

WHY DEPORTING IMMIGRANTS FOR “CRIMES INVOLVING MORAL TURPITUDE” IS NOW UNCONSTITUTIONAL

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In the best of times, immigrants should only be deported according to the rule of law and not by the whim of executive branch officials. Now, it is imperative. Yet the statute authorizing removal of immigrants for “crimes involving moral turpitude” invites officials to base their prosecutorial choices on political or personal views. As a result, defense attorneys advising their clients on the immigration consequences of pleas have no basis for prediction. Although the Supreme Court long ago rejected the argument that the “moral turpitude” clause was void for vagueness, one of the Court’s most recent decisions now makes that conclusion unsupported. The notion that due process permits officials to banish legal permanent residents based on “moral turpitude,” which never comported with common sense, is now legally incorrect.

INTRODUCTION

Every year, many Legal Permanent Residents (LPRs, or “green card holders”) are removed from the United States for past “crimes involving moral turpitude” (CIMT).¹ Many of these LPRs have lived in the United States since their youth. The phrase “crime involving moral turpitude” appears in the immigration statute, so the courts are bound to enforce it, if it is constitutional. Common sense strongly suggests that deporting people based on subjective impressions of morality is unconstitutionally vague, yet the United States Supreme Court has long rejected the vagueness argument. In this Article, we argue that one of the Court’s recent decisions, the 2015 case of *Johnson v. United*

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 1. The terms “exclusion” and “expulsion” are no longer officially used by the INA. However, prior to the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA), an exclusion was a denial of entry into the country, and an expulsion was the removal of a deportable alien already in the country. The IIRAIRA condensed the two terms into one, categorizing them both as “removal proceedings.” Removal proceedings can either be deportations of aliens previously admitted into the country, or determinations that an alien is inadmissible prior to entry. *See infra* Section II.B.

States,² now compels the conclusion that the CIMT clause is unconstitutionally vague.³

The Article proceeds in four parts. First, we examine the relevant portion of the controlling statute, the Immigration and Nationality Act (INA). In this same section, we review the judicial treatment of CIMT over the years, including the Supreme Court’s longstanding determination that, for vagueness purposes, CIMT is treated as if it were a criminal statute. This section also surveys the relevant literature on CIMT. Second, we review the Court’s 2015 decision in *Johnson* and outline its proper, limited scope.⁴ Third, we explain why *Johnson* is squarely inconsistent with the CIMT doctrine as it is currently structured. Finally, we explain why the provision cannot plausibly be given a saving construction and therefore must be struck down on its face.

I. THE IMMIGRATION AND NATIONALITY ACT (INA)

A. *The Relevant Text*

The INA contains two references to crimes involving moral turpitude, one with reference to inadmissibility and the other with

2. 135 S. Ct. 2551 (2015).

3. Although the Supreme Court recently rejected a vagueness challenge based on *Johnson*, that should have no impact on the vagueness analysis regarding CIMT. In *Beckles v. United States*, 580 U.S. ___ (2017), the Court upheld the United States Sentencing Guidelines against a vagueness challenge under *Johnson*. Because the federal guidelines were rendered “effectively advisory” by the Court’s decision in *Booker v. United States*, 543 U.S. 220, 245 (2004), the guidelines are “not amenable to a vagueness challenge.” 580 U.S. at ___, slip op. at 8. However, the CIMT provision of the INA is binding, not advisory, thus making *Beckles* inapposite.

4. *Johnson*’s holding that the residual clause in the Armed Career Criminal Act is unconstitutionally vague has already been used to invalidate other laws, and has created controversy about whether it requires other laws to be invalidated. *See* *United States v. Gonzalez-Longoria*, 831 F.3d 670, 677–79 (5th Cir. 2016) (declining to extend *Johnson*’s reasoning to the phrase “crime of violence” in the sentencing enhancement provision of 18 U.S.C. § 16(b)); *see also* *United States v. Taylor*, 814 F.3d 340, 378–79 (6th Cir. 2016); *United States v. Hill*, 832 F.3d 135, 149–50 (2d Cir. 2016) (similarly distinguishing *Johnson*’s reasoning to hold that a different statute is not unconstitutionally vague). *But see* *United States v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015) (invalidating 18 U.S.C. § 16(b) in other contexts using *Johnson*’s reasoning). Professor Jennifer Lee Koh has elsewhere made a powerful argument that *Johnson* invalidates many immigration provisions, including “crimes involving moral turpitude,” on the ground of vagueness. *See* Jennifer L. Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1177–78 (2016) (describing CIMT as perhaps “the most confusing removal ground in the INA.”). Professor Koh did not focus on CIMT but rather analyzed *Johnson*’s effect on immigration laws more generally. This Article is the first to make the full argument.

reference to removal. The provision regarding inadmissibility appears at 8 U.S.C. § 1182, and states in pertinent part:

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

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) crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.⁵

The provision regarding removal appears at 8 U.S.C. § 1227, and states in pertinent part:

(a) Classes of deportable aliens

Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is

5. Subsection (a)(2)(A)(ii) contains exceptions based on the youth of the immigrant at the time of commission and on the brevity of the maximum possible penalty.

within one or more of the following classes of deportable aliens:

...

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude within five years (or 10 years in the case of any alien provided lawful permanent resident status under Section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

The INA does not define the term “moral turpitude” but instead leaves it to case law, which is surveyed here later.

II. THE HISTORY OF IMMIGRATION REGULATION

Regulation of immigration within the United States dates back to colonial times.⁶ Initially, the regulation of immigration was left to the

6. 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 H.R. COMM. ON THE JUDICIARY].

colonies.⁷ The Constitution and subsequent case law, however, gave the power to control and regulate immigration to Congress.⁸

A. *History of the Immigration and Nationality Act*

The first federal legislation regulating immigration was the Immigration and Nationality Act of March 3, 1875.⁹ The Act simply excluded those convicted of certain crimes, and it prohibited importing women for prostitution.¹⁰ In 1875, the Supreme Court declared tax and bond requirements for incoming aliens in the states of New York, Louisiana and California to be unconstitutional for violating the Commerce Clause.¹¹ The taxes and bonds had been an attempt to produce funds to accommodate the large numbers of aliens then entering the states.¹² Principally in reaction to that decision, lobbyists began fighting for federal financing to deal with immigration.¹³ The ruling was seen as a declaration that immigration was to be left in Congress's hands.¹⁴

In reaction to record levels of immigration, the subsequent amendment to the Act increased the list of excludable aliens, redefined some of the existing categories, and addressed concerns of involuntary immigration (the offloading of perceived undesirables by other countries).¹⁵ The Act of 1891 excluded insane persons, polygamists, and anyone afflicted by contagious diseases.¹⁶ Additionally, and significantly, criminals made excludable by the Act included "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."¹⁷ The amendment was passed without any comment on the meaning of moral turpitude and was the first time the phrase was used in immigration law.

The list of excludable aliens continued to expand in 1903 when Congress added several grounds for exclusion. These additions excluded anarchists, people with mental and physical deficiencies, prostitutes, "professional beggars," and any "helpless" immigrant, as

7. *Id.*

8. The statute generally appears at 8 U.S.C. §§ 1101–1778.

9. H.R. COMM. ON THE JUDICIARY, *supra* note 6, at 6.

10. *Id.* at 6–7.

11. *Henderson v. Mayor of New York*, 92 U.S. 259 (1875).

12. H.R. COMM. ON THE JUDICIARY, *supra* note 6, at 7–8.

13. *Id.* at 8.

14. 13 CONG. REC., 5107 (1882) (statement of Rep. Van Voorhis).

15. H.R. COMM. ON THE JUDICIARY, *supra* note 6, at 10–11.

16. *Id.* at 10.

17. *Id.*

well as anyone accompanying them.¹⁸ Congress repealed the 1903 Act in 1907, and reenacted many of the provisions with additions. The class of individuals excluded due to physical defects was expanded greatly to include people with “feeble minds,” anyone with tuberculosis, and anyone determined by a surgeon to be “mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living.”¹⁹ In addition, the Act excluded aliens who admitted having committed a felony or other crime or misdemeanor involving moral turpitude (without actually having been convicted) in addition to aliens actually convicted of CIMTs.²⁰ Again, the phrase “moral turpitude” was used without definition or comment.

After attempts at passing new legislation had been vetoed three times, once by President William Howard Taft and twice by President Woodrow Wilson,²¹ Congress overruled Wilson’s second veto in 1917. This resulted in the next significant change in the Act. The most controversial amendment to the 1917 Act was the inclusion of a literacy requirement that had been previously vetoed by President Grover Cleveland in 1897.²² This requirement excluded from entry into the United States anyone who was older than 16 and who was unable to read in any language. The 1917 amendments left the criminal provisions unchanged. The health provisions were expanded to include “persons of constitutional psychopathic inferiority” and alcoholics.²³ “Vagrants” were also added to the list of those excluded from entry.²⁴

The Act of 1918 expanded the class of excludable persons, and the Act of 1924 provided the first quota on immigrants.²⁵ The Act also

18. *Id.* at 12–14.

19. *Id.* at 15.

20. *Id.*

21. *Id.* at 16.

22. *Id.* at 16, 18. Cleveland had stated that the literacy requirement “afford[ed] . . . a misleading test of contented industry and supplie[d] unsatisfactory evidence of desirable citizenship or a proper apprehension of the benefits of our institutions.” *Id.* at 11–12.

23. *Id.* at 20.

24. *Id.* at 21.

25. *Id.* at 22–23. The current quota functions as a visa percentage maximum that cannot be exceeded by any one country in a fiscal year. “No more than 7 percent of the visas may be issued to natives of any one independent country in a fiscal year; no more than 2 percent may issued [sic] to any one dependency of any independent country. The per-country limit does not indicate, however, that a country is entitled to the maximum number of visas each year, just that it cannot receive more than that number. Because of the combined workings of the preference system and per-country limits, most countries do not reach this level of visa issuance.” *Per Country Limit*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/tools/glossary/country-limit> (last visited July 18, 2016).

included a section maintained in current legislation in Section 212(a)(20) prohibiting entry of aliens without proper documents.²⁶ The 1917 and 1924 legislations were left largely unchanged until 1952, with most amendments making language or administrative changes.

The largest changes to immigration law came in the Immigration and Nationality Act of June 27, 1952, which repealed, revised, and recodified the then-existing statute.²⁷ President Harry Truman vetoed the Act largely due to the numerical limitations provided by the national origin quota system.²⁸ Truman's veto was overruled, and the Act remains largely in effect today.

Throughout each of these revisions and recodifications, "moral turpitude" remained in the statute, persistently undefined. Additionally, most of the grounds for exclusion from previous acts were retained in the 1952 Act, with some expansions and additions. These additions included narcotics addicts, aliens engaging in immoral sexual acts, aliens entering under false statements, and aliens aiding illegal immigration.²⁹

The current Immigration and Nationality Act is codified in Title 8, chapter 12 of the United States Code.³⁰ The Act provides several bases for inadmissibility and several circumstances in which removal is appropriate. Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), removal proceedings were categorized as either exclusions or expulsions. An exclusion was defined as denying an alien entry into the country, whereas an expulsion referred to removing a deportable alien already in the country.³¹ The IIRAIRA amended the terminology to encompass both exclusions and expulsions with the term "removal proceedings."³² Removal proceedings thus include both aliens who are deportable³³ and aliens who are inadmissible.³⁴ Deportation occurs when an alien who was previously admitted into the United States becomes subject

26. H.R. COMM. ON THE JUDICIARY, *supra* note 6, at 23.

27. *Id.* at 26.

28. *Id.*

29. *Id.* at 26–27.

30. 8 U.S.C. §§ 1101–1537 (2012).

31. *Definition of Terms*, U.S. DEP'T HOMELAND SECURITY, <https://www.dhs.gov/immigration-statistics/data-standards-and-definitions/definition-terms#> (last visited June 20, 2016) [hereinafter *DHS Definitions*].

32. *Id.*

33. 8 U.S.C. § 1227(a) (2012).

34. *Id.* § 1182(a).

to removal for violating the immigration laws.³⁵ Inadmissible aliens are those determined not to meet the criteria in the INA for admission, and they may be placed in removal proceedings.³⁶ Inadmissible aliens may also be allowed to withdraw their applications, or may be subject to an expedited removal if they either have no entry documents, or if their documents are improper.³⁷ Between the years 2005 and 2013, the Department of Homeland Security (DHS) determined nearly two million aliens to be inadmissible, with an average of more than 200,000 per year.³⁸ During that time, an additional half-million aliens were deported.³⁹

There are various reasons for removal of both deportable and inadmissible aliens. The INA lists six separate classes in which deportation is appropriate, including inadmissibility at the time of entry, criminal offenses, failure to register, security related offenses, and unlawful voting.⁴⁰ The criminal offense class is broken down into six subclasses including general crimes, controlled substance crimes, firearm crimes, miscellaneous crimes, crimes of domestic violence, and crimes involving trafficking.⁴¹ The general crimes subclass further includes two subsections based on crimes involving moral turpitude. One subsection concerns crimes involving moral turpitude committed within five years after admission and with a sentence of one year or longer.⁴² The second subsection makes any alien deportable who, after the time of admission, is convicted of two or more crimes involving moral turpitude.⁴³

B. History and Judicial Construction of the Phrase “Moral Turpitude”

i. “Moral turpitude” in American law generally

Despite the fact that the term “crime involving moral turpitude” has a long history within the law, the term has never been exactly

35. *DHS Definitions*, *supra* note 31.

36. *Id.*

37. *Id.*

38. U.S. DEP’T HOMELAND SECURITY, 2013 YEARBOOK OF IMMIGRATION STATISTICS 97 (2014), https://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf.

39. *Id.* at 103.

40. 8 U.S.C. § 1227(a).

41. *Id.* § 1227(a)(2).

42. *Id.* § 1227(a)(2)(A)(i).

43. *Id.* § 1227(a)(2)(A)(ii). The grounds for inadmissibility in the INA are very similar to those listed for deportability, though many sections are more thoroughly described and specific and there are several additional categories.

defined.⁴⁴ That inexactitude has earned the term persistent criticism. The phrase “moral turpitude” first appeared in American defamation law, making slanderous words actionable when they would, if true, subject the slandered party “to an indictment for a crime, involving moral turpitude, or subject him to an infamous punishment.”⁴⁵ Since that time, its use has expanded to evidence law, voting rights, juror disqualification, attorney malpractice and, of course, immigration law.⁴⁶

The New York Supreme Court adopted the term “moral turpitude” in 1809 as a test for slander *per se*.⁴⁷ The court intended to create a category of defamation cases in which the alleged crime would be considered harmful enough to the victim’s reputation that damages would be presumed. Under such conditions, the court believed that the phrase would “conduce to certainty,” making those instances of slander *per se* obvious.⁴⁸ This was reflexive of the social belief that there were “reputation-defining norms of conduct that courts could easily discern.”⁴⁹

After its debut in the law of slander, the phrase moral turpitude was adopted in the law of evidence, under the belief that reputation was relevant to witness credibility.⁵⁰ Multiple states allowed evidence of acts involving moral turpitude to impeach witnesses.⁵¹

Since reputation and credibility were considered highly important character measures, it is unsurprising that Congress embraced moral turpitude as a metric for denying admission to and excluding immigrants. Good moral character appears to have been a priority in attempts to “shape . . . the polity.”⁵² Congress used the phrase to attempt to draw a line between “the orderly and the disorderly.”⁵³ The 1891 Act’s use of the phrase without comment demonstrates Congress’ desire for a flexible standard that allowed for hand selection of those

44. See Derrick Moore, “Crimes Involving Moral Turpitude”: *Why the Void-for-Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT’L L.J. 813, 816 (2008) (“The phrase . . . is unclear and vague.”).

45. *Brooker v. Coffin*, 5 Johns. 188, 188 (N.Y. Sup. Ct. 1809).

46. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1001 (2012).

47. *Brooker*, 5 Johns. at 188.

48. *Id.* at 192.

49. Simon-Kerr, *supra* note 46.

50. *Id.* at 1026.

51. *Id.*

52. *Id.* at 1039.

53. *Id.* at 1045 (quoting WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE* 216 (1996)).

deemed suitable for entry. The subsequent amendment and expanded use of the phrase in 1907 was, again, not explained or defined.⁵⁴

Despite the use of “moral turpitude” for longer than a century, the phrase has not been used consistently among circuits or individual Supreme Court justices.⁵⁵ The most common definition cited in court opinions and law journals is from Black’s Dictionary: “[An] act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man”⁵⁶ Though this definition has held constant and has been continuously cited for many years, it does little to shed light on the proper application of the phrase to particular offenses. The definition calls upon an agency and/or judge to act as the supreme arbiter of morals, an often-inconsistent sentiment dependent on many factors including region, gender, and time period.⁵⁷ Social morality has been described as a “notoriously plastic” concept⁵⁸ that constitutes an “invitation to judicial chaos.”⁵⁹

This amorphous standard has resulted in a tangle of inconsistent rulings affording little predictability.⁶⁰ This inconsistency has shifted with social norms over time, making it impossible to predict whether one thing held to constitute a crime involving moral turpitude at one time would continue to bear that brand of infamy at another. Professor Julia Simon-Kerr provides a detailed account of the history of the use of the phrase, in which she demonstrates just how flexible the standard is and how drastically it has changed over time.⁶¹ When it was a standard for slander, the phrase meant significantly different things for

54. See Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 118 (1929) (“[T]he phrase has been widely employed . . . in legislation dealing with immigration . . .”).

55. See *infra* Section IV-A.

56. *Moral Turpitude*, BLACK’S LAW DICTIONARY (9th ed. 2009).

57. Simon-Kerr, *supra* note 46, at 1004–05 (“Even in early defamation cases, courts were troubled at the lack of familiar legal guideposts and disinclined to use the standard as a platform for their own views of moral conduct. Other courts simply declined to adopt the standard because it would require them to ‘search moral and ethical authors, rather than legal writers.’” (quoting *Skinner v. White*, 18 N.C. (1 Dev. & Bat.) 471, 474 (1836) (per curiam))).

58. *Ali v. Mukasey*, 521 F.3d 737, 739 (7th Cir. 2008).

59. *People v. Castro*, 696 P.2d 111, 134 (Cal. 1985) (Bird, J., dissenting). Although some people believe that *religious* morality as codified in church doctrine is fixed, objective, and absolute, that simply cannot be said of *social* morality.

60. See Note, *supra* note 54, at 117 (“Violation of the Volstead Act and petit larceny have recently been held to involve moral turpitude; manslaughter, violation of a state liquor law, and fornication were held not to.”).

