

## Should They Stay or Should They Go: Rethinking The Use of Crimes Involving Moral Turpitude in Immigration Law

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SHOULD THEY STAY OR SHOULD THEY GO: RETHINKING  
THE USE OF CRIMES INVOLVING MORAL TURPITUDE IN  
IMMIGRATION LAW

*Sara Salem\**

Abstract

Although absent from modern English conversation, the words moral turpitude continue to carry devastating consequences for undocumented aliens living in the United States. Under federal immigration law, an alien convicted of a crime involving moral turpitude may be deported or denied entry into the United States. Perhaps most significantly, nearly all immigration relief is conditioned on an alien having never been convicted of a crime involving moral turpitude. So the question becomes, what is a crime involving moral turpitude? There is currently no clear answer. No one standard exists for determining whether a conviction qualifies as a crime involving moral turpitude. Circuit courts are split, each applying their own body of case law to determine issues of moral turpitude that reach their dockets. This Note reviews the history and inconsistencies of CIMT jurisprudence, explains Attorney General Mukasey’s failed attempt to standardize the area, and finally recommends a standard approach to be applied by the BIA and circuit courts across the country.

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INTRODUCTION<sup>1</sup>

Courts have long struggled to define “crimes involving moral turpitude.” In 1916, during a discussion by the House Committee on Immigration, an Illinois Representative said, “No one can really say what is meant by saying a crime involving moral turpitude.”<sup>2</sup> In 1956, the U.S. Court of Appeals for the Third Circuit observed that, “the borderline of ‘moral turpitude’ is not an easy one to locate.”<sup>3</sup> In 2005, one judge referred to moral turpitude jurisprudence as an “amorphous morass.”<sup>4</sup> And most recently in 2016, Judge Richard Posner stated, “It is preposterous that that stale, antiquated, and, worse, meaningless phrase should continue to be a part of American Law.”<sup>5</sup> Despite these criticisms, the term moral turpitude persists throughout modern immigration law.<sup>6</sup> Under current federal statutes, a conviction for a crime involving moral turpitude (CIMT) can result in severe consequences for an alien living in the United States.<sup>7</sup>

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1. Prior to the publication of this Note, the BIA complied with the Attorney General’s direction to articulate a uniform standard for determining whether a particular criminal offense is a CIMT. *See Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016). The BIA concluded that the categorical and modified categorical approaches should be used for the CIMT inquiry. *Id.* at 827. As to which categorical test is appropriate, the BIA stated that the realistic-probability test will be applied to determine whether an offense categorically qualified as a CIMT “unless controlling circuit law expressly dictates otherwise.” *Id.* at 832. Given that the BIA has spoken directly on the CIMT question, this Note can be read to better understand why the BIA reached the decision that it did.

2. *Restriction of Immigration: Hearing on H.R. 10384 Before the Comm. on Immigration & Naturalization*, 64th Cong. 8 (1916) (statement of Rep. Adolph J. Sabath).

3. *Quilodran-Brau v. Holland*, 232 F.2d 183, 184 (3d Cir. 1956).

4. *Partyka v. Att’y Gen.*, 417 F.3d 408, 409 (3d Cir. 2005).

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

6. *See infra* notes 9–11 and accompanying text. Moral turpitude has previously been used in a range of areas such as defamation, evidence law, voting rights, juror qualification, and professional licensing; however, it remains most prevalent in immigration law. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1001–02.

7. *See Jordan v. De George*, 341 U.S. 223, 231 (1951) (“The court has stated that ‘deportation is a drastic measure and at times the equivalent of banishment or exile.’” (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948))).

Under the Immigration and Nationality Act (INA)<sup>8</sup> an alien convicted of a CIMT can be denied entry to the United States,<sup>9</sup> deported,<sup>10</sup> or rendered ineligible for certain forms of immigration relief.<sup>11</sup> These consequences have been described as a sort of “collateral sanctioning mechanism,” where aliens suffer immigration consequences in addition to the penalty for the underlying offense.<sup>12</sup> With such harsh penalties at stake, one might hope that a clear standard exists for determining whether a crime is a CIMT.<sup>13</sup> Unfortunately, that is not the case, and the CIMT inquiry continues to be a source of confusion for courts and practitioners across the country.<sup>14</sup> Separation-of-power concerns present one roadblock to standardization.<sup>15</sup> And because criminal codes differ by state, Congress has abstained from creating one exhaustive list of CIMTs.<sup>16</sup> Without definitive answers, courts have turned to common law tests to determine whether specific state law convictions qualify as CIMTs.<sup>17</sup> These various tests have resulted in inconsistency and

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8. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

9. 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012).

10. *Id.* § 1227(a)(2)(A)(i)(I).

11. *See, e.g., id.* § 1229b(b)(1)(C) (rendering the alien ineligible for cancellation of removal).

12. Simon-Kerr, *supra* note 6, at 1040.

13. It has previously been suggested that the term “crimes involving moral turpitude” lacked sufficiently definite standards and was therefore void for vagueness. *Jordan*, 341 U.S. at 229. However, in 1951, the Supreme Court arguably closed the door to that argument, stating in dicta that the language of the statute conveyed a sufficiently definite warning as to the proscribed conduct in cases involving fraud. *Id.* at 231. The vagueness argument has not been raised in less “obvious cases.” *Id.* at 232.

14. *See* Anthony Guidice, *Is a Crime One Involving Moral Turpitude? You Have an Answer – Silva-Trevino? The Devil You Have!*, 12-05 IMMIGR. BRIEFINGS 1, 1 (2012) (“People with years and years of experience cannot agree on how to attack a monster like this CIMT idea—one having no clear methodology or genuine clarity.”).

15. *See infra* Section III.C (discussing the circuit courts rejection of the Attorney General’s attempt to standardize the CIMT inquiry). In addition, the *Chevron* doctrine directs federal courts to give deference to the BIA’s definition of CIMT under the INA, however, federal courts review de novo the BIA’s evaluation of a state criminal statute. *Ruiz–Lopez v. Holder*, 682 F.3d 513, 516 (6th Cir. 2012); *Rodriguez–Castro v. Gonzales*, 427 F.3d 316, 320 (5th Cir. 2007).

16. *See* Brian C. Harms, *Redefining “Crimes of Moral Turpitude”: A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 280 (2001) (stating that efficiency and flexibility concerns have likely prevented Congress from developing one exhaustive list of CIMTs). Compare this to the similarly ambiguous term “aggravated felony” used in immigration law, where Congress has adopted a listing approach. *See* 8 U.S.C. § 1101(a)(43) (2012). However, in 2016, the Tenth Circuit held that a portion of the INA’s listing definition of “aggravated felonies” was unconstitutionally vague. *Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016).

17. *See infra* Part II.

confusion across the country in how criminal convictions should be classified for immigration purposes.<sup>18</sup>

Consider, for example, the crime of false use of a Social Security number.<sup>19</sup> Where employment is increasingly conditioned on completion of I-9 verification, it is not unusual for aliens to use fraudulent Social Security numbers to obtain work.<sup>20</sup> This was the case for Octavia Beltran–Tirado, a native and citizen of Mexico, who fled her country at eighteen to come to the United States.<sup>21</sup> Beltran–Tirado initially used a fraudulent Social Security number to obtain employment, and over the course of the next twenty years, continued to use the Social Security number to work, pay taxes, and buy a house.<sup>22</sup> Beltran–Tirado was eventually arrested and convicted for fraudulent use of a Social Security number.<sup>23</sup> After being issued an order of removal, Beltran–Tirado applied for relief based on a provision of law designed to regularize the status of long-resident aliens illegally in the country.<sup>24</sup> However, the grant of this relief was conditioned on a finding of good moral character, the definition of which excluded anyone convicted of a CIMT.<sup>25</sup> After a lower court denied Beltran–Tirado relief based on a finding that her conviction constituted a CIMT, the U.S. Court of Appeals for the Ninth Circuit reversed, holding that the crime was *not* a CIMT, reasoning that false use of a Social Security number is *malum prohibitum* and the crime was

18. See *Jordan*, 341 U.S. at 235 (Jackson, J., dissenting) (arguing that there is universal recognition that moral turpitude is an “undefined and undefinable standard”); *Arias v. Lynch*, 834 F.3d 823, 829 (7th Cir. 2016) (recognizing the difficulty courts have had in defining the boundaries of moral turpitude); *Danesh*, 19 I. & N. Dec. 669, 670 (B.I.A. 1988) (referring to moral turpitude as a nebulous concept).

