CIRCUMSTANCES REQUIRING SAFEGUARDS: LIMITATIONS ON THE APPLICATION OF THE CATEGORICAL APPROACH IN *HERNANDEZ-ZAVALA v. LYNCH*

Abstract: On November 20, 2015, the U.S. Court of Appeals for the Fourth Circuit in *Hernandez-Zavala v. Lynch* held that adjudicators deciding whether a noncitizen has been convicted of a crime of domestic violence as defined in 8 U.S.C. § 1227(a)(2)(E)(i) must apply the circumstance-specific approach to the statute's domestic relationship requirement. In so doing, the Fourth Circuit carved out an exception to the more protective categorical and modified categorical approaches, which limit the evidence that may be admitted to determine whether a conviction triggers immigration consequences. This Comment argues that the Fourth Circuit erred in extending the circumstance-specific approach to crimes of domestic violence under the Immigration and Nationality Act, given the unique historical legacy of the categorical approach in immigration proceedings and the procedural disadvantages to which noncitizens in removal proceedings are subjected.

INTRODUCTION

Throughout the history of the United States, immigration and deportation have been divisive political issues.[1] Political leaders on both sides of the aisle, however, generally support the removal of immigrants with prior criminal convictions.[2] This population, though seen by many as unsympathetic and undeserving of immigration benefits, includes refugees, lawful permanent residents,

[1] *See generally* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007) (exploring the history of deportation in the United States); PETER SCHRAG, NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA (2010) (discussing three centuries of anti-immigrant sentiment in the United States).

[2] *See, e.g.*, Hillary Clinton, *Remarks on Plan to Strengthen Immigrant Families at the National Immigrant Integration Conference in Brooklyn*, HILARY FOR AMERICA (Jan. 31, 2016), https://www.hillaryclinton.com/speeches/remarks-plan-strengthen-immigrant-families-national-immigrant-integration-conference-brooklyn/ [https://perma.cc/7XBL-LYGP] (supporting the deportation of "dangerous criminals"); Barack Obama, *Remarks by the President in Address to the Nation on Immigration*, OBAMA WHITE HOUSE ARCHIVES (Nov. 20, 2014), https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [https://perma.cc/SKV9-LBCH] (promoting the deportation of "[f]elons, not families" and "[c]riminals, not children"); Donald Trump, *Remarks by President Trump in Joint Address to Congress* (Feb. 28, 2017), https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-joint-address-congress [https://perma.cc/M2F3-545N] (recounting stories of violent crimes committed by undocumented immigrants).

and undocumented individuals, many of whom have lived in the United States for decades and are the parents of children with U.S. citizenship.[3]

This Comment focuses on one provision of the Immigration and Nationality Act ("INA") which makes those who have committed "crimes of domestic violence" removable and ineligible for certain forms of discretionary relief.[4] In November 2015, in *Hernandez-Zavala v. Lynch*, the U.S. Court of Appeals for the Fourth Circuit held that when analyzing whether a noncitizen's conviction for a "crime of domestic violence" triggers immigration consequences, immigration adjudicators should consider the underlying facts of the conviction using a "circumstance-specific approach."[5] Part I of this Comment provides an overview of the competing approaches to determining immigration consequences of criminal convictions and the facts and procedural history of *Hernandez-Zavala*.[6] Part II discusses the current state of the law with respect to "crimes of domestic violence" as defined in the INA.[7] Part III argues that the Fourth Circuit failed to sufficiently consider the unique need for analytic and evidentiary limits in determining immigration consequences of criminal convictions, particularly considering the numerous procedural hurdles faced by immigrants in removal proceedings.[8]

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[3] *See generally* HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY (2007) (recounting the stories of permanent residents and undocumented parents of U.S. citizens deported for having committed crimes); LEITNER CTR. FOR INT'L LAW & JUSTICE AT FORDHAM LAW SCH., REMOVING REFUGEES: U.S. DEPORTATION POLICY AND THE CAMBODIAN-AMERICAN COMMUNITY (2010) (documenting the experiences of deported Cambodians, many of whom came to the United States as refugees and were deported in the early 2000s as a result of criminal convictions); *2014 Yearbook of Immigration Statistics, Table 41: Aliens Removed by Criminal Status and Region and Country of Nationality: Fiscal Year 2014*, HOMELAND SECURITY, https://www.dhs.gov/immigration-statistics/yearbook/2014/table41 [https://perma.cc/4HWN-N4X3] (last visited Apr. 18, 2017) (noting a total of 167,740 removals in 2014 of individuals with prior criminal convictions).

[4] *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2012) (listing "crimes of domestic violence" as a removal ground); *id.* § 1229b(b)(1)(C) (stating that nonpermanent residents who have been convicted of crimes listed under § 1227(a)(2) are ineligible for relief in the form of cancellation of removal for certain nonpermanent residents); *see also infra* notes 46–49 and accompanying text (discussing the Immigration and Nationality Act ("INA") definition of "crimes of domestic violence" under 8 U.S.C. § 1227(a)(2)(E)(i)).

[5] Hernandez-Zavala v. Lynch, 806 F.3d 259, 266–67 (4th Cir. 2015); *see infra* notes 58–65 and accompanying text (discussing the Fourth Circuit's reasoning in *Hernandez-Zavala*).

[6] *See infra* notes 9–54 and accompanying text.

[7] *See* 8 U.S.C. § 1227(a)(2)(E)(i); *infra* notes 55–74 and accompanying text.

[8] *See infra* notes 75–95 and accompanying text.

I. IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: THE CATEGORICAL AND CIRCUMSTANCE-SPECIFIC APPROACHES

For centuries, criminal convictions have impacted the ability of foreign nationals to immigrate to and remain in the United States.[9] A dramatic shift occurred in the 1980s and 1990s, when a series of immigration reforms expanded conviction categories predicating immigration consequences and increased the severity of these consequences, resulting in increased numbers of deportations based on criminal convictions.[10] With the passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996, as part of an effort to protect public safety and address fears of "criminal aliens," Congress included for the first time "crimes of domestic violence" as a ground of removability under the INA.[11] Section A of this Part discusses the development of the categorical approach to determine whether crimes qualify as those de-

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[9] *See* Act of March 3, 1891, ch. 551, 26 Stat. 1084 (1891) (including for the first time "crimes involving moral turpitude" as a ground for exclusion); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 4 (2015) (tracing the origins of "crimmigration" law to 1788, when Congress encouraged states to restrict the immigration of convicts); Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1044–46 (noting that the adoption of "crimes involving moral turpitude" as a ground of exclusion in the Act of 1891 built upon the historic usage of the moral turpitude standard to perpetuate discriminatory policies such as disenfranchisement).

[10] *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.) (expanding the list of "aggravated felony" offenses and eliminating judicial review of certain final removal orders based on criminal convictions); The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.) (expanding the list of "aggravated felony" offenses and the immigration consequences of certain criminal convictions to include mandatory detention and expedited removal); Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4180, 4469–71 (1988) (codified as amended in 8 U.S.C. § 1101) (creating a new category of "aggravated felony" offenses, which result in the most serious immigration consequences); *see also* HUMAN RIGHTS WATCH, *supra* note 3, at 38 (showing a steady increase in deportations based on criminal convictions from 1996 through 2005); Daniel Kanstroom, *"Passed Beyond Our Aid:" U.S. Deportation, Integrity, and the Rule of Law*, 35 FLETCHER F. WORLD AFF., no. 2, 2011, at 95, 95–96 (exploring the political climate leading up to the 1996 immigration amendments and the various ways in which AEDPA and IIRIRA transformed immigration law).

[11] *See* 8 U.S.C. § 1227(a)(2)(E)(i); IIRIRA § 350(a), 110 Stat. at 3009-639 to 640 (1996). While "crimes of violence" resulting in a specified minimum sentence were already included within the INA's list of "aggravated felony" offenses prior to 1996, the 1996 laws provided that convictions for "crimes of *domestic* violence" can result in immigration consequences even when no criminal sentence is imposed. *See* Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990) (expanding the definition of "aggravated felony" to include "crimes of violence" resulting in at least five-year sentences); IIRIRA § 350(a), 110 Stat. at 3009-639 to 640 (codified as amended at 8 U.S.C. § 1227) (creating a new category of domestic violence predicate offenses); *see also* Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 316 (1997) (critiquing domestic violence immigration laws enacted in the 1990s and the ways in which survivors are negatively impacted by requirements that abusers face deportation).

scribed in the INA.[12] Section B examines the more recent development of the circumstance-specific approach, with particular attention to "crimes of domestic violence."[13] Section C discusses the facts and procedural history of *Hernandez-Zavala*.[14]

A. The Categorical Approach

For as long as U.S. law has imposed immigration consequences on individuals with criminal convictions, adjudicators have been faced with the challenge of developing analytic approaches and evidentiary guidelines to determine whether convictions under a variety of state and federal penal codes qualify as crimes outlined in the INA.[15] In portions of the INA that lay out the grounds of inadmissibility and deportability, the statute lists both categories of generic crimes and crimes defined in other sections of the United States Code.[16] In determining whether a past conviction under a state or federal criminal statute falls within one of these categories, Courts have generally adopted the "categorical approach," which requires a comparison of the elements of the crime for which the respondent was convicted and the crime listed in the INA to determine whether the respondent's conviction triggers immigration consequences.[17] In other words, the noncitizen's underlying conduct is irrelevant in

[12] *See infra* notes 15–28 and accompanying text.

[13] *See infra* notes 29–40 and accompanying text.

[14] *See infra* notes 41–54 and accompanying text.