61. See Simon-Kerr, *supra* note 46, at 1005–25 (tracing the standard’s nineteenth-century evolution from its origins in slander through its application to the law of evidence).

men than it did for women. A man's act of moral turpitude connoted "disloyalty, oath-breaking, and deception in financial matters"; a man's moral turpitude was made up entirely of the man's notion of loyalty and integrity.⁶² In contrast, the phrase as applied to a woman indicated "violations of female honor norms requiring sexual purity."⁶³ Thus, while a man's moral worth was bound up in his abstinence from fraud and his loyalty to contract and oath, a woman's was based entirely on her sexual morality. The impact of gender norms on individuals' treatment before the court was no secret; one court even stated explicitly that "the sex of the parties [must be] considered."⁶⁴

Gender norms are not the only generational influence on the meaning of moral turpitude. Views on violence have also changed since the standard was introduced into law. In the beginning, a crime of violence against another could be excused as a defense of honor, while a crime of violence against property was oft times more reprehensible. A striking example is found in an 1851 slander case involving cow poisoning, which exhibits more moral turpitude than do crimes of a "higher *legal* grade, and hence the accusation of it may render a man more infamous in the estimation of the public."⁶⁵ The court noted that even homicide can be mitigated by the heat of passion, but "no circumstances can possibly extenuate the moral turpitude of that wretch who will poison his neighbor's horse or cow."⁶⁶

Though shocking to our modern sentiments about violence against humans, this opinion's high valuation of livestock property was likely unremarkable for the time.⁶⁷ The opinion may also have been different if the incident had taken place in a large metropolitan area rather than in a farming community in Iowa. This all graphically illustrates the plasticity of the concept of moral turpitude and the impossibility of developing it into a standard that does not expand and contract dependent on time period and location. As one judge memorably quipped, "Moral turpitude is a compass with the directional needle removed."⁶⁸

62. *Id.* at 1012.

63. *Id.* at 1013.

64. *McAlmont v. McClelland*, 14 Serg. & Rawle 359, 362 (Pa. 1826).

65. *Burton v. Burton*, 3 Greene 316, 318 (Iowa 1851).

66. *Simon-Kerr*, *supra* note 46, at 1018 (quoting *Burton*, 3 Greene at 318).

67. *Id.*

68. *In re Berk*, 602 A.2d 946, 951 (Vt. 1991) (Morse, J., concurring).

The most famous judicial critique of the CIMT doctrine is Justice Jackson's eloquent dissent in *Jordan v. De George*.⁶⁹ In *De George*, the Court held that deportation should be treated as a criminal penalty for purposes of constitutional analysis, yet upheld the constitutionality of CIMT as applied to the crime of conspiracy to defraud the United States of taxes on distilled spirits.

The Court's treatment of deportation as akin to punishment pointed to a conflict among the federal circuits regarding the definition of moral turpitude.⁷⁰ Jackson denied that the Court could provide a succinct and basic definition of moral turpitude sufficient to resolve that split.⁷¹ He argued that Congress employed the phrase knowing full well that it was highly ambiguous:⁷²

If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral.⁷³

In *De George*, defendant and government agreed that "moral turpitude" was ambiguous and had proposed rival tests to clarify its meaning. De George argued that the test should be the level of violence involved in the crime; the government argued that the test should be the seriousness of the offense.⁷⁴ Of these two tests, said Jackson, only De George's would result in a sufficiently definite construction.⁷⁵ "Seriousness" as a test for moral turpitude was unworkable because all offenses must be of a degree of seriousness, else they would not be denounced as crimes.⁷⁶

Jackson also considered the suggestion that the test for moral turpitude could be hitched to the traditional distinction between crimes *mala prohibita* and crimes *mala in se*.⁷⁷ However, he pointed out that this distinction was far from clear-cut and had been the subject of

69. 341 U.S. 223, 232 (1951) (Jackson, J., dissenting).

70. *Id.* at 233 (citing United States *ex rel.* Berlandi v. Reimer, 113 F.2d 429 (2d Cir. 1940); Maita v. Haff, 116 F.2d 337 (9th Cir. 1940) (both holding that fraud involves moral turpitude)).

71. *De George*, 341 U.S. at 233 (Jackson, J., dissenting).

72. *See id.* at 233–34 (“[A] crime involving moral turpitude has not been defined. No one can really say what is meant by saying a crime involving moral turpitude.”) (quoting *Hearings Before House Committee on Immigration and Naturalization on H.R. 10384*, 64th Cong., 1st Sess. 8 (1916) (statement of Rep. Adolph Sabath)).

73. *Id.* at 234 (Jackson, J., dissenting).

74. *Id.* at 235.

75. *Id.* at 235–36.

76. *Id.* at 236.

77. *Id.*

debate.⁷⁸ The concept of *malum in se*, as well as the notion of moral turpitude, reverted back to the common law practice of blending “religious conceptions of sin with legal conceptions of crime.”⁷⁹ As such, Jackson continued, moral turpitude will always fluctuate with differences in time, culture, and locality. “This is a large country[,] and acts that are regarded as criminal in some states are lawful in others,” Jackson stated.⁸⁰ Lower court opinions applying moral turpitude rested not on consistent usage but rather on the “moral reactions of particular judges to particular offenses.”⁸¹ “How many aliens have been deported who would not have been had some other judge heard their cases, and vice versa, we may only guess,” Jackson and his fellow dissenters concluded.⁸² “That is not government by law.”⁸³

ii. “Moral turpitude” in immigration law

Despite the convoluted history and consistent judicial critique of the phrase, a fair number of offenses are always considered to involve moral turpitude, with courts generally finding explanation unnecessary. Murder and attempted murder,⁸⁴ forcible rape,⁸⁵ prostitution and solicitation of prostitution,⁸⁶ theft with intent to permanently deprive

78. *Id.* at 236–37.

79. *Id.* at 237 (Jackson, J., dissenting).

80. *Id.* at 237–38.

81. *Id.* at 239.

82. *Id.*

83. *Id.* at 239–40.

84. *See, e.g., In re Nalini Nagappa*, A018 197 83, 2010 WL 1747411, at *1 (BIA 2010) (“[V]oluntary manslaughter and attempted murder are extremely serious crimes involving moral turpitude.”); *Matter of Lopez-Amaro*, 20 I. & N. Dec. 668, 673 (BIA 1993) (“[M]urder is a crime involving moral turpitude”); *Matter of Sanchez-Linn*, 20 I. & N. Dec. 362, 366 (BIA 1991) (“[V]oluntary manslaughter and attempted murder . . . are two extremely serious crimes involving moral turpitude.”); *Matter of Awaijane*, 14 I. & N. Dec. 117, 119 (BIA 1971) (“[T]he crime of which the respondent was convicted [attempted murder] did involve moral turpitude”).

85. *See, e.g., People v. Mazza*, 175 Cal. App. 3d 836, 844 (1985) (“Rape fits every suggested definition of moral turpitude.”).

86. *See, e.g., Florentino-Francisco v. Lynch*, 611 F. App’x. 936, 938 (10th Cir. 2015) (“[P]rostitution is a CIMT”); *In the Matter of W*, 4 I. & N. Dec. 401, 402 (BIA 1951) (“[T]he crime of practicing prostitution involves moral turpitude.”).

(including petty theft),⁸⁷ and possession of child pornography⁸⁸ are always CIMT. Failure to register as a sex offender is never a CIMT.⁸⁹ However, there are many other offenses sometimes considered CIMT and other times not. Among the offenses that may or may not be CIMT

87. See, e.g., *U.S. v. Esparza-Ponce*, 193 F.3d 1133, 1137 (9th Cir. 1999) (“[T]he element of moral turpitude would continue to be present whether the theft be petty or grand.”); *Soetarto v. INS*, 516 F.2d 778, 780 (7th Cir. 1975) (“Theft has always been held to involve moral turpitude”); *Ablett v. Brownell*, 240 F.2d 625, 630 (D.C. Cir. 1957) (“[P]etty theft [is] a crime which does involve moral turpitude”); *In re De La Nues*, 18 I. & N. Dec. 140, 145 (BIA 1981) (“Burglary and theft or larceny, whether grand or petty, are crimes involving moral turpitude.”); *In re Scarpulla* 15 I. & N. Dec. 139, 140–41 (BIA 1974) (“[T]heft or larceny, whether grand or petty, has always been held to involve moral turpitude”); *Matter of Grazley*, 14 I. & N. Dec. 330, 333 (BIA 1973) (“[T]hat the theft may have been petty is immaterial to the question of whether or not it involved moral turpitude”).

88. See, e.g., *U.S. v. Santacruz*, 563 F.3d 894, 897 (9th Cir. 2009) (“[K]nowing possession of child pornography is a crime involving moral turpitude.”).

89. See, e.g., *Mohamed v. Holder*, 769 F.3d 885, 889 (4th Cir. 2014) (“[V]iolating a registration law . . . is categorically not a crime involving moral turpitude”); *Totimeh v. Attorney General*, 666 F.3d 109, 116 (3d Cir. 2012) (“[T]he BIA’s determination that Minnesota’s predatory offender registration statute is a crime involving moral turpitude . . . is wrong as a matter of law.”).

are manslaughter,⁹⁰ fraud,⁹¹ sex offenses against children,⁹² child

90. See, e.g., *Carter v. INS*, 90 F.3d 14, 18 (1st Cir. 1996) (“[M]anslaughter stemming from assault and battery is properly classified as a crime of moral turpitude.”); *Franklin v. INS*, 72 F.3d 571, 573 (8th Cir. 1995) (“[W]e cannot say the BIA has gone beyond the bounds of reasonableness in finding that an alien who recklessly causes the death of her child . . . has committed a crime that involves moral turpitude.”); *De Lucia v. Flagg*, 297 F.2d 58, 61 (7th Cir. 1961) (“So long as the homicide is voluntary and not justifiable no amount of provocation can remove it from the class of crimes involving moral turpitude.”); *Pillisz v. Smith*, 46 F.2d 769, 770 (7th Cir. 1931) (“We know of no greater moral law than that which discountenances the taking of human life without excuse We hold, therefore, that moral turpitude was involved in the crime”); *United States ex rel. Allesio*, 42 F.2d 217, 217 (2d Cir. 1930) (“The crimes for which he was convicted [including first degree manslaughter] involved moral turpitude.”). *But see*, e.g., *Matter of Ghunaim*, 15 I. & N. Dec. 269, 270 (BIA 1975) (“Murder and voluntary manslaughter are crimes involving moral turpitude; involuntary [sic] manslaughter is not.”); *Matter of Lopez*, 13 I. & N. Dec. 725, 727 (BIA 1971) (“[T]he respondent was convicted of the crime of involuntary manslaughter, a crime not involving moral turpitude.”).

91. See, e.g., *Miranda-Romero v. Lynch*, 797 F.3d 524, 526 (8th Cir. 2015) (“[A] conviction under [the statute] . . . is thus categorically a crime involving moral turpitude.”); *De Martinez v. Holder*, 770 F.3d 823, 825 (9th Cir. 2014) (“[C]rimes requiring proof of an ‘intent to defraud’ necessarily involve moral turpitude.”); *Planes v. Holder*, 652 F.3d 991, 997–98 (9th Cir. 2011) (“[C]rimes that have fraud as an element . . . are categorically crimes involving moral turpitude.”); *Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1266 (10th Cir. 2011) (“Mr. Rodriguez’s conviction of identity fraud . . . is a crime involving moral turpitude.”); *Mendez v. Mukasey*, 547 F.3d 345, 351 (2d Cir. 2008) (“[F]irst degree larceny in the form of defrauding a public community . . . is a crime involving moral turpitude”); *Cetik v. Gonzales*, 181 F. App’x 117, 118 (2d Cir. 2006) (“Cetik’s conviction . . . constitutes a ‘crime involving moral turpitude’”); *Lozano-Giron v. INS*, 506 F.2d 1073, 1076 (7th Cir. 1974) (“The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.”); *Tseung Chu v. Cornell*, 247 F.2d 929, 934 (9th Cir. 1957) (“[A] violation of [the statute is] a crime involving moral turpitude.”); *U.S. ex rel. Robinson v. Day*, 51 F.2d 1022, 1022 (2d Cir. 1931) (“Forgery in all its degrees . . . is thus a crime of moral turpitude.”). *But see*, e.g., *Espino-Castillo v. Holder*, 770 F.3d 861, 863 (9th Cir. 2014) (citing *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) as “an isolated exception to the prevailing rule that a conviction for a fraud offense is categorically a crime involving moral turpitude”).

92. See, e.g., *Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2007) (“Morales . . . does not admit committing a crime involving moral turpitude. We nevertheless conclude that her conviction for communication with a minor for immoral purposes is such a crime.”); *Amaya v. Attorney General*, 189 F. App’x 130, 134 (3d Cir. 2006) (“[T]he knowing endangerment of the welfare of a child by sexual conduct which would impair or debauch the morals of a child [involves moral turpitude]”); *Sheikh v. Gonzales*, 427 F.3d 1077, 1082 (8th Cir. 2005) (“Sheikh’s conviction, which involved having sexual intercourse with a minor, is a crime of moral turpitude.”); *Castle v. INS*, 541 F.2d 1064, 1066 (4th Cir. 1976) (“[A] man’s carnal knowledge of a fifteen year old girl . . . is so basically offensive to American ethics and accepted moral standards as to constitute moral turpitude per se.”); *Schoeps v. Carmichael*, 177 F.2d 391 (9th Cir. 1949) (“He committed acts of a loathsome nature upon . . . a 7 year old girl. This type of conduct . . . clearly involv[es] moral turpitude”); *Matter of Dingena*, 11 I. & N. Dec. 723, 729 (BIA 1966) (“[A]s long as sexual intercourse with a child constitutes a crime under the law of the state, we conclude . . . that moral turpitude is involved.”). *But see*, e.g., *Quintero-Salazar v. Keisler*, 506 F.3d 688, 694 (9th Cir. 2007) (“[Engaging in intercourse with a minor] is not categorically a crime involving moral turpitude within the meaning of the immigration statutes.”).

abandonment and child abuse,⁹³ indecent exposure,⁹⁴ assault,⁹⁵ misprision of felony,⁹⁶ false statements,⁹⁷ and driving under the influence.⁹⁸

93. See, e.g., *Garcia v. Attorney General*, 329 F.3d 1217, 1222 (11th Cir. 2003) (“Based upon the inherent nature of the crime of aggravated child abuse, Garcia has committed a crime of moral turpitude”); *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406–07 (9th Cir. 1969) (“[I]nflicting ‘cruel or inhuman corporal punishment or injury’ upon a child is so offensive . . . that the fact that it was done purposely . . . ends debate on whether moral turpitude was involved.”); In the Matter of S—, 2 I. & N. Dec. 553, 556 (BIA 1946) (“[T]he act of abandoning a child under 16 years of age in destitute circumstances . . . [does] involve moral turpitude.”). But see, e.g., *Jean-Louis v. Attorney General*, 582 F.3d 462, 464 (3d Cir. 2009) (“[S]imple assault under Pennsylvania law, where the victim is under 12 years of age . . . is [not] a crime involving moral turpitude”); *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 318 (5th Cir. 2005) (“[A]ttempted misdemeanor child abandonment, with intent to return to the child . . . is [not] a crime involving moral turpitude”); *Padernal-Nye v. Gonzales*, 133 F. App’x 403, 407 (9th Cir. 2005) (“[T]he record of conviction does not demonstrate unequivocally that Nye was convicted of a willful offense or that her stepson actually suffered physical pain or mental suffering. Thus, Nye’s conviction did not necessarily qualify as a crime of moral turpitude.”).

94. *Matter of Medina*, 26 I&N Dec. 79, 84 (BIA 2013) (“[A] person convicted of indecent exposure . . . has committed a crime involving moral turpitude”). But see, e.g., *Nunez v. Holder*, 594 F.3d 1124, 1133 (9th Cir. 2010) (“California’s indecent exposure statute . . . does not, however, categorically meet the federal standard for moral turpitude.”); *Pannu v. Gonzales*, 196 F. App’x 566, 566–67 (9th Cir. 2006) (unpublished) (“The full range of conduct encompassed by California’s indecent exposure statute . . . does not constitute a categorical crime of moral turpitude”).

95. See, e.g., *Ceron v. Holder*, 712 F.3d 426, 429 (9th Cir. 2013) (“[O]ur holding . . . that assault with a deadly weapon . . . is a crime involving moral turpitude . . . remains good law.”); In the Matter of G— R—, 2 I. & N. Dec. 733, 740 (BIA 1946) (“[W]e cannot conclude . . . that the crime of assault with a deadly weapon in California never involves moral turpitude.”). But see, e.g.; *In re Sanudo*, 23 I. & N. Dec. 968, 973 (BIA 2006) (“[D]omestic battery does not qualify categorically as a crime involving moral turpitude”); *In re Fualaau*, 21 I. & N. Dec. 475, 475 (BIA 1996) (“[A]n assault in the third degree . . . is not a crime involving moral turpitude.”); In the Matter of B—, 5 I. & N. Dec. 538, 541 (BIA 1953) (“It is firmly established that simple assault does not necessarily involve moral turpitude”); cf. *Ceron v. Holder*, 747, 783 F.3d 773 (9th Cir. 2014) (“Turning more specifically to crimes of assault with a deadly weapon, we find guidance that points in both directions, leaving us uncertain whether a conviction . . . categorically involves moral turpitude.”); *Partyka v. Attorney General*, 417 F.3d 408, 414 (3d Cir. 2005) (“[W]e reject the . . . contention that moral turpitude inheres in the . . . aggravated assault statute in all instances”); In the Matter of B—, 1 I. & N. Dec. 52, 54–55 (BIA 1941) (“[T]he crime of assault, second degree . . . may involve moral turpitude or may not”).

96. See, e.g., *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) (“[M]isprision of a felony is a crime of moral turpitude”). But see, e.g., *Robles-Urrea v. Holder*, 678 F.3d 702, 707 (9th Cir. 2012) (“[M]isprision of a felony is not categorically a crime involving moral turpitude.”)

97. See, e.g., *Castillo-Torres v. Holder*, 394 F. App’x 517, 521 (10th Cir. 2010) (“[T]he BIA has held that making false statements to government authorities with an intent to mislead them is turpitudinous. . . . [W]e cannot say that [this] construction is unreasonable.”); *Kabongo v. INS*, 837 F.2d 753, 758 (6th Cir. 1988) (“[C]onvictions [for false statements] may be considered as involving moral turpitude.”); *Matter of Patricia Pinzon*, 26 I. & N. Dec. 189, 193 (BIA 2013) (“[C]rimes involving fraud or making false statements involve moral turpitude.”). But see, e.g., *Notash v. Gonzales*, 427 F.3d 693, 700 (9th Cir. 2005) (“[The] conviction [for attempted entry of goods by means of a false statement] does not categorically qualify as a crime involving moral turpitude.”).

98. See, e.g., *Marmolejo-Campos v. Gonzales*, 503 F.3d 922, 926 (9th Cir. 2007) (“[W]e

a. Fraud

While the fraud precedents appear mixed, these cases can be reconciled by focusing on whether fraudulent intent is an essential element of the conviction.

