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How to Use the Categorical Approach Now

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With a few exceptions, immigration authorities must use the “categorical approach” to determine whether a criminal conviction triggers a ground of removal.

Competent use of the categorical approach may be the single most important defense strategy available to immigrants convicted of crimes. This is especially true now that the Supreme Court has addressed how the analysis must be applied, in three recent decisions: *Mathis v. United States*, 136 S.Ct. 2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). In *Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016) (“*Chairez III*”³) the BIA adopted the Supreme Court’s analysis.

Mathis, *Descamps* and *Moncrieffe* overrule a lot of past precedent, to the benefit of immigrants. In fact, if you represent an immigrant convicted of a crime and do *not* understand how to use the categorical approach in light of these decisions, you may be doing your client a terrible disservice. Relying on older precedent, you may decide that the conviction has adverse immigration consequences, when it should have no consequences or at least less serious ones.

This article provides a step-by-step guide on how to use the categorical approach now. Part I outlines the three steps in the analysis. This five-page section can stand alone as a summary of the approach.

Part II addresses frequently asked questions about the steps. Part III provides some examples of formerly removable offenses that now should be held immigration-neutral. Part IV discusses in what contexts the categorical approach does not apply.

This article is more of a how-to guide than an analysis of the reasoning and full implications of the key cases. For an in-depth discussion of *Moncrieffe*, *Descamps* and *Mathis*, as well as related opinions such as *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) and *Johnson v. United States*, 135 S.Ct. 2551 (2015), see Practice Advisories on these opinions that are available online.⁴

As always, how one uses new arguments depends on where one is in proceedings. Advocates representing people in removal proceedings can advance any good argument. Advocates considering whether to file an affirmative application, where this would expose a potentially removable person to authorities, must be somewhat more conservative and should consider the chances that the argument might be rejected while the application is pending. Criminal defenders always try to act conservatively by pleading specifically to one of the “good” immigration offenses within a criminal statute, even if this ought not to be necessary under the categorical approach.

PART I. CATEGORICAL APPROACH IN THREE STEPS

Overview

Let's say that a client comes in who has an Iowa conviction for burglary for which she was sentenced to 16 months. You know that a burglary conviction with a sentence of a year or more is an aggravated felony. How do you know if *her* conviction is an aggravated felony? Is every offense that a state labels "burglary" an aggravated felony if a year or more is imposed?

No, it isn't, and this is the core of the categorical approach. The title of the offense – burglary, theft, assault – does not control. Instead, we undertake a detailed legal analysis, based on the minimum conduct to violate the criminal statute. This approach can take up to three steps.

In Step 1 of the categorical approach, we compare the "generic" definition in the removal ground with the elements of the criminal statute. Every criminal law term that appears in removal grounds (e.g., burglary, crime involving moral turpitude) must have its own technical, federal definition, referred to as the "generic" definition. We will compare this generic definition to the state (or federal or other) statute our client was convicted of. Here we do not look at what the client actually did, or pled guilty to doing. Instead we identify the minimum possible conduct that has a reasonable probability of being prosecuted under the criminal statute, and compare *that* conduct to the generic definition.

If the elements match up sufficiently, the removal ground applies and the immigrant loses. In that case, anyone who ever is convicted of that offense will come within the removal ground. But if the elements don't match sufficiently, the statute is "overbroad." There is no categorical match.

If there is no categorical match, we breathe a sigh of relief. Our client will win as long as the statute is not "divisible." We now move to Step 2 to determine whether the statute is divisible. In *Descamps* and *Mathis* the Supreme Court affirmed that a statute must meet a strict standard to be "truly" divisible. In many prior decisions, federal courts and the Board of Immigration Appeals have not correctly applied this test. Because of this, ***a lot of published precedent on specific offenses must be considered overruled, in favor of the immigrant.*** This is one reason that it is important to have a basic understanding of the categorical approach: we can't rely on (bad) past precedent.

In many cases the criminal statute will not be truly divisible under the Supreme Court's standard. In that case – where the statute is overbroad (not a categorical match per Step One) and indivisible (not a divisible statute per Step Two) – the client wins big. No conviction under the statute ever triggers the removal ground, for any purpose: deportability, inadmissibility, or eligibility for relief. It does not matter to what facts the person pled guilty; *no one* convicted under the statute, under any circumstances, comes within the removal ground.

If instead the statute is truly divisible, we go on to Step 3, the "modified" categorical approach. Here an immigration judge or officer may look at a limited set of documents from the client's criminal record, called the reviewable record of conviction, to see if it conclusively shows of which statutory elements he or she was convicted. If the record identifies those elements, the adjudicator performs the categorical analysis on those.

