

Understanding the Categorical and Modified Categorical Tests

By Lee A. O'Connor

It has been said that immigration law is second only to the Internal Revenue Code in complexity. *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987). Perhaps the most complex aspect of immigration law involves determining the immigration consequences of a criminal conviction. Yet, as changes in immigration law reach increasingly more criminal convictions, the ability to analyze the immigration consequences of a conviction has become essential for an immigration practitioner. Moreover, with the U.S. Supreme Court's recent decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), requiring criminal defense counsel to advise clients of the immigration consequences of a conviction, those who practice immigration law should expect to receive an increasing number of requests from the criminal defense bar for assistance in formulating pleas to criminal charges.

Highly legal analysis, known as the categorical and modified categorical tests, is used to determine whether a conviction has adverse immigration consequences. This article uses case examples and graphics to illustrate the mechanics of the categorical and modified categorical tests. The second half of this article includes a discussion of, and possible theories for dealing with, the decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (Att'y. Gen. 2008), in which the U.S. attorney general effectively eviscerated the traditional categorical and modified categorical tests as applied to crimes involving moral turpitude.

This article does not purport to be a full exposition of the law with respect to the areas covered by the case examples. Rather, the examples discussed in the article are provided primarily to illustrate points about the working of the categorical and modified categorical tests. Moreover, this article will not discuss situations in which the categorical test is not used. *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009).

The Categorical Test

In ascertaining whether a particular offense carries immigration consequences, the courts employ what is known as a categorical test. This means that the analysis is legal rather than factual and focuses on the elements of the statute of conviction, not the alien's actual conduct.

A three-step analysis is used in the categorical test:

1. Identify the federal standard for determining whether a conviction constitutes an inadmissible or deportable offense. The courts often call this the "generic definition of the offense." I like to call it the federal "hook." This federal hook might require fraud for a crime involving moral turpitude or "the use of force" for a crime of violence.
2. The statute of conviction is evaluated in order to determine the full range of conduct punished by the statute. This step generally involves researching state appellate case law interpreting the statute of conviction.¹ The goal of counsel should be to identify the most minimal or least culpable conduct that violates the statute. As a rule of thumb, cases that a criminal defense attorney would consider "bad" are good for an immigration practitioner because they involve an expansive interpretation of the state statute. A broad statute of conviction is favorable for the alien because it increases the likelihood that the statute will cover conduct outside the reach of the federal standard.
3. Compare the most minimal violation of the underlying criminal statute with the generic definition of the crime to determine whether the underlying offense necessarily requires conduct that meets the federal hook.

Under the categorical test, unless every violation of a particular criminal statute meets the generic federal definition, the conviction is not one that leads to inadmissibility or deportability. The label attached to the offense is meaningless.² The controlling factor is whether the minimum conduct that will lead to a conviction violates the federal hook.

Figure 1 depicts a conviction with immigration consequences, where the outer circle titled "Federal" represents the standard for imposing immigration consequences. The inner circle titled "State" represents the full range of conduct penalized by the statute of conviction. All violations of the state statute fall within the generic federal definition of the offense. Even a conviction for conduct at the very edge of the state statute's reach—marked by a sad face ☹—violates the federal standard.

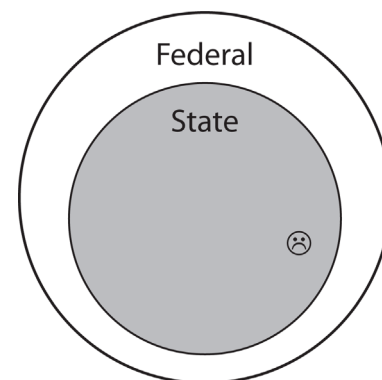


Figure 1

Figure 2 shows a conviction without immigration consequences, where, even though most violations of the state statute meet the federal hook, it is possible to commit the crime but not violate the federal standard. Convictions for conduct at the edge of the state statute—marked by a happy face ☺—fall outside the generic definition of an immigration offense.

Because the state offense is broader than the federal standard, the conviction is not categorically a deportable or inadmissible offense.

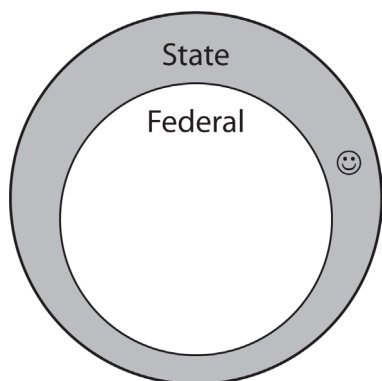


Figure 2

What about a situation where it's possible to violate the state statute without violating the federal hook, but the alien's actual conduct violated the federal standard?

In Figure 3, the happy face ☺ denotes a state appellate case upholding a conviction based on conduct outside the federal standard. The sad face ☹ denotes the client's actual conduct that violated the generic federal definition.