Exhibit A is *Jordan v. De George*,⁹⁹ the decision from which Justice Jackson dissented, discussed in the previous section. *De George* involved a prior conviction for conspiracy to defraud the United States of taxes on distilled spirits.¹⁰⁰ “In every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude.”¹⁰¹ “[F]raud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.”¹⁰²

As stated in *De George*, “true” fraud cases really are uniform.¹⁰³ In *United States ex rel. Portada v. Day*,¹⁰⁴ the prior conviction was for issuing checks with intent to defraud.¹⁰⁵ The statute of conviction made punishable the issuance of a check with intent to defraud another person.¹⁰⁶ Although it was not at all clear that the immigrant had intended to defraud anyone when he wrote the check, this statute explicitly required intent to defraud, and the federal court thus felt constrained to find that the conviction necessarily involved moral turpitude.¹⁰⁷

In *Miranda-Romero v. Lynch*, the prior conviction was for forgery in California.¹⁰⁸ The statute stated in pertinent part: “Every person who, with intent to defraud another, forges, or counterfeits the seal of this State, the seal of any public officer authorized by law, the seal of any

conclude that . . . aggravated DUI involving actual driving is a crime involving moral turpitude.”). *But see, e.g.*, *Matter of Torres-Varela*, 23 I. & N. Dec. 78, 78 (BIA 2001) (“The issue raised . . . is whether the respondent’s conviction for aggravated driving under the influence . . . is a crime involving moral turpitude. We find that it is not.”).

99. 341 U.S. 223 (1951).

100. *Id.* at 224.

101. *Id.* at 227.

102. *Id.* at 229.

103. *Id.* at 242 (1951) (Jackson, J., dissenting) (“Uniformity and equal protection of the law can come only from a statutory definition of fairly stable and confined bounds.”)

104. 16 F.2d 328 (S.D.N.Y. 1926).

105. *Id.* at 329.

106. CAL. PENAL CODE § 476(a) (West 2011).

107. *Portada*, 16 F.2d at 329 (“[T]he result is harsh and unjust, [yet] I must, for I have no power to do otherwise, dismiss the writ and remand the relator to the custody of the Commissioner of Immigration.”)

108. 797 F.3d 524, 525 (8th Cir. 2015).

court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this State, or any other State, Government, or country . . . is guilty of forgery.”¹⁰⁹ The Eighth Circuit held that this conviction qualified as a CIMT: “[W]e hold that a conviction under § 472 always includes the element of a specific intent to defraud and is thus categorically a crime involving moral turpitude.”¹¹⁰

These two cases are merely examples drawn from a huge pool of cases in which convictions were found to be CIMT because fraudulent intent was an essential element of the offense.¹¹¹ They are distinct from cases in which immigrants were convicted under a divisible statute containing distinct offenses, some of which required fraudulent intent and some of which did not. For example, in *Hirsch v. INS*,¹¹² the Ninth Circuit rejected the BIA’s conclusion that a petitioner was deportable for CIMT even when the statute did require proof of a false, fictitious, or fraudulent statement.¹¹³ According to the court, a crime does not involve moral turpitude unless it requires proof of “evil intent.”¹¹⁴ Although all “fraudulent” statements necessarily involve evil intent, not all “false” or “fictitious” statements involve evil intent. And, because the statutory language is phrased in the disjunctive, there was insufficient basis to conclude that the petitioner’s conviction involved evil intent, and, derivatively, moral turpitude.¹¹⁵ Thus, *Hirsch* supports

109. CAL. PENAL CODE § 472 (West 2011).

110. *Miranda-Romero*, 797 F.3d at 526.

111. See, e.g., *Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1268–69 (10th Cir. 2011) (conviction for identify fraud where the statute required “fraudulent intent”); *Planes v. Holder*, 652 F.3d 991, 997–98 (9th Cir. 2011) (conviction for passing a bad check where the statute required an “intent to defraud”, and fraud with access devices where the statute required an “intent to defraud”); *De Martinez v. Holder*, 770 F.3d 823, 825 (9th Cir. 2014) (conviction for criminal impersonation where the statute required “intent to defraud”); *U.S. ex rel. Robinson v. Day*, 51 F.2d 1022, 1022 (2d Cir. 1931) (conviction for forgery where the statute required an “intent to defraud”); *Lozano-Giron v. INS*, 506 F.2d 1073, 1076 (7th Cir. 1974) (conviction for possessing counterfeit obligations where the statute required “intent to defraud”); *Espino-Castillo v. Holder*, 770 F.3d 861, 864 (9th Cir. 2014) (conviction for forgery where the statute required “intent to defraud”); *Mendez v. Mukasey*, 547 F.3d 345, 351 (2nd Cir. 2008) (conviction for larceny where the alien was convicted under part of a divisible statute that required “defrauding a public community”); *Tseung Chu v. Cornell*, 247 F.2d 929, 935 (9th Cir. 1957) (conviction for attempting to defeat or evade the income tax where the statute required “a false and fraudulent income tax return for said calendar year”); *Cetik v. Gonzales*, 181 F. App’x 117, 118 (2d Cir. 2006) (conviction for criminal possession of a forged instrument where the statute required “intent to defraud”); *Miranda-Romero v. Lynch*, 797 F.3d 524, 526 (8th Cir. 2015) (conviction for forgery where the statute required “intent to defraud”).

112. 308 F.2d 562 (9th Cir. 1962).

113. 18 U.S.C. § 80 (1946).

114. *Hirsch*, 308 F.2d at 567.

115. *Id.*

the conclusion that a conviction necessarily involves moral turpitude if proof of fraudulent intent is an essential element.

Another case that, on first inspection, may appear inconsistent with this conclusion is *Bobadilla v. Holder*.¹¹⁶ There, the petitioner was convicted of, *inter alia*, giving a false name to a police officer.¹¹⁷ The statute of conviction stated, “Whoever with the intent to obstruct justice gives a fictitious name other than a nickname, or gives a false date of birth, or false or fraudulently altered identification card to a peace officer . . . is guilty of a misdemeanor.”¹¹⁸

The Eighth Circuit found that petitioner’s conviction under this statute did not constitute a CIMT.¹¹⁹ Analysis of the statute might well lead a reader to the same conclusion reached by the court in *Hirsch*—namely, that the statute was divisible, and that there was insufficient basis for the court to determine that Bobadilla had been convicted under one of the statutory parts requiring fraudulent intent. Instead, the court in *Bobadilla* took a different tack. It held that a conviction under this statute did not necessarily involve moral turpitude because it did not require proof that the police officer was actually misled.¹²⁰ After admonishing the government for treating every intentional act making “a government official’s task more difficult” as an act of moral turpitude, the court noted that “[t]he statute does not require proof that the ‘intent to obstruct justice’ was successful, or that it misled the police officer even for a moment.”¹²¹ The court then pointed to a case in which the state courts had upheld a conviction under this statute despite the fact that the defendant had immediately corrected himself after giving a false name, and presumably had never really misled the officer.¹²²

The court’s reasoning in *Bobadilla* is a bit surprising. It is not immediately clear why the fortuitous result of a police officer being misled or not being misled reflects on the turpitudinous quality of the defendant’s statement.¹²³ Whether or not one agrees with the reasoning of *Bobadilla*, however, the decision does not contradict the conclusion

116. 679 F.3d 1052 (8th Cir. 2012).

117. *Id.* at 1053.

118. MINN. STAT. ANN. § 609.506(1).

119. *Bobadilla*, 679 F.3d at 1057–58.

120. *Id.* at 1058.

121. *Id.*

122. *Id.* (citing *State v. Costello*, 620 N.W.2d 924 (Minn. Ct. App. 2001)).

123. Our critique of the reasoning in *Bobadilla* would seem to be supported by BIA’s statement that “there is no distinction for immigration purposes in respect to moral turpitude, between the commission of the substantive crime and the attempt to commit it . . .” *Matter of Awajjane*, 14 I. & N. Dec. 117, 118–119 (BIA 1972).

that a conviction under a statute that requires fraudulent intent as an essential element is always a CIMT. It is true that the statute in *Bobadilla* contains the phrase “fraudulently altered identification card,” and it is also true that the court found no CIMT.¹²⁴ However, Bobadilla was not convicted under the portion of the statute requiring proof of an altered identification card.¹²⁵ He was convicted under the portion of the statute requiring proof of having given a fictitious name.¹²⁶ Thus, Bobadilla was not convicted under a statute requiring proof of a fraudulent intent.

b. Other crimes of dishonesty

Although the fraud cases can be reconciled, the same cannot fairly be said of precedents involving other crimes of dishonesty. Such statutes come in many variations, and there is no identifiable litmus test that reliably predicts which variations will be found CIMT and which ones will not. Some courts focus on the mens rea—the evil intent—and some focus on the presence or absence of actual harm, which is an actus reus element.

Some offenses involving dishonesty have been analogized to fraud. For example, the Ninth Circuit has held that tax evasion is a CIMT because “‘intent to evade’ is synonymous with ‘intent to defraud’ within the meaning of the removal provisions of the INA.”¹²⁷ Quoting a previous case, the court in *Carty v. Ashcroft* stated, “We have held that ‘[e]ven if intent to defraud is not explicit in the statutory definition, a crime nevertheless may involve moral turpitude if such intent is ‘implicit in the nature of the crime.’”¹²⁸ The panel distinguished a previous case which held that willfully structuring transactions with the intent to deprive the government of information did not involve moral turpitude.¹²⁹ The difference, according to the court, between willfully structuring transactions and willfully evading taxes was the impact on the government.¹³⁰ While structuring transactions was only intended to deprive the government of information, evading taxes deprived the government of revenue.¹³¹

124. *Bobadilla*, 679 F.3d at 1053.

125. *Id.*

126. *Id.*

127. *Carty v. Ashcroft*, 395 F.3d 1081, 1082 (9th Cir. 2005).

128. *Id.* at 1084 (quoting *Goldeshtein v. INS*, 8 F.3d 645, 648 (9th Cir. 1993)).

129. *Id.* (citing *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993)).

130. *Id.*

131. *Id.*

In *In re Jurado-Delgado*, the statute of conviction authorized punishment for anyone who, “[w]ith intent to mislead a public servant in performing his official function . . . makes any written false statement which he does not believe to be true”¹³² The BIA held the petitioner’s conviction under this statute to be a CIMT because the crime involved deceit, and because it entailed actual obstruction of the performance of a public servant’s duties.¹³³ Thus, both an aggravated mens rea element and an aggravated actus reus element were present in this case.

Castillo-Torres v. Holder involved two convictions for false statements.¹³⁴ The first conviction was obtained under a statute punishing any person who, “with intent of misleading a police officer to believe that the person is another actual person . . . gives the name, birthdate, or address of another person to a police officer in the lawful discharge of the peace officer’s official duties.”¹³⁵ The second statute stated:

A person is guilty of a class A misdemeanor if the person makes a false statement:

- (a) which the person does not believe to be true;
- (b) that the person has reason to believe will be used in a preliminary hearing; and
- (c) after having been notified either verbally or in writing that: (i) the statement may be used in a preliminary hearing before a magistrate or judge; and (ii) if the person makes a false statement after having received this notification, he is subject to a criminal penalty.¹³⁶

The Tenth Circuit held that convictions under both statutes involve moral turpitude, because intentionally misleading the government has almost always been held to involve moral turpitude.¹³⁷ In *Castillo-Torres*, then, the focus was on mens rea.

Knowingly providing false information to public officials and on government forms has been held to involve moral turpitude by the Second, Third, Sixth, Seventh, and Tenth Circuits.¹³⁸ Additionally, the

132. 24 I. & N. Dec. 29, 34 (BIA 2006) (quoting 18 PA. CONS. STAT. § 4904(a) (1992)).

133. *Id.* at 34–35.

134. 394 F. App’x 517, 517 (10th Cir. 2010).

135. UTAH CODE ANN. § 76-8-507 (Lexis Nexis 2017).

136. *Id.* § 76-8-504.5.

137. *Castillo-Torres*, 394 F. App’x at 521.

138. *Rodriguez v. Gonzales*, 451 F.3d 60 (2d Cir. 2006); *Daibo v. Attorney General*, 265 F.

BIA has held that knowingly and willfully making a materially false statement to obtain a United States passport in violation of 18 U.S.C. Section 1001(a)(2) is a crime involving moral turpitude.¹³⁹ The Seventh Circuit has held that knowingly providing false information to a police officer requires the intent to obstruct justice and therefore involves moral turpitude.¹⁴⁰ On the other hand, two Ninth Circuit decisions have held that convictions involving intent to deceive the government were not CIMT because the deceit was not employed to obtain an item of value.¹⁴¹ These Ninth Circuit decisions are squarely inconsistent with *Castillo-Torres* and seem difficult to reconcile with the many cases from other circuits on providing false information to government officials and on government forms.

Some cases focus not only on intent to deceive, but also on the actus reus element of actual harm done by the attempted deception. Recall *Bobadilla v. Holder*, discussed in the previous section.¹⁴² There, the petitioner had been convicted of giving a fictitious name to a police officer, and the court found it not to be a CIMT because the statute did not require proof that the officer had actually been misled.

c. Misprision of felony

Although there are only two recorded cases involving convictions for misprision of felony, they both involve convictions under the same federal statute, and they are at least somewhat in conflict with one another. Title 18 of the United States Code, § 4, states in pertinent part:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this Title or imprisoned not more than three years, or both.¹⁴³

In *Itani v. Ashcroft*, the petitioner was involved in a scheme to rent automobiles, report them stolen, and export them to Kuwait.¹⁴⁴ He was

App'x 56 (3d Cir. 2008); *Kabongo v. INS*, 837 F.2d 753 (6th Cir. 1988); *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005); *Holder*, 394 F. App'x 517 (10th Cir. 2010).

139. *Matter of Patricia Pinzon*, 26 I. & N. Dec. 189 (BIA 2013).

140. *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005).

141. *See Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008) (reasoning that when the only benefit the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude); *Notash v. Gonzales*, 427 F.3d 693 (9th Cir. 2005).

142. 679 F.3d 1052, 1052 (8th Cir. 2012).

143. 18 U.S.C. § 4 (2012).

144. 298 F.3d 1213, 1213 (11th Cir. 2002).

indicted for interstate transportation of stolen automobiles. Eventually he pled guilty to misprision of felony under Section 4. When the government sought to deport him for this conviction, he argued that it did not constitute a CIMT, but the Eleventh Circuit disagreed. “Misprision of felony is a crime of moral turpitude because it necessarily involves an affirmative act of concealment or participation in a felony, behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity.”¹⁴⁵

The BIA has followed *Itani*, but another Court of Appeals has disagreed. In *Robles-Urrea v. Holder*, the Ninth Circuit held that a conviction under Section 4 did not constitute a CIMT.¹⁴⁶ The court criticized *Itani* for failing to analyze the commonly quoted requirement that, for a crime to involve moral turpitude, it must also be so base and deprived as to be morally outrageous.¹⁴⁷ A conviction cannot involve moral turpitude simply because the person broke the law. If that were the case, *all* criminal convictions would be *per se* CIMTs.¹⁴⁸ Although the *Robles-Urrea* opinion contains many statements that could be considered alternative rationales supporting its conclusion, its most insistent theme is that convictions for misprision of felony should not be regarded as *categorically* involving moral turpitude. After all, destroying the property of another, assaulting another person, and breaking and entering private property are not CIMTs.¹⁴⁹ Yet, under *Itani*, misprision of any of these felonies *would* categorically constitute a CIMT. This is a paradox that the *Robles-Urrea* court was unwilling to entertain. Whichever of these two cases, *Robles-Urrea* or *Itani*, is correct, they cannot both be correct. There is an irreconcilable conflict regarding misprision of felony.

d. Assault

Assault may or may not involve moral turpitude. The BIA has held that, for an assault to involve moral turpitude, the assault statute in question must require both a specific intent and “a meaningful level of

145. *Id.* at 1216.

146. 678 F.3d 702 (9th Cir. 2012).

147. *Id.* at 709.

148. *Id.*

149. *Id.* (citing *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1071 (9th Cir. 2007); *Cuevas-Gaspar*, 430 F.3d at 1020 (burglary with intent to commit a crime within the residence)); *Carr v. INS*, 86 F.3d 949, 950–51 (9th Cir. 1996) (assault with a deadly weapon); *Rodriguez-Herrera v. INS*, 52 F.3d 238, 239–40 (9th Cir. 1995) (“knowingly and maliciously . . . caus[ing] physical damage to property of another”).

harm.”¹⁵⁰ Additionally, the BIA has held that there must be an “aggravating dimension” indicative of the depraved nature of the conduct.¹⁵¹ Thus, to be a crime involving moral turpitude, an assault must involve (1) an evil intent; (2) a meaningful level of harm; and (3) an aggravating dimension. Therefore, simple assault is not a crime involving moral turpitude,¹⁵² but assault with a deadly weapon is,¹⁵³ as is assault with the intent to inflict great bodily injury.¹⁵⁴ Referencing the specific intent requirement, the BIA has reasoned that there is “little difference,” moral turpitude-wise, between assault with a deadly weapon and assault with intent to do great bodily harm.¹⁵⁵ Indeed, somewhat confusingly, the BIA has even held that a reckless assault, coupled with actual serious bodily injury, constitutes a crime involving moral turpitude.¹⁵⁶ In that instance, the aggravating dimension is presumably the serious bodily injury inflicted.¹⁵⁷

Furthermore, the BIA has indicated that a reckless assault with a dangerous weapon would also constitute a CIMT. In this instance, it is the use of a deadly weapon that converts a mere reckless assault into a crime involving moral turpitude.¹⁵⁸ Given that the BIA has also held that “there is no distinction for immigration purposes in respect to moral turpitude, between the commission of the substantive crime and the attempt to commit it,”¹⁵⁹ attempted assault with any of the above aggravating dimensions would constitute moral turpitude.

150. *In re Solon*, 24 I. & N. Dec. 239, 241–42 (BIA 2007).

151. “In the area of assault, crimes involving moral turpitude ordinarily include an aggravating dimension.” *In re Fualaau*, 21 I. & N. Dec. 475, 478 (BIA 1996); *see also* *Esparaza-Rodriguez v. Holder*, 699 F.3d 821, 824 (5th Cir. 2012) (explaining that several courts also require an aggravating element indicative of the inherent vileness of the prohibited conduct).

152. *Matter of Short*, 20 I. & N. Dec. 136, 139 (BIA 1989); *Matter of Baker*, 15 I. & N. Dec. 50, 51 (BIA 1974).

153. *Matter of Medina*, 15 I. & N. Dec. 611, 612 (BIA 1976) (citing to *Gonzales v. Barber*, 207 F.2d 398 (2d Cir. 1953)), *aff’d*, 347 U.S. 637, 400 (1954); *U.S. ex rel. Morlacci v. Smith*, 8 F.2d 663, 664 (W.D.N.Y. 1925); *Matter of Ptasi*, 12 I. & N. Dec. 790, 791 (BIA 1968); *Matter of Goodalle*, 12 I. & N. Dec. 106 (BIA 1967); *Matter of G_R*, 2 I. & N. Dec. 733 (BIA 1946; A.G. 1947).

154. *Matter of P*, 15 I. & N. Dec. 5 (BIA 1976).

155. *Id.* at 8–9.

156. *Fualaau*, 21 I. & N. Dec. at 478.

157. The BIA has also drawn a dividing line between statutes that identify misconduct that causes bodily injury, and statutes that require serious bodily injury. *Matter of Perez-Contreras*, 20 I. & N. Dec. 615 (BIA 1992). This creates an arbitrary line that may allow two similarly situated defendants to obtain vastly different immigration results dependent only on the state statutory language.

