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"Crimes Involving Moral Turpitude": The Puzzling and Persistent (and Constitutional) Immigration Law Doctrine

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Introduction

On what legal and moral grounds can a nation expel an alien? The Swedish highest court recently overturned a deportation order of a convicted rapist, holding that there was no "extraordinary reason" to banish the offender.[1] The court explained that, "[t]he idea behind the requirement of 'extraordinary reasons' [if the perpetrator has been in Sweden for over four years] is that there should be a point where a foreigner has the right to feel secure in Sweden." In the case in question, the court acknowledged that the 33-year-old Somali citizen, who had lived in Sweden for 8 years, displayed "clear signs of flaws in his social adaptation," including convictions for drug possession, reckless driving, and aggravated assault. However, when not committing minor criminal offenses, the court found that he had been engaged in either studies or employment, and he had even learned some Swedish. Thus, the balancing of equities weighed in favor of allowing him to remain in Sweden, after he had served his two-year prison sentence for rape.[2]

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[1] Sweden's High Court Overturns Deportation Decision for Convicted Rapist, The Local, April 25, 2019, at https://www.thelocal.se/20190425/swedens-supreme-court-overturns-deportation-decision-for-convicted-rapist.

[2] The Swedish approach to deportation seems remarkably hospitable, but even it falls short of the principled position advocated by Professor Ilya Somin. Ilya Somin, *The Case Against Deporting Immigrants Convicted of Crimes*, REASON, May 27, 2018, at https://reason.com/2018/05/27/the-case-against-deporting-immigrants-co. He argues that deportation or banishment should be regarded as a form of punishment; and criminal punishment should be *identical* whether the offender is a citizen or an alien. Sweden allows for banishment in "extraordinary circumstances," but Professor Somin argues that "the discriminatory deportation of criminal immigrants is indefensible under any conceivable circumstances."

Australia has adopted a markedly different approach to the issue of deportation. In 2014 its Parliament voted overwhelmingly to expand the grounds for deportation. Criminal convictions are no longer necessary predicates for a banishment order. Australia's Attorney General can deport an alien upon a finding that the alien belonged to a group that had been involved in criminal activity or even that the alien did possess "good moral character."[3] This provision has been invoked, for example, to expel a New Zealand citizen who had joined a biker gang associated with drug trafficking, although no criminal charges were ever filed.

Over the past century, the American approach to the issue has evolved, generally in a direction less congenial to aliens deemed unfit, for whatever reason, to remain. Apart from statutorily denominated noncriminal reasons for expulsion, a growing number of criminal offenses can trigger removal from, or foreclose entry into, the United States. Almost all of the crimes ("aggravated felony," drug trafficking, money laundering, etc.) are familiar and defined, but the first category of crimes listed in the relevant statute is, outside of the immigration law context, an oddity: "crimes involving moral turpitude (CIMT)."

The phrase entered federal immigration law in 1891. The Act of 1891 provided for the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."[4] At the time, the phrase "moral turpitude" was a customary term in the law, arising most often in slander cases and in deciding questions of evidence (relating to

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[3] https://www.kaldorcentre.unsw.edu.au/publication/can-australia-deport-refugees-and-cancel-visas-character-grounds.

[4] Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084. The "moral turpitude" provision was reenacted in the Immigration Act of 1903, § 2, Act of March 3, 1903, 32 Stat. 1213; the Immigration Act of 1907, § 2, Act of February 20, 1907, 34 Stat. 898; the Immigration Act of 1952, § 241, Act of June 27, 1952, 66 Stat. 163; and the Immigration Act of 1996.

the impeachment of a witness).[5] The Immigration and Nationalization Act of 1917 provided that those "convicted" of a "crime involving moral turpitude" were not only inadmissible, but also deportable. The law did provide that for some offenses the judge who presided over a criminal trial could issue a recommendation, binding on federal immigration officials, that a defendant alien not be deported. Curiously, the 1917 law defined the word "conviction," but left unspecified the phrase "moral turpitude."

Over the ensuing decades, legal grounds for expulsion came and went, but deportation as the result of a "crime involving moral turpitude" persisted. Every reenactment of the federal immigration law preserved the doctrine. The Immigration and Nationality Act of 1952 provided for the deportation of any immigrant who had a committed a "crime involving moral turpitude" within five years of admission to the United States, whenever the alien had received a prison sentence of at least one year.[6] The Immigration Act of 1996 broadened the criterion, providing that a crime involving moral turpitude was a ground for deportation even if the alien had not been sentenced to any prison time, as long as the crime was punishable by a year in prison.

In recent decades, the phrase has attracted skeptical commentary and blunt criticisms in judicial opinions and the academic literature. Questions have been raised about the manner in which immigration officials, the Board of Immigration Appeals (BIA), and federal judges have decided whether an alien has committed a crime "involve moral turpitude": should the adjudicator evaluate the legal elements of the alien's crime of conviction (the "categorical approach") or should it consider the actual, underlying conduct

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[5] Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1039 (2012).

[6] In addition, conviction of two or more crimes involving moral turpitude provided a ground for deportation regardless of the length of time the alien had been present in the United States.

that gave rise to the criminal conviction (the "fact-based approach")?[7] Critics have challenged whether federal courts owe deference to the BIA's conclusion that an alien has committed a crime involving moral turpitude.[8] The most sweeping criticism, raised as long ago as a 1929 Harvard Law Review student note,[9] but with mounting fervor in the past decade, is that the CIMT provisions are so indeterminate as to be unconstitutional.[10] The latter argument has become particularly ripe in light of a trio of Supreme Court opinions that have used the void-for-vagueness doctrine to strike down aspects of federal criminal and immigration law.

This article offers a contrarian perspective on the CIMT provisions, built upon a revisionist history. Part I of this Article demonstrates that for over a century Congress has relied on the CIMT provisions in crafting the nation's immigration law. As set out in this section, Congress has long been aware that these provisions have generated a measure of jurisprudential uncertainty (both procedural and substantive). The puzzle that emerges from

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

[8] William Yeatman, *Ninth Circuit Review-Reviewed: Court's Constitutional Critics of "Crimes Involving Moral Turpitude" Should Start with* Chevron, YALE JOURNAL OF REGULATION: NOTICE AND COMMENT, April 9, 2019; Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241 (2011).

[9] *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 121 (1929).

[10] Jennifer Lee Koh, 71 STAN. L. REV. ONLINE 267, 279-80 (March 2019); Evan Tsen Lee & Lindsay M. Kornegay, *Why Deporting Immigrants for "Crimes Involving Moral Turpitude" Is Now Unconstitutional*, 13 DUKE J. CON. L. & PUB. POL'Y 47 (201&); Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647 (2012); Amy Wolper, *Unconstitutional and Unnecessary: A Cost/Benefit Analysis of "Crimes Involving Moral Turpitude" in the Immigration and Nationality Act*, 31 CARDOZO L. REV. 1907, 1908-09 (2010); Derrick Moore, *"Crimes Involving Moral Turpitude": Why the Void-For-Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT'L L. J. 813, 814-16 (2008).

this section is why Congress has remained wedded to these provisions even as simpler-to-administer alternatives are easily imagined.

Part II sketches what is likely to emerge as the newly minted argument that courts, which have become increasingly critical of the CIMT provisions, strike them down as unconstitutionally vague. This section argues, however, that the void-for-vagueness precedents cited to support the invalidation of the CIMT provisions are, for the most part, inapposite. These provisions are deeply entrenched in the law and reflect a conscious Congressional choice; the fact that alternatives can be imagined does not authorize courts to overturn them. Furthermore, the argument that the CIMT provisions are hopelessly indeterminate, because there is no moral consensus in American contemporary society, is overstated.

This last claim is tested in Part III. The article considers a case of first impression, litigated over the past decade in the BIA and Ninth Circuit—whether sponsoring an animal in a fighting venture, in violation of federal law, is a crime of moral turpitude. Despite the skepticism of the Ninth Circuit, this Article argues that the BIA's conclusion that there *is* an American consensus on this issue is reasoned and defensible. Sponsoring a chicken in a cockfight may not be a grave crime, meriting substantial punishment, but the goals of criminal law and immigration law are not identical. The Article concludes by arguing that the CIMT provisions reflect and highlight these differences: criminal law is fundamentally about punishment; immigration law is fundamentally about deciding what kind of people share the moral precepts that define it as a community.

I. The Congressional Reliance on "Crimes Involving Moral Turpitude" in Federal Immigration Law

The phrase "crime . . . involving moral turpitude" acquired its foothold in federal immigration law in 1891. On three subsequent occasions (1917, 1952, and 1996) Congress enacted provisions that enlarged the importance of

CIMTs in immigration law and policy. This legislative commitment to the phrase is noteworthy, given the mounting disapproval of CIMTs in judicial opinions and academic commentary. Those charged with implementing the phrase have raised procedural and substantive questions. There is, first, the procedural issue of how executive officials and judges are to determine whether a crime is one that involves moral turpitude, thereby triggering immigration consequences—that is, should they consider only the elements of the offense of conviction or should they consider also the facts of a crime, as it was committed. There is, second, the substantive issue of what constitutes moral turpitude and what kinds of acts qualify for such censure. By a consideration of Congressional debates, this section demonstrates that Congress has often made a clear policy choice to preserve the CIMT language in immigration law, notwithstanding concerns and questions raised in judicial opinions and the academic literature.

A. The 1891 Act

The Immigration Act of 1891, expanding upon exclusions in previous laws,[11] prohibited the admission of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."[12] At that time, the phase "moral turpitude" was used frequently in legal contexts,[13] but it also enjoyed a wider currency. In the post-Civil War decades the phrase appears dozens of times in the Congressional Record, usually contemplating fraud,[14] but many times gesturing indistinctly towards

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[11] Immigration Act of 1882, ch. 376, 22 Stat. 214 (excluding only "all foreign convicts except those convicted of foreign offenses")

[12] Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084.

[13] *See* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1039 (2012)

[14] For example, in 1873, in debates concerning a bankruptcy bill, Senator Sherman stated that "[a]s a matter of course, where a person has committed an act of fraud, . . . I do not care whether it is in regard to five dollars, or five hundred dollars, or five thousand dollars . . . but to others, I would not allow

the concept of moral impropriety.[15] Although no member of Congress clarified the phrase's meaning in the 1891 law, members of Congress had a general idea of what was intended.[16] Professor Simon-Kerr has argued that there was an intentional "fuzziness" to the phrase. And this fuzziness was not so much a bug, as a feature, as it afforded policymakers some play in administering the immigration law. The House Select Committee on Immigration and Naturalization explained that the "intent of our immigration laws is not to restrict immigration, but to sift it, to separate the desirable from the undesirable immigrants, and to permit only those to land on our shores who have certain physical and moral qualities."[17]

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the enginery of involuntary bankruptcy; . . .and it seems to me he ought not to be forced into involuntary bankruptcy unless he has committed [an act] which is wrong in a moral sense, . . . which seem to imply some moral turpitude, or involve some immorality, or some attempt to deceive, to defraud or to cheat." 43 Cong. Rec. 1151 (Feb 4, 1874).

