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

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I. INTRODUCTION

President Trump wants to deport undocumented immigrants who “have criminal records,” and are “gang members” or “drug dealers.” Since the 2016 election, immigration has dominated the headlines. From the President’s
"Muslim ban" to his deportation actions, the discussion about which noncitizens are "bad" continues to consume much of the country's public policy debate.3

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

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


A. Illustrating the Problem

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

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

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7 Arias, 834 F.3d at 824.

8 Id.


10 Arias, 834 F.3d at 825.

11 Id.

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

13 Arias, 834 F.3d at 825.

14 Id.; see also 42 U.S.C. § 408(a)(7)(B), (a)(8) (2012) (criminal statute); Susan Pilcher & John Newman, Are Your Clients Ready for the ICE?, 32 VT. B.J. 40, 44 (2007) (explaining one method by which authorities are able to detect false social security numbers used by undocumented workers and others).
security number in order to work for Grabill. As a result, she was convicted of the crime in 2010, and "sentenced to just about the lightest felony sentence one is likely to find in modern federal practice: one year of probation and a $100 special assessment." After completing her probation, Grabill promptly rehired Arias.

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

However, under the Immigration and Nationality Act (INA), the Attorney General cannot exercise discretion to cancel removal where the respondent has been convicted of a "crime involving moral turpitude." The INA does not define "moral turpitude" or "crimes involving moral turpitude," and "courts have labored for generations to provide a workable definition" as a result.

Arias appealed this decision to the DOJ’s Board of Immigration Appeals (BIA), which agreed that her crime was turpitudinous. After the BIA’s decision, Arias appealed to the Seventh Circuit Court of Appeals.

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

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16 Arias, 834 F.3d at 825.

17 Id.

18 Id.

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


21 Arias, 834 F.3d at 825–26.

22 Id. at 825.

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

24 Id. at 826.

remanded her case to the BIA with a directive to “consider Arias’s case under an appropriate legal framework for judging moral turpitude.”

B. What Is Moral Turpitude?

Courts often accept that moral turpitude means something like its early Black’s Law Dictionary definition: “baseness, vileness, or depravity.” However, this definition seems to be of little help, as courts and scholars routinely criticize “moral turpitude” for its vagueness. Judge Posner levels such a criticism in his Arias concurrence. He says that previous court opinions defining moral turpitude “approach gibberish,” and sees Arias’s circumstance as especially sympathetic. Is making up a social security number to get a job—particularly when the employer in question calls the employee “excellent” and
is eager to rehire her—really the most “base, vile, or depraved” conduct that a
court can imagine? Judge Posner thinks not, and expresses his desire that the
BIA avoid using “broad categorical rules that sweep in harmless conduct.”

C. How To Better Define Moral Turpitude

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

31 Id. at 834; see also Moral Turpitude, supra note 27.
32 Arias, 834 F.3d at 836 (Poser, J., concurring in the judgment).
33 See id. at 830; infra Part V.
Harvey, 268 S.E.2d 587, 588 (S.C. 1980) (marijuana). Although other examples that are
further discussed in Part III relate more closely to federal immigration law, the marijuana-
and-cocaine dichotomy, in this author’s opinion, provides a succinct illustration of moral-
turpitude jurisprudence’s arbitrariness.
35 See Lopez-Meza, 22 I. & N. Dec. 1188, 1196 (B.I.A. 1999); Moral Turpitude, supra
note 27.
36 Compare Franklin, 20 I. & N. Dec. 867, 870 (B.I.A. 1994) (involved turpitude), with
38 Id.
39 See id. at 1018–19.
40 See infra Part V.D.
41 See infra Part V.E. Again, in the majority of circuits, this means Chevron deference.
See supra note 25.
Specifically, a revised standard for moral turpitude should mandate a “yes” answer to the following questions as necessary conditions for a finding that any given crime involves moral turpitude:

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

II. STATUTORY BACKGROUND

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

A. History

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

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

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42 See infra Part V.
43 See Harms, supra note 5, at 262 (citing Act of March 3, 1875, ch. 141, 18 Stat. 477); Simon-Kerr, supra note 37, at 1017.
45 Harms, supra note 5, at 260–61.
46 Id.
47 Id. This trend began with the British government’s “policy of exporting convicts to the colonies.” STAFF OF H.R. COMM. ON THE JUDICIARY, 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 5 (Comm. Print 1988) [hereinafter HOUSE JUDICIARY COMM.]. President Johnson publicly objected to this practice in 1866, after roughly a century of states regulating in this area. See Harms, supra note 5, at 261 (citing H.R. EXEC. DOC. NO. 43-253, at 75 (1874) (lodging a formal protest against pardons by foreign powers on condition of emigration to America)).
49 Id.
50 Id.
practices continued, and by the late 1880s, there were widespread reports that
criminal aliens remained in the country in large numbers.\textsuperscript{51} As a result, Congress
passed the Immigration Act of 1891, and in so doing, introduced the concept of
moral turpitude into immigration law.\textsuperscript{52} Specifically, this statute made it
possible to exclude “persons who [were] convicted of a felony or other infamous
crime or misdemeanor involving moral turpitude.”\textsuperscript{53} Perhaps because of the
consensus around the meaning of what was then a relatively common term,
Congress did not define “moral turpitude” in the Act.\textsuperscript{54} In response to continuing
concerns about the presence of immigrant criminals in the United States,
Congress made the commission of a crime involving moral turpitude a criterion
for deportation (in addition to exclusion) in the Immigration Act of 1917.\textsuperscript{55}

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

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

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

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

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

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

\textsuperscript{52} Harms, supra note 5, at 262 (citing HOUSE JUDICIARY COMM., supra note 47, at 8).

\textsuperscript{53} HOUSE JUDICIARY COMM., supra note 47, at 10.

