AN OPPORTUNITY FOR CHANGE? AGGRAVATED FELONIES IN IMMIGRATION PROCEEDINGS AND THE EFFECT OF *MONCRIEFFE V. HOLDER*

AARON LANG*

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* Boston University School of Law, J.D. Candidate 2015; Editor-in-Chief, *Boston University International Law Journal* ("*BUILJ*") (2014-2015). The author would like to thank the incredible second- and third-year *BUILJ* staff for their hard work and dedication. The author would also like to thank Professor Gerald Leonard of Boston University School of Law for his invaluable assistance in writing this Note.

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INTRODUCTION

Under the Immigration and Nationality Act ("INA"), any noncitizen, including lawful permanent residents who have resided in the United States for years, may be mandatorily removed from the country for committing what is known as an aggravated felony.[1] An aggravated felony "is a term of art" for a certain class of criminal convictions under the INA, which trigger "particularly harsh" immigration penalties, such as automatic removal.[2] Aggravated felonies include murder, rape, sexual abuse of a minor, drug trafficking and illicit trafficking in a controlled substance, certain firearms and explosive weapons offenses, and even theft or burglary.[3] In defining these felonies, the INA typically references specific federal statutes that criminalize the conduct.[4]

Aggravated felonies, however, need not arise from a federal conviction.[5]

[1] Immigration Policy Ctr., *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2012), http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview (explaining that the potential consequences of an aggravated felony conviction are "deportation without a removal hearing," "mandatory unreviewable detention following release from criminal custody," "ineligibility for asylum," "ineligibility for cancellation of removal," "ineligibility for certain waivers of inadmissibility," "ineligibility for voluntary departure," "permanent inadmissibility following departure from the United States," and "enhanced penalties for illegally reentering the United States").

[2] *Id.*

[3] 8 U.S.C. § 1101(a)(43) (1996).

[4] *See, e.g.*, *id.* § 1101(a)(43)(B) ("[I]llicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18).").

[5] *Id.* § 1101(a)(43) ("The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the

The INA treats as an aggravated felony both the defining federal offense as well as any state-level conviction for the same conduct.[6] To determine whether a noncitizen's state criminal conviction for a certain offense matches that offense's federal definition, courts employ the highly technical "categorical approach."[7] The categorical approach compares the elements of the noncitizen's state conviction to each necessary element of the similar federal offense, which the INA categorizes as an aggravated felony.[8] If the state conviction necessarily requires all of the same elements as the federal offense, immigration judges are obliged not to consider relief from removal for the noncitizen.[9]

Because of its complexity, the categorical approach is frequently misapplied. One common misapplication occurs when the record of a noncitizen's state-level conviction does not specify the exact conduct that the noncitizen committed.[10] This problem typically arises when a noncitizen has been convicted under a divisible state statute. A divisible statute is one in which a portion of the activity criminalized may be properly deemed an aggravated felony while other activities enumerated may not.[11] With a conviction under a divisible statute, there is no way to determine conclusively that the noncitizen committed an aggravated felony.[12]

Courts look to a noncitizen's criminal record for aggravated felonies in two contexts: (1) when determining the removability of the noncitizen, and (2) when determining eligibility for relief for the noncitizen.[13] In the removability context, the government bears the burden of proving that the

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law of a foreign country for which the term of imprisonment was completed within the previous 15 years.").

[6] *Id.*; *see also* Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1711-12 (1999) (explaining that the differences between states' criminal laws against drug distribution have led to discrepancies in the imposition of federal immigration penalties).

[7] Laura Jean Eichten, Comment, *A Felony I Presume? 21 USC § 841(B)'s Mitigating Provision and the Categorical Approach in Immigration Proceedings*, 79 U. CHI. L. REV. 1093, 1095 (2012).

[8] Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of a Crime*, 26 GEO. IMMIGR. L.J. 257, 260 (2013).

[9] *Id.*; *see supra* note 1 and accompanying text.

[10] Martinez v. Mukasey, 551 F.3d 113, 120 (2d Cir. 2008).

[11] *Id.* at 118 n.4.

[12] *See id.* at 120 (explaining that, without further detail in the charging instruments, Martinez's conviction could have been for an illicit-trafficking federal felony or misdemeanor: transfer of a small quantity of marijuana for no remuneration).

[13] Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law,* 62 U. MIAMI L. REV. 979, 979 n.2 (2008).

noncitizen has committed an aggravated felony by presenting the noncitizen's criminal record.[14] In the eligibility for relief context, the noncitizen bears the much more difficult burden of proving that his or her conviction documents *do not* show that the noncitizen committed an aggravated felony.[15] With respect to removability, the Supreme Court recently ruled in *Moncrieffe v. Holder*,[16] that, if the government seeks a noncitizen's mandatory removal, an inconclusive state criminal record is not sufficient to show that the noncitizen has committed an aggravated felony.[17] In the case of eligibility for relief, however, several circuits have split as to whether, when the noncitizen bears the burden of proof, an inconclusive record is sufficient to show no aggravated felony.[18] In *Moncrieffe*, the majority opinion alludes in dictum to the idea that an inconclusive record *never* calls for aggravated felony treatment no matter which party bears the burden of proof.[19] That is, language in *Moncrieffe* suggests that if a noncitizen presented an inconclusive record of conviction to prove no aggravated felony, the Supreme Court may be inclined to throw out the approach adopted by several federal circuits and hold that an inconclusive record is sufficient for the noncitizen to meet his or her burden of production.[20]

In addition to indicating to courts a potential shift in the application of the categorical approach, the *Moncrieffe* decision allows for reflection on the INA's aggravated felony provisions and the imposition of automatic removal in general.[21] For instance, the INA's aggravated felony definition

[14] Leocal v. Ashcroft, 543 U.S. 1, 4 (2004).

[15] 8 U.S.C.A. § 1229b(a) (West 2008) (requiring for cancellation of removal that a noncitizen has been lawfully admitted for permanent residence not less than five years prior, that the noncitizen has resided in the United States for no less than seven years, and that the noncitizen "has not been convicted of an aggravated felony").

[16] 133 S. Ct. 1678 (2013).

[17] *Id.* at 1687.

[18] The split between circuits is as follows: The Ninth, the Sixth, and the Fourth Circuits hold that an inconclusive record is insufficient for the noncitizen to meet his or her burden of production. *See, e.g.*, Young v. Holder, 697 F.3d 976, 989 (9th Cir. 2012) (en banc); Garcia v. Holder, 638 F.3d 511, 517-18 (6th Cir. 2011); Salem v. Holder, 647 F.3d 111, 115 (4th Cir. 2008). On the other side, the Second and Third Circuit have held that a noncitizen meets his burden with an inconclusive record. *See, e.g.*, Martinez v. Mukasey, 551 F.3d 113, 120 (2d Cir. 2008); Thomas v. Att'y General, 625 F.3d 134, 147 (3d Cir. 2010).

[19] *See Moncrieffe*, 133 S. Ct. at 1685 n.4.

[20] *See id.* at 1692.

[21] Automatic removal in this section refers to mandatory deportation for the commission of an aggravated felony without the possibility of administrative or judicial review. *See* 8 U.S.C.A. § 1252(a)(2)(C) (West 2005) ("[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in . . . 1227(a)(2)(A)(iii), (B), (C), or (D) of this

has expanded to include less serious offenses, such as theft and burglary.[22] Is the automatic removal of a noncitizen thief a just or proportionate penalty considering that theft and burglary are not nearly as severe as many other aggravated felonies under the INA? In other words, should noncitizen thieves and burglars receive the same treatment under the aggravated felony provisions as noncitizen rapists and murderers?

Part I of this Note explains how the *Moncrieffe* dictum may resolve the circuit split concerning the application of the categorical approach in cases where the noncitizen bears the burden of proving no aggravated felony. In light of the harsh outcomes associated with aggravated felony treatment, Part II challenges the expansion of the aggravated felony definition, arguing for enhanced executive and judicial discretion in deportation decision-making and for state criminal law reform. In many cases, automatic removal may be a far more severe penalty than what a noncitizen deserves for his or her crimes.[23] Reform in this area of the law is essential to achieving a more humane and effective immigration policy in the United States.

I. APPLICATION OF THE CATEGORICAL APPROACH

Misapplication of the categorical approach in immigration proceedings is one of the most common grounds for appealing a Board of Immigration Appeals ("BIA") decision to the federal circuit courts.[24] As the number of immigration adjudications increases exponentially, immigration courts are unable to engage in the in-depth review required for the correct application

title."). Absent an aggravated felony, a noncitizen, depending on the circumstances, may avail himself or herself of various statutory mechanisms for relief from removal. *See* 8 U.S.C.A. 1229b(a) (West 2008) (cancelation of removal); 8 U.S.C.A. § 1182(h) (West 2013) (waivers of inadmissibility grounds).

[22] *See* United States v. Ramirez, 731 F.3d 351, 354-55 (5th Cir. 2013) (finding a noncitizen's state-level misdemeanor conviction for sexual abuse of a minor an aggravated felony under the INA); United States v. Urias-Escobar, 281 F.3d 165, 167 (5th Cir. 2002) (finding a noncitizen's state-level misdemeanor assault conviction a "crime of violence" aggravated felony under the INA); *see also* William Johnson, Note, *When Misdemeanors are Felonies: The Aggravated Felony of Sexual Abuse of a Minor*, 52 N.Y.L. SCH. L. REV. 419, 424 (2007-2008) (explaining that aggravated felonies now include misdemeanors such as shoplifting and simple battery).

[23] *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1671 (2011) (citing Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (likening deportation to "'banishment or exile'")).

[24] *See id.* at 1672-73 (noting that the categorical approach's complexity stems from the ever-increasing number of categories and subcategories of criminal convictions with immigration consequences and the lack of clear instruction on how to analyze state criminal convictions under federal immigration law).

of the categorical approach to noncitizens' state-level convictions.[25] Misapplication of the categorical approach in immigration courts and the BIA, coupled with misguided appellate interpretations of the INA's aggravated felony provisions, may result in the unjust removal of many noncitizens.[26] Before delving deeper into the problems associated with the application of the categorical approach in immigration proceedings, consider the following example of the aggravated felony issue.