[15] *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1673–74 (2011) (analyzing the history of how adjudicators have determined immigration consequences of criminal convictions); Simon-Kerr, *supra* note 9, at 1046–47 (analyzing the ways in which adjudicators have struggled to establish workable standards to determine whether convictions satisfy immigration law's undefined moral turpitude standard).

[16] *See* 8 U.S.C. §§ 1182(a)(2), 1227(a)(2). Sections 212(a)(2) and 237(a)(2) of the INA (8 U.S.C. §§ 1182(a)(2), 1227(a)(2)) provide lists of crimes and establish that respondents convicted of these crimes are inadmissible and/or removable. *Id.* For some crimes, the INA references definitions contained in other federal statutory provisions, while for others it uses generic terms without providing any definition. *Compare* 8 U.S.C. § 1101(a)(43)(B) (including within the list of "aggravated felony" offenses those illicit trafficking offenses "defined in section 802 of Title 21"), *with* 8 U.S.C. § 1101(a)(43)(A) (including "murder"—a generic crime—in the list of "aggravated felony" offenses). Both federal and state convictions may qualify as grounds of removability or inadmissibility, and since immigration law first included such provisions, adjudicators have struggled to account for the variety in criminal statutes, many of which are broader or narrower than those referenced in the INA. *See* Das, *supra* note 15, at 1673–74.

[17] *See* Mellouli v. Lynch, 135 S. Ct. 1980, 1986 n.3, 1988 (2015) (applying the categorical approach to determine whether the respondent's conviction for drug paraphernalia possession qualified as a controlled substance deportable offense by comparing the controlled substances listed under a state schedule with those listed under the federal schedule referenced in the INA—21 U.S.C. § 802 (2012)); Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) (applying the categorical approach to determine whether the respondent's conviction for possession with intent to distribute marijuana qualified as an aggravated felony deportable offense by comparing the federal offense listed in the INA—21 U.S.C. § 841(a)—with the state statute). Convictions under state or federal law may trigger immigration consequences if the statute of conviction is either directly referenced in the INA or criminaliz-

this analysis, and courts compare only the elements of the statute of conviction against the elements of the federal statute.[18] Under the categorical approach, if a criminal statute is overbroad and could criminalize conduct that would not satisfy the elements of the INA-listed offense, a conviction under that statute would not trigger immigration consequences, regardless of the respondent's actual conduct.[19]

Immigration adjudicators have used some form of the categorical approach since the early 1900s.[20] Federal judges deciding immigration cases during this period concluded that in drafting national immigration policies, Congress intended to limit the power of administrative immigration adjudicators.[21]

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es the same or a narrower range of conduct than a specific or generic crime listed in the INA. *See* Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 260 (2012) (explaining the process used to determine if a state conviction qualifies as a crime listed in the INA). For example, if a noncitizen is charged with having been convicted of an aggravated felony related to child pornography under INA § 101(a)(43)(I), the noncitizen must have either been convicted under one of the specific provisions of 18 U.S.C. listed in the relevant section of the INA (18 U.S.C. §§ 2251, 2251A, or 2252) or have been convicted under a state law which is a categorical match for the relevant provisions of Title 18. *Id.*

[18] *See Moncrieffe*, 133 S. Ct. at 1684, 1697 (explaining that under the categorical approach, a *respondent's* actual conduct resulting in a criminal conviction is irrelevant).

[19] *See Mellouli*, 135 S. Ct. at 1988 (holding that the petitioner's conviction for possession of drug paraphernalia was not categorically a controlled substance offense as defined in the INA because the statute of conviction criminalized the possession of paraphernalia relating to substances not included in the federal controlled substances schedules); Descamps v. United States, 133 S. Ct. 2276, 2282–83 (2013) (holding that the petitioner had not committed the generic crime of burglary because the statute under which he was convicted did not require breaking and entering, which is an element of the generic definition of burglary); *Moncrieffe*, 133 S. Ct. at 1684, 1701 (holding that the petitioner's conviction for possession of marijuana with intent to distribute was not categorically an aggravated felony because the state statute under which the petitioner was convicted criminalized the sharing of small amounts of marijuana, conduct which would not result in a conviction under the relevant federal statute). Under the categorical approach, when the INA does not provide a definition for a crime, adjudicators must identify the elements of the "offense as commonly understood." *Descamps*, 133 S. Ct. at 2281.

[20] *See* Act of March 3, 1891, ch. 551, 26 Stat. 1084 (listing categories of predicate crimes triggering inadmissibility); Das, *supra* note 15, at 1689 (describing the early history of the categorical approach). The development of the categorical approach in the immigration context can be traced to the early 1900s, not long after crimes involving moral turpitude were first included in the federal immigration code as a ground of inadmissibility. Das, *supra* note 15, at 1689. Scholars have argued that this history is generally overlooked, which has enabled adjudicators to carve out a growing number of exceptions to the categorical approach. *Id.*; *see also* Simon-Kerr, *supra* note 9, at 1046–47 (arguing that the categorical approach developed as a result of the lack of a clear definition for the term "moral turpitude" in early immigration statutes, and adjudicators' hesitance to reach fact-dependent conclusions regarding the morality of respondents' conduct).

[21] *See* United States *ex rel.* Mylius v. Uhl, 203 F. 152, 153 (S.D.N.Y. 1913); Das, *supra* note 15, at 1690, 1695–96. The District Court for the Southern District of New York reasoned in *United States ex rel. Mylius v. Uhl* in 1913 that the categorical approach is necessary for deciding immigration cases because of the administrative (as opposed to judicial) role of immigration adjudicators, the need for "definite standards" and "general rules," and the importance of applying immigration law in a uniform manner. 203 F. at 153. A subsequent decision by Attorney General Cummings adopted the reasoning

The categorical approach was thus viewed as a way to ensure that immigration law is applied in a fair and uniform manner, and that determinations of guilt or innocence are restricted to Article III judges.[22]

Despite this lengthy history, current interpretations of the categorical approach are based largely on non-immigration cases, including the U.S. Supreme Court's 1990 decision in *Taylor v. United States* and subsequent cases employing the categorical approach to determine whether a prior conviction triggers a sentencing enhancement under the Armed Career Criminal Act ("ACCA").[23] In *Taylor*, the Court held that the prior burglary convictions of a

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of *Uhl* as justification for use of the categorical approach. *See* Immigration Laws—Offenses Involving Moral Turpitude, 37 Op. Att'y Gen. 293, 294–95 (1933); Das, *supra* note 15, at 1695–96. *But see* Simon-Kerr, *supra* note 9, at 1048, 1058 (suggesting that despite these early judicial decisions adopting the categorical approach, Congress likely actually intended for adjudicators to examine the facts of individual cases to determine whether convictions were for crimes involving moral turpitude).

[22] *See* U.S. Const. art. III, § 1 (establishing Article III judges); United States *ex rel.* Guarino v. Uhl, 107 F.2d 399, 400 (2d Cir. 1939) (stating that the *respondent* could only be deported if he were found to have been convicted of a crime that was "inherently" or "necessarily" immoral, and implying that under-inclusivity is preferable considering the "dreadful penalty of banishment"); Howes v. Tozer, 3 F.2d 849, 852 (1st Cir. 1925) (stating that by including the language "convicted" and "admits" in the immigration statute, Congress prevented immigration adjudicators from deciding whether the respondent was actually guilty or innocent of the crime of which he was convicted or admitted to having committed); Das, *supra* note 15, at 1690. The categorical approach prevents *respondents* from being subjected to "minitrials" by administrative judges to determine the facts behind convictions, and thereby facing removal based on alleged conduct rather than convictions. *See Moncrieffe*, 133 S. Ct at 1690 ("The categorical approach serves 'practical' purposes: It promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact."). Given the lack of the procedural safeguards in removal proceedings that are guaranteed by the Constitution to criminal defendants, such as legal representation, trial by jury, and evidentiary limits, the categorical approach is an important limitation on the power of administrative judges to look behind a conviction at a *respondent's* underlying conduct. *See* U.S. CONST. amend. IV (establishing protections against unreasonable seizures); *id.* amend. VI (establishing the right to trial by jury, to confront one's accuser, and to counsel); *id.* amend. VIII (establishing protections against cruel and unusual punishment); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (declaring that "[t]he order of deportation is not a punishment for crime" and "the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application"). *See generally* Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L. J. 2394 (2013) (noting that the guaranteed right to counsel in criminal proceedings does not extend to removal proceedings, and arguing that courts should recognize lawful permanent residents' due process right to counsel).

[23] *See* 18 U.S.C. § 924(e) (2012) (imposing sentencing enhancements on those convicted of a firearms possession or transportation offense under § 922(g) who have prior violent felony or drug offense convictions); *Moncrieffe*, 133 S. Ct. at 1697 (citing *Taylor* as the basis for the Court's definition of the categorical approach); Taylor v. United States, 495 U.S. 575, 602 (1990) (using the categorical approach to determine whether a burglary conviction qualified as a predicate offense triggering a sentencing enhancement for a felon in possession of a firearm conviction). The categorical approach has developed in a number of contexts under the Armed Career Criminal Act ("ACCA"). *See* Mathis v. United States, 136 S. Ct. 2243, 2248–50 (2016) (burglary); *Descamps*, 133 S. Ct. at 2281 (burglary); Johnson v. United States, 559 U.S. 133, 144 (2010) (simple battery); Chambers v. United States, 555 U.S. 122, 123–25 (2009) (failure to report for penal confinement); Shepard v. United States, 544 U.S. 13, 26 (2005) (burglary). This more recent development of the categorical approach

defendant charged as a felon in possession of a firearm resulted in a sentence enhancement under the ACCA because the state burglary statute contained all the elements of the modern generic crime of burglary.[24] Recent cases drawing on the *Taylor* Court's reasoning have led to the refinement of what is known as the "modified categorical approach."[25] This variation on the categorical approach provides adjudicators with a means of analyzing convictions under "divisible" statutes containing multiple alternative elements.[26] In such situations, adjudicators are permitted to consult limited sources within the record of conviction to determine under which version of the statute a respondent was convicted.[27] If the respondent was convicted under a version of the statute that aligns with the predicate crime listed in the INA, the underlying conviction may trigger immigration consequences, notwithstanding the overbreadth of the statute of conviction as a whole.[28]

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in the criminal sentencing context is based on similar, but slightly different rationales than in the immigration context. *See Shepard*, 544 U.S. at 24 (concluding that the categorical approach protects defendants' Sixth Amendment right to a jury trial); *Taylor*, 495 U.S. at 600–02 (justifying adoption of the categorical approach due to statutory interpretation, legislative history, and "the practical difficulties and potential unfairness" of inquiries into the facts behind a conviction, particularly where a respondent entered a guilty plea).