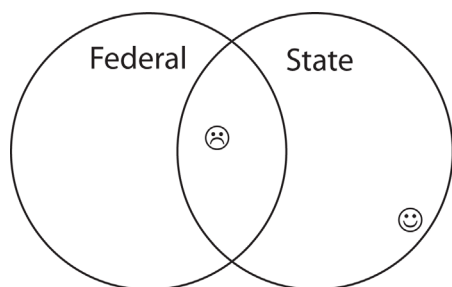


Figure 3

In deciding whether the alien committed a deportable or inadmissible offense, should an adjudicator rely on the alien's actual conduct or the fact that the offense may be committed in a way that does not violate the federal hook?

The Modified Categorical Approach

Generally, an alien may only be found deportable or inadmissible if all violations of the state statute also violate the federal hook. However, when a crime is considered "divisible," an adjudicator may consider a limited number of documents to determine whether the conviction violates the federal standard.

When is a statute "divisible"? The answer, in brief, is when the statute enumerates various ways in which the crime can be committed.

- A divisible offense is one in which the statute sets out a list of alternative ways to commit the crime and some of those "suboffenses" categorically meet the federal standard while others do not necessarily meet the federal standard.
- A divisible offense uses the disjunctive "or."³

Some cases define a divisible statute as one that applies to conduct that violates the federal standard as well as conduct that does not.⁴ However, this definition is the result of

sloppy drafting and should be strenuously resisted.

A practitioner generally should seek to avoid the modified categorical approach and argue that the categorical test disposes of the issue. There is no advantage to an alien in applying the modified categorical approach, because the categorical approach assumes the least culpable violation of the statute. The alien's actual conduct can never be "less bad" than the most minimal violation of the statute, so the alien already is getting the maximum benefit from the categorical test. On the other hand, adjudicators often use the modified categorical test as a means to evaluate the alien's actual conduct. Thus, counsel should never concede that a statute is divisible unless it can clearly be divided into alternative ways to commit the crime. When a statute uses broad language rather than enumeration to cover conduct that violates the federal standard as well as conduct that does not, only the categorical test should be employed.

Limitations on the Modified Categorical Test

Even when the modified categorical test is properly used, it has several important limitations.

- The adjudicator may only consider the record of conviction, which consists of the criminal charge, the plea agreement, and any plea or sentencing colloquy. The record of conviction does not include arrest reports, the presentence investigation, the testimony of witnesses, and so forth.⁵
- Unless the record of conviction indicates the alien committed a suboffense that categorically violates the federal standard, the alien cannot be found deportable or inadmissible.⁶ Under the modified categorical approach, "ties also go to the alien."
- The purpose of reviewing the record of conviction is to determine which part of a divisible state statute the alien is convicted of violating—specifically whether the alien was convicted of violating a particular suboffense that categorically meets the federal hook. An adjudicator may not use the modified categorical test as a guise to consider the alien's conduct.

Once the record of conviction is consulted to determine the part of a divisible statute under which the alien was convicted, the test reverts to being categorical. If the record of conviction shows that the alien was convicted of a suboffense that categorically meets the federal hook, the conviction will result in inadmissibility or deportability. If the record of conviction shows that the alien was convicted of an overbroad suboffense, the offense will not result in inadmissibility or deportability.⁷

Figure 4 demonstrates application of the modified categorical test. The statute of conviction enumerates various alternative ways to commit the crime, including suboffenses, labeled A, B, and C.

All violations of suboffense A meet the definition of the generic immigration crime. Most, but not all, violations of suboffense C meet the generic definition of the immigration crime.

The record of conviction is consulted to determine whether the alien was charged and convicted of violating

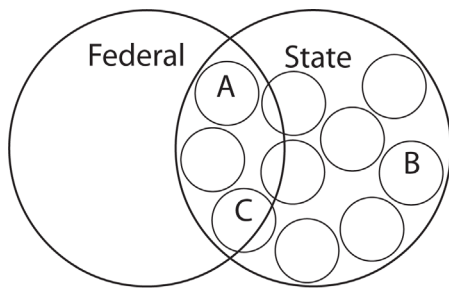


Figure 4

suboffense A, B, or C. Once the conviction is identified as being under subpart A, B, or C, the analysis reverts to being categorical with respect to the particular subpart. In other words, if the record of conviction establishes a violation of subpart C, but also discloses that the alien's actual conduct violated the federal hook, the conviction still does not carry adverse immigration consequences, because the analysis with respect to subpart C is categorical. Because subpart C may be violated in a way that does not violate the federal standard, that suboffense is not a deportable or inadmissible offense. The record of conviction is used only to identify which suboffense was violated, not to determine whether the alien's conduct violated the federal hook. This is a critical, yet commonly misunderstood, aspect of the modified categorical test.

Example: Battery as a Crime of Violence

The example of battery as a crime of violence can be used to demonstrate the proper use of the categorical and modified categorical tests. The federal definition of a crime of violence is found in 18 U.S.C. § 16: "The term 'crime of violence' means (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. ..." The "force" requirement of § 16(a) has been found to constitute the use of violent force. *Solorzano-Patlan v. INS*, 207 F.3d 869, 875 n.10 (7th Cir. 2000).

Now, let's consider the battery statutes in force in Indiana and Illinois:

Indiana: Ind. Code § 35-42-2-1. Battery
(a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor.

Illinois: 720 Ill. Comp. Stat. 5/12-3(a)(2)
A person commits battery if he intentionally or knowingly without legal justification and by any means ... (2) makes physical contact of an insulting or provoking nature with an individual.

