Punishing Harmless Conduct: Toward a New Definition of "Moral Turpitude" in Immigration Law

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I. INTRODUCTION

President Trump wants to deport undocumented immigrants who "have criminal records," and are "gang members" or "drug dealers."[1] Since the 2016 election, immigration has dominated the headlines.[2] From the President's

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[1] *60 Minutes: President-Elect Trump Speaks to a Divided Country* (CBS television broadcast Nov. 13, 2016) [hereinafter *60 Minutes*], http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/ [https://perma.cc/RN36-B2YP]; Dara Lind, *Donald Trump Promises To Deport 3 Million "Illegal Immigrant Criminals." That's Literally Impossible.*, VOX (Nov. 14, 2016), http://www.vox.com/policy-and-politics/2016/11/14/13623004/trump-deport-million-immigrants [https://perma.cc/7U6P-99UL]; *see also* Madison Burga & Angelina Lerma, *The Use of Prosecutorial Discretion in the Immigration Context After the 2013 ICE Directive: Families Are Still Being Torn Apart*, 42 W. ST. L. REV. 25, 49 (2014) (quoting a 2014 tweet from not-yet-President Trump in which he criticized the Obama administration for failing to deport more undocumented migrants who had committed crimes); Angela D. Morrison, *Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers*, 11 HARV. L. & POL'Y REV. 295, 299–300 (2017) ("Throughout his 2016 presidential campaign, Donald Trump vowed to deport millions of unauthorized immigrants."). *See generally* Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015) (describing a pattern of targeting Latinos for deportation as "criminal aliens," even while most are nonviolent).

[2] *See, e.g.*, Kelly Lytle Hernandez, *Largest Deportation Campaign in US History Is No Match for Trump's Plan*, CONVERSATION (Mar. 8, 2017), https://theconversation.com/largest-deportation-campaign-in-us-history-is-no-match-for-trumps-plan-73651 [https://perma.cc/XZP6-KGDR]; Lind, *supra* note 1; Michael D. Shear & Ron Nixon, *New Trump Deportation Rules Allow Far More Expulsions*, N.Y. TIMES (Feb. 21, 2017), https://www.nytimes.com/2017/02/21/us/politics/dhs-immigration-trump.html (on file with *Ohio State Law Journal*) (explaining new guidelines issued by the Department of Homeland Security with respect to deportation and, *inter alia*, prosecutorial discretion); *60*

"Muslim ban" to his deportation actions, the discussion about which noncitizens are "bad" continues to consume much of the country's public policy debate.[3]

In practice, the federal government uses the standard of "moral turpitude" when determining the deportability or excludability of a noncitizen who has committed a crime.[4] This Note examines the issues involved in determining what falls within the vague category of "crimes involving moral turpitude." The category's vagueness is problematic for immigrants, because it fails to provide reasonable notice to noncitizens regarding their excludability or removability from the United States, and has the potential to allow for "arbitrary or discriminatory law enforcement practices."[5]

This Note proposes a novel solution that will clarify the standard via administrative adjudication.

Minutes, *supra* note 1; *see also* U.S. DEP'T OF HOMELAND SECURITY, ENFORCEMENT OF THE IMMIGRATION LAWS TO SERVE THE NATIONAL INTEREST 2–4 (2017) [hereinafter HOMELAND SECURITY], https://assets.documentcloud.org/documents/3469363/Trump-Immigration-Enforcement-Policies.pdf [https://perma.cc/JDX8-QUAH] (directing, *inter alia*, changes in immigration-related prosecutorial-discretion guidelines). The Trump administration's efforts so far around immigration have focused on eliminating the Deferred Action for Childhood Arrivals (DACA) program, decreasing the use of prosecutorial discretion, and "build[ing] a 30-foot-high border wall that looks good from the north side." *Id.* at 4 (prosecutorial discretion); Associated Press, *Trump Wants To Build 30-Foot-High Wall at Mexican Border*, CNBC (Mar. 19, 2017), https://www.cnbc.com/2017/03/19/trump-wants-to-build-30-foot-high-wall-at-mexican-border.html [https://perma.cc/MWZB-LSQM] (border wall); *see also* Mallory Shelbourne, *Staff Stopping Trump from Striking Compromise with Dems To End Shutdown: Report*, HILL (Jan. 22, 2018), http://thehill.com/homenews/administration/370054-staff-stopping-trump-from-striking-compromise-with-dems-to-end [https://perma.cc/T7H2-B7PX] (describing compromise negotiations over the status of former DACA recipients and border-security measures). *See generally* Kurtis A. Kemper, Annotation, *Department of Homeland Security's Program of Deferred Action for Childhood Arrivals (DACA)*, 17 A.L.R. Fed. 3d Art. 3 (2016).

[3] *See, e.g.*, Associated Press, *Trump Threatens Mexico over 'Bad Hombres,'* POLITICO (Feb. 1, 2017), http://www.politico.com/story/2017/02/trump-threatens-mexico-over-bad-hombres-234524 [https://perma.cc/E2MW-CVHV] (discussing which immigrants, in the President's opinion, are "bad"); Editors, *The Travel-Ban Do-Over*, NAT'L REV. (Mar. 7, 2017), http://www.nationalreview.com/article/445543/trump-travel-ban-new-executive-order-clarified-improved [https://perma.cc/3RQ6-48RA] ("The Trump administration's revised [travel-ban] executive order . . . is . . . what the White House should have done from the beginning."); Mark Hanrahan, *Trump Travel Ban: Girl Guides of Canada Axes All Trips to U.S.*, NBCNEWS (Mar. 14, 2017), http://www.nbcnews.com/news/world/trump-travel-ban-girl-guides-canada-cancels-all-trip-u-n733161 [https://perma.cc/4SCU-KDEM] (outlining the "travel ban" and describing one example of its practical consequences); *see also, e.g.*, HOMELAND SECURITY, *supra* note 2, at 4 (implementing, in part, President Trump's views on the general issue of criminal law and immigration).

[4] 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012); *see, e.g.*, Sotnikau v. Lynch, 846 F.3d 731, 735–38 (4th Cir. 2017) (example of application).

[5] Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1127 (2016); *see also* Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 259–60 (2001).

A. *Illustrating the Problem*

The 2016 case of *Arias v. Lynch* illustrates the vagueness of the moral turpitude standard.[6] Maria Eudofilia Arias began working for Grabill Cabinet Company in Indiana shortly after coming to the United States without authorization in 2000.[7] Her superiors at the manufacturing company called her an "excellent employee."[8] In many ways, Arias's life story in the United States exemplifies that of a "model" undocumented immigrant.[9] She always paid her federal taxes, and appears to have lived a stable life in America.[10] Arias and her husband have been married since 1989.[11] Her eldest son, age twenty-six, was granted a reprieve from possible deportation because of the Obama administration's DACA program.[12] Arias's two younger children hold American citizenship.[13]

After a decade in this country, the federal government charged Arias with false use of a social security number, a felony.[14] Because she arrived in the United States without detection, her status forced her to fabricate a social

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[6] *See* Arias v. Lynch, 834 F.3d 823, 835 (7th Cir. 2016) (Posner, J., concurring in the judgment) ("The concept of moral turpitude, in all its *vagueness*, rife with contradiction, a fossil, an embarrassment to a modern legal system, continues to do its dirty work." (emphasis added)). Federal circuit courts are split as to whether the false use of a social security number, Arias's crime, is a crime involving moral turpitude. *Compare* Lateef v. Dep't of Homeland Sec., 592 F.3d 926, 929 (8th Cir. 2010) (holding that the crime involves moral turpitude), *with* Beltran-Tirado v. Immigration & Naturalization Serv., 213 F.3d 1179, 1181 (9th Cir. 2000) (holding the opposite). *See generally* Eugene Volokh, *Using a False Social Security Number Is a Crime—but Is It a Crime 'of Moral Turpitude'?*, WASH. POST (Aug. 26, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/26/using-a-false-social-security-number-is-a-crime-but-is-it-a-crime-of-moral-turpitude/?utm_term=.9328e0698d1b [https://perma.cc/9XQU-LFZ2] (discussing the issue and the *Arias* case).

[7] *Arias*, 834 F.3d at 824.

[8] *Id.*

[9] *Id.* at 824–25; *cf.* PRESS RELEASE, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, FACT SHEET: FIXING OUR BROKEN IMMIGRATION SYSTEM SO EVERYONE PLAYS BY THE RULES (2013), https://obamawhitehouse.archives.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules [https://perma.cc/E2EE-SEZF] ("Our immigration system should reward anyone who is willing to work hard and play by the rules."); Marc A. Thiessen, *Commentary: Trump Has a Soft Spot for Illegal Immigrants*, CHI. TRIB. (Dec. 20, 2016), http://www.chicagotribune.com/news/opinion/commentary/ct-trump-illegal-immigrants-dreamers-20161220-story.html [https://perma.cc/CD4U-LRRE] (suggesting that President Trump has a "soft spot" for undocumented workers who are "good students" or "have wonderful jobs").

[10] *Arias*, 834 F.3d at 825.

[11] *Id.*

[12] *Id.*; *see also* Kemper, *supra* note 2 (explaining DACA).

[13] *Arias*, 834 F.3d at 825.

[14] *Id.*; *see also* 42 U.S.C. § 408(a)(7)(B), (a)(8) (2012) (criminal statute); Susan Pilcher & John Newman, *Are Your Clients Ready for the ICE?*, 32 VT. B.J. 40, 44 (2007) (explaining one method by which authorities are able to detect false social security numbers used by undocumented workers and others).

security number in order to work for Grabill.[15] As a result, she was convicted of the crime in 2010, and "sentenced to just about the lightest felony sentence one is likely to find in modern federal practice: one year of probation and a $100 special assessment."[16] After completing her probation, Grabill promptly rehired Arias.[17]

Subsequently, the Department of Justice (DOJ) acted swiftly to deport her in 2010.[18] In response, Arias sought discretionary cancellation of her impending removal, which may be granted to those "who have been in the United States for at least ten years and who can show that their removal would cause 'exceptional and extremely unusual hardship'" to immediate family members who are American citizens.[19]

However, under the Immigration and Nationality Act (INA), the Attorney General cannot exercise discretion to cancel removal where the respondent has been convicted of a "crime involving moral turpitude."[20] Unfortunately for Arias, an immigration judge determined that her crime fell into this category.[21] The INA does not define "moral turpitude" or "crimes involving moral turpitude," and "courts have labored for generations to provide a workable definition" as a result.[22] Arias appealed this decision to the DOJ's Board of Immigration Appeals (BIA), which agreed that her crime was turpitudinous.[23] After the BIA's decision, Arias appealed to the Seventh Circuit Court of Appeals.[24]

However, the framework which the BIA used to decide if Arias's offense was turpitudinous had been struck down as violating the INA by the time her case reached the Seventh Circuit Court of Appeals.[25] As a result, the court

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[15] *Arias*, 834 F.3d at 825. *See generally False Social Security Numbers Spark Immigration Raids*, WILNER & O'REILLY, http://www.wilneroreilly.com/News/False-Social-Security-Numbers-Spark-Immigration-Raids.shtml [https://perma.cc/U3W8-RA3A] (discussing the widespread use of false social security numbers by undocumented immigrants and the consequences for employers).

[16] *Arias*, 834 F.3d at 825.

[17] *Id.*

[18] *Id.*

[19] *Id.* (quoting 8 U.S.C. § 1229b(b)(1)). 8 U.S.C. §1229b(b)(1) authorizes applications for cancellation of deportation under various circumstances.

[20] 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1229b(b)(1)(C); *Arias*, 834 F.3d at 825.

[21] *Arias*, 834 F.3d at 825–26.

[22] *Id.* at 825.

[23] *Id.* at 826. Judge Posner, in his *Arias* concurrence, criticizes the use of the word "turpitudinous," as it appears to be a made-up adjective only used in this narrow area of law. *See id.* at 832 (Posner, J., concurring in the judgment) ("Who *needs* to talk like that? Lawyers apparently, and they go a step further into the lexical mud by intoning an adjectival form of 'turpitude': 'turpitudinous.'").

[24] *Id.* at 826.

[25] *Id.* at 829–30. Part III.B *infra* details this framework and its judicial rejection. In summary, former Attorney General Michael Mukasey mandated that the BIA follow a three-step inquiry. Silva-Trevino (*Silva-Trevino I*), 24 I. & N. Dec. 687, 688–90 (Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550, 554 (Att'y Gen. 2015). The third step of the inquiry allowed

remanded her case to the BIA with a directive to "consider Arias's case under an appropriate legal framework for judging moral turpitude."[26]

B. *What Is Moral Turpitude?*

Courts often accept that moral turpitude means something like its early *Black's Law Dictionary* definition: "baseness, vileness, or depravity."[27] However, this definition seems to be of little help, as courts and scholars routinely criticize "moral turpitude" for its vagueness.[28] Judge Posner levels such a criticism in his *Arias* concurrence.[29] He says that previous court opinions defining moral turpitude "approach gibberish," and sees Arias's circumstance as especially sympathetic.[30] Is making up a social security number to get a job—particularly when the employer in question calls the employee "excellent" and

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adjudicators to, under certain circumstances, look beyond the "record of conviction." *Id.* at 690. In 2014, the Fifth Circuit Court of Appeals found that the third prong of that test went beyond the unambiguous language of the INA. Silva-Trevino v. Holder (*Silva-Trevino II*), 742 F.3d 197, 200–06 (5th Cir. 2014). The majority of circuits hold that the Department of Justice is entitled to *Chevron* deference in defining what constitutes a crime involving moral turpitude. Knapik v. Ashcroft, 384 F.3d 84, 88 (3d Cir. 2004); *see, e.g.*, *Arias*, 834 F.3d at 830 n.1; *Silva-Trevino II* at 200–06; Ali v. Mukasey, 521 F.3d 737, 738–39 (7th Cir. 2008); *see also infra* Part V.E (arguing that this author's proposed solution does not violate *Chevron*). *But see* Paul Chaffin, Note, *Expertise and Immigration Administration: When Does* Chevron *Apply to BIA Interpretations of the INA?*, 69 NYU ANN. SURV. AM. L. 503, 506–07 (2013) (finding that such deference is not universal). *See generally* Chevron v. Nat'l Res. Def. Council, 467 U.S. 837 (1984) (outlining what is generally known as "*Chevron* deference" to executive agencies by courts); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. 545 U.S. 967, 982 (2005) ("*Chevron*'s premise is that it is for the agencies, not courts, to fill statutory gaps.").

[26] *Arias*, 834 F.3d at 830.

[27] *Moral Turpitude*, BLACK'S LAW DICTIONARY (4th ed. 1968) ("An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."); *see also, e.g.*, Jordan v. De George, 341 U.S. 223, 226 (1951) (citing the same definition); *Arias*, 834 F.3d at 829 (same definition); Rohit v. Holder, 670 F.3d 1085, 1089 (9th Cir. 2012) (same definition); Traders & Gen. Ins. Co. v. Russell, 99 S.W.2d 1079, 1084 (Tex. Civ. App. 1936) (using a similar definition outside of the immigration context).

[28] *See, e.g.*, *Arias*, 834 F.3d at 836 (Poser, J., concurring in the judgment); Harms, *supra* note 5, at 259–60; Koh, *supra* note 5, at 1177 ("[Crimes involving moral turpitude] may also be the most confusing removal ground in the INA."); Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 120–21 (1929) (stating that the use of a moral turpitude standard in witness impeachment "represents confused thought"); 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, 816 (2008) (arguing that the term "crimes involving moral turpitude" in the INA is unconstitutionally void for vagueness); *see also infra* Part V.A (discussing these criticisms).

[29] *Arias*, 834 F.3d at 830–36 (Posner, J., concurring in the judgment).