A. A Typical Problem in Applying the Aggravated Felony Provisions

The typical case of categorical approach misapplication arises in the context of state-level drug convictions. Under 8 U.S.C. § 1101(a)(43)(B), an aggravated felony includes felony convictions of "illicit trafficking in a controlled substance" as defined by the Controlled Substances Act ("CSA").[27] Put simply, if a noncitizen has a federal felony conviction specifically for illicit trafficking of a controlled substance, that conviction falls squarely within the aggravated felony definition under immigration law, and the noncitizen will be barred from discretionary relief from removal.[28] Most drug trafficking convictions, however, are state convictions, and many state statutes do not share the same definition of drug trafficking with the CSA.[29]

For example, Arizona law criminalizes the knowing "transfer for sale, import into this state, or offer to transport for sale or import into this state, sell, transfer, or offer to sell or transfer marijuana."[30] As previously mentioned, the record of conviction of a defendant noncitizen who pleads guilty to an offense under § 13-3405 may not specify whether that

[25] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT (2006), *available at* http://www.gao.gov/assets/260/251155.pdf. (finding that the three percent increase of "on-board" immigration judges is not sufficient to manage the thirty-nine percent increase of immigration cases from 381,000 to 531,000).

[26] *See, e.g.*, Moncrieffe v. Holder, 133 S. Ct. 1687, 1695 (2013) (Thomas, J., dissenting) ("The majority notes that '[t]his is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as . . . an 'aggravated felony.' The Court has brought this upon itself. The only principle uniting *Lopez, Carachuri–Rosendo,* and the decision today appears to be that the Government consistently loses. If the Court continues to disregard the plain meaning of § 924(c)(2), I expect that these types of cases will endlessly—and needlessly—recur.").

[27] 8 U.S.C. § 1101(a)(43)(B) (1996) specifically references "drug trafficking crimes" as defined by 18 U.S.C. § 924(c), which in turn defines "drug trafficking crimes" as felonies punishable under the Controlled Substances Act. Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013) (citing Lopez v. Gonzales, 549 U.S. 47, 60 (2006)).

[28] *See Moncrieffe*, 133 S. Ct. at 1683.

[29] *See, e.g.*, GA. CODE ANN. § 16-13-30(j)(1) (2007).

[30] ARIZ. REV. STAT. ANN. § 13-3405(A)(4) (2010).

defendant transferred, sold, or merely offered to sell marijuana.[31] Instead, the conviction document reproduces § 13-3405's text and states that the defendant noncitizen was convicted pursuant to the statute's terms. When analyzed in immigration proceedings for aggravated felony purposes, this record would be considered inconclusive because it does not isolate the defendant's specific activity from the broader range of criminalized conduct under the statute's full text.[32] Here, "selling" marijuana would be deemed an illicit-trafficking aggravated felony, but "offering to sell," a solicitation offense, would not.[33] Without specific designation in the conviction document, it is impossible for courts to determine whether a noncitizen committed an aggravated felony with absolute certainty.[34] The noncitizen or lawful permanent resident may, therefore, be wrongfully removed without access to any means of discretionary relief.[35]

B. Explanation of the Law

Application of the categorical approach is essentially a two-step process.[36] The first step requires the isolation of each element of the statute under which the noncitizen was convicted.[37] Recall that, in applying the categorical approach, the statutory elements, rather than the particular facts of the noncitizen's state conviction, are the sole subject of analysis.[38] In other words, the goal of the categorical approach is to distance the inquiry from the noncitizen's specific past conduct to prevent time-consuming and potentially prejudicial mini-trials on prior state convictions.[39] Once isolated, the elements of the state statute must match the elements of the

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[31] This example is based on Coronado-Durazo v. INS, 123 F.3d 1322 (9th Cir. 1997).

[32] *See* Martinez v. Mukasey, 551 F.3d 113, 118 n.4 (2d Cir. 2008).

[33] Under the Controlled Substances Act, 21 U.S.C.A. § 841(a) (West 2013), solicitation offenses such as "offering to sell" or "offering to transport" a controlled substance, which are criminalized under Arizona Law, are not included. *See Coronado-Durazo*, 123 F.3d at 1325 (interpreting a different INA provision, § 241(a)(2)(B)(i), which also does not allow for state-level solicitation convictions to qualify under the categorical approach when matched to generic federal drug laws).

[34] Shepard v. United States, 544 U.S. 13, 19 (2005) (finding that, in applying the modified categorical approach to state plea agreements, there may be no inquiry into the specific facts of a defendant's case beyond those in the text of the plea agreement). The inability to consider the specific facts of a noncitizen's state conviction is essential to the correct application of the categorical approach. *See id.*

[35] *See* Das, *supra* note 23, at 1672 n.11.

[36] Eichten, *supra* note 7, at 1098-99.

[37] *Id.*

[38] Taylor v. United States, 495 U.S. 575, 599 (1990).

[39] Sharpless, *supra* note 13, at 1033.

generic federal offense that the INA defines as an aggravated felony.[40] In the example above, the generic federal offense would be "illicit trafficking in a controlled substance" under 21 U.S.C. § 841(a). Elements of the state conviction under Arizona's § 13-3405 drug-trafficking statute, therefore, must necessarily match each of the elements required for conviction under the terms of the federal "illicit trafficking" offense.[41]

The categorical approach in immigration proceedings stems from a similar procedure used in federal sentence enhancement.[42] Much like aggravated felony determinations, federal sentence enhancement requires an inquiry into a defendant's prior state convictions to determine whether he or she committed certain past conduct that merits an increased sentence for a current conviction.[43] In *Taylor v. United States*, the Supreme Court explained that "Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled 'robbery' or 'burglary' by the laws of the State of conviction."[44] Emphasis on the elements of the crime developed from the Court's desire for uniformity in the application of the concrete definitions of burglary and robbery under federal law.[45] The Court grounded its analysis of federal sentence enhancement legislation in the principle of statutory interpretation to construe federal laws independently of state law definitions.[46]

Determining the elements of a noncitizen's conviction is often no simple task. Because many state convictions are not adjudicated, the precise facts of the noncitizen's conviction may not be available in a court opinion.[47] The Supreme Court has determined that, in applying the categorical approach to convictions in which no court rendered an opinion, the categorical analysis is limited to a short list of official documents.[48] Those

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[40] Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) (citing Shepard v. United States, 544 U.S. 13, 24 (2005)).

[41] *See* Martinez v. Mukasey, 551 F.3d 113, 120 (2d Cir. 2008).

[42] Taylor v. United States, 495 U.S. 575, 588-89 (1990).

[43] *See id.* at 577-78 ("This statute provides a sentence enhancement for a defendant who is convicted under 18 U.S.C. § 922(g) (unlawful possession of a firearm) and who has three prior convictions for specified types of offenses, including 'burglary.'").

[44] *Id.*

[45] *Id.* at 588.

[46] Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 119-20 (1983) (explaining that this canon is important because "the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control").

[47] *See* Shepard v. United States, 544 U.S. 13, 26 (2005).

[48] *See id.* at 25 (reasoning that, given the interpretive principle to construe statutes "to avoid serious risks of unconstitutionality," the scope of documents a reviewing court may consider under the categorical approach must be limited). Here, the Court references the

documents include "the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or 'some comparable judicial record' of the factual basis for the plea."[49] This examination, often referred to as the modified categorical approach, is employed in the context of a noncitizen's state conviction under a divisible state statute.[50] As described in the example above, a divisible state statute includes a list of varied criminal activity grouped together under a single statutory provision.[51] If the charging instrument does not isolate the exact conduct of the convicted noncitizen, a court may use the documents listed above to determine the specific nature of the noncitizen's conviction before matching that conviction to the relevant generic federal offense.

Once the elements of the state offense have been determined, the second step of the aggravated felony analysis is to determine whether those elements match the elements required under the generic federal offense that the INA categorizes as an aggravated felony.[52] If the state conviction necessarily includes the elements for a conviction under the generic federal offense, the inquiry is over, and the noncitizen receives aggravated felony treatment.[53] If, on the other hand, the conviction elements do not match the elements of the generic federal offense, the noncitizen is not an aggravated felon and preserves the opportunity to seek discretionary relief from removal.[54]

An issue arises, however, when the state conviction documents do not clearly state the conviction's elements. Because the categorical approach forbids inquiry into the specific facts beyond the conviction documents, it may be impossible for a noncitizen to present additional evidence of the actual nature of his or her original conviction.[55] He or she may therefore be unable to defend against an unfavorable aggravated felony determination, which, in turn, may lead to wrongfully imposed automatic removal.

Sixth and Fourteenth Amendments reasoning that additional findings of fact by the immigration court are too far removed from the province of the factfinder in the criminal trial for the original conviction. *Id.*

[49] *Id.* Another complicating issue arises in the case of an amended plea agreement. *See* Anderson v. Holder, 527 Fed. Appx. 602 (9th Cir. 2013). In *Anderson*, the noncitizen's amended plea agreement altered the terms of the original conviction without a "plea colloquy, minute entry, abstract of judgment, or other document" elaborating on the specific facts of his conviction. *Id.* at 604. For more information on the effects of an amended plea agreement or pleading down a conviction, see *infra* Part II.B.2 of this note.

[50] Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude after Silva-Trevino*, 111 COLUM. L. REV. 313, 329 (2011).

[51] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3405 (2010).

[52] Eichten, *supra* note 7, at 1099.

[53] *See id.*

[54] Moncrieffe v. Holder, 133 S. Ct. 1678, 1682 (2013).

[55] Martinez v. Mukasey, 551 F.3d 113, 122 (2d Cir. 2008).

C. The Two Contexts of the Aggravated Felony Analysis

Depending on the context in which aggravated felony status must be determined, the burden of proof falls either on the government or the noncitizen. The two contexts pertinent to this Note are removability and eligibility for relief by cancellation of removal.

1. Removability

In the context of removability, the government may learn of a lawful permanent resident's state criminal conviction and begin deportation proceedings against that individual.[56] If the government argues for automatic removal based on the noncitizen's commission of an aggravated felony, the government bears the burden of proving that, under the categorical approach, the state conviction necessarily involves all of the elements of the relevant generic federal offense.[57] Demonstrating the commission of an aggravated felony is not the only means by which the government may deport a lawful permanent resident or other noncitizen with a state-level criminal conviction.[58] An aggravated felony, however, is the only route by which the government may achieve automatic removal preventing the noncitizen from applying for discretionary relief under any other provision of the INA.[59]

2. Cancellation of Removal

In the second context, if the noncitizen is found deportable on any grounds other than an aggravated felony, the burden falls on the noncitizen to argue for relief from removal.[60] One option is to claim asylum.[61] Another option, if the noncitizen is a lawful permanent resident ("LPR"), is to argue for cancellation of removal.[62] Prevailing on cancellation of removal allows a deportable LPR to remain in the United States.[63]

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[56] *Moncrieffe*, 133 S. Ct. at 1682.

[57] *Id* at 1684.