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

\textsuperscript{55} Annotation, What Constitutes “Crime Involving Moral Turpitude” Within Meaning
of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. § 1182(a)(9),
1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense [among other possibilities, involving moral turpitude as in the INA section quoted above]; and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.57

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

III. MODERN CASE LAW

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

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57 Id. § 1229b(b)(1).
59 See, e.g., Arias v. Lynch, 834 F.3d 823, 825 (7th Cir. 2016).
61 Compare Smith v. Smith, 34 Tenn. (2 Sneed) 473, 479 (1855) (“It is easy to see that trespass, assault, battery, and the like are not within the [category of crimes involving moral turpitude]: while other misdemeanors, [such as bribery, extortion, theft], are properly included.”), with Arias, 834 F.3d at 826–29 (discussing the BIA’s twenty-first century holding that a relatively innocuous white-collar crime is turpitudinous), and Sotnikau v. Lynch, 846 F.3d 731, 736 (4th Cir. 2017) (holding that involuntary manslaughter, under Virginia law in 2017, is not a crime involving moral turpitude). But see Beck v. Stitzel, 21 Pa. 522, 524 (1853) (indicating that moral turpitude standards are “necessarily adaptive,” in the sense that they ought to evolve over time). See generally Simon-Kerr, supra note 37, at 1022–23 (discussing Smith v. Smith); id. at 1019 (discussing Beck v. Stitzel).
judges' personal moral sensibilities might play a role. Courts use a "categorical approach" in making these determinations: Judges examine whether a particular crime can be committed without a "turpitudinous" mens rea. No matter what actual actions lead to the defendant's conviction, if one can possibly violate the applicable statute without involving moral turpitude, the crime is categorically not one "involving moral turpitude." The BIA's handling of Matter of Lopez-Meza illustrates both the categorical approach and its confusing results in the context of aggravated DUls. Here, the BIA held that aggravated DUI was a crime involving moral turpitude because Lopez-Meza had to knowingly drive with a suspended license in order to be convicted. An analogy between "concealing" a driver's-license status and committing fraud was salient to the Board's decision. The 2017 case of Sotnikau v. Lynch provides an example of a hair-splitting mens rea distinction. Although previous cases held that involuntary manslaughter was a crime involving moral turpitude, a Virginia Supreme Court decision suggesting that it would be possible to commit the same crime while only being criminally negligent lead to a different result.

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

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


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

66 Compare id., with, e.g., OHIO REV. CODE ANN. § 2903.13(A)–(B) (LexisNexis 2014) (using the terms "knowingly" and "recklessly" in a seemingly intentional way).
A. Courts and Agencies Emphasize How To Look for Moral Turpitude

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

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

Before Silva-Trevino I, some courts agreed that a two-step inquiry should be used to determine whether a crime involved moral turpitude. First, under the “categorical” prong of the test, courts should look to the statute under which the respondent was convicted. If the statute sub judice could not be violated canon and suggesting in a general way that courts assume that legislators choose words carefully).


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

74 Id.
75 Id.
76 See id.
77 Id.

80 Id.
A NEW DEFINITION OF “MORAL TURPITUDE”

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

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

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

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81 Id.
82 Id.
83 Id.
84 Compare Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006) (standard categorical approach), with Marciano v. Immigration & Naturalization Serv., 450 F.2d 1022, 1025 (8th Cir. 1971) (“common usage” rule).
85 Amouzadeh, 467 F.3d at 456. Again, this meant looking for the least culpable way in which to violate a statute, and determining if such a crime would necessarily include the requisite scienter to sustain a finding of moral turpitude. See, e.g., id. at 457 (finding that, in order to violate a particular statute, a defendant had to knowingly make a false statement; both the “knowingness” mens rea and “false” nature of the statement were salient to the court’s decision that this crime was turpitudinous).
86 See Marciano, 450 F.2d at 1028 (Eisele, J., dissenting) (characterizing the majority’s approach as following a “common usage” rule).
87 See Nicanor-Romero v. Mukasey, 523 F.3d 992, 1004–07 (9th Cir. 2006) (indicating that prior to the Ninth Circuit’s application of Chevron deference to the BIA with respect to specific crimes the BIA had found to involve moral turpitude, the Ninth Circuit Court of Appeals would evaluate possible crimes involving moral turpitude based on a “realistic probability” test), overruled by Marmolejo-Campos v. Holder, 558 F.3d 903, 911 (9th Cir. 2009) (en banc).
88 See Simon-Kerr, supra note 37, at 1008, 1023 n.161; see also Serna, 20 I. & N. Dec. 579, 581 (B.I.A. 1992) (viewing the malum in se aspect of a crime as intrinsic to a finding that such a crime involves moral turpitude).
90 Id.
crime involving moral turpitude.\textsuperscript{91} Finally, if neither step one nor two resolved the matter, the judge looked beyond the “record of conviction” to other facts in determining if a crime involving moral turpitude was committed.\textsuperscript{92} This is the “Silva-Trevino I standard.”

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

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

\textsuperscript{91} Id. at 690.
\textsuperscript{92} Id.
\textsuperscript{93} Silva-Trevino (Silva-Trevino II), 742 F.3d 197, 200–06 (5th Cir. 2014).
\textsuperscript{94} See id. at 200 (“We have long held that, in making this determination, judges may consider only ‘the inherent nature of the crime, as defined in the statute,’ or, in the case of divisible statutes, ‘the alien’s record of conviction.’” (citing Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006))).
\textsuperscript{95} Silva-Trevino II, 742 F.3d at 200.
\textsuperscript{96} Id. (citing 8 U.S.C. § 1101(a)(48)(A) (2012)).
\textsuperscript{97} Id. at 200–01 (citing 8 U.S.C. §1229a(c)(3)(B)).
\textsuperscript{98} Id. at 201–03.
\textsuperscript{99} Sanchez v. Holder, 757 F.3d 712, 717–18 (7th Cir. 2014). In Arias, the Seventh Circuit Court of Appeals recognized that this approval of the Silva-Trevino I standard was likely irrelevant, as the DOJ had already decided to abandon Silva-Trevino I based on the Fifth Circuit’s disapproval. See Arias v. Lynch, 834 F.3d 823, 824, 830 (7th Cir. 2016). Indeed, the Attorney General formally vacated the Silva-Trevino I approach in its entirety in Silva-Trevino (Silva-Trevino III), 26 L. & N. Dec. 550, 554 (Att’y Gen. 2015).
\textsuperscript{100} Arias, 834 F.3d at 834 (Posner, J., concurring in the judgment).
\textsuperscript{101} Silva-Trevino III, 26 L. & N. Dec. at 554.
B. Confusing Decisions: What Is a Crime Involving Moral Turpitude?

