Justices, Justices, Look Through Your Books, and Make Me a Perfect Match: An Argument for the Realistic Probability Test in CIMT Removal Proceedings

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ABSTRACT: *The Immigration and Nationality Act provides a mechanism for automatic removal of aliens convicted of "crimes involving moral turpitude." The problems resulting from trying to make law based on that phrase led immigration courts to adopt a categorical approach to statutory interpretation, which attempts to guarantee deportation based on statutes that cover actually turpitudinous conduct and not on overinclusive or vague statutory language. The Circuits have split in their methodology when using the categorical approach, with some favoring a "realistic probability" test that requires a showing that the statute of conviction has actually been used to punish the conduct that may trigger deportation, and with others favoring a more formalistic—and less forgiving—"minimum reading" approach. The former allows defendants greater flexibility in front of immigration courts and furthers important procedural goals identified by the Supreme Court's most recent decisions involving the categorical approach. The latter approach is associated with adverse, and sometimes unfair, results for defendants, who may not have been actually guilty of the conduct proscribed by the statute of conviction, and is also underinclusive in that its narrow and formulaic application can sometimes lead to favorable outcomes for defendants whose conduct was obviously proscribed. This Note advocates for the nationwide adoption of the "realistic probability" standard. To support this argument, this Note will assess the history of the approaches, the methodology and philosophical concerns motivating the use of both tests, and the outcomes defendants can expect from jurisdictions using one test over the other. This Note will argue that the realistic probability test is more in line with Supreme Court precedent, stated goals of procedural fairness, and the principles that*

motivated the adoption of the categorical approach in the immigration context.

I.   INTRODUCTION

Much has been said about the spare phrase "crime involving moral turpitude" ("CIMT") in the context of the Immigration and Nationality Act ("INA"), and how such an amorphous phrase nonetheless manages to have such dramatic consequences.[1] Among other things, conviction of a "crime

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1.   Mary Holper, *Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NEB. L. REV. 647, 680–81 (2012) ("[CIMT is] loaded with religious overtones and hark[ens] back to a day when judges played God, assigning blame for sin."). Professor Holper makes a strong argument for striking "crime involving moral turpitude" from the INA and other contexts in which it appears on the grounds that its definition, necessarily shifting and wildly inconsistent, leads to intolerable confusion on the part of criminal defendants (and their attorneys) and is so vague as to not put anyone on notice as to what sort of conduct might actually be proscribed in a given jurisdiction. *Id.* at 648–49. This line of argument is not new. *See* John S. Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CALIF. L. REV. 9, 14 (1935) (describing the phrase "crime involving moral turpitude" as a legislative "catch-all" and anathema to any degree of precision). While the

involving moral turpitude" can be used to deny entry to the United States,[2] deny the extension of a visa or travel permit,[3] and trigger automatic removal procedures for a noncitizen.[4] The lack of guidance in the INA as to what counts as a CIMT historically led to inconsistent outcomes, with arguably non-turpitudinous conduct getting swept up in overbroad legislative language, leading to inconsistent outcomes based on things like accidents of geography or poorly drafted law.[5]

This problem, combined with the severity of deportation, prompted courts and the Board of Immigration Appeals ("B.I.A.") to use a "categorical approach," a judicial method imported from collateral consequences doctrines developed in general criminal law, when determining which state and federal crimes count as crimes involving moral turpitude.[6]

A court applying the categorical approach takes the language of a statute of conviction and assesses whether the actions that the statute criminalizes inherently cover morally turpitudinous action, using whatever standard of "moral turpitude" has been developed by the local jurisdiction.[7] If the statutory language does inherently include morally turpitudinous action, a court can move on to a "modified" categorical approach, which is used to separately analyze sections of ambiguous or broad criminal laws.[8] Importantly, a reviewing court using either the categorical approach or the modified categorical approach will generally not be permitted to look at the facts of the individual case.[9]

In the early 21st century, the Supreme Court and the Board of Immigration Appeals developed two frameworks for new modifications of the

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vagueness of "crime involving moral turpitude" is of significant concern for immigration purposes, this Note will take it as a given and leave policy arguments for or against its continued use to others.

2.   8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012).

3.   *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 482–83 (2007) (listing how "a criminal conviction can damage one's immigration status," including discretionary adjustments of visa or prevent someone from obtaining citizenship status). This block on discretionary adjustment of visa status is likely the most widespread collateral consequence associated with CIMT or general criminal convictions since it spills over into so many other areas of immigration policy. It is not, however, nearly as dramatic as deportation, and does not carry sufficient political salience to have drawn much national or legislative attention, to the detriment of people trapped by the INA's inflexible standards. *See id.* at 481–83.

4.   8 U.S.C. § 1227(a)(2)(A)(i).

5.   *See generally* Legomsky, *supra* note 3 (arguing that immigration law has incorporated some parts of criminal law while excluding its procedural safeguards—such "asymmetry" creates inconsistencies in proportionality and uniformity of the law).

6.   Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1000 n.70 (2008) (noting the first use of the categorical approach by the B.I.A. in *Matter of Alcantar*, 20 I. & N. Dec. 801, 809 (B.I.A. 1994)).

7.   *See* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007); Taylor v. United States, 495 U.S. 575, 600 (1990).

8.   *See Taylor*, 495 U.S. at 602.

9.   *Gonzales*, 549 U.S. at 187.

categorical approach. First is the "realistic probability" test, which allows a court using the modified categorical approach to ask whether there is an actual (i.e., supported by historical prosecution or convictions) probability that the statute being examined would be used to capture behavior not considered morally turpitudinous.[10] If that realistic probability cannot be shown, the statute is not a categorical match, and cannot be used to trigger automatic CIMT deportation.[11]

Second is the "minimum reading" test, which does not look to an actual record of prosecution, but instead asks whether the narrowest possible interpretation of a statute captures only crimes involving moral turpitude.[12] If the narrowest possible interpretation captures non-turpitudinous action, it is not a categorical match, and cannot be used to trigger automatic CIMT deportation either.[13] The Circuits have split over which test to apply, with a majority adopting the realistic probability test, but a significant minority adopting the minimum reading test.[14]

This Note will assess the methodology and the arguments for both the realistic probability test and the minimum reading test. Part II will provide background on the relevant portions of the INA, and on the development of the categorical approach and subsequent development of the competing tests. Part III will examine the outcomes of each test as applied by the various Circuits. In Part IV, this Note will advocate for a uniform adoption of the realistic probability test for CIMT removal proceedings that use the categorical approach. Uniform application of the realistic probability test over the minimum reading test would create a national floor of predictability for aliens facing CIMT removal, and would comport with the Supreme Court's existing precedent, as well as national trends. While there would likely be an increased administrative cost to adopting the realistic probability test, the benefits outweigh whatever small strain would result from its national use.

II.   BACKGROUND: EVOLUTION OF THE CATEGORICAL APPROACH

An understanding of the "moral turpitude" provision of the INA, the categorical approach as a judicial tool, and the specific forms of the categorical approach as applied by the various Circuits in deportation proceedings is necessary to properly frame the fragmented state of CIMT removal proceedings across the country. The categorical approach was born

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10.   Matter of Silva-Trevino (*Silva-Trevino III*), 26 I. & N. Dec. 826, 831 (B.I.A. 2016) (explicitly adopting the realistic probability test for B.I.A. proceedings, absent Circuit precedent to the contrary).

11.   *Id.*

12.   *See* Gomez-Perez v. Lynch, 829 F.3d 323, 327 (5th Cir. 2016) (outlining the minimum reading test as applied in the 5th Circuit, one of the major jurisdictions that has expressly rejected the realistic probability test in favor of the minimum reading test).

13.   *Id.* at 327–38.

14.   *See infra* notes 69–76.

in the context of criminal law as a response to increasing application of collateral consequences arising from criminal convictions.[15] After developing there in a series of Supreme Court decisions, it immigrated to the world of CIMT removal proceedings largely thanks to the INA's use of the mystifying phrase "moral turpitude"—a phrase that, despite its importance to immigration law for almost the entire time the federal government has seriously regulated immigration, has never been fully defined.[16] The categorical approach was designed in the criminal context to guard against ambiguous statutes, which naturally lend themselves to arbitrary decision-making, but the transplant to the immigration context—which was motivated by concerns about the same sort of arbitrary decision-making—was not a perfect one, partially due to the fragmented structure of immigration courts. The result has been a wide spectrum of judicial interpretations of "moral turpitude," other provisions of immigration law, and even which versions of the categorical approach to use in the context of removal proceedings. This spectrum of interpretations has not just led to inconsistent outcomes, but has led to fundamentally incompatible outcomes, and outcomes that are sometimes hard to square with a basic sense of justice, whether that means an unjust removal or an unjust finding that an alien convicted of a heinous crime is nevertheless entitled to stay in the United States.

A.   *"CRIME INVOLVING MORAL TURPITUDE"*

"Moral turpitude," when used as a justification for automatic removal, is drawn from an explicit provision in the INA.[17] It reflects a concern that has been present in American immigration law for more than a century.[18] The portion of the INA governing collaterally-consequential removal for conviction of crimes involving moral turpitude provides merely that:

> Any alien who—
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> (I) is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and
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> (II) is convicted of a crime for which a sentence of one year or longer may be imposed,
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> is deportable.[19]

Nothing in the remainder of the text of the INA further defines what moral turpitude is, and as a result, that bare phrase must do significant heavy lifting

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    15.   Jeremiah J. Farrelly, *Denying Formalism's Apologists: Reforming Immigration Law's CIMT Analysis*, 82 U. COLO. L. REV. 877, 888 (2011).