[58] *See* 8 U.S.C.A. § 1182(a) (West 2013) (classes of aliens ineligible for visas or admission).

[59] *See supra* note 21 and accompanying text.

[60] STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍQUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 544-89 (5th ed. 2009) (dividing deportability grounds into four categories: "deportability grounds concerned with immigration control," "crime-related deportability grounds," "political and national security grounds," "and other deportability grounds" such as "past or present drug abuse or addiction").

[61] *Moncrieffe*, 133 S. Ct. at 1682. Asylum requires proving a well-founded fear of persecution if the noncitizen were to return to his or her country of origin. *Id.*

[62] *Id*.

[63] LEGOMSKY & RODRÍQUEZ, *supra* note 60, at 593-95.

Cancellation of removal requires that the LPR prove a number of elements, the most difficult of which is that he or she has not been convicted of an aggravated felony.[64]

D. How Does the Lawful Permanent Resident Meet His or Her Burden in the Context of Cancellation of Removal?

Currently, circuit courts are split in the application of the categorical and modified categorical approaches to a noncitizen that argues for cancellation of removal. Some align with *Young v. Holder*, a recent Ninth Circuit decision.[65] Decided in 2012, *Young* was the case of a noncitizen who became a lawful permanent resident in 1977.[66] After the noncitizen pleaded guilty to selling, transporting, or offering to sell cocaine, the government charged him "with removability . . . as an alien convicted of an aggravated felony related to illicit trafficking in a controlled substance."[67] The immigration judge ("IJ") held, and the BIA affirmed, that Young's state conviction was an aggravated felony barring him from cancellation of removal relief.[68] Before the Ninth Circuit, Young argued that, because his record of conviction was inconclusive, it was impossible to match the elements of his state conviction to the elements of an aggravated felony.[69] Thus, Young claimed that he had not been necessarily convicted of an aggravated felony and was therefore eligible for cancellation of removal.[70] The Ninth Circuit disagreed.[71]

The *Young* court's reasoning is deceptively simple. After accepting the conviction record as ambiguous, the court wrote:

> When the record of conviction is inconclusive, "the government has not met its burden of proof, and the conviction may not be used for purposes of removal." It makes equal sense that when the burden rests on the alien to show eligibility for cancellation of removal, an inconclusive record is similarly insufficient to satisfy the alien's burden of proof.[72]

The *Young* decision mirrored an earlier Fourth Circuit decision, *Salem v.*

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[64] 8 U.S.C.A. § 1229b(a) (West 2008).
[65] Young v. Holder, 697 F.3d 976 (9th Cir. 2012) (en banc).
[66] *Id.* at 980.
[67] *Id.* (citing CAL. HEALTH & SAFETY § 11352 (West 2014)).
[68] *Id.* at 981.
[69] *Id.* at 982.
[70] Young v. Holder, 697 F.3d 976, 990 (9th Cir. 2012) (en banc).
[71] *Id.*
[72] *Id.* at 989 (citations omitted).

Holder,[73] which elaborated further on the requirements for a noncitizen to meet his or her burden of proving no aggravated felony conviction:

> To satisfy his burden, an applicant for cancellation of removal must, among other things, demonstrate by a preponderance of the evidence that he "has not been convicted of an aggravated felony. . . ." Presentation of an inconclusive record of conviction is insufficient to meet a noncitizen's burden of demonstrating eligibility, because it fails to establish that it is more likely than not that he was not convicted of an aggravated felony.[74]

Thus, the *Salem* court reached the same conclusion as in *Young*, grounding its holding in terms of the preponderance of the evidence standard.[75] Several circuits have aligned with the Fourth and Ninth Circuit decisions.[76] As a result, an inconclusive criminal record will never be sufficient to meet the crucial aggravated felony requirement for cancellation of removal.[77] Therefore, a noncitizen may commit non-aggravated conduct, receive a conviction under a state statute that criminalizes both aggravated and non-aggravated conduct, and, even though the record of conviction would be inconclusive, the noncitizen's removal order would be unreviewable.[78] And no IJ would be permitted to consider that the noncitizen, like Young and many others, had resided in the United States for over thirty years.[79]

The Second Circuit is on the other side of the circuit split.[80] In *Martinez v. Mukasey*, Elvis Martinez had been convicted of two state drug offenses involving distribution of marijuana.[81] Martinez became a lawful permanent resident of the United States in 1989, and the government began removal proceedings against him in 2001.[82] Martinez conceded removability for the drug offenses, but applied for cancellation of removal.[83] The BIA affirmed the IJ's finding that Martinez's conviction was for an aggravated felony.[84] The BIA held that Martinez still bore the burden of demonstrating that his conviction fell under the federal misdemeanor provision for drug

[73] Salem v. Holder, 647 F.3d 111 (4th Cir. 2011).

[74] *Id.* at 116.

[75] *Id.*

[76] Eichten, *supra* note 7, at 1118; *see supra* note 18 and accompanying text.

[77] Young v. Holder, 697 F.3d 976, 989 (9th Cir. 2012) (en banc).

[78] *See id.* at 989.

[79] *See id.*

[80] In this issue, the Third Circuit aligns with the Second Circuit. *See supra* note 18 and accompanying text.

[81] Martinez v. Mukasey, 551 F.3d 113, 115 (2d Cir. 2008).

[82] *Id.* at 116.

[83] *Id.*

[84] *Id.* at 117.

trafficking, rather than the felony provision.[85] Because the record of conviction was inconclusive as to the amount of marijuana and whether transfer of the marijuana was for remuneration—two differences between the federal felony and the federal misdemeanor—the BIA held that Martinez did not meet his burden of proving that he was not removable under the aggravated felony provisions.[86]

Contrary to the later decisions in the Ninth and Fourth Circuits, the Second Circuit rejected the BIA's conclusion and held that an inconclusive record of conviction is sufficient to meet the burden of proof for cancellation of removal.[87] The Second Circuit justified its position by appealing to the nature of the categorical inquiry itself.[88] Fundamentally, the Second Circuit relied on the principle that "only the minimum conduct necessary to sustain a conviction" may be considered, and never the individual circumstances of the conviction.[89] That being the case, it was wholly inappropriate to require Martinez to prove the amount of marijuana because that would implicate specific facts of his conviction, an analysis that the categorical approach flatly prohibits.[90] The categorical approach is meant to prevent mini-trials into a noncitizen's past criminal activity.[91] Placing the burden of proof on a noncitizen to show specific past conduct runs completely contrary to this goal.[92]

Additionally, it would have been impossible for a noncitizen like Martinez to prove the amount of marijuana in his state conviction. As determined in *Shepard v. United States*, in applying the modified categorical approach, courts may analyze only a small set of documents to determine whether a noncitizen has met his or her burden of showing no aggravated felony.[93] If the *Shepard* documents are also inconclusive as to the amount, the noncitizen has no recourse even if, as the Second Circuit emphasizes, the noncitizen's conviction was "for precisely the sort of non-remunerative transfer of small quantities of marijuana that is only a federal misdemeanor."[94] In other words, no evidence would be available for Martinez to meet his burden, and the presumption of aggravated felony status imposed as a result of the other circuits' approaches would be

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[85] *Id.*
[86] Martinez v. Mukasey, 551 F.3d 113, 117 (2d Cir. 2008).
[87] *Id.* at 120.
[88] *Id.* at 118.
[89] *Id.*
[90] *Id.* at 121.
[91] *See* Martinez v. Mukasey, 551 F.3d 113, 120-21 (2d Cir. 2008).
[92] *See id.*
[93] Shepard v. United States, 544 U.S. 13, 26 (2005).
[94] *Martinez*, 551 F.3d at 120.

impossible to rebut.[95]

E. Moncrieffe v. Holder

The most recent Supreme Court case on the application of the categorical approach in immigration proceedings is *Moncrieffe v. Holder*, which the Court decided on April 23, 2013.[96] This 7-2 decision dealt with the categorical approach in removal proceedings where the government bears the burden of proof, not the noncitizen.[97] Despite the distinction, certain aspects of the majority opinion indicate that, given the opportunity, a majority of justices may favor the approach taken by the Second Circuit in *Martinez* concerning the mechanics of the categorical approach over the decisions of the Ninth and Fourth Circuits.

The *Moncrieffe* facts are similar to the facts of the cases previously described. Adrian Moncrieffe was a Jamaican citizen that had lived legally in the United States since 1984.[98] In 2007, during a traffic stop, police found 1.3 grams of marijuana in Moncrieffe's car.[99] Moncrieffe then pleaded guilty to "possession of marijuana with intent to distribute" in violation of a Georgia drug possession statute.[100] Claiming that this infraction constituted an aggravated felony, the government sought to deport Moncrieffe.[101] The government argued that possession with intent to distribute amounted to a felony violation of the Controlled Substances Act,[102] and therefore, Moncrieffe's conviction constituted an aggravated felony.[103]

Deeming possession with intent to distribute a generic federal offense, the Court applied the categorical approach to Moncrieffe's conviction to determine whether the CSA necessarily proscribed Moncrieffe's conduct as a felony.[104] The Georgia statute in question was divisible, but under the modified categorical approach, the Court determined from Moncrieffe's plea agreement that the specific conduct criminalized was possession of

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[95] *See id.* at 121 ("Placing the burden on Martinez, instead, necessarily requires looking into evidence of Martinez's actual conduct, evidence that may never have been seen by the initial convicting court.").

[96] Moncrieffe v. Holder, 133 S. Ct. 1678 (2013).

[97] *Id.* at 1682.

[98] *Id.* at 1683.

[99] *Id.* Justice Sotomayor notes that 1.3 grams amounts to "two or three marijuana cigarettes." *Id.*

[100] *Id.* The statute cited is GA. CODE ANN. § 16-13-30(j)(1) (2007).

[101] Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013).

[102] 21 U.S.C.A. § 841(a) (West 2010).

[103] *Moncrieffe*, 133 S. Ct. at 1683.

[104] *Id.* at 1685.

marijuana with intent to distribute.[105] Having resolved the issue of Moncrieffe's specific conduct, the Court then sought to determine whether the conviction necessarily involved the elements of a CSA felony.[106] Because nothing in the plea agreement dealt with the amount of marijuana in Moncrieffe's possession or whether Moncrieffe exchanged or sought to exchange the marijuana for remuneration, the Court could not determine with absolute certainty that Moncrieffe's state conviction matched the relevant felony provision of the CSA or the CSA's misdemeanor exception.[107] Without more precise information in the charging instruments as to the amount of marijuana in Moncrieffe's possession and the remunerative nature of Moncrieffe's intended dealings, the Court ruled that the government could not sustain its burden of proving that Moncrieffe committed an aggravated felony.[108]

F. Moncrieffe v. Holder *and Cancellation of Removal*

In *Moncrieffe v. Holder*, the government shouldered the burden of proving an aggravated felony conviction and actively sought to deport Moncrieffe after his 2007 guilty plea.[109] Although the case concerned removal proceedings, *Moncrieffe* may have implications for cancellation of removal. In explaining its decision, the *Moncrieffe* Court hinted that it might be prepared to decide on the proper application of the categorical approach to a noncitizen's request for cancellation of removal.

