Circumstances Requiring Safeguards: Limitations on the Application of the Categorical Approach in Hernandez-Zavala v. Lynch

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CIRCUMSTANCES REQUIRING SAFEGUARDS: LIMITATIONS ON THE APPLICATION OF THE CATEGORICAL APPROACH IN HERNANDEZ-ZAVALA v. LYNCH

Abstract: On November 20, 2015, the U.S. Court of Appeals for the Fourth Circuit in Hernández-Zavala v. Lynch held that adjudicators deciding whether a noncitizen has been convicted of a crime of domestic violence as defined in 8 U.S.C. § 1227(a)(2)(E)(i) must apply the circumstance-specific approach to the statute’s domestic relationship requirement. In so doing, the Fourth Circuit carved out an exception to the more protective categorical and modified categorical approaches, which limit the evidence that may be admitted to determine whether a conviction triggers immigration consequences. This Comment argues that the Fourth Circuit erred in extending the circumstance-specific approach to crimes of domestic violence under the Immigration and Nationality Act, given the unique historical legacy of the categorical approach in immigration proceedings and the procedural disadvantages to which noncitizens in removal proceedings are subjected.

INTRODUCTION

Throughout the history of the United States, immigration and deportation have been divisive political issues.1 Political leaders on both sides of the aisle, however, generally support the removal of immigrants with prior criminal convictions.2 This population, though seen by many as unsympathetic and undeserving of immigration benefits, includes refugees, lawful permanent residents, and so on.

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and undocumented individuals, many of whom have lived in the United States for decades and are the parents of children with U.S. citizenship.  

This Comment focuses on one provision of the Immigration and Nationality Act (“INA”) which makes those who have committed “crimes of domestic violence” removable and ineligible for certain forms of discretionary relief. 4 In November 2015, in Hernandez-Zavala v. Lynch, the U.S. Court of Appeals for the Fourth Circuit held that when analyzing whether a noncitizen’s conviction for a “crime of domestic violence” triggers immigration consequences, immigration adjudicators should consider the underlying facts of the conviction using a “circumstance-specific approach.” 5 Part I of this Comment provides an overview of the competing approaches to determining immigration consequences of criminal convictions and the facts and procedural history of Hernandez-Zavala. 6 Part II discusses the current state of the law with respect to “crimes of domestic violence” as defined in the INA. 7 Part III argues that the Fourth Circuit failed to sufficiently consider the unique need for analytic and evidentiary limits in determining immigration consequences of criminal convictions, particularly considering the numerous procedural hurdles faced by immigrants in removal proceedings. 8

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4 See 8 U.S.C. § 1227(a)(2)(E)(i) (2012) (listing “crimes of domestic violence” as a removal ground); id. § 1229b(b)(1)(C) (stating that nonpermanent residents who have been convicted of crimes listed under § 1227(a)(2) are ineligible for relief in the form of cancellation of removal for certain nonpermanent residents); see also infra notes 46–49 and accompanying text (discussing the Immigration and Nationality Act (“INA”) definition of “crimes of domestic violence” under 8 U.S.C. § 1227(a)(2)(E)(i)).

5 Hernandez-Zavala v. Lynch, 806 F.3d 259, 266–67 (4th Cir. 2015); see infra notes 58–65 and accompanying text (discussing the Fourth Circuit’s reasoning in Hernandez-Zavala).

6 See infra notes 9–54 and accompanying text.

7 See 8 U.S.C. § 1227(a)(2)(E)(i); infra notes 55–74 and accompanying text.

8 See infra notes 75–95 and accompanying text.
I. IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: THE CATEGORICAL AND CIRCUMSTANCE-SPECIFIC APPROACHES

For centuries, criminal convictions have impacted the ability of foreign nationals to immigrate to and remain in the United States. A dramatic shift occurred in the 1980s and 1990s, when a series of immigration reforms expanded conviction categories predating immigration consequences and increased the severity of these consequences, resulting in increased numbers of deportations based on criminal convictions. With the passage of the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) in 1996, as part of an effort to protect public safety and address fears of “criminal aliens,” Congress included for the first time “crimes of domestic violence” as a ground of removability under the INA. Section A of this Part discusses the development of the categorical approach to determine whether crimes qualify as those de-

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9 See Act of March 3, 1891, ch. 551, 26 Stat. 1084 (1891) (including for the first time “crimes involving moral turpitude” as a ground for exclusion); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 4 (2015) (tracing the origins of “crimmigration” law to 1788, when Congress encouraged states to restrict the immigration of convicts); Julia Ann Simon-Kerr, Moral Turpitude, 2012 UTAH L. REV. 1001, 1044–46 (noting that the adoption of “crimes involving moral turpitude” as a ground of exclusion in the Act of 1891 built upon the historic usage of the moral turpitude standard to perpetuate discriminatory policies such as disenfranchisement).


11 See 8 U.S.C. § 1227(a)(2)(E)(i); IIRIRA § 350(a), 110 Stat. at 3009-639 to 640 (1996). While “crimes of violence” resulting in a specified minimum sentence were already included within the INA’s list of “aggravated felony” offenses prior to 1996, the 1996 laws provided that convictions for “crimes of domestic violence” can result in immigration consequences even when no criminal sentence is imposed. See Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990) (expanding the definition of “aggravated felony” to include “crimes of violence” resulting in at least five-year sentences); IIRIRA § 350(a), 110 Stat. at 3009-639 to 640 (codified as amended at 8 U.S.C. § 1227) (creating a new category of domestic violence predicate offenses); see also Linda Kelly, Domestic Violence Survivors: Surviving the Beatings of 1996, 11 GEO. IMMIGR. L.J. 303, 316 (1997) (critiquing domestic violence immigration laws enacted in the 1990s and the ways in which survivors are negatively impacted by requirements that abusers face deportation).
scribed in the INA. Section B examines the more recent development of the circumstance-specific approach, with particular attention to “crimes of domestic violence.” Section C discusses the facts and procedural history of Hernandez-Zavala.

A. The Categorical Approach

For as long as U.S. law has imposed immigration consequences on individuals with criminal convictions, adjudicators have been faced with the challenge of developing analytic approaches and evidentiary guidelines to determine whether convictions under a variety of state and federal penal codes qualify as crimes outlined in the INA. In portions of the INA that lay out the grounds of inadmissibility and deportability, the statute lists both categories of generic crimes and crimes defined in other sections of the United States Code. In determining whether a past conviction under a state or federal criminal statute falls within one of these categories, Courts have generally adopted the “categorical approach,” which requires a comparison of the elements of the crime for which the respondent was convicted and the crime listed in the INA to determine whether the respondent’s conviction triggers immigration consequences. In other words, the noncitizen’s underlying conduct is irrelevant in