Both these statutes appear to cover conduct such as punching someone in the face ☹, which constitutes "force" within the meaning of 18 U.S.C. § 16(a), as well as conduct such as spitting ☹, which would not involve "force." *Hamilton v. State*, 145 N.E.2d 391, 392 (Ind. 1957) ("It is elemental that any touching, however slight, may constitute an assault and battery."); *Kirland v. State*, 43 Ind. 146, 149 (Ind.

1873) (spitting on a person or throwing water on a person is a battery); *People v. Walker*, 683 N.E.2d 1296, 1301 (Ill. App. Ct. 1997) (throwing water constitutes battery); *People v. Peck*, 633 N.E.2d 222, 223–224 (Ill. App. Ct. 1994) (spitting).

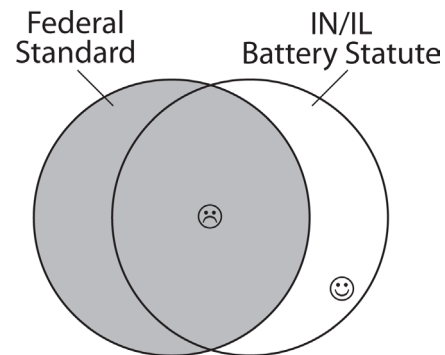


Figure 5

Accordingly, the way these statutes are related to the federal definition of a crime of violence can be depicted graphically.

Even though many of the violations of these statutes might, in fact, involve the use of force, a conviction is not categorically a crime of violence because the statutes also reach nonforcible touchings.

What if the record of conviction indicates that the alien actually engaged in a forcible violation of the statute? The happy face in the figure indicates nonviolent conduct covered by the statute, such as spitting at someone. The sad face indicates the client's actual (forcible) conduct, such as punching. Can the court find that the alien was convicted of a crime of violence?

The analysis should start with determining whether the statute is "divisible." If divisibility is defined as an offense that covers conduct that meets the federal standard as well as conduct that falls outside the federal standard, then the offense would appear to be divisible. If divisibility requires an enumeration of alternative ways to commit the offense, then the statute is not divisible. It covers conduct that meets the federal standard through broad language, not by enumerated suboffenses.

In *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), the government argued that Indiana's battery statute referred to a crime of violence because, in that case, the alien's actual conduct involved the use of force.

Now Flores did not tickle his wife with a feather during a domestic quarrel, causing her to stumble and bruise her arm. ... Flores attacked and beat his wife even though prior violence had led to an order barring him from having any contact with her. ... The immigration officials ask us to examine what Flores actually did, not just the elements of the crime to which he pleaded guilty. The problem with that approach lies in the language of § 16(a), which specifies that the offense of conviction must have "as an element" the use or threatened use of physical force.

Id. at 670. The court went on to explain that “[a]n offensive touching is on the ‘contact’ side of this line, a punch is on the ‘force’ side; and even though we know that Flores’s acts were on the ‘force’ side of this legal line, the elements of his offense are on the ‘contact’ side.” *Id.* at 672.

Another Example of Battery

Florida’s battery statute is another good illustration of the proper use of the categorical and modified categorical tests.

Florida Statutes § 784.03. Battery; felony battery.

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

Consequently, the Florida statute sets out three alternative ways to commit the offense of battery: by intentionally (1) striking, (2) touching, or (3) causing bodily injury to a person.

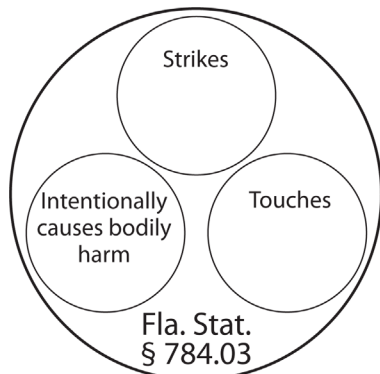


Figure 6

The “touching” element in the Florida statute has been applied to throwing a fork full of ravioli.⁸ Like spitting, this is minimal conduct that doesn’t involve force. However, the statute also covers “striking” and “intentionally causing bodily harm.” Let’s assume that striking is always forcible. Even though it’s a disputed issue, let’s further assume for these purposes that “intentionally causing bodily harm” also meets the “force” standard. *Matter of Martin*, 23 I. & N. Dec. 491 (BIA 2002) (willful attempt to inflict injury held to be crime of violence).

The Florida statute covers much of the same conduct as the Indiana and Illinois statutes cover, but Florida does so through enumeration rather than broad language. Some of the subviolations (striking and intentionally causing bodily harm) categorically meet the federal hook; others (touching) do not necessarily require conduct that meets the federal standard. Therefore, the statute is divisible and the court can review the record of conviction.