[24] *See Taylor*, 495 U.S. at 598, 602. In *Taylor*, the Court measured the defendant's state conviction against the generic definition of burglary because the ACCA failed to define burglary. *Id.* The Court examined the traditional common law definition of burglary as well as the definition contained in the Model Penal Code and other statutes. *Id.* at 580. Through a thorough analysis of the various definitions of burglary and the legislative history of the Model Penal Code and the ACCA, the Court applied the definition of burglary as adopted by most states. *Id.* at 598.

[25] *See Mathis*, 136 S. Ct. at 2249 (clarifying when the modified categorical approach may be used); *Descamps*, 133 S. Ct. at 2285 (recognizing but not applying the modified categorical approach); *Shepard*, 544 U.S. at 26 (listing the documents within the record of conviction that courts later determined are all that may be consulted when analyzing a conviction using the modified categorical approach).

[26] *See Mathis*, 136 S. Ct. at 2249; *Descamps*, 133 S. Ct. at 2285. As the Supreme Court explained in *Descamps* in 2013, the modified categorical approach is not actually a separate approach to determining immigration consequences of criminal convictions, but rather a tool that enables adjudicators to continue utilizing the categorical approach in situations involving divisible statutes. *Descamps*, 133 S. Ct. at 2285.

[27] *See Mathis*, 136 S. Ct. at 2252–53 (clarifying that the modified categorical approach may only be applied when a statute contains "multiple alternative elements"); *Shepard*, 544 U.S. at 26 (limiting the sources that may be consulted when a statute is found to be divisible to the record of conviction); *Taylor*, 495 U.S. at 602 (creating an exception to the categorical approach where a jury was "actually required to find all the elements" of the generic offense).

[28] *See, e.g.*, Ibarra-Hernandez v. Holder, 770 F.3d 1280, 1282 (9th Cir. 2014) (finding that the noncitizen's conviction for taking the identity of another qualified as a crime involving moral turpitude even though the statute was overbroad, because he had been convicted under a version of the statute necessarily involving fraud); Kaufmann v. Holder, 759 F.3d 6, 8–9 (1st Cir. 2014) (finding that a child pornography conviction under a statute containing multiple alternative elements qualified as an aggravated felony even though the statute was overbroad, because the noncitizen had been convicted under a version of the statute which was a categorical match to the offense listed in the INA). The modified categorical approach allows a prior state conviction under a divisible statute with multiple alternative elements to trigger immigration consequences when the record of conviction makes clear

B. The Circumstance-Specific Approach

As guidelines for applying the categorical and modified categorical approaches have gradually developed, a recent line of cases has emerged carving out exceptions to these approaches.[29] Where requirements of offenses listed in the INA appear to describe the particular circumstances under which a noncitizen committed a crime, rather than elements of the crime, courts have approved the use of the "circumstance-specific approach."[30] This new alternative to the categorical approach permits adjudicators to examine any evidence that would otherwise be admissible in immigration court to determine whether the facts underlying a criminal conviction satisfy the requirements of the INA offense.[31] Under the circumstance-specific approach, therefore, a conviction may trigger an immigration consequence even if the statute under which the respondent was convicted is overbroad and indivisible.[32]

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that the *respondent* was convicted under the version of the statute that is a categorical match for the crime listed in the INA. *See Mathis*, 136 S. Ct. at 2252–53 (explaining how the modified categorical approach functions). Under both the categorical and modified categorical approaches, however, the inquiry made by the adjudicator is whether the respondent was convicted under a statute aligning with a crime listed in the INA, rather than whether the facts underlying the conviction should trigger immigration consequences. *See Descamps*, 133 S. Ct. at 2285 (describing the modified categorical approach as a tool used to engage in a categorical analysis involving a divisible statute of conviction).

[29] *See, e.g.*, Nijhawan v. Holder, 557 U.S. 29, 36 (2009) (holding that the categorical approach does not apply to a monetary threshold requirement for fraud crimes); Garcia-Hernandez v. Boente, 847 F.3d 869, 872 (7th Cir. 2017) (holding that the categorical approach does not apply to protection order violations); *In re* Garza-Olivares, 26 I. & N. Dec. 736, 738–39 (B.I.A. 2016) (holding that the categorical approach does not apply to certain requirements of crimes of failure to appear); *In re* Dominguez-Rodriguez, 26 I. & N. Dec. 408, 411 (B.I.A. 2014) (holding that the categorical approach does not apply to the issue of whether a drug offense was merely "possession for personal use"); *see also* Das, *supra* note 15, at 1712–18 (explaining the history of exceptions to the categorical approach in the immigration context in the wake of the Supreme Court's decision in *Taylor* in 1990); Michael R. Devitt, *Improper Deportation of Legal Permanent Residents: The U.S. Government's Mischaracterization of the Supreme Court's Decision in* Nijhawan v. Holder, 15 SAN DIEGO INT'L L.J. 1, 5 (2013) (highlighting the high numbers of foreign nationals deported for fraud convictions following the Supreme Court's creation of the circumstance-specific approach in *Nijhawan*).

[30] *See Nijhawan*, 557 U.S. at 38; *Garza-Olivares*, 26 I. & N. Dec. at 738–39; *Dominguez-Rodriguez*, 261 I. & N. Dec. at 411; *see also infra* note 32 (summarizing cases establishing the circumstance-specific approach).

[31] *See Nijhawan*, 557 U.S. at 36 (noting the practical difficulties resulting from the *Taylor* Court's restrictions on the evidence that may be consulted in categorical inquiries); Bianco v. Holder, 624 F.3d 265, 272–73 (5th Cir. 2010) (setting no heightened limits on evidence that may be considered in circumstance-specific inquiries); *In re* H. Estrada, 26 I. & N. Dec. 749, 753 (B.I.A. 2016) (permitting the consultation of all "reliable" evidence in circumstance-specific inquiries); *see also infra* notes 86–95 and accompanying text (critiquing the Fourth Circuit's failure to establish evidentiary limits).

[32] *See Nijhawan*, 557 U.S. at 38 (finding that a fraud conviction triggered immigration consequences based on the underlying facts, even though the statute of conviction did not contain as an element 8 U.S.C. § 1101(a)(43)(M)(i) (2012)'s requirement that a fraud offense result in "loss to the victim or victims exceed[ing] $10,000"); *In re Garza-Olivares*, 26 I. & N. Dec. at 738–39 (finding that a failure to appear conviction triggered immigration consequences based on the underlying facts, even though the statute of conviction did not contain as an element 8 U.S.C. § 1101(a)(43)(T)'s re-

The circumstance-specific approach was first articulated in the U.S. Supreme Court's decision in 2009 in *Nijhawan v. Holder*.[33] In *Nijhawan*, the Court held that the categorical approach should not be applied to determinations of whether a fraud crime resulted in a loss of at least ten thousand dollars, and thus fell within the INA's list of "aggravated felony" fraud offenses.[34] Rather, adjudicators were to look to the record of conviction and any other reliable evidence to determine the amount of loss caused by a respondent's fraud crime.[35]

In 2009 in *United States v. Hayes*, the Supreme Court similarly declined to use the categorical approach in a firearms possession case to determine whether a defendant had been convicted of a misdemeanor "crime of domestic violence" under 18 U.S.C. § 922(g)(9), also known as the Lautenberg Amendment.[36] The Lautenberg Amendment, enacted in 1996, expanded § 922(g)'s prohibition on firearms possession by individuals convicted of certain felony offenses to also include misdemeanor domestic violence convictions.[37] The

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quirement that the *respondent* failed to appear "pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed"); *In re Dominguez-Rodriguez*, 26 I. & N. Dec. at 411 (finding that the exception to the controlled substance offense provision in 8 U.S.C. § 1227(a)(2)(B)(i), which applies when a conviction was based on "possession for one's own use of 30 grams or less of marijuana," requires an inquiry of the facts underlying the conviction rather than the elements of the statute of conviction).

[33] *See Nijhawan*, 557 U.S. at 38 ("The language of the provision is consistent with a circumstance-specific approach."); *Hernandez-Zavala*, 806 F.3d at 264 (attributing the circumstance-specific approach to the Supreme Court's decision in *Nijhawan*).

