

**“CRIMES INVOLVING MORAL TURPITUDE”:
THE CONSTITUTIONAL AND PERSISTENT
IMMIGRATION LAW DOCTRINE**

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ABSTRACT

For over a century, American immigration law has provided that an alien is deportable for “crimes involving moral turpitude” (CIMT). For nearly as long, observers have lamented the persistence of the phrase, complaining of its antiquarianism and imprecision. These criticisms have ripened in recent years into the argument that the phrase is so vague as to be unconstitutional. Defenders of the phrase are scarce among judges and nonexistent in the scholarly community.

This Article offers a defense of the CIMT provisions, built upon a more thorough understanding of their history. It demonstrates that Congress has acknowledged objections to the CIMT provisions but ultimately rejected these criticisms. The recent void-for-vagueness precedents cited to support the invalidation of the CIMT provisions are, for the most part, inapposite. Furthermore, the argument that the CIMT provisions are indeterminate, because there is no moral consensus in American contemporary society, is overstated. The Article concludes that the CIMT provisions reflect and highlight the

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differences between criminal law, which punishes discrete acts, and immigration law, which sets a minimum moral threshold for inclusion in a political community. The CIMT provisions invest executive officials with a measure of discretion, channeled by precedent, that allows them to achieve the goals of immigration law.

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INTRODUCTION

On what legal and moral grounds can a nation expel an alien? Even among Western nations, the approaches differ greatly. 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.”² In that case, the court acknowledged that the thirty-three year-old Somali citizen, who had lived in Sweden for eight years, displayed “clear signs of flaws in his social adaptation,” including convictions for drug possession, reckless driving, and causing bodily harm.³ However, when not committing criminal offenses, the court found that he had been engaged in either studies or employment, and he had even learned some Swedish. Thus, the equities weighed in favor of allowing him to remain in Sweden, after he had served his two-year prison sentence for rape.⁴

Australia has adopted a markedly different approach to the issue of deportation. In 2014 its Parliament voted overwhelmingly

1. *Sweden’s Supreme Court overturns deportation decision for convicted rapist*, THE LOCAL (Apr. 25, 2019), <https://www.thelocal.se/20190425/swedens-supreme-court-overturns-deportation-decision-for-convicted-rapist> [<https://perma.cc/K43L-HJUD>].

2. *Id.* (second alteration in original).

3. *Id.*

4. *Id.* The Swedish approach to deportation seems remarkably hospitable, but even it falls short of the more principled position advocated by Professor Ilya Somin. Ilya Somin, *The Case Against Deporting Immigrants Convicted of Crimes*, REASON (May 27, 2018, 5:35 PM), <https://reason.com/2018/05/27/the-case-against-deporting-immigrants-co> [<https://perma.cc/A6NT-28AE>]. He argues that deportation or banishment should be regarded as a form of punishment. Categorizing the “discriminatory deportation of criminal immigrants” as a “serious injustice,” Professor Somin argues that it is defensible only when there is “strong evidence” that it is necessary to prevent a “great evil.” *Id.*

to expand the grounds for removing an alien.⁵ Criminal convictions are no longer necessary predicates for a banishment order.⁶ Australia's Attorney General can revoke the visa of an alien upon a finding that the alien belonged to a group that had been involved in criminal activity or simply that the alien did not possess "good moral character."⁷ For example, this provision has been invoked to expel a New Zealand citizen who had joined a biker gang associated with drug trafficking.⁸

Over the past century, the American approach to this issue has generally evolved in a direction less congenial to aliens deemed unfit, for whatever reason. Apart from statutorily denominated non-criminal reasons for expulsion, a growing number of criminal offenses can trigger removal from, or foreclose entry into, the United States. 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."⁹ At the time, the phrase "moral turpitude" was a customary term in the law, arising most often in slander cases

5. See Henry Sherrell, *Australia, New Zealand and the "corrosive" character test*, THE INTERPRETER (July 19, 2019).

6. Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet: Can Australia Deport Refugees and Cancel Visas on 'Character Grounds'?*, UNSW SYDNEY (Mar. 22, 2017), <https://www.kaldorcentre.unsw.edu.au/publication/can-australia-deport-refugees-and-cancel-visas-character-grounds> [<https://perma.cc/B79H-B8RS>].

7. *Id.*

8. *Two Hells Angels gang members to be deported from Australia to New Zealand*, STUFF (Oct. 16, 2020), <https://www.stuff.co.nz/world/australia/300134596/two-hells-angels-gang-members-to-be-deported-from-australia-to-new-zealand> [<https://perma.cc/XA4J-CJ59>].

9. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084. The "moral turpitude" provision was reenacted in the Immigration Act of 1917, Pub. L. No. 64-301, §§ 3, 19, 39 Stat. 874, 875, 889; the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 241, 66 Stat. 163, 204; and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 435, 110 Stat. 1214, 1274.

and in deciding questions of evidence (relating to the impeachment of a witness).¹⁰ The Immigration Act of 1917 provided that those “convicted” of a “crime involving moral turpitude” were not only inadmissible to the United States but also deportable.¹¹ 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 committed a “crime involving moral turpitude” within five years of admission to the United States, assuming that a prison sentence of at least one year was imposed.¹² The Illegal Immigration Reform and Immigration Responsibility Act of 1996 broadened this 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.¹³

In recent decades, the phrase has attracted skeptical commentary and blunt criticisms in judicial opinions and academic literature. Questions have been raised about how 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

10. See generally Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001 (2012). As late as 1933, an American judge could write, “The phrase ‘involving moral turpitude’ is a familiar term in the courts of the United States.” *United States ex rel. Volpe v. Smith*, 62 F.2d 808, 810 (7th Cir. 1933).

11. Immigration Act of 1917, Pub. L. No. 64-301, §§ 3, 19, 39 Stat. 874, 875, 889.

12. § 241, 66 Stat. at 204. 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.

13. § 435, 110 Stat. at 1274.

consider the actual, underlying conduct that gave rise to the criminal conviction (the “fact-based approach”)?¹⁴ Critics of the CIMT provisions have questioned whether federal courts owe deference to the BIA’s conclusion that an alien has committed a crime involving moral turpitude.¹⁵ Some have argued that the concept of “moral turpitude” is outdated and rooted in “gendered honor-culture norms.”¹⁶ The most sweeping criticism, raised as long ago as a 1929 Harvard Law Review student note¹⁷ but with mounting fervor in the past decade, is that the CIMT provisions are so indeterminate as to be unconstitutional.¹⁸ This 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.¹⁹

14. See 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, 282 (2001).

15. See William Yeatman, *Ninth Circuit Review-Reviewed: Court’s Constitutional Critics of “Crimes Involving Moral Turpitude” Should Start with Chevron*, YALE J. REG. NOTICE & COMMENT (Apr. 9, 2019), <https://www.yalejreg.com/nc/ninth-circuit-review-reviewed-courts-constitutional-critics-of-crimes-involving-moral-turpitude-should-start-with-chevron-by-william-yeatman/> [<https://perma.cc/26ZJ-6NAU>]; Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1242 (2011).

16. Rob Doersam, *Punishing Harmless Conduct: Toward a New Definition of “Moral Turpitude” in Immigration Law*, 79 OHIO. ST. L.J. 547, 564 (2008) (citing Simon-Kerr, *supra* note 10).

17. Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 121 (1929).

18. See Jennifer Lee Koh, *Crimmigration Beyond the Headlines: The Board of Immigration Appeals’ Quiet Expansion of the Meaning of Moral Turpitude*, 71 STAN. L. REV. ONLINE 267, 279–80 (Mar. 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, 48–49 (2017); Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 648 (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).

19. *United States v. Davis*, 139 S. Ct. 2319 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Johnson v. United States*, 576 U.S. 591 (2015).

This author cannot help but wonder whether the intensifying hostility to the CIMT doctrine arises, in part, from the rejection of any meaningful distinctions between aliens and citizens.²⁰ Whereas one of the preeminent privileges of citizenship is immunity from banishment, it was for centuries taken for granted that aliens claimed no such immunity; to the contrary, aliens were said to be here on “sufferance.”²¹ This did not mean, of course, that America was indifferent to the demands of hospitality and to legal and extralegal duties to accord fair treatment to foreigners, particularly those in long residence here. Today, however, it is deemed rude in most law review articles even to use the word “alien,” given its exclusionary connotations.²² From this perspective, the CIMT doctrine not only makes objectionable claims about what morality is but then dares to impose this requirement only on aliens.

This Article offers a different perspective on the CIMT provisions, built upon a more thorough understanding of their history. Part I

20. This could be framed positively, as reflecting our movement along the moral “arc of history” (Barack Obama) as we expand our “circles of compassion” (Peter Singer), or warily, as reflecting the indiscriminate progress of the principle of equality (Tocqueville) and the triumph of the last man (Nietzsche).

21. See, e.g., *United States ex rel. Volpe v. Smith*, 62 F.2d 808, 810 (7th Cir. 1933); *Tutrone v. Shaunessy*, 160 F. Supp. 433, 437 (S.D.N.Y. 1958); *In re Cartellone*, 148 F. Supp 676, 681 (N.D. Ohio 1957); *United States ex rel. Berlandi v. Reimer*, 30 F. Supp. 767, 768 (S.D.N.Y. 1939).

22. See, e.g., Eric Franklin Amarante, *Criminalizing Immigrant Entrepreneurs (and their Lawyers)*, 61 B.C. L. REV. 1323, 1328–29 (2020) (immigrant activists and some governments refrain from using the term because it “exoticizes and otherizes those from foreign countries”); *Trump v. Hawaii*, 138 S. Ct. 2392, 2443 n.7 (2018) (Sotomayor, J., dissenting) (observing that many scholars and courts regard “using the term ‘alien’ to refer to other human beings [as] offensive and demeaning.”). This Article uses the term “alien” not to fetishize otherness but because it is the legal term used in federal statutes. Immigration and Nationality Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2018) (“alien” is defined as “any person not a citizen or national of the United States”). Using terms such as “immigrant” or “noncitizen” invites confusion, as is conceded even by those who prefer these terms to “alien.” See, e.g., Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions*, 74 N.Y.U. L. REV. 1696, 1698 n.7 (1999) (“‘noncitizen’ is somewhat of a misnomer because the persons to whom it refers are presumably citizens of some nation”).

demonstrates that for over a century Congress has, in a bipartisan spirit, relied on the CIMT provisions in crafting the nation's immigration law. As set out in this Part, Congress has long been aware that these provisions have generated a measure of jurisprudential uncertainty. The puzzle that emerges from this Part is why Congress has remained wedded to these provisions even as simpler-to-administer alternatives are easily imagined.

Part II sketches the argument that courts, which have become increasingly critical of the CIMT provisions, would likely use to strike them down as unconstitutionally vague. This Part argues that the void-for-vagueness precedents cited to support the invalidation of the CIMT provisions are, for the most part, inapposite. These provisions are 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 indeterminate, because there is no moral consensus in American contemporary society, is overstated.

Part III tests this last claim—that there is sufficient moral consensus in the United States that the CIMT doctrine remains viable. This Article considers a case of first impression, litigated over the past decade in the BIA and Ninth Circuit. The principal issue is whether sponsoring an animal in a fighting venture, in violation of federal law, is a crime of moral turpitude. Despite the Ninth Circuit's initial doubts that it is, this Article argues that the BIA's conclusion—that there *is* an American consensus on this issue—is reasoned and defensible. Furthermore, 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 punishing discrete acts; immigration law is fundamentally about deciding what kind of people share the moral precepts that define it as a

political community. The CIMT provisions invest executive officials with a measure of discretion, channeled by precedent, that allows them to achieve the goals of immigration law.

I. CONGRESSIONAL RELIANCE ON “CRIMES INVOLVING MORAL TURPITUDE” IN IMMIGRATION LAW

The phrase “crime . . . involving moral turpitude” acquired its foothold in federal immigration law in 1891.²³ On three subsequent occasions (1917, 1952, and 1996), Congress enacted provisions that enlarged the importance of CIMTs.²⁴ This legislative commitment to the phrase is noteworthy, given the growing disapproval of CIMTs in judicial opinions and academic commentary. Aware of criticisms and alternatives, legislators have persisted in re-enacting the CIMT provisions. This should be understood as a conscious choice. By considering congressional debates, this Part demonstrates that Congress has chosen to preserve the CIMT language in immigration law, notwithstanding the miscellaneous concerns that have been raised.

A. *The 1891 Act: Introduction of the CIMT Language*

The Immigration Act of 1891, expanding upon exclusions in previous laws,²⁵ prohibited the admission of “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.”²⁶ At that time, the phrase “moral turpitude” was used frequently in legal contexts,²⁷ but it also enjoyed a

23. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084.

24. Immigration Act of 1917, Pub. L. No. 64-301, §§ 3, 19, 39 Stat. 874, 875, 889; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 241, 66 Stat. 163, 204; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 435, 110 Stat. 1214, 1274.

25. *E.g.*, Immigration Act of 1882, ch. 376, § 4, 22 Stat. 214 (excluding only “all foreign convicts except those convicted of political offenses”).

26. § 1, 26 Stat. at 1084.

27. *See* Simon-Kerr, *supra* note 10, at 1039.

wider currency. In the post-Civil War decades, the phrase appears dozens of times in the congressional record, usually contemplating fraud, but many times gesturing indistinctly toward the concept of moral impropriety.²⁸ 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. Professor Julia-Ann Simon-Kerr has argued that there was a "fuzziness" to the phrase.²⁹ This fuzziness has become a feature, rather than a bug, as it affords policymakers some play in administering the immigration law.³⁰ 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."³¹

To the extent that the immigration law was creating grounds for the exclusion of aliens who had no connection to America, constitutional objections to such standards are hard to articulate; after all, such individuals are unable to raise a due process challenge. Fairness issues nonetheless arose when implementing a law designed to exclude those convicted of CIMTs. The case of Edward Mylius

28. For example, in 1873, in debates concerning a bankruptcy bill, Senator Sherman stated that a man "ought not to be forced into involuntary bankruptcy unless he has committed some 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. 3, 1874).

29. Simon-Kerr, *supra* note 10, at 1040.

30. Professor Julia Ann Simon-Kerr discusses how, in the voting context, the fuzziness of the phrase "crimes of moral turpitude" made it "well suited to the purpose of selective [voter] disenfranchisement." *Id.* She argues that in the immigration context courts took steps to "couch[] the question in the terms of clearer common law concepts," rendering the doctrine more operational. *Id.* at 1046. This view is sound and accords with my own conclusion; nonetheless, the doctrine inescapably invites judgments about the community's moral norms in at least some cases, such as the one explored in Part III.

31. H.R. REP. NO. 3472, at ii (1891).

highlighted those difficulties.³² Mylius was convicted of criminal libel in English courts in 1911 as the result of defamatory statements he published about King George V.³³ American immigration officials, deeming libel a CIMT, held him to be inadmissible into the United States.³⁴ He sought and obtained relief in a habeas proceeding in federal district court, the decision of which the Second Circuit affirmed.³⁵ Opinions from both courts merit attention.