    16.   Eric H. Singer, *The Muddle of Determining Moral Turpitude after* Silva-Trevino, 45 MD. B.J. 54, 55 (2012).

    17.   8 U.S.C. § 1227(a)(2)(A) (2012).

    18.   Singer, *supra* note 17, at 55.

    19.   8 U.S.C. § 1227(a)(2)(A)(i).

in INA removal procedures. [20] The ambiguity of the phrase naturally lends itself to a wide array of interpretations, and a wide array of criminal statutes can thus be transformed into crimes that can lead to automatic removal from the United States.[21] These interpretations have been entirely left up to the judicial system and the executive[22]—at no point has Congress weighed in on what it intends "moral turpitude" to mean in the context of the INA.[23]

The executive (primarily, but not exclusively, through the B.I.A.) and judicial branches have struggled to reach a consensus on what counts as a CIMT. Any definition of a CIMT is necessarily divorced from a purely legal conclusion because what counts as "moral" in a given time or context is a shifting target.[24] That slipperiness is the main source of difficulty in creating a judicially administrable test for CIMT.[25] However, the executive and judiciary generally agree that a principled line can be drawn between *malum*

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20. Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 259–60 (2001). Much has been said about the massive disparity of outcomes caused by the lack of any clear definition of "moral turpitude," and about how absurd it is that judges are by and large in the dark with regards to its application. *See supra* note 1 and accompanying text.

21. Harms, *supra* note 20, at 278–79 (raising issue of arbitrary and inconsistent application of statutes to generate pretext for removal under § 1227(a)(2)(A)). These concerns are omnipresent and have historically posed a significant problem for courts absent any precedent guiding them on which statutes or crimes count for the purposes of CIMT. *Id.* at 270–74. It is reasonable to assume that the recognition of the arbitrary and inconsistent application of state criminal statutes is part of what motivated the Supreme Court to explicitly begin promulgating categorical approach rules in the immigration context, since this is what partially motivated its decision to do so in the context of aggravated felonies, etc. in the first place. *See* Mathis v. United States, 136 S. Ct. 2243, 2257 (2016). This fact also has implications for the future adoption of specific categorical approach rules in the context of aggravated felonies to the context of CIMT removal, since the Supreme Court in *Mathis* already laid a foundation for precisely that sort of transplant. This will be discussed later in this Note.

22. Harms, *supra* note 20, at 278–79.

23. Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After* Silva-Trevino, 111 COLUM. L. REV. 313, 315–19 (2011). Congress has mentioned "moral turpitude" in a Code of Federal Regulations provision governing parallel CIMT language in the grounds for visa denial section of the INA (8 U.S.C. § 1182(a)(2)(A)(i)(I)) stating that "a Consular Officer [a federal official processing visa applications overseas, often based in an embassy] must base a determination that a crime involves moral turpitude upon the moral standards generally prevailing in the United States." 22 C.F.R. § 40.21(a)(1) (2018). This, too, however, fails to actually define what CIMT means as far as congressional intent is concerned, and it represents the same open-endedness that has led to disparate outcomes and applications of the relevant removal and visa denial procedures governed by CIMT language in the INA. What little can be gleaned from this direction indicates that Congress does not believe CIMT to be a universal standard, which has occasionally helped courts and executive agencies struggling to apply the categorical approach to federal law in a CIMT situation, which happens with distressing, but unsurprising, frequency. *See* Evan Tsen Lee, Mathis v. U.S. *and the Future of the Categorical Approach*, 101 MINN. L. REV. HEADNOTES 263, 266–67 (2016) (discussing the difficulty of applying the categorical approach to CIMT).

24. Harms, *supra* note 20, at 265.

25. *Id.*

in se crimes (crimes that are judged to be evil in civilized society[26]) and *malum prohibitum* crimes (crimes that are wrong because they are forbidden[27]), where the former encompasses CIMT and the latter do not.[28] Part of what gives this distinction its moral heft is that *malum in se* crimes have a scienter requirement that *malum prohibitum* crimes may lack,[29] which implies that the criminal is making a conscious choice to act in a morally objectionable way.[30]

The distinction between *malum in se* and *malum prohibitum*, however, is not always binary. Any judicial definition of a CIMT starts to fray in crime that blends elements of purely statutory infractions and elements requiring some degree of morally objectionable action.[31] These cases are necessarily decided on a presiding judge's interpretation, which has a profound negative effect on uniform application of CIMT analyses. Because there is no binding definition, only broad principles, the definition will frequently depend on a judge's examining the statute of conviction and then "mystically intuit[ing] whether particular acts committed by any alien were, in fact, morally turpitudinous."[32] This proves especially difficult when the crimes of conviction (which could be state, federal, or even foreign) had inconsistent terms or different elements than those in other jurisdictions, casting an air of ambiguity over what exactly a given statute is attempting to criminalize. The only judicial tool available to aid in this legal augury is the categorical approach, as articulated by the Supreme Court, which is used to analyze

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26. *See Malum in se*, BLACK'S LAW DICTIONARY (10th ed. 2014).

27. *See Malum prohibitum*, BLACK'S LAW DICTIONARY (10th ed. 2014).

28. *See, e.g., In re* L-V-C, 22 I. & N. Dec. 594, 603 (B.I.A. 1999) ("[I]t is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude."); Matter of Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1988) (describing moral turpitude as "inherently base, vile, or depraved"); Matter of P—, 6 I. & N. Dec. 795, 798 (B.I.A. 1955) ("[T]he nature of the act itself and not its statutory prohibition constitutes the test of moral turpitude . . . ."). The B.I.A. has developed its own set of precedents for gauging moral turpitude, but its judgments are only entitled so much deference by both lower courts actually handing down decisions and the Courts of Appeals reviewing them, and the constructions of the immigration courts system are only binding for immigration judges.

29. Dadhania, *supra* note 23, at 318.

30. *Id.*

31. An interesting implication to the dichotomy between *malum in se* and *malum prohibitum* is that *malum prohibitum* crimes have the potential to, through broad buy-in as to the validity of the initially morally neutral crime, be bootstrapped into being seen as having a moral cast. If enough people, having been conditioned through statutory criminalization of, for example, a type of drug, come to see the use of that drug as a moral negative in itself, could that transform what would have been a *malum prohibitum* offense in one year into a *malum in se* offense in the next? While this is more a long-term social science and philosophical question than a judicial one, the potential for further shifts in what could be considered a CIMT is interesting, and potentially troubling for judicial administration down the line. It also highlights the difficulty of nailing down what precisely counts as "moral turpitude," making it all the more frustrating that Congress has declined to clarify what it intended by that phrase.

32. Jeremiah J. Farrelly, *Denying Formalism's Apologists: Reforming Immigration Law's CIMT Analysis*, 82 U. COLO. L. REV. 877, 879 (2011).

crimes of conviction and collateral consequences—such as removal from the country following a criminal conviction.

B.   *THE CATEGORICAL APPROACH*

The categorical approach is a judicial heuristic that first arose out of interpretation of other statutes imposing collateral consequences (including, but not limited to, sentence enhancements, loss of certain other rights or privileges flowing from a conviction, etc.) on recidivists, but because of its similarity to CIMT analysis, and because the INA's CIMT provisions triggered similar collateral consequences (i.e., removal), it was quickly adopted in the INA context more or less wholesale.[33] Beginning with *Taylor v. United States* in 1990, the Supreme Court articulated a series of general principles for dealing with collateral consequences based on various types of statutes.[34] A court applying a collateral consequence, such as deportation, was to examine only "the fact of conviction and the statutory definition of the prior offense,"[35] and then compare those definitions to a "generic" (sometimes hypothetical) federal version consisting of only the necessary elements of the crime of conviction.[36] If the statutory definition that led to the defendant's conviction was a "match" to the generic version of the crime—essentially, if the defendant could have been convicted under the generic version for the same conduct—then a court can apply collateral consequences, such as deportation.[37] If the statutory definition demanded more, or covered different types of conduct entirely, no collateral consequence can be applied because it is not a "match" to the generic statute of conviction. *Taylor* was at least partially prompted by the introduction of aggravated felony provisions to immigration and other areas of law, providing for alternative means of deportation or applying other collateral consequences to recidivists.[38] This made it a natural fit for INA removal procedures.[39]

The categorical approach has been tweaked in subsequent rulings. Most applicable to the context of CIMT removal procedures is the articulation of a "modified categorical approach." This approach is used when a statute of conviction covers a range of crimes, some of which are not CIMT or do not trigger another collateral consequence in a different context.[40] When confronted with such a statute, a court is allowed a very limited "peek" at the

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33.   *Id.* at 890–91; *see* Tokatly v. Ashcroft, 371 F.3d 613, 620 (9th Cir. 2004) (explicitly using the categorical approach in the 9th Circuit).

34.   Taylor v. United States, 495 U.S. 575, 600–02 (1990).

35.   *Id.* at 602.

36.   *See id.* at 590–92, 599.

37.   *Id.* at 602.

