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Renewing the Vagueness Challenge to Crimes Involving Moral Turpitude

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RENEWING THE VAGUENESS CHALLENGE TO CRIMES INVOLVING MORAL TURPITUDE

Melissa London*

Abstract: Noncitizens who have been convicted of a "crime involving moral turpitude" (CIMT) under the Immigration and Nationality Act (INA) can be deported. However, the INA fails to provide a definition for "moral turpitude" or a list of crimes that necessarily involve "moral turpitude." As a result, judges are given wide discretion to decide when a crime is morally reprehensible enough to render a noncitizen deportable. This moral determination in the CIMT analysis has led to disparate results among the lower courts, which deprives noncitizens of meaningful notice of what conduct could render them deportable. In 1951, the Supreme Court held in *Jordan v. De George* that the phrase "crimes involving moral turpitude" was not unconstitutionally vague. This decision left the moral turpitude provisions intact in the INA, though still undefined.

While the *Jordan* decision remains untouched, the CIMT analysis has drastically evolved. Under the current framework, judges across the country reach disparate results on whether certain crimes necessarily involve moral turpitude, and noncitizens pay the price of the ensuing arbitrary results. Regulatory crimes pose particular difficulties in applying the current CIMT analysis. Even though some courts have reasoned regulatory crimes are typically not crimes involving moral turpitude, other courts have held the opposite. This discrepancy is notable with respect to a recent circuit split over whether failure to register as a sex offender is a CIMT. The revival and expansion of the void-for-vagueness doctrine and the increasing uncertainty over CIMT analysis—shown chiefly through sex offender registration statutes—creates an opportunity to revisit the vagueness challenge to the CIMT provision in the INA seventy years since it was first heard by the Court. Accordingly, the current framework for analyzing whether a crime involves moral turpitude under the INA should be rendered void-for-vagueness under the Due Process Clause.

INTRODUCTION

The United States immigration system is a complex scheme that is unlike any other area of the law because it blurs the line between civil proceedings and criminal punishments. As a sovereign nation, the United States has the power to choose who it lets into the country and under what circumstances.[1] This power is reserved to Congress as the primary

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1. *See, e.g.*, Ekiu v. United States, 142 U.S. 651 (1892) (holding that Congress determines how

regulator of the immigration system.[2] Congress's power is plenary, meaning its decisions are often final and outside the scope of judicial review.[3] The primary way Congress regulates immigration is through the Immigration and Nationality Act (INA).[4] Since its enactment in 1952, the INA has evolved through amendments and changes in United States immigration policy.[5]

While commentators point to many problematic provisions in the INA, one that continues to perplex legal scholars and judges alike is the codification of "crime involving moral turpitude"[6] (CIMT).[7] Although this phrase has been around for over a century, it has never been formally defined by either Congress or the courts.[8] A noncitizen[9] may be deported

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much process is due for individuals subject to exclusion from the United States); Fong v. United States, 149 U.S. 698, 708 (1893) (finding that allowing a "foreigner" into the United States is a "matter of pure permission, of simple tolerance, and creates no obligation").

2. *Compare* Marbury v. Madison, 5 U.S. 137 (1803) (establishing the doctrine of judicial review as part of the judicial branch), *with* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889) (establishing the plenary power doctrine, which protects Congress's immigration decisions from judicial review).

3. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 416 (1948) ("The authority to control immigration—to admit or exclude [noncitizens]—is vested solely in the Federal Government.") (quoting Truax v. Raich, 239 U.S. 33, 42 (1915)). Scholars have expounded on the uniqueness of plenary power over immigration law. For a more in-depth analysis, see generally David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015); Hiroshimi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992), *reprinted in* 14 IMMIGR. & NAT'Y L. REV. 3 (1992); and Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

4. Pub. L. No. 82-414, 66 Stat. 153 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537); *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act [https://perma.cc/2DG8-4ZMJ].

5. Many of the grounds of inadmissibility and deportability in the INA have been frequently amended with new categories based on which groups of people Congress intended to exclude at different points in history. *See Legislation*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy/legislation [https://perma.cc/8D94-YXP8] ("Congress has amended the INA many times based on new public laws.").

6. 8 U.S.C. § 1227(a)(2)(A)(i).

7. DAVID WEISSBRODT, LAURA DANIELSON & HOWARD S. MYERS, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 267 (7th ed. 2017) ("Although the term has been used in immigration law since 1891, possibly the most difficult criminal ground to define is the 'crime involving moral turpitude.'"); *see also* Craig S. Lerner, *"Crimes Involving Moral Turpitude": The Constitutional and Persistent Immigration Law Doctrine*, 44 HARV. J.L. & PUB. POL'Y 71 (2021).

8. *See infra* section I.B.

9. This Comment uses the term "noncitizen" rather than "alien," which is the term that appears in the INA. Recently, President Joe Biden proposed an immigration reform bill that would remove the term "alien" from U.S. immigration laws, replacing it with "noncitizen" in an effort to move away from the dehumanizing term. *See* Nicole Acevedo, *Biden Seeks to Replace 'Alien' with Less 'Dehumanizing Term' in Immigration Laws*, NBC NEWS (Jan. 22, 2021, 12:34 PM),

if an immigration judge determines the crime they committed involves moral turpitude,[10] without regard for the noncitizen's actual conduct.[11] Offenses that have been considered CIMTs range from passing a bad check[12] to murder.[13]

Even though it is essential to provide noncitizens with notice of what conduct could be considered a CIMT, the current framework for evaluating whether a crime involves moral turpitude does not lead to uniform results. Judges must decide whether a crime is a CIMT without a clear definition to follow, which permits their personal and moral beliefs to influence the outcome. This leads to disparate results.

The Board of Immigration Appeals (BIA) attempted to create uniformity across the courts via a framework for lower courts to use in determining whether a crime constitutes a CIMT under the INA.[14] However, this Comment argues the framework ultimately enables arbitrary enforcement of the INA's CIMT provisions and fails to meaningfully warn noncitizens of what conduct could render them deportable.

This arbitrary enforcement and lack of notice leads some judges and legal scholars to suggest the CIMT provisions are unconstitutional under the void-for-vagueness doctrine.[15] The concept of vagueness is derived from the Due Process Clause[16] of the United States Constitution and requires statutes to provide fair notice in order to avoid arbitrary enforcement of the laws.[17] The Supreme Court previously weighed in on

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https://www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350 [https://perma.cc/RFD5-283E].

10. *See* 8 U.S.C. §§ 1227(a)(2)(A)(i)(I)–(II).

11. *See* Jennifer Lee Koh, *Crimmigration Beyond the Headlines: The Board of Immigration Appeals' Quiet Expansion of the Meaning of Moral Turpitude*, 71 STAN. L. REV. ONLINE 267, 267 (2019) [hereinafter Koh, *Crimmigration Beyond the Headlines*].

12. *See* Dolic v. Barr, 916 F.3d 680 (8th Cir. 2019).

13. *See* United States v. Nunez-Garcia, 262 F. Supp. 2d 1073 (C.D. Cal. 2003).

14. *See infra* Part II.

15. *See, e.g.*, Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647 (2012) (arguing that the CIMT provision in the INA is unconstitutionally vague and should be replaced by a clear definition from Congress); Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1004–05 ("The few scholarly articles on the [CIMT] standard, almost all in immigration law, have argued, in agreement, that it is unconstitutionally vague and invites inconsistent and unpredictable judgments."); Jordan v. De George, 341 U.S. 223, 232 (1951) (Jackson, J., dissenting) (criticizing the phrase "moral turpitude" because it had "no sufficiently definite meaning to be a constitutional standard for deportation").

16. *See* U.S. CONST. amend. V.

17. *See* Roger A. Fairfax & John C. Harrison, *The Fifth Amendment Due Process Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-v/clauses/633 [https://perma.cc/VE3Y-BZAA].

a vagueness challenge to CIMTs in 1951 in *Jordan v. De George*.[18] In that case, the Court held the phrase "crime involving moral turpitude" was not unconstitutionally vague.[19] The majority reasoned that even if it is difficult to determine whether "certain marginal offenses" are CIMTs, that "does not automatically render a statute unconstitutional . . . ."[20]

Although the CIMT framework has evolved over the last seventy years since *Jordan*, the same critiques of the phrase "crimes involving moral turpitude" exist: the current CIMT framework continues to enable arbitrary enforcement by permitting judges to make moral determinations, thus failing to provide notice to noncitizens contrary to the requirements of the Due Process Clause.[21] However, the Supreme Court appears to be expanding the void-for-vagueness doctrine as shown through three recent decisions.[22] This expansion could allow for a renewed vagueness challenge notwithstanding the *Jordan* decision. Challenging the CIMT provisions is important given the clearly unpredictable nature of the current CIMT analysis.[23]

This Comment proceeds in five parts. Part I provides a brief overview of the immigration system, focusing on the treatment of noncitizens in removal proceedings and evaluating the differences in procedural safeguards afforded to defendants in criminal proceedings versus respondents in immigration proceedings. This Part also introduces the CIMT provisions and discusses issues in defining "moral turpitude." Part II outlines the history of the CIMT analysis, including the BIA's attempt at creating a uniform framework through three decisions: *Silva-Trevino I*,[24] *Silva-Trevino II*,[25] and *Silva-Trevino III*.[26] Part III discusses the impact of the current CIMT framework set forth in *Silva-Trevino III*. Part III also introduces a circuit split regarding sex offender registration statutes to further emphasize the difficulties of applying the CIMT analysis due to the influence of moral judgments. Part IV provides a brief primer on the void-for-vagueness doctrine, which forms the basis of the solution ultimately posed in this Comment, and summarizes a recent expansion of the void-for-vagueness doctrine in three Supreme Court

18. 341 U.S. 223 (1951).

19. *Id.* at 231–32.

20. *Id.* at 231.

21. *See* Fairfax & Harrison, *supra* note 17.

22. *See infra* section IV.C.

23. *See infra* Part III.

24. 24 I. & N. Dec. 687 (Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Att'y Gen. 2015).

25. 742 F.3d 197 (5th Cir. 2014).

26. 26 I. & N. Dec. 826 (B.I.A. 2016).

cases: *Johnson v. United States*,[27] *Sessions v. Dimaya*,[28] and *United States v. Davis*.[29] Finally, Part V sets forth a renewed vagueness challenge in light of the current difficulty of applying the CIMT framework and the Court's purported expansion of the void-for-vagueness doctrine. Challenging the CIMT framework as void-for-vagueness is necessary to curb the unpredictable and disparate effect on noncitizens.

I. THE TREATMENT OF NONCITIZENS WITHIN THE IMMIGRATION SYSTEM

Immigration law is uniquely situated in between civil and criminal law in many respects. This overlap between the civil and criminal systems is considered by legal scholars to be the "criminalization of immigration law,"[30] often referred to as "crimmigration."[31] This Comment focuses on one particular point of intersection between the two systems: removal of noncitizens. For purposes of this Comment, the term "noncitizen" refers to individuals who were properly admitted into the country but have been alleged to have committed a crime involving moral turpitude (CIMT), which is a deportable offense.[32] However, the INA does not define what constitutes a CIMT, so courts are left to sort out the definition on their own. Moreover, a noncitizen alleged to have committed a CIMT lacks many of the procedural safeguards afforded to defendants in criminal proceedings because immigration proceedings are civil.[33]

A. Removal Proceedings

Congress has the power to regulate immigration,[34] which includes not

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27. 576 U.S. 591 (2015).

28. __ U.S. __,138 S. Ct. 1204 (2018).

29. __ U.S. __,139 S. Ct. 2319 (2019).

30. Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 616 (2003).

31. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 378 (2006).

32. *See* 8 U.S.C. § 1227(a)(2)(A)(i). There are many other grounds of deportation listed in the INA. *See id.* § 1227(a)(2) (listing the criminal offenses that can render a noncitizen deportable). This Comment focuses only on the provisions regarding crimes involving moral turpitude.

33. *See generally Two Systems of Justice*, AM. IMMIGR. COUNCIL (Mar. 2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf [https://perma.cc/5SZ7-RQD7] [hereinafter *Two Systems of Justice*].

34. *See* U.S. CONST. art. I, § 8 ("Congress shall have Power to . . . establish [a] uniform Rule of Naturalization . . . ."); *Chapter 3: USCIS Authority to Naturalize*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual/volume-12-part-a-chapter-3 [https://perma.cc/J38E-MFRM].

only deciding the classes of people permitted to enter the country, but also the circumstances under which people are no longer allowed to stay in the country.[35] Pursuant to its authority under the INA, Congress set forth numerous grounds of deportability that can trigger removal proceedings.[36] Removal proceedings are used to determine "the inadmissibility or deportability of [a noncitizen]."[37] The Executive Office for Immigration Review (EOIR) oversees these proceedings.[38] The EOIR comprises fifty-eight administrative immigration courts and the Board of Immigration Appeals (BIA).[39] The BIA is "the highest administrative body for interpreting and applying immigration laws."[40]

Once the government believes a noncitizen may be deportable,[41] they are issued a "Notice to Appear," which initiates removal proceedings.[42] They are then referred to an immigration judge.[43] The immigration judge has full discretion to determine whether the noncitizen is removable based

35. *See* Fong v. United States, 149 U.S. 698, 711 (1893) ("The right to exclude or to expel all [noncitizens], or any class of [noncitizens] . . . being an inherent and inalienable right of every sovereign and independent nation . . . .").

36. *See* 8 U.S.C. § 1229a(a)(2) ("[A noncitizen] placed in proceedings under this section may be charged with any applicable . . . ground of deportability under section 1227(a) of this title."); *see also id.* § 1227.

