


Naked Dishonesty: Misuse of a Social Security Number for an Otherwise Legal Purpose May Not Be a Crime Involving

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I. AN HONEST DAY’S WORK: THE FACE OF ILLEGAL MIGRATION TO THE UNITED STATES

“For me it has been very hard. But I know I am not alone.”¹ Like so many others, Elvira Arellano entered the United States illegally in search of a better life, but her particular experience has made her the face of the illegal alien’s struggle in America.² Elvira’s public plight has been likened to that of Rosa Parks or a “persecuted pilgrim out of the middle ages.”³

Elvira, a Mexican national, moved to the United States in 1997, first to Oregon, and later Chicago, where she worked at O’Hare International Airport cleaning planes.⁴ For years, Elvira paid income taxes and Social

1. *Elvira Arellano Says U.S. ‘Broke The Law First’*, LIVELEAK (Aug. 22, 2007), http://www.liveleak.com/view?i=d69_1187877604&p= (transcript on file with author).

2. See Associated Press, *Boy Fighting Mom’s Battle to Stay in U.S.*, CBS NEWS (July 2, 2010, 11:40 AM), <http://www.cbsnews.com/stories/2006/11/14/world/main2181120.shtml>.

3. Daniel Hernandez, *Remember the Immigrant-Rights Movement?*, LA WEEKLY (Aug. 23, 2006), <http://www.laweekly.com/2006-08-24/news/remember-the-immigrant-rights-movement/>. Rosa Parks earned the title the “Mother of the Civil Rights Movement” for her efforts in the fight for equality in the mid twentieth century. See LOLA M. SCHAEFER, *ROSA PARKS 21* (Gail Saunders-Smith ed. 2002). Police arrested Ms. Parks after she refused to give up her seat on the front of a city bus to a white man, in violation of an Alabama segregation law. *Id.* at 16. Ms. Parks’s arrest led to a year long bus boycott by African-Americans in the Alabama town. *Id.* at 17. Ultimately, the Supreme Court ruled bus segregation laws were unconstitutional. *Id.* at 19.

4. Associated Press, *supra* note 2. Chicago’s O’Hare International Airport, the United States’ only dual hub airport (United Airlines and Delta Airlines both use O’Hare as a major hub location) sees over 75 million passengers and 1.7 million tons of freight and mail per year, generating over 500,000 jobs in the region and \$37 billion per year in economic development. *O’Hare International Airport History*, <http://www.flychicago.com/About/History/Default.aspx> (last visited Feb. 21, 2013).

Security deductions.⁵ In 1999, Elvira gave birth to a baby boy named Saul,⁶ who was born a United States citizen.⁷

In 2002, immigration agents arrested Elvira during a raid at O'Hare.⁸ Ultimately, she suffered a conviction for illegally working under a false Social Security number.⁹ After serving three years of probation, an immigration judge ordered Elvira's removal.¹⁰ Her case fell under the international spotlight when in response to the removal order, Elvira sought protection through the rarely invoked principle of sanctuary.¹¹ She took up residence with Saul in a Chicago church, which sparked a wave of sanctuary immigration cases.¹² After living in the church for a

5. See Ed Pilkington, *US Deports Mother Who Took Sanctuary*, GUARDIAN (Aug. 20, 2007), <http://www.guardian.co.uk/world/2007/aug/21/usa.edpilkington>. Elvira asserts that “the United States is the one who broke the law first. By letting people cross over without documents. By letting people pay taxes.” *Elvira Arellano says U.S. ‘Broke The Law First’*, *supra* note 1.

6. See Jeff Goldblatt, *Son of Deported Immigration Activist Urges Congress to Bring Mom Back to America*, FOX NEWS (Sept. 12, 2007), <http://www.foxnews.com/story/0,2933,296621,00.html>.

7. See U.S. CONST. amend. XIV, § 1. “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” *Id.* In 2008 and 2009, 350,000 children were born in the United States to parents illegally present in the country. Jeffrey S. Passel & D’Vera Cohn, Pew Research Ctr., *Unauthorized Immigrant Population: National and State Trends: 2010*, PEW HISPANIC CENTER, 1 (Feb. 1, 2011), available at <http://pewhispanic.org/files/reports/133.pdf>. For a discussion of “anchor babies” in the United States and perspectives on both sides of the discussion, see Mariana E. Ormonde, *Debunking the Myth of the “Anchor Baby”*: Why Proposed Legislation Limiting Birthright Citizenship is Not a Means of Controlling Unauthorized Immigration, 17 ROGER WILLIAMS U. L. REV. 861 (2012).

8. Associated Press, *supra* note 2.

9. See *id.*

10. See *id.*

11. See Hernandez, *supra* note 3.

12. See *id.* Elvira’s revival of the use of the sanctuary principle led to the beginning of a modern sanctuary movement where aliens in sixteen states sought refuge from immigration authorities in churches. Pilkington, *supra* note 5; see also Daniel Hernandez, *Broken Sanctuary*, LA WEEKLY (Aug. 23, 2007), <http://www.laweekly.com/2007-08-23/columns/broken-sanctuary/>. By the black letter law, the Immigration and Nationality Act prohibits “smuggling, harboring, transporting, or encouraging of illegal aliens.” Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747, 748 (1986). Nonetheless, many churches throughout the United States open their doors as safe houses for illegal immigrants from the immigration authorities. *Id.* at 747. This is a modern evolution of the Church’s “ancient function” as a holy place of refuge for

year,¹³ Elvira left to attend an immigration rally in Los Angeles, where immigration agents arrested and removed Elvira to Mexico.¹⁴ No longer able to live in the United States, Elvira had to choose between leaving young Saul behind at his only home in the United States, and bringing him to Mexico.¹⁵

Elvira and Saul desperately wanted their old life back in the United States. Saul, then an elementary school student, appeared in front of Mexico's Congress to ask for the Mexican government's help persuading the United States to allow his mother to stay in the United States.¹⁶ The Mexican Chamber of Deputies unanimously agreed to help Saul and Elvira; they appealed to President Bush to suspend Elvira's deportation and the deportation of illegal immigrants with children who are United States citizens.¹⁷ Unfortunately, the United States did not grant Mexico's call for suspension of Elvira's removal.¹⁸

Those in favor of Elvira's removal argue that in misusing a Social Security number, she broke United States' laws and has no business being in the United States.¹⁹ Rosanna Pulido of American Hispanics Against Illegal Immigration criticized Elvira, "[She] has really been a terrible poster child for this cause; she broke into the country twice, she stole American jobs. She stole identities."²⁰

criminals hoping to escape legal vigilante justice; for example, Ancient Greek temples offered what is described as divine protection for criminals. *Id.* at 751.

13. Pilkington, *supra* note 5. Elvira's place of refuge was Adalberto United Methodist Church of Chicago, Illinois, led by Reverend Walter Coleman. *Id.*

14. *See* Goldblatt, *supra* note 6.

15. Associated Press, *supra* note 2.

16. *See id.*

17. *Id.*

18. *See* Goldblatt, *supra* note 6.

19. *See id.*

20. *Id.* *See* *GOP Not Fully Embracing Their Candidate for Congress*, NBC CHICAGO (Mar. 5, 2009), http://www.nbcchicago.com/news/local/GOP_Not_Fully_Embracing_Their_Candidate_for_Congress_Chicago.html (transcript on file with author). Pulido, herself of Mexican heritage, is a founder of the Minutemen, a group of civilian citizens acting as a vigilante border patrol posse to prevent illegal immigration. *Id.* Pulido's immigration philosophy is based on the theory that legal immigrants and citizens go jobless while employers hire illegal aliens in their place. *Id.* When Congressman and current Mayor of Chicago, Rahm Emmanuel vacated his seat in Congress to serve as Chief of Staff to President Obama in 2009, Pulido won the Republican special election primary for the 5th Congressional district of Illinois. *Id.* However, negative publicity spread surrounding Pulido's reference to Mexicans as "The Ku Klux Klan with the tan" leading Pulido to receive little financial support from her Republican party. *Id.* Ultimately Pulido lost the special election and Emanuel's vacated Congressional seat was filled by Democrat Mike Quigley, who captured nearly 70% of votes. *Id.*; *IL – District 05 —Special Election*, OUR CAMPAIGNS (Nov. 19, 2011), <http://www.ourcampaigns.com/RaceDetail.html?RaceID=489029>.

Meanwhile a disagreement has developed between the federal circuit courts over the very question of law that Elvira's case poses: is the misuse of a Social Security number for an otherwise legal purpose—otherwise lawful employment—a crime involving moral turpitude?²¹ Because convictions for crimes involving moral turpitude subject aliens to removal, resolution of the circuit split could lead to nationwide law that clarifies whether aliens like Elvira need to be deported.²²

This Comment questions whether the misuse of a Social Security number for an otherwise legal purpose is a crime involving moral turpitude. It begins with a history of moral turpitude and its initial connection to immigration law in the United States. Through a close analysis of misuse of a Social Security number for an otherwise legal purpose as a crime involving moral turpitude in modern cases, this comment will examine the role of fraud and dishonesty in the question. The analysis reveals a critical distinction between crimes involving dishonesty and crimes involving fraud. This distinction shows that crimes involving naked dishonesty, that is, crimes that involve dishonesty but do not involve fraud, namely misuse of a Social Security number for an otherwise legal purpose, need not be classified as crimes involving moral turpitude under the law.

II. THE PROBLEM: LACKING STATUTORY DEFINITION

Aliens who commit a crime involving moral turpitude are ineligible for admission to the United States under the Immigration and Nationality Act (INA) section 212.²³ Furthermore, INA section 237 provides that

21. See generally *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000); *Hyder v. Keisler*, 506 F.3d 388 (5th Cir. 2007).

22. Elvira may have been able to avoid removal for other reasons; when an alien is ordered removed, relief still may exist through cancellation of removal proceedings for various reasons under 8 U.S.C. § 1229b(b)(1). Additionally, 8 U.S.C. § 1259 could provide an alien relief under registry, as the alien in *Beltran-Tirado* sought. See *Beltran-Tirado*, 213 F.3d at 1181. However, because Elvira entered the United States after 1979, she was rendered ineligible for registry. See *id.*

23. See Immigration and Nationality Act (INA) § 212, 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006). “Aliens . . . are ineligible to receive visas and ineligible to be admitted . . . any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime.” *Id.* Exceptions apply for juvenile offenses dating more than five years from the date of application for admission and certain non-felonies. *Id.* at § 1182(a)(2)(A)(ii).

aliens already present in the United States who suffer a felony conviction for a crime involving moral turpitude within five years of admission or who suffer a second conviction for a crime involving moral turpitude may be subject to removal.²⁴ Although a finding of removability does not necessarily lead to ejection from the United States,²⁵ an alien faces a very great risk of removal once the moral turpitude label affixes.²⁶ Because conviction for an offense involving moral turpitude carries the heavy potential consequence of removal or inadmissibility, accurately determining moral turpitude's proper application is of the utmost importance.

Unfortunately, despite this importance, “interpretation of ‘moral turpitude’ has become enshrouded by an impenetrable mist.”²⁷ Because the term moral turpitude lacks a clear-cut statutory definition, the responsibility of defining the term and determining the situations in which it applies falls on the courts.²⁸ However, despite being charged with the task, the courts operate under little guidance.²⁹ Courts have noted that moral turpitude has “no satisfactory definition.”³⁰ Particularly, because it is a moral concept rather than a legal concept, noncitizens’ right to remain in the country are subject to ever-changing societal norms and the subjective personal views of judges, all of which vary by jurisdiction and leads to inconsistent results.³¹

24. See INA § 237, 8 U.S.C. § 1227(a)(2)(A)(i)-(ii).

25. See INA § 240A, 8 U.S.C. § 1229b (allows the United States Attorney General to cancel removal for an inadmissible or deportable alien). Removal may be withheld for other reasons, such as asylum for persecution. See Elizaveta Kabanova, *The Supreme Court’s Take on Immigration in Nken v. Holder: Reaffirming a Traditional Standard that Affords Courts More Time and Flexibility to Decide Immigration Appeals Before Deporting Aliens*, 30 J. NAT’L ASS’N ADMIN. L. JUD. 183, 192 (2010).

26. See *Deportation 101: A Community Resource on Anti-Deportation Education and Organizing*, NATIONAL IMMIGRATION PROJECT (May, 2010), available at http://www.nationalimmigrationproject.org/Deportation101_LowRes_January_2011.pdf. The Department of Homeland Security reports that ICE detained over 363,000 noncitizens in 2010 and approximately 387,000 were removed in the same year. *Annual Report*, UNITED STATES DEP’T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf> (last visited Sept. 9, 2013).

27. JANE PERRY CLARK, *DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE 171* (Faculty of Political Science of Columbia University eds., 1931) (1969).

28. See Brian C. Harms, *Redefining “Crimes of Moral Turpitude”: A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 259 (2001).

29. *Id.* at 259–60.

30. *Gibson v. Ferguson*, 562 S.W.2d 188, 189 (Tenn. 1976) (discussing crimes of moral turpitude in the context of moral turpitude as grounds for disqualification from obtaining a liquor license).

31. See CLARK, *supra* note 27, at 171; *United States ex rel. Manzella v. Zimmerman*, 71 F. Supp. 534, 537 (E.D. Pa. 1947) (explaining that moral turpitude is not clearly defined because it refers to changing moral standards rather than legal standards).

It is quite problematic that in a noncitizen's interaction with the United States as a foreigner, he would face a different immigration penalty for the same offense across different jurisdictions and judges within the United States.³² But this is the result of the current schema where different rules have developed for different arbitrary internal boundaries.³³ The problem with moral turpitude would subside if courts were not placed in the perilous position of independently defining the term moral turpitude on a case-by-case basis. Because courts are better suited to effectively apply legal standards, when courts attempt to apply moral standards without statutory guidance, one cannot expect a precise or uniform definition of the term moral turpitude to evolve.³⁴ Nonetheless, despite frequent Congressional dissatisfaction over the years,³⁵ moral turpitude remains the standard, however dissatisfying the inconsistent results may be.³⁶

See also Mary Holper, *Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NEB. L. REV. 647, 678–79 (2012) (arguing that granting judges broad power over a moral rather than a legal determination “places them in the role of God, passing judgment on the morals of the noncitizens. . .”).

32. *See* CLARK, *supra* note 27.