[30] *Id.* at 831 ("It's difficult to make sense of . . . definitions [of crimes involving moral turpitude], which approach gibberish yet are quoted deferentially in countless modern opinions."); *id.* at 836 (harmlessness).

is eager to rehire her—really the most "base, vile, or depraved" conduct that a court can imagine?[31] Judge Posner thinks not, and expresses his desire that the BIA avoid using "broad categorical rules that sweep in harmless conduct."[32]

C. *How To Better Define Moral Turpitude*

This Note proposes that the BIA adopt a revised framework for moral turpitude that errs on the side of not sweeping in conduct that many, today, consider relatively harmless.[33] First, in Part II, the historical reasons for the inclusion of "crimes involving moral turpitude" in the INA are considered. Second, in Part III, examples of confusing modern case law are discussed: Why is cocaine possession turpitudinous, but marijuana possession is not?[34] Why is a DUI not "base, vile, or depraved," but a DUI on a suspended license is?[35] Why do nearly identical definitions of involuntary manslaughter lead to differing conclusions about whether that crime involves moral turpitude?[36] In Part IV, the author explores the reasons why modern moral-turpitude decisions seem so odd. Namely, the standard—used in contexts such as professional sanctions and witness impeachment—incorporated widely held moral ideals;[37] generally, "turpitude" related to honesty for men, and chastity for women.[38] Today, courts continue to follow nineteenth-century case law rooted in these now-outdated standards.[39] To avoid the confusion associated with following ancient, gendered standards, the BIA should adopt a revised definition of "crimes involving moral turpitude" that accords with modern moral sensibilities.[40] Although such a redefinition would represent a sharp departure from previous BIA precedents, courts should uphold the new standard as being consistent with the judicial deference the DOJ receives.[41]

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[31] *Id.* at 834; *see also Moral Turpitude*, *supra* note 27.

[32] *Arias*, 834 F.3d at 836 (Poser, J., concurring in the judgment).

[33] *See id.* at 830; *infra* Part V.

[34] *Compare* State v. Major, 391 S.E.2d 235, 237 (S.C. 1990) (cocaine), *with* State v. Harvey, 268 S.E.2d 587, 588 (S.C. 1980) (marijuana). Although other examples that are further discussed in Part III relate more closely to federal immigration law, the marijuana-and-cocaine dichotomy, in this author's opinion, provides a succinct illustration of moral-turpitude jurisprudence's arbitrariness.

[35] *See* Lopez-Meza, 22 I. & N. Dec. 1188, 1196 (B.I.A. 1999); *Moral Turpitude*, *supra* note 27.

[36] *Compare* Franklin, 20 I. & N. Dec. 867, 870 (B.I.A. 1994) (involved turpitude), *with* Sotnikau v. Lynch, 846 F.3d 731, 736–37 (4th Cir. 2017) (did not involve turpitude).

[37] *See* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1007 (2012).

[38] *Id.*

[39] *See id.* at 1018–19.

[40] *See infra* Part V.D.

[41] *See infra* Part V.E. Again, in the majority of circuits, this means *Chevron* deference. *See supra* note 25.

Specifically, a revised standard for moral turpitude should mandate a "yes" answer to the following questions as necessary conditions for a finding that any given crime involves moral turpitude:

1. Is the mens rea purposely or knowingly?
2. Is it punishable by at least five years in prison? Alternatively, is it a sex crime; a crime of domestic violence; a violent crime that involves harm to children, animals, or the elderly; or a hate crime?[42]

II. STATUTORY BACKGROUND

Americans widely understood the meaning of "moral turpitude" in the nineteenth century, when the term first found its way into immigration law.[43] By the middle of the twentieth century, Congress codified it in the INA without providing a statutory definition, although the term had, by then, lost its agreed-upon meaning.[44]

A. *History*

Historically, America had a special incentive to exclude the "worst of the worst" among immigrants[45]: More than one European country made a habit of requiring that those with criminal convictions emigrate to America.[46] These same governments would sometimes agree to drop criminal charges in exchange for emigration.[47]

In the latter part of the nineteenth century, Congress took legislative action.[48] In 1875, it passed the Act of March 3, which was the first to designate any class of aliens as excludable from the United States.[49] This legislation focused on those who had been convicted of, or received an emigration-conditioned pardon for, a felony.[50] However, these foreign prosecutorial

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[42] *See infra* Part V.

[43] *See* Harms, *supra* note 5, at 262 (citing Act of March 3, 1875, ch. 141, 18 Stat. 477); Simon-Kerr, *supra* note 37, at 1017.

[44] *See* 8 U.S.C. § 1182(a)(2)(A)(i) (2012); Harms, *supra* note 5, at 261–64; Simon-Kerr, *supra* note 37, at 1017–19.

[45] Harms, *supra* note 5, at 260–61.

[46] *Id.*

[47] *Id.* This trend began with the British government's "policy of exporting convicts to the colonies." STAFF OF H.R. COMM. ON THE JUDICIARY, 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 5 (Comm. Print 1988) [hereinafter HOUSE JUDICIARY COMM.]. President Johnson publicly objected to this practice in 1866, after roughly a century of states regulating in this area. *See* Harms, *supra* note 5, at 261 (citing H.R. EXEC. DOC. NO. 43-253, at 75 (1874) (lodging a formal protest against pardons by foreign powers on condition of emigration to America)).

[48] *See* Harms, *supra* note 5, at 261 (citing Act of March 3, 1875, ch. 141, 18 Stat. 477).

[49] *Id.*

[50] *Id.*

practices continued, and by the late 1880s, there were widespread reports that criminal aliens remained in the country in large numbers.[51] As a result, Congress passed the Immigration Act of 1891, and in so doing, introduced the concept of moral turpitude into immigration law.[52] Specifically, this statute made it possible to exclude "persons who [were] convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."[53] Perhaps because of the consensus around the meaning of what was then a relatively common term, Congress did not define "moral turpitude" in the Act.[54] In response to continuing concerns about the presence of immigrant criminals in the United States, Congress made the commission of a crime involving moral turpitude a criterion for deportation (in addition to exclusion) in the Immigration Act of 1917.[55]

B. *The Immigration and Nationality Act: Moral Turpitude Remains Undefined*

The Immigration Act of 1952 sought to stiffen the rubric for deportation, but kept the language of the Immigration Act of 1917 Act intact. It provides that the following individuals are excludable from the United States:

> Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . .[56]

In addition, 8 U.S.C. 1229b(b) indicates that:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

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[51] *See* HOUSE JUDICIARY COMM., *supra* note 47, at 9 ("[P]aupers, contract laborers, and convicts were entering the country in large numbers in disregard of existing laws . . . . [Legislators also] expressed particular concern about the foreign encouragement of the emigration of undesirables.").

[52] Harms, *supra* note 5, at 262 (citing HOUSE JUDICIARY COMM., *supra* note 47, at 8).

[53] HOUSE JUDICIARY COMM., *supra* note 47, at 10.

[54] *Id.* at 10; *cf.* Simon-Kerr, *supra* note 37, at 1018–19 (discussing broad consensus in the nineteenth century regarding the meaning of "moral turpitude"). *But see, e.g.*, Harms, *supra* note 5, at 262 (discussing a lack of relevant legislative history for the 1874 and 1891 acts); Note, *supra* note 28, at 118 (arguing that it was unclear whether this was a "new criterion, or was merely a synthesis of previously recognized distinctions").

[55] 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.A. § 1182(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 § 2[a] (1975).

[56] 8 U.S.C. § 1182(a)(2)(A)(i) (2012).

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
(B) has been a person of good moral character during such period;
(C) has not been convicted of an offense [among other possibilities, involving moral turpitude as in the INA section quoted above]; and
(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.[57]

In summary, the above statutes relate to deportation law in at least two important ways. In some circumstances, the Justice Department has used this to deport individuals pursuant to their criminal convictions.[58] In other cases, the Attorney General may be powerless to adjust the immigration status of some individuals because of their convictions for certain seemingly minor crimes.[59] In a nation with tens of millions of immigrants contributing substantially to the American economy, these decisions come with high stakes.[60]

III. MODERN CASE LAW

Modern decisions regarding moral turpitude can seem confusing.[61] Because these rules no longer accord with our intuitions, courts often rely on fine-grain distinctions in mens rea requirements to guard against the possibility that

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[57] *Id.* § 1229b(b)(1).

[58] *See, e.g.*, Jordan v. De George, 341 U.S. 223, 232 (1951).

[59] *See, e.g.*, Arias v. Lynch, 834 F.3d 823, 825 (7th Cir. 2016).

[60] CAP Immigration Team, *The Facts on Immigration Today*, CTR. FOR AM. PROGRESS (Oct. 23, 2014), https://www.americanprogress.org/issues/immigration/reports/2014/10/23/59040/the-facts-on-immigration-today-3/ [https://perma.cc/HJG8-EQYH] ("The foreign-born population consisted of 40.7 million in 2012."); George J. Borjas, *The Economic Benefits from Immigration*, 9 J. ECON. PERSP. 3, 5 (1995) (explaining that the economic benefits of immigration are between $7 billion and $25 billion); *The Effects of Immigration on the United States' Economy*, PENN WHARTON, U. PA.: BUDGET MODEL (June 27, 2016), http://budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy [https://perma.cc/8YQ9-ZEVD] (describing how evidence supports the fact immigrants do not affect wages and actually benefit natives economically).

[61] *Compare* Smith v. Smith, 34 Tenn. (2 Sneed) 473, 479 (1855) ("It is easy to see that trespass, assault, battery, and the like are not within the [category of crimes involving moral turpitude]: while other misdemeanors, [such as bribery, extortion, theft], are properly included."), *with Arias*, 834 F.3d at 826–29 (discussing the BIA's twenty-first century holding that a relatively innocuous white-collar crime is turpitudinous), *and* Sotnikau v. Lynch, 846 F.3d 731, 736 (4th Cir. 2017) (holding that involuntary manslaughter, under Virginia law in 2017, is not a crime involving moral turpitude). *But see* Beck v. Stitzel, 21 Pa. 522, 524 (1853) (indicating that moral turpitude standards are "necessarily adaptive," in the sense that they ought to evolve over time). *See generally* Simon-Kerr, *supra* note 37, at 1022–23 (discussing *Smith v. Smith*); *id.* at 1019 (discussing *Beck v. Stitzel*).

judges' personal moral sensibilities might play a role.[62] Courts use a "categorical approach" in making these determinations: Judges examine whether a particular crime can be committed without a "turpitudinous" mens rea.[63] No matter what actual actions lead to the defendant's conviction, if one can possibly violate the applicable statute *without* involving moral turpitude, the crime is categorically *not* one "involving moral turpitude."[64] The BIA's handling of *Matter of Lopez-Meza* illustrates both the categorical approach and its confusing results in the context of aggravated DUIs.[65] Here, the BIA held that aggravated DUI was a crime involving moral turpitude because Lopez-Meza had to *knowingly* drive with a suspended license in order to be convicted.[66] An analogy between "concealing" a driver's-license status and committing fraud was salient to the Board's decision.[67] The 2017 case of *Sotnikau v. Lynch* provides an example of a hair-splitting mens rea distinction.[68] Although previous cases held that involuntary manslaughter was a crime involving moral turpitude, a Virginia Supreme Court decision suggesting that it would be possible to commit the same crime while only being criminally negligent lead to a different result.[69]

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[62] *See Arias*, 834 F.3d at 830–36 (Posner, J., concurring in the judgment) (explaining that certain crimes are not intuitively known to be wrongful). *Compare Sotnikau*, 846 F.3d at 736 (making a fine-grain mens rea distinction), *with* Franklin, 20 I. & N. Dec. 867, 869–71 (B.I.A. 1994) (making a fine-grain mens rea distinction that produced a result markedly different from *Sotnikau* in the context of involuntary manslaughter).

[63] *See* Prudencio v. Holder, 669 F.3d 472, 484 (4th Cir. 2012) (mandating a categorical approach in crimes involving moral turpitude immigration cases, and indicating that most circuits mandate this approach).

[64] *See id.* at 485; *see also Sotnikau*, 846 F.3d at 735 (applying the categorical approach to involuntary manslaughter).

[65] Lopez-Meza, 22 I. & N. Dec. 1188, 1193–96 (B.I.A. 1999).

[66] *Id.* at 1194–95; *see also* Marmolejo-Campos v. Gonzales, 503 F.3d 922, 925–26 (9th Cir. 2007) (finding, again, moral turpitude where a defendant was convicted of aggravated DUI because of his knowledge of a license suspension), *aff'd on reh'g sub nom.* Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009) (en banc). *But see* Torres-Varela, 23 I. & N. Dec. 78, 86 (B.I.A. 2001) (finding that *Lopez-Meza* was not controlling where a defendant was convicted of aggravated DUI under Arizona law, but under a different section that did not require a defendant *know* that they were under suspension in order to be convicted).

[67] *See Lopez-Meza*, 22 I. & N. Dec. at 1193, 1195.

[68] Sotnikau v. Lynch, 846 F.3d 731, 736 (4th Cir. 2017).

[69] *Id.* This author characterizes the distinction as fine-grain because, *inter alia*, the mens rea required for involuntary manslaughter in Virginia stemmed from case law, and the idea that a finding of negligence could support a conviction was based on the inclusion of the words "or is charged with the knowledge of [the risk that a death might result from a particular course of conduct]" in a court opinion. *Id.* (citing Noakes v. Commonwealth, 699 S.E.2d 284, 288 (Va. 2010)). This perhaps stands in contrast to carefully chosen mens rea terms in some criminal statutes. *Compare id.*, *with, e.g.*, OHIO REV. CODE ANN. § 2903.13(A)–(B) (LexisNexis 2014) (using the terms "knowingly" and "recklessly" in a seemingly intentional way). *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174–79 (2012) (discussing the "surplusage"

A. *Courts and Agencies Emphasize How To Look for Moral Turpitude*

Moral turpitude standards can be examined along two dimensions: what must be present for a finding of moral turpitude, and how an adjudicator should look for those elements.[70] There has been a great deal of confusion on both fronts.[71] The *Silva-Trevino* cases lay out the recent judicial difficulties with the "how" question.[72]

In his November 2008 opinion in *Silva-Trevino I*, Attorney General Michael Mukasey recognized that moral-turpitude jurisprudence consisted of a "patchwork of different approaches across the nation."[73] He hoped to seize the case as a unique opportunity to "establish a uniform framework for ensuring that the [INA]'s moral turpitude provisions are fairly and accurately applied."[74] The Attorney General felt that this new standard should "accord[] with the statutory text [of the INA], [be] administratively workable, and further[] the policy goals underlying the [INA]."[75] The federal circuits took different approaches, and the BIA's pre-*Silva-Trevino I* policies exacerbated the confusion[76]: Typically, the BIA would follow the version of the moral-turpitude test that was applied in the circuit from which any given case arose.[77] Since the *Silva-Trevino I* opinion, the DOJ has had the policy goal of devising a framework that immigration judges can apply across all cases.[78]

Before *Silva-Trevino I*, some courts agreed that a two-step inquiry should be used to determine whether a crime involved moral turpitude.[79] First, under the "categorical" prong of the test, courts should look to the statute under which the respondent was convicted.[80] If the statute sub judice could not be violated

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canon and suggesting in a general way that courts assume that legislators choose words carefully).

[70] *See, e.g.*, Arias v. Lynch, 834 F.3d 823, 830–36 (7th Cir. 2016) (Posner, J., concurring in the judgment) (what); Silva-Trevino (*Silva-Trevino I*), 24 I. & N. Dec. 687, 693–94 (Att'y Gen. 2008) (how), *vacated*, 26 I. & N. Dec. 550, 554 (Att'y Gen. 2015).

[71] *See, e.g.*, *Silva-Trevino I*, 24 I. & N. Dec. at 693–94 ("how"); *Arias*, 834 F.3d at 830–36 (Posner, J., concurring in the judgment) ("what").

[72] *Silva-Trevino I*, 24 I. & N. Dec. at 693–94 (summarizing the approaches of various courts); Silva-Trevino (*Silva-Trevino II*), 742 F.3d 197, 201–02 (5th Cir. 2014) (rejecting the *Silva-Trevino I* approach). On the other hand, a revision of moral turpitude standards that would respond to Judge Posner's concerns in his *Arias* concurrence would alter what moral turpitude means. *See infra* Part V.E.

