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NOTES

CRIMES INVOLVING MORAL TURPITUDE: IN SEARCH OF A MORAL APPROACH TO IMMORAL CRIMES

PATRICK J. CAMPBELL[†]

INTRODUCTION

Isabella is a hard-working mother of two who immigrated to the United States from Honduras three years ago and has been granted "lawful permanent resident" status. She has held a steady job as a cashier at a gas station for the duration of her time in the country. She is also involved with the community church and has many friends in the area. Her husband, who lost his job because of the economic downturn, asked her to look the other way while he took some gasoline without paying so that he could drive to a job interview a few towns away. She reluctantly agreed because she knew it could help her family. At the end of the month, the manager noticed the discrepancy in the receipts and confronted Isabella. Being the honest person that she is, Isabella confessed to her manager. Her manager reported her to the police, she was prosecuted for embezzlement, and she received a sentence of six months probation. Shortly after sentencing, she received a notice to appear in immigration court for deportation proceedings because she had been convicted of a "crime involving moral turpitude."

The preceding hypothetical is a very real situation that many immigrants face. After substantial periods of time legally residing within the United States, they face removal proceedings for what are sometimes rather benign violations of the law. Much to the disadvantage of immigrants, these proceedings vary

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from jurisdiction to jurisdiction and courts struggle with defining "moral turpitude."[1] The result is uncertainty and unfairness for an already marginalized population.[2]

America was founded as an immigrant nation, tolerant of many ethnic and religious groups. For as long as the United States has been admitting immigrants, it has been regulating who is admissible. Commission of "crimes involving moral turpitude," a term which appeared in immigration statutes as early as 1891, has long been a factor that bars aliens[3] from admission and makes them deportable once admitted.[4] The term makes its most recent appearance in the Immigration and Nationality Act of 1952 ("the INA").[5] Common to all of these immigration statutes is a lack of a definition for what constitutes moral turpitude. This has led courts to adopt a wide range of approaches for defining the term.[6] As a result, the same factual situation may lead to deportation in one jurisdiction, but it may not lead to deportation in another jurisdiction.[7]

Prior to 2008, courts applied the moral turpitude provisions of the INA in varying forms. Most courts applied some variation of a two-step "categorical approach" that developed over several decades of case law.[8] First, courts determined whether the conviction was for a crime that categorically involves moral turpitude in every instance, irrespective of the facts.[9] Since it is difficult to determine if a crime will always involve moral turpitude, classifying it categorically often proved difficult. If the initial categorical inquiry was inconclusive, and often it was, courts then looked to a wide range of facts, depending on the

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[1] *See infra* Part II.A.

[2] *See infra* Part I.C.3.

[3] An "alien" is a person who is not a citizen, which is different than an "immigrant," which is a person who immigrates to a country to reside there permanently. BLACK'S LAW DICTIONARY 84, 817 (9th ed. 2009). This Note uses both terms because the usage depends on the status of the person. For example, an alien, who is not a citizen, can be denied admission. An immigrant, who has lawfully immigrated, can be deemed removable based on prior criminal convictions.

[4] *See* Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

[5] 8 U.S.C. § 1227 (2012); 8 U.S.C.A. § 1182 (West 2014).

[6] *See infra* Part I.C.

[7] *See infra* Part II.A.

[8] *See infra* Part I.C.

[9] *See* Prudencio v. Holder, 669 F.3d 472, 484 (4th Cir. 2012).

jurisdiction.[10] These variations were troubling for courts and litigants, and they did not go unnoticed by legal scholars and the Attorney General's office.[11]

In response to the discrepancy in approaches to defining crimes involving moral turpitude across the circuits, the Attorney General issued an opinion aimed at creating a uniform approach for handling these types of cases.[12] His opinion settled the division between the circuits by adopting the "realistic probability" test while also adding a controversial third step that allows the trial court to examine the underlying facts of a conviction.[13] However, relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[14] several circuits have refused to adopt the Attorney General's approach on the ground that the statute is unambiguous and therefore deference to the Attorney General's opinion is unnecessary.[15]

This Note seeks to demonstrate that the term "moral turpitude" is sufficiently ambiguous to warrant judicial deference to the Attorney General's opinion in *Silva-Trevino*. Part I explains the origins of "crimes involving moral turpitude" as grounds for removal and inadmissibility, and how courts have historically defined which crimes fit within this category. Even though courts do not dispute the general definition of moral turpitude, this Note explains how legislation that centers on subjective issues like morality is inherently ambiguous. Part II explains the shortfalls of the approach derived from case law prior to *Silva-Trevino*, largely because of the variation observed between courts, and details the Attorney General's solution described in *Silva-Trevino*. It also details the inconsistencies that resulted from not having a uniform approach. While some

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[10] *See infra* Part I.C.3. (describing the differences between the "minimal conduct," "general nature," and "realistic probability" tests).

[11] *See, e.g.*, Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After* Silva-Trevino, 111 COLUM. L. REV. 313, 313–15 (2011); Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 265 (2001).

[12] *See* Silva-Trevino, 24 I. & N. Dec. 687, 688 (Op. Att'y Gen. 2008).

[13] *See id.* at 688–90.

[14] 467 U.S. 837, 842–43 (1984). *Chevron* is the landmark Supreme Court case that established the test for determining when a court must give deference to a government agency's interpretation of a statute.

[15] *See* Prudencio v. Holder, 669 F.3d 472, 481–82 (4th Cir. 2012); Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011); Jean-Louis v. Att'y Gen. of the U.S., 582 F.3d 462, 473–74 (3d Cir. 2009).

argue that the third step articulated in *Silva-Trevino* creates substantial problems by granting courts too much discretion, this Note aims to explain why the step is necessary and how it resolves problems with the approach the opinion seeks to replace. Part III details why the reviewing courts must find that the INA is ambiguous and argue for deference to the test adopted in *Silva-Trevino*. It also shows that the controversial third step proves essential in only a limited number of cases, thereby alleviating concerns that the approach opens the door to relitigating the facts of these cases.

I. EMERGENCE AND EVOLUTION OF "CRIMES INVOLVING MORAL TURPITUDE" AND THE COURTS' APPROACHES

A. *Historical Uses of the Term*

It has long been the policy of the United States to exclude aliens of certain classes. Early immigration statutes set the stage for the limitations and wording of their modern successors. As early as the Page Act of 1875 ("the Page Act"), aliens convicted of felonies in their home countries were excluded from immigrating to the United States.[16] The Page Act also prohibited the importation of women for the purpose of prostitution[17] or other "lewd and immoral purposes."[18] The Page Act, however, does not make aliens convicted of "political offenses" inadmissible.[19] This exemption for political offenses remains in current immigration statutes and the language is nearly identical to that contained in the Page Act.[20] While the Page Act does not use the term "crimes involving moral turpitude," its underlying policy was to exclude those who might erode the morality of the nation.[21]

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[16] Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477.

[17] *Id.* § 3.

[18] *Id.* § 1.

[19] *Id.* § 5.

[20] *See* 8 U.S.C.A. § 1182(2)(A)(i)(I) (West 2014) (providing that aliens are inadmissible if convicted of "a crime involving moral turpitude (other than a purely political offense)").