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12 See infra notes 15–28 and accompanying text.
13 See infra notes 29–40 and accompanying text.
14 See infra notes 41–54 and accompanying text.
15 See Alina Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U. L. REV. 1669, 1673–74 (2011) (analyzing the history of how adjudicators have determined immigration consequences of criminal convictions); Simon-Kerr, supra note 9, at 1046–47 (analyzing the ways in which adjudicators have struggled to establish workable standards to determine whether convictions satisfy immigration law’s undefined moral turpitude standard).
16 See 8 U.S.C. §§ 1182(a)(2), 1227(a)(2). Sections 212(a)(2) and 237(a)(2) of the INA (8 U.S.C. §§ 1182(a)(2), 1227(a)(2)) provide lists of crimes and establish that respondents convicted of these crimes are inadmissible and/or removable. Id. For some crimes, the INA references definitions contained in other federal statutory provisions, while for others it uses generic terms without providing any definition. Compare 8 U.S.C. § 1101(a)(43)(B) (including within the list of “aggravated felony” offenses those illicit trafficking offenses “defined in section 802 of Title 21”), with 8 U.S.C. § 1101(a)(43)(A) (including “murder”—a generic crime—in the list of “aggravated felony” offenses). Both federal and state convictions may qualify as grounds of removability or inadmissibility, and since immigration law first included such provisions, adjudicators have struggled to account for the variety in criminal statutes, many of which are broader or narrower than those referenced in the INA. See Das, supra note 15, at 1673–74.
17 See Mellouli v. Lynch, 135 S. Ct. 1980, 1986 n.3, 1988 (2015) (applying the categorical approach to determine whether the respondent’s conviction for drug paraphernalia possession qualified as a controlled substance deportable offense by comparing the controlled substances listed under a state schedule with those listed under the federal schedule referenced in the INA—21 U.S.C. § 802 (2012)); Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) (applying the categorical approach to determine whether the respondent’s conviction for possession with intent to distribute marijuana qualified as an aggravated felony deportable offense by comparing the federal offense listed in the INA—21 U.S.C. § 841(a)—with the state statute). Convictions under state or federal law may trigger immigration consequences if the statute of conviction is either directly referenced in the INA or criminaliz-
Fourth Circuit Uses Circumstance-Specific Approach in INA Removal Case

this analysis, and courts compare only the elements of the statute of conviction against the elements of the federal statute. 18 Under the categorical approach, if a criminal statute is overbroad and could criminalize conduct that would not satisfy the elements of the INA-listed offense, a conviction under that statute would not trigger immigration consequences, regardless of the respondent’s actual conduct. 19

Immigration adjudicators have used some form of the categorical approach since the early 1900s. 20 Federal judges deciding immigration cases during this period concluded that in drafting national immigration policies, Congress intended to limit the power of administrative immigration adjudicators. 21

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18 See Moncrieffe, 133 S. Ct. at 1684, 1697 (explaining that under the categorical approach, a respondent’s actual conduct resulting in a criminal conviction is irrelevant).

19 See Mellouli, 135 S. Ct. at 1988 (holding that the petitioner’s conviction for possession of drug paraphernalia was not categorically a controlled substance offense as defined in the INA because the statute of conviction criminalized the possession of paraphernalia relating to substances not included in the federal controlled substances schedules); Descamps v. United States, 133 S. Ct. 2276, 2282–83 (2013) (holding that the petitioner had not committed the generic crime of burglary because the statute under which he was convicted did not require breaking and entering, which is an element of the generic definition of burglary); Moncrieffe, 133 S. Ct. at 1684, 1701 (holding that the petitioner’s conviction for possession of marijuana with intent to distribute was not categorically an aggravated felony because the state statute under which the petitioner was convicted criminalized the sharing of small amounts of marijuana, conduct which would not result in a conviction under the relevant federal statute). Under the categorical approach, when the INA does not provide a definition for a crime, adjudicators must identify the elements of the “offense as commonly understood.” Descamps, 133 S. Ct. at 2281.

20 See Act of March 3, 1891, ch. 551, 26 Stat. 1084 (listing categories of predicate crimes triggering inadmissibility); Das, supra note 15, at 1689 (describing the early history of the categorical approach). The development of the categorical approach in the immigration context can be traced to the early 1900s, not long after crimes involving moral turpitude were first included in the federal immigration code as a ground of inadmissibility. Das, supra note 15, at 1689. Scholars have argued that this history is generally overlooked, which has enabled adjudicators to carve out a growing number of exceptions to the categorical approach. Id.; see also Simon-Kerr, supra note 9, at 1046–47 (arguing that the categorical approach developed as a result of the lack of a clear definition for the term “moral turpitude” in early immigration statutes, and adjudicators’ hesitance to reach fact-dependent conclusions regarding the morality of respondents’ conduct).

21 See United States ex rel. Mylius v. Uhl, 203 F. 152, 153 (S.D.N.Y. 1913); Das, supra note 15, at 1690, 1695–96. The District Court for the Southern District of New York reasoned in United States ex rel. Mylius v. Uhl in 1913 that the categorical approach is necessary for deciding immigration cases because of the administrative (as opposed to judicial) role of immigration adjudicators, the need for “definite standards” and “general rules,” and the importance of applying immigration law in a uniform manner. 203 F. at 153. A subsequent decision by Attorney General Cummings adopted the reasoning
The categorical approach was thus viewed as a way to ensure that immigration law is applied in a fair and uniform manner, and that determinations of guilt or innocence are restricted to Article III judges.\(^{22}\)

Despite this lengthy history, current interpretations of the categorical approach are based largely on non-immigration cases, including the U.S. Supreme Court’s 1990 decision in *Taylor v. United States* and subsequent cases employing the categorical approach to determine whether a prior conviction triggers a sentencing enhancement under the Armed Career Criminal Act (“ACCA”).\(^ {23}\) In *Taylor*, the Court held that the prior burglary convictions of a
defendant charged as a felon in possession of a firearm resulted in a sentence enhancement under the ACCA because the state burglary statute contained all the elements of the modern generic crime of burglary.24 Recent cases drawing on the Taylor Court’s reasoning have led to the refinement of what is known as the “modified categorical approach.”25 This variation on the categorical approach provides adjudicators with a means of analyzing convictions under “divisible” statutes containing multiple alternative elements.26 In such situations, adjudicators are permitted to consult limited sources within the record of conviction to determine under which version of the statute a respondent was convicted.27 If the respondent was convicted under a version of the statute that aligns with the predicate crime listed in the INA, the underlying conviction may trigger immigration consequences, notwithstanding the overbreadth of the statute of conviction as a whole.28

in the criminal sentencing context is based on similar, but slightly different rationales than in the immigration context. See Shepard, 544 U.S. at 24 (concluding that the categorical approach protects defendants’ Sixth Amendment right to a jury trial); Taylor, 495 U.S. at 600–02 (justifying adoption of the categorical approach due to statutory interpretation, legislative history, and “the practical difficulties and potential unfairness” of inquiries into the facts behind a conviction, particularly where a respondent entered a guilty plea).

See Taylor, 495 U.S. at 598, 602. In Taylor, the Court measured the defendant’s state conviction against the generic definition of burglary because the ACCA failed to define burglary. Id. The Court examined the traditional common law definition of burglary as well as the definition contained in the Model Penal Code and other statutes. Id. at 580. Through a thorough analysis of the various definitions of burglary and the legislative history of the Model Penal Code and the ACCA, the Court applied the definition of burglary as adopted by most states. Id. at 598.

See Mathis, 136 S. Ct. at 2249; Descamps, 133 S. Ct. at 2285 (recognizing when the modified categorical approach may be used); Shepard, 544 U.S. at 26 (listing the documents within the record of conviction that courts later determined are all that may be consulted when analyzing a conviction using the modified categorical approach).

See Mathis, 136 S. Ct. at 2249; Descamps, 133 S. Ct. at 2285. As the Supreme Court explained in Descamps in 2013, the modified categorical approach is not actually a separate approach to determining immigration consequences of criminal convictions, but rather a tool that enables adjudicators to continue utilizing the categorical approach in situations involving divisible statutes. Descamps, 133 S. Ct. at 2285.

See Mathis, 136 S. Ct. at 2252–53 (clarifying that the modified categorical approach may only be applied when a statute contains “multiple alternative elements”); Shepard, 544 U.S. at 26 (limiting the sources that may be consulted when a statute is found to be divisible to the record of conviction); Taylor, 495 U.S. at 602 (creating an exception to the categorical approach where a jury was “actually required to find all the elements” of the generic offense).

