Nebraska Law Review

Volume 100 | Issue 4 Article 9

6-30-2022

The Immorality of Crimes Involving Moral Turpitude: Evaluating the Eighth Circuit's Split in *Bakor v. Barr*

Emma Franklin
University of Nebraska College of Law

Note*

The Immorality of Crimes Involving Moral Turpitude: Evaluating the Eighth Circuit's Split in *Bakor v. Barr*

TABLE OF CONTENTS

* Emma Franklin, J.D. Candidate, University of Nebraska College of Law, 2022. I would like to thank all of the *Nebraska Law Review* editors and those individuals who have helped shape my interest in immigration law.

I. INTRODUCTION

Alex failed to register his car, Pilar failed to renew his broker license, Juan failed to register as a sex offender, and all three noncitizens have been convicted of one previous crime. Each of these registration failures flow from dramatically different legal requirements and serve different purposes, but they share a common characteristic. All three legal missteps are based on administrative registration obligations promulgated by a governmental entity. Indeed, the failure to register as a sex offender may accompany more ethical and moral intimations, but the act of failing to register as a sex offender is not itself clearly evil behavior.[1] Failure to register as a sex offender, however, can beget grave consequences for noncitizens in the United States.[2] The most significant difference between Alex, Pilar, and Juan is that Juan, depending on where he lives in the United States, may be subject to removal or deportation.[3]

The Eighth Circuit recently deemed the failure to register as a sex offender to be a crime involving moral turpitude (CIMT).[4] In doing so, the Eighth Circuit departed from the approach in the Third, Fourth, Ninth, and Tenth Circuits, which holds that the failure to register as a sex offender is *not* a CIMT.[5] This newly created circuit split effectively holds noncitizens—an exceedingly marginalized population[6]—to different standards under the federal Immigration and Nationality Act, depending on the noncitizen's jurisdictional residence.

This Note analyzes the Eighth Circuit's decision, *Bakor v. Barr*, based on the categorical approach framework used to determine whether a crime involves moral turpitude. Part II describes the re-

1. *See* Bernie Pazanowski, *Immigrant May Be Deported for Not Registering as Sex Offender*, BLOOMBERG L. NEWS (May 7, 2020, 11:05 AM), https://news.bloomberglaw.com/us-law-week/immigrant-may-be-deported-for-not-registering-as-sex-offender [https://perma.cc/UK6X-PMTE] (discussing the prevailing determination in the Third, Fourth, and Ninth Circuits that failure to register as a sex offender is administrative in nature).
2. *See* discussion *infra* section II.C.
3. *See generally* 8 U.S.C. § 1227(a)(2)(A)(ii) (effective Dec. 23, 2008) (prescribing removal for aliens who commit two or more crimes involving moral turpitude).
4. Bakor v. Barr, 958 F.3d 732 (8th Cir. 2020), *cert. denied sub nom.* Bakor v. Garland, 141 S. Ct. 2566 (2021).
5. Totimeh v. Att'y Gen. of the U.S., 666 F.3d 109 (3d Cir. 2012); Mohamed v. Holder, 769 F.3d 885 (4th Cir. 2014); Plasencia-Ayala v. Mukasey, 516 F.3d 738 (9th Cir. 2008); Efagene v. Holder, 642 F.3d 918 (10th Cir. 2011).
6. *See* Patrick J. Campbell, Note, *Crimes Involving Moral Turpitude: In Search of a Moral Approach to Immoral Crimes*, 88 ST. JOHN'S L. REV. 147, 148 (2014).

moval process for noncitizens who are convicted of crimes involving moral turpitude and the difficulty courts have in defining moral turpitude. Part III examines the *Bakor v. Barr* decision in light of the Third, Fourth, Ninth, and Tenth Circuits' approach. Finally, Part IV argues that the Eighth Circuit should have followed the Third, Fourth, Ninth, and Tenth Circuits to conclude that failure to register as a sex offender is not a crime involving moral turpitude. Moreover, to promote predictability and consistency in removal cases arising from CIMTs the court should categorically proclaim that failure to register as a sex offender is *not* a CIMT.

II. BACKGROUND

A. The Immigration and Nationality Act

Crimes involving moral turpitude surfaced in United States immigration legislation in 1891.[7] Conviction of a CIMT has since been utilized to remove aliens[8] and to prevent entry by immigrants.[9] A more recent iteration of the immigration legislation, the Immigration and Nationality Act of 1952, sought to consolidate scattered immigration laws in the United States.[10] In this legislation, Congress enunciated a plethora of grounds upon which noncitizens may be precluded from entering the United States or deported including, but not limited to, drug abuse, marriage fraud, unlawful voting, criminal convictions, and a vague catchall term: crimes involving moral turpitude.[11] The nebulous expression, "crimes involving moral turpitude," did not originate in the Immigration and Nationality Act; rather, it is a remnant of past legislative acts, and it is still invoked today as a reason to bar individuals from being admitted into the United States and to deport noncitizens.[12]

7. Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084. This Act of March 3 prevented many classes of people, such as polygamists and people who "suffer[ed] from a loathsome or a dangerous contagious disease," from entering the United States on the basis of ostensibly problematic moral characteristics.
8. *Alien*, BLACK'S LAW DICTIONARY (11th ed. 2019). The courts and statutes use the term "alien" generally to refer to people who reside in the United States but are not citizens. This Note will only use "alien" to describe noncitizens when paraphrasing or quoting the immigration statutes and the courts. In every other context, the term noncitizen will be supplanted.
9. *See* Lindsay M. Kornegay & Evan Tsen Lee, *Why Deporting Immigrants for "Crimes Involving Moral Turpitude" Is Now Unconstitutional*, 13 DUKE J. CONST. L. & PUB. POL'Y 47, 52–54 (2017). The word "immigrant" refers to "[s]omeone who enters a country to settle there permanently." *Immigrant*, BLACK'S LAW DICTIONARY (11th ed. 2019).
10. Campbell, *supra* note 6, at 151.
11. *Id.*
12. *See* Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 649–51 (2012).

The Immigration and Nationality Act permits the Attorney General to bring removal proceedings against an alien convicted of a crime involving moral turpitude if the crime occurs within five years of entrance into the United States or within ten years of entrance into the United States for an alien who possesses lawful permanent resident status.[13] Any alien, however, can also be subject to removal if they are "convicted of *two or more* crimes involving moral turpitude."[14] The risk of removal that noncitizens face after a conviction for a CIMT has been described as a "collateral sanctioning mechanism," whereby noncitizens confront immigration penalties as well as punishment for the underlying offense.[15]

The most critical flaw that emerges with respect to the removal of an alien who has been convicted of a CIMT is that Congress neglected to define moral turpitude in the Immigration and Nationality Act and has failed to define it in all subsequent legislation that employs the language.[16] Not surprisingly, the Immigration and Nationality Act's legislative history suggests that immigration inspectors and consular officers have voiced concern over the broad and possibly subjective interpretations that would emanate from the term moral turpitude.[17] In response to these concerns, the Senate admitted that it deliberately embraced a comprehensive term that could apply to various crimes.[18] Although the Senate aimed to incorporate a catchall phrase in removal legislation, the courts nevertheless have a duty to ascertain what moral turpitude means.[19]