[21] *See* Ming M. Zhu, *The Page Act of 1875: In the Name of Morality* 4, 20–24 (Mar. 23, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577213 (explaining that while the Page Act was an example of legislative restraint by not passing harsher immigration laws, it was meant to protect American morals and labor).

The Immigration Act of 1891 ("the Immigration Act") greatly expanded the class of aliens who were inadmissible.[22] It contained one of the earliest references to moral turpitude in an immigration statute.[23] Notably absent from this statute was any type of definition for what constitutes a crime or misdemeanor involving moral turpitude. The Immigration Act seemed to be concerned with making those who would be an economic drain on the country inadmissible.[24] It also expanded from prior acts' prohibitions against admitting those who have committed felonies to exclude those who have committed "crime[s] . . . involving moral turpitude."[25] This language has survived to present-day immigration statutes without any clear definition from Congress as to what it precisely means.

B. Present Use of the Term in Immigration Statutes

While modern immigration policy is arguably much different than its historical predecessors, there are presently many reasons why aliens can be deemed inadmissible or deportable. Congress passed the Immigration and Nationality Act ("the INA") of 1952 to revise and unify the immigration laws of the country.[26] In its present form, aliens are inadmissible or deportable for a variety of reasons, including health concerns, criminal convictions, drug trafficking, prostitution, marriage fraud, and unlawful voting.[27] While the statute lists several specific crimes or circumstances that make an immigrant removable or inadmissible, it also includes what some would consider a catch-all provision for crimes involving moral turpitude.[28]

[22] *See* Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (providing that the following persons were inadmissible: "All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, [and] polygamists").

[23] *Id.*

[24] *See id.* § 3.

[25] *Id.* § 1.

[26] *See* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (1952) (also known as the McCarren-Walter Act).

[27] *See* 8 U.S.C.A. § 1182 (West 2014); 8 U.S.C. § 1227 (2012).

[28] *See* 8 U.S.C.A. § 1182; 8 U.S.C. § 1227.

The phrase "crimes involving moral turpitude" appears in two sections titled "Inadmissible aliens" and "Deportable aliens."[29] The statute provides that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible."[30] The statute also provides that "[a]ny alien who is convicted of a crime involving moral turpitude . . . is deportable."[31] Consistent with previous immigration statutes, there is no definition for what constitutes a crime involving moral turpitude.[32]

C. *Courts' Approaches Towards Defining "Crimes Involving Moral Turpitude"*

Absent a clear procedure for determining which crimes constitute moral turpitude, courts have been left to craft a test case-by-case. The result is a test that varies across states and circuits and leads to an inconsistent application of immigration law. The Supreme Court has only addressed the issue once, leaving many questions unanswered.

1. The Supreme Court's Interpretation of "Crimes Involving Moral Turpitude"

The Supreme Court last granted *certiorari* in a case concerning a crime involving moral turpitude in 1951 in *Jordan v. De George*.[33] Several important pieces of law came out of that decision. The defendant in *Jordan* had been convicted twice of defrauding the United States of its tax on liquor and the Court was tasked with deciding whether his convictions were crimes

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[29] 8 U.S.C.A. § 1182; 8 U.S.C. § 1227.

[30] 8 U.S.C.A. § 1182(a)(2)(A)(i)(I).

[31] 8 U.S.C. § 1227(a)(2)(A)(i)(I)–(II) (providing that "[a]ny alien who is convicted of a crime involving moral turpitude within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable."); *see also* 8 U.S.C. § 1227(a)(2)(A)(ii) ("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.").

[32] *See* 8 U.S.C. § 1101 (2012).

[33] 341 U.S. 223, 223–25 (1951).

involving moral turpitude that made him eligible for removal.[34] The Court, persuaded by holdings from federal and state courts, held that fraud is categorically a crime involving moral turpitude.[35] The Court narrowed its holding by saying that not all fraud involves moral turpitude, but fraud is often an essential element that evinces moral turpitude.[36]

In deciding the case, the Court took no issue with the definition that the circuit courts were using in their decisions and the definition remains unchanged to this day.[37] The circuits have held that the term "crimes involving moral turpitude" applies only to "crimes of violence, or crimes which are commonly thought of as involving baseness, vileness or depravity" and behavior that is "contrary to the accepted rules of morality and the duties owed between persons or to society in general."[38] This "definition" is open-ended and unsettling because of its vagueness and subjective nature, but the Supreme Court did not address these shortcomings and only decided the narrower issue of whether conspiracy to defraud the government of liquor taxes involves moral turpitude.[39]

This decision is an early indicator of the difficulty courts face when applying the moral turpitude provisions of immigration statutes. Justice Jackson noted in his dissent the inherent problems with ruling on crimes that punish morality.[40] He noted

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[34] *Id.* ("This case presents only one question: whether conspiracy to defraud the United States of taxes on distilled spirits is a 'crime involving moral turpitude' . . . .").

[35] *Id.* at 229.

[36] *Id.*

[37] *See id.* at 226.

[38] *Id.* at 226; Hernandez-Perez v. Holder, 569 F.3d 345, 347 (8th Cir. 2009); *see, e.g.*, Marmolejo-Campos v. Holder, 558 F.3d 903, 910 (9th Cir. 2009); Knapik v. Ashcroft, 384 F.3d 84, 89 (3d Cir. 2004).

[39] *See Jordan*, 341 U.S. at 223–24, 232 ("Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude.").

[40] *Id.* at 239–42 (Jackson, J., dissenting). Justice Jackson commented that:

> The use of the phrase by state courts for various civil proceedings affords no teaching for federal courts. The Federal Government has no common-law crimes and the judges are not permitted to define crimes by decision, for they rest solely in statute. Nor are we persuaded that the state courts have been able to divest the phrase of its inherent ambiguities and vagueness.

Id. at 240.

that Congress had not given a clear definition of what behavior constitutes deportable conduct and that it is not the judiciary's job to make that determination.[41] He went on to say:

> We should not forget that criminality is one thing—a matter of law—and that morality, ethics and religious teachings are another. Their relations have puzzled the best of men. Assassination, for example, whose criminality no one doubts, has been the subject of serious debate as to its morality. This does not make crime less criminal, but it shows on what treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case. We usually end up by condemning all that we personally disapprove and for no better reason than that we disapprove it. In fact, what better reason is there? Uniformity and equal protection of the law can come only from a statutory definition of fairly stable and confined bounds.[42]

Though these difficulties were apparent early on, they remained unresolved for several decades.

The Court also rejected the "void for vagueness" argument advanced by the defendant.[43] To pass constitutional muster, a criminal statute must be specific enough to warn members of society of the consequences of their actions.[44] In this case, however, since the immigration statute is not a criminal statute and there were no other cases finding it to be vague, the Court found there to be adequate warning so as to uphold the statute as constitutional.[45] This argument is difficult to understand given the possible breadth of crimes that could be considered base, vile, or depraved.[46]

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[41] *Id.* at 242 ("Apparently, Congress expected the courts to determine the various crimes includable in this vague phrase. We think that not a judicial function.").

[42] *Id.* at 241–42.

[43] *Id.* at 231–32 (majority opinion).