37. *Id.* § 1229a(a)(1). Prior to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, removal proceedings were triggered based on whether a person had entered the country or not. If a noncitizen had not entered the country, then they were subject to exclusion, whereas a noncitizen who entered the country was subject to deportation. Now, both processes are encompassed by removal proceedings, but rather than focusing on entry, the inquiry instead hinges on admission. WEISSBRODT ET AL., *supra* note 7, at 267; *see also* 8 U.S.C. § 1101(a)(13)(A) ("The terms 'admission' and 'admitted' mean, with respect to [a noncitizen], the lawful entry of the [noncitizen] into the United States after inspection and authorization by an immigration officer.").

38. *See* HILLEL R. SMITH, CONG. RSCH. SERV., LSB10150, IMMIGRATION LAWS REGULATING THE ADMISSION AND EXCLUSION OF ALIENS AT THE BORDER 1 (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10150 (last visited May 1, 2022).

39. *Chapter 3: The Immigration Court System*, KIDS IN NEEDS OF DEFENSE, https://supportkind.org/wp-content/uploads/2015/04/Chapter-3-The-Immigration-Court-System.pdf [https://perma.cc/6VTM-NDAB].

40. *Board of Immigration Appeals*, U.S. DEP'T OF JUST. (Dec. 7, 2020), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/T9E2-QRY8].

41. *See* 8 U.S.C. § 1227(a).

42. *Executive Office for Immigration Review: An Agency Guide*, U.S. DEP'T OF JUST. 2 (Dec. 2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download [https://perma.cc/NM4A-GXGL]; *see also* 8 U.S.C. § 1229(a)(1) ("In removal proceedings under section 1229a of this title, written notice (in this section referred to as a 'notice to appear') shall be given in person to the [noncitizen] . . . .").

43. 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of [a noncitizen]."); Colleen Muñoz, *Reevaluating the Adjudication of Crimes Involving Moral Turpitude*, 24 LEWIS & CLARK L. REV. 325, 336 (2020).

on the evidence presented at the hearing.[44] The noncitizen may appeal the ruling to the BIA.[45] If the BIA issues the noncitizen a final order of removal, they can appeal again through a petition for review in a federal court of appeals in the circuit where their case was originally filed.[46]

Even when a case is appealed to a circuit court, the BIA's prior published decisions will have precedential value if they are designated as such. [47] Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[48] an administrative body's decision must be followed unless it is "arbitrary, capricious, or manifestly contrary to the statute."[49] In the context of immigration law, the Supreme Court determined that "the BIA is entitled to deference in interpreting ambiguous provisions of the INA."[50] The Court reasoned that because Congress charged the Attorney General with administering the INA, and the Attorney General in turn delegated the power to determine cases to the BIA, "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'"[51] Therefore, when a noncitizen's conviction is evaluated under the CIMT analysis, the court will first look to decisions from the BIA to see whether the conduct at issue had been previously ruled on.[52] This differs from other areas of the law where federal courts need only defer to Supreme Court

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44. 8 U.S.C. § 1229a(c)(1)(A). Additionally, the immigration judge is not constrained by any evidentiary barriers because the rules of evidence do not apply to removal proceedings. *See Two Systems of Justice*, *supra* note 33, at 7.

45. *See* 8 C.F.R. § 1003.1(b) (2022); *Fact Sheet: Immigration Courts*, NAT'L IMMIGR. F. (Aug. 7, 2018), https://immigrationforum.org/article/fact-sheet-immigration-courts/ [https://perma.cc/G7FQ-KS9R].

46. *Fact Sheet: Immigration Courts*, *supra* note 45.

47. 8 C.F.R. § 1003.1(g) (2022); *see also* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 505 (2018).

48. 467 U.S. 837 (1984).

49. *Id.* at 844. Federal courts follow a two-step process to determine whether the agency's decision is entitled to deference. First, the court looks to the plain language of the statute to determine whether it is ambiguous. *Id.* at 842–43. If the language is deemed ambiguous, then the court must determine whether the agency's decision was arbitrary or capricious. *Id.* at 843–44. So long as the agency's interpretation is reasonable and based "on a permissible construction of the statute," the court must defer to the agency's interpretation. *Id.* at 843; *see* Jennifer Safstrom, *An Analysis of the Applications and Implications of* Chevron *Deference in Immigration*, 34 GEO. IMMIGR. L.J. 53, 54 (2019).

50. Negusie v. Holder, 555 U.S. 511, 516 (2009). However, there is an ongoing debate among scholars about whether *Chevron* deference does and should apply in the immigration context. *See, e.g.*, Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021) (discussing the debate over *Chevron* deference in immigration law).

51. *Negusie*, 555 U.S. at 517 (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)).

52. Muñoz, *supra* note 43, at 337.

decisions.[53]

Removal proceedings seek to remove two types of individuals: (1) those who were not properly admitted into the country and are therefore inadmissible;[54] and (2) those who were properly admitted into the country but have since committed a deportable offense.[55] This Comment focuses only on the latter category of individuals who were properly admitted into the country but became removable upon committing a deportable offense—specifically by violating one of the CIMT provisions.

Even if a noncitizen is authorized to live in the United States—for example, as a lawful permanent resident (LPR)—they can still be deported.[56] LPRs are potentially subject to removal proceedings because they are not United States citizens.[57] Thus, even after going through the onerous process of becoming an LPR and obtaining a green card[58] with the intent to remain in the United States permanently, LPRs can be subject to deportation if they are found to have committed a deportable offense.[59] Under the INA, the listed grounds of deportability are not subject to statute of limitations.[60] To avoid the possibility of deportation, noncitizens can apply for naturalization under the INA to become United States citizens.[61]

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53. *See, e.g.*, Henderson v. Collins, 262 F.3d 615, 623 (6th Cir. 2001) (explaining that the court is bound by decisions from the Supreme Court of the United States and must defer to its prior decisions unless there are "material distinctions").

54. Individuals can be deemed inadmissible for a variety of reasons, such as entering without inspection or not having the correct documentation when attempting to cross at a border. *See EWI: Entry Without Inspection*, FINDLAW (May 14, 2020), https://www.findlaw.com/immigration/deportation-removal/ewi-entry-without-inspection.html [https://perma.cc/4DLC-999C]; 8 U.S.C. § 1182(a)(7)(A)(i); *see also* 8 U.S.C. § 1225(b)(1)(A)(i) (explaining expedited removal).

55. Both of these categories fall under the same removal proceedings. *See* 8 U.S.C. § 1227.

56. *Lawful Permanent Residents (LPR)*, U.S. DEP'T OF HOMELAND SEC. (Oct. 22, 2020), https://www.dhs.gov/immigration-statistics/lawful-permanent-residents [https://perma.cc/J8MC-2Y8V] [hereinafter *Lawful Permanent Residents*].

57. *See id.*; *Cancellation of Removal*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/cancellation_of_removal [https://perma.cc/U5C7-YPHZ]

58. *Lawful Permanent Residents*, *supra* note 56.

59. *See* 8 U.S.C. § 1227.

60. *See Two Systems of Justice*, *supra* note 33, at 3.

61. *See* 8 U.S.C. § 1427 (detailing the requirements for naturalization). It is important to note that the process of applying for naturalization may in and of itself be the trigger for deportation proceedings if it is discovered in the background review that the noncitizen committed a deportable offense. *See* Ilona Bray, *Risks of Applying for Naturalized U.S. Citizenship: Denial or Even Deportation*, NOLO, https://www.nolo.com/legal-encyclopedia/who-should-not-apply-naturalized-us-citizenship-without-talking-lawyer.html [https://perma.cc/N3MF-6ACK]. Even after being naturalized, a noncitizen could be denaturalized for either "illegal procurement of naturalization" or procuring naturalization by "concealing a material fact or by willful misrepresentation." *See Fact Sheet on Denaturalization*, NAT'L IMMIGR. F. (Oct. 2, 2018),

If a noncitizen meets certain eligibility requirements[62] they can become a United States citizen and cannot thereafter be removed from the country.[63]

Congress codified the list of deportable offenses in section 237 of the INA.[64] For example, committing marriage fraud or being convicted of an aggravated felony are deportable offenses.[65] If a court finds a noncitizen committed a deportable offense during removal proceedings,[66] they are subject to deportation and can be barred from reentering the United States.[67]

Because immigration law is civil, removal proceedings are characterized as civil proceedings. [68] This can be counterintuitive given that removal proceedings are often triggered by the alleged criminal conduct of a noncitizen. Nevertheless, in the 1893 decision of *Fong v. United States*,[69] the Supreme Court determined that deportation is a civil sanction rather than a criminal punishment.[70] At the time of that decision, the process of deporting a noncitizen was thought to be more of an administrative mechanism by which a person is returned to their native country.[71] However, this theory of deportation was not unanimously accepted. Justice Brewer dissented in *Fong*, arguing that deportation "deprives [noncitizens] of liberty, and imposes punishment, without due process of law, and in disregard of constitutional guaranties."[72]

Justice Brewer's dissent gained traction in the following decades. Nearly a half century later, a majority opinion restated the notion that

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https://immigrationforum.org/article/fact-sheet-on-denaturalization/ [https://perma.cc/HBN2-FNQF]. If a noncitizen was naturalized and later denaturalized, they could theoretically be removed if required under the INA. *Id.*

62. *See generally* 8 U.S.C. § 316.2.

63. *Lawful Permanent Residents*, *supra* note 56. However, it is theoretically possible for a person to be denaturalized.

64. *See* 8 U.S.C. § 1227.

65. *See id.* §§ 1227(a)(1)(G), (a)(2)(A)(iii).

66. *See id.* § 1229a(a).

67. *See Can You Return to the U.S. After Being Deported?*, ALLLAW, https://www.alllaw.com/articles/nolo/us-immigration/can-you-return-after-being-deported.html [https://perma.cc/9DHD-PH72]. The bar on reentry for a noncitizen that has been deported can last as few as five years up to a permanent bar on ever being able to reenter the country. *Id.*

68. *Two Systems of Justice*, *supra* note 33, at 11.

69. 149 U.S. 698 (1893). The Chinese laborers had been living in the United States but failed to apply for a certificate of residence under the Act of 1892. They were subsequently arrested and subject to expulsion (what would now be called deportation). *Id.* at 718–19.

70. *See id.* at 730 ("The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.").

71. *Two Systems of Justice*, *supra* note 33, at 2.

72. *Fong*, 149 U.S. at 733 (Brewer, J., dissenting).

deportation is a form of severe punishment. In *Fong Haw Tan v. Phelan*,[73] Justice Douglas concluded that "deportation is a drastic measure and at times the equivalent of banishment or exile . . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."[74]

More recently, the Court again recognized the convergence of civil and criminal law with respect to deportation in *Padilla v. Kentucky*.[75] In that case, the Court held that a defendant's counsel was "constitutionally deficient" under the Sixth Amendment by not informing the defendant that their plea could carry a risk of deportation.[76] The *Padilla* decision is significant because it "represented a groundbreaking recognition by the highest Court . . . that for noncitizens, the constitutional right to counsel must include advice on the immigration consequences of a criminal case."[77] Notwithstanding the fact that removal proceedings are civil, the Court recognized that the risk of deportation is so severe that the Constitution requires a defense attorney inform criminal defendants of the potential immigration consequences of a guilty plea.

B. Crimes Involving Moral Turpitude

The largest category of deportable offenses in the INA is criminal offenses.[78] This category includes general crimes, controlled substances, certain firearm offenses, miscellaneous crimes, crimes of domestic violence, and trafficking.[79] A noncitizen who commits a crime under any of these provisions is automatically deportable.[80] One of the offenses

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73. 333 U.S. 10 (1948).

74. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

75. 559 U.S. 356 (2010).

76. *Id.* at 374.

77. Manny Vargas, *Ten Years Later, Fulfilling the Promise of* Padilla v. Kentucky, IMMIGRANT DEF. PROJECT, https://www.immigrantdefenseproject.org/ten-years-later-fulfilling-the-promise-of-padilla-v-kentucky/ [https://perma.cc/3R4Q-2Q9Z].

78. *See* 8 U.S.C. § 1227(a)(2).

79. *See id.* §§ 1227(a)(2)(A)–(F).

80. *See id.* § 1227(a) ("Any [noncitizen] in and admitted to the United States *shall* . . . be removed if the [noncitizen] is within one or more of the following classes of deportable [noncitizens] . . . ." (emphasis added)). If found to have committed one of these offenses, deportation is mandatory because of the use of the word "shall." This differs from other provisions in the INA, such as detention, where Congress used the word "may" to designate that detention is permitted, but not mandatory. *See, e.g.*, *id.* § 1226(a) ("On a warrant issued by the Attorney General, [a noncitizen] *may* be arrested and detained . . . ." (emphasis added)). However, it is necessary to distinguish between an individual committing a deportable offense and the individual actually being deported. Even if an individual is found to have committed a deportable offense, they may still qualify for forms of relief. *See generally* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., FACT SHEET: FORMS OF RELIEF FROM REMOVAL (2004), https://www.justice.gov/sites/default/files/eoir/

listed in the general crimes category of the INA is a "crime involving moral turpitude" (CIMT).[81] The INA provides the following language:

> (i) Crimes of moral turpitude
>
> Any [noncitizen] who—
>
> (I) is convicted of a crime involving moral turpitude committedwithin five years . . . after the date of admission, and
>
> (II) is convicted of a crime for which a sentence of one year or longer may be imposed,
>
> is deportable.[82]

This provision triggers deportation if a noncitizen is convicted of one CIMT within five years of being admitted to the United States. However, the five-year time limit only applies in this particular provision. The subsequent provision in the INA provides an additional ground of deportation for a noncitizen found to have committed two or more CIMTs at any time in their life:

> (ii) Multiple criminal convictions
>
> Any [noncitizen] 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.[83]

The BIA held that for crimes to fall within a "single scheme," the crimes "must take place at one time, meaning that there must be no substantial interruption that would allow the participant to disassociate himself from his enterprise and reflect on what he has done."[84] However, the BIA did not instruct courts on how to exactly define the necessary temporal restriction; thus, the "single scheme" exception is incredibly narrow.[85] Accordingly, an immigration judge can determine that two crimes from the same police report, criminal complaint, or plea colloquy

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legacy/2004/08/05/ReliefFromRemoval.pdf [https://perma.cc/VP56-XVHH] (discussing different forms of relief from removal, including voluntary departure, cancellation of removal, and asylum—which are forms of discretionary relief—and motions to reopen or reconsider, stay of removal, administrative appeal, and judicial relief—which are forms of administrative and judicial relief).