---

13. 8 U.S.C. § 1227(a)(2)(A)(i) (effective Dec. 23, 2008).
14. *Id.* § 1227(a)(2)(A)(ii) (emphasis added).
15. Sara Salem, Note, *Should They Stay or Should They Go: Rethinking the Use of Crimes Involving Moral Turpitude in Immigration Law*, 70 FLA. L. REV. 225, 227 (2018). While Salem's Note stresses the use of moral turpitude in immigration laws, the term has been used in multiple legal contexts, including defamation, voting rights, professional licensing, and juror qualification. *Id.* at 226 n.6 (citing Julia Ann Simon-Kerr, *Moral Turpitude,* 2012 UTAH L. REV. 1001, 1001–02); *see also* Jordan v. De George, 341 U.S. 223, 227 (1951) (noting that moral turpitude has been employed as a factor in disqualifying and impeaching witnesses, in deciding the amount of contribution between tortfeasors, and in assessing whether language is slanderous).
16. *See, e.g.*, Bakor v. Barr, 958 F.3d 732, 735 (8th Cir. 2020), *cert. denied sub nom.* Bakor v. Garland, 141 S. Ct. 2566 (2021); Campbell, *supra* note 6, at 148 (acknowledging that many immigration statutes that encompass CIMTs fail to define the term).
17. *See* Holper, *supra* note 12, at 651 (citing S. REP. NO. 81-1515, at 353 (1950)).
18. *See id.* A Senate report justified the decision to keep the term: "Although it might be desirable to have the crimes [involving moral turpitude] specifically set forth, difficulties might be encountered in getting a phrase that would be broad enough to cover the various crimes contemplated with the law and yet easier to comprehend than the present phrase." *Id.*
19. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Some judges, however, have acknowledged the pitfalls in affording the elusive term any amount of legal authority.[20] Justice Jackson's dissent in *Jordan v. De George* concluded that using the moral turpitude standard to justify removal from the United States is likely unconstitutional due to the term's vagueness.[21] Piggybacking off of Justice Jackson's strong rebuke of moral turpitude in immigration law, Judge Posner articulated compelling semantic arguments for why the term should be discarded:

> The definitions constitute a list of antiquated synonyms for bad character, and why does the legal profession cling to antiquated synonyms? Why are we so backward-looking? The answer lies in the American legal culture—in the fact that law is backward-looking, that the legal profession revels in antiquity, cherishes jargon, and lacks respect for proper English usage—"base or vile" is not an expression used by sophisticated speakers of modern English, or for that matter unsophisticated, and the word "turpitude" has disappeared from the language as spoken and written today. The language I quoted from *Black's*—who talks like that? Who *needs* to talk like that? Lawyers apparently, and they go a step further into the lexical mud by intoning an adjectival form of "turpitude": "turpitudinous."[22]

Notwithstanding some judges' admonishment, the term prevails in immigration statutes and in American case law.[23]

B. Process of Removal

The Department of Homeland Security and the Department of Justice (DOJ) enforce United States immigration laws and bring removal proceedings in immigration court on behalf of the United States.[24] The administrative courts in the DOJ's Executive Office for Immigration Review (involving adjudication before an immigration judge)[25]

---

20. *Jordan*, 341 U.S. at 235 (Jackson, J., dissenting). Justice Jackson excoriated the majority's endorsement of moral turpitude in immigration law:

> 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. The Government confesses that it is "a term that is not clearly defined," and says: "The various definitions of moral turpitude provide no exact test by which we can classify the specific offenses here involved."

Id. at 234–35 (footnotes omitted).

21. *Id.* at 243–45 (arguing that CIMT is not definite enough to serve as a constitutional standard for deportation).
22. Arias v. Lynch, 834 F.3d 823, 832 (7th Cir. 2016) (Posner, J., concurring) (questioning whether moral turpitude has a legitimate place in American law).
23. *See* Kornegay & Lee, *supra* note 9, at 60–63 (stressing that courts will deem some crimes as involving moral turpitude without providing a rationale).
24. U.S. Gov't Accountability Off., GAO-19-416, Immigration Enforcement: Actions Needed to Better Handle, Identify, and Track Cases Involving Veterans 7 (2019).
25. *See* Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After* Silva-Trevino, 111 Colum. L. Rev. 313, 320 (2011).

and federal courts determine whether a crime constitutes a CIMT.[26] If an individual appeals the immigration court's decision, the Board of Immigration Appeals (BIA) is the highest administrative body that may render a decision based on applicable immigration law.[27] At this point, the Attorney General could handle the case directly.[28] Even though BIA cases are agency decisions, they are binding on other cases with similar circumstances.[29] In some cases, after exhausting administrative appeals options, a noncitizen can appeal to the federal circuit court of appeals for the jurisdiction in which the immigration proceedings took place.[30]

Federal circuit courts of appeals generally accord agency deference to the BIA regarding whether a criminal offense qualifies as a CIMT so long as the Board's interpretation is reasonable.[31] Unless the Supreme Court grants certiorari, the circuit court of appeals is the court of last resort for noncitizens defending a removal action. Consequently, it is especially important that courts interpret immigration laws fairly and consistently. However, consistency is difficult to maintain when the standard for understanding and deciding "moral turpitude" jurisprudence stems from an intentionally vague term that is subject to individual judges' own moral predilections.[32]

---

26. Holper, *supra* note 12, at 653.

27. U.S. DEP'T OF JUST. BD. OF IMMIGR. APPEALS, https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/U7BR-GXL7] (Sept. 14, 2021).

28. *See* Colleen Muñoz, Note, *Reevaluating the Adjudication of Crimes Involving Moral Turpitude*, 24 LEWIS & CLARK L. REV. 325, 336 (2020) (citing 8 C.F.R. § 1003.1(h)(1), which allows the Attorney General, the Chairman of the Board of Immigration Appeals, and the Secretary of Homeland Security, or specific officials designated by the Secretary, to refer cases specifically to the Attorney General for review).

29. *Id.* at 336–37.

30. Holper, *supra* note 12, at 653.

31. Bakor v. Barr, 958 F.3d 732, 735 (8th Cir. 2020). When an agency interprets a statute that the agency administers, courts defer to the agency's construction if the phrase is ambiguous or the statute is silent on the matter and the agency's interpretation is reasonable. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

32. *See In re* Silva-Trevino (*Silva-Trevino I*), 24 I. & N. Dec. 687 (Att'y Gen. 2008), *vacated*, *In re* Silva-Trevino (*Silva-Trevino II*), 26 I. & N. Dec. 550, 553 (Att'y Gen. 2015). In *Silva-Trevino I*, the Attorney General elucidated the challenges of defining and applying "moral turpitude" when the definition is subject to various interpretations:

> To the extent it suggests a method, the text actually cuts in different directions. Some statutory language—for example, use of the phrase "convicted of" rather than "committed"—suggests that the relevant inquiry should be categorical and focus on whether moral turpitude inheres in the statutory elements required for conviction rather than in the particularized facts of the alien's crime. . . . Other language—for example, use of the word "involving" and the reference in section 212(a)(2)(A)(i)(I) to aliens who admit "committing" certain "acts"—seems

C. Crimes Involving Moral Turpitude

The current definition of a CIMT comes from the Board of Immigration Appeals. It states in pertinent part:

> Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong or malum in se [bad in and of itself], so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.[33]

Courts often consider whether the noncitizen's conduct "shocks the public conscience,"[34] which ostensibly should provide an objective measure, but the public conscience can evolve over time and be subject to individual experience and interpretation.[35] The working definition put forth by the BIA, replete with morally weighted descriptions, is inherently susceptible to a judge's own opinion.[36] The Supreme Court, however, seemingly rejected the idea that moral turpitude could be void for vagueness when it stated that "crimes in which fraud was an ingredient have always been regarded as involving moral turpitude . . . . Congress sufficiently forewarned respondent that the statu-

---

> to call for, or at least allow, inquiry into the particularized facts of the crime.

Id. at 693.