[15] In a raucous debate on the issuance of bank notes, interspersed with laughter, one Senator observed: "Now, the Senator from New York, in due modesty, for nobody will find any a usurpation in his manner, came forward and did a thing which he did not suppose to have any moral turpitude in it, and which in former times it was supposed any United States Senator under his sense of responsibility had a right to do; that is to say, he offered an amendment to this bill." 43 Cong. Rec. 2649 (Mar. 31, 1874).

[16] Just how fuzzy "moral turpitude" was even in the heyday of its usage was illustrated in an exchange on the Senate floor three days before debates on the immigration law of 1891. It is often taken for granted that fraud always qualified as a CIMT, but even within the genus fraud there seem to have been species that somehow escaped, in the nineteenth century, the opprobrium of "moral turpitude." In a debate in 1891 concerning an appropriation for a federal building, when one Senator expressed concern about the individuals entrusted with the direction of the enterprise, Senator Butler responded: "The Senator, of course, is too good a lawyer not to know that there may be many badges of fraud or evidences of fraud without any moral turpitude. I do not charge the commission with any deliberate purpose to defraud anybody. I do not charge them with moral turpitude. . ." 51 Cong. Rec. 3319 (Feb. 26, 1891). The distinction apparently assumed to be understood by any good lawyer is that between intentional fraud, which involve moral turpitude, and other frauds, which do not.

[17] H. Rept. No. 3807, 51st Cong., 2d Sess., Feb. 14, 1891. p. 8.

To the extent that the immigration law was creating standards for the exclusion of aliens who had no connection to America, constitutional objections are hard to credibly articulate; after all, such individuals are unable to raise a due process challenge. Yet fairness issues nonetheless arose in implementing a law designed to exclude those convicted of CIMTs. The case of Edward Mylius highlighted those difficulties.[18] Mylius had been convicted of criminal libel in English courts as the result of defamatory statements he had published about the King. American immigration officials, deeming libel a CIMT, held him to be inadmissible in the United States. He sought and obtained relief in a habeas proceeding in federal district court, which the Second Circuit affirmed. Opinions from both courts merit attention.

The threshold procedural question was how to decide whether a crime was one that involves moral turpitude; and in addressing the issue, the courts held that the inquiry should be stripped of all the facts in the petitioner's case. As the Second Circuit, per Judge Coxe, held, the question before the court was whether "the publication of a defamatory libel *necessarily* involve[s] moral turpitude?"[19] Even though the facts of Mylius's case reveal "the extreme brutality of the libel," involving the English King and his family, this was deemed irrelevant, as the judicial focus must be on the inherent "nature" of the crime.[20]

On the substantive question of whether criminal libel "necessarily" involves moral turpitude, the district court (Judge Noyes) observed that a definition of the term was in order. But no precision is possible here because of the unfortunate ambiguity of the relevant term:

> 'Moral turpitude' is a vague term. Its meaning depends to some extent upon the state of public morals. A definition sufficiently accurate for

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[18] United States ex rel. Mylius v. Uhl, 203 F. 152 (S.D. N.Y. 1913), *affirmed*, 210 F. 860 (2d Cir. 1914).
[19] 210 F. at 862.
[20] 210 F. at 862.

> this case is: 'An act of baseness, vileness, or depravity in the private or social duties which a man owes to his fellow man or to society.'[21]

Criminal libel, as committed, might entail moral turpitude, but the elements of the offense do not *necessarily* entail it. Judge Noyes observed that one can negligently commit the offense, and thus "guilt hardly implies moral obliquity."[22] Likewise, Judge Coxe offered this hypothetical: "A statute makes it a crime to give a glass of whiskey to an Indian under the charge of an Indian agent. A conviction under this section would not be proof of moral turpitude, although the evidence might disclose the fact that the whisky was given for the basest purposes."[23]

Although the district court and appellate opinions were influential in later decades, one can question whether the adopted categorical approach—focusing on the elements or inherent nature of the offense, and not the offense as it was committed—is the best interpretation of what Congress intended when enacting the Immigration Act of 1891. On the one hand, the language provides for the exclusion of those who have been "*convicted* . . . of a crime . . . involving moral turpitude," which arguably focuses attention on the crime of conviction—that is, the elements of the offense—and not the actual conduct of the alien. Had the fact-based approach been what Congress had intended, the language could have been, for example, "criminal *acts* involving moral turpitude." On the other hand, in common speech when one says that one is convicted of a crime one often has in mind the facts of the crime committed—that is, "Smith was convicted of burglary *of a mansion*," or "Jones stole *a Rembrandt*." In recent decades, in other statutory contexts, the Supreme Court has grappled with this question, with the majority view

[21] 203 F. at 154.
[22] 203 F. at 153.
[23] 210 F. at 862.

being the former, and Justice Alito most prominently urging the latter.[24]

In reaching these conclusions, modern opinions have tended to direct their attention, at least initially, on the legislative text, but this was not the approach taken in either opinion in Mylius's case. Rather than a linguistic analysis, the courts argued that allowing immigration officials to consider the facts of the crime, as it was committed, would be beyond their competence[25] and would substantially and unreasonably delay the admission process.[26] Judge Noyes conceded that under the adopted categorical approach some aliens who had been convicted of nominally serious crimes may be excluded, although their particular acts evidence no immorality, and that some who have been convicted of slight offenses may be admitted, although the facts surrounding their commission may be such as to indicate moral obliquity.[27] But, he added, such a result is "necessary for the efficient administration of the immigration laws."[28]

Both the crime at issue in *Mylius* (libel) and the hypothetical crime cited by the Second Circuit (providing alcohol to an Indian) are sufficiently

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[24] Moncrieffe v. Holder, 569 U.S. 184, 219 (2013) (Alito, J. dissenting) ("In ordinary speech, when it is said that a person was convicted of or for doing something, the "something" may include facts that go beyond the bare elements of the relevant criminal offense.")

[25] 203 F. at 153 ("[The immigration officials'] function is not, as it seems to me, to go behind judgments of conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment.").

[26] 210 F. at 862–63 ("[T]he rule which confines the proof of the nature of the offense to the judgment is clearly in the interest of a uniform and efficient administration of the law and in the interest of the immigration officials as well, for if they may examine the testimony on the trial to determine the character of the offense, so may the immigrant. How could the law be speedily and efficiently administered if an immigrant convicted of perjury, burglary or murder, is permitted to show from the evidence taken at the trial that he did not commit a felony, but a misdemeanor only?").

[27] 210 F. at 863.

[28] 210 F. at 863.

minor that only rarely is there even an imputation of moral turpitude. But for more serious crimes, the circumstances of the offense can be invaluable in any accurate sorting process. Judge's Noyes's claim that "efficiency" requires the categorical approach is vulnerable to the objection, which he concedes, that the results may be irrational. Could this possibly be what Congress had intended? If efficiency was the preeminent goal, American immigration policy could be to admit everyone or no one. The very fact that Congress implemented a screening device suggests that it wanted a rational screening device, which is arguably undermined by the categorical approach.

B. 1917 Act

In response to growing concerns about immigration "of the wrong kind,"[29] Congress passed the 1917 Act, which further expanded the criteria both for excluding aliens from entering and deporting those who were lawfully present.[30] In partial mitigation, the Act provided that an alien would not be deported if the sentencing judge made a recommendation against deportation (JRAD) to the federal government.

In subsequent years, courts and academic observers have studied the legislative history of the 1917 Act for evidence that members of Congress were aware of, and addressed, the procedural and substantive issues that

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[29] Brian C. Harms, *Redefining "Crimes Of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 262 (2001) (quoting President Theodore Roosevelt: "[w]e can not have too much immigration of the right kind, and we should have none at all of the wrong kind. The need is to devise some system by which undesirable immigrants shall be kept out entirely.").

[30] Congress drew upon the doctrine of "moral turpitude" for both purposes, providing for: (1) the exclusion of any aliens who had been convicted of a CIMT; (2) the deportation of any alien who was convicted of a CIMT within 5 years of admission to the United States, for which the sentence had exceeded one year of imprisonment, and (3) the deportation of any alien who was twice convicted of a CIMT, for with the sentence had exceeded one year imprisonment. See Act of Feb. 5, 1917, ch. 29, § 3, 19, 39 Stat. 874, at 889.

were already percolating with respect to reliance on CIMTs in immigration law. With respect to the procedural issue, members of Congress did not directly confront the question of how immigration officials and judges were to assess whether an alien's crime was a CIMT—that is, whether to consider the crime as it was committed or only through an analysis of the elements of the offense of conviction. However, members of Congress were not indifferent to the concern raised in *Mylius* that the purely categorical approach could, although "efficient," generate unjust results. If, for example, a lawful alien committed larceny, the categorical approach might deem this a CIMT, triggering deportation, and gloss over the factual details, such as that the amount taken was small or that there were extenuating circumstances. The inclusion of the provision allowing a sentencing judge to issue a binding recommendation not to deport the alien was an acknowledgment of this reality and a willingness to introduce a procedure to promote fairer results.[31]

Yet the question remains: In adopting the JRAD provision, was Congress embracing the categorical approach endorsed in *Mylius* or rejecting it? On the one hand, the provision reflects an awareness that a purely categorical approach to CIMTs can be both over- and under-inclusive in capturing those aliens truly guilty of moral turpitude. This would suggest an openness to having immigration authorities and reviewing courts look beyond the elements of the offense of conviction to the circumstances of the crime. On the other hand, the provision provided one discrete solution: a judicial

[31] Representative Adolph Sabath, one of the most active members in debates on the bill, observed that "[i]n certain sections of the country, the theft of a few pennies or of a piece of bread or coal is considered a crime involving moral turpitude. I do not think we should be too harsh on an unfortunate man of that kind." Other members observed that it was quite unlikely that what would not be termed petty larceny would result in a year's imprisonment, triggering deportation, but Representative Sabath persisted in arguing that it was necessary to expand the judicial recommendation clause. His efforts prevailed, to the extent that a trial judge could issue the recommendation not only at sentencing, but up to 30 days after the imposition of sentence.

recommendation not to deport. It could be argued that Congress regarded the categorical approach as appropriate with this ameliorating qualification.

With respect to the substantive question of what is a "crime involving moral turpitude," judges and academic observers have stressed Representative Sabath's comment in committee hearings that "no one can really say what is meant by saying a crime involving moral turpitude."[32] The statement's significance has been overstated, however. Although Representative Sabath doubted one could, to everyone's satisfaction, define a CIMT, he nonetheless used the language "crime involving moral turpitude" when introducing an amendment.[33] Apparently, Representative Sabath regarded "moral turpitude" as *sufficiently* clear to form the basis of federal law. Nor did any member of Congress propose an alternative to the language of "moral turpitude." Indeed, on the very same day that the House of Representative was debating the immigration law, another bill, concerning a federal pension, was debated; and the adopted law provided for the termination of benefits in the event that one was convicted of a "crime involving moral turpitude."