158. “Assault is not a crime involving moral turpitude unless the crime has as an the [sic] element of a reckless state of mind coupled with the infliction of serious bodily injury or use of a dangerous weapon.” *In re Aron Avalos Ramirez*, 2006 WL 2427886, at *2 (BIA 2006).

159. *Matter of Awajjane*, 14 I. & N. Dec. 117 (BIA 1972) (citing to *U.S. ex rel. Meyer v. Day*,

Assaults against peace officers have also caused notable conflict regarding moral turpitude. In *Partyka v. Attorney General*, the Third Circuit held that the aggravated assault of a police officer in the third degree was not a crime involving moral turpitude.¹⁶⁰ The assault committed by Partyka was aggravated because it was committed against a police officer; it was in the third degree because the police officer suffered bodily injury.¹⁶¹ The court, referring to moral turpitude jurisprudence as an “amorphous morass,”¹⁶² held that the New Jersey statute in question was divisible and encompassed both reckless and negligent conduct.¹⁶³ Because evil intent is not present in a negligent infliction of bodily injury, it cannot involve moral turpitude.¹⁶⁴ Thus, because it was possible to violate the statute by acting only negligently, the offense could not be a CIMT.¹⁶⁵ Despite this ruling, an unpublished opinion from the Third Circuit subsequently held the BIA had not erred in holding that a conviction for a third degree aggravated assault against a police officer under the same statute did involve moral turpitude.¹⁶⁶ Referencing *Partyka*, the court reasoned that the alien in the present case had violated a different subsection of the statute than Partyka.¹⁶⁷ Because the statute was divisible and covered both turpitudinous and nonturpitudinous conduct, the BIA’s holding that the offense in question was a CIMT was upheld.¹⁶⁸

e. Homicide

For many years, the federal courts and BIA had a clear rule for homicides: murders, attempted murders, and voluntary manslaughters were always CIMT, and involuntary manslaughters never were.¹⁶⁹ This rule remains in force for murders, attempted murders, and voluntary manslaughters, but no longer for involuntary manslaughters. It now seems that an involuntary manslaughter qualifies as CIMT if the

54 F.2d 336 (2d Cir. 1931)).

160. 417 F.3d 408 (3d Cir. 2005).

161. *Id.* at 412.

162. *Id.* at 409.

163. *Id.* at 412–13.

164. *Id.* at 413–14.

165. *Partyka v. Attorney General*, 417 F. 3d 408, 414 (3d Cir. 2005).

166. *Salomon-Bajxac v. Attorney General*, 558 Fed. App’x. 160 (3d Cir. 2014).

167. *Id.*

168. *Id.*

169. See *Matter of Ghunaim*, 15 I. & N. Dec. 269 (1975) (holding that involuntary manslaughters are not crimes involving moral turpitude); *Matter of Lopez*, 13 I. & N. Dec. 725 (1971); *Matter v. B—*, 4 I. & N. Dec. 493 (1951) (citing *Mongiovi v. Karnuth*, 30 F.2d 825 (W.D.N.Y. 1929)).

statute requires “recklessness”—that is, conscious disregard of a substantial and unjustifiable risk that someone may be killed by the actor’s conduct. If, on the other hand, the statute requires only “criminal negligence,” then it does not qualify.

In *Matter of Franklin*, the petitioner was convicted of involuntary manslaughter for recklessly killing her daughter.¹⁷⁰ She argued that involuntary manslaughter is *per se* not a CIMT. The BIA rejected that argument, instead insisting that killings done with “conscious disregard of a substantial and unjustifiable risk” (which is the definition of “reckless”) could involve moral turpitude.¹⁷¹ Because the statute under which Franklin had been convicted defined involuntary manslaughter on the basis of recklessness, the BIA upheld the finding of CIMT. “Mindful that moral turpitude is a nebulous concept and there is ample room for differing definitions of the term,” an Eighth Circuit panel affirmed, finding the BIA’s interpretation not unreasonable.¹⁷²

The BIA’s view on involuntary manslaughter changed in *Matter of Medina*.¹⁷³ In *Matter of Szegedi*¹⁷⁴ and *Matter of Gantus-Bobadilla*,¹⁷⁵ the BIA had previously held that criminally reckless conduct did not involve moral turpitude. In *Medina*, the Board reconsidered that view based on the notion that reckless conduct necessarily involves a “willingness to commit the act in disregard of the perceived risk.”¹⁷⁶ Furthermore, the actor must be “actually aware” of the risk, without regard to any sort of evil state of mind.¹⁷⁷ Thus, where a jurisdiction requires recklessness for an involuntary manslaughter conviction, it qualifies for CIMT. Where a jurisdiction requires only criminal negligence for involuntary manslaughter, it may not.

f. Sex crimes

Whether certain sex crimes involve moral turpitude has also caused controversy over the years. Forcible rape, sexual battery, and prostitution have been unequivocally held to involve moral turpitude, while indecent exposure and sex crimes involving children have,

170. 20 I. & N. Dec. 867 (BIA 1994).

171. *Id.*

172. *Franklin v. INS*, 72 F.3d 571, 573 (8th Cir. 1995).

173. *See* 15 I. & N. Dec. 611 (1976) (holding that moral turpitude can lie in criminally reckless conduct); *See also* *Matter of Wojtkow*, 18 I. & N. Dec. 111 (BIA 1981) (holding that criminally reckless conduct can be the basis for being convicted of a crime involving moral turpitude).

174. 10 I. & N. Dec. 28 (1962).

175. 13 I. & N. Dec. 777 (1971).

176. 15 I. & N. Dec. 611, at 614.

177. *Id.*

surprisingly, not produced as clear-cut of results. There are relatively few cases addressing the question of whether forcible rape is a crime involving moral turpitude, probably because the matter is so clear.¹⁷⁸ One California Court of Appeal, surprised to find no California case holding forcible rape as a crime involving moral turpitude,¹⁷⁹ stated,

While it may be suggested that the definition of moral turpitude may depend on the state of public morals, and that it may vary according to the community and the times, it never has been suggested that our public morality has sunk so low as to countenance the singularly depraved act of rape.¹⁸⁰

Sexual battery and indecent assault have also been held by the Ninth and Third Circuits respectively to categorically involve moral turpitude.¹⁸¹ In holding sexual battery to involve moral turpitude, the Ninth Circuit relied on the specific intent necessary to commit the crime.¹⁸² This evil intent, the court held, rises to the level necessary for a crime to be considered morally turpitudinous.¹⁸³ In contrast, the Third Circuit in *Mehboob v. Attorney General* held a conviction for indecent assault to involve moral turpitude, despite the fact that the offense did not have an intent requirement.¹⁸⁴ This, the court reasoned, was because some sex crimes are strict liability crimes because they are so contrary to morality.¹⁸⁵

Additionally, prostitution, solicitation of prostitution, and pandering have all been held to be CIMTs.¹⁸⁶ The BIA has held that prostitution always involves moral turpitude because it is “inherently

178. See, e.g., *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1068 (9th Cir. 2007) (en banc) (Reinhardt, J., concurring).

179. “Most of the cases involve statutory rape or attempted rape, rather than an actual forcible rape (as to which, like first degree murder, it would appear futile to argue that no ‘moral turpitude’ was involved).” *People v. Mazza*, 175 Cal. App. 3d 838, 843 (Cal. 1985) (citing 23 A.L.R. Fed. 480, 567 (1975)).

180. *Id.* at 843; See also *People v. McCullar*, 171 Cal. App. 3d 485 (Cal. 1985); *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1068 (9th Cir. 2007) (en banc) (Reinhardt, J., concurring) for further discussion.

181. *Gonzalez-Cervantes v. Holder*, 709 F.3d 1265 (9th Cir. 2013); *Mehboob v. Attorney General*, 549 F.3d 272 (3d Cir. 2008).

182. *Gonzalez-Cervantes*, 709 F.3d at 1270.

183. *Id.*

184. 549 F.3d at 279.

185. *Id.* at 274.

186. *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012); *In the Matter of W*, 4 I. & N. Dec. 401 (BIA 1951); *Florentino-Francisco v. Lynch*, 611 F. App’x 936 (10th Cir. 2015); *Matter of Lambert*, 11 I. & N. Dec. 340 (BIA 1965); *Matter of A-*, 5 I. & N. Dec. 546 (BIA 1953); *In the Matter of S—* — *L—* —, 3 I. & N. Dec. 396 (BIA 1948); *In the Matter of P—* —, 3 I. & N. Dec. 20 (BIA 1947); *People v. Jaimez*, 184 Cal. App. 3d 146 (Cal. App. 1986).

base, vile, and depraved.”¹⁸⁷ Because the solicitation of the act is no less base, vile, and depraved than the actual act itself, this holding has been extended to solicitation of prostitution and pandering as well.¹⁸⁸ The solicitation is a precursor and enabler to the act and, therefore, just as morally turpitudinous.¹⁸⁹

Convictions for indecent exposure and public lewdness have involved more complicated and less consistent analyses regarding whether they involve moral turpitude. The BIA has held that indecent exposure involves moral turpitude when there is lewd intent.¹⁹⁰ The Fifth Circuit later held that no moral turpitude could be found in a conviction where the statute did not contain the word “lewd” or require an intent to “direct attention to one’s genitals,”¹⁹¹ despite the fact that the conviction was for “public lewdness.”¹⁹² Complicating matters, the Ninth Circuit has held that moral turpitude is not involved in indecent exposure.¹⁹³ Contrary to the BIA and Fifth Circuit’s holdings that lewdness is an essential element for an indecent exposure conviction to involve moral turpitude, the Ninth Circuit held a conviction not to qualify as CIMT where the statute did include a requirement of willful and lewd intent.¹⁹⁴ The court noted that a nude dancer or someone who grabbed his genitals as an insult during a road rage incident could be convicted under the statute.¹⁹⁵ Because neither of these acts involves moral turpitude, the court held that the statute did not categorically involve moral turpitude.¹⁹⁶ Although inappropriate and offensive, these acts are not “base, vile, and depraved,” nor do they shock the conscience.¹⁹⁷

187. *In the Matter of W*, 4 I. & N. Dec. 401 (BIA 1951); *see also* *Florentino-Francisco v. Lynch*, 611 F. App’x 936 (10th Cir. 2015) (explaining that the BIA has long viewed prostitution as involving moral turpitude).

188. *Rohit*, 670 F.3d at 1090–91.

189. *Id.*; *see also Matter of Lambert*, 11 I. & N. Dec. 340 (holding that a defendant who provided rooms for use for prostitution was guilty of moral turpitude); *Matter of A-*, 5 I. & N. Dec. 546; *In the Matter of P—*, 3 I. & N. Dec. 20.

190. *Matter of Medina*, 26 I. & N. Dec. 79 (BIA 2013).

191. *Cisneros-Guerrero v. Holder*, 774 F.3d 1056, 1060 (5th Cir. 2014).

192. *Id.* at 1058.

193. *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010).

194. “Every person who willfully and lewdly [e]xposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . is guilty of a misdemeanor.” *Id.* at 1130.

195. *Id.* at 1135–1139.

196. *Id.* at 1138.

197. *Id.*

Further inconsistencies are found in sex crimes involving minors and children. Statutory rape has been held by the BIA and Eighth Circuit to be morally turpitudinous.¹⁹⁸ Further, “carnal knowledge of a female 15 years of age” has held by the Fourth Circuit to involve “moral turpitude per se.”¹⁹⁹ In contrast, the Ninth Circuit has held statutory rape not to constitute a CIMT.²⁰⁰

Furthermore, “endangering the welfare of a child through sexual conduct,”²⁰¹ “lewd and lascivious conduct toward a child,”²⁰² “communicating with a minor for immoral purposes,”²⁰³ and “encouraging or contributing to deprivation or delinquency of a minor”²⁰⁴ were all found to be crimes involving moral turpitude. This contrasts with two of the more surprising CIMT rulings—that child annoyance²⁰⁵ and child molestation²⁰⁶ do not involve moral turpitude. *Nicanor-Romero v. Mukasey* held that the crime of annoying or molesting a child was not a CIMT, despite the fact that the statute required that the annoyance or molestation be “motivated by an unnatural or abnormal sexual interest in the victim.”²⁰⁷

g. Failure to register as a sex offender

The BIA has taken the position that failure to register as a sex offender can constitute a CIMT. In *In re Tobar-Lobo*, the petitioner had been convicted under the California Sex Offender Registration Act.²⁰⁸ One of the essential elements of this offense was that the convict be apprised of the obligation to register as a sex offender. The BIA held that this was a CIMT.²⁰⁹ The federal courts of appeals, however, have not agreed and have been uniform in rejecting failure to register as a sex offender as a CIMT.

198. Matter of Dingena, 11 I. & N. Dec. 723 (BIA 1966); In the Matter of M—, 2 I. & N. Dec. 17 (BIA 1944); In the Matter of S—, 2 I. & N. Dec. 553 (BIA 1946); Marciano v. INS, 450 F.2d 1022 (8th Cir. 1971).

199. Castle v. INS, 541 F.2d 1064 (4th Cir. 1976).

200. Quintero-Salazar v. Keisler, 506 F.3d 688 (9th Cir. 2007).

201. Amaya v. Attorney General, 189 F. App'x 130 (3d Cir. 2006).

202. Schoeps v. Carmichael, 177 F.2d 391 (9th Cir. 1949).

203. Morales v. Gonzales, 478 F.3d 972 (9th Cir. 2007).

204. Sheikh v. Gonzales, 472 F.3d 1077 (8th Cir. 2005).

205. Rodriguez-Macias v. Mukasey, 286 F. App'x 984 (9th Cir. 2008).

206. Nicanor-Romero v. Mukasey, 523 F.3d 992 (9th Cir. 2008).

207. *Id.*

208. 24 I. & N. Dec. 143 (BIA 2007).

209. *Id.* at 146.

In *Efagene v. Holder*, the Tenth Circuit was faced with a conviction for failure to register as a sex offender under Colorado law.²¹⁰ The court held that this was not a CIMT for two reasons. First, and most importantly, failure to register is merely a regulatory offense of omission, not a crime *malum in se*.²¹¹ Second, the court criticized the BIA's reasoning in *Tobar-Lobo* because it was incapable of any principled stopping place. "Any obligation on which society has placed a threat of imprisonment for failure to comply can be characterized as 'too important not to heed,' as the BIA said of the obligation to register as a sex offender."²¹² "Moreover, as the dissent in *Tobar-Lobo* correctly pointed out, 'the breach of any and every law can be said to violate the duties owed between persons or to society in general.'"²¹³

Another Court of Appeals has highlighted the lack of mens rea required in the crime of failure to register as a sex offender. In *Plasencia-Ayala v. Mukasey*, because the statute was one of strict liability for any failure to register by the deadline or update a current registration, it had no requirement for "willfulness or evil intent."²¹⁴ This scienter requirement was held to be a requirement for a finding of moral turpitude, and thus, the statute did not constitute one criminalizing CIMTs.²¹⁵ Precedent from other circuits lines up with *Plasencia-Ayala*.²¹⁶

h. Child abuse and child abandonment

Further complicating the analysis are crimes involving child abandonment and child abuse, which have created inconsistent rulings. The BIA held that child abandonment involves moral turpitude, but this holding has not been followed by the Fifth Circuit. In *In re Matter of S—*, the BIA held that a conviction under a New York statute prohibiting the willful abandonment of a child in destitute circumstances and the failure to provide necessary food, clothing, or shelter a felony, was a crime involving moral turpitude.²¹⁷ The BIA

210. 642 F.3d 918 (10th Cir. 2011); See COLO. REV. STAT. § 18-3-412.5.

211. *Efagene*, 642 F.3d at 921–25.

212. *Id.* at 925.

213. *Id.*

214. 516 F.3d 738, 747 (9th Cir. 2008), *overruled on other grounds*, *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009).

215. 516 F.3d at 747.

216. *Totimeh v. Atty Gen.*, 666 F.3d 109 (3d Cir. 2012) (MINN. STAT. § 243.166 was not CIMT); *Mohamed v. Holder*, 769 F.3d 885 (4th Cir. 2014) (VA. CODE ANN. § 18.2-472.1 was not CIMT).

217. 2 I. & N. Dec. 553 (BIA 1946).

contrasted this statute with others from Ohio, California, Missouri, and Canada that had been held not to involve moral turpitude.²¹⁸ The Ohio and California statutes did not require that the child be left in destitute circumstances.²¹⁹ The Missouri statute allowed for a conviction if the child had been abandoned or if the defendant had failed to provide for the child, but did not require both elements.²²⁰ Finally, the Canadian statute did not require abandonment or any element of willfulness.²²¹ In contrast, the New York statute required a finding of 1) willfulness, 2) leaving the child in destitute circumstances, and 3) failing provide food, clothing, or shelter.²²² Thus, the BIA held that the combination of all three elements brought the statute to the level of involving moral turpitude.²²³

The Fifth Circuit came to a contrary ruling regarding a Texas statute criminalizing child abandonment.²²⁴ The court justified this with a least culpable conduct analysis of the statute. The statute had been construed to require proof that the offender knew that he was leaving the child in a place without an adequate caretaker, but not that the offender knew that the circumstances would expose the child to an unreasonable risk of harm.²²⁵ The minimum level of culpability that could result, then, was “an act involving only negligence in temporarily leaving a child, with the intent to return, in a situation of unreasonable risk, but without harm to the child.”²²⁶ Because the statute did not require a finding of willful or intentional leaving of the child in destitute circumstances, the crime at hand was not one involving moral turpitude. Thus, it seems that a conviction for child abandonment will be found to involve moral turpitude if it involves intentionally leaving a child in potentially harmful, destitute circumstances, but not if the statute does not require this element of willfulness.

In addition to the cases involving child abandonment, the Eleventh Circuit, Ninth Circuit, and Fifth Circuit have found that child abuse is a crime involving moral turpitude. In a 1969 Ninth Circuit case, *Guerrero de Nodahl v. INS*, the defendant had been charged in

218. *Id.* at 555.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 556.

224. *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 318 (5th Cir. 2005).

225. *Id.* at 321.

226. *Id.* at 322.

California for “willfully, unlawfully and feloniously mak[ing] an assault and inflict[ing] a corporal injury” upon her minor son.²²⁷ With limited discussion, the court held that a conviction under the statute “is so offensive to American ethics that the fact that it was done purposely or willingly (the California definition of ‘willful’) ends debate on whether moral turpitude was involved.”²²⁸ Thus, the element of willfulness regarding the injury inflicted was the factor which caused the crime to be one involving moral turpitude.

In contrast, a 2005 Ninth Circuit case contains dicta indicating that a challenge to a conviction for aggravated child abuse under the same statute in *Guerrero de Nodahl* is still open.²²⁹ There, the court remanded the case for a determination of ineffective assistance of counsel on the grounds that the defendant’s counsel should have appealed the ruling that her conviction for aggravated child abuse was a CIMT.²³⁰ The court stated that, under the modified categorical approach, there was no indication from the record that the defendant’s offense was willful or that the child actually suffered injury from the offense.²³¹ Thus, in order for a charge of aggravated child abuse to properly be considered a crime involving moral turpitude, there needs to be proof of an element of willfulness and of actual injury to the victim.

