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ARTICLES

Toward a True Elements Test: *Taylor* and the Categorical Analysis of Crimes in Immigration Law

REBECCA SHARPLESS*

The U.S. Supreme Court has cautioned against "shoehorning" criminal convictions into grounds of deportation where they do "not fit."[1] When deportation depends on the existence of a conviction, the Board of Immigration Appeals ("BIA") and federal courts broadly agree that the role of the judge or other adjudicator is limited to determining the legal effect of the conviction under immigration law.[2] Adjudicators cannot decide questions of fact regarding the underlying circumstances of the offense. This limitation is commonly expressed in the maxim that adjudicators may not redetermine, or determine in the first instance, the guilt or innocence of the noncitizen.[3] Without exception, appellate courts and

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* Visiting Assistant Clinical Professor of Law at Florida International University College of Law. I am grateful for the insightful comments of Dan Kesselbrenner, Stacy Caplow, and Lenni Benson on a previous version of this article. This article is dedicated to my husband, Andrew Stanton, and to my parents, Clair and Tom Sharpless, whose tireless efforts and unfailing support made it possible for me to research and write this article.

1. Leocal v. Ashcroft, 543 U.S. 1, 13 (2004).

2. The issue whether a conviction has a legal effect under immigration law appears not only when a judge or other adjudicator is determining whether a noncitizen is subject to deportation under 8 U.S.C. § 1227 (2000). It also appears in the context of determining whether a noncitizen is eligible to be admitted to the United States under 8 U.S.C. § 1182 (2000), has good moral character for naturalization or other purposes as defined in 8 U.S.C. § 1101(f) (2000), and is eligible for forms of relief from removal like cancellation of removal under 8 U.S.C. § 1229b(a) (2000).

The Immigration and Nationality Act also expressly conditions removal on certain criminal conduct, as opposed to a conviction for that conduct. *See, e.g.*, § 1182(a)(1)(A)(iv) (drug abuser or addict); § 1182(a)(2)(C) (reason to believe illicit trafficker in controlled substance); § 1182(a)(2)(D) (prostitution); § 1182(a)(2)(H) (reason to believe trafficker in persons); § 1182(a)(2)(I) (reason to believe money launderer); § 1182(a)(3) (national security and terrorism); § 1182(a)(3)(E) (Nazi persecution and genocide); § 1182(a)(6)(C) (misrepresentation); § 1182(a)(6)(E) (smuggling); § 1182 (a)(10)(C) (international child abductors); § 1182(a)(10)(D) (unlawful voters); *see also* § 1227(a)(1)(E) (smuggling); § 1227(a)(1)(G) (marriage fraud); § 1227(a)(2)(B)(ii) (drug abuser or addict); § 1227(a)(3) (failure to register and falsification of documents); § 1227(a)(4) (national security); § 1227(a)(6) (unlawful voting). These grounds will not be discussed in this article.

3. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation hearing is held before an immigration judge. The judge's sole power is to order deportation; the judge cannot

the BIA characterize the question whether a conviction falls within a particular ground of removal as a question of law.[4]

The assumption that a state or federal criminal justice system has already established guilt underlies this analytical approach. Under this view, immigration adjudicators assume that the immigrant has already received a full and fair opportunity to dispute the criminal charges and guilt has already been established beyond a reasonable doubt.[5] Any resulting jury verdict or plea agreement must be given full legal effect under our immigration laws. An immigration adjudicator cannot "go behind" the four corners of the conviction.[6]

The prohibition on going behind the conviction is a two-way street. On the one hand, the government is entitled to use the conviction as conclusive proof of guilt, rendering irrelevant to immigration proceedings even the most persuasive proof of actual innocence. On the other hand, the immigrant is entitled to have his or her deportation depend only on the "conviction" rather than on any extraneous fact. Deportation depends on what was already adjudicated in the criminal justice proceeding.

While our criminal justice system generally bifurcates adjudications into "factual" adjudications carried out by juries and "legal" adjudications carried out by judges, immigration adjudicators generally perform both functions. In the context of evaluating convictions, how-

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adjudicate guilt . . . ."); Gouveia v. INS, 980 F.2d 814, 817 (1st Cir. 1992) ("An immigration judge cannot substitute his judgment for that of the criminal courts in order to determine core questions of guilt and innocence."); Matter of Khalik, 17 I. & N. Dec. 518, 519 (B.I.A. 1980) ("[A]n immigration judge cannot go behind the judicial record to determine the guilt or innocence of an alien." (citing Matter of McNaughton, 16 I. & N. Dec. 569 (B.I.A. 1978); Matter of Fortis, 14 I. & N. Dec. 576 (B.I.A. 1974); Matter of Sirhan, 13 I. & N. Dec. 592 (B.I.A. 1970))); *see also* Hall v. U.S. INS, 167 F.3d 852, 856 (4th Cir. 1999) ("To go beyond the offense as charged and scrutinize the underlying facts would change our inquiry from a jurisdictional one into a full consideration of the merits. Such an approach would fly in the face of the jurisdiction-limiting language of [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996].").

4. *E.g.*, Ramirez v. Mukasey, No. 07-1655, 2008 WL 682602, at *1 (1st Cir. Mar. 14, 2008) ("The question of whether a state crime is an aggravated felony is a question of law that we review de novo."); Klementanovsky v. Gonzales, 501 F.3d 788, 791 (7th Cir. 2007); Blake v. Gonzales, 481 F.3d 152, 155–56 (2d Cir. 2007); Morales-Alegria v. Gonzales, 449 F.3d 1051, 1053 (9th Cir. 2006); Vargas v. Dep't of Homeland Sec., 451 F.3d 1105, 1107 (10th Cir. 2006); Smith v. Gonzales, 468 F.3d 272, 275 (5th Cir. 2006); Garcia v. Att'y Gen., 462 F.3d 287, 291–92 (3d Cir. 2006); Guenther v. Gonzales, 127 F. App'x 786, 790 (6th Cir. 2005); Balogun v. U.S. Att'y Gen., 425 F.3d 1356, 1359–60 (11th Cir. 2005); Yousefi v. U.S. INS, 260 F.3d 318, 324 (4th Cir. 2001); *In re* S-I-K-, 24 I. & N. Dec. 324, 326 (B.I.A. 2007).

5. This view is consistent with how the Supreme Court has viewed prior convictions in the context of criminal sentencing enhancements. In *Jones v. United States*, for example, the Court noted that the fact of a prior conviction, unlike other facts, "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." 526 U.S. 227, 249 (1999).

6. *Matter of Khalik*, 17 I. & N. Dec. at 519.

ever, immigration adjudicators should be understood as performing a judge, not a jury, function. All relevant factual determinations concerning the conviction must stem from a jury verdict or the plea bargaining process, not independent fact-finding by an immigration adjudicator.

Despite a general consensus regarding the principles outlined above, there is considerable confusion over the rules for evaluating the legal effect of criminal convictions.[7] This article analyzes this confusion, demonstrating that a source of it is a fundamental misunderstanding concerning the nature of a conviction and the difference between a fact that appears in the record of conviction and a fact that was necessarily decided in the criminal proceeding to establish the elements of the crime. As a result of this confusion, some decisions of the BIA and federal courts, including the Eleventh Circuit, have undermined their basic commitment to the idea that immigration adjudicators are limited to determining the legal effect of a conviction—the product of the criminal justice system—and are precluded from making findings of fact about an immigrant's guilt or innocence.

This article considers whether there is any defensible, bright-line rule governing how adjudicators should determine the legal effect of a conviction in immigration law. Discussed below are the majority and minority rules that appear in BIA case law and the immigration and criminal recidivism sentencing jurisprudence of the federal courts of appeals, focusing on the Eleventh Circuit Court of Appeals. I argue that only the majority rule—an elements test—places appropriate restrictions on judicial fact-finding regarding core issues of guilt and innocence. I argue that the minority rule, which permits immigration adjudicators to make findings of fact about the manner in which a crime was committed, is incorrect and should be abandoned.

Part I of this article describes the nature of a criminal conviction

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7. This confusion is wide-ranging in part owing to the many different government officials required to evaluate the nature of criminal convictions when deciding whether to grant lawful immigration status or admission into the United States. In addition to immigration judges, officials with the U.S. consulate offices, U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection make decisions about whether an offense triggers deportation or inadmissibility. Moreover, the determinations of consulate officers and officers working at ports of entry typically are not reviewed by an immigration judge or federal court. *See* Burrafato v. U.S. Dep't of State, 523 F.2d 554 (2d Cir. 1975) (no review of Department of State immigration-related adjudication); *see also* 8 U.S.C. § 1224(b)(1)(A)(i) (2000) (describing expedited removal without a court hearing of noncitizens arriving in the United States). Because of the virtual absence of review and the harsh effects on noncitizens when they are denied status or admission, it is critical that these officials correctly analyze the effect of criminal convictions under immigration law. Reliance on generic lists of offenses to determine immigration consequences is inherently erroneous because the legal effect of a particular conviction necessarily depends on the particular criminal statute under which a person was convicted.

and the difference between a fact necessary to the conviction (an element) and extraneous facts that may appear in the criminal court's record of conviction. Part II discusses the law versus fact distinction, arguing that it is meaningful to distinguish between fact-finding related to guilt or innocence (a jury role) and fact-finding related to determining from the record of conviction what "necessary facts" the criminal justice system decided (a judicial role). Part III lays out the origin and history of what is now called the categorical approach to the analysis of convictions under immigration law. Part IV discusses the majority and minority versions of the modified categorical approach in BIA and federal court decisions, including the Supreme Court's decisions in *Taylor*,[8] *Shepard*,[9] *Leocal*,[10] *Lopez*,[11] and *Duenas-Alvarez*.[12] Part V analyzes the immigration and criminal sentencing jurisprudence of the Eleventh Circuit. Part VI discusses the implications of the Sixth Amendment issues raised by the Supreme Court in the *Apprendi v. New Jersey*[13] line of cases. Part VII addresses recent developments in BIA case law interpreting certain aggravated felony provisions as requiring mini-trials in immigration court concerning facts found not to be elements of the aggravated felony conviction. Part VIII discusses the fairness and efficiency concerns that underlie the majority approach to analyzing the immigration consequences of crimes.

I. THE NATURE OF A CRIMINAL CONVICTION

Because many grounds for deportation depend on the product of our criminal justice system—a conviction—a full and accurate understanding of how our criminal justice system produces convictions is essential. The nature of a conviction is indivisible from the rules that created it. Under the U.S. Constitution, all individuals charged with a crime are entitled to notice of the charges against them and, if the government seeks a jail sentence, they are entitled to an attorney at the government's expense.[14] The prosecution bears the burden of proof beyond

8. Taylor v. United States, 495 U.S. 575 (1990).

9. Shepard v. United States, 544 U.S. 13 (2005).

10. Leocal v. Ashcroft, 543 U.S. 1 (2004).

11. Lopez v. Gonzales, 127 S. Ct. 625 (2006).

12. Gonzales v. Duenas-Alvarez, 127 S. Ct. 815 (2007).

13. 530 U.S. 466 (2000).

14. The Fifth and Sixth Amendments of the U.S. Constitution guarantee a defendant the rights "to be informed of the nature and cause of the accusation," U.S. CONST. amend. VI, to be tried by "an impartial jury" and "to have the Assistance of Counsel for his defence," *id.*, and not to be "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." *Id.* amend. V. Article Three of the Constitution states that "[t]he Trial of all Crimes, . . . shall be by Jury." *Id.* art. III, § 2, cl. 3. The Supreme Court has held that these

a reasonable doubt.[15] Defendants are entitled to a jury trial on the question of guilt and, generally, on any fact that increases the maximum possible punishment.[16]

State or federal statutes define criminal offenses, and courts interpret the language of these statutes.[17] Often, a single criminal statute will define multiple crimes by using subsections, disjunctive language, or cross-referencing to other statutes.[18] To prevail in a prosecution, the government must prove all of the facts "necessary to constitute the crime" beyond a reasonable doubt.[19] These necessary facts are the "elements" of the crime.[20]

The charging document in a criminal case must allege the elements, the "essential facts constituting the offense charged."[21] A conviction is subject to reversal if the prosecutor has failed to charge all of the elements of the crime.[22] But not all facts that appear in a charging document are essential facts. While alleging the essential elements of a crime is the most important function of the charging document, it is not its sole function. A second function of a charging document is to give the defendant sufficient notice in ordinary language of the crime being

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protections apply in prosecutions by the states. Herring v. New York, 422 U.S. 853, 857 n.7 (1975).

15. *See* Brinegar v. United States, 338 U.S. 160, 174 (1949).

16. *See Apprendi*, 530 U.S. at 476–77; *see also* discussion *infra* Part V.I.

17. State court interpretations of a criminal statute are often critical to the definition of a crime. *See* Galeana-Mendoza v. Gonzales, 465 F.3d 1054, 1058 (9th Cir. 2006) ("[I]n determining the categorical reach of a state crime, we consider not only the language of the state statute, but also the interpretation of that language in judicial opinions." (quoting Ortega-Mendez v. Gonzales, 450 F.3d 1010, 1016 (9th Cir. 2006))) (internal quotation marks omitted). Pattern jury instructions are helpful in determining the elements of an offense, as they incorporate the statutory language and how the courts have interpreted that language.

Foreign convictions may also have an effect under immigration law if the underlying conduct is criminalized by U.S. law. *See In re* McNaughton, 16 I. & N. Dec. 569 (B.I.A. 1978). These foreign convictions should be analyzed in the same way as domestic convictions. *See* Lennon v. INS, 527 F.2d 187 (2d Cir. 1975) (evaluating legal effect by analogizing elements to domestic statute).

18. As the Third Circuit has pointed out, "[s]tatutes phrased in the disjunctive are akin to, and can be readily converted to, statutes structured in outline form, with a series of numbered or letter elements." Singh v. Ashcroft, 383 F.3d 144, 162 (3d Cir. 2004).

19. *See In re* Winship, 397 U.S. 358, 363 (1970).

20. *See id.* at 364 (an element is a "fact necessary to constitute the crime"). The BIA has cited to *In re Winship* for its understanding of what an element is. *See In re* Babaisakov, 24 I. & N. Dec. 306, 310 n.2 (B.I.A. 2007).

21. FED. R. CRIM. P. 7(c)(1); *see also* Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998) ("An indictment must set forth each element of the crime that it charges."); Hamling v. United States, 418 U.S. 87, 117 (1974) ("[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.").

22. 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 19.3(a), at 249 (3d ed. 2007).

alleged.[23] The charging document must "provide the accused with a sufficient description of the acts he is alleged to have committed to enable him to defend himself adequately."[24] This requirement has been described as mandating that the charging document describe the "who . . . , what, where, and how" of the crime.[25] For example, in an assault case, a charging document typically identifies the alleged victim. In a crime against property, the charging document typically describes the type of property that was involved. Courts have found a federal constitutional violation when pleadings in state cases lack specificity.[26]

Nonessential facts also typically appear in the factual basis for a plea.[27] The federal criminal rules of procedure and many states require a factual basis as a condition of pleas to guard against defendants pleading guilty to crimes they could not have committed.[28] There are typically no, or virtually no, standards governing them.[29] A statement of factual basis, even more so than a charging document, contains a broad range of facts, typically using everyday language to describe the manner in which the crime was allegedly carried out.[30]

To prevail at trial, the prosecution does not have to prove every fact in the charging document. Nor would the prosecution have needed to prove every fact that later appears in a statement of factual basis. In a Florida battery case, for example, guilt would not turn on whether the

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23. *See id.* § 19.3(b), at 276.

24. *Id.* (quoting United States v. Rizzo, 373 F. Supp. 204, 205–06 (S.D.N.Y. 1973), *aff'd sub nom.* United States v. Marion, 493 F.2d 1399 (2d Cir. 1974)) (internal quotation marks omitted).

25. *Id.* (quoting People v. Zupancic, 557 P.2d 1195, 1197 (Colo. 1976)). Other rationales for pleading requirements are to guard against double jeopardy and safeguard the grand jury's screening role. *See id.* § 19.2(f), at 243–47.

26. *See generally id.* § 19.3(b), at 276 (discussing the factual specificity requirement).

27. *See* United States v. Robinson, 14 F.3d 1200, 1207 (7th Cir. 1994) ("The court may find the factual basis from anything which appears in the record . . . .") (internal quotation marks omitted).

28. *See* FED. R. CRIM. P. 11 advisory committee's note (stating that the purpose is to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge"); *see also* Monroe v. State, 318 So. 2d 571, 573 (Fla. Dist. Ct. App. 1975) (stating that the purpose of the factual basis "is to make certain that a defendant does not plead guilty to an offense of which he could not possibly be guilty").

29. *See* FED. R. CRIM. P. 11 advisory committee's note ("The draft does not specify that any particular type of inquiry be made."); *see also Monroe*, 318 So. 2d at 573 (noting that the inquiry "need not be a 'mini-trial'" and "is not a matter of weighing the evidence").

30. *See* Santobello v. New York, 404 U.S. 257, 261 (1971). For examples of facts that may comprise a factual basis, see *People ex rel. Valle v. Bannan*, 110 N.W.2d 673 (Mich. 1961), and *People v. Bumpus*, 94 N.W.2d 854 (Mich. 1959). The factual basis may include a broad range of facts to ensure that the plea will not be reversed. *See* United States v. Palmer, 456 F.3d 484 (5th Cir. 2006) (finding insufficient factual basis for crime); United States v. Adams, 448 F.3d 492, 498–500 (2d Cir. 2006) (same); United States v. Monzon, 429 F.3d 1268, 1274–75 (9th Cir. 2005) (same).

victim was the defendant's spouse or whether the battery was carried out by a blow to the victim's head or by a de minimis unwanted touching.[31] In a Florida theft case, guilt would not depend on showing that the property at issue was gum or a shopping cart.[32]

A conviction does not exist apart from its elements. To say that a person has been found guilty of a crime is simply to say that he or she has been found guilty of each element of the crime. Another way of expressing this point is to say that a conviction consists of only facts that are *necessarily* decided by the criminal justice system. All other alleged facts concerning the defendant's conduct are extraneous and, for both the prosecutor and the defendant, irrelevant to the proceedings. From the prosecutor's perspective, only facts that are elements need be proven. From the defendant's perspective, only element facts can result in the deprivation of the defendant's liberty. Extraneous facts need not be proven at all and therefore certainly are not proven beyond a reasonable doubt. A defendant therefore has no reason to dispute (or to exclude from the record) nonelement facts.

To summarize, to say that someone was convicted of a particular crime is simply to say that either (1) a jury found him or her guilty of each of the elements of the crime, as defined by the statute, or (2) the person pleaded guilty to those elements. A "conviction" is simply all of its constituent parts—the elements—added together.