The threshold procedural question in front of both courts was how to decide whether a crime was one that involves moral turpitude. In addressing that issue, the courts held that the inquiry should be stripped of all the facts in the petitioner's case. As Judge Coxe, writing for the Second Circuit, held, the question before the court was whether "the publication of a defamatory libel *necessarily* involve[s] moral turpitude."³⁶ Even though the facts of Mylius's criminal 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.³⁷

On the substantive question of whether criminal libel "necessarily" involves moral turpitude, the district court, in an opinion by Judge Noyes, observed that a definition of the term "moral turpitude" was in order, but exactitude was impossible:

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

32. United States *ex rel.* Mylius v. Uhl, 203 F. 152 (S.D.N.Y. 1913), *aff'd*, 210 F. 860 (2d Cir. 1914).

33. *Id.* at 153. Mylius had written that George V had secretly married a woman in Malta in 1890, which, if true, would render his marriage to Queen Mary bigamous. See United States *ex rel.* Mylius v. Uhl, 210 F. 860, 862 (2d Cir. 1914); Robin Callender Smith, *The Missing Witness? George V, Competence, Compellability and the Criminal Libel Trial of Edward Frederick Mylius*, 33 J. LEGAL HIST. 209, 209 (2012).

34. *Mylius*, 203 F. at 153.

35. United States *ex rel.* Mylius v. Uhl, 210 F. 860 (2d Cir. 1914).

36. *Uhl*, 210 F. at 862.

37. *Id.*

baseness, vileness, or depravity in the private or social duties which a man owes to his fellow man or to society.’³⁸

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 [one’s] moral obliquity.”³⁹ Likewise, Judge Coxe offered this hypothetical:

A statute . . . makes it a crime to give a glass of whisky 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 at the trial might disclose the fact that the whisky was given for the basest purposes.⁴⁰

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.⁴¹ Had the fact-based approach been what Congress intended, the language could have been, for example, “criminal *acts* involving moral turpitude.” On the other hand, in ordinary speech we often contemplate and specify the conduct giving rise to a criminal conviction—that is, “Smith was convicted of burglary *of a mansion,*” or “Jones stole *a Rembrandt.*” In recent decades, in related statutory contexts, the Supreme Court has grappled with this interpretative question, with the majority view being the former (criminal convic-

38. *Mylius*, 203 F. at 154.

39. *Id.*

40. *Uhl*, 210 F. at 862.

41. *Id.*

tion focuses on elements of the offense) and the minority view being the latter (criminal conviction contemplates the facts of the crime as committed).⁴²

In reaching these conclusions, modern opinions have tended to direct their attention, at least initially, to the legislative text and what “convicted” means, but this was not the approach taken in either opinion in *Mylius*’s case. Rather than a textual analysis, the courts argued that considering the facts of the crime, as it was committed, would be beyond the competence of immigration officials⁴³ and would substantially and unreasonably delay the admission process.⁴⁴ Judge Noyes conceded that under the adopted categorical approach some aliens who were convicted of nominally serious crimes may be excluded, although their particular acts evidenced no immorality, and that some who were convicted of slight offenses may be admitted, although the facts surrounding their commission were such as to indicate moral obliquity.⁴⁵ But, he added, such a result is “necessary for the efficient administration of the immigration laws.”⁴⁶

Judge Noyes’s claim that “efficiency” requires the categorical approach is vulnerable to the objection, which he recognizes, that the resulting conclusions may be irrational. Could this categorical approach possibly be what Congress had intended? The very fact that Congress implemented a screening device suggests that it wanted a *rational* screening device, which is arguably undermined by a rigidly categorical approach.

42. The latter (minority) view has been prominently espoused by Justice Alito. See *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.”).

43. See *Mylius*, 203 F. at 153.

44. See *Uhl*, 210 F. at 862–63.

45. See *Mylius*, 203 F. at 153.

46. *Id.*

B. *The 1917 Act: Expansion of CIMTs to Deportation*

In response to growing concerns about immigration “of the wrong kind,”⁴⁷ Congress passed the 1917 Act, which further expanded the criteria both for excluding aliens from entering and for deporting those who were lawfully present.⁴⁸ Congress drew upon the doctrine of “moral turpitude” for both purposes, providing for: (1) the exclusion of any alien who had been convicted of a CIMT; (2) the deportation of any alien who was convicted of a CIMT within five years of admission to the United States, for which the sentence was one year or more of imprisonment; and (3) the deportation of any alien who was twice convicted of a CIMT, whenever committed, for which the sentence was one year or more of imprisonment.⁴⁹ An alien could potentially avoid adverse consequences from a criminal conviction if the sentencing judge in his criminal trial made a recommendation against deportation, referred to as a Judicial Recommendation Against Deportation, or JRAD, to the federal government.⁵⁰

47. 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.” (alteration in original)); see also E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 127 (1981) (quoting Theodore Roosevelt, who remarked that immigration law should “exclude absolutely . . . all persons who are of a low moral tendency”).

48. Immigration Act of 1917, Pub. L. No. 64-301, §§ 3, 19, 39 Stat. 874, 875, 889.

49. *Id.*

50. *Id.* § 19. The statutory language allowed the court to “make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act.” *Id.* 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. Whether this broadly authorized a more fact-based approach can be debated. On the one hand, the provision suggests 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 provides one discrete solution: a judicial recommendation not to deport. It could be argued that Congress regarded the categorical approach as appropriate with this ameliorating qualification. For a comprehensive study of the provision, see Margaret H. Taylor & Ronald F. Wright,

As to how and why the language of “moral turpitude” was inserted into the statutory framework for deportation, the answer is lost in the cigar smoke that beclouded the corridors of power. Clues abound, but they are inconclusive. In 1908, a bill was proposed in the House that would have required the deportation of an alien convicted of *any* felony.⁵¹ As E.P. Hutchinson observes, “One of the most telling arguments of the opponents was that the definition of felony varies widely from state to state and includes minor crimes in some of them.”⁵² The use of the phrase “crimes involving moral turpitude,” borrowed from the law governing the exclusion of aliens, was likely seen as a solution to the difficulty. In the words of Representative Adolph Sabath, it would allow immigration officials to distinguish between a minor criminal and “a real criminal . . . a criminal at heart.”⁵³ It is perhaps also significant that the early twentieth century saw the rise of *malum prohibitum* crimes; in some such crimes, the common law assumption that “scienter was a necessary element” in the criminal law was relaxed or abandoned.⁵⁴ Given the rise of such offenses, the need to specify a subcategory within “crime” may have seemed all the more imperative; otherwise, the Joseph Dotterweichs of the world, innocent of all wrongdoing but nonetheless culpable in the eyes of modern regulatory law, should find themselves, were they aliens, not only punished but then, to compound the injustice, banished.⁵⁵

The Sentencing Judge as Immigration Judge, 51 EMORY L.J. 1131 (2002).

51. H.R. 13079, 60th Cong. (1908).

52. HUTCHINSON, *supra* note 47, at 144 (citations omitted).

53. 53 CONG. REC. 5167 (Mar. 30, 1916) (statement of Rep. Sabath).

54. *United States v. Balint*, 258 U.S. 250, 251 (1922); *see also United States ex rel. Berlandi v. Reimer*, 30 F. Supp. 767, 768 (S.D.N.Y. 1939) (“Moral turpitude implies something immoral in itself It must not merely be *mala prohibita*.”).

55. *See United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (“In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”); *see also* Craig S. Lerner, *The Trial of Joseph Dotterweich: The Origin of the “Responsible Corporate Officer” Doctrine*, 12 CRIM. L. & PHIL. 493, 495 (2018) (documenting that the government secured the convic-

A moment is needed here to address a stray comment in the legislative history that has been leveraged in subsequent decades by critics of the CIMT language. In a hearing in the House of Representatives in which the Police Commissioner from New York City was the sole witness, Representative Sabath remarked that that “no one can really say what is meant by saying a crime involving moral turpitude.”⁵⁶ The statement’s significance has achieved undeserved talismanic power in the CIMT literature. In fact, no member of Congress expressed the opinion that the CIMT language was so imprecise as to preclude its usage in the law. And even Representative Sabath accepted the CIMT language. He proposed several amendments to the proposed law that incorporated—and even extended—the CIMT language.⁵⁷ Nor did he or any member of Congress propose alternative language. Indeed, within months of the debate on the immigration bill, Congress enacted a law providing for a pension for all firefighters in the District of Columbia; the

tion by simultaneously insisting that Dotterweich’s culpability, or lack thereof, was irrelevant, thereby preventing him from introducing exculpatory evidence, but then regularly insinuating that he had acted in bad faith despite the absence of any supporting evidence).

56. *Restriction of Immigration: Hearings Before the H. Comm. on Immigration & Naturalization*, H.R. REP. NO. 10384, 64th Cong. 8 (1916) (statement of Rep. Sabath); see also *Cabral v. INS*, 15 F.3d 193, 195 (1st Cir. 1994) (citing *Jordan v. DeGeorge*, 341 U.S. 223, 233–34 (1951) (referencing Justice Jackson’s review of legislative history in *Cabral*, which includes Rep. Sabath’s statement as evidence that Congress knew of the ambiguity in the phrase).

57. One amendment would have rendered an alien deportable for a CIMT only within three, not five, years of admission to the United States. His point in so doing was to ameliorate the harshness of the proposed legislation in one sense. But to demonstrate his bona fides he also proposed another amendment that would have provided for the deportation of an alien, regardless of how long he had been in the United States, upon being convicted of a second CIMT. See 53 CONG. REC. 5167–69 (Mar. 30, 1916) (“I have no desire to protect a real criminal.”). He prevailed on the second amendment, but not the first. *Id.* He also proposed an amendment to allow a trial judge to issue the recommendation against deportation not only at sentencing but up to thirty days after the imposition of sentence. *Id.*

adopted law provided for the termination of benefits in the event that one was convicted of a “crime involving moral turpitude.”⁵⁸

The CIMT language drew public scrutiny in 1926. Immigration officials excluded an English playwright, Vera, Countess of Cathcart, on the basis that she had committed adultery—a crime involving moral turpitude.⁵⁹ The Countess attracted many supporters, doubtless in part because the play she had recently written, and in which she intended to perform, *Ashes of Love*, was touted as an oblique commentary on her celebrated, star-crossed affair.⁶⁰ What made the Countess’s case so controversial, moreover, was that just months earlier, the aptly named Earl of Craven, who had spurned the Countess in said affair, was permitted, without commentary on *his* moral turpitude, to enter the country. A *Harvard Law Review* student note, citing the Countess’s case, complained in 1929 that the phrase “crime involving moral turpitude” had attracted a “patch-quilt of decisions.”⁶¹ 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

58. 53 CONG. REC. 12025 (1916).

59. Simon-Kerr, *supra* note 10, at 1049–51.

60. See Mark Lynn Anderson, *The Impossible Films of Vera, Countess of Cathcart*, in RESEARCHING WOMEN IN SILENT CINEMA: NEW FINDINGS AND PERSPECTIVES 176 (Monica Dall’Asta et al., eds., Univ. of Bologna Dep’t of Arts 2013). Contemporary reviewers, Walter Winchell included, were unimpressed by the play and by the Countess’s thespian skill. *Id.* at 187–88.

61. See Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 117 (1929).

anomalous that for the same offense a person should be deported or excluded in one circuit and not in another.⁶²

The author concluded that it was “perilous and idle to expect an indefinite statutory term to acquire precision by the judicial process” and suggested that Congress should either enumerate those offenses that provide a basis for deportation or specify a minimum criminal penalty that would trigger deportation proceedings.⁶³

The 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 student author did not call for the abolition of the phrase.⁶⁴ 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.”⁶⁵ The editorial continued, “It meant murder, robbery, embezzlement, and the like, not sin, not vice, not caddishness.”⁶⁶ As in the *New York Times* article, the objection was not to the phrase but to its unequal application (against the Countess but not the Earl of Craven). And when Senator Copeland introduced the *New York World* editorial into the Congressional Record, his point was exactly the same: he objected to the application of the phrase, not the phrase itself.⁶⁷

Furthermore, the student author’s judgment that the CIMT language had resulted in a “patchquilt” of decisions is inaccurate.⁶⁸

62. *Id.* at 121.

63. *Id.*

64. *Id.* at 117 n.6 (quoting *British Countess, Admitting Divorce, Detained On Liner*, N.Y. TIMES, Mar. 6, 1926, at 1).

65. *Official Dunces*, N.Y. WORLD, Feb. 15, 1926, quoted in 67 CONG. REC. 3,978 (Feb. 15, 1926).

66. *Id.*

67. 67 CONG. REC. 3,979 (1926) (statement of Sen. 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.”).

68. Which is to say that, were the note submitted in a class at Harvard Law School in the Fall 2020 semester, it would have received a “P.”

Given the paucity of criminal offenses in the first half of the twentieth century, it is likely that in many cases, there was little doubt that an alien's crime qualified as a CIMT. After all, murder, rape, robbery, and burglary were conceded to be CIMTs.⁶⁹

More striking is the obdurate conclusion that any intent to separate another person unlawfully from his property, regardless of the amount or the provocation, represented a blackness of heart meriting banishment. Perhaps there is an echo of Maitland here and the idea that to be a thief is to be a felon and to call someone a felon is "as bad a word as you can give a man or thing."⁷⁰ Thus, condemnation was sweeping—for larceny, grand or petty, issuing a check without funds, receiving stolen goods, encumbering mortgaged property, and all of the sundry offenses involving an intent to defraud, irrespective of magnitude. The Jean Valjeans found no quarter in such a hard world, as was discovered by twenty-three year-old Phyllis Edmead. A housemaid in Massachusetts and an alien from the British West Indies, Edmead stole fifteen dollars from her employer, was convicted of misdemeanor petty larceny, and sentenced to exactly one year in jail.⁷¹ A divided First Circuit panel affirmed the Immigration Commissioner's order to deport her; in so doing, the panel invoked, among other august sources, the "divine and natural duties" that forbid theft of any kind.⁷² The decision prompted a dissenting judge to gesture, in quasi-Marxist disgust, to our benighted "code of property rights and wrongs," but the decision is still a striking demonstration of the monolithic case law on all variants of property crimes.⁷³

69. See, e.g., *United States ex rel. Andreacchi v. Curran*, 38 F.2d 498, 499 (S.D.N.Y. 1926) ("It is conceded that the sentence for burglary does involve moral turpitude.").

70. Quoted in *Morissette v. United States*, 342 U.S. 246, 260 (1952) (citing Maitland). This author confesses to being puzzled how a "thing" can be a felon but is nonetheless impressed by the comprehensiveness of the denunciation.

71. *Tillinghast v. Edmead*, 31 F.2d 81, 82 (1st Cir. 1929).

72. *Id.* at 83.

73. *Id.* at 84 (Anderson, J., dissenting).

Malum prohibitum crimes raised more questions, although even here courts were fairly consistent. For example, the modern strict liability offense of carrying a concealed weapon was uniformly deemed not a CIMT.⁷⁴ Prohibition Act cases proved potentially more difficult, as illustrated by *United States ex rel. Iorio v. Day*.⁷⁵ Judge Learned Hand's opinion is noteworthy as a rare judicial confession that construing the phrase "crime involving moral turpitude" required more than application of self-evident moral truths. According to Judge Hand, the CIMT language narrows the category of crimes triggering deportation to those that are "shamefully immoral."⁷⁶ But this is "a nebulous matter at best"; judges should be careful not to impose their own moral judgments, and must instead estimate "what people generally feel."⁷⁷ 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."⁷⁸ And, as Judge Hand observed, "We cannot say that among the commonly accepted mores the sale or possession of liquor as yet occupies so grave a place."⁷⁹ Judge Hand easily distinguished the case at hand from a Ninth Circuit case in which the alien had been convicted under a state statute that had criminalized not simply the illegal sale of alcohol but the ownership of an establishment where illegal liquor was sold.⁸⁰

Crimes of violence like assault and manslaughter also raised CIMT categorization issues, but again, inconsistencies have been

74. See, e.g., *Andreacchi*, 38 F.2d at 499; *Ex parte Saraceno*, 182 F. 955, 957 (S.D.N.Y. 1910).

75. 34 F.2d 920 (2d Cir. 1929).