[34] *See* 8 U.S.C. § 1101(a)(43)(M)(i) (defining aggravated felony fraud crimes as those "in which the loss to the victim or victims exceeds $10,000"); *Nijhawan*, 557 U.S at 36. "Aggravated felony" convictions, including 8 U.S.C. § 1101(a)(43)(M)(i), result in mandatory detention, mandatory removal without the possibility of discretionary relief, and bars on the ability to reenter the United States. *See* Erica Steinmiller-Perdomo, Note, *Consequences Too Harsh for Noncitizens Convicted of Aggravated Felonies?*, 41 FLA. ST. U. L. REV. 1173, 1187–88 (2014). Based on the Court's decision in *Nijhawan*, if a respondent has been convicted of a fraud crime, adjudicators may now conduct a factual inquiry not limited to the record of conviction to determine whether the amount of loss exceeds $10,000. *Nijhawan*, 557 U.S. at 36. Therefore, a fraud conviction may qualify as an aggravated felony and result in immigration consequences even if the statute of conviction does not have a monetary threshold as an element. *Id.*

[35] *See Nijhawan*, 557 U.S at 36 (holding that the "fraud and deceit" provision of the INA "calls for a 'circumstance-specific' . . . interpretation").

[36] *See* United States v. Hayes, 555 U.S. 415, 418 (2009) (resolving a split between the Fourth Circuit and nine other circuit courts and overturning the Fourth Circuit's decision that under 18 U.S.C. § 922(g)(9), the domestic relationship must be an element of the statute of conviction).

[37] *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104–208, 110 Stat. 3001 (1996) (enacting the Lautenberg Amendment); 142 CONG. REC. S11,878 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (stating that the purpose of the Lautenberg Amendment is to ensure that "[i]f you beat your wife, if you beat your child, if you abuse your family and you are convicted, even of a misdemeanor, you have no right to possess a gun"); Tanjima Islam, Note, *The Fourth Circuit's Rejection of Legislative History: Placing Guns in the Hands of Domestic Violence Perpetrators*, 18 AM. U. J. GENDER SOC. POL'Y & L. 341, 344 (2010) (discussing the purpose of the Lautenberg Amendment).

Hayes Court emphasized that the existence of a domestic relationship, though required under the Lautenberg Amendment, is not an element of the predicate domestic violence offense, and therefore is not subject to the categorical approach.[38] The *Hayes* Court justified its holding by explaining that Congress intended the Lautenberg Amendment to apply broadly to dangerous domestic violence crimes not charged as felonies and therefore not previously covered by other provisions of 18 U.S.C. § 922(g).[39] As a result of *Hayes*, the Lautenberg Amendment's restrictions can be triggered when a person commits a crime of violence and the facts underlying the conviction reveal that the victim and perpetrator were domestic partners, even if the underlying crime does not include a domestic relationship as an element.[40]

C. Hernandez-Zavala v. Lynch*: Facts and Procedural History*

On March 8th 2012, Hernan Hernandez-Zavala, a native and citizen of Mexico living in the United States without authorization, was charged with misdemeanor assault.[41] The victim of the assault was Mr. Hernandez-Zavala's partner, with whom he parented a child and shared an address.[42] This criminal complaint brought Mr. Hernandez-Zavala to the attention of immigration authorities, and the following day he was served with a notice to appear, charging that he was removable for having entered and continued living in the United States without authorization.[43] Mr. Hernandez-Zavala conceded that he was

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[38] *Hayes*, 555 U.S. at 426; *see* 142 CONG. REC. S11,878 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (noting that "convictions for domestic violence-related crimes are often for crimes, such as assault, that are not explicitly identified as related to domestic violence" and urging that "law enforcement authorities [should] thoroughly investigate misdemeanor convictions on an applicant's criminal record to ensure that none involves domestic violence . . . ").

[39] *Hayes*, 555 U.S. at 426; *see* Bethany A. Corbin, *Goodbye Earl: Domestic Abusers and Guns in the Wake of* United States v. Castleman*—Can the Supreme Court Save Domestic Violence Victims?*, 94 NEB. L. REV. 101, 120–21 (2015) (discussing *Hayes*); Islam, *supra* note 37, at 355–58 (arguing that the *Hayes* Court was correct to place significant weight on Senator Lautenberg's floor statements regarding the Lautenberg Amendment).

[40] *Hayes*, 555 U.S. at 426; Corbin, *supra* note 39, at 121 (explaining the significance of the *Hayes* Court's holding).

[41] *Hernandez-Zavala*, 806 F.3d at 261. The statute Mr. Hernandez-Zavala pled guilty to having violated provides that "assault, assault and battery, or affray" resulting in serious injury or involving a deadly weapon is a misdemeanor. *See* N.C. GEN. STAT. § 14-33(c)(1) (2012); *Hernandez-Zavala*, 806 F.3d at 261.

[42] *Hernandez-Zavala*, 806 F.3d at 261. The actual existence of a relationship between Mr. Hernandez-Zavala and the victim of his assault conviction was undisputed, and Mr. Hernandez-Zavala described the victim in his brief as his "partner." *Id.*

[43] *Id.*; *see also* Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1147–51 (2013) (describing the ways in which the immigration and criminal justice systems interact to bring unauthorized immigrants to the attention of authorities in the early stages of a criminal case). The government charged Mr. Hernandez-Zavala under 8 U.S.C. § 1182(a)(6)(A)(i) (2012) for never having been admitted or paroled. *Hernandez-Zavala*, 806 F.3d at 261.

removable on this ground and applied for discretionary relief from removal in the form of cancellation of removal for certain nonpermanent residents.[44] On March 21st, Mr. Hernandez-Zavala pleaded guilty to assault with a deadly weapon.[45] Then, on February 4th, the Department of Homeland Security moved to pretermit his application for cancellation of removal on the basis that he had been convicted of a "crime of domestic violence" and was therefore statutorily ineligible for relief.[46]

The INA defines "crimes of domestic violence" as those that first meet 18 U.S.C. § 16's definition of "crimes of violence."[47] Courts have generally accepted that this provision requires a categorical analysis of whether a conviction qualifies as a "crime of violence."[48] Secondly, the perpetrator and victim must share a domestic relationship.[49] Mr. Hernandez-Zavala argued that be-

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[44] *Hernandez-Zavala*, 806 F.3d at 262; *see* 8 U.S.C. § 1229b(b) (outlining the requirements of cancellation of removal for certain nonpermanent residents). Cancelation of removal for certain nonpermanent residents is a discretionary form of relief available to those who have been present in the United States for at least ten years, whose deportation would result in "exceptional and extremely unusual hardship" to a qualifying relative, who have been of "good moral character," and who have not committed certain crimes. 8 U.S.C. § 1229b(b).

[45] *Hernandez-Zavala*, 806 F.3d at 261.

[46] *See* 8 U.S.C. § 1229b(b) (establishing as one of the requirements for cancellation of removal for certain nonpermanent residents that the applicant may not have been convicted of a crime listed under 8 U.S.C. § 1227(a)(2)); *see also id.* § 1227(a)(2)(E) (including definitions for predicate crimes of domestic violence convictions); *Hernandez-Zavala*, 806 F.3d at 262 (listing the INA's crime of domestic violence provision as the Department of Homeland Security's reason for moving to pretermit Mr. Hernandez-Zavala's application for relief). A crime of domestic violence is defined as:

> "Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term 'crime of domestic violence' means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former [partner] . . . ."

8 U.S.C. § 1227(a)(2)(E).

[47] 8 U.S.C. § 1227(a)(2)(E)(i); 18 U.S.C. § 16 (2012). Title 18 of the U.S. Code governs federal crimes and criminal procedure. Chapter 1 of Title 18 contains definitions of terms used throughout Title 18, including "crime of violence." 18 U.S.C. § 16. A crime of violence is defined as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id.

[48] *See Hernandez-Zavala*, 806 F.3d at 263 (concluding that assault with a deadly weapon was categorically a "crime of violence"); *Bianco*, 624 F.3d at 272 (concluding that aggravated assault was categorically a "crime of violence"); *In re H. Estrada*, 26 I. & N. Dec. at 750 (concluding that simple battery was categorically a "crime of violence").

[49] 8 U.S.C. § 1227(a)(2)(E)(i). The INA gives several examples of domestic relationships, including spouses, co-parents, and cohabiting couples, and also says that any relationship "protected . . . under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government" suffices. *Id.*

cause the statute under which he was convicted did not include as an element a domestic relationship between the victim and abuser, it therefore is not a categorical match to the offense of domestic violence described in the INA.[50]

The Immigration Judge ("IJ") rejected Mr. Hernandez-Zavala's argument and granted the government's motion, concluding first that Mr. Hernandez-Zavala had been convicted of a "crime of violence" under 18 U.S.C. § 16 and second that the facts of Mr. Hernandez-Zavala's conviction satisfied the necessary domestic relationship requirement.[51] Mr. Hernandez-Zavala appealed to the Board of Immigration Appeals ("BIA" or "the Board"), arguing that the IJ erred as a matter of law in admitting and examining evidence of the facts underlying his criminal conviction.[52] The BIA affirmed the decision of the IJ based on its adoption of the circumstance-specific approach, permitting examination of underlying evidence to establish the existence of a domestic relationship.[53] Mr. Hernandez-Zavala subsequently appealed the BIA's decision to the Fourth Circuit.[54]

II. The Fourth Circuit's Adoption of the Circumstance-Specific Approach with Respect to "Crimes of Domestic Violence"

In 2015, in *Hernandez-Zavala v. Lynch*, the U.S. Court of Appeals for the Fourth Circuit held that the circumstance-specific approach should be used to determine whether convictions under state criminal statutes qualify as "crimes of domestic violence" as defined in the INA, and therefore result in immigration consequences.[55] Section A of this part examines the Fourth Circuit's reliance in *Hernandez-Zavala* on the Supreme Court's 2009 decisions in *Nijhawan v. Holder* and *United States v. Hayes*.[56] Section B discusses the current state of

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[50] *See id.* (defining crimes of domestic violence triggering immigration consequences); N.C. Gen. Stat. § 14-33(c)(1) (2012); *Hernandez-Zavala*, 806 F.3d at 263 (noting Mr. Hernandez-Zavala's sole contention on appeal was that the IJ should have applied the categorical approach to determine whether he had convicted a "crime of domestic violence" as defined by the INA).