In dozens of cases over the next few decades, courts addressed the procedural and substantive questions raised by CIMTs, and they generally did so with little fanfare or handwringing. With respect to the procedural question, the categorical approach was applied, almost without comment and notwithstanding fairness issues that arose in individual cases. For example, a court overturned a deportation when the crime of conviction (assault) was not a CIMT, even though the circumstances suggested that the crime was more serious than the paradigm case (the victim was a police officer and the offender possessed a razor blade). Conversely, when the crime was a CIMT

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[32] *See, e.g.,* Cabral v. I.N.S., 15 F.3d 193, 195 (1st Cir. 1994) (quoting Rep. Sabath).

[33] His amendment would have rendered an alien deportable for a CIMT only within 3, not 5, years of admission to the United States. His point in so doing was to ameliorate the harshness of the proposed legislation.

(larceny), but there were mitigating circumstances (the offender was young and the amount taken only 15 dollars), a court held that crime of conviction was a CIMT.[34]

With respect to the substantive question of what is a "crime involving moral turpitude," courts for the most part displayed little anxiety about the phrase's meaning nor did they great confess difficulty in applying it. One might even suggest that a consensus generally emerged about which crimes qualified as CIMTs and which did not. The distinctions were sometimes fine—that is, for example, between mere possession of an illegal substance and possession with intent to distribute a controlled substance—but fine distinctions are inevitable in the law,[35] and supply little ground for the objection, raised by a law school student note, that the case law on "moral turpitude" was little more than a "patchquilt of decisions."[36]

There were, of course, marginal crimes that divided judges. Some courts regarded Prohibition Act offenses as CIMTs, but in a 1929 opinion Learned Hand staked out a minority position. His opinion in *United States ex. rel. lorio v. Day*,[37] is noteworthy in that it a rare judicial confession that construing the phrase "crime involving moral turpitude" required more than application of self-evident moral truths.[38] According to Judge Hand, CIMTs could not be construed to encompass all crimes committed deliberately: if Congress had intended all intentional crimes to serve as bases for deportation, it would have said so. The text narrows the category of crimes triggering deportation to those that are "shamefully immoral."[39] But this is a

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[34] Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929).
[35] *Compare* Rousseau v. Weedin, 284 F. 565 (9th Cir.) (ownership of "joint" where intoxicating liquor sold a CIMT) *with* Hampton v. Wong Ging, 299 F. 289 (9th Cir.) (possession conviction under Narcotics Act not a CIMT).
[36] Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 117 (1929).
[37] U.S. ex rel. Iorio v. Day, 34 F.2d 920 (2d Cir. 1929).
[38] *See* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1039 (2012).
[39] 34 F.2d at 921.

"a nebulous matter at best," and judges should be careful not to impose their own moral judgments, but must instead estimate "what people generally feel." [40] Importantly, Judge Hand did not regard this task as an insurmountable one: "Congress may make [a CIMT] a ground of deportation, but while it leaves as the test accepted moral notions, we must be loyal to that, so far as we can ascertain it."[41]

Just a few years earlier, the phrase attracted public scrutiny when immigration officials excluded an English playwright, Vera, Countess of Cathcart, on the basis that she had committed adultery—a crime involving moral turpitude. The Countess's cause attracted various supporters. What made the Countess's case so controversial was that just months earlier, the Earl of Craven, with whom she had had an affair, was permitted to enter the country. It was citing the Countess's case that the Harvard Law Review student note complained that the phrase "crime involving moral turpitude" had attracted a "patchquilt of decisions." The student author lamented the persistence of the phrase anywhere in the law, but particularly in the immigration context:

> [I]t is in the Immigration Act that the phraseology seems most unfortunate. Though proceedings under the act are not criminal, they are sufficiently severe in the application to be in their nature penal. Men who are menaced with the loss of civil rights should know with certainty the possible grounds of forfeiture. And the loose terminology of moral turpitude hampers uniformity; it is anomalous that for the same offense a person should be deported or excluded in one circuit and not in another.[42]

The author concluded that it was "perilous and idle to expect an indefinite statutory term to acquire precision by the judicial process": Congress should either enumerate those offenses that provide a basis for deportation or

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[40] 34 F.2d at 921.
[41] 34 F.2d at 921.
[42] Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 121 (1929).

specify a minimum criminal penalty that would trigger deportation proceedings.

The 1929 student note adumbrated modern criticisms of the phrase, but it did not reflect public opinion at the time. The *New York Times* article cited by the author did not call for the abolition of the phrase. Indeed, a contemporaneous *New York World* editorial wrote that the phrase "lays down a reasonable enough doctrine in language plain enough to anyone who uses such brains as God gave him." The editorial continued that "[i]t meant murder, robbery, embezzlement, and the like, not sin, not vice, not caddishness."[43] As in the *New York Times* article, the objection was not to the phrase but to its unequal application. And when Representative Copeland introduced the *New York World* editorial into the Congressional Record, his point was exactly the same: not with the phrase but with the application. [44]

Perhaps the first judicial opinion to express marked disapproval with use of "moral turpitude" in deportation decisions was *U. S. ex rel. Manzella v. Zimmerman*.[45] The case turned on whether "prison breach" was a CIMT.[46] Restricting the inquiry to the record of conviction and not the "particular circumstances," the judge concluded that the elements of the offense did not necessarily entail force or fraud (e.g. if escape was accomplished simply by walking away) and thus was not a CIMT. The judge continued, however:

> I agree with those who regard it as most unfortunate that Congress has chosen to base the right of a resident alien to remain in this

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[43] Quoted in Cong. Rec. 3978 (Feb.15, 1926).

[44] Cong. Rec. 3978 (Feb.15, 1926) (Rep. Copeland) ("I have no doubt it was an act of moral turpitude. I rose in my place to say, however, that the same punishment should have been meted out to the Earl of Craven.").

[45] 71 F. Supp. 534, 537 (E.D. Pa. 1947).

[46] The petitioner had entered America 13 years earlier, the government was required to prove at least 2 CIMTs to deport, or that he had committed the prison breach and had then escaped to Canada and reentered. Either theory would require the government to show that the prison breach, altogether apart from the bank robbery, was a CIMT.

> country upon the application of a phrase so lacking in legal precision and, therefore, so likely to result in a judge applying to the case before him his own personal views as to the mores of the community.[47]

The citation for the sentence is not a judicial opinion but the *Harvard Law Review* student note. Curiously, the *Zimmerman* opinion belies its own claim that the phrase is "lacking in legal precision." Judge Maris applied the test in a straightforward manner in reaching the conclusion that prison breach did not necessarily include force or fraud.[48]

Four years later, the most far-ranging criticism of the CIMT provisions was raised in the dissenting opinion in *Jordan v. De George.*[49] The case involved an alien who had lived in the United States for decades and had been convicted on two separate occasions of conspiring to defraud the United States (through the sale of illegal liquor). Although his brief had simply challenged the classification of his crime as one that involved moral turpitude, a dissenting Justice Jackson, joined by Justices Black and Frankfurter, argued that the CIMT provisions were so hopelessly indeterminate as to be unconstitutional.

Justice Jackson's dissenting opinion has lately become a banner waved by scholars and academics, protesting that the phrase "crimes involving moral turpitude" is incurably vague. Most notably, in 2016, Judge Posner cited Justice Jackson's dissenting opinion in *Jordan v. De George* as a

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[47] 71 F. Supp. at 537.

[48] To be sure the result in the case was perhaps not what Congress would have intended. Petitioner had been arrested for bank robbery, escaped, and promptly fled to Canada, before sneaking back into the United States. In clarifying whether prison breach was a CIMT in his case, one might well want to know the crime for which he had been incarcerated and the circumstances of the escape, but none of this was at issue, because the court rigorously applied the categorical approach. In other words, to the extent that the result was irrational, that followed from the categorical approach; but the claim that the phrase lacked "legal precision" has no basis in the opinion itself.

[49] 341 U.S. 223 (1951).

"masterpiece" and a demonstration that "[i]t is preposterous that that stale, antiquated, and, worse, meaningless phrase should continue to be a part of American Law."[50] Justice Jackson's opinion is premised on the claim that resident aliens in deportation hearings are entitled to the same protections of the due process clause as are applicable in a criminal trial. Justice Jackson then draws attention to a recent Supreme Court decision that had struck down a Utah law that had criminalized "acts injurious to public morals." He observes: "I am unable to rationalize why 'acts injurious to public morals' is vague if 'moral turpitude' is not." One response, unfortunately not articulated by the majority, is that that the due process standards that govern a criminal trial do not apply *identically* to deportation hearings.

Justice Jackson also points to the already-cited observation by Representative Sabath that "no one can really say what it meant by . . . crime involving moral turpitude." Justice Jackson drolly adds that, notwithstanding this ambiguity, "Congress did not see fit" to clarify. Justice Jackson seems to regard Representative Sabath's statement as a confession against interest, an acknowledgment of legislative ineptitude so grave as to justify judicial nullification. But there are many reasons why Congress might not have seen fit to clarify, among them it intended to delegate the matter to executive officials or that it thought that over time the phrase's meaning would coalesce around a settled interpretation. Justice Jackson acknowledges the latter possibility, but finds that a few decades of practice and "fifty cases in the lower courts" had failed to produce agreement. The support for this claim, which is crucial to his argument, is buried in a footnote that presents three pairs of supposedly inconsistent precedents construing the CIMT provisions. As already suggested, the legal distinctions in CIMT cases were fine, but arguably not, in the words of Justice Jackson, "a matter of caprice."

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[50] Arias v. Lynch, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring)

Justice Jackson's most fundamental objection to the CIMT provisions is that they presuppose the implausible: an American consensus as to what constitutes "moral turpitude." Decades earlier, Judge Hand had also observed that, given the diversity of views in our large nation, a judge would have difficulty surveying "what people feel"; nonetheless, he did not dispute that Congress "may make a [CIMT] a ground for deportation." Justice Jackson, by contrast, concluded that the CIMT provisions failed to supply "an intelligible definition of deportable conduct."

As it happened, Congress was at that very moment debating a momentous change to immigration law. Did it take note of Justice Jackson's concerns in formulating the new law?

C. The 1952 Act

The short answer is: yes, but not in a way that would have been satisfactory to Justice Jackson.