If the record of conviction demonstrates that the alien was convicted under the “striking” suboffense, the conviction is categorically a crime of violence, because all instances of striking involve force. On the other hand, if

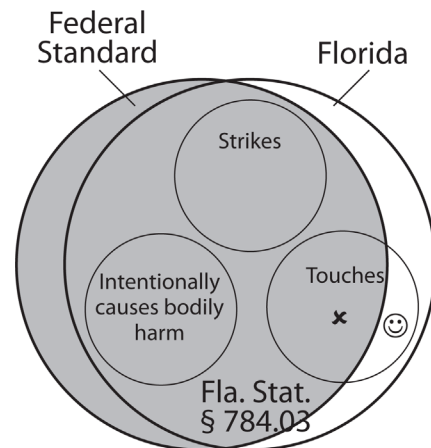


Figure 7

the record of conviction reveals that the alien was convicted of the touching component, the offense is not a crime of violence, because it is possible to touch another person in a way that does not involve force. Similarly, if the record of conviction does not identify the suboffense, the conviction is not a crime of violence, because ties go to the alien when the record of conviction is inconclusive.

What if the record of conviction demonstrates that the alien was charged with the “touching” suboffense but also shows that the alien’s actual conduct was forcible? May the adjudicator find that the conviction was a crime of violence? The answer would be “no” under a proper application of the modified categorical approach. If we refer to Figure 7 but remove the “striking” and “intentionally causing bodily injury” suboffenses, we are left with the following conclusion:

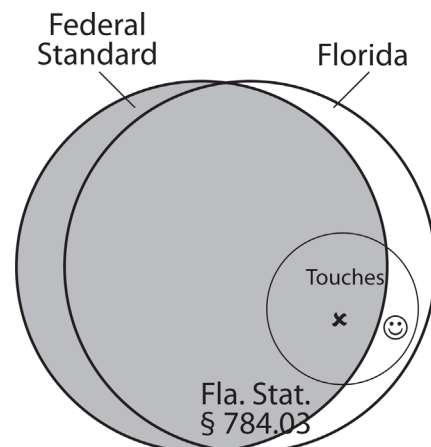


Figure 8

In effect, this presents the same situation as the Indiana and Illinois battery statutes do, and they are not crimes of violence.

The purpose of the modified categorical approach is to use the record of conviction to ascertain which suboffense the alien violated, not the alien’s conduct. Then the analysis reverts to being categorical.

Counsel will not always win with these arguments, because courts and litigants confuse the nature of the modified categorical test and tend to focus on conduct.

However, strenuously arguing the proper standards will give clients their best chance of success.

Matter of Silva-Trevino and its Aftermath

Now that we have a full understanding of the categorical and modified categorical tests, we can examine the attorney general's opinion in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (Att'y Gen. 2008), and understand how it fundamentally changed these tests. The attorney general's opinion set out a three-step test to determine whether a conviction is a crime involving moral turpitude. The first two parts superficially appear similar to the categorical and modified categorical tests but differ in important respects. The third part of the test, in effect, creates conduct-based grounds for removal or inadmissibility where the adjudicator may consider any necessary and appropriate evidence to determine whether the alien's conduct in fact involved moral turpitude.

Silva-Trevino, Step 1

The first part of the test starts with a categorical analysis, but only to the extent that the statute is evaluated to determine whether all violations involve moral turpitude, in which case the alien loses. Under the categorical test, the alien wins unless *all* violations involve moral turpitude (unless the statute is divisible). The alien only wins under part 1 of *Silva-Trevino* if *none* of the possible violations of the statute involve moral turpitude.

If an immigration judge determines, based on application of the realistic probability approach, that a prior conviction is categorically a crime involving moral turpitude, there is no reason to proceed to a second stage. The same would be true if the immigration judge were able to determine at the first stage that a prior conviction categorically was not a crime involving moral turpitude—i.e., if none of the circumstances in which there is a realistic probability of conviction involves moral turpitude.

Id. at 699, n.2. Therefore, two questions must be asked when applying Step 1 of the *Silva-Trevino* analysis. First, does a violation of the statute *always* involve moral turpitude? If the answer to this question is “yes,” the alien loses, as would occur under the traditional categorical test. However, unlike the traditional categorical test, the alien does not win if some violations of the statute do *not* involve moral turpitude. Rather, the second question is whether *any* violation of the statute involves moral turpitude. The alien wins only if the answer to this question is “no.” This is a significant restriction on the categorical test. Very few statutes will cover situations that *never* involve moral turpitude. Step 1 of the *Silva-Trevino* test essentially turns the traditional categorical test on its head. Under the traditional test, the alien wins if *any* violation of the statute does *not* involve moral turpitude. Now, the alien only wins at Step 1 if *no* possible violation of the statute involves moral turpitude. If *any* violation of the statute involves moral turpitude, the analysis goes to Step 2. Ties no longer go to the alien.