33. *Id.* Note that these are not sovereign boundaries such as states or nations. *See generally* Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990). In contrast to states or nations, *circuit boundaries are arbitrary* and “Congress has redrawn [them] quite regularly.” *Id.* at 918. The first circuit boundaries were drawn in the Judiciary Act of 1789 and over the next two centuries, Congress continued to expand the circuits in number and occasionally reassign states to different circuits. *Id.* at 919, 922. The arrangement of the present thirteen circuits—eleven regional plus D.C. and the Federal Circuits—was implemented in 1982. *Id.* at 922.

34. *See generally* Annotation, *What Constitutes “Crime Involving Moral Turpitude” Within Meaning of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (a)(9), 1251(a)(4), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. Fed. 480, 491–92; CLARK, *supra* note 27, at 171.

35. *See* 142 CONG. REC. S4058-59 (daily ed. Apr. 24, 1996) (where Senator Bob Dole describes the phrase moral turpitude as “vague” and “lack[ing] the certainty we should desire.”); Derrick Moore, Note: “Crimes Involving Moral Turpitude”: *Why the Void-For-Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813, 823 (2008).

36. *See* Moore, *supra* note 35, at 823; *see also* INA §§ 212, 237.

A. Statutory History of Moral Turpitude

The term moral turpitude first appeared in American jurisprudence to describe slander in an 1809 civil case.³⁷ Throughout the latter half of the 19th century, use of the term moral turpitude grew alongside increased immigration policies that sought to exclude immigrants who had marks on their moral report cards, such as prostitutes, “lewd and debauched” women or repeat criminal offenders.³⁸

The term moral turpitude first appeared in immigration legislation in 1891.³⁹ However, despite the term’s “deep roots in the law,”⁴⁰ from the initial appearance in the 1891 Immigration Act to present day, the term has never been statutorily defined.⁴¹ The Act of March 3, 1891, made inadmissible to the United States, “persons who have been convicted of a felony or other infamous crime involving moral turpitude.”⁴² Additionally, from the onset of its statutory use, it was unclear if the term’s purpose was to synthesize the collection of attributes that previously rendered aliens inadmissible, or instead to create an entirely new criterion for admissibility.⁴³

Not only did moral turpitude lack a statutory definition and a definitive purpose, but Congress introduced the term to immigration law “without even Congressional comment in the accompanying reports,” which made ascertaining a definition through legislative intent difficult.⁴⁴ When the term was introduced to immigration legislation in 1891, lawmakers

37. See CLARK, *supra* note 27, at 167 n.5. The term has no root in English common law, and apparently legal use never traveled back to English courts after usage began in American courts. *Id.* See generally, *Brooker v. Coffin*, 5 Johns. 188 (N.Y. 1809) (Plaintiff alleged that defendant slandered her with accusations that she was a prostitute, a liar, and had borne a bastard child. For the accusations to be found slanderous, they would have to have subjected the target to charges for a crime of moral turpitude if true.).

38. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 93–94 (2010).

39. See Holper, *supra* note 31, at 649; Act of March 3, 1891, ch. 551, 26 Stat. 1084.

40. *Jordan v. De George*, 341 U.S. 223, 227 (1951).

The presence of moral turpitude has been used as a test in a variety of situations, including legislation governing the disbarment of attorneys and the revocation of medical licenses . . . as a criterion in disqualifying and impeaching witnesses, in determining the measure of contribution between joint tort-feasors, and in deciding whether certain language is slanderous.

Id.

41. See *Hamdan v. INS*, 98 F.3d 183, 185 (5th Cir. 1996).

42. Holper, *supra* note 31, at 649 (quoting Act of March 3, 1891, ch. 551, 26 Stat. 1084) (internal quotation marks omitted).

43. See CLARK, *supra* note 27, at 168.

44. Harms, *supra* note 28, at 262 (internal quotation marks omitted).

wrestled with the country's moral dilemma of staying true to the nation's roots as a place of refuge for foreign victims of political oppression, while simultaneously preventing entry of the truly undesirable.⁴⁵ Building upon past immigration policies that focused on excluding the morally unclean, Congressional hearings from 1891 recommended that immigration laws "separate the desirable from the undesirable immigrants, and to permit only those . . . [to] land on our shores who have certain physical and moral qualities."⁴⁶ By inserting the term moral turpitude in the 1891 Act, Congress sought to strike a reasonable balance between those competing goals of excluding the morally undesirable while maintaining some of the nation's humanitarian motives of being a place of refuge.⁴⁷

In 1917, commission of a crime involving moral turpitude became grounds for an alien's deportation from the United States.⁴⁸ The nation's sovereignty was often a sufficiently compelling justification for such expulsions.⁴⁹ Citizen support for such deportation policies was strong, as the general public sentiment at the time was that increased immigrant presence was to blame for rising crime levels.⁵⁰ The Act of February 5, 1917 provided deportation for (1) any alien who committed a felony involving moral turpitude within five years of admission to the United States, or (2) an alien who commits any second crime involving moral turpitude after admission to the United States.⁵¹ Similar to the 1891 Act,

45. See CLARK, *supra* note 27, at 161–62. Bailey discusses the inscription at the pedestal of the Statue of Liberty, which is "the main gateway to America." PAUL BAILEY, *THE STONE KINGDOM* 655 (2001). The inscription reads "Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!" *Id.* (internal quotation marks omitted).

46. KANSTROOM, *supra* note 38, at 115 (quoting Special Comm. on Immigration and Naturalization, 51st Cong., 2d Sess., Rep. (ii) (1891) (internal quotation marks omitted)).

47. See CLARK, *supra* note 27, at 162.

48. See Holper, *supra* note 31, at 650 n.13; Act of Feb. 5, 1917, ch. 29, §§ 3, 19, 39 Stat. 874, 875, 889–90.

49. See *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893). National sovereignty was previously the justification for denial of admission as well. Where there is a sovereign, there is an inherent power, "essential to self-preservation" to deny entry of foreigners. *Id.* at 705 (quoting *Nishimora Elkin v. United States*, 142 U.S. 651, 659 (1892)).

50. See KANSTROOM, *supra* note 38, at 133.

51. See Act of Feb. 5, 1917, ch. 29, §§ 3, 19, 39 Stat. 874, at 889. The act did have some mitigating factors that favored preservation of aliens' rights, such as implementing a pardon as a defense to deportation and allowing sentencing judges to

in the 1917 Act, Congress continued the problematic trend of relying on the term moral turpitude to determine aliens' admissibility and removability, but omitting a statutory definition.⁵²

The term moral turpitude was addressed once again in the Immigration and Nationality Act of 1952.⁵³ The 1952 Act modified the moral turpitude provisions of the prior Acts, removing references to the specific crimes that involve moral turpitude, leading to the inference that moral turpitude was to be used as a new criteria instead of a synthesis of all offenses that were previously grounds for denial of entry or removal.⁵⁴ Additionally, the act broadened the power to exclude; aliens who had committed "acts which constitute the essential elements" of crimes of moral turpitude became inadmissible.⁵⁵

With the 1952 Act, Congress sought to make exclusion "less amenable to a flexible application" and to more clearly distinguish desirable from undesirable immigrants.⁵⁶ Immigration officials themselves objected to the 1952 Act because of continued problems with the term moral turpitude.⁵⁷ President Truman complained that the new law "would result in empowering minor immigration and consular officials to act as prosecutor, judge, and jury in determining" the scope of moral turpitude.⁵⁸ Moral turpitude was too broad a term, and without some statutory explanation, the applicability continued to depend on subjective individual beliefs.⁵⁹ Following the 1952 Act, moral turpitude became the single highest cause of visa refusals when compared to the other grounds for exclusion.⁶⁰

Forty-four years after the 1952 Act, Congress enacted the most recent pieces of major immigration legislation: the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant

issue a binding recommendation against deportation. See KANSTROOM, *supra* note 38, at 133–34. Compare the Act of 1917, with the present day INA §§ 212, 237.

52. See Holper, *supra* note 31, at 650–51. See also *Jordan v. De George*, 341 U.S. 223, 233–34 (1951) (Jackson, J., dissenting) (noting Representative Sabath's remarks that the term moral turpitude is deficient due to its lack of a clear definition).

53. See Moore, *supra* note 34 at 822. This version of the Act wasn't passed as smoothly as previous versions. President Truman vetoed it, but the veto was overcome by a supermajority of the Senate. *Id.*

54. See *id.*; *supra* note 43, and accompanying discussion.

55. *Id.* Previously, a conviction was necessary. See The Act of March 3rd, 1891, ch. 551, § 1, 29 Stat. 1084 (1891).

56. Harms, *supra* note 28, at 264.

57. See Holper, *supra* note 31, at 651.

58. Moore, *supra* note 35, at 822.

59. Holper, *supra* note 31, at 651.

60. See Harms, *supra* note 28, at 263 (citing STAFF OF H. COMM. ON THE JUDICIARY, 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 102, 102 (Comm. Print. 1988).

Responsibility Act, both of which left the previous 1952 treatment of crimes involving moral turpitude largely untouched.⁶¹ The INA provides the current statutory law, which renders inadmissible any aliens convicted of a crime involving moral turpitude or who admit to acts constituting the elements of a crime of moral turpitude.⁶² For aliens present in the United States, a single felony involving moral turpitude within five years of admission, or any two crimes involving moral turpitude from different courses of conduct, are grounds for removal.⁶³ Congress still declines to statutorily define the term moral turpitude.⁶⁴ As such, despite widespread concern surrounding the term's meaning, it is left to judicial interpretation.⁶⁵

B. History of Moral Turpitude Decisional Law

Because of the lack of a statutory definition, independent courts and judges have provided the only definition of moral turpitude, resulting in a hodgepodge of piecemeal case law offering little guidance and frequent inconsistency.⁶⁶ The courts' common definition of moral turpitude is "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man."⁶⁷ But the mere fact that conduct is forbidden by criminal law, or is felonious, or is *malum in se*,⁶⁸ without more, is insufficient for a finding of moral turpitude.⁶⁹

61. See Holper, *supra* note 31, at 652–53.

62. See INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1994).

63. See INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (1999).

64. See Harms, *supra* note 28, at 259.

65. See Harms, *supra* note 28, at 264. Harms argues that reliance solely on judicial interpretation is contrary to the stated legislative purpose behind the Acts of 1891, 1952 and 1996, where Congress sought to make exclusion 'less amenable to a flexible application' and to more clearly distinguish desirable from undesirable immigrants. *Id.*

66. See Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (a)(9), 1251(a)(4), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. Fed. 480; CLARK, *supra* note 27, at 171.

67. See Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act 8 U.S.C.S. 1882(a)(9), 1251(a)(4) (1917), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. Fed. 480.

68. *Malum in se* traditionally refers to crimes that derive their wrongfulness from God or an utmost authority superior to all manmade authority. Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1570 (1997). *Malum prohibitum* refers to crimes that derive their wrongfulness by the manmade authorities such as the criminal

Examples of inter-jurisdictional case law inconsistency illustrate the problems caused by moral turpitude's lacking definition.⁷⁰ The First Circuit considered a conviction for stealing \$15 to involve moral turpitude, rendering an alien deportable.⁷¹ But that same year a federal district court in New York held that a manslaughter conviction, which could include intentional killing, did not involve moral turpitude.⁷² The distinguishing factor between these two offenses was that misdemeanor petty theft was intrinsically and morally wrong,⁷³ whereas manslaughter lacks evil intent and possibly commission of a willful act.⁷⁴ In a later case, Justice Jackson wondered what result other than inconsistency one should expect; he cleverly opined that the term moral turpitude itself is redundant since the dictionary definition of turpitude is "moral wickedness or depravity," therefore the term moral turpitude essentially means "morally immoral."⁷⁵

Over the years, more inconsistency arose in the "attempt[] to [pluck] out a line of definition [where] the dots in the line often trace a zig-zag and devious course" due to different treatment for identical or highly similar crimes with respect to moral turpitude across jurisdictions.⁷⁶ In Texas, two adults who were married to other people admitted to nearly a dozen sexual encounters with one another, but the district could found

code. *Id.* See also Richard L. Gray, *Eliminating the (Absurd) Distinction Between Malum in Se and Malum Prohibitum Crimes*, 73 WASH. U. L.Q. 1369, 1377 (1995) (suggesting that *malum in se* is synonymous with moral turpitude, and that no difference in function or definition exists in contemporaneous usage). *But see* Castle v. INS, 541 F.2d 1064, 1066 (4th Cir. 1976) (for usage of the compound phrase "moral turpitude per se").

69. See Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act, 8 U.S.C.S. 1882(a)(9), 1251(a)(4) (1917)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. Fed. 480; see also Moore, *supra* note 35, at 818.

70. See CLARK, *supra* note 27, at 170.

71. See Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929).

72. See *Mongiovi v. Karnuth*, 30 F.2d 825 (W.D.N.Y. 1929); CLARK, *supra* note 27, at 167 n.1. The conviction for second degree manslaughter in this case "expressly includes an act resulting in death without design to injure or effect death" as well as heat of passion deaths; therefore an alien with intent to kill or injure could also be found guilty of this second-degree manslaughter, but nonetheless avoid the moral turpitude label. *Mongiovi*, 30 F.2d at 826.

73. See CLARK, *supra* note 27, at 165.

74. See *id.* at 167 n.1. But which alien would the average citizen like to see removed: a petty thief or an intentional killer?

75. *Jordan v. De George*, 341 U.S. 223, 234 (1951).

76. See CLARK, *supra* note 27, at 164–66.

that their conduct did not involve moral turpitude.⁷⁷ However, in the same decade, an English woman was deported for committing a crime involving moral turpitude, when 14 years after her husband deserted her, she immigrated to Ohio and lived with an American man for some time but never officially divorced her husband.⁷⁸ In another inconsistency, a district court in Pennsylvania held that aggravated assault and battery was not a crime involving moral turpitude, but in New York State it was.⁷⁹ Similarly, whether assault with a deadly weapon is a crime involving moral turpitude depends on the jurisdiction.⁸⁰ This comment focuses on the inconsistency between the Ninth⁸¹ and Second⁸² Circuits' finding that misuse of a Social Security number for an otherwise legal purpose does not involve moral turpitude, and the Fifth,⁸³ Sixth,⁸⁴ Eighth,⁸⁵ Tenth,⁸⁶ and Eleventh⁸⁷ Circuits' decisions, which hold that such conduct does involve moral turpitude.