Members of Congress revealed familiarity with the *De George* decision in debates about the proposed immigration law. For example, on May 14, 1952, Senator Humphrey questioned the constitutionality of a provision that would have given the Attorney General the discretion to deport aliens solely on the ground that the alien knowingly engaged in "activities which would be prejudicial to the public interest."[51] According to Senator Humphrey, given the "vagueness of what may be prejudicial to our interest," the provision could not be "reconcile[d]" with *De George*.[52] That precedent was understood to stand for the proposition that the criteria for deportation must be sufficiently precise to survive due process scrutiny. It is noteworthy, then, that Senator Humphrey recognized this principle, but did not indicate that he

[51] The language appears in Section 212(27) of the Act.
[52] 98 Cong. Rec. S5161 (daily ed. May 14, 1952)

believed the CIMT provisions violated it.[53]

A comprehensive 1950 Senate report, weighing in at 953 pages, canvassed the myriad issues raised by federal immigration law, including the implementation of the CIMT provisions regarding exclusion and deportation. The Report referenced the recommendation of an American consul in Marseilles that Congress provide a "listing of crimes and circumstances comprehended within the meaning of 'moral turpitude.'"[54] But the Report then noted contrary opinions from several other immigration officials. One official acknowledged that it might be, as a theoretical matter, preferable to articulate a list of deportable crimes, but that in practice it would be difficult to formulate a catalog "broad enough to cover the various crimes contemplated by the law."[55] The Report quoted another official who wrote that if the law was designed to exclude the "criminally inclined," then "the test of the law as written is as good as any that can be inserted into the law."[56]

The Report was not insensitive to the concern that the term is "vague," has not been "definitively and conclusively defined by the courts," and "is dependent to some extent on the state of public morals." But a "sufficiently clear" definition was identified in a court opinion:

> [Moral turpitude] is an act of baseness or vileness in the private and social duties that a man owes to his fellow man or society. And, adapting this, we may say that a crime involves moral turpitude when it manifests on the part of the perpetrator personal depravity or baseness.[57]

The Report, after observing that the courts were in broad agreement as to

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[53] On the same day, Senator Benton discusses the CIMT language, without any suggestion that he regarded it as vague or unconstitutional. *Id*. at 5155-56.

[54] S. Rep. No. 81-1515, 353.

[55] *Id*.

[56] *Id*.

[57] *Id*. at 351.

what crimes constituted CIMTs,[58] concluded by embracing the continuation of CIMTs in the law.[59]

Adopting the recommendations of the Report, the 1952 law preserved CIMTs in immigration law, for purposes of admission and deportation, in a manner almost identical to the 1917 law. To the chagrin (again) of the *Harvard Law Review*, "the need for clarification was ignored."[60] Needless to say, the cases multiplied in the ensuing decades, hardly surprising given the swelling number of immigrants, the growing complexities of criminal codes, and the shifting views of what constituted moral turpitude. There were close or "peripheral"[61] cases, although courts handled them without condemning the applicable law as hopelessly indeterminate. An illustrative such case is *Velez-Lozano v. INS*.[62] The petitioner, an alien who had resided in the United States for 4½ years, was charged with consensual sodomy with a woman who was not his wife. He was convicted and sentenced to three years imprisonment, all of which was suspended. The immigration authorities initiated deportation proceedings against him on the basis that he was convicted of a CIMT and sentenced to more than a year in prison within five

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[58] *Id*. at 351-52 (observing that forgery, embezzlement, and larceny, had been found to be CIMTs, whereas not paying a ship fare or carrying a concealed weapon had not).

[59] The Report also addressed the procedural or methodological question of how immigration officials and courts were to identify whether a crime was one that involved moral turpitude. Quoting extensively from the Second Circuit's opinion in *Mylius*, the Report implicitly embraced the position that that immigration officials should base their deportation decisions exclusively on the judgment of conviction and not the facts introduced at trial. It also noted with apparent approval that the 1917 law had implemented the JRAD procedure (to allow trial judges to issue binding recommendations against deportation). *Id*. at 636-37. In addition, even if an alien had committed a CIMT, a pardon by the president would operate to remove the basis for deportation. *Id*. at 637.

[60] *Developments in the Law of Immigration and Nationality*, 66 HARV. L. REV. 643, 655 (1953).

[61] Franklin v. INS, 72 F.3d 571, 595 (8th Cir. 1995) (Bennett, J., dissenting).

[62] 463 F.2d 1305 (D.C. Cir. 1972).

years of his admission to the United States.

Appealing his deportation order to the D.C. Circuit,[63] petitioner made a "lengthy argument" that consensual sodomy was not a CIMT. With striking brevity, the D.C. Circuit rejected the argument:

> Sodomy is a crime of moral turpitude in Virginia, Section 18.2-212, and is still considered a felony in the District of Columbia, 22 D.C. Code 3502. Similarly the Board has held that crime of solicitation to commit sodomy was a crime involving moral turpitude as early as 1949.[64]

One might object that the question of whether a crime is a CIMT should be assessed by the moral views of the country, not two states. It was true that in 1970 all or almost all states criminalized sodomy, but in some jurisdictions, there was a defense, that might have been available to *Velez-Lozano*, when the crime occurred in a "private place." Furthermore, the fact that an activity has been criminalized does not necessarily mean that the relevant crime is a CIMT.[65] The very existence of the category, "crimes involving moral turpitude," assumes that there are activities that the legislature has criminalized that do *not* involve moral turpitude. To this, the court offered no clear response, perhaps assuming that any reader would recognize that crimes of sexual impropriety necessarily involve moral turpitude. And clinching this conclusion was the long-settled judgment of the Board of Immigration Appeals that sodomy was a CIMT.

The D.C. Circuit was not pleased with the outcome in the case. All of the judges were persuaded that the crime was a CIMT, and furthermore that

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[63] Although the crime occurred in Arlington, Virginia, the appeal from the deportation order was taken to the D.C. Circuit.

[64] 463 F.2d at 1307.

[65] The Virginia statute did not designate the crime as one that involved moral turpitude. *See* Va. Code. Ann. § 18.1-212 (Michie 1950) ("If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony."), quoted in Ellen Ann Anderson, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 319 (1998).

as a matter of law, it was irrelevant that the petitioner has not been actually incarcerated.[66] The trouble was that the judge in the case had issued a recommendation not to deport, but had done so after the 30-day period in which such recommendations could be entertained. (He had waited 6 months.) The panel majority announced that it reached its decision "reluctantly," given the "harsh" result and the fact that it was due to negligence on the part of the trial counsel and judge. It concluded: "While the Service has the *legal* power and authority this court hopes that they will take a moment to examine the *equities* of this case before proceeding."[67]

Not a single court of appeals opinion in this period complained that the CIMT language was so vague as to be unconstitutional. That the case law was confusing was often conceded, as was the indisputable fact that "crimes involving moral turpitude" was not an easily defined phrase. Yet a notable refrain in the courts of appeal in this period was that, given the "nebulous" nature of the phrase,[68] deference was owed to the interpretation given by the BIA, at a minimum when that interpretation was consistent over time.[69] (The Ninth Circuit, alone, took the position that whether a criminal statute constituted a CIMT was a question of law, reviewed de novo.)[70] The occasional judge, in dissent, wondered whether it might be appropriate to re-think the categorical approach to the CIMT inquiry and allow immigration

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[66] 463 F.2d at 1307 ("it is clear that while Velez was never imprisoned *in durance vile* he was sentenced to a term of confinement").

[67] 463 F.2d at 1307. The dissenting judge would have given effect to the JRAD even though it was issued outside the 30-day statutory window. 463 F.2d at 1309 (Fahy, J., dissenting,).

[68] Franklin v. INS, 72 F.3d 571, 573 (8th Cir. 1995).

[69] *Id*. *See also* Okoroha v. INS, 715 F3d 830 (8th Cir. 1983) (deferring to the BIA's conclusion that possession of stolen mail was a CIMT; "[t]his court . . . must give deference to the agency's interpretation of a statute it is charged with administering"); Cabral v. I.N.S., 15 F.3d 193 (1st Cir. 1994) (deferring to the BIA's conclusion that accessory after the fact to murder was a CIMT; "We therefore inquire whether the agency interpretation was arbitrary capricious, or clearly contrary to statute.").

[70] Rodriguez-Herrerra v. INS, 52 F.3d 238, 240 n.4 (9th Cir. 1995).

officials and judges to consider the circumstances of the crime, and not simply the elements of the offense.[71] And in some cases there was a mild relaxation of the categorical approach, with courts taking note of the "record of conviction," including the information or indictment, the plea, the verdict or judgment, and the sentence.[72]

The only sustained criticism of the CIMT language in this period is in Judge Bennett's dissenting opinion in *Franklin v. INS*.[73] The petitioner in that case had been convicted of involuntary manslaughter—a crime that straddles the CIMT line and about which the BIA has twice flip-flopped over the past century. Assuming, as Judge Bennett plausibly did, that a CIMT presumes a "readiness to do evil,"[74] then there is a legitimate question whether the conscious creation of a substantial and unjustified risk of death qualifies.

But in the 1990s, not a single case in this period questioned the constitutionality of the CIMT language and most courts assumed that the agency's determination that a crime was a CIMT was entitled to *Chevron* deference. Furthermore, except in "peripheral" cases, there was remarkable "certainty" as to whether a crime was a CIMT, as even Judge Bennett concedes.[75] It was against this backdrop of judicial opinions that Congress was embarking on yet another major piece of immigration legislation.

D. The 1996 Act

The 1996 Immigration and Naturalization Act was the culmination of years of debate. Although major provisions in the 1952 law were reconsidered

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[71] Marciano v. Immigration & Naturalization Serv., 450 F.2d 1022, 1027 (8th Cir. 1971) (Eisele, J., dissenting).
[72] *See, e.g.* Cabral, 15 F.3d at 196 (quoting the indictment to confirm that the petitioner, convicted of being an accessory after the fact to murder, had committed a CIMT).
[73] 72 F.3d 571 (8th Cir. 1995).
[74] *Id*. at 601.
[75] *Id*. at 588.

and jettisoned, there is no indication that any thought was given to replacing the CIMT provisions. In fact, the 1996 Act broadened the importance of CIMTs, rendering an alien deportable on the basis of a CIMT for which there was the possibility of a year's imprisonment, regardless of the actual term, if any, of incarceration.[76]

In 1995, Senator Roth came closest to suggesting a radical approach to deportable offenses that would obviate the CIMT provisions. Arguing in favor of a proposal to "dramatically simplify[]" the law governing deportation, he observed that "criminal aliens have already been afforded all the substantial [sic] due process required under our system of criminal justice."[77] He added that "[f]urther simplification could be achieved if Congress were to eliminate the current distinctions among aggravated felonies, crimes of moral turpitude and drug offenses and simply make all felonies deportable offenses."[78] In later debates, Senator Dole acknowledged that the CIMT phrase was "vague" and "lack[ed] the certainty we should desire."[79] But his point in making this observation was not to call into question the phrase's legitimacy, but to emphasize the need for a new provision that made crimes of domestic violence deportable offenses. As Senator Dole observed, "[s]imple assault and battery are not necessarily going to be interpreted as crimes of moral turpitude."[80] Elsewhere, Senator Dole made a comment that suggests a familiarity with the judicially prevailing categorical approach to determining whether a crime was a CIMT.[81]

Interpreting the 1996 Act, most courts of appeal have continued to embrace the categorical approach (narrowing the focus to the record of

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[76] Pub. L. No. 104-132, 110 Stat. 1214, 1274, § 435.
[77] S. REP. NO. 104-48, at 3 (1995).
[78] *Id*. at 4.
[79] 142 Cong. Rec. S4058-59142 Cong. Rec. S4058-59 (daily ed. Apr. 24, 1996)
[80] *Id*.
[81] He said: "Whether a crime is one of moral turpitude is a question of State law and thus varies from State to State." *Id*.