See, e.g., Ibarra-Hernandez v. Holder, 770 F.3d 1280, 1282 (9th Cir. 2014) (finding that the noncitizen’s conviction for taking the identity of another qualified as a crime involving moral turpitude even though the statute was overbroad, because he had been convicted under a version of the statute necessarily involving fraud); Kaufmann v. Holder, 759 F.3d 6, 8–9 (1st Cir. 2014) (finding that a child pornography conviction under a statute containing multiple alternative elements qualified as an aggravated felony even though the statute was overbroad, because the noncitizen had been convicted under a version of the statute which was a categorical match to the offense listed in the INA). The modified categorical approach allows a prior state conviction under a divisible statute with multiple alternative elements to trigger immigration consequences when the record of conviction makes clear
B. The Circumstance-Specific Approach

As guidelines for applying the categorical and modified categorical approaches have gradually developed, a recent line of cases has emerged carving out exceptions to these approaches. Where requirements of offenses listed in the INA appear to describe the particular circumstances under which a noncitizen committed a crime, rather than elements of the crime, courts have approved the use of the “circumstance-specific approach.” This new alternative to the categorical approach permits adjudicators to examine any evidence that would otherwise be admissible in immigration court to determine whether the facts underlying a criminal conviction satisfy the requirements of the INA offense. Under the circumstance-specific approach, therefore, a conviction may trigger an immigration consequence even if the statute under which the respondent was convicted is overbroad and indivisible.

that the respondent was convicted under the version of the statute that is a categorical match for the crime listed in the INA. See Mathis, 136 S. Ct. at 2252–53 (explaining how the modified categorical approach functions). Under both the categorical and modified categorical approaches, however, the inquiry made by the adjudicator is whether the respondent was convicted under a statute aligning with a crime listed in the INA, rather than whether the facts underlying the conviction should trigger immigration consequences. See Descamps, 133 S. Ct. at 2285 (describing the modified categorical approach as a tool used to engage in a categorical analysis involving a divisible statute of conviction).

See Nijhawan, 557 U.S. at 38; Garza-Olivares, 26 I. & N. Dec. at 738–39; Dominguez-Rodriguez, 261 I. & N. Dec. at 411; see also infra note 32 (summarizing cases establishing the circumstance-specific approach).
The circumstance-specific approach was first articulated in the U.S. Supreme Court’s decision in 2009 in *Nijhawan v. Holder*. In *Nijhawan*, the Court held that the categorical approach should not be applied to determinations of whether a fraud crime resulted in a loss of at least ten thousand dollars, and thus fell within the INA’s list of “aggravated felony” fraud offenses. Rather, adjudicators were to look to the record of conviction and any other reliable evidence to determine the amount of loss caused by a respondent’s fraud crime.

In 2009 in *United States v. Hayes*, the Supreme Court similarly declined to use the categorical approach in a firearms possession case to determine whether a defendant had been convicted of a misdemeanor “crime of domestic violence” under 18 U.S.C. § 922(g)(9), also known as the Lautenberg Amendment. The Lautenberg Amendment, enacted in 1996, expanded § 922(g)’s prohibition on firearms possession by individuals convicted of certain felony offenses to also include misdemeanor domestic violence convictions. The requirement that the respondent failed to appear “pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years’ imprisonment or more may be imposed”); *In re Dominguez-Rodriguez*, 26 I. & N. Dec. at 411 (finding that the exception to the controlled substance offense provision in 8 U.S.C. § 1227(a)(2)(B)(i), which applies when a conviction was based on “possession for one’s own use of 30 grams or less of marijuana,” requires an inquiry of the facts underlying the conviction rather than the elements of the statute of conviction).

*See Nijhawan*, 557 U.S. at 38 (“The language of the provision is consistent with a circumstance-specific approach.”); *Hernandez-Zavala*, 806 F.3d at 264 (attributing the circumstance-specific approach to the Supreme Court’s decision in *Nijhawan*).

*See 8 U.S.C. § 1101(a)(43)(M)(i) (defining aggravated felony fraud crimes as those “in which the loss to the victim or victims exceeds $10,000”); Nijhawan, 557 U.S. at 36. “Aggravated felony” convictions, including 8 U.S.C. § 1101(a)(43)(M)(i), result in mandatory detention, mandatory removal without the possibility of discretionary relief, and bars on the ability to reenter the United States. See Erica Steinmiller-Perdomo, Note, *Consequences Too Harsh for Noncitizens Convicted of Aggravated Felonies?*, 41 FLA. ST. U. L. REV. 1173, 1187–88 (2014). Based on the Court’s decision in *Nijhawan*, if a respondent has been convicted of a fraud crime, adjudicators may now conduct a factual inquiry not limited to the record of conviction to determine whether the amount of loss exceeds $10,000. *Nijhawan*, 557 U.S. at 36. Therefore, a fraud conviction may qualify as an aggravated felony and result in immigration consequences even if the statute of conviction does not have a monetary threshold as an element. *Id.*

*See Nijhawan*, 557 U.S. at 36 (holding that the “fraud and deceit” provision of the INA “calls for a ‘circumstance-specific’ . . . interpretation”).


Hayes Court emphasized that the existence of a domestic relationship, though required under the Lautenberg Amendment, is not an element of the predicate domestic violence offense, and therefore is not subject to the categorical approach. 38 The Hayes Court justified its holding by explaining that Congress intended the Lautenberg Amendment to apply broadly to dangerous domestic violence crimes not charged as felonies and therefore not previously covered by other provisions of 18 U.S.C. § 922(g). 39 As a result of Hayes, the Lautenberg Amendment’s restrictions can be triggered when a person commits a crime of violence and the facts underlying the conviction reveal that the victim and perpetrator were domestic partners, even if the underlying crime does not include a domestic relationship as an element. 40


On March 8th 2012, Hernan Hernandez-Zavala, a native and citizen of Mexico living in the United States without authorization, was charged with misdemeanor assault. 41 The victim of the assault was Mr. Hernandez-Zavala’s partner, with whom he parented a child and shared an address. 42 This criminal complaint brought Mr. Hernandez-Zavala to the attention of immigration authorities, and the following day he was served with a notice to appear, charging that he was removable for having entered and continued living in the United States without authorization. 43 Mr. Hernandez-Zavala conceded that he was

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38 Hayes, 555 U.S. at 426; see 142 CONG. REC. S11,878 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (noting that “convictions for domestic violence-related crimes are often for crimes, such as assault, that are not explicitly identified as related to domestic violence” and urging that “law enforcement authorities [should] thoroughly investigate misdemeanor convictions on an applicant’s criminal record to ensure that none involves domestic violence . . . ”).

39 Hayes, 555 U.S. at 426; see Bethany A. Corbin, Goodbye Earl: Domestic Abusers and Guns in the Wake of United States v. Castleman—Can the Supreme Court Save Domestic Violence Victims?, 94 NEB. L. REV. 101, 120–21 (2015) (discussing Hayes); Islam, supra note 37, at 355–58 (arguing that the Hayes Court was correct to place significant weight on Senator Lautenberg’s floor statements regarding the Lautenberg Amendment).

40 Hayes, 555 U.S. at 426; Corbin, supra note 39, at 121 (explaining the significance of the Hayes Court’s holding).

41 Hernandez-Zavala, 806 F.3d at 261. The statute Mr. Hernandez-Zavala pled guilty to having violated provides that “assault, assault and battery, or affray” resulting in serious injury or involving a deadly weapon is a misdemeanor. See N.C. GEN. STAT. § 14-33(c)(1) (2012); Hernandez-Zavala, 806 F.3d at 261.

42 Hernandez-Zavala, 806 F.3d at 261. The actual existence of a relationship between Mr. Hernandez-Zavala and the victim of his assault conviction was undisputed, and Mr. Hernandez-Zavala described the victim in his brief as his “partner.” Id.

removable on this ground and applied for discretionary relief from removal in the form of cancellation of removal for certain nonpermanent residents. On March 21st, Mr. Hernandez-Zavala pleaded guilty to assault with a deadly weapon. Then, on February 4th, the Department of Homeland Security moved to pretermit his application for cancellation of removal on the basis that he had been convicted of a “crime of domestic violence” and was therefore statutorily ineligible for relief.