[44] *See id.* at 230.

[45] *Id.* at 230–32.

[46] *See* Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 701 (2012) (analogizing the role of judges in determining what constitutes morality to the "role of God" in judging sins). The article also emphasizes that the Board of Immigration Appeals often hears cases of first impression and it is difficult to "translate ethical concepts into legal ones, case by case." *Id.* at 683 (quoting *Jordan*, 341 U.S. at 242 (Jackson, J., dissenting)). *See generally* 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL: VISAS § 40.21(a) notes, *available at* http://www.state.gov/documents/organization/86942.pdf (describing a

2. The Emergence of Step One: The Categorical Approach

Following what seemed to be the Supreme Court's lead,[47] most courts have settled on a preliminary inquiry into whether the underlying conviction is categorically a crime involving moral turpitude.[48] This categorical approach requires the court to look at the statutory elements of the crime, instead of the underlying facts, to determine whether the crime in every possible factual situation is a crime involving moral turpitude.[49] Since the statute is defined in terms of "baseness, vileness, or depravity,"[50] this type of inquiry involves some level of subjectivity because it requires the judge to make some judgment as to what is base, vile, or depraved. These judgments are likely to vary across the country and, in fact, have varied across jurisdictions.[51] When viewed in terms of extremes, most judges could easily determine whether a crime fits the category.[52] But unfortunately, those cases that are not at the extremes represent the biggest problems for courts and defendants.

This categorical approach was borrowed from a line of sentencing enhancement cases interpreting the Armed Career Criminal Act ("ACCA") in which courts faced an ambiguity similar to that in the INA.[53] In *Taylor v. United States*, the defendant faced sentencing enhancement for a burglary conviction, but the term "burglary" had no single definition.[54] The Court interpreted the sentencing enhancement statute to

range of offenses, from assault to mail fraud, which may constitute moral turpitude for the purpose of issuing visas).

[47] *See Jordan*, 341 U.S. at 232.

[48] *See* Prudencio v. Holder, 669 F.3d 472, 484 (4th Cir. 2012).

[49] *Id.*

[50] *Jordan*, 341 U.S. at 226.

[51] *See infra* Part II.A. (discussing how different circuits reach different results when analyzing arguably similar facts).

[52] Hypothetically, rape would very likely be considered a crime involving moral turpitude because of the nature of the crime, whereas assault would most likely not be a crime involving moral turpitude. It is those crimes in the middle that prove the most difficult for courts.

[53] *See Prudencio*, 669 F.3d at 484 (citing Taylor v. United States, 495 U.S. 575, 600–01 (1990)).

[54] 495 U.S. at 580 (explaining that state courts define burglary differently and it is not clear whether, in the sentencing enhancement context, Congress intended that courts apply the common-law definition, a generic definition articulated under the Model Penal Code, or some other form). Burglary at common law had to be committed at nighttime and in a dwelling, but it would not make sense to take such a narrow reading today. *See id.* at 582.

mean that Congress intended the courts to "look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions."[55] The Court reaffirmed this narrow inquiry fifteen years later in another sentencing enhancement case, *Shepard v. United States.*[56]

Courts applying the moral turpitude provisions have widely adopted the categorical approach outlined under the ACCA, but this leaves something to be desired for the middle-of-the-road cases where the conviction is not easily defined as categorically involving moral turpitude. Burglary and other predicate offenses under the enhanced sentencing laws are easier to define than moral turpitude because they have concrete elements.[57] As much as the categorical approach tells courts how to define moral turpitude, it does not remove the subjective nature of the inquiry. This initial subjective inquiry, borrowed from Supreme Court precedent, has led to fundamental unfairness for immigrants and does not help the courts procedurally to determine which crimes involve moral turpitude.

The categorical approach borrowed from ACCA cases is ill-suited for dealing with crimes involving moral turpitude. With burglary, for example, a court must determine whether the elements of a burglary (which may vary, but are generally well-defined) satisfy the elements of the ACCA.[58] Categorically defining crimes with established elements is simple in most cases.[59] If a court seeks to determine whether burglary is a crime involving moral turpitude, however, it must determine if the crime and its elements are inherently "base, vile, or depraved"

[55] *Id.* at 600 (finding the Court of Appeals' use of a categorical approach persuasive).

[56] *See* Shepard v. United States, 544 U.S. 13, 23 (2005) (explaining that in the 15 years since *Taylor*, Congress has not modified the judicial understanding that only a "restricted look beyond the record of conviction" is permissible).

[57] *Compare, e.g.*, N.Y. PENAL LAW § 140.20 (McKinney 2014) (listing the elements of burglary in the third degree as "knowingly enter[ing] or remain[ing] unlawfully in a building with intent to commit a crime therein"), *with* 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2012) (providing for the deportation of any alien "convicted of a crime involving moral turpitude").

[58] *See Taylor*, 495 U.S. at 579 (explaining that to qualify for sentencing enhancement, the burglary must be classified as a violent felony).

[59] For example, if a defendant was previously convicted of three crimes carrying a sentence of more than one year, he would qualify for sentencing enhancement regardless of the crimes or their elements. *See* 18 U.S.C. § 924(e) (2012).

since the moral turpitude provisions have no elements.[60] Categorizing crimes according to morality is rarely simple. Perhaps a better analogy would be the courts' handling of the moral turpitude provisions in attorney misconduct rules, which is discussed below.[61]

3. Step Two: The Modified Categorical Approach and Its Variants

Quite predictably, many courts find the question of what constitutes a crime involving moral turpitude unresolved after completion of the categorical inquiry.[62] Since the elements of many crimes do not make it clear whether they involve moral turpitude, courts often proceed to subsequent steps of analysis. Without further interpretation from the Supreme Court or Congress, the circuit courts were left to create their own additional steps of inquiry.

In general, courts adopted a "modified categorical approach" as a second step, which looked at limited facts to determine if a crime was one involving moral turpitude.[63] This approach allows the court to examine the record of conviction, which is composed of the charging document, the plea agreement, any plea colloquy, and any explicit facts found by the trial judge.[64] This second step gives courts significantly more information to consider when making their determination. Since this step developed in the courts rather than through legislation, courts have applied it in varying forms.

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[60] *See* Silva-Trevino, 24 I. & N. Dec. 687, 699 (Op. Att'y Gen. 2008) (explaining that "moral turpitude is not an element of an offense").

[61] *See infra* Part III.

[62] *See, e.g.*, Wala v. Mukasey, 511 F.3d 102, 109 (2d Cir. 2007) (applying the modified-categorical approach after the categorical approach failed to resolve whether third degree burglary under Connecticut law was a crime involving moral turpitude); Galeana-Mendoza v. Gonzales, 465 F.3d 1054, 1062 (9th Cir. 2006) (applying the modified-categorical approach after the categorical approach did not resolve whether battery was a crime involving moral turpitude).

[63] *See* Prudencio v. Holder, 669 F.3d 472, 485 (4th Cir. 2012); *Wala*, 511 F.3d at 109.

[64] Shepard v. United States, 544 U.S. 13, 26 (2005). The Court explained:

> [The] enquiry under the ACCA . . . is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

Id.