76. *Id.* at 921.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (distinguishing *Rousseau v. Weedon*, 284 F.2d 565 (9th Cir. 1922)).

overstated and relatively clear rules emerged.⁸¹ Assaultive crimes were divided into simple assault (not CIMTs) and aggravated assault (CIMTs).⁸² This distinction, akin to that between “general intent” assaults and “specific intent” assaults, is a fine one. But the law is festooned with fine distinctions, and this distinction is preserved in the criminal law today, particularly in the context of the intoxication defense.⁸³ Judges in cases involving assaults studied the statutes under which the alien had been convicted, and they were not averse to going beyond the elements of the offense to a consideration of at least parts of the factual record. Such a detailed inquiry was frequently necessary to establish whether the assault reflected a deliberate intention to do harm, which would constitute moral turpitude, or a more inchoate act of violence, in which “one ordinarily law abiding, in the heat of anger, strikes another.”⁸⁴ In *Ciambelli ex rel. Maranci v. Johnson*,⁸⁵ the court referred to the “allegations of the indictment” and even the “alien’s statement” in concluding that the victim had been injured in a “melee,” and not from conscious design.⁸⁶

Manslaughter posed a still more interesting problem for the CIMT analysis, one that persists to this day and which this Article will repeatedly consider. It partakes of the genus of crimes (homicide) generally regarded as the very worst. Assuming, however, that a CIMT is an “act of baseness, vileness, and depravity,” or, as

81. See, e.g., *Recent Decisions*, *Guarneri v. Kessler*, 98 F.2d 580 (5th Cir. 1938), 37 MICH. L. REV. 1294, 1295 (1939) (describing the clear conditions for “moral turpitude” in the crimes of assault and manslaughter).

82. *Id.*

83. Intoxication is traditionally permitted as a defense in crimes, including assaults, involving “specific intent,” but not “general intent.” See, e.g., *People v. Hood*, 462 P.2d 370, 374–75 (Cal. 1969); *State v. Stasio*, 396 A.2d 1129, 1132 (N.J. 1979).

84. *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass. 1926).

85. 12 F.2d 465 (D. Mass. 1926); see also *United States ex rel. Griffo v. McCandless*, 28 F.2d 287 (E.D. Pa. 1928); cf. *Weedin v. Tayokichi Yamada*, 4 F.2d 455 (9th Cir. 1925); *United States ex rel. Mazzillo v. Day*, 15 F.2d 391 (S.D.N.Y. 1926); *United States ex rel. Morlacci v. Smith*, 8 F.2d 663 (W.D.N.Y. 1925);.

86. *Johnson*, 12 F.2d at 466.

a judge later put it, reflects a “readiness to do evil,” manslaughter straddles the CIMT line.⁸⁷ When we focus on the harm, manslaughter is as serious a crime as there is. Yet when we focus on the culpability, manslaughter occupies a hazier place in the pantheon of crimes. The difficulty is that the mens rea required for manslaughter is typically “recklessness,” or the conscious creation of a substantial and unjustified risk.⁸⁸ Criminal punishments necessarily take account, notwithstanding academic objections,⁸⁹ of both harm and culpability, so the sentences for manslaughter are frequently greater than those that are imposed for crimes that are unmistakably CIMTs, such as larceny or perjury. Courts recognized this difficulty and coalesced around a sensible distinction: only those manslaughters in which the injury was intentional qualified as CIMTs.

Illustrative of this distinction is *United States ex rel. Sollano v. Doak*.⁹⁰ The alien had been convicted under New York law of first degree manslaughter, which required that the killing occur in a “cruel or unusual manner, or by means of a dangerous weapon.”⁹¹ The court observed:

[O]ne who uses a dangerous weapon like a revolver, not in self-defense but in such a way as to cause the death of another, must be held so lacking in sense of moral responsibility as to be morally depraved and his act to be one involving moral turpitude.⁹²

By contrast, the court in another case held that a conviction of second degree manslaughter did not justify deportation, as the offense contemplated “an act resulting in death *without design to injure or*

87. *Franklin v. INS*, 72 F.3d 571, 594 (8th Cir. 1995) (Bennett, J., dissenting).

88. MODEL PENAL CODE § 2.02(2)(C) (AM. LAW. INST. 1985).

89. See, e.g., LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 38–41 (2009).

90. *United States ex rel. Sollano v. Doak*, 5 F. Supp. 561 (N.D.N.Y. 1933).

91. *Id.* at 564.

92. *Id.* at 565.

effect death."⁹³ The distinction is a subtle one, and the court, although paying lip service to the rule that the "facts and particular circumstances" of a crime should not be taken account, nonetheless saw fit to add that the evidence in the case supported the alien's claim that the death was accidental.⁹⁴

The first judicial opinion to express marked disapproval with the use of "moral turpitude" in deportation decisions was *United States ex rel. Manzella v. Zimmerman*.⁹⁵ The case turned on whether "prison breach" was a CIMT. 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.⁹⁶ 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 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.⁹⁷

The citation for the sentence is not a judicial opinion but the 1929 *Harvard Law Review* note. Curiously, the *Zimmerman* opinion belies its own claim that the phrase is "lacking in legal precision."⁹⁸ Judge Maris applied the test in a straightforward manner in reaching the

93. *United States ex rel. Mongiovi v. Karnuth*, 30 F.2d 825, 826 (W.D.N.Y. 1929) (emphasis added) (reversing deportation order).

94. *Id.* ("In an affidavit filed in this proceeding, he deposed that it was his daughter who accidentally suffered death at his hands in the course of a quarrel between him and his wife, wherein there was a struggle for possession of a pistol, which, during the struggle, was accidentally discharged.")

95. 71 F. Supp. 534 (E.D. Pa. 1947).

96. *Id.* at 537.

97. *Id.*

98. *Id.*

conclusion that prison breach did not *necessarily* include force or fraud and therefore did not necessarily involve moral turpitude.⁹⁹

Four years later, the most far-ranging criticism of the CIMT provisions was expounded in the dissenting opinion in the Supreme Court case, *Jordan v. De George*.¹⁰⁰ 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 De George's brief 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 premised his opinion on the claim that resident aliens in deportation hearings are entitled to the same protections of the Due Process Clause that are applicable in a criminal trial. Justice Jackson drew attention to a recent Supreme Court decision invalidating a Utah law that had criminalized "acts injurious to public morals."¹⁰¹ He observed: "I am unable to rationalize why 'acts injurious to public morals' is vague if 'moral turpitude' is not."¹⁰² One response to Justice Jackson, unfortunately not raised by the majority, is that the due process standards that govern a criminal trial do not apply *identically* to deportation hearings.¹⁰³

99. To be sure, the result in the case was perhaps not what Congress would have intended. The petitioner had been arrested for bank robbery, escaped, and promptly fled to Canada, before sneaking back into the United States. *Id.* at 535. 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.

100. 341 U.S. 223 (1951).

101. *Id.* at 243 (Jackson, J., dissenting) (citing *Musser v. Utah*, 333 U.S. 95, 97 (1948)).

102. *Id.*

103. See *infra* at text accompanying notes 262–67.

Justice Jackson also pointed 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 added that, notwithstanding this ambiguity, “Congress did not see fit” to clarify the meaning of the phrase.¹⁰⁴ Justice Jackson seemed to regard Representative Sabath’s statement as a statement 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 that 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 conceded the latter possibility, but found that a few decades of practice and “fifty cases in lower courts” failed to produce agreement.¹⁰⁵ The support for this claim, which is crucial to his argument, was buried in a footnote that presents three pairs of supposedly inconsistent precedents construing the CIMT provisions.¹⁰⁶ As already suggested, the legal distinctions in CIMT cases were fine, but arguably not, in the words of Justice Jackson, a matter of “caprice.”¹⁰⁷

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.”¹⁰⁸ Justice Jackson, by contrast, concluded that the CIMT provisions failed to supply “an intelligible definition of deportable conduct.”¹⁰⁹

104. *De George*, 341 U.S. at 234 (Jackson, J., dissenting).

105. *Id.* at 239.

106. *Id.* at 239 n.13.

107. *Id.*

108. *United States ex rel. Iorio v. Day*, 34 F.2d 920, 921 (2d Cir. 1929).

109. *De George*, 341 U.S. at 245 (Jackson, J., dissenting).

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 opinion in *Jordan v. De George* as a "great dissent" 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."¹¹⁰ As it happened, in the very year *De George* was decided, Congress was 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: Preservation of CIMTs After Elaborate Study*

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

Members of Congress revealed a 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."¹¹¹ According to Senator Humphrey, given the "vagueness of what may be prejudicial to our interest," the provision could not be "reconcil[e]" with *De George*.¹¹² *De George* was thus 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 believed the CIMT provisions violated it.¹¹³

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

111. 98 CONG. REC. S5,161 (daily ed. May 14, 1952) (statement of Sen. Humphrey).

112. *Id.*

113. On the same day, Senator Benton discussed the CIMT language, without any suggestion that he regarded it as vague or unconstitutional. *Id.* at 5,155-56.

A comprehensive 1947 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.’”¹¹⁴ But the Report then noted contrary opinions from several other immigration officials. One official recognized 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.”¹¹⁵ The Report quoted another official who wrote that if the law was designed to exclude the “criminally inclined,” then “the test of the statute as now written is as good as any that can be inserted in any law.”¹¹⁶

The Report was sensitive to the concern that the term is “vague,” has not been “definitely and conclusively defined by the courts,” and is “dependent to some extent on the state of public morals.”¹¹⁷ But the Report also identified a “sufficiently clear” definition of moral turpitude from 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.¹¹⁸

114. S. REP. NO. 81-1515, at 353 (1947).

115. *Id.*

116. *Id.*

117. *Id.* at 351.

118. *Id.* (citation omitted).

The Report, after observing that the courts were in general agreement as to what crimes constituted CIMTs,¹¹⁹ concluded by embracing the continuation of the CIMT provisions in the law.¹²⁰

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.”¹²¹ The origin of this “need” was obscure: as the article conceded, in the heartland of cases, whether or not a crime constituted a CIMT was well defined.¹²² Notably, larceny and fraud, even when seemingly trivial, did not escape condemnation as crimes of moral turpitude.¹²³ The one case that dared to compromise this principle involved a conviction for petty larceny, when the alien was a minor; nonetheless, the court acknowledged its own audacity and paid homage to the doctrine that, “[i]t is of course true that all aliens are here on sufferance.”¹²⁴

At least through the 1970s, also squarely in the “moral turpitude” camp were crimes involving sexual impropriety. In *Babouris v. Esperdy*,¹²⁵ for example, the alien, convicted of two counts of “soliciting men for the purpose of committing a crime against nature,” objected that the crime did not qualify as a CIMT. The court curtly rejected the claim: “Appellant stresses the comparatively trivial sentences imposed upon him. The sentence imposed, however,

119. *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).

120. *Id.* at 353.

121. *Developments in the Law: Immigration and Nationality*, 66 HARV. L. REV. 643, 655 (1953).

122. *Id.* (recognizing that “[l]arceny, criminal fraud with respect to property, and perjury have been held to involve moral turpitude, while disorderly conduct, carrying a concealed weapon, criminal libel, and juvenile delinquency do not”).

123. See, e.g., *Burr v. INS*, 350 F.2d 87, 91–92 (9th Cir. 1965) (holding that issuing a check without sufficient funds was a CIMT).

124. *Tutrone v. Shughnessy*, 160 F. Supp. 433, 437 (S.D.N.Y. 1958).

125. 269 F.2d 621 (2d Cir. 1959).

does not qualify or alter the nature of the crime.”¹²⁶ The court is here making the point, discussed earlier in the context of manslaughter, that the punishments imposed by the criminal law are only imperfect proxies for moral turpitude. Manslaughter is often punished by years in prison but may not be a CIMT, whereas crimes of sexual impropriety can be less severely punished but (at least in this period) were uniformly held to be CIMTs. The moral obliquity of a crime—the concern of immigration law—is only incompletely captured by the punishment assigned by the criminal law.

This point regarding crimes of sexual impropriety is also made in *Velez-Lozano v. INS*.¹²⁷ The petitioner, an alien who had resided in the United States for nearly five years, was charged with consensual sodomy with a woman who was not his wife.¹²⁸ He was convicted and sentenced to three years imprisonment, all of which was suspended.¹²⁹ He appealed his deportation order.¹³⁰ With arresting brevity, the D.C. Circuit rejected his “lengthy argument”:

Sodomy is a crime of moral turpitude in Virginia, § 18.1-212, and is still considered a felony in the District of Columbia, 22 D.C. Code 3502. Similarly, the Board has held the crime of solicitation to commit sodomy was a crime involving moral turpitude as early as 1949.¹³¹

One might object that the question of whether a crime is a CIMT should be assessed by the moral views of the whole country, not two states. In 1970 all or almost all states criminalized sodomy, but in some jurisdictions there was a defense, which might have been available to Velez-Lozano, when the crime occurred in a “private

126. *Id.* at 623.

127. 463 F.2d 1305 (D.C. Cir. 1972).

128. *Id.* at 1307.

129. *Id.*

130. Although the crime occurred in Arlington, Virginia, the appeal from the deportation order was taken to the D.C. Circuit. *Id.* at 1306.

131. 463 F.2d at 1307.

place.”¹³² Furthermore, the fact that an activity has been criminalized does not necessarily mean that the relevant crime is a CIMT.¹³³ 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 in *Velez-Lozano* offered no clear response, perhaps assuming that any reader would recognize that crimes of sexual impropriety, whatever the punishment assigned by the court, necessarily involve moral turpitude. And clinching this conclusion was the court’s recognition that it was the long-settled judgment of the Board of Immigration Appeals that sodomy was a CIMT.¹³⁴ Indeed, all courts of appeal in this period, apart from the Ninth Circuit, recognized, either implicitly or explicitly, that the BIA’s construal of the statutory phrase “crimes involving moral turpitude” was owed a measure of judicial deference.¹³⁵

132. See, e.g., *United States v. Lemons*, 697 F.2d 832, 838 (8th Cir. 1983) (Arkansas statute criminalizing sodomy “in a public place or public view”).

133. The Virginia statute did not designate the crime as one that involved moral turpitude. See Va. Code. Ann. § 18.1-212 (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 Andersen, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 298 (1998)).

134. *Velez-Lozano*, 463 F.2d at 1307 (“[T]he Board has held the crime of solicitation to commit sodomy was a crime involving moral turpitude as early as 1949.”).

135. See, e.g., *Cabral v. INS*, 15 F.3d 193, 195 (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 the statute.”); *Okoroha v. INS*, 715 F.2d 380, 382 (8th Cir. 1983) (deferring to the BIA’s conclusion that possession of stolen mail was a CIMT; “This court . . . must give deference to an agency’s interpretation of a statute it is charged with administering”). The Fifth Circuit took the position that the BIA’s construction of federal law was entitled to deference, but not its determination of the elements of state law. See, e.g., *Hamdan v. INS*, 98 F.3d 183, 185 (5th Cir. 1996) (“We must uphold the BIA’s determination of what conduct constitutes moral turpitude [under the INA] if it is reasonable. However, a determination that the elements of a crime constitute moral turpitude for purposes of deportation pursuant to [the INA] is a question of law, which we review *de novo*.”).