conviction), but some have suggested a willingness to look beyond the elements of the offense to ascertain whether the crime, as committed, was a CIMT.[82] Confronting this division of authorities, Attorney General Mukasey issued a decision in 2008 that embraced a more fact-based approach, authorizing judges "to the extent they deem it necessary and appropriate [to] consider evidence beyond the formal record of conviction."[83] But several courts of appeal balked, refusing to accord the Mukasey decision *Chevron* deference, and Attorney General Holder vacated the 2008 decision in 2015. Divisions persist among the court of appeal, and members of Congress have in recent years indicated that they are aware of the confusion. Senator Cornyn and others have introduced bills that would authorize officials and judges to look beyond the record of conviction, to plea colloquies and even police reports.[84] Although those bills have not gained traction, some observers have complained that the BIA has moved subtly towards a less categorical, more fact-based approach in determining whether a crime, as committed, was a CIMT.[85]

With respect to the substantive question—what is the meaning of "crime involving moral turpitude"?—the past twenty years have witnessed a growing disconnect between the academic community and many judges on the one hand, and Congress on the other. For whatever reason, federal judges, who are regularly in the business of construing inartfully drafted statutes, have openly criticized the phrase. It has been called "notoriously

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[82] Piotr M. Matusiak, *Overcoming the Labyrinth: Embracing Attorney General Mukasey's* Silva-Trevino *Decision*, 2016 MICH. ST. L. REV. 215, 231-235.
[83] Silva-Trevino, 24 I. & N. Dec. 687, 690 (Op. Att'y Gen. 2008), vacated, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015).
[84] 163 Cong. Rec. S4801 (daily ed. Aug. 3, 2017) (statement of Sen. Cornyn); Building America's Trust Act, S. 1757, 115th Cong. § 404 (2017); SECURE Act of 2017, S. 2192, 115th Cong. § 1404 (2017).
[85] *See, e.g.,* Koh, Crimmigration, supra, at 270 ("since Silva-Trevino III, the Board's decisions suggest an unstated backlash against the categorical approach").

plastic,"[86] and "the quintessential example of an ambiguous phrase"[87]; the jurisprudence surrounding it has been called an "amorphous morass."[88] Judge Posner's concurring opinion in *Arias v. Lynch*[89] is characteristically uninhibited in its condemnation. According to Judge Posner, the phrase is "preposterous," "stale," and "arbitrary"; echoing the 1926 Harvard Law Review student note, he contends that it has exerted a "particularly malign influence in immigration adjudication." Judge Posner's objection, at bottom, is that the phrase is infused by "antiquated" ideas ("base, vile, or depraved"), and the distinctions that are drawn amount to irrational "gibberish." Some of the examples that Judge Posner cites do not merit such vitriol. For example, he noted that one state regards possession of cocaine as a CIMT but another regards possession of marijuana as not a CIMT. The distinction between cocaine (criminalized in every American jurisdiction) and marijuana (decriminalized de jure in many states and de facto in many more) permeates American criminal law in 2019. In any event, Judge Posner's condemnation of the concept of CIMT was unnecessary to the resolution of the case before him; as he argues, the crime at issue—using a false social security card to obtain employment—was probably not a CIMT under existing case law, as there was no intent to defraud. (There was no "victim": the petitioner paid taxes.)

Judge Posner did not argue that the phrase CIMT should be struck down as unconstitutional, but two Ninth Circuit judges have "joined the chorus of voices calling for renewed consideration as to whether the phrase

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[86] Ali v. Mukasey, 521 F.3d 737, 739 (7th Cir. 2008).
[87] Partyka v. Att'y Gen., 417 F.3d 408, 409 (5th Cir. 2005) (referring to "amorphous morass of moral turpitude law"). *See also* Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009) (en banc) ("'[M]oral turpitude' is perhaps the quintessential example of an ambiguous phrase."); *id.* at 921 (Berzon, J., dissenting) (describing BIA precedent on CIMT definition as "a mess of conflicting authority").
[88] Partyka v. Attorney General, 417 F.3d 408 (3rd Cir. 2005).
[89] 834 F.3d 823 (7th Cir. 2016).

"crimes involving moral turpitude" is unconstitutionally vague."[90] The argument has been percolating in the academic literature for over a decade,[91] but it has become more viable in the light of a trilogy of Supreme Court cases deploying the void-for-vagueness to doctrine to hold the phrase "crime of violence" unconstitutional.[92] I explore this argument in the next section.

Yet in the midst of this swelling judicial and scholarly disapproval of CIMTs, members of Congress continue to use the phrase without any indication that they regard it as unconstitutionally vague. Even members of Congress sympathetic to loosening standards for admission of aliens and for restricting grounds for deportation have never proposed to abandon the CIMT language. One of the most commonly proposed amendments to the 1996 immigration law has been to restore language from the 1952 law that made a CIMT relevant for immigration purposes only if the alien was actually incarcerated for one year for the offense. For example, the Immigrant Fairness Restoration Act of 2000 aimed to return to the pre-1996 definition, reserving deportation for aliens "*sentenced* to a year in prison for a crime involving moral turpitude."[93] Senator Leahy backed the amendment not because the post-1996 definition was vague, but because immigration laws should "respect the decisions of judges and juries, not seek to undermine them."[94] His point seems to have been that a felony could not have been base

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[90] Barbosa v. Barr, 919 F.3d 1169, 1175 (Berzon, J., concurring); *see also* Islas-Veloz v. Whittaker, 914 F.3d 1249, 1259 (Fletcher, J., concurring).
[91] *See supra* at n.10.
[92] The more modest argument in the academic literature is that Congress or the BIA should step in and replace the CIMT doctrine with a distinction that is easier to apply and, supposedly, more reliably tracks modern intuitions about which crimes involve the greatest moral impropriety. *See, e.g.,* Brian C. Harms, *Redefining "Crimes Of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259 (2001).
[93] Immigrant Fairness Restoration Act of 2000, S. 3120, 106th Cong. § 4 (2000).
[94] 146 Cong. Rec. S9388-89 (daily ed. Sept. 27, 2000) (statement of Sen. Leahy).

and vile, and therefore a CIMT, if the sentencing judge and jury declined to impose a year's incarceration.

In response to criticisms that bills they have sponsored would allow criminals to enter the country and become citizens, Democrats have often *approvingly* cited to the language in the current law that guarantees the inadmissibility and deportability of those convicted of CIMTs. Moreover, while discussing the Securing America's Borders Act in 2006, Senator Kennedy rejected the claim that the Act was necessary to ensure that criminals were ineligible for permanent resident status, drawing attention to the "sweeping changes" to immigration laws that already foreclose those convicted of crimes, such as CIMTs, from eligibility for a green card.[95] Just this year, Representative Lofgren corrected a fellow representative who argued that aliens convicted of a DUI could escape immigration consequences.[96] She observed that "one conviction for DUI with a suspended license" would constitute a CIMT.[97] In addition, repeated efforts to introduce a bill giving privileged refugee status to Liberians, which finally succeeded, have all excluded those convicted of a CIMT.[98]

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[95] 152 Cong. Rec. S2591 (daily ed. Mar. 30, 2006) (statement of Sen. Kennedy).

[96] 165 Cong. Rec. H4290 (daily ed. June 4, 2019) (statement of Rep. Lofgren).

[97] *Id.* Of course, a DUI not on a suspended license would not constitute a CIMT and therefore would not bar an alien from admission or result in deportation.

[98] Liberian Refugee Immigration Fairness Act of 1999, S. 656, 106th Cong. (1999); Liberian Refugee Immigration Fairness Act of 2001, S. 656, 107th Cong. (2001); Liberian Refugee Immigration Fairness Act of 2003, S. 656, 108th Cong. (2003); Liberian Refugee Immigration Fairness Act of 2005, S. 656, 109th Cong. (2005); Liberian Refugee Immigration Fairness Act of 2007, S. 656 110th Cong. (2007); Liberian Refugee Immigration Fairness Act of 2009, S. 656 111th Cong. (2009); Liberian Refugee Immigration Fairness Act of 2011, S. 656, 112th Cong. (2011); Liberian Refugee Immigration Fairness Act of 2013, S. 527, 113th Cong. (2013); Liberian Refugee Immigration Fairness Act of 2015, S. 2161, 114th Cong. (2015); Liberian Refugee Immigration Fairness Act of 2018, S. 2275, 115th Cong. (2018); Liberian Refugee Immigration Fairness Act of 2019, S. 456, 116th Cong. § 3 (2019);

Finally, outside the immigration context, members of Congress continue to use the phrase "crimes involving moral turpitude." The context is typically identifying grounds for the removal of government officials and judges and the stripping of government pensions.[99] The phrase was also used when discussing President Clinton's impeachment trial, with one Senator observing that "committing crimes of moral turpitude, such as perjury and obstruction of justice, go to the very heart of qualification for public office."[100]

In short, the criticism of CIMTs in the judicial and scholarly arenas does not seem to have secured any purchase in Congress. Democrats and Republicans, those in favor of liberalizing and those in favor of restricting immigration, all regard the doctrine as eminently sensible. This makes all the more remarkable the mounting argument that the doctrine is so irrational and vague as to be unconstitutional. To that argument we now turn.

II. The New Void-for-Vagueness Challenge

In the decades after *De George* was decided, void-for-vagueness challenges to the CIMT language were seldom raised and peremptorily rejected: The decision in that case was presumed to have resolved the issue. But several law review articles in recent years have revived the argument. The majority opinion in *De George*, these authors have argued, was narrow, holding only that crimes that involve fraud constitute a CIMT: Chief Justice Vinson explicitly left open the possibility that constitutional challenges in

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Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. § 642 (2010); Comprehensive Immigration Reform Act of 2011, S. 1258, 112th Cong. 372 (2011); National Defense Authorization Act for Fiscal Year 2020, S. 1790, 116th Cong. § 6013 (2019).

[99] *E.g.*, White House Accountability Act, S. 2000, 104th Cong. § 5(IV)(e)(1)(D) (1996).

[100] 145 Cong. Rec. S1781, S1789-90 (daily ed. Feb. 23, 1999).

"less obvious cases" could still be raised.[101] Furthermore, the constitutionality argument was never briefed or argued by the parties in *De George*, and "a constitutional rule announced *sua sponte* is entitled to less deference than ones announced on full briefing and argument."[102]

The more fundamental challenges to the CIMT provisions now focus on the supposed errors in Chief Justice Vinson's opinion, which have eroded the solidity of the precedent and invited its reconsideration.[103] The majority opinion emphasized that the CIMT language had been a part of immigration law for "60 years," suggesting that the duration of its presence somehow insulated it from constitutional challenge.[104] But several authors have contended that this argument was wrong in 1951 for the reasons stated by the dissenting Justice Jackson,[105] and have even become more manifestly wrong over time. With each passing year, it is said, the incoherence of the CIMT language is more obvious.[106] As the conflicting precedents multiply, the incoherence of the CIMT language is harder to deny.