The Eleventh Circuit held that a conviction for aggravated child abuse was a crime involving moral turpitude, based on *Guerrero de Nodahl*.²³² With little discussion, and without referring to the record of conviction, the court concluded that “the inherent nature of the crime of aggravated child abuse” was enough to conclude that the defendant had committed a crime involving moral turpitude and was therefore inadmissible.²³³ Interestingly, the Florida statute under which the defendant was convicted contained three subsections:

- (a) “Aggravated child abuse” occurs when a person:
1. commits aggravated battery on a child;
 2. willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or

227. 407 F.2d 1405, 1405–06 (9th Cir. 1969).

228. *Id.* at 1406–07.

229. *Padernal-Nye v. Gonzales*, 133 F. App’x 403, 407 (9th Cir. 2005).

230. *Id.*

231. *Id.*

232. *Garcia v. Attorney General of U.S.*, 329 F.3d 1217, 1222 (11th Cir. 2003) (citing *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406–07 (9th Cir. 1969)).

233. *Id.*

3. Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.²³⁴

Though the court did not specify under which subsection the defendant was convicted, the defendant was likely convicted under subsection (1) because the court also stated that the defendant was convicted of aggravated battery. The Florida statute for aggravated battery stated:

(1)(a) A person commits aggravated battery who, in committing battery:

1. intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
2. Uses a deadly weapon.²³⁵

Though a conviction for aggravated child abuse, based on aggravated battery under subsection (1), would satisfy the Ninth Circuit's requirement for willfulness, a conviction under subsection (2) would not. Because the court did not specify the subsection under which the defendant was convicted or refer to the record of conviction, it is unclear whether the element of willfulness was satisfied in this case. The court also did not advert to willfulness as a necessary feature to qualify aggravated child abuse as a CIMT.

Another Fifth Circuit case similarly held that a conviction for aggravated child abuse was a crime involving moral turpitude without referring to willfulness.²³⁶ In a brief opinion, the court stated only that "our review of the relevant Florida statutes indicates that the BIA's determination that Jimenez-Zuniga's conviction for aggravated child abuse constituted a CIMT was reasonable."²³⁷

234. FLA. STAT. ANN. § 827.03(1)(a) (2017).

235. FLA. STAT. ANN. § 784.045(1)(a) (2017).

236. *Jimenez-Zuniga v. Mukasey*, 305 F. App'x 208, 209–10 (5th Cir. 2008).

237. *Id.* at 210; the statute at issue there stated:

"Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment. . . ."

CAL. PENAL CODE § 368(b)(1) (West 2011).

In an interesting contrast, the Ninth Circuit overturned a BIA holding that elder abuse categorically involved moral turpitude.²³⁸ The court found the statute to be divisible into multiple crimes, some of which involved moral turpitude and some of which did not.²³⁹ Without explaining which of the divisible crimes involved moral turpitude and which did not, the court remanded the case to the BIA to address whether the specific conviction was a CIMT.²⁴⁰ It is difficult to determine which of the crimes from the statute the court determined not to involve moral turpitude, particularly since there seems to be an element of willfulness involved in any conviction under the statute.

i. Theft

Theft convictions, on the surface, appear to be clear-cut in regards to whether they constitute CIMTs. Because theft is considered a fraudulent act, it has long been held to involve moral turpitude. To a layperson it would seem that petty theft lacks the requisite seriousness to be considered a crime involving moral turpitude, yet the courts have found that “since the elements of petty theft are the same as theft in general, the element of moral turpitude would continue to be present whether the theft be petty or grand.”²⁴¹ Thus, courts have long held that petty theft is a CIMT.²⁴² The Seventh Circuit stated that “Theft has always been held to involve moral turpitude, regardless of the sentence imposed or the amount stolen.”²⁴³ According to the BIA, “Burglary and theft or larceny, whether grand or petty, are crimes involving moral turpitude.”²⁴⁴ “It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude,”²⁴⁵ the BIA stated in a different case, and in yet another, it stated, “The fact that the theft may have been petty is immaterial to the question of whether or not it involved moral turpitude.”²⁴⁶ Thus, due to the nature of theft itself, the seriousness afforded to the conviction by the law is not given the same weight for immigration purposes. The mother who steals bread for her family is considered as deportable as the career criminal who steals vehicles for profit.

238. *Singh v. Holder*, 414 F. App’x 909, 910 (9th Cir. 2011).

239. *Id.* at 910.

240. *Id.*

241. *U.S. v. Esparza-Ponce*, 193 F.3d 1133, 1137 (9th Cir. 1999).

242. *Ablett v. Brownell*, 240 F.2d 625, 630 (D.C. Cir. 1957).

243. *Soetarto v. INS*, 516 F.2d 778, 780 (7th Cir. 1975).

244. *In re De La Nues*, 18 I. & N. Dec. 140, 145 (BIA 1981).

245. *In re Scarpulla* 15 I. & N. Dec. 139, 140–41 (BIA 1974).

246. *Matter of Grazley*, 14 I. & N. Dec. 330, 333 (BIA 1973).

In theft cases, for CIMT purposes, the BIA and courts have focused on the intent to permanently deprive.²⁴⁷ The BIA has held repeatedly that a theft offense is not categorically a crime of moral turpitude if the statute of conviction is broad enough to criminalize a taking with intent to deprive the owner of his property only temporarily.²⁴⁸ However, this seemingly clear line requiring the permanent taking of property for a theft offense to be a CIMT becomes blurred when juxtaposed with the BIA's holding that the "specific intent [to permanently deprive] can be *presumed* whenever one unlawfully takes, or attempts to take, the property of another."²⁴⁹ Allowing courts to make this presumption converts every taking into a CIMT whether the intent to deprive was permanent or temporary. With the law in such a state, it is entirely up to the discretion of prosecutors and judges which theft convictions will be determined CIMT and which will not.

III. THE LAW OF VAGUENESS

*Johnson v. United States*²⁵⁰ is the latest word from the U.S. Supreme Court on vagueness and thereby becomes the focal point for any subsequent vagueness analysis. It is nonetheless worth a brief look at the history of vagueness as a constitutional doctrine.²⁵¹

A. Origins

Interestingly, the doctrine was innovated at least in part to protect the interests of whites as against people of color. In the Reconstruction-era case *United States v. Reese*,²⁵² the federal government brought

247. "Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended." *Id.*

248. See, e.g., *In re Jurado-Delgado*, 24 I. & N. Dec. 29, 33 (BIA 2006); *Matter of Grazley*, 14 I. & N. Dec. 330, 333 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."); *In the Matter of P*, 2 I. & N. Dec. 887 (B.I.A.1947) (holding that offenses like joy riding are not morally turpitudinous because they do not involve the intent to deprive the owner of the property permanently); *Matter of H*, 2 I. & N. Dec. 864, 865 (BIA 1947) ("[T]he element which must exist before the crime of theft or stealing is deemed one involving moral turpitude is that the offense must be one which involves a permanent taking as distinguished from a temporary one").

249. *Matter of V-Z-S-*, 22 I. & N. Dec. 1338, 1350 (BIA 2000).

250. 135 S. Ct. 2551 (2015).

251. Although there are many law review articles on vagueness, they tend to focus exclusively on applications of vagueness analysis to particular statutes or on the relationship of vagueness to other constitutional doctrines. The most helpful general article on vagueness is Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003). The *locus classicus*, now somewhat dated, is Anthony Amsterdam's student note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

252. 92 U.S. 214 (1875).

criminal charges against Kentucky officials for discriminating against a black voter. The Court struck down the federal criminal statute on the ground that, literally construed, it authorized punishment for more than just race discrimination. This overbreadth rendered the statute not “appropriate legislation” to enforce the Fifteenth Amendment.²⁵³ In so holding, the Court stated, “Laws which prohibit the doing of things, and provide a punishment for their violation, should not have a double meaning.”²⁵⁴ “If the legislature undertakes to define by statute a new offense,” continued the Court, “and provides for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.”²⁵⁵ Putting aside the obvious racial dynamic underlying this case, *Reese* confirms that the law of vagueness developed as a response to the advent and spread of *malum prohibitum* offenses. A crime *malum in se* gave notice of its illegality by its obvious immorality; a crime *malum prohibitum* did not.

Another example of a *malum prohibitum* offense is a criminal antitrust statute. In *International Harvester Co. of America v. Kentucky*, the defendant corporation was prosecuted and fined for violating state price-fixing conspiracy laws.²⁵⁶ Justice Holmes’ opinion reversing the convictions is worth excerpting because it presages *Johnson*:

[F]or it shows how impossible it is to think away the principal facts of the case as it exists, and say what would have been the price *in an imaginary world*. . . . The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind.

We regard this decision as consistent with *Nash v. United States* [229 U.S. 373 (1913)] in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree — what is an undue restraint of trade. That deals with the actual, *not with an imaginary condition other than the facts*. . . . To compel them to guess, on peril of indictment, what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts *would be upon the imaginations* and

253. *Id.* at 221–22.

254. *Id.* at 220.

255. *Id.*

256. 234 U.S. 216 (1914).

desires of purchasers, is to exact gifts that mankind does not possess.²⁵⁷

International Harvester is not on all fours with *Johnson*, as it concerns the difficulty of predicting the imaginings of purchasers, not the imaginings of judges. Still, *International Harvester* creates an intellectual template for *Johnson* by finding constitutional fault with a criminal statute for forcing citizens to gauge the criminality of their contemplated acts on a *hypothetical*, rather than *factual*, predicate. As with *Johnson*, the ultimate problem was lack of sufficient notice.

Eventually, the Court's vagueness analysis leaped from statutes gauging criminality based on hypothetical facts to statutes that were simply too textually open-ended in their liability standards. In *United States v. L. Cohen Grocery Co.*, the defendant company was punished under a criminal rate-fixing statute that "made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities. . . ."²⁵⁸ Chief Justice White stated that the provision "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."²⁵⁹

In *Connolly v. General Construction Co.*, the defendant company had been punished for violating a state minimum-wage law decreeing, "[N]ot less than the current rate of per diem wages in the locality where the work is performed shall be paid"²⁶⁰ The Court found the statute unconstitutionally vague, stressing that the provision "presents a double uncertainty."²⁶¹ The Court was particularly concerned that the word "'neighborhood' is quite as susceptible of variation as the word 'locality.' Both terms are elastic"²⁶² The "double uncertainty" found fatal in *Connolly* parallels the dynamic of uncertainty-compounding-uncertainty in the residual clause of the statute struck down in *Johnson*.

The vagueness doctrine's next leap forward came toward the end of the Warren Court, which generally distrusted broad discretion in law enforcement. In *Papachristou v. City of Jacksonville*,²⁶³ the Court held

257. *Id.* at 223–24 (emphasis added).

258. 255 U.S. 81, 89 (1920).

259. *Id.*

260. 269 U.S. 385, 388 (1926).

261. *Id.*

262. *Id.*

263. 405 U.S. 156 (1969).

a loitering ordinance void for vagueness “both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, and because it encourages arbitrary and erratic arrests and convictions.”²⁶⁴ Arbitrary enforcement as a ground for vagueness was also apparent in *Grayned v. City of Rockford*, which, in rejecting a vagueness challenge to a municipal anti-noise ordinance, noted that the law “contains no broad invitation to subjective or discriminatory enforcement.”²⁶⁵ “As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible.”²⁶⁶

It became clear in *Kolender v. Lawson*²⁶⁷ that the notice and arbitrary enforcement prongs of the vagueness doctrine constituted independently sufficient reasons for finding a criminal law unconstitutional. Striking down a California loitering statute, Justice O’Connor stated the general rule for vagueness as follows: “[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”²⁶⁸ The portion of the statute that required an individual to produce “credible and reliable” identification upon police demand failed the second prong of that rule. “[T]he statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.”²⁶⁹ The majority continued: “An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets ‘only at the whim of any police officer’ who happens to stop that individual under” the ordinance.²⁷⁰ The focus on arbitrary enforcement continued into the Rehnquist Court when, in *City of Chicago v. Morales*,²⁷¹ the Court invalidated Chicago’s “Gang Congregation

264. *Id.* at 162.

265. 408 U.S. 104, 113 (1972).

266. *Id.* at 114.

267. 461 U.S. 352 (1983).

268. *Id.* at 357, citing, *inter alia*, *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982) (ordinance requiring license for retailers of marijuana paraphernalia was not vague in context of a pre-enforcement challenge where there was not a clear showing of the danger of arbitrary enforcement).

269. *Id.* at 358.

270. *Id.*

271. 527 U.S. 41 (1999).

Ordinance.” Because that ordinance contained no requirement of a harmful purpose, and because it applied to non-gang members as well as suspected gang members, it effectively left complete discretion to the police to arrest almost anyone. In the words of Justice Stevens, it “provide[d] absolute discretion to police officers to decide what activities constitute loitering.”²⁷²

B. Johnson v. United States

In 2012, Samuel James Johnson was indicted in federal court for being a convicted felon in possession of a weapon, the normal sentence for which is two years. The government successfully sought a mandatory minimum sentence of 15 years based on Johnson having three previous convictions for “violent felonies,” including one for possession of a short-barreled shotgun. The lower federal courts held that this mandatory minimum sentence was authorized by the “residual clause” of the Armed Career Criminal Act (ACCA).²⁷³ Among other things, the ACCA makes it a federal crime for a convicted felon to possess a weapon, and sets forth greatly enhanced sentences for those previously convicted of “serious drug offenses” and/or “violent felonies.”²⁷⁴

The ACCA sets forth several definitions of “violent felony,” including any felony that involves force; robbery, burglary, extortion, or use of explosives; or any other felony that poses a “serious potential risk of injury” to someone other than the felon himself.²⁷⁵ The last clause has come to be known as the “residual clause,” because it has a catch-all quality. Johnson’s possession of sawed-off shotgun conviction did not qualify under any of the other definitions of violent felony, so the lower courts held that it qualified under the residual clause. Johnson challenged that holding on the ground that the residual clause was unconstitutionally vague. In a landmark opinion by Justice Scalia for a 6-3 majority, the Court struck down the residual clause for impermissible vagueness.

Justice Scalia’s opinion for the Court began its analysis with *Kolender’s* statement of the rule, which had become the black-letter law. “Our cases establish that the Government violates this guarantee by taking away someone’s life, liberty, or property under a criminal law

272. *Id.* at 61 (quoting *City of Chicago v. Morales*, 177 Ill. 2d 440, 457 (Ill. 1997)).

273. 18 U.S.C. § 924 (2012).

274. *Id.* § 924(e)(1).

275. *Id.* § 924(e)(2)(B)(i)–(ii).

so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”²⁷⁶ Without further elaboration of this rule, the Court then stated that the law of vagueness applies “not only to statutes defining elements of crimes, but also to statutes fixing sentences.”²⁷⁷

The Court then described the so-called “categorical approach” to determine whether prior convictions qualify under the ACCA. Although the categorical approach is intellectually challenging to grasp, it is absolutely essential to understanding why *Johnson* makes CIMT untenable going forward, because both the residual clause of the ACCA and CIMT are applied categorically, not on the basis of the actual facts of the underlying convictions. The categorical approach by definition requires judging based on hypothetical, rather than actual, facts. This is what makes it unconstitutionally vague in both the ACCA residual clause and CIMT contexts.

The pathmarking decision regarding the categorical approach is *Taylor v. United States*, in which the defendant’s alleged third strike was a Missouri burglary conviction.²⁷⁸ Burglary is enumerated in § 924(e)(2),²⁷⁹ so one might think that the conviction obviously qualified. But the *Taylor* Court explained that the analysis was not so simple; the courts could not simply take a nominal approach to burglary—that is, they could not simply count the conviction as burglary because Missouri called it burglary.²⁸⁰ Every state has a different burglary statute, with major variations regarding which places can be burglarized. Congress could not have wanted all sorts of different statutes counted as burglary simply because the state legislatures chose to use that label.²⁸¹

276. *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)).

277. *Id.* at 2557 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

278. 495 U.S. 575, 578 (1990).

279. Section 924(e)(2)(B)(ii) states in pertinent part:

“[T]he term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife or destructive device that would be punishable by imprisonment for such a term if committed by an adult, that – is *burglary*, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .”

18 U.S.C. § 924(e)(2)(B)(ii)(emphasis added).

280. See *Taylor*, 495 U.S. at 592 (“We think that ‘burglary’ in 924(e) must have some uniform definition independent of the labels employed by the various States’ criminal codes.”).

281. *Id.* at 590–91.

Thus, the *Taylor* Court adopted a generic form of burglary for ACCA analysis. If a state version of burglary contained all the elements of this generic federal target, then convictions under that statute count as burglary; if not, then not. But adopting a generic federal form of burglary quickly provoked another issue, namely, how to determine whether a given conviction meets the elements in the generic form. For example, *Taylor*'s generic form of burglary requires that the place of the burglary be a fixed structure and not a car, boat, or airplane.²⁸² Yet in some states people can be convicted of "burglary" for unlawfully entering cars, boats, or airplanes with the intent to commit crimes therein. Do those convictions count?

There are two principal methods of making that determination. One would be to look at the real conduct—the actual facts—underlying the burglary conviction. If, for example, the defendant's lawyer admitted at the plea hearing that the place of the burglary was a house or a store, or if something else in the record showed that the place of the burglary was a fixed structure, then the conviction would count. In the real world, however, the record does not always contain competent evidence of the precise nature and place of the burglary, which means the "real conduct" or "actual facts" approach would often require mini-trials of old convictions to determine the applicability of the ACCA.²⁸³

Eschewing this method as impractical, the Court in *Taylor* instead adopted a categorical approach.²⁸⁴ With respect to burglaries, courts are to examine the state statute of conviction. If the statute permits convictions for burglaries of places other than fixed structures, then all convictions under that statute are categorically disqualified, even if it is clear that this particular burglary took place in a fixed structure. Thus, federal sentencing courts are not required to retry cases that are often from a long time ago and from a state far away. Note, however, that if there are no state court precedents on point (as there usually are not), the federal court must hypothesize one or more fact patterns to determine whether the statute reaches conduct beyond the relevant category (in *Taylor*, the burglary of a fixed structure). It is this need for judicially hypothesized facts, rather than the actual facts of the

282. *Id.* at 599 ("building or structure").

283. *Id.* at 601; *see also* *Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013) (explaining how the categorical approach "avoids the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries").

284. *Taylor*, 495 U.S. at 590.

underlying convictions, that makes CIMT so vulnerable to a vagueness challenge.

The exact mode of categorical approach employed in *Taylor* was not available to the courts in residual clause cases, because the residual clause enumerates no felonies, such as burglary or extortion. It is impossible to analyze the formal elements of statutes unless one knows the precise statutes to be analyzed. The whole point of a residual clause is not to limit coverage; hence, the analytical mode of scrutinizing formal elements to determine the “minimum” or “least culpable” conduct required for a conviction was not possible. In *Taylor*, that minimum or least culpable conduct would be burglarizing something other than a fixed structure.