[73] *Silva-Trevino I*, 24 I. & N. Dec. at 688.

[74] *Id.*

[75] *Id.*

[76] *See id.*

[77] *Id.*

[78] *See id.* at 688–89 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)) (indicating that Attorney General Mukasey intended to use his *Silva-Trevino I* opinion to accomplish this goal).

[79] *Silva-Trevino I*, 24 I. & N. Dec. at 688.

[80] *Id.*

without involving moral turpitude, then this prong decided the matter.[81] However, if the court could conceive of a way in which the at-issue statute could be violated without involving moral turpitude, then a second, more fact-specific examination was undertaken.[82] There was some variation in how courts applied each prong.[83]

Indeed, circuits varied considerably, even when they followed the same general themes.[84] The Fifth Circuit Court of Appeals, for instance, emphasized a fairly standard application of the categorical prong.[85] Other courts looked at the "general nature" of a crime, and asked whether or not it involved moral turpitude in "common usage."[86] Still others emphasized whether or not there was a "realistic probability" that a crime could be committed without moral turpitude.[87] Finally, historically, some courts fell back on making a distinction between *malum in se* crimes (which were held to be turpitudinous) and *malum prohibitum* crimes (which were not).[88]

Attorney General Mukasey attempted to resolve these disagreements by mandating a three-step inquiry.[89] First, adjudicators had to evaluate whether there was a "realistic possibility" that the statute could be violated in a way that does not involve moral turpitude.[90] If there was such a possibility, the judge should proceed to step two and examine the "record of conviction" to see if the available facts could determine whether the respondent actually committed a

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[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Compare* Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006) (standard categorical approach), *with* Marciano v. Immigration & Naturalization Serv., 450 F.2d 1022, 1025 (8th Cir. 1971) ("common usage" rule).

[85] *Amouzadeh*, 467 F.3d at 456. Again, this meant looking for the least culpable way in which to violate a statute, and determining if such a crime would necessarily include the requisite scienter to sustain a finding of moral turpitude. *See, e.g.*, *id.* at 457 (finding that, in order to violate a particular statute, a defendant had to knowingly make a false statement; both the "knowingness" mens rea and "false" nature of the statement were salient to the court's decision that this crime was turpitudinous).

[86] *See Marciano*, 450 F.2d at 1028 (Eisele, J., dissenting) (characterizing the majority's approach as following a "common usage" rule).

[87] *See* Nicanor-Romero v. Mukasey, 523 F.3d 992, 1004–07 (9th Cir. 2006) (indicating that prior to the Ninth Circuit's application of *Chevron* deference to the BIA with respect to specific crimes the BIA had found to involve moral turpitude, the Ninth Circuit Court of Appeals would evaluate possible crimes involving moral turpitude based on a "realistic probability" test), *overruled by* Marmolejo-Campos v. Holder, 558 F.3d 903, 911 (9th Cir. 2009) (en banc).

[88] *See* Simon-Kerr, *supra* note 37, at 1008, 1023 n.161; *see also* Serna, 20 I. & N. Dec. 579, 581 (B.I.A. 1992) (viewing the *malum in se* aspect of a crime as intrinsic to a finding that such a crime involves moral turpitude).

[89] Silva-Trevino (*Silva-Trevino I*), 24 I. & N. Dec. 687, 689–90 (Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550, 554 (Att'y Gen. 2015).

[90] *Id.*

crime involving moral turpitude.[91] Finally, if neither step one nor two resolved the matter, the judge looked beyond the "record of conviction" to other facts in determining if a crime involving moral turpitude was committed.[92] This is the "*Silva-Trevino I* standard."

In 2014, the Fifth Circuit Court of Appeals found that the third prong of that test went beyond the unambiguous language of the INA.[93] In this case (*Silva-Trevino II*), the court viewed the *Silva-Trevino I* standard as a direct attack on its precedent.[94] The court had to determine if the term "convicted of a crime involving moral turpitude" allowed the court to look beyond the record of conviction to additional facts that an appellee might offer.[95] However, Congress defined the term "conviction" as meaning a "formal judgment of guilt" in the INA.[96] In addition, the law details specific documents which comprise these "formal judgments."[97] Given these statutory constraints, and the force of prior precedent, the court ruled that the DOJ exceeded its bounds by asking courts to look beyond the record of conviction.[98]

The aftermath of *Silva-Trevino II* left moral-turpitude law as confusing as ever. Additional disagreement among courts emerged as the Seventh Circuit approved the *Silva-Trevino I* standard.[99] Arias's case was caught in the legal limbo as the immigration judge she first appeared before applied an outdated version of the law: simply using the categorical approach without looking to the record of conviction.[100] However, after the Fifth Circuit struck *Silva-Trevino I* down and the Seventh Circuit had approved the same standard, but before Arias's case reached an appellate court, Attorney General Eric Holder directed the BIA to devise a new moral-turpitude standard that was unambiguously consistent with the term "conviction" as used by the INA.[101]

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[91] *Id.* at 690.

[92] *Id.*

[93] Silva-Trevino (*Silva-Trevino II*), 742 F.3d 197, 200–06 (5th Cir. 2014).

[94] *See id.* at 200 ("We have long held that, in making this determination, judges may consider only 'the inherent nature of the crime, as defined in the statute,' or, in the case of divisible statutes, 'the alien's record of conviction.'" (citing Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006))).

[95] *Silva-Trevino II*, 742 F.3d at 200.

[96] *Id.* (citing 8 U.S.C. § 1101(a)(48)(A) (2012)).

[97] *Id.* at 200–01 (citing 8 U.S.C. §1229a(c)(3)(B)).

[98] *Id.* at 201–03.

[99] Sanchez v. Holder, 757 F.3d 712, 717–18 (7th Cir. 2014). In *Arias*, the Seventh Circuit Court of Appeals recognized that this approval of the *Silva-Trevino I* standard was likely irrelevant, as the DOJ had already decided to abandon *Silva-Trevino I* based on the Fifth Circuit's disapproval. *See* Arias v. Lynch, 834 F.3d 823, 824, 830 (7th Cir. 2016). Indeed, the Attorney General formally vacated the *Silva-Trevino I* approach in its entirety in Silva-Trevino (*Silva-Trevino III*), 26 I. & N. Dec. 550, 554 (Att'y Gen. 2015).

[100] *Arias*, 834 F.3d at 834 (Posner, J., concurring in the judgment).

[101] *Silva-Trevino III*, 26 I. & N. Dec. at 554.

B. *Confusing Decisions: What Is a Crime Involving Moral Turpitude?*

Although this judicial wrestling with *how* to look for moral turpitude created a great deal of confusion in itself, case law that relied on hair-splitting distinctions had long created seemingly odd results with respect to *what* specific crimes involved moral turpitude.[102] Again, (1) moral turpitude never gets far away from its historical kernel of fraud, and (2) moral turpitude decisions often rely on very fine-grain mens rea concerns.

1. *The Fraud Paradigm: Aggravated DUI*

For historical reasons, adjudicators often hold that fraudulent or deceptive conduct lies "close to the core" of moral turpitude.[103] *Matter of Lopez-Meza* illustrates this paradigm.[104]

In *Matter of Lopez-Meza*, the respondent had been convicted of aggravated DUI under Arizona law.[105] The immigration judge initially concluded that since there was no record to indicate that DUI generally was a crime involving moral turpitude, the respondent was not removable under the INA.[106] However, as a majority of the BIA recognized, such an aggravated DUI conviction has an additional mens rea element.[107] The Arizona statute provides, in pertinent part, that a conviction for aggravated DUI must be committed "while the person's driver's license or privilege to drive is suspended, cancelled, revoked or refused, or the person's driver's license or privilege to drive is restricted as a result of violating § 28-692 [DUI] or under § 28-694 [involving an administrative license suspension related to DUI]."[108] The majority emphasized this "culpable mental state" in finding Lopez-Meza's conduct to be shocking to the public conscience, because it involved "'knowingly' driving on a suspended, cancelled, or revoked license."[109]

The dissent in *Lopez-Meza* found it odd that the respondent's decision to "ignore a state administrative directive" transformed the strict-liability offense of DUI—which all parties agreed was not a crime involving moral turpitude—

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[102] *See infra* Parts III.B.1 and III.B.2.

[103] *Arias*, 834 F.3d at 827 ("Despite the confusion about how to determine what moral turpitude is, there is a consensus that fraud is close to the core of moral turpitude."); *see also, e.g.*, Jordan v. De George 341 U.S. 223, 227 (1951) ("Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude."); Simon-Kerr, *supra* note 37, at 1007–08 (arguing that, at least for men, fraud and dishonesty were historically part of the "core" of moral turpitude).

[104] Lopez-Meza, 22 I. & N. Dec. 1188, 1193 (B.I.A. 1999); *see also, e.g.*, *Jordan*, 341 U.S. at 227.

[105] *Lopez-Meza*, 22 I. & N. Dec. at 1188–89.

[106] *Id.* at 1189.

[107] *Id.* at 1194–95.

[108] *Id.* (citing ARIZ. REV. STAT. ANN. §§ 28-692(A)(1), 28-697(A)(1)).

[109] *Id.* at 1194–95.

into one that involved "baseness . . . contrary to accepted moral standards."[110] Immediately after discussing why fraud is a paradigmatic example of a crime involving moral turpitude, the majority said that the statute's "knowing" requirement made Lopez-Meza's crime turpitudinous.[111] The implication was clear: These actions were very bad because they involved a person who was hiding something, just like fraud involves a person who is hiding something. The BIA emphasized this point in saying that the violation of a state administrative directive "involved a baseness so contrary to accepted moral standards that it rises to the level of a crime involving moral turpitude."[112] This is a critical reason why, to the uninitiated, moral-turpitude jurisprudence looks so odd. Without viewing fraud as a lodestone for moral turpitude, it is not at all clear that simply doing something sneaky is morally outrageous in the same sense that murder and rape are morally depraved crimes.[113]

2. *Hair-Splitting Distinctions: Involuntary Manslaughter*

Decisions regarding the moral-turpitude status of offenses of recklessness and negligence can rest on hair-splitting distinctions. In the 1994 *Matter of Franklin*, a Filipino woman was convicted of involuntary manslaughter in Missouri.[114] At the time, Missouri's involuntary manslaughter statute required "recklessness" insofar as "the convicted person must have consciously disregarded a substantial and unjustifiable risk, and that such disregard [must have] constituted a gross deviation from the standard of care that a reasonable person would exercise . . . ."[115] In finding that involuntary manslaughter was a crime involving moral turpitude, the BIA cited parts of its own conflicted

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[110] *Id.* at 1196 ("simple" DUI majority conclusion); *id.* at 1201 (dissent agreement) (Rosenberg, Board Member, concurring and dissenting in part). Adding to the vagueness concerns discussed *ad nauseum* in other literature, the BIA found a highly similar violation of a different section of the same Arizona statute to be nonturpitudinous. Torres-Varela, 23 I. & N. Dec. 78, 85–86 (B.I.A. 2001) (examining a case in which the "aggravating" factor was repeat convictions within a specified period of time). *But see* Marmolejo-Campos v. Gonzalez, 503 F.3d 922, 926 (9th Cir. 2007) (affirming that *Lopez-Meza* is still good law where the aggravating factor is knowingly driving on a suspended license), *aff'd on reh'g sub nom.* Marmolejo-Campos v. Holder, 558 F.3d 903, 917 (9th Cir. 2009) (en banc).

[111] *Lopez-Meza*, 22 I. & N. Dec. at 1193 (*Jordan* discussion); *id.* at 1194–95 ("knowingly" discussion).

[112] *Id.* at 1195.

[113] *See, e.g.*, Arias v. Lynch, 834 F.3d 823, 833 (7th Cir. 2016) (Posner, J., concurring in the judgment) (comparing lists of turpitudinous and nonturpitudinous crimes, and stating that "[t]he division between the two lists is arbitrary"); Milija Zivkovic, No. A017099761, 2014 WL 4966413, at *3 (B.I.A. Aug. 28, 2014) (indicating that both rape and attempted rape are crimes involving moral turpitude); Applicant, 1998 WL 1990297, at *1 (I.N.S. Nov. 9, 1998) ("Murder is a crime involving moral turpitude in all cases."); Rivera Pagán v. Superintendente de la Policía, 135 P.R. Dec. 789, 799 (1994) (indicating that attempted murder is a crime involving moral turpitude).

[114] Franklin, 20 I. & N. Dec. 867, 870 (B.I.A. 1994).

[115] *Id.* at 867.

precedent as supporting the idea that recklessness, so defined, involved moral turpitude, stating that "[t]his definition of recklessness requires an actual awareness of the risk created by the criminal violator's action."[116] On the other hand, in the 2017 case of *Sotnikau v. Lynch*, the Fourth Circuit Court of Appeals concluded that involuntary manslaughter, under Virginia law, was not a crime involving moral turpitude.[117] The court acknowledged *Franklin*, but felt that the best-defined mens rea required for a Virginia involuntary manslaughter conviction came in the form of the following quote from the Virginia Supreme Court:

> [A]cts of a wanton or willful character, committed or omitted, show a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which make it not improbable that injury will be occasioned, and the offender knows, or is charged with the knowledge of, the probable results of his [or her] acts.[118]

The court describes this as a "criminal negligence" standard, because it requires "indifferent disregard" for others, when it is "not improbable" that injury will result.[119] In any case, because this broad, ambiguous description of a mens rea that might be termed "negligence"—although it includes the word "reckless" within its definition—encompassed less culpable conduct than the Missouri statute in play in the *Franklin* case, the court distinguished the two.[120]

Although it is certainly not the only area in which moral-turpitude decisions become murky, offenses of recklessness and negligence may occasion thorny

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[116] *Id.* at 869 (quoting Medina, 15 I. & N. Dec. 611, 613–14 (B.I.A. 1976), *aff'd sub. nom.* Medina-Luna v. Immigration & Naturalization Serv., 547 F.2d 1171 (7th Cir. 1977)). Interestingly, the board quotes this conclusion from a case in which the board defined recklessness as "*consciously* disregard[ing] a *substantial and unjustifiable* risk, and such disregard must constitute a *gross* deviation from the standard of care," perhaps with the implication that if the standard definition of recklessness does not clearly involve moral turpitude, the same definition with *several adjectives and adverbs italicized* will make the point clear. *Id.* (quoting *Medina*, 15 I. & N. Dec. at 613–14); *see also* Franklin v. Immigration & Naturalization Serv., 72 F.3d 571, 593 (8th Cir. 1995) (Bennett, J., dissenting) ("I find that the [BIA's precedent] gives no explanation or analysis to support its conclusion that willingness to commit an act in disregard of a perceived risk is moral turpitude . . . ."). For a similarly "standard" definition of recklessness, see MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."). Previously, the board had followed the rule that "voluntary manslaughter involves moral turpitude, although involuntary manslaughter does not." Lopez, 13 I. & N. Dec. 725, 726 (B.I.A. 1971) (calling this rule "well settled"); *see also* Burton v. Burton, 3 Greene 316, 318 (Iowa 1851) (suggesting that there may be various instances in which homicides are not crimes involving moral turpitude).

[117] Sotnikau v. Lynch, 846 F.3d 731, 737 (4th Cir. 2017).

[118] *Id.* at 736 (citing Noakes v. Commonwealth, 699 S.E.2d 284, 288 (Va. 2010)).