II. The Law Versus Fact Distinction

As noted above, the BIA and federal courts uniformly characterize the classification of convictions under immigration law as a legal endeavor.[33] Immigration adjudicators view themselves as simply applying the immigration "law" to the "fact" of a conviction—a "fact" that has already been established by the criminal law system. In this way, immigration adjudicators understand that they are refraining from passing on the guilt or innocence of the immigrant.

This characterization, while convenient and comforting, oversimplifies what really happens when an immigration adjudicator determines the legal effect of a conviction. The criminal justice system does not deliver typecast convictions that slot easily into immigration law catego-

31. *See* Johnson v. State, 858 So. 2d 1071, 1072 (Fla. Dist. Ct. App. 2003) (spitting on another person constitutes a battery).

32. *See* State v. Meisner, 692 So. 2d 933, 935 (Fla. Dist. Ct. App. 1997) (no need to distinguish between permanent and temporary deprivations because "even a temporary deprivation of property constitutes theft").

33. *See* cases cited *supra* note 4.

ries. How a state has chosen to label a crime does not control whether a particular conviction falls within a ground of removal.

In applying immigration law to the fact of a conviction, adjudicators must engage in at least two distinct inquiries. First, they must interpret immigration law to determine the criteria for a given ground of removal. Second, they must decide whether the conviction produced by the criminal justice system is of the type that triggers removal. This determination inevitably involves looking at the documents created by the criminal justice system that are evidence of the conviction. While the first inquiry might be strictly legal, the second may be factual because it involves the review and interpretation of documents.

The question of what constitutes a question of law, as opposed to a question of fact, is complex and the subject of much debate. Some scholars argue that there is no analytical difference between the two.[34] Others argue that there is a difference, but the boundary between the two is ill-defined.[35]

For the purpose of this article, it is not necessary to settle definitively this debate. It is, however, important to examine the nature of the law versus fact distinction to determine whether there is any possible methodology that immigration adjudicators can use to analyze a conviction in order for most to agree that it falls within the core meaning of a legal determination. I argue below that, while evaluating the legal effect of a conviction may, strictly speaking, entail some amount of "fact-finding," a strict elements test is the only way for immigration adjudicators to avoid making factual determinations about guilt or innocence—a task that all agree falls firmly within the domain of the criminal justice system.

A. *The Role of Deductive Reasoning*

Most would agree that when adjudicators employ deductive reasoning, they are making legal rather than factual determinations.[36] It is

34. *See* Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law–Fact Distinction*, 97 Nw. U. L. Rev. 1769, 1769–70 (2003). Allen and Pardo point out that the Supreme Court has characterized the law–fact "distinction as 'elusive,' 'slippery,' and as having a 'vexing nature.'" *Id.* at 1769 (footnotes omitted); *see also* Gary Lawson, *Proving the Law*, 86 Nw. U. L. Rev. 859, 862–65 (1992) (discussing the nature of the law–fact distinction). For a discussion of the fact versus law distinction in the context of criminal recidivist sentencing, see William R. Maynard, *'Statutory' Enhancement by Judicial Notice of Danger: Who Needs Legislators or Jurors?*, Champion, Jan.–Feb. 2007, at 42, 42.

35. *See* Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 Nw. U. L. Rev. 916, 917–23 (1992); Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 261–62 (1985).

36. *See* Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 Ohio St. L.J. 1125, 1130 (2003); *cf.* William C. Whitford, *The Role of the Jury*

therefore important to analyze the extent to which immigration adjudicators can use deductive reasoning to analyze the legal effect of criminal convictions. If they can exclusively rely on deductive reasoning, then they are engaged in a purely legal endeavor and cannot be characterized as determining guilt or innocence.

The following classic syllogism is an example of deductive reasoning.

> Socrates is a man. All men are mortal. Therefore, Socrates is mortal.

Taking as assumptions that Socrates is a man and that all men are mortal, it follows that Socrates is mortal. No inferences or additional facts are needed in order to arrive at this conclusion. Deductive reasoning simply reconfigures knowledge one already has.

In the deportation context, we can create the following analogous syllogism.

> Deportation is triggered by a conviction of type X. Mr. Smith's conviction is of type X. Therefore, Mr. Smith's conviction triggers deportation.

The problem is that, unlike the syllogism involving Socrates, the assumptions built into this syllogism are far from obvious.[37] How do we interpret immigration law so that we know what types of convictions trigger removal? How do we determine whether any given conviction is of that type?[38]

Because deportation depends on the product of the criminal system (a "conviction"), it may be possible to rewrite the syllogism with somewhat more solid assumptions.

> Deportation is triggered by a conviction of type X. Mr. Smith's conviction was determined by the criminal justice system to be type X. Therefore, Mr. Smith's conviction triggers deportation.

In this iteration of the deportation syllogism, the immigration adju-

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(and the Fact/Law Distinction) in the Interpretation of Written Contracts, 2001 WIS. L. REV. 931, 933 (2001) (arguing that both deductive and inductive reasoning are necessarily involved in both legal and factual determinations, but if deductive reasoning is involved, the determination is one made by a judge). *See generally* Ruggero J. Aldisert, Stephen Clowney & Jeremy D. Peterson, *Logic for Law Students: How To Think Like a Lawyer*, 69 U. PITT. L. REV. 1 (2007) (discussing principles of logic used in the legal profession, including deductive reasoning). The discussion in Part II of this article builds on ideas contained in Paul Kirgis's analysis of the roles of deductive and inductive reasoning in so-called "legal" and "factual" determinations.

37. Some have commented on the limitations of using formal logic to explain legal reasoning because of the lack of uncontroverted premises. *See, e.g.*, Steven D. Jamar, Essay, *This Article Has No Footnotes: An Essay on RFRA and the Limits of Logic in the Law*, 27 STETSON. L. REV. 559 (1997).

38. Legal realists and others have challenged the legal positivist notion of law as essentially deductive reasoning. For the purpose of this article, it is unnecessary to fully address the legal realist challenge. It suffices to point out that deductive reasoning is insufficient when evaluating the immigration consequences of crimes. Inductive reasoning is also required.

dicator interprets immigration law to decide what types of convictions trigger removal. The adjudicator, however, then defers to whether the criminal justice system has determined that the conviction is of the specified type. But how do adjudicators know whether the criminal justice system has produced a conviction of type X?

B. *The Role of Inductive Reasoning*

Inductive reasoning must play a role in establishing the assumptions necessary for the deportation syllogism. Inductive reasoning involves making inferences or generalizations about data in the world, be it data concerning events in the natural world, the written word in our laws, or literary texts.[39] Unlike the conclusions of deductive reasoning, the conclusions of inductive reasoning are only "probably true."[40] Because inductive reasoning is involved even in statutory construction, scholars argue that there is no ontological difference between a question of law and a question of fact.[41] Both involve making inferences or generalizations about a set of data. In the case of statutory construction, the data that require interpretation are written words.

While there may be no ontological difference between legal and factual inquiries, the distinction is nonetheless critical from a functional point of view. As commentators have pointed out, the distinction serves an important function in describing the allocation of adjudicative responsibilities between judges and juries.[42] While the fact versus law distinction may really be a spectrum, there is general agreement that pure statutory construction is a judge function (a "legal" inquiry) while determinations of guilt or innocence in our criminal justice system are a jury function ("factual" inquiries).[43]

Of course, there are no juries in immigration court; immigration judges determine both facts and the law. As noted above, however, the law versus fact distinction takes on critical significance in the context of evaluating the legal effect of convictions. Because many grounds of removal require a "conviction," immigration adjudicators must take the conviction at face value and not look behind it to make independent factual determinations about the conduct underlying the conviction. In other words, when removal is dependent on a conviction, immigration adjudicators cannot take on the jury function of determining guilt or innocence.

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39. *See* Kirgis, *supra* note 36, at 1153–54.

40. RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 89 (3d ed. 1997); *see also* Kirgis, *supra* note 36, at 1154–55.

41. *See* Allen & Pardo, *supra* note 34, at 1796–97.

42. *See, e.g.*, Kirgis, *supra* note 36, at 1130.

43. *See id.* at 1131–32.

Applying these principles to the deportation syllogism above, we see that the first assumption in the syllogism (deportation is triggered by a conviction of type X) involves what is commonly called pure statutory construction. The immigration adjudicator must interpret the words contained in the statutory grounds of removal to decide what types of convictions fall inside the different grounds. While this statutory interpretation involves inductive reasoning, it nonetheless falls with the core meaning of what is understood as a question of law.

More importantly for our purposes, inductive reasoning is also required to arrive at the second assumption in the deportation syllogism. As noted above, the criminal justice system does not produce incontrovertible conclusions regarding whether particular convictions are, or are not, of type X. To the contrary, it falls to immigration adjudicators to review the relevant criminal documents and come to a conclusion about the nature of the conviction produced by the criminal justice system. This process involves inductive reasoning because it requires adjudicators to make inferences off of the data contained in the criminal documents. Even looking at criminal documents to determine the statute under which the noncitizen was convicted, for example, involves a minimal amount of inductive reasoning.

In striving to make the immigration adjudicator's inquiry legal rather than factual, the goal therefore is not to eliminate inductive reasoning entirely, as this would be impossible. Rather, the goal is to minimize the role of inductive reasoning to guard against the immigration adjudicator substituting his or her judgment for that of the criminal justice system on the critical issue whether guilt or innocence of particular conduct has been established.

C. *The Possible Rules Governing the Categorization of Crimes*

There are four basic rules that could potentially govern how an immigration adjudicator arrives at the second assumption of the deportation syllogism described above (that a conviction was determined by the criminal justice system to be of the type that triggers removal). The first rule would give immigration adjudicators unfettered authority to adjudicate all facts underlying the conviction. Under such a rule, the role of the criminal justice system would be reduced to issuing an advisory opinion regarding guilt. The immigration adjudicator could not only find the immigrant innocent of the elements of the crime, but would be free to determine the truth or falsity of all extraneous facts.

The second possible rule is that immigration adjudicators are permitted to look to enumerated, reliable documents related to the criminal conviction, but can rely on any uncontradicted fact in those documents,

including unadjudicated facts, in order to categorize the crime. This will be discussed below as the "minority" or "fact-finding" rule. The third possible rule is that adjudicators can look to reliable documents, but can only rely on facts that were necessarily decided (facts that established elements) in the criminal proceedings. This will be discussed below as the "majority rule" or "elements test." The fourth and final possible rule is that adjudicators are precluded from ever looking beyond the statute of conviction.

D. *Limiting Inductive Reasoning to the Elements*

As discussed in Part I, a criminal conviction is the sum total of its constituent parts called the "elements" of the crime. Element facts are the facts necessary to establish guilt. Nonelement facts, sometimes called "extraneous" or "accompanying" facts, routinely appear in various documents related to the criminal conviction. These facts are not necessary to the crime and typically appear as mere surplusage or as a description of the underlying conduct so that defendants have sufficient notice of the factual basis for the criminal charge. Such extraneous facts commonly appear in the charging document and factual basis for a plea.

If immigration adjudicators rely on extraneous facts to categorize a crime, they inevitably substitute their judgment for that of the criminal justice system regarding the truth or falsity of the fact. Unless a fact was necessarily decided in the criminal proceeding, it is being decided in the first instance by the immigration adjudicator. An example illustrates this point. Suppose that Mr. Smith was convicted under a theft statute that permits prosecution for the deprivation of another person's property, regardless of whether the deprivation was "temporary or permanent." The immigrant, however, admits to the immigration adjudicator that he, in fact, intended to permanently deprive the owner of the property. Assume further that, under immigration law, an immigrant can only be deported for a conviction for a permanent deprivation. Inserting these facts into the deportation syllogism, we get the following result.

> Deportation is triggered by a conviction for a permanent deprivation of property, as determined by the criminal justice system.
> Mr. Smith's conviction was *not* determined *by the criminal justice system* to *necessarily* be a permanent deprivation.
> Therefore, Mr. Smith's conviction does *not* trigger deportation.

Even in the face of a confession to a permanent taking, the adjudicator cannot make his or her own determination that the immigrant was guilty of a permanent, as opposed to a temporary, deprivation. Like the first proposed rule described above, such a determination would straightforwardly constitute a prohibited factual determination, as it directly con-

tradicts the rule that deportation is triggered only by what was necessarily decided in the criminal justice system.

The same result is required in the converse situation when an immigrant presents the immigration adjudicator with uncontroverted evidence of his or her *innocence*. Suppose that, in the example above, the state statute criminalized only permanent deprivations and the immigrant pleaded guilty to that statute. In immigration court, the immigrant submits conclusive proof to the immigration judge that he committed only a temporary deprivation. For the same reasons that the adjudicator cannot consider the confession of guilt, the adjudicator is precluded from considering even conclusive proof of actual innocence.

But what if facts suggesting that the deprivation was permanent appear in reliable court documents related to the conviction? What if the charging document alleges that Mr. Smith stole chewing gum from a convenience store, put the gum in his mouth, and walked out of the store without paying for it? Is the immigration adjudicator permitted to rely on these facts describing the manner in which the crime was carried out? Can the adjudicator use inductive reasoning to infer that Mr. Smith was not intending to return the chewed gum and that the conviction was for a permanent deprivation?

The answer must be no. If immigration adjudicators cannot adjudicate guilt or innocence, they must rely only on facts *necessarily* decided by the criminal proceeding. Because nothing in the criminal proceeding turned on whether the taking was permanent or temporary, the immigration judge would be adjudicating guilt in the first instance if he or she determined that it was a permanent deprivation, as opposed to a temporary one. While no one would dispute that it is reasonable to assume that Mr. Smith was not intending to return the chewed gum, this observation misses the critical point. When removal depends on a *conviction*, immigration judges lack the authority to make factual adjudications of guilt or innocence, even in the face of obvious inferences or even confessions. Because the issue whether the deprivation was temporary or permanent was not necessarily decided in the criminal proceeding, Mr. Smith in no sense has a "conviction" for a permanent deprivation.

Next let us make a slight, but critical, change in the hypothetical. Suppose that the charging document used the word "permanent" to characterize the deprivation of property and nothing else in the record of conviction contradicted this characterization? Is the immigration adjudicator permitted to characterize this conviction as a permanent deprivation under this scenario? This presents a different case. In this situation, the prosecutor has opted to proceed with the prosecution as a permanent deprivation and, in order to convict, he or she must prove that the depri-

vation was permanent, not temporary. If the prosecutor tried to argue to the jury that the deprivation could have been temporary, the defense would object and be entitled to require that the charging document be amended.[44] Thus, in this formulation of the hypothetical, it would be accurate to say that the criminal justice system necessarily determined that the deprivation was permanent.

The further that an immigration adjudicator strays from analyzing the elements of the crime, the greater the risk that the adjudicator will take on the role of the jury. Unless an immigration adjudicator limits his or her "data" to the elements of the conviction as determined by the criminal justice system, the adjudicator will inevitably employ her own inductive reasoning to categorize a crime and determine whether the immigrant was guilty or innocent of underlying conduct. Inductive reasoning about the nature of a conviction turns into impermissible fact-finding on the part of the immigration adjudicator the moment that the adjudicator relies on facts extraneous to the conviction, even if these facts are undisputed and come from reliable sources.

Against this theoretical backdrop, we can now turn to an analysis of how the BIA and federal courts, primarily the U.S. Court of Appeals for the Eleventh Circuit, evaluate the effect of convictions under immigration law. I demonstrate that the majority approach, and the modern trend, is to adopt a strong version of the third rule articulated above. The minority approach is a version of the second rule described above—a rule that sanctions judicial fact-finding. I argue that the majority rule is the most appropriate and that, when properly applied, is a true elements test.

Because the methodology of analyzing crime in immigration cases has been significantly influenced by analogous developments in the con-

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44. In scenarios in which the prosecution is not limited to proving the elements as contained in the charging document, this conclusion is incorrect and an immigration adjudicator should be limited to the statutory language only. In Florida burglary cases, for example, the statute requires that the prosecution prove that the defendant intended to commit a crime after unlawfully entering or remaining in a dwelling, structure, or conveyance. FLA. STAT. § 810.02(1)(b) (2007). While the charging documents typically specify the underlying crime, the prosecutor is permitted to argue to the jury that the crime could have been any crime, not necessarily the one listed in the information. *See* Puskac v. State, 735 So. 2d 522, 523 (Fla. Dist. Ct. App. 1999). In such a case, the particular crime that was listed in the charging document is not an element of the crime. *See id. But see* Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1017–20 (9th Cir. 2005) (holding that burglary with intent to commit theft was a crime involving moral turpitude because theft involves moral turpitude); Matter of Esfandiary, 16 I. & N. Dec. 659, 661 (B.I.A. 1979) (finding moral turpitude in malicious trespass conviction by looking to charging document to see that the "intent to commit a misdemeanor" was to commit petit larceny, a crime involving moral turpitude). This issue also surfaces in cases where elements are charged in the conjunctive but can be proved by the prosecutor in the disjunctive. For a discussion of this issue, see *infra* note 65 and accompanying text.

text of federal criminal sentencing enhancements, I also analyze some criminal resentencing cases, focusing on the U.S. Supreme Court's decisions in *Taylor v. United States*[45] and *Shepard v. United States*[46] and the jurisprudence of the Eleventh Circuit. I demonstrate that, in contrast to the immigration context, a significant number of criminal sentencing cases in the Eleventh Circuit adopt the second rule, the minority rule. This expansive rule, by sanctioning excessive judicial fact-finding, runs up against the Supreme Court's decisions in the *Apprendi v. New Jersey*[47] line of cases and also breaches notions of fairness and efficiency. Moreover, having different methodologies in the immigration and criminal sentencing contexts risks creating the paradox that the same conviction can be an "aggravated felony" under 8 U.S.C. § 1101(a)(42) for the purpose of a criminal sentencing enhancement in a criminal illegal reentry case, but not for deportation.

III. THE CATEGORICAL APPROACH

Immigration law adjudicators aspire to employ a uniform and strictly "legal" methodology for determining whether a noncitizen's criminal conviction triggers removal.[48] The basic tenets of what is now called the categorical analysis of criminal convictions have stood as pillars of immigration law for at least seventy years. At its most fundamental, the categorical approach requires immigration adjudicators to evaluate the criminal conviction against a federal standard when determining whether a particular crime falls within a ground of deportation or inadmissibility under the Immigration and Nationality Act.[49] State definitions and labels do not control.[50] Equally important, the method prohibits consideration of the underlying circumstances that gave rise to the

45. 495 U.S. 575 (1990).

46. 544 U.S. 13 (2005).

47. 530 U.S. 466 (2000).

48. *See supra* note 4 and accompanying text. For a discussion of how courts have struggled to maintain uniformity in the aggravated felony context, see Natalie Liem, Note, *Mean What You Say, Say What You Mean: Defining the Aggravated Felony Deportation Grounds To Target More than Aggravated Felons*, 59 FLA. L. REV. 1071 (2007).

49. 8 U.S.C. §§ 1101–1537 (2000). The grounds of inadmissibility appear at § 1182(a) and the grounds of deportation appear at § 1227.