33. Alonzo v. Lynch, 821 F.3d 951, 958 (8th Cir. 2016) (quoting Gomez-Gutierrez v. Lynch, 811 F.3d 1053, 1058 (8th Cir. 2016)). *Malum in se* refers to crimes that have an inherent essence of wrongfulness, as opposed to crimes that are merely illegal but do not encompass the same immoral associations (*malum prohibitum*). *Malum In Se*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Malum Prohibitum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

34. Eric H. Singer, *The Muddle of Determining Moral Turpitude After* Silva-Trevino, 45 MD. BAR J. 54, 55 (2012) (quoting *In re* Perez-Contreras, 20 I. & N. Dec. 615, 618 (B.I.A. 1992)).

35. *See* Elijah T. Staggers, Note, *The Racialization of Crimes Involving Moral Turpitude*, 12 GEO. J.L. & MOD. CRITICAL RACE PERSP. 17, 25–26 (2020) ("[Judge Posner] noted the words in the [BIA's] definition [of CIMT] were 'gibberish' and 'virtually dropped from the vocabulary of modern Americans.'"). Staggers further expands on Judge Posner's critique of the working definition of a CIMT, which Posner described as incorporating a bevy of clichés that attempt to define moral turpitude but actually "serve to confuse rather than clarify" the term. *Id.*

36. *See, e.g.*, *id.*; Kornegay & Lee, *supra* note 9, at 112–13. Kornegay and Lee argue that the capriciousness and inconsistencies applied in cases determining whether an individual has committed a crime of moral turpitude render deportation for such a conviction unconstitutional under the Due Process Clause. Indeed, the void-for-vagueness argument has circulated throughout legal academic spheres, but neither the courts nor the Department of Justice have determined that conviction for a CIMT is unconstitutional. *Accord* Holper, *supra* note 12, at 701 ("[T]he term CIMT casts judges in the role of God, deciding according to the 'moral standards generally prevailing in the United States,' whether a certain offense involves moral turpitude. This allows neither noncitizens nor their criminal defense attorneys to predict which offenses will lead to deportation for a CIMT." (quoting 22 C.F.R. § 40.21(a)(1) (2011))).

tory consequence of twice conspiring to defraud the United States is deportation."[37]

Agency interpretations and case law have generated some helpful guidance and bright line rules to ascertain what constitutes a CIMT. Certain categories of offenses have consistently been deemed CIMTs across jurisdictions.[38] Crimes requiring fraud or deceit, the intentional deprivation of another's property (theft), harm to persons, some sexual offenses, and aggravated crimes, including aggravated assault, have been held to be CIMTs.[39]

A commonly cited feature in cases finding moral turpitude is a willful or evil intent, and as a result, some courts have stated that "scienter is the touchstone of moral turpitude."[40] For example, an offense such as simple assault, while indeed a crime, does not necessarily require a vicious motive, so it is not a CIMT.[41] This reasoning is an application of the principle that just because certain behavior is statutorily prohibited does not make it inherently or intrinsically reprehensible.[42] Behavior that does not require a vicious motive but is nonetheless prohibited by statute may be described as *malum prohibitum*, or bad by virtue of being illegal.[43] As such, domestic battery that is bereft of willfulness to inflict serious physical harm may not be a CIMT in jurisdictions that require "aggravating factors" for assault and battery offenses to be classified as CIMTs.[44]

In contrast, some courts have taken the position that the existence of "a vicious motive or a corrupt mind" is among the tests used to de-

37. Jordan v. De George, 341 U.S. 223, 232 (1951). The Court broached the vagueness argument on its own and in dicta because neither party raised the question of vagueness. *Id.* at 229.

38. Dadhania, *supra* note 25, at 319.

39. Holper, *supra* note 12, at 655.

40. De Leon v. Lynch, 808 F.3d 1224, 1228 (10th Cir. 2015) (quoting Michel v. INS, 206 F.3d 253, 263 (2d Cir. 2000)); *see also* Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1165–67 (9th Cir. 2006) (acknowledging that the Ninth Circuit generally requires evil intent or willfulness for a crime to be a CIMT). Scienter is defined as a possession of knowledge that renders an individual responsible for his or her actions or omissions (culpability). *Scienter*, BLACK'S LAW DICTIONARY (11th ed. 2019). Secondarily, it is defined as a mental state characterized by "an intent to deceive, manipulate, or defraud." *Id.*

41. Chanmouny v. Ashcroft, 376 F.3d 810, 814–15 (8th Cir. 2004) (finding that simple assault is not a crime involving moral turpitude).

42. *See id.*

43. Staggers, *supra* note 35, at 26. A major problem with using the *malum in se* and *malum prohibitum* distinction is that the terms originated in religious and ethical concepts that are difficult to apply in legal contexts. Moreover, the "moral turpitude" legal standard has been criticized as unworkable because it asks courts to divine public moral standards that are often different across the country and subject to change as societal attitudes shift. *See id.* at 26–27 (emphasizing the antiquated and unworkable nature of moral turpitude).

44. *In re* Sanudo, 23 I. & N. Dec. 968, 971 (B.I.A. 2006) (noting that domestic battery is not a CIMT where the statute can be violated with a mere offensive touch).

termine whether moral turpitude exists, but given the circumstances of the case, a lower level of scienter (like recklessness) can attend a CIMT.[45] And at least one court has "reject[ed] the contention that all crimes requiring some degree of evil intent are necessarily crimes involving moral turpitude."[46] Therefore, some courts may find a vicious motive to be dispositive, and others may declare that "the bare presence of some degree of evil intent is not enough to convert a crime that is not serious into one of moral turpitude."[47]

Categorical Approach

When evaluating whether a particular criminal offense involves moral turpitude, courts turn to the categorical approach, albeit with slightly different modifications to certain steps of the analysis depending on the jurisdiction.[48]

1. Traditional Categorical Approach

The first step of the analysis is called the traditional categorical approach.[49] The traditional categorical approach seeks to evaluate the crime based on the statute violated, not the specific circumstances surrounding the noncitizen or their case.[50] The first inquiry essentially assesses the elements of the criminal statute or the statutory definition in question to glean whether moral turpitude necessarily attends each element. If any conviction for the crime at issue would involve moral turpitude, then it is a CIMT.[51] Courts generally employ either the "least culpable conduct" test or the "realistic probability" test to execute this first step.[52]

a. Least Culpable Conduct Test

According to the "least culpable conduct" test under the traditional categorical approach, the adjudicator must consider "the least culpable conduct necessary to sustain a conviction [ ] under th[e] statute" and whether moral turpitude necessarily inheres in such conduct.[53] If every instance that could sustain a conviction for the particular crime involves moral turpitude, then the crime is a CIMT and the analysis

45. Avendano v. Holder, 770 F.3d 731, 734–36 (8th Cir. 2014) (quoting *Chanmouny*, 376 F.3d at 814).
46. Rodriguez-Herrera v. INS, 52 F.3d 238, 241 (9th Cir. 1995).
47. *Id.*
48. *See* Dadhania, *supra* note 25, at 314.
49. *Id.* at 325.
50. *See Rodriguez-Herrera*, 52 F.3d at 239.
51. Dadhania, *supra* note 25, at 325–26.
52. *Id.* at 326.
53. Lewis Frasch, Comment, *Circuit Split on the Procedural Determination of Crimes Involving Moral Turpitude*, 34 IMMIGR. & NAT'Y L. REV. 829, 831–32 (2013).

