the deportation consequences of a guilty plea, it did not discuss how to address the possibility of determining authority being able to inquire beyond the record of conviction. The circumstances in Padilla surround a high-volume drug trafficking case where the inevitability of deportation was high despite the plea negotiated. However, more often than not, aliens are convicted of minor crimes, which may still constitute a CIMT after going through a categorical analysis. When aliens are charged with minor crimes with a strong likelihood of obtaining a plea bargain, incorporating immigration considerations is paramount.

With ninety-four percent of all state convictions arising from guilty

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106 See Memorandum from Janet Napolitano, Sec’y, DHS, to David V. Aguilar, Acting Comm’r, CBP, Alejandro Mayorkas, Dir., USCIS, and John Morton, Dir., ICE, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (detailing why children brought to United States should be subject to prosecutorial discretion in deportation).

107 See id. (justifying why prosecutorial discretion should apply to younger noncitizens).

108 See id. (noting severity of offense does not allow for any prosecution).


112 See id. at 362-63 (noting drug trafficking crimes generally trigger deportation due to nature of offense).


114 See id. at 1781-85 (noting counsel’s misguided efforts to have noncitizen clients accept plea deals while creating deportation implications).
pleas, protecting a defendant’s benefit from the plea bargain is a critical concern behind using the modified categorical approach. Honoring a plea bargain is, and should continue to be, a core concern in upholding the application of the two-step categorical approach and refusing to look beyond the record of conviction.

While a clear definition of how to handle CIMTs may never be achieved, legislative reform regarding the repercussions of such a finding may be achievable. An all-inclusive list of what crimes constitute a CIMT and how to make such a determination is quite possibly impossible; therefore, Congress should consider eliminating deportation as a consequence for misdemeanor offenses. This would incentivize aliens who are facing the possibility of deportation as a result of a conviction to accept plea bargains rather than going to trial on the advice of counsel and save the criminal court system precious resources such as time and money. As the intersections between criminal and immigration courts continue to increase, Congress should also consider the possibility of judicial recommendations as part of plea bargains for misdemeanor offenses, especially those which do not require the appointment of counsel.

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115 Cf. Analyzing Washington General Assault Convictions After Moncrieffe, Decamps, and Olivas-Motta: An Overview Guide for Immigration Counsel, WASH. DEFENDER ASS’N 4 (Aug. 1, 2013), http://www.defensenet.org/immigration-project/immigration-resources/moncrieffe-decamps-analysis-for-immigration-attorneys/AILA-WA%20Post%20Moncrieffe%20Descamps%20Assault%20Advisory%20%201-13.pdf (discussing how importance of preserving benefit of bargain played significant role in modified categorical approach). The Advisory also discusses how the act of a plea agreement is contractual by nature. Id. ("Just as the defendant chooses rationally to avoid the risk of conviction at trial, the prosecution avoids testing its evidence before a jury.").

116 See Taylor v. United States, 495 U.S. 575, 601-02 (1990) ("[I]n cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove these facts, if a guilty plea to a lesser, non burglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.").

117 See Cade, supra note 113, at 1812 (discussing possibilities to alternative reform for CIMT consequences).

118 See id. at 1812 (proposing elimination of deportation as consequence will promote general fairness).

119 See Roberts, supra note 109, at 1099-1100 (arguing if more misdemeanor defendants choose trial over guilty pleas system would internalize costs of prosecutions).

120 See Cade, supra note 113, at 1812 (discussing possibilities to alternative reform for CIMT consequences).
V. CONCLUSION

Disuniformity is inevitable in immigration law due to the procedural requirements under administrative law and the variability of state criminal statutes between jurisdictions. Despite the importance of a unified application of the law, we must have faith in the judicial system’s ability to reason through these issues, such as how to best determine what constitutes a CIMT in order to serve the needs of noncitizens. Courts continue to reference in their decisions that if Congress wanted to have a precise definition of a CIMT, they would amend the statute. However, Congress’s input will likely never occur since immigration reform is so controversial amongst constituents. It is very possible that another hundred years will pass and there will still not be a hard and fast answer on how to address CIMTs. In the interim, application of a strict categorical approach will rightfully restrain the prosecutorial abilities of the BIA and prevent the over expenditure of resources on the increasing number of deportable aliens by disallowing examination of facts outside the record of conviction.

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