During this period, there were close or “peripheral”¹³⁶ cases, and the BIA and courts were not averse to reviewing the “record of the conviction,” including the indictment, to resolve whether a crime, as committed, was a CIMT. The Ninth Circuit carved out as narrow a definition of CIMTs as might be plausibly (and sometimes implausibly) inferred from the statutory text and evolving case law.¹³⁷ This may have reflected a diminishing attachment to the background principle that aliens are here on sufferance. Consider that a court in 1958 gruffly informed an alien present in America for decades, expelled for a long-ago crime, that “he has no one to blame but himself, for his behavior has certainly not been what this country had the right to expect of an alien living here at its sufferance.”¹³⁸ This once oft-repeated meme, in its various formulations,¹³⁹ gradually fell out of favor.

As already discussed, some of the most difficult crimes to categorize were those that involved inchoate acts of violence. Even in homicide cases, the BIA and courts required evidence that the crime reflected a consciously evil design: negligently causing a death was not a CIMT. Recklessness is the great puzzle for the criminal law. Assuming, as Judge Bennett did in *Franklin v. INS*,¹⁴⁰ that a CIMT presumes a “readiness to do evil,”¹⁴¹ then there is a legitimate debate, already noted,¹⁴² as to whether recklessly causing a death qualifies as a CIMT. The facts of Myrisia Franklin’s case highlight the difficulty. While pregnant with her fourth child, Franklin failed

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

137. The Ninth Circuit adopted the view that, “For crimes . . . that are not of the gravest character, a requirement of fraud has ordinarily been required.” *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 (9th Cir. 1995). For a criticism of this approach, see *infra* at text accompanying notes 180–92 and 306–07.

138. *Cartellone v. Lehmann*, 255 F.2d 101, 102 (6th Cir. 1958).

139. See, e.g., *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 223 (1953) (“Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government.”).

140. 72 F.3d 571 (8th Cir. 1995).

141. *Id.* at 601 (Bennett, J., dissenting).

142. See *supra* text accompanying notes 87–94.

to seek medical treatment for her three-year-old son after her son's father violently assaulted him; she was sentenced to three years of incarceration for involuntary manslaughter.¹⁴³ There was, we must assume, evidence beyond a reasonable doubt that she was conscious of the mortal risk to her child. However, exploring whether her failure to seek aid promptly constituted a "readiness to do evil" would launch us into deep philosophical waters. The panel majority remained safely grounded by applying the categorical approach—that is, it never considered the facts of the case—and deferring to the BIA's conclusion that, in the abstract, the conscious creation of a substantial and unjustified risk amounts to moral turpitude.¹⁴⁴ The one and one-half page majority opinion elicited a thirty-three page dissenting opinion which ventilated a congeries of concerns about the CIMT doctrine.¹⁴⁵

Yet Judge Bennett's dissenting opinion in *Franklin* was the only sustained criticism of the CIMT language in this period. Throughout the 1990s, not a single case 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 deference. It was against this backdrop of judicial opinions that Congress embarked on yet another major piece of immigration legislation.

D. The 1996 Act: Further Expansion of CIMTs to Crimes Punishable by One Year's Imprisonment

The 1996 Immigration and Naturalization Act was the culmination of years of debate. Although major provisions in the 1952 law were reconsidered and jettisoned, the 1996 Act significantly broadened the scope of the CIMT provisions: amendments to then-existing immigration law rendered an alien deportable on the basis of a

143. See *Franklin*, 72 F.3d at 580 n.6 (Bennett, J., dissenting).

144. See *id.* at 572–73 (majority opinion).

145. *Id.* at 573–606 (Bennett, J., dissenting).

CIMT for which there was simply the possibility of a year's imprisonment, even if no term of incarceration was imposed.¹⁴⁶

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 . . ."¹⁴⁷ 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."¹⁴⁸ In later debates, Senator Dole admitted that the CIMT phrase was "vague" and "lack[ed] the certainty we should desire."¹⁴⁹ 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 all crimes of domestic violence deportable offenses. As Senator Dole correctly observed, "Simple assault or assault and battery are not necessarily going to be interpreted as crimes of moral turpitude."¹⁵⁰ Elsewhere, Senator Dole made a comment that suggests a familiarity with the prevailing categorical approach judges used to determine whether a crime was a CIMT.¹⁵¹

Interpreting the 1996 Act, most courts of appeal have continued to embrace the categorical approach (narrowing the focus to the record of conviction), but some have suggested a willingness to

146. Pub. L. No. 104-132, 110 Stat. 1214, 1274, § 435. This amendment to then-existing law was sufficiently uncontroversial that it emerged from committee by a voice vote. *House Judiciary Committee Clears Criminal Alien Legislation*, 72 Interpreter Releases 199 (1996).

147. S. REP. NO. 104-48, at 3 (1995).

148. *Id.* at 4.

149. 142 CONG. REC. S4058-59 (daily ed. Apr. 24, 1996).

150. *Id.*

151. He said: "Whether a crime is one of moral turpitude is a question of State law and thus varies from State to State." *Id.*

look beyond the elements of the offense to ascertain whether the crime, as committed, was a CIMT.¹⁵² 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.”¹⁵³ Several courts of appeal balked, refusing to accord *Chevron* deference to the *Mukasey* decision. In *Prudencio v. Holder*,¹⁵⁴ for example, the Fourth Circuit held that no deference to the Attorney General was appropriate because “the moral turpitude statute is not ambiguous.”¹⁵⁵ The court then rejected the BIA’s conclusion that a twenty-year-old alien, who had had sex with a thirteen-year-old girl, infecting her with a sexually transmitted disease,¹⁵⁶ had committed a crime involving moral turpitude. The panel majority arrived at this remarkable conclusion by diligently averting its gaze from the facts of the case and then straining its imagination and hypothesizing cases involving the charged offense that would allegedly not have presupposed moral turpitude.¹⁵⁷ A dissenting Judge Shedd responded:

I find it difficult—if not impossible—to accept that Congress intended for persons such as Prudencio to remain in the United States “simply because there might

152. See Piotr M. Matusiak, *Overcoming the Labyrinth: Embracing Attorney General Mukasey’s Silva-Trevino Decision*, 2016 MICH. ST. L. REV. 215, 231–35 (2016).

153. Silva-Trevino, 24 I. & N. Dec. 687, 690 (Att’y. Gen. 2008), *vacated* 26 I. & N. Dec. 550 (Att’y. Gen. 2015).

154. 669 F.3d 472, 482 (4th Cir. 2012).

155. *Id.*

156. *Id.* at 487 (Shedd, J., dissenting).

157. The majority reasoned as follows: The statute under which Prudencio was convicted had two subsections. See *id.* at 476–77 (majority opinion). Although no one seems to have doubted that he was convicted under the second subsection, involving carnal knowledge, the first subsection punishes “[a]ny person 18 years of age or older . . . who willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected.” *Id.* That subsection could be violated if an adult induced the minor to commit trespassing. *Id.* at 485. It was thus conceivable that the crime, as committed, would not involve moral turpitude. See *id.* at 486.

have been no moral turpitude in the commission by other individuals (real or hypothetical) of crimes described by the wording of the same statute under an identical indictment.”¹⁵⁸

Judge Shedd’s observation that this was not a result intended by Congress can be filed under the header of “truer words were never spoken.” Nonetheless, the case appropriately turned not on congressional intent but on the text of the law. Even here, the panel majority’s conclusion is dubious;¹⁵⁹ at a minimum, *Prudencio* suggests that a Rubicon in the mental landscape has been traversed, and far behind us is the unforgiving realm in which aliens are deemed present merely on sufferance.

In the face of such judicial headwinds, Attorney General Holder conceded defeat in 2015 and vacated the 2008 *Mukasey* decision.¹⁶⁰ Divisions persist in the courts of appeal on the appropriateness of the categorical approach,¹⁶¹ and members of Congress have indi-

158. *Id.* at 488 (Shedd, J., dissenting) (quoting *Marciano v. INS*, 450 F.2d 1022, 1027 (8th Cir. 1971) (Eisele, J., dissenting)).

159. Even assuming that courts owe no deference to the BIA’s interpretation of the statutory language, and even assuming that the BIA was foreclosed from considering the arrest warrant, surely the “record of conviction” includes the fact that *Prudencio* was sentenced to twelve months’ incarceration, *see id.* at 473; such a sentence would not have been imposed for the trivial infractions fancifully imagined by the panel majority.

160. *Matter of Silva-Trevino*, 26 I. & N. Dec. 550 (Att’y Gen. 2015).

161. The BIA followed up with another decision, *Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016), which explicitly declined to settle the matter. In determining whether a crime constituted a CIMT, the BIA observed that some courts look to “the least culpable conduct hypothetically necessary to sustain a conviction under the statute,” whereas others look to “the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction.” *Id.* at 832. The BIA then stated that the BIA would apply the latter approach, “unless controlling circuit law expressly dictates otherwise.” This Article will not directly engage the literature that developed in this area, except to note that the “least culpable” test risks making a mockery of the CIMT language. Even courts supposedly employing the “realistic probability” test seem to do so in a way that is wholly unrealistic. *See, e.g., Menendez v. Whitaker*, 908 F.3d 467, 473 (9th Cir. 2018) (apparently regarding it as “realistic” that a hug at a Halloween party could give rise to a criminal conviction, *see infra* note 192). One method of constraining the imagination of appellate judges and introducing a measure of rationality to the

cated 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.¹⁶² Although those bills have not gained traction, some observers have complained that the BIA has moved toward a less categorical, more fact-based approach in determining whether a crime was a CIMT.¹⁶³

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. Federal judges, who are regularly in the business of construing unartfully drafted statutes, have openly criticized the phrase. It has been called “notoriously plastic”¹⁶⁴ and “the quintessential example of an ambiguous phrase”;¹⁶⁵ the jurisprudence surrounding it has been called an “amorphous morass.”¹⁶⁶ Judge Posner’s concurring opinion in *Arias v. Lynch*¹⁶⁷ is characteristically uninhibited in its condemnation. According to Judge Posner, the phrase is “preposterous,” “stale,” and “arbitrary”; echoing the 1929 Harvard Law Review student note, Judge Posner contended the phrase is infused

CIMT case law would be to consider the sentence imposed. Immigration law specifically states that the sentence is part of the record of conviction, 8 U.S.C. § 1229a(c)(3)(B)(ii) (2018), and several courts have recognized that the sentence imposed is indeed part of the record of conviction. *See, e.g., Fajardo v. Att’y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011); *Daibo v. Att’y Gen.*, 265 F. App’x 56, 59 (3d Cir. 2008); *Wala v. Mukasey*, 511 F.3d 102, 108 (2d Cir. 2007) (quoting *Dickson v. Ashcroft*, 346 F.3d 44, 53 (2d Cir. 2003)). For a persuasive argument to bring order in this area of the law, see *Matusiak*, *supra* note 152, at 267.

162. 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).

163. *See, e.g., Koh*, *supra* note 18, at 270 (“[S]ince *Silva-Trevino III*, the Board’s decisions suggest the existence of an unstated backlash against the categorical approach”).

164. *Ali v. Mukasey*, 521 F.3d 737, 739 (7th Cir. 2008).

165. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc).

166. *Partyka v. Att’y Gen.*, 417 F.3d 408, 409 (3d Cir. 2005) (Berzon, J., dissenting).

167. 834 F.3d 823 (7th Cir. 2016).

by “antiquated” ideas (“base, vile, or depraved”), and that the distinctions that are drawn amount to irrational “gibberish.”¹⁶⁸ Some of the examples that Judge Posner cited 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.¹⁶⁹ 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 2020. In any event, Judge Posner’s condemnation of the concept of CIMT was unnecessary to the resolution of the case before him. As he observed, 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,” as the petitioner paid taxes.)

Judge Posner did not argue that the phrase “crimes involving moral turpitude” 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 ‘crimes involving moral turpitude’ is unconstitutionally vague.”¹⁷⁰ The argument has been percolating in the academic literature for over a decade,¹⁷¹ but it has become more viable in the light of a trilogy of Supreme Court cases deploying the void-for-vagueness doctrine to hold the phrase “crime of violence” unconstitutional.¹⁷² I explore this argument in the next Part.

168. *Id.* at 831 (Posner, J., concurring).

169. *Id.* at 832.

170. *Barbosa v. Barr*, 919 F.3d 1169, 1175 (9th Cir. 2019) (Berzon, J., concurring); *see also Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1257 (9th Cir. 2019) (Fletcher, J., concurring).

171. *See supra* note 18.

172. 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, 278 (2001).

Given the multiplication of criminal laws, courts of appeal are more often deciding novel CIMT issues. But Judge Colloton's opinion in *Bakor v. Barr*¹⁷³ suggests that traditional principles are adequate to the task even when the criminal offenses are of recent vintage. In that case, the alien had been convicted of two crimes under Minnesota law: fifth degree criminal sexual conduct and failure to register as a sex offender. With respect to the first offense, defined as "intentional touching" of another's "intimate parts," Judge Colloton held that the offense could be construed either as nonconsensual sexual conduct or as aggravated assault; either way, under long-established precedents, the offense qualified as a CIMT.¹⁷⁴ Failure to register as a sex offender was a more difficult issue, as the offense could be cast as a *malum prohibitum* offense, in which case the weight of opinion has been that the imputation of moral turpitude was inappropriate. Judge Colloton sensibly argued that the "bright line" that is said to exclude regulatory crimes from the CIMT categorization is doubtful, at least when the law's intent is to protect "vulnerable victims" and the mens rea upon which the offense is predicated is *willful* conduct.¹⁷⁵

Judge Colloton's approach to CIMTs may be a beacon unto those judges who conceive their duty as straightforwardly applying the statutory language within the body of precedents that already exists; other judges seem to regard CIMT cases as an arena in which to indulge their cleverness at the expense of a supposedly obtuse BIA. Illustrative of this latter category is *Garcia-Martinez v. Barr*.¹⁷⁶ The Seventh Circuit reversed the BIA's conclusion that being an accomplice in an assault with a deadly weapon was a CIMT. The

173. 958 F.3d 732 (8th Cir. 2020).

174. *Id.* at 736.

175. Judge Colloton distinguished sex registration offenses in which negligence would suffice to convict. His approach would also mean that regulatory crimes in which there is no discrete class of vulnerable victims would not be CIMTs. See *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993) (reversing a BIA decision that structuring financial transactions to avoid currency report was a CIMT).

176. 921 F.3d 674, 677 (7th Cir. 2019).

opinion lingered over the fact that the only act committed by the alien was that he tripped the victim, adding, archly, that “the Board did not decide whether the foot for this purpose was deadly.”¹⁷⁷ Playing for easy laughs, the court here committed an elementary error: to be an accomplice in an assault *with a deadly weapon* one must knowingly align oneself with *that* venture.¹⁷⁸ There is, moreover, a vast gulf that separates Scenario 1, in which A trips V while B slaps V, and Scenario 2, in which A trips V while B is applying a bat to V’s head *and A knows that B is wielding a bat*. Most people would have little difficulty concluding that Scenario 1 is not a CIMT, but Scenario 2 is.

The Ninth Circuit has been a trailblazer in the past decade in its ever-narrowing reading of the CIMT provisions. Rejecting the BIA’s conclusions and granting petitions for review, the court has concluded that the following crimes are not CIMTs: misdemeanor false imprisonment;¹⁷⁹ misprision of a felony;¹⁸⁰ simple kidnapping;¹⁸¹ commission of a felony “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members”;¹⁸² witness tampering;¹⁸³ perjury;¹⁸⁴ identity theft;¹⁸⁵

177. *Id.* at 677.