concludes.[54] In many cases, however, the first question will not produce a clear answer because the statute may be divisible.[55] A divisible statute encompasses elements that may not necessarily require morally turpitudinous action, in which case the courts move to step two of the analysis: the modified categorical approach.[56] A divisible statute exists when the statute contains disjunctive elements—some of the elements would qualify the crime as a CIMT and some elements would not.[57]

b. Realistic Probability Test

The other test employed under the traditional categorical approach is called the realistic probability test.[58] The realistic probability test considers whether an actual, not hypothetical, realistic probability exists that the criminal statute at issue could apply to behavior that does not involve moral turpitude.[59] If the noncitizen cannot put forth evidence showing that the criminal statute at issue has been applied to crimes *without* moral turpitude, then the inquiry concludes with a determination that the crime is indeed a CIMT.[60] The realistic probability test presents a greater challenge for noncitizens fighting a charge of a potential CIMT because the onus is on the noncitizen to produce evidence of cases in which the statute was employed to prosecute a crime deemed *not* to involve moral turpitude.[61]

---

54. *Id.* at 832.
55. *Id.*
56. Jean-Louis v. Att'y Gen., 582 F.3d 462, 466 (3d Cir. 2009). In *Jean-Louis*, the Third Circuit explained:

> Where a statute of conviction contains disjunctive elements, some of which are sufficient for conviction of the federal offense and others of which are not, we have departed from a strict categorical approach. In such a case, we have conducted a limited factual inquiry, examining the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.

Id.; *see also* Frasch, *supra* note 53, at 832 (delineating the situations in which looking to the record of conviction is appropriate in moral turpitude analysis).
57. Frasch, *supra* note 53, at 832.
58. Dadhania, *supra* note 25, at 326.
59. *Id.* at 326–27. The Supreme Court set forth the realistic probability test in a case based on aggravated felonies. *Id.* at 327 n.72 (acknowledging that the realistic probability test was not originally introduced to serve as a test under the traditional categorical approach for finding a CIMT).
60. *Id.* at 329.
61. *See id.* at 328. The noncitizen can present evidence such as "published decisions, unpublished decisions, and plea transcripts, including those from a noncitizen's own criminal case." *Id.* The BIA and the Attorney General take the position that, unless the relevant federal court of appeals says otherwise, courts should use the realistic probability test to determine whether a crime categorically involves moral turpitude. *In re* Silva-Trevino (*Silva-Trevino III*), 26 I. & N. Dec. 826, 831–32 (B.I.A. 2016) (restating the BIA's prescribed approach to determine whether a crime is a CIMT).

Another shortcoming of the realistic probability test is that it relies on previously adjudicated results, which, while important, may not have produced an example of the statute convicting an individual for non-turpitudinous conduct. In other words, the realistic probability test equates realistic probability with existing legal precedent, which presupposes that an outcome is not probable if it has not occurred. The realistic probability test has also been criticized for violating the immigration lenity doctrine.[62] The immigration lenity doctrine[63] emerged after the Supreme Court's decision in *Fong Haw Tan v. Phelan*, where the Court resolved that deportation is an extreme measure and also a penalty.[64] There, the Court refused to expand the meaning of the statute at issue and construed the statute narrowly in favor of the noncitizen.[65] Since *Fong Haw Tan*, the immigration lenity doctrine has applied in cases involving deportation.[66]

2. Modified Categorical Approach

The second step of the categorical approach arises if the first step fails to conclude whether the criminal statute comprises a CIMT.[67] Under the second step (called the modified categorical approach), courts look beyond the elements of the criminal statute and focus specifically on the noncitizen's record of conviction for the "narrow purpose of determining the specific subpart under which the defendant was convicted."[68] The Immigration and Nationality Act specifies the exhibits from the record that can be used to illustrate proof of conviction, which include the following:

> (i) An official record of judgment and conviction.
> (ii) An official record of plea, verdict, and sentence.
> (iii) A docket entry from court records that indicates the existence of the conviction.
> (iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

---

62. *See, e.g.*, Frank George, Student Article, *On Moral Grounds: Denouncing the Board's Framework for Identifying Crimes of Moral Turpitude*, 51 AKRON L. REV. 577, 598 (2017).
63. The rule of lenity in criminal law requires courts to construe ambiguous criminal statutes in a way that avoids penal sanction unless there is clear legislative intent to impose such a sanction. *See* Note, *Justifying the* Chevron *Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2044 (2010) (citing United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)). Deportation cases are a corollary to the rule of lenity since both deportation and criminal sanctions involve serious punishments. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).
64. *Fong Haw Tan*, 333 U.S. at 10.
65. *Id.*
66. George, *supra* note 62, at 598.
67. Dadhania, *supra* note 25, at 329.
68. Frasch, *supra* note 53, at 832 (quoting Jean-Louis v. Att'y Gen., 582 F.3d 462, 466 (3d Cir. 2009)).

> (v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.
> (vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
> (vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.[69]

If the court can ascertain from the noncitizen's record of conviction that they pled guilty to elements of a CIMT or that the jury or immigration court found elements of a CIMT, the noncitizen is removable.[70] In other words, if the record reveals that the noncitizen's offense involved moral turpitude, then the crime is considered a CIMT. If the record is ambiguous or, despite evaluating the record, the court cannot confirm that the offense involved moral turpitude, then the noncitizen is deemed not to have committed a CIMT.[71] While the modified categorical approach looks at case-specific information, it does not allow a court to investigate the circumstances outside of the noncitizen's record of conviction.[72]

3. Silva-Trevino *Third Step (Now Vacated)*

In 2008, the Attorney General endeavored to synchronize the categorical approach across the federal circuit courts of appeals.[73] In this ambitious attempt,[74] the Attorney General adopted the realistic

69. 8 U.S.C. § 1229a(c)(3)(B); *see also* Dadhania, *supra* note 25, at 329–30 ("The record of conviction consists of, inter alia, the charging document, a written plea agreement, a verdict or judgment of conviction, a record of the sentence, a plea colloquy transcript, and any explicit factual finding by a trial judge or a jury.").
70. *See* Marmolejo-Campos v. Holder, 558 F.3d 903, 912 (9th Cir. 2009).
71. Dadhania, *supra* note 25, at 330.
72. *Id.* The modified categorical approach limits the inquiry to the noncitizen's record of conviction because moral turpitude is based on the inherently evil nature of the crime, not the status of the crime's illegality. *See supra* notes 67–71 and accompanying text (providing the rationale behind limiting the modified categorical approach to the noncitizen's record of conviction).
73. *See Silva-Trevino I*, 24 I. & N. Dec. 687 (Att'y Gen. 2008), *vacated*, *Silva-Trevino II*, 26 I. & N. Dec. 550 (Att'y Gen. 2015) (vacating the 2008 decision that endorsed a third step to the categorical approach which allowed courts to look beyond the record of conviction).
74. The Attorney General directly acknowledged the significance of creating a consistent standard for determining whether a crime is a CIMT. He declared:

> [C]ourts have applied a wide range of approaches with respect to both prongs of the test, resulting in a patchwork of conflicting legal and evidentiary standards. Moreover, many of these approaches do not adequately perform the function they are supposed to serve: distinguishing aliens who have committed crimes involving moral turpitude from those who have not.

probability test under step one, requiring noncitizens to prove that there is a real probability that the criminal statute could be applied to conduct not involving moral turpitude.[75] Second, the Attorney General employed the modified categorical approach, whereby the adjudicator looks to the noncitizen's record of conviction (including indictment documents, jury instructions, and plea transcripts) to uncover moral turpitude. The third and novel step promulgated by the Attorney General in *In re Silva-Trevino* allowed the court to evaluate evidence extrinsic to the record of conviction when the record proved inconclusive.[76] The Attorney General reasoned that charging documents can still leave the question unanswered because the documents do not always describe the conduct preceding the conviction.[77]

In trying to engineer a uniform three-part test, the Attorney General instead produced a bevy of confused judges and courts.[78] Only the Seventh and Eighth Circuits accepted the Attorney General's new third step,[79] which compelled the Attorney General to vacate the 2008 *In re Silva-Trevino* opinion.[80] Effectively, vacating *In re Silva-Trevino* forced courts back into employing some form of the categorical approach, which involves inconsistent applications of the traditional categorical approach (step one) and modified categorical approach (step

Id. at 688.