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

1. The Fraud Paradigm: Aggravated DUI

For historical reasons, adjudicators often hold that fraudulent or deceptive conduct lies “close to the core” of moral turpitude. Matter of Lopez-Meza illustrates this paradigm.

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

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

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102 See infra Parts III.B.1 and III.B.2.
103 Arias, 834 F.3d at 827 (“Despite the confusion about how to determine what moral turpitude is, there is a consensus that fraud is close to the core of moral turpitude.”); see also, e.g., Jordan v. De George 341 U.S. 223, 227 (1951) (“Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude.”); Simon-Kerr, supra note 37, at 1007–08 (arguing that, at least for men, fraud and dishonesty were historically part of the “core” of moral turpitude).
104 Lopez-Meza, 22 I. & N. Dec. 1188, 1193 (B.I.A. 1999); see also, e.g., Jordan, 341 U.S. at 227.
105 Lopez-Meza, 22 I. & N. Dec. at 1188–89.
106 Id. at 1189.
107 Id. at 1194–95.
108 Id. (citing ARIZ. REV. STAT. ANN. §§ 28-692(A)(1), 28-697(A)(1)).
109 Id. at 1194–95.
into one that involved “baseness . . . contrary to accepted moral standards.”

Immediately after discussing why fraud is a paradigmatic example of a crime involving moral turpitude, the majority said that the statute’s “knowing” requirement made Lopez-Meza’s crime turpitudinous. The implication was clear: These actions were very bad because they involved a person who was hiding something, just like fraud involves a person who is hiding something. The BIA emphasized this point in saying that the violation of a state administrative directive “involved a baseness so contrary to accepted moral standards that it rises to the level of a crime involving moral turpitude.”

This is a critical reason why, to the uninitiated, moral-turpitude jurisprudence looks so odd. Without viewing fraud as a lodestone for moral turpitude, it is not at all clear that simply doing something sneaky is morally outrageous in the same sense that murder and rape are morally depraved crimes.113

2. Hair-Splitting Distinctions: Involuntary Manslaughter

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

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

111 Lopez-Meza, 22 I. & N. Dec. at 1193 (Jordan discussion); id. at 1194–95 (“knowingly” discussion).

112 Id. at 1195.


115 Id. at 867.
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precedent as supporting the idea that recklessness, so defined, involved moral turpitude, stating that "[t]his definition of recklessness requires an actual awareness of the risk created by the criminal violator's action."\(^{116}\) On the other hand, in the 2017 case of *Sotnikau v. Lynch*, the Fourth Circuit Court of Appeals concluded that involuntary manslaughter, under Virginia law, was not a crime involving moral turpitude.\(^{117}\) The court acknowledged *Franklin*, but felt that the best-defined mens rea required for a Virginia involuntary manslaughter conviction came in the form of the following quote from the Virginia Supreme Court:

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

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

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

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

\(^{117}\) *Sotnikau v. Lynch*, 846 F.3d 731, 737 (4th Cir. 2017).

\(^{118}\) *Id.* at 736 (citing *Noakes v. Commonwealth*, 699 S.E.2d 284, 288 (Va. 2010)).

\(^{119}\) *Id.*

\(^{120}\) Compare *id.*, with *Franklin*, 20 I. & N. Dec. at 870.
distinctions. In other cases, courts may focus on analogizing elements of criminal statutes to fraud. And, of course, there has been a great deal of disagreement, in fairly recent history, regarding how adjudicators ought to look for moral turpitude.

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

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

A. Moral Turpitude’s First Appearance: Brooker v. Coffin

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

121 See supra Part III.B.1.
122 See supra Part III.A.
123 Compare Arias v. Lynch, 834 F.3d 823, 833 (7th Cir. 2016) (Posner, J., concurring in the judgment) (comparing lists of turpitudinous and nonturpitudinous crimes, and stating that “[t]he division between the two lists is arbitrary”), with Moral Turpitude, supra note 27.
124 Simon-Kerr, supra note 37, at 1007.
125 Id.
126 Id.
128 Compare, e.g., Jordan, 341 U.S. at 227, with, e.g., Lopez-Meza, 22 I. & N. Dec. at 1191.
130 Brooker, 5 Johns. at 188.
“physiognomy, palmistry, [and] pretending to tell fortunes” as within its ambit.\(^{131}\) In the opinion of the court, since these acts were not ones of “moral turpitude,” accusing someone of violating any part of the statute would not constitute slanderous words without a showing of an injury.\(^{132}\) However, one dissenting judge wrote that the defendant’s words, “besides imputing great moral turpitude, and tending to render the person odious in the opinion of mankind, may . . . also subject the [plaintiff] to a . . . disgraceful punishment.”\(^{133}\) From this very first instance of moral turpitude in the law, two key themes emerge: it is concerned with reputational harm, viewed through the prism of nineteenth-century honor-culture norms; and, no one can agree on what it means.

B. The Early Evolution of the Moral Turpitude Standard

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

1. Moral Turpitude’s Roots in Gendered Honor Culture

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

\(^{131}\) Id. at 191.

\(^{132}\) Id. at 189.

\(^{133}\) Id. at 190 (Sedgwick, J., dissenting).

\(^{134}\) Harms, *supra* note 5, at 272.

\(^{135}\) See Simon-Kerr, *supra* note 37, at 1007.

\(^{136}\) Id.

\(^{137}\) Id.