38.   Farrelly, *supra* note 32, at 889–90.

39.   *See id.*

40.   Gonzales v. Duenas-Alvarez, 549 U.S. 183, 187 (2007) (explaining the "modified categorical approach" in the context of a removal proceeding).

record, but not the facts underlying the conviction, to determine whether the defendant was convicted under a collateral-consequence-triggering offense or a different offense covered by that same statute.[41] The materials that can be examined under the modified categorical approach are generally limited to court documents such as verdicts and jury instructions—in the immigration context, a judge can look to the portion of the INA detailing which documents can be examined as proof of conviction for the purposes of a removal proceeding in general.[42] Since many criminal statutes are broad, and may cover an extremely wide array of crimes, the modified categorical approach increases the probability that a conviction that ultimately triggers a collateral consequence will flow from the type of conduct that Congress or a state legislature intended to trigger that consequence when it passed the collateral consequence statute.[43]

    As applied in INA removal proceedings for CIMT, the categorical approach operates thusly: At the outset, a court looks to a statute of conviction to see whether it necessarily involves or implicates moral turpitude.[44] If any possible set of facts (i.e., conduct by a defendant) not involving morally turpitudinous actions could lead to a conviction under that statute, the

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    41.   *Id.*

    42.   8 U.S.C. § 1229a(c)(3)(B) (2012).

    43.   *See* Shepard v. United States, 544 U.S. 13, 17 (2005) (explaining the purposes of the modified categorical approach). In the CIMT context, this often reflects a concern that judges will sign off on deportation orders and other collateral consequences based on overbroad statutes that might contain one CIMT element and 99 non-turpitudinous ways to be convicted. Courts are rightly worried that judges may be influenced by outside pressure or prejudices when dealing with CIMT and deportation issues specifically, which could inappropriately motivate a less-than-exacting determination. It also speaks to the broader issue present in statutes authorizing collateral consequences: if a defendant has already been convicted of a crime, but an additional penalty is nonetheless being applied, it is less offensive to our concept of fairness to make sure that the additional penalty is at least justified by what the defendant actually did, rather than simply by the one-part-turpitudinous, 99-parts-not statute that a legislature decides to create. The issue of sloppy legislative drafting is a persistent one, made worse by the tendency of legislatures to copy-and-paste (sometimes literally) statutes from other states rather than draft their own statutory language, allowing a potentially poorly thought out construction to spread to multiple jurisdictions. *See* Joshua M. Jansa et al., *Copy and Paste Lawmaking: Legislative Professionalism and Policy Reinvention in the States,* AM. POLITICS RESEARCH (2018) (finding that legislatures with staff or funding constrictions are more likely to plagiarize or copy model legislation, often provided by interest groups). There is only so much a court can do in response to these issues, and the application of the categorical approach in situations like this often plays out over time like a game of judicial whack-a-mole, addressing different parts of sprawling statutes and redoing the same analysis each time because the local legislature has not seen fit to more carefully tailor its laws to any specific crime or set of conduct it wishes to regulate. *See generally* Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime,* 26 GEO. IMMIGR. L.J. 257 (2012) (describing the application of the categorical approach); Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing,* 43 U.C. DAVIS L. REV. 1135 (2010) (describing the impact of *United States v. Booker* and *Shepard v. United States* on sentencing enhancements for recidivists).

    44.   Mathis v. United States, 136 S. Ct. 2243, 2249 (2016).

defendant is considered not to have committed a CIMT and cannot be removed on that ground.[45] If a statute is ambiguous, or covers a range of actions, some of which involve moral turpitude and some of which do not, a court is allowed to "peek" at certain documents of conviction to determine which part of the ambiguous statute led to the defendant's conviction.[46] The analysis then follows the same pattern as in the unmodified categorical approach, and a defendant who could have been convicted under the non-CIMT portions of the statute is shielded from removal on that ground.[47] While this forms the backbone of the approach as applied by all the Circuits, recent decisions have generated a split over some of the methodology going into the categorical approach in the context of CIMT removal.

C.   CIRCUIT VARIATIONS ON THE CATEGORICAL APPROACH FOR CIMT

In 2016, the B.I.A. was faced with the task of clearly articulating a uniform approach to identifying CIMT under the INA. That decision, *Silva-Trevino*, formalized the B.I.A.'s incorporation of the categorical and modified categorical approaches, and additionally concluded that appellate courts hearing a CIMT removal proceeding should apply an additional "realistic probability" test to their decisions, unless there was preexisting precedent to the contrary.[48] This test was drawn from two Supreme Court decisions, *Moncrieffe v. Holder*[49] and *Gonzales v. Duenas-Alvarez*,[50] which applied the realistic probability standard to aggravated felonies that can lead to removal, not CIMT. The B.I.A.'s decision in *Silva-Trevino* thus brought the CIMT inquiry in line with other removal procedures already established by court precedent.[51]

The realistic probability test focuses on the minimum conduct covered by a statute being examined for CIMT that has a realistic probability of being prosecuted. If there is no realistic probability of prosecution, then the statute is a categorical "match."[52] In *Duenas-Alvarez,* the Court spelled out its intent with the realistic probability test:

> [I]n our view, to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical

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45.   *See id.* at 2248–49.

46.   *Id.* at 2249.

47.   *See id.*

48.   Matter of Silva-Trevino (*Silva-Trevino III*), 26 I. & N. Dec. 826, 831 (B.I.A. 2016) ("In evaluating the criminal statute under the categorical approach, unless circuit court law dictates otherwise, we apply the realistic probability test.").

49.   Moncrieffe v. Holder, 569 U.S. 184, 191 (2013).

50.   Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).

51.   *Silva-Trevino III*, 26 I. & N. Dec. at 830–31.

52.   *Id.* at 831.

possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.[53]

The Court's purpose was to guarantee that the statute triggering a collateral consequence, such as removal, actually spoke to the conduct that the defendant was convicted for. This priority is in line with the general goals of the categorical approach, as explained by the court in *Moncrieffe*: The objective of both is to ensure some degree of justice and justifiability when imposing so severe a collateral consequence as deportation to an alien defendant.[54] In *Moncrieffe,* the Court doubled down on the realistic probability test. The Court determined that "[b]ecause we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense,"[55] and that "there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'"[56] If so, then recourse to the modified categorical approach becomes relevant and can be applied provided that the criminal statute is divisible.[57] For the purposes of assessing whether a realistic probability of prosecution exists, a defendant is expected to "at least point to his own case or other cases in which the state courts in fact did apply the statute in the special . . . manner for which he argues."[58] For the purposes of the realistic probability test, then, a defendant's argument about the potential application of an overbroad statute cannot be purely speculative and must have some basis in historical fact.[59]

The B.I.A. applied this understanding of the realistic probability test in *Silva-Trevino,* but ran into the problem that persisted throughout the Circuits: Some of the Circuit courts expressly rejected the realistic probability test, confusing the application of the B.I.A.'s recommendation. In a case that bounced between the B.I.A. and the Attorney General for more than ten years, Silva-Trevino, an alien defendant, had been convicted of child indecency under a Texas statute.[60] As a result, he was pending deportation for conviction of a CIMT.[61] However, the Texas statute also covered conduct that was not morally turpitudinous,[62] which meant that it was not a categorical match under the *Taylor* framework adopted by the B.I.A. and endorsed in

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53.   *Duenas-Alvarez,* 549 U.S. at 193.

54.   *Moncrieffe,* 569 U.S. at 201.

55.   *Id.* at 190–91 (quoting Johnson v. United States, 559 U.S. 133, 137 (2010)).

56.   *Id.* (quoting *Duenas-Alvarez,* 549 U.S. at 193).

57.   *Id.* at 192.

58.   *Duenas-Alvarez,* 549 U.S. at 193.

59.   *Id.*

60.   Matter of Silva-Trevino (*Silva-Trevino III*), 26 I. & N. Dec. 826, 827 (B.I.A. 2016).

61.   *See id.*

62.   *Id.*

Moncrieffe and *Duenas-Alvarez* by the Supreme Court. The B.I.A., having adopted the realistic probability test, would have next turned its inquiry to whether Silva-Trevino's conduct had a realistic probability of being prosecuted for any of the other, non-turpitudinous offenses criminalized by the Texas statute.[63] The difficulty in *Silva-Trevino* stemmed from the fact that the Fifth Circuit had previously rejected the realistic probability test in favor of a "minimum reading" approach,[64] so the B.I.A. applied the Fifth Circuit test to determine whether a minimum reading of the criminal statute only reached offenses involving moral turpitude.[65] The B.I.A. concluded that it did not, and since the minimum reading test requires the narrowest interpretation of a statute of conviction, Silva-Trevino was not eligible for CIMT removal despite his conviction for a sex crime involving a minor.[66] This bizarre and arguably unjust result was necessary because the Texas statute at issue covered, at minimum, criminal offenses that did not contain an element of moral turpitude.[67] The decision in *Silva-Trevino* underscores the consequences that the application of one approach over another can have on removal proceedings. While the B.I.A.'s decisions are entitled to deference by the Circuit courts, many of them had made their own determinations on which variants of the categorical approach to use prior to the B.I.A.'s express recommendations in *Silva-Trevino*, and thus created binding and divergent circuit precedent. Because there has been no Supreme Court decision resolving which of the tests to use—the minimum reading test analogous to a pure categorical approach, or a realistic probability test that comports with the Court's precedent in *Moncrieffe* and *Duenas-Alvarez*—a significant rift has

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63. *Id.* at 831.