Moreover, legal developments have strengthened the constitutional argument. At the time *De George* was decided, the void-for-vagueness doctrine was exclusively designed to ensure that penal laws were put people on notice as to the conduct that was proscribed: "Every man ought to know with certainty when he is committing a crime."[107] In the second half of the twentieth century, the Court's void-for-vagueness doctrine took a "leap

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[101] Moore, *supra*, at 835; *De George*, 341 U.S. at 232.
[102] Monell v. Dep't of Social Serv., 436 U.S. 658, 709 n.6 (1978). *See* Moore, *supra*, at 836.
[103] *See* Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 Wis. L. Rev. 1127, 1170 (2016) ("The federal judiciary need not prolong its endorsement of CIMTs. Courts are likely to hear arguments that the CIMT definition is void for vagueness").
[104] 341 U.S. at 229.
[105] 341 U.S. at 238 (Jackson, J., dissenting).
[106] *See, e.g.*, Lee & Kornegay, *supra*, at 57 ("This amorphous standard has resulted in a tangle of inconsistent rulings affording little predictability.").
[107] United States v. Reese, 92 U.S. 214, 220 (1875).

forward" by adding a second goal: the need to curtail arbitrary enforcement.[108] As the Court explained in *Papachristou v. City of Jacksonville*,[109] striking down a vagrancy law, the challenged ordinance was void "both in the sense that it fails to give a person of ordinary intelligence fair notice this his contemplated conduct is forbidden by the statute, and because it encourages arbitrary and erratic arrests and convictions." The "fair notice" and the "arbitrary enforcement" rationales supply independent grounds for striking down a law as unconstitutionally vague.[110] The CIMT provisions are thus doubly unconstitutional, both because they fail to provide notice as to the forbidden conduct and also because they invest executive officials with untrammeled power. As one author writes, "the term CIMT casts judges in the role of God, deciding according to the 'moral standards prevailing at time."[111]

The Court's void-for-vagueness doctrine has recently acquired greater prominence. In a trilogy of cases, the Supreme Court deployed the vagueness rationale to strike down language in federal law that had existed for years. In *Johnson v. United States*,[112] the Court held that "violent felony," as defined in the residual clause of the Armed Career Criminal Act, was unconstitutionally vague because of its "hopeless indeterminacy." In *Sessions v. Dimaya*,[113] the Court found that "crime of violence," as defined in 18 U.S.C. §16(b), and cross-referenced in the Immigration and Nationalization Act, was likewise unconstitutionally vague. Finally, in *Davis v. United States*,[114] the Court struck down the phrase "crime of violence," as it appears in 18 U.S.C. § 924(c)(3)(B).

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[108] Lee & Kornegay, *supra*, at 84. *See also* Koh, Crimmigration, *supra*, at 1134-1136.
[109] 405 U.S. 156, 162 (1969).
[110] City of Chicago v. Morales, 527 U.S. 41 (1999).
[111] Holper, *supra*, at 701.
[112] 135 S. Ct. 2551, 2558 (2015).
[113] 138 S. Ct. 1204 (2018).
[114] 139 S. Ct. 2319 (2019).

The trilogy supplies a road map for constitutional challenges to CIMTs in immigration law. In *Johnson*, the contested language provided that a "violent felony" was any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Previous case law had held that when inquiring whether an offense was a violent felony, courts should adopt a "categorical approach": the question was not how much risk was created in the crime as it was committed, but how much is created categorically, in the "ordinary case." Given this "categorical approach," Justice Scalia held that "violent felony" was unconstitutionally vague for two reasons: first, there is "grave uncertainty" as to what constitutes an "ordinary case"; and second, even if one could identify the "ordinary case," it is unclear what degree of risk constitutes "serious potential risk."[115]

The application of this reasoning to CIMTs in immigration law is clear. Courts have adopted a categorical approach to CIMTs, inquiring not about an individual crime as it was committed, but typically hypothesizing the "least culpable conduct" that has given rise to a conviction. If the charged crime is indecency with a minor, for example, courts are foreclosed from the considering the actual ages of the defendant and victim, but must consider the "least culpable conduct" that could generate a conviction under the statute. But what does "least culpable conduct" mean? Even if the actual victim was 14 years old and the actual defendant 60 years old, are courts obliged to imagine that the victim was 16 and the defendant 30? Or 17 and 21? "Is the federal court in [this] immigration case going to go to that extreme length in hypothesizing innocuous fact situations, or is the federal court . . . going to stick to locally familiar anecdotes?"[116] Furthermore, how much moral impropriety is needed for a finding of "moral turpitude?" Is it moral turpitude for a 25-year-old to have sex with a 16-year-old? And says who?

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[115] 135 S. Ct. 2551, 2557, 2559 (2015).
[116] Lee & Kornegay, *supra*, at 114.

The difficulties multiply. Almost any crime carries an attribution of moral fault, but how much fault constitutes "moral turpitude?" Even the most serious crimes, such as premeditated murder, can be committed in ways that are not acutely probative of moral fault?[117] If courts are required to consider the "least culpable conduct" that can give rise to a conviction, most crimes can escape a finding of moral turpitude.[118] With respect to "violent felony," Justice Scalia observed that there is "pervasive disagreement" in the lower courts about what constitutes a "crime of violence" and what does not.[119] Likewise with CIMTs. The decades of judicial struggles have demonstrated that the indeterminacy is sufficiently "grave" that a void-for-vagueness challenge is compelling.[120]

In *Johnson*, the government argued that even if "violent felony" is indeterminate in some cases, there are others that are "straightforward." To this, Justice Scalia responded that the number of "straightforward" cases

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[117] Conviction for premeditated first-degree murder can follow from an agonized mercy killing. *State v. Forrest*, 362 S.E.2d 25 (N.C. 1987). More generally, homicide and murder are regarded as the most heinous of crimes. Yet these legal categories capture a spectrum of unlawful killings that vary widely in their moral culpability. In addition, accomplice liability and felony murder rules, as well as a general disregard for motives (as illustrated by the case of Clyde Forrest), result in a heterogeneous moral collection of offenses falling under the header of "homicide" and "murder." *See, e.g.,* Hines v. State, 578 S.E.2d 868 (Ga. 2003) (felony murder conviction and life without parole sentence affirmed, when the predicate felony was being a felon in possession of a firearm and the defendant had accidentally caused a friend's death during a hunting trip); Adam Liptak, *Serving Life For Providing Car to Killers*, N.Y. TIMES, Dec. 4, 2007 (felony murder conviction for person who lent his car to housemates, who then robbed a drug dealer and accidentally killed his daughter).

[118] Lee & Kornegay, *supra*, at 115.

[119] 135 S. Ct. 2551, 2560 (2015).

[120] *Cf.* Clancey Henderson, *Stemming the Expansion of the Void-for-Vagueness Doctrine Under Johnson*, 2019 UTAH L. REV. 237, 262 (2019) ("It was only after the Court's failed efforts that Justice Scalia reiterated that 'the life of the law is experience' and concluded that the Court's poignant experience with the residual clause over a decade left only "guesswork and intuition.").

may be overstated,[121] which is equally true of CIMTs. Moreover, he rejected the contention that "a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."[122] And likewise again for CIMTs: even if some crimes "clearly" involve moral turpitude, the phrase generates uncertain answers for many other crimes, and must therefore be struck down.[123]

In *Dimaya*,[124] the Court expanded upon *Johnson* in ways that could prove significant in the context of a challenge to CIMTs. *Dimaya* turned on a provision in the INA that provides for the deportation of any alien convicted of an "aggravated felony"; that term includes "crime of violence," as defined by 18 U.S.C. §16(b).[125] Not surprisingly, the government's first argument, attempting to distinguish *Johnson*, was that "a less searching form of the void-for-vagueness doctrine applies," because this was not a criminal case, but an immigration matter.[126] Justice Kagan responded that *De George* foreclosed this argument, for the Court in that case applied "the established criteria of the 'void for vagueness' doctrine" applicable to criminal laws."[127] She added:

> Nothing in the ensuing years calls that reasoning into question. To the contrary, this Court has reiterated that deportation is "a particularly severe penalty," which may be of greater concern to a convicted alien

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[121] 135 S. Ct. 2551, 2560 (2015).
[122] 135 S. Ct. 2551, 2561 (2015).
[123] *See* Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1130 (2016) ("by dispensing with the requirement that a statute be vague in all of its applications in order to run afoul of due process, *Johnson* thus potentially invigorates the vagueness doctrine, and has particularly strong implications for immigration provisions").
[124] 138 S. Ct. 1204 (2018).
[125] 18 U.S.C. §16(b) defines a "crime of violence" to encompass "any … offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."
[126] 138 S. Ct. 1204, 1212 (2018).
[127] 138 S. Ct. 1204, 1213 (2018).

> than "any potential jail sentence." And we have observed that as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more "intimately related to the criminal process.[128]

In sum, Justice Kagan argued that following *De George*, "the same standard" should be applied in the two settings.[129]

In the final installment of the void-for-vagueness trilogy, *United States v. Davis*,[130] Justice Gorsuch's opinion for the Court not only reiterated arguments made in *Johnson* and *Dimaya*, but also rejected an argument the government is likely to raise in the context of a challenge to the CIMT provisions. In *Davis*, the government argued that any vagueness problems with "crime of violence" could be avoided if the language were not construed to require the "categorical approach." Thus, instead of requiring courts to identify the mythical "nature" of any given criminal offense is—an insuperably difficult task for reasons cataloged by Justice Scalia in *Johnson*—the statute's ambiguous language should be construed to admit a fact-based-approach. For example, it is unclear whether, in the abstract, conspiracy to commit a Hobbs Act violation is a violent offense, but the question is easier to answer with respect to a concrete example, when the facts of a case are considered. As a dissenting Justice Kavanaugh argued, "[b]y any measure, Davis and Glover's conduct during the conspiracy was

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[128] 138 S. Ct. 1204, 1213 (2018).

[129] *Id*. *See* Jennifer Gordon, *Immigration As Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L.J. 653, 655–56 (2018) ("In *Sessions v. Dimaya,* a 5-4 majority of the Supreme Court reached new heights of constitutional oversight of Congress's actions on immigration, for the first time striking down a substantive deportation ground as unconstitutional after finding that it was void for vagueness. Rather than approaching plenary power doctrine head on, the 5-4 majority in *Dimaya* simply ignored it, robustly reviewing the immigration statute without referring to the doctrine.").

[130] 139 S. Ct. 2319 (2019).

violent." [131] But Justice Gorsuch rejected the argument, holding the "constitutional avoidance" cannon has never been used to expand the reach of a criminal statute; indeed, the rule of lenity forecloses the argument that an ambiguous criminal statute should be broadened to proscribe conduct not clearly contemplated by a statute.[132] A parallel argument can foreclose a "constitutional avoidance" claim to save CIMTs in immigration law: courts should not resolve the ambiguity in a way that *expands* the doctrine's meaning to encompass crimes not contemplated under the prevailing interpretation today.