\(^{138}\) See id. at 1012–13; see also Mark M. Carroll, “All for Keeping His Own Negro Wench”: *Birch v. Benton* (1858) and the Politics of Slander and Free Speech in Antebellum Missouri, 29 LAW & HIST. REV. 835, 858 (2011) (“The model for praiseworthy manhood in antebellum Missouri was Andrew Jackson, whose mother summed up its essence with the colloquial advice, ‘Never tell a lie, nor take what is not your own, nor sue anybody for slander or assault and battery. Always settle them cases yourself.’ . . . The vindication of personal honor . . . frequently prompted common men and politicians to respond to political insults with lethal violence.’”). This attitude is further exemplified by an exchange between Representative Samuel Untermeyer and J.P. Morgan while Mr. Morgan was testifying before
turpitude." And, in a young country that lacked many universal norms—where "reputation was the glue that held the polity together"—being a person of moral turpitude was a pretty bad thing. Professor Simon-Kerr notes that the founding fathers particularly admired Cicero; as such, perhaps the intellectual elite of the late-eighteenth and early-nineteenth century would have been inclined to heed words such as these: "[T]he dishonesty of an action is . . . in itself execrable and frightful. . . . [A]s virtue or moral excellency is for itself to be valued and desired, so vice or moral turpitude is to be hated and avoided."

2. Early Case Law: Contrasting Homicide and Commercial Crimes

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


Id. (citing joanne b. freeman, Affairs of Honor: National Politics in the New Republic 69 (2001)).

Id. (citing 3 Cicero, De Finibus 158 (Jeremy Collier ed., Samuel Parker trans., 1812)).

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

Burton, 3 Greene at 316–17 ("In [Brooker v. Coffin] it is held, that if the charge, being true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable.")
estimation of all worthy neighbors and citizens."\textsuperscript{145} Importantly, the court found this more turpitudinous than homicide, because homicides may occur in the "heat of sudden passion."\textsuperscript{146} And, given that "many circumstances may exist as palliations of moral guilt in the public mind [with respect to homicide]; but no circumstances can possibly extenuate the moral turpitude of that wretch who will poison his neighbor’s horse or cow," the court thought it obvious that cow poisoning involved greater moral turpitude.\textsuperscript{147}

3. Early Case Law: Violence Is Not So Bad

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

\textsuperscript{145} Id. at 317–18.
\textsuperscript{146} Id. at 318.
\textsuperscript{147} Id.
\textsuperscript{148} See supra Parts IV.B.1, IV.B.2.
\textsuperscript{149} Smith v. Smith, 34 Tenn. (2 Sneed) 473, 479–83 (1855); see also Simon-Kerr, supra note 37, at 1022–23 (discussing the case).
\textsuperscript{150} See supra Part IV.B.1.
\textsuperscript{151} Cf. supra Part IV.B.1.
4. The Creation of an Important Precedent: Jordan v. De George

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

V. A Solution

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

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154 Id. at 224–25.
155 Id. at 233 (Jackson, J., dissenting).
156 Id. at 225–26 (majority opinion).
157 Id. at 227. The offenses the Court cites for this proposition include: "obtaining goods under fraudulent pretenses; conspiracy to defraud by deceit and falsehood; forgery with intent to defraud; using the mails to defraud; execution of chattel mortgage with intent to defraud; concealing assets in bankruptcy; [and] issuing checks with intent to defraud." Id. at 228 (citations omitted).
158 Id. at 229.
159 See, e.g., Arias v. Lynch, 834 F.3d 823, 827 (7th Cir. 2016) ("Despite the confusion about how to determine what moral turpitude is, there is a consensus that fraud is close to the core of moral turpitude.").
161 Compare, e.g., Jordan, 341 U.S. at 231 (concluding that "difficulty in determining whether certain marginal offenses [were] within the meaning of the language" did not render the statute unconstitutionally vague and, therefore, the meaning of moral turpitude was sufficiently definite to withstand scrutiny), with, e.g., Lopez-Meza, 22 I. & N. Dec. at 1191 (stating that since Jordan, courts have referred to moral turpitude as a "nebulous concept" with ample room for differing definitions"). But see Beck v. Stitzel, 21 Pa. 522, 524 (1853).
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turpitude precedents—insofar as they concern specific crimes—because closely following such precedent limits the appearance that courts are simply applying judges' individualized senses of morality.\(^{162}\) It would seem imprudent—or in any event unlikely—for judges to suddenly break with this practice, and begin explicitly deciding moral-turpitude cases based on what they, personally, view as "base[, vile[, or deprav[ed]."\(^{163}\)

Of course, there are other possible ways to resolve the moral-turpitude problem, and this Note begins by presenting this author's novel solution in contrast to those.\(^{164}\) First, some have proposed that the United States Supreme Court find the term "moral turpitude" to be void for vagueness.\(^{165}\) While other authors make compelling arguments on this front, this solution would itself require an upending of an oft-cited precedent, \textit{Jordan v. De George}.\(^{166}\)

Additionally, this judicial solution would simply remove the moral-turpitude standard from the INA without providing a workable replacement, and could not be implemented as quickly as an administrative one.\(^{167}\) Others have proposed a legislative solution\(^{168}\): that Congress should provide a definition of "crimes involving moral turpitude" in the INA.\(^{169}\) However, Congress has been wrought with gridlock in recent years.\(^{170}\) And, even in a time when Republicans control both the House and Senate, the redefinition would have to clear several

\footnotesize{(indicating that moral turpitude standards are "necessarily adaptive," in the sense that they ought to evolve over time); Simon-Kerr, \textit{supra} note 37, at 1019 (discussing \textit{Beck}). The author offers support for this Note's contentions regarding modern moral sentiments below in terms of public—and broadly speaking, emotional—reactions to wrongdoing. One of the strengths of the metaethical paradigm of moral sentimentalism is its ability to "mak[e] sense of the practical aspects of morality." \textit{Moral Sentimentalism}, \textit{Stan. Encyclopedia Phil.} (Jan. 29, 2014), https://plato.stanford.edu/entries/moral-sentimentalism [https://perma.cc/6WWL-58JN]; see also \textit{David Hume}, \textit{A Treatise of Human Nature} 457 (L.A. Selby-Bigge ed., 2d ed. 1978) ("Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular."). See generally \textit{Adam Smith}, \textit{The Theory of Moral Sentiments} (1759) (outlining a version of this paradigm).

