The Categorical and Modified Categorical Approach

by Karl Krooth, Andrew Knapp, and Ilyce Shugall

Karl Krooth conducts post-conviction relief before California and federal Courts and represents foreign nationals with criminal records on U visas and other affirmative applications before USCIS. Karl works for a professional law corporation by the name of Immigrant Crime and Justice. Karl gained practical experience in every phase of the criminal justice system by prosecuting crime and then conducting criminal defense. Karl has served for years as criminal defense liaison on the AILA Northern California Advisory Council, and continues to serve as lead local law enforcement liaison. Karl previously served on the local board of the National Lawyers Guild (NLG) after two years as local chair of NLG's Immigration Committee. SuperLawyers has recognized Karl as a "Rising Star." Karl has a B.A. from U.C. Berkeley and a J.D. from the Northwestern School of Law of Lewis and Clark College.

Andrew Knapp is as an adjunct professor at Southwestern Law School in Los Angeles, where he co-teaches the law school's Ninth Circuit Appellate Clinic Practicum. He also serves as the Chief Financial Officer and lead volunteer attorney for Immigrant Access to Justice Assistance, which provides pro bono representation before the U.S. Court of Appeals for the Ninth Circuit to disadvantaged noncitizens who would otherwise go without legal representation. Andrew was most recently employed as a staff attorney for the Board of Immigration Appeals from 2010 to 2011. Before that, he practiced immigration law in Los Angeles for over 10 years with his wife's firm, Cifuentes Knapp & Associates. Prior to that, in the 1990s, Andrew worked for legacy INS as an asylum officer. Andrew's published U.S. Court of Appeals for the Ninth Circuit decisions include: *Mejia-Hernandez v. Holder*, 633 F.3d 818 (9th Cir. 2011), *Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047 (9th Cir. 2008), *Recinos De Leon v. Gonzales*, 400 F.3d 821 (9th Cir. 2005), *Reyes-Melendez v. INS*, 342 F.3d 1001 (9th Cir. 2003), and *Guadalupe-Cruz v. INS*, 240 F.3d 1209 (9th Cir. 2001).

Ilyce Shugall has been practicing immigration law since 1999. She has been working as the Supervising Immigration Attorney at Community Legal Services in East Palo Alto since April of 2012. Prior to joining CLSEPA, Ms. Shugall was a partner at Van Der Hout, Brigagliano & Nightingale, LLP. Her practice focuses on all areas of removal defense, the intersection between criminal and immigration law, DACA, and asylum. She also represents victims of domestic violence and other serious crimes in VAWA self-petitions and applications for U and T visas.

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INTRODUCTION

When analyzing whether a criminal conviction constitutes a ground of inadmissibility or deportability, an immigration judge (IJ) must determine whether the elements of the specific criminal statute under which the person was convicted fall within the generic elements of the offense. In doing so, the IJ must look to the statutory definition of the offense to determine the crime for which he or she was convicted.[1] This analysis is called the strict categorical approach.[2] If the criminal statute covers conduct that falls within the generic definition of the offense and conduct that does not, the IJ must use a modified categorical approach. Such a modified approach provides the IJ with discretion to examine documentation or judicially noticeable facts that establish whether the foreign national's conviction qualifies as a deportable offense.[3] More often than not, the IJ must proceed to the modified categorical approach because the criminal statutes are broader than the generic offense or the section being analyzed under the Immigration

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[1] *Taylor v. United States*, 495 U.S. 575, 602. (1990).

[2] *Young v. Holder*, ___ F.3d ___, Case No. 2012 WL 4074668, *3 (9th Cir. 2012).

[3] *United States v. Corona-Sanchez*, 291 F. 3d 1201, 1203 (9th Cir. 2002); *United States v. Casarez-Bravo*, 181 F.3d 1074, 1077 n.1 (9th Cir. 1999); *see also Ye v. INS*, 214 F. 3d 1128, 1134 (9th Cir. 2000).

and Nationality Act (INA).[4] The case law regarding the modified categorical approach is extensive, somewhat confusing, and has been in flux for several years, as published decisions are repeatedly overturned.