In Figure 9—as with the traditional categorical test—the

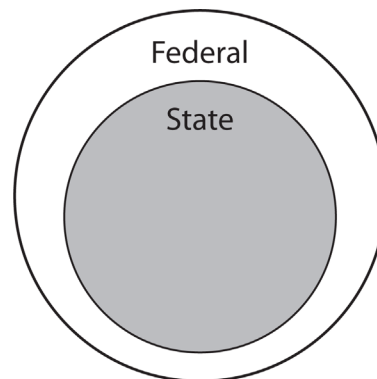


Figure 9

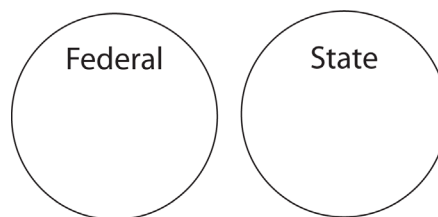


Figure 10

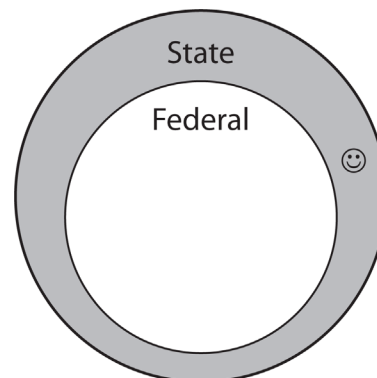


Figure 11

alien loses because all violations of the state statute also meet the federal standard.

The alien wins under Step 1 only in Figure 10, where no possible violation of the state offense involves moral turpitude.

In a case in which some violations of a nondivisible statute would involve moral turpitude, but others would not (Figure 11), the alien would win under the traditional categorical test, but under the *Silva-Trevino* test, the analysis proceeds to Step 2.

Silva-Trevino, Step 2

Step 2 also subtly deviates from the modified categorical approach. Some language in the attorney general's opinion suggests that the record of conviction is examined to determine the alien's *conduct*:

Second, where this categorical analysis does not resolve the moral turpitude inquiry in a particular

case, an adjudicator should proceed with a ‘modified categorical’ inquiry. In so doing, immigration judges should first examine whether the alien’s record of conviction—including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea and the plea transcript—evidences a crime that *in fact* involved moral turpitude.

Id. at 690 (emphasis added).

The attorney general’s focus on whether the crime “in fact” involved moral turpitude removes the “categorical” component from the modified categorical test by changing the inquiry to a factual one. Under the modified categorical test, the record of conviction is not consulted to determine the alien’s conduct, but rather to identify the suboffense with which the alien was charged. Once the particular suboffense is identified, the analysis reverts to being categorical.

Also, prior to *Silva-Trevino*, the government would lose under the modified categorical test unless the record of conviction affirmatively established that the suboffense necessarily involved moral turpitude. A tie would go to the alien, and, if the particular subviolation could not be identified from the record of conviction, the alien would win. Under the *Silva-Trevino* test, the adjudicator proceeds to Step 3 if there is no definitive answer for either side for Steps 1 and 2.

***Silva-Trevino*, Step 3**

Unless the record of conviction discloses that the alien’s conviction did not involve moral turpitude, the analysis proceeds to Step 3, which allows the adjudicator to examine evidence outside of the record of conviction to determine whether the alien’s conduct associated with the offense involved moral turpitude. According to the attorney general’s opinion,

When the record of conviction is inconclusive, judges may, to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction. The goal of this inquiry is to discern the nature of the underlying conviction where a mere examination of the statute itself does not yield the necessary information; it is not an occasion to relitigate facts or determinations made in the earlier criminal proceeding.

Id. at 690. The attorney general added the following:

In my view, when the record of conviction fails to show whether the alien was convicted of a crime involving moral turpitude, immigration judges should be permitted to consider evidence beyond that record if doing so is necessary and appropriate to ensure proper application of the Act’s moral turpitude provisions.

Id. at 699; *see also id.* at 703 (an adjudicator can consider evidence beyond the record of conviction “when and to the extent he or she determines that it is necessary.”). In effect, Part 3 of the *Silva-Trevino* test allows a retrial of the

criminal case, even on issues that would not be relevant in the state’s case.

Consequently, the radical nature of the attorney general’s decision in *Matter of Silva-Trevino* is apparent. In Step 1, the government will win any case that it would have won under the traditional categorical test. Moreover, most cases that the alien would win under the categorical test will proceed to Step 2 under the *Silva-Trevino* test. Similarly, the government will win under Step 2 any case that would have won under the modified categorical test. The government will also have an opportunity to use the record of conviction in Step 2 to prove the actual conduct and win cases that it would have lost under the categorical test. Finally, in cases in which the record of conviction is inconclusive, the government can proceed to Step 3 and use any competent evidence to show the alien’s actual conduct and attempt to win cases that it would have lost under either the categorical or modified categorical tests. In short, under the *Silva-Trevino* test, the government wins *every* case that it would win under the traditional categorical or modified categorical tests and also has the opportunity to win most cases that it would have lost under the traditional categorical or modified categorical tests.

Caveat: Inapplicability of the Silva-Trevino Test Outside the CIMT Context

Matter of Silva-Trevino should never be applied unless the conviction is alleged to constitute a crime involving moral turpitude. The opinion in *Silva-Trevino* makes clear that the new methodology does not apply beyond the CIMT context. In several places of the opinion, the attorney general mentions that the decision does not apply in other contexts:

This opinion does not, of course, extend beyond the moral turpitude issue—an issue that justifies a departure from the *Taylor/Shepard* framework because moral turpitude is a non-element aggravating factor that “stands apart from the elements of the [underlying criminal] offense.”

Id. at 704 (quoting *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008)). Later, the attorney general states that,

as this opinion makes clear, the framework it adopts for moral turpitude cases governs only immigration decisions based on the Act’s moral turpitude provisions and does not govern the scope or application of the aggravated felony ground for sexual abuse of a minor under section 101(a)(43)(A) of the Act.