81. 8 U.S.C. § 1227(a)(2)(A)(i).

82. *Id.*

83. *Id.* § 1227(a)(2)(A)(ii).

84. Saiful Islam, 25 I. & N. Dec. 637, 640 (B.I.A. 2011) (quoting Adetiba, 20 I. & N. Dec. 506, 509–10 (B.I.A. 1992)).

85. KATHY BRADY, IMMIGRANT LEGAL RES. CTR., ALL THOSE RULES ABOUT CRIMES INVOLVING MORAL TURPITUDE 8 (2020), https://www.ilrc.org/sites/default/files/resources/all_those_rules_cimt_june_2020.pdf [https://perma.cc/4GZE-D9XX].

did not arise from a single scheme of misconduct.[86]

Congress does not define what constitutes a CIMT within these provisions or anywhere else in the INA.[87] Congress also does not provide a list of offenses considered to be CIMTs anywhere in the INA.[88] This differs from other categories of general crimes where the INA provides a clear definition of the offense, such as "aggravated felony."[89] Without a clear definition to follow, the INA leaves it to judges to decide which crimes necessarily involve moral turpitude and accordingly render a noncitizen deportable for committing a CIMT. As a result, even a misdemeanor conviction could result in mandatory deportation for a noncitizen.[90]

A historical evaluation of the phrase "crime involving moral turpitude" provides little insight to creating a concrete definition for courts and judges to consistently apply. The phrase "moral turpitude" first appeared in the Immigration Act of 1891[91] as a ground of exclusion, but was adopted "without comment."[92] CIMTs became a ground of deportation in the Immigration Act of 1917,[93] but again Congress did not include a definition.[94] The legislative history of that provision suggests that Congress believed a CIMT constituted a "serious offense."[95]

Without a statutory definition to follow, courts must come up with their own definitions, which leads to disparate and varied outcomes.[96] Courts commonly look to Black's Law Dictionary to glean an understanding of "moral turpitude."[97] Black's Law Dictionary defines "moral turpitude," in part, as "[c]onduct that is contrary to justice, honesty, or morality."[98] The

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86. Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1180 [hereinafter Koh, *Void for Vagueness*].

87. *See* Pooja R. Dadhania, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 315 (2011).

88. *See* Simon Y. Svirnovskiy, *Finding a Right to Remain: Immigration, Deportation, and Due Process*, 12 NW. J.L. & SOC. POL'Y 32, 41 (2017).

89. *See* 8 U.S.C. § 1227(a)(2)(A)(iii); *id.* §§ 1101(a)(43)(A)–(U) (describing different crimes that are considered by the INA as aggravated felonies).

90. Muñoz, *supra* note 43, at 331.

91. Pub. L. No. 51-551, § 1, 26 Stat. 1084 (1891).

92. Holper, *supra* note 15, at 649–50.

93. *See* Pub. L. No. 64-301, § 19, 39 Stat. 974 (1917).

94. Holper, *supra* note 15, at 651.

95. *Id.*; *see also* 2 HON. J. HOWARD MCGRATH, THOMAS G. FINUCANE & WATSON B. MILLER, ADMINISTRATIVE DECISIONS UNDER IMMIGRATION & NATIONALITY LAWS 139 (1944) (discussing the reports preceding the 1917 Act that included reference to "serious crimes").

96. *See infra* section II.B.

97. Dadhania, *supra* note 87, at 318–19.

98. *Moral Turpitude*, BLACK'S LAW DICTIONARY (11th ed. 2019).

notion of morality is also present in the underpinnings of immigration law in the United States as a whole: the original purpose of the INA was to delineate between "desirable" and "undesirable" people so that only those who were considered desirable were allowed into the country.[99] As such, the codification of CIMTs as a deportation ground reflects the prevalence of this moral judgment in immigration law.

The BIA attempted to solidify a definition of CIMTs to help instruct lower courts when applying the CIMT provisions against noncitizen respondents in immigration proceedings. In several decisions, the BIA defined CIMT as "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."[100] The BIA also held that "[t]o involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state."[101]

Even with these working definitions in mind, the task of determining whether a crime inherently involves moral turpitude is not easy. Many judges have observed the difficulty of pinpointing the line between conduct that necessarily involves moral turpitude and conduct that does not.[102] Determining what crimes involve moral turpitude further implicates other aspects of immigration law beyond deportation of noncitizens, which are outside the scope of this Comment.[103]

C. Evaluating the Lack of Procedural Safeguards Afforded to Noncitizens in Removal Proceedings

Even though deportation is a severe consequence of removal proceedings, a noncitizen alleged of committing a CIMT—or any other deportable offense—does not receive many of the procedural safeguards that are required for defendants in criminal proceedings because removal

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99. GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT, H.R. JUDICIARY COMM. NO. 100–7, at 10 (1988) ("The intent of our immigration laws is not to restrict immigration, but to sift it, to separate the desirable from the undesirable immigrants, and to permit only those to land on our shores who have certain physical and moral qualities.").

100. Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1989).

101. Silva-Trevino III, 26 I. & N. Dec. 826, 834 (B.I.A. 2016).

102. *See, e.g.*, Partyka v. Att'y Gen., 417 F.3d 408, 409 (3d Cir. 2005) (calling the moral turpitude jurisprudence an "amorphous morass"); Arias v. Lynch, 834 F.3d 823, 831 (7th Cir. 2016) (Posner, J., concurring) ("It's difficult to make sense of these definitions, which approach gibberish yet are quoted deferentially in countless modern opinions.").

103. *See, e.g.*, 8 U.S.C. § 1229b(b)(1)(C) (discussing cancellation of removal); *id.* § 1101(f)(3) (requiring a noncitizen to establish good moral character as a prerequisite to citizenship); *id.* § 1182(a)(2)(A)(i)(I) (barring noncitizens convicted of CIMTs from obtaining visas).

proceedings are civil.[104] Accordingly, removal proceedings do not trigger the constitutional protections required for criminal defendants in criminal proceedings.[105] Each proceeding is distinct with respect to the noncitizen. For example, if a noncitizen is alleged of committing murder, they would first be prosecuted as a criminal defendant in state court. As this Part explains, they would receive greater constitutional protections in this criminal proceeding. If the noncitizen is convicted of the crime of murder, they would then be subject to removal proceedings as a noncitizen respondent in immigration court. Because the immigration proceeding is civil, the noncitizen respondent would receive far fewer protections than they previously had in their criminal proceeding. In effect, this means that noncitizens have fewer rights than criminal defendants even amidst the recognition of the severity of deportation.[106]

The following sections will briefly discuss three categories of rights that are required for defendants in criminal proceedings but not for noncitizen respondents in immigration proceedings: (1) constitutionally required rights; (2) Supreme Court-created rights; and (3) procedural rights. This discussion is not meant to be exhaustive, but rather to provide a few examples of the difference in rights afforded to defendants in criminal proceedings versus respondents in immigration proceedings.

1. Rights Required by the Constitution

The Constitution requires different protections for respondents in immigration proceedings than for defendants in criminal proceedings.[107] This is primarily due to the fact that immigration proceedings are governed by civil law, whereas criminal proceedings are governed by criminal law. Respondents in removal proceedings have no constitutional right to appointed counsel because the Sixth Amendment does not attach to civil proceedings like it does in criminal proceedings.[108] In the absence of the Sixth Amendment, the INA also does not provide a right to counsel for respondents. Rather, the INA states that respondents in removal proceedings "shall have the privilege of being represented (*at no expense*

104. *See Two Systems of Justice*, *supra* note 33, at 1.

105. *Id.*

106. *Id.* at 5; *see also supra* notes 69–75 and accompanying text (discussing the evolution of the Supreme Court's recognition of deportation as a severe punishment).

107. *Two Systems of Justice*, *supra* note 33, at 1.

108. *See* KATE M. MANUEL, CONG. RSCH. SERV., R43613, ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 6 (2016). *But see* U.S. CONST. amend. VI ("In all *criminal prosecutions*, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." (emphasis added)).

to the Government)."[109] Therefore, it is up to the respondent to find their own attorney if they want representation during their removal proceedings.

Securing representation largely turns on factors outside of the respondent's control. For example, the location of the respondent's removal proceedings has a significant impact on their ability to find representation because larger cities have more attorneys available than smaller cities.[110] A lack of constitutionally-mandated appointed counsel also requires respondents to pay for their own counsel, which poses financial barriers to obtaining representation.[111] For individuals in removal proceedings, access to counsel can mean the difference between a permanent bar on reentering the United States or obtaining some form of relief from removal.[112] One study conducted in 2016 found that only thirty-seven percent of individuals were able to get legal representation for their deportation proceedings.[113]

The Sixth Amendment also guarantees defendants in criminal proceedings the right to a speedy trial by an impartial jury in the jurisdiction where the original crime was alleged to have occurred.[114] However, respondents in immigration proceedings do not have the right to a speedy trial,[115] and the immigration judge, rather than a jury, determines whether a respondent is removable.[116] Furthermore, respondents have no right to stand trial in the same jurisdiction as the alleged offense took place.[117] This primarily impacts respondents facing removal proceedings while in detention because United States Immigration and Customs Enforcement has discretion to detain a respondent in any jurisdiction it chooses.[118] As a result, even if a

109. *See* 8 U.S.C. § 1362 (emphasis added).

110. *See Two Systems of Justice*, *supra* note 33, at 9–10.

111. *See id.* at 10.

112. *See generally* 8 U.S.C. § 1229(b) (providing for discretionary cancellation of removal for certain noncitizens by the Attorney General).

113. *Fact Sheet: Immigration Courts*, *supra* note 45.

114. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .").

115. *See* Svirnovskiy, *supra* note 88, at 72; *Two Systems of Justice*, *supra* note 33, at 1.

116. *See* Holper, *supra* note 15, at 668.

117. *See Two Systems of Justice*, *supra* note 33, at 9.

118. *See* BRYAN LONEGAN & THE IMMIGRATION LAW UNIT OF THE LEGAL AID SOCIETY, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 8 (2006), https://www.nilc.org/wp-content/uploads/2015/12/detentionremovalguide_2006-02.pdf [https://perma.cc/9GDG-9WA4]. This Comment will not go in depth on the treatment of individuals in detention, but for more information, see 8 U.S.C. § 1226.

respondent can obtain counsel, there is no guarantee they will not be transferred to another jurisdiction during their removal proceedings, which could leave them without representation.[119]

2. Rights Created by the Supreme Court

In addition to constitutional rights, the Supreme Court has conferred other procedural safeguards on criminal defendants through caselaw that do not extend to respondents in removal proceedings. In *Coffin v. United States*,[120] the Supreme Court held that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law."[121] Therefore, criminal defendants are presumed innocent until proven guilty beyond a reasonable doubt. Alternatively, respondents in removal proceedings do not receive a presumption of non-removability.[122] The Supreme Court also requires that individuals suspected of committing a crime must be given "Miranda warnings" before they are questioned by officers. The rights encompassed in Miranda warnings stem from the Fifth and Sixth Amendments—namely, the right against self-incrimination and the right to counsel.[123] In *Miranda v. Arizona*,[124] the Court reasoned that in order for these rights to be meaningful, a person suspected of committing a crime must be explicitly informed of their rights.[125] The Court specifically referenced these warnings as a necessary procedural safeguard for individuals suspected of committing a crime.[126] As a result of the Court's decision in *Miranda*, officers must inform persons under arrest of their right to remain silent, that anything they say can be used against them in a court of law, that they have the right to an attorney, and that an attorney will be appointed if they cannot afford one.[127] This protection does not extend to noncitizens suspected of violating immigration law prior to questioning because of the civil nature of

119. While an immigration court can transfer an individual's case to a court closer to the individual's home jurisdiction, obtaining a change of venue is more difficult for people in detention. *See* LONEGAN & THE IMMIGRATION LAW UNIT OF THE LEGAL AID SOCIETY, *supra* note 118, at 8.

120. 156 U.S. 432 (1895).

121. *Id.* at 453.

122. *Two Systems of Justice*, *supra* note 33, at 7.

123. *See* U.S. CONST. amends. X, VI.

124. 384 U.S. 436 (1966).

125. *Id.* at 478–79.

126. *Id.* ("[W]e hold that when an individual is taken into custody or otherwise deprived of [their] freedom . . . the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege . . . .").

127. *Id.* at 479.

immigration proceedings.[128] Instead, noncitizens may be asked questions that pertain directly to their alleged removability without receiving any warning that the information can be used against them in their subsequent immigration proceedings.[129] The lack of warnings is further exacerbated by the fact that immigration proceedings are not subject to the same rules of evidence as criminal proceedings,[130] and instead the general rule is in favor of admissibility.[131]

3. Procedural Rights Within the Courts

The structure of immigration courts also disadvantages respondents in immigration proceedings compared to criminal defendants. In criminal prosecutions, the judge is the neutral decision-maker and independent from the prosecuting agency.[132] Alternatively, immigration judges are employed by the Department of Justice (DOJ), meaning they are technically DOJ attorneys.[133] As opposed to impartial judges, these immigration judges "are subject to DOJ performance evaluations, which emphasize case completion goals, rather than judicial standards of conduct."[134] As a result, immigration judges have different incentives than traditional judges.