19. Federal law has codified various offenses relating to the fraudulent use of a Social Security number; however, a finding of guilt can typically be predicated on the same underlying facts—as in a false attestation on an employment verification form for the purpose of obtaining employment. See 18 U.S.C. § 1546(b)(3) (2012); 42 U.S.C. § 408(a)(7) (2012).

20. See Thomas Ahearn, *DOJ Significantly Increases Fines for Form I-9 Violations*, ESR NEWS BLOG (July 20, 2016), <http://www.esrcheck.com/wordpress/2016/07/20/doj-significantly-increases-fines-for-form-i-9-violations/>. For an interesting discussion on undocumented immigrants’ “unfair decision” between starving and lying upon entrance to the United States, see Carlos Cano, *Crimes Involving Moral Turpitude: A Call for Congressional Clarification and the “Use of a False Social Security Number” Exception*, 60 LOY. L. REV. 815, 847–50 (2014).

21. *Beltran–Tirado v. INS*, 213 F.3d 1179, 1181–82 (9th Cir. 2000).

22. *Id.* at 1182.

23. *Id.*

24. *Id.* at 1183.

25. *Id.* This requirement is typical of immigration relief provisions, many of which are either conditioned on admissibility or require good moral character, the definition of which precludes anyone convicted of a CIMT. See 8 U.S.C. § 1101(f)(3) (2012) (stating that no person shall be regarded as having good moral character who is a member of the classes of persons described in section 1182(a)(2)(A)); *id.* § 1182(a)(2)(A) (describing aliens who have been convicted of CIMTs as inadmissible).

committed only “to further otherwise legal behavior.”<sup>26</sup> This Ninth Circuit decision stands in stark contrast to opinions on the same issue in the Fifth,<sup>27</sup> Sixth,<sup>28</sup> Seventh,<sup>29</sup> and Eighth<sup>30</sup> Circuits, all finding that fraudulent use of a Social Security number *is* a CIMT, and therefore carries all the consequences of a CIMT conviction. This is just one example of the inconsistency and ambiguity that plagues the CIMT inquiry.

While calls to standardize this area of the law are nothing new, what has changed are the express priorities of the executive branch. President Donald J. Trump has repeatedly advocated for the deportation of all criminal aliens, and his campaign promises highlighted a tougher stance on immigration.<sup>31</sup> In a campaign speech in Arizona, Trump stated, “According to federal data, there are at least 2 million, 2 million, think of it, criminal aliens now inside of our country, 2 million people criminal aliens. We will begin moving them out day one.”<sup>32</sup> On January 25, 2017, President Trump acted on these promises, issuing an executive order directing the Department of Homeland Security to prioritize for removal aliens who have been convicted of any criminal offense.<sup>33</sup>

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26. *Beltran–Tirado*, 213 F.3d at 1184. Note that CIMT jurisprudence has historically distinguished between crimes that are *malum in se* and *malum prohibitum*, finding that only the former meets the definition of CIMT. See *New Jersey v. T.L.O.*, 469 U.S. 325, 379 n.21 (1985) (Stevens, J., concurring and dissenting).

27. *E.g.*, *Hyder v. Keisler*, 506 F.3d 388, 393 (5th Cir. 2007).

28. *E.g.*, *Serrato–Soto v. Holder*, 570 F.3d 686, 692 (6th Cir. 2009).

29. *E.g.*, *Marin–Rodriquez v. Holder*, 710 F.3d 734, 740 (7th Cir. 2013).

30. *E.g.*, *Guardado–Garcia v. Holder*, 615 F.3d 900, 903 (8th Cir. 2010).

31. Stephen Collinson & Jeremy Diamond, *Trump on Immigration: No Amnesty, No Pivot*, CNN (Sept. 1, 2016), <http://www.cnn.com/2016/08/31/politics/donald-trump-immigration-speech/index.html>.

32. Phillip Bump, *Here’s What Donald Trump Said in His Big Immigration Speech, Annotated*, WASH. POST (Aug. 31, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/08/31/heres-what-donald-trump-said-in-his-big-immigration-speech-annotated/?utm\\_term=.b86cb18a458c](https://www.washingtonpost.com/news/the-fix/wp/2016/08/31/heres-what-donald-trump-said-in-his-big-immigration-speech-annotated/?utm_term=.b86cb18a458c).

33. Press Release, Office of the Press Sec’y, Executive Order: Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>. See also Liz Robbins & Caitlin Dickerson, *Immigration Agents Arrest 600 People Across U.S. in One Week*, N.Y. TIMES (Feb. 12, 2017), <https://mobile.nytimes.com/2017/02/12/nyregion/immigration-arrests-sanctuary-city.html?referer=http://m.facebook.com> (reporting that federal immigration officials arrested over 600 people in the weeks following President Trump’s executive order defining new enforcement priorities); Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 12, 2017, 3:34 AM), <https://twitter.com/realDonaldTrump/status/830741932099960834> (“The crackdown on illegal criminals is merely the keeping of my campaign promise. Gang members, drug dealers & others are being removed!”).

This executive order marks a drastic shift from President Barack Obama's previous enforcement priorities, which were limited to undocumented immigrants who threatened public safety or national security, had ties to criminal gang activity, committed serious felony offenses, or were habitual misdemeanor criminal offenders.<sup>34</sup> The importance of this change is underpinned by budgetary constraints, which generally limit removal to only those aliens who qualify as enforcement priorities.<sup>35</sup> This means that aliens with convictions for lesser crimes, who did not previously qualify as enforcement priorities and were therefore likely to receive prosecutorial discretion, will now receive removal orders if brought to the attention of authorities. And in line with this increased enforcement, we are likely to see a proportional increase in applications for relief, the grant of which is often conditioned on the applicant having no prior CIMT convictions.<sup>36</sup>

It is because of this change in policy and priorities that it is more important than ever to address the problems that have beleaguered CIMT jurisprudence. Where removal of undocumented aliens could potentially increase in coming years, it is important that aliens facing this difficult process are met with a fair and consistent legal system. In an effort to address this issue, Part I of this Note examines the background and history of the term CIMT. Part II discusses the various approaches circuit courts adopted to determine whether a conviction qualifies as a CIMT. Part III addresses the three-step framework articulated by the Attorney General in *Silva-Trevino (Silva-Trevino I)*<sup>37</sup> and the circuit court's subsequent responses and eventual rejection of the approach. Part IV discusses the Attorney General's decision to vacate *Silva-Trevino I* and concludes by suggesting a framework the Board of Immigration Appeals (BIA) should adopt to promulgate consistency across the circuits.

## I. BACKGROUND

The term moral turpitude has been used in immigration law for over a hundred years.<sup>38</sup> Congress first included the term in 1891, "and it was

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34. Memorandum from Sec'y Jeh Charles Johnson on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 3–4 (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

35. See Kristina Gasson, *Which Undocumented Persons Are Helped by Prosecutorial Discretion*, NOLO, <http://www.nolo.com/legal-encyclopedia/which-undocumented-persons-are-helped-by-prosecutorial-discretion.html> (last visited Sept. 24, 2017).

36. See *supra* note 25 and accompanying text.

37. 24 I. & N. Dec. 687 (A.G. 2008), *vacated by* *Silva-Trevino*, 26 I. & N. Dec. 550, 550 (A.G. 2015).

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

adopted without comment in the accompanying reports.”<sup>39</sup> Subsequent revisions of immigration law have not added clarity to the term. Nowhere in the INA does Congress explicitly define moral turpitude.<sup>40</sup> In addition, legislative history is silent as to Congress’s intent.<sup>41</sup>

Left with ambiguous language, dictionary definitions can help guide our understanding of what is meant by a CIMT. Modern dictionary definitions of turpitude include a very evil quality or way of behaving,<sup>42</sup> “depravity or wickedness,”<sup>43</sup> and “depraved or wicked behavior or character.”<sup>44</sup> *Black’s Law Dictionary* defines moral turpitude as “conduct that is contrary to justice, honesty, or morality.”<sup>45</sup> These definitions appear consistent with congressional reports discussing the general goals of immigration law at the time moral turpitude was first included in immigration statutes: “[T]he 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 . . . moral qualities.”<sup>46</sup> However, with thousands of criminal statutes,<sup>47</sup> difficulties have arisen in differentiating between which crimes signal the presence of “undesirable moral qualities” and which do not.