First, the Court reiterated that, in applying the categorical approach, the presumption is that the conviction involved "the least of the acts criminalized."[110] If the conviction did not "necessarily proscribe the conduct that is an offense" punishable as a felony, it did not satisfy the categorical approach and was not an aggravated felony in the context of

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[105] *Id.* Under the full text of the Georgia statute, the following conduct was criminalized: "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute." GA. CODE ANN. § 16-13-30(j)(1) (2007). The use of the plea agreement to determine which of the above activities Moncrieffe engaged in is permissible under Shepard v. United States, 544 U.S. 13, 26 (2005) (limiting the analysis under the modified categorical approach to the "terms of the charging document, the terms of a plea agreement or transcript of a colloquy between judge and defendant. . . , or some comparable judicial record. . .").

[106] Moncrieffe v. Holder, 133 S. Ct. 1678, 1686-87 (2013).

[107] *Id.* The CSA misdemeanor exception is codified under 21 U.S.C.A. § 841(b)(4) (West 2010) ("Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.").

[108] *Moncrieffe*, 133 S. Ct. at 1687.

[109] *Id.* at 1682.

[110] *Id.* at 1684 (citing Johnson v. United States, 559 U.S. 133, 137 (2010)).

drug distribution.[111] This language suggests that no matter who has the burden of proof, a conviction either is or is not an aggravated felony under the categorical approach. Referring back to the hypothetical scenario at the beginning of Part I,[112] if a noncitizen produces a conviction under a statute which lists a variety of aggravated and non-aggravated conduct without specifying precisely what the noncitizen did, the conviction could not necessarily be classified as an aggravated felony.[113] The *Moncrieffe* Court's emphasis on the *Martinez* court's description of the categorical approach, therefore, indicates that an inconclusive record of conviction should never amount to an aggravated felony.[114]

Additionally, in response to Justice Alito's dissent, the *Moncrieffe* Court further indicated that, if given the opportunity to decide the burden of proof issue in the cancellation of removal context, an inconclusive record may be insufficient to bar a noncitizen's request for relief[115]:

> Escaping aggravated felony treatment does not mean escaping deportation, though. It means only avoiding mandatory removal. Any marijuana distribution offense, even a misdemeanor will still render a noncitizen deportable as a controlled substance offender. At that point, having not been found an aggravated felon, the noncitizen may seek relief from removal such as asylum or *cancellation of removal*, assuming he satisfies other eligibility criteria.[116]

The satisfaction of "other eligibility criteria" in cancellation of removal included the noncitizen's proving that he or she did not commit an aggravated felony.[117] Here, the majority indicated that, with an inconclusive record of conviction, the noncitizen did not receive aggravated felony treatment and could seek other forms of relief from removal.[118] The language here suggests that when a noncitizen argues for compliance with the "other eligibility criteria," the inconclusive record automatically satisfies the no-aggravated-felony requirement.[119] Therefore, contrary to

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[111] *Id.* at 1685.

[112] *See supra* Part I.A.

[113] Moncrieffe v. Holder, 133 S. Ct. 1678, 1686 (2013).

[114] *See id.* at 1685-86.

[115] *Id.* at 1692.

[116] *Id.* (citations omitted) (emphasis added); *see* Manny Vargas et al., *Moncrieffe v. Holder: Implications for Drug Charges and Other Issues Involving the Categorical Approach*, at 9, AM. IMMIGR. COUNCIL (2013), *available at* http://www.legalactioncenter.org/sites/default/files/moncrieffe_v_holder-_implications_for_drug_charges_and_other_categorical_approach_issues_5-1-13_fin.pdf

[117] 8 U.S.C.A. § 1229b(a)(3) (West 2008).

[118] Moncrieffe v. Holder, 133 S. Ct. 1678, 1686-87 (2013).

[119] *Id.* at 1692.

the Ninth Circuit's *Young* decision, the question in cancellation of removal proceedings should not be whether an inconclusive record establishes no aggravated felony by a preponderance of the evidence.[120] Instead, the aggravated felony determination relies exclusively on the elements of the federal criminal statute and whether the noncitizen's state-level crime necessarily matches those elements.[121]

In footnote four of the *Moncrieffe* majority opinion, the Court briefly addressed cancellation of removal: "*Carichuri-Rosendo*[122] construed a different provision of the INA that concerns cancellation of removal, which also requires determining whether the noncitizen has been convicted of any aggravated felony. Our analysis is the *same* in both contexts."[123] Although this statement was made in dicta, it further signals that the *Moncrieffe* analysis would be the same no matter which party bore the burden of showing that a conviction was or was not an aggravated felony.[124] Footnote four shows that a noncitizen, with the same record of conviction in both instances, does not become an aggravated felon as soon as the burden shifts to him or her to prove eligibility for relief under the cancellation of removal criteria.[125] The fourth footnote in *Moncrieffe* also cuts directly against *Young*'s argument that "when the burden rests on the alien to show eligibility for cancellation of removal, an inconclusive record is . . . insufficient to satisfy the alien's burden of proof."[126] If, under the categorical approach, the government's production of an inconclusive conviction record could not show an aggravated felony, it does not make sense that the same inconclusive record would fail to prove that the noncitizen is not an aggravated felon for cancellation of removal purposes.

The reasoning in the *Moncrieffe* opinion also reflects other important policy considerations that were present in the Second Circuit's *Martinez* decision. First, the *Moncrieffe* Court pointed to a "fundamental flaw" in the Government's argument: "[The argument] would render even an undisputed misdemeanor an aggravated felony."[127] This result is inherent in the

[120] Young v. Holder, 697 F.3d 976, 988 (9th Cir. 2012) (en banc).

[121] *See Moncrieffe*, 133 S. Ct. at 1684-85.

[122] 560 U.S. 563, 563 (2010) (finding that noncitizen's state misdemeanor convictions for possession of marijuana and antianxiety medication did not constitute aggravated felonies for cancellation of removal purposes because the state prosecutor had not charged the prior conviction with the second conviction, which otherwise, would have been a felony under the CSA and an aggravated felony under the INA).

[123] Moncrieffe v. Holder, 133 S. Ct. 1678, 1685 n.4 (2013) (emphasis added). No further context for this remark is available in the *Moncrieffe* majority opinion.

[124] *See* Vargas et al., *supra* note 116, at 7-9.

[125] *See id.*

[126] Young v. Holder, 697 F.3d 976, 989 (9th Cir. 2012) (en banc).

[127] Moncrieffe v. Holder, 133 S. Ct. 1678, 1689 (2013).

government's position because it completely ignored the CSA's misdemeanor provision.[128] Instead, the government contended that the bare elements of possession with intent to distribute were met because Moncrieffe's charging instrument showed: "(1) possession (2) of marijuana (a controlled substance)," and "(3) . . . intent to distribute it."[129] Focusing on those elements alone, however, would also make noncitizens with convictions for the transfer without remuneration of a small quantity of marijuana—a clear misdemeanor under § 841(b)(4)—aggravated felons.[130] The Court emphasized that it erred "on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor."[131] Here, the *Moncrieffe* Court clearly disfavored expanding the imposition of aggravated felony status where a conviction record did not necessarily show aggravated felony conduct.[132] The Court appealed to something analogous to the rule of lenity, reasoning that it would be preferable for a noncitizen to avoid mandatory removal with an ambiguous conviction record.[133]

In his dissent, Justice Alito expressed concern that the *Moncrieffe* ruling would make anyone convicted of possession with intent to distribute immune from mandatory deportation: "[A]bout half the States criminalize marijuana distribution through statutes that do not require remuneration or any minimum quantity of marijuana."[134] Additionally, Justice Alito argued that "even if an alien is convicted of possessing tons of marijuana with intent to distribute, the alien is eligible to remain in this country."[135]

Justice Alito is correct that such a noncitizen would be "eligible" to remain in the United States, but his concerns may be exaggerated. As previously mentioned, cancellation of removal is a discretionary form of relief, which would likely be denied to a "noncitizen [who] is actually a member of one of the 'world's most dangerous cartels'" trafficking a large quantity of marijuana.[136] Akin to *Martinez*, the *Moncrieffe* Court realized

[128] *Id.* at 1687.

[129] *Id.*

[130] *Id.* at 1689.

[131] *Id.* at 1693.

[132] *See* Vargas et al., *supra* note 116, at 13 (explaining the *Moncrieffe* Court's "strong reaffirmation of the minimum conduct test" limiting the aggravated felony inquiry to those state offenses that necessarily involve all of the elements of the generic federal offense).

[133] Moncrieffe v. Holder, 133 S. Ct. 1678, 1693 (2013).

[134] *Id.* at 1692.

[135] *Id.* at 1696 (Alito, J., dissenting).

[136] 8 U.S.C.A. § 1229b(a) (West 2008) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if. . . ."); *Moncrieffe*, 133 S. Ct. at 1692 (citing *Id.* at 1696 (Alito, J., dissenting)).

that mandatory removal is not to be broadly imposed.[137] Many avenues still exist for the government to ensure the removal of heinous noncitizen criminals who may not meet the strict requirements of the categorical approach for aggravated felony status.[138] For instance, the government may invoke any of the INA's inadmissibility grounds as a justification for removal, such as aiding and abetting in the trafficking of a controlled substance or laundering money.[139] The *Moncrieffe* decision rejected speculative aggravated-felony determinations no matter which party bore the burden of proof.[140] The broad language employed by the *Moncrieffe* majority in explaining the categorical approach should be read to encompass aggravated-felony determinations in both the removability and relief-from-removal contexts.[141]

II. ENHANCED DISCRETION IN AGGRAVATED FELONY REMOVAL PROCEEDINGS AND STATE CRIMINAL LAW REFORM: TWO SOLUTIONS FOR THE MISAPPLICATION OF THE AGGRAVATED FELONY PROVISIONS

The most important aspect of the *Moncrieffe* decision is that it reveals grave inconsistencies in the application of the categorical approach in the aggravated felony regime.[142] The immigration penalties associated with aggravated felony status are harsh. Penalties include expedited removal procedures, removal orders without administrative intervention, denial of discretionary relief, as well as permanent or long-term exclusion from entering or obtaining legal status in the United States.[143] To apply for cancellation of removal, a noncitizen must be a lawful permanent resident who has resided in the United States for "no less than five years."[144] A denial of relief would be tremendously detrimental to a noncitizen who has spent a considerable amount of time establishing a life for him or herself in the United States. Additionally, aggravated felony status does not include

[137] *See Moncrieffe*, 133 S. Ct. at 1692.

