CAUSING MISCHIEF FOR TAYLOR’S CATEGORICAL APPROACH: APPLYING “LEGAL IMAGINATION” TO DUENAS-ALVAREZ

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INTRODUCTION

The categorical approach the Supreme Court articulated in Taylor v. United States1 has become the rule of perpetuities of criminal law.2 Even lawyers who regularly practice criminal law can struggle to understand the doctrine and its occasionally perplexing results. Faithfully applying the approach can require courts to hold that a defendant was not previously convicted of “burglary,” even if he previously broke into a home and was convicted of burglary as a result.3 Faced with a paradoxical conclusion like that, lower courts can be hostile to the categorical approach and have continuously looked for ways to limit it. In their latest attempt, courts have pinned their hopes to the Supreme Court’s 2007 decision in Gonzales v. Duenas-Alvarez,4 where the Court addressed the scope of the categorical approach. This Article contends that many lower courts have misread Duenas-Alvarez and that the decision does not meaningfully alter the doctrine. In justifying that conclusion, this Article offers a defense of the much-beleaguered categorical approach—and its peculiar results.

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2 One authority on the common law rule against perpetuities describes it as follows: “The [doctrine] imposes a time limit on the creation of a future [property] interest chain, commonly known as ‘lives in being plus twenty-one years.’” Daphna Lewinsohn-Zamir, The Objectivity of Well-Being and the Objectives of Property Law, 78 N.Y.U. L. Rev. 1669, 1746 (2003). The rule has perpetually caused confusion for both law students and lawyers. See generally Maureen E. Markey, Ariadne’s Thread: Leading Students into and out of the Labyrinth of the Rule Against Perpetuities, 54 CLEV. ST. L. REV. 337, 338-46 (2006) (documenting the difficulties law professors have in teaching the rule to their students). The doctrine is “so arcane and complicated” that the California Supreme Court has even held that it is “not malpractice for an attorney to violate it.” Id. at 344 (citing Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961)). I hope to make clear in this Article, however, that the categorical approach is not particularly complicated to understand, unlike the rule against perpetuities—with apologies to my law school property professor.

3 See Shepard v. United States, 544 U.S. 13, 16-19 (2005) (holding that the defendant had not been “convicted of” generic burglary, even though he had previously broken into buildings and had been convicted of violating a Massachusetts burglary statute).

Part I outlines the categorical approach with a focus on the Supreme Court’s 1990 decision in *Taylor*. The doctrine deals with a host of federal laws—mostly in the criminal and immigration context—that require courts to determine what an individual was previously “convicted of.” The approach is easiest to explain through an example. Imagine a federal law that requires a court to determine if a defendant was previously convicted of “burglary,” where burglary is defined using its generic definition: “an unlawful entry into a structure, with intent to commit a crime.” Our hypothetical defendant previously violated a state’s burglary statute, which broadly defines burglary to include breaking into structures or vending machines. During his guilty plea colloquy in state court, our defendant did not admit whether he broke into a structure or a vending machine. In other words, he has been convicted of breaking into a “structure or vending machine.” Under the categorical approach, the defendant has not been “convicted of” generic burglary because the state statute criminalizes some non-generic-burglary conduct—that is, it criminalizes breaking into a vending machine. Moreover—and more controversially—the categorical approach would now prevent the government from trying to prove that the defendant had, in fact, broken into a structure and therefore committed generic burglary. Even if the government could prove such a fact, that would merely establish what the defendant had previously committed. It would not establish what he had been convicted of. Comprehending the distinction between what the defendant was “convicted of” versus what the defendant “committed” is the key to understanding the categorical approach.

Part II discusses *Gonzales v. Duenas-Alvarez*, a 2007 Supreme Court decision that is at the center of this Article. In *Duenas-Alvarez*, the Court stated that courts should not use “legal imagination” when applying the categorical approach. Rather, in applying the doctrine, the Court held that courts should ensure that there was 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.”

Part III documents the circuit split that developed in light of *Duenas-Alvarez*’s comment about “legal imagination.” Some circuits adopted what this Article terms the “evidentiary-burden view” of *Duenas-Alvarez*. Under this view, *Taylor*’s categorical approach has been discarded. Courts should no longer answer the legal question of the scope of the state statute and then

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6 This is a truncated version of the definition of generic burglary that the Court provided in *Taylor*. See *Taylor*, 495 U.S. at 598 (defining generic burglary as “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime”).

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

8 Id.
compare that to the scope of the qualifying offense at issue. Rather, if an individual contends that a prior conviction is not a qualifying offense because it criminalizes some non-generic conduct, that individual must establish that the state has actually prosecuted someone under the statute for that non-generic conduct. To use the burglary example above, a defendant could not claim that the state’s burglary statute does not qualify as generic burglary unless the defendant can prove that the state prosecutes individuals for breaking into vending machines. Other circuits have not read Duenas-Alvarez in this way. They read Duenas-Alvarez to stand for what this Article terms the “novel-interpretation view.” Under this view, Duenas-Alvarez is consistent with Taylor, as the decision merely warns courts against interpreting state law in broad, novels ways in the course of determining whether the state offense is broader than the generic offense at issue. The difference in these approaches is vast. Many state statutes that are not qualifying offenses under the novel-interpretation view become qualifying offenses under the evidentiary-burden view.

Part IV contends that the novel-interpretation view—not the evidentiary-burden view—is the correct interpretation of Duenas-Alvarez. This Part first establishes that a careful reading of Duenas-Alvarez reveals that it is irreconcilable with the evidentiary-burden view and entirely consistent with the novel-interpretation view. This Part then documents that the Supreme Court’s post-Duenas-Alvarez decisions on the categorical approach all support the novel-interpretation view. Finally, this Part shows that, even if Duenas-Alvarez could be read to support the evidentiary-burden view, that reading should be rejected because of the troubling policy implications raised by replacing the categorical approach with the evidentiary-burden view.

I. TAYLOR’S CATEGORICAL APPROACH

A. The Problem: Translating State Penal Codes into a Federal Language

Both federal criminal and immigration law can require courts to determine the collateral effect of an individual’s prior conviction. In the immigration context, non-citizens’ convictions can make them deportable or prevent them from qualifying for relief from deportation. Likewise, for


10 For example, non-citizens convicted of an aggravated felony are not entitled to many forms of discretionary relief otherwise available to non-citizens who have been ordered deported. E.g., Hing Sum v. Holder, 602 F.3d 1092, 1094-95 (9th Cir. 2010) (“Accordingly, § 212(h) waivers . . . are unavailable
defendants who commit a federal crime, their prior convictions can increase their Guideline range under the Federal Sentencing Guidelines or trigger a mandatory minimum sentence.\footnote{One prominent example of this phenomenon is seen in the illegal re-entry Guideline, which includes prior conviction enhancements. See \textit{U.S. Sentencing Guidelines Manual} § 2L1.2(b)(1) (2009). For example, defendants convicted of illegally entering the country after having been deported can see their Guideline range increase dramatically if they were previously convicted of, among other things, a “drug trafficking offense.” Id. Commentators have criticized this practice because the penal purpose served by such an enhancement scheme has never been articulated by the Commission, and the enhancement itself results in a Guideline range that fosters unwarranted sentencing disparity and harsh sentences. See generally Doug Keller, Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases Are Unjust and Unjustified (and Unreasonable Too), 51 B.C. L. Rev. 719 (2010).}

Federal law takes into account the consequences of an individual’s prior conviction in a variety of ways. A common method is through the use of a generic label, typically through the use of the name of a traditional crime. For example, federal immigration law requires legal permanent residents to be deported if they have been convicted of “burglary.”\footnote{“Burglary” is an aggravated felony. 8 U.S.C. § 1101(a)(43)(G). A prior burglary conviction makes an individual deportable. \textit{Id.} § 1227(a)(2)(A)(iii).} A generic label might also describe a category of crimes. For example, defendants convicted of illegal re-entry and who have previously been convicted of a “forcible sex offense” will see their Guideline range increase dramatically.\footnote{A forcible sex offense is not the name of a traditional crime.} Rather, it is an umbrella term that subsumes a number of sex crimes. Another way federal law incorporates prior convictions is through a description of the crime. For example, legal permanent residents are deportable if they commit any crime that has, as an element, “the use, attempted use, or threatened use of physical force against” person or property.\footnote{A “crime of violence” is defined as, among other things, any “offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” \textit{Id.} § 16(a). A non-citizen convicted of an aggravated felony is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii). Congress has defined an “aggravated felony” as, among other things, any “crime of violence.” \textit{Id.} § 1101(a)(43)(F) (internal quotation marks omitted).}

Federal law’s incorporation of a prior conviction can raise a number of difficulties. For example, how should a court translate a prior state conviction into these federal categories? Has a defendant committed the crime of “burglary” if the state in which he committed the offense labels his crime to non-citizens who were convicted of an aggravated felony after their admission as [legal permanent residents].”)?
“burglary”? What if the defendant committed a crime that seems like burglary, but which the state calls something else? And should courts simply look to the state statute of conviction to determine whether the defendant’s conduct fell under the state label? Or should courts conduct an evidentiary hearing to determine what specific acts the defendant committed?

B. The Solution: The Categorical Approach

The answers to those thorny questions find their root in the Supreme Court’s 1990 decision of *Taylor v. United States*. At issue in *Taylor* was the Armed Career Criminal Act (“ACCA”), a statute that provides for mandatory minimum penalties for certain repeat offenders who are convicted in federal court of being a felon in possession of a firearm. ACCA requires a fifteen-year mandatory minimum sentence for felon-in-possession defendants who were previously “convicted of” three “violent felonies” or “serious drug offenses.” ACCA defines a “violent felony,” in part, as “any crime punishable by imprisonment for a term exceeding one year . . . that is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”

The defendant in *Taylor* pled guilty to violating the federal felon-in-possession statute and admitted that he had previously been convicted of robbery, assault, and burglary in Missouri. At sentencing, the government contended that each of those prior convictions qualified as violent felonies under ACCA. Taylor disputed only whether his burglary conviction qualified. The district court agreed with the government and sentenced Taylor to fifteen years. He appealed to the Eighth Circuit, which affirmed the sentence. The court reasoned that a defendant is convicted of “burglary,” as that term is used in ACCA, when he or she is convicted of a crime that a state labels “burglary.” Thus, because Missouri styled Taylor’s prior conviction as “burglary,” he had been convicted of

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18 18 U.S.C. § 924(e).
19 Id. § 924(e)(1).
20 Id. § 924(e)(2)(B) (internal quotation marks omitted).
21 *Taylor*, 495 U.S. at 578.
22 Id. at 579.
23 Id.
24 Id.
25 Id.
26 Id. (internal quotation marks omitted). The Eighth Circuit, relying on its own precedent, wrote that “‘burglary’ in the sentence enhancement statute means ‘burglary’ however a state chooses to define it.” United States v. Taylor, 864 F.2d 625, 627 (8th Cir. 1989) (citing United States v. Portwood, 857 F.2d 1221, 1224 (8th Cir. 1988)), vacated, 495 U.S. 575 (1990).
“burglary” for the purposes of ACCA.\textsuperscript{27} The Supreme Court then granted certiorari to address the circuit split over how courts were to determine if a state crime fell under a federal label.

The Court began by addressing how to define the term “burglary” in ACCA. The Court determined that Congress would not have wanted the definition of the generic crimes in ACCA to hinge on “vagaries of state law.”\textsuperscript{28} As a result, the Court rejected the Eighth Circuit’s label test, especially in light of the fact that some states had broadly defined “burglary” to include things like shoplifting, whereas other states had no offense labeled “burglary” at all.\textsuperscript{29} The Court then determined that Congress intended the word “burglary” in “the generic sense in which the term is now used in the criminal codes of most States.”\textsuperscript{30} According to the Court, “the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.”\textsuperscript{31} The Court next turned to the issue at the heart of this Article: How should a court determine whether a defendant’s prior conviction is a qualifying offense?

The Court first addressed the situation in which the federal definition of the crime encompassed all of the conduct that the state statute criminalized. Put more concretely, the Court addressed the situation in which a state robbery statute criminalized no more conduct than that covered by the generic definition of robbery. In that case, a conviction under the state statute “necessarily implies that the defendant has been found guilty of all the elements of generic burglary.”\textsuperscript{32} In other words, in such a situation, any defendant who had been convicted of the state crime had necessarily been convicted of the elements of the generic federal crime.