64. Gomez-Perez v. Lynch, 829 F.3d 323, 327 (5th Cir. 2016) ("[I]f the elements of the prior offense cover conduct beyond what the generic offense covers, then it is not a qualifying offense. Under this approach, a prior offense qualifies as a crime of moral turpitude if 'the minimum reading of the statute necessarily reaches *only* offenses involving moral turpitude.'" (citation omitted) (quoting Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006))).

65. *See Silva-Trevino III*, 26 I. & N. Dec. at 835.

66. *See id.* at 835–36.

67. *See id.* at 835, 838.

emerged. The Seventh,[68] Eighth,[69] Ninth,[70] and Tenth Circuits[71] have adopted the realistic probability test in the context of crimes involving moral turpitude, but the Third[72] and Fifth Circuits[73] have expressly rejected it. The First Circuit has reserved the issue,[74] but the Second, Fourth, Sixth, and

68.   Cano-Oyarzabal v. Holder, 774 F.3d 914, 917 (7th Cir. 2014) ("The first step in [a CIMT proceeding] is to look at the statute on a categorical basis and 'determine whether there is a realistic probability, not a theoretical possibility, that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude.'" (internal quotation marks omitted) (quoting *Silva-Trevino III,* 24 I. & N. Dec. at 689–90) (Atty. Gen. 2008))).

69.   Villatoro v. Holder, 760 F.3d 872, 877–79 (8th Cir. 2014) ("Under [the categorical approach], 'the inquiry is terminated if the statute at issue categorically either requires or excludes conduct involving moral turpitude.' But if 'there is a realistic probability that the statute could be applied to encompass conduct that does not involve moral turpitude, as well as conduct that does, the inquiry must continue . . . .'" (citation omitted) (quoting Prudencio v. Holder, 669 F.3d 472, 479 (4th Cir. 2012))).

70.   Leal v. Holder, 771 F.3d 1140, 1145 (9th Cir. 2014) ("To find that the statute of conviction is broader than the generic definition of a CIMT, there must be 'a realistic possibility . . . that the State would apply its statute' to non-turpitudinous conduct." (quoting Turijan v. Holder, 744 F.3d 617, 620 (9th Cir. 2014))).

71.   Rodriguez-Heredia v. Holder, 639 F.3d 1264, 1267 (10th Cir. 2011) ("[W]e ask here if [defendant] has established that there is a realistic probability that [the statute of conviction] would be applied to reach conduct that is not a crime involving moral turpitude.").

72.   Jean-Louis v. Att'y Gen. of U.S., 582 F.3d 462, 481 (3d Cir. 2009) ("We seriously doubt that the logic of the Supreme Court in *Duenas-Alvarez,* however, is transferable to the CIMT context. In *Duenas-Alvarez,* the hypothetical conduct asserted by the alien was not clearly a violation of California law. In fact, the parties vigorously disputed whether California courts would permit application of the statute to a defendant who had committed acts *resulting* in a crime, but where the commission of the crime itself was not intended. Here, by contrast, no application of 'legal imagination' to the Pennsylvania simple assault statute is necessary."). The Third Circuit's description of the "realistic probability" test in its opinion here is perhaps unduly harsh, but its criticism of the test both in this opinion and in subsequent decisions will be discussed in more detail in other portions of this Note.

73.   Mercado v. Lynch, 823 F.3d 276, 279 (5th Cir. 2016) ("[T]here has not been an intervening change of law that would permit this panel to overturn prior precedent and adopt the realistic probability approach as applied to CIMTs."); *see* Gomez-Perez v. Lynch, 829 F.3d 323, 327 (5th Cir. 2016) (explaining use of the "minimum reading" test in the Fifth Circuit, which still prevails). The Fifth Circuit seems to assume that there is an irreconcilable clash between a "minimum reading" test and the realistic probability test, but does not significantly expand on its reasoning beyond this statement of reluctance to "overturn prior precedent." Whether or not that clash exists will be discussed below.

74.   Da Silva Neto v. Holder, 680 F.3d 25, 29 (1st Cir. 2012). "[W]e have not specifically applied the 'realistic probability' test. We have begun by looking 'to the inherent nature of the crime of conviction, as defined in the criminal statute,' to determine whether it fits the CIMT definition." *Id.* (footnote omitted) (quoting Idy v. Holder, 674 F.3d 111, 118 (1st Cir. 2012)). "Because the parties have not briefed the issue, and it therefore is not properly before us, we will leave for another day the question of whether to adopt the 'realistic probability' test . . . ." *Id.* at 29 n.7. The First Circuit has not explicitly addressed the realistic probability test, or the minimum reading test, since this pair of decisions from 2012.

Eleventh Circuits have not addressed the issue at all, despite adopting the categorical approach.[75]

The most immediate consequence of this disparity is that a Circuit's decision on whether or not to use a realistic probability test in conjunction with the categorical approach can lead to dramatically different outcomes for defendants, as well as bizarre outcomes like that in *Silva-Trevino*. The differences between the minimum reading and realistic probability tests are stark. The rationale adopted by Circuits that applied the minimum reading test is generally in direct opposition to the realistic probability test, rendering reconciliation without Supreme Court input unlikely.[76] The most significant difference between the tests for the purpose of CIMT analysis is that while a defendant can point to their own conviction under the realistic probability test and use that fact to rebut an asserted categorical match between the statute under which he was convicted and the generic version of the offense for which he was convicted, a defendant in a jurisdiction that uses the minimum reading test does not have that ability.[77] This divergence raises the troubling possibility of a defendant who was clearly not convicted under the morally turpitudinous sections of a statute nonetheless not only facing removal because that statute also covered morally turpitudinous action, but also being barred from alerting the Court of his own conviction, which would vindicate him in the removal proceeding because it would serve as evidence that the statute did indeed cover non-turpitudinous activity. The fact the Fifth Circuit, which has applied the minimum reading test, is home to significant populations of undocumented aliens—that is, people most at risk of the collateral consequence of removal[78]—means that this seemingly formalistic distinction could have a very real impact on hundreds of thousands of people.[79]

The next part of this Note will assess the effects that each of the tests currently used by the Circuits—the realistic probability test and the minimum reading test—have had on outcomes for alien defendants facing removal for CIMT, and will explore the expectations of defendants in the various Circuits depending on their jurisdiction's interpretation of these tests.

III.   OUTCOMES FOR DEFENDANTS ARE BETTER UNDER THE REALISTIC PROBABILITY TEST

A comparison between the two tests shows that outcomes for defendants are typically better—not only in the sense that fewer defendants are deported,

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75. Matter of Silva-Trevino (*Silva-Trevino III*), 26 I. & N. Dec. 826, 832 (B.I.A. 2016).

76. *See Jean-Louis*, 582 F.3d at 481 (noting the Supreme Court's silence on this topic).

77. *See generally* Dadhania, *supra* note 23 (discussing a circuit split on the correction variation of the categorical approach to CIMT analysis).

78. *See id.* at 316–20.

79. This includes the communities affected by deportation, as well as the individuals facing that consequence themselves.

but because decisions are less arbitrary, more in line with expected outcomes given the natures of the crimes committed, and conforming better with a sense of justice—in jurisdictions applying the realistic probability test, at the cost of a probable increase in judicial workload, whereas jurisdictions that use the minimum reading test result in less favorable outcomes. There are important and sometimes surprising exceptions to these trends, which raise further issues to consider when assessing which of the tests is more desirable for both defendants and for judicial efficiency. The fact that a seemingly formalistic difference can lead to such a divergence in results, and in some cases can lead to results that thwart legislative and public policy, is itself a strong argument for codification of the realistic probability test.

A. COSTS AND BENEFITS OF THE REALISTIC PROBABILITY TEST

One significant advantage of the realistic probability test is that it is already in use in the other context that triggers mandatory deportation under the INA: conviction of an aggravated felony. This, aside from being desirable in itself for uniformity reasons, could help streamline and clarify a procedural area that the Circuit courts have occasionally struggled with. For instance, the Third Circuit, in *Jean-Louis*, the same decision that ultimately rejected the use of the realistic probability approach, "cited aggravated felony and CIMT precedent interchangeably . . . [using] aggravated felony precedent in a CIMT case."[80] Since the Supreme Court determined in *Moncrieffe* that the realistic probability test was its preferred method to resolve ambiguity in the context of an aggravated felony triggering removal proceedings,[81] and since many of the same concerns underlying its decision in *Moncrieffe* —accountability, reasonable fit between a statute and a conviction, and so on[82]—are present in the context of CIMT removal,[83] the use of the realistic probability test in this analogous context intuitively makes sense. This is further evinced by the fact that several Circuits decided, even before *Moncrieffe,* to adopt the realistic probability test.[84]

Uniformity of the legal standards in the context of deportation is also a useful objective in itself. The B.I.A. has "acknowledged that uniformity is important to achieve a fair and consistent immigration policy,"[85] since so

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80.   Dadhania, *supra* note 23, at 347 n.183.

81.   The Third Circuit can be forgiven for some of its confused application of the standards, because *Moncrieffe* was decided several years after its own decision in *Jean-Louis*; unfortunately, however, the *Jean-Louis* standard is still controlling law, and the negative outcomes associated with that decision are discussed in Parts III and IV of this Note.

82.   *See generally* Moncrieffe v. Holder, 569 U.S. 184 (2013) (applying the realistic probability test).

83.   *See supra* Section II.B.