[119] *Id.*

[120] *Compare id.*, *with Franklin*, 20 I. & N. Dec. at 870.

distinctions. In other cases, courts may focus on analogizing elements of criminal statutes to fraud.[121] And, of course, there has been a great deal of disagreement, in fairly recent history, regarding how adjudicators ought to look for moral turpitude.[122]

IV. HISTORICAL CASE LAW: EXPLAINING WHY TODAY'S STANDARDS ARE SO CONFUSING

So, how did moral-turpitude law become so counterintuitive? Why do today's decisions about what is a "crime involving moral turpitude" seem to bear little relationship to what twenty-first-century Americans regard as "base, vile, or depraved?"[123] Professor Julia Ann Simon-Kerr offers one compelling explanation[124]: "Moral turpitude," in the nineteenth century, related to widely-held, gendered honor-culture norms.[125] Specifically, Americans prized honesty in men, and chastity in women.[126] Today, courts apply stare decisis to moral-turpitude decisions by continuing to hold that any specific crime is turpitudinous so long as a previous case recognizes it as such.[127] Thus, courts create a body of moral-turpitude law in which nineteenth-century honor-culture norms are calcified in modern precedent.[128]

A. *Moral Turpitude's First Appearance:* Brooker v. Coffin

A New York court first used the phrase "moral turpitude" in determining what conduct may constitute slander per se.[129] Here, the defendant accused the plaintiff of being a "common prostitute."[130] In determining that these words, in themselves, were not actionable, the court emphasized that the statute which covered prostitution at the time in New York, a broad provision aimed towards various types of disorderly conduct, also described behavior such as

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[121] *See supra* Part III.B.1.

[122] *See supra* Part III.A.

[123] *Compare* Arias v. Lynch, 834 F.3d 823, 833 (7th Cir. 2016) (Posner, J., concurring in the judgment) (comparing lists of turpitudinous and nonturpitudinous crimes, and stating that "[t]he division between the two lists is arbitrary"), *with Moral Turpitude*, *supra* note 27.

[124] Simon-Kerr, *supra* note 37, at 1007.

[125] *Id.*

[126] *Id.*

[127] *Compare, e.g.*, Jordan v. De George, 341 U.S. 223, 227 (1951), *with, e.g.*, Lopez-Meza, 22 I. & N. Dec. 1188, 1191 (B.I.A. 1999).

[128] *Compare, e.g.*, *Jordan*, 341 U.S. at 227, *with, e.g.*, *Lopez-Meza*, 22 I. & N. Dec. at 1191.

[129] Brooker v. Coffin, 5 Johns. 188, 188 (N.Y. Sup. Ct. 1809). Moral turpitude continues to be linked to the perceived reputational harm stemming from a criminal accusation in defamation law today. *See, e.g.*, Ne. Ohio Elite Gymnastics Training Ctr., Inc. v. Osborne, 916 N.E.2d 484, 487 (Ohio Ct. App. 2009). *See generally* 50 AM. JUR. 2D *Libel and Slander* §§ 141, 212 (2017) (discussing defamation per se).

[130] *Brooker*, 5 Johns. at 188.

"physiognomy, palmistry, [and] pretending to tell fortunes" as within its ambit.[131] In the opinion of the court, since *these* acts were not ones of "moral turpitude," accusing someone of violating any part of the statute would not constitute slanderous words without a showing of an injury.[132] However, one dissenting judge wrote that the defendant's words, "besides imputing great moral turpitude, and tending to render the person odious in the opinion of mankind, may . . . also subject the [plaintiff] to a[] . . . disgraceful punishment."[133] From this very first instance of moral turpitude in the law, two key themes emerge: it is concerned with reputational harm, viewed through the prism of nineteenth-century honor-culture norms; and, no one can agree on what it means.

B. *The Early Evolution of the Moral Turpitude Standard*

In the decades following *Brooker*, the "moral turpitude" standard came to be used in rules regarding the "the disbarment of attorneys, revocation of physicians' licenses . . . and credibility of witnesses."[134] Although there have always been marginal cases involving controversial moral-turpitude determinations, the standard came into more widespread use because it captured certain moral sentiments that were widely shared by the community.[135]

1. *Moral Turpitude's Roots in Gendered Honor Culture*

In her article *Moral Turpitude*, Professor Simon-Kerr argues that when "moral turpitude" entered the legal lexicon, Americans generally agreed on what it meant.[136] People used the phrase in everyday life, and it corresponded to those acts which might bring one the most reputational harm: for women, this meant promiscuity, and for men, it meant oath-breaking.[137] Indeed, oath-keeping honor culture was the dominant zeitgeist of political and business elites in the nineteenth century.[138] The opposite of truthful, honorable conduct was "moral

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[131] *Id.* at 191.

[132] *Id.* at 189.

[133] *Id.* at 190 (Sedgwick, J., dissenting).

[134] Harms, *supra* note 5, at 272.

[135] *See* Simon-Kerr, *supra* note 37, at 1007.

[136] *Id.*

[137] *Id.*

[138] *See id.* at 1012–13; *see also* Mark M. Carroll, *"All for Keeping His Own Negro Wench": Birch v. Benton (1858) and the Politics of Slander and Free Speech in Antebellum Missouri*, 29 LAW & HIST. REV. 835, 858 (2011) ("The model for praiseworthy manhood in antebellum Missouri was Andrew Jackson, whose mother summed up its essence with the colloquial advice, 'Never tell a lie, nor take what is not your own, nor sue anybody for slander or assault and battery. Always settle them cases yourself.' . . . The vindication of personal honor . . . frequently prompted common men and politicians to respond to political insults with lethal violence."). This attitude is further exemplified by an exchange between Representative Samuel Untermeyer and J.P. Morgan while Mr. Morgan was testifying before

turpitude."[139] And, in a young country that lacked many universal norms—where "reputation was the glue that held the polity together"—being a person of moral turpitude was a pretty bad thing.[140] Professor Simon-Kerr notes that the founding fathers particularly admired Cicero;[141] as such, perhaps the intellectual elite of the late-eighteenth and early-nineteenth century would have been inclined to heed words such as these: "[T]he dishonesty of an action is . . . in itself execrable and frightful. . . . [A]s *virtue* or *moral excellency* is for itself to be valued and desired, so *vice* or *moral turpitude* is to be hated and avoided."[142]

2. *Early Case Law: Contrasting Homicide and Commercial Crimes*

The 1851 Iowa case of *Burton v. Burton* exemplifies the connection between moral turpitude and a man's commercial reputation.[143] In this slander case, in which the state's supreme court applied the rule of *Brooker v. Coffin*, the defendant was accused of having poisoned a neighbor's cow.[144] The *Burton* court referred to the *Brooker* moral-turpitude standard as a "well-defined rule," and thought that it very clear that cow poisoning was a turpitudinous offense, given that its commission would "impute[] to the plaintiff a degree of moral turpitude which would render him disgraceful and morally infamous in the

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the House Banking and Currency Committee. WILLIAM W. BAKER, ENDLESS MONEY: THE MORAL HAZARDS OF SOCIALISM 278–79 (2010). In response to Representative Untermeyer's question, "Is not commercial credit based upon money or property?" Morgan replied that a man gets a loan "on character . . . [b]ecause a man I do not trust could not get money from me on all the bonds in Christendom." *Id.* This way of viewing the world stands in contrast to today's discourse, in which even antifeminists accept as given that male violence is a bad thing. *See, e.g.*, Frank Miniter, *The Hard, Adrenaline-Soaked Truth About "Toxic Masculinity,"* FORBES (Jan. 18, 2017), https://www.forbes.com/sites/frankminiter/2017/01/18/the-hard-adrenaline-soaked-truth-about-toxic-masculinity/2/#88aa2f744ccc [https://perma.cc/4C2C-UVS8] ("Man's caveman traits, [some feminists wrongly] argue, run toxic with adrenaline unless our young men can swear off being men ."); *see also* Kali Holloway, *Toxic Masculinity Is Killing Men: The Roots of Male Trauma*, SALON (June 12, 2015), http://www.salon.com/2015/06/12/toxic_masculinity_is_killing_men_the_roots_of_male_trauma_partner/ [https://perma.cc/3UGK-63BU] (discussing "toxic masculinity" in general).

[139] Simon-Kerr, *supra* note 37, at 1011.

[140] *Id.* (citing JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 69 (2001)).

[141] *Id.*

[142] *Id.* (citing 3 CICERO, DE FINIBUS 158 (Jeremy Collier ed., Samuel Parker trans., 1812)).

[143] Burton v. Burton, 3 Greene 316, 318 (Iowa 1851); *see* Simon-Kerr, *supra* note 37, at 1018 (discussing the case). The author's selection of historical case law, throughout this Part, owes a great deal to Professor Simon-Kerr's selection of cases. *See id.*

[144] *Burton*, 3 Greene at 316–17 ("In [*Brooker v. Coffin*] it is held, that if the charge, being true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable.").

estimation of all worthy neighbors and citizens."[145] Importantly, the court found this more turpitudinous than homicide, because homicides may occur in the "heat of sudden passion."[146] And, given that "many circumstances may exist as palliations of moral guilt in the public mind [with respect to homicide]; but no circumstances can possibly extenuate the moral turpitude of that wretch who will poison his neighbor's horse or cow," the court thought it obvious that cow poisoning involved greater moral turpitude.[147]

3. *Early Case Law: Violence Is Not So Bad*

Many early moral-turpitude cases stand for the proposition that—at least for men—violent offenses do not occasion such reputational damage as to be turpitudinous, but that any conduct that might erode trust does.[148] In *Smith v. Smith*, an 1858 case from the Tennessee Supreme Court, it was determined that trespass, assault, and battery were not crimes involving moral turpitude, while bribery, extortion, theft, keeping a bawdy house, financial corruption, and selling liquor to slaves, were certainly crimes involving moral turpitude.[149] Though these distinctions might today seem wildly counterintuitive, at the time, they were widely agreed upon.[150] As such, moral turpitude served a clear policy purpose: it placed those offenses which caused the most reputational harm, based on a widely shared consensus, into a particular legal category, for purposes of adjudicating slander cases which concerned reputation.[151] It makes sense, then, that authorities imported moral turpitude into other realms: professional licensure, witness impeachment, and juror disqualification.[152] As originally conceived, moral turpitude helped to pick out both the worst among us, and the least honest among us; thus, the standard was particularly well suited to each of these contexts.

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[145] *Id.* at 317–18.

[146] *Id.* at 318.

[147] *Id.*

[148] *See supra* Parts IV.B.1, IV.B.2.

[149] Smith v. Smith, 34 Tenn. (2 Sneed) 473, 479–83 (1855); *see also* Simon-Kerr, *supra* note 37, at 1022–23 (discussing the case).

[150] *See supra* Part IV.B.1.

[151] *Cf. supra* Part IV.B.1.

[152] *See* Christopher J. McFadden et al., *Preservation of Error with Regard to the Jury Selection Process—Generally*, *in* GEORGIA APPELLATE PRACTICE WITH FORMS § 9.3 (2017); H.D.W., Annotation, *What Offenses Involve Moral Turpitude Within Statute Providing Grounds for Denying or Revoking License of Dentist, Physician, or Surgeon*, 109 A.L.R. 1459, 1459–64 (1937); R.E.H., Annotation, *Impeachment of Witness by Expert Evidence Tending To Show Mental or Moral Defects*, 15 A.L.R. 932, 932–36 (1921). Indeed, moral turpitude is still used as a criterion for witness impeachment in some states. *See* STEVEN GOODE & OLIN GUY WELLBORN, COURTROOM EVIDENCE HANDBOOK 12–13 (2016–2017 Student ed. 2016); George Blum et al., *Necessity that Felony Involve Moral Turpitude*, 21A CAL. JUR. 3D CRIMINAL LAW: TRIAL § 767 (2017).

4. *The Creation of an Important Precedent:* Jordan v. De George

In 1951, just before the passage of the INA, the Supreme Court decided the seminal moral turpitude case of *Jordan v. De George*.[153] De George was twice convicted of conspiracy to defraud the United States of taxes on distilled spirits.[154] The defendant had lived in the United States for twenty-nine years, and his wife and children were all American citizens.[155] After appealing his deportation order over a five-year period beginning in 1946, the Supreme Court finally pronounced him removable.[156] The Court found it critical that—up to that point—"[i]n every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude."[157] Because of the "contaminating component" of fraud in his conspiracy to deprive the federal government of revenue, the Court deemed this crime turpitudinous.[158] In subsequent immigration-court and appellate cases, fraud, deceit, and virtually all forms of dishonesty and concealment have been treated as paradigmatic examples of moral turpitude;[159] *Jordan v. De George* continues to be cited in many of these opinions.[160]

V. A SOLUTION

The moral turpitude standard in immigration law has long ceased to serve the policy function for which it was originally conceived. Rather than continuing to evolve as the American public's moral sentiments have changed, moral-turpitude decisions have led courts to calcify outdated ethical norms in judicial precedent.[161] Judges and administrators closely adhere to moral-

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[153] Jordan v. De George, 341 U.S. 223, 232 (1951).

[154] *Id.* at 224–25.

[155] *Id.* at 233 (Jackson, J., dissenting).

[156] *Id.* at 225–26 (majority opinion).

[157] *Id.* at 227. The offenses the Court cites for this proposition include: "obtaining goods under fraudulent pretenses; conspiracy to defraud by deceit and falsehood; forgery with intent to defraud; using the mails to defraud; execution of chattel mortgage with intent to defraud; concealing assets in bankruptcy; [and] issuing checks with intent to defraud." *Id.* at 228 (citations omitted).

[158] *Id.* at 229.

[159] *See, e.g.*, Arias v. Lynch, 834 F.3d 823, 827 (7th Cir. 2016) ("Despite the confusion about how to determine what moral turpitude is, there is a consensus that fraud is close to the core of moral turpitude.").

[160] *See, e.g., id.*; Prudencio v. Holder, 669 F.3d 472, 481 (4th Cir. 2012); Ali v. Mukasey, 521 F.3d 737, 739 (7th Cir. 2008); Lopez-Meza, 22 I. & N. Dec. 1188, 1191 (B.I.A. 1999); *In re* Ramos, 326 P.3d 826, 831 (Wash. Ct. App. 2014).

[161] *Compare, e.g., Jordan*, 341 U.S. at 231 (concluding that "difficulty in determining whether certain marginal offenses [were] within the meaning of the language" did not render the statute unconstitutionally vague and, therefore, the meaning of moral turpitude was sufficiently definite to withstand scrutiny), *with, e.g., Lopez-Meza*, 22 I. & N. Dec. at 1191 (stating that since *Jordan*, courts have referred to moral turpitude as a "'nebulous concept' with ample room for differing definitions"). *But see* Beck v. Stitzel, 21 Pa. 522, 524 (1853)

turpitude precedents—insofar as they concern specific crimes—because closely following such precedent limits the appearance that courts are simply applying judges' individualized senses of morality.[162] It would seem imprudent—or in any event unlikely—for judges to suddenly break with this practice, and begin explicitly deciding moral-turpitude cases based on what they, personally, view as "base[], vile[], or deprav[ed]."[163]

Of course, there are other possible ways to resolve the moral-turpitude problem, and this Note begins by presenting this author's novel solution in contrast to those.[164] First, some have proposed that the United States Supreme Court find the term "moral turpitude" to be void for vagueness.[165] While other authors make compelling arguments on this front, this solution would itself require an upending of an oft-cited precedent, *Jordan v. De George*.[166] Additionally, this judicial solution would simply remove the moral-turpitude standard from the INA without providing a workable replacement, and could not be implemented as quickly as an administrative one.[167] Others have proposed a legislative solution[168]: that Congress should provide a definition of "crimes involving moral turpitude" in the INA.[169] However, Congress has been wrought with gridlock in recent years.[170] And, even in a time when Republicans control both the House and Senate, the redefinition would have to clear several

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(indicating that moral turpitude standards are "necessarily adaptive," in the sense that they ought to evolve over time); Simon-Kerr, *supra* note 37, at 1019 (discussing *Beck*). The author offers support for this Note's contentions regarding modern moral sentiments below in terms of public—and broadly speaking, emotional—reactions to wrongdoing. One of the strengths of the metaethical paradigm of moral sentimentalism is its ability to "mak[e] sense of the practical aspects of morality." *Moral Sentimentalism*, STAN. ENCYCLOPEDIA PHIL. (Jan. 29, 2014), https://plato.stanford.edu/entries/moral-sentimentalism [https://perma.cc/6WWL-58JM]; *see also* DAVID HUME, A TREATISE OF HUMAN NATURE 457 (L.A. Selby-Bigge ed., 2d ed. 1978) ("Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular."). *See generally* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759) (outlining a version of this paradigm).