One case that had a substantial impact on the modified categorical approach analysis was the Ninth Circuit's en banc opinion in *U.S. v. Aguila-Montes de Oca*.[5] In this case, the Federal Circuit Court rejected the "missing element" test, which was first set forth in the court's opinion in *Navarro-Lopez*,[6] by allowing for application of the modified categorical approach to statutes that are missing an element of the generic definition of a particular offense.[7] The Court thus determined that the modified categorical approach can be applied to all three of the following scenarios: divisible statutes, statutes that are missing an element of the generic offense, and statutes that are broader than the generic definition of the offense.[8] The Court then concluded that "the purpose of the modified categorical approach is to determine (1) what facts the state conviction necessarily rested on and (2) whether these facts satisfy the elements of the generic offense."[9]

The Ninth Circuit has also resolved another point in an en-banc opinion that was hotly contested over the last several years-- the issue of statutory construction related to statutes worded in the disjunctive ("or") which prosecutors file in the conjunctive ("and") by charging instrument. In *Young v. Holder*,[10] the Court clarified that any misconduct filed in the conjunctive by charging instrument should be taken to mirror disjunctive language of the statute. Thus, even if the charging document is worded in the conjunctive, a guilty plea to the charging instrument means that the defendant admitted at least one, but not all of the alternative elements charged.

CRIMES INVOLVING MORAL TURPITUDE UNDER CATEGORICAL APPROACH

U.S. Court of Appeals for the Ninth Circuit jurisprudence limits crimes involving moral turpitude (CIMT) to offenses "... involving fraud and those involving grave acts of baseness or depravity."[11] Although this standard appears facially formidable, an IJ who finds a statute

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[4] Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).
[5] *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011).
[6] *Navarro-Lopez v. Gonzales,* 503 F.3d 1063 (9th Cir. 2007).
[7] In *Navarro-Lopez*, the Ninth Circuit created the "missing element test" wherein it found that if a criminal statute was missing an element of the generic definition of the offense, then only the categorical approach applied, and the IJ should not proceed to the modified categorical approach. 503 F.3d 1063, 1073 (9th Cir. 2007).
[8] *U.S. v. Aguila-Montes de Oca, supra*, 655 F.3d at 926.
[9] *Aguila-Montes de Oca*, 655 F.3d 915, 936 (9th Cir. 2011) (citing *Shepard v. United States*, 544 U.S. 13, 21 (2005)). In addition, "[i]f the defendant could not have been convicted of the offense of conviction unless the trier of fact found the facts that satisfy the elements of the generic crime, then the fact finder necessarily found the elements of the generic crime." *Id.* at 937.
[10] *Young v. Holder*, ___ F.3d ___, 2012 WL 4074668, *6 (9th Cir. 2012) (overruling *U.S. v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2010), overruling *Sandoval-Lua v. Ashcroft*, 499 F.3d 1121 (9th Cir. 2005), and reaffirming *Malta–Espinoza*, 478 F.3d , 1080 1082 n .3 (9th Cir. 2007)).
[11] *Carty v. Ashcroft*, 395 F.3d 1081, 1083 (9th Cir. 2005).

divisible under the strict categorical approach is entitled to draw broadly from the record to assess whether the conviction is a CIMT under the modified categorical approach.[12]

The Ninth Circuit refers to scrutiny of CIMTs by the same labels of strict categorical approach[13] and modified categorical approach in articulating a two-prong analysis, in contrast to the BIA's development of a three-prong approach in *Matter of Silva-Trevino* (2008) 24 I. & N. Dec. 687.[14]