50. *See Taylor*, 495 U.S. at 602 (holding that a state conviction for burglary is not a burglary under 18 U.S.C. § 924(e) (2000)); Vizcarra-Ayala v. Mukasey, 514 F.3d 870, 872, 877 (9th Cir. 2008) (holding that a state forgery conviction is not necessarily an aggravated felony that can be used as a basis for removal). The scope of a ground of removal is defined by federal law, and the BIA and courts "look to state law only to determine the elements of the offense of conviction." Cabral v. INS, 15 F.3d 193, 196 n.5 (1st Cir. 1994) (citing Matter of H—, 7 I. & N. Dec. 359, 360 (B.I.A. 1956)); *see also* Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 119–20 (1983) (stating a presumption that federal laws are not dependent on state law definitions "because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control").

conviction and requires that adjudicators "categorically" determine whether a crime triggers removal by reference to the statute and, in some cases, the record of conviction.

Federal court decisions in the early half of the last century contain the first statements of the categorical analysis in the context of crimes involving "moral turpitude."[51] In the landmark decision *United States ex rel. Mylius v. Uhl*, the court of appeals framed the question as whether the crime at issue "*necessarily* involve[s] moral turpitude."[52] The court rejected the argument that the crime of defamatory libel should be found to be a crime involving moral turpitude because the libel, in that particular case, involved the royal family of England. Adopting an unabashedly democratic approach, the court stated: "If it would not involve moral turpitude to publish this libel of a field laborer in Devon or a street sweeper in London, it would not involve moral turpitude to publish it regarding the Lord Chancellor or even the King."[53] The court drew a distinction between what the defendant was convicted of and what the evidence showed, finding only the former relevant.[54] The court gave five justifications for its approach: (1) uniform application of law; (2) efficiency of adjudication; (3) the prohibition on immigration officers being triers of facts underlying crimes; (4) the interest of the government in preventing consideration of evidence that contradicts the conviction documents; and (5) the manifest injustice that would result if individuals convicted of the same crime were treated differently on account of an immigration officer's findings about underlying circumstances.[55]

When evaluating alleged crimes involving moral turpitude, subsequent federal court and BIA decisions reinforced the method of considering the minimal conduct necessary to violate the statute as well as the prohibition on looking to the underlying circumstances of the crime.[56]

51. As the Supreme Court has noted, the meaning of "moral turpitude" is construed in judicial decisions, and many argue that it has no settled meaning. *See* Jordan v. De George, 341 U.S. 223, 229–30 (1951). For a discussion of this difficult concept, see Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 264–65 (2001).

52. 210 F. 860, 862 (2d Cir. 1914) (emphasis added).

53. *Id.*

54. *Id.* ("It is not enough that the *evidence* shows that the immigrant has committed such a crime, the *record* must show that he was convicted of the crime.") (emphasis added).

55. *Id.* at 862–63.

56. *See* Gonzalez-Alvarado v. INS, 39 F.3d 245, 246 (9th Cir. 1994) ("[W]e consider the elements or nature of a crime as defined by the relevant statute, not the actual conduct that led to the conviction."); Okabe v. INS, 671 F.2d 863, 865 (5th Cir. 1982) ("Whether a crime involves moral turpitude depends upon the inherent nature of the crime, as defined in the statute concerned, rather than the circumstances surrounding the particular transgression."); Pino v. Nicolls, 215 F.2d 237, 245 (1st Cir. 1954) ("[N]either the administrative officials in a deportation proceeding nor

Law review articles from as early as the 1950s recognized the method as the established approach to analyzing whether convictions involve moral turpitude.[57] After Congress added a firearm ground of deportation in 1952, the BIA extended the approach to that determination as well.[58] In 1988 Congress added an aggravated felony ground of deportation, defining it to include murder, drug trafficking, and firearm trafficking offenses.[59] The definition has been expanded many times and now includes a long list of offenses ranging from certain theft offenses to

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the courts on review of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma of moral obliquity."); United States *ex rel.* Giglio v. Neelly, 208 F.2d 337, 340 (7th Cir. 1953) (refusing to "explore beyond the record of conviction in order to evaluate the quality of [the] petitioner's conduct"); United States *ex rel.* McKenzie v. Savoretti, 200 F.2d 546, 548 (5th Cir. 1952) ("Immigration officials and courts sitting in review of their actions need only to look to the record and the inherent nature of the offense."); United States *ex rel.* Guarino v. Uhl, 107 F.2d 399, 400 (2d Cir. 1939) (framing question as whether crime "necessarily" or "inherently" involves moral turpitude); United States *ex rel.* Zaffarano v. Corsi, 63 F.2d 757, 758 (2d Cir. 1933) (failing to find moral turpitude because "[u]nder this provision a man may be convicted for putting forth the mildest form of intentional resistance against an officer"); United States *ex rel.* Robinson v. Day, 51 F.2d 1022, 1022–23 (2d Cir. 1931) ("When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral."); United States *ex rel.* Griffo v. McCandless, 28 F.2d 287, 288 (E.D. Pa. 1928) (ruling that a crime did not involve moral turpitude because only "extraneous evidence" demonstrated that moral turpitude was involved); *In re* Tejwani, 24 I. & N. Dec. 97, 98 (B.I.A. 2007) ("[W]e look to the elements of the respondent's statutory offense in order to determine whether the crime is one that necessarily involves moral turpitude, without considering the circumstances under which it was committed."); Matter of Serna, 20 I. & N. Dec. 579, 585 (B.I.A. 1992) ("[A]n offense must necessarily involve moral turpitude in order for a conviction for that crime to support an order of deportation."); *In re* O—, 4 I. & N. Dec. 301, 304 (B.I.A. 1951) ("Where a statute such as the one we are now considering is broad enough to include acts which do not involve moral turpitude, we must hold that a violation thereof does not involve moral turpitude . . . ."). The Seventh Circuit questioned, but ultimately applied, the categorical approach in *Abdelqadar v. Gonzales*, 413 F.3d 668, 671–72 (7th Cir. 2005). The term "crime involving moral turpitude" appears in both the grounds of inadmissibility and grounds of deportation specified in the Immigration and Nationality Act. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2000); 8 U.S.C. § 1227(a)(2)(A)(i) (2000).

57. *See, e.g.*, *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 656 (1953) ("Moral turpitude exists independently of the penalty imposed for the crime and is found in the nature of the offense. The record of conviction is final, and a reviewing court may not go behind the record . . . .") (footnote omitted).

58. The firearm ground of removal appears at § 1227(a)(2)(C). In the Anti-Drug Abuse Act of 1988 and again in the Immigration Act of 1990, Congress significantly broadened the firearm ground of deportation, such that the ground now covers possession offenses. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7348, 102 Stat. 4181, 4473 (codified as amended at 8 U.S.C. § 1251(a)(14) (2000)); Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. 1101(a) (2000)). The BIA applies a categorical analysis to firearms offenses. *See In re* Teixeira, 21 I. & N. Dec. 316, 316 (B.I.A. 1996); *In re* Madrigal-Calvo, 21 I. & N. Dec. 323, 325 (B.I.A. 1996); *In re* Pichardo-Sufren, 21 I. & N. Dec. 330, 334–35 (B.I.A. 1996) (en banc) ("extrinsic evidence" is irrelevant to determining the nature of the conviction).

59. Anti-Drug Abuse Act §§ 7342, 7344.

certain crimes of violence.[60] The BIA and federal courts have applied some form of a categorical approach to the analysis of alleged aggravated felony convictions.[61]

IV. The Modified Categorical Approach

The term "modified" categorical approach refers generally to the approach of categorizing a crime by looking beyond the statute to the record of conviction. The record of conviction includes the charging document, written plea, judgment and sentence, and any statement of factual basis assented to by the defendant.[62] While there has been general consensus in the BIA and federal courts that immigration adjudicators cannot look to the police report, testimony, or similar sources in order to determine the nature of a criminal conviction, there has been considerable disagreement regarding when and how an adjudicator may consult the court's record of conviction.

A. *The Majority Rule or Elements Test*

The majority rule in immigration cases is that recourse to the record of conviction is only appropriate to settle ambiguity in situations involving "divisible" statutes—statutes that are multisectional or use disjunctive language to define multiple offenses. A divisible statute is one that can be broken down and rewritten into multiple statutes, each with its own set of elements.[63] Because courts can add or refine the statutory

60. *See, e.g.*, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 321, 110 Stat. 3009, 3009-627 to -628 (1996) (codified as amended at 8 U.S.C. § 1101(a)(43)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (codified as amended at 8 U.S.C. § 1101(a)(43)); Immigration Act § 501.

61. The aggravated felony ground of removal appears at § 1227(a)(2)(A)(iii). The definition of "aggravated felony" appears at § 1101(a)(43). For cases applying the categorical approach to aggravated felony conviction, see Matter of Aruna, 24 I. & N. Dec. 452, 454 (B.I.A. 2008), *In re* Carachuri-Rosendo, 24 I. & N. Dec. 382, 393 (B.I.A. 2007), *In re* Sweetser, 22 I. & N. Dec. 709, 712–13 (B.I.A. 1999), and Matter of Alcantar, 20 I. & N. Dec. 801, 812 (B.I.A. 1994). The categorical approach in the aggravated felony context depends on whether the particular aggravated felony provision cross-references a criminal statute, employs a "generic" definition of a crime, or contains general terms such as "sexual abuse of a minor" which are interpreted according to their plain meaning. *See, e.g.*, § 1101(a)(43)(A) and (G) (referring to generic crimes of "murder," "rape," "theft," and "burglary"); § 1101(a)(43)(E), (F), (H), and (L) (defining removable offenses by reference to federal statutes); § 1101(a)(43)(A) (using phrase "sexual abuse of a minor"). For a discussion of the categorical approach in the context of the crime of violence aggravated felony ground, see *infra* note 84.

62. *See In re* Ajami, 22 I. & N. Dec. 949, 950 (B.I.A. 1999).

63. *See* case cited *supra* note 18 and accompanying text. In some jurisdictions, however, the elements in a charging document can be phrased in the conjunctive (with an "and") but proven in the disjunctive (as if it were an "or"). In these jurisdictions, the prosecutor need only prove one or the other element, but not both. When a defendant takes a plea in this scenario, the defendant may or may not be treated as having pleaded to both elements. *Compare* United States v. Morales-Martinez, 496 F.3d 356, 359–60 (5th Cir. 2007) (defendant who pleads to a charging document

elements, it is important to consult case law interpretations when determining the elements of an offense.[64]

Under the majority rule, if a statute is divisible and only some offenses trigger removal, an adjudicator is permitted to look at the record of conviction, but only to determine whether the noncitizen was convicted of the statutory elements that trigger removal. An adjudicator is limited to reviewing the facts in the record that established the elements of the crime. Extraneous facts are irrelevant. Under this approach, an adjudicator is prohibited from even looking to the record of conviction if a statute contains only one set of elements or is divisible but all offenses defined in the statute result in removal.[65]

We can illustrate the rule abstractly as well as by reference to real world examples. Suppose that a criminal statute is violated either by the commission of (X and Y) or by (X and Z). Suppose further that removal is triggered only by (X and Y). In this situation, an adjudicator could look to the record of conviction to determine whether fact Y was necessarily established. For example, imagine that deportation requires conviction for an intentional striking. A battery statute might criminalize in a single provision an intentional touching *or* an intentional striking. In such a case, the jury would have to find that the defendant acted intentionally, but the action could have been either a touching *or* a striking.

A nondivisible statute, however, would present a different case. Suppose that a statute contains elements X and Y, both of which must be established before the defendant is guilty of the crime. Suppose that removal is triggered only by Z. Under the majority rule, an adjudicator cannot peruse the record of conviction looking for some evidence that conduct constituting Z was involved. Since Z is not an element of the offense, Z either does not appear in the record of conviction or, if it does, it appears only as an extraneous fact describing the manner in which the crime was allegedly carried out.

A real world example demonstrates this point. Suppose that a person is convicted of driving with a suspended license (DWLS), and, in the factual basis for the plea, the defendant acknowledges that, during the traffic stop, the arresting officer found a firearm in the car. Even though driving with a suspended license is in some sense "overbroad"

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with elements listed in the conjunctive is admitting only in the disjunctive because only the minimum facts necessary to support a conviction are admitted), *with* United States v. White, 408 F.3d 399, 402 (8th Cir. 2005) (even though prosecution only had to prove the elements in the disjunctive, the defendant admits both elements in the conjunctive when taking a plea).

64. *See* cases cited *supra* note 17 and accompanying text.

65. *See, e.g.*, Patel v. Mukasey, No. 06-61056, 2008 WL 1874579, at *2 (5th Cir. 2008) (not permitting reference to the record of conviction "because the [criminal statute at issue] does not contain disjunctive elements or divisible subsections creating multiple offenses").

with respect to the firearm ground of deportation (since DWLS can be committed with or without possessing a firearm), nothing in the elements of DWLS refers to a firearm or a weapon of any kind. The overbreadth between the DWLS statute and the deportation ground for possessing a firearm is that the former has at least one element that is absent from the latter.

The BIA and federal courts would most likely agree that this conviction does not fall within the firearm ground of removal.[66] The majority rule, however, tells us exactly why this is the case. Although the fact that a firearm was involved is in the record of conviction, it was not a fact necessary to the conviction because DWLS lacks a firearm element. As such, it would have been impossible for the defendant to have *necessarily* pleaded to the firearm element.

While this example presents what most would agree is a clear case, even less obvious instances of overbroad statutes are analytically the same. Suppose that a state statute for contributing to the delinquency of a child is not divisible, but is broadly worded to criminalize a wide range of inappropriate adult conduct with children, including both sexual and nonsexual conduct. Suppose further that the grounds of removal require a conviction for *sexual* abuse of a minor. Because the statute contains only one set of elements, review of the record of conviction would not settle any ambiguity concerning what elements constituted the conviction. The only reason for reviewing the record of conviction would be to make a determination about the *way* in which the crime was committed—a determination precluded by the majority approach. To say that a statute is overbroad because it sweeps in more conduct than necessary to trigger removal is simply to say that the statute *lacks the necessary element to trigger removal.*

Thus, whenever a statute is "overbroad" with respect to a ground of removal because the statute lacks an element, the record of conviction is irrelevant and must not be consulted.[67] Only where the statute is mul-

66. *See* Matter of Perez-Contreras, 20 I. & N. Dec. 615, 617 (B.I.A. 1992) (finding conviction for assault in the third degree where charging document indicated the defendant shot the victim not to be a firearm conviction because possession or use of a firearm was not an element of the offense).

67. In a concurrence in *Li v. Ashcroft*, 389 F.3d 892, 899 (9th Cir. 2004), Judge Kozinski made this precise point. While agreeing with the result in that case, he argued that the majority erred in its analysis by progressing to a review of the facts in the record of conviction. *Id.* at 900–01. He recognized that the record of conviction will *never* settle ambiguity in cases "when the crime of conviction is broader *because it is missing an element of the generic crime altogether.*" *Id.* at 899 (emphasis added). In this scenario, he pointed out, a court can *never* satisfy the *Taylor* requirement that "a jury was actually required to find all the elements of" the comparison offense. *Id.* (quoting Taylor v. United States, 495 U.S. 575, 602 (1990)) (internal quotation marks omitted). In *Navarro-Lopez v. Gonzales*, the Ninth Circuit, sitting en banc, cited approvingly to Judge Kozinski's analysis, stating "[w]hen the crime of conviction is missing an

tisectional or written in the disjunctive is recourse to the record of conviction sanctioned in order to settle the ambiguity about what section the person was convicted under.[68]

Even certain multisectioned or disjunctive statutes must be treated in the same way. A statute is divisible with respect to a ground of removal only if *some, but not all,* of the different offenses it defines result in removal. If *all* of the different offenses trigger removal, then the statute is in some sense divisible, but it is not divisible vis-à-vis the removal grounds. For example, if a statute defines crimes involving the elements X and (Y or Z). If both Y and Z trigger removal, there is no reason for the adjudicator to consult the record of conviction. Under either set of elements (X and Y) or (X and Z), the conviction falls within the removal ground.

An example of irrelevant divisibility would be a false imprisonment statute that requires confinement by force or confinement by threat. If both types of confinement result in removal, the fact that the statute is written in the disjunctive is irrelevant for the purpose of immigration law.

B. *The Minority or Fact-Finding Rule*

As discussed in detail below, the BIA and many federal courts have generally adopted the majority, elements test approach. In a minority of cases, however, the BIA and federal courts appear to sanction recourse to the record of conviction even when a statute is nondivisible. These cases permit a judge or adjudicator to look at *all* facts contained in the record of conviction, even to extraneous facts that describe the manner in which the crime was carried out.

We can see how the majority and minority rules diverge by reference to the second example above. If a statute contains only elements X and Y, but removal is triggered by Z, the majority approach does not permit review of the record of conviction. Under the minority rule, however, an adjudicator would be permitted to look at the record to decide whether fact Z was part of the underlying conduct. In the firearm and sexual abuse of a minor examples, the adjudicator would be permitted to look at the record of conviction to see if facts there indicated that a firearm was used or that the inappropriate conduct was sexual in nature. While the term "modified categorical approach" is used to

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element of the generic crime altogether, we can never find that 'a jury was actually required to find all the elements of' the generic crime." 503 F.3d 1063, 1073 (9th Cir. 2007) (citing *Li*, 389 F.3d at 899–901 (Kozinski, J., concurring)).

68. As noted earlier, either the express terms of the statute or case law interpretation of the terms may be the source of the mismatch of elements. *See supra* note 64 and accompanying text.

describe both the minority and majority approaches, the approaches are radically different. In the first, the record of conviction serves only to clarify which of multiple possible crimes in a statute was the actual crime of conviction. The majority rule is an elements test because it permits recourse to the record of conviction only to clarify what facts were established to prove elements of the crime. In the second, the minority rule, *any* fact in the record of conviction can be used to establish the nature of the conviction, even if the fact was not necessary to an element. The minority rule is a fact-finding rule because it permits adjudicators to engage in fact-finding from the record of conviction.[69]

C. *Board of Immigration Appeals Decisions*

Long before the terms "categorical" or "modified categorical" analysis appeared in case law, the BIA employed a "divisible statute" test to determine when it could look at a record of conviction.[70] The BIA's first reference to a "divisible" statute appears in 1944.[71] In *In re S—*, the BIA articulated its divisibility approach in the following terms:

> It is only where the statute includes within its scope offenses which do and some which do not involve moral turpitude, and is so drawn that the offenses which do embody moral obloquy are defined in divisible portions of the statute and those which do not in other such portions, that *the record of conviction . . . is examined to ascertain therefrom under which divisible portion of the statute the conviction was had* and determine therefrom whether moral turpitude is involved.[72]

Countless BIA decisions have employed the divisibility approach, including the decisions displaying the fullest articulations of how to analyze criminal convictions. These decisions forbid general fact-finding from what is contained in the record of conviction, authorizing recourse to the record only "for the purpose of determining under which section

69. The Second Circuit has discussed how this fact-finding approach undermines the commitment to basing deportation or inadmissibility on an immigrant's conviction, as opposed to underlying conduct. *See* Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 127 (2d Cir. 2007).