But what if the state defines the crime broader than the generic definition, so that the state offense covers generic and non-generic conduct? For example, with respect to burglary, a minority of states’ burglary statutes criminalize breaking into not just buildings, but “vending machines” as

\begin{footnotesize}
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\item[$27$] Taylor, 495 U.S. at 579.
\item[$28$] Id. at 588. And, in fact, when Congress had defined burglary in an earlier version of ACCA, the Court pointed out that it had provided a definition that corresponded to “a modern ‘generic’ view of burglary, roughly corresponding to the definitions of burglary in a majority of the States’ criminal codes.” Id. at 589.
\item[$29$] Id. at 590-91 (observing that Michigan has no offense labeled “burglary,” whereas California labels shoplifting as a subset of “burglary” (internal quotation marks omitted)). The Court also rejected Taylor’s argument that Congress intended to define “burglary” as it had been defined at common law. See id. at 592-96. The Court noted that “[t]he arcane distinctions embedded in the common-law definition have little relevance” to the modern world and Congress could not have intended such a narrow definition. Id. at 593-94.
\item[$30$] Id. at 598.
\item[$31$] Id.
\item[$32$] Id. at 599.
\end{enumerate}
\end{footnotesize}
well.33 If a court is faced with a defendant convicted of that sort of burglary statute, the Court held that the categorical approach prohibited that court from holding an evidentiary hearing to determine whether the defendant had, in fact, broken into a building (i.e., committed generic burglary) or into a vending machine (i.e., did not commit generic burglary). The court was not to look “to the particular facts underlying th[e] conviction[].”34 On the other hand—and perhaps somewhat confusingly—a defendant convicted under a statute that covers non-generic conduct can still have been “convicted of” the generic crime, as long as there are conviction documents that establish that the defendant was convicted of the portion of the statute that covers only generic conduct—that is, if there are conviction documents that establish that the defendant admitted in his guilty plea, or, if there is a jury trial, that the jury necessarily found the generic elements of the qualifying offense.35

That last statement is worth unpacking. Essentially, the inquiry seeks to determine if any conviction documents exist (e.g., a transcript of the guilty plea colloquy or the jury’s verdict) that narrow the overly broad statute to make it co-extensive with the generic crime. For example, if the state burglary statute included breaking into vending machines, the court could find that the defendant had been “convicted of” generic burglary only if the defendant had admitted in his guilty plea that he had broken into a building or, after a jury trial, if the jury had been asked to find that the defendant had broken into a building. Using reliable documents in this way to narrow the statute of conviction has been called the “modified categorical approach” by the lower courts.36 While it has been called an “exception”37 to the categorical approach, it really is not. Rather, it just flows from the categorical approach’s requirement that the only relevant facts are the facts the defendant was necessarily convicted of. In the burglary example, if the defendant admitted in his guilty plea that he broke

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33 Taylor, 495 U.S. at 599.
34 Id. at 600.
35 See id. at 602.
36 See, e.g., Pelayo-Garcia v. Holder, 589 F.3d 1010, 1016 (9th Cir. 2009) (“If the specific crime of conviction ‘does not categorically qualify as a predicate offense under a federal statute, it still may qualify under a modified categorical analysis.’ Under the modified categorical approach, we examine specified judicial records to determine whether a defendant was necessarily convicted of the elements of the federal generic crime.” (quoting Quintero-Salazar v. Keisler, 506 F.3d 688, 694 (9th Cir. 2007))); Olmsted v. Holder, 588 F.3d 556, 559 (8th Cir. 2009) (“If the statute criminalizes both conduct that constitutes a crime of violence and conduct that does not, we apply a modified categorical approach, under which we may refer to ‘the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.’” (quoting United States v. Williams, 537 F.3d 969, 973 (8th Cir. 2008))). For a more thorough discussion of the modified categorical approach, see generally Rebecca Sharpless, Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law, 62 U. MIAMI L. REV. 979, 996-1012 (2008).
37 See, e.g., United States v. Martinez-Cortez, 988 F.2d 1408, 1412 (5th Cir. 1993).
into a building, the admission can be used to narrow the elements of his conviction, essentially scrubbing from the statute the words “vending machine.” Once that alternative method of committing burglary is eliminated, the remnants of the statute are what the defendant was “convicted of” and constitute generic burglary. As the Seventh Circuit would later explain it, courts may look at the guilty plea or the jury’s verdict not to determine “how [the defendant] committed th[e] crime” but “only to determine which crime within a statute the defendant committed”—that is, which portion of the statute the defendant was convicted of.

In short, the inquiry under Taylor is ultimately limited to determining what facts the defendant had necessarily been convicted of in the prior proceeding. Courts may therefore not look outside the record of conviction. This typically means that courts do no more than compare the entirety of the state statute with the qualifying offense to determine whether there is a match because, as a practical matter, the government often does not produce conviction documents that narrow the statute of conviction.

The Court gave several reasons for its selection of a strict categorical approach. First, the Court determined that this is what Congress intended when it drafted ACCA. In looking at ACCA’s language, Congress had indicated that “the sentencing court [was] to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions”—that is, because the statute asked about what a defendant had been “convicted of,” not what acts the defendant had “committed.” Asking what the defendant had been

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38 That is, if he either admitted in his written guilty plea (if there is one) or during the guilty plea colloquy in court.

39 United States v. Woods, 576 F.3d 400, 405 (7th Cir. 2009).

40 For a more thorough discussion of the categorical approach and what it means to determine what a defendant was previously “convicted of,” see generally Sharpless, supra note 36, at 993-96. Professor Rebecca Sharpless explores a number of interesting quirks about the categorical approach that are beyond the scope of this Article. She also explores the deep, historical roots of the categorical approach, documenting that courts were using it in the immigration context by at least 1914. See id. at 993-94 (citing United States ex rel. Mylius v. Uhl, 210 F. 860, 862 (2d Cir. 1914)). Similarly, Alina Das has recently explored the historical roots of the categorical approach. See Alina Das, The Immigration Penalties of CriminalConvictions: Resurrecting Categorical Analysis in Immigration Law 16-27 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-75, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1692891. Das provides an excellent overview of the categorical approach, along with advancing a series of strong arguments for why the approach is desirable from a policy perspective, particularly in the immigration context. See id. at 27-63.

41 There are several reasons for this reality. Sometimes the records have been destroyed. Sarah French Russell, Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing, 43 U.C. Davis L. Rev. 1135, 1220-21 (2010). Other times, however, the documents that are available do not narrow the statute of conviction for one reason or another. See id. at 1221-28.


43 See id. at 600-01.
convicted of implied that the court was to determine the elements the
defendant had previously been found to have violated in the prior
proceeding.\(^4^4\) Moreover, the legislative history indicated that Congress
wanted this sort of categorical approach because “[t]here was considerable
debate over what kinds of offenses to include and how to define them, but
no one suggested that a particular crime might sometimes count towards
enhancement and sometimes not, depending on the facts of the case.”\(^4^5\)

The Court also discussed the “potential unfairness” of not using the
categorical approach:

If the sentencing court were to conclude, from its own review of the record, that the
defendant actually committed a generic burglary, could the defendant challenge this
conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded
guilty, there often is no record of the underlying facts. Even if the Government were able to
prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea
bargain, it would seem unfair to impose a sentence enhancement as if the defendant had
pleaded guilty to burglary.\(^4^6\)

Moreover, there would be “practical difficulties” in not using a
categorical approach:

In all cases where the Government alleges that the defendant’s actual conduct would fit the
generic definition of burglary, the trial court would have to determine what that conduct was.
In some cases, the indictment or other charging paper might reveal the theory or theories of
the case presented to the jury. In other cases, however, only the Government’s actual proof of
trial would indicate whether the defendant’s conduct constituted generic burglary. Would the
Government be permitted to introduce the trial transcript before the sentencing court, or if no
transcript is available, present the testimony of witnesses? Could the defense present
witnesses of its own and argue that the jury might have returned a guilty verdict on some
theory that did not require a finding that the defendant committed generic burglary?\(^4^7\)

In implicitly answering these questions in the negative, the Court decided
that it did not make policy sense—or at least that Congress had decided that
it did not make policy sense—to have the parties re-litigate issues from
prior cases. And while the Court did not explicitly discuss it, the prohibition
against re-litigating a prior conviction works both to the government’s
detriment and to its benefit. Not only does the prohibition prevent the
government from establishing what the defendant actually did, it
necessarily prevents the defendant from doing so as well. That means
defendants cannot try to prove that they did not commit the offense for
which they were convicted—under the categorical approach, if they were
convicted of burglary, this determination ends the inquiry.\(^4^8\)

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\(^4^4\) See id.
\(^4^5\) Id. at 601.
\(^4^6\) Id. at 601-02.
\(^4^7\) Id. at 601.
\(^4^8\) See Sharpless, supra note 36, at 1031.
In sum, federal courts should classify the defendant’s prior conviction based solely on the facts necessarily found in the prior conviction—that is, facts that the jury had necessarily found or facts that the defendant had already admitted in the prior proceeding. After announcing these principles, the Court remanded the case back to the lower court because it was not clear which Missouri burglary statute the defendant had been convicted of.49

This relatively straightforward approach, however, became controversial in practice. While bright-line rules come with a number of practical benefits, their inflexibility can lead to substantively peculiar results. The bright-line rule that Taylor established was not immune to that defect. An example demonstrates this point.

Imagine a situation in which a defendant commits burglary in Massachusetts, which broadly defines burglary to include breaking into buildings, boats, or motor vehicles—rather than just a “building or other structure”—thus taking it outside the purview of generic burglary.50 The defendant pleads guilty to the statute. In short, the defendant has not admitted to facts that would establish he was convicted of the elements of generic burglary. But, according to a police report, the defendant did in fact break into a home. The defendant, however, was never asked to admit this fact during his state plea colloquy. Under Taylor, despite the fact that it is clear the defendant actually committed generic burglary, a federal court could not reach that result. A police report does not reflect facts that the defendant admitted or facts that a jury was required to find. Put another way, the defendant was not “convicted of” generic burglary, even though he “committed” generic burglary.

It would not be surprising for a court to want to avoid the strict categorical approach in that situation. And in United States v. Shepard,51 involving a similar fact pattern, the First Circuit did just that. Because the defendant had never contested that he had broken into a building, and because all of the available evidence pointed to the conclusion that he had broken into a building, the First Circuit held that the defendant’s prior conviction qualified as generic burglary.52

In a 2005 decision, the Supreme Court reversed.53 The government, in defending the lower court’s decision, argued that the police report, combined with the complaint, could be used to narrow the Massachusetts burglary statute because they are “free from any inconsistent, competing evidence on the pivotal issue of fact separating generic from nongeneric burglary.”54 The Court rejected this contention, noting that such an

49 Taylor, 595 U.S. at 602.
50 See MASS. GEN. LAWS ch. 266, § 16 (2008).
51 348 F.3d 308 (1st Cir. 2003), rev’d, 544 U.S. 13 (2005).
52 Id. at 311-14.
54 Id. at 21-22.
argument ran contrary to Taylor and its holding that even jury-trial transcripts (which would merely show what the defendant did, not what he was convicted of) were not documents that could be used to narrow a defendant’s statute of conviction.\textsuperscript{55} The Court said it was not inclined to overturn Taylor, a decision that was then already fifteen years old and which Congress had not attempted to overrule through amending ACCA.\textsuperscript{56} The Court also explained that the government’s position would require the Court to address serious Sixth Amendment issues because its position would mean a defendant’s sentence would dramatically increase (the prior conviction increased the defendant’s sentence from three years to fifteen years) based on facts found not by a jury, but by a judge at sentencing.\textsuperscript{57} Thus, Shepard re-affirmed Taylor and the strict categorical approach that required courts to look only at the elements of the state offense.

The Court in Shepard did not try to address the concerns raised by the categorical approach\textsuperscript{58}—concerns that likely led the First Circuit to bypass the approach to begin with. Rather, the Court hinged its analysis mostly on stare decisis grounds.\textsuperscript{59} This omission undoubtedly left critics of the categorical approach feeling neglected, especially given that there are legitimate concerns about the categorical approach based on the counterintuitive results it demands at times. In cases where the federal court knows the individual’s actual prior conduct, the categorical approach nevertheless requires that the court turn a blind eye if the individual was not “convicted of” that conduct. That was the situation in Shepard. And even when the federal court does not know the individual’s prior conduct, there are certainly situations where the court has good reason to suspect that the defendant did not commit non-qualifying conduct. As a result, at least some judges are eager to attempt to limit the categorical approach, just like the First Circuit did in Shepard.