In seeking to effectuate Congress’s intent, courts have refined their own definitions of moral turpitude. The Fifth Circuit defines moral turpitude as conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties between persons or to society in general.<sup>48</sup> Adding to that, moral turpitude has been described as an act, “which is per se morally reprehensible and intrinsically wrong or malum in se, so it is the nature

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39. HOUSE JUDICIARY COMM., 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT, HISTORICAL BACKGROUND AND ANALYSIS 10 (Comm. Print 1988).

40. *Cabral v. INS*, 15 F.3d 193, 195 (1st Cir. 1994).

41. *Id.* at 194–95.

42. *Turpitude*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/turpitude> (last visited Sept. 24, 2017).

43. *Turpitude*, GOOGLE, <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=turpitude> (last visited Sept. 24, 2017).

44. *Turpitude*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/definition/turpitude> (last visited Sept. 24, 2017).

45. *Moral Turpitude*, BLACK’S LAW DICTIONARY (8th ed. 1999).

46. HOUSE JUDICIARY COMM., *supra* note 39.

47. Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation’s Federal Criminal Laws*, WALL ST. J. (July 23, 2011), <http://www.wsj.com/articles/SB10001424052702304319804576389601079728920>.

48. *Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir. 1996).

of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.<sup>49</sup>

Over time, practitioners have grouped crimes together to better recognize which convictions typically involve moral turpitude.<sup>50</sup> Certain groupings have universally been recognized as CIMTs.<sup>51</sup> Courts have consistently held that a crime in which fraud is an ingredient involves moral turpitude.<sup>52</sup> This includes a variety of conduct including issuing checks with the intent to defraud,<sup>53</sup> using the mail to defraud,<sup>54</sup> forgery with intent to defraud,<sup>55</sup> concealing assets in bankruptcy,<sup>56</sup> and intent to defraud the United States.<sup>57</sup>

In addition, courts have held that crimes against the person involve moral turpitude when the statute requires malicious intention or the equivalent of such intention.<sup>58</sup> Examples of statutes that typically require the necessary intent element include murder,<sup>59</sup> voluntary manslaughter,<sup>60</sup> kidnapping,<sup>61</sup> assault with intent to kill,<sup>62</sup> and assault with intent to rape.<sup>63</sup> Crimes against property similarly turn on whether the statute requires intent to deprive, defraud, or destroy.<sup>64</sup> Typically only aggravated sexual offenses involve moral turpitude, while minor sexual offenses do not.<sup>65</sup> Regulatory violations are generally not CIMTs, because they lack the requisite level of moral condemnation.<sup>66</sup> Finally, conspiracy to commit a

49. Flores, 17 I. & N. Dec. 225, 227 (B.I.A. 1980).

50. See Maryellen Fullerton & Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 AM. CRIM. L. REV. 425, 433 (1986).

51. *Jordan v. De George*, 341 U.S. 223, 227 (1951).

52. *Id.*

53. *United States ex rel. Portada v. Day*, 16 F.2d 328, 329 (S.D.N.Y. 1926).

54. *Ponzi v. Ward*, 7 F. Supp. 736, 737-38 (D. Mass. 1934).

55. *United States ex rel. Popoff v. Reimer*, 79 F.2d 513, 515 (2d Cir. 1935).

56. *United States ex rel. Medich v. Burmaster*, 24 F.2d 57, 57-58 (8th Cir. 1928).

57. *Jordan*, 341 U.S. at 229.

58. *Awaijane*, 14 I. & N. Dec. 117, 118 (B.I.A. 1972); Fullerton & Kinigstein, *supra* note 50, at 433.

59. See, e.g., *Lopez-Amaro*, 20 I. & N. Dec. 668, 673 (B.I.A. 1993).

60. See, e.g., *De Lucia v. Flagg*, 297 F.2d 58, 61 (7th Cir. 1961); *United States ex rel. Sollano v. Doak*, 5 F. Supp. 561, 565 (N.D.N.Y. 1993).

61. See, e.g., *Nakoi*, 14 I. & N. Dec. 208, 209 (B.I.A. 1972); P-----, 5 I. & N. Dec. 444, 446-47 (B.I.A. 1953).

62. See, e.g., C-----, 5 I. & N. Dec. 370, 375 (B.I.A. 1953).

63. See, e.g., *Beato*, 10 I. & N. Dec. 730, 733, 735 (B.I.A. 1964).

64. See *Khalik*, 17 I. & N. Dec. 518, 519 (B.I.A. 1980).

65. See R-----, 6 I. & N. Dec. 444, 454 (B.I.A. 1954). This division is helpful in illustrating the difference between a crime and a crime involving moral turpitude. In the latter, society must morally condemn the underlying action that constituted a violation of the statute.

66. See Fullerton & Kinigstein, *supra* note 50, at 436.

crime is typically considered a CIMT only if the underlying offense involves moral turpitude.<sup>67</sup>

## II. PRE-*SILVA-TREVINO I* APPROACH

While it is easy to conclude that crimes such as murder and rape involve moral turpitude, there are numerous crimes for which the CIMT inquiry is not nearly as clear-cut.<sup>68</sup> Prior to the Attorney General's decision in *Silva-Trevino I* each circuit court applied its own body of case law to determine whether a specific conviction qualified as a CIMT.<sup>69</sup> While it is beyond the scope of this Note to detail all of the approaches the circuit courts employed, the following section will discuss some of the major variations of the CIMT inquiry used prior to *Silva-Trevino I*.

Traditionally courts employed some form of the categorical approach to determine whether a conviction qualified as a CIMT.<sup>70</sup> The categorical approach focuses on the inherent nature of the conviction, rather than the specific facts.<sup>71</sup> "Immigration law adjudicators aspire to employ a uniform and strictly 'legal' methodology" for determining whether a crime involves moral turpitude.<sup>72</sup> The idea that the moral turpitude inquiry should not involve specific facts is one of the basic tenets of the categorical approach, which "stood as [a] pillar[] of immigration law for at least seventy years."<sup>73</sup> The categorical approach can generally be

67. See, e.g., Flores, 17 I. & N. Dec. 225, 228 (B.I.A. 1980).

68. See U.S. Dep't of Justice, Exec. Office for Immigration Review, Recent Court Opinions, 9 IMMIGR. L. ADVISOR, Apr. 2015 at 6, [https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/05/01/vol9no4\\_final.pdf](https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/05/01/vol9no4_final.pdf) (noting a circuit split as to whether misprision of felony is a crime involving moral turpitude); Kelly Knaub, *BIA Wants Input on Whether Cockfighting Is Moral Turpitude*, LAW360 (Feb. 6, 2017), <https://www.law360.com/articles/887731/bia-wants-input-on-whether-cockfighting-is-moral-turpitude> (reporting that the BIA has asked for public comment on whether cockfighting should be considered a CIMT).

69. *Silva-Trevino*, 24 I. & N. Dec. 687, 693 (A.G. 2008), *vacated by* *Silva-Trevino*, 26 I. & N. Dec. 550, 550 (A.G. 2015).

70. Brief for Catholic Charities of Dallas et al., as Amici Curiae Supporting Petitioner, *Silva-Trevino I*, 24 I. & N. Dec. 687 (A.G. 2008), (No. 11-60464) (listing cases from the Supreme Court, circuit courts, and the BIA applying some form of the categorical approach); Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1831 (2013) (finding that adjudicators have used the categorical approach for over a century to assess whether a particular conviction triggers removability).

71. Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 324 (2011). See also Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 993 (2008) (noting that the categorical method prohibits consideration of the underlying circumstances that gave rise to the conviction).

72. Sharpless, *supra* note 71.

73. *Id.*

broken down into two steps: the traditional categorical approach and the modified categorical approach.<sup>74</sup>

### A. Step One: The Traditional Categorical Approach

The first step of the traditional categorical approach considers whether moral turpitude “necessarily inheres” in a conviction under a particular statute.<sup>75</sup> Essentially this step asks if every conviction under the particular statute would involve moral turpitude.<sup>76</sup> After looking to the elements of the statute, if the answer is yes, then every conviction under the statute will be a CIMT with no further inquiry into the specific facts of the conviction. The majority of the circuits split between three tests to determine whether a particular statute necessarily involves moral turpitude: the least-culpable-conduct test, the common-case approach, or the realistic-probability test.<sup>77</sup> The difference between these tests lies in how the court analyzes the underlying criminal statute to determine whether the statute categorically involves moral turpitude.