178. *See Rosemond v. United States*, 572 U.S. 65, 76 (2014) (citations omitted) (“[A] person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense’s commission. An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged . . .”).

179. *See Saavedra-Figueroa v. Holder*, 625 F.3d 621, 628–29 (9th Cir. 2010).

180. *See Robles-Urrea v. Holder*, 678 F.3d 702, 712 (9th Cir. 2012). The underlying felony was conspiracy to distribute marijuana and cocaine. *See In re Robles-Urrea*, 24 I.& N. Dec. 22, 23 (B.I.A. 2006). The alien was sentenced to nine months’ imprisonment. *Id.*

181. *See Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1218 (9th Cir. 2013).

182. *See Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 797 (9th Cir. 2015) (quoting Cal. Penal Code § 186.22(b)(1)).

183. *See Escobar v. Lynch*, 846 F.3d 1019, 1021 (9th Cir. 2017).

184. *See Rivera v. Lynch*, 816 F.3d 1064, 1075 (9th Cir. 2016).

185. *See Linares-Gonzalez v. Lynch*, 823 F.3d 508, 515–16 (9th Cir. 2016).

fleeing a police officer;¹⁸⁶ committing lewd and lascivious conduct upon a fourteen or fifteen year-old child;¹⁸⁷ and robbery in the third degree.¹⁸⁸ In arriving at these conclusions, the Ninth Circuit has employed a definition of CIMTs (“[o]nly truly unconscionable conduct”)¹⁸⁹ that reflects an unwarranted contraction from the traditional definition of CIMTs.¹⁹⁰ When the Ninth Circuit’s depleted notion of what constitutes moral turpitude is paired with a comically inventive use of the categorical approach, the results can be irrational, as in the court’s conclusion in *Menendez v. Whitaker*¹⁹¹ that committing lewd and lascivious conduct upon a fourteen or fifteen year-old child is not a CIMT because one could be guilty of this offense if, for instance, one hugged a minor dressed as an adult at a Halloween party.¹⁹²

The CIMT language presupposes the exercise of discretion and judgment—there is no algorithm that solves for “moral turpitude.” Cases such as *Menendez* suggest that some judges are not exercising

186. See *Ramirez-Contreras v. Sessions*, 858 F.3d 1298, 1306 (9th Cir. 2017).

187. See *Menendez v. Whitaker*, 908 F.3d 467, 474 (9th Cir. 2018).

188. See *Barbosa v. Barr*, 926 F.3d 1053, 1059 (9th Cir. 2019).

189. See *Robles-Urrea v. Holder*, 678 F.3d 702, 708 (9th Cir. 2012).

190. See *United States ex rel. Mylius v. Uhl*, 203 F. 152, 154 (S.D.N.Y. 1913) (“An act of baseness, vileness, or depravity in the private or social duties which a man owes to his fellow man or to society.”). The 1947 Senate Report used an almost identical definition. See S. REP. NO. 81-1515, *supra* note 114.

191. 908 F.3d 467 (9th Cir. 2018).

192. One judge posed the following “Halloween party hypothetical” at oral argument:

A criminal defendant is charged with hugging someone at a Halloween party thinking that they were 19 years old. The defendant is 24 years old, thinking . . . the victim is 19 years old, turns out the victim is 14 years old, but the criminal defendant had every reason to think the person was 19-year-old. Of course, they said, they were 19, they had a college ID with them saying they were sophomore [sic] in college. You can think of the many reasons why someone could make themselves look like they’re 19 when they’re 14.

Transcript of Oral Argument, *Menendez v. Sessions*, No. 14-72730, 2018 WL 1426516 (9th Cir. Feb. 8, 2018). In what world this person would not only be indicted for lewd and lascivious conduct against a minor but also convicted and then sentenced to six month’s incarceration, as was this defendant, is hard to say, but it is undoubtedly several thousand miles from California.

that discretion consistent with the statutory text, let alone in a manner that reflects a background interpretative principle that aliens are present at the host country's pleasure.¹⁹³ The Ninth Circuit is not alone in disfiguring the CIMT caselaw with questionable decisions.¹⁹⁴ Even so, the "patchquilt" quality¹⁹⁵ of the CIMT case law can be overstated: If the denominator is the number of CIMT immigration cases and the numerator is the number of petitions for review granted, the relevant number is still very small.¹⁹⁶

Yet in the midst of 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 offered 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.¹⁹⁷ In response to criticisms that bills

193. In *Zadvydas v. Davis ex rel. Mezei*, 533 U.S. 678 (2001), a dissenting Justice Scalia quoted from an older case for the proposition that "[n]othing in the Constitution requires the admission or sufferance of aliens." *Id.* at 703 (quoting *Shaughnessy v. United States*, 345 U.S. 206, 222 (1953)) (Scalia, J., dissenting). According to Justice Scalia, the majority declined to overrule *Mezei* but only because it "obscure[d] it in a legal fog." *See id.* at 703.

194. Consider the Second Circuit's opinion in *Mendez v. Barr*, 960 F.3d 80 (2d Cir. 2020). Following Ninth Circuit precedent, the court in *Mendez* rejected the BIA's conclusion that misprision of a felony is a CIMT. *See id.* at 85. The opinion turned on what it means to "conceal" a felony, and the panel majority strung together a "grab bag" of inapposite cases to manufacture the implausible argument that accidental concealment is legally adequate for a misprision of felony conviction. *See id.* at 92 (Sullivan, J., dissenting). Other circuits have rejected the Second and Ninth Circuits' conclusions on this point. *See, e.g., Patel v. Mukasey*, 526 F.3d 800, 803–04 (5th Cir. 2008); *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002).

195. *See Crimes Involving Moral Turpitude, supra* note 17, at 117.

196. *See infra* note 280 and accompanying text.

197. 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. Immigrant Fairness Restoration Act of 2000, S. 3120,

they have sponsored would allow criminals to enter the country and become citizens, Democrats have often *approvingly* cited the language in the current law that guarantees the inadmissibility and deportability of those convicted of CIMTs. For instance, 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.¹⁹⁸ Two years ago, Representative Lofgren corrected a fellow representative who had argued that aliens convicted of a DUI could escape immigration consequences.¹⁹⁹ She observed that "one conviction for DUI with a suspended license[,] where the driver knew that her license was suspended, would constitute a CIMT."²⁰⁰ 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.²⁰¹

Outside the immigration context, members of Congress continue to use the phrase "crimes involving moral turpitude." This typically occurs when identifying grounds for the removal of government officials and judges and the stripping of government pensions.²⁰² The phrase was also used when discussing President

106th Cong. § 4 (2000); *see also* 146 CONG. REC. S9388-89 (daily ed. Sept. 27, 2000) (statement of Sen. Leahy).

198. *See* 152 CONG. REC. S2591 (daily ed. Mar. 30, 2006) (statement of Sen. Kennedy).

199. *See* 165 CONG. REC. H4290 (daily ed. June 4, 2019) (statement of Rep. Lofgren).

200. *See id.* Representative Lofgren is correct that a DUI while driving on a suspended license is a CIMT, *see* *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc); however, "'a simple DUI offense' will almost never rise to the level of moral turpitude," *see* *Knapik v. Ashcroft*, 384 F.3d 84, 90 (3d Cir. 2004) (quoting *Matter of Lopez-Mena*, 22 I. & N. Dec. 1188 (B.I.A. 1999)).

201. *See, e.g.*, *Liberian Refugee Immigration Fairness Act of 1999*, S. 656, 106th Cong. § 2 (1999); *Liberian Refugee Immigration Fairness Act of 2013*, S. 527, 113th Cong. § 2 (2013); *National Defense Authorization Act for Fiscal Year 2020*, Pub. L. No. 116-92, § 7611 (2019).

202. *See generally* *White House Accountability Act*, S. 2000, 104th Cong. § 471(e)(1)(D) (1996).

Clinton's impeachment trial, with one Senator observing that "[c]ommitting crimes of moral turpitude such as perjury and obstruction of justice go to the heart of qualification for public office."²⁰³ And, notwithstanding academic scoffing,²⁰⁴ the doctrine of "crimes involving moral turpitude" remains a fixture in professional licensing law, with regulatory bodies throughout the country using the criterion to expel some who are among their ranks and to disqualify others from joining.²⁰⁵ The doctrine attracted notice last year when it was discovered that receipt of Covid-19 relief was, according to long-standing, albeit obscure, Small Business Association regulations, contingent upon business owners not having been convicted of a "felony or crime of moral turpitude."²⁰⁶ This regulation is evocative of the use of CIMTs in immigration law: one is not entitled to an SBA loan. It is a supererogatory gesture, albeit one that must be dispensed in a just and rational manner. CIMTs provide such a sorting function here, as they do in the context of immigration law, where, at least according to the older view, an alien cannot demand the right to remain in a country but may do so only as long as he or she observes the moral traditions of that country.

203. 145 CONG. REC. S1781, S1789–90 (daily ed. Feb. 23, 1999) (statement of Sen. Hatch).

204. See, e.g., Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 LAW & SOC. INQUIRY 1027, 1033–34 (2018).

205. The catalog of professions that continue to use "moral turpitude" to screen applicants and expel members is long, extending well beyond the familiar ones of law and medicine. See, e.g., Sutton, Mo. Admin 15-1012 CB, 2016 WL 3456667, at *1 (Mo. Admin. Hrg. Comm. May 4, 2016) (cosmetologist); Florida Chapter 61B-60.003(a)(1), <http://www.myfloridalicense.com/Dbpr/lsc/documents/YSRules.pdf> [<https://perma.cc/5LAA-W8GX>] (ship broker).

206. See *Ineligible Businesses and Eligible Passive Companies*, 13 C.F.R. § 120.110(n) (2020). The regulation was referenced in a lawsuit brought by a former felon challenging restrictions in the Coronavirus Aid, Relief, and Economic Security Act. See *Verified Complaint for Declaratory and Injunctive Relief, Carmen's Corner Store v. SBA*, No. 1:20-cv-01736-GLR, 2020 WL 3254359, at ¶ 60 (D. Md. June 10, 2020); Pub. L. No. 116-136 (2020).

In short, the criticism of CIMTs in the judicial and scholarly arenas has not secured purchase in America at large or in the halls of 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. We now turn to that argument.

II. THE NEW VOID-FOR-VAGUENESS CHALLENGE TO THE CIMT PROVISIONS

In the decades after *De George* was decided, void-for-vagueness challenges to the CIMT language were seldom raised and peremptorily rejected. Recently, however, several judges, litigants, and law review authors have revived the argument. This Part will first lay out an argument for reconsidering *De George* and holding the CIMT provisions unconstitutional under the more robust “void for vagueness” doctrine articulated by the Supreme Court over the past decade. The Part will then present a refutation, which focuses on the crucial difference between immigration law and criminal law. Under the correct understanding of the void-for-vagueness doctrine, the CIMT provisions are constitutional.

A. *The Argument That “Crimes Involving Moral Turpitude” is Unconstitutionally Vague*

The constitutional challenges to the CIMT provisions begin with the supposed errors in Chief Justice Vinson’s *De George* opinion. These errors are said to have eroded the opinion’s solidity as a precedent and invited its reconsideration.²⁰⁷ The majority opinion in *De*

207. See Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WISC. L. REV. 1127, 1179 (“The federal judiciary need not prolong its endorsement of CIMTs. Courts are likely to hear arguments that the CIMT definition is void for vagueness . . .”).

George emphasized that the CIMT language had been a part of immigration law for “sixty years.”²⁰⁸ Yet time bestows veneration only on those laws that prove themselves in the cauldron of experience, and, as a dissenting Justice Jackson observed, this cannot be said of the provisions in immigration law that use the CIMT language.²⁰⁹ According to the critics, as the conflicting precedents multiply, the respect due the CIMT language²¹⁰—and *De George* for upholding that language—allegedly evaporates.

Moreover, legal developments have strengthened the constitutional argument. At the time *De George* was decided, the void-for-vagueness doctrine²¹¹ was exclusively designed to ensure that penal laws put people on notice as to the conduct that was proscribed: “Every man should be able to know with certainty when he is committing a crime.”²¹² In the second half of the twentieth century, the Court’s void-for-vagueness doctrine took a “leap forward” by adding a second goal: the need to curtail arbitrary enforcement.²¹³ As

208. See *Jordan v. De George*, 341 U.S. 223, 229 (1951).

209. See *id.* at 238 (Jackson, J., dissenting).

210. See, e.g., Lee & Kornegay, *supra* note 18, at 57 (“This amorphous standard has resulted in a tangle of inconsistent rulings affording little predictability.”).

211. The academic literature on the doctrine dates back to a student note by Anthony Amsterdam. See generally Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). Then came the law review articles, invariably commenting on the “murk[iness]” of the doctrine, before proposing ways to reframe, recast, or reconceptualize it. See Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL’Y & L. 1, 3 (1997); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 242 (2002) (“[O]ne of the subjects that defies principled reasoning is the concept of vagueness in the criminal law”); Ryan McCarl, *Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court’s “Void-for-Vagueness” Doctrine*, 42 HASTINGS CONST. L.Q. 73, 73 (2014) (“The void-for-vagueness doctrine is a confusing conceptual thicket.”). This author will resist the urge to wander into this rabbit warren, but he does recommend one recent article for its comprehensive survey and insightful proposal. See Michael J. Zydney Mannheimer, *Vagueness As Impossibility*, 98 TEX. L. REV. 1049, 1114 (2020).

212. E.g., *United States v. Reese*, 92 U.S. 214, 220 (1875).

213. See Lee & Kornegay, *supra* note 18, at 84; Koh, *supra* note 207, at 1134–36.

the Court explained in *Papachristou v. City of Jacksonville*,²¹⁴ 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 that his contemplated conduct is forbidden by the statute,’ and because it encourages arbitrary and erratic arrests and convictions.”²¹⁵ The “fair notice” and the “arbitrary enforcement” rationales supply independent grounds for striking down a law as unconstitutionally vague.²¹⁶ The CIMT provisions are, according to this argument, doubly unconstitutional: they fail to provide notice as to the forbidden conduct, and they endow executive officials with untrammled power. As one author writes, “[T]he term CIMT casts judges in the role of God, deciding according to the ‘moral standards prevailing at time.’”²¹⁷

The Court’s void-for-vagueness doctrine has recently acquired greater prominence. In a trilogy of cases, the Supreme Court relied upon the vagueness rationale to strike down language in federal law that had existed for years. In *Johnson v. United States*,²¹⁸ 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.”²¹⁹ In *Sessions v. Dimaya*,²²⁰ 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 (INA), was likewise unconstitutionally vague.²²¹ Finally, in

214. 405 U.S. 156 (1972).

215. *Id.* at 162 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)) (citations omitted).

216. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

217. Holper, *supra* note 18, at 701.

218. 576 U.S. 591 (2015).

219. *Id.* at 598.

220. 138 S. Ct. 1204 (2018).

221. *See id.* at 1215.

Davis v. United States,²²² the Court struck down the phrase “crime of violence,” as it appears in 18 U.S.C. § 924(c)(3)(B).²²³

The trilogy supplies a roadmap 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.”²²⁴ 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.”²²⁵ 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.”²²⁶

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 often hypothesizing the “least culpable conduct” that has given rise to a conviction.²²⁷ If the charged crime is indecency with a minor, for example, courts are foreclosed from 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

222. 139 S. Ct. 2319 (2019).

223. *See id.* at 2324.

224. 576 U.S. at 591.