\(^{162}\) See Harms, \textit{supra} note 5, at 276 n.147.
\(^{163}\) \textit{Moral Turpitude, supra} note 27.
\(^{164}\) See infra Part V.A.
\(^{165}\) See Moore, \textit{supra} note 28, at 814; see also Koh, \textit{supra} note 5, at 1127; infra Part V.A.2.
\(^{166}\) See \textit{Jordan}, 341 U.S. at 229 ("But it has been suggested that the phrase 'crime involving moral turpitude' . . . is . . . unconstitutional for vagueness. Under this view, no crime, however grave, could be regarded as falling within the meaning of the term 'moral turpitude.'"); Moore, \textit{supra} note 28, at 833.
\(^{167}\) See \textit{Elizabeth C. Richardson, Administrative Law and Procedure} 15 (1996) ("Agencies can generally move faster than courts . . . .").
\(^{168}\) See Harms, \textit{supra} note 5, at 260; see also infra Part V.A.1.
\(^{169}\) See Harms, \textit{supra} note 5, at 260.
veto-gates, including a potential Democratic filibuster. In any case, an administrative solution, as Judge Posner suggests in his Arias concurrence, has the virtue of relatively rapid implementation.

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

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

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

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

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

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

175 See Sotnikau v. Lynch, 846 F.3d 731, 735–37 (4th Cir. 2017); Franklin, 20 I. & N. Dec. 867, 867 (B.I.A. 1994); supra Part III.B.2 (discussing cases). Even if the distinctions between involuntary manslaughter law in Missouri and Virginia are not arbitrary in the sense
Second, modern Americans regard violence as being quite serious in nature, whereas their nineteenth-century forebears did not. Additionally, Westerners find the victimization of vulnerable people, including sex crimes, to be morally reprehensible. Finally, in any case, sentencing standards and offense gradation, in the twenty-first century, relate to how seriously Americans regard any particular crime. The BIA is best positioned to move forward with this redefinition of moral turpitude because it (1) can act relatively quickly and decisively, and (2) generally receives Chevron deference with respect to its definition of moral turpitude. This Note concludes by arguing that this author’s proposed moral-turpitude redefinition should be upheld by courts under various schemes of deference.

A. Contrasting Judicial and Legislative Proposals

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

1. Congress Could Redefine Moral Turpitude

In his 2001 article Redefining “Crimes of Moral Turpitude”: A Proposal to Congress, Professor Brian Harms articulates a legislative fix for moral turpitude that courts use “arbitrary” in constitutional void-for-vagueness law, it seems dubious that the fine-grain legal distinctions elicited in these cases relate to what Missourians and Virginians regard as base, vile, or depraved. See supra Part III.B.2 (discussion of cases); infra Part V.A.2 (void for vagueness). Is it true that Missourians think involuntary manslaughter to be a “vile” offense, while Virginians think that it is not? The author doubts this.

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

177 See infra Part V.D.2.

178 See infra Part V.D.3.

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

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

181 See RICHARDSON, supra note 167, at 15.

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

183 Harms, supra note 5, at 279.

184 Moore, supra note 28, at 816.
law.\textsuperscript{185} He begins by drawing on several sources which argue that the current state of moral-turpitude decisions can best be understood as falling into four categories: "(1) crimes against the person; (2) crimes against property; (3) sex crimes and crimes involving family relationships; and (4) crimes of fraud against the government or its authority."\textsuperscript{186} Although courts often do not draw on these distinctions as decision-making frameworks, they offer some clarity in describing the body of moral-turpitude law.\textsuperscript{187} Crimes against the person are found to "involve moral turpitude when the local statute . . . requires 'malicious intent.'"\textsuperscript{188} As a result, murder, \textit{inter alia}, is always a crime involving moral turpitude.\textsuperscript{189} Crimes against property "involve moral turpitude if the . . . statute requires an intent to deprive, defraud, or destroy."\textsuperscript{189} Sex crimes and crimes involving family relationships are a bit more difficult to succinctly characterize.\textsuperscript{190} Rape, for instance, as an "aggravated" sex crime, always involves moral turpitude.\textsuperscript{192} On the other hand, those sex crimes which courts consider nonaggravated, such as vagrancy, are not turpitudinous.\textsuperscript{193} Crimes of fraud against the government or its authority, such as unlawful use of the mails, are considered exemplary crimes involving moral turpitude in all cases.\textsuperscript{194}

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

\textsuperscript{185} Harms, \textit{supra} note 5, at 260.
\textsuperscript{186} \textit{Id.} at 267–69.
\textsuperscript{187} \textit{Id.}; see, e.g., Arias v. Lynch, 834 F.3d 823, 823–30 (7th Cir. 2016) (failing to use this as a decision-making framework).
\textsuperscript{188} Harms, \textit{supra} note 5, at 267–68.
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.} at 268.
\textsuperscript{191} \textit{See id.} at 268–69.
\textsuperscript{192} \textit{Id.} at 268.
\textsuperscript{193} \textit{Id.} at 269. Family law, although Professor Harms places it in this category, is a bit more haphazard: "adultery, abortion, bigamy, spousal abuse, and child abuse" have been held to be crimes involving moral turpitude, while bastardy has not. \textit{Id.}
\textsuperscript{194} Harms, \textit{supra} note 5, at 269.
\textsuperscript{195} \textit{Id.} at 278–79.
\textsuperscript{196} \textit{Id.} at 279–80.
\textsuperscript{197} \textit{Id.} at 267–70 (type of crime); \textit{id.} at 279–80 (method).
\textsuperscript{198} \textit{See id.} at 279–80.
\textsuperscript{199} \textit{See id.} at 280.
Second, Congress could simply codify the current common law of moral turpitude.200 While this “generally accepted principles” approach provides minimal notice, it would have the arguable virtue of preserving current judicial flexibility.201 Ultimately, Professor Harms recommends that Congress use what he calls the “listing method plus,” specifically detailing which crimes are crimes involving moral turpitude, which are not, and setting up a clearer framework for those that are not in either category.202