To further complicate matters, some immigration judges do not even have any immigration law experience.[135] This poses significant problems for proper administration of immigration proceedings due to the complex

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128. *Two Systems of Justice*, *supra* note 33, at 5.

129. *See, e.g.*, E-R-M-F- & A-S-M-, 25 I. & N. Dec. 580 (B.I.A. 2011) (holding that immigration officers are not required to tell noncitizens they have the right to counsel or that statements made during interrogation can be used against them in subsequent proceedings before the noncitizens are placed in formal proceedings).

130. *Two Systems of Justice*, *supra* note 33, at 7, 10–11.

131. *See, e.g.*, Ramirez-Sanchez, 17 I. & N. Dec. 503, 505 (B.I.A. 1980) ("To be admissible in deportation proceedings, evidence must be relevant and probative and its use must not be fundamentally unfair."); Zaruma-Gauman v. Wilkinson, 988 F.3d 1, 7 (1st Cir. 2021) ("[S]trict rules of evidence to not apply in immigration proceedings." (citing Jianli Chen v. Holder, 703 F.3d 17, 23 (1st Cir. 2012))).

132. *Two Systems of Justice*, *supra* note 33, at 7.

133. *Id.*; *see also* Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 429 (2011).

134. *Two Systems of Justice*, *supra* note 33, at 7.

135. In early 2020, the EOIR swore in twenty-eight new immigration judges, of which eleven had no immigration law experience. This was made possible by the fact that the job posting to fill the immigration judge vacancies did not mention a requirement for immigration law experience. Rather, only seven years of "post-bar experience as a licensed attorney preparing for, participating in, and/or appealing formal hearings or trials" was required. Nolan Rappaport, *No Experience Required: U.S. Hiring Immigration Judges Who Don't Have Any Immigration Law Experience*, HILL (Feb. 3, 2020, 11:30 AM), https://thehill.com/opinion/immigration/481152-us-hiring-immigration-judges-who-dont-have-any-immigration-law-experience [https://perma.cc/SKV7-YB4R].

and unusual nature of immigration law. In the realm of asylum-seekers, scholars have compared the decisions made by immigration judges to that of a "refugee roulette."[136] Similar arbitrary decisions are made in other areas of immigration law that can influence deportation of noncitizens.[137] As the next Part will discuss, the inconsistent application of the phrase "crimes involving moral turpitude" has been argued as similarly subjecting noncitizens "to play what amounts to a game of Russian Roulette with their liberty."[138]

As a result of these differences in constitutional and procedural rights granted only to criminal defendants, an individual suspected of violating an immigration law receives fewer procedural protections than an individual suspected of violating a criminal law.[139] For criminal defendants, many of these protections are required by the Bill of Rights and serve as "the foundation of a system of justice premised on the idea that it is better that ten guilty persons go free than one innocent be imprisoned."[140] In comparison, because removal is a civil process, noncitizens are without many of these protections as respondents in removal proceedings, which "does not reflect American values of due process and fundamental fairness."[141]

II. PAST TO PRESENT CIMT ANALYSIS

For decades, courts have tried to find a way to consistently define CIMTs but "have long struggled in administering and applying the . . . moral turpitude provisions."[142] This Part begins by describing the difficulty of using a categorical approach to determine when a crime is a CIMT. Next, this Part explores the BIA's attempt to develop a uniform framework for CIMT analysis through a series of decisions: *Silva-Trevino I*, *Silva-Trevino II*, and *Silva-Trevino III*.

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136. Koh, *Void for Vagueness*, *supra* note 86, at 1132. *See generally* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

137. Koh, *Void for Vagueness*, *supra* note 86, at 1160 ("Extraordinary levels of arbitrariness when it comes to discretionary decision-making in immigration cases have already been widely documented.").

138. Motion for Leave to File Amicus Curiae Brief at 19, Islas-Veloz v. Barr, 914 F.3d 1249 (9th Cir. 2019) (No. 19-627), 2019 WL 7049908.

139. *See Two Systems of Justice*, *supra* note 33, at 5.

140. *Id.* at 7.

141. *Id.* at 1.

142. Silva-Trevino I, 24 I. & N. Dec. 687, 688 (Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Att'y Gen. 2015).

A. The Two-Step Categorical Approach Led to Inconsistent Outcomes

Courts have used various categorical approaches throughout the recent decades to determine whether a crime involves moral turpitude.[143] Prior to 2008, courts employed a two-step categorical approach through which the presence of moral turpitude was "determined by the nature of the *statutory* offense for which the [noncitizen] was convicted, and *not by the acts* underlying the conviction."[144] The BIA reasoned that "[i]n determining whether a crime involves moral turpitude, it is the nature of the offense itself which determines moral turpitude."[145] The two-step categorical approach was developed as a way "[t]o avoid leaving the requirements of citizenship to state control"[146] with the purpose of efficiency and consistency.[147]

The first step of the categorical approach instructed courts to look to "the inherent nature of the crime as defined by statute"[148] and ask "whether moral turpitude 'necessarily inheres' in a conviction under a particular statute."[149] The majority of circuits used one of three tests to determine whether violating a particular statute necessarily involved moral turpitude under the first step of the categorical approach: (1) least-culpable conduct test, (2) realistic-probability test, or (3) common-case approach.[150] These tests helped courts determine whether the statute at issue was a "categorical match" for the CIMT provision requiring removal.[151] If every crime committed under the statute necessarily involved moral turpitude, then there was a categorical match.[152] However, if the statute was found to cover conduct that would not necessarily involve moral turpitude, then there was no categorial match. [153]

The least-culpable-conduct test looks to the "minimum criminal

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143. *See generally* KATHERINE BRADY, IMMIGRANT LEGAL RES. CTR., HOW TO USE THE CATEGORICAL APPROACH NOW (2019), https://www.ilrc.org/sites/default/files/resources/how_to_use_the_categorical_approach_now_dec_2019_0.pdf [https://perma.cc/W5QA-XK4C].

144. 9 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL – VISAS § 9 FAM 40.21(a) n.2 (2005), http://www.cba.org/cba/cle/pdf/imm06_chang_app1.pdf [https://perma.cc/P4RM-55N9] (emphasis in original).

145. Short, 20 I. & N. Dec. 136, 137 (B.I.A. 1989).

146. *See* Nehme v. INS, 252 F.3d 415, 429 (5th Cir. 2001).

147. *See* Dadhania, *supra* note 87, at 325.

148. *Short*, 20 I. & N. Dec. at 137.

149. Sara Salem, *Should They Stay or Should They Go: Rethinking the Use of Crimes Involving Moral Turpitude in Immigration Law*, 70 FLA. L. REV. 225, 234 (2018).

150. *Id.* at 234–36.

151. BRADY, *supra* note 143, at 2. Courts appear to determine which test to use dependent on precedent within their circuit.

152. *Id.*

153. *Id.*

conduct necessary to satisfy the essential elements of the crime" in order to determine whether any hypothetical set of facts under the statute would be considered a CIMT.[154] Alternatively, the realistic-probability test "asks whether moral turpitude necessarily inheres in all cases that have a realistic probability of being prosecuted."[155] Lastly, the common-case approach asks whether the common conviction under a particular statute involves moral turpitude.[156] Under any of the tests used by the circuit courts, the actual conduct of the noncitizen played no role in the decision. Rather, if the statute "defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude."[157] This analysis necessarily involved evaluating a hypothetical scenario to determine if moral turpitude was involved, rather than looking to the particular facts of the crime that the noncitizen was actually convicted of.[158]

If the court concluded there was a categorical match under its chosen test, then the inquiry ended and the noncitizen was deemed to have committed a CIMT.[159] However, if there was no categorical match, then courts moved to the second step of the categorical analysis, which was referred to as a "modified categorical approach."[160]

In the second step, courts considered information beyond just the elements of the statute, which allowed them to look at the noncitizen's record of conviction "to determine, at a minimum, under which portion of the statute [they were] convicted to ascertain whether convictions under that portion necessarily involve moral turpitude."[161] This could include "the indictment, jury instructions, charging documents, or plea agreements."[162] Nevertheless, courts were still not permitted to consider the underlying facts of the noncitizen's conviction "that are extrinsic to the record of conviction."[163] After consulting the record of conviction, if the court determined that the particular offense the noncitizen was convicted of involved moral turpitude, then the noncitizen was found to have committed a CIMT.[164]

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154. Mendez v. Mukasey, 547 F.3d 345, 348 (2d Cir. 2008).

155. Salem, *supra* note 149, at 236.

156. *Id.* at 235.

157. Short, 20 I. & N. Dec. 136, 137 (B.I.A. 1989).

158. *See supra* notes 143–146 and accompanying text.

159. BRADY, *supra* note 143, at 3.

160. Dadhania, *supra* note 87, at 329.

161. *Id.*

162. Salem, *supra* note 149, at 237.

163. Dadhania, *supra* note 87, at 330.

164. *Id.*

Under this two-step categorial approach, three categories of crimes were easily defined as involving moral turpitude: (1) crimes against people;[165] (2) crimes against property;[166] and (3) crimes with an element of fraud.[167] Beyond these categories, the line to determine whether a crime is a CIMT was much more uncertain, and courts often came out differently on identical questions of law.[168] Examples include failure to report a felony to authorities,[169] falsely using a social security number,[170] and driving under the influence.[171] Accordingly, noncitizens were potentially subject to automatic deportation based on which circuit their case was heard in—because the circuit determined which test was used in the first step of the categorical approach—rather than on the nature of the crime they actually committed.[172] These diverse outcomes arguably ran afoul of the constitutional principle that "Congress shall have [p]ower [t]o . . . establish an *uniform* Rule of Naturalization."[173]

B. The BIA's Attempt at Uniformity: The Silva-Trevino *Trio*

With the difficulty of applying the two-step categorical approach and the resulting uncertain outcomes, the BIA sought to create a uniform framework for courts to use to determine what crimes involve moral turpitude. The Attorney General issued three decisions, each of which attempted to create a new categorical approach that courts could use to

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165. Examples include murder, rape, and kidnapping. Svirnovskiy, *supra* note 88, at 41.

166. Examples include arson, burglary, or embezzlement. *Id.*

167. Jordan v. De George, 341 U.S. 223, 232 (1951) ("Fraud is the touchstone by which this case should be judged.").

168. Silva-Trevino I, 24 I. & N. Dec. 687, 694–95 (Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Att'y Gen. 2015) ("Yet under the existing arrangement, [noncitizens] who commit identical offenses may be treated differently with respect to eligibility . . . adjustment of status."); *see infra* section III.C.

169. *Compare* Villegas-Sarabia v. Sessions, 874 F.3d 871, 878–81 (5th Cir. 2017) (holding that misprision of a felony is a crime involving moral turpitude), *with* Robles-Urrea v. Holder, 678 F.3d 702, 705 (9th Cir. 2012) (holding that misprision of a felony is not a crime involving moral turpitude).

170. *Compare* Beltran-Tirado v. INS, 213 F.3d 1179, 1184 (9th Cir. 2000) (holding that falsely using a social security number is not a CIMT), *with* Lateef v. Dep't of Homeland Sec., 592 F.3d 926, 929 (8th Cir. 2010) (holding that falsely using a social security number is a CIMT).

171. *Compare* Keungne v. U.S. Att'y Gen., 561 F.3d 1281, 1288 (11th Cir. 2009) (holding that driving under the influence is a CIMT), *with* Knapik v. Ashcroft, 384 F.3d 84, 93 (3rd Cir. 2004) (holding that driving under the influence is not a CIMT).

172. Frank George, *On Moral Grounds: Denouncing the Board's Framework for Identifying Crimes of Moral Turpitude*, 51 AKRON L. REV. 577, 604 (2017) ("[I]nconsistent approaches leads to a troubling realization: noncitizens' morality will be determined based on the jurisdiction's categorical approach, rather than on the conviction.").

173. U.S. CONST., art. I, § 8, cl. 4 (emphasis added); *see also* Salem, *supra* note 149, at 238–39 (arguing that the inconsistent outcomes produced by the CIMT framework run contrary to the desire for a uniform federal law and the Constitution's requirement of a uniform rule of naturalization).

analyze CIMTs. *Silva-Trevino I* instructed courts to employ a three-step categorical test, which allowed judges to consider the underlying facts of the noncitizen's conviction. *Silva-Trevino II* vacated *Silva-Trevino I* on the basis that the three-step test violated the language of the INA. Finally, *Silva-Trevino III* reverted back to the two-step categorical approach that courts used prior to *Silva-Trevino I*, but allowed courts to defer to controlling circuit precedent. Ultimately, after *Silva-Trevino III*, the CIMT framework remains unworkable in achieving uniform outcomes across circuit courts.

1. Silva-Trevino I *Established a Three-Step Categorical Approach to CIMT Analysis*

In 2008, Attorney General Michael Mukasey issued *Matter of Silva-Trevino*[174] (*Silva-Trevino I*) to address the lack of uniformity across courts for defining CIMTs.[175] The Attorney General is authorized to refer cases to themselves from the BIA in order to issue opinions regarding interpretation of immigration statutes.[176] The goal of *Silva-Trevino I* was "to establish a uniform framework for ensuring that the [INA's] moral turpitude provisions are fairly and accurately applied."[177] The respondent in *Silva-Trevino I* was a Mexican citizen who was admitted into the United States as a lawful permanent resident (LPR) and faced possible deportation for committing a crime.[178] The issue before the court was whether the criminal offense of "indecency with a child" under the Texas Penal Code was a crime involving moral turpitude.[179]

In issuing the opinion, the Attorney General held that courts should apply a three-step categorical approach to determine whether a noncitizen's conviction is a CIMT, rather than the previously-used two-step categorical approach.[180] First, courts were instructed to conduct a categorical review of the statute under the realistic-probability test.[181] If after this first step the court determined that the "statute encompasses both conduct that involves moral turpitude *and* conduct that does not," then the

174. 24 I. & N. Dec. 687 (Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Att'y Gen. 2015).