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\item \textsuperscript{55} Id. at 22-23.
\item \textsuperscript{56} Id. at 23.
\item \textsuperscript{57} Id. at 24-26.
\item \textsuperscript{58} Many judges had raised concerns about the categorical approach and its requirement that courts turn a blind eye to the defendant’s actual prior conduct. See, e.g., Flores v. Ashcroft, 350 F.3d 666, 672-73 (7th Cir. 2003) (Evans, J., concurring) (lamenting that the categorical approach required the court to hold that the petitioner’s battery conviction was not a crime of domestic violence and stating that the result it required in this case was “divorced from common sense”); United States v. Martinez-Cortez, 988 F.2d 1408, 1417-18 (5th Cir. 1993) (Jolly, J., specially concurring) (contending that “a literal reading of Taylor”—that is, the strict categorical approach—“produces nonsensical results” and arguing that the proper inquiry is whether there is “reliable proof showing that the defendant indeed had committed a ‘generic’ [crime]” (emphasis added)).
\item \textsuperscript{59} See Shepard, 544 U.S. at 23.
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II. AIDING AND ABETTING THE CATEGORICAL APPROACH: DUENAS-ALVAREZ

Two years after the Court decided Shepard, it issued Gonzales v. Duenas-Alvarez, another opinion discussing the categorical approach. That case involved a legal permanent resident who had been convicted under California state law for vehicle theft.\(^{60}\) The Ninth Circuit determined that the California statute did not categorically qualify as a generic theft offense.\(^{61}\) Relying on circuit precedent, the court held that because an individual could be guilty of the California offense merely by aiding and abetting a theft offense, the statute did not constitute generic theft.\(^{62}\)

The Supreme Court vacated the ruling.\(^{63}\) It began with a rote recitation of the principles of Taylor, Shepard, and the categorical approach.\(^{64}\) Next, the Court determined that the immigration statutes (including the one at issue) treated aiders and abettors the same as principals because both federal and state criminal law did.\(^{65}\) Thus, someone who aided and abetted theft could have committed generic theft, as long as the state defined (a) “theft” using its generic definition and (b) “aiding and abetting” using its generic definition. According to Duenas-Alvarez, however, California had a unique legal definition of “aiding and abetting,” and thus California’s theft statute still did not categorically qualify as generic theft.\(^{66}\) Duenas-Alvarez explained that California had stretched its aiding-and-abetting liability to include any crime that would “‘naturally and probably’ result[] from [the defendant’s] intended crime.”\(^{67}\) Duenas-Alvarez argued that this unusual extension of liability meant someone could have committed a theft offense through a non-generic application of aiding-and-abetting law. The Court disagreed because “relatively few jurisdictions” had rejected the natural-and-probable-results test.\(^{68}\) In other words, this test did not demonstrate that California’s aiding-and-abetting liability was broader than generic aiding-and-abetting liability.

The Court then pointed out that “[t]o succeed, Duenas-Alvarez must show something special about California’s version of the doctrine—for example, that California in applying it criminalizes conduct that most other States would not consider ‘theft.’”\(^{69}\) Duenas-Alvarez argued that

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\(^{61}\) Id. at 188-89.

\(^{62}\) Id. at 189.

\(^{63}\) Id. at 194.

\(^{64}\) See id. at 185-87.

\(^{65}\) Id. at 189-90.

\(^{66}\) Duenas-Alvarez, 549 U.S. at 190.

\(^{67}\) Id.

\(^{68}\) Id. at 190-91.

\(^{69}\) Id. at 191.
California’s version was indeed special, contending that the doctrine criminalized “conduct that the defendant did not intend, not even as a known or almost certain byproduct of [his] intentional acts.”70 In support of his interpretation of California law, he pointed to several California cases.71 In examining each case, the Court rejected the view that they established anything “special” about California law, noting that those cases did not “extend” the legal concept of intent as used by other states.72 Faced with Duenas-Alvarez’s claim that California’s doctrine was different than that of most other states despite the fact that they used similar written formulations, the Court then made the following pronouncement, which would become a source of controversy:

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 possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.73

The Court then concluded that California’s aiding-and-abetting liability is not broader than the generic doctrine because Duenas-Alvarez had not made such a showing and the Court could not “find that California’s statute, through the California courts’ application of a ‘natural and probable consequences’ doctrine, creates a subspecies of the Vehicle Code section crime that falls outside the generic definition of ‘theft.’”74

III. THE TWO VIEWS OF DUENAS-ALVAREZ

In the wake of Duenas-Alvarez, two contradictory interpretations of the opinion emerged in the lower courts. This Article will refer to one as the “evidentiary-burden” view and the other as the “novel-interpretation” view. As will become clear below, the evidentiary-burden view is immensely appealing to a judge who believes that the costs of the categorical approach outweigh its benefits. The novel-interpretation view, on the other hand, provides, at best, a minor gloss on the categorical approach. It is essentially a reaffirmation of the status quo. Despite the existence of these competing views, there has been no judicial dialogue about the split and almost no

70 Id.
71 Id. at 191-94 (citing People v. Montes, 88 Cal. Rptr. 2d 482 (Ct. App. 1999); People v. Nguyen, 26 Cal. Rptr. 2d 323 (Ct. App. 1993); People v. Simpson, 152 P.2d 339 (Cal. Ct. App. 1944)).
72 Duenas-Alvarez, 549 U.S. at 191-93.
73 Id. at 193.
74 Id. at 193-94.
theorizing about what the Supreme Court could have meant. This lack of theorizing has even led one court, the Ninth Circuit, to issue decisions consistent with both views.

A. The Evidentiary-Burden View

One view of the meaning of Duenas-Alvarez is the evidentiary-burden view. Under this interpretation, Duenas-Alvarez tossed aside Taylor’s categorical approach—and its focus on the elements of the state offense—altogether. According to this view, if a defendant claims that a state statute does not categorically qualify as a predicate offense, he must point to a case in which a defendant has been prosecuted and convicted under the relevant state statute for conduct that would not qualify as the generic offense. He cannot merely point out that the language of the state statute (or the way in which the statute has been interpreted) covers non-generic conduct. In other words, Duenas-Alvarez puts an evidentiary burden on individuals who claim a state statute is broader than the generic offense to prove that a given state prosecutes people for non-generic conduct.

The clearest application of this view is in United States v. Ramos-Sanchez, 75 a Fifth Circuit case in which the defendant pled guilty to illegal re-entry. 76 The defendant had also previously pled no contest to “indecent solicitation of a child” in Kansas. 77 That statute criminalized “[e]nticing or soliciting” a fourteen- or fifteen-year-old child “to commit or to submit to an unlawful sexual act.” 78 Based on that prior conviction, the district court determined that the defendant qualified for the sentencing enhancement applicable in illegal re-entry cases for defendants who have previously been convicted of “sexual abuse of a minor.” 79 On appeal, the defendant argued that the Kansas statute criminalized a broad range of sexual conduct that would not qualify as “sexual abuse of a minor,” including consensual sex between fifteen-year-olds. 80 The Fifth Circuit did not dispute that the statute covered such conduct. Nevertheless, the court held that it was irrelevant whether consensual sex between fifteen-year-olds constituted “sexual abuse of a minor.” 81 Quoting the Duenas-Alvarez paragraph about “legal imagination”—although otherwise not discussing the case—the court held that there was “no evidence of the realistic probability of such a

75 483 F.3d 400 (5th Cir. 2007).
76 Id. at 401.
77 Id.
78 Id. (alteration in original) (quoting KAN. STAT. ANN. § 21-3510(a)(1) (2007)) (internal quotation marks omitted).
79 Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) & cmt. n.1(B)(iii) (2005)) (internal quotation marks omitted).
80 Id. at 403.
81 See Ramos-Sanchez, 483 F.3d at 404 (internal quotation marks omitted).
prosecution.” In other words, the defendant had failed to prove that the state of Kansas would, as a matter of fact, prosecute two fifteen-year-olds for having consensual sex. He could only point to a case where a seventeen-year-old was prosecuted for having consensual sex with a fifteen-year-old. Thus, according to the court, any defendant who pled guilty to the Kansas statute would have necessarily committed “sexual abuse of a minor,” and the sentencing enhancement would therefore have been properly applied.

Not long thereafter, the Fifth Circuit replicated this view of Duenas-Alvarez in United States v. Balderas-Rubio. As in Ramos-Sanchez, the defendant had pled guilty to illegal re-entry and the issue on appeal was whether the defendant’s prior sex offense qualified as “sexual abuse of a minor.” The prior sex offense at issue involved Oklahoma’s statute criminalizing indecency or lewd acts with a child under sixteen. According to the defendant, the statute criminalized lewdly or lasciviously looking at a minor from afar, even if the minor had no knowledge of the individual’s presence. The Fifth Circuit assumed, for the sake of argument, that the statute covered such conduct and that such conduct would not constitute sexual abuse of a minor. Nevertheless, the court held that the defendant had failed to establish that his prior offense did not categorically qualify as sexual abuse of a minor because he had “identified no instance of a person being convicted” under the statute involving those facts. In reaching this result, the court once again quoted the Duenas-Alvarez paragraph about “legal imagination,” although it once again did so without providing any other discussion of the case.

The Fifth Circuit is not alone in its reading of Duenas-Alvarez. For example, in United States v. Cadieux, the First Circuit determined that a defendant’s prior Massachusetts conviction for indecent assault and battery

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82 Id. at 403-04 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)) (internal quotation marks omitted).
83 Id. at 403 (citing State v. Snelling, 975 P.2d 259, 261 (Kan. 1999)).
84 See id.
85 499 F.3d 470 (5th Cir. 2007).
86 Id. at 471 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) & cmt. n.1(B)(iii) (2005)) (internal quotation marks omitted).
87 Id. (citing OKLA. STAT. tit. 21, § 1123 (1985)).
88 Id. at 473.
89 Id.
90 Id. at 473-74 (“Even if Balderas-Rubio were correct that his example would be punishable under Okla. Stat. tit. 21, § 1123(A)(4) but fall outside the generic definition of sexual abuse of a minor, he has ‘failed to show a realistic probability that [Oklahoma] would in fact punish conduct of the type he describes.’” (alteration in original) (quoting United States v. Ramos-Sanchez, 483 F.3d 400, 404 (5th Cir. 2007))).
92 500 F.3d 37 (1st Cir. 2007).
on a child under fourteen qualified as an ACCA predicate offense. Among other things, the court rejected the defendant’s argument that the state statute did not qualify because it covered consensual sexual touching between underage teenagers. The court did not dispute that such conduct fell under the statute’s reach; rather, the court, relying in part on Duenas-Alvarez, held that there was not a “realistic probability” that such conduct would be prosecuted. The court noted that it had “scoured the caselaw and could not discover a single reported case in which a juvenile was convicted under [the state statute at issue] for consensual sexual activity with a similarly-aged youth.”

In 2008, then Attorney General Alberto Gonzales also issued an opinion concerning immigration law that assumed the evidentiary-burden view of Duenas-Alvarez. In In re Silva-Trevino, the Attorney General determined how the nation’s immigration courts should decide whether an individual had been “convicted of” a “crime involving moral turpitude.” After determining that the relevant statutory regime was ambiguous as to whether Taylor’s categorical approach applied, the Attorney General construed the statute in a way consistent with the evidentiary-burden view.

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93 *Id.* at 38, 47.
94 *Id.* at 46. The Massachusetts statute provided the following: “Whoever commits an indecent assault and battery on a child under the age of fourteen shall be punished . . . .” MASS. GEN. LAWS ch. 265, § 13B (1989). The statute further provided that it was irrelevant whether the victim consented. See *id*. The First Circuit noted that Massachusetts courts had interpreted an indecent assault and battery as the “intentional, unjustified touching of private areas.” *Cadieux*, 500 F.3d at 44 (quoting Commonwealth v. Mosby, 567 N.E.2d 939, 941 (Mass. App. Ct. 1991)) (internal quotation marks omitted).
95 *See Cadieux*, 500 F.3d at 46-47.
96 *Id.* at 46. This case involved an application of ACCA’s residual clause, so it arguably raises conceptually different issues. See *infra* text accompanying notes 203-23 (discussing the Supreme Court’s quirky ACCA residual clause jurisprudence). That being said, the First Circuit’s analysis does not seem to limit its understanding of Duenas-Alvarez to the context of ACCA’s residual clause, and it would not make sense to believe the language of Duenas-Alvarez means different things depending on the context in which it is applied.
97 *See Cadieux*, 500 F.3d at 46-47.
99 *Id.* at 688 (internal quotation marks omitted).
100 According to the United States Attorney General, the statute was ambiguous because, on the one hand, it asked what the individual had been “convicted of”—which favored an interpretation that Taylor’s categorical approach applied because that language is used in ACCA. *Id.* at 693 (internal quotation marks omitted). On the other hand, the Attorney General contended, the language that the crime at issue “involve” moral turpitude seems to envision an analysis of an individual’s actual conduct. *Id.* Because there was this statutory ambiguity, the Attorney General contended, he had the authority—as the individual tasked with interpreting the nation’s immigration laws—to determine the statute’s meaning. See *id.* at 696. According to the Attorney General, he had three options: (1) apply Taylor’s strict categorical approach; (2) apply Duenas-Alvarez’s “realistic probability” test; or (3) apply the “usual” case test, which would require the court to determine how the statute was applied in the typical case. *Id.* at 696-97.
of *Duenas-Alvarez*—that is, the individual would have to establish that the state would prosecute someone for conduct under the statute that would not constitute a “crime involving moral turpitude.”¹⁰¹ According to the Attorney General, if the petitioner could not point to a case where an individual had been prosecuted for non-generic conduct, “the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.”¹⁰² The Attorney General did not explain why he believed that *Duenas-Alvarez* placed an evidentiary burden on the defendant, nor did he provide any context to the Court’s paragraph about “legal imagination.”¹⁰³

The Ninth Circuit has also issued opinions consistent with the evidentiary-burden view—though, as will be made clear in the next section, it has also issued opinions consistent with the novel-interpretation view. One case in which it has articulated the evidentiary-burden view of *Duenas-Alvarez* was in *United States v. Laurico-Yeno*.¹⁰⁴ There, the defendant argued that California’s “inflicting corporal injury on a spouse” statute did not have, as an element, “the use of physical force” against another, as the government had claimed.¹⁰⁵ In a series of cases the Supreme Court had made it clear that a predicate offense meets that requirement only if it criminalized “violent, active crimes.”¹⁰⁶ While the plain language of the California statute seemed to indicate that it had as an element the use of physical force against another,¹⁰⁷ the defendant pointed to a series of cases in which California courts had broadly interpreted the language of the statute to include defendants who were guilty of committing simple battery against their spouse.¹⁰⁸ Thus, because simple battery in California could be

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¹⁰¹ Id. at 698 (“That said, the *Duenas-Alvarez* Court’s adoption of the ‘realistic probability’ approach is grounded in the realization that immigration penalties ought to be based on criminal laws as they are actually applied.”).