C. Modern Approaches to Determining Presence of Moral Turpitude

I. Categorical Approach

Although the results often differ, in the last 100 years, immigration officials have relied on some form of the categorical approach to determine whether a crime involves moral turpitude.⁸⁸ The categorical approach considers the elements of the alien's conviction⁸⁹ to see if all instances

77. See *Ex parte Rocha*, 30 F.2d 823, 824 (S.D. Tex. 1929); CLARK, *supra* note 27, at 165–66.

78. See CLARK, *supra* note 27, at 192–93.

79. See *id.* at 167.

80. See *id.* at 169.

81. See *Beltran-Tirado v. INS*, 213 F.3d 1179, 1182 (9th Cir. 2000).

82. See *Ahmed v. Holder*, 324 F. App'x. 82, 84 (2d Cir. 2009).

83. See *Hyder v. Keisler*, 506 F.3d 388, 391–92 (5th Cir. 2007).

84. See *Serrato-Soto v. Holder*, 570 F.3d 686, 691 (6th Cir. 2009).

85. See *Sohaib Bin Lateef v. Dep't of Homeland Sec.*, 592 F.3d 926 (8th Cir. 2010).

86. See *Rodriguez-Heredia v. Holder*, 639 F.3d 1264 (10th Cir. 2011).

87. See *Moreno-Silva v. U.S. AG*, 481 F. App'x. 611 (11th Cir. 2012) (unpublished).

88. Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 314 (2011); United States *ex rel. Mylius v. Uhl*, 210 F. 860, 862 (2d Cir. 1914).

89. Presumably, when guilty pleas are accepted in exchange for dismissal of other counts with a *Harvey waiver*, the dismissed counts' elements can be considered in the

of that particular criminal conduct are crimes involving moral turpitude, rather than looking at the specific facts of conviction⁹⁰ or being swayed by a prosecutor’s gratuitous verbiage.⁹¹ The goal of the categorical approach is to effectuate a federal standard to ensure that state law does not take precedence in immigration proceedings, and to maintain an equal treatment of comparable criminal acts.⁹²

Traditionally, the categorical approach uses a two-step analysis to determine if the elements of an offense inhere in moral turpitude.⁹³ The first step is a pure categorical approach, where only the elements of the crime of conviction control.⁹⁴ If the convicting statute involves elements in which moral turpitude necessarily inheres, then the offense involves moral turpitude.⁹⁵ If not, the analysis proceeds to step two.

If the first step does not resolve whether moral turpitude inheres in the elements of the statute, there are two tests to apply for the second step.⁹⁶ The first test, the least culpable conduct test, looks at whether moral turpitude inheres in the lowest level of conduct that would satisfy the

immigration judge’s assessment if the *Harvey waiver’s* effect were to transfer from criminal sentencing to immigration considerations. *See* *People v. Harvey*, 25 Cal. 3d 754, 758 (1979) (holding that absent defendant’s waiver, it is improper and unfair for facts underlying counts dismissed pursuant to a plea agreement to be considered for enhancing or aggravating defendant’s sentence). If not permissible in the categorical approach, consideration of the dismissed counts under a *Harvey waiver* could be appropriate in the modified categorical approach analysis. *See* *Matter of Sweetser*, 22 I. & N. Dec. 709, 714 (B.I.A. 1999).

90. *See Mylius*, 210 F. at 863; *see also* *Taylor v. United States*, 495 U.S. 575, 590–93 (1990).

91. For a description of such concerns, *see* *United States v. Carollo*, 30 F. Supp. 3, 7 (W.D. Mo. 1939).

Whether a particular crime involves moral turpitude depends on its description as set out in the statute defining it and upon the material essentials of the indictment charging it. It certainly does not depend upon unnecessary adjectives, a zealous and over careful prosecutor may have added in the indictment to the essentials required by law nor upon the eloquent, perhaps even lurid, description of the offense by the prosecutor to court or jury.

Id.

92. *Dadhania*, *supra* note 88, at 325 (citing *Matter of R—*, 6 I. & N. Dec. 444, 448 n.2 (B.I.A. 1954)).

93. *See* *Dadhania*, *supra* note 88, at 324 (as developed in *Taylor*, 495 U.S. at 602).

94. *Dadhania*, *supra* note 88, at 324.

95. *See* *Matter of Torres-Varela*, 23 I. & N. Dec. 78, 84 (B.I.A. 2001).

96. *See* *Dadhania*, *supra* note 86, at 326; *but see* *Dadhania*, at 326, n.66 (citing *James v. United States*, 550 U.S. 192, 208 (2007)) (using a third test called the ordinary common sense approach, the court looks to “the conduct encompassed by the elements of the offense, in the ordinary case,” but not the possibility that the least culpable level of conduct covered by the statute may not involve moral turpitude.). Ironically, despite its appealing name, the ordinary common sense approach is the least frequently used test. *See* *Dadhania*, *supra* note 88, at 326 n.66.

statute's elements.⁹⁷ Every level of conduct to which the statute could apply must involve moral turpitude, otherwise no conviction under that particular statute will be held to involve moral turpitude.⁹⁸ Therefore, if the minimum level of conduct possible that could amount to a conviction does not involve moral turpitude, then the statute fails the test and the noncitizen is found to have not committed a crime involving moral turpitude.⁹⁹ Conversely, if the minimum level of conduct does involve moral turpitude, then that conviction, and all other convictions under that statute, will necessarily involve moral turpitude as well.¹⁰⁰

The second test, called the realistic probability test, considers whether there is a realistic probability that a prosecutor would apply the statute "to conduct that falls outside the generic definition of the crime," in which case, the particular offense would not involve moral turpitude.¹⁰¹ If, however, the statute is ambiguous in that crimes both involving and not involving moral turpitude could be prosecuted under the statute, then

97. See Dadhania, *supra* note 88, at 326. This test is used by the Second, Third, Fifth, and Eleventh Circuits. *Id.*

98. See *Mendez v. Mukasey*, 547 F.3d 345, 348 (2d Cir. 2008) (referring to the test as the minimum conduct approach).

99. See Dadhania, *supra* note 88, at 327, 335–36 n.108 (citing *Sullivan v. State*, 986 S.W.2d 708 (Tex. Crim. App. 1999)). In *Sullivan*, a noncitizen defendant was convicted for touching the chest of a ten-year-old boy under a statute that covered much less intrusive contact upon a minor than sexual penetration. *Sullivan*, 986 S.W.2d at 710. Under the statute, it would have also been possible for a twenty-year-old woman to be convicted for dancing suggestively with a seventeen-year-old boy whom she reasonably believed to be older. See Dadhania, *supra* note 88, at 335 n.108. The hypothetical woman's behavior represents the minimum level of conduct punishable under the statute. *Id.* This minimum level of conduct did not strike the court as inhering in moral turpitude, therefore, all levels of conduct proscribed by the statute could not involve moral turpitude. *Id.* The original defendant's touching the boy's chest would thereby fail the least culpable conduct test, meaning, and therefore, his conviction under this statute could not be a crime involving moral turpitude. *Id.*

100. See Dadhania, *supra* note 88, at 327.

101. *Id.* at 327–28 n.74. (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The Supreme Court in *Duenas-Alvarez* ruled that a defendant can prove the realistic probability by pointing to a case, including his own, where a prosecutor applied the statute to conduct that does not constitute a crime involving moral turpitude. *Duenas-Alvarez*, 549 U.S. at 187. In *Duenas-Alvarez*, the defendant was convicted of aiding and abetting a vehicle theft, but could not make a showing that the unintended "natural and probable consequences" that supported his aiding and abetting conviction created a realistic probability that a prosecutor could apply the statute to conduct outside of the generic theft offense. *Id.* at 193. His conduct was therefore determined to involve moral turpitude. *Id.*

the test is not dispositive as to a lack of moral turpitude, and the analysis must continue to the next step.¹⁰²

2. Modified Categorical Approach

In the modified categorical approach, the court looks to more than the plain language of the statute. The analysis expands on the categorical approach by additionally considering a predetermined, limited set of documents in the record of conviction, such as the indictment, judgment of conviction, jury instruction, plea, or plea transcript.¹⁰³ The adjudicator may not look to facts outside of the record of conviction.¹⁰⁴ Specifically, in order to maintain consistency across cases, the adjudicator may not consider facts presented to the trier of fact.¹⁰⁵ For example, in *Matter of Sweetser*, the immigration court looked only at the record of the noncitizen's conviction, not the facts underlying the offense.¹⁰⁶ Ultimately, in this final test, the government bears the burden to show the limited, permissible facts constitute a crime involving moral turpitude.¹⁰⁷

3. Silva-Trevino Doctrine

In 2008, much to the chagrin of legal scholars and practitioners, and after over a century of limited categorical approaches to determining whether crimes involve moral turpitude,¹⁰⁸ the Attorney General announced the *Silva-Trevino* doctrine, which introduced a third step to the moral

102. See Dadhania, *supra* note 88, at 337. See also *Wala v. Mukasey*, 511 F.3d 102, 107 (2d Cir. 2007) (explaining that a statute is divisible when it encompasses conduct that both may or may not involve moral turpitude).

103. See *Tijani v. Holder*, 628 F.3d 1071, 1075 (9th Cir. 2010); see also *Shepard v. United States*, 544 U.S. 13, 26 (2005) (categorizing the plea document as including charging documents as well as the record of the plea's factual basis).

104. See Dadhania, *supra* note 88, at 330; see also *Matter of Sweetser*, 22 I. & N. Dec. 709, 714 (B.I.A. 1999).

105. See *Sweetser*, 22 I. & N. Dec. at 714.

106. See *id.* The BIA in *Matter of Sweetser* used the same removal analysis as that of moral turpitude to determine if an alien's conviction was an aggravated felony for purposes of removal litigation. *Id.* at 712. The modified categorical approach is used in removal proceedings for various underlying reasons. See *Conteh v. Gonzales*, 461 F.3d 45, 54 (1st Cir. 2006) (using the modified categorical approach in removal proceedings based on an aggravated felony conviction); *Wala*, 511 F.3d at 109 (using the modified categorical approach in removal proceedings for convictions based on a conviction for a crime involving moral turpitude). This approach furthers the goal of uniformity across all courts for treatment of similar offenses outlined in *Matter of R—*, 6 I. & N. Dec. 444, 448 n.2 (B.I.A. 1954).

107. See *Conteh*, 461 F.3d at 56.

108. See Dadhania, *supra* note 88, at 314.

turpitude analysis.¹⁰⁹ After *Silva-Trevino*, the immigration judge may now consider “any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question.”¹¹⁰ With *Silva-Trevino*, the previous limitations that prevented the immigration court from viewing the record and evidence supporting the conviction are essentially discarded, which significantly increases the risk of inconsistent application of the moral turpitude law.¹¹¹ While the federal courts of appeals remain split on full use of the *Silva-Trevino* three-prong categorical approach,¹¹² some form of the categorical approach remains the standard in all United States courts in moral turpitude determinations.¹¹³

IV. THE EXISTING CIRCUIT SPLIT¹¹⁴

A. Ninth Circuit: *Beltran-Tirado v. INS*

“The borderline of ‘moral turpitude’ is not an easy one to locate.”¹¹⁵ The initial case of this circuit split, *Beltran-Tirado*, , defines that line.¹¹⁶ Ms. Beltran-Tirado moved to the United States at the age of eighteen, where she resided for over thirty years.¹¹⁷ In her early twenties, Ms. Beltran-Tirado found a Social Security card on a bus and used the identity of the card owner for purposes unavailable to her as a noncitizen, but were otherwise legal.¹¹⁸ For example, she obtained employment, got married, applied for DMV licenses, and accrued and satisfactorily paid

109. See *id.* at 335–36; Matter of *Silva-Trevino*, 24 I. & N. Dec. 687, 704 (A.G. 2008).

110. *Silva-Trevino*, 24 I. & N. Dec. at 704. The Attorney General argued that since moral turpitude is not an element of any crime, fact considerations are necessary to determine if conduct involves moral turpitude. *Id.* at 700.

111. See Dadhania, *supra* note 88, at 324 (explaining that pure categorical approaches ensure uniform application of federal law).

112. See *Mata-Guerrero*, 627 F.3d 256, 260 (7th Cir. 2008) (following the Seventh Circuit case, *Silva-Trevino*, in its entirety). *But see* *Olivas-Motta v. Holder*, 716 F.3d 1199, 1207 (9th Cir. 2013) (rejecting *Silva-Trevino*).

113. See Dadhania, *supra* note 88, at 314.

114. The Author discovered this split in Circuit Review Staff, *Current Circuit Split: Civil Matters: Immigration*, 4 SETON HALL CIR. REV. 401, 401 (2008).

115. *Quilodran-Brau v. Holland*, 232 F.2d 183, 184 (3d Cir. 1956).

116. See *Beltran-Tirado v. INS*, 213 F.3d 1179, 1183 (9th Cir. 2000).

117. See *id.* at 1182.

118. See *id.*

consumer debt in the form of a credit card and a home loan.¹¹⁹ Eventually, the citizen to whom the Social Security number belonged noticed irregularities with the Internal Revenue Service caused by income Ms. Beltran-Tirado had earned while working under the true owner's Social Security number.¹²⁰ The true owner contacted Ms. Beltran-Tirado and demanded that she stop using the Social Security number.¹²¹

After three years of continued use of the Social Security number, Ms. Beltran-Tirado was arrested and ultimately convicted for false attestation on an employment verification form and falsely representing a Social Security number.¹²² Although such activity is clearly not law abiding, the Ninth Circuit emphasized that Ms. Beltran-Tirado “did not attempt to create any liability for [the Social Security card's true owner] . . . [Ms. Beltran-Tirado] used the card to establish her own credit.”¹²³ After Ms. Beltran-Tirado was sentenced, the INS sought removal.¹²⁴

Ms. Beltran-Tirado attempted to prevent removal by applying for registry status.¹²⁵ The goal of registry statutes is to “regularize the status of long-resident aliens illegally in the country.”¹²⁶ A long time resident, Ms. Beltran-Tirado was the type of candidate the legislature sought to target as a beneficiary from the registry statute,¹²⁷ unfortunately, her registry application was denied for lack of good moral character because the immigration judge found her convictions relating to improper use of the Social Security card were crimes involving moral turpitude.¹²⁸ The

119. *See id.*

120. *See id.*

121. *See id.*

122. *See id.*; 18 U.S.C. § 1546(b)(3) (criminalizing false attestation on an employment verification form); 42 U.S.C. § 408(a)(7)(B) (criminalizing false representation of a Social Security number).

123. *Beltran-Tirado*, 213 F.3d at 1182.

124. *See id.* Ms. Beltran-Tirado was sentenced to ninety days imprisonment, ninety days in a halfway house, and five years probation. *Id. But see* § 408(a), which provides a maximum penalty of five years imprisonment; §1546(b), which provides a maximum penalty of five years imprisonment.