The Third and Fifth Circuits have focused their analysis on whether even the most "minimal conduct" under the statute could be considered a crime involving moral turpitude.[65] Courts using this analysis hold that a crime involves moral turpitude if the most basic reading of the statute reaches only those offenses necessarily involving moral turpitude.[66] If the statute might include crimes that are not inherently morally turpitudinous, then the crime is not considered to categorically involve moral turpitude.[67] This approach also makes a distinction over whether the statute is divisible, or can be divided into subsections that do or do not constitute crimes involving moral turpitude.[68] Where the statute is divisible, the court looks to the record of conviction to determine whether the crime involves moral turpitude.[69]

In contrast, the First and Eighth Circuits developed a separate approach at step two. These courts look to the statute to determine if its "general nature" or "common usage" evidences that the crime involves moral turpitude.[70] This approach relieves the court of the burden of reviewing underlying facts.[71] It leaves the judge to consider any hypothetical situation in which the statute could include a crime that is not morally turpitudinous when making the decision.[72] This broad interpretation of the

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[65] Silva-Trevino, 24 I. & N. Dec. 687, 693–94 (Op. Att'y Gen. 2008) (citing Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006)); Partyka v. Att'y Gen. of the U.S., 417 F.3d 408, 411 (3rd Cir. 2005).

[66] *Amouzadeh*, 467 F.3d at 455. The use of the word "minimum" is confusing, but it can probably be fairly read as meaning "narrow."

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Silva-Trevino*, 24 I. & N. Dec. at 694 (citing Marciano v. Immigration & Naturalization Serv., 450 F.2d 1022, 1025 (8th Cir. 1971)); Pino v. Nicolls, 215 F.2d 237, 245 (1st Cir. 1954), *rev'd on other grounds sub nom.* Pino v. Landon, 349 U.S. 901 (1955).

[71] *Pino*, 215 F.2d at 245. The court explained:

> If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude, neither the administrative officials in a deportation proceeding nor the courts on review of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma of moral obliquity.

Id.

[72] *See, e.g.*, Franklin v. Immigration & Naturalization Serv., 72 F.3d 571, 581 n.8 (8th Cir. 1995) (explaining that the "general nature" test is adopted in most majority opinions, though there are some dissents); Cabral v. Immigration &

statute seems to recognize the problem in defining crimes involving moral turpitude without really adding anything to the analysis because it would find that most crimes do not fit within the category.

Adding to the confusion, the Ninth Circuit has developed yet another version of step two. The Ninth Circuit evaluated whether moral turpitude is inherent in all cases that have a "realistic probability" of being prosecuted.[73] This is a modification of the "minimum conduct" test with the qualifier that prosecution be realistically possible. If an alien can show that the statute of conviction could realistically apply to conduct that is not morally turpitudinous, then the conviction is not treated as being categorically a crime involving moral turpitude.[74] This test is borrowed from a review of a removal proceeding not involving the moral turpitude provision where the Court determined whether the term "theft offense" included "aiding and abetting" a theft offense.[75] The Court held that there must be a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct falling outside the generic definition" of a crime.[76] This approach requires judges to look at other similar cases rather than formulate hypothetical situations of how the statute might apply, as is done in the "general usage" test.[77]

Naturalization Serv., 15 F.3d 193, 197 n.6 (1st Cir. 1994) (explaining that the definition rests on administrative workability).

[73] *Silva-Trevino*, 24 I. & N. Dec. at 694 (citing Nicanor-Romero v. Mukasey, 523 F.3d 992, 1004–05 (9th Cir. 2008), *overruled en banc by* Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009)).

[74] *See Nicanor-Romero*, 523 F.3d at 1005. Defendant was charged with annoying or molesting a child under eighteen under California law. *Id.* at 995. The court held that since another court had found that a conviction with similar facts under the same law could constitute a crime involving moral turpitude, there was a realistic probability of prosecution. *Id.* at 1007 (citing People v. Villareal, No. B161735, 2003 WL 21153430, at *2 (Cal. Ct. App. May 20, 2003) (explaining how a man's inappropriate sexual comments to a thirteen-year-old and then following her down the street could support a conviction for a crime involving moral turpitude).

[75] Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185 (2007). Defendant aided and abetted the taking of a vehicle, which the Court classified as a general theft offense for the purpose of removal. *See id.* at 187–89.

[76] *Id.* at 193.

[77] *Id.* at 190–92 (explaining that to make such a showing, an offender must at least point to his own case or other cases in which the state courts did apply the statute in the special nongeneric manner for which the offender argues).

II. PROBLEMS IN APPLICATION AND THE ATTORNEY GENERAL'S SOLUTION

Immigration is a contentious issue—it is always a key factor in elections and a frequent subject of Supreme Court attention.[78] Recent immigration policy developments have shown an increasingly anti-immigrant sentiment.[79] The number of immigrants facing removal has more than doubled in the decade following September 11, 2001.[80] While this trend may be policy-based, the judiciary's varied approaches to immigration issues, including what constitutes a crime involving moral turpitude, is a contributing factor.[81]

A. *Same Law, Different Results*

While a general framework has emerged to guide courts in defining what constitutes crimes involving moral turpitude,[82] there are many instances where two different courts or administrative bodies, analyzing similar facts, have reached opposite conclusions. Alexander Hamilton recognized early in

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[78] *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2507–09 (2012) (upholding Arizona's controversial "show your papers" law); Nate Silver, *What Obama's Immigration Decision Might Mean for 2012*, N.Y. TIMES (June 19, 2012, 7:55 AM), http://fivethirtyeight.blogs.nytimes.com/2012/06/19/what-obamas-immigration-decision-might-mean-for-2012/ (commenting on the role Hispanics will play in the 2012 presidential election).

[79] *See Strengthening Interior Enforcement: Deportation and Related Issues: Hearing Before the Subcomm. on Immigration, Border Sec. & Citizenship, & on Terrorism, Tech. & Homeland Sec. of the S. Comm. on the Judiciary*, 109th Cong. 60–61 (2005) (statement of Victor X. Cerda, Acting Director of Detention and Removal Operations, U.S. Immigration and Customs Enforcement Department of Homeland Security), *available at* http://www.ice.gov/doclib/news/library/speeches/20050414testimony.pdf ("The role that [Detention and Removal Operations] plays is recognized throughout our strategic plan, 'Endgame,' which seeks to reach a point where for every order of removal issued, a removal is effectuated.").

[80] OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 102 tbl.39 (2012), *available at* http://www.dhs.gov/yearbook-immigration-statistics-2011-3 (showing that in 2001, the total number of removals was 189,026, and in 2011, the total number of removals was 391,953).

[81] *See* Transactional Records Access Clearinghouse, Syracuse Univ., *Individuals Charged with Moral Turpitude in Immigration Court*, TRACIMMIGRATION (2008), http://trac.syr.edu/immigration/reports/moral_turp.html (showing a steady increase in the number of individuals charged with crimes involving moral turpitude in immigration court).

[82] *See supra* Part I.C.

our nation's history the importance of a uniform immigration law.[83] He wrote in the Federalist Papers that power over naturalization "must necessarily be exclusive; because if each State had power to prescribe a *distinct rule*, there could not be a *uniform rule*."[84] The judiciary, however, has not been able to deliver a uniform approach in dealing with crimes involving moral turpitude.