¹⁰² Id. at 697.

¹⁰³ See id. at 697-98 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)) (internal quotation marks omitted).

¹⁰⁴ 590 F.3d 818 (9th Cir. 2010). In the interest of full disclosure, Federal Defenders of San Diego Inc. represented Ms. Laurico-Yeno before the Ninth Circuit while I was an attorney at Federal Defenders. I was not counsel of record for Ms. Laurico-Yeno, however.

¹⁰⁵ See id. at 819-20 (citing CAL. PENAL CODE § 273.5 (West 2008)).

¹⁰⁶ Id. at 821 (quoting Leocal v. Ashcroft, 543 U.S. 1, 11 (2004)) (internal quotation marks omitted).

¹⁰⁷ The California statute provided, in part: “Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony . . . .” PENAL § 273.5(a).

¹⁰⁸ See Laurico-Yeno, 590 F.3d at 821-22; Appellant’s Reply Brief at 6-7, United States v. Laurico-Yeno, 590 F.3d 818 (9th Cir. 2010) (No. 09-50093) (‘Indeed, the California courts have repeatedly held that liability under § 273.5 may be found upon the ‘least touching’ that constitutes simple battery.’) (citing People v. Stearns, No. B183521, 2006 WL 946671, at *2 (Cal. Ct. App. Apr. 13, 2006); People v. Guster, No. C043276, 2004 WL 397060, at *5 (Cal. Ct. App. Mar. 4, 2004); People v. McCombs,
committed through the “least touching”—rather than the use of violent force—the defendant argued that the statute did not have as an element the use of physical force against another. The court rejected this argument. Importantly, the court did not seem to contest the defendant’s reading of California law. Rather, relying on Duenas-Alvarez, the court held that the defendant had not established that the California crime was overly broad because no California appellate case involved facts that constituted the least possible touching. In other words, while the defendant was not providing a novel interpretation of a California statute—indeed, he relied on a host of cases that established the contours of California law—he had not met his burden to prove that California would actually prosecute an individual for committing the least possible touching against his spouse.

The Ninth Circuit also articulated the evidentiary-burden view in Nicanor-Romero v. Mukasey. In that case, the petitioner had been convicted of “annoying or molesting” someone under the age of eighteen, a misdemeanor under California law. The government ordered the petitioner removed based on that conviction, contending that the crime constituted a “crime involving moral turpitude.” The Ninth Circuit disagreed. In surveying California law, the court documented that the statute criminalized annoying behavior (e.g., taking an unwanted photograph) directed at someone under eighteen that was “motivated by an unnatural or abnormal sexual interest in the victim.” Moreover, the

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109 Appellant’s Reply Brief, supra note 108, at 6 (internal quotation marks omitted).

110 The Court does, however, hinge its analysis on the “text” of the California statute. See Laurico-Yeno, 590 F.3d at 822. But it does not challenge the defendant’s reading of how California cases have interpreted that text—that is, the text has been interpreted to include situations in which the defendant uses the least possible touching. Indeed, that reading would be hard to impeach, given that a series of cases had made it clear that a defendant had violated the statute if he had committed the least possible touching. See supra note 108 (listing cases).

111 The Court wrote that the defendant was “asking us to surmise that a non-violent ‘least touching’ could result in a § 273.5 conviction. We need not entertain such a hypothetical possibility.” Laurico-Yeno, 590 F.3d at 822. Thereafter, the Court quoted Duenas-Alvarez and its prohibition against “legal imagination.” See id. (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)) (internal quotation marks omitted). It also points out, in a footnote, that the defendant had relied on the facts of one case to establish that California would prosecute an individual for the least possible touching; the court, however, disagreed that the fact pattern actually involved the least possible touching. See id. at 822 n.3 (“Laurico argues People v. Dennis [involved the least possible touching]. In that case, however, the jury found defendant had pulled the victim’s fingernail off, more than a non-violent ‘least touching.’” (citing People v. Dennis, No. D044201, 2005 WL 1230772 (Cal. Ct. App. May 24, 2005))).

112 523 F.3d 992 (9th Cir. 2008), overruled on other grounds by Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009) (en banc).

113 Id. at 995 (citing CAL. PENAL CODE § 647.6(a) (West 2008)).


115 Id. at 1000 (quoting People v. Lopez, 965 P.2d 713, 717 (Cal. 1998)) (internal quotation marks omitted).
defendant did not need to know the age of the victim; rather, the defendant could be convicted if he were negligent with respect to the victim’s age.\textsuperscript{116} Conduct could meet that description, the court reasoned, that would not constitute a crime involving moral turpitude.\textsuperscript{117}

But that was not an end to the court’s analysis. The court observed that the Supreme Court had just issued \textit{Duenas-Alvarez}. After citing the Court’s “realistic probability” paragraph, the Ninth Circuit wrote that the “full implications of the Court’s ‘realistic probability’ test are, at this point, unclear.”\textsuperscript{118} The court further explained that it had been over a decade since \textit{Taylor} had been decided and that a substantial body of case law had developed using \textit{Taylor}’s elements test.\textsuperscript{119} “By disapproving of such an approach,” the court wrote, “\textit{Duenas-Alvarez} leaves uncertain the continued validity of this extensive case law.”\textsuperscript{120} The court then lamented that \textit{Duenas-Alvarez} had not explained what sort of evidence was necessary to meet the “realistic probability” standard.\textsuperscript{121} The court stated that it believed that an unpublished opinion discussing a conviction involving non-generic conduct would be enough.\textsuperscript{122} While Judge Bybee, in dissent, disagreed with this contention, the majority responded that “if a client sought advice regarding the scope of a state statute, Judge Bybee would not advise the client to engage in conduct that had already been held illegal simply because the conviction was reported in an unpublished opinion.”\textsuperscript{123} Thereafter, the court pointed to an unpublished case with a fact pattern involving a conviction that it felt did not demonstrate morally turpitudinous conduct.\textsuperscript{124} Thus, because there was evidence to establish that California prosecuted people under the relevant law for conduct that did not fall under the generic federal label, the state statute was not categorically a qualifying offense.\textsuperscript{125} In dissent, Judge Bybee agreed with the majority’s reading of \textit{Duenas-Alvarez}, but disagreed with its application in the case. He argued, among other things, that the majority had misread California law and that the

\textsuperscript{116} \textit{Id.} at 1001-02. The court noted that this was because a defendant could be convicted under the statute if he were “found to have manifested an ‘unnatural or abnormal sexual interest’” in someone under eighteen “solely because he possessed an otherwise natural and normal interest in an underage person whom he negligently believed to be eighteen.” \textit{Id.} at 1002.

\textsuperscript{117} \textit{Id.} at 1002.

\textsuperscript{118} \textit{Nicanor-Romero}, 523 F.3d at 1004.

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.} at 1005 (internal quotation marks omitted).

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} See \textit{Nicanor-Romero}, 523 F.3d at 1005-06.

\textsuperscript{125} See \textit{id.} at 1007.
unpublished authority the majority relied on, at least in this case, was not sufficient to meet the *Duenas-Alvarez* evidentiary burden.126

B. The Novel-Interpretation View

A second view of *Duenas-Alvarez* is the “novel-interpretation” view. Under this view, *Duenas-Alvarez* has limited relevance to Taylor’s categorical approach, as it views the decision as applying only when the defendant offers a novel interpretation of state law to establish that the state statute is broader than the federal statutory hook at issue. In those cases, the defendant bears the burden to establish that state courts have in fact applied the law in the “novel” fashion that the defendant contends. In other words, *Duenas-Alvarez* was a case about how not to interpret—or, at least, not misinterpret—the contours of state law.

This view of *Duenas-Alvarez* gets its name from *United States v. Madera*,127 a federal district court case out of Connecticut.128 There, the issue was the same as it was in *Taylor* and *Shepard*: whether the defendant’s prior convictions qualified as ACCA predicate offenses, thereby triggering the statute’s mandatory minimum penalty.129 The application of the enhancement turned on whether the defendant’s three prior Connecticut drug convictions qualified as “serious drug offense[s].”130 To qualify as a “serious drug offense,” ACCA requires the drug conviction to involve a substance that the federal drug schedules prohibit.131 The defendant argued that his prior convictions did not qualify as serious drug felonies because the Connecticut statute that he had thrice been convicted of criminalized a broad array of drugs, some of which would not fall under

126 Id. at 1020-24 (Bybee, J., dissenting). A number of Ninth Circuit decisions, in fact, contain dissents that articulate the evidentiary-burden view of *Duenas-Alvarez*. See, e.g., *Nunez v. Holder*, 594 F.3d 1124, 1140 (9th Cir. 2010) (Bybee, J., dissenting) (advancing the evidentiary-burden view of *Duenas-Alvarez* and “question[ing]” whether a petitioner can meet the realistic probability burden by pointing to only a single appellate case where a defendant was prosecuted for non-generic conduct); *Latu v. Mukasey*, 547 F.3d 1070, 1079 (9th Cir. 2008) (O’Scannlain, J., dissenting) (contending that the petitioner had committed a qualifying offense because one had to “speculate that the Hawaiian government would prosecute an individual” for non-qualifying conduct, which was forbidden under *Duenas-Alvarez*); *United States v. Baza-Martinez*, 481 F.3d 690, 693 (9th Cir. 2007) (Graber, J., dissenting) (claiming that under *Duenas-Alvarez*’s prohibition against using legal imagination, “[i]t is no longer valid to sift through considerably more than one hundred cases and rely on a single case (decided by the state court of appeals more than a decade ago) that arguably falls outside the federal definition of the crime”).

127 521 F. Supp. 2d 149 (D. Conn. 2007).

128 For an interesting discussion of the efforts by the Office of the Federal Defender in Connecticut that led to *Madera*, see Russell, supra note 41, at 1190-1202.

129 *See Madera*, 521 F. Supp. 2d at 151.


131 Id. at 151 (citing 18 U.S.C. § 924(e)(2)).
federal law, such as benzylfentanyl and thenylfentanyl.\textsuperscript{132} Since there were no documents available that would allow the court to use the modified categorical approach—thereby determining which substance he had been involved with—the defendant argued that his prior convictions should not count as ACCA predicates.\textsuperscript{133} In response, the government argued that the defendant should have to establish that individuals had been prosecuted in Connecticut in connection with the use of those substances.\textsuperscript{134} In support of its position, the government cited to the paragraph in \textit{Duenas-Alvarez} concerning “legal imagination.”\textsuperscript{135} In other words, the government advanced the evidentiary-burden view of \textit{Duenas-Alvarez}. The district court rejected this argument, writing that “Duenas-Alvarez was arguing for a novel judicial interpretation of a state theft statute.”\textsuperscript{136} The defendant in \textit{Madera}, however, was not arguing for such an interpretation of state law.\textsuperscript{137} Rather, his argument hinged on simply “[c]omparing the federal and state controlled substance schedules,” which was “a simple matter of comparing entries on two lists.”\textsuperscript{138} As a result, the court held that, to use \textit{Duenas-Alvarez}’s language, there was “a realistic probability that those selling benzyl- or thenylfentanyl would be prosecuted.”\textsuperscript{139}

A Third Circuit decision seems to mimic this view of \textit{Duenas-Alvarez}. In \textit{Jean-Louis v. Attorney General},\textsuperscript{140} a legal permanent resident had been ordered deported because he had been convicted of violating a Pennsylvania statute that criminalized the commission of simple assault against an individual under the age of twelve.\textsuperscript{141} The petitioner conceded that he was deportable, but he argued that he was entitled to cancellation of removal, a form of relief from deportation.\textsuperscript{142} The government disagreed, contending that his Pennsylvania conviction was a crime involving moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(i)(I), which is defined as a crime involving conduct that is “inherently base, vile, or depraved.”\textsuperscript{143} Committing such a crime makes an individual ineligible for cancellation.\textsuperscript{144} An immigration judge agreed with the government that the petitioner’s

\begin{footnotes}
\footnote{132}{See id. at 154-55.}
\footnote{133}{See id. at 153-54.}
\footnote{134}{Id. at 156.}
\footnote{135}{See \textit{Madera}, 521 F. Supp. 2d at 156 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)) (internal quotation marks omitted).}
\footnote{136}{Id.}
\footnote{137}{Id.}
\footnote{138}{Id.}
\footnote{139}{Id.}
\footnote{140}{582 F.3d 462 (3d Cir. 2009).}
\footnote{141}{Id. at 464-65.}
\footnote{142}{Id.}
\footnote{143}{See id. (quoting Knapik v. Ashcroft, 384 F.3d 84, 89 (3d Cir. 2004)) (internal quotation marks omitted).}
\footnote{144}{Id. at 464 (citing 8 U.S.C. § 1229b(d)(1) (2006)).}
\end{footnotes}
conviction involved moral turpitude and ordered the deportation of the defendant. The Third Circuit reversed, noting that it was applying the categorical approach, which required the court to look at “the elements of the statutory offense to ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute.” Using that rationale, the court held that the Pennsylvania statute was not categorically a crime involving moral turpitude because a defendant could be convicted under the statute for recklessly committing a simple assault without knowing the age of the victim, which was not a depraved crime. The court noted, however, that the Attorney General’s recent opinion in *In re Silva-Trevino* complicated things. The Third Circuit explained that the Attorney General’s approach required the petitioner to “identify an actual conviction” that would establish that the statute was not categorically a crime involving moral turpitude. To use the terminology of this Article, the Third Circuit observed that the Attorney General had followed the evidentiary-burden view of *Duenas-Alvarez*. The Third Circuit rejected this view because it believed the relevant statute unambiguously required the use of Taylor’s categorical approach because the statute asked what the defendant had been “convicted of.” The court also addressed *Duenas-Alvarez*, noting that the decision addressed “hypothetical conduct asserted by the alien [that] was not clearly a violation of California law.” In this case, the Third Circuit observed, the elements of the state statute were “clear” and there was no need to apply “legal imagination” to the state statute’s language.