125. *See Beltran-Tirado*, 213 F.3d at 1182; 8 U.S.C. § 1259 (providing that an alien may obtain a record of lawful admission if the alien is not inadmissible under INA § 212(a) and the alien shows “(a) entrance the United States prior to January 1, 1972; (b) has had his residence in the United States continuously since such entry; (c) is a person of good moral character; and (d) is not ineligible to citizenship and is not deportable under [terrorism provisions of the INA]”).

126. *Mrvica v. Esperdy*, 376 U.S. 560, 569 (1964).

127. “[8 U.S.C. § 1259] appears to have been designed to aid a person who has formed a substantial tie to the United States.” Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. REV. 637, 658 (2008).

128. *See Beltran-Tirado*, 213 F.3d at 1183; 8 U.S.C. 1259(c).

Board of Immigration Appeals [hereafter BIA]¹²⁹ affirmed the ruling.¹³⁰ On appeal, the Ninth Circuit addressed the issue: do the offenses of making a false attestation on an employment verification form and misuse of a Social Security number involve moral turpitude for purposes of section 212 of the INA?¹³¹

Due to a lack of decisional law applying a categorical approach, the Ninth Circuit looked to the history of Congressional amendments behind the federal criminal statute for misuse of a Social Security number.¹³² In 1990, Congress had amended the statute to include a subsection narrowly exempting permanent resident aliens from prosecution for past use of false Social Security numbers when used to facilitate otherwise lawful conduct.¹³³ Although this section did not apply directly to Ms. Beltran-Tirado because she was not a permanent resident alien,¹³⁴ the Ninth Circuit reasoned that this subsection's "rationale illuminates the view of Congress concerning the lack of moral turpitude involved in Beltran[-Tirado]'s actions."¹³⁵ This amendment expresses Congress's intent to not identify misuse of a Social Security number for an otherwise legal purpose should not qualify as a crime involving moral turpitude.¹³⁶

The amendment's Congressional Conference Committee report shows that the exemption was intended to "apply only to those individuals who use a false [S]ocial [S]ecurity number to engage in otherwise lawful conduct. For example, an alien who used a false [S]ocial [S]ecurity number

129. "BIA is the highest administrative body for interpreting and applying immigration laws." *Board of Immigration Appeals*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/eoir/biainfo.htm>. The BIA has jurisdiction to hear immigration and homeland security appeals wherein the United States is a party and the opposing party is an alien, citizen or business. *Id.* BIA rulings may be overruled by federal courts or the attorney general. *Id.*

130. *See Beltran-Tirado*, 213 F.3d at 1179.

131. *See id.* at 1183–84.

132. *See id.*

133. *See id.*; 42 U.S.C. § 408(e) (2006) (codified as amended in 42 U.S.C. § 408(d) (2004)).

134. Ms. Beltran-Tirado sought lawful permanent residence through the registry process. *Beltran-Tirado*, 213 F.3d at 1181. However, the conviction for a crime involving moral turpitude precluded registration. *Id.* at 1182–83. Had the conviction occurred post registry, Ms. Beltran-Tirado most likely would not have been deportable because the 1990 amendment to the statute precluded convictions by lawful permanent residents from being found to involve moral turpitude. *See* 42 U.S.C. § 408(e).

135. *Beltran-Tirado*, 213 F.3d at 1183.

136. *See id.*

in order to obtain employment.”¹³⁷ The amended subsection exempts qualifying aliens from a finding that their misuse of a Social Security number for an otherwise legal purpose involved moral turpitude.¹³⁸

Despite failure to qualify for the exemption from prosecution for those offenses, the court reasoned that the legislature was clear in establishing that Ms. Beltran-Tirado’s misuse of a Social Security number for an otherwise legal purpose as well as her false attestation on an employment verification form are not crimes involving moral turpitude.¹³⁹ The timing of her registry, whether it preceded or postdated the misuse of a Social Security number, is not relevant in the inquiry of morality of the conduct.¹⁴⁰ The morality of conduct is the same regardless of when it occurs, so once Congress legislated that the conduct does not involve moral turpitude, the legislation precluded any occurrence of that conduct from a finding that it involved moral turpitude.¹⁴¹ Therefore, Ms. Beltran-Tirado’s misuse of a Social Security number as well as false attestation on an employment verification form prior to registration were therefore not crimes involving moral turpitude because Congress declared them as such in the 1990 amendment to the misuse of a Social Security number statute.¹⁴²

B. Fifth Circuit: *Hyder v. Keisler*

Seven years after *Beltran-Tirado*, in *Hyder v. Keisler*, the Fifth Circuit directly opposed the Ninth Circuit’s *Beltran-Tirado* holding.¹⁴³ *Hyder* disregarded any consideration of some otherwise legal purpose underlying the misuse of a Social Security number and elected not to follow the reasoning that the morality of conduct does not change based on when it occurs.¹⁴⁴ *Hyder* essentially held that due to the dishonest nature of the conduct, fraud was necessarily present in all misuse of a Social Security number, and that the timing of the immoral act is significant.¹⁴⁵

137. *Id.* at 1183. “. . .with exceptions not relevant here.” *Id.* at 1184. Additionally, the statute’s 1990 amendment covers Ms. Beltran-Tirado’s other offense—false attestation on an employment verification form. *Id.* at 1183–84. See H.R. Conf. Rep. No. 101-964, at 948 (1990), reprinted in 1990 U.S.C.C.A.N. 2374, 2653 [hereinafter Conference Report].

138. See Conference Report at 948; *Beltran-Tirado*, 213 F.3d at 1183. Aliens qualify based on attainment of permanent residence status under either an amnesty or registry statute. See *Beltran-Tirado*, 213 F.3d at 1183.

139. See *id.* at 1183–84.

140. See *id.*

141. See *id.*

142. See *id.*

143. See *Hyder v. Keisler*, 506 F.3d 388, 388 (5th Cir. 2007); Circuit Review Staff, *supra* note 114, at 401.

144. See *Hyder*, 506 F.3d at 393.

145. See Circuit Review Staff, *supra* note 114, at 401.

Kashif Hyder, a Pakistani citizen, came to the United States on a nonimmigrant visa as a toddler in 1985.¹⁴⁶ When his visa expired, he remained in the country beyond the authorized timeframe without any further known illegal conduct until a family member obtained a Social Security card on his behalf.¹⁴⁷ The Social Security card application deliberately included false information.¹⁴⁸ Mr. Hyder received and later used the Social Security card to obtain a driver's license and state identification card, claiming that he thought the Social Security card was legitimate at the time.¹⁴⁹ Mr. Hyder later entered a guilty plea to misuse of a Social Security number and received one year of probation.¹⁵⁰

Based on the conviction, removal proceedings began against Mr. Hyder.¹⁵¹ Mr. Hyder conceded that he was removable because he remained in the country past the expiration of his visa and he violated his status as a nonimmigrant visa issuee by obtaining paid employment¹⁵² but sought to remain in the country by applying for cancellation of removal by the Attorney General.¹⁵³ The Immigration Judge determined that Mr. Hyder's

146. See *Hyder*, 506 F.3d at 389.

147. See *id.*

148. See *id.* The false information included assertions that Mr. Hyder was a lawful immigrant on a student visa, when in fact he had been illegally present in the country for fourteen years under the expired nonimmigrant visa. *Id.*

149. See *id.* It is peculiar that Mr. Hyder's guilty plea was permitted despite his claim that he lacked knowledge of the card's illegitimacy. Of interest would be the court transcript of the acceptance of the guilty plea and allocution. The opinion reads, "Hyder claims that he was unaware that the social security card was fraudulent when these events occurred." *Id.* However, since Mr. Hyder entered a plea agreement, the issue of knowledge was presumably never litigated. The criminal statute of Mr. Hyder's conviction uses specific mens rea language: "willfully, knowingly, and with the intent to deceive." 42 U.S.C. § 408 (a)(7)(A) (2006). Despite his claims to lack knowledge and intent, Mr. Hyder's guilty plea to an offense with elements of knowledge and intent were nonetheless accepted.

150. See *Hyder*, 506 F.3d at 389; compare 42 U.S.C. § 408(a)(7)(A) with 42 U.S.C. § 408(a)(7)(B). The charge for making a false claim to United States citizenship was dismissed pursuant to Mr. Hyder's plea agreement. See *Hyder*, 506 F.3d at 389; see also 18 U.S.C. § 911 (2006).

151. See *Hyder*, 506 F.3d at 389.

152. See *id.*; 8 U.S.C. § 1229b(b)(1) (2006); *id.* at § 1227(a)(1)(C)(i).

153. See *Hyder*, 506 F.3d at 389. Cancellation of removal for nonpermanent residents requires ten years of immediately preceding continuous presence in the United States, good moral character, no convictions for crimes involving moral turpitude, and establishment that deportation would lead to exceptional hardship to an immediate family member who is a citizen or lawful permanent resident. See 8 U.S.C. § 1229b(b)(1); compare 8 U.S.C. 1259(a), with 8 U.S.C. 1259(b).

conviction for misuse of a Social Security number was a crime involving moral turpitude, which prevented him from satisfying the cancellation statute's 'good moral character' requirement.¹⁵⁴ Upon appeal, the BIA affirmed the ruling, finding that misuse of a Social Security number for an otherwise legal purpose was a crime involving moral turpitude.¹⁵⁵

Upon a second appeal, the Fifth Circuit sought to determine if Mr. Hyder could satisfy the good moral character requirement to allow consideration of his application for cancellation of removal.¹⁵⁶ In order to do so, the court needed to define moral turpitude with respect to misuse of a Social Security number for an otherwise legal purpose according to Fifth Circuit law.¹⁵⁷ Because moral turpitude lacks a statutory definition, the Fifth Circuit looked to intracircuit case law involving forgery,¹⁵⁸ fraud,¹⁵⁹ and dishonesty¹⁶⁰ as crimes involving moral turpitude.¹⁶¹ The Fifth Circuit explained that all cases involving fraud or deception were crimes involving moral turpitude,¹⁶² therefore, when using the categorical approach to analyze the statutory definition of Mr. Hyder's criminal offense, the element of "willful deceit" raised a red flag.¹⁶³ Mr. Hyder's conviction required that the defendant "willfully, knowingly, and with intent to deceive" falsely use a Social Security number.¹⁶⁴ The key words "willful[] . . . decei[t]" were present in Mr. Hyder's conviction, so the court determined that based on precedents involving fraud or dishonesty, Mr. Hyder's offense must also be a crime involving moral turpitude.¹⁶⁵

Because *Hyder* was directly contrary to the Ninth Circuit ruling in *Beltran-Tirado*,¹⁶⁶ the Fifth Circuit analyzed the *Beltran-Tirado* decision.¹⁶⁷

154. See *Hyder*, 506 F.3d at 389; 8 U.S.C. § 1229b(b)(1)(B).

155. See *Hyder*, 506 F.3d at 389. But see *Beltran-Tirado*, 213 F.3d at 1184.

156. See *Hyder*, 506 F.3d at 388–89; 8 U.S.C. § 1229b(b)(1)(B).

157. See *Hyder*, 506 F.3d at 390–91.

158. See *Balogun v. Ashcroft*, 270 F.3d 274, 278–79 (5th Cir. 1982) (holding forgery and fraudulent use of credit cards are crimes involving moral turpitude); *Okabe v. I.N.S.*, 671 F.2d 863, 865 (5th Cir. 1982) (holding attempting to bribe an immigration agent is a crime involving moral turpitude).

159. See *Balogun*, 270 F.3d at 278–79; *Jordan v. De George*, 341 U.S. 223, 229 (1951).

160. See *Fuentes-Cruz v. Gonzales*, 489 F.3d 724, 726 (5th Cir. 2007) (where smuggling aliens into the United States as a coyote was found to involve moral turpitude); *Omagah v. Ashcroft*, 288 F.3d 254, 261–62 (5th Cir. 2002) (where conspiracy to obtain fraudulent immigration documents coupled with false testimony under oath constituted a crime involving moral turpitude).

161. See *Hyder*, 506 F.3d at 391.

162. See *id.*

163. *Id.* See *Dadhania*, *supra* note 88, at 324.

164. *Hyder*, 506 F.3d at 391–92; 42 U.S.C. § 408(a)(7)(A) (2006).

165. *Hyder*, 506 F.3d at 392.

166. See Circuit Review Staff, *supra* note 114, at 401.

167. See *Hyder*, 506 F.3d at 392–93.

The Fifth Circuit argued that *Beltran-Tirado* expanded a narrow exemption beyond its intended scope because the original statutory exemption was only intended to apply to aliens who had already used a registry statute to become lawful permanent residents.¹⁶⁸ The Fifth Circuit also disagreed with the ruling in *Beltran-Tirado*, as to the relationship between timing and morality: “the mere fact that Congress chose to exempt a certain class of aliens from prosecution for certain acts does not necessarily mean that those acts do not involve moral turpitude in other contexts.”¹⁶⁹ Ultimately, based on binding precedents, the Fifth Circuit concluded that Mr. Hyder committed a crime involving moral turpitude by misusing a Social Security number, even if the misuse was to facilitate otherwise lawful conduct.¹⁷⁰

C. Other Relevant Cases Disagreeing With the Ninth Circuit

Following the Federal Circuit split between the Fifth and Ninth Circuits as to whether the misuse of a Social Security number for an otherwise legal purpose is a crime involving moral turpitude, more circuits considered the issue.

In *Lateef v. Dep’t. of Homeland Sec.*,¹⁷¹ the Eighth Circuit declined to follow *Beltran-Tirado*.¹⁷² After over two decades of residence in the United States, Mr. Lateef pled guilty to using an unlawfully obtained Social Security number in order to obtain a state identification card in Missouri.¹⁷³ This was the same statute as was at issue in the conviction in *Hyder*.¹⁷⁴ Like the Fifth Circuit, the Eighth Circuit declined to follow the Ninth Circuit’s reasoning that the morality of conduct does not change over short time-periods.¹⁷⁵ Therefore, Mr. Lateef committed a crime involving

168. *See id.* at 393.

169. *Id.* *See Beltran-Tirado*, 213 F.3d at 1184.

170. *See Hyder*, 506 F.3d at 393.

171. *Lateef v. Dep’t. of Homeland Sec.*, 592 F.3d 926 (8th Cir. 2010).

172. *See id.* at 930.

173. *See id.* at 928; 42 U.S.C. § 408(a)(7)(A). Mr. Lateef’s conviction occurred after 1991, therefore he was not covered by the Congressional exemption that made this offense not a crime of moral turpitude for some permanent residents. *Lateef*, 592 F.3d at 930.