Now that we've described the whole process once, we will go over it again in a more formal manner discussing the three questions: Is there a categorical match? If not, is the statute divisible? If so, does the record of conviction identify the specific crime?

Step 1: Is there a categorical match?

To determine if there is a categorical match we determine: (a) What are the elements of the crime that is listed in the applicable removal ground (the “generic” definition)? (b) what are the elements of the offense in the criminal statute of which the client was convicted (the minimum conduct required to violate that statute)? and (c) Does the removal ground definition match every element of the offense in the criminal statute? As the Supreme Court summarized:

To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case.

Mathis v. United States, 136 S. Ct. 2243, 2248 (U.S. 2016)

a. Identify the “generic” definition of the crime listed in the removal ground.⁵

The grounds of inadmissibility and deportability (which include the definition of an aggravated felony) contain dozens of criminal law terms, e.g., “crime involving moral turpitude,” “crime of child abuse,” “controlled substance,” “crime of violence,” “burglary,” etc. Each of these terms must have a technical, federal definition, referred to as the “generic” definition. Our first research task is to identify the generic definition of the crime that appears in the removal ground.

To define a crime, we identify its elements. “‘Elements’ are the ‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction.’” *Mathis*, 136 S. Ct. at 2248. To illustrate the categorical approach and its use of elements, let’s consider whether an Iowa burglary conviction can be an aggravated felony as burglary. First, we must identify the federal generic definition of “burglary.”

Example: The definition of aggravated felony includes conviction of “burglary” if a sentence of a year or more is imposed. INA § 101(a)(43)(G). How is “burglary” defined here?

The Supreme Court held that generic burglary contains these elements: “an unlawful or unprivileged entry into, or remaining in, a **building or other structure**, with intent to commit a crime.” The Court found that the term “building or other structure” does not include a vehicle. *Taylor v. United States*, 495 U.S. 575, 598 (1990) (emphasis added).

b. Identify the minimum prosecuted conduct that violates the criminal statute.⁶

Next, using state case law, jury instructions, or other materials, we identify the elements of the criminal statute of which the person was convicted, and the *minimum conduct* required to commit these elements. (In some courts this is called the “least adjudicated elements” or “least criminalized act” required for guilt.) Note that we are focusing solely on the minimum conduct required for guilt, and “ignoring the particular facts of the case.” *Mathis, supra*.

The Supreme Court cautioned that an immigrant may not simply imagine some possible minimum conduct for an offense, but must demonstrate a “realistic probability” that the conduct actually would be prosecuted under the criminal statute.⁷ We can demonstrate a realistic probability of prosecution by producing published or unpublished decisions, or the person’s own case, where that conduct actually was prosecuted, or (at least in some circuits) showing that the specific conduct is set out in the language of the criminal statute.

Example: Iowa Code § 702.12 prohibits in part a burglary of “building and structures, [or] land, water, or air **vehicle**...” (emphasis added). The language of the statute as well as Iowa cases demonstrate that the statute is used to prosecute burglary of vehicles, not just burglary of buildings. Thus, the minimum prosecuted conduct includes burglary of a vehicle.

c. Do the elements of the crime of conviction (the minimum conduct required for guilt) necessarily meet the elements of the generic definition?⁸

Here is where we compare the elements of the generic definition and the criminal statute. If the generic definition contains all of the elements of the criminal statute, there is a categorical match. Another way to state the test is to say that if there is some way to violate the statute that would not also come within the generic definition, then there is no categorical match.

Example: A person can be convicted of Iowa burglary for illegally entering a vehicle with intent to commit a crime. Could that person also be convicted of generic burglary?

No. Generic burglary includes entry into a building or structure, but excludes entry into a vehicle. Because of this discrepancy, there is no categorical match.

If there is no categorical match then the statute as whole is **overbroad**, meaning it reaches conduct not reached by the generic definition. In that case the immigrant will win everything, *unless* the statute is divisible. We go to Step 2 to determine divisibility.

If instead there is a categorical match, the removal ground will apply to every immigrant convicted under the statute. The client loses and our analysis is over.

Step 2: Is the criminal statute divisible?⁹

This step may appear complex, but stay with it until the example. The Supreme Court affirmed a strict test for when a criminal statute is divisible. The statute must meet all of these criteria:

1. The statutory language must set out multiple discrete elements in the alternative (i.e., the statute must use the word “or”).
2. At least one, but not all, of the offenses created by these alternatives is a categorical match to (comes within) the generic definition.
3. In every case, a jury would have to agree unanimously between these alternatives in order to find the defendant guilty. This jury unanimity requirement what makes the statutory alternatives constitute “elements” rather than mere “means.”