The INA defines “crimes of domestic violence” as those that first meet 18 U.S.C. § 16’s definition of “crimes of violence.” Courts have generally accepted that this provision requires a categorical analysis of whether a conviction qualifies as a “crime of violence.” Secondly, the perpetrator and victim must share a domestic relationship. Mr. Hernandez-Zavala argued that be-

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44 Hernandez-Zavala, 806 F.3d at 262; see 8 U.S.C. § 1229b(b) (outlining the requirements of cancellation of removal for certain nonpermanent residents). Cancellation of removal for certain nonpermanent residents is a discretionary form of relief available to those who have been present in the United States for at least ten years, whose deportation would result in “exceptional and extremely unusual hardship” to a qualifying relative, who have been of “good moral character,” and who have not committed certain crimes. 8 U.S.C. § 1229b(b).

45 Hernandez-Zavala, 806 F.3d at 261.

46 See 8 U.S.C. § 1229b(b) (establishing as one of the requirements for cancellation of removal for certain nonpermanent residents that the applicant may not have been convicted of a crime listed under 8 U.S.C. § 1227(a)(2)); see also id. § 1227(a)(2)(E) (including definitions for predicate crimes of domestic violence convictions); Hernandez-Zavala, 806 F.3d at 262 (listing the INA’s crime of domestic violence provision as the Department of Homeland Security’s reason for moving to pretermit Mr. Hernandez-Zavala’s application for relief). A crime of domestic violence is defined as:

“Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term ‘crime of domestic violence’ means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former [partner] . . . .”


47 8 U.S.C. § 1227(a)(2)(E)(i); 18 U.S.C. § 16 (2012). Title 18 of the U.S. Code governs federal crimes and criminal procedure. Chapter 1 of Title 18 contains definitions of terms used throughout Title 18, including “crime of violence.” 18 U.S.C. § 16. A crime of violence is defined as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id.

48 See Hernandez-Zavala, 806 F.3d at 263 (concluding that assault with a deadly weapon was categorically a “crime of violence”); Bianco, 624 F.3d at 272 (concluding that aggravated assault was categorically a “crime of violence”); In re H. Estrada, 26 I. & N. Dec. at 750 (concluding that simple battery was categorically a “crime of violence”).

49 8 U.S.C. § 1227(a)(2)(E)(i). The INA gives several examples of domestic relationships, including spouses, co-parents, and cohabiting couples, and also says that any relationship “protected . . . under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government” suffices. Id.
cause the statute under which he was convicted did not include as an element a
domestic relationship between the victim and abuser, it therefore is not a categ-
orical match to the offense of domestic violence described in the INA.50

The Immigration Judge (“IJ”) rejected Mr. Hernandez-Zavala’s argument
and granted the government’s motion, concluding first that Mr. Hernandez-
Zavala had been convicted of a “crime of violence” under 18 U.S.C. § 16 and
second that the facts of Mr. Hernandez-Zavala’s conviction satisfied the nec-
essary domestic relationship requirement.51 Mr. Hernandez-Zavala appealed to
the Board of Immigration Appeals (“BIA” or “the Board”), arguing that the IJ
erred as a matter of law in admitting and examining evidence of the facts un-
derlying his criminal conviction.52 The BIA affirmed the decision of the IJ
based on its adoption of the circumstance-specific approach, permitting exam-
ination of underlying evidence to establish the existence of a domestic rela-
tionship.53 Mr. Hernandez-Zavala subsequently appealed the BIA’s decision to
the Fourth Circuit.54

II. THE FOURTH CIRCUIT’S ADOPTION OF THE CIRCUMSTANCE-SPECIFIC
APPROACH WITH RESPECT TO “CRIMES OF DOMESTIC VIOLENCE”

In 2015, in Hernandez-Zavala v. Lynch, the U.S. Court of Appeals for the
Fourth Circuit held that the circumstance-specific approach should be used to
determine whether convictions under state criminal statutes qualify as “crimes
of domestic violence” as defined in the INA, and therefore result in immigra-
tion consequences.55 Section A of this part examines the Fourth Circuit’s reli-
ance in Hernandez-Zavala on the Supreme Court’s 2009 decisions in Nijhawan
v. Holder and United States v. Hayes.56 Section B discusses the current state of

50 See id. (defining crimes of domestic violence triggering immigration consequences); N.C. GEN.
STAT. § 14-33(c)(1) (2012); Hernandez-Zavala, 806 F.3d at 263 (noting Mr. Hernandez-Zavala’s sole
contention on appeal was that the IJ should have applied the categorical approach to determine wheth-
er he had convicted a “crime of domestic violence” as defined by the INA).
51 Hernandez-Zavala, 806 F.3d at 262. The Immigration Judge (“IJ”) engaged in both a modified
categorical and a circumstance-specific analysis, and determined that under either approach, Mr. Her-
nandez-Zavala had been convicted of a crime of domestic violence triggering immigration conse-
quences. Id.
52 Id. The Board of Immigration Appeals (“BIA” or “the Board”) is the administrative body that
hears appeals of decisions by IJs. See 8 C.F.R. § 1003.1(b) (2016) (establishing the Board’s appellate
jurisdiction). BIA decisions are binding on IJs nationwide unless they are overruled by the Board, the
attorney general, or a federal court. See 8 C.F.R. § 1003.1(g) (outlining when BIA decisions serve as
precedent). See generally DEP’T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL
53 Hernandez-Zavala, 806 F.3d at 262.
54 Id.
(4th Cir. 2015); supra notes 29–40 and accompanying text (describing the circumstance-specific ap-
proach).
56 See infra notes 58–65 and accompanying text.
the law with respect to immigrants charged with having been convicted of “crimes of domestic violence” in light of a preexisting circuit split, the Fourth Circuit’s decision in Hernandez-Zavala, and the BIA’s subsequent decision in 2016 in In re H. Estrada.57

A. The Fourth Circuit’s Reliance on the Supreme Court’s Decisions in Nijhawan and Hayes

In assessing Mr. Hernandez-Zavala’s case, the Fourth Circuit affirmed the BIA’s use of the circumstance-specific approach to determine whether the domestic relationship requirement was satisfied, and denied Mr. Hernandez-Zavala’s petition for review.58 The Fourth Circuit gave three primary justifications for its adoption of the circumstance-specific approach with respect to “crimes of domestic violence” as defined in the INA.59 First, it reasoned that the language used in the INA reveals that Congress intended the relationship requirement to be a limitation on the crimes of violence that trigger immigration consequences, rather than an element of a more specific generic crime of domestic violence.60 Secondly, the Fourth Circuit looked to the Supreme Court’s 2009 decision in Hayes, and found the Hayes Court’s holding that “crimes of domestic violence” under the Lautenberg Amendment require a circumstance-specific analysis to determine the existence of a domestic relationship instructive, despite the different context and slightly different wording in the INA and the Lautenberg Amendment.61

57 See infra notes 66–74 and accompanying text.
58 Hernandez-Zavala, 806 F.3d at 266, 268.
59 Id. at 266–67; see also 8 U.S.C. § 1227(a)(2)(E)(i) (defining “crimes of domestic violence”).
60 Hernandez-Zavala, 806 F.3d at 266. In particular, the Fourth Circuit referenced the phrase “committed by” in 8 U.S.C. § 1227(a)(2)(E)(i) as an indication that Congress intended that the categorical approach be used to determine if a conviction was for a “crime of violence” and the circumstance-specific approach be used to determine whether there was a domestic relationship. Id. In reaching this conclusion, the Fourth Circuit relied on the Supreme Court’s 2013 opinion in Moncrieffe v. Holder, in which it reconciled its prior 2009 holding in Nijhawan v. Holder with its ongoing defense of the categorical approach by distinguishing between provisions in the INA that refer to generic crimes and those that contain exceptions calling for fact-finding into the attendant circumstances of a particular conviction. Id.; see Moncrieffe v. Holder, 133 S. Ct. 1678, 1691 (2013); Nijhawan v. Holder, 557 U.S. 29, 32 (2009).
Finally, the Fourth Circuit based its holding in *Hernandez-Zavala* on practical considerations. Citing both *Nijhawan* and *Hayes*, the Fourth Circuit concluded that Congress could not have intended that the categorical approach apply to the domestic relationship requirement in 8 U.S.C. § 1227(a)(2)(E)(i) because at the time this statutory provision was enacted, only approximately one third of all states had statutes in place that included a domestic relationship element. Moreover, even in those states that did have separate domestic violence statutes, domestic violence crimes were often prosecuted under general assault and battery statutes. Requiring the categorical approach to determine the existence of a domestic relationship would therefore have made § 1227(a)(2)(E)(i) meaningless in most states.