#### 1. Least-Culpable-Conduct Test

The least-culpable-conduct test asks whether an examination of the statute reveals that even the minimum conduct that could hypothetically permit a conviction necessarily involves moral turpitude.<sup>78</sup> If the least culpable conduct that could sustain a conviction under that statute involves moral turpitude, then the statute is categorically a CIMT.<sup>79</sup> The least-culpable-conduct test in no way considers the actual conduct of the alien.<sup>80</sup> Instead, the courts look for any hypothetical fact pattern that could sustain a conviction under the statute, and if one can be found that does not involve moral turpitude, then the statute is not categorically a CIMT under step one.<sup>81</sup> The Second, Third, Fifth, and Ninth Circuits have

74. Dadhania, *supra* note 71, at 324.

75. *Silva-Trevino I*, 24 I. & N. Dec. at 693. *See also* Dadhania, *supra* note 71, at 326.

76. *See* Sharpless, *supra* note 71, at 993–94 (stating that the categorical approach prohibits consideration of the underlying facts of a conviction, and requires adjudicators to “categorically” determine whether the crime triggers removal).

77. *Silva-Trevino I*, 24 I. & N. Dec. at 693–94; Dadhania, *supra* note 71, at 326.

78. Some courts have referred to this as the “minimum conduct test” but the underlying analysis is essentially the same. *See* *Mendez v. Mukasey*, 547 F.3d 345, 348 (2d Cir. 2008) (“Under the categorical approach, we look only to the minimum criminal conduct necessary to satisfy the essential elements of the crime, not the particular circumstances of the defendant’s conduct.”). This Note will refer to this type of analysis as the least-culpable-conduct test.

79. *E.g.*, *Partyka v. Att’y Gen.*, 417 F.3d 408, 411 (3d Cir. 2005).

80. *Id.* (“Whether an alien’s crime involves moral turpitude is determined by the criminal statute and the record of conviction, not the alien’s conduct.”).

81. *Silva-Trevino I*, 24 I. & N. Dec. at 695.

all adopted this test in some form,<sup>82</sup> although more recently the Ninth Circuit appears to have moved towards the realistic-probability approach.<sup>83</sup> The least-culpable-conduct test has been criticized as potentially underinclusive, allowing aliens to avoid CIMT penalties for crimes that did in fact involve moral turpitude because some hypothetical situation exists where a conviction under the same statute would not involve the same level of moral condemnation.<sup>84</sup>

## 2. Common-Case Approach

In contrast, the common-case approach to step one of the traditional categorical approach looks to whether moral turpitude inheres in the usual or general nature of the statute at issue. The test requires the court to consider whether the common conviction under the statute would involve moral turpitude.<sup>85</sup> The First and Eighth Circuits appear to have both adopted some form of this approach.<sup>86</sup> The common-case approach has been criticized as potentially overinclusive, allowing judges to apply CIMT penalties to aliens whose particular crimes did not actually involve moral turpitude.<sup>87</sup>

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82. *See, e.g., Mendez*, 547 F.3d at 348 (“Under the categorical approach, we look to the minimum criminal conduct necessary to satisfy the essential elements of the crime . . . .”); *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) (“Under the categorical approach, we read the statute at its minimum, taking into account ‘the minimum conduct necessary to sustain a conviction under the statute.’”); *Fernandez–Ruiz v. Gonzales*, 468 F.3d 1159, 1163 (9th Cir. 2006) (“[T]he issue is . . . whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude.” (alteration in original)); *Partyka*, 417 F.3d at 411 (“Under this categorical approach, we read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute.”).

83. *See infra* note 91 and accompanying text.

84. *Silva-Trevino I*, 24 I. & N. Dec. at 695 (“Such an analysis would require a judge to refrain from applying those provisions with respect to criminal offenses that *do* involve moral turpitude if the judge simply hypothesizes some theoretical situation in which the statute *might* be applied to conduct that does not involve moral turpitude.”); *see also* *Marciano v. INS*, 450 F.2d 1022, 1027 (8th Cir. 1971) (Eisele, J., dissenting) (“I cannot believe that Congress intended for [persons who have actually committed crimes involving moral turpitude] to be allowed to remain simply because there might 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.”).

85. *Silva-Trevino I*, 24 I. & N. Dec. at 696.

86. “If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude” then the court may find that the crime categorically involves moral turpitude. *Pino v. Nicolls*, 215 F.2d 237, 245 (1st Cir. 1954), *rev’d on other grounds*, *Pino v. Landon*, 349 U.S. 901 (1955) (*per curiam*); *see* *Marciano v. INS*, 450 F.2d 1022, 1025 (8th Cir. 1971).

87. *See Marciano*, 450 F.3d at 1028 (Eisele, J., dissenting) (“The statute says deportation shall follow *when the crime committed involves moral turpitude*, not when that type of crime ‘commonly’ or ‘usually’ does.”).

### 3. Realistic-Probability Test

In an effort to address the shortcomings of the minimum-conduct and common-case approaches, some circuits have recently adopted the realistic-probability test. The realistic-probability test asks whether moral turpitude necessarily inheres in all cases that have a realistic probability of being prosecuted.<sup>88</sup> The U.S. Supreme Court laid out this test in *Gonzales v. Duenas-Alvarez*,<sup>89</sup> allowing courts to focus on the actual scope of the statute, rather than hypothetical conduct, theoretically addressing over- and under-inclusivity concerns. Although not specifically considering the CIMT question, the Court in *Duenas-Alvarez* addressed how to best determine whether a state conviction warrants secondary immigration consequences. Specifically, the Court stated:

[T]o find that state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct falling outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.<sup>90</sup>

Following *Duenas-Alvarez*, courts adopting the realistic-probability test have required aliens arguing that a statute is not categorically a CIMT to provide evidence of an actual case where the statute at issue was used to prosecute conduct not involving moral turpitude. While the Supreme Court did not specify what evidence could be used to make this showing, the Ninth Circuit has allowed factual evidence of actual convictions, unpublished and non-precedential opinions, statutory language and the logic of published opinions, or some combination thereof to do so.<sup>91</sup>

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88. *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004 (9th Cir. 2008), *overruled on other grounds*, *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009); *Silva-Trevino I*, 24 I. & N. Dec. at 696-97.

89. 549 U.S. 183, 193 (2007). This test was initially adopted in the context of aggravated felonies; however, it has since been applied to the moral-turpitude inquiry. *See Nicanor-Romero*, 523 F.3d at 1004-05.

90. *Duenas-Alvarez*, 549 U.S. at 193.

91. *Nicanor-Romero*, 523 F.3d at 1005.

### B. *Step Two: The Modified Categorical Approach*

If after the step-one analysis a criminal statute is ambiguous as to whether all convictions under it necessarily involve moral turpitude, courts typically proceed to step two, the modified categorical approach.<sup>92</sup> Some circuits have rejected the step-two inquiry entirely, refusing to allow immigration judges to inquire into any specific facts of a case.<sup>93</sup> However, for the majority that do proceed, step two allows the courts to go beyond the mere fact of conviction and examine other information such as the indictment, jury instructions, charging documents, or plea agreements to see if any pertinent information can be added to the moral-turpitude inquiry.<sup>94</sup> There is no one universally accepted definition of what the modified categorical approach allows a court to look at, and the circuits differ as to what kinds of evidence they will consider beyond the language of the statute itself.<sup>95</sup>

Circuits also disagree over *when* a court should proceed to the modified categorical inquiry.<sup>96</sup> Even within the same circuit, there appear to be conflicting opinions as to when a court should consider evidence beyond the statute. In 1999, the First Circuit allowed the immigration court to “refer to the record of conviction, meaning the charge (indictment), plea, verdict, and sentence” in ascertaining exactly what criminal conduct an alien had pled guilty to, even when the statutory language appeared clear.<sup>97</sup> However, just one year later, the First Circuit indicated that the step-two inquiry is only appropriate where “the statute . . . includes both crimes of moral turpitude and others,” signaling that the step-two inquiry is only appropriate if the plain language of the statute is ambiguous.<sup>98</sup> This type of confusion as to the use of the modified categorical inquiry is not unique to the First Circuit.<sup>99</sup>

In considering when to proceed to step two, a majority of courts limit the modified categorical approach to cases where the conviction at issue

92. Dadhania, *supra* note 71, at 324.

93. *See* Rodriguez–Castro v. Gonzales, 427 F.3d 316, 320 (5th Cir. 2005) (ending the moral turpitude inquiry after the step one traditional categorical approach); Rodriguez–Herrera v. INS, 52 F.3d 238, 239 (9th Cir. 1995) (ending the moral turpitude inquiry after the step one traditional categorical approach).

94. *See* Duenas–Alvarez, 549 U.S. at 187.