[138] See the inadmissibility grounds under 8 U.S.C.A. § 1182(a) (West 2013) (classes of aliens ineligible for visas or admission).

[139] *Id.* § 1182(a)(2)(C)(i) (aiding and abetting in the trafficking of a controlled substance); *id.* § 1182(a)(2)(I) (money laundering).

[140] *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1692-93 (2013).

[141] *See supra* note 132 and accompanying text.

[142] *See Moncrieffe*, 133 S. Ct. at 1693 ("This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as 'illicit trafficking in a controlled substance,' and thus an 'aggravated felony.' Once again we hold that the Government's approach defies 'the commonsense conception' of these terms.").

[143] RICHARD D. STEEL, STEEL ON IMMIGRATION: 2013 EDITION 507 (2013); *see supra* note 1 and accompanying text.

[144] 8 U.S.C.A. § 1229b(a)(1) (West 2008).

any statutory time limit.[145] Unlike other immigration penalties for noncitizen criminal conduct, such as "crimes involving moral turpitude," which require commission "within five years after admission" of the noncitizen, a sixty-year-old who committed an aggravated felony at the age of eighteen would still be subject to mandatory removal although forty-two years have passed.[146] Owing to the severity of aggravated felony treatment, inconsistent application is unacceptable. The *Moncrieffe* opinion reflects this notion, demonstrating the need for change in this area of immigration policy.[147]

Since the creation of the aggravated felony in immigration law, the list of offenses has continuously expanded.[148] Aggravated felonies began as crimes of murder, rape, and the sexual abuse of minors.[149] That initially limited set of heinous offenses has now broadened to include trafficking in drugs and firearms, as well as theft and burglary.[150] Aggravated felony status serves the important purpose of expediting the removal of violent noncitizen criminals.[151] However, the aggravated felony regime begins to lose that purpose when applied to long-term lawful permanent residents convicted of lesser offenses.

The scope of criminal removal is not confined to a discrete class of noncitizens. In 2004, for instance, 22,000 of the 90,000 criminal deportations likely involved lawful permanent residents.[152] Lawful permanent residency is unlike any other legal status in that it allows noncitizens ample time to settle down in the United States, integrate into a community, and begin a family.[153] According to a report by Human Rights

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[145] LEGOMSKY & RODRIGUEZ, *supra* note 60, at 575.

[146] *Id*.

[147] *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1692 (2013) (arguing for the importance of consistency with not only the INA, but also the categorical approach in making an aggravated felony determination).

[148] STEEL, *supra* note 143, at 507.

[149] *Id*. at 508-15.

[150] *Id*.

[151] *See* Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 876 (2005) (explaining that measures, such as the aggravated felony provisions, were part of a congressional response to what was seen as a widespread problem with criminal aliens).

[152] Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 78-79 (2007).

[153] *See id.* at 70 (explaining that "one of the predominant, if not paramount, features of United States immigration policy over the past eighty-five years has been the promotion of family unity"). Lonegan laments that the fact that "U.S. citizen children suffer and an American family is destroyed when a parent is removed—was lost on Congress when it

Watch, "at least 1.6 million family members have been separated by deportations since 1997."[154] In light of these statistics, mandatory removal for lesser or uncertain aggravated felonies is an unduly harsh immigration penalty.

Underlying the *Moncrieffe* decision is a notice to legislators, both state and federal, to provide clarity for courts facing difficult aggravated-felony determinations and non-reviewable removal orders.[155] Without purging the aggravated felony regime from the INA, two options for reform exist which may reduce confusion in this area of the law.[156] The first is the reintroduction of discretion into the aggravated felony analysis to ensure, on a case-by-case basis, the just imposition of immigration penalties for criminal conduct. The second is slight reform of state criminal law and procedure that would eliminate the divisible statute and, thus, the problem of the inconclusive record. The *Moncrieffe* decision implies a need for reevaluating the mandatory removal provisions of the INA and encourages Congress to take a closer look at aggravated felony status in subsequent immigration reform.[157]

A. The Consequences of Aggravated Felony Removal Demonstrate the Need for Enhanced Discretionary Decision-Making

1. Extending Case-by-Case Discretionary Analysis to Aggravated Felons

In a 2007 article on family separation due to aggravated felony convictions and mandatory removal, Professor Bryan Lonegan told the story of a thirty-two-year-old lawful permanent resident born in Guyana, who was stopped at an airport after a vacation and detained for a "five-year-old conviction for possessing $5 worth of cocaine."[158] The immigration judge regretted imposing mandatory deportation and bemoaned the lack of discretion afforded to him under the law.[159] Having become a lawful permanent resident in 1993, the Guyana native was finally deported in 2004 after languishing in a detention center for two years.[160] To ameliorate the devastating effects of the mandatory removal of LPRs on their families,

enacted IIRAIRA." *Id.*

[154] *Id.* at 78-79.

[155] *See* Yates et al., *supra* note 151, at 909 (finding that the position of some circuits "imposing aggravated felony status on noncitizens whose offenses are not equivalent to traditional federal standards for felonies, distorts the underlying purpose and meaning of INA § 1101(a). . .").

[156] *See supra* note 142 and accompanying text.

[157] *See id.*

[158] Lonegan, *supra* note 152, at 55-56.

[159] *Id.*

[160] *Id.*

Professor Lonegan suggests creating a parental exemption in the INA to allow for discretionary relief from removal if an aggravated-felon LPR has a family with children.[161]

Although the reintroduction of discretionary relief for aggravated-felon LPRs with families in the United States is one way to blunt the harshness of mandatory removal, reform in the aggravated felony statutory framework must reach beyond family cases. Enhanced administrative and judicial review must also exist for LPRs who are able to demonstrate significant contributions to their community, as well as other mitigating factors.[162] Family separation is a serious concern both domestically and internationally in the development of humane immigration and refugee policy.[163] A lawful permanent resident without a family, however, may be subject to equally severe consequences if removed from the United States. For instance, having spent ten or fifteen years in the United States, an LPR who came to the country as a minor may have no connection whatsoever to his or her country of origin.[164] After removal, the lawful permanent resident may not be able to reestablish his or her life, find gainful employment, or reintegrate after, for instance, having escaped from extreme violence in his or her country of origin in the first place.[165] Removal from the United States has the tendency to put lawful permanent residents in extremely dangerous positions.[166] If the LPR has not conclusively committed a crime deserving

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[161] *Id.* at 79.

[162] *See, e.g.*, 8 U.S.C.A. § 1182(h)(1)(B) (West 2013) (allowing the Attorney General, "in his discretion," to waive inadmissibility ground for "simple possession of 30 grams or less of marijuana" if the immigrant is a parent or a spouse and denial of the waiver would result in "extreme hardship to the United States citizen or lawfully resident spouse, parent," etc.). Where a conviction may not qualify as an aggravated felony, it still may render the noncitizen inadmissible for status in the United States, as is the case with simple marijuana possession. As a result, removal need not occur if the noncitizen's case warrants an exercise of favorable discretion by the Attorney General pursuant to the statutory text referenced above.

[163] *See* Protocol Relating to the Status of Refugees art. 1(2), Jan. 31, 1967, 606 U.N.T.S. 268 (incorporating the definition of refugee from the 1951 Refugee Convention, in which the preservation of family unity is an essential goal).

[164] *See* Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 647-48 (2012).

[165] *See id.*

[166] In 2007, Harvard's International Human Rights Clinic released a report on the removal of noncitizens to El Salvador. One interviewee had this to say: "In the time that I have been here, three or four deportees have been killed. One of them [was killed] only a block away from here. . . . Here, *to kill a deportee is like a trophy*. . . . If I were to leave town it would be very dangerous." HARVARD LAW SCH. INT'L HUMAN RIGHTS CLINIC, NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 100 (2007), *available at* http://www.ansarilawfirm.com/docs/Gang-State-and-Clandestine-Violence-in-El-

of removal, mandatory removal under the current aggravated felony regime finds no logical or moral justification. Enhanced discretionary review would permit the consideration of these and other factors in aggravated felony cases and should be incorporated into the INA's aggravated felony regime.[167]

Although the *Moncrieffe* decision does not explicitly support enhanced administrative or judicial discretion in aggravated felony determinations, its strict adherence to the traditional tenets of the categorical approach reveals skepticism about the aggravated felony regime's effectiveness.[168] For instance, in responding to the government's arguments, the Court notes a "fundamental flaw" in reasoning: "It would render even an undisputed misdemeanor an aggravated felony. This is 'just what the English language tells us not to expect,' and that leaves us 'very wary of the Government's position.'"[169] However, under the categorical approach in *Young*[170] and *Salem*,[171] a state or federal misdemeanant may very well receive aggravated felony treatment notwithstanding an inconclusive state conviction.[172] Inconsistency in applying the categorical approach under the INA's aggravated felony provisions is precisely what the Supreme Court endeavored to eliminate in its *Moncrieffe* decision.[173] Enhanced discretion in the INA's aggravated felony regime would prevent the aggravated felony provisions' inconsistent application.

One solution to the problem of inconclusive state convictions would be a discretionary relief option for noncitizens that have potentially been convicted of the lesser aggravated felonies, thus limiting the mandatory removal of lesser offenders.[174] This is precisely the route that the Supreme

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[167] *See* Reyes, *supra* note 164, at 641.

[168] Moncrieffe v. Holder, 133 S. Ct. 1678, 1690 (2013).

[169] *Id.* at 1689. Recall that this part of the *Moncrieffe* opinion was a response to the government's argument that an illicit trafficking aggravated felony required merely possession of marijuana with intent to distribute it. Such an approach plainly ignores the definitional link between the CSA and the illicit trafficking aggravated felony as well as the CSA's misdemeanor exception for transfer of a small amount of marijuana for no remuneration. Because a conviction under both the CSA's illicit trafficking provisions and its misdemeanor exception require possession of marijuana with intent to distribute, the government's argument would potentially allow for aggravated felony treatment even if the noncitizen's state conviction were clearly equivalent to the CSA misdemeanor. *See supra* note 127.

[170] Young v. Holder, 697 F.3d 976 (9th Cir. 2012) (en banc).

[171] Salem v. Holder, 647 F.3d 111 (4th Cir. 2011).