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

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

200 Harms, supra note 5, at 280–81.
201 Id.
202 Id. at 281–83.
203 Moore, supra note 28, at 816. Professor Jennifer Lee Koh discusses the void-for-vagueness doctrine’s possible application throughout immigration law, including moral turpitude law, in Crimmigration and the Void for Vagueness Doctrine. Koh, supra note 5. The author has chosen Moore’s note to summarize as a possible alternative because of Moore’s narrower focus on crimes involving moral turpitude. See Moore, supra note 28, at 816.
204 Keyishian v. Bd. of Regents, 385 U.S. 589, 609–10 (1967); Moore, supra note 28, at 834.
205 Moore, supra note 28, at 815–16.
206 Id. at 835–36.
207 Arias v. Lynch, 834 F.3d 823, 827 (7th Cir. 2016) (“[T]here is a consensus that fraud is close to the core of moral turpitude.”).
208 See Moore, supra note 28, at 815–16.
209 Id. at 836–37.
210 Id. at 837 (citing Adam A. Milani & Michael R. Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 TENN. L. REV. 245, 251 (2002)).
relative to issues that parties brief and argue. Finally, Moore cites some of the alleged flaws in the majority opinion alluded to above. Chief Justice Vinson, writing for the Court, calls moral turpitude a “deep root[ed]” concept, since it had, at that point, been in immigration law for about sixty years. However, Justice Jackson, writing in dissent, finds this characterization disingenuous, as courts and scholars had already recognized the term’s ambiguities. Additionally, the Jordan majority fails to explicitly connect the void-for-vagueness doctrine with the concept of notice, an underlying policy concern that has been more fully developed as a component of the doctrine in subsequent years. The doctrine’s availability outside of the criminal context, Jordan’s narrow reading, and moral turpitude’s widely recognized vagueness arguably offer the judicial branch an opportunity to strike down the INA’s reliance on moral turpitude as too ambiguous.

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

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


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

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

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

217 Cf. Richardson, supra note 167, at 15 (describing agencies as quicker at handling problems).

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

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

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


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

\(^{222}\) *Id.* at 833.

\(^{223}\) *Id.* (citing U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL, 9 FAM 40.21(a) N2.3-2).
In examining the two lists, some themes do emerge: Crimes involving moral turpitude tend to have higher mens rea standards, and have more obvious connections to fraud and dishonesty. Despite this, Judge Posner sees the list as confounding. As he puts it, "[t]he first is open-ended and therefore provides incomplete guidance on how to avoid committing a crime of moral turpitude against the government. The second list . . . includes a number of crimes that are as serious . . . as those in the first list . . . ." Of course, Judge Posner is not alone in his opinion that crimes involving moral turpitude and

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224 See id.  
225 Id.  
226 Id.
crimes not involving moral turpitude often seem equally serious. The explanation for this is simple: Our modern moral sentiments no longer accord with those notions of moral turpitude that have hardened into judicial precedent.

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

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

227 See Arias, 834 F.3d at 833 (Posner, J., concurring in the judgment). Compare supra Part V.A.1 (Professor Harms), with supra Part V.A.2 (Moore).
228 See supra Part IV.B.1 (Professor Simon-Kerr).
229 See, e.g., Arias, 834 F.3d at 833 (Posner, J., concurring in the judgment).
230 See supra Parts V.A.1 (Professor Harms), and V.A.2 (Moore).
231 See supra Part III.B.1.
233 See supra Parts IV.B.1, IV.B.2, and IV.B.3 (discussing nineteenth-century precedents which do, in fact, significantly constrain current moral-turpitude decisions). To illustrate the extent to which personal morality may affect judicial moral-turpitude decisions, one could compare Major, 391 S.E.2d at 237, a case in which a South Carolina court found cocaine possession to be a turpitudinous crime, with Harvey, 268 S.E.2d at 588, a case in which a different South Carolina court found marijuana possession to be nonturpitudinous.
234 Compare Major, 391 S.E.2d at 237, with Harvey, 268 S.E.2d at 588.
Yet, precise bright lines are necessarily somewhat arbitrary. Municipalities formulate speed limits with precision. However, few would pretend that driving twenty-six miles per hour in a residential neighborhood involves a grave moral wrong, while driving twenty-five miles per hour on the same street is commendably safe. Instead, governments line draw simply because lines must be drawn somewhere.

Experiments with open-ended speed limits have run into serious problems. As a result, we accept very particular speed limits, even if they penalize fairly harmless conduct. The literature criticizing moral turpitude usually discusses the first type of ad hoc unfairness ad nauseum, and focuses less on what might happen if courts were to draw moral-turpitude lines too precisely.

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

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

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


239 Cf. supra Parts IV.B.1 (Professor Simon-Kerr), V.A.1 (Professor Harms), and V.A.2 (Moore).
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out above are not entirely mutually exclusive, many policymaking decisions involve the balancing of these competing concerns.\textsuperscript{240}

In any enterprise of precise line drawing, one may predict what type of seemingly undesirable result the rule’s arbitrariness will more often cause: a false positive or a false negative.\textsuperscript{241} In the speeding context, low speed limits risk penalizing drivers who are driving in a safe manner. This is a false positive. This must be balanced against the risk of a high speed limit, which might fail to catch many drivers who are driving at speeds unsafe given road conditions: a false negative. Of course, line drawing occurs in many contexts, and line drawers must be sensitive to the policy needs underlying the creation of standards.\textsuperscript{242}

In devising screening procedures for cancers, scientists and physicians want to catch as many instances of actual cancer as possible, with the concomitant risk that they will detect “cancer” where none exists (a false positive).\textsuperscript{243} So, they draw the “you have cancer” line at a place that risks, if anything, over diagnosing. On the other hand, in designing police hiring procedures, law enforcement agencies prefer false negatives;\textsuperscript{244} they want to avoid hiring individuals who will end up “on the front page of the newspaper and not for good reasons.”\textsuperscript{245}

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


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


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

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

\textsuperscript{245} Russo, supra note 242.