95. Conteh v. Gonzales, 461 F.3d 45, 54 (1st Cir. 2006).

96. Silva–Trevino I, 24 I. & N. Dec. 687, 694 (A.G. 2008), *vacated by* Silva–Trevino, 26 I. & N. Dec. 550 (A.G. 2015).

97. Maghsoudi v. INS, 181 F.3d 8, 14 (1st Cir. 1999).

98. Montero–Ubri v. INS, 229 F.3d 319, 321 (1st Cir. 2000).

99. *See* Silva–Trevino I, 24 I. & N. Dec. at 694 (“The circumstances under which courts that permit a second-stage inquiry will allow that inquiry to proceed, and the facts they will consider in such an inquiry, also vary widely.”).

is based on a divisible statute.<sup>100</sup> Where a statute is structured in outline form with multiple subsections, it may be necessary to proceed beyond a pure categorical inquiry.<sup>101</sup> The majority of courts limit the second-step inquiry to this narrow purpose of ascertaining under what portion of a statute an alien was convicted.<sup>102</sup> When an alien is convicted under a consolidated statute, a theft statute for example,<sup>103</sup> it becomes necessary for the factfinder to look beyond the plain language of the statute, which contains both CIMTs and non-CIMTs, to determine whether further immigration penalties are warranted by the relevant subsection the alien was actually convicted under. Failing to conduct the second-step inquiry in these instances would likely result in underinclusiveness of CIMT penalties, contrary to Congress's intent.

### III. ATTORNEY GENERAL MUKASEY'S FAILED ATTEMPT TO STANDARDIZE

After surveying the various circuit approaches to the CIMT inquiry, what is left is “a patchwork application of the law—with the most profound decisions affecting aliens . . . tied to the mere happenstance of where their cases arise geographically.”<sup>104</sup> This inconsistency is directly contrary to the much-emphasized goal of national uniformity of federal law.<sup>105</sup> And perhaps, at its worst, it runs contrary to the United States

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100. See *Jean-Louis v. Att’y Gen.*, 582 F.3d 462, 471 (3d Cir. 2009) (“[W]e departed from a strict categorical analysis only where the statute of conviction featured disjunctive variations . . . .”); *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) (considering the record of conviction only if the statute of conviction is divisible into multiple subsections); *Singh v. Ashcroft*, 383 F.3d 144, 162 (3d Cir. 2004).

101. *Singh*, 383 F.3d at 162. This additional step seems to better reflect the probable intent of Congress because “it would seem strange to think that Congress intended the application of the categorical approach to turn on the typography used by the statute’s drafters.” *Id.* at 163.

102. *Dadhania*, *supra* note 71, at 331. See, e.g., *Carty v. Ashcroft*, 395 F.3d 1081, 1184 (9th Cir. 2005) (“When a statute is divisible into several crimes, some of which may involve moral turpitude and some not, it is appropriate to examine the ‘record of conviction’ to determine which part applies to the defendant.”); *United States v. Martinez–Hernandez*, 422 F.3d 1084, 1086 (10th Cir. 2005) (“When the underlying statute reaches a broad range of conduct, some of which merits an enhancement and some of which does not, courts resolve the resulting ambiguity by consulting reliable judicial records, such as charging document, plea agreement, or plea colloquy.”).

103. Practically every state has consolidated all common law theft crimes under one unified crime, demonstrating the prevalence of consolidated criminal statutes. See, e.g., CAL. PENAL CODE §§ 484, 490(a) (West 2017); FLA. STAT. § 812.014(1)(a)–(b) (2016); N.Y. PENAL LAW § 155.05(2)(a)–(d) (McKinney 2016); TEX. PENAL CODE ANN. § 31.03(a), (b)(1)–(3) (West 2016).

104. *Cerna*, 20 I. & N. Dec. 399, 408 (B.I.A.), *superseded by regulation on other grounds as stated in* *Sadighi v. Lynch*, 670 F. App’x 446 (9th Cir. 2016).

105. See, e.g., *Cazarez–Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004) (emphasizing the importance of national uniformity in immigration law).

Constitution, which provides that “Congress shall have Power To . . . establish an *uniform* Rule of Naturalization.”<sup>106</sup>

### A. *Silva-Trevino* 3-Step Approach

In an attempt to provide guidance and consistency to this “fractured approach,” in 2008, Attorney General Michael Mukasey articulated a new framework to be applied by all courts.<sup>107</sup> In *Silva-Trevino I* the Attorney General laid out a three-step test for determining whether a crime is a CIMT.<sup>108</sup> Some regarded this new test as drastically departing from firmly established law in this area.<sup>109</sup>

In *Silva-Trevino I* the alien was a native and citizen of Mexico who was admitted to the United States as a lawful permanent resident in 1962.<sup>110</sup> The alien entered a plea of no contest to the criminal offense of indecency with a child.<sup>111</sup> The following year the Department of Homeland Security initiated removal proceedings against the alien.<sup>112</sup> The alien requested discretionary relief from removal, which required that he have no CIMT convictions.<sup>113</sup> He argued that his conviction for indecency with a child should not be considered a CIMT because the relevant statute did not require “that a person have knowledge that the individual with whom the perpetrator has sexual contact is a child” and thus allowed for convictions where the perpetrator lacked the requisite intent for a crime involving moral turpitude.<sup>114</sup>

The Attorney General began his analysis of the case with the statutory text of the INA.<sup>115</sup> Section 212(a)(2)(A)(i)(I), defining admissibility, provides that “any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political

106. U.S. CONST. art. 1, § 8 (emphasis added).

107. *Silva-Trevino I*, 24 I. & N. Dec. 687, 695 (A.G. 2008), *vacated by* *Silva-Trevino*, 26 I. & N. Dec. 550 (A.G. 2015).

108. *Id.* at 708.

109. Dadhania, *supra* note 71, at 314.

110. *Silvia-Trevino I*, 24 I. & N. Dec. at 690.

111. *Id.*

112. *Id.* at 691. This timeline reflects the typical process leading up to removal proceedings following a criminal conviction. Law enforcement agencies throughout the country participate in joint programs with immigration officials, where law enforcement refers cases to immigration officials when they become aware that they have arrested an undocumented alien. See FED’N FOR AM. IMMIGRATION REFORM, THE ROLE OF STATE & LOCAL ENFORCEMENT IN IMMIGRATION MATTERS AND REASONS TO RESIST SANCTUARY POLICIES, 1–2 (2016), [http://www.fairus.org/DocServer/state\\_local/IssueBrief\\_Cooperation\\_and\\_Anti-SanctuaryPolicy.pdf](http://www.fairus.org/DocServer/state_local/IssueBrief_Cooperation_and_Anti-SanctuaryPolicy.pdf).

113. *Silvia-Trevino I*, 24 I. & N. Dec. at 691.

114. *Id.*

115. *Id.* at 692.

offense) or an attempt or conspiracy to commit such a crime” is inadmissible.<sup>116</sup> In what appears to be an effort to head off challenges under the *Chevron* doctrine, the Attorney General stated:

The statute does not define the term “crime involving moral turpitude.” It is also silent on the precise method that immigration judges and courts should use to determine if a prior conviction is for a crime involving moral turpitude. To the extent it suggests a method, the text actually cuts in different directions. Some statutory language—for example, use of the phrase “convicted of” rather than “committed”—suggests that the relevant inquiry should be categorical and focus on whether moral turpitude inheres in the statutory elements required for conviction rather than in the particularized facts of the alien’s crime. Other language—for example, use of the word “involving” and the reference in section 212(a)(2)(A)(i)(I) to aliens who admit “committing” certain “acts”—seems to call for, or at least allow, inquiry into the particularized facts of the crime.<sup>117</sup>

Addressing the ambiguity of the statutory text, the Attorney General noted that courts have long begun the moral turpitude inquiry with some form of “categorical” test, although no one preferred methodology has been adopted across the circuits.<sup>118</sup> The Attorney General found that there was even more confusion among the circuits in what, if anything, followed the categorical inquiry.<sup>119</sup> Concerned with the “patchwork” approach among the different circuits and noting the fundamental effects immigration laws have on individuals, the Attorney General articulated a new three-prong approach to determine whether a crime is a CIMT, in hopes of promulgating consistency across the courts.<sup>120</sup>

The Attorney General held that the first step of the moral-turpitude inquiry requires a categorical review of the statute of conviction to determine whether there is a “realistic probability” that the state or federal criminal statute at issue could ever be applied to reach conduct that does not involve moral turpitude.<sup>121</sup> If there is no realistic probability that the statute would ever catch conduct not involving moral turpitude, then any conviction under the statute is necessarily a CIMT and the inquiry ends.<sup>122</sup> In adopting the realistic-probability approach to the categorical

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116. *Id.*

117. *Id.* at 693 (citations omitted).