84.   Dadhania, *supra* note 23, at 340–43.

85.   Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1712 (1999).

many convictions that will trigger deportation (whether for CIMT or for aggravated felonies) will be products of state law.[86] Since there can be no homogenization of the state laws relevant to deportation actions, the next best alternative is for courts of appeals and the B.I.A. to set uniform standards when they are asked to assess the appropriate collateral consequence flowing from state convictions. Commentators have noted an "apparent reluctance" on the part of courts to weigh in on these sorts of procedural issues prior to *Taylor* and especially prior to *Moncrieffe*, which has created significant issues for not just immigration judges, but also for attorneys and defendants who may not know what the state of the law is in a given jurisdiction or which standard to apply or argue.[87] The realistic probability standard sidesteps those issues of judicial confusion because it is already familiar to federal judges.[88]

However, the aftermath of the *Moncrieffe* decision also suggests that if the realistic probability test is adopted in CIMT proceedings, it will quickly become standard practice to mount a defense along the lines *Moncrieffe* lays out.[89] While the overall number of cases that would be eligible for a non-frivolous defense based on the realistic probability test is likely small, those

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86.   *Id.* at 1700–01.

87.   *Id.* at 1714–15. Bennett's analysis draws heavily on work by Hiroshi Motomura, a scholar of immigration law and policy who has identified what he calls "phantom norms" at play when courts of appeals have addressed immigration issues. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564–65 (1990). Rather than extend explicit constitutional protections, like due process or equal protection rights, Motomura argues that appellate courts have leaned heavily into analysis that ostensibly hinges on statutory interpretation but are unusually "influenced" by constitutional norms. *Id.* at 573–74. Due to the theoretical focus on non-constitutional issues, these norms are never codified or formally articulated, and are left for lower courts to apply in a more ad hoc manner. *See id.* at 604. This ambiguity, whether by design (Motomura theorizes, among other things, that judges may be sensitive to potential political fallout that could be generated by an explicit and sweeping grant of constitutional protections to non-citizens. *See id.* at 563) or by judicial accident (read: sloppy drafting), has compounded the uncertainty that courts of appeals have created with narrow and muddy rulings in the context of immigration procedure, which still grants defendants significantly fewer procedural and little to no serious constitutional guarantees of those same due process or equal protection norms that may nevertheless be working some ethereal influence in the background of immigration decisions. *Id.* at 548–49.

88.   Motomura, *supra* note 87, at 555–56.

89.   *See generally* ANDREW WACHTENHEIM ET AL., THE REALISTIC PROBABILITY STANDARD: FIGHTING GOVERNMENT EFFORTS TO USE IT TO UNDERMINE THE CATEGORICAL APPROACH, NAT'L IMMIGRATION & IMMIGRANT DEFENSE PROJECT (2014) (reviewing the use of the realistic probability test since *Moncrieffe* and noting the increase in use of the realistic probability test by defendants in mounting challenges to statutes of conviction). The main activity generated by the realistic probability test for litigants seems to be exhaustive research into sometimes antiquated or all-but-unexamined law, which in turn generates new problems for litigants, as cases turn upon antiquated language being stretched to the limits of its reasonable constructions. This is a general problem for immigration law—the INA itself has not seen a significant stylistic makeover in quite some time.

cases would certainly exist, and would consume more judicial time and energy without necessarily leading to radically different results for defendants.[90]

Even if the different results are not radical, however, they certainly exist amongst the Circuits currently using the realistic probability test in CIMT removal proceedings. While the number of unpublished decisions by the Circuit courts precludes an exceptionally accurate sense of which cases are decided on categorical approach issues, the percentage of released cases that have resulted in reversals or remands on categorical approach grounds is typically slightly higher in the Circuits that have adopted the realistic probability test.[91] These increases are also correlated in time to "Supreme

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90.   In what may be either a boon or a negative, depending on one's perspective on immigration enforcement, the use of the realistic probability test is also not strongly associated with either more or fewer deportations in the context of aggravated felonies—but it is also important to note that the approach is still relatively new, given that *Moncrieffe* only established it expressly in 2013. *See generally id.* (explaining the realistic probability test since *Moncrieffe* and how it applies to defendants).

91.   John Guendelsberger, *Circuit Court Decisions for December 2015 and Calendar Year 2015 Totals,* 10 IMMIGR. L. ADVISOR 1, 5–6 (2016), https://www.justice.gov/sites/default/files/pages/attachments/2016/02/02/vol10no01_final.pdf. The data collected in this report focuses on trends between 2006 and 2015, and displays a clear (though, again, small, given the overall small percentage of cases that are reversed or remanded by Circuit Courts from either lower courts or the B.I.A.) correlation between Circuits that use the realistic probability test and their rates of reversal and remand in favor of an immigrant defendant. *See id.* In 2015, for example, the overall percentage of cases that were reversed or remanded was 13.1%; the First, Seventh, Ninth, and Tenth Circuits, all of which used the realistic probability test for both CIMT and aggravated felonies in 2015, or had reserved the right to do so, had reversal/remand rates of 13.9%, 25%, 18.1%, and 16.4%, respectively, while the Circuits that used the minimum reading test in 2015 —the Third, Fifth, and Eighth—had rates below that 13.1% average, at 11.1%, 2.5%, and 4.3%, respectively. *See id.* at 5. Some of the discrepancy here may be attributable to lower courts in those jurisdictions misapplying relatively new legal tests and standards, but the trend over time suggests that the tests applied by the Circuits are at least partially to blame for the rising and falling of reversal/remand rates over time. *See id.* at 6. In particular, the year after the Third Circuit expressly rejected the realistic probability test in *Jean-Louis*—2009—the rate of reversals/remands fell from 16.4% to 10.7%, the largest drop among any of its sister Circuits in that two-year span (in many of the other Circuits, the reverse/remand rate actually *increased* between 2009 and 2010). *See id.* As noted, the number of unpublished decisions makes determining precisely which cases were determined on realistic probability or minimum reading grounds difficult, but what data does exist seems to support the proposition that there has been a similar "bump" in positive outcomes (reversals/remands of removal orders) for defendants for whom the realistic probability test is available as a defense. *See id.* at 5–6. Some of this may be attributable to lower courts incorrectly or inconsistently applying the new standard, since some of the Circuits only explicitly adopted the realistic probability test in recent years and the B.I.A. only codified its recommendation (to the Circuits still on the fence, such as the First Circuit) in 2016 with *Silva-Trevino.* It does not seem eminently unreasonable, though, to give sentencing courts something of the benefit of the doubt, since the realistic probability test would not be wholly foreign to them, given its use in the aggravated felony context. Absent any significant error by sentencing courts, then, or any unusual national trend that would lead to unusually less deference to sentencing courts, it seems most likely that it is the adoption of the realistic probability test that motivates the discrepancy in reversal and remand rates by the Circuits that have adopted it. It is also important to note, however, that the overall percentage of defendants affected by these decisions will always be small, though not so small as to totally evade statistical review.

Court and circuit court decisions clarifying the application of the categorical approach to criminal grounds of removal,"[92] which include CIMT as well as other types of crimes that may trigger removal under the INA. On balance, the realistic probability test results in better outcomes for criminal defendants—that is, it results in fewer sustained deportation orders by either the B.I.A. or a local court of appeals. This may be in part due to the tendency of state statutes, which are the source of the overwhelming majority of convictions that could lead to a CIMT deportation, to be overbroad, as well as the historical tendency of law enforcement to selectively enforce laws in ways that disproportionately affect immigrant populations with the express or implied purpose of effectuating more removal proceedings (often in tandem with a more aggressive federal policy to do the same).[93]

B. *Costs and Benefits of the Minimum Reading Test*

The Circuits that have adopted the minimum reading test have done so partially out of concerns that the realistic probability test, as applied in the CIMT context, deviates impermissibly from prevailing norms and from precedent.[94] The minimum reading test is also a simpler and more consistent standard for judges to apply.[95]

Proponents also believe that the minimum reading test arguably fits better with the categorical approach and provides fewer opportunities to deviate from it.[96] The Third and Fifth Circuits in particular see an irreconcilable difference between the realistic probability test and the minimum reading test, and between the realistic probability test and the categorical approach generally.[97] The merits of these claims will be discussed further below, but for now, the position of the Third Circuit (and presumably Fifth, given its incorporation of the reasoning of the Third Circuit in its own decisions) is that the realistic probability test provides an inadmissible look at the facts underlying a conviction (which was later explicitly prohibited by the Supreme Court in *Moncrieffe*[98]). This, the Court reasoned, was sufficient reason to reject the realistic probability test in favor of the minimum reading test,[99] which allows no detours whatsoever into the underlying facts of a conviction.[100] This inflexible standard significantly lightens the workload of judges, who must engage in a relatively simple statutory interpretation

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92. *Id.* at 6.
93. *See infra* Section IV.A.
94. *See infra* Section IV.B.
95. *See infra* Section IV.B.
96. *See infra* Section IV.B.
97. *See infra* Section IV.B.
98. Moncrieffe v. Holder, 569 U.S. 184, 200–01 (2013).
99. Jean-Louis v. Att'y Gen. of the U.S., 582 F.3d 462, 481–82 (3d Cir. 2009).
100. *Id.* at 471, 477–78.

analysis, as opposed to the more searching inquiry required by the realistic probability test.[101]

An obvious downside of this less flexible standard means that the minimum reading test will result in fewer favorable outcomes for defendants on appeal, or at least will result in more convictions being upheld (assuming that lower courts have done their jobs correctly). Since a lower court will be using something akin to the minimum reading standard when doing its own assessment of whether a statute is a categorical match for the purpose of generating the collateral consequence of deportation[102] (though not engaging in a formal categorical approach analysis in all but the most exceptional circumstances), the judgments of those courts will more closely mirror the judgment of the reviewing court using a minimum reading standard. The expected result of this would be fewer reversals or remands of lower court decisions by reviewing courts using the minimum reading standard, since it ought to be the case that courts using significantly similar heuristics would reach similar conclusions, assuming that all parties involved are acting in good faith.[103] Existing data suggests that this is indeed the case: The Circuits currently employing the minimum reading test have a markedly lower rate of reversals and remands than do the Circuits that use the realistic probability test, and each of the three Circuits that use the minimum reading test has a reversal/remand rate lower than the national average over a period of ten years.[104]

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101.   In practice, it appears that most of the research done in Circuits and jurisdictions that have adopted the realistic probability test is done by the parties themselves, not the courts. Although, slogging through longer and denser briefs may also get to the overall concern of judicial workload that partially motivates the application of the minimum reading standard over the realistic probability test. *See* Dadhania, *supra* note 23, at 354–55 n.216 (describing the nature of the increased litigant/attorney workload that has been associated with the realistic probability test).