Id. at 707 n.6. Consequently, the traditional categorical and modified categorical tests should continue to be applied to all other grounds of deportation or inadmissibility, including offenses involving controlled substances, aggravated felonies, firearms offenses, and so forth.

Strategies for Dealing With *Silva-Trevino*

An analysis of the flaws in *Matter of Silva-Trevino* exceeds the scope of this article. However, the American Immigration

Lawyers Association (AILA) submitted an amicus brief to the attorney general seeking reconsideration of the decision. The brief contains an excellent discussion of the problems with the opinion. See AILA Amicus Brief, *Matter of Silva-Trevino*, AILA InfoNet Doc. No. 08120961, available at www.aila.org/Content/default.aspx?docid=27391. The Third Circuit has already rejected *Silva-Trevino*. See *Jean-Louis v. Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009).

If *Silva-Trevino* holds up, the most effective way of avoiding immigration consequences is to work with criminal defense counsel and structure a plea *before* a conviction occurs.

Before Conviction

The first step to take when trying to avoid immigration consequence is to structure a plea to a regulatory offense or an offense with an intent element involving less than recklessness. In *Silva-Trevino*, the attorney general attempted to provide a general standard for a CIMT. The attorney general held that, "to qualify as a crime involving moral turpitude for purposes of the Act, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness." 24 I. & N. Dec. at 689 n.1. Thus, if counsel can structure a plea to a regulatory offense or an offense with a mens rea element of less than recklessness, the client should be able to avoid immigration consequences under Step 1 of the *Silva-Trevino* test.

However, if the client must plea to an offense that includes conduct involving moral turpitude as well as conduct not involving moral turpitude, counsel can structure the record of conviction so that it demonstrates that the offense did not involve moral turpitude. Under *Silva-Trevino*, an adjudicator is precluded from going to Step 3 unless the record is inconclusive. If the record of conviction shows that the alien's conduct did not involve moral turpitude, the government is prevented from attempting to show otherwise.

The case of a conviction for theft provides a helpful example. The courts have held that theft offenses generally involve moral turpitude,⁹ because most theft statutes define the offense of theft as involving an intent to permanently deprive the owner of property. When a theft offense does not require a permanent taking, it does not constitute a crime involving moral turpitude. *Matter of D.*, 1 I. & N. Dec. 143 (BIA 1941); *Matter of T.*, 2 I. & N. Dec. 42 (Att'y Gen. 1944); *Matter of H.*, 2 I. & N. Dec. 864, 865 (Comm'r 1947), *aff'd*, 2 I. & N. Dec. 866 (BIA 1947); *Matter of Z.*, 5 I. & N. Dec. 383, 384-385 (BIA 1953).

Indiana's theft statute (Ind. Code § 35-43-4-2) does not necessarily require a permanent taking to sustain a conviction. The statute states:

A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.

Indiana's courts have held that it is not necessary to have the intent to permanently deprive the owner of the property

to violate this statute. *Bennett v. State*, 878 N.E.2d 836 (Ind. 2008); *Hart v. State*, 671 N.E.2d 420 (Ind. Ct. App. 1996); *Coff v. State*, 483 N.E.2d 39 (Ind. 1985). Obviously, however, many thefts in Indiana do involve an intent to deprive the owner of the property permanently. Thus, Indiana's theft statute involves a situation in which some violations involve moral turpitude (that is, permanent takings), but others do not (temporary takings). Moreover, the statute is not divisible because it does not explicitly enumerate permanent and temporary takings as alternative ways to commit the crime.

Therefore, the Indiana statute fits Figure 12, with the happy face ☺ denoting takings that do not involve an intent to deprive the owner of the property permanently. In this situation, the alien should win under the traditional categorical test, but under *Matter of Silva-Trevino*, the analysis will proceed to Step 2.

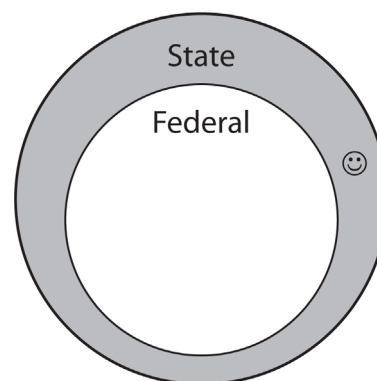


Figure 12

However, if the alien's plea or some other part of the record of conviction were to specify that the taking involved an intent to temporarily deprive the owner of the property, then the Step 2 inquiry would be conclusive and therefore would prevent inquiry into the facts.

After Conviction

An alien's options are more limited after he or she has been convicted of a crime involving moral turpitude. Nevertheless, counsel can take several steps to try to avoid immigration consequences of the conviction:

- Until the issue is resolved conclusively, counsel should always argue that *Silva-Trevino* was wrongly decided. This argument will, of course, lose before the immigration judge and the Board of Immigration Appeals, because they are not free to ignore or overrule the attorney general; but the issue should be preserved for appeal. Counsel should request assistance from the AILA Amicus Committee. See www.aila.org/content/default.aspx?docid=28713. *Silva-Trevino* is one of the committee's priority issues.