118. *Id.*

119. *Id.* at 694.

120. *Id.*

121. *Id.* at 698.

122. *See id.*

inquiry, the Attorney General rejected the least-culpable-conduct test used by the Third and Fifth Circuits and the common-case approach used by the First and Eighth Circuits.<sup>123</sup>

If the categorical inquiry does not resolve the issue, the Attorney General directed that the courts should engage in a modified categorical inquiry and examine the record of conviction, jury instructions, a signed guilty plea, and the plea transcript to see if any such documents support a conclusive finding that the conduct underlying the alien's conviction involved moral turpitude.<sup>124</sup> The Attorney General reasoned that the traditional categorical approach was poorly equipped to resolve cases where the statute of conviction encompasses both conduct that involves moral turpitude and conduct that does not.<sup>125</sup> The Attorney General explicitly stated that adjudicators should engage in such a second-stage inquiry when necessary, signaling to circuit courts which had previously refused to go beyond the first step to adjust their approach accordingly.<sup>126</sup>

Last, if the record of conviction proves inconclusive, the Attorney General directed courts to consider any additional evidence deemed necessary and appropriate to accurately resolve the moral-turpitude question.<sup>127</sup> The Attorney General emphasized that the third step need not be a burdensome inquiry, noting that questioning the alien about his knowledge and intent at the time of the crime might be sufficient.<sup>128</sup> This addition of a third step was a dramatic change in long established, yet inconsistent, moral-turpitude jurisprudence.<sup>129</sup> Commentators have gone so far as to describe the new framework as “eviscerat[ing] the categorical nature of the CIMT inquiry.”<sup>130</sup>

### B. *Post-Silva-Trevino I Discord*

*Silva-Trevino I* elicited varied responses. Contrary to goals of unity, federal circuit courts split on whether to follow the decision of the Attorney General or to continue applying their own established common law tests. Two circuits fully accepted *Silva-Trevino I*'s three-step framework.<sup>131</sup> Both the Seventh and Eighth Circuits rejected the formalistic approach taken by their sister circuits, and permitted

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123. *Id.* at 693–94.

124. *Id.* at 698–99.

125. *Id.* at 698.

126. *See id.*

127. *Id.* at 699.

128. *Id.* at 709.

129. *See supra* Part II (excluding any mention of a third step in the CIMT inquiry).

130. Dadhania, *supra* note 71, at 314.

131. *See Sanchez v. Holder*, 757 F.3d 712, 720 (7th Cir. 2014); *Bobadilla v. Holder*, 679 F.3d 1052, 1059 (8th Cir. 2012).

consideration of evidence under step three of *Silva-Trevino I*.<sup>132</sup> However, neither court detailed its reasoning for following the new procedure.<sup>133</sup> Some circuits never considered whether to adopt the *Silva-Trevino I* three-step approach.<sup>134</sup> The Third,<sup>135</sup> Fourth,<sup>136</sup> and Fifth<sup>137</sup> Circuits refused to apply the entire approach. Other circuits, such as the Eleventh, chose to follow *Silva-Trevino I* only to a limited extent by adopting the realistic-probability test as the first step in the categorical inquiry.<sup>138</sup>

### C. Chevron Rejection of *Silva-Trevino I*

In 2009, the Third Circuit was the first to decline to follow the three-step approach articulated in *Silva-Trevino I*.<sup>139</sup> In *Jean-Louis v. Attorney General*,<sup>140</sup> the Third Circuit concluded that they were not bound by *Silva-Trevino I* because “it is bottomed on an impermissible reading of the statute, which, we believe, speaks with requisite clarity. The ambiguity that the Attorney General perceives in the INA is an ambiguity of his own making, not grounded in the text of the statute.”<sup>141</sup> The court went on to meticulously describe the inconsistencies between the Attorney General’s three-step approach and over a century of moral-turpitude jurisprudence.<sup>142</sup> The Third Circuit cited *Chevron U.S.A. v. Natural Resources Defense Council*<sup>143</sup> multiple times; however, the court did not go through an in-depth *Chevron* analysis, instead relying on years of precedent to reject *Silva-Trevino I*.<sup>144</sup>

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132. See *Sanchez*, 757 F.3d at 720; *Bobadilla*, 679 F.3d at 1056; *Mata-Guerro v. Holder*, 627 F.3d 256, 260 (7th Cir. 2010).

133. *Sanchez*, 757 F.3d at 720 (remanding for application of the three-step framework); *Bobadilla*, 679 F.3d at 1056 (remanding for application of the three-step framework).

134. See *Dadhania*, *supra* note 71, at 340.

135. *Jean-Louis v. Att’y Gen.*, 582 F.3d 462, 470 (3d Cir. 2009) (“We conclude that deference is not owed *Silva-Trevino*’s novel approach and thus will apply our established methodology.”).

136. See *Prudencio v. Holder*, 669 F.3d 472, 482 (4th Cir. 2012) (“Thus in a case such as the present one in which the only issue is the alien’s prior conviction, the statute unambiguously directs that an adjudicator consider only the conviction itself, and not any underlying conduct.”).

137. *Silva-Trevino v. Holder*, 742 F.3d 197, 200 (5th Cir. 2014) (rejecting the use of a third step in the CIMT inquiry).

138. *Destin v. U.S. Att’y Gen.*, 345 F. App’x 485, 487 (11th Cir. 2009) (not reported). However, the Eleventh Circuit eventually joined its sister circuits by rejecting the Attorney General’s third step. See *Fajardo v. Att’y Gen.*, 659 F.3d 1303, 1310 (11th Cir. 2011).

139. *Jean-Louis*, 582 F.3d at 473.

140. *Id.*

141. *Id.*

142. *Id.*

143. 467 U.S. 837 (1984).

144. *Jean-Louis*, 582 F.3d at 473–74.

In 2012, the Fourth Circuit rejected the *Silva-Trevino I* three-step approach as an unauthorized exercise of the Attorney General's power, this time explicitly under the *Chevron* doctrine.<sup>145</sup> Using a separation-of-powers argument, the Fourth Circuit found that it was not bound by the Attorney General's interpretation of the appropriate test for CIMT inquiries.<sup>146</sup> To understand the rejection of *Silva-Trevino I*, one must remember that federal immigration agencies and immigration courts are part of the "fourth branch of government," and therefore subject to the *Chevron* doctrine, a pillar of administrative law.

In *Chevron* the Supreme Court established the framework for judicial review of administrative agencies' interpretation of statutes.<sup>147</sup> When determining whether the courts must accord substantial deference to an agency's interpretation of the statute it administers, the first step under *Chevron* is to consider whether "Congress has directly spoken to the precise question at issue."<sup>148</sup> If, using traditional tools of statutory construction, the court determines that Congress clearly addressed the precise question at issue, then Congress's clear intention must be given effect and no deference is given the agency's interpretation.<sup>149</sup> If the statute is ambiguous or silent regarding the precise question, then the court proceeds to step two.<sup>150</sup> Step two of the *Chevron* analysis directs courts to defer to an agency's interpretation of a statute where it is reasonable.<sup>151</sup>

In applying *Chevron* to *Silva-Trevino I*, the Fourth Circuit first had to overcome its own precedent, *Yousefi v. U.S. INS*.<sup>152</sup> In *Yousefi*, the Fourth Circuit held that it should defer to the DHS's determinations regarding what type of conduct involved moral turpitude because Congress chose not to define moral turpitude in the governing statute.<sup>153</sup> This holding, on its face, seems to indicate that under *Chevron* step one, the statute is ambiguous as to the meaning of CIMT, and therefore any reasonable interpretation by the agency should be given deference by the courts. In rejecting *Silva-Trevino I*, the Fourth Circuit skirted this issue by reframing the *Chevron* issue as not what conduct involves moral turpitude under the statute, "but rather what language in the statute informs an

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145. *Prudencio v. Holder*, 669 F.3d 472, 476 (4th Cir. 2012).

146. *Id.*

147. *Chevron*, 467 U.S. at 842.

148. *Id.*

149. *Id.* at 842–43.

150. *Id.* at 843.

151. *Id.*

152. 260 F.3d 318 (4th Cir. 2001).