75. *Id.* at 689–90.

76. *Id.* at 708 ("[I]f the record of conviction does not resolve the inquiry, consider any additional evidence or factfinding the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question.").

77. *Id.* at 699 (pointing out that moral turpitude is not an element of an offense, and charging documents usually focus on the elements required to reach a conviction); *see also* Dadhania, *supra* note 25, at 314 (arguing that the *Silva-Trevino* step essentially eviscerated the categorical nature of the categorical approach framework because the third step allowed the adjudicator to look beyond the elements of the crime to extrinsic evidence when assessing whether a crime involves moral turpitude).

78. Frasch, *supra* note 53, at 837 ("Seven federal circuit courts of appeals have addressed *Matter of Silva-Trevino*, but they have all done so in different ways and have analyzed different aspects of the case.").

79. *See* Bobadilla v. Holder, 679 F.3d 1052 (8th Cir. 2012) (deferring and applying the Attorney General's three-part approach in *Silva-Trevino I*); *see also* Jocelyn E. Bremer, Note, *Understanding* Bobadilla v. Holder*: A Pragmatic Approach to Analyzing Crimes Involving Moral Turpitude for Eighth Circuit Attorneys*, 37 HAMLINE L. REV. 427, 441–42 (2014) (discussing the Eighth Circuit's adoption of the *Silva-Trevino* three-part framework for determining whether a crime is a CIMT).

80. *Silva-Trevino II*, 26 I. & N. Dec. 550, 553 (Att'y Gen. 2015) ("In view of the decisions of five courts of appeals rejecting the framework set out in Attorney General Mukasey's opinion . . . as well as intervening Supreme Court decisions that cast doubt on the continued validity of the opinion, I conclude that it is appropriate to vacate the November 7, 2008, opinion in its entirety."). In addition to vacating the 2008 *Silva-Trevino* framework, the Attorney General solicited the BIA to put forth an appropriate standard for determining whether an offense is a CIMT in light of the vacatur. *See id.*

two).[81] Today, courts do not analyze a third step in determining whether an offense is a CIMT.

III. CIRCUIT SPLIT

A. The Third, Fourth, Ninth, and Tenth Circuits Hold that a Noncitizen's Failure To Register as a Sex Offender Is *Not* a Crime Involving Moral Turpitude

In *Totimeh v. Attorney General*, Mr. George Totimeh, a Liberian native, had pled guilty to fourth degree criminal sexual conduct in Minnesota.[82] Per Minnesota statute, Mr. Totimeh registered on Minnesota's predatory offender registry, but after about three years he moved in with a friend and failed to update the registration information.[83] As a result, Mr. Totimeh pled guilty to failure to comply with the predatory offender registry, and the Department of Homeland Security brought removal proceedings against him.[84] The Third Circuit explained that failure to register is not inherently despicable, even if the underlying reason for registering under the predatory offender statute is inherently despicable.[85] Therefore, Mr. Totimeh's failure to notify authorities of his move did not trigger removal under § 1227(a)(2)(A)(ii) as his second crime involving moral turpitude.[86]

In *Mohamed v. Holder*, Mr. Khalid Mohamed, a native of Sudan and a lawful permanent resident of the United States, had pled guilty to sexual battery in 2010.[87] The following year, he faced a conviction for his failure to register as a sex offender.[88] When the Department of Homeland Security brought removal proceedings against him, he argued that he could not be removed under 8 U.S.C. § 1227(a)(2)(A)(ii)

81. *See, e.g.*, *Silva-Trevino III*, 26 I. & N. Dec. 826 (B.I.A. 2016) (adopting the realistic probability test for the traditional categorical approach, which is step one; adopting the modified categorical approach for step two; and entirely extinguishing the *Silva-Trevino I* third step that looks to evidence extrinsic to the record of conviction).

82. Totimeh v. Att'y Gen., 666 F.3d 109, 111 (3d Cir. 2012).

83. *Id.*

84. *Id.* at 111–12. The Department of Homeland Security asserted removal under both 8 U.S.C. § 1227(a)(2)(A)(i) and 8 U.S.C. § 1227(a)(2)(A)(ii) for conviction of a CIMT within five years of entry and for conviction of two CIMTs. *Id.* Mr. Totimeh urged the court to use the least culpable conduct test to prove that it is possible to violate the statute without engaging in behavior amounting to moral turpitude. *Id.* at 116 n.7.

85. *Id.* at 116 (recognizing that violation of a regulatory or licensing statute is not a CIMT). The Third Circuit employs the least culpable conduct test to determine whether an offense satisfies the first step of the categorical approach.

86. *Id.* at 118.

87. Mohamed v. Holder, 769 F.3d 885, 886 (4th Cir. 2014). Specifically, Mr. Mohamed pled guilty to the sexual abuse of a seventeen-year-old girl "by force, threat, intimidation, [or] ruse." *Id.* (quoting VA. CODE ANN. § 18.2-67.4).

88. *Id.* at 887.

because he only committed one CIMT: sexual battery. The Fourth Circuit refused to classify Mr. Mohamed's failure to register in accordance with Virginia's sex offender registration statute as a CIMT because "a crime involving moral turpitude must involve conduct that not only violates a statute but *also independently* violates a moral norm."[89]

In *Plasencia-Ayala v. Mukasey*, Mr. Plasencia-Ayala, a Mexican native, had pled guilty to gross lewdness, which is a "gross misdemeanor" under Nevada law.[90] After Mr. Plasencia-Ayala served a nine-month jail sentence, the authorities discovered that he had not registered as a sex offender, as required by his conviction.[91] Though he subsequently pled guilty to failure to register as a sex offender, he stated at the removal hearing that he thought the authorities knew where he lived.[92] Mr. Plasencia-Ayala further explained that he believed he only needed to notify authorities if he moved.[93] The immigration judge and Board of Immigration Appeals determined that Mr. Plasencia-Ayala should be removed due to his convictions of two crimes involving moral turpitude, and both courts refused his application for cancellation of removal.[94] The Ninth Circuit overruled the BIA's decision. It reasoned that violation of the sex offender registration statute is not a CIMT because the statute does not require any willful or depraved conduct; rather, it is merely a strict liability offense.[95] The Ninth Circuit further noted that regulatory registration statutes are "not designed to serve traditional aims of punishment, deterrence, and retribution."[96]

Lastly, in *Efagene v. Holder*, a Nigerian native with lawful permanent residence status had pled guilty to a Colorado misdemeanor offense of sexual conduct lacking consent.[97] Like in *Plasencia-Ayala*, Mr. Francis Efagene served nearly a year in prison and later pled guilty for failure to register as a sex offender under a misdemeanor registration failure statute.[98] Predictably, the Department of Homeland Security brought removal proceedings against Mr. Efagene for