The Ninth Circuit—despite having issued decisions consistent with the evidentiary-burden view, as discussed above—has also issued decisions consistent with the novel-interpretation view. For example, in *Cerezo v. Mukasey*, the government (citing *Duenas-Alvarez*) argued that a California statute that criminalized leaving the scene of an accident resulting in bodily injury or death was categorically a crime involving moral turpitude because—even though the language of the statute appeared to take the state crime outside the generic definition—the state did not apply the statute as it was written. In rejecting the government’s

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145 *Id.* at 465.
146 *Jean-Louis*, 582 F.3d at 471.
147 *Id.* at 466-69.
148 See supra text accompanying notes 98-103.
149 *Jean-Louis*, 582 F.3d at 471.
150 *Id.* at 473-82.
151 *Id.* at 481.
152 *Id.* (internal quotation marks omitted).
153 See supra text accompanying notes 104-26.
154 512 F.3d 1163 (9th Cir. 2008).
155 See *id.* at 1166-67 (discussing CAL. VEH. CODE § 20001(a) (West 2000)).
argument, the court said Duenas-Alvarez was not relevant because it took no legal imagination to determine that the statute was overly broad—the plain language of the state statute itself established that the statute was overly broad.\textsuperscript{156} As the court forcefully put it in rejecting the idea that it should look behind the statute’s language: “[W]here, as here, the state statute plainly and specifically criminalizes conduct outside the contours of the federal definition, we do not engage in judicial prestidigitation by concluding that the statute ‘creates a crime outside the generic definition of a listed crime.’”\textsuperscript{157} The Ninth Circuit in United States v. Grisel,\textsuperscript{158} sitting en banc, came to the same conclusion about the scope of Duenas-Alvarez:

Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no ‘legal imagination’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute’s greater breadth is evident from its text.\textsuperscript{159}

\section*{IV. THE MEANING OF DUENAS-ALVAREZ}

Given the frequency with which courts must determine the collateral effect of an individual’s prior conviction—indeed, it is probably one of the most-litigated issues in criminal and immigration cases—the meaning of Duenas-Alvarez is a pressing issue. In criminal cases, whether the evidentiary-burden view or the novel-interpretation view is correct can mean the difference between years of prison time for a defendant. In immigration cases, it can mean the difference between an individual being allowed to live in the United States and being deported. So, which view is correct?

As discussed below, the novel-interpretation view is the better reading of what the Supreme Court intended in Duenas-Alvarez for three reasons. First, a close examination of the text of Duenas-Alvarez establishes that it is consistent with the novel-interpretation view and irreconcilable with the evidentiary-burden view. Second, post-Duenas-Alvarez decisions from the Supreme Court regarding Taylor’s categorical approach strongly suggest—if not conclusively show—that the Court did not intend to alter Taylor’s categorical approach in Duenas-Alvarez. Finally, even if Duenas-Alvarez could plausibly be read to support the evidentiary-burden view, strong

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\textsuperscript{156} Id. at 1167.
\textsuperscript{157} Id. (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)) (internal quotation marks omitted).
\textsuperscript{158} 488 F.3d 844 (9th Cir. 2007) (en banc).
\textsuperscript{159} Id. at 850 (citation omitted) (quoting Duenas-Alvarez, 549 U.S. at 193).
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policy considerations counsel against discarding Taylor’s categorical approach.

A. A Close Reading of Duenas-Alvarez Supports the Novel-Interpretation View

Despite the disagreement about what Duenas-Alvarez means, surprisingly little discussion of the case exists, particularly among courts that have adopted the evidentiary-burden view. For example, in both of the Fifth Circuit cases that most clearly articulate the evidentiary-burden view, there is no discussion of Duenas-Alvarez, other than a block quote of the paragraph about “legal imagination.” 160 Neither case explains the context in which that paragraph arose. A close reading of Duenas-Alvarez, however, supports the novel-interpretation view, not the evidentiary-burden view.

As explained above, Duenas-Alvarez dealt with the scope of a well-known legal doctrine: aiding and abetting. 161 Specifically, it addressed the scope of California’s natural-and-probable consequences theory of aiding and abetting. 162 In the face of Duenas-Alvarez’s claim that California’s doctrine was broader than most other states, despite the fact that the state used the same verbal formulation as many other states (“the natural and probable consequences” test), the Court wrote that “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.” 163 In other words, a defendant cannot offer an idiosyncratic interpretation of statutory language in an attempt to claim certain language makes a state’s crime broader than the generic offense. The Court’s remark about “legal imagination” was not a stand-alone concept. Rather, it was legal imagination with respect to interpreting state law that concerned the Court. The Court then continued: “It requires 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.” 164 While the use of “realistic probability” and “theoretical possibility” are not the clearest formulations, they become clear when read in the context of the previous sentence. Put together, the Court was saying that if one uses “legal imagination” to interpret a state statute, there would only be a “theoretical possibility,” rather than a “realistic probability,” that the statute actually

160 See United States v. Balderas-Rubio, 499 F.3d 470, 473-74 (5th Cir. 2007) (quoting Duenas-Alvarez, 549 U.S. at 193) (internal quotation marks omitted); United States v. Ramos-Sanchez, 483 F.3d 400, 403-04 (5th Cir. 2007) (quoting Duenas-Alvarez, 549 U.S. at 193) (internal quotation marks omitted); supra text accompanying notes 82, 91.

161 See Duenas-Alvarez, 549 U.S. at 185; see also supra Part II.

162 See Duenas-Alvarez, 549 U.S. at 190-91.

163 Id. at 193 (emphasis added) (internal quotation marks omitted).

164 Id.
covers such conduct. Granted, the Court’s prose is not entirely clear. But it appears that the Court was doing no more than responding to a defendant’s argument for a novel judicial interpretation. It was not faced with a statute that covered generic and non-generic conduct; rather, the Court believed the state statute covered only generic conduct.

The Court in *Duenas-Alvarez* was merely doing *Taylor’s* second-step analysis: determining the scope of the state law at issue to determine whether it is narrower than the federal label. In the course of interpreting California state law, the defendant was arguing for an unusual interpretation of a doctrine used in other states. Given that he was arguing that California used a set of words to mean something very different from what other states used those words to mean, it made sense to put the burden on *Duenas-Alvarez* to prove that a California court had applied the doctrine in the counterintuitive manner that he had claimed. In short, *Duenas-Alvarez* was a case about how to interpret (or, really, not misinterpret) state law—nothing more.

A close reading of *Duenas-Alvarez* also reveals that the decision is difficult to reconcile with the evidentiary-burden view. First, if the evidentiary-burden view is correct, the Court’s test in *Taylor*, which focuses on the elements of the state law at issue, has been completely obliterated. Courts, instead of trying to determine the legal question of the scope of state law, would have to answer the evidentiary question regarding how a state statute is applied in practice. This would be a large departure from prior law. Indeed, in *Nicanor-Romero v. Mukasey*, the Ninth Circuit, in one of its opinions consistent with the evidentiary-burden view, wrote that “a substantial body of case law” under *Taylor’s* categorical approach had been now left “uncertain” due to *Duenas-Alvarez*. Despite this huge shift that would potentially affect hundreds of lower court decisions, nothing in *Duenas-Alvarez* indicates that the Court intended to change *Taylor*, *Shepard*, or the categorical approach in such a radical way, and every

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165 As an aside, it is worth noting that this close reading of *Duenas-Alvarez* also reveals that the decision is inconsistent with a potential alternative to the evidentiary-burden and novel-interpretation views: the standard is relevant only when a state statute is ambiguous on its face. Under this potential argument, if a state statute is ambiguous as to whether it covers non-generic conduct, courts should hold that the statute does not cover non-generic conduct unless the defendant can point to an appellate case that contains facts involving non-generic conduct. While this view would be a slight improvement over the evidentiary-burden view, this third view finds no basis in *Duenas-Alvarez* itself, as nothing in the case supports the idea that the Court thought the state statute at issue was ambiguous. Instead, the Court seems to think to the contrary: the state statute was unambiguously a qualifying offense. In short, regardless of the merits of this view, it is not a fair reading of *Duenas-Alvarez*. Additionally, this view is undesirable on its own merits. No state court, when interpreting its own statutes, would apply such a presumption. Thus, a federal court interpreting state law would be using a canon of construction that would not be faithful to state law.

166 *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc).
Justice who joined the majority opinion in *Shepard* joined the Court’s unanimous opinion in *Duenas-Alvarez*.\(^{167}\) Surely, if the Court had intended such a giant sea change in the law, it would have provided more discussion of what it was doing and why it was doing it. Moreover, the Court, in allegedly silently overruling *Taylor*, gave no explanation for why it believed its new test was consistent with congressional intent or Congress’s decision to use the phrase “convicted of”—the precise concerns that pushed the Court to adopt the strict categorical approach in the first place.\(^{166}\) In fact, it appears impossible to reconcile the evidentiary-burden view with Congress’s use of the phrase “convicted of” because the spotlight under that view shifts from the elements of the offense (i.e., what the defendant was “convicted of”) to the conduct that likely led to the conviction (i.e., what the defendant committed).

The second reason *Duenas-Alvarez* is not consistent with the evidentiary-burden view can be traced to the Court’s use of the phrase “legal imagination to a state statute’s language.”\(^{169}\) That phrase is not consistent with court decisions that rely on the evidentiary-burden view. The Fifth Circuit’s decision in *Ramos-Sanchez* is a good example. As noted above, the Fifth Circuit assumed, for the sake of argument, that a statute that criminalized sexual contact between fifteen-year-olds would not constitute sexual abuse of a minor.\(^{170}\) Despite that assumption, and despite the fact that the Kansas statute at issue clearly criminalized sex between fifteen-year-olds (i.e., it criminalized any sexual contact with a fifteen-year-old\(^{171}\)), the court held that the defendant had failed to meet his *Duenas-Alvarez* burden to establish that such conduct would be prosecuted.\(^{172}\) But the defendant’s argument did not rely on the application of “legal imagination to the state statute’s language.” The example he used was unquestionably covered by the plain language of the statute.\(^{173}\) Thus, the court did not need to apply any legal imagination, as *Duenas-Alvarez* had warned against.

Third, the Supreme Court’s use of the phrase “realistic probability” is irreconcilable with the evidentiary-burden view. According to the evidentiary-burden view, when the Court stated that there must be a “realistic probability” that the state statute would be applied in the way the


\(^{169}\) See *Duenas-Alvarez*, 549 U.S. at 193.

\(^{170}\) See United States v. *Ramos-Sanchez*, 483 F.3d 400, 403-04 (5th Cir. 2007) (discussing KAN. STAT. ANN. § 21-3510(a)(1) (2007)); see also supra text accompanying notes 75-84.

\(^{171}\) The Kansas statute criminalized “[e]nticing or soliciting a child 14 or more years of age but less than 16 years of age to commit or to submit to an unlawful sexual act.” KAN. STAT. ANN. § 21-3510(a)(1).

\(^{172}\) *Ramos-Sanchez*, 483 F.3d at 404.

\(^{173}\) See id.
defendant contends, the Court meant that the defendant must show that someone had been prosecuted in the way the defendant suggests. But if someone has, in fact, been prosecuted under the theory the defendant contends, one would not say that there is a “probability,” realistic or otherwise, that the statute would be applied in the way the defendant suggests. If there has been a prosecution, it has been applied in the way the defendant contends. It does not make sense to use the word “probability” when talking about an event that has already happened. The use of the word “probability,” on the other hand, makes sense in the context of the novel-interpretation view because that view would hold that there is a “realistic probability”—but not a certainty—that a state has applied its statute to any conduct covered by the scope of the statute. In other words, to use the statute at issue in Ramos-Sanchez, there is a “realistic probability” that Kansas has applied its statute to two fifteen-year-olds for having sex because such conduct falls under the statute’s sweep. This probability exists regardless of whether Kansas prosecutors have actually decided to prosecute someone for such conduct.