There is confusion among the circuit courts about how to handle arguably similar offenses. The Eighth Circuit has held that child endangerment is a crime involving moral turpitude because of the disregard of the substantial risk to the child, which is contrary to the moral duties owed by everyone to society.[85] In contrast, the Fifth Circuit has held that attempted misdemeanor child abandonment, which is statutorily defined in Texas as "expos[ing] the child to an unreasonable risk of harm," is not a crime involving moral turpitude because "it does not shock the public conscience as being inherently base, vile, . . . depraved," or morally reprehensible.[86] These cases deal with the same issue, exposing a child to risk, and yet each court uses a different lens of analysis and reaches a different conclusion.[87]

The Board of Immigration Appeals ("the BIA") also seems to reach conflicting conclusions on arguably similar crimes even before these immigration cases reach the circuit courts for review.[88] The BIA has held that resisting arrest under Texas law

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[83] *See* THE FEDERALIST No. 32, at 137 (Alexander Hamilton) (Penn State Electronic Classics Series Publication 2001), *available at* http://www2.hn.psu.edu/faculty/jmanis/poldocs/fed-papers.pdf.

[84] *Id.*

[85] *See* Hernandez-Perez v. Holder, 569 F.3d 345, 348 (8th Cir. 2009). The defendant in this case was also convicted of operating a vehicle while intoxicated, which the court held was categorically not a crime involving moral turpitude. The court considered the child endangerment conviction as a sort of aggravating factor in terms of the removal proceedings. *Id.*

[86] Rodriguez-Castro v. Gonzales, 427 F.3d 316, 324 (5th Cir. 2005); TEX. PENAL CODE ANN. § 22.041(b) (West 2007).

[87] *Compare* Blanco v. Mukasey, 518 F.3d 714, 720 (9th Cir. 2008) (holding that providing false identification to a police officer is not categorically a crime involving moral turpitude), *with* Padilla v. Gonzales, 397 F.3d 1016, 1020 (7th Cir. 2005) (holding that providing false identification to a police officer is categorically a crime involving moral turpitude).

[88] The BIA is an administrative body with nationwide jurisdiction to review appeals from immigration judges. *See* Exec. Office for Immigration Review, U.S. Dep't of Justice, *Board of Immigration Appeals*, JUSTICE.GOV (Nov. 2011), http://www.justice.gov/eoir/biainfo.htm.

is not a crime involving moral turpitude.[89] In *In re* Garcia-Lopez, the defendant intentionally resisted arrest, but he did not intentionally attempt to cause the arresting officer bodily injury.[90] The record of conviction only showed a guilty plea for resisting arrest.[91] In contrast, the BIA has also held that resisting arrest under Utah law is a crime involving moral turpitude.[92] Even though the underlying act is the same, the BIA reached two different conclusions.

The approaches some courts have taken at step two of the inquiry do not adequately enforce the INA. The "minimum conduct" test in the Third and Fifth Circuits are likely under-inclusive.[93] Reading the statute narrowly excludes some cases that would otherwise be considered crimes involving moral turpitude. In contrast, the "general usage" test is likely over inclusive. A broad reading of the statute includes crimes that might otherwise not be considered to involve moral turpitude. It

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[89] *See In re* Garcia-Lopez, No. A38 096 900, 2007 WL 4699842, at *1–2 (B.I.A. Nov. 2, 2007) (unpublished decision) (explaining that, absent intent to cause bodily injury, the crime is not one involving moral turpitude); TEX. PENAL CODE ANN. § 38.03 (West 1994). The Texas statute provides that:

> A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another.

Id. § 38.03(a).

[90] *See Garcia-Lopez*, 2007 WL 4699842, at *2.

[91] *See id.* at *1.

[92] *See* Vaquero-Cordero v. Holder, 498 F. App'x 760, 766 (10th Cir. 2012) (holding that the BIA's determination that resisting arrest is a crime involving moral turpitude was improper). The defendant in this case merely held the door closed to prevent his capture while the police officer attempted entry. *See id.* While the convictions are under two different states' obstruction of justice statutes, there are no remarkable differences between them. *Compare* TEX. PENAL CODE ANN. § 38.03(a) (West 1994), *with* UTAH CODE ANN. § 76-8-306(1)(b) (West 2009). The Utah statute provides that:

> An actor commits obstruction of justice if the actor, with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense . . . prevents by force, intimidation, or deception, any person from performing any act that might aid in the discovery, apprehension, prosecution, conviction, or punishment of any person.

§ 76-8-306(1)(b). The court, comparing the facts of *Vaquero-Cordero* to *Garcia-Lopez*, found no real distinction to rationalize the conflicting results. *See Vaquero-Cordero*, 498 F. App'x at 765.

[93] *See* Silva-Trevino, 24 I. & N. Dec. 687, 693–95 (Op. Att'y Gen. 2008).

is unlikely that Congress intended the statute to be enforced from either of these two extremes and a more moderate, consistent approach is appropriate.

B. Implications for Immigrant Defendants

The range of judicial and administrative decisions on what qualifies as a crime involving moral turpitude demonstrates the institutional unfairness that immigrants face in these types of proceedings.[94] Quite simply, an immigrant convicted of a crime involving moral turpitude in one jurisdiction may face deportation while an immigrant convicted of the same crime in another jurisdiction may not. Immigration law should be uniform throughout the country as a matter of fairness. The Constitution provides for procedural fairness in all proceedings,[95] and it is lacking in the immigration context under the system in place prior to *Silva-Trevino*.

Depending on the method of analysis, nearly any crime could be considered to contain some element that evinces moral turpitude because all crime is viewed as bad for society. The United States Department of State has published a twenty-six page manual to guide its officers on what crimes constitute moral turpitude.[96] The manual makes a general statement that the most common elements of crimes that involve moral turpitude include "(1) [f]raud; (2) [l]arceny; and (3) [i]ntent to harm persons or things."[97] This is a broad description that demonstrates just how inclusive the INA can be interpreted without a uniform procedure in place for judicial review.

An immigrant has the right under U.S. law to be represented in removal proceedings,[98] but access to legal services is difficult or impossible for many immigrants.[99] This is because of some

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[94] *See supra* Part II.A.

[95] *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

[96] *See* 9 U.S. DEP'T OF STATE, *supra* note 46.

[97] *Id.* § 40.21(a) N2.2.

[98] 8 U.S.C. § 1229a(b)(4)(A) (2012).

[99] *See, e.g.*, NAT'L IMMIGRATION JUSTICE CTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 3 (2010), *available at* https://www.immigrantjustice.org/isolatedindetention. While the U.S. government detains nearly 400,000 immigrants yearly, there are only approximately 100 non-government organizations providing legal assistance to detained immigrants and most have fewer than five staff members working on detention cases. *Id.*

immigrants' inability to pay for representation and the lack of lawyers available. It is not uncommon for immigrants to appear unrepresented and without a full understanding of the proceedings.[100] Most immigrants, and in fact probably some attorneys, do not understand the importance of contesting the moral turpitude designation at trial. While a uniform system for classifying crimes involving moral turpitude will not address access to justice issues for immigrants, it is important to recognize the disadvantage that this population experiences in court already. A uniform approach would, at a minimum, ensure that immigrants, represented and unrepresented alike, receive the same treatment under the law.