225. *See Taylor v. United States*, 495 U.S. 575, 600 (1990).

226. 576 U.S. at 597–599.

227. *See, e.g., Moreno v. Attorney General*, 887 F.3d 160, 163 (3d Cir. 2019) (citations omitted) (“Under our precedent, we apply the categorical approach to determine whether moral turpitude inheres in a particular offense. Our inquiry proceeds in two steps. First, we must ‘ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute.’”).

was fourteen years old and the actual defendant sixty years old, are courts obliged to imagine that the victim was sixteen and the defendant thirty? Or seventeen and twenty-one? “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?”²²⁸ Furthermore, how much moral impropriety is needed for a finding of “moral turpitude?” Is it moral turpitude for a twenty-five year-old to have sex with a sixteen year-old? And says who?

Moreover, 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.²²⁹ 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.²³⁰ With respect to “violent felony,” Justice Scalia observed that there is “pervasive disagreement” in the lower courts about what constitutes a crime of violence.²³¹ The same could be said for CIMTs. The decades of judicial struggles have demonstrated, it is said, that

228. Lee & Kornegay, *supra* note 18, at 114.

229. For instance, conviction for premeditated first-degree murder can follow from an agonized mercy killing. *State v. Forrest*, 362 S.E.2d 252 (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), <https://www.nytimes.com/2007/12/04/us/04felony.html?ref=topics> [<https://perma.cc/R4G-8LMH>] (felony murder conviction for person who lent his car to housemates, who then robbed a drug dealer and accidentally killed the dealer’s daughter).

230. Kornegay & Lee, *supra* note 18, at 115.

231. *Johnson*, 576 U.S. at 601.

the indeterminacy is sufficiently “grave” that a void-for-vagueness challenge is compelling.²³²

In *Johnson*, the government argued that even if “violent felony” is indeterminate in some cases, there are others that are “straightforward.”²³³ To this, Justice Scalia responded that the number of “straightforward” cases may be overstated,²³⁴ 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.”²³⁵ 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.²³⁶

In *Dimaya*,²³⁷ 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,” a term that includes “crime of violence,” as defined by 18 U.S.C. § 16(b).²³⁸ 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

232. Cf. Clancey Henderson, *Stemming the Expansion of the Void-for-Vagueness Doctrine Under Johnson*, 2019 UTAH L. REV. 237, 258 (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.’”).

233. 576 U.S. at 602.

234. *Id.*

235. *Id.*

236. See Koh, *supra* note 207, at 1130 (“[B]y 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 . . .”).

237. 138 S. Ct. 1204 (2018).

238. *Id.* at 1207; 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.” 18 U.S.C. § 16(b) (2018).

but an immigration matter.²³⁹ Justice Kagan responded that *De George* foreclosed this argument, as the Court in that case applied “the established criteria of the ‘void for vagueness’ doctrine’ applicable to criminal laws.”²⁴⁰ She added:

Nothing in the ensuing years calls that reasoning into question. This Court has reiterated that deportation is “a particularly severe penalty,” which may be of greater concern to a convicted alien 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.”²⁴¹

In sum, Justice Kagan argued that following *De George*, “the same standard” should be applied in the two settings.²⁴² Justice Gorsuch’s concurring opinion not only purported to give an originalist basis for this conclusion, but also seemed to suggest, sweepingly, that the void-for-vagueness doctrine operated as broadly in the civil context as it does in the criminal context.²⁴³

In the final installment of the void-for-vagueness trilogy, *United States v. Davis*,²⁴⁴ the government argued that any vagueness problems with the phrase “crime of violence” could be avoided if the language were not construed to require the hypothesizing “categorical approach.”²⁴⁵ Instead of expecting courts to identify the inherent “nature” of any given criminal offense—an insuperably difficult task for reasons cataloged by Justice Scalia in *Johnson*²⁴⁶—the

239. *Dimaya*, 138 S. Ct. at 1212.

240. *Id.* at 1213 (quoting *Johnson v. DeGeorge*, 341 U.S. 223, 231 (1951)).

241. *Id.* (citations omitted) (quoting *Jae Lee v. United States*, 137 S. Ct. 1958, 1968 (2017); *Chaidez v. United States*, 568 U.S. 342, 352 (2013)).

242. *Id.*

243. *Id.* at 1246 (Gorsuch, J., concurring in part and concurring in the judgment).

244. 139 S. Ct. 2319 (2019).

245. *Id.* at 2327.

246. *See supra* at text accompanying note 226.

statute's ambiguous language should be construed to allow immigration officials and judges to consider the concrete facts of a crime, as it was committed.²⁴⁷ Justice Gorsuch rejected the government's argument, hewing to the categorical approach and holding that the "constitutional avoidance" canon has never been used to expand the reach of a criminal statute.²⁴⁸ That holding, it will be argued, forecloses an analogous argument the government could raise in the CIMT context: Abandoning the categorical approach to CIMTs and adopting a fact-based approach would impermissibly expand the reach of the law—that is, by resulting in the removal of aliens who had committed offenses that would not qualify, categorically, as CIMTs.

As a recent amicus brief filed with the Supreme Court argued, if the statutory phrases "violent felony" and "crimes of violence" are unconstitutionally vague, then the phrase "crimes involving moral turpitude" cannot survive a constitutional challenge.²⁴⁹ Given the "incommensurability of morality" and the fact that "the concept of moral turpitude will always fluctuate with differences of time, culture, and locality," it is a hopeless task to clarify the phrase to achieve sufficient certainty.²⁵⁰ It is, according to this argument, time to relegate the antiquated CIMT provisions to the dustbin of history.

247. *Davis*, 139 S. Ct. at 2349–50 (2019) (Kavanaugh, J., dissenting). 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 Justice Kavanaugh argued in dissent, "By any measure, Davis and Glover's conduct during the conspiracy was violent." *Id.* at 2338.

248. *Id.* at 2332 (majority opinion). Justice Gorsuch argued that adopting the more fact-based approach "would cause [the provision's] penalties to apply to conduct they have not previously been understood to reach: categorically nonviolent felonies committed in violent ways." *Id.*

249. Brief of Amici Curiae Law Professors, *Islas-Veloz v. Barr* (2019) (No. 19-627), 2019 WL 7049908.

250. *Id.* at *7–*8.

B. *The Argument That “Crimes Involving Moral Turpitude” Survives Constitutional Scrutiny*

As we have seen in the previous Part, 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. This Part will refute this argument, emphasizing the differences between immigration law and criminal law. Drawing upon recent scholarship, this Part will argue that the void-for-vagueness doctrine, properly understood, focuses on laws that are so indefinite that compliance is impossible. Subjecting aliens to the CIMT provisions raises none of the unfairness issues, either regarding lack of notice or arbitrary discretion, that are addressed by the void-for-vagueness doctrine.

For starters, little weight should be ascribed to the *De George* Court’s statement that the same due process standards apply in criminal law and in immigration law: the question was not briefed and the Court’s treatment of it was conclusory.²⁵¹ If we are to reconsider the Court’s conclusion that the CIMT provisions are constitutional, it is only appropriate likewise to reconsider the premise of that holding.

Justice Kagan did not entirely rely on precedent. She also observed that the consequences of an adverse ruling in an immigration proceeding can amount to a “severe penalty.”²⁵² However true, this alone does not justify the importation of the same procedural protections required in a criminal trial. The manifold protections of

251. Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring in part and concurring in the judgment) (“Sound judicial decisionmaking requires ‘both a vigorous prosecution and a vigorous defense’ of the issues in dispute” (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978))).

252. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018).

the criminal justice system—the privilege against self-incrimination,²⁵³ the power to suppress illegally obtained evidence,²⁵⁴ the duty to provide *Miranda* warnings,²⁵⁵ the right to be free from cruel and unusual punishments,²⁵⁶ the right to state-appointed counsel,²⁵⁷ the right to be free from *ex post facto* laws,²⁵⁸ and the like—are not afforded aliens in removal proceedings. One might argue that the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel, by their plain text, and the *ex post facto* law, by long-established precedent,²⁵⁹ apply only to criminal matters. The same cannot be said of the Fourth Amendment, which broadly proscribes all unreasonable searches and seizures. Nonetheless, the exclusionary rule, imposed in all criminal matters, applies only in egregious cases in immigration matters: the Court has emphasized that such hearings are noncriminal in nature,²⁶⁰ notwithstanding the fact that deportation can deprive a man “of all that makes life worth living.”²⁶¹ Thus, the oft-repeated statement that due process applies in immigration matters must be read in tandem with the equally oft-repeated statement that “control over matters of immigration is a sovereign prerogative, largely within

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

254. *Yanez-Marquez v. Lynch*, 789 F.3d 434, 445–46 (4th Cir. 2015).

255. *Guzman-Aranda v. Sessions*, 887 F.3d 205, 214 (9th Cir. 2017).

256. *Sunday v. Attorney Gen.*, 832 F.3d 211, 218–19 (3d Cir. 2016).

257. *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1045 (9th Cir. 2012).

258. *Harisiades v. Shaughnessey*, 342 U.S. 580, 594 (1952). If the Court were to strike down the CIMT provisions as intolerably vague, a puzzling conclusion would result: it would be unconstitutional to remove an alien on the basis of a criterion (“crimes involving moral turpitude”) that has been embedded in immigration law for over a century because that term fails to provide adequate notice, but it would be constitutional to remove an alien on the basis of a criterion that did not exist *at all* when the triggering offense was committed.

259. *See Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798).

260. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

261. *Galvan v. Press*, 347 U.S. 522, 530 (1954) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

the control of the executive and the legislature.”²⁶² Summary procedures, which would plainly offend due process in a criminal case, are tolerated in immigration matters, precisely because they are regarded as a different “context.”²⁶³

It has indeed never been the case that the void-for-vagueness doctrine was applied in the same way in the immigration and criminal law contexts. As Justice Thomas observed, a criminal law that punished “moral turpitude” could never survive constitutional scrutiny, but immigration law has long been understood to attach consequences to crimes involving moral turpitude.²⁶⁴ 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 can, on any sound principle, be defined in so vague a fashion.”²⁶⁵ By contrast, it is constitutional, the Supreme Court has held, to attach adverse immigration consequences to having a “psychopathic personality.”²⁶⁶ This is a condition so imprecise that it is inconceivable, as Justice Thomas observed, that it could satisfy due process if it supplied the basis of a criminal offense.²⁶⁷

It is true that in recent years the void-for-vagueness doctrine has acquired new rationales—such as the prohibition of “arbitrary and discriminatory enforcement”²⁶⁸—and migrated to distant corners of

262. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *see also Hinds v. Lynch*, 790 F.3d 259, 279 (1st Cir. 2015) (citation omitted) (“Nor do we gainsay that ‘the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.’ But, at least when delineating those classes of aliens who are removable, the Constitution in its fullest application places little substantive limit on Congress’s reasonable policy decisions.” (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001))).

263. *Rusu v. INS*, 296 F.3d 316, 321 (4th Cir. 2002) (“[H]earing procedures that comport with due process in the asylum context might well be unacceptable in other proceedings.”).

264. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1248 (2018) (Thomas, J., dissenting).

265. *Ex parte Jackson*, 45 Ark. 158, 164 (1885).

266. *Boutilier v. INS*, 387 U.S. 118, 123–24 (1967).

267. *Dimaya*, 138 S.Ct. at 1247 (Thomas, J., dissenting).

268. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

the legal system. This development has prompted Justice Thomas to liken the doctrine, both in its legitimacy and its metastasizing quality, to substantive due process. Justice Gorsuch has engaged Justice Thomas and defended the void-for-vagueness doctrine on originalist grounds.²⁶⁹ However, in a recent article, *Vagueness as Impossibility*, Professor Michael Mannheimer persuasively argues that Justice Gorsuch's effort has failed.²⁷⁰ Professor Mannheimer's article is a pathbreaking contribution to a crowded field of academic scholarship in this area. He contends that the void-for-vagueness doctrine is "best understood as an instantiation of Lord Coke's ancient dictum that a statute cannot compel that the 'impossible . . . be performed.'"²⁷¹ This formulation admirably captures the historic contours of the void-for-vagueness doctrine, but it raises questions about some of the more recent applications, including the trilogy of

269. It is striking that the two most outspokenly originalist judges on the Court today, Justices Thomas and Gorsuch, have staked out opposite positions on the void-for-vagueness doctrine, with Justice Thomas exhibiting wariness about what he has depicted as its alarming growth, *see Johnson v. United States*, 576 U.S. 591, 607–08 (2015) (Thomas, J., concurring); *Dimaya*, 138 S. Ct. at 1244 (Thomas, J., dissenting), and Justice Gorsuch embracing a more robust doctrine, *see id.* at 1223 (Gorsuch, J., concurring). Given the indisputably originalist understanding that Congress exercised plenary power in this area, *id.* 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.'" (alteration in original) (quoting *Demore v. Kim*, 538 U.S. 510, 538 (2003) (O'Connor, J., concurring in part and concurring in the judgment))), Justice Gorsuch's confident extension of the doctrine to immigration matters seems unwarranted, *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.").

270. Professor Mannheimer argues that Justice Gorsuch's account of the earlier cases was mistaken: he confused cases applying the rule that penal statutes should be strictly construed with cases striking down statutes as unconstitutionally vague. *See Mannheimer, supra* note 211 at 1069–73.

271. *Id.* at 1054.

cases that would likely form the basis for the newly minted challenge to the CIMT provisions.

As Professor Mannheimer argues, the void-for-vagueness doctrine is a protection against laws so indefinite that they quite literally demand the impossible. For example, a law that requires individuals to calculate a commodity's price under perfect market conditions ("what the community would have given for them if the continually changing conditions were other than they are") demands the impossible.²⁷² By contrast, the laws at issue in *Johnson* and *Dimaya* did not demand the impossible. In the former, the Armed Career Criminal Act provided for enhanced penalties upon conviction for being a felon in possession if one had committed three or more "violent felonies"; in the latter, 18 U.S.C. § 16(b) provided for removal of an alien who committed a "crime of violence." Professor Mannheimer concludes:

Looked at through the lens of impossibility, these cases were wrongly decided. For an alien to avoid virtually automatic deportation, and for a federal felon to avoid being sentenced as a recidivist, he need not do the impossible. Even pursuant to these admittedly imprecisely worded statutes, he need only refrain from committing a felony or, at the least, refrain from committing a felony that could possibly be considered to engender a serious or substantial risk of force against, or injury to, another.²⁷³

This was essentially the same point made by Justice Alito, dissenting in *Johnson*: due process requires that one know whether one's conduct is criminal or not, but "[d]ue process does not require . . . that a 'prospective criminal' be able to calculate the precise penalty that a conviction would bring."²⁷⁴

272. *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 223 (1914).

273. Mannheimer, *supra* note 211, at 1112.

274. *Johnson v. United States*, 576 U.S. 591, 630 (2015) (Alito, J. dissenting).

Along with Professor Mannheimer's article, Justice Alito's dissenting opinion draws attention to the gulf that separates the foundational due process cases and some of the more recent applications. Vastly different procedural protections are appropriate when (a) the question is whether conduct is proscribed *at all* and (b) the question is the extent of the penalty, direct and indirect, that attaches to a criminal conviction. In category (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."²⁷⁵ 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 category (b), the person is on notice that the conduct was contrary to law. The substantially less compelling narrative is "I knew that my conduct was a felony, but I could not price the cost because I was unclear on the penalty." The foundational "void-for-vagueness" cases do not have this aspect. As Justice Alito observed in *Johnson*, the concerns that vague laws will "trap the innocent" have no force "when it comes to sentencing provisions."²⁷⁶

With the further extension of the void-for-vagueness doctrine to immigration matters—that is, the indirect consequences of a criminal conviction—the doctrine takes flight to even more distant lands. Consider a recent certiorari petition filed by an alien convicted of Medicare fraud and tax fraud; he asked the Supreme Court to strike

275. 405 U.S. at 156 n.1.