[172] *Young*, 697 F.3d at 997 (Fletcher, J., dissenting); *see supra* text accompanying note 169.

[173] Moncrieffe v. Holder, 133 S. Ct. 1678, 1690 (2013).

[174] *See* Reyes, *supra* note 164, at 641.

Court appears to prefer in *Moncrieffe* and other decisions.[175] In those cases, the Court has consistently ruled against the government's arguments for broader application of the aggravated felony provisions to encompass more noncitizen offenders.[176] These decisions reveal the need for a statutory mechanism to resolve ambiguities that stem from inconclusive state criminal records in the determination of aggravated felony status. Incorporating additional options for discretionary relief in the INA's aggravated felony provisions may more effectively prevent the aggravated felony designation of noncitizens with inconclusive state conviction records.

2. The Advantages and Disadvantages of a Regime of Administrative Discretion

In his article *Discretionary Deportation*, Professor Gerald Neuman argues against increasing "discretionary elements of deportation policy."[177] Professor Neuman stresses that enhanced administrative discretion "reduce[s] the legal status of lawfully admitted aliens" and blurs "the distinction between admitted and non-admitted aliens."[178] Concerning discretionary relief, Professor Neuman explains that "rough guidance on the exercise of discretion emerges from the occasional precedential decisions" of the BIA, and does not facilitate the development of "generalizable" immigration policy.[179] Uniformity in case-by-case discretionary adjudications suffers as a result.[180] Accordingly, enhancing noncitizens' eligibility for discretionary relief "can . . . reinforce powerlessness," making detained noncitizens less likely to contest their conditions "when their conduct in detention may affect whether they will be deported."[181]

Although Professor Neuman's concerns are valid, they do not necessarily apply to enhanced discretion in the aggravated-felony context. Concerning generalizable immigration policy, the consequences of wrongfully imposed mandatory removal for the commission of an aggravated felony far outweigh any disadvantages in clarity in immigration proceedings in

[175] *See Moncrieffe*, 133 S. Ct. at 1686-87 (finding petitioner's conviction did not constitute an aggravated felony because ambiguity in his record of conviction did not establish that he was necessarily convicted of the generic federal offense categorized by the INA as an aggravated felony).

[176] *See, e.g.*, Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010); Nijhawan v. Holder, 129 S. Ct. 2294 (2009).

[177] Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 655 (2006).

[178] *Id.*

[179] *Id.* at 624.

[180] *Id*.

[181] *Id.* at 621.

general. Additionally, if an IJ finds that a noncitizen committed an aggravated felony, he or she is obliged to order removal; the noncitizen's subsequent actions in detention, for instance, are irrelevant.[182]

Others have advanced the position that enhanced discretionary review in immigration appeals best comports with notions of retributive criminal justice: "Is justice provided for crime victims when the aliens convicted of those crimes are deported from the United States after the completion of their sentences? At that point, has justice not been served?"[183] While it may not be entirely appropriate to compare U.S. citizen criminals and noncitizen criminals given Congress's plenary power to determine immigration policy, the case of the thirty-two-year-old Guyanan convicted for five dollars' worth of cocaine, for instance, does arouse sympathy.[184] Despite the Supreme Court's refusal to treat deportation as a form of punishment, deportation and its consequences seem punitive in nature.[185]

When the factors favoring relief far outweigh the severity of the aggravated felony conviction, even certain immigration judges lament the inability to review a mandatory removal order.[186] Discretion is essential to differentiate Adrian Moncrieffe who was convicted for possessing 1.3 grams of marijuana from the cartel marijuana trafficker.[187] In the context of cancellation of removal, it does not seem just that a conviction for 1.3 grams of marijuana and another for the trafficking of large quantities of the drug both warrant the same immigration penalty: mandatory removal. A lawful permanent resident with a ten-year-old minor drug conviction would feel far more secure if his family, employment, and community ties were favorably considered during his removal proceedings.[188] Enhanced discretion would allow immigration adjudicators to take into account a broad range of factors when considering removal for the commission of an aggravated felony, just as they would when considering waivers of inadmissibility.[189] Enhanced discretion would also empower decision-makers to provide the appropriate treatment for noncitizens who truly commit aggravated felonies. In turn, lesser offenders who form an integral

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[182] *Id.*

[183] *See, e.g.*, Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 825 (2012).

[184] Lonegon, *supra* note 152, at 55-56.

[185] Lisa Mendel, Note, *The Court's Failure to Recognize Deportation as Punishment: A Critical Analysis of Judicial Deference*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 205, 205-06 (2000).

[186] *See, e.g.*, Lonegan, *supra* note 152, at 55-56.

[187] Moncrieffe v. Holder, 133 S. Ct. 1678, 1692 (2013).

[188] *Contra* Neuman, *supra* note 177, at 655.

[189] *See supra* note 162 and accompanying text.

part of their respective communities would have the opportunity to remain in the United States at home with their families.[190]

3. Canadian Immigration Policy: Other Approaches to Mitigating the Unjust Imposition of Aggravated Felony Status

In Canada, lawful permanent residents enjoy more options in applying for relief from removal for less serious offenses, some of which may be considered aggravated felonies in the United States.[191] "'[H]umanitarian and compassionate' considerations" reenter the analysis in the relief stage despite the lawful permanent resident's having conclusively been convicted of these certain crimes.[192] Canadian courts look to international treaty obligations, such as those under the U.N. Convention on the Rights of the Child, in interpreting domestic immigration law to justify enhanced discretion.[193] In criticizing the United States' reluctance to expand discretionary decision-making in relief from removal, Adam Collicelli points to legislators' unreasonable national security and public safety concerns.[194] Aggravated felony treatment for noncitizens with vastly different offenses unduly penalizes lesser offenders and puts lawful permanent residents on the same standing as "immigrants that have only recently arrived."[195]

Discretionary decision-making, as it exists in Canadian immigration policy, does not interfere with uniformity in the application of immigration law.[196] Though discretion requires faith in the impartiality of the immigration judge presiding over each case, judges with "full knowledge of the facts" are better suited to consider the subtle circumstantial differences between, for instance, recently arrived immigrants and LPRs, and determine relief from removal accordingly.[197] While Canadian courts justify enhanced discretion under international treaty obligations to which the

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[190] *See* Reyes, *supra* note 164, at 641.

[191] Adam Collicelli, Note, *Affording Discretion to Immigration Judges: A Comparison of Removal Proceedings in the United States and Canada*, 32 B.C. INT'L & COMP. L. REV. 115, 122 (2009) (citing Immigration and Refugee Protection Act, S.C. § 64(1) (2001) (Can.)).

[192] *Id.*

[193] *Id.* at 123.

[194] *Id.* at 125.

[195] *Id.* This is not to say that recently arrived immigrants deserve less of an opportunity for discretionary relief. The fact that lawful permanent residents receive the same treatment under the aggravated felony provisions as recently arrived immigrants, however, is more difficult to rationalize given the potential consequences of removal for lawful permanent residents. *See supra* Part II.A.1.

[196] *But see* Neuman, *supra* note 177, at 624.

[197] Collicelli, *supra* note 191, at 127-28.

United States does not formally adhere, enhanced discretion in U.S. immigration policy need not originate from international law.[198] The *Moncrieffe* decision's emphasis on a more narrow application of the aggravated felony provisions to LPRs and other noncitizens with inconclusive records of conviction offers substantial justification for providing further discretionary relief from removal for certain aggravated felons.[199]

4. Enhanced Discretion versus Limiting the Scope of the Aggravated Felony Definition

In reforming the INA's aggravated felony regime, Andrew Kennedy argues for a more "moderate approach."[200] That approach includes (1) increasing the minimum sentence length for certain types of convictions before they may be properly deemed aggravated felonies; and (2) introducing limited procedural remedies, such as the opportunity for a noncitizen to appeal an aggravated felony determination in the event of a "miscarriage of justice or extreme hardship."[201] Additionally, Kennedy suggests limiting the statutory aggravated felony definition to its *Black's Law Dictionary* definition, which predominantly includes crimes of violence such as murder, rape, and kidnapping.[202]

The *Black's Law* definition, however, leaves out many non-violent crimes that may warrant mandatory removal, specifically drugs and arms trafficking in mass quantities.[203] Additionally, certain public safety concerns, such as the protection of Americans from repeat aggravated felony offenders, still serve as a compelling justification for maintaining much of the current list of aggravated felonies.[204] For this reason, enhanced judicial discretion remains the most viable option for a fairer immigration

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[198] *Id.*

[199] *See* Diana R. Podgorny, Comment, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. CRIM. L. & CRIMINOLOGY 287, 314 (2009) ("The implementation of laws, particularly with regard to the aggravated felony classification and mandated removal, has resulted in inconsistent and unpredictable application."). By tying the aggravated definition to state statutory components, which differ across jurisdictions, similar conduct may invoke mandatory removal in one state, where in another state, the option for other forms of relief will remain. *Id.*

[200] Andrew David Kennedy, Note, *Expedited Injustice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons*, 60 VAND. L. REV. 1847, 1867 (2007).

[201] *See id.* At 1867-69.

[202] *Id.*

[203] 8 U.S.C. §§ 1101(a)(43)(B)-(C) (1996).

[204] *See* Kennedy, *supra* note 200, at 1849.

policy.[205] Changes in the aggravated felony provisions' list of crimes would certainly reduce the overbroad penalization of minor offenders, but difficulties in the application of the categorical approach would still persist in aggravated felony litigation.[206] For instance, many divisible state statutes would still include serious potentially aggravated offenses alongside lesser ones.[207] And again, the same categorical approach issues would surface if the noncitizen's state conviction records were inconclusive.[208] Because many states proscribe aggravated-felony and non-aggravated-felony conduct in single statutory provisions,[209] increasing judicial or administrative discretionary relief in the INA would be preferable to merely constraining the statutory list of aggravated felony convictions.[210]

B. Slight Reform in State Criminal Law and Procedure in States with Disproportionate Criminal Immigration Issues

In *Moncrieffe*, the Court expressly rejects the government's "proposed remedy" of delving into a noncitizen's criminal history for proof that the specific facts of the noncitizen's conviction did not constitute an aggravated felony.[211] This solution, the Court responds, "is entirely inconsistent with both the INA's text and the categorical approach."[212] The Court continues, "The procedure the Government envisions would require precisely the sort of *post hoc* investigation into the facts of the predicate offenses that we have long deemed undesirable."[213] Under *Moncrieffe*, the resolution of ambiguity in a noncitizen's inconclusive criminal record must therefore not involve enhanced factfinding procedures.[214] Because the Supreme Court has roundly rejected this in-trial investigative approach, a more compliant solution to the problem of the inconclusive record may need to come from

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[205] *See* Tamar Jacoby, *Immigration Reform and National Security*, N.Y. TIMES, Sep. 16, 2002, http://www.nytimes.com/2002/09/16/opinion/immigration-reform-and-national-security.html (detailing congressional action in 2002 increasing border security measures and intelligence efforts to "distinguish terrorists from immigrants").