102.   *See* Koh, *supra* note 43, at 309.

103.   *Id.* at 309–10 (pointing out the deference of reviewing courts to courts that initially handed down a deportation order for CIMT, as well as the potential issues that deference creates for defendants).

104.   Guendelsberger, *supra* note 91, at 5–6. The trends over time for the Circuits using the minimum reading test reveal marked departures from both their sister Circuits and the national average. The Fifth Circuit, which contains Texas and therefore sees a significant number of removal proceedings on review, remanded 5.9% of such cases in 2006, 8.7% in 2007, 3.1% in 2008, 4.0% in 2009, 13.5% in 2010, 2.9% in 2011, 7.5% in 2012, 1.9% in 2013, 5.9% in 2014, and 2.5% in 2015. *Id.* at 6. Only in 2010 did the Fifth Circuit reverse or remand at a higher rate than the national average, which was then 11.5%; in the other years covered by the data, the Fifth Circuit was between 3% and 12% less likely than the national average to reverse or remand, indicating a higher level of deference to the judgments of lower courts. *See id.* The trends in the Third and Eighth Circuits are closer to the national averages—both hovering at or around 10% for most of the 10-year period captured by the data, compared to the roughly 13% reversal/remand rate nationally over the same amount of time—but, as discussed above, these three Circuits have markedly lower rates of reversals and remands than do the Circuits that were early adopters of the realistic probability test. *See id.* It is again important to note that there are likely many lurking variables in this data, but the intuitive connection between use of the minimum reading test and resulting higher de facto deference to the judgments of lower courts

C. COMPARISON AND IMPLICATIONS

One of the more striking consequences of the disparity of tests between the Circuits is that, despite immigration law being an expressly federal concern, which implies uniform application of immigration laws throughout the country, the differences in tests mean that alien defendants living near the southern border of the United States in particular (that is, the area that sees the most deportation proceedings) can face radically different procedural standards based on where they happen to be convicted or arrested. The fact that the Fifth Circuit, which contains Texas, and the Ninth Circuit, which contains California—two of the jurisdictions that, by volume, see the most removal proceedings[105]—use different tests means that defendants not very far removed geographically could have potentially opposite and contradictory results on similar sets of facts. This is a troubling situation for believers in the categorical approach, which tolerates some degree of inconsistency as a matter of doing business in a federal system, but was partially designed to avoid these kinds of strange disparities. When close to a quarter of defendants facing CIMT removal nationally are literally being judged by a different standard, something strange and probably inimical to the pursuit of justice is likely going on behind the scenes. The divergence in the tests used by the Circuits explains this under-the-hood oddity, and similarly suggests that resolution of that divergence would go a long way toward achieving the goals of the categorical approach—predictability and uniformity, as well as basic justice in applying collateral consequences. The next section of this Note will argue that this divergence ought to be resolved via a national application of the realistic probability test in the context of CIMT removal.

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is still bolstered by this trend, or at least is not harmed by it. The fact that these Circuits see significant numbers (in absolute terms only, as part of the national percentage—at no point was the number of remanded cases higher than 1,000 over that same 10-year period) of deportation cases generally mean that the trends in these Circuits affect more aliens than do decisions in smaller Circuits that are further removed from the southern border of the United States and see fewer such cases. *See Outcomes of Deportation Proceedings in Immigration Court*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php (last updated Jan. 2019) (showing that courts closer to the border, like those in California and Texas, see more deportations by volume than other courts).

105.   Guendelsberger, *supra* note 91, at 5. In 2015, the Ninth Circuit heard almost half of all removal appeals nationally (just over 900, out of just over 1900 nationally); second was the Second Circuit, (289 cases, likely driven by the fact that the Second Circuit contains New York City); and in third was the Fifth Circuit, with approximately a sixth of the national number (122 cases) as well. *See id.* at 5–6. Intriguingly, and importantly for this analysis, the Ninth Circuit's decisions do not seem to represent any sort of statistical outlier: In most years, it hews within one to three percentage points from the national average, which belies its reputation as a vanguard or loose cannon Circuit, depending on one's political perspective. For the purposes of this Note, it also supports the idea that there is more at work than mere political influence in an individual Circuit's remand and reversal rates.

IV.   THE SUPREME COURT SHOULD ADOPT THE REALISTIC
PROBABILITY TEST NATIONWIDE

The realistic probability test is more in line with the current direction of Supreme Court precedent, and it would be simple for the Court to take this test and codify its use across the disparate Circuits. This would be desirable for three main reasons: First, it serves to procedurally protect against over- and under-inclusive statutory language, one of the original purposes of the categorical approach, while the minimum reading test does not; second, it can serve as a safety valve for poorly designed or poorly implemented immigration policy, giving the courts a de facto check on potentially deleterious policy decisions that would otherwise evade review; and third, it more meaningfully advances principles of basic fairness and uniformity that purportedly underlie not just immigration law, but the law of the United States as a whole.

A.   *PROCEDURAL PROTECTIONS ARE GUARANTEED BY THE*
REALISTIC PROBABILITY TEST

One of the purposes of the categorical approach is to guarantee some degree of procedural safeguard for defendants facing severe collateral consequences mandated by perhaps overbroad or overinclusive statutes.[106] In the instances when the realistic probability test would be invoked, there is a nonzero chance that the defendant is facing a collateral consequence because they were caught by an overbroad statute that may not actually capture the activity they were actually convicted for. This is an especially undesirable outcome given that the determination of morally turpitudinous conduct is designed to be pegged to local standards, not any objective or uniform measure of what sort of conduct might satisfy the moral turpitude element of a statute.[107]

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106.   Descamps v. United States, 570 U.S. 254, 276 (2013).

107.   This creates problems for state courts adjudicating issues of moral turpitude based on federal law; or, rather, it creates issues for defendants who face uncertainty as to whether conduct X will be considered morally turpitudinous in this circuit or that circuit, thus influencing their actions and their defense strategy in sometimes inconsistent or unintuitive ways. *See generally* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008) (discussing how federal immigration law intersects with traditional state powers and how this expands judicial acceptance of state regulation of immigration). The issue of state law enforcement and state courts attempting to enforce or judge federal immigration policy is one of the central issues in the context of CIMT removal, as well as federal immigration policy generally, both practically and philosophically. Practically, state and local enforcement patterns differ wildly, as discussed in Professor Stumpf's article—think of the distance between San Francisco, a sanctuary city, and Joe Arpiao's tent cities in Arizona—but the disparity in enforcement is, if not mandated by it, guaranteed by a federal system that allows the states more authority over these issues. Philosophically, it raises the difficult balancing question of how much discretion to leave to localities when they enforce their laws as well as federal immigration laws.

The realistic probability test, by requiring the government show the minimum conduct described by a potentially overbroad statute would actually be punished by the jurisdiction the noncitizen finds themselves in, is not creating a de facto double standard out of an overbroad law. Overbroad statutory language carries an inherent risk of selective enforcement,[108] because a sweeping grant of power to law enforcement leaves more to officer or departmental discretion than a narrow, explicit, and directed delegation of state authority.[109] Overbroad statutory language that incorporates both CIMT and non-CIMT activity thus carries this risk as well. When an overbroad statute is enforced differently against citizens and against noncitizens, it is surely unjust to have a comparatively minor element of an ambiguous statute consistently charged only against aliens. To allow a minor element to serve as the basis for deportation, and to allow the noncitizen no opportunity to challenge the actual application of the statute (i.e., applications that result in prosecutions or criminal convictions), removes any possibility for noncitizen defendants to shield themselves against that statute being used by law enforcement to harass and target immigrants. Thus, the realistic probability test shields a noncitizen from the deeply undesirable possibility that a statute creates two *de facto* bodies of law—one body that applies to all and one that hounds noncitizens specifically, on the off chance that a prosecution, conviction, and deportation may be secured against them.[110] This concern is

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108.   Jereen Trudell, *The Constitutionality of Section 793 of the Espionage Act and its Application to Press Leaks*, 33 WAYNE L. REV. 205, 220 (1986).