Before considering the merits of this overall argument, it is worth recalling that the review of the legislative debates over the past century demonstrates that members of Congress are aware of many of the issues that have arisen from the implementation of the CIMT provisions. For example, members of Congress have proposed legislation to address the methodological question of how immigration officials and judges should decide whether a crime is a CIMT.[133] Furthermore, members of Congress have long realized that the phrase is vague. Aware that the Supreme Court has applied the void-for-vagueness doctrine in the immigration context,[134] no member of Congress has ever suggested that the phrase is unconstitutional. Members of Congress have also specifically rejected the argument that the doctrine is unnecessary because all the crimes that otherwise merit deportation are addressed by other provisions in the law.[135]

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[131] 139 S. Ct. 2319, 2349-50 (2019) (Kavanaugh, J., dissenting).
[132] 139 S. Ct. 2319, 2332 (2019).
[133] *See supra* at text accompanying note 84.
[134] *See supra* at text accompanying note 52
[135] *See supra* at text accompanying note 95-97. Mary Holper argues that "[a] court should ask whether the vague language is necessary to achieve some legislative purpose that cannot be achieved through more precise terms." But Congress has clearly and repeatedly indicates it regards the CIMT as necessary to achieve a legislative purpose.

The linchpin of the argument that the CIMT provisions are unconstitutional is that the void-for-vagueness doctrine supplies, in the words of Justice Kagan, the "same standard" in criminal law and in immigration law. Justice Kagan's support for this proposition is a citation to *De George* and a statement of the indisputable fact that deportation is a "severe penalty." Yet as the critics of *De George* have observed, the constitutionality question was not briefed and the *De George* Court's treatment of it was perfunctory—assuming that due process applied, before finding it satisfied in that case. A moment's reflection, however, would generate profound doubts about Justice Kagan's claim the standard is the "same" in a criminal trial and a deportation hearing. The manifold protections of the criminal justice system—the right to the assistance of the counsel, the privilege against self-incrimination, the power to suppress illegally obtained evidence, etc.—do not apply in a deportation hearing. It would be odd if protections explicitly codified in the Constitution are not extended *at all* to deportation hearings, but a "void-for-vagueness" doctrine that courts have inferred from the due process clause is applied in the "same" way. The implausibility of the claim is succinctly captured by Justice Thomas's observation that a criminal law that punished "moral turpitude" could never survive constitutional scrutiny, but immigration law has long been understood to attach consequences to CIMTs. As early as 1885, for example, an Arkansas court overturned a conviction for an act "against public morals," with the observation, "We cannot conceive how a crime, on any sound principle, be defined in so vague a fashion."[136]

At least since the mid-twentieth century, due process concerns have been deemed relevant in deportation hearings, but those concerns are relaxed. Even if one rejects Justice Thomas's originalist argument that deferential judicial review is appropriate in the context of deportation

[136] Ex Parte Jackson, 45 Ark. 158, 164 (1885).

hearings,[137] vastly different procedural protections are present when (a) the question is whether conduct is proscribed *at all* by the criminal law and (b) the question is the extent of the penalty, direct and indirect, that attaches to a criminal conviction. In (a), the void-for-vagueness principle is primarily important in ensuring that an individual was, *ex ante*, put on notice that the conduct was contrary to law. In *Papachristou*, for example, the statute criminalized "habitual loafers."[138] The vagueness of the phrase is manifest: Many a law professor would be obliged to wonder, day to day, whether he or she is running afoul of this prohibition. By contrast, in (b) the person is on notice that the conduct was contrary to law. The substantially less compelling narrative, for those subject to deportation after being convicted of a CIMT, is "I knew that my conduct was a crime, punishable by over a year in prison. But it was unclear whether that crime qualified as one involving moral turpitude, to which deportation consequences follow."

None of the foundational "void-for-vagueness" cases have the latter aspect. In all of these cases, the petitioners argued that, due to the vagueness of the law, they could not know whether their conduct were criminalized or not. As Justice Alito observed in *Johnson*, the concerns that vague laws will "trap the innocent" have no force "when it comes to sentencing provisions."[139] Consider, furthermore, that for much of American history many felonies were punishable by any prison sentence from a year to life, subject only to the unfettered discretion of the trial judge. Obviously, such a scheme would not satisfy void-for-vagueness concerns if the standard were applied in the "same" way to sentencing as it does to guilt. And deportation hearings present a less compelling case for "vagueness" concerns

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[137] *Dimaya*, 138 S.Ct. at 1249 (Thomas, J., dissenting) ("When our Constitution was ratified, moreover, "[e]minent English judges, sitting in the Judicial Committee of the Privy Council, ha[d] gone very far in supporting the ... expulsion, by the executive authority of a colony, of aliens.").
[138] 405 U.S. at 156 n.1.
[139] 135 S.Ct. at 2577 (Alito, J. dissenting).

than sentencing hearings. After all, the indirect consequences of a finding of criminal liability are unclear and vague in untold ways—whether one will forfeit one's right to bear arms; whether one will have to register as a felon; whether one will lose one's right to vote, etc. No court has ever invalidated any of these indirect consequences of a criminal conviction on the basis that the state failed to clearly demarcate which would follow from a criminal conviction.

Even accepting that "notice" concerns are present to some extent in deportation hearings, many commentators exaggerate the degree of the uncertainty generated by the CIMT provisions.[140] As critics of these provisions acknowledge, in a heartland of cases, there is, at any given time, a consensus at to which qualify as CIMTs and which do not.[141] A few crimes have shifted over time, from one category to another, and still others are on the margin and have generated a welter of precedents.[142] Yet this inconsistency can be overstated. In some instances, the precedents are not in fact inconsistent, as the courts construed different state laws. Those laws may have captured the same genus of offense, but minor differences in statutory drafting result in plausibly different specifications, CIMT or not CIMT. To the extent that the courts of appeal *have* generated inconsistent results, and to the extent that uniformity and predictability are goals in

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[140] See, e.g., Moore, *supra*, at 838 ("[c]ourts are still bewildered by the vague term"); Wolper, *supra*, at 1912 (referencing "the confusion [the term] has wrought").

[141] *See, e.g.*, Moore, *supra*, at 824 ("there are some crimes that all circuits agree are reportable or exclusionary offenses"); Holper, supra, at ("a few rules have emerged with respect to the meaning of CIMT").

[142] Involuntary manslaughter is the preeminently difficult crime to categorize. For decades, the BIA regarded involuntary manslaughter as not a CIMT. This judgment was overruled in the 1970s. *See* Franklin v. INS, 72 F.3d 571, 585 n.14 (Bennett, J., dissenting). The issue remains a source of disagreement today. *See* Sotnikay v. Lynch, 846 F.3d 731 (4th Cir. 2017) (reversing BIA's judgment that involuntary manslaughter under Virginia law constutes a CIMT). As discussed *supra* at text accompanying notes 73-74, the question is a genuinely difficult one.

immigration law, then the obvious solution is judicial deference to the reasoned judgments of the BIA as to what constitutes a CIMT.[143] One cannot complain that it's a "fool's errand to bring coherence to CIMTs in immigration law" and then object to embarking on one path likely to arrive at coherence.[144]

Similarly, one cannot simultaneously insist that immigration officials inquire whether a crime was a CIMT in a rigidly categorical way, blind to all of the circumstances of a case, and then object that the results in any given case are irrational.[145] Obviously, the solution to this problem is for immigration officials and judges to consider, as necessary, the "record of conviction," which would give a fuller sense of what crime was actually committed. Given that this was a common approach in the courts of appeal at the time Congress enacted the 1996 Act,[146] it is fair to assume that this the inquiry Congress intended immigration officials to conduct.[147]

Finally, the objection that the CIMT provisions invest untrammelled discretion in executive branch officials, enabling them to "play God," seems to arise from an elementary theological misunderstanding. As best we can tell, when God proclaims judgment, He does not review the contents of the U.S. Code, nor consult the morals of the community. He simply channels His own omniscient wisdom. By contrast, when an immigration official adjudicates an alien deportable, he or she is required to determine that the offensive act is (1) a state or federal crime punishable by more than a year in prison, and (2) a crime of moral turpitude, *as defined by the national community*. Step (1)

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[143] *See* Matusiak, *supra*, at 219.
[144] *See* Yeatman, supra.
[145] *Cf*. Johnson, 135 S.Ct. at 2573 (Thomas, J., concurring) ("Having damaged the residual clause through our misguided jurisprudence, we have no right to send this provision back to Congress and ask for a new one.").
[146] *See supra* at text accompanying note 72.
[147] *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378 (1982) (presuming that Congress was aware of the legal background when it reenacted a law).

could not be more objective and constrained. And even step (2) presupposes an inquiry into the views of the community. As Learned Hand observed, in this task, the judge "must be loyal" to "accepted moral notions . . . to that, so far as we can ascertain [them]."[148]

To be sure, when an immigration official or judge is painting on a blank canvas—that is, when there is no precedent resolving whether conviction for a given offense qualifies as a CIMT—then the task is a difficult one. For a century, however, members of Congress on both sides of the political aisle have thought it prudent to invest immigration officials with the power to exclude and deport aliens on this basis. The final section will consider a recent case of first impression. The immigration judge and the BIA were confronted with a statute that had never before been considered a CIMT. Through a study of this case, we can evaluate whether the critics have fairly portrayed both how vague the CIMT provisions are and how unconstrained immigration officials have been when enforcing them.

III. A Case Study: The Matter of Ortega-Lopez

Whether there is a federal interest in protecting animals from fighting ventures that merited (and constitutionally authorized) Congressional attention is a topic beyond the scope of this article. But in 1976 Congress determined there was a federal interest, and it enacted the Animal Welfare Act Amendments, [149] most recently amended by the Animal Fighting Prohibition Enforcement Act of 2007, [150] which addressed the issue and imposed substantial penalties on those responsible for such ventures. Federal law now criminalizes the exhibition or sponsoring of animals in

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[148] 34 F.2d at 921.
[149] Pub. L. No. 94-279, § 17, 90 Stat. 421 (1976).
[150] Pub. L. No. 110-22, § 3, 121 Stat. 88 (2007). *See* Francesca Ortiz, *Making the Dogman Heel: Recommendations for Improving the Effectiveness of Dogfighting Laws*, 3 STAN. J. ANIMAL L. & POL'Y 1, 75 (2010).

fighting ventures.[151] In 2008, football player Michael Vick was sentenced to two years in prison for his role in a dog fighting conspiracy.[152] To judge by the stiff sentence Vick received, and the withering denunciations he endured in the national press, the crime is taken seriously by many Americans. But no court had ever decided whether a violation of 7 U.S.C. § 2156(a)(1) (for sponsoring or exhibiting an animal in a fighting venture) qualified as a CIMT until the issue was posed by Augustin Ortega-Lopez.