**B. The Current State of the Law Concerning Immigration Consequences of “Crimes of Domestic Violence”**

The Fourth Circuit made its decision in the context of an existing circuit split on the issue of whether to use the categorical or circumstance-specific approach to determine whether a past conviction was for a “crime of violence” perpetrated against an individual with whom the perpetrator was in a domestic relationship within the meaning of the INA. In 2010, in *Bianco v. Holder*, the

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63 *Id.* The Lautenberg Amendment was passed in the same year as the INA was amended to include the provision codified in 8 U.S.C. § 1227(a)(2)(E)(i), and the *Hayes* Court cited the same statistic and practicality concerns as a basis for its holding. *Hayes*, 555 U.S. at 426–27; *Hernandez-Zavala*, 806 F.3d at 266–67. The Supreme Court acknowledged a similar argument in *Nijhawan*, noting that at the time the case was decided only three applicable criminal fraud statutes contained any monetary threshold element as required by the INA. *Nijhawan*, 557 U.S. at 39.
64 *Hayes*, 555 U.S. at 427; *Hernandez-Zavala*, 806 F.3d at 266–67; see 142 CONG. REC. S11,878 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (discussing the common prosecution of domestic violence offenses under statutes “not explicitly identified as related to domestic violence” as a reason why the Lautenberg Amendment should be thoroughly enforced and broadly applied).
65 *See Hernandez-Zavala*, 806 F.3d at 267 (referencing the *Hayes* Court’s concern that if the categorical approach were applied to the domestic relationship requirement of the Lautenberg Amendment, the provision would have been “dead letter” in a majority of states). As part of its explanation of how practicality concerns indicate the need for a circumstance-specific approach, the Fourth Circuit distinguished between the Supreme Court’s decision in *Nijhawan* and the Fourth Circuit’s 2012 decision in *Prudencio v. Holder*. *See id.* (citing *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012)). In *Prudencio*, the Fourth Circuit rejected the circumstance-specific approach as a way to determine if a crime involves moral turpitude. *Prudencio*, 669 F.3d at 484. The difference between the statutory provisions at issue in these two cases, the Fourth Circuit reasoned, is whether the factual inquiry requires minimal interpretation or whether it requires more extensive evaluation of underlying facts by an IJ. *See Hernandez-Zavala*, 806 F.3d at 267 (referencing the *Prudencio* court’s distinction between circumstance-specific inquiries involving purely “objective” matters, and those involving extensive evaluation of underlying evidence of a criminal conviction); *Prudencio*, 669 F.3d at 484 (holding that “an adjudicator applying the moral turpitude statute may consider only the alien’s prior conviction and not the conduct underlying that conviction”).
U.S. Court of Appeals for the Fifth Circuit adopted the circumstance-specific approach to determine the existence of a domestic relationship.\textsuperscript{67} The U.S. Court of Appeals for the Ninth Circuit, the only other circuit to have addressed this issue as of this writing, continues to rely on its 2004 decision in \textit{Tokatly v. Ashcroft} that nothing outside the record of conviction may be consulted to reach such a determination.\textsuperscript{68} Looking at both \textit{Bianco} and \textit{Tokatly}, the Fourth Circuit found the Ninth Circuit’s decision unpersuasive considering the Supreme Court’s intervening rulings in \textit{Nijhawan} and \textit{Hayes}.\textsuperscript{69}

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272–73 (5th Cir. 2010) (applying the circumstance-specific approach to the domestic relationship requirement of the INA’s definition of crimes of domestic violence), with \textit{Tokatly} v. Ashcroft, 371 F.3d 613, 624–25 (9th Cir. 2004) (applying the modified categorical approach to the domestic relationship requirement of the INA’s definition of crimes of domestic violence). \textit{See generally KATHY BRADY, DEPORTABLE CRIMES OF DOMESTIC VIOLENCE: MATTER OF H. ESTRADA} (2016) (contrasting the U.S. Court of Appeals for the Ninth Circuit’s adoption of the modified categorical approach with respect to crimes of domestic violence under the INA with other circuits’ adoption of the circumstance-specific approach); Mark Fleming, Bianco v. Holder (5th Cir., October 19, 2010), NAT’L IMMIGRANT JUST. CTR., https://www.immigrantjustice.org/litigation/blog/bianco-v-holder [https://perma.cc/YVM7-BUSU] (last visited Apr. 19, 2017) (noting the U.S. Court of Appeals for the Fifth Circuit’s departure from the Ninth Circuit’s decision in \textit{Tokatly} and from the categorical and modified categorical approaches in its adoption of the circumstance-specific approach with respect to crimes of domestic violence in \textit{Bianco}).
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67 \textit{Bianco}, 624 F.3d at 272–73. The respondent in \textit{Bianco} was convicted of aggravated assault for stabbing a victim whom the criminal complaint and affidavit of probable cause revealed was her husband. \textit{Id.} at 267. The respondent argued that the IJ erred in admitting evidence outside the record of conviction to determine the existence of a domestic relationship rather than applying the categorical or modified categorical approach. \textit{Id.} at 268. In departing from the Ninth Circuit’s approach to the domestic relationship determination, the Fifth Circuit cited the practicality concerns discussed by the Supreme Court in \textit{Nijhawan} and \textit{Hayes}. \textit{Id.} at 272. The Fifth Circuit also borrowed from the \textit{Hayes} Court’s reasoning regarding statutory interpretation to determine that the domestic relationship requirement of 8 U.S.C. § 1227(a)(2)(E)(i) need not be an element of the underlying crime. \textit{Id.}
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68 \textit{See} Olivas-Motta v. Holder, 746 F.3d 907, 912–13 (9th Cir. 2013) (holding that the categorical and modified categorical approaches must be applied to determinations of whether a conviction was for a crime involving moral turpitude, and citing \textit{Tokatly} as precedent); \textit{Tokatly}, 371 F.3d at 624–25 (applying the modified categorical approach to the domestic relationship determination of 8 U.S.C. § 1227(a)(2)(E)(i)). The respondent in \textit{Tokatly} was convicted of burglary and attempted kidnapping and charged as removable for having been convicted of a crime of domestic violence. \textit{Tokatly}, 371 F.3d at 615. At the removal hearing, because the record of conviction did not establish the existence of a domestic relationship, the government called the victim of the crime as a witness to testify as to her prior relationship with the respondent. \textit{Id.} at 616. The Ninth Circuit held that consultation of testimonial evidence to determine the existence of a domestic relationship was improper, and stated that strict adherence to the \textit{Taylor} Court’s bar against “looking beyond the record of conviction in order to consider the particular facts underlying an alien’s prior offense” was necessary to avoid “resorting to the type of mini-trials [it] deem[ed] to be wholly inappropriate in this context.” \textit{Id.} at 621. Given that \textit{Tokatly} was decided prior to \textit{Nijhawan} and \textit{Hayes}, the Ninth Circuit noted that it had never before “divided the [underlying] crime into segments . . . and required that one part be proven by the record of conviction and the other by evidence adduced at the administrative hearing.” \textit{Id.} at 622.
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69 \textit{Hernandez-Zavala}, 806 F.3d at 267. Immigration legal advocates also acknowledge that the Ninth Circuit’s decision in \textit{Tokatly} does not conform with current understandings of the categorical, modified categorical, or circumstance-specific approaches, and is therefore likely to face challenges in the future. \textit{See, e.g.}, \textit{BRADY, supra} note 66, at 3 (“[T]he Ninth Circuit may well decide to change the \textit{Tokatly} rule when it next addresses the issue.”). \textit{But see Olivas-Motta}, 746 F.3d at 912–13 (citing
The BIA’s 2016 decision in *In re H. Estrada* has further strengthened the significance of the Fourth Circuit’s opinion in *Hernandez-Zavala*. In *Estrada*, the BIA approved the removability of a lawful permanent resident based on a 1999 conviction for simple battery in the state of Georgia. The respondent unsuccessfully argued that the IJ erred by consulting evidence outside the record of conviction to determine that he shared a domestic relationship with the victim of the battery, specifically given that a separate family violence statute existed in Georgia.