153. *Id.* at 326.

adjudicator of the procedure for determining whether a particular conviction qualifies as a crime involving moral turpitude.”<sup>154</sup>

After artfully distinguishing precedent and framing the issue, the Fourth Circuit applied step one of *Chevron* and considered whether the moral-turpitude statute clearly indicated the process for determining whether a particular conviction is a CIMT.<sup>155</sup> In analyzing the plain language of the statute, the Fourth Circuit disagreed with the Attorney General’s interpretation in *Silva-Trevino I*.<sup>156</sup> The Fourth Circuit distinguished procedure from substance and noted that the issue under the *Chevron* doctrine is not what statutory offense qualifies as a crime involving moral turpitude, but rather what language in the statute informs courts of the procedure that should be used in the moral turpitude inquiry.<sup>157</sup> Breaking down the language of the statute, the Fourth Circuit concluded that the plain language of the statute was not ambiguous as to procedure:

Because the relevant statutory language refers only to convictions, not to conduct or to “committing” acts, there is no uncertainty in the statutory language created by the use of the phrase “convicted of” in the same statute as the words “committing” and “involving.” Thus, in such a case as the present one in which the only issue is the alien’s prior conviction, the statute unambiguously directs that an adjudicator consider only the conviction itself, and not any underlying conduct.<sup>158</sup>

Finding the plain language unambiguous, the Fourth Circuit concluded that the Congress’s clear intent controlled the procedure of the moral turpitude inquiry and therefore the *Silva-Trevino I* three-step framework was not binding.<sup>159</sup>

After rejecting *Silva-Trevino I*, the Fourth Circuit went on to discuss why the third step of the Attorney General’s framework was so concerning.<sup>160</sup> The court reasoned that allowing documents of questionable veracity as proof of an alien’s conduct could be problematic

154. *Prudencio*, 669 F.3d at 480.

155. *Id.*

156. *Id.* at 481.

157. *Id.* at 480 (emphasizing the distinction between ambiguity in procedure of the moral turpitude inquiry versus ambiguity inherent in the phrase crime involving moral turpitude).

158. *Id.* at 482.

159. *Id.* at 484. Similarly, famed Judge Posner has long voiced his skepticism that the BIA is owed any *Chevron* deference on the definition of moral turpitude, because the BIA has never actually defined the term nor molded a definition toward any policy aims in the INA. *Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004).

160. *Prudencio*, 669 F.3d at 483.

and, further, that documents from early in an investigation do not always properly account for later events.<sup>161</sup> These concerns have been echoed in court opinions and scholarly discussions across the country.<sup>162</sup>

Other circuits soon followed in rejecting *Silva-Trevino I* under a *Chevron* analysis, including the Fifth,<sup>163</sup> Ninth,<sup>164</sup> and Eleventh Circuits.<sup>165</sup> In *Olivas–Motta v. Holder*,<sup>166</sup> the Ninth Circuit declined to follow *Silva-Trevino I*, noting three critical points where the court disagreed with the Attorney General’s reasoning.<sup>167</sup> Citing to *Prudencio*, the Ninth Circuit agreed that the Attorney General conflated substantive ambiguity for procedural ambiguity and concluded that the statute unambiguously only allowed for consideration of the record of conviction, not the specific acts that the alien may have committed.<sup>168</sup> In *Olivas–Motta*, the Ninth Circuit also joined the Third, Fourth, and Eleventh Circuits in finding that a “crime involving moral turpitude” is a generic crime whose description is complete unto itself, such that “involving moral turpitude” is an element of the crime.<sup>169</sup> And because it is an element of the generic crime, immigration courts are limited to the record of conviction in determining whether an alien has been “convicted” of a CIMT.<sup>170</sup> To try and put it more simply, the court, following its sister circuits, took a formalistic approach to statutory construction, reasoning that the word “conviction” clearly indicates Congress’s intent as to the procedure for finding a CIMT, and finding the subsequent word “involving” to be only an element of a generic crime, not enough to open the door to an argument that Congress’s intent in

161. *Id.* at 483–84.

162. See *Jean–Louis v. Att’y Gen.*, 582 F.3d 462, 476 (3d Cir. 2009) (“[T]he practical evidentiary difficulties and potential unfairness associated with looking behind [an alien’s] offense of conviction [are] no less daunting in the immigration [context] than in the sentencing context.” (second and fourth alteration in original) (quoting *Dulal–Whiteway v. United States*, 501 F.3d 116, 126 (2d Cir. 2007)); *Dadhania*, *supra* note 71, at 353 (calling for the rejection of *Silva-Trevino I*’s third step as an impermissible reading of the statute that will lead to an increase in unfairness, inconsistency, and inefficiency in application of CIMT provisions).

163. See *Silva-Trevino v. Holder*, 742 F.3d 197, 200 (5th Cir. 2014) (rejecting the Attorney General’s three-step process as impermissible under *Chevron*).

164. *Olivas–Motta v. Holder*, 746 F.3d 907, 916 (9th Cir. 2013).

165. See *Fajardo v. Att’y Gen.*, 659 F.3d 1303, 1310 (11th Cir. 2011). While not as explicit about which categorical approach it utilizes, the court clearly limits inquiry outside the plain language of the statute to the charging document, plea, verdict, and sentence. *Id.*

166. 746 F.3d at 907.

167. *Id.* at 911 (disagreeing with the Attorney General’s definitions of “crime involving moral turpitude” and “convicted of” and the conclusion that “moral turpitude” is not an element of “an offense”).

168. *Id.* at 916.

169. *Id.*

170. *Id.*

using “conviction” was ambiguous. Therefore, the consideration of evidence outside the conviction record under step three of the *Silva-Trevino I* framework is impermissible as inconsistent with Congress’s clear intent.<sup>171</sup>

#### IV. CURRENT STATE OF THE CIMT INQUIRY

On April 10, 2015, after five circuits rejected the three-step approach, Attorney General Eric Holder vacated the opinion in *Silva-Trevino I*, and directed the BIA to address in appropriate cases how “adjudicators are to determine whether a particular criminal offense is a crime involving moral turpitude” under the INA.<sup>172</sup> Acknowledging that five circuits had declined to follow *Silva-Trevino I* on the basis of an impermissible reading of the INA, the Attorney General found that *Silva-Trevino I* had not “accomplished its stated goal” of providing uniformity to the moral-turpitude inquiry.<sup>173</sup> The Attorney General also noted that several recent Supreme Court decisions might bear on the moral-turpitude inquiry, “cast[ing] doubt on the continued validity of the third step of the framework.”<sup>174</sup> Specifically, Holder cited *Carachuri-Rosendo v. Holder*<sup>175</sup> and *Moncrieffe v. Holder*,<sup>176</sup> two Supreme Court decisions rejecting the use of the fact-based approach in determining whether a particular conviction was an aggravated felony.<sup>177</sup>

The BIA has yet to act on Holder’s instruction, “leaving a vacuum of authority” on how courts should determine whether a crime is a CIMT.<sup>178</sup> Since Holder’s vacatur, the BIA has issued only one opinion addressing the issue of CIMTs; however, instead of articulating a clear procedure for

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171. *Id.*

172. *Silva-Trevino*, 26 I. & N. Dec. 550, 553 (A.G. 2015).

173. *Id.* at 552.

174. *Id.* at 552–53.

175. 560 U.S. 563 (2010). The Court in *Carachuri-Rosendo* held that where an alien could have been convicted as a recidivist for a second offense, a felony, but was instead charged with simple possession, the alien has not been convicted of an aggravated felony for the purposes of the INA. *Id.* at 582.

176. 133 S. Ct. 1678 (2013). Here, the Court applied the categorical approach to determine whether a convicted qualified as an “aggravated felony under the INA,” and noting that the underlying facts of the crime were not to be examined). *Id.* at 1684.

177. *See Moncrieffe*, 133 S. Ct. at 1691–92 (rejecting a circumstance-specific analysis of a conviction for the purpose of determining if the conviction is an aggravated felony under the INA); *Carachuri-Rosendo*, 560 U.S. at 581–82 (holding that courts cannot consider uncharged conduct when determining whether an alien is convicted of an aggravated felony under the INA).