70. The first use of the term "categorical approach" by the BIA appears to be in *Matter of Alcantar*, 20 I. & N. Dec. 801, 809 (B.I.A. 1994).

71. *In re* T—, 2 I. & N. Dec. 22, 23 (B.I.A. 1944) ("If one statute defines several crimes, some of which involve moral turpitude and some of which do not, and the statute is divisible, it is permissible to ascertain by examination of the record of conviction whether the particular offense involved moral turpitude."); *see also In re* S—, 2 I. & N. Dec. 353, 357 (B.I.A. 1945) (permitting review of the record of conviction only where the statute is divisible or separable and so drawn as to include within its definition crimes "which do and some which do not involve moral turpitude").

72. 2 I. & N. Dec. at 357 (emphasis added).

or clause of the statute the conviction occurred."[73]

In *In re Sweetser*, for example, the BIA described at length its categorical approach in the context of an analysis of a "crime of violence" aggravated felony.[74] The BIA stated that its "approach does not involve an inquiry into facts previously presented and tried."[75] Review of the record of conviction is appropriate only to consider "facts *necessarily decided* by the prior conviction."[76] The BIA's emphasis on "necessary" facts rather than on any facts contained in a record of conviction demonstrates that recourse to the facts in the record is appropriate only if the fact was used to establish an element.[77]

Similarly, in *In re Madrigal-Calvo*, the BIA considered whether a conviction for criminal possession of a weapon was a firearm offense where a firearm was one of many weapons defined under the statute.[78] The BIA stated that "there must be proof that possession of a firearm is an integral *element* of the crime of which the respondent was convicted."[79] More recently, in *In re Sejas*, the BIA held that a conviction for assault and battery against a family or household member under Virginia law was not a crime involving moral turpitude.[80] The BIA stated that the proper test involved looking "to the *elements* of the statute"[81] and that looking to the record of conviction was only appropriate if the statute was divisible and the record lead to the "conclu[sion] that the respondent was convicted under *elements* of the Virginia statute that would constitute a crime involving moral turpitude."[82]

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73. *In re* R—, 2 I. & N. Dec. 819, 826 (B.I.A. 1947); *see also In re* Vargas-Sarmiento, 23 I. & N. Dec. 651, 654 (B.I.A. 2004) (when statute is divisible it is permissible to look at the record of conviction); Matter of Short, 20 I. & N. Dec. 136, 137 (B.I.A. 1989) ("Only where the statute under which the respondent was convicted includes some offenses which involve moral turpitude and some which do not do we look to the record of conviction . . . ."); Matter of Lopez, 13 I. & N. Dec. 725, 726–27 (B.I.A. 1971) (declining to make inferences off of language in indictment to determine whether noncitizen was convicted of voluntary or involuntary manslaughter); *In re S*—, 2 I. & N. Dec. at 362 (using divisibility analysis to narrow statutory options and concluding that knowingly making false statements in an application for registration as an alien was not a crime involving moral turpitude). Consistent with its approach, the BIA noted that state courts have held that certain "averments" in a charging document "may be considered surplusage." *In re* M—, 2 I. & N. Dec. 871, 873 (B.I.A. 1947).

74. 22 I. & N. Dec. 709, 712–13 (B.I.A. 1999).

75. *Id.* at 714.

76. *Id.* at 715 (emphasis added).

77. Similarly, in *In re Teixeira*, the BIA stated that "the firearms ground of deportability hinges on the existence of a *conviction*." 21 I. & N. Dec. 316, 320 (B.I.A. 1996) (emphasis added). As such, the only "material evidence is that which discloses what type of offense the *conviction* encompasses." *Id.* (emphasis added).

78. 21 I. & N. Dec. 323, 323 (B.I.A. 1996).

79. *Id.* at 325 (emphasis added).

80. 24 I. & N. Dec. 236, 238 (B.I.A. 2007).

81. *Id.* at 237 (emphasis added).

82. *Id.* at 238 (emphasis added).

After identifying the elements of the crime, the BIA has generally applied a "minimum conduct" test, asking whether *all* of the conduct prohibited by the elements falls within the ground of removal. For example, when determining whether a conviction involves "moral turpitude" the adjudicator would determine whether the most minimal conduct prohibited by the statute involves moral turpitude.[83] Most grounds of removal require this minimum conduct approach to analyzing convictions.[84]

D. *Supreme Court Decisions*

The Supreme Court has addressed the methodology for categorizing convictions, both under immigration law and for the purpose of criminal sentencing enhancement based on recidivism. In 1992 and 2005 the Supreme Court decided two landmark cases in the criminal sentencing context that have influenced the legal landscape regarding the immigration analysis of crimes. In *Taylor v. United States*, the Supreme Court established a uniform standard for determining whether a prior conviction falls within a category of crimes that can serve as predicates for enhancing a federal sentence.[85] The Court construed the meaning of the word "burglary" as used in 18 U.S.C. § 924(e), the Career Criminals Amendment Act of 1986 ("CCAA"), as the "generic" contemporary meaning of burglary.[86] When determining whether a particular prior offense constitutes "generic burglary," a trial court must

83. The Second Circuit has described the minimum conduct test as requiring that "every set of facts violating a statute must satisfy the criteria for removability in order for a crime to amount to a removable offense; the BIA may not justify removal based on the particular set of facts underlying an alien's criminal conviction." Dickson v. Ashcroft, 346 F.3d 44, 48 (2d Cir. 2003).

84. A possible exception is the second prong of the "crime of violence" definition at 18 U.S.C. § 16 (2000), which is incorporated into the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(F) (2000). The first prong, section 16(a), straightforwardly requires a minimum conduct test, encompassing "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 16(a) (2000); *see also* United States v. Fulford, 267 F.3d 1241, 1250 (11th Cir. 2001). Section 16(b), however, includes "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." § 16(b). This provision instructs an adjudicator first to determine the elements of the crime and then ask whether it is the nature of the crime to involve "a substantial risk that physical force" against a person or property. *See id.*; *see also* Chery v. Ashcroft, 347 F.3d 404, 408 (2d Cir. 2003) ("Doubtless, cases can be imagined where defendant's conduct does not create a genuine probability that force will be used, but the *risk* of force remains inherent in the offense."). For a discussion of the methodology in 16(b) cases, see Canada v. Gonzales, 448 F.3d 560, 566–73 (2d Cir. 2006), and United States v. Gonzalez-Lopez, 911 F.2d 542, 547 (11th Cir. 1990).

85. 495 U.S. 575, 602 (1990).

86. *Id.* at 598–99. The court found that "the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598.

evaluate the state statute under which the prior conviction occurred to determine whether the statute encompasses the "basic elements" of generic burglary.[87] If the statute defines burglary "more broadly," the Court held that the sentencing statute "mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions."[88]

The Court went on to state, however, that the categorical approach "may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary."[89] The express holding in *Taylor* was the following:

> We therefore hold that an offense constitutes "burglary" for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to "generic" burglary, or the charging paper and jury instructions *actually required* the jury to find all the *elements* of generic burglary in order to convict the defendant.[90]

Fifteen years later, the Supreme Court in *Shepard v. United States* addressed whether facts contained in the record of conviction in nonjury cases (bench trials and plea cases) were relevant in sentencing enhancement cases.[91] The Court held that the trial court could look at certain records to determine whether "the plea had '*necessarily*' rested on the fact identifying" the conviction as within the generic definition at issue.[92] A trial court, however, is precluded from looking to documents outside the record of conviction, even though they are undisputed and "free from any inconsistent, competing evidence on the pivotal issue of fact."[93] In *Shepard*, as in *Taylor*, the Supreme Court framed the issue as whether the prior conviction "'necessarily' involved (and a prior plea necessarily admitted) facts equating to generic burglary."[94]

The Supreme Court has decided a series of immigration cases, each of which either tacitly or expressly employed the categorical approach. In *Leocal v. Ashcroft*, the Supreme Court considered whether a conviction under Florida's aggravated DUI statute constituted a "crime of violence" under 18 U.S.C. § 16(a) or 16(b) for the purposes of the

87. *Id.* at 599.
88. *Id.* at 599–600.
89. *Id.* at 602.
90. *Id.* (emphasis added).
91. 544 U.S. 13, 15 (2005).
92. *Id.* at 20–21 (citing *Taylor*, 495 U.S. at 602) (emphasis added).
93. *Id.* at 22.
94. *Id.* at 24.

aggravated felony definition in immigration law.[95] Holding that it did not, the Court considered only the elements of the statute in its analysis. The Court found that the statute could be violated by a negligent intent only and held that negligence was insufficient to make the offense a crime of violence under either section 16(a) or 16(b).[96] In so ruling, the Court at no point consulted the record of conviction in order to determine whether, in fact, the mental state of the noncitizen was something more than negligent.[97] Although the Court did not discuss why it limited itself to review of the statute, presumably it did so because Florida's statute was not divisible and the Court was following the majority rule's preclusion on consulting the record of conviction for extraneous facts.

In *Lopez v. Gonzales*, the Supreme Court also employed a categorical approach to consider whether a state felony conviction for aiding and abetting another person to possess cocaine constitutes an aggravated felony under immigration law.[98] The aggravated felony definition includes "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of Title 18)."[99] While "illicit trafficking" is undefined in the statute, the phrase "a drug trafficking crime" is defined as "any felony punishable under the Controlled Substances Act" or under two other enumerated federal statutes.[100] The Supreme Court in *Lopez* held that a state drug offense constitutes a drug trafficking aggravated felony under the Controlled Substances Act "*only* if it proscribes conduct punishable as a felony under that federal law."[101]

The Court took as its starting point the plain language of the phrase "illicit trafficking," finding that "ordinarily 'trafficking' means some sort of commercial dealing."[102] "Commerce," the Court noted, is "no element" of the crime of helping someone else to possess.[103] To qualify as an illicit trafficking offense under *Lopez*, a state offense must have a minimum element of "commercial dealing" or, at the very least, strictly correspond to a *federal* felony.[104] Under this federal felony approach,

95. 543 U.S. 1, 3 (2004). The Court's decision overruled the Eleventh Circuit's decision in *Le v. U.S. Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam). *Leocal*, 543 U.S. at 6.

96. *Leocal*, 543 U.S. at 11.

97. One could imagine a set of facts alleged in the charging document or contained in a factual basis for a plea that, for example, indicated that the defendant intentionally crashed his car into another.

98. 127 S. Ct. 625, 629 (2006).

99. 8 U.S.C. § 1101(a)(43)(B) (2000).

100. 18 U.S.C § 924(c)(2) (2000).

101. 127 S. Ct. at 633 (emphasis added). The Court rejected the government's argument that all state drug offenses designated as felonies under state law, including the aiding and abetting possession offense at issue in *Lopez*, qualify as "illicit trafficking." *Id.* at 629.

102. *Id.* at 630.

103. *Id.*

104. *Id.* at 630–31.

courts must closely analyze the requirements for conviction of a state drug offense to determine whether these requirements correspond to those of a federal drug *felony*.[105] Only those state drug offenses with true "federal felony counterpart[s]" constitute aggravated felonies.[106] Although the Court did not label it as such, the Court's approach in comparing state crimes to a hypothetical federal felony is an example of *Taylor*'s categorical approach.

The Supreme Court in *Gonzales v. Duenas-Alvarez* has settled any lingering debate on whether the *Taylor* approach applies in the immigration context, at least with respect to aggravated felonies employing a generic definition of a crime.[107] The Court expressly employed *Taylor*'s categorical approach to consider whether a California theft conviction corresponded to a generic definition of theft, as required under the theft aggravated felony ground.[108] Holding that it did, the Court rejected the petitioner's argument that California case law had expanded the elements of the crime beyond the generic definition.[109] In so doing, the Court acknowledged approvingly that "[i]n determining whether a conviction . . . falls within the scope of a listed [aggravated felony] offense . . . , the lower courts uniformly have applied the approach this Court set forth in *Taylor v. United States*."[110] Addressing the appropriate methodology for when state statutes define a crime "more broadly" than the

105. *See id.* 631–32.

106. *Id.* (noting that a state offense is an aggravated felony if it is "a state offense *whose elements* include the elements of a felony punishable under the [Controlled Substance Act]") (emphasis added).

107. 127 S. Ct. 815 (2007). A "generic" crime in the aggravated felony definition is one whose elements are not defined by the statute but by the elements of the crime as established by the majority of states. *See supra* note 63.

108. 127 S. Ct. at 818–19.

109. *Id.* at 820–21. The Court rejected the petitioner's argument that state court interpretations of the minimum conduct needed to violate the elements of the California theft statute expanded the offense beyond the elements of generic theft. *Id.* at 822–23. The petitioners had argued that California had an expansive "natural and probable consequences" doctrine that, for example, would "hold an individual who wrongly bought liquor for an underage drinker criminally responsible for that young drinker's later (unforeseen) reckless driving." *Id.* at 821. Rejecting the petitioner's reading of California case law, the Court characterized the hypothetical prosecutions envisioned by the petitioner as an exercise in "legal imagination." *Id.* at 822. This language in the Court's opinion is consistent with the categorical approach and simply emphasizes that case law can interpret the elements in a way that creates divisibility. *See* supra note 17 and accompanying text. The Court was simply making the unsurprising statement that, when relying on a state court interpretation of statutory elements, litigants must be able to point to case law to support their hypothetical prosecutions. In contrast, where divisibility is due to express statutory language, courts presume that the state will prosecute all of the multiple offenses contained in the statute. *See* United States v. Grisel, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (no showing of a realistic probability of prosecution required when "a state statute explicitly defines a crime more broadly than the generic definition").

110. 127 S. Ct. at 818.

federal definition, the Court summarized the methodology in *Taylor*. It stated that *Taylor* permits a court "to go beyond the mere fact of conviction" to decide whether the "jury was *actually required* to find all the *elements* of" the crime in question.[111] *Shepard*, the Court noted, expanded the rule to nonjury cases, permitting inquiry into the "factual basis for the plea." The Court then expressly acknowledged that *Duenas-Alvarez* "concern[ed] the application of the [*Taylor*] framework."[112]

These cases demonstrate that, when immigration and criminal law depend on the nature of a prior conviction, the Supreme Court focuses on the facts that were necessarily decided in the prior criminal proceeding. *Taylor* focused on the "elements" that the jury was "actually required to find."[113] Similarly, *Shepard* permitted reliance only on facts that the plea had "'necessarily' rested on."[114] In the immigration context, the Court in *Leocal*, *Lopez*, and *Duenas-Alvarez* applied these rules, undertaking categorical analyses without reliance on nonelement facts.

E. *Applying the Majority Rule or Elements Test*

The BIA and federal courts have repeatedly employed the BIA's historical divisibility approach, interpreting *Taylor* and *Shepard* as consistent with it. The BIA has aptly summarized the methodology of the Supreme Court in *Shepard*, *Taylor*, and *Duenas-Alvarez* as permitting "reference to the statutory definition of the State offense or, *where that offense is 'divisible,'* by reference to admissible portions of the 'conviction record' *showing which prong of the divisible statute* led to the particular conviction."[115] As demonstrated by this summary, the BIA understands *Taylor* and *Shepard* as embodying its historical divisibility analysis. The BIA has elsewhere described its divisibility approach as

111. *Id.* at 819 (quoting Taylor v. United States, 495 U.S. 575, 602 (1990)) (emphasis added). The Court also acknowledged that some courts refer to this second step in the *Taylor* analysis as the "modified categorical approach." *Id.* (citing Conteh v. Gonzales, 461 F.3d 45, 54 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 3003 (2007).

112. *Id.* at 819. More recently, the BIA has construed the Supreme Court in *Duenas-Alvarez* as saying that "the record of conviction may be consulted when considering a 'divisible' statute." *In re* Gertsenshteyn, 24 I. & N. Dec. 111, 112 (B.I.A. 2007).

113. 495 U.S. at 602.

114. Shepard v. United States, 544 U.S. 13, 21 (2005).

115. *In re* Carachuri-Rosendo, 24 I. & N. Dec. 382, 389 (B.I.A. 2007) (emphasis added). In another case, the BIA characterized *Shepard*, *Taylor*, and *Duenas-Alvarez* as "all focus[ing] on the elements that necessarily were found by either a jury or a sentencing judge in the course of a determination of guilt" and stated that its own case law, "exemplified by *Matter of Pichardo* and *Matter of S—*, similarly focuses on the elements of a criminal statute when the question is the nature of the 'conviction' sustained by the alien." *In re Gertsenshteyn*, 24 I. & N. Dec. at 113 (citations omitted). The BIA, however, refrained from deciding whether the categorical and modified categorical approaches "are fully portable into the immigration arena." *Id.* at 113 n.1.

"an approach that parallels that outlined in *Taylor v. United States* and *Shepard v. United States*."[116] The BIA has acknowledged that "confusion has arisen" regarding when, and for what purpose, the record of conviction can be consulted, recognizing that some of its unpublished decisions may have permitted a "search" for "facts" that were not necessarily "elements."[117] In what amounts to a repudiation of this minority approach to facts in the record of conviction, the BIA stated that its "published law applies either a categorical or a divisibility analysis, where the actual *elements* leading to conviction *are the determining factor* for removal charges hinging on a conviction for a crime."[118]

Consistent with the BIA, federal courts of appeals have generally interpreted *Taylor* as embodying the divisibility approach. The Second Circuit has construed *Shepard* as sanctioning reliance on record of conviction facts in a plea only if both of two conditions apply: (1) the defendant "admitted or confirmed" the fact; *and* (2) the "plea 'necessarily rested' (i.e., because they constituted an *element* of the offense)" on the fact.[119] The Third Circuit has similarly characterized the rule as follows: "Where a statute covers both turpitudinous and non-turpitudinous acts . . . it is 'divisible,' and we then look to the record of conviction to determine whether the alien was convicted under that part of the statute defining a crime involving moral turpitude."[120] The court interpreted *Taylor* as framing the question as whether the ground of removal is triggered by conduct that is "*necessary* for" the "conviction."[121]

The Fourth Circuit has understood *Taylor* to permit review of the record of conviction when "the statute of conviction may, but does not necessarily, include all the *elements*" necessary for the ground of removal.[122] Record of conviction review is limited to assessing whether "the state court, in adjudging guilt, was required to find the *elements*"

116. *In re Gertsenshteyn*, 24 I. & N. Dec. at 112 (citations omitted). As an example of its divisibility approach, the BIA cited to its decision in *In re S*, 2 I. & N. Dec. 353, 357–58 (B.I.A. 1945).

117. *In re* Babaisakov, 24 I. & N. Dec. 306, 310–12 (B.I.A. 2007).

118. *Id.* at 312 (emphasis added).

119. Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 125 (2d Cir. 2007) (emphasis added); *see also* Dickson v. Ashcroft, 346 F.3d 44, 52 (2d Cir. 2003) (permissible to review "record of conviction for the limited purpose of determining whether [the alien] was convicted [under the branch of the statute that permits removal]").

120. Partyka v. Att'y Gen., 417 F.3d 408, 411 (3d Cir. 2005). In *Joseph*, the Third Circuit also followed the *Taylor* approach, refraining from looking at the record of conviction because the statute at issue did "not have any relevant disjunctive language." Joseph v. Att'y Gen., 465 F.3d 123, 128 (3d Cir. 2006).

121. Singh v. Ashcroft, 383 F.3d 144, 153 (3d Cir. 2004).

122. Soliman v. Gonzales, 419 F.3d 276, 284 (4th Cir. 2005) (citing Taylor v. United States, 495 U.S. 575 (1990)) (emphasis added).

needed for removal.[123] The Ninth Circuit, citing *Taylor*, has found that recourse to the record of conviction is appropriate to "narrow" the statutory options and to see whether the immigrant "pled guilty to elements that constitute a crime involving moral turpitude."[124] The Tenth Circuit characterized *Taylor* as requiring an inquiry into whether "the jury necessarily had to find" a "specified predicate offense" that would trigger removal.[125]

As courts of appeals have pointed out, *Taylor* itself involved a divisible statute, thus providing one example of a circumstance in which a court could look beyond the "fact of conviction."[126] *Taylor* contrasted state statutes that define burglary to "include entry of an automobile as well as a building" with generic burglary, which includes only entry of a building.[127] In such a case, the Court held that recourse to the charging document and jury instructions could be had to see if the "defendant was *charged* only with a burglary of a building, and that the jury *necessarily had to find* an entry of a building to convict."[128] The critical aspect of the Court's rule, as exemplified by its example, is that the state statute at issue expressly permitted violation in distinct, multiple ways. *Either* entry of an automobile *or* entry of a building was criminalized. In such a case, consideration of the record of conviction is permissible to resolve ambiguity arising from the disjunctive nature of a statute. Only in this scenario is review of the record permitted in order to clarify which of the multiple ways of violating the statute resulted in the conviction.

F. *Applying the Minority or Fact-Finding Approach*

While there is general consensus in favor of the BIA's divisibility

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123. *Id.* (emphasis added).

124. Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1169 (9th Cir. 2006) (quoting Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1020 (9th Cir. 2005)) (internal quotation marks omitted); *see also* Chang v. INS, 307 F.3d 1185, 1189–91 (9th Cir. 2002) (record of conviction must establish that the individual pleaded guilty to all of the elements necessary for removal). In *Navarro-Lopez v. Gonzales*, the Ninth Circuit, sitting en banc, applied the *Taylor* approach to the question whether an offense involved moral turpitude. 503 F.3d 1063, 1067 (9th Cir. 2007). In one of several dissents, Judge Bea argued that the *Taylor* approach was not appropriate because there is no "generic" federal crime of moral turpitude against which the elements of a state crime can be compared. *Id.* at 1085 (Bea, J., dissenting). This view, however, ignores the BIA's historical divisibility approach to analyzing crimes involving moral turpitude—an approach that tracks *Taylor*'s categorical approach. While it is true that there is no generic crime involving moral turpitude, the federal standard for what involves moral turpitude is provided by case law. The majority in *Navarro-Lopez* therefore correctly applied the *Taylor* approach, comparing the elements of the offense at issue to the case law on moral turpitude. *Id.* at 1068 (majority opinion).

125. Vargas v. Dep't of Homeland Sec., 451 F.3d 1105, 1109 (10th Cir. 2006) (quoting *Taylor*, 495 U.S. at 602) (alteration in original) (internal quotation marks omitted).

126. *See, e.g.*, *Singh*, 383 F.3d at 153.

127. 495 U.S. at 602.

128. *Id.* (emphasis added).

analysis (and reading *Taylor* and *Shepard* as consistent with it), a minority of BIA and federal court cases appear to ignore the rule in particular cases. The First Circuit has suggested that it need not follow the majority, elements test approach in immigration cases.[129] The Seventh Circuit has expressly broken from its prior precedent to rule that the BIA can look to underlying circumstances when determining whether a crime involves moral turpitude.[130]

The BIA has strayed from the majority, elements approach when analyzing whether particular theft offenses constitute crimes involving moral turpitude. In *Matter of Grazley*, for example, the BIA considered a theft statute that criminalized both temporary and permanent takings.[131] Finding that the statute was divisible, the BIA said, "[I]t is permissible to look beyond the statute to consider *such facts as may appear* from the record of conviction to determine whether the conviction was rendered under the portion of the statute dealing with crimes that do involve moral turpitude."[132] Even though the prosecution did not charge the offense as a "permanent" taking, the BIA nonetheless found it "reasonable to assume" that it had been a permanent taking because cash had been taken.[133] By making inferences from description of the way in which the crime had allegedly been carried out, the BIA followed the minority, fact-finding rule.

In another theft case, *In re Jurado-Delgado*, the BIA engaged in a similar analysis, deciding that a retail theft conviction was a crime involving moral turpitude because it found "that the nature of the offense is such that it is *reasonable to assume* that the taking is with the intention of retaining the merchandise permanently."[134] A number of older BIA decisions involving other types of crime also follow the minority approach.[135]

Federal courts of appeals have sometimes articulated the majority rule and then fallen short of applying it in practice. For example, the

129. Conteh v. Gonzales, 461 F.3d 45, 55 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 3003 (2007).

130. *See* Ali v. Mukasey, 521 F.3d 737 (7th Cir. 2008).

131. 14 I. & N. Dec. 330 (B.I.A. 1973). For application of the majority approach in theft cases, see *Wala v. Mukasey*, 511 F.3d 102 (2d Cir. 2007).

132. 14 I. & N. Dec. at 333 (emphasis added).

133. *Id.*

134. *In re* Jurado-Delgado, 24 I. & N. Dec. 29, 33–34 (B.I.A. 2006) (emphasis added). As support for its position, the BIA cited to *Matter of Grazley* and other old theft cases that also infer from charging document descriptions about what was allegedly taken, suggesting that it might view theft offenses as somehow exempt from its customary methodology. *Id.* The BIA, however, has never explained why it believes it is appropriate to abandon its minimum conduct analysis and make "reasonable" inferences from facts alleged in the record of conviction.

135. *E.g.*, *In re* P, 3 I. & N. Dec. 290 (B.I.A. 1948) (looking to facts in the charging documents to determine that a conviction for contributing to the delinquency of a minor was a crime involving moral turpitude).

Second Circuit in *Vargas-Sarmiento v. U.S. Department of Justice* stated that "a court applying the categorical approach may look beyond the language of the statute 'to the record of conviction for the limited purpose of determining whether the alien's conviction was under the branch of the statute that permits removal.'"[136] The court, however, then violated this rule by permitting inferences from a second-degree murder indictment, even though the noncitizen ultimately had pleaded guilty to a lesser charge.[137]

The First Circuit has taken a unique approach, declining to "transplant the [*Taylor*] categorical approach root and branch—without any modification whatever—into the civil removal context."[138] The court has held that "the government is not required to show that the jury in the prior criminal case necessarily found (or, where a guilty plea has taken place, that the defendant necessarily admitted) every element of an offense" that triggers removal.[139] Instead the court allowed the government to rely on any fact in the record of conviction to meet its burden of proving "by clear and convincing evidence" that the noncitizen's crime "involved every element of one of the enumerated offenses [that trigger removal]."[140] While recognizing that it was departing from the *Taylor* rule, the court believed that its approach was consistent with "the animating principle of *Taylor*."[141]

The court's decision is the classic articulation of the minority rule that a crime can be categorized by reference to any fact in the record of conviction.[142] Although the court believed that it was not sanctioning the BIA to "adjudicate guilt or mete out criminal punishment," it was doing precisely this. As discussed above, if immigration adjudicators rely on facts not necessarily decided in the criminal proceeding, they inevitably adjudicate the truth of these facts (i.e., the underlying con-

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136. 448 F.3d 159, 167 (2d Cir. 2006) (quoting Dickson v. Ashcroft. 346 F.3d 44, 48–49 (2d Cir. 2003)).

137. To reach its conclusion, the court made extensive inferences from the description in the initial charging document, including the inference that the description was inconsistent with the abortion prong of the statute. The charging document, however, gave a description that could plausibly describe a crime under the abortion prong, stating that the defendant "stabb[ed] [the victim] with a sharp instrument and thing, thereby inflicting divers wounds and injuries." *Id.* at 168. (internal quotation marks omitted). The case aptly demonstrates how limits on inductive reasoning are needed in order to prevent judicial speculation about the nature of an offense.

138. Conteh v. Gonzales, 461 F.3d 45, 55 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 3003 (2007).

139. *Id.*

140. *Id.* (citing *In re* Pichardo-Sufren, 21 I. & N. Dec. 330, 333 (B.I.A. 1996)).

141. *Id.* at 56.

142. *See supra* Part IV.B. Consistent with the minority approach, the court has permitted reliance on facts in a charging document pertaining to a count to which the defendant did *not* plead guilty. Montero-Ubri v. INS, 229 F.3d 319, 321 (1st Cir. 2000).

duct) in the first instance.[143]

The court's reasoning appears to stem from a misunderstanding related to the burden of proof in immigration proceedings. According to the court, it would impermissibly "elevate[ ] the government's burden" to "proof beyond a reasonable doubt" if the government had to establish that "facts were necessarily found by a criminal jury or admitted by the alien qua criminal defendant."[144] The court, however, is confusing the difference between establishing guilt beyond a reasonable doubt (the criminal proceeding) and establishing by clear and convincing evidence what was necessarily decided in the criminal proceeding beyond a reasonable doubt (the immigration proceeding). As discussed in Parts I and II, these are distinct inquiries. The first involves adjudication of guilt. The second involves adjudication of what facts were necessarily decided in the prior adjudication of guilt.[145]

In the recent case *Ali v. Mukasey*, the Seventh Circuit held that the BIA can rely on facts alleged in a document not included in the record of conviction when deciding whether an offense involved moral turpitude.[146] In so doing, the court expressly departed from its prior decisions, which had applied the U.S. Supreme Court's approach in *Taylor*.[147] The court's decision appears to be based on a flawed analysis of the BIA's decision in *Matter of Babaisakov*, a decision discussed below in Part VII.[148] The court mistakenly interpreted that decision as permitting immigration judges to make findings of fact about the underlying circumstances of an offense.[149] As discussed more fully below, the BIA's decision in *Matter of Babaisakov* did not sanction broad judicial fact-finding. To the contrary, the BIA held that underlying facts are relevant *only* when the statutory removal ground at issue is interpreted to permit review of underlying conduct.[150] In so holding, the BIA reaf-

143. By disguising "choice" as simply "following a rule," the minority, fact-finding rule is an example of what has been called a "vice of formalism." Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 513 (1988).

144. *Conteh*, 461 F.3d at 56.

145. The analysis in this article is consistent with the dissent in *Conteh*, which argues that removal depends on the existence of a "conviction," which requires an assurance that "the jury was actually required to find all the elements of the generic offense." *Id.* at 67. The dissent also makes the point that the "clear and convincing evidence" standard was inapplicable to the inquiry because the "BIA's determination that a given violation of a state or federal statute constitutes an aggravated felony presents a pure question of law." *Id.* at 68 (internal quotation marks omitted).

146. 521 F.3d 737, 743 (7th Cir. 2008).

147. *Id.* at 741 (discussing its prior decisions in *Hashish v. Gonzales*, 442 F.3d 572 (7th Cir. 2006), and *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005)).

148. 24 I. & N. Dec. 306 (B.I.A. 2007).

149. *Ali*, 521 F.3d at 742 (citing *Matter of Babaisakov* for the proposition that "the Board has decided that additional evidence may be taken by the immigration judge when necessary").

150. In *Matter of Babaisakov*, the BIA interpreted the removal provision at issue as permitting inquiry into certain facts underlying the offense. 24 I. & N. Dec. at 316.

firmed that it "applies either a categorical or a divisibility analysis, where the actual elements leading to conviction are the determining factor for removal charges hinging on a conviction for a crime."[151] Because the crime involving moral turpitude ground of removal requires a conviction, *Matter of Babaisakov* and the long line of cases discussed above in Parts III and IV mandate the majority categorical or divisibility approach. The Seventh Circuit therefore erred fundamentally when it understood *Matter of Babaisakov* as creating the blanket rule that underlying circumstances are always fair game when categorizing offenses in immigration law.

V. Eleventh Circuit Jurisprudence

This Part analyzes whether the Eleventh Circuit Court of Appeals uses the majority or minority approach to analyze the legal effect of a conviction under immigration law and in the analogous context of recidivist criminal sentencing. In immigration cases, the Eleventh Circuit generally adheres to the majority approach based on *Taylor*, although there is some divergence of theory from practice. In the criminal context, however, the court is significantly less uniform, sometimes interpreting *Taylor* as permitting judicial fact-finding from extraneous facts in the record of conviction.

The Eleventh Circuit's criminal sentencing jurisprudence is relevant to the court's immigration jurisprudence for two reasons. As discussed above, the BIA and courts cite to *Taylor* and *Shepard* as controlling, or at least guiding, the proper analysis of convictions under immigration law.[152] The way in which the Eleventh Circuit interprets these cases in both immigration and criminal cases is therefore relevant. Second, sentencing for the federal crime of illegal reentry after removal for an aggravated felony expressly requires an analysis of whether the prior crime falls within the immigration law definition of an aggravated felony under 8 U.S.C. § 1101(a)(42).[153] As the Supreme Court, federal courts, and the BIA have recognized, the term "aggravated felony" must be given the same meaning in the immigration law and criminal sentencing contexts.[154] Unless the method for deciding whether a crime is an

151. *Id.* at 312.

152. *See supra* Part IV.E.

153. *See* 8 U.S.C. § 1326(b)(2) (2000).

154. The Supreme Court in *Leocal* recognized that the definition of "crime of violence" in 18 U.S.C. § 16 provides a "general definition" in "both criminal and noncriminal" contexts. Leocal v. Ashcroft, 543 U.S. 1, 6–7 (2004). *Lopez* made clear that the aggravated felony definition must be interpreted consistently across the immigration and illegal reentry contexts. Lopez v. Gonzales, 127 S. Ct. 625, 629 n.3 (2006) (describing a circuit split and referencing both immigration and criminal sentencing cases); *see also* United States v. Estrada-Mendoza, 475 F.3d

aggravated felony is the same across both contexts, a noncitizen could be deemed an aggravated felon in one but not the other.

This is not to say that the reasoning and conclusions in criminal sentencing cases translate seamlessly into the immigration context. To the contrary, the two areas of law diverge in critical ways. For example, both the immigration law definition of an aggravated felony and various federal sentencing enhancement statutes and guidelines refer to the term "crime of violence." The relevant definitions of this term, however, vary significantly.[155] A divergence more directly related to the focus of this article, however, is that courts have interpreted particular sentencing guidelines as expressly sanctioning judicial fact-finding about the *conduct* underlying a prior conviction.[156] These cases are irrelevant to the analysis of grounds of removal that focus on a conviction immigration context, where the focus is on the conviction, not the underlying conduct.

A. *Immigration Jurisprudence*

The fullest example of the Eleventh Circuit articulating, and applying, the majority, elements approach is in *Jaggernauth v. U.S. Attorney General*, where the court considered whether a conviction based on a guilty plea under Florida's theft statute fell within the "theft" aggravated

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258, 261 (5th Cir. 2007) ("*Lopez* ineluctably applies with equal force to immigration and criminal cases."); *In re* Brieva-Perez, 23 I. & N. Dec. 766, 769 (B.I.A. 2005) (finding that the meaning of "crime of violence" at 18 U.S.C. § 16(b) must have a uniform meaning in both immigration and criminal sentencing law).

155. Different definitions of "crime of violence" appear in 18 U.S.C. § 16, 18 U.S.C. § 924(e)(2)(B), and section 4B1.2(a) of the *U.S. Sentencing Guidelines Manual*. *Compare* 18 U.S.C. § 16(b) (2000) ("crime of violence" is a felony that, "by its nature, involves a substantial risk [of] physical *force* against" a person or property) (emphasis added), *with* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2008) (an offense punishable by a year or more in prison that "involves conduct that presents a serious *potential* risk of physical *injury* to another") (emphasis added). The Eleventh Circuit in *United States v. Rutherford*, 175 F.3d 899, 905 (11th Cir. 1999), downplayed the significance of the difference in the definition. Other courts of appeals and the BIA have disagreed. *See In re Brieva-Perez*, 23 I. & N. Dec. at 769 (holding that circuit case law interpreting guidelines definition does not control interpretation under 18 U.S.C. § 16(b)); *In re* Sweetser, 22 I. & N. Dec. 709, 715–16 (B.I.A. 1999) (finding that cases interpreting guidelines definition not controlling in § 16(b) context). As the BIA has pointed out, a prior iteration of the sentencing guidelines referenced 18 U.S.C. § 16(b), thereby making controlling the court of appeals cases interpreting those guidelines. *See In re* B—, 21 I. & N. Dec. 287 (B.I.A. 1996).

156. Eleventh Circuit sentencing cases that fall into the latter category include *United States v. Breitweiser*, where the sentencing guideline provided for a doubling of the sentence if the defendant had a prior sex offense "defined as an 'offense consisting of *conduct* that would have been an offense' under" certain provisions. 357 F.3d 1249, 1255 (11th Cir. 2004) (citations and internal quotation marks omitted). The court noted that the guidelines expressly invited inquiry into the conduct underlying the prior conviction. *Id.* at 1255–56. Whether the Eleventh Circuit has correctly interpreted this guideline as sanctioning judicial fact-finding about prior conduct is a question outside the scope of this article.

felony ground at 8 U.S.C. § 1101(a)(43)(G).[157] The Florida theft statute was expressly divisible, criminalizing both "deprivation" and "appropriation" of property under separate subsections. The language of the charging document tracked the statute and did not settle the ambiguity concerning which subsection was charged by the prosecution.[158] Nor did the plea agreement specify a subsection. Following the generic definition of "theft" articulated by the BIA, the court found that an essential element of generic theft is the deprivation of property.[159] Citing to a BIA case that, in turn, cites *Taylor*, the Court articulated its methodology as looking "first . . . to the fact of conviction and the statutory definition of the offense."[160] Finding that the theft statute contains "two distinct intent standards" and that appropriation is different from deprivation, the court then turned to the record of conviction.[161] The court found that the information, plea, judgment, and sentence "do not provide clear, unequivocal and convincing evidence" that the theft "conviction" was for a deprivation.[162]

By finding two "distinct intent standards" before looking to the record of conviction, the court followed the majority rule that recourse to the record of conviction is appropriate only in cases where the statute defines multiple crimes through multiple sets of elements. The court was performing an elements test, forbidding the inference that there had actually been a deprivation of property from the facts in the record of conviction. When analyzing the charging document, the court discusses only whether the document referenced the deprivation prong of the statute. At no point does the court discuss the extraneous language in the charging document purporting to describe facts underlying the crime, (i.e., the allegation that a "merchant['s]" property was involved). This approach is consistent with the majority rule that precludes considera-

157. 432 F.3d 1346 (11th Cir. 2005).