\textsuperscript{246} See supra Part III and accompanying footnotes.
are always crimes involving moral turpitude. These are uncontroversial bright lines. However, stare decisis has morphed certain less-generalizable decisions into bright-line rules: aggravated DUI is a crime involving moral turpitude, while “ordinary” DUI is not. Cocaine possession is a crime involving moral turpitude, while marijuana possession is not. Particular judges have found appreciable differences between the moral import of these crimes, where others do not see such differences. Additionally, ad hoc decisions are based on differing standards: Sometimes judges look for scienter, and sometimes they look to see if a crime is malum in se. In any case, these precedents have calcified into rules that lack a basis in the underlying policy. They are—as Judge Posner puts it—“broad categorical rules that sweep in harmless conduct.” The DOJ would be wise to take Judge Posner’s advice seriously and draw bright lines that err on the side of false negatives. This way, the presence of clear standards will reduce the chances that individual judges will use their own, personalized moral senses to decide moral-turpitude cases.

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


250 See supra Part III.A and accompanying footnotes.

251 See supra Part IV.B (discussing old precedents); cf. Arias v. Lynch, 834 F.3d 823, 834 (7th Cir. 2016) (Posner, J., concurring in the judgment) (alluding to the ways in which current moral-turpitude jurisprudence fails to respond to underlying policy concerns regarding which noncitizens have committed morally reprehensible crimes). Indeed, in other contexts, the American government has adapted the term “moral turpitude” to be responsive to its policy concerns. See DEP’T OF THE AIR FORCE, GUIDANCE MEMORANDUM 191 (2017), http://static.e-publishing.af.mil/production/1/af_a1/publication/af36-3208/af36-3208.pdf [https://perma.cc/F471-7YVL] [hereinafter AIR FORCE MANUAL]. The Air Force Manual—perhaps in view of the policies of unit cohesion and discipline—dictates that, for certain purposes, “offenses involving moral turpitude include . . . sexual perversion, drug addiction, drug use, and drug supplier . . . .” Id.

252 Arias, 834 F.3d at 836 (Posner, J., concurring in the judgment).
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1. Is the mens rea purposely or knowingly?
2. Is it punishable by at least five years in prison? Alternatively, is it a sex crime; a crime of domestic violence; a violent crime that involves harm to children, animals, or the elderly; or a hate crime?253

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

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

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

1. Moving away from Fraud: Reassessing Mens Rea Requirements

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

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

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

255 Although the influence of the Model Penal Code has significantly reduced the potential for this to cause confusion, there are still many statutes which take a more haphazard approach to criminal mens rea requirements. See, e.g., Joshua Dressler, Criminal Law 109 (2d ed. 2005) (“[M]any states have adopted portions of the [Model Penal
This restriction has a simple basis: to ensure that adjudicators do not sweep in lesser, relatively innocuous offenses because of outdated distinctions that have been calcified in moral-turpitude precedent. For example, if a judge based a moral-turpitude determination on the *malum in se* vs. *malum prohibitum* distinction, she might be inclined to view assault as a crime that is *malum in se*.256 This makes sense: Legislatures criminalize assault because it is morally wrong, not because it is simply conduct that we wish to avoid for regulatory reasons.257 However, Ohio’s assault statute dictates that, *inter alia*, “[n]o person shall recklessly cause serious physical harm to another . . .”258 The Ohio Revised Code indicates that “[a] person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result.”259

The following hypothetical illustrates why crimes that are committed recklessly and are also *malum in se* pose problems for moral-turpitude law. Say that Jones is an undergraduate student living in a small dorm room measuring ten feet by six feet, with one small window facing toward the outside and a desk nearby. Smith, a friend, wishes to play a prank on Jones, and intends to throw a
rock at Jones’s window. One night, seeing Jones sitting at the desk through the window, Smith decides to act out her plan: She chooses a rather large stone, hurdles the rock at the glass, shatters the window, and causes injury to Jones’s eye. Smith truly had not considered that the consequences of her youthful prank could be so serious. However, it seems clear that Smith acted with heedless indifference to a substantial and unjustifiable risk that physical harm to Jones would result from this conduct. Thus, because Smith has violated a statute that lays out a crime which is malum in se, she could be said to have committed a crime involving moral turpitude, even though this prank is one that—I would guess—most of us would agree is not among the most significant crimes one could commit.

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

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

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

261 Kenneth Dowler, Media Consumption and Public Attitudes Toward Crime and Justice: The Relationship Between Fear of Crime, Punitive Attitudes, and Perceived Police Effectiveness, 10 J. CRIM. JUST. & POPULAR CULTURE 109, 110 (2003) (“In an early study, Gerbner . . . hypothesized that heavy viewing of television violence leads to fear rather than aggression. Gerbner . . . find[s] that individuals who watch a large amount of television are more likely to feel a greater threat from crime . . . .” (emphasis added) (citations omitted)); Public Perception of Crime Remains out of Sync with Reality, Criminologist Contends, UTNEWS (Nov. 10, 2008), https://news.utexas.edu/2008/11/10/crime (detailing the eponymous metaethical paradigm which holds that individuals’ emotions, such as fear, are key to “the anatomy of morality”); Are We Scaring Ourselves to Death, YOU TUBE (Nov. 20, 2013), https://www.youtube.com/watch?v=WmiFSbQDi [https://perma.cc/7XRN-JHPA] (ABC television broadcast).
reporting is to blame. The diversion of federal law enforcement resources away from white-collar crime towards antiterrorism efforts, and the public’s general view of blue-collar crime as less socially acceptable, both support the same view: whether right, wrong, or indifferent, Americans today see violence as a more serious type of crime.

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


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

264 See Serani, supra note 262 (detailing media practices that emphasize very violent crimes).
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Yet, assaults between feuding males make up a disproportionate number of violent crimes relative to the media coverage they receive. Society takes other categories of crime more seriously: One need only compare media reaction to football players injuring intimate partners with media reaction to football players punching one another. Of course, crimes that modern Americans consider most serious cannot be limited to domestic violence: sex crimes, hate crimes, and crimes with other vulnerable victims make intuitive candidates.