175. *Id.* at 688.

176. *See* 8 C.F.R. § 1003.1(h)(1)(i) (2022). These decisions receive *Chevron* deference. *See* Naeem v. Gonzales, 469 F.3d 33, 36 (1st Cir. 2006) (explaining that decisions from the Attorney General are afforded *Chevron* deference).

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

178. *Id.* at 690–91.

179. *Id.* at 690.

180. *Id.* at 704; *see supra* section II.A.

181. *Silva-Trevino I*, 24 I. & N. Dec. at 698.

court moved to the second step.[182] The second step was a modified categorical approach in which "adjudicators consider whether the [noncitizen]'s record of conviction evidences a crime that in fact involved moral turpitude."[183] If the record of conviction was inconclusive to determine whether the noncitizen's conviction involved moral turpitude, then courts were instructed to go to a third step where "immigration judges should be permitted to consider evidence beyond that record."[184] By incorporating the third step, the Attorney General opened the door to evaluating the underlying facts of the noncitizen's conviction, which was not permitted under the previous two-step categorical approach. After this opinion came out, many courts were reluctant to apply the three-step approach.[185]

2. Silva-Trevino II *Rejected the Three-Step Categorical Approach Established in* Silva-Trevino I

Even after the Attorney General issued *Silva-Trevino I*, the three-step categorical approach was not widely used. While some courts fully adopted the three-step approach, most rejected it in full or utilized only part of the analysis.[186] Six years later, the Fifth Circuit Court of Appeals held in *Silva-Trevino v. Holder*[187] that the third step of the three-step categorical approach was contrary to the "unambiguous language" of the INA.[188] Accordingly, the Attorney General vacated *Silva-Trevino I* and asked the BIA to address "[h]ow adjudicators are to determine whether a particular criminal offense is a crime involving moral turpitude under the [INA]."[189] This decision came to be known as *Silva-Trevino II*.

182. *Id.* (emphasis in original).

183. *Id.* This second step would typically be used when the statue at issue includes multiple provisions, some which do involve moral turpitude and some which do not involve moral turpitude. *Id.*

184. *Id.* at 699.

185. Dadhania, *supra* note 87, at 341–43. At the time this decision was rendered, the Seventh Circuit adopted the three-step approach in its entirety; the Ninth Circuit adopted the first two steps but was reluctant to apply the third step requiring inquiry beyond the record of conviction; and the Third and Eighth Circuits entirely refused to follow the three-step approach. *See id.* at 341–44.

186. Salem, *supra* note 149, at 241–42.

187. 742 F.3d 197 (5th Cir. 2014).

188. *Id.* at 198.

189. Silva-Trevino II, 26 I. & N. Dec. 550, 553 (Att'y Gen. 2015). The Attorney General also asked the BIA to weigh in on a couple other issues, but those are outside the scope of this Comment.

3. Silva-Trevino III *Revived the Two-Step Categorical Approach to CIMT Analysis*

In 2016, the CIMT analysis was revisited for a third and final time in *Silva-Trevino* (*Silva-Trevino III*),[190] which once again attempted to provide a uniform CIMT framework. *Silva-Trevino III* set forth a two-step categorical test, with the second step mimicking the modified categorical approach that had been previously applied by circuit courts. The *Silva-Trevino III* decision currently controls CIMT analysis.

In the first step of the test, courts must determine whether the offense at issue "fits within the generic definition of a crime involving moral turpitude."[191] *Silva-Trevino III* further instructs courts to apply the realistic probability test by "focus[ing] on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation of the statute."[192] However, this test is not mandatory; courts are instructed to apply the realistic probability test "unless controlling circuit law expressly dictate[d] otherwise."[193] In other words, if a particular circuit has precedent utilizing the minimum conduct test or the common-case approach in its CIMT analysis, then its courts could continue to use that test rather than employing the realistic probability test as instructed by the *Silva Trevino III* framework. Effectively, this puts the CIMT analysis right back to where it was pre-2008: courts can apply whichever test they want—typically realistic-probability, minimum conduct, or common-case—within the categorical analysis based on the precedent of the particular circuit.

The second step instructs courts to apply the same modified categorical approach that they had applied prior to *Silva-Trevino I*: "In cases where the statute of conviction includes some crimes that involve moral turpitude and some that do not, adjudicators must determine if the statute is . . . susceptible to a modified categorical analysis."[194] As such, where a statute includes multiple crimes—only some of which could be considered CIMTs—courts are permitted to "resort to the record of conviction . . . to identify the statutory provision that the respondent was convicted of violating."[195]

Silva-Trevino III set forth the controlling framework that courts

190. 26 I. & N. Dec. 826 (B.I.A. 2016).

191. *Id.* at 831.

192. *Id.*

193. *Id.* at 832.

194. *Id.* at 833.

195. *Id.*

currently follow to determine whether a noncitizen's conviction is a CIMT. Nevertheless, decisions have been anything but uniform across the circuits.[196]

III. DIFFICULTIES OF APPLYING THE *SILVA-TREVINO III* ANALYSIS

Post-*Silva Trevino III*, uniform application of the CIMT analysis remains elusive. While a categorical approach generally seeks to "promote efficiency, fairness, and predictability"[197] in adjudicating immigration cases, the practical application falls short due, in part, to the influence of moral judgments within the analysis. This Part evaluates the influence of a judge's personal moral beliefs on the CIMT analysis. In particular, this Part looks at a type of crime that should allow an "easy" application of the CIMT analysis: regulatory offenses. Regulatory offenses are considered to be *mala prohibita* crimes, which historically do not involve moral turpitude because they are crimes that are "wrong only because made so by statute."[198] Nevertheless, this Part focuses on a current circuit split over whether failure to register as a sex offender constitutes a CIMT.

A. The Role of Subjective Moral Judgments in Determining Whether a Crime Necessarily Involves Moral Turpitude

Currently, courts apply the *Silva-Trevino III* two-step categorical analysis to evaluate whether a particular crime involves moral turpitude.[199] However, this analysis does not yield uniform results because courts can utilize a variety of tests within this analysis depending upon precedent within their circuit.[200] Further, courts do not base a finding of moral turpitude solely on criminalization, but rather where the "clear consensus in contemporary American society" finds that certain conduct has a "profoundly degrading nature."[201] This makes outcomes

196. *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, 61–63 nn.90–98 (2017).

197. Mellouli v. Lynch, 575 U.S. 798, 806 (2015).

198. State v. Horton, 51 S.E. 945, 946 (N.C. 1905).

199. *See supra* section II.B.3.

200. *See supra* section II.A.

201. Ortega-Lopez, 27 I. & N. Dec. 382, 390 (B.I.A. 2018) (determining that animal fighting is like prostitution and incest and thus inherently reprehensible regardless of whether any injury actually occurred); *see also* Lopez-Meza, 22 I. & N. Dec. 1188, 1192 (B.I.A. 1999) (explaining that under the moral turpitude analysis, "the nature of a crime is measured against contemporary moral standards").

unpredictable because moral standards "may be susceptible to change based on the prevailing views of society."[202]

Ultimately, the BIA decides what it views as morally reprehensible behavior.[203] As such, even victimless crimes have been considered CIMTs when they are found to "offend 'the most fundamental values of society.'"[204] Seeing this problem, some courts have warned of the danger of conflating CIMTs with any crime at all: "That an offense contravenes 'societal duties' is not enough to make it a crime involving moral turpitude; otherwise, every crime would involve moral turpitude."[205] In one concurring opinion, Judge Posner queried, "What does 'the public conscience' mean? What does 'inherently base, vile, or depraved' . . . mean and how do any of these terms differ from . . . 'the duties owed between persons or to society in general'?"[206]

This side-eye towards moral judgments is not new. Indeed, the first judicial opinion to push back on the use of "moral turpitude" in deportation decisions came in 1947.[207] In *United States ex rel Manzella v. Zimmerman*,[208] the district court condemned the CIMT provision in the INA by highlighting the way in which a judge's personal morals play a significant role:

> I agree with those who regard it as most unfortunate that Congress has chosen to base the right of a [noncitizen] to remain in this country upon the application of a phrase so lacking in legal precision and, therefore, so likely to result in a judge applying to the case before him his own personal views as to the mores of the community.[209]

This concern has since been echoed in subsequent decisions. For example, in his dissent in *Jordan v. De George*, Justice Jackson reasoned that, given the expansiveness of the country, "acts that are regarded as criminal in some states are lawful in others."[210] Justice Jackson further opined that perceptions of morality would similarly lack uniformity across

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202. *Lopez-Meza*, 22 I. & N. Dec. at 1192.

203. *See* Koh, *Crimmigration Beyond the Headlines*, *supra* note 11, at 272. For a more in depth discussion and analysis on the role of implicit biases in immigration decisions, see Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011).

204. Koh, *Crimmigration Beyond the Headlines*, *supra* note 11, at 273.

205. Robles-Urrea v. Holder, 678 F.3d 702, 705 (9th Cir. 2012) (citing United States v. Aguila-Montes de Oca, 655 F.3d 915, 1070 (9th Cir. 2011)).

206. Arias v. Lynch, 834 F.3d 823, 831 (7th Cir. 2016) (Posner, J., concurring).

207. Craig S. Lerner, *"Crimes Involving Moral Turpitude": The Constitutional and Persistent Immigration Law Doctrine*, 44 HARV. J.L. & PUB. POL'Y 71, 93 (2021).

208. 71 F. Supp. 534 (E.D. Pa. 1947).

209. *Id.* at 537.

210. Jordan v. De George, 341 U.S. 223, 238–39 (1951) (Jackson, J., dissenting).

the country and that lower court decisions would "rest . . . upon the moral reactions of particular judges to particular offenses."[211]

B. Moral Judgments Influence the Evaluation of Regulatory Offense Under the CIMT Analysis

In addition to the two-step categorial approach set forth in *Silva-Trevino III*, the BIA and lower courts can look to the common law distinction between *mala in se* crimes and *mala prohibita* crimes to determine whether moral turpitude is involved.[212] A crime that is *malum in se* is "naturally evil as adjudged by the sense of a civilized community," whereas a crime that is *malum prohibitum* is "wrong only because made so by statute."[213] This distinction is helpful because these categories are based, in part, on a moral judgment. Therefore, many traditional moral offenses, like murder and theft,[214] are considered *mala in se*.[215] Historically, courts have reasoned that CIMTs involve *mala in se* crimes, as opposed to *mala prohibita* crimes.[216]

By these commonly used definitions, *mala prohibita* crimes do not involve "moral turpitude" in the general sense of the phrase because such acts are not inherently wrong, but rather they are wrong solely by way of statute.[217] Therefore, under the categorical approach used in the CIMT

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211. *Id.*

212. *See* Holper, *supra* note 15, at 656; 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 45–48 (1986).

213. State v. Horton, 51 S.E. 945, 946 (N.C. 1905); *see also Malum in se*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/malum%20in%20se [https://perma.cc/45S8-L3YU] (defining as "an offense that is evil or wrong from its own nature irrespective of statute"); *Malum Prohibitum*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/malum%20 prohibitum [https://perma.cc/FY2L-BJVB] (defining as "an offense prohibited by statute but not inherently evil or wrong").

214. *Horton*, 51 S.E. at 946.

215. Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1280–81 (2008).

216. *See, e.g.*, Flores, 17 I. & N. Dec. 225, 227 (B.I.A. 1980) (reasoning that a CIMT "has been defined as an act which is per se morally reprehensible and intrinsically wrong or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude"); *The Distinction Between Mala Prohibita and Mala in se in Criminal Law*, Note, 30 COLUM. L. REV. 74, 84–85 (1930) ("Thus the determination under immigration . . . statutes of whether or not an individual has been convicted of a crime involving moral turpitude has in some cases been made to depend upon whether the crime was *malum in se*.").

217. *See* Arthur D. Greenfield, *Malum Prohibitum: Moral, Legal and Practical Distinctions Between Mala Prohibita and Mala in Se and Danger to Civic Conscience When Former Are Too Numerous*, 7 A.B.A. J. 493, 493 (1921); *see also* LAFAVE & SCOTT, JR., *supra* note 212, at 45 ("It has been said that a crime of which a criminal intent is an element is *malum in se*, but if no criminal intent is required, it is *malum prohibitum*; and that generally a crime involving 'moral turpitude' is *malum in se*, but otherwise it is *malum prohibitum*.").

analysis, these crimes should not, in theory, be found to involve moral turpitude. Nevertheless, lower courts have found that certain regulatory offenses are crimes involving moral turpitude,[218] which necessarily transforms them into deportable offenses for noncitizens.