89. *Id.* at 888 (emphasis added).
90. Plasencia-Ayala v. Mukasey, 516 F.3d 738, 741 (9th Cir. 2008).
91. *Id.* at 742.
92. *Id.* Under NEV. REV. STAT. ANN. § 179D.550 (West 2008), the failure to register as a sex offender is a category D felony, which is punishable by a prison sentence of between one and five years. NEV. REV. STAT. ANN. § 193.130 (West 2020).
93. *Plasencia-Ayala*, 516 F.3d at 742.
94. *Id.* at 743.
95. *Id.* at 746–47.
96. *Id.* at 747 (quoting Nollette v. State, 46 P.3d 87, 91 (Nev. 2002)).
97. Efagene v. Holder, 642 F.3d 918, 920 (10th Cir. 2011).
98. *Id. Compare* COLO. REV. STAT. ANN. § 18-3-412.5(3)(a) (West 2020) (stating that failure to register as a sex offender is a class 1 misdemeanor if the underlying sexual offense was a misdemeanor), *with* NEV. REV. STAT. ANN. § 179D.550 (West 2008) (stating that failure to register as a sex offender is a category D felony).

conviction of two crimes involving moral turpitude.[99] The Tenth Circuit rejected the BIA's conclusion that failure to register as a sex offender is morally despicable because failure to register does not target a specific, identifiable victim.[100] To support this contention, the court shed light on the BIA's typical treatment of failure-to-report violations.[101] The Tenth Circuit refused to entertain the second step of the categorical approach (the modified categorical approach) because looking to the record of conviction is unnecessary when step one reveals that the statute in question does not require a reprehensible act or moral turpitude for conviction of the crime.[102]

B. The Eighth Circuit Split in *Bakor v. Barr*

In early 2020, the Eighth Circuit released an opinion, *Bakor v. Barr*, in direct contrast to the courts in *Totimeh*, *Mohamed*, *Plasencia-Ayala*, and *Efagene*. Mr. Tua Mene Lebie Bakor came to the United States as a refugee from Nigeria in 1999.[103] Two years after his entry, he was convicted of criminal sexual conduct in the fifth degree under Minnesota law.[104] It was not until 2015 that Mr. Bakor failed to comply with the sex offender registration requirements and consequently pled guilty to a knowing failure to register as a sex offender.[105] In accord with its practice of bringing removal proceedings against noncitizens who have been convicted of two crimes ostensibly involving moral turpitude, the Department of Homeland Security initiated removal proceedings against Mr. Bakor.[106]

Upon review, when determining whether the BIA erred in ordering Mr. Bakor's removal to Nigeria, the Eighth Circuit explained that it applies the realistic probability test in the first step of the categorical approach.[107] However, rather than look solely at the elements of the

99. *Efagene*, 642 F.3d at 920; *see also* 8 U.S.C. § 1227(a)(2)(A)(ii) (stating that conviction of two or more crimes involving moral turpitude can render an individual subject to removal).

100. *Efagene*, 642 F.3d at 923–24 (citing *Plasencia-Ayala*, 516 F.3d at 748) (echoing the Ninth Circuit's reasoning that failure to register is more akin to a failure to comply with a filing or licensing requirement, which is ultimately a regulatory offense).

101. *Id.* at 923 (citations omitted) ("The principle that regulatory crimes do not involve moral turpitude is not new to the BIA. As early as 1943, the BIA held a violation of a statute requiring liquor retailers to pay a tax was 'merely a revenue or licensing statute.'").

102. *Id.* at 926.

103. Bakor v. Barr, 958 F.3d 732, 734 (8th Cir. 2020).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 735 ("If the statute of conviction has a 'realistic probability' of covering conduct that falls outside the generic definition, then the conviction does not qualify categorically as grounds for removal under 8 U.S.C. § 1227(a)(2)(A)(ii).").

statute requiring sex offender registration, the Eighth Circuit deferred to the BIA's opinion in *In re Tobar-Lobo*, where the BIA held that "a willful failure to register by a sex offender who has been previously apprised of his obligation" is a CIMT.[108]

In *In re Tobar-Lobo*, the BIA opined that sex offender registration requirements flow from moral outrage regarding the underlying sex crime such that "the serious risk involved in a violation of the duty owed by this class of [sex] offenders to society" makes the knowing failure to register "inherently base or vile" behavior.[109] The Eighth Circuit concluded that the BIA's interpretation was reasonable because moral turpitude analysis involves "consideration of the danger that the crime poses to society at large."[110] Much of the court's analysis focused on deference to the BIA and the nature of Mr. Bakor's underlying offense that required him to register as a sex offender.[111]

The dissent in *Bakor v. Barr*, by contrast, underscored the importance of a strict application of the categorical approach's steps in determining whether a crime involves moral turpitude, rather than reliance on the BIA's decision in *In re Tobar-Lobo*.[112] The dissent also investigated the gravamen of Minnesota's sex offender registration statute and concluded that the statute is not punitive but seeks to as-

108. *Id.* at 737 (quoting *In re* Tobar-Lobo, 24 I. & N. Dec. 143, 146–47 (B.I.A. 2007)).

109. *Id.* (quoting *In re Tobar-Lobo*, 24 I. & N. Dec. at 146). *Contra* Plasencia-Ayala v. Mukasey, 516 F.3d 738, 748 (9th Cir. 2008) (noting that if breaching an important duty to society makes a crime one of moral turpitude, then virtually all crimes would involve moral turpitude because all crimes involve some violation of a duty to society); Kornegay & Lee, *supra* note 9, at 77 (explaining the Ninth and Tenth Circuits' refusal to apply *In re Tobar-Lobo*).

110. *Bakor*, 958 F.3d at 737. The Eighth Circuit recognized that administrative registration requirements carry different amounts of moral gravity, which is why some failures to register can involve moral turpitude when other failures to register do not involve moral turpitude. Importantly, the Eighth Circuit declined to adopt a bright line rule that a regulatory offense (like the failure to register) is per se not a CIMT. *Id.* at 738.

111. *But see Plasencia-Ayala*, 516 F.3d at 746 (refusing to defer to the BIA's decision in *In re Tobar-Lobo*); Efagene v. Holder, 642 F.3d 918, 922 (10th Cir. 2011) (refusing to defer to the BIA's decision in *In re Tobar-Lobo*); Totimeh v. Att'y Gen., 666 F.3d 109, 115 (3d Cir. 2012) (emphasizing that the BIA in *In re Tobar-Lobo* was unreasonable because if moral turpitude was involved in every breach of duty to society, the words "moral turpitude" would be meaningless and essentially render any noncitizen with two criminal convictions subject to removal under 8 U.S.C. § 1227(a)(2)(A)(ii)); Mohamed v. Holder, 769 F.3d 885, 889 (4th Cir. 2014) (refusing to defer to the BIA's interpretation of moral turpitude in *In re Tobar-Lobo*).

112. *Bakor*, 958 F.3d at 742 (Kelly, J., dissenting) ("The BIA's decision to the contrary is not entitled to deference because it is an unreasonable interpretation of federal law.").

sist law enforcement with investigations.[113] Above all, the dissent echoed the Third, Fourth, Ninth, and Tenth Circuits' analysis.

IV. THE EIGHTH CIRCUIT EMPLOYED AGENCY DEFERENCE AT THE EXPENSE OF A PRINCIPLED APPLICATION OF THE CATEGORICAL APPROACH

A. Agency Deference Is Not Always Appropriate

The Eighth Circuit's holding in *Bakor v. Barr* classifies the failure to register as a sex offender as a crime involving moral turpitude, and this conclusion primarily rests on the Eighth Circuit's reliance on the BIA's opinion in *In re Tobar-Lobo*.[114] Indeed, agency deference should be heeded by courts, but deference is only appropriate when the agency tasked with interpreting the relevant law reaches a "reasonable" interpretation.[115] The reasoning adopted in *In re Tobar-Lobo* should not be construed as a reasonable interpretation[116] because it ignores a principled application of the Eighth Circuit's own recitation of the categorical approach used to determine whether an offense is a CIMT.[117]

Interestingly, the BIA in *In re Tobar-Lobo* began its analysis by expounding the long-standing test for identifying whether a crime is a CIMT—the categorical approach.[118] However, when the BIA applied the test to determine whether the noncitizen's failure to register as a sex offender in California should be a CIMT, it drifted quite dramatically from the categorical approach's normal inquiry. The first step of the categorical approach looks to the elements of the crime (there, the failure to register as a sex offender) and then determines whether it inheres to "base, vile, or depraved" conduct.[119] Instead of looking solely at the statutory elements, the BIA stressed the importance of

113. *Id.* at 741 (citing Minnesota case law that describes the sex offender registration statute as regulatory and for the benefit of law enforcement, not for additional punishment).