[206] *See* Lee A. O'Connor, *Understanding the Categorical and Modified Categorical Tests*, 57 DEC FED. LAW. 48, 48 (2010) (citing Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987)) ("It has been said that immigration law is second only to the Internal Revenue Code in complexity.").

[207] *See supra* Part I.A.

[208] *See* O'Connor, *supra* note 206, at 49.

[209] Moncrieffe v. Holder, 133 S. Ct. 1678, 1692 (2013).

[210] *See, e.g.*, Collicelli, *supra* note 191, at 127-28.

[211] *Moncrieffe*, 133 S. Ct. at 1681.

[212] *Id.* at 1690.

[213] *Id.*

[214] *Id.*

state legislatures, rather than the federal judiciary. State-level criminal law reform—as opposed to judicially imposed procedural mechanisms—is a second option for promoting more just aggravated felony review.

One of the most complicating aspects of certain aggravated felony determinations is the conjunctive, long-winded wording of state statutes that criminalize drug distribution.[215] Because many state drug laws, for instance, encompass a vast range of punishable offenses, their provisions do not easily match up to felony offenses under the CSA.[216] While states obviously have near-absolute discretion to criminalize drug activity as they see fit, some states may benefit from rewording or administering their drug laws to facilitate the federal government's removal of truly deserving aggravated felons. Aside from immigration reform at the federal level, change in state criminal law and procedure could make application of the categorical approach in federal immigration proceedings far simpler.[217] For instance, a slight increase in specificity in charging instruments and plea agreements distinguishing between conduct, attempt, conspiracy, and solicitation under certain divisible statutes would entirely prevent the complicated categorical analysis at the federal level.[218] Additionally, a slightly more in-depth treatment of the facts in plea discussions would ensure that, in later removal proceedings, a noncitizen that is truly deserving of aggravated felony treatment is subjected to mandatory removal, the ultimate deterrent for states worried about recidivist noncitizen offenders.[219] Apart from enhanced discretion, providing specific factual and legal context in the *Shepard* documents is another option to ensure the just imposition of aggravated felony penalties.[220] Especially in states that experience higher levels of noncitizen criminal activity, such as the southwestern states, criminal legal reform could also promote quick removal of the worst offenders.

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[215] *Id.* at 1692-93.

[216] Moncrieffe v. Holder, 133 S. Ct. 1678, 1692-93 (2013).

[217] *See id.* at 1696 (Alito, J., dissenting).

[218] *See* Rosas-Castaneda v. Holder, 655 F.3d 875, 885 (9th Cir. 2011) ("A conviction under this statute does not qualify categorically as an aggravated felony because it contains solicitation offenses, which we have held do not qualify as aggravated felonies within the meaning of 8 U.S.C. § 1101(a)(43)(B).").

[219] *See id.* ("On June 12, 2009, the IJ admitted Rosas-Castaneda's conviction documents into evidence—the criminal complaint against him and his plea agreement. Based on these documents the IJ found Rosas-Castaneda removable because of his conviction for a controlled substance offense, but not on the basis of a conviction for an aggravated felony.").

[220] Shepard v. United States, 544 U.S. 13, 26 (2005).

1. Reforming State Law to Conform to the Generic Federal Offenses that the INA Designates as Aggravated Felonies

Without divisible statutes, application of the categorical approach in immigration proceedings would no longer be difficult.[221] While, as a matter of federalism, Congress would not be able to compel states to incorporate the precise terms of generic federal offenses in state criminal legislation,[222] states with a disproportionate number of criminal noncitizens such as California, Texas, and Arizona may benefit from independently conforming state legislation to the INA's aggravated felony structure.[223]

For instance, Arizona's 2010 Support Our Law Enforcement and Safe Neighborhoods Act[224] sought to direct police activity toward the deportation of criminal noncitizens in the United States illegally.[225] Many of the provisions of the act were found unconstitutional or preempted by federal immigration legislation.[226] This Arizona statute was a response to

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[221] *See Rosas-Castaneda*, 655 F.3d at 885 (finding a conviction under an Arizona drug statute inconclusive because the statute punished solicitation, which was not aggravated-felony conduct under 8 U.S.C. § 1101(a)(43)(B)). Here, for instance, if Arizona law separated solicitation offenses from offenses for other, more serious conduct, the conviction document could have included a specific reference to either the solicitation offense, which would not have constituted an aggravated felony, or the more serious offense, which would have constituted an aggravated felony. *Id.* As a result, no issue in applying the categorical approach would have arisen. *See id.*

[222] *See* New York v. United States, 505 U.S. 144 (1992).

[223] *See* Nick McClellan, *How Many Illegal Immigrants Live in your State?*, SLATE, Feb. 1, 2013, http://www.slate.com/articles/news_and_politics/map_of_the_week/2013/02/map_illegal_immigrant_population_by_state.html (finding that California, Nevada, New Jersey, Arizona, and Texas have the highest proportion of illegal immigrants to their respective state populations).

[224] ARIZ. REV. STAT. ANN. § 11-1051 (2010). Many provisions of the statute were found preempted by federal law, and thus, invalid, in Ariz. v. United States, 132 S. Ct. 2492 (2012). However, the Court

> unanimously sustained the law's centerpiece, the one critics have called its 'show me your papers' provision. . . . The provision requires state law enforcement officials to determine the immigration status of anyone they stop or arrest if they have reason to suspect that the individual might be in the country illegally.

Adam Liptak, *Blocking Parts of Arizona Law, Justices Allow Its Centerpiece*, N.Y. TIMES, June 25, 2015, http://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html?ref=arizonaimmigrationlawsb1070&_r=0.

[225] *Ariz.*, 132 S. Ct. at 2506 (describing section six of the preempted Arizona statute, which provided "state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers"). The Court goes on to note that this statute "would allow the State to achieve its own immigration policy." *Id.*

[226] *Id.*

what the state perceived to be a failure in the current U.S. immigration regime to control the disproportionate impact of illegal immigration and criminal activity in Arizona.[227] The 2010 Arizona immigration law demonstrates the readiness of states to accept statutory reform and facilitate the federal government's removal of violent noncitizen criminals.[228] As with Arizona's immigration law, this statutory reform may manifest itself in policies that are far more stringent than required under federal procedures for detention and removal.[229] If Arizona lawmakers are willing to resort to intrusive impositions into federal immigration authority, modest reform in state criminal law—such as criminalizing illicit trafficking in conformance with the CSA's generic illicit trafficking felony—does not seem like a difficult sell.[230] Further, a more marked separation in criminal statutes of less serious solicitation and facilitation offenses would require charging courts to record more precisely the exact conduct for which a noncitizen has been convicted.[231] By manipulating its own criminal laws to simplify the application of federal aggravated felony provisions, a state like Arizona could avoid constitutional challenges to its legislation while easing the burden on the federal government to remove truly deserving aggravated

[227] *See* Randal Archibald, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, http://www.nytimes.com/2010/04/24/us/politics/24immig.html?_r=0. Arizona Governor Jan Brewer's approval of the law as an "indispensable tool for the police in a border state that is a leading magnet of illegal immigration," came at the heels of the murder by a "suspected smuggler" of a southern Arizona rancher. *Id.*

[228] *See id.* (describing the intense pressure on Arizona Governor Jan Brewer and Arizona Senator John McCain to enact stricter immigration legislation at the state level when the Bush Administration's attempted immigration reform failed due to differences in political opinion within the Republican Party).

[229] Ariz. v. United States, 132 S. Ct. 2492, 2506 (2012).

[230] *See* Fernanda Santos, *Arizona Immigration Law Survives Ruling*, N.Y. TIMES, Sep. 6, 2012, http://www.nytimes.com/2012/09/07/us/key-element-of-arizona-immigration-law-survives-ruling.html. Arizona's immigration law has shown that Arizona is willing to enact legislation that directly conflicts with federal immigration policy under the INA. *Id.* A solution that would not directly infringe, but rather would facilitate the application of the aggravated felony provisions to noncitizens without being rendered unconstitutional, seems like a simpler statutory solution for a state to pursue.

[231] ARIZ. REV. STAT. ANN. § 13-3405 (2010) in one provision criminalizes the "transport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer, or offer to sell or transfer marijuana." By separating all of the "offer" solicitation offenses into separate statutory provisions, a conviction under the separate provisions would more precisely demonstrate the conduct of the noncitizen for aggravated felony purposes. The statute already separates knowing possession or use of marijuana, possession of marijuana for sale, and production of marijuana. *Id.* Further separation of offenses under the illicit trafficking would make aggravated felony treatment a much simpler inquiry in subsequent immigration proceedings.

felons.[232]

The structure of state criminal laws receives significant treatment in Justice Alito's dissent in *Moncrieffe*.[233] In arguing against the majority's interpretation of the categorical approach, Justice Alito notes that "state criminal codes vary widely, and some state crimes are defined so broadly that they encompass both very serious and much less serious cases."[234] Justice Alito goes on to comment that, owing to this variance among states, attempts to punish certain noncitizens as aggravated felons uniformly may lead to unjust results.[235] Thus, Justice Alito suggests abandoning the categorical approach in cases involving a divisible state statute "that encompasses both a substantial number of cases that qualify under the federal standard [as an aggravated felony conviction] and a substantial number that do not."[236] Under these circumstances, the Court would be able to look to the facts that the noncitizen admitted in state court to determine whether the noncitizen's conviction was for aggravated felony conduct.[237]

This approach, however, raises more problems with efficiency than it resolves. First, which statutes would warrant a departure from the traditional categorical analysis? When years of litigation in *Moncrieffe* have been dedicated to determining whether one Georgia drug statute encompasses both aggravated felony and non-aggravated felony conduct, the subsequent question of whether to depart from the categorical approach entirely would require identically lengthy treatment.[238] Furthermore, Justice Alito's approach would render the categorical analysis essentially inapplicable in all cases involving an aggravated felony determination.[239]

[232] For comprehensive insight into the interplay between federal immigration law and state criminal law, see Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Law Enforcement*, 88 N.Y.U. L. REV. 1126 (2013).

[233] Moncrieffe v. Holder, 133 S. Ct. 1678, 1696 (2013) (Alito, J., dissenting).