109.   *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 44 U. CHI. L. REV. 20, 38–39 (1975).

110.   The possibility of this sort of police and prosecutorial abuse is unfortunately a real one. *See, e.g.*, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 297–300 (2002) (tracking patterns of police harassment and selective enforcement against noncitizens and those perceived as foreign in the wake of the September 11th attacks, under the guise of tougher immigration enforcement); Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 264–71 (2016) (surveying procedural safeguards created in response to police and prosecutorial harassment of immigrants, again prompted by renewed federal focus on deportation); Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675, 730–31 (2015) (discussing the lack of accountability for police action in the context of immigration court, where arresting officers rarely, if ever, appear); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1003–04 (2016) (cataloguing nationwide and historical trends of police abuse of immigrants/perceived immigrants and a lack of judicial or legislative response to that issue). For their part, both state and federal law enforcement have occasionally explicitly appealed to racial profiling as an important tool in the context of immigration enforcement, and courts (including the Supreme Court) have acquiesced to these sorts of judgments with distressing frequency. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) ("[E]ven if it be assumed that such referrals [there, warrantless stops at a traffic checkpoint in California] are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation." (footnote omitted)). The extent to which racial profiling is a useful tool must be balanced with the extent to which society is willing to tolerate racial profiling as a police practice in any context; some localities may have different attitudes than others, but should that in turn dictate outcomes

especially salient given the shifting and wildly inconsistent interpretations of federal drug statutes, and whether they count as CIMT.

Indeed, there is evidence suggesting that drug offenses are being used as precisely that sort of discretionary tool for law enforcement to harass and affect the removal of aliens while rarely enforcing it against citizen offenders.[111] Given the gravity of deportation and the intense disruption that it causes for not just the immigrant, but for a community and a society, it is deeply important to make certain that only the targeted, specifically proscribed conduct is being captured and sanctioned.[112] The realistic probability test helps guarantee these sorts of outcomes, and provides a way to hold local law enforcement more accountable than they traditionally have been in the context of immigration law.

Along similar lines, the realistic probability test can shield defendants from overly harsh or overbroad applications of immigration policy. In a sense, this test gives courts a type of safety valve, or a practical check on legislative decisions that either overburden the judiciary or fail to affect any meaningful or legitimate—that is, supported by something besides animus—policy objectives. Immigration policy is perhaps uniquely susceptible to this kind of legislative failure, and immigrants are often uniquely powerless in the face of a determined majoritarian decision to punish an outgroup—any group with which the majority does not identify.[113] "Explicit racial, ethnic, and gender

for criminal defendants? The immense power of local law enforcement in bringing and sustaining prosecution and convictions of immigrant defendants that lead to deportation looms over the whole of this discussion, and is a factor that may evade the review of the judiciary; ultimately, after all, it is the executive's job to decide when and how to enforce the law.

111.   *See generally* Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of* Moncrieffe v. Holder, 48 U. MICH. J.L. REFORM 967 (2015) (discussing racial profiling as a police tactic generally, and then as applied to drug laws being used to generate deportations for CIMT, noting a disparity in both enforcement and outcomes for aliens versus citizens). In *Moncrieffe*, the defendant, a Jamaican national who had been living in the United States for more than a decade, faced deportation for the "aggravated felony" of possessing a small amount of marijuana. *Id.* at 996. Johnson tracks the Court's reasoning, but also lays out a strong moral and public policy argument against enforcement of federal drug laws in the same context, given the severe disproportionate impact federal drug laws have on people of color, who are in turn at increased risk of deportation. *See generally id.*

112.   *See generally* Ryan D. King et al., *Employment and Exile: U.S. Criminal Deportations, 1908–2005*, 117 AM. J. SOC. 1786 (2012) (explaining deportations in the U.S. over time); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (discussing the role of retroactivity within immigration and deportations); Wilber A. Barillas, Note, *Collateral Damage: Drug Enforcement & Its Impact on the Deportation of Legal Permanent Residents*, 34 B.C. J.L. & SOC. JUST. 1 (2014) (touching on the social harm that deportation has on immigrant communities, which in turn impact the broader state and local community).

113.   *See generally* Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359 (2012) (tracking historical trends of immigration law). Motomura has generated a significant body of political science scholarship related to the historical trends of immigration law and policy, especially as it relates to the shifting conceptions of racial ingroups and outgroups through American history, and his research and argument

discrimination in immigrant admissions and citizenship was common for much of U.S. history,"[114] and while those explicit racial distinctions have been mostly (though not entirely!) eliminated in the letter of the law,[115] the explicit outgrouping created by early immigration law remains in much of its spirit, as well as the spirit of the legislators and executives creating immigration policy. Further, the practical reality of the immigrant experience involves a heightened probability of police harassment and law enforcement applying different standards, almost inevitably negative and often motivated by the same persistent spirit of animus.[116]

The realistic probability test may not affect individual, on-the-ground police behavior, but it does provide a procedural check on the sort of legislative and executive policy that can lead to an immigrant being brought before a court in the first place. The same is true of the categorical approach generally: As early as *Taylor*, courts and commentators have identified its usefulness in guaranteeing that there is not just an actual match between a collateral consequence and a crime, but that the match is sufficiently tight so as to not offend our sense of justice or our sense of what the rights of a criminal defendant (or deportable noncitizen) ought to be.[117] Basic rule of law principles demand that if a legislature responds to a majoritarian impulse to punish a disliked outgroup, or if an executive decides to stealthily or tacitly enforce laws so as to only punish a disliked outgroup, members of that outgroup should have recourse to avoid severe criminal or collateral consequences in the judiciary.[118] While the categorical approach does not by

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provide strong support for the unfortunate conclusion that immigration law and policy is just as influenced by racial bias as any other area of the American criminal justice system. *Id.* at 368–69. In particular, the historical trends associated with shifts in federal immigration goals over the course of the 20th century can be explained in large part by periodic outbursts of white paranoia at perceived 'floods' of immigrants appearing in 'their' communities, and the pressure those outbursts put on local law enforcement especially result in disparate impacts for those most likely to be the face of immigration for the average white citizen: Hispanics. *Id.* at 368–71.

114.   *Id.* at 368.

115.   *Id.* at 368–69.

116.   *See id.*

117.   *See* Descamps v. United States, 570 U.S. 254, 276 (2013); Taylor v. United States, 495 U.S. 575, 598 (1990). The *Taylor* Court tied the extension of the categorical approach to the rule of lenity, which requires ambiguity in statutory language be resolved in favor of the defendant, since it is really the legislature's fault if a statute is so unclear as to thwart a criminal prosecution. *Taylor*, 495 U.S. at 598–99. The *Descamps* Court also warned against the possibility of "endless manipulation" on the part of both the State and defendants absent a principled application of the categorical approach, undermining just outcomes. *Descamps,* 570 U.S. at 276. This anticipates some of the fairness concerns that the Court has articulated in subsequent categorical approach cases, such as *Moncrieffe*, and indicates that the fairness concern—especially in light of consistently broad congressional directives in the context of immigration law—is an important one for alien defendants who face CIMT deportation.

118.   Current events unmistakably bear out the fact that these sorts of punitive majoritarian impulses do exist, and they have also been historical engines of immigration policy. *See, e.g.*, Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2143 (2017)

itself solve the problem of disparate impacts or selective enforcement between racial groups, it adds another line of defense for an immigrant facing CIMT removal. The realistic probability test helps defendants who find themselves brought before a court and faced with truly horrible consequences for a perhaps trivial offense that a legislature has nonetheless decided to harshly punish, or one that falls under a statutory scheme that allows no discretion or mercy on the face of the law.[119]

The realistic probability test provides another of these redoubts for the immigrant defendant, because it requires the jurisdiction to put its money where its mouth is by actually enforcing the laws in a way that touches more than just the despised outgroup it may be covertly targeting. This is an advantage unique to the realistic probability test and does not serve as a "get-out-of-deportation-free" card; it merely creates another opportunity to challenge a statute or a sentence that there may be good, though not presently judicially discoverable or adjudicable, reasons to challenge.

Finally, the realistic probability test is fundamentally fairer than the minimum reading test because it avoids the under- and over-inclusiveness problems that the minimum reading test can generate. Besides being more in line with the goals and outcomes sought by the categorical approach generally, as well as the principles of basic fairness that were identified in *Taylor* as motivating the categorical approach, the realistic probability test would guard against bizarre outcomes like that in *Silva-Trevino*. Recall that in *Silva-Trevino*, the B.I.A. was constrained by the Fifth Circuit's decision to

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(characterizing changes in immigration policy in the 1990s as "not a thoughtful, considered proposal to an existing problem . . . . [but] at best a political calculation by each party to woo voters who were concerned with the optics of being tough on immigration along with being tough on crime" and addressing the racial overtones of that approach); Motomura, *supra* note 113, at 368–71 (assessing historically racist immigration policy, beginning in the early 20th century); Scott Rempell, *Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge*, 18 CHAP. L. REV. 337, 338–341 (2015) (assessing the sometimes racially charged political response to the 2014 Central American immigration crisis, which saw significant numbers of women and children suddenly arrive on the southern border of the United States in response to regional instability).