[162] *See* Harms, *supra* note 5, at 276 n.147.

[163] *Moral Turpitude*, *supra* note 27.

[164] *See infra* Part V.A.

[165] *See* Moore, *supra* note 28, at 814; *see also* Koh, *supra* note 5, at 1127; *infra* Part V.A.2.

[166] *See Jordan*, 341 U.S. at 229 ("But it has been suggested that the phrase 'crime involving moral turpitude' . . . is . . . unconstitutional for vagueness. Under this view, no crime, however grave, could be regarded as falling within the meaning of the term 'moral turpitude.'"); Moore, *supra* note 28, at 833.

[167] *See* ELIZABETH C. RICHARDSON, ADMINISTRATIVE LAW AND PROCEDURE 15 (1996) ("Agencies can generally move faster than courts . . . .").

[168] *See* Harms, *supra* note 5, at 260; *see also infra* Part V.A.1.

[169] *See* Harms, *supra* note 5, at 260.

[170] *See* Martin Nie & Christopher Barns, *The Fiftieth Anniversary of the Wilderness Act: The Next Chapter in Wilderness Designation, Politics, and Management*, 5 ARIZ. J. ENVTL. L. & POL'Y 237, 276–77 (2014) ("[C]ongressional gridlock has simply pushed some policy issues and disputes onto alternative decision-making paths . . . [including] executive branch intervention . . . .").

veto-gates, including a potential Democratic filibuster.[171] In any case, an administrative solution, as Judge Posner suggests in his *Arias* concurrence, has the virtue of relatively rapid implementation.[172]

As a result, this Note proposes that the BIA adopt a definition of *what* moral turpitude is. While the DOJ's previous efforts in the *Silva-Trevino* cases have dealt with *how* adjudicators ought to look for moral turpitude, Judge Posner accurately suggests that a serious solution that resolves moral-turpitude jurisprudence's most grave issues must deal with *what* the concept itself entails.[173] This Note proposes that "yes" answers to the following questions be necessary conditions for a finding that any given crime involves moral turpitude:

1. Is the mens rea purposely or knowingly?
2. Is it punishable by at least five years in prison? Alternatively, is it a sex crime; a crime of domestic violence; a violent crime that involves harm to children, animals, or the elderly; or a hate crime?

To be consistent with Judge Posner's prescription that the BIA use rules that avoid sweeping in "harmless conduct," the DOJ ought to prefer a bright-line rule for determining what constitutes a crime involving moral turpitude.[174] More specifically, these factors result from several basic propositions about twenty-first century ethical norms and moral-turpitude law. For one, as *Franklin* and *Sotnikau* illustrate, moral-turpitude determinations involving offenses of recklessness and negligence are often so hair-splitting as to be arbitrary.[175]

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[171] *See* Mark Z. Barabak & Lisa Mascaro, *Republicans Hold the House and Senate, but Will That End the Washington Gridlock Even with President Trump?*, L.A. TIMES (Nov. 9, 2016), http://www.latimes.com/politics/la-na-pol-election-congress-control-20161108-story.html [https://perma.cc/3SET-V9AA] (Republican control); Burgess Everett & Seung Min Kim, *McConnell Warns Trump To Back Off on Killing Filibuster*, POLITICO (Jan. 27, 2017), http://www.politico.com/story/2017/01/mitch-mcconnell-trump-filibuster-234293 [https://perma.cc/W6HH-39YF] (indicating that Senate Majority Leader Mitch McConnell does not support ending the filibuster). *See generally* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997) (describing the filibuster).

[172] *See* Arias v. Lynch, 834 F.3d 823, 830–36 (7th Cir. 2016) (Posner, J., concurring in the judgment) (suggestion); RICHARDSON, *supra* note 167, at 15 ("[A]gencies are efficient when you consider how long it would take Congress or even a court to respond . . . ."). To be clear, Judge Posner himself suggests administrative action, but does not expound on the virtues of administrative efficiency. *See Arias*, 834 F.3d at 830–36 (Posner, J., concurring in the judgment).

[173] *See Arias*, 834 F.3d at 836 (Posner, J., concurring in the judgment) ("[T]he [BIA's] congressional mandate [under the INA] is to identify crimes that are morally reprehensible and thus a proper ground for deportation."); *see also* Silva-Trevino (*Silva-Trevino III*), 26 I. & N. Dec. 550, 554 (Att'y Gen. 2015) (DOJ efforts); Silva-Trevino (*Silva-Trevino I*), 24 I. & N. Dec. 687, 688–90 (Att'y Gen. 2008) (DOJ efforts), *vacated*, 26 I. & N. Dec. 550, 554 (Att'y Gen. 2015).

[174] *See Arias*, 834 F.3d at 836 (Poser, J., concurring in the judgment); *infra* Part V.C.

[175] *See* Sotnikau v. Lynch, 846 F.3d 731, 735–37 (4th Cir. 2017); Franklin, 20 I. & N. Dec. 867, 867 (B.I.A. 1994); *supra* Part III.B.2 (discussing cases). Even if the distinctions between involuntary manslaughter law in Missouri and Virginia are not arbitrary in the sense

Second, modern Americans regard violence as being quite serious in nature, whereas their nineteenth-century forebears did not.[176] Additionally, Westerners find the victimization of vulnerable people, including sex crimes, to be morally reprehensible.[177] Finally, in any case, sentencing standards and offense gradation, in the twenty-first century, relate to how seriously Americans regard any particular crime.[178] The BIA is best positioned to move forward with this redefinition of moral turpitude because it (1) can act relatively quickly and decisively, and (2) generally receives *Chevron* deference with respect to its definition of moral turpitude.[179] This Note concludes by arguing that this author's proposed moral-turpitude redefinition should be upheld by courts under various schemes of deference.[180]

A. *Contrasting Judicial and Legislative Proposals*

Again, legislative and judicial solutions lack the swiftness of an administrative change.[181] However, both Professor Brian Harms and Derrick Moore offer compelling legislative and judicial solutions, respectively.[182] Professor Harms details a congressional redefinition of "crimes involving moral turpitude" based on what he terms a "listing method plus."[183] Mr. Moore outlines the arguments for a judicial finding that "crimes involving moral turpitude" is unconstitutionally void for vagueness.[184]

1. *Congress Could Redefine Moral Turpitude*

In his 2001 article *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, Professor Brian Harms articulates a legislative fix for moral turpitude

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that courts use "arbitrary" in constitutional void-for-vagueness law, it seems dubious that the fine-grain legal distinctions elicited in these cases relate to what Missourians and Virginians regard as base, vile, or depraved. *See supra* Part III.B.2 (discussion of cases); *infra* Part V.A.2 (void for vagueness). Is it true that Missourians think involuntary manslaughter to be a "vile" offense, while Virginians think that it is not? The author doubts this.

176 *See infra* Part V.D.2 (violence today); *supra* Part IV.B.2 (violence in the nineteenth century).

177 *See infra* Part V.D.2.

178 *See infra* Part V.D.3.

179 *See* RICHARDSON, *supra* note 167, at 15 (quick action); *infra* Part V.E (*Chevron*); *see also* Ali v. Mukasey, 521 F.3d 737, 738 (7th Cir. 2008) (*Chevron*).

180 *Infra* Part V.E. Again, some circuits apply non-*Chevron* schemes of deference to the BIA's determinations of whether a given crime involves moral turpitude. *E.g.*, Smalley v. Ashcroft, 354 F.3d 332, 335–36 (5th Cir. 2003) ("First, we accord 'substantial deference to the BIA's interpretation of the INA' and its definition of the phrase 'moral turpitude.' Second, we review *de novo* whether the elements of a state or federal crime fit the BIA's definition of a [crime involving moral turpitude]." (citation omitted)).

181 *See* RICHARDSON, *supra* note 167, at 15.

182 *See* Harms, *supra* note 5, at 260; Moore, *supra* note 28, at 816.

183 Harms, *supra* note 5, at 279.

184 Moore, *supra* note 28, at 816.

law.[185] He begins by drawing on several sources which argue that the current state of moral-turpitude decisions can best be understood as falling into four categories: "(1) crimes against the person; (2) crimes against property; (3) sex crimes and crimes involving family relationships; and (4) crimes of fraud against the government or its authority."[186] Although courts often do not draw on these distinctions as decision-making frameworks, they offer some clarity in describing the body of moral-turpitude law.[187] Crimes against the person are found to "involve moral turpitude when the local statute . . . requires 'malicious intent.'"[188] As a result, murder, *inter alia*, is always a crime involving moral turpitude.[189] Crimes against property "involve moral turpitude if the . . . statute requires an intent to deprive, defraud, or destroy."[190] Sex crimes and crimes involving family relationships are a bit more difficult to succinctly characterize.[191] Rape, for instance, as an "aggravated" sex crime, always involves moral turpitude.[192] On the other hand, those sex crimes which courts consider nonaggravated, such as vagrancy, are not turpitudinous.[193] Crimes of fraud against the government or its authority, such as unlawful use of the mails, are considered exemplary crimes involving moral turpitude in all cases.[194]

Professor Harms considers that, if Congress were to delineate "crimes involving moral turpitude" in statute, it could take one of three approaches.[195] First, legislators could choose the "listing method," which is what it sounds like: simply creating lists of turpitudinous and nonturpitudinous crimes.[196] For instance, "crimes of fraud against the government or its authority," or murders, would always be crimes involving moral turpitude, per an explicit directive in an amended INA.[197] Of course, this would maximize notice to the public, but would offer minimal flexibility.[198] In fact, it would likely depend on the notion that a complete list of crimes might be ascertainable with certainty, and would require future legislators to decide whether every new federal, state, or local crime in the United States belonged in the "basket of turpitude" or not.[199]

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[185] Harms, *supra* note 5, at 260.

[186] *Id.* at 267–69.

[187] *Id.*; *see, e.g.*, Arias v. Lynch, 834 F.3d 823, 823–30 (7th Cir. 2016) (failing to use this as a decision-making framework).

[188] Harms, *supra* note 5, at 267–68.

[189] *Id.*

[190] *Id.* at 268.

[191] *See id.* at 268–69.

[192] *Id.* at 268.

[193] *Id.* at 269. Family law, although Professor Harms places it in this category, is a bit more haphazard: "adultery, abortion, bigamy, spousal abuse, and child abuse" have been held to be crimes involving moral turpitude, while bastardy has not. *Id.*

[194] Harms, *supra* note 5, at 269.

[195] *Id.* at 278–79.

[196] *Id.* at 279–80.

[197] *Id.* at 267–70 (type of crime); *id.* at 279–80 (method).

[198] *See id.* at 279–80.

[199] *See id.* at 280.

Second, Congress could simply codify the current common law of moral turpitude.[200] While this "generally accepted principles" approach provides minimal notice, it would have the arguable virtue of preserving current judicial flexibility.[201] Ultimately, Professor Harms recommends that Congress use what he calls the "listing method plus," specifically detailing which crimes are crimes involving moral turpitude, which are not, and setting up a clearer framework for those that are not in either category.[202]

2. *The Supreme Court Could Find That Moral Turpitude Is Void for Vagueness*

In a 2008 note in the Cornell International Law Journal, Derrick Moore argues that the void-for-vagueness argument is meritorious.[203] Importantly, sixteen years after *Jordan*, the Supreme Court clarified that the vagueness doctrine could apply to noncriminal statutes in *Keyishian v. Board of Regents*.[204] Further, Moore cites at least three reasons why *Jordan* could be read narrowly.[205] First, *Jordan* is amenable to the interpretation that it is only binding on "'easy' fraud" cases.[206] Again, fraud is a paradigmatic example of moral turpitude.[207] Since De George committed an offense of fraud against the government, it made more sense to find that he was on notice that his conduct was turpitudinous, as it had been turpitudinous since the nineteenth century.[208] Secondly, the void-for-vagueness argument is raised sua sponte, and in response to Justice Jackson's dissent.[209] Here, Moore cites Professors Adam A. Milani and Michael R. Smith's work criticizing sua sponte decisions generally;[210] importantly, Professors Milani and Smith argue that such decisions should be accorded less precedential weight, as courts do not consider them as fully

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[200] Harms, *supra* note 5, at 280–81.

[201] *Id.*

[202] *Id.* at 281–83.

[203] Moore, *supra* note 28, at 816. Professor Jennifer Lee Koh discusses the void-for-vagueness doctrine's possible application throughout immigration law, including moral turpitude law, in *Crimmigration and the Void for Vagueness Doctrine*. Koh, *supra* note 5. The author has chosen Moore's note to summarize as a possible alternative because of Moore's narrower focus on crimes involving moral turpitude. *See* Moore, *supra* note 28, at 816.

[204] Keyishian v. Bd. of Regents, 385 U.S. 589, 609–10 (1967); Moore, *supra* note 28, at 834.

[205] Moore, *supra* note 28, at 815–16.

[206] *Id.* at 835–36.

[207] Arias v. Lynch, 834 F.3d 823, 827 (7th Cir. 2016) ("[T]here is a consensus that fraud is close to the core of moral turpitude.").

[208] *See* Moore, *supra* note 28, at 815–16.

[209] *Id.* at 836–37.

[210] *Id.* at 837 (citing Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 251 (2002)).

relative to issues that parties brief and argue.[211] Finally, Moore cites some of the alleged flaws in the majority opinion alluded to above.[212] Chief Justice Vinson, writing for the Court, calls moral turpitude a "deep root[ed]" concept, since it had, at that point, been in immigration law for about sixty years.[213] However, Justice Jackson, writing in dissent, finds this characterization disingenuous, as courts and scholars had already recognized the term's ambiguities.[214] Additionally, the *Jordan* majority fails to explicitly connect the void-for-vagueness doctrine with the concept of notice, an underlying policy concern that has been more fully developed as a component of the doctrine in subsequent years.[215] The doctrine's availability outside of the criminal context, *Jordan*'s narrow reading, and moral turpitude's widely recognized vagueness arguably offer the judicial branch an opportunity to strike down the INA's reliance on moral turpitude as too ambiguous.[216]

Professor Harms and Mr. Moore each offer compelling solutions that would address significant problems with moral turpitude. However, neither achieves the rapid implementation of an administrative solution;[217] further, while a judicial finding of void for vagueness might constitute a first step towards resolving the problem, it still would not answer the question: What is the sort of morally reprehensible conduct for which someone ought to be excluded from the United States?[218] As a result, this Note urges the BIA to follow Judge Posner's suggestion in *Arias*, and redefine what "moral turpitude" means.[219]

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[211] *See* Milani & Smith, *supra* note 210, at 251; Moore, *supra* note 28, at 837. Professors Milani and Smith cite at least three things that appellate courts often fail to do with respect to sua sponte issues, which ought to be best practices: "request supplemental briefs and arguments from counsel," "grant the losing party's request for rehearing," and indicate that subsequent courts should accord the *sua sponte* issue "less deference." *Id.*

[212] Moore, *supra* note 28, at 837–39.

[213] Jordan v. De George, 341 U.S. 223, 227 (1951); Moore, *supra* note 28, at 837–38.

[214] *Jordan*, 341 U.S. at 243–44 (Jackson, J., dissenting); Moore, *supra* note 28, at 837.

[215] *See Jordan*, 341 U.S. at 223–32; Moore, *supra* note 28, at 838. Further, arguably, the Court was precluded from considering the void-for-vagueness issue in *Jordan*, since the issue was not raised in the petition for certiorari. *See* Moore, *supra* note 28, at 838–39.

[216] Moore, *supra* note 28, at 813–16, 828.

[217] *Cf.* RICHARDSON, *supra* note 167, at 15 (describing agencies as quicker at handling problems).

[218] *See* Arias v. Lynch, 834 F.3d 823, 836 (7th Cir. 2016) (Posner, J., concurring in the judgment) ("[T]he [BIA's] congressional mandate [under the INA] is to identify crimes that are morally reprehensible and thus a proper ground for deportation.").