174. *See Hyder*, 506 F.3d at 389.

175. *See Lateef*, 592 F.3d at 930–31; *Beltran-Tirado v. INS*, 213 F.3d 1179, 1184 (9th Cir. 2000). In *Beltran-Tirado*, the court determined that the timing of a noncitizens registry was not relevant in the inquiry of morality of the conduct. *Id.* That is, that which is moral is moral and that which is immoral is immoral, regardless of the date it occurred. *Id.*

moral turpitude, and the Eighth Circuit joined the Fifth Circuit in opposing *Beltran-Tirado*, holding that misuse of a Social Security number for an otherwise lawful purpose is a crime involving moral turpitude.¹⁷⁶

In *Serrato-Soto v. Holder*, the Sixth Circuit also declined to follow the Ninth Circuit and agreed with the Fifth Circuit in *Hyder*.¹⁷⁷ Similar to the defendants in *Hyder* and *Beltran-Tirado*, Mr. Serrato-Soto was present illegally in the United States for eleven years when he was convicted of fraudulent use of a Social Security number in a Mississippi state court.¹⁷⁸ When immigration proceedings began, Mr. Serrato-Soto sought pre-completion voluntary departure, but was ultimately determined to be ineligible because the BIA's definition of moral turpitude included all misuse of a Social Security number, even if for otherwise lawful conduct.¹⁷⁹ On appeal, the Sixth Circuit applied the categorical approach and concluded that because of the fraud label, all convictions under this Mississippi statute would necessarily involve moral turpitude. Therefore, Mr. Serrato-Soto's conduct necessarily involved moral turpitude.¹⁸⁰ The court rejected *Beltran-Tirado* and explicitly followed *Hyder*.¹⁸¹

The Tenth Circuit found that misuse of a Social Security number for the otherwise legal purpose of obtaining employment was a crime involving moral turpitude although it did so without citing *Hyder* or the above similarly decided cases, in *Rodriguez-Heredia v. Holder*.¹⁸² Mr. Rodriguez-Heredia was convicted under a Utah' criminal fraud statute with essential elements of knowing or intentional use of a Social Security number with fraudulent intent to obtain employment.¹⁸³ Mr. Rodriguez-Heredia

176. See *Lateef*, 592 F.3d at 931.

177. See *Serrato-Soto v. Holder*, 570 F.3d 686, 692 (6th Cir. 2009).

178. See *id.* at 687; MISS. CODE ANN. § 97-19-85 (2)(b)-(c) (LexisNexis 2012).

A person is guilty of fraud . . . willfully, knowingly, and with intent to deceive, uses a Social Security account number to establish and maintain business or other records; or with intent to deceive, falsely represents a number to be the Social Security account number assigned to him or another person, when in fact the number is not the Social Security account number assigned to him or such other person.

Id. Compare § 97-19-85 with 42 U.S.C. § 408(a)(7) (statutes that do not describe the conduct as fraud in their text).

179. See *Serrato-Soto*, 570 F.3d at 688; 8 U.S.C. § 1229c(a)(1) (2006) (where an alien is provided the opportunity to voluntarily exit the United States at his own expense prior to the commencement of removal proceedings).

180. See *Serrato-Soto*, 570 F.3d at 690–91.

181. See *id.* at 691–92.

182. See *Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1266 (10th Cir. 2011).

183. See *id.* at 1268; compare UTAH CODE ANN. § 76-6-1102(2)(a) (LexisNexis 2012) (“a person is guilty of identity fraud when that person knowingly or intentionally uses, or attempts to use, the personal identifying information of another person, whether that person is alive or deceased, with fraudulent intent, including to obtain, or attempt to obtain, credit, goods, services, employment, any other thing of value, or medical

unpersuasively argued that the offense did not involve moral turpitude because he obtained little value from the act.¹⁸⁴ Ultimately, the court relied on Supreme Court precedent holding that conspiracy to defraud the United States involved moral turpitude, regardless of the value gained.¹⁸⁵ Because Utah's state statute always requires fraudulent intent, Mr. Rodriguez-Heredia's offense necessarily involved moral turpitude.¹⁸⁶

In *Moreno-Silva v. United States*, a case with a factual scenario very similar to Elvira's, the Eleventh Circuit held that misuse of a Social Security number was a crime involving moral turpitude.¹⁸⁷ Mr. Moreno-Silva was convicted of fraudulent use of a Social Security number and the government instituted removal proceedings against him.¹⁸⁸ Mr. Moreno-Silva sought cancellation of removal based on the exceptional hardship his wife and children would suffer if he was removed to Mexico.¹⁸⁹ Despite the immigration judge's explicit acknowledgement that Mr. Moreno-Silva established exceptional hardship, the Immigration Judge denied his application for cancellation of removal due to his conviction for a crime involving moral turpitude.¹⁹⁰ On appeal, the Eleventh Circuit noted that crimes involving dishonesty generally involve moral turpitude. The court further reasoned that because dishonesty was an essential element of Mr. Moreno-Silva's conviction for fraudulent use of a Social Security number, the BIA interpretation of the statute was

information.”: (i) obtains personal identifying information of another person whether that person is alive or deceased; and (ii) knowingly or intentionally uses . . . that information with fraudulent intent . . . including to obtain . . . employment, [or] any other thing of value), with 42 U.S.C. § 408(a)(7)(B). The difference between the Utah statute and § 408(a)(7) is that the Utah statute expressly declares the described conduct to be fraud, whereas in the federal statute, Congress declined to do so. See § 76-6-1102; §408(a). The Utah statute defines fraud differently than the legal definition the comment's analysis assumes. See § 76-6-1102. The Utah statute only requires obtaining any thing of value, whereas the legal definition the comment assumes requires inducing another to act to their detriment. See § 76-6-1102; BLACK'S LAW DICTIONARY 731 (9th ed. 2009). Since Congress did not characterize § 408(a)(7) as fraud, this comment's analysis uses the legal definition of fraud.

184. See *Rodriguez-Heredia*, 639 F.3d at 1268–69.

185. See *id.* at 1269.

186. See *id.*; *Jordan v. De George*, 341 U.S. 223, 232 (1951).

187. See *Moreno-Silva v. United States Att'y Gen.*, 481 F. App'x. 611, 612 (11th Cir. 2012); Associated Press, *supra* note 2.

188. See *Moreno-Silva*, 481 F. App'x. at 612; 42 U.S.C. § 408(a)(7).

189. See *Moreno-Silva*, 481 F. App'x. at 612; 8 U.S.C. § 1229b(b)(1).

190. See *Moreno-Silva*, 481 F. App'x. at 612.

proper in determining that misuse of a Social Security number involved moral turpitude.¹⁹¹

D. Developing the Critical Distinction: The Second Circuit Agrees With the Ninth Circuit

In *Ahmed v. Holder*, the Second Circuit used the categorical approach to examine the phrase ‘for any purpose . . . with intent to deceive’ within the federal misuse of a Social Security number criminal statute.¹⁹² The Second Circuit was unable to find moral turpitude is necessarily always involved in the conduct the statute the covers.¹⁹³

The court explained the critical distinction between intent to deceive and intent to defraud.¹⁹⁴ The Second Circuit analogized Mr. Ahmed’s conduct to a homeowner who has no functioning alarm, but posts an alarm system warning sign as a means of deceiving burglars.¹⁹⁵ Despite his act of deception, the homeowner defrauds no one.¹⁹⁶ The Second Circuit found Mr. Ahmed’s conduct “distinguishable from the many cases holding crimes of fraud to be crimes involving moral turpitude” because, like the deceptive homeowner, one who misuses a Social Security number with intent to deceive to secure employment is not necessarily acting with intent to defraud.¹⁹⁷ Because misuse of a Social Security number for an otherwise legitimate purpose falls under the less common occurrence of the offense, which does not necessarily involve fraud, the Second Circuit was not persuaded that the conviction for misuse of a Social Security number for an otherwise lawful purpose must involve moral turpitude.¹⁹⁸

191. See *id.* at 613. The Eleventh Circuit solely relied on *Itani v. Ashcroft* to determine that dishonesty is necessarily a crime involving moral turpitude. *Itani v. Ashcroft*, 298 F.3d 1213, 1215–16 (11th Cir. 2002). In *Itani*, the defendant was convicted of misprision of his felony scheme to export stolen rental cars. *Id.* at 1214. This conduct was ruled a crime involving moral turpitude. *Id.* at 1216. It appears that the Eleventh Circuit, like the Fifth, did not distinguish between fraud and dishonesty, but rather applied the clearly fraudulent conduct involving moral turpitude in *Itani* to the dishonesty without fraud in *Moreno-Silva* to determine that *Moreno-Silva*’s dishonesty was a crime involving moral turpitude. See *Moreno-Silva*, 481 F. App’x. At 613.

192. See *Ahmed v. Holder*, 324 F. App’x. 82, 84 (2nd Cir. 2009); 42 U.S.C. 408(a)(7).

193. See *Ahmed*, 324 F. App’x. at 84.

194. See *id.*

195. See *id.*

196. See *id.*

197. *Id.*

198. See *id.* at 83. *Ahmed* was remanded for the BIA to determine if moral turpitude “should be construed to encompass any crime that includes intentional deception as an element.” *Id.* at 84. Upon further review of the case post remand, the issue of moral turpitude was not addressed and petitioner’s appeal was denied on other grounds. See *Ahmed v. Holder*, 435 Fed. Appx. 13, 15 (2d Cir. 2011).

V. WHY THIS SPLIT OUGHT TO BE RESOLVED: THE UNITED STATES IS A SINGLE NATION

A longstanding circuit split that involves such a critical issue as one's right to remain in the country poses a significant problem.¹⁹⁹ Immigration is a delicate international political issue with a direct impact on critical foreign relationships.²⁰⁰ The United States presents to the outside world one national border rather than thirteen circuit borders, and as such it is impractical to have different rules for different circuits on matters involving the United States' relationships with foreigners.²⁰¹ After all, when an alien is removed from the United States, the alien is removed from and

199. See CLARK, *supra* note 27, at 171.

200. Demore v. Kim, 538 U.S. 510, 522 (2003); Matthew v. Diaz, 426 U.S. 67, 81 (1976). See also For decades, Mexico has been notorious for manufacturing and smuggling dangerous controlled substances into the United States. David Maung, *Mexican Drug Trafficking (Mexico's Drug War)*, N.Y. TIMES, (Oct 9, 2012), http://topics.nytimes.com/top/news/international/countriesandterritories/mexico/drug_trafficking/index.html. Alongside the dangers of these controlled substances come oppressive cartels, severe corruption and shocking violence. Tracy Wilkinson, Richard Fausset & Brian Bennett, *U.S.-Mexico Drug War Partnership Under Calderon Broke New Ground*, L.A. TIMES, (Nov. 28, 2012), <http://articles.latimes.com/2012/nov/28/world/la-fg-us-mexico-drug-war-20121129>.

201. See *id.*; see also Ernst Freund *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921). 200 years ago, John Jay wrote in *The Federalist Papers* “[W]e have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection.” *The Federalist No. 2*, at 38–39 (John Jay) (ABA ed. 202). However, when circuit splits on significant issues of federal law remain unresolved, John Jay's vision falls short of fulfillment. See Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1138 (2012). The particular importance of the United States' relationship with Mexico is illustrated by the traditional meeting between all incoming United States presidents and the Mexican president. Brian Montpoli, *Obama Meets with Mexican President*, CBS NEWS, (Jan. 12, 2009), http://www.cbsnews.com/8301-503544_162-4717070-503544.html. To put the relationship in economic terms, Mexico is the United States' third largest trading partner by volume, with over \$30 billion USD per month in combined imports and exports, trailing only Canada and China. *Top Ten Countries with which the U.S. Trades*, UNITED STATES CENSUS BUREAU (July 18, 2013), <http://www.census.gov/foreign-trade/top/dst/2010/07/balance.html>. Additionally, the three North American nations are parties to the North American Free Trade Agreement. Ranko Shiraki Oliver, *In the Twelve Years of NAFTA, the Treaty Gave to Me . . . What, Exactly?: An Assessment of Economic, Social and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States*, 10 HARV. LATINO L. REV. 53, 54 (2007) (discussing the importance and pitfalls of NAFTA).

prohibited from reentering every state, not just the circuit that affirmed a removal order.²⁰²

Those who do not call for a resolution of such circuit splits argue regional differences that facilitate fruitful social and political experimentation are inherent in and integral to an effective federalist system.²⁰³ However, these arguments are problematic when applied to the federal circuit system. The concept of independent federalist regions that serve as social and political laboratories was intended to apply to individual states, not multiple states grouped into appellate circuits.²⁰⁴ Furthermore, when differences in interpretation of the law arise, the nation is not served best by some greatly delayed, albeit more correct answer, but rather by a definitive answer.²⁰⁵ The Supreme Court itself has agreed with this rationale and

202. See 8 U.S.C. § 1326(a)(1)–(2) (2013) (any alien under an order for denial of admission or removal who attempts to enter or is found *anywhere* in the United States is subject to a fine or imprisonment).

203. See Jennifer K. Luse et al., *Such Inferior Courts. . . : Compliance by Circuits with Jurisprudential Regimes*, 37 AM. POL. RES. 75, 77–78 (2009). These defenders of the split also point to the lack of a Constitutional requirement or evidence of framers’ intent for uniform national interpretation of federal law. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1573–74 (2008); see Logan, *supra* note 201, at 116–63. The defenders argue that with regional political experimentation, unique circuit decisions are able to percolate—that is, to develop on their own in independent political laboratories, allowing the Supreme Court to observe the results of a course of action and arrive at a more informed ultimate decision. *Id.* Along the same vein, the political efficiency argument is that if citizens are displeased with their region’s preferences, they may “vote with their feet” by relocating to a region with ideals more aligned with their own. *Id.* at 1163; see also DANIEL A. FARBER, WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY 830* (4th ed. 2009).