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


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

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

By asking whether the crime is punishable by five years or more in prison, or alternatively a crime of violence with a vulnerable victim, the “punishable by five years or more in prison” prong of the moral turpitude test above manages to accomplish one thing: It excludes misdemeanors and low-level felonies that are nonviolent or do not involve an exceptionally vulnerable victim.269 This
criterion rests on the assumption that today, our moral sentiments are connected to sentencing standards. Indeed, when one begins discussing more serious offenses, ethical lines may blur. Perhaps a defendant has been convicted of drug trafficking, but we can be sure that he was associated with a broader, violent criminal enterprise. Perhaps a drug dealer never struck, stabbed, or shot his customers, but instead gave them strong opiates that lead to their overdose deaths. Or, in other cases, an ambitious Ponzi schemer may have defrauded investors of billions of dollars, causing many to lose their entire life savings. Each of these crimes run afoul of modern moral sensibilities, and might still be considered a twenty-first-century crime involving moral turpitude.

E. Courts Should Uphold Such a Redefinition by the DOJ

The majority of circuits apply Chevron deference to the BIA’s decisions regarding whether a given crime involves moral turpitude. While other

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


272 See Knapik v. Ashcroft, 384 F.3d 84, 88 (3d Cir. 2004). Courts treat the question of how, procedurally, to determine whether a crime involves moral turpitude differently from the question of whether a given crime involves moral turpitude. See, e.g., Jean-Louis v. Attorney General, 582 F.3d 462, 477 (3d Cir. 2009). In Jean-Louis, the DOJ supported its Silva-Trevino I standard by arguing, inter alia, that “crime” and “involving moral turpitude” could be understood as “distinct grammatical units.” Id. The Third Circuit rejected this, indicating that the phrase is unambiguous (under a Chevron rubric) insofar as it constitutes a single term of art. Id. In contrast, in Prudencio v. Holder the Fourth Circuit came to a similar conclusion regarding this argument, but declined to extend the DOJ Chevron deference with respect to its determinations of how to examine questions of moral turpitude from a procedural standpoint. Prudencio v. Holder, 669 F.3d 472, 485 (4th Cir. 2012). See
circuits apply a varied mosaic of standards on this question without invoking 
*Chevron*, the DOJ would have strong arguments that this redefinition of moral 
turpitude is consistent with either *Skidmore* deference, or even a modified de 
novo review.\(^\text{273}\) Although a change in the definition of a crime involving moral 
turpitude by the BIA might occasion a resolution of this circuit split on an 
important issue, just as importantly, many of the same reasons undergird the 
arguments that the DOJ might make to different circuits.

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

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

The Fifth Circuit would apply a modified de novo review in this context.\(^\text{280}\)
In *Smalley v. Ashcroft*, the court outlined its general approach as according 
"substantial deference to the BIA’s interpretation of the INA’ and its definition 
of the phrase ‘moral turpitude.’"\(^\text{281}\) However, the Fifth Circuit reviews “*de novo

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\(^\text{273}\) *Knapik*, 384 F.3d at 87–88 (mentioning multiple review standards).

\(^\text{274}\) *Ali v. Mukasey*, 521 F.3d 737, 739 (7th Cir. 2008).

also *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) 
(“*Chevron*’s premise is that it is for agencies, not courts, to fill statutory gaps.”).

\(^\text{276}\) *Chevron*, 467 U.S. at 843.

\(^\text{277}\) *Ali*, 521 F.3d at 739.

\(^\text{278}\) *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc).

\(^\text{279}\) See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Skidmore v. Swift &

\(^\text{280}\) *Smalley v. Ashcroft*, 354 F.3d 332, 335–36 (5th Cir. 2003).

\(^\text{281}\) *Id.*
whether the elements of a . . . crime fit the BIA’s definition.”282 Thus, although the Fifth Circuit’s approach could accurately be characterized as a de novo review, its deference on the question of defining “moral turpitude” in the first place should allow for the DOJ to argue meaningfully for a revised meaning.

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

VI. CONCLUSION

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

282 Id. at 336.
283 See, e.g., Arias v. Lynch, 834 F.3d 823, 830–36 (7th Cir. 2016) (Posner, J., concurring in the judgment); cf. supra Parts V.A.1, V.A.2.
284 See, e.g., Arias, 834 F.3d at 830–36 (Posner, J., concurring in the judgment).
285 See supra Parts V.A.1, V.A.2.
286 Beck v. Stitzel, 21 Pa. 522, 524 (1853) (indicating, in a nineteenth-century case, that moral turpitude standards are “necessarily adaptive,” in the sense that they ought to evolve over time).
287 AIR FORCE MANUAL, supra note 251, at 191.
288 Moral Turpitude, supra note 27.
289 Cf., e.g., Arias, 834 F.3d at 830–36 (Posner, J., concurring in the judgment).
290 Cf. supra Parts V.A.1, V.A.2.
legislature and little from the Supreme Court, can only apply precedent as best it can be determined to maintain judicial impartiality.\textsuperscript{292} When that body of precedent itself depends on a mixture of nineteenth century honor-culture norms and decades-old decisions, moral-turpitude law is rife with instances of square pegs being pounded into round holes.\textsuperscript{293} In many ways, the BIA is stuck in the middle. It is constrained by the definition of “conviction” in the INA, and frustrated by a fractured judiciary.\textsuperscript{294} The BIA should take advantage of the judicial deference it receives, and the concomitant recognition that it may—within reason—reinterpret statutes in light of policy goals. By excluding low-level, nonviolent crime, and by fixing a fine point on the mens rea required for a finding of moral turpitude, it can move the law in a positive direction.


\textsuperscript{292} \textit{See supra} Part V.

\textsuperscript{293} \textit{See supra} Parts III, IV.

\textsuperscript{294} \textit{See supra} Parts II.B and III.B.