[219] *See id.* This author reads Judge Posner's *Arias* concurrence as suggesting that the BIA should adopt a construction of "crimes involving moral turpitude" that he would deem more reasonable. However, it should be acknowledged that Judge Posner is not so explicit as to suggest that the DOJ initiate this change via adjudication. This Note, though, aspires to devise a construction of the term that would satisfy his concerns.

B. *Emphasizing the "What" over the "How"*

The BIA's previous attempts at addressing problems in moral-turpitude decision-making, in the *Silva-Trevino* cases, centered on questions of *how* to look for moral turpitude;[220] in his *Arias* concurrence, Judge Posner urges the BIA to resolve the "what" question that lies at the heart of the problem.[221] Judge Posner, like many, criticizes the bizarre juxtapositions between crimes that are and are not ones of moral turpitude.[222] He offers the following list from the DOJ's handbook as one that is particularly confusing[223]:

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[220] Silva-Trevino (*Silva-Trevino I*), 24 I. & N. Dec. 687, 687 (Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550, 554 (Att'y Gen. 2015); Silva-Trevino (*Silva-Trevino III*), 26 I. & N. Dec. 550, 550 (Att'y Gen. 2015).

[221] *See Arias*, 834 F.3d at 836 (Posner, J., concurring in the judgment) ("[T]he [BIA's] congressional mandate [under the INA] is to identify crimes that are morally reprehensible and thus a proper ground for deportation.").

[222] *Id.* at 833.

[223] *Id.* (citing U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 9 FAM 40.21(a) N2.3-2).

Table 1

Crimes Involving Moral Turpitude:	Crimes Not Involving Moral Turpitude:
(1) Bribery; (2) Counterfeiting; (3) Fraud against revenue or other government functions; (4) Mail fraud; (5) Perjury; (6) Harboring a fugitive from justice (with guilty knowledge); and (7) Tax evasion (willful).	(1) Black-market violations; (2) Breach of the peace; (3) Carrying a concealed weapon; (4) Desertion from the Armed Forces; (5) Disorderly conduct; (6) Drunk or reckless driving; (7) Drunkenness; (8) Escape from prison; (9) Failure to report for military induction; (10) False statements (not amounting to perjury or involving fraud); (11) Firearms violations; (12) Gambling violations; (13) Immigration violations; (14) Liquor violations; (15) Loan sharking; (16) Lottery violations; (17) Possessing burglar tools (without intent to commit burglary); (18) Smuggling and customs violations (where intent to commit fraud is absent); (19) Tax evasion (without intent to defraud); and (20) Vagrancy.

In examining the two lists, some themes do emerge: Crimes involving moral turpitude tend to have higher mens rea standards, and have more obvious connections to fraud and dishonesty.[224] Despite this, Judge Posner sees the list as confounding.[225] As he puts it, "[t]he first is open-ended and therefore provides incomplete guidance on how to avoid committing a crime of moral turpitude against the government. The second list . . . includes a number of crimes that are as serious . . . as those in the first list . . . ."[226] Of course, Judge Posner is not alone in his opinion that crimes involving moral turpitude and

[224] *See id.*
[225] *Id.*
[226] *Id.*

crimes *not* involving moral turpitude often seem equally serious.[227] The explanation for this is simple: Our modern moral sentiments no longer accord with those notions of moral turpitude that have hardened into judicial precedent.[228]

C. *How To Avoid Sweeping in Harmless Conduct: Use a Bright-Line Rule*

Ad hoc tests have a downside: they can be unfair.[229] Critics of moral-turpitude standards make this point routinely.[230] Why do aggravated DUIs involve moral turpitude, but other DUIs do not?[231] Why is cocaine possession turpitudinous, but marijuana possession is not?[232] In part, the ad hoc nature of current moral-turpitude standards explains this: Judges are free—within sometimes tight precedential constraints—to apply their own moral sense to each case.[233] And, when judges apply their own moral sense in making decisions, they may treat individuals unfairly; the crimes that seem really bad to one judge will be not so bad to another, and which way any individual case goes will rest on the luck of the draw.[234]

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[227] *See Arias*, 834 F.3d at 833 (Posner, J., concurring in the judgment). *Compare supra* Part V.A.1 (Professor Harms), *with supra* Part V.A.2 (Moore).

[228] *See supra* Part IV.B.1 (Professor Simon-Kerr).

[229] *See, e.g.*, *Arias*, 834 F.3d at 833 (Posner, J., concurring in the judgment).

[230] *See supra* Parts V.A.1 (Professor Harms), and V.A.2 (Moore).

[231] *See supra* Part III.B.1.

[232] *Compare* State v. Major, 391 S.E.2d 235, 237 (S.C. 1990) (cocaine), *with* State v. Harvey, 268 S.E.2d 587, 588 (S.C. 1980) (marijuana).

[233] *See supra* Parts IV.B.1, IV.B.2, and IV.B.3 (discussing nineteenth-century precedents which do, in fact, significantly constrain current moral-turpitude decisions). To illustrate the extent to which personal morality may affect judicial moral-turpitude decisions, one could compare *Major*, 391 S.E.2d at 237, a case in which a South Carolina court found cocaine possession to be a turpitudinous crime, with *Harvey*, 268 S.E.2d at 588, a case in which a different South Carolina court found marijuana possession to be nonturpitudinous.

[234] *Compare Major*, 391 S.E.2d at 237, *with Harvey*, 268 S.E.2d at 588.

Yet, precise bright lines are necessarily somewhat arbitrary.[235] Municipalities formulate speed limits with precision.[236] However, few would pretend that driving twenty-six miles per hour in a residential neighborhood involves a grave moral wrong, while driving twenty-five miles per hour on the same street is commendably safe. Instead, governments line draw simply because lines must be drawn somewhere.[237] Experiments with open-ended speed limits have run into serious problems.[238] As a result, we accept very particular speed limits, even if they penalize fairly harmless conduct. The literature criticizing moral turpitude usually discusses the first type of ad hoc unfairness ad nauseum, and focuses less on what might happen if courts were to draw moral-turpitude lines too precisely.[239] And, although the two concepts laid

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[235] *See* HENRY SIDGWICK, THE METHODS OF ETHICS 457 (6th ed. 1901) ("[U]niformity [in rulemaking] is . . . at least highly desirable, in order to maintain effectively such rules of conduct as are *generally*—though not *universally*—expedient. Under this head would come the exacter definition of the limits of . . . property in literary compositions and technical inventions . . . ."); *cf.* Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, *in* PHILOSOPHY OF LAW 574, 580 (Joel Feinberg & Jules Coleman eds., 8th ed. 2008) ("The principle involved in imposing ordinary strict liability . . . [means that m]ost of those held liable will be at fault but a minority will not."). The author is indebted to Erin Flynn, Ph.D., Associate Professor of Philosophy at Ohio Wesleyan University, for making this more general point (in a class lecture) in reaction to Professor Honoré's essay.

[236] *See* FED. HIGHWAY ADMIN., FHWA-SA-12-004, METHODS AND PRACTICES FOR SETTING SPEED LIMITS: AN INFORMATIONAL REPORT 10 (Apr. 2012) (describing four practices and methodologies used to establish speed limits).

[237] *See id. But see* OHIO REV. CODE ANN. § 4511.21(A) (LexisNexis Supp. 2018) ("No person shall operate a motor vehicle, trackless trolley, or streetcar at a speed greater or less *than is reasonable or proper* . . . ." (emphasis added)). This "reasonable rate of speed" provision governs many instances of possible speeding in Ohio. *See, e.g.*, State v. Neff, 322 N.E.2d 274, 275 (Ohio 1975); 7 OHIO JUR. 3D § 284 (2015). Additionally, for instance, Columbus does not have a speeding ordinance which renders all violations of posted speed limits instances of speeding per se. *Compare* OHIO REV. CODE ANN. § 4511.21(B)(1)–(16) (containing no mention of a thirty-mile-per-hour speed limit), *and* COLUMBUS, OHIO TRAFFIC CODE, § 2133.03(B)(1)–(7) (2009) (containing no mention of a thirty-mile-per-hour speed limit), *with*, GOOGLE MAPS, https://www.google.com/maps (on file with *Ohio State Law Journal*) (search 497 West Broad Street, Columbus, Ohio, use street view function, and view the north side of West Broad Street) (a thirty-mile-per-hour speed limit sign in Columbus), *and* CITY OF COLUMBUS, DEP'T OF DEV., CITY OF COLUMBUS CORPORATE BOUNDARY (Nov. 2013), https://www.columbus.gov/uploadedFiles/Columbus/Departments/Development/Planning_Division/Map_Center/Columbus%20Corporate%20Boundary.pdf [https://perma.cc/X2TK-GPBM] (indicating that said speed limit sign is within city limits). *Cf. Liberty Woman Pulled Over for Driving 1 Mile over Speed Limit*, FOX CAROLINA (Jan. 15, 2016), http://www.foxcarolina.com/story/30780079/liberty-woman-pulled-over-for-going-1-mph-over-speed-limit [https://perma.cc/J454-PUKX] (describing the story of a woman being pulled over by a police officer for going one-mile-per-hour over the posted speed limit).

[238] *See, e.g.*, Jim Robbins, *Montana's Speed Limit of ?? M.P.H. Is Overturned as Too Vague*, N.Y. TIMES (Dec. 25, 1988), http://www.nytimes.com/1998/12/25/us/montana-s-speed-limit-of-mph-is-overturned-as-too-vague.html [https://perma.cc/XX32-G8HY].

[239] *Cf. supra* Parts IV.B.1 (Professor Simon-Kerr), V.A.1 (Professor Harms), and V.A.2 (Moore).

out above are not entirely mutually exclusive, many policymaking decisions involve the balancing of these competing concerns.[240]

In any enterprise of precise line drawing, one may predict what type of seemingly undesirable result the rule's arbitrariness will more often cause: a false positive or a false negative.[241] In the speeding context, low speed limits risk penalizing drivers who are driving in a safe manner. This is a false positive. This must be balanced against the risk of a high speed limit, which might fail to catch many drivers who are driving at speeds unsafe given road conditions: a false negative. Of course, line drawing occurs in many contexts, and line drawers must be sensitive to the policy needs underlying the creation of standards.[242] In devising screening procedures for cancers, scientists and physicians want to catch as many instances of actual cancer as possible, with the concomitant risk that they will detect "cancer" where none exists (a false positive).[243] So, they draw the "you have cancer" line at a place that risks, if anything, over diagnosing. On the other hand, in designing police hiring procedures, law enforcement agencies prefer false negatives;[244] they want to avoid hiring individuals who will end up "on the front page of the newspaper and not for good reasons."[245]

What type of error should we prefer in determining what is a crime involving moral turpitude? Although the ad hoc breed of moral-turpitude decisions often come under fire, this area has evolved to become an odd mixture of bright lines and case-by-case evaluations.[246] Murder and rape, for instance,

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[240] *See, e.g.*, Renée Paradis, Note, *Carpe Demonstratores: Towards a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators*, 103 COLUM. L. REV. 316, 316 (2003) (discussing the relative merits of possible bright-line tests, compared with more nebulous alternatives in § 1983 claims against police officers for excessive use of force).

[241] *See, e.g.*, Darren Boone et al., *Patients' & Healthcare Professionals' Values Regarding True- & False-Positive Diagnosis when Colorectal Cancer Screening by CT Colonography: Discrete Choice Experiment*, Article in *PLOS One*, PLOS 1 (2013), https://doi.org/10.1371/journal.pone.0080767 [https://perma.cc/6NW5-2W9S].

[242] *See, e.g.*, Chuck Russo, *Demystifying the Background Investigation Process: What You Can Expect when Applying for a Law Enforcement Job*, PUB. SAFETY (Feb. 4, 2014), http://inpublicsafety.com/2014/02/demystifying-the-background-investigation-process-what-you-can-expect-when-applying-for-a-law-enforcement-job/ [https://perma.cc/VVW9-42WR] (discussing law enforcement-recruitment standards).

[243] *See, e.g.*, Boone et al., *supra* note 241, at 1 ("When screening for colorectal cancer, patients and professionals believe gains in true-positive diagnoses are worth much more than the negative consequences of a corresponding rise in false-positives.").

[244] *See* Russo, *supra* note 242 (discussing the use of polygraph tests—among other generally cautious hiring practices—by law enforcement agencies); *see also The Truth About Lie Detectors (aka Polygraph Tests)*, AM. PSYCHOL. ASS'N (Aug. 5, 2004), http://www.apa.org/research/action/polygraph.aspx [https://perma.cc/38ET-62CP] (discussing reliability issues with polygraph tests).

[245] Russo, *supra* note 242.

[246] *See supra* Part III and accompanying footnotes.

are always crimes involving moral turpitude.[247] These are uncontroversial bright lines. However, stare decisis has morphed certain less-generalizable decisions into bright-line rules: aggravated DUI is a crime involving moral turpitude, while "ordinary" DUI is not.[248] Cocaine possession is a crime involving moral turpitude, while marijuana possession is not.[249] Particular judges have found appreciable differences between the moral import of these crimes, where others do not see such differences. Additionally, ad hoc decisions are based on differing standards: Sometimes judges look for scienter, and sometimes they look to see if a crime is *malum in se*.[250] In any case, these precedents have calcified into rules that lack a basis in the underlying policy.[251] They are—as Judge Posner puts it—"broad categorical rules that sweep in harmless conduct."[252] The DOJ would be wise to take Judge Posner's advice seriously and draw bright lines that err on the side of false negatives. This way, the presence of clear standards will reduce the chances that individual judges will use their own, personalized moral senses to decide moral-turpitude cases.

To reiterate, in drawing additional boundaries to clarify the content of its moral-turpitude test, the BIA should mandate that—to be a possible crime involving moral turpitude—an adjudicator must answer "yes" in response to two criteria for any given crime:

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[247] *See, e.g.*, Milija Zivkovic, No. A017-009-761, 2014 WL 4966413, at *3 (B.I.A. Aug. 28, 2014) (indicating that both rape and attempted rape are crimes involving moral turpitude); Applicant, 1998 WL 1990297, at *1 (I.N.S. Nov. 9, 1998) ("Murder is a crime involving moral turpitude in all cases."); Rivera Pagán v. Superintendente de la Policía, 135 P.R. Dec. 789, 799 (1994) (indicating that attempted murder is a crime involving moral turpitude).

[248] *See, e.g.*, Lopez-Meza, 22 I. & N. Dec. 1188, 1189, 1196 (B.I.A. 1999).

[249] *Compare* State v. Major, 391 S.E.2d 235, 237 (S.C. 1990) (cocaine), *with* State v. Harvey, 268 S.E.2d 587, 588 (S.C. 1990) (marijuana).

[250] *See supra* Part III.A and accompanying footnotes.

[251] *See supra* Part IV.B (discussing old precedents); *cf.* Arias v. Lynch, 834 F.3d 823, 834 (7th Cir. 2016) (Posner, J., concurring in the judgment) (alluding to the ways in which current moral-turpitude jurisprudence fails to respond to underlying policy concerns regarding which noncitizens have committed morally reprehensible crimes). Indeed, in other contexts, the American government has adapted the term "moral turpitude" to be responsive to its policy concerns. *See* DEP'T OF THE AIR FORCE, GUIDANCE MEMORANDUM 191 (2017), http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-3208/afi36-3208.pdf [https://perma.cc/F47J-7YVL] [hereinafter AIR FORCE MANUAL]. The Air Force Manual—perhaps in view of the policies of unit cohesion and discipline—dictates that, for certain purposes, "offenses involving moral turpitude include . . . sexual perversion, drug addiction, drug use, and drug supplier . . . ." *Id.*

[252] *Arias*, 834 F.3d at 836 (Posner, J., concurring in the judgment).