The Ninth Circuit has not adopted *Silva-Trevino*'s third prong authorizing the IJ to consider documents outside the record of conviction, even when application of the strict and modified categorical approaches would lead to exclusion of these documents. On one hand, the Ninth Circuit has expressed hesitancy to embrace this third prong of *Silva-Trevino* and thus rejected the Government's invitation to deviate from the record. On the other hand, the Ninth Circuit has in practice imputed that the record is broader for potential CIMT analysis than for analysis of potential aggravated felonies by allowing IJs to consider a wider range of documents in the CIMT context. This tendency may have developed because inadmissibility was historically the exclusive context in which CIMTs were scrutinized, and a foreign national could traditionally be found inadmissible based on confession or conviction of a CIMT. On one hand, IJs cannot enter removal orders based on confessions for CIMT grounds in INA §237(a)(2)(A). On the other hand, codification of a CIMT-based "deportation" ground did not deter IJs from relying on the broad category of documents available for traditional analysis of CIMT-based inadmissibility grounds. A notice to appear that alleges a CIMT before an IJ in the Ninth Circuit will thus warrant scrutiny of a broader conviction record under the modified categorical approach than a notice to appear alleging an aggravated felony.

THE MODIFIED CATEGORICAL APPROACH AND AGGRAVATED FELONIES

The categorical and modified categorical approach are regularly employed to determine whether a conviction constitutes an aggravated felony under INA §101(a)(43). The framework set forth in *Taylor*, *Shepard*, and *Aguila-Montes de Oca*, discussed above, generally controls such inquiries. However, the U.S. Supreme Court deviated from the modified categorical approach in its decision in *Nijhwan v. Holder*, [15] which analyzed the loss provision at INA §101(a)(43)(M)(i).[16]

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[12] *Marmolejo-Campos v. Ashcroft*, 558 F.3d 903, 913 (9th Cir. 2009) (where license suspension and being under influence were elements of offense, statute was divisible between CIMT element of actual driving and non-CIMT element of physically controlling vehicle under strict categorical approach. Modified categorical approach led to reliance on transcript of change of plea without any indication that foreign national had stipulated to transcript for a factual basis and without adherence to requirement in aggravated felony context for stipulation to factual basis under *Shepard v. United States*, *supra*, 544 U.S. at 21); *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1098 n.8 (9th Cir. 2011) (Admission of criminal court transcripts and police reports without stipulation for factual basis ignored, but petition for review granted on other grounds).

[13] *Pannu v. Holder*, 639 F.3d 1225, 1229 (strict liability crime not categorical CIMT); *Nunez v. Holder*, 594 F.3d 1124, 1138 (9th Cir. 2010) (nude dancing option renders not categorical CIMT); *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012) (proscription of solicitation and prostitution defines categorical CIMT); *Uppal v. Holder*, 605 F.3d 712, 715 (9th Cir. 2010) ("endangerment" alternative renders not categorical CIMT because of "base-level" intent).

[14] *Marmolejo-Campos v. Ashcroft*, *supra*, 558 F.3d at 907 n.6, 910 (*Robles-Urrea v. Holder*, 678 F.3d 702, 708 n.3 (9th Cir. 2012) placed emphasis on quote at page 910 of *Marmolejo-Campos*).

[15] *Nijhwan v. Holder*, 557 U.S. 29 (2009).

In *Nijhawan*, the Court concluded that the loss amount was not to be analyzed under the categorical approach. Rather, it "...applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion."[17] Moreover, the Court allowed for the use of documents outside the scope of *Shepard*, because it found that the statutory text demanded a circumstance-specific inquiry, rather than a categorical one.[18]

DHS has the Burden to Establish Removability in INA §237(a) Proceedings

The government has the burden of proof in removal proceedings.[19] Accordingly, if the records of the criminal conviction at issue cognizable under *Taylor* and *Shepard* fail to conclusively show a conviction for a crime satisfying the elements of a removable offense, the U.S. Department of Homeland Security (DHS) fails to meet its initial burden of proof.[20] The burden is, however, often susceptible to the modified categorical approach so long as the criminal statute can be violated by conduct which fits a generic removable offense and the conviction necessarily rested upon such conduct.[21]

Burden of Proof for a Returning Lawful Permanent Resident (LPR) Charged as an Inadmissible "Arriving Alien"