C. *The Attorney General's Approach*

Recognizing the BIA and federal courts' struggles in applying the moral turpitude section of the INA, the Attorney General issued an opinion in the 2008 decision *In the matter of Silva-Trevino* to "establish a uniform framework for ensuring that the Act's moral turpitude provisions are fairly and accurately applied."[101] *Silva-Trevino* did not revolutionize the approach used by the courts and the BIA. Instead, it articulated three steps, the first and second of which were largely adopted from developments in case law, and a novel third step for determining which crimes are crimes involving moral turpitude.[102]

In determining if a crime involves moral turpitude, courts should first engage in a "categorical" inquiry, looking at the statute of conviction and not the specific facts of the case, to determine if every possible conviction under the statute could involve moral turpitude.[103] Although most, if not all, courts already performed this inquiry, the Attorney General refined this step by saying that the proper approach is to determine if there is a "realistic probability" that the statute of conviction would reach conduct that does not involve moral turpitude.[104] This settles a division among the circuits by adopting the language

[100] *See id.* at 2.
[101] Silva-Trevino, 24 I. & N. Dec. 687, 688 (Op. Att'y Gen. 2008).
[102] *Id.* at 688–90.
[103] *Id.* at 688.
[104] *Id.* at 689–90.

and approach of the Ninth Circuit.[105] If the first step does not resolve the issue, courts should then proceed to a "modified categorical" inquiry, examining the record of conviction, which includes "the indictment, the judgment of conviction, jury instructions, a signed guilty plea and the plea transcript."[106] Some courts had also previously applied this step in their analyses,[107] but the Attorney General's opinion clarifies exactly what evidence courts should consider. If the question is still unanswered, courts should "to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction."[108]

Since the first two steps of the Attorney General's approach have their roots in case law, they have been met with little resistance in subsequent decisions. The third step, however, is a novel addition and has received considerable pushback from several circuit courts.[109] It leaves substantial discretion to the trial judge to look at the underlying facts,[110] which could present more problems than solutions on the issue of uniform application of the law. But as Part III discusses, analyzing crimes involving moral turpitude requires such a fact-based approach.

D. *Criticism from Circuit Courts That Refuse To Follow* Silva-Trevino

The most common argument advanced by circuit courts that do not follow the approach outlined in *Silva-Trevino* is that the INA is not ambiguous in identifying a procedure for analyzing crimes involving moral turpitude.[111] Absent any ambiguity, there is no need, and in fact, no authority, for an agency to interpret the statute.[112] The Fourth Circuit argued that since the statute makes aliens "convicted" of a crime involving moral turpitude inadmissible, the focus is on conviction and there is no ambiguity.[113] The court further argued that the Attorney

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[105] *See supra* notes 73–74 and accompanying text.

[106] *Silva-Trevino*, 24 I. & N. Dec. at 690.

[107] *See supra* notes 63–64 and accompanying text.

[108] *Silva-Trevino*, 24 I. & N. Dec. at 690.

[109] *See infra* Part II.D.

[110] *See Silva-Trevino*, 24 I. & N. Dec. at 690.

[111] *See, e.g.*, Prudencio v. Holder, 669 F.3d 472, 476 (4th Cir. 2012).

[112] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[113] 8 U.S.C.A. § 1182(a)(2)(A)(i)(I) (West 2014); *Prudencio*, 669 F.3d at 482.

General was misguided in finding that the word "involving" within the phrase "crimes involving moral turpitude" created ambiguity and invited a fact-based inquiry.[114] Those courts that find no ambiguity have continued to apply the approach from *Taylor* and *Shepard*, which does not examine underlying facts.[115]

Another argument advanced by these courts is that Congress has acquiesced to judicial interpretation because it has not updated the statute through amendments.[116] The INA has been amended approximately sixty-six times since its original enactment in 1952.[117] The courts reason that the case law of the last several decades has settled the issue and therefore their precedent dictates that there is no ambiguity.[118] There is, however, overwhelming evidence that precedent is not settled.[119] It is precisely this unsettled precedent that led the Attorney General to issue his opinion in *Silva-Trevino*.

III. *SILVA-TREVINO* AS A UNIFORM APPROACH TO AN AMBIGUOUS STATUTE

The Third, Fourth, and Eleventh Circuits argue that the INA is not ambiguous, but this argument goes against Supreme Court precedent regarding statutory interpretation.[120] This Part of the Note argues that the only logical interpretation courts can have is that the statute is ambiguous. And, if that is the case, the Attorney General's opinion must be accorded deference.

A. *Why Circuit Courts Must Find Ambiguity in the INA Statute*

In 1984, the Supreme Court decided the landmark *Chevron* case on the proper scope of judicial deference to agency interpretation of statutes.[121] In *Chevron*, the court outlined a

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[114] *Prudencio*, 669 F.3d at 481–82.

[115] *See supra* notes 47–56 and accompanying text.

[116] Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1309 (11th Cir. 2011) ("Congress is presumed to be aware of an administrative or judicial interpretation . . . when it re-enacts a statute without change." (quoting Lorillard v. Pons, 434 U.S. 575, 580 (1978))).

[117] *See generally* 8 U.S.C.A. § 1182.

[118] *See Fajardo*, 659 F.3d at 1307–09 (detailing courts of appeals' decisions from 1914 to present that apply a categorical approach in determining whether a conviction involves moral turpitude).

[119] *See supra* notes 62–77 and accompanying text.

[120] *See generally* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[121] *Id.*

two-step process for reviewing an agency's construction of a statute.[122] A court must first determine whether Congress has spoken directly on the issue at hand and, if it has, then Congress's intent must be given full effect.[123] If Congress has not spoken on the issue, the question becomes whether the agency's determination is a permissible construction of the statute.[124] This framework recognizes that administrative agencies are in a better position than the judiciary to make decisions about policy. All courts interpreting the moral turpitude statute have analyzed whether deference was appropriate under *Chevron*,[125] but not all have reached the conclusion that the statute is ambiguous.[126]

Pursuant to the first step under *Chevron*, Congress has not spoken directly on the definition of crimes involving moral turpitude. The INA includes a "definitions" section, but it does not define crimes involving moral turpitude.[127] While the lack of a definition itself does not make a statute ambiguous, it does create the potential for the definition to be crafted by judicial or agency interpretation. The courts and the Attorney General seem to take no issue with the definition arising from case law, but the adopted definition is ambiguous.[128]

Courts have applied the canon of construction requiring that words of a statute be given their plain meaning.[129] There is no plain meaning for the term "moral turpitude." Dictionaries define the term with vague and subjective terms. Black's Law Dictionary defines "moral turpitude" as "[c]onduct that is contrary to justice, honesty, or morality."[130] The Oxford English Dictionary defines "moral" as that which is "concerned with the principles of right and wrong behaviour" and the goodness or badness of human character, and "turpitude" as coming from the

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[122] *Id.* at 842–43.