In short, while the Court was less than clear in Duenas-Alvarez, the text of the decision supports the novel-interpretation view and is inconsistent with the evidentiary-burden view.

B. The Court’s Post-Duenas-Alvarez Decisions Are Inconsistent with the Evidentiary-Burden View

Since the Court decided Duenas-Alvarez, it has issued a handful of decisions squarely concerning Taylor’s categorical approach. Each is consistent with the novel-interpretation view. None is consistent with the evidentiary-burden view.

1. The Court’s Decisions Outside of the ACCA Context

Since Duenas-Alvarez, the Court has issued only two decisions about Taylor’s categorical approach outside of the context of ACCA: United States v. Hayes174 and Nijhawan v. Holder.175 Both reject the use of the strict categorical approach based on the way in which the federal statute at issue was drafted. And both support the novel-interpretation view of Duenas-Alvarez.

In Hayes, the Court addressed the scope of the federal firearm ban. The ban, in part, prohibits anyone from possessing a firearm who has been

175 129 S. Ct. 2294 (2009).
convicted of a “misdemeanor crime of domestic violence”—a term that Congress defined, in part, as any offense that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim.” After carefully reviewing the statute, the Court determined that Taylor’s categorical approach applied only to the “use, attempted use, or threatened use” portion of the definition. On the other hand, the Court determined that the categorical approach should be jettisoned for purposes of the second half of the definition—the provision requiring that there be a domestic relationship between the defendant and the victim. Among other things, the Court focused on the fact that the domestic relationship portion of the statute used the phrase “committed by”—rather than the “convicted of” language at issue in Taylor—which indicated a preference for an examination of the actual facts of the prior conviction. In dissent, Chief Justice Roberts, joined by Justice Scalia, lamented the erosion of Taylor’s categorical approach. After disputing the majority’s reading of the federal statute, the dissent attacked the “significant problems in application” that the majority had wrought. The dissenter believed Taylor’s categorical approach should apply to the entire statute, which would make it “easy to determine whether an individual is covered by the gun ban: Simply look to the record of the prior conviction.” The majority’s approach, however, would often result in an “elaborate factfinding [sic] process regarding the defendant’s prior offense[s]” to determine whether it happened to involve domestic violence.” The dissent concluded that Taylor’s categorical approach was particularly warranted because it gave defendants fair notice regarding what the federal statute prohibited.

In Nijhawan, the Court addressed an immigration provision that made someone deportable if they had been convicted of “an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.” Following Hayes, the Court unanimously rejected the use of

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179 See id.
180 See id. at 1085-87 (internal quotation marks omitted).
181 See id. at 1092 (Roberts, J., dissenting).
182 Id.
183 Id.
184 Hayes, 129 S. Ct. at 1092 (Roberts, J., dissenting) (second alteration in original) (quoting Taylor v. United States, 495 U.S. 575, 601 (1990)).
185 See id. at 1093.
the categorical approach based on the wording of the statutory language.\textsuperscript{187} The Court held that the statutory language indicated that Congress desired a “circumstance-specific” method, which would require a later adjudicator to determine whether the individual’s prior offense actually involved fraud or deceit where there was at least a $10,000 loss.\textsuperscript{188}

In both \textit{Nijhawan} and \textit{Hayes}, the Court never discusses, or even cites, \textit{Duenas-Alvarez}. Rather, when \textit{Taylor} is discussed, the Court gives no hint that the doctrine has somehow evolved or changed.\textsuperscript{189} Likewise, there is no discussion of anything resembling the evidentiary-burden view. This, of course, is not what one would expect if \textit{Duenas-Alvarez} were intended to change \textit{Taylor} or in some way fundamentally alter the categorical approach. Rather, the Court takes \textit{Taylor}’s categorical approach as the starting point and then proceeds to determine why, based on the language of the relevant text, the categorical approach does not apply. If the categorical approach, and its focus on state elements, were no longer the law, it would be bizarre for the Court to spend so much energy explaining why the strict categorical approach did not apply.

Moreover, \textit{Nijhawan} and \textit{Hayes} are also inconsistent with reading \textit{Duenas-Alvarez} to stand for the evidentiary-burden view in a more subtle way. According to proponents of the evidentiary-burden view, the Court in \textit{Duenas-Alvarez} departed from the categorical approach, even though it never explicitly recognized it was doing so. This reading is hard to square with the Court’s work in \textit{Nijhawan} and \textit{Hayes}, which both dealt with deviations from \textit{Taylor} only after pages of discussion of why the categorical approach did not apply.\textsuperscript{190} One obvious implication is that the Court would not set aside \textit{Taylor}’s categorical approach without substantial discussion; as a result, the fact that there was no such discussion in \textit{Duenas-Alvarez} indicates that the Court did not think its opinion was inconsistent with \textit{Taylor}.\textsuperscript{191} Indeed, Chief Justice Roberts, who joined the majority opinion in \textit{Duenas-Alvarez}, wrote his dissent in \textit{Hayes} extolling the virtues of \textit{Taylor}’s strict categorical approach and refused to deviate from it, despite strong hints from Congress that it did not intend the categorical approach. Given that fact, it seems hard to believe that he, along with Justice Scalia—not one known to be bashful about his legal views—would silently accede to easing \textit{Taylor}’s strict requirements in \textit{Duenas-Alvarez}.

\textsuperscript{187} See id. at 2300-02 (“The upshot is that the ‘aggravated felony’ statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed.”).

\textsuperscript{188} See id. at 2301-02.

\textsuperscript{189} See id. at 2299-2300; \textit{Hayes}, 129 S. Ct. at 1092-93 (Roberts, J., dissenting).

\textsuperscript{190} See \textit{Nijhawan}, 129 S. Ct. at 2299-2300; \textit{Hayes}, 129 S. Ct. at 1084-88.

\textsuperscript{191} \textit{Cf.} United States v. Washington, 629 F.3d 403, 409 (4th Cir. 2011) (“It would be strange for the Supreme Court to change the law so profoundly yet so quietly, and we should not strain to find that it has done so where there are more plausible interpretations of its handiwork.”).
2. The Supreme Court’s ACCA Decisions

The Court has also issued four ACCA cases after Duenas-Alvarez, none of which is consistent with the evidentiary-burden view of Duenas-Alvarez.

The decision that most clearly supports the novel-interpretation view is Johnson v. United States, where the Court addressed whether a defendant’s prior Florida battery conviction was a violent felony under ACCA, an issue that ultimately turned on whether such a conviction had, as an element, the “use . . . of physical force against the person of another.” The Court began by determining the scope of the Florida statute at issue. It explained that there was a question of “state law” and that the Florida court’s interpretation of the state statute controlled. The Court quoted a Florida Supreme Court case that broadly defined the scope of the state battery statute to include “any intentional physical contact, ‘no matter how slight.’” Notably, that Florida case did not involve a fact pattern with a defendant who had committed a slight touch and had been prosecuted for battery; rather, the Florida Supreme Court was determining whether the defendant’s prior conviction for battery qualified for a sentencing enhancement under state law and, in the course of doing so, the court had to determine the scope of its battery statute. Given the Florida court’s broad interpretation of its own law, the Supreme Court held that this offense did not have as an element the use of physical force, as such a requirement could only result from active, violent conduct, and a defendant convicted of using the slightest touch would not have been convicted of meeting that federal standard.

In Johnson, the Court never cited Duenas-Alvarez. And the Court never surveyed state law to determine whether an individual had been prosecuted for such conduct; rather, the Court relied on a state court decision to determine the scope of the state statute. Of course, according to the evidentiary-burden view, this is exactly what you are not supposed to do. Indeed, the Court’s reasoning is squarely at odds with the Ninth Circuit’s decision in United States v. Laurico-Yeno. As noted above, the Laurico-Yeno court did not dispute the defendant’s reading of the scope of California law concerning a domestic violence statute. It seemed to accept that California courts had stated that a defendant could be convicted

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192 130 S. Ct. 1265 (2010).
194 Id. at 1269-70.
195 Id. (quoting State v. Hearns, 961 So.2d 211, 218 (Fla. 2007)).
196 See Hearns, 961 So.2d at 212-13.
197 See Johnson, 130 S. Ct. at 1270-74.
198 See United States v. Laurico-Yeno, 590 F.3d 818, 821-22 (9th Cir. 2010); see also supra text accompanying notes 104-11.
under the statute using the “least touching.” Nevertheless, the court held that because the defendant could not identify a fact pattern involving the least possible touching, the defendant should receive the relevant sentencing enhancement. But in Johnson, the Court stopped after determining that there was a Florida case interpreting the relevant state statute to cover assaults involving the slightest touching. Had the Ninth Circuit used the same methodology, it would have stopped after the defendant pointed to a sea of cases in which California courts had interpreted the state statute to cover the least possible touching. Thus, Johnson very strongly suggests, if not conclusively shows, that the Court in Duenas-Alvarez did not intend to establish anything like the evidentiary-burden view.

The last three ACCA cases—Chambers v. United States, Begay v. United States, and James v. United States—involves similar issues. In each case, the Court had to determine whether a state prior conviction qualified under ACCA’s residual clause—that is, whether the defendants’ convictions “involve[] conduct that presents a serious potential risk of physical injury to another.”

The first two of these opinions involved unremarkable applications of Taylor’s categorical approach. Chambers involved an Illinois conviction for failing to report to prison. Begay involved a New Mexico conviction for driving under the influence. The Court held that neither fell under ACCA’s residual clause. Neither opinion mentions Duenas-Alvarez, nor does either decision discuss how Illinois and New Mexico use their statutes

199 See Laurico-Yeno, 590 F.3d at 822.
200 See id. at 822-23.
201 See Johnson, 130 S. Ct. at 1269-70.
202 More recently, the Ninth Circuit revisited Laurico-Yeno in light of Johnson in Banuelos-Ayon v. Holder. See 611 F.3d 1080 (9th Cir. 2010). In Banuelos-Ayon, the Ninth Circuit reaffirmed that the California statute categorically qualified as an offense involving violence because even though California cases had interpreted the statute to cover such conduct, the fact patterns in those cases did not involve the least possible touching. Id. at 1085. The Ninth Circuit then rejected the petitioner’s argument that Johnson required the court to overrule Laurico-Yeno, stating that the statute in Johnson did not criminalize the use of force. See id. at 1086. That, of course, does not answer whether the Supreme Court’s approach in Johnson regarding the scope of state law (i.e., whether state law covered violence) was the same as the Ninth Circuit’s in Laurico-Yeno.
207 See Chambers, 129 S. Ct. at 689.
208 See Begay, 553 U.S. at 139.
209 Chambers, 129 S. Ct. at 693 (holding that the defendant’s Illinois prior conviction for failing to report was not a violent felony); Begay, 553 U.S. at 148 (holding that the defendant’s New Mexico DUI conviction was not a violent felony).
in practice—something one would expect if the evidentiary-burden view of Duenas-Alvarez were correct.

The final decision, James, presents something of a peculiar case and seems to put an odd gloss on the categorical approach for purposes of ACCA’s residual clause. In James, the defendant had been convicted of attempted burglary of a dwelling in Florida. Whether the defendant’s prior conviction qualified as a predicate ACCA conviction ultimately turned on whether it qualified under the residual clause. The Court first determined the scope of Florida law as interpreted by the Florida courts. While the state statute seemed quite broad on its face—it swept up “any act toward the commission” of the burglary—Florida courts had narrowed the provision to require a showing of an “overt act directed toward entering or remaining in a structure or conveyance.” Thereafter, the Court asked whether the risk of physical injury to another posed by crimes that fell under attempted burglary (as defined in Florida) presented a similar risk of injury posed by the listed, enumerated crimes—that is, whether someone convicted of attempted burglary in Florida was just as likely to have injured someone in the course of committing the offense as someone who had been convicted of burglary, arson, or extortion. The Court ultimately determined that attempted burglary generally possesses the same kind of risk as the enumerated offenses.

The defendant argued, however, that it was “not enough that attempted burglary ‘generally’ or in ‘most cases’ will create a risk of physical injury to others.” The Court rejected this argument: “One could, of course, imagine a situation in which attempted burglary might not pose a realistic risk of confrontation or injury to anyone . . . . But ACCA does not require metaphysical certainty. Rather, [ACCA]’s residual provision speaks in terms of a ‘potential risk.’ These are inherently probabilistic concepts.” The Court then continued: “James’ argument also misapprehends Taylor’s categorical approach. We do not view that approach as requiring that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony.” In support of this sentence, the Court included a “cf.” cite to Duenas-Alvarez, with a parenthetical that quoted the decision’s paragraph

210 James, 550 U.S. at 195-96.
211 Id. at 197 (noting that the parties agreed that it did not qualify under any other ACCA provision, including as generic burglary).
212 Id. at 202 (quoting Fla. Stat. § 777.04(1) (1993)) (internal quotation marks omitted).
213 Id. (quoting Jones v. State, 608 So.2d 797, 799 (Fla. 1992)) (internal quotation marks omitted).
214 See id. at 203-07.
215 Id. at 207.
216 James, 550 U.S. at 207 (quoting Brief of Petitioner at 32, James v. United States, 550 U.S. 192 (2006) (No. 05-9264)) (internal quotation marks omitted).
217 Id.
218 Id. at 208.
on “legal imagination.” The Court then followed that citation with the following: “Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another. One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury . . . .” Thus, under James, the inquiry for purposes of ACCA’s residual clause is not whether the full range of conduct criminalized by the state statute presents a serious potential risk of injury to another. Rather, courts must determine whether that risk is present in the ordinary case under the state statute.