204. See Logan, *supra* note 201, at 1141. Circuits lack the “sovereign dignity” that the several states enjoy, and in fact as members of a diverse circuit, state interests are actually vulnerable to being undermined by circuit rulings. *Id.* at 1165–66. The theory of geographic representativeness in the circuits suffers multiple flaws in its assumptions. *Id.* at 1164. First, many judges are appointed from other regions to sit on a circuit, bringing with them to the new circuit their own ideals and beliefs. *Id.* Second, the circuits are not as geographically aligned as one might assume. *Id.* For example, the First Circuit represents states from New England, as well as the vastly different Commonwealth of Puerto Rico; the Sixth Circuit spans from the upper Midwest with Michigan to the South with Tennessee. *Id.*

205. See *id.* at 1170. For an example of the turmoil caused by the lack of a majority opinion on a definitive issue, see generally *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). In *Asahi*, the Supreme Court considered the requirements for personal jurisdiction of foreign companies whose products are eventually sold in the United States, but ‘only helped to confuse’ what contact was required to establish personal jurisdiction in these products liability cases. Kristin R. Baker, *Product Liability Suits and the Stream of Commerce after Asahi: World-Wide Volkswagen is Still the Answer*, 35 TULSA L.J. 705, 705–06 (2000). The fractured *Asahi* court provided no majority opinion but three concurrences provided two nonbinding rules. *Id.* Supporters of quickly resolving circuit splits additionally argue that the Supremacy Clause suggests a preference

specifically insisted that, while experimentation at times can be beneficial, Constitutional rights are improper laboratories for experimentation; it is better to give basic rights, a reliable consistent determination.²⁰⁶ One such basic right that needs a reliable consistent determination is the right to remain present in the United States.²⁰⁷

Despite the argument that the right to presence in the country is not an issue fit for experimentation, the results of past regional differences in immigration policy have percolated to an extent worth considering. In regions with high illegal immigrant presence, there are concerns that the increased immigrant population increases domestic unemployment and burdens public services.²⁰⁸ These concerns have led to the demonization and mistreatment of immigrant populations to an extent that is, arguably, on par with the United States' mistreatment of African-Americans.²⁰⁹

for judicial uniformity in the Constitution. *See* Logan, *supra* note 201, at 1171; U.S. CONST. art. VI, cl. 2. Although there is no express requirement for uniformity, Article III creates one Supreme Court tasked with final interpretation of federal law. *See* Logan, *supra* note 201, at 1171; *see generally* Marbury v. Madison, 5 U.S. 137 (1803) (solidifying judicial review and the ultimate power to interpret the constitutionality of federal laws). If uniformity was not preferable to the framers, then the Supremacy Clause and the role of the Supreme Court as the highest court would be without meaning. *See* Logan, *supra* note 201, at 1171.

206. *See* Logan, *supra* note 201, at 1162; Truax v. Corrigan, 257 U.S. 312, 338 (1921) (explaining that “the Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual”).

207. *See* Shaughnessy v. United States ex re. Mezei, 345 U.S. 206, 212 (1953) (explaining that even aliens who are illegally present may be expelled only after proceedings affording the alien due process and fundamental standards of fairness).

208. *Compare* Andrew Greene, *Mexicans Are Stealing Our Jobs*, QUINNIPIAC CHRONICLE, (Apr. 28, 2010), <http://www.qchronicle.com/2010/04/mexicans-are-stealing-our-jobs/>, *with* Rosanne Skirble, *Mexican Workers Take Jobs Few Americans Want*, VOICE OF AMERICA, (Aug. 16, 2010), <http://www.voanews.com/content/mexican-guest-workers-take-jobs-few-americans-want-100873354/162095.html> (arguing that United States citizens rarely desire the jobs typically filled by immigrant labor). Additionally, concerns exist that immigration excessively burdens public services, such as education and health care. Howard Fischer, *Bill Would Require Hospitals to Check Immigration Status*, ARIZONA DAILY SUN, (Jan. 27, 2012), http://azdailysun.com/news/local/state-and-regional/bill-would-require-hospitals-to-check-immigration-status/article_a9ad6973-3227-552d-9816-82870b8fcf4e.html.

209. *See* Hernandez, *supra* note 3; *see also* Paul Harris, *Tensions Rise as Latinos Feel Under Siege in America's Deep South*, THE GUARDIAN, (Aug. 20, 2011), <http://www.guardian.co.uk/world/2011/aug/21/racist-immigration-law-in-deep-south>. Proposals for new laws that may require immigrants to carry papers as proof of their legal status involve similar treatment as that of former slaves who faced oppression and harassment to show their papers. *Id.* Ironically, the immigrants in the fields of the southeastern states today

Indeed, many of the jobs allegedly taken from citizens by illegal aliens may be occupied by aliens who were only able to obtain their jobs through misuse of a Social Security number.

In other respects, percolation of immigration policies that exclude aliens has shown that exclusionary policies have dramatic negative effects on local economies. The parallel between mistreatment of illegal immigrants and African-Americans manifests again in the United States' high level of dependence on the inexpensive immigrant population's labor, similar to the United States's past long reliance on inexpensive slave labor.²¹⁰ When inexpensive immigrant labor is driven out by tough legislation and exclusionary policies, even in areas of high citizen unemployment, farmers see multi-billion dollar crop losses. This drives up food prices in grocery stores and increases costs in all markets, hampering the United States competitive position in the global marketplace.²¹¹ Classifying the misuse of a Social Security number for

provide radically inexpensive labor that the local economy is built upon, similar to the inexpensive slave labor that the colonial and early American economies relied upon. *Id.*

In Georgia, Alabama and South Carolina, new laws have been signed that represent the toughest crackdown on illegal immigrants—the vast majority of whom are Hispanics—in America. They give the police sweeping new powers and require them, and employers, to check people's immigration status. In Alabama, they even make helping illegal immigrants, by giving them a lift in a car or shelter in a home, into a serious crime.

Id. See also ARIZ. REV. STAT. ANN. §§ 11-1051(B), 13-1059, 13-2928(C), 13-3883(A)(5) (LexisNexis 2010), which was the source of much controversy, particularly regarding racial profiling concerns. After United States Supreme Court review, the law now only requires state law enforcement agencies to check immigration status for all persons stopped when there is reason to believe the individual may be present in the United States illegally. See John Schwartz, *Supreme Court Decision on Arizona Immigration Law*, N.Y. TIMES, (June 26, 2012), <http://www.nytimes.com/interactive/2012/06/26/us/scotus-immigration-law-analysis.html>. Other components of the law, such as requiring immigrants to carry immigration registration papers were stricken by the highest court. See *id.*; United States v. Arizona, 132 S. Ct. 2492, 2502–03 (2012).

210. See ARMSTEAD L. ROBINSON, BITTER FRUITS OF BONDAGE: THE DEMISE OF SLAVERY AND THE COLLAPSE OF THE CONFEDERACY, 1861-1865 37 (2005); see also JOHN MAJEWSKI, MODERNIZING A SLAVE ECONOMY: THE ECONOMIC VISION OF THE CONFEDERATE NATION 84 (2011) (explaining that the United States' pre industrial-age growth and prosperity was extremely dependent on slavery).

211. See Alfonso Serrano, *Bitter Harvest: U.S. Farmers Blame Billion Dollar Losses on Immigration Laws*, TIME MAGAZINE BUSINESS AND MONEY, (Sept 21, 2012), <http://business.time.com/2012/09/21/bitter-harvest-u-s-farmers-blame-billion-dollar-losses-on-immigration-laws/>. Because farmers cannot find enough help with their harvest in the wake of harsh immigration laws, some see up to 10% of their crop rot unharvested, seriously impacting their bottom line. *Id.*

Roughly 70% of the 1.2 million people employed by the agriculture industry are undocumented. No U.S. industry is more dependent on undocumented immigrants. But acute labor shortages brought on by anti-immigration measures threaten to heap record losses on an industry emerging from years of stiff

an otherwise legal purpose as a crime involving moral turpitude only aggravates these negative trends.

Further percolation of localized immigration policies is observable in the effects of harsh, new immigration laws. Immigration agents say, when state law enforcement detains an alien they will check the alien's status, but not necessarily take action unless the alien fits their highest priorities, *even if the alien is illegally present in the United States*.²¹² This statement could be an interesting predictor of the effectiveness of a policy that uniformly makes misuse of a Social Security number for an otherwise legal purpose a crime involving moral turpitude.

Following up on political efficiency arguments,²¹³ some justification for allowing splits to remain outstanding lies in the concern that instead of the search for true impartial interpretation of the law, differences in political philosophy are the true root of many court decisions.²¹⁴ Indeed, at least partially due to varying morals, the determination of whether a certain crime involves moral turpitude depends on the geographic location of the court.²¹⁵ The results reinforce the theory that the Ninth Circuit, which provided the *Beltran-Tirado* decision, is often criticized for its liberal slant.²¹⁶ Conversely, the Fifth Circuit, which provided the

foreign competition. Nationwide, labor shortages will result in losses of up to \$9 billion, according to the American Farm Bureau Federation.

Id. See also Jay Bookman, *Ga's Farm Labor Crisis Playing Out as Planned* ATLANTA JOURNAL CONSTITUTION, (June 17, 2011), <http://blogs.ajc.com/jay-bookman-blog/2011/06/17/gas-farm-labor-crisis-playing-out-as-planned/a> (discussing severe labor shortages in southwest Georgia caused by tough immigration policies, where the state suggests criminal probationers as possible replacements for displaced immigrant laborers).

212. See Associated Press, *Judge Rules that Arizona Police Can Check Immigration Status*, FOX NEWS (Sept 19, 2012), <http://www.foxnews.com/politics/2012/09/18/judge-police-to-enforce-ariz-immigration-law-now/>. Checking status does not mean the federal government necessarily will expend limited resources that do not fit their principle immigration enforcement priorities of legitimate threats to public safety or national security as well as repeat offenders. *Id.*

213. See Logan, *supra* note 201, at 1162–63.

214. See Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative Than Others?*, 45 LAW & SOC'Y REV. 171, 173 (2011). Broscheid's article presents an interesting econometric study into the existence of actual political bias, and concludes that the popular sentiment that there is a weighty political bias is most likely "overblown." *Id.* at 189.

215. See CLARK, *supra* note 27, at 166.

216. See Broscheid, *supra* note 214, at 171. Bill O'Reilly refers to the Ninth Circuit as the "wild bunch." *Id.* Granted, this may in some respects be a fair assessment; the Ninth Circuit's mostly notorious wild judge, Alex Kozinski, has developed quite the reputation as a funny guy. See Scott Glover, *9th Circuit's Chief Justice Posted Sexually Explicit*

Hyder decision, is generally known as a conservative court and is often criticized for its perceived conservative bias.²¹⁷ Generally, the Third and Ninth Circuits are considered the most liberal, while the Fourth, Fifth, Seventh, and Eighth are considered the most conservative.²¹⁸

As one might expect, the lynchpins of the circuit split involving misuse of a Social Security number for an otherwise legitimate purpose are pitted at opposite ends of the spectrum.²¹⁹ Whether this split exists due to inter-circuit political differences or due to legitimate differing interpretations of the law, the United States presents a single border and a single nation to foreigners seeking entry or lawful residence. As a single nation with a single border, a single set of laws governing that border is the most practical method to effectively manage foreign relationships and interacting with foreign citizens.²²⁰ Ordinarily, allowing an outstanding circuit split to percolate may be acceptable, but because basic rights are at stake and the issue involves the United States' interaction with foreign individuals and nations, the United States, the Circuits and the several states within will be best served with a resolution to the application of moral turpitude to misuse of a Social Security number for an otherwise legal purpose.²²¹

Material On His Website, L.A. TIMES, (June 11, 2008), http://www.latimes.com/news/local/la-me-kozinski12-2008jun12_0,6220192.story; see also tdudden04, *Kozinski on the Dating Game (and Squiggy, too!)*, YOUTUBE, (Nov. 2, 2006), <http://www.youtube.com/watch?v=OdjCdbGucCU>. Senator Orrin Hatch has characterized the Ninth Circuit as “judicial activism and overreaching . . . out of the mainstream of both American law and culture,” and Bruce Fein scolds the court as “manipulative judging at its worst” among others. Broscheid, *supra* note 214, at 171.

217. See Broscheid, *supra* note 214, at 180.

218. See *id.* at 171–72, 173, 186. Similarly, Deborah Sontag of the New York Times described the Fourth Circuit as “the shrewdest, most aggressively conservative federal appeals court in the nation” and John Dean calls the court “the most conservative circuit court in modern American history.” *Id.* The Fourth Circuit has yet to consider the question of whether misuse of a Social Security number for an otherwise legitimate purpose involves moral turpitude. See Circuit Review Staff, *supra* note 114, at 401.

219. See generally *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000). See *Hyder v. Keisler*, 506 F.3d 388 (5th Cir. 2007); *Sohaib Bin Lateef v. Dep’t. of Homeland Sec.*, 592 F.3d 926 (8th Cir. 2010) (the Eighth Circuit’s conservative decision to follow *Hyder*).

220. See Logan, *supra* note 201, at 1141.

221. If the Supreme Court were to grant certiorari, it is hard to predict how the Court would decide. Although the appellate decisions covering this split have straddled the expectations of their geographical political ideologies, a potential United States Supreme Court decision regarding misuse of a Social Security number for an otherwise legitimate purpose could rise above the traditional political factors often used to predict the rulings of our highest court.

As the 2012 Obamacare decision illustrates, the Justices are willing to rock the boat by straying from their political roots. See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (where conservative Chief Justice Roberts cast the decisive vote to uphold parts of the controversial health care law). Similarly, in

VI. WHY THE NINTH CIRCUIT GOT IT RIGHT

A. *Morality Exists Outside Short Term Temporal Constraints*

The strongest support for *Beltran-Tirado* is the irrefutable principle that once the morality of a particular conduct is determined, when the conduct occurs within a short time period does not change the morality or immorality of that conduct.²²² In the 1990 amendment to the misuse of a Social Security number statute, Congress showed its clear desire that misuse of a Social Security number for an otherwise legal purpose is not a crime involving moral turpitude.²²³ Morality is a timeless concept—that which is moral is moral and that which is immoral is immoral, regardless of when it occurs.²²⁴ Therefore, whether the misuse of a Social Security number occurred before or after an alien filed an application for permanent residence has no bearing on the morality of the misuse.

The Fifth Circuit responded to this issue by looking at classes of aliens rather than the morality of the conduct. However, *that is not the proper inquiry for resolving the question these cases pose*. The question presented in *Hyder* asks not what class of alien Mr. Hyder falls into, but rather the question was whether misuse of a Social Security number for an otherwise legal purpose was a crime involving moral turpitude, i.e. whether Mr.