[123] *Id.*

[124] *Id.* at 843.

[125] *See id.* at 842–43.

[126] *See, e.g.*, Bobadilla v. Holder, 679 F.3d 1052, 1054 (8th Cir. 2012).

[127] *See* 8 U.S.C. § 1101 (2012).

[128] *See supra* notes 34–42 and accompanying text.

[129] *See* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.").

[130] BLACK'S LAW DICTIONARY 1101 (9th ed. 2009).

Latin *turpitudo* meaning "depraved or wicked."[131] What is "depraved" or "wicked" is a judgment call that each person, and each judge, makes depending on personal point of view.[132] The very nature of these terms invites a fact-based inquiry such as the one that the Attorney General has proposed. Interpreting this statutory term requires an analysis of what is right and wrong, and the answer often lies beyond the language of the conviction statute.

Congress expressly delegated the power of interpretation to the Attorney General.[133] The INA says "determination[s] and ruling[s] by the Attorney General with respect to all questions of law shall be controlling."[134] This express delegation precludes the judiciary from interpreting the statute. It is also consistent with the idea that it is not the judiciary's role to determine policy and that those decisions are better left to the executive branch, which is accountable to the populace.[135]

Courts that find the statute to be unambiguous rely on the language that refers to "convictions" to support their argument.[136] These courts argue that since the statute deals with convictions, the proper inquiry is to look at the statute of conviction and nothing further.[137] This only addresses half of the argument, however. While this reference to convictions directs the courts to consider the grounds for conviction of the underlying crime, it does not answer the question of *which* facts courts should consider. Courts that reject the Attorney General's approach fear a relitigation of the facts of the underlying

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[131] OXFORD ENGLISH DICTIONARY (2d ed. 2004).

[132] Justice Jackson rightly pointed out this problem in his dissent in *Jordan*, which upheld a conviction for moral turpitude. *See* Jordan v. De George, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting) ("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.").

[133] *See* 8 U.S.C. § 1103(a)(1) (2012).

[134] *Id.*

[135] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . .").

[136] *See, e.g.*, Prudencio v. Holder, 669 F.3d 472, 482 (4th Cir. 2012).

[137] *See* Taylor v. United States, 495 U.S. 575, 600–01 (1990); *Prudencio*, 669 F.3d at 484; Yousefi v. Immigration & Naturalization Serv., 260 F.3d 318, 326 (4th Cir. 2001) (internal citations omitted).

crime,[138] but the Attorney General specifically addressed this issue in *Silva-Trevino* by saying that the approach is not an invitation to relitigate the facts.[139] It seems possible that courts could consider the factual circumstances of the underlying conviction that qualified the crime as a crime involving moral turpitude without relitigating them since this type of inquiry is regularly conducted in appellate courts.[140]

Perhaps just as important is that Congress has not precluded a factual inquiry. There is nothing in the legislative history or amendments that would suggest that a factual inquiry would be inappropriate. The Attorney General's opinion is not inconsistent with congressional intent since there is no preclusion of his third step and therefore, it should be given deference according to *Chevron*.

B. Comparing the Use of "Moral Turpitude" in Attorney Disciplinary Proceedings

The term "moral turpitude" is used, but not defined, in other areas of the law, which provides further support that the term is ambiguous. The term's use in the context of attorney discipline serves as a useful basis for comparison. The term appears in the comments to rule 8.1 of the Model Rules of Professional Conduct, which regulates attorney misconduct.[141] This rule recognizes that certain illegal conduct adversely affects an attorney's ability to practice law.[142] This is similar to the recognition in the immigration statutes that certain conduct will affect an immigrant's ability to remain in the country. The comment says that when assessing what behavior constitutes misconduct, "[t]raditionally, the distinction was drawn in terms of offenses involving 'moral turpitude[,]' . . . [a] concept [that] can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses."[143]

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[138] *Prudencio*, 669 F.3d at 483–84.

[139] Silva-Trevino, 24 I. & N. Dec. 687, 690 (Op. Att'y Gen. 2008) ("[I]t is not an occasion to relitigate facts or determinations made in the earlier criminal proceeding.").

[140] *See, e.g.*, Jarbough v. Att'y Gen. of the U.S., 483 F.3d 184, 188 (3d Cir. 2007) ("[I]t is clear that courts of appeals continue to have no jurisdiction to review discretionary and factual determinations presented in petitions for review.").

[141] MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2 (2013).

[142] *Id.*

[143] *Id.*

Using morality as indicia of acceptable behavior, in the context of professional conduct or immigration law, is problematic in both definition and application.

There are several important things to note from comparing the use of the term "moral turpitude" in the attorney discipline context to the immigration context. First, courts reach conflicting decisions when faced with similar facts just as they do in immigration proceedings.[144] Second, unlike in the immigration context, in the attorney discipline context, courts reviewing disciplinary determinations look to the underlying facts when making their decisions.[145] Third, an examination of the case law seems to suggest that it is relatively difficult for an attorney to be found guilty of a crime involving moral turpitude.[146]

Similar to immigration cases, courts reviewing professional misconduct have struggled to define moral turpitude.[147] Some courts adopt a definition of base and vile behavior, which is similar to the definition in the immigration context, but other courts note that "[t]he concept of moral turpitude depends upon the state of public morals, and may vary according to the community or the times."[148] While some courts reviewing disciplinary proceedings have recognized the subjective nature of moral turpitude, circuit courts reviewing immigration decisions seem to ignore this reality.

Many would argue that attorneys should be held to a higher standard because of their superior knowledge and role in society. Perhaps immigrants, because of their status as non-citizens, should also be held to a higher standard. That seems like an acceptable argument, but if that is the case, then the standards should be clear in both the definition of moral turpitude and how courts identify the illegal conduct that leads to deportation and

[144] *Compare In re* Higgins, 105 A.D.2d 462, 462, 480 N.Y.S.2d 257, 257–58 (3d Dep't 1984) (holding that possession of marijuana is not a crime involving moral turpitude), *with* State v. Denton, 598 P.2d 663, 665 (Okla. 1979) (holding that possession of marijuana is a crime involving moral turpitude).

[145] *See, e.g.*, Att'y Grievance Comm'n of Md. v. Proctor, 524 A.2d 773, 774–75 (Md. 1987) (recanting the facts of an arrest for possession of marijuana).

[146] *See, e.g.*, People v. Thomas, 254 Cal. Rptr. 15, 18, 23 (Cal. Ct. App. 1988) (holding that even felony assault is not a crime involving moral turpitude).

[147] *See supra* note 144 and accompanying text.

[148] Jay Wilson, Comment, *The Definitional Problems with "Moral Turpitude,"* 16 J. LEGAL PROF. 261, 261 (1991) (citing *In re* Fahey, 505 P.2d 1369, 1373 (Cal. 1973)).

inadmissibility. This clarity is something the Attorney General attempted to adopt in *Silva-Trevino* and it is what is missing in the *Shepard* and *Taylor* decisions.