In *Estrada*, the BIA discussed *Hernandez-Zavala*, and like the Fourth Circuit, focused on the impracticality of applying the categorical approach to certain provisions of the INA, concluding that Congress could not have intended for adjudicators to be so restricted. Furthermore, the BIA instructed that “all reliable evidence,” including police reports and other components of pretrial investigation reports, may be considered in circumstance-specific inquiries.

*Tokatly* as precedent for the argument that courts cannot “look to conduct that an alien ‘committed’ to determine the acts he has been ‘convicted of,’” despite the Supreme Court’s intervening decisions in *Nijhawan* and *Hayes*).

70 *See In re Estrada*, 26 I. & N. Dec. at 751–53 (summarizing and agreeing with the Fourth Circuit’s decision in *Hernandez-Zavala*). Because decisions of the BIA are binding on parties nationwide, the BIA’s decision in *Estrada* essentially extended the holdings of the Fourth Circuit in *Hernandez-Zavala* and the Fifth Circuit in *Bianco* to everywhere except the Ninth Circuit, where *Tokatly* still controls. *See id.* 751 (citing *Tokatly* as contrary precedent to *Hernandez-Zavala*); 8 C.F.R. § 1003.1(g) (2016).


72 *Id.* at 750, 752. In *Estrada*, the Board upheld the IJ’s finding that the domestic relationship requirement was satisfied based on the admission as evidence of two incident reports not contained in the record of conviction. *Id.* at 754. One of these reports listed the same address for the respondent and the victim of the assault crime, and included a statement from the victim that the respondent was her boyfriend. *Id.* The second piece of evidence was a “Family Violence Incident Report,” which the state only required following incidents involving domestic violence. *Id.* at 754–55.

73 *Id.* at 753; *see Hernandez-Zavala*, 806 F.3d at 266–67. The BIA further concluded that the circumstance-specific approach with respect to “crimes of domestic violence” does not present any due process concerns, given that respondents charged under 8 U.S.C. § 1227(a)(2)(E)(i) have two opportunities to contest allegations against them—once in criminal and once in immigration proceedings. *See Estrada*, 26 I. & N. Dec. at 752.

74 *Estrada*, 26 I. & N. Dec. at 753. As the law currently stands everywhere outside the Ninth Circuit, therefore, in determining whether an immigrant was convicted of a “crime of domestic violence,” adjudicators may examine the facts underlying the conviction and consider all “reliable” evidence to reach a decision as to whether the respondent committed a “crime of violence” against someone with whom he or she was in a domestic relationship. *See Hernandez-Zavala*, 806 F.3d at 261, 266 (adopting the circumstance-specific approach and examining “substantial evidence in the record”); *Tokatly*, 371 F.3d at 624–25 (applying the modified categorical approach and sustaining the noncitizen’s objection to examination of testimonial evidence); *Estrada*, 26 I. & N. Dec. at 753 (applying the circumstance-specific approach and examining police incident reports); *see also infra* notes 86–95 and accompanying text (discussing the problematic lack of evidentiary restrictions for circumstance-specific inquiries in immigration cases).
III. ERRORS IN THE FOURTH CIRCUIT’S DECISION IN HERNANDEZ-ZAVALA

The U.S. Court of Appeals for the Fourth Circuit’s 2015 decision in Hernandez-Zavala v. Lynch and the general departure from strict use of the categorical approach are problematic for two main reasons. First, as discussed in Section A of this Part, in adopting the circumstance-specific approach with respect to certain provisions of the INA, courts have failed to fully reconcile their decisions with the historic application of the categorical approach in immigration cases and the immigration-specific justifications for retaining this analytic tool. Secondly, as discussed in Section B, the failure of adjudicators to set any limits on evidence that may be considered in circumstance-specific inquiries severely and unjustly disadvantages immigrant respondents.

A. The Need for Greater Recognition of the History of and Unique Justifications for the Categorical Approach in an Immigration Context

Decisions adopting the circumstance-specific approach with respect to immigration consequences of criminal convictions have emphasized the differences between the INA and ACCA as justification for declining to extend the categorical approach to certain provisions of the INA. These decisions fail to

75 See infra notes 78–95 and accompanying text (discussing the problems with the Fourth Circuit’s decision in Hernandez-Zavala); supra notes 15–28 and accompanying text (explaining the categorical approach); supra notes 29–40 and accompanying text (explaining the circumstance-specific approach). See generally Hernandez-Zavala v. Lynch, 806 F.3d 259 (4th Cir. 2015).

76 See infra notes 78–85 and accompanying text.

77 See infra notes 86–95 and accompanying text.

78 See Bianco v. Holder, 624 F.3d 265, 270 (5th Cir. 2010) (referencing the arguments made in the Court’s 2009 decision in Nijhawan v. Holder as to distinctions between the ACCA and INA). Compare Descamps v. United States, 133 S. Ct. 2276, 2287 (2013) (applying the categorical approach to determining whether a sentencing enhancement under the ACCA was triggered, and citing “the Sixth Amendment concerns that would arise from sentencing courts’ making findings of fact that properly belong to juries”), with Nijhawan v. Holder, 557 U.S. 29, 36 (2009) (adopting the circumstance-specific approach for determining whether the monetary threshold requirement of the “fraud and deceit” aggravated felony provision of the INA has been met, and noting that “[t]he ‘aggravated felony’ statute . . . differs in general from ACCA”). Courts have pointed out first that compared to the ACCA, the INA lists several crimes that do not correspond with any generic crime and require more interpretation and fact-finding than the categorical approach permits. See Nijhawan, 557 U.S. at 37 (“[T]he ‘aggravated felony’ statute differs from ACCA in that it lists certain other ‘offenses’ using language that almost certainly does not refer to generic crimes but refers to specific circumstances.”); In re Babaisakov, 24 I. & N. Dec. 306, 310 (B.I.A. 2007) (stating that adoption of the categorical approach depends on whether the statutory provision is made up of a combination of elements or contains “nonelement factors” permitting a circumstance-specific inquiry). Secondly, courts have emphasized that while in the criminal sentencing context Sixth Amendment concerns justify adherence to the categorical approach, such protections do not exist in civil immigration cases. See Nijhawan, 557 U.S. at 36–40 (implying that Sixth Amendment issues with circumstance-specific inquiries could only arise in cases in which a defendant is charged with illegal reentry after having previously been convicted of an aggravated felony); Ali v. Mukasey, 521 F.3d 737, 741 (7th Cir. 2008) (allowing circumstance-specific inquiries to determine whether a crime involved moral turpitude because the
acknowledge, however, the many ways in which immigrant respondents in civil removal proceedings are procedurally disadvantaged compared to defendants in criminal sentencing cases.79 For example, indigent respondents do not have a right to affordable legal representation, and those who are charged with having committed certain crimes may be subject to expedited removal, ineligible for discretionary relief, and detained without a right to a bond hearing.80 Additionally, evidence that would be barred under the Federal Rules of Evidence is admissible in immigration court.81 The differences between civil immigration and criminal sentencing cases should therefore have resulted in a stricter, ra-

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6 Sixth Amendment does not apply); Das, supra note 15, at 1677 (discussing how courts have come to distinguish the application of the categorical approach in criminal sentencing and immigration contexts).