Pursuant to *Matter of Rivens*,[22] DHS has the burden of proving by clear and convincing evidence that an LPR is an "arriving alien" who thereby bears the INA §240(c)(2)(A) burden of proving admissibility "clearly and beyond doubt." DHS can meet its burden to rebut the presumption that a returning LPR is not an applicant for admission by establishing the exception at INA §101(a)(13)(C)(v) for an LPR who "committed an offense identified in INA §212(a)(2)." In such cases, proving up the INA §101(a)(13)(C)(v) exception will also conclusively establish the LPRs inadmissibility under INA §212(a)(2).[23]

APPLICATIONS FOR RELIEF: BURDEN OF PROOF AND THE MODIFIED CATEGORICAL APPROACH

Pursuant to INA §240(c)(4) and 8 CFR §1240.8(d) the noncitizen bears the burden of demonstrating eligibility for relief from removal, even where a criminal ground for removal has

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[16] INA § 101(a)(43)(M)(i) defines as an aggravated felony a fraud offense wherein the loss to the victim exceeds $10,000.

[17] *Nijhawan, supra*, 557 U.S. at 40.

[18] *Id.*; *Young v. Holder*, 2012 WL 4074668, *4.

[19] *Woodby v. INS*, 385 U.S. 276 (1966); INA § 240(c)(3)(A).

[20] *See e.g. Tokatly v. Ashcroft*, 371 F.3d 613, 624 (9th Cir. 2004).

[21] *See Lanferman* at 726 (permitting the use of the modified categorical approach to "all statutes of conviction ... regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct" (*quoting Lanferman v. Bd. of Immigration Appeals*, 576 F.3d 84, 90 (2d Cir. 2009)); *Aguila–Montes*, 655 F.3d at 937 (even where a state statute lacks an element required for a generic offense, the modified categorical approach may be used to ferret out the conduct upon which the defendant's conviction "necessarily rested"which would constitute a generic removable offense).

[22] 25 I&N Dec. 623, 625 (BIA 2011).

[23] *Matter of Rivens, supra*, 25 I&N at 626-7.

not been charged in the Notice to Appear.[24] The Ninth Circuit recently found a noncitizen can only meet this burden by proving that his or her conviction is *not* a disqualifying offense.[25]

The *Young* court concluded that evidentiary limitations of *Taylor* and *Shepard* apply with full force when an applicant for relief is endeavoring to show under the modified categorical approach that his or her conviction does not constitute a disqualifying offense.[26] Thus, an applicant for relief is confined to the record of conviction, including the transcript of the plea colloquy, plea agreement, and comparable judicial records in proving that he or she is not disqualified from certain forms of relief.[27] Thus, at the present time, a noncitizen's best hope to undermine DHS's argument that any particular criminal conviction could constitute such a disqualifying offense is to hold Chief Counsel to its burden of production under 8 CFR §1240.8(d) to provide evidence "that one or more of the grounds for mandatory denial of the application for relief may apply."

CONCLUSION

While the viability of the categorical approach is not in dispute, the permutations thereof are in a great deal of flux. Cases have been held in abeyance pending the outcome of *Young*, so changes are afoot that may well displace established categorical-approach case law.

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[24] The noncitizen "shall have the burden of establishing that he or she is eligible for any requested benefit," and that "[i]f the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply."

[25] *Young v. Holder*, --- F.3d ----, 2012 WL 4074668, *9 (9th Cir. 2012) ("By demonstrating that the record of conviction is inconclusive, the alien has failed to establish the absence of a predicate crime. Instead, the alien has simply demonstrated that the evidence about the nature of the conviction is in equipoise. The alien therefore cannot carry the burden of proof with an inconclusive record."). *See also Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009).

[26] *Young*, 2012 WL 4074668, *4. Of interest, the Ninth Circuit in *Perez-Mejia v. Holder*, 663 F.3d 403, 414 (9th Cir. 2011) held that when "applying the modified categorical approach, the IJ may rely on facts admitted at the pleading stage." The limitation in *Young* might call into question *Perez-Mejia*.

[27] *Id.* at *10 ("Although some aliens will surely face challenges using only the *Shepard* documents to prove that they were not convicted of a predicate crime, that result is not so absurd that Congress could not have intended it.").