[51] *Hernandez-Zavala*, 806 F.3d at 262. The Immigration Judge ("IJ") engaged in both a modified categorical and a circumstance-specific analysis, and determined that under either approach, Mr. Hernandez-Zavala had been convicted of a crime of domestic violence triggering immigration consequences. *Id.*

[52] *Id.* The Board of Immigration Appeals ("BIA" or "the Board") is the administrative body that hears appeals of decisions by IJs. *See* 8 C.F.R. § 1003.1(b) (2016) (establishing the Board's appellate jurisdiction). BIA decisions are binding on IJs nationwide unless they are overruled by the Board, the attorney general, or a federal court. *See* 8 C.F.R. § 1003.1(g) (outlining when BIA decisions serve as precedent). *See generally* Dep't of Justice, Board of Immigration Appeals Practice Manual (2016) (establishing informal guidelines for BIA procedures).

[53] *Hernandez-Zavala*, 806 F.3d at 262.

[54] *Id.*

[55] *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2012); Hernandez-Zavala v. Lynch, 806 F.3d 259, 266–67 (4th Cir. 2015); *supra* notes 29–40 and accompanying text (describing the circumstance-specific approach).

[56] *See infra* notes 58–65 and accompanying text.

the law with respect to immigrants charged with having been convicted of "crimes of domestic violence" in light of a preexisting circuit split, the Fourth Circuit's decision in *Hernandez-Zavala*, and the BIA's subsequent decision in 2016 in *In re H. Estrada*.[57]

A. The Fourth Circuit's Reliance on the Supreme Court's Decisions in Nijhawan and Hayes

In assessing Mr. Hernandez-Zavala's case, the Fourth Circuit affirmed the BIA's use of the circumstance-specific approach to determine whether the domestic relationship requirement was satisfied, and denied Mr. Hernandez-Zavala's petition for review.[58] The Fourth Circuit gave three primary justifications for its adoption of the circumstance-specific approach with respect to "crimes of domestic violence" as defined in the INA.[59] First, it reasoned that the language used in the INA reveals that Congress intended the relationship requirement to be a limitation on the crimes of violence that trigger immigration consequences, rather than an element of a more specific generic crime of *domestic* violence.[60] Secondly, the Fourth Circuit looked to the Supreme Court's 2009 decision in *Hayes*, and found the *Hayes* Court's holding that "crimes of domestic violence" under the Lautenberg Amendment require a circumstance-specific analysis to determine the existence of a domestic relationship instructive, despite the different context and slightly different wording in the INA and the Lautenberg Amendment.[61]

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[57] *See infra* notes 66–74 and accompanying text.

[58] *Hernandez-Zavala*, 806 F.3d at 266, 268.

[59] *Id.* at 266–67; *see also* 8 U.S.C. § 1227(a)(2)(E)(i) (defining "crimes of domestic violence").

[60] *Hernandez-Zavala*, 806 F.3d at 266. In particular, the Fourth Circuit referenced the phrase "committed by" in 8 U.S.C. § 1227(a)(2)(E)(i) as an indication that Congress intended that the categorical approach be used to determine if a conviction was for a "crime of violence" and the circumstance-specific approach be used to determine whether there was a domestic relationship. *Id.* In reaching this conclusion, the Fourth Circuit relied on the Supreme Court's 2013 opinion in *Moncrieffe v. Holder*, in which it reconciled its prior 2009 holding in *Nijhawan v. Holder* with its ongoing defense of the categorical approach by distinguishing between provisions in the INA that refer to generic crimes and those that contain exceptions calling for fact-finding into the attendant circumstances of a particular conviction. *Id.*; *see* Moncrieffe v. Holder, 133 S. Ct. 1678, 1691 (2013); Nijhawan v. Holder, 557 U.S. 29, 32 (2009).

[61] *Hernandez-Zavala*, 806 F.3d at 266; *see also* 18 U.S.C. § 921(a)(33)(A) (2012) (defining misdemeanor "crimes of domestic violence" as listed under § 922(g)(9)); United States v. Hayes, 555 U.S. 415, 418 (2009) (holding that for purposes of the Lautenberg Amendment, a domestic relationship "need not be a defining element of the predicate offense"). The Fourth Circuit was unconvinced by Mr. Hernandez-Zavala's argument that 18 U.S.C. § 921(a)(33)(A) and 8 U.S.C. § 1227(a)(2)(E)(i) require different analytic approaches on account of the existence of the singular term "element" in 18 USC § 921(a)(33)(A) and the absence of such a term in 8 U.S.C. § 1227(a)(2)(E)(i). *Hernandez-Zavala*, 806 F.3d at 266. The Fourth Circuit stated that because 8 U.S.C. § 1227(a)(2)(E)(i) references 18 USC § 16, which *does* contain the singular term "element," Mr. Hernandez-Zavala's argument was without merit. *Id.*

Finally, the Fourth Circuit based its holding in *Hernandez-Zavala* on practical considerations.[62] Citing both *Nijhawan* and *Hayes*, the Fourth Circuit concluded that Congress could not have intended that the categorical approach apply to the domestic relationship requirement in 8 U.S.C. § 1227(a)(2)(E)(i) because at the time this statutory provision was enacted, only approximately one third of all states had statutes in place that included a domestic relationship element.[63] Moreover, even in those states that did have separate domestic violence statutes, domestic violence crimes were often prosecuted under general assault and battery statutes.[64] Requiring the categorical approach to determine the existence of a domestic relationship would therefore have made § 1227(a)(2)(E)(i) meaningless in most states.[65]

B. The Current State of the Law Concerning Immigration Consequences of "Crimes of Domestic Violence"

The Fourth Circuit made its decision in the context of an existing circuit split on the issue of whether to use the categorical or circumstance-specific approach to determine whether a past conviction was for a "crime of violence" perpetrated against an individual with whom the perpetrator was in a domestic relationship within the meaning of the INA.[66] In 2010, in *Bianco v. Holder*, the

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[62] *Hernandez-Zavala*, 806 F.3d at 266–67.

[63] *Id.* The Lautenberg Amendment was passed in the same year as the INA was amended to include the provision codified in 8 U.S.C. § 1227(a)(2)(E)(i), and the *Hayes* Court cited the same statistic and practicality concerns as a basis for its holding. *Hayes*, 555 U.S. at 426–27; *Hernandez-Zavala*, 806 F.3d at 266–67. The Supreme Court acknowledged a similar argument in *Nijhawan*, noting that at the time the case was decided only three applicable criminal fraud statutes contained any monetary threshold element as required by the INA. *Nijhawan*, 557 U.S. at 39.

[64] *Hayes*, 555 U.S. at 427; *Hernandez-Zavala*, 806 F.3d at 266–67; *see* 142 CONG. REC. S11,878 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (discussing the common prosecution of domestic violence offenses under statutes "not explicitly identified as related to domestic violence" as a reason why the Lautenberg Amendment should be thoroughly enforced and broadly applied).

[65] *See Hernandez-Zavala*, 806 F.3d at 267 (referencing the *Hayes* Court's concern that if the categorical approach were applied to the domestic relationship requirement of the Lautenberg Amendment, the provision would have been "dead letter" in a majority of states). As part of its explanation of how practicality concerns indicate the need for a circumstance-specific approach, the Fourth Circuit distinguished between the Supreme Court's decision in *Nijhawan* and the Fourth Circuit's 2012 decision in *Prudencio v. Holder*. *See id.* (citing Prudencio v. Holder, 669 F.3d 472, 484 (4th Cir. 2012)). In *Prudencio*, the Fourth Circuit rejected the circumstance-specific approach as a way to determine if a crime involves moral turpitude. *Prudencio*, 669 F.3d at 484. The difference between the statutory provisions at issue in these two cases, the Fourth Circuit reasoned, is whether the factual inquiry requires minimal interpretation or whether it requires more extensive evaluation of underlying facts by an IJ. *See Hernandez-Zavala*, 806 F.3d at 267 (referencing the *Prudencio* court's distinction between circumstance-specific inquiries involving purely "objective" matters, and those involving extensive evaluation of underlying evidence of a criminal conviction); *Prudencio*, 669 F.3d at 484 (holding that "an adjudicator applying the moral turpitude statute may consider only the alien's prior conviction and not the conduct underlying that conviction").

[66] *See Hernandez-Zavala*, 806 F.3d at 267; *see also* 8 U.S.C. § 1227(a)(2)(E) (defining crimes of domestic violence triggering immigration consequences). *Compare* Bianco v. Holder, 624 F.3d 265,

U.S. Court of Appeals for the Fifth Circuit adopted the circumstance-specific approach to determine the existence of a domestic relationship.[67] The U.S. Court of Appeals for the Ninth Circuit, the only other circuit to have addressed this issue as of this writing, continues to rely on its 2004 decision in *Tokatly v. Ashcroft* that nothing outside the record of conviction may be consulted to reach such a determination.[68] Looking at both *Bianco* and *Tokatly*, the Fourth Circuit found the Ninth Circuit's decision unpersuasive considering the Supreme Court's intervening rulings in *Nijhawan* and *Hayes*.[69]

272–73 (5th Cir. 2010) (applying the circumstance-specific approach to the domestic relationship requirement of the INA's definition of crimes of domestic violence), *with* Tokatly v. Ashcroft, 371 F.3d 613, 624–25 (9th Cir. 2004) (applying the modified categorical approach to the domestic relationship requirement of the INA's definition of crimes of domestic violence). *See generally* KATHY BRADY, DEPORTABLE CRIMES OF DOMESTIC VIOLENCE: *MATTER OF H. ESTRADA* (2016) (contrasting the U.S. Court of Appeals for the Ninth Circuit's adoption of the modified categorical approach with respect to crimes of domestic violence under the INA with other circuits' adoption of the circumstance-specific approach); Mark Fleming, Bianco v. Holder *(5th Cir., October 19, 2010)*, NAT'L IMMIGRANT JUST. CTR., https://www.immigrantjustice.org/litigation/blog/bianco-v-holder [https://perma.cc/YVM7-BUSU] (last visited Apr. 19, 2017) (noting the U.S. Court of Appeals for the Fifth Circuit's departure from the Ninth Circuit's decision in *Tokatly* and from the categorical and modified categorical approaches in its adoption of the circumstance-specific approach with respect to crimes of domestic violence in *Bianco*).