1. Is the mens rea purposely or knowingly?
2. Is it punishable by at least five years in prison? Alternatively, is it a sex crime; a crime of domestic violence; a violent crime that involves harm to children, animals, or the elderly; or a hate crime?[253]

Together, these factors would avoid sweeping in crimes that are comparatively innocuous in view of modern ethical norms. While they reflect a preference for false negatives over positives, the justifications for each of these factors can be found in threads running through Judge Posner's concurrence, as well as other criticisms of moral turpitude law.[254]

D. *The BIA Should Use Standards that Accord with Our Modern Moral Sentiments*

These criteria would sweep away the most problematic vestiges of nineteenth-century moral ideas that plague current moral-turpitude law. First, as illustrated by the discussion of involuntary manslaughter cases above, these precedential rules have devolved from being meaningful distinctions related to reputational harm into exercises in fairly arbitrary nit-picking of *mens rea* elements. By drawing a bright line that includes only those crimes committed purposely or knowingly, courts could ensure that only the most reprehensible crimes occasion additional immigration penalties via a label of "moral turpitude." Next, this test substitutes modern moral sensibilities that actually correspond to reputational harm by penalizing crimes of violence, crimes that hurt vulnerable victims, or alternatively, crimes that occasion harsh sentences.

1. *Moving away from Fraud: Reassessing Mens Rea Requirements*

First, for a crime to be considered one of moral turpitude, it must require a mens rea of purposely or knowingly, or the functional equivalent thereof.[255]

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[253] The author assumes that courts would maintain a "categorical approach" in answering these questions; for example, courts would only make a finding of "domestic violence" if a defendant was convicted under an actual domestic violence statute. For instance, see generally Nat'l Conference of State Legislatures, *Domestic Violence/Domestic Abuse Definitions and Relationships*, NCSL (Jan. 8, 2015), http://www.ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and-relationships.aspx#1 [https://perma.cc/FYH9-N9EP] (compiling a chart with state provisions regarding domestic violence or abuse). A possible example of the downside of the categorical approach in this context is that not all crimes that would, in layman's terms, be considered "domestic violence" are criminalized as such. *See, e.g.*, OHIO REV. CODE ANN. § 3113.31(A)(1) (LexisNexis Supp. 2018) (requiring that domestic violence occur against a "family or household member," and offering a relatively limited definition of such).

[254] *See, e.g.*, *Arias*, 834 F.3d at 830–36 (Posner, J., concurring in the judgment).

[255] Although the influence of the Model Penal Code has significantly reduced the potential for this to cause confusion, there are still many statutes which take a more haphazard approach to criminal mens rea requirements. *See, e.g.*, JOSHUA DRESSLER, CRIMINAL LAW 109 (2d ed. 2005) ("[M]any states have adopted portions of the [Model Penal

This restriction has a simple basis: to ensure that adjudicators do not sweep in lesser, relatively innocuous offenses because of outdated distinctions that have been calcified in moral-turpitude precedent. For example, if a judge based a moral-turpitude determination on the *malum in se* vs. *malum prohibitum* distinction, she might be inclined to view assault as a crime that is *malum in se*.[256] This makes sense: Legislatures criminalize assault because it is morally wrong, not because it is simply conduct that we wish to avoid for regulatory reasons.[257] However, Ohio's assault statute dictates that, *inter alia*, "[n]o person shall recklessly cause serious physical harm to another . . . ."[258] The Ohio Revised Code indicates that "[a] person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result."[259]

The following hypothetical illustrates why crimes that are committed recklessly and are also *malum in se* pose problems for moral-turpitude law. Say that Jones is an undergraduate student living in a small dorm room measuring ten feet by six feet, with one small window facing toward the outside and a desk nearby. Smith, a friend, wishes to play a prank on Jones, and intends to throw a

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Code]."); *see also* MODEL PENAL CODE § 2.02(2) (AM. LAW INST. 1985) (using relatively precise mens rea definitions, namely "purposely," "knowingly," "recklessly," and "negligently"); *cf., e.g.*, 26 U.S.C. § 7201 (2012) (using the mens rea term "willful" in defining a tax evasion crime). For the purposes of this test, any crime requiring anything more than "consciously disregard[ing] a substantial and unjustifiable risk that [a] material element exists or will result from [an offender's] conduct" would qualify as a functional equivalent of "purposely" or "knowingly" where none of the terms "purposely," "knowingly," "recklessly," or "negligently" are used to denote the required mens rea for the offense of which an individual was convicted. *See* MODEL PENAL CODE § 2.02(2)(c) (defining recklessness). For instance, terms like "intentionally" or "willfully" used in the United States Code would qualify as "functional equivalents" of "purposely" or "knowingly." *Cf., e.g.*, 26 U.S.C. § 7201 (using "willful"); DRESSLER, *supra* at, 403 (indicating that, as a mens rea term, "intentional" equates to "purposeful" or "knowing"). An additional problem arises when statutes are ambiguous about mens rea requirements; indeed, the Supreme Court has read implicit guilty-mind standards into some laws. *See, e.g.*, Dean v. United States, 556 U.S. 568, 570–72 (2009); *see also* Paul Larkin et al., *The Supreme Court on Mens Rea: 2008–2015*, HERITAGE FOUND. (Jan. 14, 2016), http://www.heritage.org/courts/report/the-supreme-court-mens-rea-2008-2015#_ftn21 [https://perma.cc/CJ46-NWF7] (discussing such statutes generally). In any case—for the sake of bright-line drawing and preferring false negatives—if a court cannot find by a preponderance of the evidence that an offense requires something more than recklessness, the offense should not qualify as a crime involving moral turpitude. Courts should apply the Model Penal Code's definition of "recklessness." MODEL PENAL CODE § 2.02(2)(c).

[256] *Cf., e.g.*, Richard L. Gray, Note, *Eliminating the (Absurd) Distinction Between* Malum in Se *and* Malum Prohibitum *Crimes*, 73 WASH. U. L.Q. 1369, 1393 (1995) (indicating that some courts and academics find assault to be a crime *malum in se*).

[257] *See, e.g.*, Antonacci v. State, 504 So. 2d 521, 523 (Fla. Dist. Ct. App. 1987) ("[A]ssault is malum in se."). *But see* Gray, *supra* note 256, at 1393 (indicating that this claim is not universally supported by judges and academics).

[258] OHIO REV. CODE ANN. § 2903.13(B) (LexisNexis 2014).

[259] *Id.* § 2901.22(C) (LexisNexis Supp. 2018).

rock at Jones's window. One night, seeing Jones sitting at the desk through the window, Smith decides to act out her plan: She chooses a rather large stone, hurdles the rock at the glass, shatters the window, and causes injury to Jones's eye. Smith truly had not considered that the consequences of her youthful prank could be so serious. However, it seems clear that Smith acted with heedless indifference to a substantial and unjustifiable risk that physical harm to Jones would result from this conduct. Thus, because Smith has violated a statute that lays out a crime which is *malum in se*, she could be said to have committed a crime involving moral turpitude, even though this prank is one that—I would guess—most of us would agree is not among the most significant crimes one could commit.

2. *What Is Worse than Fraud? Violence and Hurting the Vulnerable*

Of course, in our collective, modern moral consciousness, mens rea alone does not determine the severity of a crime. Whereas in the nineteenth century, violence was once considered a lesser indication of character than dishonesty or promiscuity, today, Americans' fears regarding crime are largely driven by violent crime.[260] In popular media discussions—and even in academic literature—"crime" and "violence" are often used synonymously when talking about public fear.[261] As crime rates have decreased in the last twenty years, and as the public continues to believe that crime is becoming more frequent, a strong argument can be made that the "if it bleeds, it leads" philosophy of television

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[260] *See supra* Part IV.B (nineteenth century); *cf.* Mark Warr, *Fear of Victimization*, PUB. PERSP., Nov.–Dec. 1993, at 25, 25, https://ropercenter.cornell.edu/public-perspective/1993/51.html [https://perma.cc/K6H7-XRH6] (discussing public fear of crime in the context of violent crime). Throughout this discussion, the author essentially argues that modern public fear of violence indicates that the same public finds violence to be morally reprehensible. Although this is an oversimplification of the discussion, the author acknowledges this inferential leap in general, and asserts that it is likely not a controversial one. *See generally* Antti Kauppinen, *Moral Sentimentalism*, STAN. ENCYCLOPEDIA PHIL. (Jan. 29, 2014), https://plato.stanford.edu/entries/moral-sentimentalism [https://perma.cc/6WWL-58JM] (detailing the eponymous metaethical paradigm which holds that individuals' emotions, such as fear, are key to "the anatomy of morality").

[261] Kenneth Dowler, *Media Consumption and Public Attitudes Toward Crime and Justice: The Relationship Between Fear of Crime, Punitive Attitudes, and Perceived Police Effectiveness*, 10 J. CRIM. JUST. & POPULAR CULTURE 109, 110 (2003) ("In an early study, Gerbner . . . hypothesized that heavy viewing of television *violence* leads to fear rather than aggression. Gerbner . . . find[s] that individuals who watch a large amount of television are more likely to feel a greater threat from *crime* . . . ." (emphasis added) (citations omitted)); *Public Perception of Crime Remains out of Sync with Reality, Criminologist Contends*, UTNEWS (Nov. 10, 2008), https://news.utexas.edu/2008/11/10/crime [https://perma.cc/WM4M-EJTN] ("Yet when dramas such as 'CSI' . . . dominate popular television, and crime coverage often fills a quarter of newspapers, measured perspectives . . . are often lost . . . ."); *Are We Scaring Ourselves to Death*, YOUTUBE (Nov. 20, 2013), https://www.youtube.com/watch?v=WmiFShBQDIs [https://perma.cc/7XRN-JHPA] (ABC television broadcast).

reporting is to blame.[262] The diversion of federal law enforcement resources away from white-collar crime towards antiterrorism efforts, and the public's general view of blue-collar crime as less socially acceptable, both support the same view: whether right, wrong, or indifferent, Americans today see violence as a more serious type of crime.[263]

As a result, the second of the proposed necessary conditions above asks, *inter alia*, if an offense involves violence. If we want the government's moral-turpitude judgments to line up with our actual moral sensibilities, drawing lines in a way that emphasizes violent crime is a necessary first step. However, even within the universe of violence, there are key distinctions that cannot be lost. After all, the media drives public fear of violent crime by covering very serious felonies, such as rape and murder;[264] on the other hand, two intoxicated patrons

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[262] *See, e.g.*, Alyssa Davis, *In U.S., Concern About Crime Climbs to 15-Year High*, GALLUP (Apr. 6, 2016), http://www.gallup.com/poll/190475/americans-concern-crime-climbs-year-high.aspx [https://perma.cc/Y5PA-TRY6] (discussing public fear of crime); Alan Neuhauser, *U.S. Crime Rate Rises Slightly, Remains Near 20-Year Low*, U.S. NEWS AND WORLD REPORT (Sept. 26, 2016), https://www.usnews.com/news/articles/2016-09-26/us-crime-rate-rises-slightly-remains-near-20-year-low (on file with *Ohio State Law Journal*) (discussing a decrease in the overall crime rate); Adam Saeler, *Unreality TV: The Media and Crime Rates*, 3 CIVIC COLUMN 1, 2–3 (2011), http://www.civicinstitute.org/wordpress/wp-content/uploads/2011/07/Civic-Column-Summer-2011.pdf [https://perma.cc/8ZGV-RQCB]; *cf.* Charles M. Blow, *Crime, Bias and Statistics*, N.Y. TIMES (Sept. 7, 2014), https://www.nytimes.com/2014/09/08/opinion/charles-blow-crime-bias-and-statistics.html (on file with *Ohio State Law Journal*) ("Many media outlets reinforce the public's racial misconceptions about crime by presenting African-Americans and Latinos differently than whites . . . ."); *Truth vs. Perception of Crime Rates for Immigrants* (PBS television broadcast July 10, 2015), http://www.pbs.org/newshour/bb/truth-vs-perception-crime-rates-immigrants/ [https://perma.cc/V9E7-LALJ] (stating that public perception does not match data in recent annual crime report). *See generally* Deborah Serani, *If It Bleeds, It Leads: Understanding Fear-Based Media*, PSYCHOL. TODAY (June 7, 2011), https://www.psychologytoday.com/blog/two-takes-depression/201106/if-it-bleeds-it-leads-understanding-fear-based-media [https://perma.cc/2RNB-HKXB] (describing media crime reporting generally, as well as its potential psychological effects at an individual level).

[263] *See* GENNARO F. VITO & JEFFREY R. MAAHS, CRIMINOLOGY 351 (4th ed. 2017) (noting that "little attention is given" to many white-collar crimes); Stuart P. Green & Matthew B. Kugler, *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud*, 75 LAW & CONTEMP. PROBS. 33, 34–35 (2012) (discussing less-serious treatment of white-collar crime in many cases); Joseph P. Martinez, Unpunished Criminals: The Social Acceptability of White Collar Crimes in America 5, 21, 40 (Apr. 11, 2014) (unpublished senior honors thesis, Eastern Michigan University), http://commons.emich.edu/cgi/viewcontent.cgi?article=1381&context=honors (on file with *Ohio State Law Journal*) ("When the subject of criminal activity is brought to conversation, frequently our minds begin to consider the various forms of street crimes whose effect are very visible and immediate. Perhaps this is because the risk of serious bodily harm is much greater when comparing a strong-arm robbery to a financial scam conducted in the business place."); *Terrorism*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/investigate/terrorism [https://perma.cc/2SVD-UJBP] ("Protecting the United States from terrorist attacks is the FBI's number one priority.").

[264] *See* Serani, *supra* note 262 (detailing media practices that emphasize very violent crimes).

punching each other at the bar, while violent, tends not to be newsworthy.[265] Yet, assaults between feuding males make up a disproportionate number of violent crimes relative to the media coverage they receive.[266] Society takes other categories of crime more seriously: One need only compare media reaction to football players injuring intimate partners with media reaction to football players punching one another.[267] Of course, crimes that modern Americans consider most serious cannot be limited to domestic violence: sex crimes, hate crimes, and crimes with other vulnerable victims make intuitive candidates.[268]

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[265] *Compare* Melissa Jeltsen, *Horrific Footage of Ray Rice Punching Then-Fiancée Released*, HUFFPOST (Sept. 4, 2015), https://www.huffingtonpost.com/2014/09/08/ray-rice-punch-video_n_5783380.html [https://perma.cc/4EJT-8S8H] (describing a notorious case, which received a great deal of media coverage, in which an NFL player punched his then-fiancee on video in a casino elevator), *with* The Sports Xchange, *Denver Broncos Coach Breaks Up Locker Room Fight Between Offense, Defense*, UPI (Dec. 19, 2016), https://www.upi.com/Sports_News/NFL/2016/12/19/Denver-Broncos-coach-breaks-up-locker-room-fight-between-offense-defense/2101482179611/ [https://perma.cc/P3D7-X8KF] (describing a relatively less newsworthy event in which NFL players were involved in a locker-room altercation).

[266] *Compare* Jeltsen, *supra* note 265, *with* The Sports Xchange, *supra* note 265.

[267] *See, e.g.*, Bill Landis, *Hear the 911 Call from Bri'onte Dunn's Girlfriend Alleging Former Ohio State RB Hit and Choked Her*, CLEVELAND.COM (July 20, 2016), http://www.cleveland.com/osu/2016/07/hear_the_911_call_from_brionte.html [https://perma.cc/TP73-832E] (athlete and domestic violence); Ebenezer Samuel, *Cowboys Rookie Ezekiel Elliott Accused of Beating Ex-GF*, N.Y. DAILY NEWS (July 23, 2016), http://www.nydailynews.com/sports/football/cowboys-rookie-ezekiel-elliott-accused-beating-woman-article-1.2721641 (on file with *Ohio State Law Journal*) (athlete and domestic violence). *Compare* Jeltsen, *supra* note 265, *with* The Sports Xchange, *supra* note 265.