Therefore, if the residual clause were to be treated on a categorical basis, it would have to be on an “ordinary or typical commission” approach. That is, courts would have to determine what the ordinary commission of the felony in question looks like. What facts underlie the ordinary commission of driving under the influence? What facts underlie the ordinary commission of attempted burglary? What facts underlie the ordinary commission of using a motor vehicle to elude a police officer? Once such hypothetical facts were determined, they could be tested for the “serious potential risk” of injury.

There is, however, an inherent arbitrariness to imagining the ordinary commissions of felonies. In *James v. United States*, where the question was whether attempted burglary in Florida posed a serious potential risk of injury, the Court said yes, reasoning that the ordinary attempted burglary may be *more* dangerous than the ordinary completed burglary because the typical attempted burglary that is actually prosecuted has ended in “confrontation between the burglar and a third party.”²⁸⁵ In *Chambers v. United States*, the felony at issue was failure to report to a penal institution under Illinois law.²⁸⁶ The majority concluded that this felony did not fall within the residual clause, in large part because “an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct.”²⁸⁷ In *Sykes v. United States*, the felony at issue was vehicular

285. 550 U.S. 192, 203 (2007).

286. 555 U.S. 122, 127 (2009).

287. *Id.* at 128.

flight from a police officer.²⁸⁸ The Court imagined the following scenario as typical:

It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others. Flight from a law enforcement officer invites, even demands, pursuit. As that pursuit continues, the risk of an accident accumulates. And having chosen to flee, and thereby commit a crime, the perpetrator has all the more reason to seek to avoid capture.²⁸⁹

Statistics could have made the “ordinary commission” approach less arbitrary, and in fact the Court used them where available.²⁹⁰ But availability proved problematic. The Court’s data came from multiple sources with different gathering methodologies.²⁹¹ In dissent, Justice Scalia derided this eclectic approach to statistics: “The Court does not reveal why it chose one dataset over another. In sum, our statistical analysis in ACCA cases is untested judicial factfinding masquerading as statutory interpretation.”²⁹² The available data were too limited to solve the arbitrariness issue—which a majority of the justices realized in *Johnson*.²⁹³

In his *Johnson* majority opinion, Justice Scalia carefully explained that the residual clause was not vague merely because “serious potential risk” feels too subjective or open-ended. The government cited dozens of state and federal statutes using similar locutions: “substantial risk,” “grave risk,” and “unreasonable risk.”²⁹⁴ The

288. 564 U.S. 1 (2011).

289. *Id.* at 10.

290. See *Chambers v. United States*, 555 U.S. 122, 128–30 (2009) (using statistics in its analysis); *Sykes*, 564 U.S. at 10 (using statistics in its analysis).

291. The *Sykes* Court relied on the following statistical sources: NAT’L CTR. FOR STATISTICS & ANALYSIS, “FATALITIES IN MOTOR VEHICLE TRAFFIC CRASHES INVOLVING POLICE IN PURSUIT” (2010); INT’L ASS’N OF CHIEFS OF POLICE, C. LUM & G. FACHNER, “POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM” (2008); BUREAU OF JUSTICE STATISTICS, SHANNON CATALANO, “VICTIMIZATION DURING HOUSEHOLD BURGLARY” (Sept. 2010); U.S. FIRE ADMIN. “METHODOLOGY USED IN THE DEVELOPMENT OF THE TOPICAL FIRE RESEARCH SERIES”, <http://www.usfa.dhs.gov/downloads/pdf/tfrs/methodology.pdf> (visited by the Court June 3, 2011), 564 U.S. at 11–20.

292. *Sykes*, 564 U.S. at 32 (Scalia, J., dissenting).

293. Justice Alito alone would have saved the residual clause from vagueness by switching to an actual facts approach. He did not explain how such an approach could be carried out without the need of retrying the facts underlying prior convictions in many of the cases. *Johnson v. United States*, 135 S. Ct. 2551, 2578 (2015) (Alito, J., dissenting).

294. Supplemental Brief for the United States at 36, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120), 2015 WL 1284964 at *22. See also the statutes cited in the appendix of the brief.

government's implication was clear: if the Court held that the residual clause was unconstitutionally vague, then these similarly worded statutes would also be unconstitutional.

But the majority had a ready answer. The residual clause was vague because, given the categorical approach, it hinged the concept of risk onto hypothetical facts. It was not vague because the concept of risk is inherently vague; it was vague because the residual clause, viewed through the "ordinary commission" lens, required judges to imagine a set of facts and then to determine whether that imagined set of facts presented a serious risk of injury.

In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves?²⁹⁵

At the same time, the Court continued, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. The court pointed out the difficulty and inherent imprecision in applying a standard requiring the assessment of risk to "judge-imagined abstraction."²⁹⁶

The Court cited two additional factors that made the residual clause vague. First, by asking whether the crime otherwise involves conduct that presents a serious potential risk, the residual clause forced courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives.²⁹⁷ These offenses are "far from clear in respect to the degree of risk each poses."²⁹⁸ Second, the majority cited the Court's own interpretive struggles with the residual clause:

This Court has acknowledged that the failure of "persistent efforts . . . to establish a standard" can provide evidence of vagueness. Here, this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy.

* * *

295. *Johnson*, 135 S. Ct. at 2551.

296. *Id.* at 2558.

297. *Id.* at 2557.

298. *Id.* at 2558, citing to *Begay v. United States*, 553 U.S. 137, 143 (2008).

It has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.²⁹⁹

Thus, *Johnson's* vagueness analysis turns on one main factor and two less important ones. The main factor is the intersection of risk and hypothetical facts. The less important factors are: (1) juxtaposition to enumerated felonies, inviting comparison; and (2) repeated judicial failures to craft a principled and objective standard.

IV. THE VAGUENESS DOCTRINE IN IMMIGRATION CASES

A. Heightened Scrutiny for Immigration

In the 1951 decision *Jordan v. De George*,³⁰⁰ the Court held that deportation should be treated as a criminal penalty for constitutional purposes, but that the “moral turpitude” standard was nevertheless not void for vagueness, at least as applied to a federal liquor tax fraud statute.³⁰¹ Thus, *De George* contains two distinct holdings: one concerning the appropriate level of scrutiny for a vagueness challenge in immigration proceedings, the other on the merits of the vagueness challenge to a particular statute.³⁰² This section explains why the first holding is not only still good law, but indeed has been bolstered by the recent landmark Supreme Court decision, *Padilla v. Kentucky*.³⁰³ The Court should repudiate the second holding, based not only on Justice Jackson's *De George* dissent critiquing CIMT (discussed earlier), but also on *Johnson*.

299. *Johnson*, 135 S. Ct. at 2557 (citation omitted).

300. 341 U.S. 223 (1951).

301. *Id.* at 231–32.

302. *Id.*

303. 559 U.S. 356, 357 (2010). We believe that *De George's* holding that immigration proceedings should be subjected to heightened scrutiny is also supported, albeit obliquely, by an older Supreme Court decision, *Yamataya v. United States*, 189 U.S. 86 (1903). There, the Court held that administrative officers may not disregard the fundamental principles of due process in making final decisions about whether a non-citizen may remain in the United States. The *Yamataya* Court stated:

“[I]t is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.”

Id. at 100.

In vagueness analysis, whether deportation proceedings are considered civil or quasi-criminal determines the appropriate level of constitutional scrutiny. Even if CIMT would survive vagueness analysis under a deferential rational basis review, it would not survive under heightened scrutiny. Because *De George*, bolstered by *Padilla*, compels heightened scrutiny, the question of whether CIMT would survive rational basis scrutiny is moot.

i. *Jordan v. De George*

In 1889, the Supreme Court declared immigration removal proceedings to be of a civil, not criminal, nature.³⁰⁴ Even deportation proceedings used to expel lawful permanent residents were held four years later to be of a civil nature.³⁰⁵ Since then, however, recognizing that deportation and removal proceedings are “uniquely difficult to classify” and “intimately related to the criminal process,”³⁰⁶ the Court has eroded these early precedents.

The greatest eroding force is the Court’s 1951 decision in *De George*.³⁰⁷ The majority opinion explains why immigration may not simply be treated as a civil matter, which would subject it to deferential rational basis review.³⁰⁸

In *De George*, an Italian immigrant was charged with possessing alcohol “with intent to sell it in fraud of law and evade the tax thereon” and removing and concealing liquor “with intent to defraud the United States of the tax thereon.”³⁰⁹ De George was convicted, served his prison sentence, and then returned to unlawful activities. He was thereby charged with “unlawfully, knowingly, and willfully defraud[ing] the United States of tax on distilled spirits.”³¹⁰ He was again found guilty of these crimes.³¹¹ Deportation proceedings began against him under the theory that his crimes were crimes involving moral turpitude. The BIA determined that the respondent’s crimes involved moral turpitude and he was ordered deported, but the Seventh Circuit reversed and ordered De George discharged.³¹² The Seventh Circuit

304. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

305. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

306. *Padilla*, 559 U.S. at 357.

307. 341 U.S. 223 (1951).

308. *Id.*

309. *Id.* at 224.

310. *Id.* at 224–25.

311. *Id.* at 225.

312. *Id.*; Brief of Petitioner, *Jordan v. De George*, 341 U.S. 223 (1951) (No. 348), 1951 WL 82136 at *5–6.

ruled that the INA intended only crimes of violence and “crimes which are commonly thought of as involving baseness, vileness or depravity” to be considered CIMTs.³¹³ The Supreme Court granted certiorari on the issue of whether evading a liquor tax constitutes a crime involving moral turpitude.³¹⁴

De George argued that the Committee of Immigration and Naturalization of the House of Representatives,³¹⁵ in which the term moral turpitude was discussed, intended for the term to encompass only crimes of violence. He argued that including the words “involving moral turpitude” indicated that Congress was attempting to limit the class of deportable aliens. Additionally, he argued that selling liquor to evade a tax is not “base, vile, or depraved,” which were the descriptors most frequently used to define moral turpitude.³¹⁶

The State of Kentucky argued that moral turpitude was not clearly defined, and that there was no exact test to determine whether specific offenses involve moral turpitude.³¹⁷ Rather, the offenses must be measured against the moral standards of society.³¹⁸ Given that the evasion of liquor tax was a direct result of “the gangsters of the prohibition era,” Kentucky argued that the offenses represented evidence of a criminal enterprise. The crime in question was not one that was committed occasionally or accidentally, but represented “organized lawlessness, thriving on violence and corruption.”³¹⁹ Kentucky further argued that the crime involved a fraud against the government, and fraud crimes have always been found to involve moral turpitude.³²⁰

The Court, per Chief Justice Vinson, emphasized that it was deciding a narrow question of law—whether conspiracy to defraud the United States of taxes on distilled liquor was a CIMT.³²¹ Because De George was twice convicted of the same crime, “whether certain other offenses involve moral turpitude is irrelevant and beside the point.”³²²

313. *De George*, 341 U.S. at 228 (citation omitted).

314. *Id.*

315. *Hearings before House Committee on Immigration and Naturalization on H.R. 10384*, 64th Cong., 1st Sess. 8 (1916)

316. *Id.* at 17–18.

317. Brief of Petitioner, *Jordan v. De George*, 341 U.S. 223 (1951) (No. 348), 1951 WL 82136 at *6.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Jordan v. De George*, 341 U.S. 223, 223–24 (1951).

322. *Id.* at 226–27.

The Court then looked to the past judicial construction of the term “moral turpitude” to provide guidance for De George’s conviction. The Court held that, without exception, crimes involving fraudulent intent have been held to involve moral turpitude.³²³

It was only then that the Supreme Court reached the constitutional issue: was the phrase “crime involving moral turpitude” unconstitutionally void for vagueness?³²⁴ The Court raised the issue *sua sponte*.³²⁵ “It has been suggested,” the Court noted, that the term “lacks sufficiently definite standards to justify this deportation proceeding.”³²⁶

The Court noted the phrase’s long history in American law and that no court had yet held the phrase vague or found it to violate due process.³²⁷ The Court then turned to the issue of what degree of scrutiny applied to challenges of immigration statutes on vagueness grounds. Prior vagueness decisions had applied a heightened level of scrutiny only to criminal statutes.³²⁸ The Court stated that the primary purpose of the vagueness doctrine was to ensure adequate warning of criminal consequences.³²⁹ Therefore, a criminal statute that does not provide adequate notice of criminal consequences violates due process of law. Interestingly, the Court did not cite to *Yamataya v. Fisher*,³³⁰ a 1903 decision holding that procedural due process was necessary in deportation proceedings. It has been argued that the Court could have used *Yamataya* to justify the application of a criminal void-for-vagueness analysis to immigration proceedings.³³¹ Instead, the *De George* Court referenced the “grave nature” of removal proceedings to justify applying a criminal standard in the vagueness analysis.³³²

The Court has stated that “deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.”

323. *Id.* at 227–28.

324. *Id.*

325. *Id.* at 229–30.

326. *Id.*

327. *Id.* at 229–30.

328. *See Williams v. United States*, 341 U.S. 97, 100 (1951); *Screws v. United States*, 325 U.S. 91, 103–04 (1945); *De George*, 341 U.S. at 230.

329. *De George*, 341 U.S. at 230.

330. 189 U.S. 86 (1903).

331. *See Mary Holper, Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NEB. L. REV. 647, 667–68 (2012).

332. *De George*, 341 U.S. at 230.

We shall, therefore, test this statute under the established criteria of the “void for vagueness doctrine.”³³³

Thus, the Court created another limit (along with *Yamataya*) on the general rule that immigration proceedings are to be regarded as merely civil in nature for purposes of constitutional analysis.

The Court continued that the test for vagueness was not whether individuals would have sufficient notice of all imaginable violations of the statute; rather, the test was whether the language is sufficiently definite to provide warning with respect to the core conduct, measured by “common understanding and practices,” falling within the statute’s reach.³³⁴ Although the *De George* Court did not use the terminology of later decisions regarding “strict” versus “intermediate” scrutiny,³³⁵ it employed a form of intermediate scrutiny to the fraud statute *sub judice*. Had the Court used a test requiring that “all imaginable violations of the statute would provide sufficient notice to individuals,”³³⁶ that would have been what is now known as strict scrutiny. Instead, the Court applied a less-searching level of scrutiny, but more than simple rational basis review.³³⁷ The Court did not ask (as it would in rational basis review) whether there was any imaginable justification for Congress to use the phrase “moral turpitude,” however little warning it might provide to the average person. It staked out a category of “core conduct” covered by the CIMT statute, as measured by “common understanding and practices,” and asked whether the phrase “moral turpitude” provided “sufficiently definite . . . warning” with respect to that core conduct.³³⁸ The Court concluded that fraud has always been regarded as a crime involving moral turpitude.³³⁹ That is to say, the common understanding of fraud *circa* 1951 provided sufficiently definite warning to the average person in the United States that it was a crime involving moral turpitude. The Court did not ask

333. *Id.* at 231 (internal citations omitted).

334. *Id.* at 231–32.

335. *See generally*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (using “strict” scrutiny to analyze a sex-based distinction); *Craig v. Boren*, 429 U.S. 190 (1976) (using an intermediate level of scrutiny to analyze a sex-based distinction).

336. *De George*, 341 U.S. at 231–32.

337. It should be noted that, had the Court been applying the most deferential form of review, it would not have taken pains to hold that deportation carries consequences akin to criminal punishment if the Court had simply intended to apply rational basis review. If the Court had intended to apply rational basis review, it would simply have noted the obvious, which is that immigration proceedings are formally administrative, not criminal.

338. *Id.* at 231–32.

339. *Id.* at 232.

whether a diligent person could find out whether fraud was a crime involving moral turpitude, but instead essentially asked whether the immorality of fraud was so well known within the community that the average person would have to know without asking anyone or doing any research. The Court easily concluded that the fraud statute at issue in *De George* satisfied that standard.³⁴⁰

Boutilier v. INS,³⁴¹ a Supreme Court decision from 1967, does not contradict *De George* on the heightened scrutiny standard. In *Boutilier*, the Supreme Court held that “[t]he constitutional requirement of fair warning has no applicability to standards such as are laid down in” the section of the INA dictating inadmissibility.³⁴² However, *Boutilier* is more properly read to apply only to *non-criminal* triggers for inadmissibility and deportation, and is arguably not good law at all.

The petitioner in *Boutilier* was essentially deported for his sexual orientation.³⁴³ In applying for citizenship, Boutilier submitted an affidavit admitting that he had been charged with sodomy in 1959, and that the charge had been dismissed.³⁴⁴ Later, at the request of the government, he submitted another affidavit regarding his sexual behavior.³⁴⁵ The affidavit was submitted to the Public Health Service, which issued a certificate stating that Boutilier ““was afflicted with a class A condition, namely, psychopathic personality, sexual deviate”” at the time of his admission.”³⁴⁶ Deportation proceedings were instituted against Boutilier under the theory that he had been inadmissible at the time of entry due to his “psychopathic personality.”³⁴⁷ Because Boutilier did not dispute the fact that he was a homosexual,³⁴⁸ the issue before the Supreme Court was whether “psychopathic personality” includes homosexuals, and whether the term is unconstitutionally void for vagueness.³⁴⁹

The Court held that the requirement of fair warning does not apply to the exclusion of “those who possess those characteristics which Congress has forbidden.”³⁵⁰ The vagueness doctrine applies to fair

340. *Id.* at 229.

341. 387 U.S. 118 (1967).

342. *Id.* at 123.

343. *Id.* at 119.

344. *Id.*

345. *Id.*

346. *Id.* at 120.

347. *Id.* at 119.

348. We use the word “homosexual” because it is used throughout the Court’s opinion.

349. *Id.* at 120.

350. *Id.* at 119.

notice about future conduct (including future *criminal* conduct), not to certain forbidden characteristics. As to *Boutilier*'s argument—that, had he known his homosexual conduct could get him deported, he would have not engaged in it—the Court repeated that *Boutilier*'s deportation was based on his continuous “affliction” with homosexuality, not anything he had done since entry.³⁵¹ Thus, “a standard applicable solely to time of entry could hardly be vague as to post-entry conduct.”³⁵²

Boutilier does not contradict *De George*'s holding that immigration consequences triggered by future criminal conduct are subject to intermediate scrutiny. It holds only that the constitutional requirement of fair warning does not apply to statutorily enumerated characteristics of non-citizens that they already possess at the time of entry. The rationale of *Boutilier* is that, by definition, there is nothing that a non-citizen can do after entering the United States to alter a characteristic he possessed when he entered the United States. Thus, *Boutilier* does not apply to removal proceedings based on crimes committed while in the United States, such as CIMTs.

Additionally, *Boutilier* may not be good law anymore. Never mind that *Boutilier* has been drastically undermined by the Court's subsequent sexual orientation decisions.³⁵³ Even more on point, “psychopathic personality” has been deleted from the INA as a trigger for inadmissibility; it is unclear whether *Boutilier* survives the death of the provision at issue in it. After all, this is not a garden-variety deletion, made for stylistic or administrative reasons. The basis for *Boutilier*'s exclusion—the notion that all gays and lesbians have “psychopathic personalities” simply because of their sexual orientation—has long since been completely undermined.³⁵⁴

Stepping back from the level-of-scrutiny issue for a moment, note that many courts have read *De George* as foreclosing any future vagueness attacks on the phrase “crime involving moral turpitude.”³⁵⁵

351. *Id.* at 124.