178. *Arias v. Lynch*, 834 F.3d 823, 830 (7th Cir. 2016).

the CIMT inquiry, the BIA simply applied an old favorite—step one of the categorical approach.<sup>179</sup>

## V. PROPOSED APPROACH

In light of the inconsistencies of the CIMT inquiry, this Note proposes that the BIA follow Attorney General Holder’s instruction and articulate one clear approach for how to determine whether a conviction qualifies as a CIMT.<sup>180</sup> Although it failed, the attempt in *Silva-Trevino I* to promulgate consistency across the circuits was a step in the right direction for this often-neglected area of law. This Note suggests that the BIA adopt the realistic-probability approach<sup>181</sup> as step one of the traditional categorical inquiry, mandate a step-two modified categorical inquiry where the realistic-probability approach is ambiguous or the underlying statute of conviction is divisible, and reject the use of any extraneous evidence to prove moral turpitude outside of the conviction record.

It is clear from the circuit’s rejection of *Silva-Trevino I* that what the courts took issue with was the addition of an unprecedented third step allowing immigration judges to consider additional evidence outside the conviction record. Concerns that proof of questionable veracity would be allowed in under such a step are not unfounded. Because the rules of evidence do not apply in immigration court, aliens and their lawyers would lack the safeguards necessary to protect against such a broad inquiry.<sup>182</sup> Thus, moving forward, any standardized CIMT inquiry should similarly reject consideration of evidence outside the conviction record as inconsistent with Congress’s intent.

The BIA should adopt the realistic-probability test as step one of the traditional categorical approach. This test addresses over- and under-inclusiveness concerns and best comports with recent Supreme Court precedent.<sup>183</sup> Although not decided in the CIMT context, *Duenas-Alvarez*

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179. Moses, No. A206-352-760, 2015 WL 4537073, at \*2 (B.I.A. June 10, 2015) (“To determine whether an offense constitutes a crime involving moral turpitude, we apply a categorical approach.”).

180. Should the BIA fail to articulate a framework in this area of great national importance, the Supreme Court should intervene to provide the necessary clarity. See *Jian Hui Shao v. BIA*, 465 F.3d 497, 502 (2d Cir. 2006) (“[O]nly a precedential decision by the [Board]—or the Supreme Court of the United States—can ensure the uniformity that seems to us especially desirable in [asylum] cases such as these.”).

181. See *supra* Subsection II.A.3.

182. See *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005) (noting that the rules of evidence are not applicable in immigration court, and that constitutional and statutory due process provide some minimal due process protections).

183. See *Gonzales v. Duenas-Alveras*, 549 U.S. 183, 193 (2007) (establishing the realistic-probability test as the appropriate standard for determining whether a crime is an aggravated felony under the INA).

considered whether a conviction under a California theft statute constituted a “theft offense” under the INA.<sup>184</sup> The underlying question resembles the one here, how to determine whether a particular state statute falls within a general category of offenses described under federal immigration law. The Attorney General’s rationale for adopting the realistic probability test in *Silva-Trevino I* was both simple and persuasive—“immigration penalties ought to be based on criminal laws as they are actually applied.”<sup>185</sup> This approach avoids the glaring pitfalls of both the least-culpable-conduct test and the common-case approach, and is best able to reconcile the goal of CIMT laws with the growing complexity of state penal codes.

Where the plain language of the statute under the traditional categorical inquiry is ambiguous, the BIA should direct courts to proceed to the modified categorical inquiry. Where a statute is divisible and contains both conduct that is a CIMT and is not a CIMT, it will always be necessary to proceed to this step. In rejecting *Silva-Trevino I*, the circuits applied traditional tools of statutory interpretation, concluding that Congress’s clear intent was that courts focus only on the *conviction* when determining whether a crime is a CIMT.<sup>186</sup> As such, an alien’s record of conviction is a valid source of information when conducting a CIMT inquiry.<sup>187</sup> Although conviction records will not literally reference moral turpitude, they will generally include the elements of the charged offense, at which point adjudicators may apply CIMT case law to determine whether those elements include moral turpitude.

The modified categorical inquiry also comports with Supreme Court precedent. The proper methodology for categorizing convictions has previously been addressed by the Supreme Court in the context of criminal sentencing enhancement based on recidivism. In *Taylor v. United States*,<sup>188</sup> the Supreme Court established a uniform standard for determining whether a prior conviction falls within a category that can serve as the predicate for enhanced sentencing.<sup>189</sup> Fifteen years later, in *Shepard v. United States*,<sup>190</sup> the Court held that facts contained in the record of conviction from a non-jury trial were also relevant to sentencing

184. *Id.* at 185.

185. *Silva-Trevino I*, 24 I. & N. Dec. 687, 698 (A.G. 2008), *vacated by Silva-Trevino*, 26 I. & N. Dec. 550 (A.G. 2015).

186. *See supra* Section III.C.

187. *See Prudencio v. Holder*, 669 F.3d 472, 482 (4th Cir. 2012) (“Thus, in a case . . . in which the only issue is the alien’s prior conviction, the statute unambiguously directs that an adjudicator consider only the conviction itself, and not any underlying conduct.”).

188. 495 U.S. 575 (1990).

189. *Id.* at 602.

190. 544 U.S. 13 (2005).

enhancement where the plain language was ambiguous.<sup>191</sup> In these cases, the Court approved of a process of categorization beginning with a categorical approach, looking only to the plain language of the statute to determine whether a specific offense substantially corresponds to the generic definition at issue.<sup>192</sup> Where the plain language was ambiguous as to whether a specific conviction corresponded, the Court approved the consideration of specific facts found in the record of conviction.<sup>193</sup>

In *Duenas-Alvarez*, the Supreme Court explicitly applied this categorization framework in the immigration context, employing *Taylor's* categorical approach and stating that the modified categorical approach should be used where necessary.<sup>194</sup> Based on these holdings, the BIA should specify that adjudicators are only to proceed to the modified categorical approach when the plain language of the statute is ambiguous as to whether the statute is always a CIMT. Under this rule, convictions under a divisible statute would always require consideration of the record of conviction, and the door would remain open for a situation where a non-divisible statute is nonetheless ambiguous and requires consideration of the record of conviction. Adoption of the realistic-probability test for the traditional categorical approach, and use of the modified categorical approach only when the plain language of a statute so dictates, best comports with both Supreme Court precedent and Congress's intent, and therefore should be adopted by the BIA in an effort to standardize the CIMT inquiry.

## CONCLUSION

Undocumented aliens are a vulnerable population who often come to the United States without the resources or language skills necessary to navigate the complex American legal system.<sup>195</sup> Aliens currently do not have a constitutional right to a government-funded lawyer in immigration proceedings,<sup>196</sup> and can be easy targets for people looking to profit off of

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191. *Id.* at 16.

192. *Taylor*, 495 U.S. at 602.

193. *Shepard*, 544 U.S. at 16; *Taylor*, 495 U.S. at 602.

194. *Gonzales v. Duenas-Alveras*, 549 U.S. 183, 187 (2007).

195. See U.S. CENSUS BUREAU, SPEAKING ENGLISH, ENGLISH-SPEAKING ABILITY OF THE FOREIGN-BORN POPULATION BY WORLD REGION OF BIRTH: 2012 (2012), [http://www.census.gov/content/dam/Census/newsroom/releases/2014/cb14-105\\_englishspeakingability\\_graphic.pdf](http://www.census.gov/content/dam/Census/newsroom/releases/2014/cb14-105_englishspeakingability_graphic.pdf) (finding that fifty percent of the total foreign born population above five years old spoke English less than "very well").

196. KATIE M. MANUEL, CONG. RESEARCH SERV., R43613, ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF (2016), <http://trac.syr.edu/immigration/library/P11612.pdf>.

the immigration process.<sup>197</sup> President Trump has made clear that he intends to prioritize the removal of all aliens with criminal records, with no indication of exceptions for minor convictions.<sup>198</sup> Because the INA frequently conditions the grant of immigration relief on an applicant having no prior CIMA convictions, it is more important than ever that we address the continued inconsistencies found in CIMA jurisprudence. “[F]amously ambiguous,”<sup>199</sup> even where the Constitution plainly calls for uniformity,<sup>200</sup> adoption of a uniform CIMA inquiry would provide much-needed guidance to courts, lawyers, and aliens. Where the stakes are at their highest, special attention should be paid to ensure consistent and equitable administration of the law, regardless of immigration status.

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197. See *USCIS Initiative to Combat the Unauthorized Practice of Immigration Law*, BEACON: OFFICIAL BLOG OF USCIS (June 9, 2011), <http://blog.uscis.gov/2011/06/uscis-initiative-to-combat-unauthorized.html>.

198. See *supra* notes 32–33 and accompanying text.

199. *Olivas–Motta v. Holder*, 746 F.3d 907, 911 (9th Cir. 2013).

200. U.S. CONST. art. 1, § 8.