C. *How* Silva-Trevino *Solves the Problem, and Suggestions Going Forward*

While courts have been hesitant to adopt the approach outlined in *Silva-Trevino*, this approach is a marked improvement from where the judicial interpretation of the INA was before the decision. Whether the approach is correct or not, there is now a uniform framework for analyzing crimes involving moral turpitude.[149] This promotes fairness and lessens the burden on defense attorneys, who can now argue for a clear, single standard regardless of the jurisdiction. Procedurally, *Silva-Trevino* addresses many issues that courts could not settle over the previous sixty or so years.

The approach allows for an inquiry into the underlying facts since in many cases looking to the statute of conviction will not answer the question of whether the crime is necessarily one involving moral turpitude.[150] Because no statute includes moral turpitude as an element of the crime, many courts find an examination of some of the underlying facts to be useful. Whereas a range of different categorical inquiries prior to *Silva-Trevino* created substantial unfairness,[151] some argue that a range of different factual inquiries under the third step could cause similar problems.

Courts' apprehensions about the ability to examine any facts "to the extent they deem . . . necessary and appropriate" is understandable.[152] This broad discretion could create entirely new sets of problems. This criticism, however, is overstated. It is important to note that the discretion of the trial judge to look at any facts he or she deems necessary is a last resort. The general feeling is that the majority of inquiries will be answered in the analysis of the first two steps.[153] Since the focus of courts

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[149] *See supra* note 101 and accompanying text.

[150] *See supra* note 108 and accompanying text.

[151] *See supra* Part I.C.

[152] *See supra* note 108 and accompanying text.

[153] *See* Jean-Louis v. Att'y Gen. of the U.S., 582 F.3d 462, 479 (3d Cir. 2009) (noting that in the last one hundred years "adjudicators have applied the categorical approach to the CIMT inquiry without great difficulty").

applying the INA is determining what constitutes amoral behavior, the underlying facts are essential to answering such a subjective inquiry and they cannot be ignored. If the legislature is intent on regulating immigration with a subjective concept like morality, courts must be given the power to examine facts. Examining facts will enable the trier of fact to fully understand a conviction that creates just a brief window into an immigrant's morality. Even with access to facts, questions of morality are still highly subjective.

Enumerating the facts that courts should look at would be one way to reign in the discretion and prevent abuse at the trial court level. The Attorney General enumerated which facts should be considered at step two of the inquiry, but left step three to the judge's discretion.[154] It is difficult to identify abuses of this third step thus far since many courts have explicitly rejected the Attorney General's approach.[155] Given the difficulty of determining what constitutes a crime involving moral turpitude, this granting of discretion to the courts by the Attorney General is likely on purpose and should be given deference. The Attorney General determined that more facts are necessary in difficult cases that cannot be decided at step one or step two. Limiting the factual inquiry will leave the court with insufficient information to determine whether the crime committed involved moral turpitude.

Silva-Trevino provides a clear demonstration of where the third step of the approach proves useful. On appeal, the BIA determined that a Texas statute for indecency with a child was not categorically a crime involving moral turpitude because it could include conduct that is not morally turpitudinous and the BIA remanded the case for further consideration.[156] A court applying the modified categorical approach would be free to consider the record of conviction, which would include the charging elements of the offense.[157] Since moral turpitude is not an element of "indecency with a child" in Texas, the record of conviction provides little or no assistance to the court.[158] Allowing the courts to determine whether the defendant knew

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[154] *See supra* notes 103–08 and accompanying text.

[155] *See supra* note 15.

[156] Silva-Trevino, 24 I. & N. Dec. 687, 692 (Op. Att'y Gen. 2008).

[157] *Id.* at 699.

[158] *See id.* at 688, 692.

the age of the victim, which, if he did, would most certainly be a strong indicator of moral turpitude, can only be accomplished by going beyond the record of conviction.[159]

Courts should recognize the subjective nature of defining crimes involving moral turpitude and embrace it. The moral turpitude analysis is not likely to fit nicely within an objective test in most cases, but that does not mean there cannot be a fair method of interpretation. For example, courts undertake a subjective inquiry when examining the beliefs of a victim claiming self-defense to determine if that victim's acts were excusable.[160] There are other subjective inquiries in trials, but courts seem inexplicably uncomfortable with such an inquiry in the immigration setting. Some courts, however, have recognized and embraced this subjectivity when reviewing attorney discipline proceedings dealing with moral turpitude.[161] It is important to note that those cases, like immigration cases, have the potential for changing a person's life dramatically. While an attorney may lose his livelihood, an immigrant may be deported to a country where she no longer has familial ties or support of any kind.[162] Courts that need to resort to the third step under *Silva-Trevino* will reach fairer and more uniform results because they have the necessary information to answer the subjective inquiry before them.

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[159] *Id.* at 703.

[160] *See, e.g.*, Gov't of the V.I. v. Robinson, 29 F.3d 878, 882 (3d Cir. 1994).

[161] *See, e.g.*, *In re* Fahey, 505 P.2d 1369, 1373 (Cal. 1973) ("The concept of moral turpitude depends upon the state of public morals, and may vary according to the community or the times."); *In re* Small, 760 A.2d 612, 613–14 (D.C. 2000) (commenting that the defendant's conviction for negligent homicide and driving while impaired in New York did not rise to the level of moral turpitude and courts should consider "the nature and circumstances of the misconduct for which the attorney was disciplined"). The American Bar Association also recommends an inquiry into the facts of each attorney discipline case dealing with moral turpitude. *See* Rachna K. Dhanda, Note, *When Attorneys Become Convicted Felons: The Question of Discipline by the Bar*, 8 GEO. J. LEGAL ETHICS 723, 727 (1995) (noting that the Clark Committee on attorney discipline recommended courts consider "the nexus between a particular crime and an attorney's fitness to practice, [so that they] are better equipped to impose discipline that is appropriate for an attorney's misconduct").

[162] The Supreme Court has likened deportation to "exile" or "banishment." *See* Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (citing Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

CONCLUSION

The concept of moral turpitude has been a mainstay in United States Immigration law for over a century. While it would be best to move away from legislation that is based on morality, it is unlikely that Congress will abandon this language any time soon. Immigration removal proceedings have incredibly high stakes and it is essential that they are uniform and fair across the country. The approach developed through case law prior to *Silva-Trevino* that courts continue to apply offers neither uniformity nor fairness.

Courts enforcing the INA should give the Attorney General's opinion deference. The statute is ambiguous because the term "moral turpitude" is subjective and because of the absence of any procedure for determining what constitutes moral turpitude. The opinion in *Silva-Trevino* is not an impermissible construction of the statute and it addresses many of the deficiencies caused by the patchwork development of judicial tests through case law. The courts that have rejected the *Silva-Trevino* framework are in direct conflict with binding precedent in the *Chevron* decision.

Fundamental fairness is a hallmark of the United States justice system. It is unacceptable for courts to reach wildly differing opinions about the same substantive area of the law. Moreover, it is not the judiciary's job to determine immigration policy. Congress expressly delegated interpretation of the INA to the Attorney General. The office of the Attorney General acted within its power and attempted to solve the problem of differing approaches in *Silva-Trevino*. Since courts refuse to adopt this approach, it is likely that this issue will eventually reach the Supreme Court, which should affirm *Silva-Trevino* in light of *Chevron*.