As noted above, AILA submitted an excellent amicus brief seeking reconsideration of the *Silva-Trevino* decision. The brief describes many of the flaws in the opinion. See AILA Amicus Brief, *Matter of Silva-Trevino*, AILA InfoNet Doc. No. 08120961, www.aila.org/Content/default.aspx?docid=27391. This is an excellent starting

point for arguments challenging the decision, as is the Third Circuit's opinion in *Jean-Louis v. Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009).

- Counsel should also rely on *INS v. St. Cyr*, 533 U.S. 289 (2001), to argue that the *Silva-Trevino* test should not be applied retroactively to pleas that were made before the date of decision, because many defendants entered into these pleas relying on the categorical test. Indeed, the importance of proper advice concerning the immigration consequences of a guilty plea to the Sixth Amendment's guarantee of effective assistance of counsel was recently stressed by the U.S. Supreme Court in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

The retroactivity argument in a *Silva-Trevino* situation should be stronger than the argument made in a *St. Cyr* situation. First, *Silva-Trevino* constitutes a substantive change that goes directly to an alien's deportability or inadmissibility following a conviction. *St. Cyr* only went indirectly to the immigration consequences of a conviction in that it applied to relief for admittedly removable aliens. Second, *St. Cyr* involved a statutory change enacted by Congress. *Silva-Trevino* involves a decision that was decided without any transparency. The BIA issued an unpublished decision in the case, and the attorney general took certification of the case without any indication to the parties or the public about the issues to be resolved.

- In the right circumstances, counsel could seek post-conviction relief under *Padilla v. Kentucky*. It bears noting that relief under *Padilla* might not be available if the alien received proper advice regarding the consequences of a guilty plea at the time. However, if this occurred, it would strengthen a retroactivity claim under *St. Cyr*. When seeking postconviction relief, counsel should be careful to comply with the requirements of *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003).
- Counsel can analyze the statute of conviction and the surrounding statutory scheme, then advance novel arguments that the offense is not a CIMT under *Silva-Trevino*.

The earlier example of an assault conviction can illustrate this strategy. Traditionally, assault offenses have been found not to involve moral turpitude. However, certain aggravated factors can convert an assault offense into a CIMT. For example, the reckless infliction of serious bodily injury constitutes a CIMT. *Matter of Fualaau*, 21 I. & N. Dec. 475, 478 (BIA 1996). Similarly, a specific intent to cause physical injury, accompanied by actual infliction of physical injury, is a crime involving moral turpitude. *Matter of Solon*, 24 I. & N. Dec. 239 (BIA 2007).

Looking at the Indiana battery statute and the accompanying statutory scheme, an argument can be made that simple battery is categorically *not* a CIMT under *Silva-Trevino*. Previously, we assumed that, even though simple battery covered very minor touchings, it also applied to more serious conduct and could also apply to individuals who seek to inflict injury. Let us re-examine that assumption. A review of the Indiana statutory scheme suggests that other provisions cover the circumstances that immigration law has identified as categorically involving moral turpitude.

Ind. Code § 35-42-2-1. Battery

(a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:

(1) a Class A misdemeanor if:

(A) it results in bodily injury to any other person;

....

(3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon;

Ind. Code § 35-42-2-1.5. Aggravated battery

A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:

(1) serious permanent disfigurement;

(2) protracted loss or impairment of the function of a bodily member or organ; or

(3) the loss of a fetus;

commits aggravated battery, a Class B felony.

Ind. Code § 35-42-2-2. Criminal recklessness

(b) A person who recklessly, knowingly, or intentionally performs:

(1) an act that creates a substantial risk of bodily injury to another person; or

(2) hazing;

commits criminal recklessness.

...

(d) A person who recklessly, knowingly, or intentionally:

(1) inflicts serious bodily injury on another person;...

...

commits criminal recklessness, a Class D felony.

Thus, Ind. Code § 35-42-2-2(d)(1) covers the situation identified in *Matter of Fualaau* involving the reckless infliction of serious bodily injury. Similarly, Ind. Code § 35-42-2-1.5 covers the situations identified in *Matter of Solon*, involving a specific intent to cause physical injury. Consequently, it can be argued that simple battery—or even battery resulting in bodily injury—is categorically *not* a CIMT because there is no requirement of an intent to produce injury, and, when such intent is present, the offense would be punished by other sections.

- Counsel can argue for standards on the types of evidence that can be considered in Step 3, because the attorney general's opinion did not elaborate on what evidence may be considered in Step 3, other than saying that adjudicators could consider evidence outside the record of conviction. However, the attorney general also stated that Step 3 should not be an invitation to relitigate the facts of an earlier criminal proceeding. *Matter of Silva-Trevino*, 24 I. & N. Dec. at 609, 703.

Counsel could argue that only uncontested or uncontroverted evidence outside the record of conviction

should be allowed, such as admissions made by the alien in the Pre-Sentence Investigation or to the police. There is some authority for this approach. The Seventh Circuit sometimes departs from the modified categorical approach, justifying its action by indicating that the alien has admitted the underlying facts. *See, e.g., Lara-Ruiz v. INS*, 241 F.3d 934, 941 (7th Cir. 2001).