[67] *Bianco*, 624 F.3d at 272–73. The *respondent* in *Bianco* was convicted of aggravated assault for stabbing a victim who the criminal complaint and affidavit of probable cause revealed was her husband. *Id.* at 267. The *respondent* argued that the IJ erred in admitting evidence outside the record of conviction to determine the existence of a domestic relationship rather than applying the categorical or modified categorical approach. *Id.* at 268. In departing from the Ninth Circuit's approach to the domestic relationship determination, the Fifth Circuit cited the practicality concerns discussed by the Supreme Court in *Nijhawan* and *Hayes*. *Id.* at 272. The Fifth Circuit also borrowed from the *Hayes* Court's reasoning regarding statutory interpretation to determine that the domestic relationship requirement of 8 U.S.C. § 1227(a)(2)(E)(i) need not be an element of the underlying crime. *Id.*

[68] *See* Olivas-Motta v. Holder, 746 F.3d 907, 912–13 (9th Cir. 2013) (holding that the categorical and modified categorical approaches must be applied to determinations of whether a conviction was for a crime involving moral turpitude, and citing *Tokatly* as precedent); *Tokatly*, 371 F.3d at 624–25 (applying the modified categorical approach to the domestic relationship determination of 8 U.S.C. § 1227(a)(2)(E)(i)). The *respondent* in *Tokatly* was convicted of burglary and attempted kidnapping and charged as removable for having been convicted of a crime of domestic violence. *Tokatly*, 371 F.3d at 615. At the removal hearing, because the record of conviction did not establish the existence of a domestic relationship, the government called the victim of the crime as a witness to testify as to her prior relationship with the *respondent*. *Id.* at 616. The Ninth Circuit held that consultation of testimonial evidence to determine the existence of a domestic relationship was improper, and stated that strict adherence to the *Taylor* Court's bar against "looking beyond the record of conviction in order to consider the particular facts underlying an alien's prior offense" was necessary to avoid "resorting to the type of mini-trials [it] deem[ed] to be wholly inappropriate in this context." *Id.* at 621. Given that *Tokatly* was decided prior to *Nijhawan* and *Hayes*, the Ninth Circuit noted that it had never before "divided the [underlying] crime into segments . . . and required that one part be proven by the record of conviction and the other by evidence adduced at the administrative hearing." *Id.* at 622.

[69] *Hernandez-Zavala*, 806 F.3d at 267. Immigration legal advocates also acknowledge that the Ninth Circuit's decision in *Tokatly* does not conform with current understandings of the categorical, modified categorical, or circumstance-specific approaches, and is therefore likely to face challenges in the future. *See, e.g.*, BRADY, *supra* note 66, at 3 ("[T]he Ninth Circuit may well decide to change the *Tokatly* rule when it next addresses the issue."). *But see Olivas-Motta*, 746 F.3d at 912–13 (citing

The BIA's 2016 decision in *In re H. Estrada* has further strengthened the significance of the Fourth Circuit's opinion in *Hernandez-Zavala*.[70] In *Estrada*, the BIA approved the removability of a lawful permanent resident based on a 1999 conviction for simple battery in the state of Georgia.[71] The respondent unsuccessfully argued that the IJ erred by consulting evidence outside the record of conviction to determine that he shared a domestic relationship with the victim of the battery, specifically given that a separate family violence statute existed in Georgia.[72]

In *Estrada*, the BIA discussed *Hernandez-Zavala*, and like the Fourth Circuit, focused on the impracticality of applying the categorical approach to certain provisions of the INA, concluding that Congress could not have intended for adjudicators to be so restricted.[73] Furthermore, the BIA instructed that "all reliable evidence," including police reports and other components of pretrial investigation reports, may be considered in circumstance-specific inquiries.[74]

Tokatly as precedent for the argument that courts cannot "look to conduct that an alien 'committed' to determine the acts he has been 'convicted of,'" despite the Supreme Court's intervening decisions in *Nijhawan* and *Hayes*).

[70] *See In re Estrada*, 26 I. & N. Dec. at 751–53 (summarizing and agreeing with the Fourth Circuit's decision in *Hernandez-Zavala*). Because decisions of the BIA are binding on parties nationwide, the BIA's decision in *Estrada* essentially extended the holdings of the Fourth Circuit in *Hernandez-Zavala* and the Fifth Circuit in *Bianco* to everywhere except the Ninth Circuit, where *Tokatly* still controls. *See id.* 751 (citing *Tokatly* as contrary precedent to *Hernandez-Zavala*); 8 C.F.R. § 1003.1(g) (2016).

[71] *In re Estrada*, 26 I. & N. Dec. at 749, 756.

[72] *Id.* at 750, 752. In *Estrada*, the Board upheld the IJ's finding that the domestic relationship requirement was satisfied based on the admission as evidence of two incident reports not contained in the record of conviction. *Id.* at 754. One of these reports listed the same address for the *respondent* and the victim of the assault crime, and included a statement from the victim that the *respondent* was her boyfriend. *Id.* The second piece of evidence was a "Family Violence Incident Report," which the state only required following incidents involving domestic violence. *Id.* at 754–55.

[73] *Id.* at 753; *see Hernandez-Zavala*, 806 F.3d at 266–67. The BIA further concluded that the circumstance-specific approach with respect to "crimes of domestic violence" does not present any due process concerns, given that respondents charged under 8 U.S.C. § 1227(a)(2)(E)(i) have two opportunities to contest allegations against them—once in criminal and once in immigration proceedings. *See Estrada*, 26 I. & N. Dec. at 752.

[74] *Estrada*, 26 I. & N. Dec. at 753. As the law currently stands everywhere outside the Ninth Circuit, therefore, in determining whether an immigrant was convicted of a "crime of domestic violence," adjudicators may examine the facts underlying the conviction and consider all "reliable" evidence to reach a decision as to whether the respondent committed a "crime of violence" against someone with whom he or she was in a domestic relationship. *See Hernandez-Zavala*, 806 F.3d at 261, 266 (adopting the circumstance-specific approach and examining "substantial evidence in the record"); *Tokatly*, 371 F.3d at 624–25 (applying the modified categorical approach and sustaining the noncitizen's objection to examination of testimonial evidence); *Estrada*, 26 I. & N. Dec. at 753 (applying the circumstance-specific approach and examining police incident reports); *see also infra* notes 86–95 and accompanying text (discussing the problematic lack of evidentiary restrictions for circumstance-specific inquiries in immigration cases).

III. Errors in the Fourth Circuit's Decision in *Hernandez-Zavala*

The U.S. Court of Appeals for the Fourth Circuit's 2015 decision in *Hernandez-Zavala v. Lynch* and the general departure from strict use of the categorical approach are problematic for two main reasons.[75] First, as discussed in Section A of this Part, in adopting the circumstance-specific approach with respect to certain provisions of the INA, courts have failed to fully reconcile their decisions with the historic application of the categorical approach in immigration cases and the immigration-specific justifications for retaining this analytic tool.[76] Secondly, as discussed in Section B, the failure of adjudicators to set any limits on evidence that may be considered in circumstance-specific inquiries severely and unjustly disadvantages immigrant respondents.[77]

A. The Need for Greater Recognition of the History of and Unique Justifications for the Categorical Approach in an Immigration Context

Decisions adopting the circumstance-specific approach with respect to immigration consequences of criminal convictions have emphasized the differences between the INA and ACCA as justification for declining to extend the categorical approach to certain provisions of the INA.[78] These decisions fail to

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[75] *See infra* notes 78–95 and accompanying text (discussing the problems with the Fourth Circuit's decision in *Hernandez-Zavala*); *supra* notes 15–28 and accompanying text (explaining the categorical approach); *supra* notes 29–40 and accompanying text (explaining the circumstance-specific approach). *See generally* Hernandez-Zavala v. Lynch, 806 F.3d 259 (4th Cir. 2015).

[76] *See infra* notes 78–85 and accompanying text.

[77] *See infra* notes 86–95 and accompanying text.