114. *Id.* at 735 (majority opinion) (citing Chanmouny v. Ashcroft, 376 F.3d 810, 811 (8th Cir. 2004)) ("[W]e generally accord deference to the [BIA's] interpretation and uphold its construction as long as it is reasonable.").

115. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); *see also Bakor*, 958 F.3d at 741 (Kelly, J., dissenting) (reiterating when deference should be accorded to an administrative agency). Note that this discussion of reasonableness assumes that the term "crime involving moral turpitude" is vague in the statute since determining whether the agency's interpretation is reasonable is step two of the *Chevron* analysis. *See id.*

116. *See supra* note 111 and accompanying text (pointing to the numerous courts that rejected the BIA's conclusion in *In re Tobar-Lobo*).

117. *Bakor*, 958 F.3d at 735 (majority opinion) (stating that the Eighth Circuit applies the "so-called categorical approach" when reviewing a BIA decision).

118. *In re* Tobar-Lobo, 24 I. & N. Dec. 142, 144 (B.I.A. 2007).

119. *E.g.*, *Bakor*, 958 F.3d at 735.

contemporary moral standards in the CIMT analysis.[120] In its reliance on contemporary moral standards, the BIA divined that because sex crimes—especially those perpetrated against children—trigger the need for sex offender registration statutes, any violation of such statute is inherently base or vile.[121]

The dissent countered by noting that the failure to register may not be a "willful" failure but rather a result of forgetfulness.[122] The BIA's majority dismissed this argument because some obligations, namely registering as a sex offender, "are simply too important not to heed."[123] The majority further supported the proposition that a regulatory offense, like the failure to register as a sex offender, may nevertheless be a CIMT by pointing to a Ninth Circuit case, *Hernandez-Martinez v. Ashcroft*,[124] in which the court implicitly found that "the regulatory offense of driving while under the influence" is a CIMT.[125] "The court deemed such conduct, which similarly creates a danger to others and may not involve a consciously evil intent because of the offender's drunkenness, to be 'despicable.'"[126] Thus, the BIA concluded that the regulatory nature of a crime does not preclude it from qualifying as a CIMT.

The BIA also noted other statutory crimes that encompass moral turpitude: "Offenses such as statutory rape, child abuse, and spousal abuse have been considered to be categorically turpitudinous crimes."[127] Each of the preceding examples of statutory crimes described as being "categorically turpitudinous" sharply diverges from the crime of failing to register as a sex offender because statutory rape, child abuse, and spousal abuse statutes are specifically intended to protect vulnerable individuals who are the direct victims of violations of those statutes.[128]

120. *In re Tobar-Lobo*, 24 I. & N. Dec. at 145.
121. *Id.* at 146 ("Given the serious risk involved in a violation of the duty owed by this class of offenders to society, we find that the crime is inherently base or vile and therefore meets the criteria for a crime involving moral turpitude.").
122. The scienter or culpability element typically required for a crime to involve moral turpitude was overlooked by the BIA in *In re Tobar-Lobo* because the Board's concern was steeped in its negative association with the underlying sex offense requiring registration. *Accord* Plasencia-Ayala v. Mukasey, 516 F.3d 738, 748 (9th Cir. 2008).
123. *In re Tobar-Lobo*, 24 I. & N. Dec. at 146 ("[E]ven if 'forgotten,' an offense based on a failure to fulfill the offender's duty to register contravenes social mores to such an extent that it is appropriately deemed turpitudinous.").
124. Hernandez-Martinez v. Ashcroft, 329 F.3d 1117 (9th Cir. 2003).
125. *In re Tobar-Lobo*, 24 I. & N. Dec. at 147.
126. *Id.* (quoting *Hernandez-Martinez*, 329 F.3d at 1119).
127. *Id.* at 145; *see, e.g.*, Grageda v. INS, 12 F.3d 919, 921 (9th Cir. 1993) (spousal abuse); Guerrero de Nodahl v. INS, 407 F.2d 1405, 1406–07 (9th Cir. 1969) (child abuse); Bendel v. Nagle, 17 F.2d 719, 720 (9th Cir. 1927) (statutory rape).
128. *See* Plasencia-Ayala v. Mukasey, 516 F.3d 738, 748 (9th Cir. 2008). The Ninth Circuit's refusal in *Plasencia-Ayala* to adopt the BIA's decision in *In re Tobar-*

Conversely, a conviction under a failure-to-register statute does not require a showing of an intent to cause harm or an intent to act deviously.[129] The BIA in *In re Tobar-Lobo* was likely correct when it asserted that community members have increasing disdain for sexual perpetrators, which is why the conviction for the underlying sex crime is indisputably a crime involving moral turpitude.[130] However, the BIA missed the point when it conflated the depravity and baseness associated with the underlying sexual offense to the alleged baseness associated with the registration requirements.

B. The Eighth Circuit Should Have Ascertained on Its Own Whether Bakor Committed a Crime Involving Moral Turpitude

Because the BIA failed to appropriately apply the categorical approach in *In re Tobar-Lobo*, the Eighth Circuit should have refused to defer to the BIA in *Bakor v. Barr*.[131] Instead, the Eighth Circuit should have executed the categorical approach independently.

In doing so, the Eighth Circuit would first apply the traditional categorical approach and look at the statutory elements of Minnesota's sex offender registration statute at issue.[132] Under Minnesota's relevant sex offender registration law, "[a] person required to register under this section who was given notice, knows, or reasonably should know of the duty to register and who: (1) knowingly commits an act *or* fails to fulfill a requirement that violates any provision of this section" is guilty of a crime.[133]

Looking solely at the elements, Mr. Bakor could have either *knowingly* failed to register or he could have merely failed to register after having been informed of the requirement at an earlier time.[134] At this

---

Lobo is significant because most of the legal authority cited in *In re Tobar-Lobo* is Ninth Circuit precedent. As such, the Ninth Circuit explains in *Plasencia-Ayala* how the BIA conflates the intent behind statutory rape and sex offender registration statutes when the statutes actually serve distinct purposes.

129. *Id.* ("Registration statutes can serve important purposes by helping to prevent future sex crimes, and assisting law enforcement in apprehending recidivist offenders. But registration is not itself a socially desirable good.").

130. *Id.*

131. Agency deference is appropriate when "an agency has taken a careful look at the general legal issue and has adopted a reasonably consistent approach to it." Mata-Guerrero v. Holder, 627 F.3d 256, 259 (7th Cir. 2010). As discussed in this section, the agency (the BIA) in *In re Tobar-Lobo* set aside established principles of CIMT analysis when it applied the categorical approach to Mr. Tobar-Lobo's situation. The approach was inconsistent with the BIA's longstanding principle that regulatory or licensing violations are not crimes involving moral turpitude. *See* Efagene v. Holder, 642 F.3d 918, 923 (10th Cir. 2011).

132. *See supra* subsection II.C.1.