[268] Sex crimes are considered especially heinous in American society. *See Law & Order SVU: No Surrender* (NBC television broadcast Feb. 22, 2017) (containing an opening sequence which asserts that sex crimes are especially heinous). *But see* Holly Henderson, Note, *Feminism, Foucault, and Rape: A Theory and Politics of Rape Prevention*, 22 BERKELEY J. GENDER L. & JUST. 225, 225–26 (2007) (describing philosopher Michel Foucault's position, expressed in the 1970s, that rape should be punished no more severely than assault). *See generally* Olive Travers, *Community Treatment of Sex Offenders*, 50 FURROW 387, 387 (1999) (describing negative attitudes towards sex offenders in society). Attitudes toward child abuse and domestic violence might be described similarly. *See* MONICA L. MCCOY & STEFANIE M. KEEN, CHILD ABUSE AND NEGLECT 5–7 (2d ed. 2014) (discussing increasingly harsh attitudes toward child abuse since the enlightenment); Jane Martinson, *The Laudable Drive To Change Attitudes Towards Violence Against Women*, GUARDIAN (July 23, 2012), https://www.theguardian.com/lifeandstyle/the-womens-blog-with-jane-martinson/2012/jul/23/attitudes-domestic-violence-women [https://perma.cc/928S-MQ9N] (discussing more recent changes in attitudes toward domestic violence). The proliferation of hate-crime statutes in modern times suggests that Americans consider hate crimes to be exceptionally reprehensible. *See* Scott Phillips & Ryken Grattet, *Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law*, 34 LAW & SOC'Y REV. 567, 572 (2000) ("[B]y 1995 two-thirds of U.S. states had enacted hate crime laws . . . ." (citations omitted)); *Hate Crime Laws*, U.S. DEP'T JUST. (2017), https://www.justice.gov/crt/hate-crime-laws [https://perma.cc/33YH-9QJU] (detailing the history of federal hate-crime legislation since 1968). Crimes against the elderly have received similar treatment. *See* J. Vincent Aprile

Although this list may not be comprehensive, keeping these extremely offensive acts within the bounds of moral turpitude makes sense based on all of the available information describing our society's moral sensibilities. Or, put differently, among crimes with relatively lower sentences, these offenses should not be excluded as possible crimes involving moral turpitude.

3. *Our Conceptions of Baseness and Depravity are Connected to Sentencing Standards*

By asking whether the crime is punishable by five years or more in prison, *or alternatively* a crime of violence with a vulnerable victim, the "punishable by five years or more in prison" prong of the moral turpitude test above manages to accomplish one thing: It excludes misdemeanors and low-level felonies that are nonviolent or do not involve an exceptionally vulnerable victim.[269] This

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II, *Defending the Elderly*, 27 A.B.A. CRIM. JUST., Spring 2012, at 55, *reprinted in* GPSOLO, Sept./Oct. 2012, at 70, 70 ("The criminal justice system has begun to recognize the need to prosecute vigorously cases of elder abuse . . . ."); Nat'l Conference of State Legislatures, *Financial Crimes Against the Elderly 2013 Legislation*, NCSL (Jan. 10, 2014), http://www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2013-legis.aspx [https://perma.cc/7CAU-RS4W] ("In the 2013 legislative session, 29 states and the District of Columbia had legislation to address financial crimes and exploitation against the elderly and other vulnerable adults."). Society also increasingly recognizes that abuse of animals is not only morally reprehensible, but often foreshadows abuse of humans by the same offenders. *See generally* Clifton P. Flynn, *Why Family Professionals Can No Longer Ignore Violence Toward Animals*, 49 FAM. REL. 87, 87 (2000) (arguing that family scholars and professionals need to address animal abuse because of its "disturbing nature" and "negative consequences for both people and animals").

[269] Many accuse the American criminal justice system of treating various other categories of crime with undue harshness. *See, e.g.*, ELIZABETH LINCOLN, INTERNATIONAL DRUG POLICY CONSORTIUM, THE UNITED STATES RETHINKS DRACONIAN DRUG SENTENCING POLICIES, 1 (Jan. 2015) (criticizing American drug laws); Brian Mann, *The Drug Laws That Changed How We Punish*, NPR (Feb. 14, 2013), http://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish (on file with *Ohio State Law Journal*); Mark Memmott, *Holder Decries "Draconian Mandatory Minimum Sentences,"* NPR (Aug. 12, 2013), https://www.npr.org/sections/thetwo-way/2013/08/12/211291336/timely-idea-holder-to-pitch-changes-to-drug-enforcement [https://perma.cc/LUX6-YELC]; *cf.* Arias v. Lynch, 834 F.3d 823, 834 (7th Cir. 2016) (Posner, J., concurring in the judgment) (describing the civil penalty of deportation as harsh relative to an offense that inhered in the defendant's undocumented entry into the United States). These include drugs laws and laws related to undocumented migration. *See Arias*, 834 F.3d at 833–34 (Posner, J., concurring in the judgment) (undocumented worker); LINCOLN, *supra*, at 1 (drug laws). Importantly, in many cases, the United States Code's lowest level, "simple possession" drug offenses are punishable by less than five years in prison. *See* 21 U.S.C. § 844(a) (2012). Similarly, those like Arias who use a false social security number cannot be punished by more than five years in prison without aggravating circumstances. 42 U.S.C. § 408(a)(7)–(8). Additionally, illegal entry into the United States is not punishable by more than two years in prison, and lacks an explicit mens rea requirement under most circumstances. 8 U.S.C. § 1325(a). As a result, the

criterion rests on the assumption that today, our moral sentiments are connected to sentencing standards.[270] Indeed, when one begins discussing more serious offenses, ethical lines may blur. Perhaps a defendant has been convicted of drug trafficking, but we can be sure that he was associated with a broader, violent criminal enterprise. Perhaps a drug dealer never struck, stabbed, or shot his customers, but instead gave them strong opiates that lead to their overdose deaths. Or, in other cases, an ambitious Ponzi schemer may have defrauded investors of billions of dollars, causing many to lose their entire life savings. Each of these crimes run afoul of modern moral sensibilities, and might still be considered a twenty-first-century crime involving moral turpitude.[271]

E. *Courts Should Uphold Such a Redefinition by the DOJ*

The majority of circuits apply *Chevron* deference to the BIA's decisions regarding whether a given crime involves moral turpitude.[272] While other

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two factors outlined here already eliminate these crimes as possible crimes involving moral turpitude.

[270] Nineteenth-century Americans could not have conceived of the particularity of today's sentencing guidelines. *Cf., e.g.*, Adam Davidson, Comment, *Learning from History in Changing Times: Taking Account of Evolving Marijuana Laws in Federal Sentencing*, 83 U. CHI. L. REV. 2105, 2107–08 (2016) ("The Sentencing Reform Act of 1984 created the United States Sentencing Commission to establish a uniform system of 'sentencing policies and practices' by implementing 'detailed' federal sentencing guidelines for judges to follow. The pre-Guidelines sentencing regime afforded judges wide discretion." (citations omitted)).

[271] *See, e.g.*, Beth Burger, *Justice Insider: Judge Pines for Short North Posse Days When Murder Wasn't Priority*, COLUMBUS DISPATCH (Apr. 4, 2017), http://www.dispatch.com/news/20170404/justice-insider-judge-pines-for-short-north-posse-days-when-murder-wasnt-priority [https://perma.cc/SD6X-AHL7] (describing negative reactions to a Columbus gang involved in both drug trafficking and a number of murders); Josh Sanburn, *Heroin Is Being Laced with a Terrifying New Substance: What To Know About Carfentanil*, TIME (Sept. 12, 2016), http://time.com/4485792/heroin-carfentanil-drugs-ohio/ [https://perma.cc/KQF8-ND7C] (describing opiate overdose deaths); Kyle Smith, *Wait a Minute—Why Should I Hate Bernie Madoff?*, FORBES (Feb. 9, 2011), https://www.forbes.com/2011/02/08/bernie-madoff-ponzi-scheme-social-security-opinions-contributors-kyle-smith.html [https://perma.cc/WM66-L75K] (suggesting that the author is extremely unusual for not "hating" infamous Ponzi schemer Bernie Madoff).

[272] *See* Knapik v. Ashcroft, 384 F.3d 84, 88 (3d Cir. 2004). Courts treat the question of how, procedurally, to determine whether a crime involves moral turpitude differently from the question of whether a given crime involves moral turpitude. *See, e.g.*, Jean-Louis v. Attorney General, 582 F.3d 462, 477 (3d Cir. 2009). In *Jean-Louis*, the DOJ supported its *Silva-Trevino I* standard by arguing, *inter alia*, that "crime" and "involving moral turpitude" could be understood as "distinct grammatical units." *Id.* The Third Circuit rejected this, indicating that the phrase is unambiguous (under a *Chevron* rubric) insofar as it constitutes a single term of art. *Id.* In contrast, in *Prudencio v. Holder* the Fourth Circuit came to a similar conclusion regarding this argument, but declined to extend the DOJ *Chevron* deference with respect to its determinations of how to examine questions of moral turpitude from a procedural standpoint. Prudencio v. Holder, 669 F.3d 472, 485 (4th Cir. 2012). *See*

circuits apply a varied mosaic of standards on this question without invoking *Chevron*, the DOJ would have strong arguments that this redefinition of moral turpitude is consistent with either *Skidmore* deference, or even a modified de novo review.[273] Although a change in the definition of a crime involving moral turpitude by the BIA might occasion a resolution of this circuit split on an important issue, just as importantly, many of the same reasons undergird the arguments that the DOJ might make to different circuits.

The Seventh Circuit Court of Appeals, like many others, reviews these questions under the *Chevron* rubric.[274] In applying *Chevron*, courts must first ask "whether Congress has directly spoken to the precise question at issue."[275] However, if a statute is "silent or ambiguous with respect to [a] specific issue," courts must ask if an agency's interpretation is reasonable.[276] In the context of moral turpitude in the Seventh Circuit, the court has stated that (1) the term "crimes involving moral turpitude" in the INA is ambiguous, and (2) the BIA is entitled to *Chevron* deference with respect to its interpretation of the term.[277] For many of the reasons that Judge Posner discusses, this Note's definition is reasonable.

The Ninth Circuit might apply *Skidmore* deference in resolving whether a change in the definition of a crime involving moral turpitude is permissible. In *Marmolejo-Campos v. Holder*, the court held that *Skidmore* deference is appropriate when the BIA deviates from its own precedents in deciding whether a particular crime involves moral turpitude.[278] *Skidmore* deference entails evaluating an agency's interpretation of a statute based on its degree of care, its consistency, formality, relative expertness, and the persuasiveness of the agency's position.[279] Here, the DOJ has an opportunity to present a revision of moral turpitude that, though purposefully inconsistent with prior doctrine, is created carefully and persuasively, and ought to be applied formally.

The Fifth Circuit would apply a modified de novo review in this context.[280] In *Smalley v. Ashcroft*, the court outlined its general approach as according "'substantial deference to the BIA's interpretation of the INA' and its definition of the phrase 'moral turpitude.'"[281] However, the Fifth Circuit reviews "*de novo*

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generally Chaffin, *supra* note 25, at 505–06 (stating that *Chevron* deference to the BIA is not universal).

[273] *Knapik*, 384 F.3d at 87–88 (mentioning multiple review standards).

[274] Ali v. Mukasey, 521 F.3d 737, 739 (7th Cir. 2008).

[275] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps.").

[276] *Chevron*, 467 U.S. at 843.

[277] *Ali*, 521 F.3d at 739.

[278] Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009) (en banc).

[279] *See* United States v. Mead Corp., 533 U.S. 218, 228 (2001); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[280] Smalley v. Ashcroft, 354 F.3d 332, 335–36 (5th Cir. 2003).

[281] *Id.*

whether the elements of a . . . crime fit the BIA's definition."[282] Thus, although the Fifth Circuit's approach could accurately be characterized as a de novo review, its deference on the question of defining "moral turpitude" in the first place should allow for the DOJ to argue meaningfully for a revised meaning.

Under any of these deference schemes, courts should uphold a reasoned redefinition of what constitutes a crime involving moral turpitude. For one thing, any reader would be hard-pressed to find judicial decisions that praise the BIA's current interpretation.[283] Importantly, this change would vindicate the judiciary's own relentless, vigorous criticisms of moral-turpitude law.[284] This marks the revised definition as both reasonable under *Chevron*, and persuasive under *Skidmore*. The change, in a general sense, would also find a great deal of support from academic literature.[285] Moreover, at least one court has suggested that moral-turpitude standards, in the first place, were meant to change over time.[286] The definition of moral turpitude also shifts across policy contexts: the Air Force defines crimes involving moral turpitude as "includ[ing] . . . sexual perversion, drug addiction, drug use, and drug suppl[ying]."[287] And, the basic definition of "moral turpitude" remains unchanged: conduct which is "bas[e], vil[e], or deprav[ed]."[288] Since courts today seem to render decisions that run counter to this definition, an agency reinterpretation is appropriate.[289] *Chevron*, *Skidmore*, and other schemes of judicial deference should not pose an obstacle to the BIA in adopting an interpretation of "crimes involving moral turpitude" that is congruent with modern ethical norms.

VI. CONCLUSION

Moral-turpitude law presents unique difficulties. Each branch of our government must grapple with its outmoded, haphazard rules in one way or another.[290] Congress may be unlikely to act, since providing a definition which lists specific crimes as unworthy of deportation might make for biting television ads come campaign season.[291] The courts, left with no guidance from the

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[282] *Id.* at 336.

[283] *See, e.g.*, Arias v. Lynch, 834 F.3d 823, 830–36 (7th Cir. 2016) (Posner, J., concurring in the judgment); *cf. supra* Parts V.A.1, V.A.2.

[284] *See, e.g.*, *Arias*, 834 F.3d at 830–36 (Posner, J., concurring in the judgment).

[285] *See supra* Parts V.A.1, V.A.2.

[286] Beck v. Stitzel, 21 Pa. 522, 524 (1853) (indicating, in a nineteenth-century case, that moral turpitude standards are "necessarily adaptive," in the sense that they ought to evolve over time).

[287] AIR FORCE MANUAL, *supra* note 251, at 191.

[288] *Moral Turpitude*, *supra* note 27.

[289] *Cf., e.g.*, *Arias*, 834 F.3d at 830–36 (Posner, J., concurring in the judgment).

[290] *Cf. supra* Parts V.A.1, V.A.2.

[291] *Cf.* DARRELL M. WEST, AIR WARS: TELEVISION ADVERTISING IN ELECTION CAMPAIGNS, 1952–2004 111 (4th ed. 2005) ("An analysis . . . demonstrates that advertising significantly affected voters' rating of several policy problems . . . ."); Jeffrey W. Koch, *Campaign Advertisements' Impact on Voter Certainty and Knowledge of House Candidates'*

legislature and little from the Supreme Court, can only apply precedent as best it can be determined to maintain judicial impartiality.[292] When that body of precedent itself depends on a mixture of nineteenth century honor-culture norms and decades-old decisions, moral-turpitude law is rife with instances of square pegs being pounded into round holes.[293] In many ways, the BIA is stuck in the middle. It is constrained by the definition of "conviction" in the INA, and frustrated by a fractured judiciary.[294] The BIA should take advantage of the judicial deference it receives, and the concomitant recognition that it may—within reason—reinterpret statutes in light of policy goals. By excluding low-level, nonviolent crime, and by fixing a fine point on the mens rea required for a finding of moral turpitude, it can move the law in a positive direction.

Ideological Positions, 61 POL. RES. Q. 609, 609 (2008) ("Evidence . . . indicates that the more negative issue advertisements were broadcast, the more confident citizens became that they knew the targeted candidate's ideological position."); Niraj Chokshi, *How Judicial Campaign Ads May Be Affecting Legal Decisions*, WASH. POST (Oct. 22, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/10/22/how-judicial-campaign-ads-may-be-affecting-legal-decisions/?utm_term=.f2f540d0f877 [https://perma.cc/5523-UT92] (providing anecdotal evidence that elected officials' behavior may be influenced by attack ads); Jose A. DelReal, *Trump, in First Attack Ad, Accuses Cruz of Immigration Flip-Flop*, WASH. POST (Jan. 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/01/22/trump-in-first-attack-ad-accuses-cruz-of-immigration-flip-flop/?utm_term=.3280824c09b6 [https://perma.cc/Y5PA-TRY6] (describing a fairly recent example of an immigration-oriented attack ad).

[292] *See supra* Part V.

[293] *See supra* Parts III, IV.

[294] *See supra* Parts II.B and III.B.