[78] *See* Bianco v. Holder, 624 F.3d 265, 270 (5th Cir. 2010) (referencing the arguments made in the Court's 2009 decision in *Nijhawan v. Holder* as to distinctions between the ACCA and INA). *Compare* Descamps v. United States, 133 S. Ct. 2276, 2287 (2013) (applying the categorical approach to determining whether a sentencing enhancement under the ACCA was triggered, and citing "the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries"), *with* Nijhawan v. Holder, 557 U.S. 29, 36 (2009) (adopting the circumstance-specific approach for determining whether the monetary threshold requirement of the "fraud and deceit" aggravated felony provision of the INA has been met, and noting that "[t]he 'aggravated felony' statute . . . differs in general from ACCA"). Courts have pointed out first that compared to the ACCA, the INA lists several crimes that do not correspond with any generic crime and require more interpretation and fact-finding than the categorical approach permits. *See Nijhawan*, 557 U.S. at 37 ("[T]he 'aggravated felony' statute differs from ACCA in that it lists certain other 'offenses' using language that almost certainly does not refer to generic crimes but refers to specific circumstances."); *In re* Babaisakov, 24 I. & N. Dec. 306, 310 (B.I.A. 2007) (stating that adoption of the categorical approach depends on whether the statutory provision is made up of a combination of elements or contains "nonelement factors" permitting a circumstance-specific inquiry). Secondly, courts have emphasized that while in the criminal sentencing context Sixth Amendment concerns justify adherence to the categorical approach, such protections do not exist in civil immigration cases. *See Nijhawan*, 557 U.S. at 36–40 (implying that Sixth Amendment issues with circumstance-specific inquiries could only arise in cases in which a defendant is charged with illegal reentry after having previously been convicted of an aggravated felony); Ali v. Mukasey, 521 F.3d 737, 741 (7th Cir. 2008) (allowing circumstance-specific inquiries to determine whether a crime involved moral turpitude because the

acknowledge, however, the many ways in which immigrant respondents in civil removal proceedings are procedurally disadvantaged compared to defendants in criminal sentencing cases.[79] For example, indigent respondents do not have a right to affordable legal representation, and those who are charged with having committed certain crimes may be subject to expedited removal, ineligible for discretionary relief, and detained without a right to a bond hearing.[80] Additionally, evidence that would be barred under the Federal Rules of Evidence is admissible in immigration court.[81] The differences between civil immigration and criminal sentencing cases should therefore have resulted in a stricter, ra-

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Sixth Amendment does not apply); Das, *supra* note 15, at 1677 (discussing how courts have come to distinguish the application of the categorical approach in criminal sentencing and immigration contexts).

[79] *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1624 (2010) (discussing the frequent use of tactics in immigration cases which would be considered Fourth or Fifth Amendment violations in criminal settings, and arguing for the extension of the Exclusionary Rule in immigration proceedings); Das, *supra* note 15, at 1671 (discussing the ways in which deportation, though technically a civil penalty, is "particularly severe"); Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675, 675 (2015) (describing how police reports, though often barred in criminal settings due to Sixth Amendment rights and restrictions in the Federal Rules of Evidence, are admissible and can make the difference between a denial or a grant in immigration court); Chris Modlish, Comment, *Immigrant Rights in Jeopardy: A Denial of Constitutional Protection in* De La Paz v. Coy, 57 B.C. L. REV. E. SUPP. 104, 115–17 (2016), http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3501&context=bclr [https://perma.cc/6NBB-5UAP] (discussing the insufficient remedial mechanisms provided under the INA and the lack of Fourth Amendment protections for unlawfully arrested noncitizens); Steinmiller-Perdomo, *supra* note 34, at 1187 (critiquing the retroactivity of aggravated felony provisions of the INA, and discussing the many consequences for a noncitizen of an aggravated felony conviction, including mandatory detention; bars against re-entry and naturalization; and enhanced sentencing for illegal re-entry); *supra* note 32 (discussing cases that have adopted the circumstance-specific approach).

[80] *See* Das, *supra* note 15, at 1672 (explaining that criminal convictions act as immigration "mandatory minimums" by eliminating the possibility of certain forms of discretionary relief); Steinmiller-Perdomo, *supra* note 34, at 1187–88 (listing the consequences of aggravated felony convictions). *See generally* INGRID EAGLY & STEVEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT (2016) (addressing the disparate outcomes for immigrants who are and are not able to access and afford counsel).

[81] *See* Holper, *supra* note 79, at 693 (discussing concerns related to admissibility of unreliable evidence in immigration court due to deportation being a civil rather than criminal penalty). Although not all constitutional rights extend to immigration proceedings, the Sixth Amendment's procedural protections and the Fifth Amendment's Due Process Clause have been found to apply to noncitizens facing removal. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (recognizing the right of a lawful permanent resident returning from abroad to invoke the Due Process Clause regarding proceedings concerning whether she would be allowed to return to the United States); Yamataya v. Fisher, 189 U.S. 86 (1903) (recognizing the right of a noncitizen facing deportation to constitutional due process protections). The lack of evidentiary restrictions regarding immigration inquiries not governed by the categorical or modified categorical approach implicates these due process concerns. *See* Holper, *supra* note 79, at 713 (arguing that even if deportation is a civil offense, the Due Process Clause of the Fifth Amendment guarantees the right to confront and cross-examine authors of and witnesses quoted in police reports admitted as evidence).

ther than a more relaxed, adherence to the categorical approach in the immigration context.[82]

In contrast to earlier decisions adopting the circumstance-specific approach, in *Hernandez-Zavala* the Fourth Circuit based its decision largely on similarities between the INA and the Lautenberg Amendment, the statute at issue in the Supreme Court's 2009 decision in *United States v. Hayes*.[83] The *Hayes* Court's focus on Congress's intent that the Lautenberg Amendment apply broadly suggests, however, that the Court's interpretation of the provision does not transfer seamlessly to an immigration context.[84] The different purposes of the Lautenberg Amendment and the INA criminal removal and inadmissibility grounds, as well as the different procedural protections provided to criminal defendants and immigrant respondents, should have cautioned the Fourth Circuit against applying the *Hayes* Court's reasoning to Mr. Hernandez-Zavala's case.[85]

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[82] *See* United States *ex rel*. Guarino v. Uhl, 107 F.2d 399, 400 (2d Cir. 1939) (embracing a strict categorical approach, based in part on the severity of deportations); Das, *supra* note 15, at 1701–02 (discussing the early history of the categorical approach in the immigration context, and noting that although federal immigration laws have dramatically evolved over the years, the language informing the development of the categorical approach has remained constant); Koh, *supra* note 17, at 262 (arguing that the categorical approach "corrects for the absence of procedural and substantive rights for the noncitizen"). Recent decisions by the Supreme Court have begun to acknowledge the historical context and unique importance of the categorical approach in immigration proceedings. *See* Mellouli v. Lynch, 135 S. Ct. 1980, 1986–87 (2015) (noting the long history of the categorical approach in immigration law, and stating that "[by] focusing on the legal question of what a conviction *necessarily* established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law"); Moncrieffe v. Holder, 133 S. Ct. 1678, 1685 (2013) (noting the categorical approach's "long pedigree in our Nation's immigration law").

[83] *See* United States v. Hayes, 555 U.S. 415, 426 (2009). *Compare Hernandez-Zavala*, 806 F.3d at 266 (basing the adoption of the circumstance-specific approach on similarities between the INA and the Lautenberg Amendment), *with Nijhawan*, 557 U.S. at 36 (basing adoption of the circumstance-specific approach on differences between the INA and the ACCA).

[84] *See Hayes*, 555 U.S. at 426. The *Hayes* Court's reasoning has been adopted in the immigration context. *See Hernandez-Zavala*, 806 F.3d at 266 (adopting the circumstance-specific approach with regard to crimes of domestic violence under the INA, and relying on the *Hayes* Court's adoption of the circumstance-specific approach with regard to crimes of domestic violence under the Lautenberg Amendment); *Bianco*, 624 F.3d at 271 (same); *In re Estrada*, 26 I. & N. Dec. at 751–52 (same). In *United States v. Castleman*, however, in 2014, the Supreme Court expressly stated that its adoption of a broad definition of "violence" for predicate offenses under the Lautenberg Amendment should not be seen as transforming the more narrow definition used in 8 U.S.C. § 1227(a)(2)(E)(i) (2012) immigration cases. United States v. Castleman, 134 S. Ct. 1405, 1411 n.4 (2014).

[85] *See* DAN KESSELBRENNER ET AL., WHY *UNITED STATES V. CASTLEMAN* DOES NOT HURT YOUR IMMIGRATION CASE AND MAY HELP IT 6 (2014) (advising practitioners on how to use *Castleman* to argue that the *Hayes* decision regarding the circumstance-specific approach should not apply to immigration cases); Das, *supra* note 15, at 1701–02 (arguing for the categorical approach's continued application based on "congressional intent and the longstanding rationales for categorical analysis").

B. The Need for Evidentiary Restrictions in Circumstance-Specific Inquiries

The Fourth Circuit's embrace of the circumstance-specific approach is also problematic considering the lack of evidentiary limitations currently imposed on immigration adjudicators conducting circumstance-specific inquiries.[86] Since the Supreme Court's 2009 decision in *Nijhawan v. Holder*, circumstance-specific inquiries have involved the consultation of evidence outside the record of conviction, including presentence investigative reports.[87] While such evidence on its face may leave little question as to whether the domestic relationship requirement of 8 U.S.C. § 1227(a)(2)(E)(i) was satisfied, police reports are often inaccurate, and the pivotal role they play in immigration cases is therefore concerning.[88]

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[86] *See Nijhawan*, 557 U.S. at 41 (holding that "nothing in prior law" limits IJs in the evidence that they may consider when determining whether a respondent has violated a provision of the INA that does not require the categorical or modified categorical approach); *Bianco*, 624 F.3d at 272–73 (holding that a domestic relationship requirement must be proven by the government "using the kind of evidence generally admissible before an immigration judge"); *In re Estrada*, 26 I. & N. Dec. at 753 (stating that police reports and records may be considered in circumstance-specific inquiries); Devitt, *supra* note 29, at 39 (highlighting the unreliability of presentence investigation reports often considered in circumstance-specific inquiries); Koh, *supra* note 17, at 263 (arguing that the categorical approach is a necessary tool in light of "the absence of (a) proportionality and discretionary relief under the current statutory frame-work; (b) restrictions on Immigration and Customs Enforcement (ICE)'s prosecutorial powers; and (c) judicial review").