133. MINN. STAT. ANN. § 243.166, subdiv. 5(a) (2015) (emphasis added).

134. *See id.*

stage of the inquiry, it would be irrelevant whether or not Mr. Bakor had a willful intent not to register because the traditional categorical approach looks at the nature of the crime, not at the individual noncitizen's situation.[135] Under the traditional categorical approach, the Minnesota statute's elements and nature would not deem the failure to register a CIMT because there can be a scenario in which a person fails to register without scienter (willful intent) and receives a conviction nonetheless.[136]

Next, assuming that step one of the categorical approach is unable to answer whether all elements that result in a conviction for the failure to register as a sex offender involve moral turpitude, the Eighth Circuit in *Bakor v. Barr* could have proceeded to the next step, the modified categorical approach.[137] Rather than defer to the BIA's decision in *In re Tobar-Lobo*, which relied on society's moral views on sex offender registrations, the *Bakor* court would have been able to look at Mr. Bakor's record of conviction and learn why he, specifically, failed to register in accordance with Minnesota's sex offender laws.[138] At this point, if the record of conviction showed that Mr. Bakor failed to register as a sex offender because he forgot or because he thought the authorities already knew where he lived, then his record would demonstrate that his conviction lacked moral turpitude.

Finally, whereas the Eighth Circuit opted to defer to the BIA's decision in *In re Tobar-Lobo*, it could have reconsidered Mr. Bakor's decision en banc.[139] A rehearing en banc would have allowed every Eighth Circuit judge (as opposed to a panel of three judges) to hear the case

135. *See* Taylor v. United States, 495 U.S. 575, 600 (1990) ("[The statute] mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions."). When the Supreme Court solidified this traditional categorical step in *Taylor*, it was with respect to sentencing for violent felonies. Later, this standard permeated the immigration context generally and finally entered the context of identifying whether a crime involves moral turpitude. *See* Dadhania, *supra* note 25, at 325 n.64 (charting the evolution of the traditional categorical approach's usage with respect to crimes involving moral turpitude).

136. *E.g.*, *Efagene*, 642 F.3d at 921 ("Under the categorical approach, [the Tenth Circuit] looks only to the statutory definition of the offense and not to the underlying facts of the conviction to determine whether the offense involves moral turpitude." (citing *Taylor*, 495 U.S. at 600)).

137. *See* Dadhania, *supra* note 25, at 324 (explaining that when the first step of the categorical approach is inconclusive, the court should proceed to the second step and look to the noncitizen's record of conviction).

138. To follow each step of the categorical approach, the court would (1) evaluate the statutory elements of failure to register as a sex offender to see if every possible conviction would necessarily involve moral turpitude; and (2) if step one resulted in an ambiguous answer, look to the noncitizen's record of conviction to see if the offense at issue involved moral turpitude. *See* discussion *supra* section II.C.

139. Bakor v. Barr, 958 F.3d 732 (8th Cir.), *en banc reh'g denied*, No. 18-3011, 2020 U.S. App. LEXIS 23898 (8th Cir. May 7, 2020), *cert. denied sub nom.* Bakor v. Garland, 141 S. Ct. 2566 (2021).

and fully consider its merits in light of the circuit split and other courts' approaches to the question. Recalling Juan's plight from Part I, it is important to note that he resides within the Eighth Circuit's jurisdiction. His fate, like Mr. Bakor's, will likely be removal back to a country in which he has not lived for years once the Department of Homeland Security realizes that he pled guilty to failing to register as a sex offender.

C. Courts Should Adopt a Per Se Rule that Failure To Register as a Sex Offender Is Not a Crime Involving Moral Turpitude

Interpreting and applying a concept that is already rife with ambiguities and subjectivities—like the CIMT—are heavy burdens to place on immigration judges and federal judges.[140] Due to the inconsistent outcomes for similarly situated noncitizens, the courts should adopt a per se rule. Under a per se rule, the crime of failure to register as a sex offender would join other specific offenses (like fraud)[141] for which courts know exactly how to apply the CIMT analysis. Failure to register as a sex offender would categorically *not* be a crime involving moral turpitude. Instead, the crime would be treated in the same manner as any other regulatory, administrative, or licensing violation.[142]

Mechanically, a per se rule could be achieved through a few different avenues. Since the Supreme Court denied Mr. Bakor's petition for certiorari in 2021, other circuit courts of appeals could side with the Eighth Circuit, creating a more significant circuit split. If this happens, affected noncitizens could try to petition the Supreme Court again. This would allow the Supreme Court to settle definitively

140. *E.g.*, *In re* Lopez-Meza, 22 I. & N. Dec. 1188, 1191 (B.I.A. 1999) ("[B]oth the courts and this Board [of Immigration Appeals] have referred to moral turpitude as a 'nebulous concept' with ample room for differing definitions of the term."); Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 273–74 (2001) ("Similarly, arbitrary enforcement [of CIMTs] raises concerns that a protected group may be the target for discriminatory enforcement. . . . [T]he Supreme Court uses the 'vagueness' doctrine to create 'an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms.'" (footnote omitted) (quoting Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960))).

141. *See* Holper, *supra* note 12, at 701 ("[T]he term aggravated felony already largely encompasses the 'easy' CIMT cases: fraud, theft, aggravated assaults, and many sexual offenses are likely to be classified as aggravated felonies, if the term of imprisonment or loss to the victim also meets the statutory requirement." (footnotes omitted)).

142. *See, e.g.*, Efagene v. Holder, 642 F.3d 918, 923 (10th Cir. 2011) (reiterating the BIA's view that a violation of a regulatory requirement is not a crime involving moral turpitude).

whether the failure to register as a sex offender qualifies as a crime involving moral turpitude. Another option would be for the BIA to vacate its holding in *In re Tobar-Lobo* and hold that the failure to register as a sex offender is not a crime involving moral turpitude. While this would only mean that the agency changed its position on the question, the Eighth Circuit would likely follow suit in the future in an effort to defer to the new agency decision.[143]

V. CONCLUSION

The individuals who will be most harmed by the Eighth Circuit's holding that the failure to register as a sex offender is a CIMT include vulnerable noncitizens. Juan, like many noncitizens, has spent more time in the United States than in his native country, but nevertheless, he will likely become another CIMT casualty. When adjudicators are able to cast a regulatory violation as a CIMT, they transcend their role as guardians of the law and become policymakers who inculcate their moral preferences into actual law. In strictly applying the categorical approach, courts should categorize the failure to register as a sex offender as not constituting a CIMT under a per se rule.

The puzzling term "moral turpitude" and its ability to subject a noncitizen to exile in a different and potentially dangerous country illustrates the phrase's immense power.[144] A term that attends this much power deserves particular care and consistency in its legal application. As such, using the phrase liberally to condemn every breach of social duty may be morally turpitudinous itself. Judge Posner once explained: "The concept of moral turpitude, in all its vagueness, rife with contradiction, a fossil, an embarrassment to a modern legal system, continues to do its dirty work."[145] Admittedly, it may be impossible to eliminate "moral turpitude" from the statutes in which Congress included it, but the expression's potential for damage can be attenuated through narrow and limited application in immigration law.

143. In *Bakor v. Barr*, the Eighth Circuit's attempt to pay fidelity to the Board of Immigration Appeals—the agency tasked with interpreting and adjudicating immigration law—suggests that if the Board changed its position, so would the Eight Circuit. *Cf. Bakor*, 958 F.3d at 738 ("[W]e are satisfied that the Board [of Immigration Appeals] permissibly classified a knowing failure to comply as morally turpitudinous.").

144. *See supra* notes 20–23 and accompanying text (cautioning against the use of CIMT analysis in deportation cases).

145. Arias v. Lynch, 834 F.3d 823, 835 (7th Cir. 2016) (Posner, J., concurring).