Ortega-Lopez is a Mexican citizen who immigrated to the United States without legal authorization in 1992.[153] In 2009, he pled guilty to a violation of 7 U.S.C. § 2156(a)(1), and the Department of Homeland Security then initiated deportation proceedings against him.[154] In 2011, the immigration judge who heard his case ruled that his cockfighting conviction was a CIMT and that therefore Ortega-Lopez was ineligible for cancellation of removal. Ortega-Lopez appealed to the BIA, which in 2013 affirmed the finding of the immigration judge.[155] In 2016, Ortega-Lopez sought review in the Ninth Circuit. The court hesitated to affirm the BIA's decision because, under its precedents, "non-fraudulent crimes of moral turpitude almost always involve an intent to harm someone, the actual infliction of harm upon

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[151] 7 U.S.C. § 2156 (a)(1); 7 U.S.C. § 2156(j); 18 U.S.C. § 49(a).

[152] Adam Kurland, *The Prosecution of Michael Vick: Of Dogfighting, Dual Sovereignty, Depravity and* "A Clockwork Orange," 21 MARQ. SPORTS L. REV. 465 (2011).

[153] Maura Dolan, *Federal Appeals Court Sides with Immigrant Convicted of Cockfighting*, L.A. TIMES (Aug. 23, 2016), https://www.latimes.com/local/lanow/la-me-ln-cockfighting-20160823-snap-story.html.

[154] *Id.*

[155] Matter of Agustin Ortega-Lopez, 26 I. & N. Dec. 99 (BIA 2013) ("Ortega-Lopez I"). Ortega-Lopez's first name is misspelled ("Augstin") in Westlaw's version of this case. *See* DOJ original at https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3777_correction.pdf

someone, or an action that affects a protected class of victim."[156] It remanded the case to the BIA for a fuller explanation of how sponsoring or exhibiting a chicken in a cockfight was a CIMT, adding that it would be inadequate to observe that all fifty states criminalized this activity.[157] In August 2018, the BIA reaffirmed its previous decision in a more elaborate opinion.[158] In September 2019, one decade after his criminal conviction, Ortega-Lopez appealed this second BIA ruling to the Ninth Circuit.[159] One wonders how many nations provide deportable aliens as much process as America has afforded Ortega-Lopez.

My point here, however, is not to assess whether the BIA is correct that a § 2156(a)(1) violation is a CIMT. Rather, the point is to evaluate whether the BIA's reasoning in arriving at its conclusion reveals the hopeless indeterminacy of the entire process: is the phrase "crimes involving moral turpitude" so vague that immigration officials are simply "playing God" in determining the fate of Ortega-Lopez?

For starters, both BIA opinions make clear that they are operating within the "categorical" approach, considering not the facts of Ortega-Lopez's case, but "the minimum conduct that has a realistic probability of being prosecuted under the statute."[160] As it happens, his case involved among the least offensive conduct proscribed by the statute, as the animals he thrust into mortal combat were chickens and not "domesticated animals."[161]

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[156] Ortega-Lopez v. Lynch, 834 F.3d 1015, 1017–18 (9th Cir. 2016) ("Ortega-Lopez II")(quoting Nunez v. Holder, 594 F.3d 1124, 1127 (9th Cir. 2010)).
[157] *Id.* at 1017–18.
[158] Matter of Agustin Ortega-Lopez, 27 I. & N. Dec. 382 (BIA 2018) ("Ortega-Lopez III").
[159] His opening brief is due October 30, 2019, and the government's answering brief is due December 30, 2019. *See* Order, *Ortega-Lopez v. Barr*, No. 18-72441 (9th Cir. July 31, 2019).
[160] Ortega-Lopez III, 27 I. & N. at 384.
[161] *Id.* at 388. The statute was amended specifically to contemplate both dog fighting *and* cockfighting. Ortega-Lopez I, 26 I & N. at 102.

The BIA then lays out the familiar framework for assessing whether a crime involves moral turpitude: there must be "[1] a culpable mental state and [2] reprehensible conduct."[162] The first part of the inquiry requires a close reading of the relevant statute. In this case, Section 2156(a)(1) stipulates a mens rea of "knowingly," so a conviction requires proof of scienter. The second part of the inquiry is the more difficult and potentially open-ended one: is the conduct contemplated by Section 2156(a)(1) "inherently base, vile, depraved, or contrary to the accepted rules of morality and the duties owned persons or to society in general?"[163] In arriving and its answer that it is, and in reaffirming its conclusion on remand, the BIA plausibly rejected the Ninth Circuit's contention that, apart from fraud, only violent crimes directed at protected classes qualify. In so doing, it did not invoke its own moral views, but it canvassed the established "standards of a civilized society."[164]

Critics of the CIMT provisions seem to regard the task of ascertaining "the standards of a civilized society" as fraudulent; for there is no such thing as a "civilized society," and those who purport to invoke its standards are simply privileging their own values. Such criticisms border on, or cross into, nihilism, but the more pertinent response is that, as an empirical matter, the criticism is faulty: as the BIA observes, there are certain activities that civilized society *does* overwhelmingly regard as reprehensible and vile.[165]
My small criticism of the BIA is that the test should not be "standards of a civilized society," but as it writes at another point in the 2018 opinion, "[t]he clear consensus in contemporary American society,"[166] which is essentially

[162] *Id*. at 100; Ortega-Lopez III, 27 I. & N. at 385.
[163] *Id*. at 385.
[164] *Id*. at 386.
[165] *Id*.
[166] *Id*. at 390.

the test adopted by Judge Learned Hand.[167] This not only dispels the aura of civilizational superiority, but it also tracks a test that the Supreme Court has adopted in manifold settings. For example, in the context of the selective incorporation of the Bill of Rights, the Court has inquired whether a procedural right is "necessary to an *Anglo-American* regime of ordered liberty," which does not foreclose the possibility that other "regimes of ordered liberty" might choose a different course.[168] Or in the context of the Eighth Amendment, the Court canvasses practices in the states to see whether a given punishment conforms to a national consensus.[169]

The BIA's observation that all 50 states criminalize cockfighting is thus relevant in assessing whether there is a national consensus that such a crime qualifies as a CIMT. The Ninth Circuit's answer that "more is required"[170] to prove that the crime involves moral turpitude is unpersuasive. Yes, all 50 states criminalize simple assault, and yes, simple assault is not a CIMT, but the legislative history of the various assault statutes do not reveal the outpouring of denunciation that accompanies the enactment of America's animal cruelty statutes. The BIA accumulates only a tiny fraction of a voluminous literature that confirms an American consensus that animal fighting ventures are reprehensible: they involve a grotesque celebration of suffering, which "deadens the feelings of humanity, both in those who participate in it, and those who witness it."[171] The fact that a few other cultures still countenance such ventures does not negate the reality of a deep American consensus on this issue. (For more on this issue, see [forthcoming] Appendix A.) Ortega-Lopez has taken an appeal to the Ninth Circuit (again),

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[167] U.S. ex rel. Iorio v. Day, 34 F.2d 920, 921 (2d Cir. 1929). *See supra* at text accompanying notes 37-41.

[168] Duncan v. Louisiana, 391 U.S. 145 (1968).

[169] *See, e.g.*, Graham v. Louisiana, 560 U.S. 48 (2010) (holding that the imposition of life without parole on a minor for a crime other than homicide is cruel and unusual because it is contrary to a clear national consensus).

[170] Ortega-Lopez II, 834 F.3d at 1018.

[171] Ortega-Lopez III, 27 I. & N. at 388.

and one cannot handicap the outcome. Whether the BIA is affirmed or not, a fair review of both of its opinions forecloses any serious argument that the immigration authorities were "playing God" or that the CIMT provisions were so vague as to provide no or little guidance.

But the puzzle of the CIMT provisions is nonetheless well posed by Ortega-Lopez's case. Here we have someone whose actions were deemed sufficiently minor by the criminal law that his sentence was only one year's probation.[172] And yet for purposes of immigration law they were deemed morally turpitudinous—that is, sufficiently serious that they may subject him, a father of three Americans, to deportation. By contrast, Ihar Sotnikau, an alien, convicted of involuntary manslaughter, was sentenced to 5 years' imprisonment. And yet according to the Fourth Circuit, his crime was not a CIMT and thus does not subject him to deportation.[173] (Because the mens rea of involuntary manslaughter is recklessness, Sotnikau was found not to possess the requisite "culpable mental state" to justify a finding of a CIMT.)

To many, the results in these two cases cannot be reconciled and provide additional grounds for reconsidering the inclusion of the CIMT provisions in immigration law. These provisions are not only difficult to administer, they generate not immediately intuitive results. It would be possible, as Senator Roth argued in 1995, simply to deport everyone convicted of a felony. Alternatively, the law could provide that any alien convicted of a felony who was sentenced to one year's incarceration should be deported. Why has Congress persisted, for over a century, in preserving the CIMT provisions in immigration law when there are alternatives that are easier to administer?

One possible answer is that criminal law and immigration law exist for different purposes. The former is fundamentally about punishment; the latter is fundamentally about what kind of people we want in our community.

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[172] Ortega-Lopez II, 26 I. & N. at 99.
[173] Sotnikau v. Lynch, 846 F.3d 731 (4th Cir. 2017).

Violations of the criminal law are proxies, but only imperfectly, for traits that may be deemed to disqualify someone from inclusion in our community. Involuntary manslaughter involves a terrible outcome, and demands punishment, but it may not reflect a recurrent behavior that renders someone unfit to be a member of our community. By contrast, knowing participation in an animal fighting venture entails a web of unsavory affiliations, as well as participation in a subculture antithetical to the morals of our community. In many other countries, cockfighting may be legal and commonplace. But the BIA cited "[t]he clear consensus in contemporary American society," as evidenced by the multiplication of criminal laws against animal fighting in every United States jurisdiction.

To be sure, there are cases that expose profound divisions of opinion and the absence of any "consensus" American view of moral turpitude. But this does not mean that it is impossible for officials and judges to discern a consensus view in many, if not most, cases, nor that it is inappropriate for immigration law to be used as a vehicle to embody and affirm that consensus view. If we are to make sense of the puzzling persistence of the CIMT provisions, it must be in this way.

Conclusion

To some observers, it is "preposterous" that as "meaningless" a phrase as "crimes involving moral turpitude" remains a part of American immigration law,[174] but its persistence, in the face of overwhelming academic and judicial hostility, is itself worthy of note. The simplest explanation is that Congress's failure to repeal these provisions is part and parcel of a comprehensive inertia in this area. Yet this is not entirely adequate. There have been changes in immigration law in recent decades, but not to the CIMT provisions; and even proposals to amend those provisions have been to tinker

[174] *See* Arias v. Lynch, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring).

at the margins. A more plausible explanation is that Congress is wary of changing the CIMT provisions this late in the game out of fear of the unknown—that is, any attempt to replicate the goals achieved by the CIMT provisions with more definite language (the solution proposed by some academics) will invite litigation and result in even greater uncertainty. Yet another explanation is that the language of "moral turpitude," however quaint and ridiculous to many ears, captures an older but not altogether outdated sentiment that participation in a political community presupposes a shared morality.