[87] *See Bianco*, 624 F.3d at 273 (relying on a police criminal complaint and affidavit of probable cause showing that the victim was the respondent's husband); *In re Estrada*, 26 I. & N. Dec. at 753–54 (relying on a police report and presentence "Family Violence Incident Report" listing the same address for the respondent and the victim and including a statement from the victim referring to the respondent as her "boyfriend"); Devitt, *supra* note 29, at 39; *see also Nijhawan*, 557 U.S. at 41–42 (relying on "[t]he defendant's own stipulation, produced for sentencing purposes" showing that the monetary threshold requirement of the deceit or fraud aggravated felony provision was satisfied).

[88] *See* Devitt, *supra* note 29, at 9 (explaining that presentence investigation reports are "notoriously untrustworthy"); Holper, *supra* note 79, at 682–88 (explaining that police reports are unreliable given that officers and individuals interviewed are not required to testify in immigration court; the fact that reports are written in the initial stages of an investigation and do not reflect later discoveries; and the possibility that witnesses may have given untrue or exaggerated statements to police or that police officers may falsify information). In its 2012 decision in *Prudencio v. Holder*, the Fourth Circuit reasoned that the use of police reports to determine whether a conviction was for a crime involving moral turpitude "pose[d] very real evidentiary concerns" given that police reports and other elements of a presentence investigation report contain "unsworn witness statements and initial impressions." 669 F.3d 472, 483–84 (4th Cir. 2012). The *Prudencio* court acknowledged that immigration proceedings are civil rather than criminal, but held that "this difference does not affect the risks inherent in considering facts only alleged, but not necessarily proved, in the underlying criminal proceedings." *Id.* at 484. Though the Fourth Circuit in *Hernandez-Zavala* distinguished its decision in *Prudencio* on the basis of the type of inquiry involved in establishing moral turpitude versus the existence of a domestic relationship, it failed to reconcile its earlier critique of the use of police reports to establish the facts underlying a criminal conviction with its subsequent failure to limit the evidence that may be considered in a circumstance-specific inquiry concerning a potential "crime of domestic violence." *See Hernandez-Zavala*, 806 F.3d at 267.

The lack of evidentiary restrictions in circumstance-specific inquiries relates to the development of increasingly strict guidelines for the use of the "modified categorical approach."[89] Historically, courts have used the phrase "modified categorical approach" to refer to the consultation of limited documents within the record of conviction to determine under which provision of a divisible statute an individual was convicted, as well as to impose more general limits on the evidence that may be considered in determining immigration consequences of criminal convictions.[90] The Supreme Court's 2016 decision in *Mathis v. United States*, however, strictly limits the modified categorical approach to analyses of convictions under statutes that contain alternative elements.[91] Unless the circumstance-specific approach applies, therefore, if a statute is found to be indivisible, nothing beyond the elements of the statute may be consulted to determine whether the conviction triggers immigration consequences.[92]

Restrictions on the situations in which the modified categorical approach may be applied have strengthened the protective force of this analytical approach, given that the record of conviction may only be consulted after deter-

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[89] *See* Mathis v. United States, 136 S. Ct. 2243, 2248–49, 2257 (2016) (holding that the modified categorical approach may only be used if a statute of conviction contains "multiple alternative elements" and not simply "alternative means of satisfying" a requirement); Evan Tsen Lee, Mathis v. U.S. *and the Future of the Categorical Approach*, 101 MINN. L. REV. HEADNOTES 263, 263 (2016), http://www.minnesotalawreview.org/wp-content/uploads/2016/11/Lee-1.pdf [https://perma.cc/C9SE-CSNG] (discussing the significance of the dissenting opinions of Justices Breyer, Ginsburg, and Alito in *Mathis*, and arguing that even though *Mathis* affirmed and adopted a strict interpretation of the categorical approach, these dissents indicate a questionable future for the categorical approach overall).

[90] *See* Tokatly v. Ashcroft, 371 F.3d 613, 620 (9th Cir. 2004) (using the phrase "modified categorical approach" to refer to evidentiary limits when determining the existence of a domestic relationship); United States *ex rel.* Zaffarano v. Corsi, 63 F.2d 757, 757–58 (2d Cir. 1933) (allowing consultation of only the record of conviction to determine if a conviction was for a crime involving moral turpitude, without engaging in a divisibility analysis). Consultation of the record of conviction to determine whether a conviction under a non-divisible statute constituted an offense listed in the INA has been referred to as the "minority" version of the modified categorical approach. Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 999–1000 (2008).

[91] *See Mathis*, 136 S. Ct. at 2257. *See generally* MANNY VARGAS ET AL., PRACTICE ALERT: IN *MATHIS V. UNITED STATES*, SUPREME COURT REAFFIRMS AND BOLSTERS STRICT APPLICATION OF THE CATEGORICAL APPROACH (2016) (discussing the implications for practitioners after *Mathis*).

[92] *See Mathis*, 136 S. Ct. at 2256 (holding that a court may review materials from the record of conviction only when a statute is divisible and for the purpose of determining under which version of the statute the defendant was convicted); *see also id.* at 2269 (Alito, J., dissenting) (arguing against the majority's holding, which absolves the defendant of the criminal sentencing enhancement triggered by a generic "burglary" conviction, when the charging documents for his five convictions under an overbroad, indivisible burglary statute make clear that the facts underlying the convictions align with the generic offense); VARGAS ET AL., *supra* note 91, at 3 (explaining the *Mathis* Court's holding that if a statute contains "different factual means of committing a single element" but is nonetheless indivisible, "the adjudicator may not look beyond the statute to the record of conviction").

mining that the statute of conviction is truly divisible.[93] Recent developments in when the modified categorical approach may be applied, however, suggest that new guidelines are needed to restrict the evidence that may be introduced when conducting circumstance-specific inquiries.[94] Given the procedural difficulties faced by respondents, the lack of any evidentiary restrictions on circumstance-specific inquiries leaves them with limited ability to contest the government's evidence and little hope of winning the removal cases brought against them.[95]

CONCLUSION

In 2015, in *Hernandez-Zavala v. Lynch*, the U.S. Court of Appeals for the Fourth Circuit designated the domestic relationship requirement of the Immigration and Nationality Act's "crimes of domestic violence" provision as requiring the circumstance-specific, rather than the categorical, approach. In al-

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[93] *See Mathis*, 136 S. Ct. at 2257 (holding that because the statute of conviction was overbroad and indivisible, it did not trigger a sentencing enhancement); Lee, *supra* note 89, at 263 (noting that for immigration advocates, the *Mathis* decision was "cause for celebration" because generally "the categorical approach is favorable to . . . immigration petitioners because it prevents the government from getting incriminating facts into evidence").

[94] *See Mathis*, 136 S. Ct. at 2257 (distinguishing between alternative means and elements for the purpose of determining if a statute is divisible and therefore whether the modified categorical approach may be applied); Devitt, *supra* note 29, at 39 (arguing against the use of presentence investigation reports as evidence in removal proceedings); Holper, *supra* note 79, at 682–88 (arguing that police reports are unreliable evidence that should not be admissible in removal proceedings).

[95] *See* Devitt, *supra* note 29, at 46; Holper, *supra* note 79, at 682–88. The difference between the categorical or modified categorical and the circumstance-specific approaches also may determine whether a respondent bears the burden of proving that a prior conviction does not bar eligibility for relief. *See* Syblis v. Attorney Gen. of the U.S., 763 F.3d 348, 357 n.12 (3d Cir. 2014); Thomas v. Attorney Gen. of the U.S., 625 F.3d 134, 147 (3d Cir. 2010); 8 C.F.R. § 1240.8(d) (2016). For example, the U.S. Court of Appeals for the Third Circuit held in *Thomas v. Attorney General of the United States* in 2010 that when the record of conviction is inconclusive as to under which version of a divisible statute a respondent was convicted, the conviction could not be categorized as an aggravated felony and therefore the respondent was not barred from applying for cancellation of removal. 625 F.3d at 147. In 2014 in *Syblis v. Attorney General of the United States*, however, the Third Circuit held that where a circumstance-specific inquiry is required, the respondent bears the burden of proving that the facts of a prior conviction do not bar eligibility for relief. 763 F.3d at 357. Several circuits have recognized that in determining whether a past crime bars an applicant from eligibility for relief, categorical inquiries do not require that a respondent affirmatively prove that a conviction is not an immigration offense by presenting evidence outside the inclusive record of conviction. *See* Sauceda v. Lynch, 819 F.3d 526, 532 (1st Cir. 2016) (domestic violence); Almanza-Arenas v. Lynch, 815 F.3d 469, 488–89 (9th Cir. 2016) (en banc) (Watford, J., concurring) (theft and unlawful driving); Martinez v. Mukasey, 551 F.3d 113, 121–22 (2d Cir. 2008) (distribution of marijuana). Circumstance-specific inquiries, however, involve questions of fact and therefore the respondent bears the burden of proving eligibility for the relief sought. *Compare Syblis*, 763 F.3d at 357 (placing the burden on the *respondent* to prove that the circumstances of his crime did not align with the offense listed in the INA where the record of conviction was inconclusive), *with Thomas*, 625 F.3d at 147 (applying the modified categorical approach and holding that where the record of conviction was inconclusive, the *respondent* had met his burden of proving that his conviction did not trigger immigration consequences).

lowing immigration adjudicators to examine the facts underlying a respondent's past criminal conviction, the Fourth Circuit failed to sufficiently address the categorical approach's long historic application in determining immigration consequences of criminal convictions and the value this analytic tool provides in a system that heavily disadvantages immigrants convicted of crimes. Furthermore, in failing to set limits on the evidence that may be considered in circumstance-specific inquiries, the Fourth Circuit enabled adjudicators to consider unreliable evidence as a basis for decisions resulting in severe and life-altering consequences.

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