Arizona, conservative Justices Kennedy and Roberts joined the liberal majority ruling, *United States v. Arizona*, 132 S. Ct. 2492, 2497 (2012). For an interesting analysis of the Justices and a breakdown of their party affiliations and votes cast with respect to the big ticket decisions of the 2012 term, see Robert Barnes, *After Supreme Court Term, Line Between Liberal and Conservative is Blurrier*, WASHINGTON POST, (June 30, 2012), http://www.washingtonpost.com/politics/after-supreme-court-term-line-between-liberal-and-conservative-is-blurrier/2012/06/30/gJQAbumcEW_story.html; see also Schwartz, *supra* note 208 (discussing University of Houston Law Professor Michael A. Olivas's comments that anyone who hopes to restrict immigration should not be 'relieved' by the recent upholding of only one of four provisions of the Arizona law).

222. See *Beltran-Tirado*, 213 F.3d at 1183.

223. See *id.*; 42 U.S.C. § 408(a)(7).

224. Granted, societal mores and standards change over time. At one time it was unheard of for an unmarried man and woman to be alone together at night. Now rampant fornication, cohabitation and illegitimate children are ever present. See Casey E. Copen, *First Marriages in the United States: Data From the 2006-2010 National Survey of Family Growth*, 49 NATIONAL HEALTH STATISTICS REPORTS 1 (Mar. 22, 2012), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf>. However, such changes take decades to unfold. *Id.* By choosing not to follow the Ninth Circuit, the morality of conduct literally hinges on the one-day period covering the days before and after the activation of the statute or granting of permanent residence status. Morality does not change in such a short time frame. *Beltran-Tirado*, 213 F.3d at 1184.

Hyder's conduct was moral.²²⁵ The court's decision must hinge on the morality of the offense. Where a court looks at morality of conduct, it is the morality of conduct that is probative, not the class of the actor. The Fifth Circuit did not resolve the issue of how identical conduct could be moral at one time and immoral at another. When the correct question is asked, the only sound conclusion is that misuse of a Social Security number for an otherwise legal purpose is not a crime involving moral turpitude.

B. Fraud Defined: The Ninth Circuit's Beltran-Tirado and the Fifth Circuit's Hyder Actually Did Not Involve Fraud

Fraud is defined as “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”²²⁶ In the very narrow case of an alien misusing a Social Security number for an otherwise legitimate purpose, such as otherwise legal employment or obtaining a driver's license, the basic elements of fraud are not satisfied.

The aliens in both *Hyder* and *Beltran-Tirado* satisfied the first prong: making a knowing misrepresentation of the truth or concealment of a material fact.²²⁷ However, the second prong—induction of another to act to his or her detriment—remains unsatisfied. At no point do the aliens in *Hyder* or *Beltran-Tirado* induce another to act to their detriment as required by the legal definition of fraud.

The true owners of the Social Security numbers have not been induced to act in any way, and certainly not to their detriment. Being passively affected is not the same as being induced to act. In *Beltran-Tirado*, the true owner is akin to the victim of a car theft. In a car theft, the car is taken without permission, but the true owner is not induced to act.²²⁸ The car owner's property was misappropriated, and they may sustain a loss, but they face no inducement to act. Similarly, in cases such as

225. “The question of law at issue in this case: whether the BIA properly classified the crime of misuse of a social security number under 42 U.S.C. § 408(a)(7)(A) as a CIMT.” *Hyder v. Keisler*, 506 F.3d 388, 390 (5th Cir. 2007).

226. BLACK'S LAW DICTIONARY 731 (9th ed. 2009). Granted, a colloquial definition of fraud may require only “an act of deceiving or misrepresenting.” MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/fraud>. *But see* *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941) (“The law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity.”).

227. *See Hyder*, 506 F.3d at 389; *Beltran-Tirado*, 213 F.3d at 1182.

228. *See* CAL. PENAL CODE § 487(d)(1) (Deering 2012); *see also* CAL. VEH. CODE § 10851(a) (Deering 2012) (auto theft requires taking, without consent, with intent to deprive, or alternatively complicity). *But see Hyder*, 506 F.3d at 389 (where there was no misuse of the Social Security number of another, therefore no true owner exists to be potentially induced).

Beltran-Tirado, a Social Security number is misappropriated, without permission, but the true owner faces no inducement to act.²²⁹

Similarly, the actions of Mr. Hyder and Ms. Beltran-Tirado do not induce any governmental agency to act to its detriment. The government issues a Social Security number and card to a rightful owner, and the owner uses the card to certify that he or she is legally employable.²³⁰ The government receives taxes allocated to a Social Security number.²³¹ When a Social Security number is misused in order to obtain employment, the government does not act to their detriment. In fact, it does not act at all because the Social Security number has already been issued, and the government takes no further action.²³²

A third potential actor could be the employer, such as Chicago O'Hare Airport, who hires the misuser of a Social Security number. There are civil and criminal penalties under federal law for employing an illegal alien.²³³ However, the employer generally must have knowledge of the alien's illegal status to be culpable.²³⁴ Where an employer hires an employee without knowledge of the employee's illegal status, the employer does not act to his detriment in hiring the employee. Instead, the employer merely enters an employment agreement that is like any other from the employer's perspective. Therefore, the misuse of a Social Security number for an otherwise legal purpose does not satisfy the legal definition of fraud because no entity is induced to act to its detriment by the misuse of a Social Security number.

The Fifth Circuit's reasoning in *Hyder* relied heavily on the concept that where there is fraud, there is a crime involving moral turpitude.²³⁵ However, when the true fraudulent nature of misuse of a Social Security

229. Also, unlike some car theft victims, the *Beltran-Tirado* victim suffered no loss. *Beltran-Tirado*, 213 F.3d at 1182.

230. See *Why Do I Need One?*, THE UNITED STATES SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/ssnumber/> (last modified June 20, 2013); *The Social Security Number Verification Service*, THE UNITED STATES SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/employer/ssnv.htm> (last modified Jan. 28, 2013).

231. See *id.*

232. In *Hyder*, the alien attempted to obtain a license to operate a motor vehicle. In this case, the government does act when it issues the license. *Hyder*, 506 F.3d at 389. However, the issue of 'to their detriment' remains. It is not the objective of a Texas DMV to ensure compliance with immigration laws.

233. See INA § 274A(a)(1), 8 U.S.C. § 1324a(1) (2006) ("it is unlawful . . . to hire . . . an alien knowing the alien is an unauthorized alien").

234. See *id.*

235. See *Hyder*, 506 F.3d at 391.

number for an otherwise legitimate purpose is undermined by the lack of an inducement of another to act to their detriment, the *Hyder* reasoning loses its foundation. If Mr. Hyder and Ms. Beltran-Tirado's offenses did not involve fraud, their identification as crimes involving moral turpitude is unnecessary under the law.

Further support for the lack of fraud in *Hyder* and *Beltran-Tirado* lies in the language of the underlying criminal statutes.²³⁶ Unlike many statutes that do involve fraud, the word fraud appears nowhere in section 408(a)(7).²³⁷ The subsection requires only misuse or a misrepresentation, for any purpose, of a Social Security number.²³⁸ There is no further requirement of fraud, detriment to a third party, or personal gain required by section 408(a)(7). Where criminal statutes are intended to cover fraud, the title or the elements of the statute explicitly use the word fraud.²³⁹ These underlying criminal statutes plainly seek to criminalize deception with respect to a Social Security number, but do not seek to penalize fraud.

VII. NAKED DISHONESTY: DECEPTION WITHOUT FRAUD IS DIFFERENT

Hyder and its progeny failed to consider the important distinction between fraud and deception.²⁴⁰ Where *Hyder* relies only upon instances of dishonesty that were simultaneously instances of fraud, *Hyder* did not consider instances of naked dishonesty, that is, an instance of dishonesty that was not an instance of fraud.

Hyder relies on the principle that “we have repeatedly emphasized that crimes whose essential elements involve fraud or deception tend to be [crimes involving moral turpitude].”²⁴¹ The opinion develops this by citing cases that supposedly fall into the named categories of either “fraud” or “deception.”²⁴² These cases involve perjury,²⁴³ bribery,²⁴⁴ smuggling of

236. See 42 U.S.C. § 408(a)(7) (2000).

237. See *id.*; see also 18 U.S.C. §§ 1341, 1343 (2006) (Mail and wire fraud statutes, which are just one example of criminal statutes that involve fraud and are labeled as fraud in the title); see also UTAH CODE ANN. § 76-6-1102(2)(a) (LexisNexis 2012); see also MISS. CODE ANN. § 97-19-85 (2)(b)-(c) (2012).

238. See 42 U.S.C. § 408(a)(7).

239. See § 76-6-1102(2)(a); see also § 97-19-85.

240. *Developed in* *Ahmed v. Holder*, 324 Fed. Appx. 82, 84 (2d Cir. 2009).

241. *Hyder v. Keisler*, 506 F.3d 388, 391 (5th Cir. 2007).

242. *Id.*

243. See *Omagah v. Ashcroft*, 288 F.3d 254, 262 (5th Cir. 2002).

244. See *id.*; see also *Okabe v. I.N.S.*, 671 F.2d 863, 865 (5th Cir. 1982).

persons,²⁴⁵ forgery,²⁴⁶ fraudulent use of a credit card,²⁴⁷ and defrauding the United States Government²⁴⁸ as crimes involving moral turpitude.²⁴⁹

There is a critical distinction between the concepts of fraud and deception that the Fifth Circuit did not consider in *Hyder*.²⁵⁰ *Hyder* relies on the principle that “crimes whose essential elements involve fraud or deception tend to be crimes involving moral turpitude.”²⁵¹ Despite this contention, the Fifth Circuit then relies solely on cases that involve both fraud and dishonesty.²⁵² Unlike *Beltran-Tirado* and *Hyder*, each of the above cases involves conduct that induces another to act to their detriment or else involve deception in the form of a false swearing.²⁵³ No case of deception without fraud is cited. Nor is any case of deception without fraud for an otherwise legitimate purpose cited.²⁵⁴ There is no precedential support in *Hyder* for the conclusion that Mr. Hyder’s conduct, which involved naked dishonesty, must be a crime involving moral turpitude.

245. See *Fuentes-Cruz v. Gonzalez*, 489 F.3d 724, 725 (5th Cir. 2007). This case also appears to not involve fraud, as the coyote does not induce another to act to his detriment. See *United States v. Raghunandan*, 587 F. Supp. 423, 425 (W.D.N.Y. 1984) (holding smuggling of aliens is a crime involving moral turpitude because the immorality is on par with false swearing or bigamy; the holding does not use fraud or deception as a justification, rather the root immorality of conduct); see also 8 U.S.C. § 1324 (2006) (illegality of bringing in and harboring certain aliens).

246. See *Balogun v. Ashcroft*, 270 F.3d 274, 276 (5th Cir. 2001).

247. See *id.*

248. See *Jordan v. De George*, 341 U.S. 223, 229 (1951).

249. See *Hyder v. Keisler*, 506 F.3d 388, 391 (5th Cir. 2007).

250. See *Ahmed v. Holder*, 324 Fed. Appx. 82, 84 (2d Cir. 2009).

251. See *Hyder*, 506 F.3d at 391.

252. See *id.*

253. Although a false swearing is dishonesty without fraud, the depravity of lying under oath elevates it to a crime involving moral turpitude, unlike other dishonesty. See Katherine Annuschat, *An Affair to Remember: The State of the Crime of Adultery in the Military*, 47 SAN DIEGO L. REV. 1161, 1180 (2010) (explaining that false swearing is an offense that involves a degree of moral turpitude, whereas lying may be dishonest but is not per se wrongful or discreditable); see also *Boraca v. Schlotfeldt*, 109 F.2d 106, 108 (7th Cir. 1940) (holding perjury is a crime involving moral turpitude because of its nature as a crime against the government); Harms, *supra* note 28, at 269 (proposition that crimes against the government that are crimes involving moral turpitude “include counterfeiting, perjury, willful tax evasion, bribery, impersonating a government official, and unlawful use of the mails”)

254. See *Beltran-Tirado v. INS*, 213 F.3d 1179, 1183–85 (9th Cir. 2000). The question of whether crimes of deception without fraud and for an otherwise legal purpose constitutes crimes involving moral turpitude was the real issue that the *Beltran-Tirado* and *Hyder* courts needed to narrowly consider. See *id.*; *Hyder*, 506 F.3d at 390; Circuit Review Staff, *supra* note 114, at 401.

There is even less precedential support for a finding that naked dishonesty for an otherwise legitimate purpose must constitute moral turpitude.²⁵⁵ Despite the distinctions and the lack of directly applicable precedent, the Fifth Circuit in *Hyder* ruled that because misuse of a Social Security number for an otherwise legitimate purpose involved dishonesty, crimes of naked dishonesty are necessarily crimes involve moral turpitude.²⁵⁶

A possible explanation for this irreconcilable result is the confusion surrounding the legal standard used in *Hyder*. Based on the above definition, the first prong of fraud requires a knowing misrepresentation of the truth or concealment of a material fact.²⁵⁷ A misrepresentation or concealment of material fact are both instances of dishonesty, and therefore, where there is fraud, there will necessarily be dishonesty. The Fifth Circuit disjunctively used the terms “dishonesty” and “fraud” to determine if misuse of a Social Security number is a crime involving moral turpitude.²⁵⁸ However, since all fraudulent acts involve dishonesty, there is overlap between the terms. Perhaps this overlap was a source of confusion.

The *Hyder* opinion begins with the initial premise that in the precedents, all crimes of fraud have involved moral turpitude.²⁵⁹ The *Hyder* opinion also adds the principle that all crimes involving fraud will include the element of dishonesty. Here lies the logical error: that *all crimes of dishonesty therefore involve fraud*. This flawed step provides the necessary basis for the Fifth Circuit’s conclusion that all crimes of dishonesty must therefore involve moral turpitude. The *Hyder* court believed it was looking at conduct and precedents that all involved both dishonesty and fraud, as such they were in the same category of conduct. In actuality, the court looked at deceptive conduct, which is distinguishable from the precedents involving fraud. Without the flawed logical step that all crimes of dishonesty involve fraud, the Fifth Circuit would not have considered itself bound by precedent to conclude that all crimes of dishonesty must involve moral turpitude.