79 See Jennifer M. Chacón, A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights, 59 DUKE L.J. 1563, 1624 (2010) (discussing the frequent use of tactics in immigration cases which would be considered Fourth or Fifth Amendment violations in criminal settings, and arguing for the extension of the Exclusionary Rule in immigration proceedings); Das, supra note 15, at 1671 (discussing the ways in which deportation, though technically a civil penalty, is “particularly severe”); Mary Holper, Confronting Cops in Immigration Court, 23 WM. & MARY BILL RTS. J. 675, 675 (2015) (describing how police reports, though often barred in criminal settings due to Sixth Amendment rights and restrictions in the Federal Rules of Evidence, are admissible and can make the difference between a denial or a grant in immigration court); Chris Modlish, Comment, Immigrant Rights in Jeopardy: A Denial of Constitutional Protection in De La Paz v. Coy, 57 B.C. L. REV. E. SUPP. 104, 115–17 (2016), http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3501&context=bclr [https://perma.cc/6NBB-5UAP] (discussing the insufficient remedial mechanisms provided under the INA and the lack of Fourth Amendment protections for unlawfully arrested noncitizens); Steinmiller-Perdomo, supra note 34, at 1187–88 (listing the consequences of aggravated felony convictions of the INA, and discussing the many consequences for a noncitizen of an aggravated felony conviction, including mandatory detention; bars against re-entry and naturalization; and enhanced sentencing for illegal re-entry); supra note 32 (discussing cases that have adopted the circumstance-specific approach).

80 See Das, supra note 15, at 1672 (explaining that criminal convictions act as immigration “mandatory minimums” by eliminating the possibility of certain forms of discretionary relief); Steinmiller-Perdomo, supra note 34, at 1187–88 (listig the consequences of aggravated felony convictions). See generally INGRID EAGLY & STEVEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT (2016) (addressing the disparate outcomes for immigrants who are and are not able to access and afford counsel).

81 See Holper, supra note 79, at 693 (discussing concerns related to admissibility of unreliable evidence in immigration court due to deportation being a civil rather than criminal penalty). Although not all constitutional rights extend to immigration proceedings, the Sixth Amendment’s procedural protections and the Fifth Amendment’s Due Process Clause have been found to apply to noncitizens facing removal. See Landon v. Plascencia, 459 U.S. 21, 32 (1982) (recognizing the right of a lawful permanent resident returning from abroad to invoke the Due Process Clause regarding proceedings concerning whether she would be allowed to return to the United States); Yamataya v. Fisher, 189 U.S. 86 (1903) (recognizing the right of a noncitizen facing deportation to constitutional due process protections). The lack of evidentiary restrictions regarding immigration inquiries not governed by the categorical or modified categorical approach implicates these due process concerns. See Holper, supra note 79, at 713 (arguing that even if deportation is a civil offense, the Due Process Clause of the Fifth Amendment guarantees the right to confront and cross-examine authors of and witnesses quoted in police reports admitted as evidence).
ther than a more relaxed, adherence to the categorical approach in the immigration context. 82

In contrast to earlier decisions adopting the circumstance-specific approach, in Hernandez-Zavala the Fourth Circuit based its decision largely on similarities between the INA and the Lautenberg Amendment, the statute at issue in the Supreme Court’s 2009 decision in United States v. Hayes. 83 The Hayes Court’s focus on Congress’s intent that the Lautenberg Amendment apply broadly suggests, however, that the Court’s interpretation of the provision does not transfer seamlessly to an immigration context. 84 The different purposes of the Lautenberg Amendment and the INA criminal removal and inadmissibility grounds, as well as the different procedural protections provided to criminal defendants and immigrant respondents, should have cautioned the Fourth Circuit against applying the Hayes Court’s reasoning to Mr. Hernandez-Zavala’s case. 85

82 See United States ex rel. Guarino v. Uhl, 107 F.2d 399, 400 (2d Cir. 1939) (embracing a strict categorical approach, based in part on the severity of deportations); Das, supra note 15, at 1701–02 (discussing the early history of the categorical approach in the immigration context, and noting that although federal immigration laws have dramatically evolved over the years, the language informing the development of the categorical approach has remained constant); Koh, supra note 17, at 262 (arguing that the categorical approach “corrects for the absence of procedural and substantive rights for the noncitizen”). Recent decisions by the Supreme Court have begun to acknowledge the historical context and unique importance of the categorical approach in immigration proceedings. See Melloul v. Lynch, 135 S. Ct. 1980, 1986–87 (2015) (noting the long history of the categorical approach in immigration law, and stating that “[b]y focusing on the legal question of what a conviction necessarily established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law”); Moncrieffe v. Holder, 133 S. Ct. 1678, 1685 (2013) (noting the categorical approach’s “long pedigree in our Nation’s immigration law”).

83 See United States v. Hayes, 555 U.S. 415, 426 (2009). Compare Hernandez-Zavala, 806 F.3d at 266 (basing the adoption of the circumstance-specific approach on similarities between the INA and the Lautenberg Amendment), with Nijhawan, 557 U.S. at 36 (basing adoption of the circumstance-specific approach on differences between the INA and the ACCA).

84 See Hayes, 555 U.S. at 426. The Hayes Court’s reasoning has been adopted in the immigration context. See Hernandez-Zavala, 806 F.3d at 266 (adopting the circumstance-specific approach with regard to crimes of domestic violence under the INA, and relying on the Hayes Court’s adoption of the circumstance-specific approach with regard to crimes of domestic violence under the Lautenberg Amendment); Bianco, 624 F.3d at 271 (same); In re Estrada, 26 I. & N. Dec. at 751–52 (same). In United States v. Castleman, however, in 2014, the Supreme Court expressly stated that its adoption of a broad definition of “violence” for predicate offenses under the Lautenberg Amendment should not be seen as transforming the more narrow definition used in 8 U.S.C. § 1227(a)(2)(E)(i) (2012) immigration cases. United States v. Castleman, 134 S. Ct. 1405, 1411 n.4 (2014).

85 See Dan Kesselbrenner et al., Why United States v. Castleman Does Not Hurt Your Immigration Case and May Help It 6 (2014) (advising practitioners on how to use Castleman to argue that the Hayes decision regarding the circumstance-specific approach should not apply to immigration cases); Das, supra note 15, at 1701–02 (arguing for the categorical approach’s continued application based on “congressional intent and the longstanding rationales for categorical analysis”).
B. The Need for Evidentiary Restrictions in Circumstance-Specific Inquiries

The Fourth Circuit’s embrace of the circumstance-specific approach is also problematic considering the lack of evidentiary limitations currently imposed on immigration adjudicators conducting circumstance-specific inquiries. Since the Supreme Court’s 2009 decision in Nijhawan v. Holder, circumstance-specific inquiries have involved the consultation of evidence outside the record of conviction, including presentence investigative reports. While such evidence on its face may leave little question as to whether the domestic relationship requirement of 8 U.S.C. § 1227(a)(2)(E)(i) was satisfied, police reports are often inaccurate, and the pivotal role they play in immigration cases is therefore concerning.