Regulatory offenses are typically created for the purpose of keeping public order.[219] The Supreme Court considers regulatory offenses to "impair[] the efficiency of controls deemed essential to the social order as presently constituted," but differ from other crimes in the sense that they "result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize."[220] Regulatory offenses are not thought to reflect an evil intent amounting to moral turpitude.[221] Indeed, the BIA even held as much in 1943, when it determined that a violation of a statute requiring liquor retailers to pay a tax was not a CIMT.[222]

But just as the line is unclear between crimes that involve moral turpitude and those that do not, so too is the line between *mala in se* crimes and *mala prohibita* crimes as caselaw has developed.[223] Conducting the current CIMT analysis with regulatory offenses is difficult because it "blends elements of purely statutory infractions and elements requiring some degree of morally objectionable action."[224] As a result, the BIA recognized that there is no bright line rule excepting *mala prohibita* offenses from being considered CIMTs[225] even though it has "many times held that the violation of a regulatory . . . provision of a statute is not a

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218. *See, e.g.*, Bakor v. Barr, 958 F.3d 732, 738 (8th Cir. 2020) ("We see no bright line rule that excludes a regulatory offense from the scope of the statute when it involves reprehensible conduct and a culpable mental state.").

219. Schwartz, *supra* note 215, at 1280–81.

220. Morissette v. United States, 342 U.S. 246, 256 (1952).

221. *See, e.g.*, *Crimes of Moral Turpitude: § 9.44 14. Regulatory Offenses*, LAW OFFS. OF NORTON TOOBY, https://nortontooby.com/node/18465#booktext [https://perma.cc/WVV7-X2LB] (providing legal advice for CIMTs and explaining that "[c]onvictions for violation of regulatory statutes generally are not considered to involve moral turpitude because there is nothing inherently wrong with engaging in the particular activity, except that someone has passed a law against it").

222. *See* Efagene v. Holder, 642 F.3d 918, 923 (10th Cir. 2011) (citing H—, I. & N. Dec. 394, 395 (B.I.A. 1943)).

223. *See* Evan F. McCarthy, Note, *Justices, Justices, Look Through Your Books, and Make Me a Perfect Match: An Argument for the Realistic Probability Test in CIMT Removal Proceedings*, 104 IOWA L. REV. 2269, 2275 (2019); *see also* Elijah T. Staggers, Note, *The Racialization of Crimes Involving Moral Turpitude*, 12 GEO. J.L. & MOD. CRITICAL RACE PERSP. 17, 26 (2020) (noting the difficulty of pinpointing the line between *mala in se* and *mala prohibita* crimes).

224. McCarthy, *supra* note 223, at 2275.

225. *See* Lopez-Meza, 22 I. & N. Dec. 1188, 1193 (B.I.A. 1999) ("While it is generally the case that a crime that is 'malum in se' involves moral turpitude and that a 'malum prohibitum' offense does not, this categorization is more a general rule than an absolute standard.").

crime involving moral turpitude."[226]

C. *Sex Offender Registration Statutes as an Example of the CIMT Analysis Rendering Disparate Results*

Sex offender registration statutes serve as a prime example of how the CIMT analysis is unpredictable even with respect to regulatory—or *mala prohibitum*—crimes. Looking at circuit court decisions shows how judges can reach opposite outcomes for nearly identical offenses under the current CIMT framework.[227] As a result, noncitizens convicted of failing to register as a sex offender have no way of knowing if that regulatory offense will lead to deportation.

In *Efagene v. Holder*,[228] the Tenth Circuit Court of Appeals held that failing to register as a sex offender was not categorically a CIMT because it did not involve any identifiable victim, actual harm, or intent to cause harm.[229] Francis Efagene, formerly a citizen of Nigeria, was admitted into the United States as a lawful permanent resident in 1991.[230] In 2005, he pled guilty to the offense of sexual conduct-no consent,[231] a misdemeanor in the state of Colorado.[232] As part of his sentence, Efagene had to register as a sex offender for the following ten years.[233] In 2007, after serving 364 days in jail, the state arrested Efagene for missing the registration deadline and ultimately pled guilty to the misdemeanor offense of failure-to-register.[234] These two misdemeanor offenses made Efagene automatically removable, as each was considered a CIMT.[235] Efagene challenged his removal, arguing that failure to register as a sex offender did not constitute a CIMT.[236]

In its majority opinion, the Tenth Circuit made explicit reference to the difference between *mala in se* and *mala prohibita* crimes—the former involving moral turpitude and the latter not involving moral turpitude.[237] The majority ultimately reasoned that failing to comply with the

226. Abreu-Semino, 12 I. & N. Dec. 775, 776 (B.I.A. 1968).

227. *See* Kornegay & Lee, *supra* note 196, at 61–63 nn.90–98.

228. 642 F.3d 918 (10th Cir. 2011).

229. *Id.* at 922.

230. *Id.* at 920.

231. COLO. REV. STAT. § 18-3-404 (2022).

232. *Efagene*, 642 F.3d at 920.

233. *Id.*

234. *Id.*

235. *Id.*; *see also* 8 U.S.C. § 1227(a)(2)(A)(ii) (authorizing deportation for noncitizens who have been convicted of two or more CIMTs at any time after admission).

236. *Efagene*, 642 F.3d at 920.

237. *Id.* at 921.

procedural rules set forth by the sex offender registration statute does not categorially involve moral turpitude because there was no "identifiable victim, any actual harm, or any intent to cause harm."[238] The majority further explained that an individual could be convicted of failing to register as a sex offender because they notified law enforcement of an address change after six business days, rather than the required five.[239] Such conduct, while wrong by virtue of violating the requirement of a statute to update authorities within five business days, is not the type of conduct that "society deems inherently base, vile, or depraved."[240]

In May 2020, on a nearly identical question of law, the Eighth Circuit Court of Appeals came out the opposite way on the CIMT analysis for failing to register under a sex offender registration statute.[241] In *Bakor v. Barr*,[242] Tua Mene Lebi Bakor was convicted of two CIMTs, which triggered mandatory deportation under the INA.[243] Bakor was admitted into the United States in 1999 as a refugee and became a lawful permanent resident in 2002.[244] In 2001, Bakor was convicted of criminal sexual conduct in the fifth degree and, as part of his sentence, had to comply with the Minnesota sex offender registration law.[245] Like Efagene, Bakor ultimately failed to comply and pled guilty to that charge in 2015.[246] As a result, he was ordered removed in 2017 for being convicted of two crimes involving moral turpitude.[247]

On appeal, the Eighth Circuit upheld the BIA's determination that failure to register as a sex offender was a CIMT.[248] The majority found that "[t]he line between *malum in se* and *malum prohibitum* . . . is murky and controversial."[249] Even though failing to register is a regulatory offense, the majority found no bright line rule that precludes a finding of

238. *Id.* at 922.

239. *Id.* at 924.

240. *Id.*

241. *See* Bakor v. Barr, 958 F.3d 732 (8th Cir. 2020).

242. 958 F.3d 732 (8th Cir. 2020).

243. *Id.* at 734–35; *see* 8 U.S.C. § 1227(a)(2)(A)(ii).

244. *Bakor*, 958 F.3d at 734.

245. *Id.*

246. *Id.*

247. *Id.* at 734–35.

248. *Id.* at 737 ("Where society has imposed a duty based on a compelling need to protect public safety, it is permissible for the Board to conclude that one who knowingly ignores that duty acts in a morally reprehensible manner. The Board reasonably concluded that knowing and willful failure to register as a sex offender, which frustrates society's efforts to monitor serious offenders and to protect vulnerable victims from predictable recidivism, is the sort of morally turpitudinous criminal conduct that subjects [a noncitizen] to removal from the country.").

249. *Id.* at 738.

a CIMT where "the scope of the statute . . . involves reprehensible conduct and a culpable mental state."[250] The majority further relied on the BIA's decision in *Tobar-Lobo*[251] where it held that failing to register under a California sex offender registration statute was a crime of moral turpitude.[252] The BIA reached this conclusion by reasoning that "the nature of a crime is measured against contemporary moral standards."[253] In that case, the BIA reasoned that sex offender registration statutes are used in every state due to "outrage over sexual crimes—particularly those targeting children."[254] Therefore, the BIA concluded that the act of failing to register as a sex offender was necessarily base or vile.[255] Similar reasoning was employed in *Bakor*: the Eighth Circuit Court of Appeals held that "knowing and willful failure to register as a sex offender . . . is the sort of morally turpitudinous criminal conduct that subjects [a noncitizen] to removal from the country."[256] But, as the dissenting opinion noted, this decision diverged from every circuit that had ruled on whether failing to register as a sex offender constituted a CIMT.[257]

In support of its petition for a writ of certiorari, counsel for petitioner Bakor provided the following in an attempt to prove that regulatory offenses cannot inherently involve moral turpitude:

> A simple thought experiment proves the point: if the Minnesota sex-offender registration law did not exist, would Bakor have acted immorally by knowingly failing to inform the authorities of his address? The answer, of course, is no; his action was wrong only because a statute said so—and so it follows that his offense is not *inherently* immoral.[258]

The Supreme Court ultimately denied Bakor's petition for certiorari,[259] which confirmed the order of removal. The outcome of Bakor's case would likely have been different if it was heard in another circuit. As such, the decision to deport Bakor was not based solely on whether moral

250. *Id.*

251. 24 I. & N. Dec. 143 (B.I.A. 2007).

252. *Id.* at 146–48.

253. *Id.* at 144.

254. *Id.* at 145.

255. *Id.* at 146.

256. Bakor v. Barr, 958 F.3d 732, 737 (8th Cir. 2020).

257. *Id.* at 741 (Kelly, J., dissenting) (citing Mohamed v. Holder, 769 F.3d 885, 889 (4th Cir. 2014); Totimeh v. Att'y Gen., 666 F.3d 109, 116 (3d Cir. 2012); Efagene v. Holder, 642 F.3d 918, 926 (10th Cir. 2011); Plasencia-Ayala v. Mukasey, 516 F.3d 738, 747 (9th Cir. 2008)).

258. Petition for Writ of Certiorari at 13, *Bakor*, 958 F.3d 732 (No. 20-837), 2020 WL 8571668, at *22 (emphasis in original).

259. *See* Bakor v. Garland, __ U.S. __, 141 S. Ct. 2566 (2021).

turpitude necessarily inhered in the crime of failing to register as a sex offender; rather, the decision was heavily informed by the personal moral judgments of the judges on the Eighth Circuit Court of Appeals. This shows the failure of the *Silva-Trevino III* two-step categorical approach, under which circuit courts are able to come out differently on identical questions of law. Moving forward, a noncitizen cannot know whether failing to comply with a registration statute will render them deportable because, per *Bakor*, courts are able to reach their own conclusions about CIMTs even against the great weight of authority.

IV. THE VOID-FOR-VAGUENESS DOCTRINE IN THE SUPREME COURT

This split over sex offender registration statutes demonstrates the unpredictability of the CIMT analysis even as applied to *mala prohibita* crimes, which were thought to not inherently involve moral turpitude. As a result, the decisions appear to be arbitrary insofar as they depend on the personal moral beliefs of the adjudicator, which leaves noncitizens without proper notice of what crimes constitute CIMTs. Because of this, many legal scholars and courts argue that the CIMT provisions in the INA should be struck down as unconstitutionally vague.[260] Although this challenge was rejected by the Supreme Court in 1951 in *Jordan v. De George*, a series of recent decisions purporting to expand the void-for-vagueness doctrine may provide a renewed vagueness challenge to crimes involving moral turpitude.

This Part gives a brief primer on the void-for-vagueness doctrine, which has its roots in the Due Process Clauses of the Fifth and Fourteenth Amendments,[261] before addressing the first and only challenge brought to the Supreme Court that the CIMT provisions in the INA are unconstitutionally vague. Then, this Part walks through three recent Supreme Court decisions that appear to expand the scope of the void-for-vagueness doctrine, ultimately setting up the solution of this Comment—there is a renewed vagueness challenge given the unpredictable framework set forth in *Silva-Trevino III* and the Court's apparent

260. *See, e.g.*, Koh, *Void for Vagueness*, *supra* note 86, at 1177 (arguing that the phrase "crime involving moral turpitude" presents vagueness problems); Holper, *supra* note 15, at 663–64 (arguing that the term should be struck down as unconstitutionally vague through an as-applied challenge); Kornegay & Lee, *supra* note 196, at 116 (concluding that being deported for a CIMT violated due process "because the standard on its face is void for vagueness"); Islas-Veloz v. Whitaker, 914 F.3d 1249, 1251–61 (Fletcher, J., concurring) (arguing that CIMT is unconstitutionally vague, and referencing the myriad other judges and justices who have found the phrase to be vague and unworkable).

261. U.S. CONST. amends. V, XIV.

willingness to expand the void-for-vagueness doctrine.

A. Overview of the Void-for-Vagueness Doctrine

The void-for-vagueness doctrine is derived from the Due Process Clauses of the Fifth and Fourteenth Amendments, allowing a statute to be struck down if it is deemed unconstitutionally vague.[262] A statute is unconstitutionally vague if it "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement."[263] Thus, the void-for-vagueness doctrine operates on two primary goals: (1) providing notice; and (2) "avoiding arbitrary or discriminatory enforcement of the law."[264] These two goals provide independent grounds for concluding that a statute is unconstitutionally vague.[265]

The first goal of the doctrine is fair warning, which is based on an objective standard: courts ask whether the law gives "[a] person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[266] The guarantee of notice is important because it ensures that—in the case of immigration grounds of deportation, including CIMTs—noncitizens know what conduct could lead to deportation.[267]

The Court has cited the second goal of avoiding arbitrary and discriminatory enforcement as "the more important aspect of the vagueness doctrine."[268] In furtherance of this goal, statutes must provide guideposts for when conduct becomes unlawful (or in the case of CIMTs, when moral turpitude necessarily inheres).[269] Understanding that judges are afforded some form of subjective discretion in ruling on individual cases, the Court has emphasized that a statute is unconstitutionally vague if it "is so standardless that it authorizes or encourages seriously

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262. *See* Roger A. Fairfax & John C. Harrison, *The Fifth Amendment Due Process Clause*, NAT'L CONST. CTR.: INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-v/clauses/633 [https://perma.cc/VE3Y-BZAA]; Koh, *Void for Vagueness*, *supra* note 86, at 1134.