352. *Id.*

353. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (striking down Texas criminal sodomy statute); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (holding that there is a fundamental right to marry guaranteed to same-sex couples by both the Due Process and Equal Protection Clauses).

354. *See* 8 U.S.C. § 1182 (2012); *see also Lawrence*, 539 U.S. at 579; *Obergefell*, 135 S. Ct. at 2607.

355. *See, e.g.*, *Chu v. Cornell*, 247 F.2d 929 (9th Cir. 1957); *United States ex rel. Circella v. Sahli*, 216 F.2d 33 (7th Cir. 1954); *Ramirez v. United States INS*, 413 F.2d 405 (D.C. Cir. 1969); *Marciano v. INS*, 450 F.2d 1022, 1024 (8th Cir. 1971).

This is a fundamental misinterpretation of *De George*. The *De George* Court was careful to articulate that, “whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases,” the holding specifically regarded crimes involving fraud.³⁵⁶ In other words, the Court was not testing the vagueness of CIMT generally, but only as it applied to that particular fraud statute. This is critical because it means that the Supreme Court is on record only as concluding that intentional false representations with the aim of wrongfully obtaining property present no problem of vagueness with respect to “moral turpitude,” not that most or even many other types of criminal offenses are clear with respect to CIMT. *De George* is the only case where the Supreme Court has directly addressed the issue of whether the moral turpitude doctrine is unconstitutionally vague and should be construed narrowly.

ii. *Padilla v. Kentucky*

Regarding the importance of immigration consequences, the Court went beyond *De George* in its landmark 2010 decision in *Padilla v. Kentucky*.³⁵⁷ There, the Court held that a criminal defendant is deprived of adequate representation in plea negotiations if his lawyer gives incorrect advice about immigration consequences of a plea, or if the lawyer altogether fails to give advice.³⁵⁸ The Court explicitly recognized that deportation proceedings are civil, but also acknowledged that deportation can be a severe consequence of a guilty plea.³⁵⁹ *Padilla* essentially acknowledges that immigration is quasi-criminal — a point that strongly supports *De George*’s application of heightened scrutiny to immigration.

Padilla had been a lawful permanent resident of the United States for more than 40 years and had served in the U.S. Armed Forces.³⁶⁰ He pled guilty to drug distribution charges for transporting marijuana in his tractor-trailer, and deportation proceedings commenced.³⁶¹ He claimed that his lawyer had failed to inform him of the immigration consequences of a guilty plea.³⁶² Not only that, but he was told that he “did not have to worry about immigration status since he had been in

356. *Jordan v. De George*, 341 U.S. 223, 232 (1951).

357. 559 U.S. 356 (2010).

358. *Id.* at 365–67.

359. *Id.* at 365.

360. *Id.* at 359.

361. *Id.*

362. *Id.*

the country so long.”³⁶³ Padilla filed a pro se post-conviction motion to withdraw his plea due to ineffective assistance of counsel.³⁶⁴ Ultimately, the Supreme Court of Kentucky held that the Sixth Amendment’s guarantee to effective assistance of counsel did not extend to Padilla’s claim, as his deportation proceeding was a civil matter.³⁶⁵ Additionally, the Supreme Court of Kentucky held that there was no difference between failing to advise on a collateral matter and giving incorrect advice on a collateral matter.³⁶⁶ Deportation was held to be a collateral consequence of his criminal conviction, and therefore neither failing to advise nor giving incorrect advice were grounds for relief.³⁶⁷

The U.S. Supreme Court reversed, stating:

We have long recognized that deportation is a particularly severe “penalty,” but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.³⁶⁸

Because of the interwoven nature of deportation proceedings with criminal sentencing, the Court held that the Sixth Amendment right to effective counsel is applicable in deportation proceedings.³⁶⁹ Thus, despite the Court’s continuing statements that immigration proceedings are formally civil, it also often continues to treat such proceedings as de facto criminal.

363. *Id.*

364. See Peter Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1326 (2011) (citing Brief of Petitioner at 11, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651)).

365. *Padilla*, 559 U.S. at 359.

366. *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008).

367. *Padilla*, 559 U.S. at 360.

368. *Id.* at 365.

369. *Id.* at 366.

V. VAGUENESS AND CIMT

A. Imprecision of Textual Standard

Professor Julia Ann Simon-Kerr has demonstrated the seeming irreconcilability of decisions finding various offenses to be inside or outside the boundary of moral turpitude:³⁷⁰

Moral turpitude jurisprudence today suggests that society condemns as immoral the petty thief³⁷¹ but not the person who attacks a police officer.³⁷² If the federal courts are to be believed and the standard taken at face value, then “aggravated fleeing” is inherently base, vile, and depraved³⁷³ while some forms of aggravated assault do not violate community norms of morality.³⁷⁴ Drunk driving repeatedly is deemed not to involve moral turpitude³⁷⁵ but drunk driving with a suspended license is assessed differently.³⁷⁶ All statutory rape involves moral turpitude but so did same-sex sodomy until it received constitutional protection in *Lawrence v. Texas*.³⁷⁷ In evidence law, moral turpitude jurisprudence holds that the prostitute lacks credibility³⁷⁸ but the batterer does not.³⁷⁹

Professor Simon-Kerr’s analysis is only too well borne out by the above review of the judicial construction of CIMT. The law of CIMT consists of small pockets of predictability surrounded by a sea of chaos.

The lack of guidance afforded by “moral turpitude” is not only the subject of academic criticism. Those who must apply it—judges and administrators—have voiced their bewilderment. It is impossible not to harken back to Justice Jackson’s dissent in *Jordan v. De George*, in which he lambasted the CIMT standard as “an undefined and undefinable standard.”³⁸⁰ One BIA decision stated, “Moral turpitude is a vague term. Its meaning depends to some extent on the state of public

370. Simon-Kerr, *supra* note 46, at 1001.

371. *Michel v. INS*, 206 F.3d 253, 261 (2d Cir. 2000).

372. *Zaranska v. U.S. Dep’t of Homeland Security*, 400 F. Supp .2d 500, 511 (E.D.N.Y. 2005).

373. *Mei v. Ashcroft*, 393 F.3d 737, 741–42 (7th Cir. 2004).

374. *Carr v. INS*, 86 F.3d 949, 950–51 (9th Cir. 1996).

375. *Torres-Varela*, 23 I. & N. Dec. 78, 83–84 (BIA 2001) (en banc).

376. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 917 (9th Cir. 2009).

377. 539 U.S. 558, 562 (2003).

378. *See, e.g., People v. Humphrey*, No. C052744, 2011 WL 1671560, at *24 (Cal. Ct. App. May 4, 2011) (“Misdemeanor conduct of prostitution represents a crime of moral turpitude.”).

379. *See, e.g., People v. Mansfield*, 200 Cal. App. 3d 82, 88–89 (1988) (refusing to permit impeachment of a witness with a conviction of “felony battery” or “battery resulting in serious bodily injury” because that offense is not a “crime of moral turpitude”).

380. *Jordan v. De George*, 341 U.S. 223, 228–29 (1951) (Jackson, J., dissenting).

morals.”³⁸¹ More recently, the BIA remarked: “[B]oth the courts and this Board have referred to moral turpitude as a ‘nebulous concept’ with ample room for differing definitions of the term.”³⁸² “While the term ‘moral turpitude’ has been used in the law for centuries, it has never been clearly or certainly defined,” according to one federal district judge. “This is undoubtedly because it refers not to legal standards but rather to those changing moral standards of conduct which society has set up for itself through the centuries.”³⁸³ The Seventh Circuit called the moral turpitude standard “notoriously baffling.”³⁸⁴ Various panels and judges in the Ninth Circuit have said, “We are not unmindful of the myriad decisions sponsoring various concepts of moral turpitude. They offer no well settled criteria”³⁸⁵; “‘Moral turpitude’ is perhaps the quintessential example of an ambiguous phrase”³⁸⁶; and “[T]he BIA’s precedential case law regarding the meaning of the phrase ‘crime involving moral turpitude’ . . . is a mess of conflicting authority.”³⁸⁷

B. Categorical Treatment of Offenses

The Court in *Johnson v. United States* found the ACCA residual clause void for vagueness largely because the clause applied to underlying convictions on a “categorical” basis. The phrase “serious potential risk of physical injury,” however ambiguous it might seem to a layperson, did not become unconstitutionally vague until it was applied in a categorical manner rather than in a manner based on the facts of the actual case at bar.³⁸⁸ In determining how broad the “category” of any particular conviction was, courts were required to imagine hypothetical violations of the statute of conviction. This imaginative process pushed an already ambiguous statutory provision into the realm of vagueness.

As with the ACCA residual clause, the CIMT clause is applied on a categorical basis. The government will doubtless point out, however, that the categorical analysis applied to the ACCA residual clause was

381. *In re D.*, 1 I. & N. Dec. 190, 193 (BIA 1942).

382. *In re Lopez-Meza*, 22 I. & N. Dec. 1188, 1191 (BIA 1999).

383. *United States ex rel. Manzella v. Zimmerman*, 71 F.Supp. 534, 537 (E.D. Pa. 1947).

384. *Garcia-Meza v. Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008).

385. *Tseung Chu v. Cornell*, 247 F.2d 929, 933 (9th Cir. 1957).

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

387. *Id.* at 921 (Berzon, J., dissenting).

388. Examples of cases where the Supreme Court analyzed prior convictions on a factual, rather than categorical, basis can be found in *Nijhawan v. Holder*, 557 U.S. 29 (2009) (immigration statute) and *United States v. Hayes*, 555 U.S. 415 (2009) (federal criminal statute).

a different mode of categorical analysis than that applied in CIMT cases. In ACCA residual clause cases, the courts determined whether the conviction was for a felony that presented a “serious potential risk of physical injury” by gauging the ordinary or typical commission of the underlying felony, and then asking whether that factual scenario presented a serious risk of injury (we shall call this the “ordinary or typical commission” mode of categorical analysis). On the other hand, in CIMT cases, the courts determine whether the conviction categorically involved moral turpitude by gauging the “least culpable conduct” necessary to constitute the crime, and then asking whether that conduct involves moral turpitude (we shall call this the “least culpable conduct” mode of categorical analysis). Does this difference in modes of analysis render *Johnson* inapposite in the CIMT context?

The Supreme Court has applied the “ordinary or typical commission” mode of categorical analysis in multiple ACCA residual clause cases. In *James v. United States*,³⁸⁹ the question was whether attempted burglary in Florida posed a serious potential risk of injury. The Court imagined an ordinary attempted burglary and reasoned that it may actually be *more* dangerous than the ordinary completed burglary because the typical attempted burglary that is actually prosecuted has ended in “confrontation with a property owner or law enforcement officer.”³⁹⁰ In *Chambers v. United States*, the Court held that failure to report to a penal institution under Illinois law did not categorically fall within the residual clause.³⁹¹ A key part of the Court’s analysis was imagining an ordinary or typical instance of failure to report and then observing that such an individual “would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct.”³⁹² In *Sykes v. United States*, the felony at issue was vehicular flight from a police officer under Indiana law; the Court used statistics and an imagined, ordinary or typical vehicular flight scenario to find that such a felony did present a serious potential risk of physical injury to another.³⁹³

Taylor v. United States, on the other hand, is an ACCA decision that exemplifies the “least culpable conduct” mode of categorical

389. 550 U.S. 192 (2007).

390. *Id.* at 204.

391. 555 U.S. 122 (2009).

392. *Id.* at 128.

393. 131 S. Ct. 2267 (2011).

analysis.³⁹⁴ In this analytical mode, the reviewing court tries to imagine non-conforming (overbroad) convictions under the statute at issue.³⁹⁵ Usually, these non-conforming or overbroad fact scenarios represent the least culpable conduct that nonetheless violates the statute. To use the facts and statute of *Taylor* itself as an example, breaking *out* of a dwelling house, or breaking an *interior* door, seem like less culpable variations on burglary than unlawful entry into a dwelling house to commit a crime.³⁹⁶ Whether one agrees with the relative culpability evaluation, these variations are “overbroad” with relation to the general federal offense, which is to say, they permit conviction in some cases that would not be permitted under the federal standard.³⁹⁷ Therefore, under *Taylor*, no conviction under these statutes may qualify for sentencing enhancement under the ACCA. So long as the reviewing court may not look at the actual facts of the case, there is no way to guarantee that the defendant’s convictions fall within the generic standard.

The least culpable conduct approach of *Taylor* is the predominant mode of categorical analysis in both immigration and federal criminal jurisprudence,³⁹⁸ but it is not the only one. Because of their nature, some statutory standards are instead analyzed under the “ordinary or typical commission” mode used in the ACCA residual clause cases. But clearly, from the standpoint of vagueness, the difference between two modes of categorical analysis is irrelevant. Both categorical approaches involve an equal amount of judicial probing to detect the contours of the statute of conviction involved. Neither looks at the actual facts of the underlying conviction—both are entirely theoretical, based on imagined hypothetical fact patterns.

The least culpable conduct analysis utilized in CIMT cases is at least as speculative and imaginative—and therefore as unpredictable—as the typical commission analysis in the residual clause cases. Consider the BIA’s well-known decision in *Matter of Silva-Trevino*.³⁹⁹ The

394. 495 U.S. 575 (1990).

395. *Id.* at 580.

396. *See id.* at 589–99.

397. *Id.*

398. *See, e.g.*, Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001); Partyka v. Attorney General, 417 F.3d 408 (3d Cir. 2005); Cerezo v. Mukasey, 512 F.3d 1163 (9th Cir. 2008); Rodriguez-Castro v. Gonzalez, 427 F.3d 316 (5th Cir. 2005).

399. 24 I. & N. Dec. 687 (U.S. Atty. Gen. 2008), *vacated by* Matter of Silva-Trevino, 26 I. & N. Dec. 550 (U.S. Atty. Gen. 2015). The Attorney General’s decision was itself later vacated in light of the Supreme Court’s decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013). We discuss these cases not for their continuing precedential value, but because they illustrate the way

question was whether Silva-Trevino's conviction in Texas for "indecent with a child" made him inadmissible as someone convicted of a CIMT, and therefore ineligible for discretionary relief in immigration court.⁴⁰⁰ The Texas statute made it "illegal for a person to engage in 'sexual contact' with a child younger than 17 years old who is not the person's spouse, unless the person is 'not more than three years older than the victim and of the opposite sex.'"⁴⁰¹ Because the case came from Texas, the Board was bound by Fifth Circuit precedent regarding analysis in CIMT cases. That precedent included *Rodriguez-Castro v. Gonzales*, in which the Fifth Circuit stated that courts trying to decide whether a particular conviction involved moral turpitude were required to view the underlying statute in terms of the "minimum criminal conduct necessary to sustain a conviction under the statute,"⁴⁰² which is a different way of expressing the "least culpable conduct" test. Using that test, the Fifth Circuit concluded that a conviction under the Texas "indecent with a child" statute did not qualify as a CIMT.⁴⁰³ The Board ruled, "Not every crime potentially 'covered under . . . § 21.11(a)(1) involves[s] conduct so depraved as to warrant classifying the statute as a whole as one involving moral turpitude.'"⁴⁰⁴ Although the statute covered many scenarios "clearly involv[ing] reprehensible conduct which is contrary to the accepted rules of morality,"⁴⁰⁵ not all convictions would necessarily fit that characterization:

In contrast to statutory rape, . . . which typically involves penetration or something similar, the sexual conduct encompassed by [Texas Penal Code] § 21.11(a)(1) potentially involves much less intrusive contact. For example, a defendant in Texas has been convicted under the statute for touching the chest/breast of a 10-year-old boy. *See Sullivan v. State*, 986 S.W. 2d 708 (Tex. Crim. App. 1999). This raises the possibility that a 20-year-old woman dancing suggestively with a youth just under the age of 17, who represents himself as older and can reasonably be believed to be such, could be liable under the statute if she acted on a desire to arouse herself or a spectator. This is so even if she touched the victim through his

in which the least culpable conduct analysis works.

400. *Silva-Trevino*, 24 I. & N. Dec. at 688.

401. *Id.* at 690 (quoting TEX. PENAL CODE § 21.11(a)(1) & (b)(1) (2003)).

402. 427 F.3d 316, 320 (5th Cir. 2005) (citation and internal quotations omitted).

403. *Silva-Trevino*, 24 I. & N. Dec. at 692.

404. *Id.*

405. *Id.*

clothing. This does not strike us as the type of behavior which would be classified as involving moral turpitude under the Act.⁴⁰⁶

Although the conviction for touching the 10-year-old boy's chest may have been real, the 20-year-old female dancer suggestively touching the chest of an almost 17-year-old male through his clothing is completely fictitious. The very process of ascertaining the "least culpable" or "minimum" conduct necessary to violate the statute requires judges to imagine cases not before the court. There is no purely logical, non-arbitrary way to determine what conduct is less culpable than other conduct; it is an inherently subjective question. For example, if the woman dancer in the BIA's hypothetical suggestively touched an almost 17-year-old girl's chest through her clothing, would that be more or less culpable than suggestively touching a boy's chest? Does it matter whether the case arises in Texas or, say, California? Moral turpitude has been an elastic phrase that has historically comported with the culture in which it is used. This notion of culture largely depends on both geography and the genders of the involved actors.⁴⁰⁷ In Texas, one might argue that a female-on-female suggestive touching is less culpable, because of traditional playful behavior among girls. On the other hand, given that the touching is "suggestive," one might argue that a female-on-female touching is more culpable than a female-on-male touching. One might think that, in a socially conservative state like Texas, lesbian behavior is considered more blameworthy than in a socially liberal state like California. For that matter, one might think that a female-on-male touching is considered less culpable in a more sexually traditional state like Texas because the culture largely regards female-on-male touching as flattering rather than harmful. Ambiguities driven by gender and regional differences often reduce this analysis to a hopeless morass of unpredictability.

Along these same lines, consider *Quintero-Salazar v. Keisler*.⁴⁰⁸ There, the immigrant had been convicted in California for engaging in intercourse with a minor under 16 years of age when the perpetrator is 21 years of age or older.⁴⁰⁹ A panel of the Ninth Circuit found this conviction did not constitute CIMT because the least culpable conduct

406. *Id.*

407. See Simon-Kerr, *supra* note 46, at 1007 (referencing the culturally dependent "honor code" norms around which the moral turpitude standard as developed).

408. 506 F.3d 688 (9th Cir. 2007).

409. CAL. PENAL CODE § 261.5(d) (West 2011).

necessary to come within the reach of this statute was not sufficiently morally turpitudinous.⁴¹⁰ The panel explained:

[A]mong the range of conduct criminalized by § 261.5(d), would be consensual intercourse between a 21-year-old (possibly a college sophomore) and a minor who is 15 years, 11 months (possibly a high school junior). That relationship may very well have begun when the older of the two was a high school senior and the younger a high school freshman and have continued monogamously without intercourse for two or three years before the offending event. On its face, such behavior may be unwise and socially unacceptable to many, but it is not “inherently base, vile, or depraved,” or accompanied by a “vicious motive or corrupt mind.”⁴¹¹

Although this least culpable conduct analysis was performed correctly as a matter of law, it is striking how much creativity is involved. Note the panel’s embellishments regarding the fidelity and chastity of the relationship. It is impossible to predict ahead of time how far a court is willing to reach in finding extremely low-culpability conduct that nonetheless technically violates the statute.