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86 See Nijhawan, 557 U.S. at 41 (holding that “nothing in prior law” limits IJs in the evidence that they may consider when determining whether a respondent has violated a provision of the INA that does not require the categorical or modified categorical approach); Bianco, 624 F.3d at 272–73 (holding that a domestic relationship requirement must be proven by the government “using the kind of evidence generally admissible before an immigration judge”); In re Estrada, 26 I. & N. Dec. at 753 (stating that police reports and records may be considered in circumstance-specific inquiries); Devitt, supra note 29, at 39 (highlighting the unreliability of presentence investigation reports often considered in circumstance-specific inquiries); Koh, supra note 17, at 263 (arguing that the categorical approach is a necessary tool in light of “the absence of (a) proportionality and discretionary relief under the current statutory frame-work; (b) restrictions on Immigration and Customs Enforcement (ICE)’s prosecutorial powers; and (c) judicial review”).

87 See Bianco, 624 F.3d at 273 (relying on a police criminal complaint and affidavit of probable cause showing that the victim was the respondent’s husband); In re Estrada, 26 I. & N. Dec. at 753–54 (relying on a police report and presentence “Family Violence Incident Report” listing the same address for the respondent and the victim and including a statement from the victim referring to the respondent as her “boyfriend”); Devitt, supra note 29, at 39; see also Nijhawan, 557 U.S. at 41–42 (relying on “[t]he defendant’s own stipulation, produced for sentencing purposes” showing that the monetary threshold requirement of the deceit or fraud aggravated felony provision was satisfied).

88 See Devitt, supra note 29, at 9 (explaining that presentence investigation reports are “notoriously untrustworthy”); Holper, supra note 79, at 682–88 (explaining that police reports are unreliable given that officers and individuals interviewed are not required to testify in immigration court; the fact that reports are written in the initial stages of an investigation and do not reflect later discoveries; and the possibility that witnesses may have given untrue or exaggerated statements to police or that police officers may falsify information). In its 2012 decision in Prudencio v. Holder, the Fourth Circuit reasoned that the use of police reports to determine whether a conviction was for a crime involving moral turpitude “pose[d] very real evidentiary concerns” given that police reports and other elements of a presentence investigation report contain “unsworn witness statements and initial impressions.” 669 F.3d 472, 483–84 (4th Cir. 2012). The Prudencio court acknowledged that immigration proceedings are civil rather than criminal, but held that “this difference does not affect the risks inherent in considering facts only alleged, but not necessarily proved, in the underlying criminal proceedings.” Id. at 484. Though the Fourth Circuit in Hernandez-Zavala distinguished its decision in Prudencio on the basis of the type of inquiry involved in establishing moral turpitude versus the existence of a domestic relationship, it failed to reconcile its earlier critique of the use of police reports to establish the facts underlying a criminal conviction with its subsequent failure to limit the evidence that may be considered in a circumstance-specific inquiry concerning a potential “crime of domestic violence.” See Hernandez-Zavala, 806 F.3d at 267.
The lack of evidentiary restrictions in circumstance-specific inquiries relates to the development of increasingly strict guidelines for the use of the “modified categorical approach.” Historically, courts have used the phrase “modified categorical approach” to refer to the consultation of limited documents within the record of conviction to determine under which provision of a divisible statute an individual was convicted, as well as to impose more general limits on the evidence that may be considered in determining immigration consequences of criminal convictions. The Supreme Court’s 2016 decision in *Mathis v. United States*, however, strictly limits the modified categorical approach to analyses of convictions under statutes that contain alternative elements. Unless the circumstance-specific approach applies, therefore, if a statute is found to be indivisible, nothing beyond the elements of the statute may be consulted to determine whether the conviction triggers immigration consequences.

Restrictions on the situations in which the modified categorical approach may be applied have strengthened the protective force of this analytical approach, given that the record of conviction may only be consulted after deter-
mining that the statute of conviction is truly divisible.93 Recent developments in when the modified categorical approach may be applied, however, suggest that new guidelines are needed to restrict the evidence that may be introduced when conducting circumstance-specific inquiries.94 Given the procedural difficulties faced by respondents, the lack of any evidentiary restrictions on circumstance-specific inquiries leaves them with limited ability to contest the government’s evidence and little hope of winning the removal cases brought against them.95

CONCLUSION

In 2015, in Hernandez-Zavala v. Lynch, the U.S. Court of Appeals for the Fourth Circuit designated the domestic relationship requirement of the Immigration and Nationality Act’s “crimes of domestic violence” provision as requiring the circumstance-specific, rather than the categorical, approach. In al-

93 See Mathis, 136 S. Ct. at 2257 (holding that because the statute of conviction was overbroad and indivisible, it did not trigger a sentencing enhancement); Lee, supra note 89, at 263 (noting that for immigration advocates, the Mathis decision was “cause for celebration” because generally “the categorical approach is favorable to . . . immigration petitioners because it prevents the government from getting incriminating facts into evidence”).

94 See Mathis, 136 S. Ct. at 2257 (distinguishing between alternative means and elements for the purpose of determining if a statute is divisible and therefore whether the modified categorical approach may be applied); Devitt, supra note 29, at 39 (arguing against the use of presentence investigation reports as evidence in removal proceedings); Holper, supra note 79, at 682–88 (arguing that police reports are unreliable evidence that should not be admissible in removal proceedings).

95 See Devitt, supra note 29, at 46; Holper, supra note 79, at 682–88. The difference between the categorical or modified categorical and the circumstance-specific approaches also may determine whether a respondent bears the burden of proving that a prior conviction does not bar eligibility for relief. See Syblis v. Attorney Gen. of the U.S., 763 F.3d 348, 357 n.12 (3d Cir. 2014); Thomas v. Attorney Gen. of the U.S., 625 F.3d 134, 147 (3d Cir. 2010); 8 C.F.R. § 1240.8(d) (2016). For example, the U.S. Court of Appeals for the Third Circuit held in Thomas v. Attorney General of the United States in 2010 that when the record of conviction is inconclusive as to under which version of a divisible statute a respondent was convicted, the conviction could not be categorized as an aggravated felony and therefore the respondent was not barred from applying for cancellation of removal. 625 F.3d at 147. In 2014 in Syblis v. Attorney General of the United States, however, the Third Circuit held that where a circumstance-specific inquiry is required, the respondent bears the burden of proving that the facts of a prior conviction do not bar eligibility for relief. 763 F.3d at 357. Several circuits have recognized that in determining whether a past crime bars an applicant from eligibility for relief, categorical inquiries do not require that a respondent affirmatively prove that a conviction is not an immigration offense by presenting evidence outside the inclusive record of conviction. See Sauceda v. Lynch, 819 F.3d 526, 532 (1st Cir. 2016) (domestic violence); Almanza-Arenas v. Lynch, 815 F.3d 469, 488–89 (9th Cir. 2016) (en banc) (Watford, J., concurring) (theft and unlawful driving); Martinez v. Mukasey, 551 F.3d 113, 121–22 (2d Cir. 2008) (distribution of marijuana). Circumstance-specific inquiries, however, involve questions of fact and therefore the respondent bears the burden of proving eligibility for the relief sought. Compare Syblis, 763 F.3d at 357 (placing the burden on the respondent to prove that the circumstances of his crime did not align with the offense listed in the INA where the record of conviction was inconclusive), with Thomas, 625 F.3d at 147 (applying the modified categorical approach and holding that where the record of conviction was inconclusive, the respondent had met his burden of proving that his conviction did not trigger immigration consequences).
lowing immigration adjudicators to examine the facts underlying a respondent’s past criminal conviction, the Fourth Circuit failed to sufficiently address the categorical approach’s long historic application in determining immigration consequences of criminal convictions and the value this analytic tool provides in a system that heavily disadvantages immigrants convicted of crimes. Furthermore, in failing to set limits on the evidence that may be considered in circumstance-specific inquiries, the Fourth Circuit enabled adjudicators to consider unreliable evidence as a basis for decisions resulting in severe and life-altering consequences.

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