158. *Id.* at 1349. The charging document for grand theft and resisting a merchant alleged that the petitioner "did unlawfully, while committing or after committing theft of property, resist the reasonable effort of a merchant or merchant's employee to recover the property which the merchant or merchant's employee had probable cause to believe the said defendant had concealed or removed from its place of display or elsewhere." *Id.* n.1.

159. *Id.* at 1353 (citing *In re* V-Z-S-, 22 I. & N. Dec. 1338, 1346 (B.I.A. 2000)).

160. *Id.* (citing *In re* Batista-Hernandez, 21 I. & N. Dec. 955, 970 (B.I.A. 1997) (citing Taylor v. United States, 495 U.S. 575 (1990)).

161. *Id.* at 1354. The court looked to *Black's Law Dictionary* for the meaning of "appropriation," defining it as the "exercise of control over property; a taking of possession" that did "not necessarily entail that the property owner be deprived his or her rights to the property's use or benefits." *Id.* (internal quotation marks omitted).

162. *Id.* at 1355. The court's citation to the government's evidentiary burden suggests that it understood the inquiry to be factual rather than legal, in apparent contradiction to its taking a categorical approach.

tion of underlying facts and inferences from facts when determining the nature of the conviction.

The court's methodology has not always been as clearly articulated as in *Jaggernauth.* In a case involving the "sexual abuse of a minor" aggravated felony ground, for example, the court suggests that it would have looked even to the "underlying facts" if the record had contained them or if the immigration judge had "made . . . factual findings about [the petitioner]'s conduct."[163] The court ultimately, however, analyzed only the elements of the offense, stating that a crime only qualifies as "sexual abuse of a minor" if the "full range of conduct" prohibited by the statute "falls within the meaning of the term."[164] Consistent with this approach, the court has rejected claims by immigrants who argued that the court should look beyond the elements of the crime to evaluate extraneous information, such as whether the state characterized the offense to be as serious as other offenses.[165]

In some cases, the court has articulated the majority approach, but then has failed to fully apply it in practice. In *Moore v. Ashcroft*, for example, the court did not consider whether divisibility in the criminal statute's mens rea requirement could put the conviction outside the "fraud or deceit" aggravated felony definition.[166] The aggravated felony provision at issue required an element of "fraud or deceit," and the statute of conviction, 18 U.S.C. § 656, criminalized misapplication of bank funds, requiring that the defendant have "acted with intent to injure *or* defraud the bank."[167] The court held that this statute "necessarily involves fraud or deceit," but did not consider whether the "intent to injure" element was distinct from "intent to defraud."[168]

The court has not always conducted a detailed inquiry into the minimum conduct needed to violate a criminal statute. In *Sosa-Martinez v. U.S. Attorney General*, for example, the court correctly analyzed only the elements of the crime, but did not appear to consider whether all "intentional battery" offenses that cause "great bodily harm" necessarily

163. Bahar v. Ashcroft, 264 F.3d 1309, 1311 (11th Cir. 2001).

164. *Id.*

165. *Cf.* Taylor v. United States, 396 F.3d 1322, 1329 (11th Cir. 2005) ("[T]he INA controls, and it contains no qualification for offense level or seriousness under state law.").

166. 251 F.3d 919, 923 (11th Cir. 2001).

167. *Id.* (quoting United States v. Morales, 978 F.2d 650, 652–53 (11th Cir. 1992)) (emphasis added).

168. *Id.* The petitioner's briefs to the court did not raise this issue and the court did not consider it sua sponte. In a case decided a year later, the Third Circuit ruled that the "intent to injure" language makes the statute divisible and not an aggravated felony. Valansi v. Ashcroft, 278 F.3d 203, 217 (3d Cir. 2002) (holding that the offenses involving deceit or fraud qualify as aggregated felonies while offenses requiring only a "specific intent to injure" do not).

involve moral turpitude.[169] Specifically, the court did not analyze whether "great bodily harm" must be *an intended result* before a battery involves moral turpitude.[170] Instead, the court summarily concluded that the issue whether the conviction involved moral turpitude was one "easily answered in the affirmative."[171]

Also in short decisions, the court considered four cases involving similar, but not identical, state convictions and several different "crime of violence" definitions.[172] The court engaged in minimum conduct tests and concluded that the convictions at issue were crimes of violence.[173] The court did not engage in a detailed analysis of the language differences between the various statutes and sentencing guideline at issue and concluded that even the most de minimis unwanted touching could constituted a "crime of violence," even when the definition at issue required that "physical force" be an element of the crime.[174] The

169. 420 F.3d 1338, 1341 (11th Cir. 2005). Although the court repeatedly emphasized that its holding related to the crime of aggravated battery under section 784.045, Florida statutes, the court recounted the elements of section 784.03, which defines felony battery.

170. The BIA has found that a battery statute requiring an "intent to cause physical injury" involved turpitude while suggesting that statutes requiring only an intent to carry out the act (and not the intended result) may not. *In re* Solon, 24 I. & N. Dec. 239, 243–44 (B.I.A. 2007).

171. 420 F.3d at 1342. Similarly, in *Vuksanovic v. U.S. Attorney General*, the court also engaged in only a brief minimum conduct analysis whether a second-degree arson conviction was a crime involving moral turpitude, even though the minimum conduct needed to violate the statute involved causing damage by fire to one's own structure under any circumstances not amounting to first-degree arson. 439 F.3d 1308, 1311 (11th Cir. 2006).

172. *See* discussion *supra* 155 for differences in the "crime of violence" definitions in various statutes and the federal sentencing guidelines.

173. *See* Hernandez v. U.S. Att'y Gen., 513 F.3d 1336, 1340 (11th Cir. 2008) (deciding that Georgia simple battery conviction is a crime of violence under 18 U.S.C. § 16(a)); United States v. Llanos-Agostadero, 486 F.3d 1194, 1198 (11th Cir. 2007) (holding that conviction for Florida aggravated battery on a pregnant woman, which included unlawful touching, was crime of violence under *U.S. Sentencing Guideline* § 2L1.2(b)); United States v. Griffith, 455 F.3d 1339, 1345–46 (11th Cir. 2006) (Georgia simple battery conviction is crime of domestic violence under the ACCC, 18 U.S.C. § 922(g)(9)); United States v. Glover, 431 F.3d 744, 749 (11th Cir. 2005) (Florida conviction for battery on a law enforcement officer, which includes unlawful touching, is a crime of violence under *U.S. Sentencing Guideline* § 4B1.2).

174. For example, the court did not consider that Florida's simple battery statute (which is incorporated into Florida's battery on a pregnant woman and on a law-enforcement officer statutes) includes spitting on another person. *See* Johnson v. State, 858 So. 2d 1071, 1072 (Fla. Dist. Ct. App. 2003). In holding that a de minimis touching is a crime of violence, the court took a position at odds with decisions of the BIA and other federal courts. *See, e.g.*, Ortega-Mendez v. Gonzales, 450 F.3d 1010, 1012 (9th Cir. 2006) (California battery conviction that included unlawful touching not a crime of violence under 18 U.S.C. §16); Servin v. Gonzales, 186 F. App'x 780, 782 (9th Cir. 2006) ("Battery . . . which only requires the least touching, is broader and does not fall within the federal definition of a crime of violence under the 18 U.S.C. § 16(a) . . . .") (internal quotation marks omitted); United States v. Gonzalez-Chavez, 432 F.3d 334, 337 (5th Cir. 2005) (discussing the Florida battery statute and finding in the criminal reentry context that unwanted touching under the statute lacks "as an element the use, attempted use, or threatened use of physical force against the person of another"); Gonzalez-Garcia v. Gonzales, 166 F. App'x 740, 743 (5th Cir. 2005); Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003) (finding unlawful

court also failed to consider the relevancy of the Supreme Court's decision in *Leocal v. Ashcroft*—a decision that characterized the plain language of the term "crime of violence" in 18 U.S.C. § 16 as "suggest[ing] a category of violent, active crimes."[175]

B. *Criminal Sentencing Jurisprudence*

The Eleventh Circuit's approach to categorizing prior convictions for the purpose of sentencing enhancement is even less uniform. The court appears to adopt the majority, elements test approach in some cases, while in others it does not. In still other cases, the court's decisions are subject to both interpretations. When the court expressly breaks from the majority approach, it interprets *Taylor* and *Shepard* as establishing an evidentiary rule for judicial fact-finding that permits reliance on any fact in the record of conviction.

In the leading case *United States v. Spell*, a case decided after *Taylor* but before *Shepard*, the Eleventh Circuit considered whether the court was permitted to look behind the judgment of conviction in a "career criminal" U.S. Sentencing Guideline case.[176] The case involved whether the defendant's prior Florida burglary conviction was a "crime of violence" under Guideline section 4B1.1 and therefore a basis for sentencing enhancement. While the court held that *Taylor* did not strictly control the analysis because that case involved the ACCA enhancement statute, the court nonetheless found that the reasoning of *Taylor* applied "with equal force to decisions under §§ 4B1.1 and 4B1.2."[177] The court stated that "a district court only may inquire into the conduct surrounding a conviction if ambiguities in the judgment make the crime of violence determination impossible from the face of

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touching is not a crime of violence and distinguishing the meaning of force in physics from its meaning in the legal context, which requires violence as opposed to contact); Chrzanoski v. Ashcroft, 327 F.3d 188, 193 (2d Cir. 2003) (finding Connecticut assault conviction not a crime of violence because "[n]othing in that definition nor in the language [of the statute] requires the government to prove that force was used in causing the injury"); United States v. Gracia-Cantu, 302 F.3d 308, 312 (5th Cir. 2002) (defendant's prior Texas state court conviction for injury to child was not a crime of violence under 18 U.S.C. §16); *In re* Sanudo, 23 I. & N. Dec. 968, 974 (B.I.A. 2006) (California conviction for domestic battery not a crime of violence); *In re* Small, 23 I. & N. Dec. 448, 449 n.1 (2002) (interpreting § 16(a) to require that the "offense . . . involve as an element the use of violent or destructive physical force" and finding that sexual abuse in the second degree is not crime of violence because it can involve a mere touching); *see also* United States v. Landeros-Gonzales, 262 F.3d 424, 426 (5th Cir. 2001) (conviction for criminal mischief is not crime of violence because it does not involve violent or destructive force). Full analysis of the court's reasoning in *Hernandez*, *Llanos-Agostadero*, *Griffith*, and *Glover* is beyond the scope of this article.

175. 543 U.S. 1, 11 (2004).

176. 44 F.3d 936, 937 (11th Cir. 1995).

177. *Id.* at 939.

the judgment itself."[178] The court makes clear, however, that only "the conduct *of which the defendant was convicted* is the focus of the inquiry."[179] The Florida burglary statute at issue was divisible, encompassing three different burglary situations. As such, the district court "correctly went beyond the face" of the judgment to determine whether the conviction was under that portion of the burglary statute that constituted a crime of violence.[180] The court, however, remanded the case because the district court relied on the charging document without first evaluating whether the defendant had pleaded guilty to the listed charge.

Although some of the language in *Spell* suggests that the court understood "look[ing] behind" the statute and judgment as "looking behind" the elements of the crime, the decision at no point goes beyond the facts necessarily decided in the prior proceeding.[181] To the contrary, by limiting review of the record of conviction to determining which section of a divisible burglary statute was at issue, the court followed *Taylor* and the majority, elements test approach.[182]

Later decisions understood *Spell* in precisely this way. In *United States v. Gay*, the court cited to *Spell* when declining to review a state court's record of conviction on the ground that the state statute at issue was "not ambiguous on its face."[183] Similarly, in *United States v. Krawczak*, the court characterized *Spell* as permitting review of the record of conviction only in "instances where the judgment of conviction and the statute are ambiguous."[184] By an "ambiguous" statute, the court meant a statute that is divisible, encompassing different offenses. The court expressly found that it was improper to look to the record of conviction in cases where the statute "does not encompass multiple degrees of offenses."[185] Because the statute at issue in *Krawczak*, unlike the statute in *Spell*, did not "differentiate" between offenses in a relevant way, the

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178. *Id.*

179. *Id.* at 940.

180. *Id.*

181. *Id.* at 939–40.

182. In other cases, however, the court reads *Taylor* as essentially involving an elements test. In *United States v. Miles*, for example, the court remanded a case because the lower court failed to follow the *Taylor* approach. 290 F.3d 1341, 1347 (11th Cir. 2002). In so doing, it characterized *Taylor* as holding that a burglary conviction can serve as a predicate for enhanced sentencing under the ACCA "only if the conviction is for a crime involving the elements of 'generic' burglary." *Id.*

183. 251 F.3d 950, 952 (11th Cir. 2001). A number of courts, however, have disagreed with the court's conclusion in *Gay* that escape—including nonviolent "walkaway" escapes—are crimes of violence. *See* U.S. v. Taylor, 489 F.3d 1112, 1114–15 (11th Cir. 2007) (Hill & Wilson, JJ., concurring dubitante) (reviewing cases and expressing view that escape is not categorically a crime of violence).

184. 331 F.3d 1302, 1306 (11th Cir. 2003).

185. *Id.* at 1307.

court held that it was error for the district court to look at the record of conviction.[186]

The prior conviction at issue in *Krawczak* was a 1994 conviction for aiding and abetting the transportation of illegal aliens under 8 U.S.C. § 1324(a)(1)(B). While the sentencing guideline differentiated between smuggling offenses committed for gain and those not committed for gain, the statute did not. The court found that there was no reason to consult the record of conviction because the statute did not include as an element what was necessary to enhance. The court's reasoning in *Krawczak* tracks the divisibility analysis of the BIA and *Taylor*. Even if the record of conviction had contained allegations suggesting that the smuggling had been for gain, these would be extraneous facts describing the manner in which the crime had allegedly been carried out. The facts would have been irrelevant to the prior criminal proceedings and therefore would not have been adjudicated. If, in the context of a later sentencing enhancement proceeding, a court relied on allegations that the smuggling was for gain, the court would be impermissibly adjudicating guilt in the first instance.

Although the court in *Krawczak* routinely refers to *Taylor* and *Shepard* as authorizing limited judicial "fact-finding," the court never suggests that judges can adjudicate facts that were not necessarily decided during the prior criminal proceeding.[187] Before *Krawczak*, the court followed the same approach, remanding a case because the lower court had failed to follow *Taylor.*[188] In so doing, the court characterized *Taylor* as holding that a burglary conviction can only serve as a predicate for enhanced sentencing "if the conviction is for a crime involving the *elements* of 'generic' burglary."[189]

The court has taken a very narrow view of what qualifies as an "elements" test. In *United States v. Fulford*, for example, the court understood *Spell* as adopting the *Taylor* approach, but characterizes

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186. *Id.*

187. As discussed in Part II, deciding what facts were decided previously may accurately be described as a factual instead of a legal inquiry, but it does not involve fact-finding of guilt or innocence. Such "fact-finding" does not transgress on the core function of the jury. The court has often referred to the categorization of a prior conviction as a factual inquiry. For example, in *United States v. Esquivel-Arellano*, the defendant in a reentry case had argued that the question whether his crime was an aggravated felony was a factual question that had to be heard by a jury under the reasoning of *Apprendi*. 208 F. App'x 758, 761 (11th Cir. 2006). The court disagreed, but not because it disagreed with the defendant's characterization of the inquiry as a factual instead of legal one. The court determined that a judge can determine the nature of a prior conviction. The court, however, has not always been consistent on this point. In *United States v. Gibson*, the court referred to the judicial inquiry into the nature of a conviction a question of law. 434 F.3d 1234, 1243 (11th Cir. 2006).

188. *See* United States v. Miles, 290 F.3d 1341, 1347 (11th Cir. 2002).

189. *Id.* (emphasis added).

neither as calling for an "elements" test.[190] *Fulford* involved the three-strikes statute, 18 U.S.C. § 3559, which defined a "serious violent felony" firearm offense as having the "elements" described in 18 U.S.C. § 924(c). Pointing to the "elements" requirement of that statute, the court characterized this as a language difference from the guideline at issue in *Spell* and the provision at issue in *Taylor*.[191] Because an elements test was expressly required under the firearm enhancement provision, the court reasoned that it could not look beyond the statute to the record of conviction to ascertain the nature of the conviction. In so doing, the court did not have occasion to consider whether reviewing the record of conviction only to settle ambiguity when a statute is divisible would qualify as an "elements" test.

As discussed in Parts II.C. and IV, it oversimplifies the choice of available rules to say that the elements test is always inconsistent with looking at the record of conviction. Looking to *any* fact in the record of conviction is "judicial fact-finding" rather than an elements test. In contrast, looking to the record to settle ambiguity regarding essential facts only when the criminal statute is divisible—the majority rule in the immigration context—is a true elements test.[192]

Courts of appeals other than the Eleventh Circuit have expressly adopted the divisibility or majority approach in criminal sentencing cases. For example, in *United States v. Calderon-Pena*, the Fifth Circuit Court of Appeals, sitting en banc, ruled that a prior conviction for child-endangerment was not an aggravated felony "crime of violence" that could be used to enhance a sentence for reentry after deportation.[193] The underlying facts of the crime were that the defendant had crashed his car into another vehicle containing his children. The court looked to the indictment to "narrow down the statutory options" but decided that the offense was not a crime of violence because it did "not require any bodily contact (let alone violent or forceful contact) or any injury."[194] In so ruling, the court rejected the government's argument that "the elements expand 'beyond the statute' to include factual material about the method of committing the offense that, when alleged in charging papers, must then be proven at trial."[195] The court recognized that "criminal law has

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190. 267 F.3d 1241, 1250 (11th Cir. 2001).

191. *Id.*

192. For the view that "*Taylor*, *Apprendi*, and *Shepard*, read together, mean statutory enhancement must be based on statutory elements of offenses," see Maynard, *supra* note 34, at 47.

193. 383 F.3d 254, 255 (5th Cir. 2004) (en banc); *see also* Szucz-Toldy v. Gonzales, 400 F.3d 978, 981 (7th Cir. 2005) (rejecting government's position that the record of conviction could be consulted to determine whether the crime was committed with force, even though force was not an element of the state statute).

194. 383 F.3d at 260.