263. Johnson v. United States, 576 U.S. 591, 595 (2015).

264. Koh, *Void for Vagueness*, *supra* note 86, at 1134.

265. Lerner, *supra* note 207, at 115–16.

266. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

267. Jessica A. Lowe, Note, *Analyzing the Void-for-Vagueness Doctrine as Applied to Statutory Defenses: Lessons from Iowa's Stand-Your-Ground Law*, 105 IOWA L. REV. 2359, 2366 (2020) ("Fundamentally, the notice requirement ensures that individuals can delineate between lawful and unlawful conduct.").

268. *Id.* at 2369.

269. *Id.* at 2370.

discriminatory enforcement."[270]

While the void-for-vagueness doctrine originated as a protection for criminal defendants with respect to criminal laws, it also applies to noncitizens with respect to immigration laws.[271] When evaluating a vagueness challenge to the CIMT provision, the Supreme Court reasoned that "[d]espite that fact that [it] is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine . . . in view of the grave nature of deportation."[272] Evaluating immigration statutes under the vagueness doctrine is also crucial because of its purpose to safeguard separation of powers.[273] If a vague law is passed by Congress, the duty to interpret it is placed on "unelected prosecutors and judges."[274] Therefore, it is of the utmost importance that certain provisions of the INA that implicate one of the harshest penalties—deportation—are unambiguous so that judges cannot "rewrite the vague law"[275] based on their personal beliefs.

Although noncitizen respondents in removal proceedings are stripped of many of the procedural safeguards afforded to defendants in criminal proceedings,[276] they do receive some constitutional protections under the Due Process Clause of the Fifth Amendment.[277] The Due Process Clause guarantees that, "[n]o *person* shall . . . be deprived of life, liberty, or property, without due process of law."[278] Noncitizens are included under this provision because the Constitution mandates due process to all persons as opposed to all citizens.[279] Further, the Supreme Court long ago

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270. United States v. Williams, 553 U.S. 285, 304 (2008).

271. *See, e.g.*, Jordan v. De George, 341 U.S. 223, 230–31 (1951) (evaluating the CIMT provision under the void-for-vagueness doctrine); Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118, 123 (1967) (allowing a vagueness challenge as a defense to deportation); *see also* Koh, *Void for Vagueness*, *supra* note 86, at 1140–42 (discussing the Supreme Court's application of the void-for-vagueness doctrine as applied to immigration law).

272. *Jordan*, 341 U.S. at 231.

273. Lowe, *supra* note 267, at 2365.

274. *Id.* (quoting United States v. Davis, 588 U.S. __, 139 S. Ct. 2319, 2323 (2019)).

275. *Id.*

276. *See supra* section I.C.

277. Gretchen Frazee, *What Constitutional Rights Do Undocumented Immigrants Have?*, PBS NEWS HOUR (June 25, 2018, 5:08 PM), https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have [https://perma.cc/U7AW-TF8C]; Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings.").

278. U.S. CONST. amend. V (emphasis added).

279. *Compare* U.S. CONST. amend. V ("No *person* shall . . . be deprived of life, liberty, or property, without due process of law . . . ." (emphasis added)), *with* U.S. CONST. amend. XIV, § I ("No state shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States." (emphasis added)). Even undocumented immigrants have the constitutional rights of

noted the unique challenges that noncitizens face in immigration proceedings when it called for invoking the Due Process Clause for people "whose roots may have become . . . deeply fixed in this land."[280] The Court later reasoned that "[noncitizens] who have once passed through our gates, even illegally, may be expelled *only after* proceedings conforming to traditional standards of fairness encompassed in due process of law."[281] At a minimum, due process requires that noncitizens in removal proceedings be afforded "[a] full and fair hearing."[282] The Court and Constitution leave the rest of the determination of what amounts to due process for noncitizens to the discretion of Congress.[283]

B. The Implication of Jordan v. De George *on a Vagueness Challenge to CIMTs*

The first and only time the Supreme Court considered a vagueness challenge to the CIMT provisions in the INA was in 1951 in *Jordan v. De George*.[284] The case before the Court asked whether "conspiracy to defraud the United States of taxes on distilled spirits [was] a crime involving moral turpitude" under the INA.[285] The Court stated that in determining whether a statute is unconstitutionally vague, "[t]he test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[286] It concluded that "[f]raud is the touchstone by which [the] case should be judged."[287] Because the crime before the Court was conspiracy to defraud, it found that fraud necessarily inhered in the conduct, and thus was obviously—according to the Court—one of moral turpitude.[288]

However, the Court declined to evaluate whether the CIMT provision is unconstitutionally vague when the crime at issue does not involve fraud. The majority stated at the end of its opinion, "[w]hatever else the phrase

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due process, but that process looks different depending on the type of proceeding and the individual. Frazee, *supra* note 277.

280. Bridges v. Wixon, 326 U.S. 135, 154 (1945).

281. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (emphasis added).

282. Gutierrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011).

283. Ekiu v. United States, 142 U.S. 651, 660 (1892).

284. 341 U.S. 223 (1951); *see also* Kornegay & Lee, *supra* note 196, at 99 ("*De George* is the only case where the Supreme Court has directly addressed the issue of whether the moral turpitude doctrine is unconstitutionally vague and should be construed narrowly.").

285. *Jordan*, 341 U.S. at 223–24 (internal quotation marks and citation omitted).

286. *Id.* at 231–32.

287. *Id.* at 232.

288. *Id.*

'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."[289]

Justice Jackson wrote a vigorous dissent. He warned that "[u]niformity and equal protection of the law can come only from a statutory definition of fairly stable and confined bounds."[290] Giving a nod to the overlap between deportation and criminal punishments, he noted that deporting a noncitizen is an additional punishment above the sentence that already must be served for being found guilty of committing a crime in the first place.[291] Compared with citizens, a noncitizen's due process rights are even more crucial because deportation triggers "a life sentence of exile from what has become home."[292] Therefore, such a "savage penalty" requires "definite and certain" standards when courts are left to determine when a crime necessarily involves moral turpitude.[293]

The Court's decision in *Jordan* remains the controlling precedent on the question of whether the CIMT provisions in the INA are unconstitutionally vague.[294] The Supreme Court appears reluctant to revisit its decision. The Court has been petitioned for certiorari numerous times in recent years to address whether the phrase "crime involving moral turpitude" is unconstitutionally vague, but it has consistently denied certiorari.[295]

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289. *Id.*

290. *Id.* at 242 (Jackson, J., dissenting).

291. *Id.* at 243.

292. *Id.*

293. *Id.*

294. *Id.* at 229; *see, e.g.*, Vidale v. Att'y Gen. United States, 783 F. App'x 143, 147 (3d Cir. 2019) (finding that *Jordan v. De George* is "controlling Supreme Court precedent" and therefore must be followed); Martinez-de Ryan v. Whitaker, 909 F.3d 247, 252 (9th Cir. 2018) ("[W]e are obliged to follow on-point Supreme Court precedent—here, *Jordan* . . . .").

295. *See, e.g.*, Petition for Writ of Certiorari at i, Martinez-de Ryan v. Barr, __ U.S. __, 140 S. Ct. 134 (2019) (No. 18-1085), 2019 WL 852262, at *i (petitioning for certiorari on the question of "whether the phrase 'moral turpitude' is unconstitutionally vague"); Petition for Writ of Certiorari at i, Islas-Veloz v. Barr, __ U.S. __, 140 S. Ct. 2704 (2020) (No. 19-627), 2019 WL 6115071, at *i (petitioning for certiorari on the question of "[w]hether the phrase 'crime involving moral turpitude' . . . is unconstitutionally vague"); Petition for Writ of Certiorari at i, Olivas-Motta v. Barr, __ U.S. __, 140 S. Ct. 1105 (2020) (No. 19-282), 2019 WL 4190336, at *i (petitioning for certiorari on the question of "[w]hether the phrase 'crime involving moral turpitude' is void for vagueness"); Petition for Writ of Certiorari at i, Mercado-Ramirez v. Barr, __ U.S. __, 140 S. Ct. 1105 (2020) (No. 19-284), 2019 WL 4190395, at *i (petitioning for certiorari on the question of "[w]hether the phrase 'crime involving moral turpitude' is void for vagueness").

C. The Supreme Court's Recent Expansion of the Void-for-Vagueness Doctrine

Many courts are reluctant to hold a statute unconstitutionally vague because it infringes on the presumption that statutes dictated by Congress are constitutional.[296] Notably, from 1960 to 2015, the Court invalidated criminal statutes as unconstitutionally vague a mere five times.[297] This trend ended in 2015 and has since taken a sharp turn in the opposite direction. Three recent Supreme Court decisions appear to expand the void-for-vagueness doctrine: *Johnson v. United States*,[298] *Sessions v. Dimaya*,[299] and *United States v. Davis*.[300] The expansion exemplified by these cases has the potential to provide a renewed vagueness challenge to the phrase "crime involving moral turpitude" notwithstanding the Court's precedent set in *Jordan*.

1. Johnson v. United States

In *Johnson*, the Court considered the meaning of the phrase "violent felony" in the Armed Career Criminal Act of 1984 (ACCA).[301] Under the ACCA, an individual "convicted of being a felon in possession of a firearm" received a more severe punishment if they had previously been convicted three or more times for a "violent felony."[302] In defining "violent felony," this provision of the ACCA had a clause at the end that included crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."[303] This came to be known as the "residual clause."[304]

Defining crimes under the residual clause provision of the ACCA required a categorical approach, similar to the one used in CIMT analysis.[305] In determining whether a crime constituted a violent felony, courts assessed how the law generally defines the offense at issue, rather than evaluating the conduct of the individual who actually committed the

296. Lowe, *supra* note 267, at 2370.

297. *Id.*

298. 576 U.S. 591 (2015).

299. __ U.S. __, 138 S. Ct. 1204 (2018).

300. __ U.S. __, 139 S. Ct. 2319 (2019).

301. Pub. L. No. 98-473, 98 Stat. 2185 (codified as amended at 18 U.S.C. § 924); *see also Johnson*, 576 U.S. at 593.

302. *Johnson*, 576 U.S. at 593.

303. *Id.* at 594 (quoting 18 U.S.C. § 924(e)(2)(B)).

304. *See id.* at 591.

305. *See supra* section II.B.1.

offense on a particular occasion.[306] Until *Johnson*, judges were instructed to look at "the ordinary case"—which is similar to the common-case approach discussed earlier[307]—of the crime at issue to determine whether it "present[ed] a serious potential risk of . . . injury."[308] Relying on "[t]wo features of the residual clause," the Court held that this method "denies fair notice to defendants and invites arbitrary enforcement by judges."[309]

First, the Court criticized the ordinary case approach, finding that there was no way for judges to accurately measure the risk posed by certain crimes when they had to imagine the "ordinary case" rather than evaluating the actual facts at issue.[310] Second, the residual clause required judges to determine when a crime becomes a "serious potential risk," without providing a scale by which to measure crimes against.[311] Ultimately, the Court held that "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates."[312]

The *Johnson* decision further broadened the scope of the void-for-vagueness doctrine "by rejecting the requirement that a statute [must] be [entirely] vague" to be deemed unconstitutional.[313] Instead, the majority noted that the Court's prior holdings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."[314]

Accordingly, *Johnson* opened the door for both facial and as-applied challenges to the CIMT provision in the INA.[315] In order to bring a facial challenge to a law, the statute either "must prohibit a substantial amount of conduct that is protected by the First Amendment or the law must 'fail[] to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.'"[316] Otherwise, an as-

306. *Johnson*, 576 U.S. at 596.

307. *See supra* note 149 and accompanying text.

308. *Johnson*, 576 U.S. at 596.

309. *Id.* at 597.

310. *Id.*

311. *Id.* at 598.

312. *Id.*

313. Koh, *Void for Vagueness*, *supra* note 86, at 1152.

314. *Johnson*, 576 U.S. at 602.

315. *See* Koh, *Void for Vagueness*, *supra* note 86, at 1179.

316. Holper, *supra* note 15, at 664 (quoting City of Chicago v. Morales, 527 U.S. 41, 52 (1999)) (alteration in original) (citation omitted). Facial challenges are extremely hard to win because the petitioner has to prove that the statute is unconstitutionally vague in every possible application. *Id.* at 665.

applied challenge may be brought to determine whether a law is constitutional as applied to the particular petitioner.[317]

2. Sessions v. Dimaya

The next case the Court ruled on in its expansion of the void-for-vagueness doctrine was *Sessions v. Dimaya*, which directly addressed a vagueness challenge to an immigration statute. The Court in *Dimaya* evaluated a similar residual clause as in *Johnson*, but this time under the INA.[318] At issue was the provision defining a "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[319] Like the residual clause under the ACCA, courts applied an "ordinary case" categorical approach to this residual clause in the INA.[320] Under this test, a court must determine "whether 'the ordinary case' of an offense poses the requisite risk" to amount to a crime of violence.[321]

The Court reaffirmed the notion first stated in *Jordan* that "the most exacting vagueness standard should apply in removal cases."[322] The Court also took particular issue with the "ordinary case" approach, noting that it is "an excessively 'speculative,' essentially inscrutable thing."[323] The Court ultimately held that the provision at issue in *Dimaya* was similarly vague as the one in *Johnson*: "It too 'requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk."[324] Further, its use "result[ed] . . . [in] 'more unpredictability and arbitrariness than the Due Process Clause tolerates.'"[325]

3. United States v. Davis

The Court most recently struck down a residual clause in 2019 in *United States v. Davis*.[326] *Davis* addressed a statute that provided for

317. *Id.* at 664–65.