Still another example, this one outside the context of sexual behavior, is *Galeana-Mendoza v. Gonzales*.⁴¹² The immigrant had been convicted in California of domestic battery, which the sentencing enhancement statute defined as:

When a battery is committed against a spouse, a person with whom the defendant is cohabitating, a person who is the parent of the defendant’s child, former spouse, fianc. . . , or fianc. . . e, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars . . . , or by imprisonment in the county jail for a period of not more than one year, or by both that fine and imprisonment.⁴¹³

The Ninth Circuit panel held that this conviction did not constitute a CIMT because:

For example, throwing a cup of cola on the lap of someone to whom one is or has been engaged, slightly shoving a cohabitant, or poking

410. *Quintero-Salazar*, 506 F.3d at 694–95.

411. 506 F.3d at 693. *Quintero-Salazar* did not mention *Duenas-Alvarez v. Gonzales*, 549 U.S. 183 (2007), and its rule requiring that hypotheticals used in the least culpable conduct analysis must be supported by actual prosecutions. *Duenas-Alvarez* was handed down in January 2007; *Quintero-Salazar* was decided in October 2007.

412. 465 F.3d 1054 (9th Cir. 2006).

413. CAL. PENAL CODE § 1058 (West 2011).

the parent of one's children rudely with the end of a pencil are all "offensive touchings" of qualifying individuals and can all constitute domestic battery⁴¹⁴

Can it honestly be said that this analysis involves less "judicial imagining" than the Supreme Court's analyses in the residual clause cases? And yet in *Johnson*, the Court condemned its own analyses as contributing to the constitutionally fatal vagueness of the residual clause.

The least culpable conduct cases involving sexual behavior most graphically illustrate the rampant creativity inherent in the analytical process. But even the U.S. Supreme Court's burglary decisions under the ACCA illustrate the necessity of factual hypothesizing while conducting a least culpable conduct analysis. In *Taylor v. United States*, the Supreme Court ruled for Taylor based on the possibility that defendants in Missouri during the relevant time period had been convicted of burglary for breaking *out* of residences, or for breaking *interior* doors. There was no evidence before the Court to show that even a single person had been convicted for burglary in Missouri for such conduct, yet Taylor prevailed based on the Court's hypothesizing.

C. Why Duenas-Alvarez Fails to Cure the Notice Deficiency in CIMT for Vagueness Purposes

The Supreme Court has been aware of the "judicial imaginings" problem with least culpable conduct analysis for some time. In *Gonzalez v. Duenas-Alvarez*,⁴¹⁵ the immigrant had been convicted in California of "taking a vehicle without consent."⁴¹⁶ The government attempted to remove Duenas-Alvarez, a permanent resident alien, under the portion of the INA that makes theft a basis for inadmissibility, and therefore, for removal.⁴¹⁷ Before the Supreme Court, Duenas-Alvarez argued that the California statute pursuant to which he was convicted did not fall within the generic federal definition of theft because California's aider and abettor doctrine reached broadly to cover all crimes that are the natural and probable consequences of the intended crime.⁴¹⁸ Speaking for the Court, Justice Breyer rejected this argument, insisting that, in order to prevail,

414. *Galeana-Mendoza*, 465 F.3d at 1061.

415. 549 U.S. 183 (2007).

416. CAL. VEH. CODE § 10851(a) (West 2011).

417. 8 U.S.C. § 1227(a)(2)(A) (2012).

418. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190 (West 2007).

Duenas-Alvarez would have to show “something special about California’s version of the doctrine—for example, that California in applying it criminalizes conduct that most other states would not consider ‘theft.’”⁴¹⁹

At oral argument, Duenas-Alvarez’s counsel attempted to show that California’s version of natural and probable consequences did extend beyond that of most states.⁴²⁰ He offered the Justices a hypothetical in which California’s natural and probable consequences doctrine would support a conviction where “an individual who wrongly bought liquor for an underage drinker [would be] criminally responsible for that young drinker’s later (unforeseen) reckless driving.”⁴²¹

The Supreme Court, however, was unpersuaded. The Court reviewed the precedents and was unable to conclude that California’s natural and probable consequences doctrine “show[s] something special” above and beyond the natural and probable consequences doctrine in other states.⁴²² This was enough to decide the case against Duenas-Alvarez because it meant the statute under which he was convicted was not overbroad with relation to the general federal definition of theft. However, the Court warned against the kind of hypothesizing that Duenas-Alvarez’s counsel had engaged in at oral argument:

[I]n our view, to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. But he must at least point to his own case or other cases in which the state courts did in fact apply the statute in a special (nongeneric) manner for which he argues.⁴²³

This dictum is why *Duenas-Alvarez* has become renowned in this field. In *Moncrieffe v. Holder*, which involved the antique firearms exception to firearms trafficking, the Court stated: “

419. *Id.* at 191.

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.* at 193.

Duenas-Alvarez requires that there be ‘a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.’ To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms.”⁴²⁴

It seems to be broadly accepted that, “in some cases, a noncitizen must make a showing that the convicting jurisdiction actually prosecutes the minimum conduct that the noncitizen claims is covered by the statute of conviction and that does not match the definition of the generic crime.”⁴²⁵ Less clear are cases where the hypothetical conduct in question is explicitly listed in the statute—for example, the Missouri burglary statutes in *Taylor* that enumerated breaking out of a building, or breaking an inner door, as sufficient to violate the statutes. Also less clear would be a case where the hypothetical conduct had explicitly been “imagined” by a state appellate court interpreting the criminal statute in question.⁴²⁶ At a minimum, though, *Duenas-Alvarez* sometimes requires immigration petitioners to demonstrate that the hypothetical conduct they claim makes a statute fatally overbroad has been actually prosecuted by the state.

This requirement forms the basis for an objection to a vagueness challenge to CIMT. If interpreting statutes pursuant to the least culpable conduct test is tethered to actual prosecutions, then no “judicial imagination” is involved, and CIMT is not unconstitutionally vague. In other words, according to this argument, *Duenas-Alvarez* saves CIMT from unconstitutionality because it eliminates the weak link in the analytical chain: the notion of “least culpable conduct” is no longer subject to arbitrary hypothesizing by judges, but instead is captured by actual prosecutions.

The answer to this objection, perhaps ironically, is that the practice under *Duenas-Alvarez* is sharply at odds with the theory of *Duenas-Alvarez*. In the real world, it is extremely difficult to find out which conduct has been prosecuted and which has not. Very few state criminal prosecutions culminate in reported opinions. The vast majority of them are resolved by plea and are not contained in any statewide database

424. 569 U.S. 184, 206 (2013).

425. NAT’L IMMIGRATION PROJECT OF THE NAT’L LAWYERS GUILD & IMMIGRANT DEF. PROJECT, THE REALISTIC PROBABILITY STANDARD: FIGHTING GOVERNMENT EFFORTS TO USE IT TO UNDERMINE THE CATEGORICAL APPROACH 3 (Nov. 5, 2014), <http://immigrantdefenseproject.org/wp-content/uploads/2014/11/realistic-probability-advisory.pdf>.

426. *Id.*

that would allow a researcher to access the underlying conduct that was involved.⁴²⁷ If a judge, prosecutor, defense lawyer, immigration official, or immigrant wanted to find out whether a particular type of conduct had ever actually been prosecuted under a particular statute, there would be no comprehensive way to find out.⁴²⁸ Individual immigration defense lawyers and immigration judges will know of certain actual prosecutions anecdotally—as where they handled those cases themselves, or where they hear of such prosecutions through the grapevine. That has happened since *Duenas-Alvarez* was handed down, and it will continue to happen sporadically. But it is simply not possible to run searches in a single database—or even in any combination of currently existing databases—to know whether any particular type of conduct has ever been prosecuted under a certain statute.

Duenas-Alvarez thereby loses its ability to restore certainty, predictability—and therefore, notice—to least culpable conduct analysis. From the standpoint of an immigrant who would like to avoid a conviction that will ultimately be considered a CIMT, there are certain statutes that may or may not qualify depending on how far down the tail of the Bell curve (in terms of culpability of conduct) courts are going to go. *Duneas-Alvarez* would put a determinate limit on how far they can go, if there were some available method of finding out which conduct has been prosecuted and which conduct has not'. But there is no such method. If an immigrant came to an immigration defense lawyer and asked whether the violation of a particular statute will be considered CIMT, the lawyer would only be able to answer with any degree of certainty if there happened to be clear appellate opinions on point. The lawyer would not be able to extrapolate from those cases to other statutes, no matter how facially similar, because there is no way to know in advance how far the least culpable conduct analysis will go for that other statute. *Duenas-Alvarez* would be irrelevant to the advising lawyer unless he or she happened to know that a certain type of conduct had actually been prosecuted. If the facts underlying that actual prosecution clearly render the statute overbroad relative to CIMT, then the lawyer's answer will be certain. Critically, however,

427. See Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?mcubz=3> (asserting that ninety percent of criminal cases are never tried).

428. Although we were unable to find documentation, one of us (Lee) has been told by numerous prosecutors and immigration defense lawyers that states do not have searchable databases of individual prosecutions, such that one would be able to ascertain the alleged facts of cases.

“actually prosecuted” does not mean the same thing as judicially declared to fall within the statute. It merely means that some prosecutor somewhere in the state once filed charging papers based on that conduct (note that it would not help matters if *Duenas-Alvarez* were recalibrated to operate based on actual convictions rather than actual prosecutions, because the vast majority of guilty pleas are never memorialized in published opinions).

It is critical to remember precisely what about the ACCA residual clause rendered it unconstitutionally vague. The key to vagueness under Due Process is a failure to give adequate notice to ordinary individuals about what conduct a law condemns, a lack of standards that would otherwise permit law enforcement to avoid arbitrary enforcement, or both. As the *Johnson* Court stated:

Our cases establish that the government violates [due process] by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” * * * We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.⁴²⁹

Although this quotation discusses “criminal law,” that makes no difference to the analysis of CIMT. Under *Jordan v. De George*, immigration laws are analyzed at the same level of scrutiny as criminal laws for vagueness purposes. Because least culpable conduct analysis inevitably hinges on a reach of indeterminate distance down the tail of the Bell curve of possible conduct—and because *Duenas-Alvarez* in the real world is incapable of bestowing determinacy on the distance of that reach—CIMT both fails to give ordinary immigrants fair notice of what can get them deported *and* fails to provide the standards that could help prevent DHS or the INS from arbitrarily enforcing it.

VI. REMEDIES

If CIMT is unconstitutionally vague as applied to some offenses, such as involuntary manslaughter, assault, and sex offenses, then the next question is what remedy should be provided. The dilemma is whether to invalidate CIMT on an offense-by-offense basis, or whether to invalidate it on its face. The case law is unambiguous with respect to some offenses, most prominently murder and forcible rape, so why

429. *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

throw the baby out with the bathwater? Why not simply invalidate CIMT for individual offenses where the case law is unpredictable? The short answer is that a limited “remedy” for vagueness will not cure the overall constitutional problem, which is unpredictability in whatever of CIMT jurisprudence remains.

The biggest problem with an offense-by-offense approach is the nature of incremental precedent creation. Unless CIMT is declared unconstitutional on its face, individuals will continue to face uncertainty about whether particular convictions will count as CIMT. The most traditional remedial approach would be for federal courts and the BIA to confront the possible vagueness of any particular type of conviction on an individual petitioner basis. Suppose that a federal court were to hold CIMT unconstitutional with respect to a conviction for assault with a deadly weapon (ADW). Criminal defense lawyers could then advise their clients that convictions under conventional ADW will never count as CIMT. But what about assault with intent to kill or assault with intent to rape? Murder and forcible rape, after all, are CIMT. There would be no way for a defense lawyer to give reliable advice on whether to take a plea offer on either of those varieties of assault. The federal court with the ADW case could reach out to opine that all sub-species of assault no longer qualify as CIMT, but such a holding would merely constitute a facial invalidation in miniature, with all the same separation-of-powers concerns as a facial invalidation across all offenses.

Facial invalidation often presents separation-of-powers concerns precisely because it requires a court to decide cases not before it. An appellate decision involving a CIMT issue presents the question of whether one particular conviction qualifies as CIMT. But vagueness presents a unique dynamic: the very reason that vague statutes violate due process is that they create a constitutionally unacceptable uncertainty about how future cases will be treated. Unless federal appellate courts—preferably the Supreme Court—announce that CIMT is unenforceable with respect to all convictions, it will be impossible to stop the guessing game as to which remaining species of offenses are and are not CIMT. To take just one example, even if a federal appellate court were to rule that CIMT is void for vagueness with respect to “all offenses other than murder and forcible rape,” this would leave uncertainty as to child sex statutes not yet enacted at the time of the appellate ruling. The conduct proscribed in child sex statutes comes in all varieties, from the relatively innocuous

“annoying” of a child (which in the future could merely constitute sexually offensive Internet name-calling) all the way to physical genital molestation.

The remedial dynamic for vagueness, then, must differ from remedies for other constitutional maladies.⁴³⁰ Yet there is an even more specific reason why facial invalidation is required when a statute has run afoul of *Johnson*. The nub of the problem is that the “least culpable conduct” test in CIMT doctrine inevitably involves an arbitrary degree of judicial imaginings. *Ex ante*, it is impossible for lawyers to predict how creative federal courts will get in hypothesizing conduct that would qualify under the statute of conviction, yet would not involve “moral turpitude.” Recall the hypothetical 20-year-old female dancer suggestively touching the chest of an almost 17-year-old male audience member in a nightclub routine.⁴³¹ How is a defense lawyer supposed to know whether a conviction under this “indecent with a child” statute qualifies as CIMT or not? Is the federal court in his prospective immigration case going to go to that extreme length in hypothesizing innocuous fact situations, or is the federal court in his case going to stick to locally familiar anecdotes? This is why facial invalidation is the only remedy that will truly get to the root of the problem.

In *Johnson*, the Court never considered limiting the remedy to the petitioner’s case, or to convictions for possession of a short-barreled shotgun.⁴³² After *Johnson*, the residual clause of the ACCA is unenforceable in any case, no matter how obviously dangerous the underlying conviction may be. This is precisely because of the nature of vagueness as a constitutional violation. Although with any rule there will be uncertain applications at the margins, the problem with vague laws is that the margins dominate the cores. Rather than a large number of applications where the law produces a certain result, leaving a small

430. Adjudications of vagueness are normally accompanied by facial invalidations. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 50 (1999) (“[W]e conclude that the ordinance enacted by the city of Chicago is unconstitutionally vague.”); *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (“We conclude that § 647(e) is unconstitutionally vague on its face.”); *City of Cincinnati v. Coates*, 402 U.S. 611, 616 (1971) (affirming the decision of the Supreme Court of Ohio that the statute was unconstitutional on its face); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964). *But cf.* *Parker v. Levy*, 417 U.S. 733, 756 (1974) (“[O]ne who has received fair warning of the criminality of his own conduct from the statute in question is [not] entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit.”).

431. *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 690 (2008).

432. 135 S. Ct. 2551.

number of applications where the law leaves uncertainty, vague laws present the opposite situation. Partly because of the elasticity of the phrase “serious potential risk of physical injury to another,” and partly because of the judicial discretion involved in the categorical analysis of underlying convictions, the result in *Johnson* was to produce islands of certainty surrounded by a sea of uncertainty. The same is true of CIMT. Although some offenses have consistently been treated as CIMT, such as murder and forcible rape, there are many others, surveyed above, whose CIMT status is put in doubt by conflicting precedent.

To cap off this point about “least culpable conduct” analysis and vagueness, consider the superficially absurd question of whether first-degree, premeditated murder “categorically” constitutes a CIMT. In one North Carolina case, the defendant was convicted of first-degree murder and sentenced to life in prison after he shot his dying father.⁴³³ In affirming the finding of premeditation, the North Carolina Supreme Court noted that the defendant brought a gun to the hospital, cocked it prior to each of his four shots, and later admitted that he had promised his father not to let him suffer.⁴³⁴ In his dissent, the Chief Justice protested that “[o]ur law of homicide should not be so roughly hewn as to be incapable of recognizing the difference” between “someone who kills because of a desire to end a loved one’s physical suffering caused by an illness which is both terminal and incurable” and “one who kills because of unmitigated spite, hatred or ill will.”⁴³⁵ A federal judge who must decide whether a premeditated murder conviction *categorically* qualifies as a CIMT could consider such a case as the “least culpable conduct” sufficient to constitute premeditated murder—and it is hardly clear whether such a case involves moral turpitude. The nationwide debates occasioned by the well-chronicled crusade of Dr. Jack Kevorkian, aka “Dr. Death,” too well reinforce the difficulty of clear moral lines even in some murder cases.⁴³⁶ Even with respect to the offenses thought to be uncontroversial as CIMT, the categorical clarity may be illusory.

CONCLUSION

Those unfamiliar with immigration law may be surprised and upset to hear that people can be deported for crimes involving “moral

433. *State v. Forrest*, 321 N.C. 186, 188 (1987).

434. *Id.* at 188–90.

435. *Id.* at 200 (Exum, J., dissenting).

436. *People v. Kevorkian*, 248 Mich. App. 373, 381 (2001).

turpitude.” Whether 18th and 19th Century America had a high degree of moral consensus, 21st Century America does not. In 19th Century Iowa, it might have seemed indubitable that a conviction for cow poisoning involved moral turpitude.⁴³⁷ But that certitude was the function of time and place. The relentlessly increasing complexity and heterogeneity of our society render any such consensus an illusion. For the government to be able to remove lawful permanent residents—many of whom have lived here for decades—based on such a contestable concept as moral turpitude violates the basic principle of the rule of law. Our society believes it acceptable to visit harsh consequences on individuals for violating the law because we believe laws are objective and impersonal. On the contrary, to hinge a law authorizing deportation on morality is to visit among the harshest of consequences based on subjectivity and the personal beliefs of officials.

It might well be said that every law has some “vague” applications. Over the decades, this truism may have discouraged the Court from declaring CIMT unconstitutionally vague. The slope may have seemed too slippery. But *Johnson v. United States* has changed the constitutionally acceptable threshold where a completely amorphous statutory standard has, through “categorical” analysis, led to a long, documentable history of judicial inconsistency in application. Now, “moral turpitude” is not just another statutory term with too much wiggle room in it. The fact that “moral turpitude” must be gauged on a categorical basis, dependent on an inescapably unpredictable degree of judicial willingness to hypothesize “least culpable conduct,” separates CIMT from other textual standards in immigration and criminal law.⁴³⁸ What has long been true as a matter of common sense has now become legally correct. Deporting anyone on the basis of a conviction for a “crime involving moral turpitude” violates the Due Process Clause because the standard on its face is void for vagueness.

437. See *Burton v. Burton*, 3 Greene 316 (Iowa 1851).

438. Although not necessarily from *all* other standards, see Koh, *supra* note 4.