195. *Id.* at 257.

traditionally distinguished between the elements of an offense and the manner and means of committing an offense in a given case."[196]

To illustrate its point, the court gave the example of an indictment in a disturbing the peace case that "specified that [the defendant] committed the crime 'by throwing a bottle at the victim's head.'"[197] The court noted that state law might require the prosecution "to prove that the defendant indeed engaged in that charged conduct."[198] But "throwing a bottle at someone is not an element of the disturbing-the-peace statute."[199] It is simply "one manner of violating the statute."[200] It would therefore be improper to rely on the bottle-throwing fact to decide that the conviction categorically involved the use of force. The court distinguished this scenario from the *Taylor* example of using the record of conviction "to see which of the various statutory alternatives are involved in the particular case."[201]

The Fifth Circuit in *Calderon-Pena* followed the majority approach, citing to *Taylor* as consistent with its reasoning. In so doing, the en banc majority vigorously disagreed with a dissent by two judges. In the dissent's view, *Taylor* permits consideration of the record of conviction not only to "'narrow' the statute of conviction," but to look for "key fact[s]" that would permit the finding that use of force was actually involved.[202] The dissent therefore endorsed the following rule:

> [W]hen a statute may, by the breadth of its language, irrespective of subparts, be violated in both violent and non-violent ways, the indictment and jury instructions may then be used to ascertain whether the underlying offense constituted a crime of violence under the guidelines.[203]

In essence, the dissent was urging the minority, fact-finding rule, reading *Taylor* as permitting unfettered recourse to extraneous facts in the record of conviction in order to categorize a crime. As pointed out in the majority opinion, the dissent blurs the fundamental difference between a conviction that "necessarily rested" on an act of violence and a conviction that was the result of a violent act. Only the former would be a violent *conviction*.

The majority opinion in *Calderon-Pena* is an example of how an elements test can be consistent with looking to the record of conviction

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196. *Id.* at 258 n.6.
197. *Id.* at 257 n.4.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 258.
202. *Id.* at 263 (dissenting opinion).
203. *Id.* at 265.

when the statute is divisible. Under this view, looking to the record of conviction does not involve determining the truth or falsity of any fact that has not already been decided as part of the elements of the offense.

Contrary to the Fifth Circuit's decision in *Calderon-Pena* and its own decision in *Krawczak*, a significant number of Eleventh Circuit cases permit judges to rely on record-of-conviction facts that were previously unadjudicated. In several cases, the court goes so far as to permit judges to enhance sentences based on *inferences* off of facts contained in the prior conviction record. In *United States v. James*, for example, the court considered whether a sentence could be enhanced under the ACCA, 18 U.S.C. § 924(e), on account of a prior "serious drug offense" defined as "involving" the intent to distribute.[204] The defendant had a prior conviction under a Florida statute for possession of between 200 and 400 grams of cocaine. His conviction did not contain an element of intent to distribute drugs. Despite the fact that the defendant was never adjudicated guilty of having an intent to distribute, the court interpreted the Florida statute to "infer[ ] an intent to distribute once a defendant possesses a certain amount of drugs."[205] The court permitted the intent to distribute enhancement even though no intent to distribute was at issue in the prior criminal case. Under the guise of statutory interpretation, the court allowed a judge to decide whether the defendant had been guilty of having an intent to distribute cocaine. In *United States v. Madera-Madera*, the court used the same reasoning to come to a similar result.[206]

204. 430 F.3d 1150, 1153 (11th Cir. 2005).

205. *Id.* at 1154 (internal quotation marks omitted).

206. 333 F.3d 1228 (11th Cir. 2003). Not only do both *James* and *Madera-Madera* run contrary to the majority approach, but the Supreme Court's decision *Lopez v. Gonzales* calls them into question. As recognized by the Supreme Court in *Lopez*, "Congress generally treats possession alone as a misdemeanor whatever the amount." Lopez v. Gonzales, 127 S. Ct. 625, 633 (2006). As a result, "an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount." *Id.* Thus, under the reasoning of *Lopez*, the convictions at issue in *James* and *Madera-Madera* would not constitute trafficking convictions. As discussed above, *Lopez* has dramatically altered the framework within which courts and the BIA must analyze drug convictions to determine whether they are drug trafficking aggravated felonies. *Lopez* expressly overruled the Eleventh Circuit's decision in *United States v. Simon*, 168 F.3d 1271 (11th Cir. 1999), and that court's subsequent unpublished decisions that rely on *Simon*. The Eleventh Circuit's decision in *Soler-Somohano v. Gonzales*, 130 F. App'x 298 (11th Cir. 2005), was also wrongly decided in light of *Lopez*. In *Soler-Somohano*, the court found that a Florida conviction for "trafficking in 400 grams or more of cocaine, in violation of Fla. Stat. Ann. § 893.135, clearly fits within the INA's definition of 'aggravated felony.'" *Id.* at 300. Under *Lopez*, however, the court was required to analyze whether section 893.135, Florida statutes, punishes nontrafficking conduct that would only be a misdemeanor under federal law. For example, actual or constructive *possession* of 150 kilograms of cocaine violates the Florida statute. But under a federal law analysis, possession of this amount of cocaine contains no element of commercial dealing and would be a federal misdemeanor. *Lopez*, 127 S. Ct. at 633. Other decisions that should also be

To make matters even more complex, some of the Eleventh Circuit's recidivism decisions are subject to competing interpretations. For example, the court's decision in *United States v. Aguilar-Ortiz* can be interpreted as following either the majority or the minority approach.[207] In that case, the court considered whether enhancement for a prior "drug trafficking offense" under the *U.S. Sentencing Guidelines* section 2L1.2(b)(1)(B) was appropriate in a case in which the defendant was found in the country after deportation in violation of 8 U.S.C. § 1326. The prior conviction was a Florida conviction for solicitation to deliver cocaine under section 777.04(2), Florida statutes.[208]

The court began its analysis with the observation that the solicitation to deliver statute criminalized a wide range of offenses, including solicitation of delivery of a "personal quantity amount" of drugs to oneself.[209] Because the statute criminalized multiple offenses, the court found that it was appropriate to turn to the record of conviction to determine the actual offense for which the defendant was convicted. The record did not demonstrate that the defendant had been convicted of anything except solicitation of delivery to himself. The court therefore reasoned that he had not been convicted of possession of a controlled substance with "intent to manufacture, import, export, distribute, or dispense it" as required under the guidelines.[210]

One reading of the court's decision is that the court adopted the majority, elements test approach because it: (1) determined that the statute was divisible; (2) found that solicitation of delivery of a personal quantity amount of drugs to oneself would violate the statute; (3) reviewed the record of conviction to see whether the defendant had been actually convicted of something more than this minimal offense; and (4) held that the conviction did not trigger enhancement because the record failed to establish more than the minimal offense.

The decision, however, can also be read as endorsing the minority, fact-finding rule. Some of the language used by the court suggests that it turned to the record of conviction to engage in judicial fact-finding about whether the defendant in fact solicited the delivery of a small amount of cocaine to himself. Under this reading, the court precluded

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revisited in light of *Lopez* include *Baig v. U.S. Attorney General*, 213 F. App'x 772 (11th Cir. 2006), and *United States v. Cabrera-Ruiz*, 132 F. App'x 288 (11th Cir. 2005).

207. 450 F.3d 1271 (11th Cir. 2006).

208. *Id.* at 1273. The Sixth Circuit has held that a conviction under this Florida statute is not a "controlled substance" violation for the purpose of career offender sentencing under *U.S. Sentencing Guidelines Manual* § 4B1.2(b). United States v. Dolt, 27 F.3d 235, 239 (6th Cir. 1994).

209. 450 F.3d at 1274.

210. *Id.* at 1276.

enhancement because the court decided that the actual, underlying conduct that gave rise to the offense was solicitation of the delivery of a small amount of cocaine. Support for this interpretation lies in the court's characterization of the question as "depend[ing] on the facts of the case" and in its statement that some solicitation offenses might be drug trafficking offenses because "the sentencing court may infer a defendant's intent to distribute the drugs" if it was a large quantity.[211] These statements suggest that the court was sanctioning reliance on extraneous facts and inferences made on the basis of essential facts in the record of conviction. Under this view, the court was *not* following the majority approach and, instead, was making the factual finding from the record of conviction that the defendant was actually innocent of any intent to distribute. As explained above, this approach would run contrary to the established principle that sentencing judges, like immigration adjudicators, should not adjudicate guilt or innocence. While it is not clear which of the two interpretations is the one intended by the court, the first approach fits more cleanly with the court's approach in *Spell* and *Krawczak*. The first approach also squares with the court's characterization of its review as legal rather than factual.[212]

VI. THE IMPACT OF *APPRENDI V. NEW JERSEY*

Whether the Eleventh Circuit adopts an elements test or judicial fact-finding approach to prior conviction sentencing enhancements has constitutional implications that are relevant to the immigration law context. If sentencing courts rely on facts that were not necessarily decided in the prior criminal proceeding, they run the risk of violating the Sixth Amendment's guarantee to a trial by jury. These Sixth Amendment concerns are relevant to immigration law analyses because the same statutory term "aggravated felony" appears in both criminal and immigration law and there is a growing consensus that the methodology of evaluating crimes under immigration law should track that used in criminal law.[213] To minimize the Sixth Amendment problem, the Eleventh Circuit, other courts of appeals, and the BIA should narrowly construe *Taylor* and *Shepard* as authorizing judicial reliance only on essential facts that established the elements of the crime.

As explained above, immigration and criminal law are inextricably intertwined through the definition of an aggravated felony at 8 U.S.C. § 1101(a)(43).[214] This definition appears both in the aggravated felony

211. *Id.* at 1275–76.
212. *Id.* at 1272.
213. *See* discussion *supra* Part IV.E. and note 152 and accompanying text.
214. *Id.*

ground of removal and in the criminal offense of reentering the United States after a prior removal.[215] The criminal reentry provision establishes different statutory maximum sentences depending on whether the defendant had entered after having been convicted of an aggravated felony. The baseline statutory maximum is two years while the statutory maximum for reentry after an aggravated felony conviction is twenty years.[216] The terms of the statute thereby raise the maximum possible sentence from two to twenty years solely on the basis of a finding that the defendant had a prior conviction for an aggravated felony.

In a string of decisions, the Supreme Court addressed whether the Sixth Amendment's guarantee of a right to trial places any restrictions on what a judge can determine in order to increase a sentence. In *Almendarez-Torres v. United States*, the Supreme Court, in a 5–4 decision in which Justice Thomas was in the majority, held that a judge could enhance a sentence in a reentry case without submitting to the jury the question whether a prior conviction constituted an aggravated felony.[217] The dissent found it "genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject."[218] The dissent would have treated prior convictions as elements of a separate offense requiring notice and adjudication by a jury.

A year later, the Court in *Jones v. United States* considered whether a judge could determine whether "serious bodily injury" had occurred for the purpose of an enhancement provision in the federal carjacking statute.[219] In a 5–4 decision that included Justice Thomas in the majority, the Court concluded that the "serious bodily injury" question had to be submitted to a jury. While the Court decided the case on statutory grounds, it also indicated that there were constitutional underpinnings to its decision.[220]

In the landmark decision *Apprendi v. New Jersey*, the Supreme Court squarely addressed the constitutional issue, holding that the Six Amendment requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statu-

215. 8 U.S.C. § 1227(a)(2)(A)(iii) (2000) (aggravated felony as a deportation ground); 8 U.S.C. § 1326 (2000) (criminal reentry provision).

216. *Compare* § 1326(a) (two years), *with* § 1326(b)(2) (twenty years).

217. 523 U.S. 224 (1998). Chief Justice Rehnquist and Justices Breyer, O'Connor, Kennedy, and Thomas were in the majority. Justices Scalia, joined by Justices Stevens, Souter, and Ginsberg dissented.

218. *Id.* at 251 (Scalia, dissenting).

219. 526 U.S. 227, 229 (1999).

220. *Id.* at 239–43.

tory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[221] While the Court expressly left in place *Almendarez-Torres*'s "prior conviction" exception to the rule that juries must decide any facts used to increase a maximum possible sentence, it acknowledged that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested."[222]

In its decisions since *Apprendi*, including *Shepard*, the Court has continued to recognize the prior conviction exception.[223] As many have pointed out, Justice Thomas was in the 5–4 majority in *Almendarez* but now believes that that case was wrongly decided.[224] The Court has yet to address the continuing viability of *Almendarez*.[225] Because the composition of the Court has since changed considerably, however, it is unclear how the Court would decide the issue today.

The Eleventh Circuit has held that, unless and until *Almendarez* is overruled, it will continue to rely on the case to permit judicial inquiry not only into the *fact* of the existence of a prior conviction but also into the *nature* of that prior conviction.[226] As the Eleventh Circuit has noted,

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221. 530 U.S. 466, 490 (2000).

222. *Id.* at 489–90 (footnote omitted). In *Blakely v. Washington*, the Court struck down a sentence under Washington's sentencing guidelines, holding that the sentence had exceeded "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. 296, 303 (2004) (emphasis omitted). In *United States v. Booker*, the Court invalidated the mandatory federal sentencing guidelines, rendering the guidelines discretionary. 543 U.S. 220, 246 (2005). The Court's decision in *Booker* should not affect the analysis of sentencing under 18 U.S.C. § 1326 because the enhancement for having an aggravated felony conviction is expressly governed by the statute, not the guidelines. In the absence of *Almendarez-Torres*, there would be a clear *Apprendi* violation unless the enhancement had been submitted to a jury. Moreover, because the criminal reentry statute, 8 U.S.C. § 1326, raises the maximum from two to twenty years only if the defendant has an aggravated felony as defined in 8 U.S.C. § 1101(a)(43), a judge cannot sentence a defendant above the statutory maximum under the "aggravated felony" definition in the discretionary federal sentencing guidelines—a definition that is broader than 8 U.S.C. § 1101(a)(43).

223. *See, e.g.*, Cunningham v. California, 127 S. Ct. 856, 868 (2007); James v. United States, 127 S. Ct. 1586, 1600 n.8 (2007); *Booker*, 543 U.S. at 244; Shepard v. United States, 544 U.S. 13 (2005); *Blakely*, 542 U.S. at 301 (citing *Apprendi*, 530 U.S. at 490).

224. *See Shepard*, 544 U.S. at 28 (Thomas, J., concurring in part and concurring in the judgment).

225. The Supreme Court, however, recently denied certiorari of cases that would have decided the issue. *See* Rangel-Reyes v. United States, 547 U.S. 1200 (2006); United States v. Pineda-Arrellano, 492 F.3d 624, 625 (5th Cir. 2007) (stating that the prior conviction issue is "fully foreclosed from further debate"), *cert. denied*, 128 S. Ct. 872 (2008).

226. In *United States. v. Greer*, for example, the court reversed the lower court's ruling that, while a judge may be permitted under *Almendarez* to determine the fact that a prior conviction exists, a jury must decide the factual nature of a prior conviction. 440 F.3d 1267 (11th Cir. 2006). Other circuits have ruled in the same way. *E.g.*, United States v. Arellano-Rivera, 244 F.3d 1119 (9th Cir. 2001); United States v. Sierra, 16 F. App'x 873 (10th Cir. 2001); United States v. Raya-Ramirez, 244 F.3d 976 (8th Cir. 2001).

Shepard left in place the *Almendarez* exception, clarifying only how the *Taylor* methodology governs in cases involving prior pleas.[227]

While the Eleventh Circuit is correct that *Almendarez* has not yet been overruled, the court, and other courts, should interpret the methodology of *Taylor* and *Shepard* in light of the underlying rationale of *Apprendi v. New Jersey*. As discussed above, courts have interpreted the judicial "fact-finding" sanctioned by *Taylor* and *Shepard* in two different ways. If *Taylor* and *Shepard* only permit reliance on facts necessarily decided in the prior criminal proceeding (the majority rule), judicial fact-finding does *not* usually implicate the core concern of the Sixth Amendment; the jury is still deciding all questions of guilt or innocence in the first instance.[228] But if *Taylor* and *Shepard* permit reliance on *any* fact in the prior record of conviction (the minority rule), judges inevitably will be deciding whether the defendant was guilty of underlying conduct.

To the extent that the Eleventh Circuit's sentencing decisions are ambiguous, they present less of a potential Sixth Amendment problem if they are read as following the majority approach. For example, when the court makes statements like "[t]he judge is permitted to find facts about both the existence and the nature of a defendant's prior convictions,"[229] the court can be understood as saying that judges can determine what facts were necessarily decided in the prior criminal proceeding to establish the elements of the crime. To interpret this statement as authorizing judicial reliance on extraneous facts contained in a record of conviction is to interpret the court as exacerbating, rather than minimizing, the possible underlying constitutional problem with judicial fact-finding.

As discussed above, the criminal reentry after deportation statute expressly increases the statutory maximum based on a prior aggravated felony conviction. The statute would therefore present a Sixth Amendment problem if *Almendarez-Torres* were to be reversed. Given that the aggravated felony definition must be the same in both the criminal and immigration law contexts, the BIA and federal courts in immigration cases must also be mindful of the possible underlying *Apprendi* problem. As in the criminal context, courts should construe *Shepard* in accordance with the narrow, majority rule on when, and how, an adjudicator can rely on facts in the record of conviction.

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227. *See Greer*, 440 F.3d at 1275.

228. This view assumes, however, that there is never any dispute regarding the existence of the prior conviction. *See* Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1361 (2007) (discussing how "prior convictions can often be both inaccurate and confusing").

229. United States v. Suarez, 214 F. App'x 937, 939 (11th Cir. 2007).

In the past, the BIA has reversed itself to keep its precedent decisions consistent with federal sentencing decisions of the courts of appeals.[230] More recently, the BIA has altered its view of enhancements to keep its case law in line with *Apprendi*.[231] The BIA should continue to keep its case law consistent with positions that avoid constitutional issues in the criminal sentencing context.[232]

VII. "Conviction" Versus "Conduct" Tests

A critical threshold question is whether an immigration ground of removal requires a certain type of conviction, a certain type of conduct, or both. The categorical approach, discussed above, applies only to determine the nature of a conviction. Increasingly, the BIA and federal courts have been interpreting specific statutory grounds of removal as requiring both a conviction and an accompanying or "limiting" fact. In these cases, the determination of removability proceeds in two steps. First, the adjudicator determines the nature of the conviction by reference to what was necessarily decided in the criminal proceeding. Second, adjudicators determine in the first instance the truth of the accompanying fact, either by looking to certain extraneous, but "reliable" facts in the record of conviction or engaging in a full-blown evidentiary hearing the issue.

The aggravated felony ground for a crime that "involves fraud or deceit" where the "loss to the victim . . . exceeds $10,000" is at the center of this controversy.[233] Courts of appeals, including the Eleventh

230. See, for example, *In re Yanez-Garcia*, 23 I. & N. Dec. 390–91 (B.I.A. 2002), overruling *In re K-V-D-*, 22 I. & N. Dec. 1163 (B.I.A. 1999), in which the BIA had determined that it could interpret "aggravated felony" differently from court of appeals interpreting the same term in the criminal sentencing context, and *In re Small*, 23 I. & N. Dec. 488 (B.I.A. 2002), in which the BIA reversed an aggravated felony issue in light of courts of appeals cases, including sentencing cases.