318. *See* Sessions v. Dimaya, __ U.S. __, 138 S. Ct. 1204, 1210–11 (2018).

319. *Id.* at 1211 (quoting 18 U.S.C. § 16(b)).

320. *Id.*

321. *Id.*

322. *Id.* at 1213.

323. *Id.* at 1215 (quoting Johnson v. United States, 576 U.S. 591, 597 (2015)).

324. *Id.* at 1216 (quoting *Johnson*, 576 U.S. at 596).

325. *Id.* (quoting *Johnson*, 576 U.S. at 598).

326. __ U.S. __, 139 S. Ct. 2319 (2019).

longer prison sentences when a firearm was used "in connection with certain other federal crimes,"[327] defined as "felonies 'that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'"[328] The majority cited both *Johnson* and *Dimaya*, stating that, "[t]hose decisions teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'"[329] In *Davis*, the government tried to save the integrity of the residual clause by arguing for a rejection of the categorical approach, and instead implemented a "case specific" approach that examined the "actual conduct" of the individual at issue.[330] However, the Court did not find that the history of the statute supported such an interpretation,[331] and ultimately held that the provision is unconstitutionally vague.[332]

Taken together, these cases indicate the Court's willingness to entertain vagueness challenges and highlight the Court's suspicion of the use of categorical tests.[333] In turn, this apparent expansion of the void-for-vagueness doctrine bodes well for a renewed vagueness challenge to CIMTs, which is especially important now given the lack of uniformity in the lower courts' application of the CIMT analysis.

V. A RENEWED VAGUENESS CHALLENGE TO CRIMES INVOLVING MORAL TURPITUDE

This Part argues that the current *Silva-Trevino III* framework for analyzing CIMTs fails to provide notice and enables arbitrary enforcement, which renders it unconstitutional under the void-for-vagueness doctrine. This is shown chiefly through the example of the current circuit split over whether failing to register as a sex offender constitutes a CIMT. This Part then argues that a new vagueness challenge may be available for noncitizens to challenge CIMTs due to the Supreme

327. *Id.* at 2323.

328. *Id.* at 2323–24 (quoting 18 U.S.C. § 924(c)(3)(B)).

329. *Id.* at 2326.

330. *Id.* at 2327 (quoting United States v. Davis, 903 F.3d 483, 485 (5th Cir. 2018)).

331. *Id.* (explaining that "the statute's text, context, and history. . . . simply cannot support the government's newly minted case-specific theory").

332. *Id.* at 2336.

333. *See, e.g.*, Lowe, *supra* note 267, at 2370–76 (concluding that "*Johnson*, *Dimaya*, and *Davis* arguably indicate an expansion of the void-for-vagueness doctrine"); Katherine Brosamle, Comment, *Obscured Boundaries:* Dimaya*'s Expansion of the Void-for-Vagueness Doctrine*, 52 LOY. L.A. L. REV. 187 (2018) (explaining the expansion of the void-for-vagueness doctrine through the Supreme Court's decision in *Sessions v. Dimaya*).

Court's apparent willingness to expand the void-for-vagueness doctrine.

A. The Silva-Trevino III *Framework Fails to Provide Notice and Enables Arbitrary Enforcement of the Laws*

The phrase "crime involving moral turpitude" has confounded courts for decades. The decision rendered in *Silva-Trevino III* attempted to clarify the CIMT analysis by providing a two-step categorical approach for courts to follow.[334] While this analysis purported to yield uniform results, in practice it failed to do so.[335] This is in large part due to the fact that courts may defer to controlling circuit precedent in determining which test to apply in the first-step of the categorical approach.[336] But such a case-by-case approach is unsustainable when the penalty for each decision is as severe as deportation.[337] Accordingly, the framework set forth in *Silva-Trevino III* created an analysis that fails to provide meaningful notice to noncitizens and enables arbitrary enforcement of the immigration system in violation of the Due Process Clause.

The current circuit split over whether failure to register as a sex offender constitutes a CIMT demonstrates how the current CIMT framework violates both pillars of the void-for-vagueness doctrine: failure to provide notice and arbitrary and discriminatory enforcement.[338] Even though failing to register as a sex offender is a *mala prohibita* regulatory crime, the Eighth Circuit Court of Appeals upheld it as a CIMT.[339] The fact that there is a circuit split over a regulatory crime—which is typically not thought to involve moral turpitude—signifies how the current CIMT framework does not lead to predictability and uniformity and, accordingly, should be struck down as unconstitutionally vague.

Under the current CIMT framework, a noncitizen cannot be put on proper notice about what kinds of convictions could render them deportable because the inquiry turns almost entirely on a moral determination. Different adjudicators will necessarily have different conceptions of what constitutes morally reprehensible conduct. Such a determination can hardly be said to be anything but arbitrary as the "limits

334. *See supra* section II.B.3.

335. *See supra* Part III.

336. Silva-Trevino III, 26 I. & N. Dec. 826, 832 (B.I.A. 2016).

337. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment of exile . . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." (citation omitted)).

338. *See* Lowe, *supra* note 267, at 2365–70.

339. *See supra* section III.B.

are charted by human experience."[340]

The current circuit split over sex offender registration statutes also shows how the CIMT analysis enables arbitrary enforcement of the laws by allowing courts to come out differently on identical questions of law. In *Efagene v. Holder*, the Tenth Circuit Court of Appeals reasoned that "although there are various ways of violating the [sex offender registration] statute, none of them involve an inherently base, vile, or depraved act."[341] Therefore, the court held that violating the statute could not constitute a CIMT. Alternatively, in *Bakor v. Barr*, the Eighth Circuit Court of Appeals came to a different conclusion based on its moral interpretation of the statute. It reasoned that "[w]here society has imposed a duty based on a compelling need to protect public safety, it is permissible . . . to conclude that one who knowingly ignores that duty acts in a morally reprehensible manner."[342]

The decision reached in *Bakor* is especially notable because it shows that the current CIMT framework allows judges to make decisions even against the great weight of authority to the contrary in other circuits based on a personal determination of what constitutes morally reprehensible conduct. Accordingly, noncitizens are unable to know with certainty whether being one day late for their sex offender registration will subject them to deportation. This lack of notice clearly violates the fair warning requirement of the void-for-vagueness doctrine. Further, arbitrary enforcement is shown by the fact that a crime may be considered a CIMT in one circuit while not considered a CIMT in another, which violates the second pillar of the doctrine. Taken together, in light of the current split over sex offender registration statutes, the CIMT provisions cannot be said to meet due process requirements for noncitizens as required by the Fifth and Fourteenth Amendments.

B. The Supreme Court's Expansion of the Void-for-Vagueness Doctrine Allows a New Challenge to CIMTs

The recent trio of Supreme Court decisions expanding the void-for-vagueness doctrine may provide a new path forward for noncitizens to challenge the CIMT provisions in the INA.

First, in *Johnson*, the Court opened the door for as-applied vagueness

340. T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 680 (8th ed. 2016) (quoting 1 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 71.05(1)(d)(i) (2015)).

341. 642 F.3d 918, 926 (10th Cir. 2011).

342. Bakor v. Barr, 958 F.3d 732, 737 (8th Cir. 2020).

challenges.[343] Rather than needing to find a statute unconstitutionally vague in all of its applications under a facial challenge, the Court in *Johnson* reasoned that its prior decisions "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."[344] Therefore, the CIMT provision can be challenged through individual as-applied challenges to particular crimes, rather than requiring that a facial challenge be brought to strike down the provisions in their entirety.

Additionally, the decision in *Dimaya* affirmed the Court's willingness to strike down a portion of the INA as unconstitutionally vague. This bodes well for a challenge to the CIMT provisions in the INA because the Court in *Dimaya* reasoned that "the most exacting vagueness standard should apply in removal cases."[345]

Lastly, the Court in *Davis* took issue with a categorical approach, which is similar to the one employed in the CIMT analysis. The *Davis* majority stated that "the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'"[346] The *Silva-Trevino III* two-step approach requires judges to make a similar estimation of whether moral turpitude necessarily inheres in a particular crime.

Other commentators have argued that the arbitrariness of the CIMT analysis can be solved by applying a uniform test, suggesting either the least-culpable conduct test or realistic probability test.[347] However, determining which test to use serves merely as a band-aid rather than solving the actual vagueness issue in the CIMT analysis. The problem with using categorical tests to determine whether certain crimes are CIMTs is that they each "involve an equal amount of judicial probing to detect the contours of the statute of conviction involved. Neither looks at the actual facts of the underlying conviction—both are entirely theoretical, based on imagined hypothetical fact patterns."[348] Employing any categorical test to determine whether a certain crime involves moral turpitude depends on the perspective and opinions of the judge. The judge must decide either what conduct under the relevant statute has a "realistic

343. *See* Koh, *Void for Vagueness*, *supra* note 86, at 1152–53, 1179.

344. Johnson v. United States, 576 U.S. 591, 602 (2015).

345. Sessions v. Dimaya, __ U.S. __, 138 S. Ct. 1204, 1213 (2018).

346. United States v. Davis, __ U.S. __, 139 S. Ct. 2319, 2326 (2019).

347. *See, e.g.*, George, *supra* note 172, at 589–603 (suggesting that courts apply the least culpable conduct test). *But see* Salem, *supra* note 149, at 247 (arguing that courts should apply the realistic probability approach).

348. Kornegay & Lee, *supra* note 196, at 104.

probability of being prosecuted"[349] or what is the "minimum criminal conduct necessary" to violate the statute.[350] Under either test, the judge must decide based on their own hypothetical configuration of the crime at issue rather than the actual conduct of the noncitizen.

Moreover, judges have no guideposts to make these determinations beyond the general understanding that certain crimes—crimes against people, against property, and involving fraud—typically involve moral turpitude.[351] Without any clear boundaries for all other crimes, judges must evaluate when conduct is so morally reprehensible that society deems it as "inherently base, vile, or depraved."[352] This determination involves a question of arbitrary line-drawing, which the Court held violated the Due Process Clause in *Johnson*, *Dimaya*, and *Davis*. Each case took issue with the fact that the phrasing of the residual clauses forced judges to make evaluations based on hypothetical scenarios.[353]

C. *A Narrow Reading of* Jordan v. De George *Permits a Vagueness Challenge to CIMTs*

While *Jordan v. De George* is still the controlling precedent for vagueness challenges to CIMTs, it should be read narrowly. The *Jordan* decision has long withstood the test of time among modern cases, but its holding may not be as expansive as it is cited for.[354] Although the Court ruled only on the issue of whether conspiracy to defraud the United States is a crime involving moral turpitude,[355] this case has come to stand for the proposition that the phrase "crime involving moral turpitude" is not unconstitutionally vague as a whole.[356] However, the majority explicitly stated that, "[w]hatever 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."[357] Therefore, if this decision is read narrowly, a new

349. Salem, *supra* note 149, at 236.

350. Mendez v. Mukasey, 547 F.3d 345, 348 (2d Cir. 2008).

351. *See supra* section IV.C.

352. Efagene v. Holder, 642 F.3d 918, 922 (10th Cir. 2011) (quoting Wittgenstein v. INS, 124 F.3d 1244, 1246 (10th Cir. 1997)).

353. *See supra* section IV.C.

354. *See* Kornegay & Lee, *supra* note 196, at 99.

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

356. *See id.* at 232; *see, e.g.*, Tseung Chu v. Cornell, 247 F.2d 929, 939 (9th Cir. 1957) (stating that the court is "bound by the language and reasoning of the majority of the Supreme Court" in rejecting the vagueness challenge to CIMTs, notwithstanding the concerns raised by the dissenting opinion in that case).

357. *Jordan*, 341 U.S. at 232.

vagueness challenge may be permitted without having to overrule *Jordan*.[358]

CONCLUSION

Much has changed since the Supreme Court's decision in *Jordan v. De George*. The BIA created a framework in *Silva-Trevino III* that was meant to help courts evaluate what crimes constitute crimes involving moral turpitude; however, this framework did little to create uniform decisions. Ultimately, the current CIMT framework violates both pillars of the void-for-vagueness doctrine by failing to provide notice and allowing arbitrary enforcement of the laws. As a result, each time a noncitizen appears before a judge for their conduct to be evaluated under the CIMT analysis the outcome is anything but certain.

Absent action by the Supreme Court to clarify the CIMT analysis, judges will continue to reach conclusions based on their own ideas of morally appropriate conduct, and noncitizens will be the ones to pay the price. However, given the current state of the *Silva-Trevino III* framework and the Court's apparent willingness to expand the void-for-vagueness doctrine in *Johnson*, *Dimaya*, and *Davis*, a new vagueness challenge to crimes involving moral turpitude may be available. This series of cases can be used by noncitizens to show the Court's skepticism about categorical tests, while providing support for vagueness challenges made to immigration statutes. Additionally, courts can be instructed to read *Jordan* narrowly as only applying to fraud crimes, which will permit new vagueness challenges without having to overrule past Supreme Court precedent. It is necessary to revisit the vagueness challenge to CIMTs to ensure that noncitizens are not removed from a place they have called home for years or even decades based on what a judge personally believes to be immoral conduct.

358. Overruling prior precedent is difficult to do given that, as of 2018, less than 2% of Supreme Court decisions have been overturned, due, in part, to the doctrine of stare decisis. *See* Amanda Shendruk, *Fewer Than 2% of Supreme Court Rulings Are Ever Overturned*, QUARTZ (May 22, 2019), https://qz.com/1326096/despite-its-pending-hard-right-turn-the-supreme-court-is-unlikely-to-overturn-roe-vs-wade/ [https://perma.cc/LD9A-WHZC].