   119.   Statutory schemes that punish recidivism are particularly prone to producing unjust outcomes, and call into question the general application of collateral consequences such as deportation or mandatory sentencing—if someone is already facing punishment proportional to the crime they committed, what good does tacking on a mandatory sentence do? Is there a real deterrent effect? Are they being punished proportionally to their actions? Are they being punished because the state has judged that this is who they are, a criminal and nothing more? The same proportionality questions extend to the immigrant defendant, and the threat of deportation is at least as severe as some prison sentences that are tacked on pursuant to "three strikes" laws and similar statutory schemes. And, as always, there is a significant risk that the actors captured by these schemes are disproportionately drawn from minority populations, raising more justice-based concerns. The wisdom of "three strikes" laws and other collateral consequences is best left to others. *See* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 153–58 (1999) (providing an overview of collateral consequences and their impact on individuals and communities).

expressly reject the realistic probability test in favor of the minimum reading test, and that as a result of the application of the minimum reading test, an immigrant defendant, who had been convicted in Texas of indecency with a minor, was spared removal because the minimum reading of the statute covered less-than-turpitudinous conduct and was therefore not a categorical match.[120] The B.I.A. noted that if the standard-practice, realistic probability test had been applied—that is, if the Fifth Circuit had not previously gone out of its way to reject it—it was likely that the defendant would have been found eligible for removal, since there was a history of prosecution for similar conduct in Texas that could have met the realistic probability test's requirements to show a categorical match.[121] Thus, while on its face the minimum reading test may seem like it creates a universally higher bar, and fits within a categorical approach framework demanding a narrow fit between a crime of conviction and a statutorily mandated collateral consequence, it actually generates and necessarily tolerates a significant degree of underinclusiveness that can, as it did in *Silva-Trevino,* thwart the purposes and objectives of immigration law. There is undoubtedly a class of immigrants who commit crimes of sufficient severity and, indeed, moral turpitude, that makes deportation the right punishment.[122] The defendant in *Silva-Trevino* was likely one of that class, given the heinousness of sexual indecency with a child, which certainly falls under the definition of moral turpitude in any jurisdiction.[123] And yet, the application of the minimum reading test did not result in the intuitively "right" outcome—from either a public policy or a criminal law standpoint—for that defendant. When a much more workable alternative exists, there is little justification for adhering to a problematic legal test; since the realistic probability test exists, there is little justification for adhering to the minimum reading test, since the realistic probability test would catch and prevent similarly bizarre results flowing from the things that happen when poorly drafted legislation meets morally turpitudinous defendants.

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120.   Matter of Silva-Trevino (*Silva-Trevino III*), 26 I. & N. Dec. 826, 835–36 (B.I.A. 2016).

121.   *Id.* at 836. Importantly, under the realistic probability test, the State could have pointed to Silva-Trevino's own conviction, while it was prevented from doing so by the minimum reading test.

122.   It is, however, worth noting that immigrants in general commit crime at a much lower rate than do native-born citizens—this may be attributable to the unusually harsh consequences that immigration law and policy impose on criminal immigrants, but it is nonetheless a fact that is often conveniently overlooked in the discussion of immigration issues, both by political actors and the general public. *See generally* Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067 (2017).

123.   *See id.* at 2074–75 (criticizing the statutory framework in federal immigration law for failing to distinguish the "minor" offenders who should not face deportation from more serious offenders like "child molester[s] who willfully prey[] on children in public").

B.   RESPONSES TO CIRCUIT ARGUMENTS AGAINST THE REALISTIC PROBABILITY TEST

The reluctance of the Third, Fifth, and Eighth Circuits to adopt the realistic probability test seem to stem from misapplications or misunderstandings of what the test actually entails. The most illustrative example of the reasoning leading to rejection of the realistic probability test is the Third Circuit's argument against applying that test, developed in a series of cases. While less clear, the same misunderstandings that motivated the Third Circuit seem to have been adopted implicitly or explicitly by the Fifth and Eighth Circuits.[124]

The Third Circuit's decision not to adopt the realistic probability test was outlined in its decision in *Jean-Louis*.[125] There, the court explained its reluctance to adopt the realistic probability test: "[W]e believe our discretion to adopt such an approach to be foreclosed by the immigration statute itself [the INA], which predicates removal on convicted conduct, and which, we conclude, expressly limits our inquiry to the official record of judgment and conviction, or other comparable judicial record evidence."[126] The court seems to be under the impression that the realistic probability test requires a premature "peek" into the facts underlying a conviction—that is, material besides "the official record of judgment and conviction, or other comparable judicial record evidence"—but that is not actually the case in the version of the test applied by the other Circuits and the B.I.A.[127] Judicial exploration of the conduct underlying a conviction is only permitted when traditional *and* modified categorical approach have proven inconclusive for the purposes of identifying a categorical match, at which point the realistic probability test is no longer in play.[128] The assessment of any underlying facts is thus no more permissible under the realistic probability test than it is under the minimum reading test, since neither test is involved in that step of a categorical inquiry.[129] As such, there is in fact no real "clash" between the minimum reading and realistic probability tests. The two approaches could even coexist, if a judge were to decide to go above and beyond and attempt to guarantee more procedural safeguards. An enterprising court could cabin the realistic probability test to the modified categorical approach and let the minimum

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124.   Gomez-Perez v. Lynch, 829 F.3d 323, 326–28 (5th Cir. 2016) (expressly endorsing the minimum reading test, albeit without much discussion or mention of the Third or Eighth Circuits' decisions); Guardardo-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010) (approvingly citing *Jean-Louis* when declining to apply the realistic probability approach advocated by the B.I.A. and instead using a minimum reading test).

125.   *See* Jean-Louis v. Att'y Gen. of U.S., 582 F.3d 462, 482 (3d Cir. 2009) (refusing to adopt the "realistic probability" test).

126.   *Id.* at 480.

127.   *Id.*

128.   *Id.* at 471–72.

129.   Matter of Silva-Trevino (*Silva-Trevino III*), 26 I. & N. 826, 831 (B.I.A. 2016).

reading test apply in those situations where a statute was unambiguous and only the "vanilla" categorical approach inquiry was necessary.[130] The possibility for confusion that this sort of hybridization would create, however, is another reason to adopt the realistic probability test wholesale and abandon the minimum reading test nationwide.

The real choice between the realistic probability and minimum reading approaches is thus between a test that effectively and consistently guards against both under- and over-inclusiveness, on the one hand, and a test that results in undesirable outcomes like *Silva-Trevino,* on the other. Absent any compelling argument along the lines of judicial or administrative efficiency agitating strongly in favor of the minimum reading test, there is little good legal reason to continue to employ a test that tolerates such a significant degree of imprecision, especially when eliminating imprecision is one of the controlling principles motivating the judicial use of the categorical approach at all.[131] This choice ought to be an easy one.

V.   CONCLUSION

Federal immigration policy purports to have an interest in predictability and uniform application of the law. A Supreme Court decision that explicitly adopted the realistic probability test in the context of CIMT removal would go a long way toward bringing that policy goal to fruition, and would provide defendants a much clearer understanding of what the consequences of their actions or criminal defense strategies could be in any given situation.[132] The realistic probability test helps mitigate some of the over- and under-inclusiveness of the categorical approach as applied in the immigration context—sensible tailoring of laws being another important policy goal—and guarantees a baseline of procedural safeguards that comport with baseline conceptions of criminal justice. It also actualizes the objectives of the line of Supreme Court decisions that have developed and fleshed out the categorical approach more generally. Finally, uniform use of the realistic probability test would help prevent poorly drafted legislation from unfairly sweeping up non-turpitudinous conduct, and would incentivize Congress and other legislatures to clarify exactly what they mean when they criminalize some conduct. The

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130.   This is not to say that such an outcome is desirable for defendants or for judges. The solution is not wholly unreasonable, just redundant, but the application of two different standards for different and conditional steps of the categorical approach is likely to generate judicial confusion, as well as confusion on the part of advocates and clients who may fairly expect one standard to be applied over another based on where they are in the categorical analysis. It is analytically and administratively neater to reject the minimum reading test and apply the realistic probability test whenever the modified categorical approach is in play—another reason for its national adoption.

131.   Taylor v. United States, 495 U.S. 575, 598–99 (1990) (linking the categorical approach to the rule of lenity and a desire for well-tailored law in the context of collateral consequences to sentencing).

132.   Dadhania, *supra* note 23, at 346–52.

modest increase in court workload and administrative burden is outweighed by these benefits to immigration policy as a whole. Those benefits would spill over into general criminal law as well, not just immigration proceedings.[133] If the Supreme Court were to enshrine this test in the context of immigration law, requiring that there be a realistic probability of prosecution for the alleged categorical match, it would mark a significant step toward a more just and coherent immigration policy framework. Even more broadly, it would provide the Court a way in which it could vindicate fundamental principles of American justice—fairness, predictability, and equal application of the laws —in a system that has produced more than its fair share of injustice, unpredictability, and unequal treatment of unpopular minorities. The importance of that kind of statement for the integrity of the American immigration system, and for the integrity of rule of law in general, cannot be overstated.

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133.   Clear statutes would benefit citizen defendants as well—the categorical approach and realistic probability tests, after all, originated on the domestic side of the criminal justice system, and both tests see their most use in those contexts. *See* Tsen Lee, *supra* note 23, at 265. Clearer law also carries obvious benefits for law enforcement and the average citizen, as it increases legislative accountability and gives a more accurate sense of what sort of conduct society really condemns or rewards, as the case may be. Hong, *supra* note 122, at 2143.