The Court’s decision to focus on the “ordinary case” is troubling. There is no realistic, principled way to determine the “ordinary case” under a given statute—particularly in light of the diverse state penal codes. But setting aside whether the Court was correct to use such a test, it tethers its analysis to the text of the residual clause, which speaks in probabilities. Thus, James’s “ordinary case” analysis does not apply outside of its narrow context.

Moreover—and importantly for present purposes—James supports the novel-interpretation view of Duenas-Alvarez. The Court’s “cf.” citation to Duenas-Alvarez is the only time it has cited to the decision in a case involving the categorical approach. At first blush, the Court’s citation of Duenas-Alvarez in this context seems to support the evidentiary-burden view. After all, the “ordinary case” test has some similarity to that view, as both seem to focus a court on how a statute is applied in practice. Nevertheless, the Court did not heavily rely on Duenas-Alvarez, which is what one would expect if Duenas-Alvarez had adopted the evidentiary-burden view. Rather, to support what it did, the Court merely mustered a weak “cf.” signal. This use of Duenas-Alvarez is consistent with the novel-interpretation view. Examined closely, the Court was saying that just as one cannot say that a state statute is overly broad in a normal Taylor case by providing a novel-interpretation of the state law, one cannot say that a crime does not present a serious potential risk of injury by focusing on

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220 Id.

221 See David C. Holman, Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act, 43 CONN. L. REV. 209, 220-21, 242-54 (2010) (documenting the ways in which courts have struggled to apply James’s “ordinary case” test (internal quotation marks omitted)).

222 See James, 550 U.S. at 207 (pointing out that ACCA’s residual clause “speaks in terms of a ‘potential risk’”).

223 See, e.g., United States v. Mayer, 560 F.3d 948, 960-63 (9th Cir.), cert. denied, 130 S. Ct. 158 (2009); Holman, supra note 221, at 216-21.

224 This signal should be used if the “[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support.” THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 55 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).
unusual applications of the state statute. This reading of *James* is particularly appropriate, given the other data points regarding how the Court views *Duenas-Alvarez*.225

Consequently, the Court’s post-*Duenas-Alvarez* cases all support the novel-interpretation view. And, given that *Duenas-Alvarez* barely makes an appearance in those cases, it is hard to read *Duenas-Alvarez* as a case representing the Court’s intention to make a sea change in the law.

C. *Eroding Taylor’s Categorical Approach Represents Bad Policy*

As explained above, the categorical approach—and, by extension, the novel-interpretation view—can demand what seems like an unjust result in a given case.226 The evidentiary-burden view, on the other hand, seems to eliminate those unjust results. For example, in the two Fifth Circuit cases that most clearly adopted the evidentiary-burden view, the defendant wanted to avoid the application of the prior conviction enhancement for having been convicted of “sexual abuse of a minor.”227 The state statutes at issue, however, criminalized some conduct that would not categorically qualify as sexual abuse of a minor.228 But while it was conceivable that someone could be convicted under the statutes for non-generic conduct, it was unlikely that these defendants had actually been convicted for such conduct.229 Consequently, even though the defendants had sexually abused a minor, the strict categorical approach would require a court to conclude that the sentencing enhancement did not apply. The defendants had not been “convicted of” such conduct. That is not an easy conclusion to accept,

225 See supra text accompanying notes 174-209.
226 See supra Part I.B.
227 See United States v. Balderas-Rubio, 499 F.3d 470, 471 (5th Cir. 2007) (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) & cmt. n.1(B)(iii) (2005)) (internal quotation marks omitted); United States v. Ramos-Sanchez, 483 F.3d 400, 401 (5th Cir. 2007) (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) & cmt. n.1(B)(iii) (2005)) (internal quotation marks omitted); see also supra text accompanying notes 75-91.
228 See Balderas-Rubio, 499 F.3d at 473 (noting that the defendant argued that the statute could conceivably criminalize “lewdly or lasciviously look[ing] upon a minor from afar, without the minor’s knowledge”); Ramos-Sanchez, 483 F.3d at 403-04 (noting that the defendant had argued that the state statute at issue could conceivably criminalize consensual sexual contact between fifteen-year-olds).
229 The court in Ramos-Sanchez did not note the actual facts of the defendant’s prior conviction, other than to point out that he “pledged no contest to indecent solicitation of a child” and was twenty-one years of age at the time the prior offense had taken place. Ramos-Sanchez, 483 F.3d at 401, 404 n.6. Thus, given his age, Ramos-Sanchez committed sexual abuse of a minor. See id. at 402, 404. Likewise, in Balderas-Rubio, the defendant, then twenty-six years of age, “looked upon and touched the body and private parts” of a seven-year-old, according to the information filed against him. Balderas-Rubio, 499 F.3d at 471 (internal quotation marks omitted). Thus, given his age, he committed sexual abuse of a minor. See id. at 474.
particularly given the heinousness of sexually abusing a child. Adopting the evidentiary-burden view allowed the court to avoid this conclusion.

But even though the evidentiary-burden view allowed the court to reach what it likely viewed as the more just result in those cases, the evidentiary-burden view (and the altering of Taylor) will likely end up causing many more issues in the long run. The discussion below explores some of those issues. When viewed in conjunction, the problems with the evidentiary-burden view—and backing away from Taylor’s categorical approach—make discarding the categorical approach undesirable.

1. The Evidentiary-Burden View is Unworkable in Practice

The most vexing problem presented by the evidentiary-burden view is how such a burden would work in practice. Thinking through the practical consequences of such an approach leads to the conclusion that substantial resources will need to be spent in many cases in which the status of an individual’s prior conviction is at issue. This is a cost that is not worth bearing, and one that is avoided by the use of Taylor’s strict categorical approach.

How can individuals meet their evidentiary-burden to establish that a state prosecutes non-generic conduct? Most (if not all) courts seem to assume that a defendant can meet the burden in only one way: by pointing to a court of appeals decision with facts involving a prosecution for non-generic conduct. For example, the First Circuit in United States v. Cadieux, where it interpreted Duenas-Alvarez as consistent with the evidentiary-burden view, wrote that it had “scoured the caselaw and could not discover a single reported case” where a defendant had been convicted for conduct that would make the crime at issue fall outside the generic definition at issue.230

But such a limitation makes little sense. Nearly all criminal cases—approximately 90 percent—are resolved through plea bargain.231 And

230 United States v. Cadieux, 500 F.3d 37, 46 (1st Cir. 2007). This also explains why courts felt justified in applying Duenas-Alvarez to cases that were pending on appeal without remanding to the district court. See, e.g., Balderas-Rubio, 499 F.3d at 473-74; Ramos-Sanchez, 483 F.3d at 403-04. The defendants in those cases never had a chance to present evidence in a district court regarding the manner in which their statutes of convictions were applied in practice. Rather, those defendants could point only to courts of appeals decisions.

231 See Robert K. Calhoun, Waiver of the Right to Appeal, 23 HASTINGS CONST. L.Q. 127, 128 n.3 (1995) (“[M]ost sources estimate that 85% to 90% of criminal cases are disposed of by some form of plea bargain.”); Michael M. O’Hear, Plea Bargaining and Procedural Justice, 42 GA. L. REV. 407, 409 & n.1 (2008) (documenting that approximately 95 percent of federal criminal cases that result in a conviction are due to a guilty plea according to Department of Justice numbers); Jacqueline E. Ross, The Entrenched Position of Plea Bargaining in United States Legal Practice, 54 AM. J. COMP. L.
because plea agreements will typically include a waiver of a defendant’s appellate rights,\textsuperscript{232} most cases involve no appeal. That means the cases that end up appealed are a small fraction of total cases.\textsuperscript{233} And even where there is an appeal, most cases are disposed of in short decisions that come with almost no discussion of the facts of the case.\textsuperscript{234} As a result, only a miniscule percentage of all prosecutions under a particular statute will end up producing an appellate decision that includes a discussion of the facts of the case. Given that fact, there is no reason to think that the cases that end up in an appellate decision are in any way representative—let alone exhaustive—of the types of cases that the state prosecutes. These problems would be exacerbated for defendants whose prior convictions occurred in small states (which have fewer prosecutions and thus fewer appellate decisions for any given statute) and defendants whose prior convictions occurred under a relatively new statute (as it will take time for any prosecution to result in an appellate opinion). Indeed, it may very well prove impossible for an individual to meet a burden under either circumstance, as it is likely that there will be no reported cases under the relevant statute.

A good example of some of these practical problems is seen with the Kansas statute at issue in *Ramos-Sanchez*, where the Fifth Circuit held that the statute categorically qualified as sexual abuse of a minor, even though the statute, on its face, criminalized conduct (i.e., consensual sex between fifteen-year-olds) that did not categorically qualify as sexual abuse of a minor.\textsuperscript{235} The court noted that the defendant had not pointed to any cases involving a prosecution of two fifteen-year-olds.\textsuperscript{236} The Kansas statute at issue, however, has been cited only a limited number of times in its forty-

\textsuperscript{232}See, e.g., Calhoun, supra note 231, at 130 (noting that including a waiver of the right to appeal in plea agreements “is becoming a dominant feature of plea bargaining practice”); Michael Zachary, *Interpretation of Problematic Federal Criminal Appeal Waivers*, 28 VT. L. REV. 149, 151 n.4 (2003) (“Although no statistics could be found concerning the number of plea agreements containing appeal waivers, the literature referred to in this article suggests, at the very least, that such waivers are frequently included in plea agreements.”).

\textsuperscript{233}The exact percentage of total criminal cases that are appealed nationwide do not appear to be available.

\textsuperscript{234}In federal court, for example, approximately 80 percent of all appellate decisions are unpublished decisions, nearly all of which do not contain any discussion of the facts of the case. See Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 20 (2007) (“The vast majority of U.S. judicial opinions are ‘unpublished’: the rate in the U.S. Courts of Appeals runs just under eighty percent, with the Fourth Circuit topping the national statistics in excess of ninety percent.”).

\textsuperscript{235}See *Ramos-Sanchez*, 483 F.3d at 403-04 (citing KAN. STAT. ANN. § 21-3510(a)(1) (2007)); see also supra text accompanying notes 75-84.

\textsuperscript{236}See *Ramos-Sanchez*, 483 F.3d at 404.
one years of existence.237 And of those times, only nine such citations are to cases that discuss the facts of an individual who was prosecuted and convicted under the statute.238 Based on only nine cases decided over more than four decades, it is hard to learn anything meaningful about how Kansas prosecutors apply the statute in practice. There is no reason to think that these cases make up a substantial percentage of the prosecutions under the statute, that they are representative of who is prosecuted under the statute, or that they would otherwise allow a court to draw any reasonable inference about how the statute is applied in practice.

Moreover, there are reasons to believe that the cases that end up on appeal mostly represent the worst violations of the state statute at issue. If the defendant commits an egregious crime, the defendant is likely to get a long sentence, which makes it much more likely that he will appeal. On the other hand, if the facts are on the least egregious side of the conduct criminalized by the statute, it is likely that the defendant will receive a shorter sentence (perhaps time served) and is less likely to appeal. The spousal abuse statute at issue in United States v. Laurico-Yeno likely provides an example of this phenomenon.239 A defendant convicted under the statute who severely beat his wife and who receives a long sentence is likely to appeal (assuming he has not plea bargained for that right away). But a defendant who commits spousal abuse through the “least touching” is not likely to receive much of a sentence, perhaps only time served. Such a defendant (who is likely to waive his right to appeal in order to receive such a sentence) is not likely to appeal. If that is correct, that means that the cases that generate appellate decisions will be skewed to the more egregious side of the conduct criminalized by the California statute and that the least egregious violators will not show up in appellate decisions at all.

Given these problems, it would be patently unfair and arbitrary—and raise troubling due process concerns—to artificially limit the type of evidence an individual could produce to establish what conduct a state prosecutes under a given statute. To combat the problems caused by limiting the scope of evidence to appellate cases, courts would need to expand the type of evidence that an individual can produce to any reliable

237 As of the publishing of this Article, Westlaw indicates that the Kansas statute has been cited in twenty-nine court decisions, including in the Fifth Circuit’s decision in Ramos-Sanchez.


239 See supra notes 104-11 and accompanying text.
evidence that they could muster establishing who has been prosecuted under the statute. For example, a defendant might have a defense attorney, prosecutor, defendant, victim, or witness testify to the facts of a case prosecuted under the statute involving non-generic conduct. The government would then have the right to cross-examine the defendant’s witness and present witnesses of its own.