276. 576 U.S. at 630 (Alito, J. dissenting). Consider, furthermore, that for much of American history many felonies were punishable by a wide range of prison terms, subject only to the unfettered discretion of the trial judge. For example, an early nineteenth century New York statute provided the crime of simple assault was punishable by up to fourteen years in prison. See Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 68 n.29 (1993). 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.

down the CIMT provisions as unconstitutionally vague.²⁷⁷ Such petitioners concede they were committing crimes, and they concede they knew a punishment including incarceration for at least a year was attached to each of those crimes; the claim is that they did not know that, after violating clearly demarcated crimes and being sentenced to clearly foreseeable punishments, they might have then been subject, as a collateral consequence, to deportation. This argument, a frail one to begin with, has been rendered vaporous in light of *Padilla v. Kentucky*,²⁷⁸ which requires a criminal defense lawyer to “advise a noncitizen client that pending charges may carry adverse immigration consequences.”²⁷⁹ When an alien pleads guilty to a crime, as the above petitioner did, we must now assume that his lawyer informed him that there are potentially adverse consequences in immigration law; these consequences may include a finding that violating clearly demarcated criminal laws, with clearly foreseeable penalties, may include a subsequent finding that said laws will be judged CIMTs. Where, then, is the unfairness, when that is exactly what happens?

The vaporous claim that the use of the CIMT provisions to trigger removal is unfair is rendered evanescent in the overwhelming majority of cases. There is, at any given time, broad agreement as to which offenses qualify as CIMTs and which do not. My research indicates that in 2019 there were only six cases in which courts of appeals granted petitions for review from BIA decisions on the ground that the agency erroneously concluded that the alien’s crime was a CIMT.²⁸⁰ Given the thousands of removal proceedings

277. Petition for Writ of Certiorari at 2, *Chhabra v. Lynch*, 137 S. Ct. 678 (2017) (No. 16-630), 2016 WL 6679341.

278. 559 U.S. 356 (2010).

279. *Id.* at 369.

280. Two such cases involved the perennial issue of how to categorize assault. *See Garcia-Martinez v. Barr*, 921 F.3d 674, 676 (7th Cir. 2019); *Hernandez v. Whitaker*, 914 F.3d 430, 432 (6th Cir. 2019). Three others involved associational crimes, where there was uncertainty as to whether the crime which the alien joined was itself a CIMT. *See Cabrera v. Barr*, 930 F.3d 627, 630 (4th Cir. 2019); *Marinelarena v. Barr*, 930 F.3d 1039,

per year, and given the dozens of petitions for review denied, the area of law is not nearly as incomprehensible as advertised. To the extent that the courts of appeal *have* generated inconsistent results, and to the extent that uniformity and predictability are goals in immigration law, then the obvious solution is judicial deference to the reasoned framework put forward by the Attorney General and BIA as to what constitutes a CIMT.²⁸¹ One cannot complain that it is a “fool’s errand to try to lend coherence to CIMTs in immigration law” and then object to embarking on a path likely to arrive at coherence.²⁸² Likewise, 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.²⁸³ The solution to this problem, assuming it is a 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 appeals at the time Congress enacted the 1996 Act,²⁸⁴ it is fair to assume that this was the inquiry Congress intended immigration officials to conduct.²⁸⁵

1042 (9th Cir. 2019); *Garcia-Morales v. Barr*, 792 F. App’x. 618, 619 (10th Cir. 2019). In only one other case—involving an offense straddling the line between larceny and joy-riding—did a court of appeals outright reject the BIA’s conclusion that a crime was a CIMT. *Barbosa v. Barr*, 926 F.3d 1053, 1056 (9th Cir. 2019). (In another case a court of appeal remanded for further explanation from the BIA, conceding that one of the government’s arguments, raised in briefing, was “compelling,” but the agency did not rely on that reasoning in its decision.” *Flores v. Barr*, 791 F. App’x. 222, 226 (2nd Cir. 2019)).

281. See *Matusiak*, *supra* note 152, at 219–20.

282. See *Yeatman*, *supra* note 15.

283. Cf. *Johnson v. United States*, 576 U.S. 591, 624 (2015) (Thomas, J., concurring in the judgment) (“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.”).

284. See *supra* at text accompanying notes 134–35.

285. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982) (presuming that Congress was aware of the legal background when it reenacted a law).

As noted earlier, apart from concerns about statutes that provide inadequate notice, the void-for-vagueness doctrine acquired a new rationale about fifty years ago—as a check against laws that encourage (or simply authorize) arbitrary and discriminatory enforcement. It is an irony, rich for those inclined to savor it, that the Court, when deploying this doctrine to invalidate laws it deems unduly vague, has been itself notoriously indifferent to precision.²⁸⁶ One can criticize the arbitrary enforcement rationale as hopelessly inconsistent in application²⁸⁷ and little more than a warrant for judicial activism,²⁸⁸ but let us assume it should be given some scope in the immigration context. To be sure, the phrase “moral turpitude,” when viewed in isolation, is so much in the eye of the beholder that

286. In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Court invalidated a statute because it “encourage[d] arbitrary and erratic arrests and convictions.” *Id.* at 162. That same year, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court replaced “arbitrary and erratic arrests and convictions” with “arbitrary and discriminatory enforcement.” *Id.* at 108. Two years later, in *Smith v. Gougon*, 415 U.S. 566 (1974), the Court tried out another test: “a legislature [must] establish minimal guidelines to govern law enforcement.” *Id.* at 574. In *Kolender v. Lawson*, 461 U.S. 352 (1983), the Court returned to “not encourage arbitrary and discriminatory enforcement,” *id.* at 357, but some cases, in a spirit of linguistic play, suggested that the doctrine should be used to invalidate statutes that do not simply encourage, but merely authorize arbitrary and discriminatory enforcement, see *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Then in 2008, the Court seemed to narrow the doctrine, restricting its application to a law “so standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008). But then in *Sessions v. Dimaya*, 138 U.S. 1204 (2018), the Court returned to: “the doctrine guards against arbitrary or discriminatory law enforcement.” *Id.* at 1212. For an excellent summary of these developments through 2010, see Christina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L., POL’Y & ETHICS J. 255, 273–75 (2010).

287. Professor Mannheimer points out that, notwithstanding the hullabaloo occasionally raised about imprecise statutes inviting untrammelled judicial discretion and arbitrary administrative enforcement, “it is equally well settled that a narrowing judicial construction can save an otherwise vague statute from unconstitutionality” and “an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.” Mannheimer, *supra* note 211, at 1088, 1092 (citations omitted).

288. See Lockwood, *supra* note 286, at 298 (arguing that the second prong of the void-for-vagueness doctrine is a license for “unwarranted judicial activism” and should be dropped).

arbitrary enforcement would seem inevitable. It is in this spirit that critics have alleged that the CIMT provisions invest untrammelled discretion in executive branch officials, enabling them to “play God.”

But the actual criterion for removal is not “moral turpitude,” but “crimes involving moral turpitude,” a legislative term that has existed for over a century and that has been substantially channeled through case law. Thus, when an immigration official or judge 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 case law and the national community*. Step (1) could not be more objective and constrained, therewith narrowing discretion and foreclosing a vagueness challenge.²⁸⁹ And even step (2) presupposes an inquiry into the views of the community. As Judge Learned Hand observed, in this task, the judge “must be loyal” to “accepted moral notions . . . , so far as we can ascertain [them].”²⁹⁰ To a great extent, these “accepted moral notions” have been clarified by precedent, which further constrains discretion. There is not “pervasive disagreement about the nature of the inquiry one is sup-

289. Furthermore, the BIA and courts of appeal have clarified that only statutes that are punishable by a year in prison *and that include a scienter requirement* qualify as CIMTs. *Michel v. INS*, 206 F.3d 253, 263 (2d Cir. 2000) (“corrupt scienter is the touchstone of moral turpitude”). Courts have deemed this significant when evaluating statutes for unconstitutional vagueness. *See Gonzalez v. Carhart*, 550 U.S. 124, 149 (2007) (“The Court has made clear that scienter requirements alleviate vagueness concerns.”); *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 13–14 (1st Cir. 2011) (rejecting vagueness challenge to ordinance that authorized police to intervene when there was a “substantial disturbance,” because the ordinance clarified that a “violation of law” was “a condition precedent to police intervention . . .”).

290. *United States ex rel. Iorio v. Day*, 34 F.2d 920, 921 (2d Cir. 1929). The case is discussed *supra* at text accompanying notes 75–80.

posed to conduct and the kinds of factors one is supposed to consider.”²⁹¹ As Judge Colloton’s opinion in *Bakor v. Barr*²⁹² demonstrates, judges are usually able to accomplish this task, even when evaluating statutes that have not been construed before, by drawing upon a thick body of precedent and the sort of analogical reasoning that is an ordinary part of the judicial task.

But in the rare case a statute will present itself for which there is no precedent to which the case can be easily analogized. This task is indisputably difficult. 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 Part will consider a recent case of first impression. 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: COCKFIGHTING AND THE MATTER OF ORTEGA-LOPEZ

In 1976, Congress enacted the Animal Welfare Act Amendments,²⁹³ amended by the Animal Fighting Prohibition Enforcement Act of 2007,²⁹⁴ which criminalizes the exhibition or sponsoring of animals in fighting ventures.²⁹⁵ In 2008, football player Michael Vick was sentenced under this statute to twenty-three months in

291. *Johnson v. United States*, 576 U.S. 591, 601 (2015). For an insightful application of this test, see Emily M. Snoddon, *Clarifying Vagueness: Rethinking the Supreme Court’s Vagueness Doctrine*, 86 U. CHI. L. REV. 2301, 2352–53 (2020).

292. 958 F.3d 732 (8th Cir. 2020). See *supra* at text accompanying notes 173–75.

293. Pub. L. No. 94-279, § 17, 90 Stat. 421 (1976).

294. Pub. L. No. 110-22, § 3, 121 Stat. 88 (2007). See Francesca Ortiz, *Making the Dog-man Heel: Recommendations for Improving the Effectiveness of Dogfighting Laws*, 3 STAN. J. ANIMAL L. & POL’Y 1, 75 (2010).

295. 7 U.S.C. § 2156 (2018); 18 U.S.C. § 49(a) (2018).

prison for his role in a dog fighting conspiracy.²⁹⁶ If we judge by the stiff sentence Vick received and the withering rebukes 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 1992.²⁹⁷ In 2009, he pled guilty to a violation of 7 U.S.C. § 2156(a)(1), and the Department of Homeland Security initiated deportation proceedings against him.²⁹⁸ In 2011, the immigration judge who heard his case ruled that his cock-fighting 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.²⁹⁹ In 2016, Ortega-Lopez sought review in the Ninth Circuit. The court hesitated to affirm the BIA's decision because, under its precedents, "[n]on-fraudulent crimes of moral turpitude almost always involve an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victim."³⁰⁰ 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

296. Adam Kurland, *The Prosecution of Michael Vick: Of Dogfighting, Dual Sovereignty, Depravity and "A Clockwork Orange,"* 21 MARQ. SPORTS L. REV. 465, 467 (2011).

297. 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-cock-fighting-20160823-snap-story.html> [<https://perma.cc/P6DJ-VYN4>].

298. *Id.*

299. Matter of Augustin 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 [<https://perma.cc/X823-DGQA>].

300. Ortega-Lopez v. Lynch, 834 F.3d 1015, 1018 (9th Cir. 2016) ("*Ortega-Lopez II*") (quoting Nunez v. Holder, 594 F.3d 1124, 1127 (9th Cir. 2010)).

states criminalized this activity.³⁰¹ In August 2018, the BIA reaffirmed its previous decision in a more elaborate opinion.³⁰² In September 2019, one decade after his criminal conviction, Ortega-Lopez appealed this second BIA ruling, and as this Article was in the final stage of edits, the Ninth Circuit denied his petition for review.³⁰³

My point here is not to assess whether the BIA is correct that a Section 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?

Both BIA opinions make clear that they are operating within the familiar framework for assessing whether a crime involves moral turpitude: there must be (1) "a culpable mental state" and (2) "reprehensible conduct."³⁰⁴ 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, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general?"³⁰⁵ By answering that it is, and in reaffirming this conclusion on remand, the BIA plausibly rejected the Ninth Circuit's contention in its first opinion that, apart from fraud, only violent crimes directed at protected classes qualify.³⁰⁶ In so doing, the BIA did not invoke its own

301. *Id.* at 1017–18.

302. *Matter of Agustin Ortega-Lopez*, 27 I. & N. Dec. 382 (BIA 2018) ("*Ortega-Lopez III*").

303. *Ortega-Lopez v. Barr*, 978 F.3d 680 (9th Cir. 2020) ("*Ortega-Lopez IV*").

304. *Ortega-Lopez I*, 26 I. & N. at 100; *Ortega-Lopez III*, 27 I. & N. at 385.

305. *Ortega-Lopez III*, 27 I. & N. at 385 (citation omitted).

306. *Ortega-Lopez II*, 834 F.3d at 1018.

moral views but canvassed the established “standards of a civilized society.”³⁰⁷ Although it might have done so more systematically than it did, and more clearly set out the criteria it was applying, the BIA nonetheless accumulated substantial evidence to support its conclusion: (1) The fact that all fifty states, the District of Columbia, and the federal government have criminalized animal fighting ventures;³⁰⁸ (2) the fact that the federal government recently enhanced the penalties;³⁰⁹ (3) denunciations of animal fighting ventures—which torture animals and brutalize human spectators—by lawmakers;³¹⁰ (4) equally spirited denunciations of the activity in judicial opinions;³¹¹ and (5) the social science conclusion that animals are sentient creatures capable of suffering pain and suffering, which has inaugurated significant changes in animal treatment in much of the world.³¹²

Critics of the CIMT provisions seem to regard the task of ascertaining “the standards of a civilized society” as fraudulent; according to these critics, there is no such thing as a “civilized society,” and those who purport to invoke its standards are simply privileging their own values.³¹³ As an empirical matter, the criticism is

307. *Ortega-Lopez III*, 27 I. & N. at 386.

308. *Id.* at 390.

309. *Id.* at 383 n.4.

310. *Id.* at 387–88. See *Animal Fighting Prohibition Enforcement Act of 2005: Hearing on H.R. 817 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 56, 57 (2006) (animal fighting desensitizes spectators to violence and teaches “that inflicting pain is an acceptable form of amusement”); H.R. REP. NO. 94-801, at 10 (1976) *reprinted in* 1976 U.S.C.C.A.N. 758, 761 (animal fighting is “dehumanizing, abhorrent, and utterly without redeeming social value”).

311. *Ortega-Lopez III*, 27 I. & N. at 388. See *Commonwealth v. Tilton*, 49 Mass. (8 Met.) 232, 234–35 (1844) (describing animal fighting as “barbarous and cruel, leading to disorder and danger, and tending to deaden the feelings of humanity, both in those who participate in it, and those who witness it”); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1973) (stating that animal fighting events have been outlawed because they “debased and brutalized the citizenry who flocked to witness such spectacles”).

312. *Ortega-Lopez III*, 27 I. & N. at 389. See Gary L. Francione, *Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein*, 2006 U. CHI. LEGAL F. 231, 240–41 (2006).