231. In *In re Martinez-Zapata*, 24 I. & N. Dec 424, 426 (B.I.A. 2007), the BIA recognized that it must now treat "as an element" any fact in a sentence enhancement that is required to be found by a jury under *Apprendi*. In so holding, the BIA modified its holding in *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587 (B.I.A. 1992), finding that a sentence enhancement does not create a separate offense, but rather imposes additional punishment. *Id.*

232. As demonstrated in Parts IV. and V., the irony is that the BIA's methodology for evaluating offenses presently avoids more constitutional concerns than the Eleventh Circuit's methodology in the criminal sentencing context.

233. 8 U.S.C. § 1101(a)(43)(M)(i). The issue whether particular grounds of removal can be read as requiring both conviction and conduct tests has arisen in a number of provisions, including the age requirement in the "sexual abuse of a minor" aggravated felony provision, *compare* United States v. Shelton, 325 F.3d 553 (5th Cir. 2003), *and* Lara-Ruiz v. INS, 241 F.3d 934 (7th Cir. 2001) (holding that the age of the victim does not need to be an element of the conviction), *with* Singh v. Ashcroft, 383 F.3d 144, 161 (3d Cir. 2004), *and* Larroulet v. Ashcroft, 108 F. App'x 506 (9th Cir. 2004) (holding the opposite), and the domestic relationship requirement in the domestic violence ground of removal. *Compare* Flores v. Ashcroft, 350 F.3d 666, 670 (7th Cir. 2003), *and* Sutherland v. Reno, 228 F.3d 171, 177 (2d Cir. 2000) (permitting domestic relationship to be

Circuit, have determined that the loss requirement does not need to be an element of the offense.[234] But in *Obasohan v. U.S. Attorney General*, the Eleventh Circuit found that a loss amount appearing in a restitution order was not sufficiently "tethered" to the charges to which the noncitizen pleaded guilty.[235] The court rejected the minority, fact-finding approach, which would have sanctioned reliance on a loss amount mentioned in the restitution order, and, by requiring "tethering," instead adopted what amounts to a middle position between the elements test of the majority rule and the judicial fact-finding permitted by the minority rule. The court gave a number of reasons for its conclusion, including the fact that restitution orders can be based on conduct unrelated to the conviction itself.[236] The court also pointed out that, if loss amounts in a restitution order issued *after* a plea of guilty are relevant, immigrants will never be able to evaluate the immigration consequences of a plea agreement before taking the plea.[237]

Shortly after this decision, the BIA decided the same issue with a different result.[238] In *In re Babaisakov*, the BIA agreed that the loss requirement does *not* have to be an element of the crime, but interpreted the loss requirement to be a real-world "limiting" fact that immigration judges must determine in the first instance.[239] In essence, the BIA interpreted the removal provision as combining a "conviction" requirement with a "conduct" requirement. Because the loss to the victim is not an element of the offense, noncitizens are entitled to a mini-trial on the issue in immigration proceedings, a hearing not limited to review of facts in the record of conviction. In providing for an evidentiary hear-

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established outside record of conviction), *with* Tokatly v. Ashcroft, 371 F.3d 613, 624 (9th Cir. 2004) (holding the opposite).

234. *See, e.g.*, Arguelles-Olivares v. Mukasey, No. 05-60914, 2008 U.S. App. LEXIS 8721 (5th Cir. Apr. 22, 2008); Obasohan v. U.S. Att'y Gen., 479 F.3d 785, 789 (11th Cir. 2007); Conteh v. Gonzales, 461 F.3d 45 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 3003 (2007); Knutsen v. Gonzales, 429 F.3d 733 (7th Cir. 2005); Li v. Ashcroft, 389 F.3d 892, 898 (9th Cir. 2004). *But see id.* at 899 (Kozinski, J., concurring) (arguing that loss must be an element of the offense). Some courts of appeals have ruled that it is sufficient for reference to a loss to appear in documents outside the record of conviction, such as presentencing reports. *E.g.*, *Arguelles-Olivares*, 2008 U.S. App. LEXIS 8721 at *50–51.

235. 479 F.3d at 790.

236. *Id.* at 789–90.

237. *Id.* at 791 n.12.

238. *In re* Babaisakov, 24 I. & N. Dec. 306 (B.I.A. 2007). That the BIA has made a subsequent ruling inconsistent with the Eleventh Circuit's decision in *Obasohan* raises the question whether the court's decision is still good law, because agency decisions are typically given due deference under *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984). Yet a subsequent agency construction does not trump "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

239. 24 I. & N. Dec. at 316.

ing, the BIA tacitly acknowledged that, under cases governed by *In re Babaisakov*, immigration judges adjudicate nonelement facts in the record of conviction in the first instance.

In a decision interpreting a different removal ground, the BIA also concluded that an elements test was not required. *In re Gertsenshteyn* involved the aggravated felony ground at 8 U.S.C. § 1101(a)(43)(K)(ii), which required determining whether a conviction under 18 U.S.C. § 2422(a) "was '*committed for* commercial advantage.'"[240] Similar to the "fraud or deceit" removal ground, the BIA interpreted the statute as requiring two separate requirements: a conviction under 18 U.S.C. § 2422(a) and a separate showing that the underlying conduct was committed for commercial advantage.[241] The BIA interpreted the phrase "committed for" in the removal provision as placing the emphasis on the underlying conduct rather than on the elements of the crime.[242]

The BIA's trend toward coupling a conviction requirement with a conduct requirement is important for a couple of reasons. First, in the course of finding that these removal grounds contain two separate requirements, the BIA, citing to *Taylor*, expressly recognized that the conviction requirement contained within these grounds entails an elements test.[243] Thus, by implication, removal grounds requiring only a conviction must also be read as encompassing elements tests. *Babaisakov* and *Gertsenshteyn* therefore demonstrate that the BIA is retreating from endorsing any version of a minority, fact-finding rule in those removal provisions it interprets to require a "conviction" rather than a "conduct" test.

Second, as noted above, the BIA has become increasingly aware that its methodology for evaluating the legal effect of convictions should

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240. 24 I. & N. Dec. 111, 111 (B.I.A. 2007) (emphasis added).

241. *Id.* at 115. The BIA, however, did not provide for an evidentiary hearing in *Gertsenshteyn*, which was decided before *Babaisakov*. Presumably, this aspect of *Gertsenshteyn* has been superseded by *Babaisakov*.

242. *Id.* at 112. There is a persuasive argument that, by interpreting the removal ground to contain both "conviction" and "conduct" requirements, the BIA has divorced the grounds of removal from the overall requirement that an immigrant be "convicted" of an "aggravated felony." The Supreme Court in *Taylor* found that Congress's use of the term "convictions" in the federal sentencing enhancement context demonstrated that the elements of the crime—not the underlying conduct—drive the analysis. "Section 924(e)(1) refers to 'a person who . . . has three previous *convictions*' for—not a person who has committed—three previous violent felonies or drug offenses." Taylor v. United States, 495 U.S. 575, 600 (1990) (emphasis added). In immigration cases, courts have similarly justified the categorical approach as demanded by the language of the INA. *See* Dalton v. Ashcroft, 257 F.3d 200, 204 (2d Cir. 2001). But the question whether the BIA correctly interpreted these provisions as requiring both a conviction and a conduct test is beyond the scope of this article.

243. 24 I. & N. Dec. at 112.

track that used in criminal sentencing cases.[244] Although immigration cases present no Sixth Amendment issue, *Apprendi* is relevant because the criminal and immigration contexts are related through the definition of aggravated felony.[245] The BIA's decoupling of the loss requirement from the conviction requirement in *Babaisakov* is consistent with the view that judicial fact-finding in the criminal recidivism context can raise a Sixth Amendment issue. In delineating between conviction and conduct tests in the immigration statute, the BIA has adopted a strong elements approach to evaluating convictions and, conversely, a strong fact-finding approach to evaluating conduct. This bifurcated approach is consistent with the BIA's appropriate concern that, unless its analysis of convictions remains consistent with the methodology of the sentencing context, an offense considered an "aggravated felony" in immigration law might not be an "aggravated felony" under criminal law, even though the term has the same definition in both contexts.[246]

VIII. Fairness and Efficiency

Minimizing the *Apprendi* problem in the analogous context of criminal sentencing is but one of a number of important reasons for adopting the majority, elements test approach to evaluating crimes. Fairness and efficiency concerns also counsel against permitting immigration adjudicators to rely on extraneous facts alleged in the record of conviction. As noted above, a key assumption underlying the majority approach is that the defendant had a full and fair opportunity to litigate his or her guilt of the prior crime. By definition, however, the only facts that were relevant to the prosecution were those necessary to establish the elements of the crime. Nonessential facts were not at issue and the defendant had no reason to dispute them. Immigration judges who later rely on these facts to determine the nature of the conviction deprive noncitizens of notice regarding the immigration consequences of convictions.

The Supreme Court has recognized that "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."[247] The Eleventh Circuit has similarly

244. *See supra* Part IV.E.

245. *See supra* notes 152–55 and accompanying text.

246. As demonstrated above, the irony is that the BIA is currently more in line with *Apprendi* than the Eleventh Circuit in its sentencing cases.

247. INS v. St. Cyr, 533 U.S. 289, 322 (2001). The Court further noted: "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Id.* at 316 (quoting Landgraf v. USI Film Products, 511 U.S. 244, 265–66 (1994)).

observed that facts contained in a restitution order cannot determine the nature of a conviction because restitution orders are entered *after* a guilty plea. To hold otherwise, would make it "impossible for a criminal defendant to evaluate the immigration consequences of a guilty plea at the time of entering that plea."[248] While it is reasonable to expect noncitizens to be on notice regarding the immigration consequences of the facts necessary to the offense, it is unreasonable to expect noncitizens to be on notice that facts outside the elements of the crime will later be used against them.

Allowing adjudicators to rely on extraneous facts in the record of conviction also injects unnecessary subjectivity into the calculus of whether a conviction triggers removal. The more latitude given adjudicators to decide the significance of facts in the record of conviction, the more likely it is that different adjudicators will treat similar cases differently. The majority approach's strict limitation on inductive reasoning helps to ensure that like cases will be treated alike.

Last, because immigration adjudicators have no statutory authority to adjudicate guilt or innocence, they cannot rely on facts unless they have already been proven beyond a reasonable doubt in the prior criminal proceeding.[249] The role of adjudicators is appropriately limited to determining what was already decided in the prior proceeding.

In any event, if nonelement facts from the record of conviction were relevant to immigration proceedings, fairness dictates that the immigrant should be permitted to rebut the facts with countervailing evidence. Like testimony or a police report, nonelement facts from the record of conviction are extrinsic evidence. Because these facts have not yet been litigated or adjudicated, noncitizens are entitled to ask the government to establish the facts by the clear and convincing evidence standard and they are entitled to rebut that evidence with proof of innocence. The BIA recognized this in *Babaisakov* when it ruled that noncitizens are entitled to an evidentiary hearing on the "loss to the victim" issue.[250]

This type of mini-trial is precisely what the BIA and courts have consistently sought to avoid by adopting the categorical approach.[251] Historically, the BIA has cautioned against authorizing mini-trials, find-

248. Obasohan v. U.S. Att'y. Gen., 479 F.3d 785, 791 n.12 (11th Cir. 2007).

249. The Supreme Court recognized in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), that immigration judges do not make determinations of guilt.

250. *In re* Babaisakov, 24 I. & N. Dec. 306, 322 (B.I.A. 2007).

251. In the sentencing context, the Eleventh Circuit noted the "practical difficulties a sentencing court would face engaging in an elaborate, historical fact-finding process, as well as the potential unfairness to a defendant." United States v. Krawczak, 331 F.3d 1302, 1306 (11th Cir. 2003) (citing *Taylor*, 495 U.S. at 601–02).

ing that categorical analysis is "the only workable approach in cases where deportability is premised on the existence of a conviction."[252] Holding mini-trials is especially impractical when adjudicators are expected to handle a high volume of cases. The immigration court, the Board of Immigration Appeals, U.S. Citizenship and Immigration Services, and the Visa Section of the U.S. Department of State adjudicate an extremely high volume of cases. In 2007, immigration court completed 328,425 cases and the Board of Immigration Appeals completed 35,393.[253] Moreover, immigration judges operate under strict and controversial case completion guidelines.[254] The other agencies that routinely evaluate the immigration consequences of crimes also handle large case loads. The U.S. Citizenship and Immigration Services approved 621,047 residency applications in 2007.[255] During that same period, the Visa Section of the U.S. Department of State adjudicated millions applications for temporary and permanent admission into the United States.[256]

The BIA's interpretations of provisions as requiring both a convic-

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252. The BIA has stated that, if extrinsic evidence were permitted, "there would be no clear stopping point where this Board could limit the scope of seemingly dispositive but extrinsic evidence bearing on the respondent's deportability." *In re* Pichardo-Sufren, 21 I. & N. Dec. 330, 336 (B.I.A. 1996) (en banc). The BIA went so far as to say, "the harm to the system induced by the consideration of such extrinsic evidence far outweighs the beneficial effect of allowing it to form the evidentiary basis of a finding of deportability." *Id.* The Second Circuit, in the context of readjudicating foreign convictions, has noted the unfairness of conducting later proceedings before a different tribunal. Chiaramonte v. INS, 626 F.2d 1093, 1098 (2d Cir.1980).

253. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2007 STATISTICAL YEAR BOOK B2, S1 (2008), www.usdoj.gov/eoir/statspub/fy07syb.pdf.

254. John M. Walker, Chief Judge of the U.S. Court of Appeals for the Second Circuit, testified before Congress about the "severe lack of resources and manpower at the Immigration Judge and BIA levels in the Department of Justice." *See Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Hon. John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit), *available at* http://judiciary.senate.gov/testimony.cfm?id=1845&wit_id=5214. He testified that "a single Judge has to dispose of 1,400 cases a year or . . . more than 5 each business day." *Id.*; *see also* David Adams, *Courts Overwhelmed by Immigration Cases*, ST. PETERSBURG TIMES (Florida), May 30, 2006, at 1A.

255. *See* Office of Immigration Statistics, Dep't of Homeland Sec., *U.S. Legal Permanent Residents: 2007*, ANNUAL FLOW REPORT, Mar. 2008, at 2, *available at* www.dhs.gov/xlibrary/assets/statistics/publications/LPR_FR_2007.pdf. The agency also adjudicated 748,912 naturalization applications, 89,679 of which were denied. *See* U.S. CITIZENSHIP & NATURALIZATION SERVS., N-400 NATURALIZATION BENEFITS MONTHLY STATISTICAL REPORT FOR MARCH 2008, http://www.uscis.gov/files/article/N-400%20NATURALIZATION%20BENEFITS_Mar08.pdf.

256. In 2005, 7,358,122 individuals applied for temporary, nonimmigrant visas to the United States. *See* BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, NONIMMIGRANT VISA WORKLOAD FISCAL YEAR 2005, http://www.travel.state.gov/pdf/fy%202005%20niv%20workload%20by%20category.pdf. Of these, 1,969,185 were initially denied and 431,602 were able to waive the ground of inadmissibility or otherwise overcome the denial. *Id.* In 2005, the U.S. Department of State issued 395,005 immigrant visas. See BUREAU OF CONSULAR AFFAIRS, U.S.

tion and an inquiry into conduct thus raise the specter of a large number of inefficient evidentiary adjudications that will be removed by both place and time from the relevant underlying events. As such, both fairness and efficiency concerns counsel against the minority, fact-finding rule.

IX. Conclusion

When deportation depends on the nature of a conviction, as opposed to conduct, adjudicators must employ a true elements test. To say that a noncitizen has been convicted of a particular crime is simply to say that a noncitizen has been found guilty of all of the elements of the crime. While in everyday speech we might say that a person has been convicted of stealing gum from a store, a jury is not instructed in a theft case to decide whether a defendant took gum, as opposed to some other item, from the store. A jury is instead instructed to decide whether "property" was taken. Similarly, when a defendant pleads guilty to theft, he or she pleads guilty to the element of taking property, not taking gum. Although extraneous facts invariably exist in the court's records to identify the crime with specificity and for other reasons, defendants are in no sense "convicted" of those facts.

Immigration adjudicators overstep their boundaries when they rely on nonelement facts found in the record of conviction to categorize a conviction. Adjudicators should instead strictly limit themselves to deciding the elements that were at issue, and decided, in the criminal proceeding. While reviewing records of conviction may in some ontological sense be fact-finding, there is a fundamental difference between fact-finding to determine what was necessarily decided beyond a reasonable doubt in the prior criminal proceeding and judicial reliance on facts on the record of conviction that were nonessential to the conviction. Only the former is an appropriate core judicial or "legal" inquiry. When the BIA and federal courts blur the distinction between these inquiries, they misunderstand the nature of a conviction as composed of its elements and inappropriately expand "fact-finding" to transgress on the core jury function of determining guilt.

To read *Shepard* and *Taylor* as permitting adjudicators to categorize a crime by relying on *any* reliable fact in the record of conviction—the minority rule—is to ignore the plain language of these decisions, which focuses on the "elements" of offenses and the facts "necessarily" decided in the prior criminal proceeding. Moreover, a broad reading conflicts with the underlying Sixth Amendment concerns of the

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Dep't of State, Immigrant and Nonimmigrant Visas Issued: Fiscal Years 2001–2005, http://www.travel.state.gov/pdf/FY05tableI.pdf.

Supreme Court in the *Apprendi* line of cases concerning criminal sentencing. Because the methodologies for evaluating prior crimes must be the same in criminal sentencing and immigration cases, the BIA and federal courts deciding immigration cases should construe *Shepard* in a way that minimizes constitutional concerns in the sentencing context. The most appropriate approach—the majority approach—is to understand *Shepard* and *Taylor*'s categorical approach as the equivalent of the BIA's historical divisibility approach, an elements test. Those Eleventh Circuit immigration and criminal sentencing cases that are inconsistent with the majority rule should be abandoned in favor of the reasoning contained in cases like *Jaggernauth* and *Krawczak*.

Last, reliance on extrinsic facts in the record of conviction deprives noncitizens of a fundamentally fair hearing and renders immigration proceedings inefficient. To permit immigration adjudicators to rely on previously unadjudicated facts without allowing noncitizens to rebut those facts is unfair. Giving noncitizens "mini-trials" on the unadjudicated facts, as the BIA has done in *Babaisakov*, wastes administrative resources and risks becoming "unworkable." Moreover, it is inherently difficult, and potentially unfair, to hold administrative hearings to determine the truth or falsity of underlying conduct that may have occurred far away and in the distant past.

The path started decades ago by the BIA, and continued more recently by the Supreme Court, is the path toward a true elements test. It is one that remains true to the "conviction" requirement in the Immigration and Nationality Act and the role of immigration adjudicators as interpreters of the law, not adjudicators of guilt. Neither the Eleventh Circuit, nor the BIA or other federal courts, should stray from this path.