Does it make much sense to hold these sorts of evidentiary hearings? The Court in Taylor did not think so, as it rejected the idea that it would be productive to hold a federal evidentiary hearing to determine the precise scope of the defendant’s prior conviction. And the mini-trial that the Court was contemplating in Taylor concerned the facts of the defendant’s conviction. The mini-trial that the defendant would be entitled to under the evidentiary-burden view would concern the facts of someone else’s conviction, an even more dubious way for a court to spend its time.

These hearings would be a waste of resources in both the criminal and immigration context. When a criminal defendant is facing a potential sentencing enhancement, it would be hard to justify asking a busy district court to hold an evidentiary hearing about the facts of another criminal case (that might have taken place years ago in a far-away state) to resolve a sentencing issue that is entirely collateral to the prosecution. This is especially so given the huge number of criminal cases in which the categorical approach is at issue. For example, the categorical approach is relevant in a large number of illegal re-entry cases because such defendants can receive sentencing enhancements based on their prior convictions. Illegal re-entry cases make up a huge portion of the federal criminal docket,

240 See Taylor v. United States, 495 U.S. 575, 600-02 (1990); see also supra Part I.B.

241 This point is worth exploring more, as it might be easy to dismiss concerns about a court holding a mini-trial when courts hold full trials all of the time. In the typical trial case, the trial is about an event that occurred not so long ago and in the same city as where the trial is being held. A mini-trial on prior convictions, however, would not operate this way. The crime under examination could have occurred years ago. Memories fade, and witnesses go missing with time. That means that the accuracy of the fact-finding will often be significantly diminished in the mini-trial. Moreover, the crime under examination could have occurred in a far-away state, even across the country. This means that the trial will necessarily cause more of an inconvenience for the witnesses, who will be away from their jobs and families longer. A police officer, for example, might have to take several days off from work to testify. Likewise, the trial might require a victim to relive an experience that he or she is trying to forget. For example, a victim of a sexual assault might have to testify. And all of this would be for the limited purpose of establishing the collateral consequences of a conviction. Perhaps in some cases that balance would tip in favor of still holding the new mini-trial. But it is likely that in most cases the balance would tip the other way.


243 See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (1989) (laying out the prior conviction enhancement scheme for illegal re-entry cases).
as prosecutions now total more than 19,000 per year.\(^\text{244}\) That means that there could be hundreds of evidentiary hearings a year in illegal re-entry cases alone, all for an issue that is collateral to the defendant’s guilt.

These sorts of hearings would also be troubling in the immigration context. First, the categorical approach is at issue in many thousands of immigration cases each year, given the large number of aliens whose deportations hinge on their prior convictions.\(^\text{245}\) Thus, the right to a contested hearing would clog the already overburdened immigration system. Second, around 60 percent of individuals in removal proceedings have no lawyer,\(^\text{246}\) and about 50 percent of individuals in removal proceedings are detained while an immigration court sorts out whether they should be allowed to remain in the United States.\(^\text{247}\) Individuals without lawyers, and especially incarcerated individuals without lawyers, will have no meaningful way to do the sort of investigation that is necessary. That means it is likely that the immigration court will make a factual finding based on insufficient information, which will inevitably lead to inaccuracies.

A possible retort to this concern is that an evidentiary hearing would be needed and relevant in only a limited number of cases. For example, while an illegal re-entry defendant who was previously convicted of violating the statute at issue in Balderas-Rubio could request an evidentiary hearing, it would almost certainly never actually happen, given that it is unlikely he could find someone convicted under the Oklahoma lewd-and-lascivious statute for non-qualifying conduct. Thus, the argument would go, the evidentiary-burden view will not, as a practical matter, require courts to expend much time on evidentiary hearings.

But even if the evidentiary-burden view results in few actual evidentiary hearings, it will still waste resources. That is because in every case in which an individual has the right to an evidentiary hearing, the

\(^{244}\) See Yearbook of Immigration Statistics: 2005, U.S. DEP’T OF HOMELAND SEC., tbl.41, http://www.dhs.gov/files/statistics/publications/YrBk05En.shtm (last modified Dec. 31, 2008) (documenting that between 1998 and 2005, between 60,000 and 90,000 individuals were deported each year because of criminal convictions).


\(^{246}\) Id. at O1 (documenting that 50 percent of individuals in removal proceedings were detained in 2009). This number has been steadily increasing over the years. See id. (documenting that the percentage of individuals detained has increased each year since 2005, when it was only 29 percent).
individual (or his or her lawyer) will have to do an investigation. The hypothetical illegal re-entry defendant mentioned above will need his lawyer to call public defenders and prosecutors in Oklahoma to get a sense of how the statute is used. That might lead to additional leads about potentially helpful cases and might require an examination of court documents and interviewing witnesses. In the end, no useful example might be found. But such an investigation would have to be undertaken in every case. Indeed, it would likely be malpractice for a lawyer not to do some sort of investigation. 248

Given all of this, implementing the evidentiary-burden view will impose serious costs on the criminal justice and immigration systems. One of the strengths of the strict categorical approach is how relatively easy it is to apply. No evidence need be taken. No court has to resolve contested evidentiary issues. No one has to re-visit painful memories from a crime that occurred years ago. Rather, under the categorical approach, the court must merely answer the legal question of the scope of the state statute at issue. In a criminal case, a district court can do that without much trouble in the vast majority of cases. Likewise, in immigration cases, an immigration judge can easily answer that sort of question and can reach the right result, even when an individual does not have an attorney. As a result, the categorical approach is appealing when viewed in light of how it works in the wide swath of cases in which it is at issue. 249

2. Adopting the Evidentiary-Burden View Will Be Unfair to Non-Citizens Who Have Relyed on the Categorical Approach

The sudden judicial altering of a well-established doctrine also raises fairness concerns—concerns that will be present with any fundamental judicial tinkering with the categorical approach.

A bevy of non-citizen defendants have pled guilty to state crimes—waiving important constitutional rights and allowing states to conserve some of their resources—with the understanding that the crime they were pleading guilty to was a non-deportable offense. As the Supreme Court has noted, “alien defendants considering whether to enter into a plea agreement

248 Cf. Wiggins v. Smith, 539 U.S. 510, 521-23 (2003) (affirming counsel’s obligation to conduct a reasonable investigation with respect to sentencing); Riggs v. Fairman, 399 F.3d 1179, 1182-83 (9th Cir.) (observing that—with respect to sentencing—a defense attorney has a duty to reasonably investigate relevant information), reh’g en banc granted, 430 F.3d 1222 (9th Cir. 2005).

249 As the First Circuit put it:

[U]sing a categorical approach makes more sense administratively than conducting a fact-intensive inquiry. The categorical approach usually requires the sentencing court to look only to a few readily available sources of undisputed information. The sentencing court is thus spared from mini-trials on prior offenses, which have already been once adjudicated . . . .

United States v. Damon, 127 F.3d 139, 145 (1st Cir. 1997).
are acutely aware of the immigration consequences of their convictions.”

For many of these defendants, whether they are allowed to remain in the United States “may be more important . . . than any potential jail sentence.” Many of them were likely encouraged to do so by their attorneys, who have a constitutional obligation to render accurate advice to defendants on the immigration consequences of their conviction. Thus, some defendants undoubtedly pled guilty to avoid risking going to trial on a different charge that could lead them to being deported, even if the state had little evidence against them or if they had a potentially viable defense to the charges.

This advice, however, hinged on courts applying the categorical approach. If courts no longer apply the categorical approach, some crimes that were not previously deportable offenses have become deportable offenses overnight. Some state statutes that, on their face, were overly broad are now deportable offenses because the non-citizen will not be able to prove that the state has prosecuted someone for the non-qualifying conduct. Each of those defendants who falsely relied on the categorical approach will have the benefit of his bargain taken away from him.

Congress has the power to command this sort of result. Indeed, in Nijhawan, the Court determined that Congress had the power to eradicate the categorical approach by making it clear it desired to do so. But the tradeoff between ignoring settled expectations for the benefits that might accrue from a new approach is a tradeoff that courts seem to be in a poor position to evaluate. Rather, it is a quintessential legislative function. If there is to be a change to the categorical approach, it should come from congressional command—not from courts suddenly changing their minds. The Supreme Court has traditionally recognized its limited ability to alter judicial interpretation of congressional acts by highlighting the special salience that stare decisis has in this context. The Court in Shepard, in

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251 Id. (quoting Kari Converse, Defending Aliens in Criminal Cases, in 3 CRIMINAL DEFENSE TECHNIQUES § 60A.01 (1999)) (internal quotation marks omitted).
253 Cf. St. Cyr, 533 U.S. at 316 (noting Congress’s power to make legislation apply retroactively).
255 See St. Cyr, 533 U.S. at 315 (“The Legislature’s unmatched powers allow [sic] it to sweep away settled expectations suddenly and without individualized consideration.” (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994)) (internal quotation marks omitted)).
fact, made this exact point with respect to the categorical approach.\textsuperscript{257} Congress has had over two decades to legislatively respond to \textit{Taylor} and has chosen not to.

Given these concerns, courts should be reluctant to alter \textit{Taylor’s} categorical approach. Hundreds, if not thousands, of individuals have relied on the categorical approach to resolve what would be the most pressing issue in their lifetimes: their legal status as lawfully present in the United States. If any sort of fundamental, systematic change is to come, it should come from Congress.

3. Adopting the Evidentiary-Burden View Will Create Confusion

Another set of problems created by abandoning \textit{Taylor’s} categorical approach for the evidentiary-burden view is the confusion and uncertainty it will inject into the criminal justice and immigration systems. The categorical approach depends on answering a relatively straightforward question: How does the scope of a state statute compare to a federal definition? The evidentiary-burden view, however, turns that simple legal question into a complicated evidentiary issue: determining how a state statute is applied in practice and then comparing that with a federal definition. The answer to this evidentiary question will often not be clear, as it is not always clear how any given statute is applied in practice. Moreover, the status of some state statutes that had been definitively resolved under the categorical approach would now be uncertain.\textsuperscript{258} Those cases will have to be litigated anew.

This complexity and uncertainty would be troublesome for both criminal defendants and for non-citizens in deportation proceedings. As Chief Justice Roberts noted in his \textit{Hayes} dissent, the categorical approach’s clarity and ease of use is particularly important in the criminal context, where a defendant has a constitutional right to fair notice regarding the criminal consequences of his behavior.\textsuperscript{259} The evidentiary-burden view muddies the water. In the immigration context, this right to fair notice is equally important. If a legal permanent resident is charged with a crime, he or she needs to know whether the charge could result in a deportation. If an individual is charged with burglary, for example, whether a conviction for such conduct makes the defendant deportable might hinge on whether the state actually prosecutes individuals who break into vending machines for


\textsuperscript{258} See, \textit{e.g.}, \textit{Fernandez-Ruiz v. Gonzales}, 466 F.3d 1121, 1124-32 (9th Cir. 2006) (en banc) (finding that under the categorical approach, Arizona’s misdemeanor domestic violence statute is not a generic crime of domestic violence, although not identifying a case involving a prosecution for non-generic conduct).

burglary. The answer to that evidentiary question might be very difficult for an individual to figure out. Given that uncertainty, it would be difficult for the legal permanent resident to know whether he or she should proceed to trial or accept a plea bargain.

In sum, adopting the evidentiary-burden view would raise troubling policy questions. It would be difficult to implement and would waste resources. It would run contrary to settled expectations. And it would cause uncertainty in both the criminal justice and immigration systems. Courts that have adopted the evidentiary-burden view have mostly ignored these concerns altogether. But when these concerns are viewed together, they present a strong case that the strict categorical approach should remain, even though it requires courts to reach peculiar results in some cases. Accordingly, even if Duenas-Alvarez could be viewed to permit the adoption of something like the evidentiary-burden view, it should not be.

**CONCLUSION**

Many courts have misread Duenas-Alvarez by adopting the evidentiary-burden view. The result has been the replacement of the relatively simple-to-use, categorical approach with a doctrine that will likely grow in complexity as courts grapple with the consequences of adopting a doctrine that turns the classification of an individual’s prior conviction into a fact question. That complexity, however, will likely be embraced by some because the evidentiary-burden view will help to eliminate a few of the unusual results that the categorical approach may require.

Courts of appeals judges will likely be the biggest proponents of changing the categorical approach, as the approach has been controversial since its inception. This is no doubt fueled by the fact that appellate courts only see the cost of the categorical approach: those cases where it appears to work an injustice. They are not in position to recognize the biggest benefit of the doctrine: its ability to easily resolve a wide range of cases without an evidentiary hearing. Nearly all of those cases do not end up on appeal.

But regardless of whether the evidentiary-burden view is superior to the strict categorical approach as a policy matter—something that appears doubtful—a fundamental change in the categorical approach cannot be based on a faithful reading of Duenas-Alvarez. That decision merely confirms the fact that the lower courts should not give a strained reading to a state statute to hold that it does not criminalize a qualifying offense.