313. *E.g.*, Brief of Amici Curiae Law Professors, *Islas-Veloz v. Barr*, *supra* note 249 (arguing that morality varies with “time, culture, and locality”).

faulty: there are certain activities that, as the BIA observes, civilized societies *do* overwhelmingly regard as reprehensible and vile.³¹⁴ Nonetheless, one plausible 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.”³¹⁵ This is essentially the test adopted by Judge Learned Hand.³¹⁶ It 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 inquires whether a procedural right is “necessary to an *Anglo-American* regime of ordered liberty,”³¹⁷ which does not foreclose the possibility that other “regimes of ordered liberty” might choose a different course. 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.³¹⁸

The BIA’s observation that all fifty states criminalize cock-fighting is thus relevant in assessing whether there is a national consensus that such a crime qualifies as a CIMT. The Ninth Circuit’s answer in its original opinion that “more is required”³¹⁹ to prove that the crime involves moral turpitude is unpersuasive. Yes, all fifty 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 condemnation that accompanied the enactment of America’s animal cruelty statutes. The BIA accumulates only a fraction of a voluminous literature that confirms an

314. *Ortega-Lopez III*, 27 I. & N. at 383 n.4, 386.

315. *Id.* at 390.

316. *United States ex rel. Iorio v. Day*, 34 F.2d 920, 921 (2d Cir. 1929). *See supra* at text accompanying notes 75–80.

317. *Duncan v. Louisiana*, 391 U.S. 145, 150 n.15 (1968).

318. *See, e.g., Graham v. Louisiana*, 560 U.S. 48 (2010) (holding that the sentencing a juvenile to life without parole for a crime other than homicide is cruel and unusual because it is contrary to a clear national consensus).

319. *Ortega-Lopez II*, 834 F.3d at 1018.

American consensus that animal fighting ventures are reprehensible: they involve, in our view, a grotesque celebration of suffering, which “deaden[s] the feelings of humanity, both in those who participate in it, and those who witness it.”³²⁰ The fact that a few other countries still countenance such ventures³²¹ does not negate the reality of a deep American consensus on this issue. The BIA’s 2013 and 2018 opinions acknowledged that cockfighting was still permitted in some American territories, but the Agricultural Improvement Act, signed into law in December 2018, filled this lacuna and essentially prohibited cockfighting in every U.S. jurisdiction.³²²

320. *Ortega-Lopez III*, 27 I. & N. at 388.

321. In the Philippines, cockfighting (known in Tagalog and Cebuano as *sabong*) is a major sport that is entirely legal and enjoys huge popularity. The Philippines hosts the cockfighting world championships—the World Slasher Cup—whose matches take place twice each year in a stadium in Manila that seats thousands. See <https://www.worldslashercup.ph> [<https://perma.cc/XRK3-VCP7>]; Phillip Day, *Cockfighting Thrives in Full View in Philippines*, NIKKEI ASIAN REV. (Mar. 15, 2018), <https://asia.nikkei.com/Life-Arts/Life/Cockfighting-thrives-in-full-view-in-Philippines2> [<https://perma.cc/D7PK-NN8P>]. Locals claim the practice has a 6,000-year history, and there is evidence to support this: the chicken was domesticated in India or Southeast Asia, and cockfighting “was a long-standing form of leisure in virtually all societies with domestic fowl.” Janet M. Davis, *Cockfight Nationalism: Blood Sport and the Moral Politics of American Empire and Nation Building*, 65 AM. Q. 549, 552 (Sep. 2013).

Cockfighting persists in Mexico, despite intermittent efforts to ban it. See Alisdair Baverstock, *It’s a Fight to the Death*, DAILY MAIL (Dec. 1, 2015), at <https://www.dailymail.co.uk/news/article-3339632/It-s-fight-death-ends-blood-feathers-Mexican-prize-cock-fighter-pumps-birds-HORSE-STERIODS-straps-razor-blades-claws-stops-win.html> [<https://perma.cc/2QYL-JEDM>] (“Bouts are generally short, but if both animals survive the first three minutes they are taken from the main stage to a smaller Palenque beside the bar where spectators are often showered with blood by the greater proximity to the action.”). The article includes a video of a Mexican cockfight in December 2015, with over a thousand people in attendance, and in which razor blades are strapped to the chicken’s claws prior to the fight.

More generally, some countries do not have comprehensive animal cruelty laws. For example, the term “animal welfare” was largely unknown in China prior to 1989, and public discussion of the legality of animal cruelty only began around the turn of the 21st century. Alisha F. Carpenter & Wei Song, *Changing Attitudes about the Weak: Social and Legal Conditions for Animal Protection in China*, 48 CRITICAL ASIAN STUD. 380, 382–83 (2016). The Chinese Academy of Social Sciences released a draft of a law in 2009, but it has yet to be enacted. See *id.*

322. See Pub. L. 115-334 § 12616, 132 Stat. 4490 (2018).

Even if there are subcultures within the United States that continue to regard cockfighting as part of their heritage,³²³ the BIA amply supported its conclusion of a “clear consensus in American society” that such activity is “contrary to the most basic moral standards.”³²⁴

323. The 2018 Farm Bill’s ban of cockfighting in U.S. Territories provoked criticism from some territorial representatives. Ralph D. Guerrero Torres, the current governor of the Northern Mariana Islands, responded to the bill’s passage:

Cockfighting has historical and cultural significance in the CNMI [Commonwealth of the Northern Mariana Islands] and is a recreational activity enjoyed by many of our residents. We joined in our community’s collective frustration with Congress to oppose the ban, but our voices weren’t heard in Washington. We will monitor the effects of this legislation accordingly, but purely from the local standpoint, we will maintain what is historically and culturally held by our people.

Jon Perez, *Cockfighting ban now law*, SAIPAN TRIB. (Dec. 24, 2018), <https://www.saipan-tribune.com/index.php/cockfighting-ban-now-law/> [https://perma.cc/4PMJ-YJ28]. Cockfighting is a long-established tradition in Puerto Rico, and the ban angered many Puerto Rican citizens and officials. The sport was actively regulated, and the island’s government actually has a “Rooster Affairs Commission” (*Comisión de Asuntos Galístico*) within its Department of Recreation and Sport. Beatriz Garcia, *Puerto Rico vs. U.S.: Who’s the rooster in the pen?*, AL DIA, (Dec. 18, 2019), <https://aldianews.com/articles/culture/social/puerto-rico-vs-us-whos-rooster-pen/57132> [https://perma.cc/UE7Y-GW6Z].

In fact, two Puerto Rican organizations and another in Guam unsuccessfully filed lawsuits seeking a declaration that the cockfighting ban is unconstitutional. *Club Galístico de Puerto Rico, Inc. v. United States*, 414 F. Supp. 3d 191 (D. Puerto Rico 2019); *Linsangan v. United States*, 2019 WL 6915943 (D. Guam 2019). In both cases, the district courts rejected a “cultural right” defense.

Pockets of resistance still linger even in the continental United States. Despite years of strong general support, efforts to ban cockfighting in Louisiana long failed because of opposition from rural Cajuns, who viewed it as “part of [their] rural way of life.” Adrian Florido, *Puerto Ricans Angry Over Impending Ban on Cockfighting*, NPR MORNING EDITION (Dec. 14, 2018, 5:01 AM), <https://www.npr.org/2018/12/14/676652923/congress-moves-to-ban-cockfighting-in-puerto-rico> [https://perma.cc/WZ7N-YCHF]. One rooster breeder in California says: “There are lots of illegal fights in California—we have lots of Hispanics and Filipinos and it is part of their tradition to fight the roosters.” *Day*, supra note 321. Just this year, prosecutors in Minnesota pursued a 5-day jury trial—with success—against someone who raised “Thai-fighting roosters” in his basement. *See State v. Su Vang*, 2020 WL 1488334 (Ct. App. Minn 2020).

324. *Ortega-Lopez III*, 27 I. & N. at 391.

In the most recent appeal, the Ninth Circuit afforded *Chevron* deference to the BIA's published and "well-reasoned" opinion, commending the agency for the "detailed explanation of its rationale."³²⁵ Indeed, a fair review of both BIA opinions forecloses any serious argument that the immigration authorities were "playing God" or that the CIMT provisions were so vague as to provide little guidance to the officials charged with enforcing the immigration law.

CONCLUSION: COCKFIGHTING, MANSLAUGHTER, AND THE CIMT
PUZZLE RESOLVED

The puzzle of the CIMT provisions is nonetheless neatly posed by Ortega-Lopez's case. Ortega-Lopez's actions were deemed sufficiently minor by the criminal law that his sentence was only one year's probation.³²⁶ 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, consider Ihar Sotnikau. An alien convicted of involuntary manslaughter, he was sentenced to five years' imprisonment.³²⁷ And yet according to the Fourth Circuit, his crime was not a CIMT and thus does not subject him to deportation. The court reasoned that because the mens rea of involuntary manslaughter under Virginia law is criminal negligence or recklessness, Sotnikau did not possess the requisite "culpable mental state" to justify a finding of a CIMT.³²⁸

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. Obviously, manslaughter is

325. *Ortega-Lopez IV*, 978 F.3d at 686–87.

326. *Ortega-Lopez I*, 26 I. & N. at 99.

327. *Sotnikau v. Lynch*, 846 F.3d 731, 733 (4th Cir. 2017).

328. *Id.* at 736. On the difficulty of how to characterize the mens rea of recklessness, see *supra* text accompanying notes 140–45.

a more serious crime than sponsoring a cockfighting event, as reflected in the substantial difference in punishments imposed. Why would the immigration law nonetheless require the deportation of Ortega-Lopez but not Sotnikau? Besides being difficult to administer, the CIMT provisions are shown to generate results that are not immediately defensible. It would be possible, as Senator Roth argued in 1995, to deport everyone convicted of a felony.³²⁹ Alternatively, the law could provide that any alien convicted of a felony who was sentenced to one year's incarceration should be deported. Under either framework, Ortega-Lopez would be permitted to remain, while Sotnikau, guilty of a more serious criminal offense, would 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?

This Article's answer is that criminal law and immigration law exist for different purposes. The former holds people accountable for blameworthy conduct and then punishes them; the latter decides what kind of people we want in our community. Alternatively put, the criminal law is retrospective, assessing a defendant's culpability; immigration proceedings "look prospectively," and "[p]ast conduct is relevant only insofar as it sheds light on the [alien's] right to remain."³³⁰ When immigration consequences follow from a violation of the criminal law, deportation, however "burdensome and severe for the alien, is not a punishment"; rather, it is the nation exercising its sovereign right to conclude that the alien's "continued presence here would not make for the safety and welfare of society."³³¹ But some discretion is required. Violations of the

329. See *supra* text accompanying notes 147–48.

330. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

331. See Elina Treyger, *The Deportation Conundrum*, 44 SETON HALL L. REV. 107, 116 (2104) ("[A]s the Supreme Court put it in 1924, the function of deportation is 'to rid the country of persons who have shown by their career and that their continued presence here would not make for the safety and welfare of society,' and implicitly, to show forbearance towards those, whose continued presence would enhance such welfare." (quoting *Mahler v. Eby*, 264 U.S. 32, 39 (1924)); *Hinds v. Lynch*, 790 F.3d 259, 264 (1st

criminal law are proxies, but only imperfectly, for the moral traits that may be deemed to disqualify someone from inclusion in our community. Furthermore, the sentences imposed by the criminal law often reflect a degree of “moral luck” —that is, the fortuity of an attendant harm, or lack thereof, can affect the severity of the punishment imposed.

Involuntary manslaughter highlights the problem. It involves a terrible outcome and demands substantial punishment, but it may not reflect a recurrent behavior that renders someone unfit to be a member of our community. Indeed, it may reflect in part very bad luck. 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. The doctrine of “crimes *involving moral turpitude*” provides an element of measured discretion in adapting the sentence imposed by the criminal law to the appropriate result in immigration law. As the previous Part discussed, in 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.³³²

American immigration law still enshrines the perhaps archaic idea that “virtue” is a useful category in sorting those who are fit for inclusion in our community and those who are not.³³³ In addition to the use of the phrase “crime involving moral turpitude,” immigration law still provides for the deportation of aliens deemed

Cir. 2015) (“By referencing a crime as a justification for removing an alien, Congress does not seek to punish an alien generally or for her particular federal or state offense. Instead, if the government seeks to remove an alien because of ‘some act the alien has committed,’ he ‘is merely being held to the terms under which he was admitted.’”) (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999)).

332. *Ortega-Lopez III*, 27 I. & N. at 390.

333. See THE FEDERALIST NO. 55 (James Madison) (arguing that republican self-government requires “sufficient virtue”).

not to be of “good moral character.”³³⁴ The law provides several examples of conduct that would reveal such character, but nonetheless it leaves the phrase open-ended, presumably for executive branch and judicial interpretation and gap-filling.³³⁵ Even the statutory examples of bad “moral character” are striking. Such bad character, justifying deportation, includes being a “habitual drunkard,” a phrase that would plainly not satisfy the criminal law’s demand for clear notice and constrained discretion.³³⁶ Another example of bad moral character is “giv[ing] false testimony for the purpose of obtaining” immigration benefits.³³⁷ In *Kungys v. United States*,³³⁸ Justice Scalia observed that a materiality requirement, which would ordinarily adhere in a criminal prosecution for a false statement to a government agency,³³⁹ is inapplicable in the context of immigration law: “The absence of a materiality requirement in § 1101(f)(6) can be explained by the fact that its primary purpose is not . . . to prevent false data from being introduced into the naturalization process *but to identify lack of good moral character.*”³⁴⁰ The

334. 8 U.S.C. § 1101(f) (2018).

335. *Id.* § 1101 (f)(9) (“The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.”).

336. *Id.* § 1101 (f)(1). Compare *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 274 (4th Cir. 2018) (invalidating criminal statute that prohibited “habitual drunkard” from possessing alcohol as “the statutes and case law fail to provide any standards of what is meant by the term ‘habitual drunkard’”) with *Ledesma-Cosimo v. Sessions*, 857 F.3d 1042, 1049 (9th Cir. 2017) (rejecting argument that 8 U.S.C. § 1101(f)(1) is unconstitutionally vague: “Because the statute is not unconstitutionally vague under the criminal law standard, it necessarily satisfies any lesser vagueness standard that might apply in a non-criminal context.”).

337. *Id.* § 1101(f)(6) (2018).

338. 485 U.S. 759, (1988).

339. *United States v. Gaudin*, 515 U.S. 506, 506–07 (1995).

340. *Kungys*, 485 U.S. at 780 (emphasis added).

CIMT provisions further exemplify immigration law's goal of identifying good character or, at a minimum, excluding bad moral character.³⁴¹

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 almost all 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.

* * *

To some observers, it is "preposterous" that as "meaningless" a phrase as "crimes involving moral turpitude" remains a part of American immigration law,³⁴² but the term's persistence, in the face of 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.³⁴³ Yet this explanation is inadequate. 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 only to tinker 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

341. Even more striking, the BIA has promulgated regulations construing 8 U.S.C. § 1101(f) that provide that evidence that an applicant for citizenship lacks good moral character includes the fact that he or she "[h]ad an extramarital affair which tended to destroy an existing marriage." 8 C.F.R.316.10 (ii) (2020).

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

343. See Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 5 (2012).

goals achieved by the CIMT provisions with more definite language (the solution proposed by some academics) will invite litigation and uncertainty. This Article's answer 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 at least some minimal agreement on the meaning of virtue.