For an analogous logic chain using simpler terms, consider the following: all tigers are mammals, but not all mammals are tigers. Similarly, all crimes of fraud involve deception, but not all instances of deception are fraudulent. Had there been no logical error, the Fifth Circuit would have concluded that Mr. Hyder’s conduct involved dishonesty without fraud,

255. See *Hyder*, 506 F.3d at 391. The *Hyder* court does not purport to extend the definition of fraud, dishonesty, or moral turpitude. Instead, the *Hyder* court simply holds that, based on the Fifth Circuit precedents and the Supreme Court’s decision in *De George*, crimes of dishonesty must involve moral turpitude. *Id.*

256. See *id.* at 392.

257. See BLACK’S LAW DICTIONARY 731 (9th ed. 2009).

258. See *Hyder*, 506 F.3d at 391–92.

259. See *Jordan v. De George*, 341 U.S. 223, 229 (1951).

and thus the court would not have felt bound to find that Mr. Hyder's naked dishonesty was a crime involving moral turpitude. It is only due to faulty reasoning—perhaps confusion concerning the overlapping definitions of fraud and deception—that the Fifth Circuit felt bound to disagree with the Ninth Circuit in *Beltran-Tirado* and conclude that misuse of a Social Security number for an otherwise legitimate purpose is a crime involving moral turpitude.²⁶⁰

*A. It's the Summer of De George: Understanding the Key
Precedent the Fifth Circuit Relied Upon in Hyder*

In the principal case *Hyder* relied on, *Jordan v. De George*, the United States Supreme Court narrowly analyzed the term “moral turpitude” in the context of fraud.²⁶¹ Decided a half-century before *Hyder*, *De George* and its progeny seemingly provided the basis for the Fifth Circuit's conclusion in *Hyder* that misuse of a Social Security number for an otherwise legitimate purpose is a crime involving moral turpitude.²⁶²

In *Jordan v. De George*, an Italian citizen had resided in the United States for nearly two decades when he pleaded guilty to a conspiracy involving eight charged defendants to violating twelve sections of the Internal Revenue Code. Specifically, fraudulently selling alcohol and evading liquor taxes, possession of alcohol “with intent to sell it in fraud of law and evade the tax thereon . . . with intent to defraud the United States of the tax thereon.”²⁶³ The alien, Mr. De George served 366 days for his conviction. Nonetheless, within a year of release he resumed his illegal activities. He was once again convicted of the same offenses and served two more years imprisonment.²⁶⁴ After a full summer of immigration

260. The *Hyder* court makes no assertion that it purports to expand upon or create new law. *Hyder*, 506 F.3d at 392. The Fifth Circuit justifies *Hyder* decision based on the strict adherence to decisional law. *Id.*

261. See *De George*, 341 U.S. at 226.

262. See *Hyder*, 506 F.3d at 391.

263. *De George*, 341 U.S. at 224.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect [sic] the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371.

264. See *De George*, 341 U.S. at 224–25.

hearings,²⁶⁵ the BIA ordered Mr. De George deported based on two separate convictions for crimes involving moral turpitude.²⁶⁶ As such, Mr. De George filed a habeas corpus petition seeking relief claiming that his crimes did not involve moral turpitude, and thus he was not deportable.²⁶⁷

At the outset of the *De George* opinion, Justice Vinson writes that the case concerns only one question, “whether conspiracy to defraud the United States of taxes on distilled spirits is a crime involving moral turpitude[.]”²⁶⁸ Justice Vinson limits the holding further by writing “our inquiry in this case is narrowed to determining whether this particular offense involves moral turpitude. *Whether or not certain other offenses involve moral turpitude is irrelevant and beside the point.*”²⁶⁹

In the Court’s decision, Justice Vinson explained that where fraud exists, the circuits have always found moral turpitude.²⁷⁰ This is the result in analysis of both federal and state offenses.²⁷¹ Because federal courts have consistently found that crimes of fraud also involve moral turpitude, Mr. De George’s crime of conspiring to defraud the United States therefore necessarily involved moral turpitude as well.²⁷²

It is important to note that the *De George* opinion never explicitly holds that all offenses with an element of fraud necessarily involve moral turpitude, it merely says that the element of fraud has always been

265. United States *ex rel.* De George v. Jordan, 183 F.2d 768, 769 (7th Cir. 1950) *overruled by De George*, 341 U.S. at 223.

266. See *De George*, 341 U.S. at 225; see also INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (1999).

267. *De George*, 341 U.S. at 226.

268. *Id.* at 223–24 (internal quotations omitted).

269. *Id.* at 226–27 (emphasis added).

270. See *id.* at 227. See also *Bermann v. Reimer*, 123 F.2d 331, 332 (2d Cir. 1941) (obtaining goods under fraudulent pretenses); *Mercer v. Lence*, 96 F.2d 122, 123 (10th Cir. 1938) (conspiracy to defraud by deceit and falsehood); *United States ex rel. Popoff v. Reimer*, 79 F.2d 513, 515 (1935) (forgery with intent to defraud); *Ponzi v. Ward*, 7 F. Supp. 736, 737–38 (D. Mass. 1934) (using the mails to defraud); *United States ex rel. Millard v. Tuttle*, 46 F.2d 342, 345 (D. La. 1930) (execution of chattel mortgage with intent to defraud); *United States ex rel. Medich v. Burmaster*, 24 F.2d 57 (8th Cir. 1928) (concealing assets in bankruptcy); *United States ex rel. Portada v. Day*, 16 F.2d 328 (S.D.N.Y. 1926) (issuing checks with intent to defraud). In the state courts, crimes involving fraud have universally been held to involve moral turpitude . . . crime of conspiracy to violate the internal revenue laws by possessing and concealing distilled spirits with intent to defraud the United States of taxes, . . . the crime of smuggling alcohol into the United States with intent to defraud the United States involves moral turpitude. See, e.g., *De George*, 341 U.S. at 228–29.

271. See *De George*, 341 U.S. at 228.

272. See *id.* at 229. Further, the *De George* court held that the term moral turpitude is not void for vagueness. *Id.* at 229–32.

found to involve moral turpitude.²⁷³ Neither *De George* nor any other United States Supreme Court decision has declared that moral turpitude necessarily inheres in crimes where fraud is an element.²⁷⁴ Additionally, the *De George* holding was explicitly limited to whether or not the conspiracy to defraud the United States of taxes on certain liquors is a crime involving moral turpitude, and further expressly declared that offenses other than Mr. De George's are beside the point of the not included in the opinion.²⁷⁵

B. De George and Accompanying Cases Involved Fraud, and Were Thereby Not Binding on Hyder's Naked Dishonesty

Despite the *De George* opinion's explicit limitations to the contrary, it is often the basis for the argument that misuse of a Social Security number for an otherwise legal purpose is a crime involving moral turpitude. Indeed, in *Hyder*, the Fifth Circuit cited *De George* for the principle that "fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude."²⁷⁶ The *Hyder* opinion explained that because Mr. Hyder was convicted of a crime involving deception as an essential element, his conviction is therefore a crime involving moral turpitude.

The *Hyder* Court based its decision on two other Fifth Circuit decisions which did not rely on *De George*.²⁷⁷ In *Balogun v. Ashcroft*, an alien was convicted in Alabama state court for illegal possession of credit cards, fraudulent use of credit cards, and forgery. The *Balogun* court determined these offenses were crimes involving moral turpitude.²⁷⁸ The *Hyder* Court relied on *Balogun* to support the proposition that crimes of fraud or deception are crimes involving moral turpitude.²⁷⁹

In *Omagah v. Ashcroft*, an alien was convicted of testifying falsely under oath, attempting to purchase a green card from an Immigration

273. See *id.* at 227.

274. See *id.* at 227–28.

275. See *id.* at 223–24, 226–27.

276. *Hyder v. Keisler*, 506 F.3d 388, 391 (5th Cir. 2007) (citing *De George*, 341 U.S. at 229).

277. See *Balogun v. Ashcroft*, 270 F.3d 274, 278–79 n.15 (5th Cir. 2001); *Omagah v. Ashcroft* 288 F.3d 254, 260 (5th Cir. 2002).

278. See *Balogun*, 270 F.3d at 276.

279. See *Hyder*, 506 F.3d at 391 (citing *Balogun*, 270 F.3d at 278–79).

and Naturalization Service undercover agent, and attempting to pay the agent to change INS computer records. The *Omagah* court determined these offenses were crimes involving moral turpitude.²⁸⁰ The *Hyder* Court relied on *Omagah* to show that offenses of “intentional deceit” are necessarily crimes involving moral turpitude.²⁸¹

The conduct in *Omagah*, *Balogun*, *De George*, as well as other federal circuit opinions, determine the presence of crimes involving moral turpitude based on unquestionable fraudulence or a basis other than deception.²⁸² However, the Fifth Circuit used those cases to find Mr. Hyder’s procurement of a driver’s license through misuse of a Social Security number was a crime involving moral turpitude, using deception as the basis.²⁸³ The *Hyder* court, purporting to be strictly bound by precedent, included crimes of deception without fraud in the fraud category.²⁸⁴ As such, the Fifth Circuit applied incorrect faulty analysis to Mr. Hyder’s status, and found that naked dishonesty is a crime involving moral turpitude.²⁸⁵

Had *Hyder* been characterized as an expansion of the crimes involving moral turpitude to include dishonesty without fraud, this conclusion that

280. See *Omagah*, 288 F.3d at 262.

281. See *Hyder*, 506 F.3d at 391 (citing *Omagah*, 288 F.3d at 261–62).

282. In *Omagah*, the alien’s false testimony and attempted bribery were independent crimes involving moral turpitude under the law because they were attempts to defraud the United States. *Omagah*, 288 F.3d at 262; see also *United States ex rel. Boraca v. Schlotfeldt*, 109 F.2d 106, 108 (7th Cir. 1940) (holding that perjury is a crime involving moral turpitude because it is a false statement under oath to an officer of the United States government); Harms, *supra* note 28. In *Balogun*, the alien induced merchants and creditors to make purchases with credit that the alien had no intent to satisfy. *Balogun*, 270 F.3d at 275. In *De George*, the alien evaded taxes on his illegal enterprise. *De George*, 341 U.S. at 224. Both *De George* and the *Balogun* statutes are inherently fraudulent, therefore fraud provided the basis for the conduct to involve moral turpitude. See *id.* (concerning 18 U.S.C. § 88; *Balogun*, 270 F.3d at 276 (concerning 42 U.S.C. § 408(g)(2)).

283. None of the cases cited in *Hyder* or *De George* involve conduct so innocuous or—assuming *arguendo* that fraud was present—of minimal fraudulence, as the conduct in *Hyder*. See *De George*, 341 U.S. at 227–29; *Hyder*, 506 F.3d at 391. However, the Fifth Circuit did not consider “particular circumstances surrounding [Mr. Hyder’s] conviction, such as the light sentence and [Mr. Hyder’s] possible lack of a vicious motive.” *Hyder*, 506 F.3d at 392. Instead the Fifth Circuit only considered the crime as written under the statute rather than the surrounding circumstances. See *id.* at 391–92. In fact, the Fifth Circuit appears to take a simple categorical approach. See *Taylor*, 495 U.S. 575, 600 (1990). Could the Fifth Circuit have found Mr. Hyder’s conduct was not a crime involving moral turpitude, had the other circumstances of Mr. Hyder’s conviction been considered based on the controversial *Silva-Trevino* method? See *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 693, 700 (B.I.A. 2008); *supra* notes 108–13, and accompanying discussion.

284. See *Hyder*, 506 F.3d at 391–92.

285. See *id.* at 392.

the Fifth Circuit need not find misuse of a Social Security for an otherwise legal purpose to be a crime involving moral turpitude would not stand. However, the Fifth Circuit did not expand or create law in *Hyder*, rather the *Hyder* opinion purported to be strictly bound by precedent. Had the Fifth Circuit not improperly felt bound to follow precedent, there would be no contrary case law to the Ninth Circuit's opinion in *Beltran-Tirado*. As such, the split should be resolved in favor of the Ninth Circuit.²⁸⁶

VIII. CONCLUSION: THE UNITED STATES NEEDS A NATIONAL RULE
THAT MISUSE OF A SOCIAL SECURITY NUMBER FOR
AN OTHERWISE LEGAL PURPOSE IS NOT A CRIME
INVOLVING MORAL TURPITUDE

Moral turpitude has a long history in United States immigration law of being poorly defined and providing inconsistent results.²⁸⁷ Elvira Arellano and Mr. Hyder were removed from the United States for their convictions for misuse of a Social Security number as crimes involving moral turpitude.²⁸⁸ Yet, under the same law, Ms. Beltran-Tirado's conviction for misuse of a Social Security number for an otherwise legitimate purpose was not a crime involving moral turpitude solely because her case was before a different federal court.²⁸⁹ It is contrary to the concept of morality that in one instance an act is moral, but just seven years later the same act is immoral.²⁹⁰ This inconsistency based on arbitrary circuit boundaries has a negative impact on the United States and its interaction with foreigners.²⁹¹

In *Hyder*, the Fifth Circuit relied on clear decisional law that fraud is always a crime involving moral turpitude, and therefore it was bound to find misuse of a Social Security number is a crime involving moral

286. Assuming *arguendo* that the United States Supreme Court would decline to follow the fraud analysis above, a decision from the highest court resolving the split in favor of the Ninth Circuit would not be overruling the prior Supreme Court decision in *De George*. Recall *De George* did not hold that all fraud offenses are crimes involving moral turpitude, therefore a decision in agreement with the Ninth Circuit that holds misuse of a Social Security number for an otherwise legal purpose is not a crime involving moral turpitude would only overrule decisions of the various circuits.

287. See *supra* notes 27–36 and accompanying discussion.

288. See *supra* notes 10, 151 and accompanying discussion.

289. See *supra* notes 122, 124 and accompanying discussion.

290. See *supra* notes 222–25 and accompanying discussion.

291. See *supra* notes 199–202 and accompanying discussion.

turpitude.²⁹² However, the Fifth Circuit did not consider the critical distinction between fraud and dishonesty.²⁹³ In fact, related precedent does not provide that naked dishonesty—dishonesty without fraud—must be a crime involving moral turpitude.²⁹⁴ Had the Fifth Circuit properly analyzed as the conduct as naked dishonesty rather than improperly as fraud, the Fifth Circuit would not have needed to find that misuse of a Social Security number for an otherwise legal purpose is a crime involving moral turpitude.²⁹⁵ Because of the need for a resolution to whether misuse of a Social Security number for an otherwise legal purpose is a crime involving moral turpitude, the United States Supreme Court ought to provide an unequivocal national rule that misuse of a Social Security number for an otherwise legal purpose is not a crime involving moral turpitude.²⁹⁶

292. *See supra* notes 240–49 and accompanying discussion.

293. *See supra* notes 250–57 and accompanying discussion.

294. *See supra* note 257 and accompanying discussion.

295. *See supra* notes 283–86 and accompanying discussion.

296. *See supra* note 287 and accompanying discussion.