[234] *Id.* at 1700.

[235] *Id.* at 1701.

[236] *Id.*

[237] *Id.*

[238] *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1694 (2013) (Thomas, J., dissenting) (arguing that Moncrieffe's possession of marijuana with intent to distribute conviction satisfies the aggravated felony provisions' two requirements: (1) the offense is a felony; and (2) the offense is subject to CSA punishment). Here, the Justices and the government still contend that Moncrieffe's conviction, under the categorical approach, constitutes an aggravated felony. *Id.* Disagreement on divisibility and its effects would render any attempt to hinge the application of the categorical approach on divisibility an ineffective solution to the problem of misapplication of the aggravated felony provisions.

[239] Technical categorical analysis is required only for divisible statutes. As mentioned above, without divisible statutes, the categorical approach is not difficult to apply. *See supra* note 221 and accompanying text.

Justice Alito notes that the statutes in half of the states of the United States are divisible and create similar categorical approach issues to those in *Moncrieffe*.[240] Thus, noncitizens in half of the states would be subjected to the same mini-trials that the Court has routinely condemned in almost every immigration case applying the categorical approach.[241] However, Justice Alito's solution does provide meaningful insight into the source of the improper application of the categorical approach in aggravated felony cases: differences between state criminal law and federal generic offenses. Rather than imposing enhanced factfinding procedures in federal appeals, states may actively reform criminal legislation in response to noncitizen offenders.[242] An immediate and more effective solution would be to change state criminal laws to reflect the generic federal felonies that the INA ties to its aggravated felony provisions.

2. Reforming State Procedures to Reduce Divisible Statutes and Inconclusive Records

Professor Michael Vastine identifies various ways in which criminal defense attorneys may structure a case or post-conviction relief in a way that avoids mandatory removal under the aggravated felony provisions.[243] By taking advantage of the categorical analysis in cases involving convictions under divisible statutes, a clever defense attorney can negotiate a plea bargain that, rather than referencing specific elements under a multi-element criminal statute, refers to all elements, thus creating an inconclusive criminal record.[244] Additionally, the aggravated felony provisions create an incentive to seek post-conviction relief vacating certain aggravated felony convictions and reinstating lesser offenses in the same statute that would not be considered aggravated felonies[245]:

> Some respondents in immigration court have the option to pursue post-conviction relief and thus may be able to vacate their conviction and terminate proceedings. It is essential for the criminal defense attorney and immigration attorney to collaborate in the timing of this attempt. For example, if the conviction is vacated and the client is re-

[240] *Moncrieffe*, 133 S. Ct. at 1696 (Alito, J., dissenting).

[241] *Id.* at 1690.

[242] *See* Ariz. v. United States, 132, S. Ct. 2492, 2510 (2013) ("Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the state may not pursue policies that undermine federal law.").

[243] Michael Vastine, *Being Careful What you Wish for: Divisible Statutes – Identifying a Non-Deportable Solution to a Non-Citizen's Criminal Problem*, 29 CAMPBELL L. REV. 203, 221-22 (2007).

[244] *Id.*

[245] *Id.* at 230.

charged and re-tried, it may be an option to plea to a divisible statute or to a clearly non-removable offense.[246]

In other words, the current aggravated felony regime promotes manipulation of a state's criminal justice system in order for attorneys to advocate more zealously on behalf of their noncitizen clients.[247] Instead of encouraging this activity, a state could easily alter criminal proceedings to prevent the creation of ambiguity in a noncitizen's charging documents.[248] A combination of legislative reform that reduces divisible statutes and clear delineation of crimes in pleading and charging documents would prevent the overbroad imposition of aggravated felony treatment.

By engaging in reform at the state level, fewer changes would be necessary in the INA aggravated felony regime as interpreted in *Moncrieffe*.[249] Changing plea arrangements and other charging instruments to reflect a noncitizen's conviction more accurately would work toward the elimination of complexities in the application of the aggravated felony provisions in federal court. State reform, therefore, would support the implicit goal of *Moncrieffe*: a narrower allocation of aggravated felony treatment to prior state convictions that do not clearly warrant mandatory removal under the INA.[250]

C. Recent Immigration Reform and Aggravated Felonies

On June 27, 2013, the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act.[251] The bill subsequently languished in the House of Representatives and eventually died, owing to the inability of Republican and Democratic lawmakers to compromise on its terms.[252] Nevertheless, governmental and non-governmental groups supporting comprehensive immigration reform continue to exert pressure

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[246] *Id.*

[247] *See id.*

[248] *See id.* at 230-31 ("The possibilities are vast for crafting a potentially non-deportable solution, given the proper legal expertise and patience by the client. The goal is for the arrested non-citizen to accept a plea or litigate only after knowing the long-term consequences of her decision. Most would agree that suffering short-term in legal limbo at the initiation of criminal proceedings and finding a livable solution is less disastrous than living a life deported, away from all that is loved in their adopted country.").

[249] *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1692-93 (2013).

[250] *See id.* at 1692-93.

[251] Alan Silverleib, *Senate Passes Sweeping Immigration Bill*, CNN (June 28, 2013, 6:45 AM), http://www.cnn.com/2013/06/27/politics/immigration.

[252] *See* Jonathan Weisman, *Boehner Doubts Immigration Bill Will Pass in 2014*, N.Y. TIMES, Feb. 6, 2014, http://www.nytimes.com/2014/02/07/us/politics/boehner-doubts-immigration-overhaul-will-pass-this-year.html?hpw&rref=politics (Speaker John Boehner concedes that he will unlikely be able to win sufficient support to pass the bill in the House).

on Congress.[253] Therefore, it is worth analyzing the extent to which current attempts at immigration reform reflect the principles emphasized in this Note's analysis of the *Moncrieffe* decision.[254]

Rather than reform the aggravated felony provisions of the INA for more efficient implementation, the Senate bill increased the list of crimes that constitute aggravated felonies.[255] Specifically, the bill expanded aggravated felony treatment to noncitizens with three drunk-driving offenses, but did not significantly change the approach to analyzing state convictions and comparing them to their federal counterpart offenses.[256] In other words, while Congress contemplated a massive overhaul in border security and immigrant visas, little was done to simplify the existing framework for dealing with lawful permanent residents and other noncitizens convicted of aggravated felonies.

While the *Moncrieffe* Court did not overtly advocate reform in the aggravated felony regime, the difficulty of applying the categorical approach in that case resulted in years of litigation, suggesting that the current aggravated felony regime should receive heightened congressional attention.[257] As the immigration bill foundered in the House of Representatives, an increase in the scope of the aggravated felony regime is fortunately not imminent.[258] It suffices to say that while aggravated-felony and categorical-approach issues continue to surface in federal courts, Congress may not consider reform in this area a priority.

Recently, President Obama has engaged in executive action in response to Congress's failure to enact immigration reform.[259] President Obama's

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253 *See* Ashley Parker & Jonathan Weisman, *House Republicans to Offer Broad Immigration Plan*, N.Y. TIMES, Jan. 25, 2014, http://www.nytimes.com/2014/01/26/us/politics/house-republicans-to-offer-broad-immigration-plan.html?_r=0.

254 The Immigration Policy Center has released a comprehensive guide to the Senate Immigration Bill. IMMIGR. POLICY CTR., A GUIDE TO S. 744: UNDERSTANDING THE 2013 SENATE IMMIGRATION BILL 15 (2013), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/guide_to_s744_corker_hoeven_final_12-02-13.pdf; *see supra* Part I.F.

255 Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3702(a)(1)(F) (2013).

256 *Id.*; *see* IMMIGR. POLICY CTR., *supra* note 254, at 15.

257 *See supra* note 26 and accompanying text.

258 Weisman, *supra* note 252.

259 *See* Memorandum on Creating Welcoming Communities and Fully Integrating Immigrants and Refugees, 79 Fed. Reg. 70765 (Nov. 26, 2014); Memorandum on Modernizing and Streamlining the United States Immigrant Visa System for the 21st Century, 79 Fed. Reg. 70769 (Nov. 26, 2014). A federal district court judge in Texas has issued a preliminary injunction against the implementation of the President's executive action. Tex. v. United States, No. 1:14-cv-00254, Doc. No. 145 (Tex. Feb. 16, 2015),

plan expands deferred action programs for children under sixteen arriving in the United States and the parents of those children that already are in the United States.[260] Unfortunately, deferred action is not a path to permanent residence; it may be revoked at any time.[261] Additionally, deferred action is unavailable for aggravated felons.[262] Like the Senate bill, President Obama's executive action does not address problems with the aggravated felony regime itself nor judicial review of aggravated felony determinations.[263]

CONCLUSION

Owing to their complexity, the INA's aggravated felony provisions have resulted in considerable, unintended consequences.[264] *Moncrieffe v. Holder*, the most recent case interpreting the aggravated felony provisions, has laid the foundation for a more just imposition of immigration penalties under the aggravated felony framework.[265] But this decision may not be enough. The fact that federal courts have sharply divided regarding the categorical approach's application to noncitizens' state convictions shows that additional reform is necessary.[266] Two options for reform are available if the aggravated felony framework is to be retained. The first is enhanced discretionary relief to ensure that lesser felony and misdemeanor convictions are not treated on par with more serious offenses. The other option is to reform state criminal law to make it easier to compare state convictions to federal felonies when applying the categorical approach. While many areas of immigration law are under congressional review, the aggravated felony regime has slipped through the cracks. Reform here would represent an important step in developing a more just and evenhanded immigration policy, allowing noncitizens who have not engaged in serious criminal activity to remain in the United States while

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available at https://www.documentcloud.org/documents/1668197-hanen-opinion.html. The Department of Justice intends to seek an emergency order from the Fifth Circuit to stay the injunction. Michael D. Shear, *White House to Seek Emergency Order for Immigration Plan*, BOSTON GLOBE, Feb. 20, 2015, https://www.bostonglobe.com/news/nation/2015/02/20/doj-seek-stay-ruling-obama-immigration-action/u0sexbpC71N5fc0rhEuHdO/story.html.

[260] Panel on the President's Executive Action on Immigration at Boston University School of Law (Feb. 19, 2015).

[261] *Id.*

[262] *Id.*

[263] *See id.*

[264] *See, e.g.*, Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013) (government argues that a conviction for 1.3 grams of marijuana is an aggravated felony).

[265] *Id.* at 1685-86.

[266] *See* Young v. Holder, 697 F.3d 976 (9th Cir. 2012) (en banc); *see also* Martinez v. Mukasey, 551 F.3d 113 (2d Cir. 2008).

facilitating the removal of more dangerous noncitizen criminals.