If any of these criteria are not met, the statutory alternatives are not elements and do not create different offenses. The statute is indivisible (not divisible).

Example: Let’s use these three criteria to determine whether the Iowa burglary statute is divisible between burglary of a building and burglary of a vehicle.

1. Does Iowa Code § 702.12 set out multiple discrete elements in the alternative?
Yes. *It prohibits entering a building “or” a vehicle.*

2. Is at least one but not all of these alternatives a categorical match to the generic definition?

Yes. *Burglary of a building meets the definition of generic burglary, but burglary of a vehicle does not.*

3. Must a jury decide unanimously between “building” and “vehicle” in order to convict the defendant?

No. *In Mathis, supra, the Supreme Court considered whether the Iowa burglary statute met this requirement. It found that under Iowa law a jury could convict the defendant even if it split, with some jurors finding that a building was burgled and others finding a vehicle was. Therefore “building” and “vehicle” are not alternative **elements**, creating multiple offenses, but are mere alternative **means** or examples of different ways to commit a single offense. Because it does not list elements in the alternative, the Iowa burglary statute is **indivisible** between a building or vehicle.*

The jury unanimity requirement is a new concept to many immigration advocates, and the law is not always clear. In *Mathis* the Supreme Court provided some guidance on how to determine whether a particular criminal statute carries a jury unanimity requirement. First, look to state cases or jury instructions. (However, frequently there is no holding on the issue.) Next, look to the language of the statute. If the statute contains a list of “illustrative examples,” that implies means, not elements, meaning that the statute is not divisible. But if different conduct has different potential sentences, the statute is divisible. The charging document also may provide information. In particular, if the charging document lists the statutory alternatives in a single paragraph, that “is as clear an indication as any” that these are simply means. See *Mathis*, 136 S.Ct. at 2256-57.

If the statute is indivisible because it does not meet all of these criteria (as in this example), the immigrant wins. The minimum conduct test controls, and we already found that the statute is overbroad under that test. When a criminal statute is both overbroad and indivisible, no one who is convicted under it comes within the removal ground. This is true for purposes of deportability, admissibility, and eligibility for relief, and regardless of facts in the record.

Example: In *Mathis* the Supreme Court found that the Iowa burglary statute was not divisible between burglary of a building and a vehicle. Since it was not divisible, the minimum conduct test controlled. The court already had found that the minimum conduct to commit the offense (burglary of a vehicle) was not a categorical match with the generic definition, and that the statute therefore was overbroad. Because the statute was both overbroad and indivisible, the Court found that no conviction under it ever amounts to generic burglary.

Note that this is true even if a defendant specifically pled guilty to burglary of a building. If the statute is not divisible, the adjudicator cannot rely on individual facts or record; she can consider only the minimum conduct prosecuted under the statute. In immigration proceedings the conviction does not trigger the removal ground regardless of whether the issue is deportability, inadmissibility, or eligibility for relief. No conviction of the Iowa statute is generic “burglary” under any circumstances. See, e.g., the Supreme Court’s holding in *Moncrieffe, supra*, which is that because the minimum conduct to commit the offense is not an aggravated felony, Mr. Moncrieffe is eligible to apply for LPR cancellation.

If the statute is divisible because it meets all of the above criteria, we go on to Step 3. For example, if Iowa did have a rule that a jury must agree unanimously between burglary of a building and a vehicle, the statute would be divisible and we would go to Step 3.

Step 3: If the statute is divisible, do documents in the record of conviction establish of which crime the defendant was convicted (the “modified categorical approach”)?¹⁰

If and only if a statute is divisible according to the criteria in Step 2, the modified categorical approach applies. Here the immigration judge or officer may review certain documents from the client’s record of conviction,¹¹ with the sole purpose of identifying *which* offense (which of the alternative elements set out in the statute) the person was convicted of.

If the record conclusively identifies of which offense the person was convicted, then the adjudicator will apply the categorical analysis to that offense.

If the record is inconclusive, the case outcome might depend upon whether the question is deportability versus eligibility for relief.

- DHS always must prove that a conviction causes deportability. If the record of conviction under a divisible statute is inconclusive then the person is not deportable, because DHS cannot meet their burden.
- The BIA and some federal courts hold that an inconclusive record of conviction does not meet an immigrant’s burden of proving eligibility for relief. Other federal courts have held that it does. See discussion in Part II.