- Counsel could hold a mini-criminal trial during the removal proceeding. The respondent's counsel can offer evidence to show of the crime of which the respondent was convicted. For example, continuing with the same example of temporary and permanent takings, the respondent could testify, if it were true, that he or she intended to return the property or at least that he or she took it on impulse, with no intent to deprive the owner of the property permanently.

Conclusion

The traditional categorical and modified categorical tests provide a powerful tool for counsel seeking to represent aliens with criminal convictions. It is essential to understand precisely how these tests should work and to hold the decision-maker to the legal requirements of the tests. Even though *Matter of Silva-Trevino* constitutes a radical departure from 80 years of law in evaluating the immigration consequences of a criminal conviction, counsel should challenge the decision as incorrectly decided and should continue to develop new theories and approaches to representing clients who are affected by the decision. **TFL**

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tional and regional conferences on immigration law. He was recently selected to serve as an immigration judge in Los Angeles and will take the bench in December 2010. © 2010 Lee A. O'Connor. All rights reserved.

Endnotes

¹*See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

²*See, e.g., Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003); *Hernandez-Mancilla v. INS*, 246 F.3d 1002, 1005 (7th Cir. 2001); *Lopez-Elias v. Reno*, 209 F.3d 788, 792 (5th Cir. 2000).

³*See, e.g., United States v. Woods*, 576 F.3d 400, 404–406 (7th Cir. 2009); *Stubbs v. Attorney General*, 452 F.3d 251, 254 (3d Cir. 2006); *Carty v. Ashcroft*, 395 F.3d 1081, 1084 (9th Cir. 2004); *United States v. Calderon-Pena*, 383 F.3d 254, 258 (5th Cir. 2004); *Dickson v. Ashcroft*, 346 F.3d 44, 46 (2d Cir. 2003); *Hamdan v. INS*, 98 F.3d 183, 187 (5th Cir. 1996).

⁴*See, e.g., Sharashidze v. Gonzales*, 480 F.3d 566, 569 (7th Cir. 2007); *Matter of Ajami*, 22 I. & N. Dec. 949, 950 (BIA 1999).

⁵*Shepard v. United States*, 544 U.S. 13 (2005); *United States v. Kovac*, 367 F.3d 1116, 1120 (9th Cir. 2004).

⁶*See, e.g., Perez v. Mukasey*, 512 F.3d 1222, 1227 (9th Cir. 2008); *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 464 (5th Cir. 2006); *Omari v. Gonzales*, 419 F.3d 303, 309 (5th Cir. 2005).

⁷*See, e.g., United States v. Woods*, 576 F.3d at 406–407; *Lanferman v. BIA*, 576 F.3d 84, 88–89 (2d Cir. 2009); *Evanson v. Attorney General*, 550 F.3d 284, 291 (3d Cir. 2008); *Martinez v. Mukasey*, 551 F.3d 113, 118 (2d Cir. 2008); *Larin-Ulloa*, 462 F.3d at 464.

⁸*D.C. v. State*, 436 So. 2d 203, 205–206 (Fla. Ct. App. 1983).

⁹*See Quilodran-Brau v. Holland*, 232 F.2d 183, 184 (3d Cir. 1956); *Khalaf v. INS*, 361 F.2d 208, 209 (7th Cir. 1966); *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966); *Matter of Garcia*, 11 I. & N. Dec. 521, 523 (BIA 1966).

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must do equity.” *In re MacNeal*, 393 B.R. 805, 810 (S.D. Fla. 2008). “[W]henver a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.” *Id.* (citing POMEROY’S EQUITY JURISPRUDENCE § 397 at 657 (3d ed. 1905)). Furthermore, the courts require that the offending party’s conduct relate to the matter in litigation. *Id.*

²⁰*See* 8 C.F.R. § 212a.2(e)(2)(i) (establishing that one of the conditions that terminate the sponsor’s obligations under Form I-864 is accrual of the 40 qualifying quarters under the Social Security Act). The legislative history makes clear that the 40 quarters cannot accrue unless or until the immigrant files his or her federal taxes, *See* S. REP. NO. 249(1996). A qualifying quarter is a three-month period: (1) during which

the immigrant earned enough for the period to count as a quarter for Social Security coverage, (2) during which the immigrant did not use welfare, and (3) which occurs in a year in which the immigrant paid federal income taxes.

²¹*Steinhardt v. Rudolph*, 422 So. 2d 884, 890 (Fla. App. 1982).

²²*Id.*

²³There is a further issue as to whether the so-called fugitive disentitlement doctrine applies in Form I-864 cases to foreclose the utilization of the judicial process by the intending immigrant where the person is, for example, subject to an order of deportation or removal and has willfully failed to report to immigration authorities. *See Pesin v. Rodriguez*, 244 F.3d 1250, 1252 (11th Cir. 2001); *Magluta v. Samples*, 162 F.3d 663, 664 (11th Cir. 1998); *Bar-Levy v. INS*, 990 F.2d 33, 35 (2d Cir. 1993). *See also Gao v Gonzales*, 481 F.3d 173, 176 (2d Cir. 2007); *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 729 (7th Cir. 2004).