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Deportation and Depravity: Does Failure to Register as a Sex Offender Involve Moral Turpitude?

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Deportation and Depravity: Does Failure to Register as a Sex Offender Involve Moral Turpitude?

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Abstract

Under U.S. immigration law, non-citizens are subject to deportation following certain criminal convictions. One deportation category is for "crimes involving moral turpitude," or CIMTs. This category usually refers to crimes that involve fraud or actions seen as particularly depraved. For example, tax evasion and spousal abuse are CIMTs, but simple assault generally is not. For a crime to qualify as a CIMT, it must include depraved conduct and some level of intent.

The CIMT framework has been criticized for a variety of reasons. Not only is it defined ambiguously with outdated language, but the moral values it enshrines can sometimes seem antiquated. The framework also leads to inconsistent results. This is partly because courts make CIMT determinations using the categorical approach, which is as confusing as it is controversial. In addition, the standard may allow for arbitrary and potentially discriminatory decisions by immigration adjudicators.

This Note evaluates a CIMT determination that the Eighth Circuit recently upheld. There, the court agreed that failure to register as a sex offender involves moral turpitude. This Note

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argues that the Eighth Circuit applied the categorical approach incorrectly and relied on an outdated case that should be overturned. A violation of Minnesota's sex offender registration law lacks the requisite depravity and intent to be a CIMT. Further, this Note contends that the moral turpitude standard creates too many problems and should be abandoned in immigration law.

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INTRODUCTION

In the twentieth century, the United States sustained a fundamental shift—from race-based to crime-based immigration controls. Until 1965, all of the United States's immigration laws had explicitly taken race into account.[1] Racism and nativism motivated the earliest immigration controls imposed by Congress and the Executive, and whiteness was a key criterion for determining whether an individual was

1. *See* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A Magic Mirror into the Heart of Darkness*, 73 IND. L.J. 1111, 1119–31 (1998) (discussing exclusionary immigration laws based on race). In addition to its impact on immigration law, racism also informed the regulation of citizenship, starting with the Naturalization Act of 1790, which limited naturalization to "free white person[s] . . . of good character." Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790) (repealed 1795).

fit to enter and stay in the country.[2] Race was not the only standard for determining whether immigrants were desirable, of course—historic immigration laws also discriminated based on disability status, socioeconomic class, and sexual orientation, just to name a few.[3]

But then, sweeping reform came. In 1965, at the height of the Civil Rights movement, Congress passed the Hart-Celler Act.[4] The Act still limited the immigration flow from each foreign country, but it admitted individuals from all over the globe, rather than limiting admission mostly to immigrants from Western Europe.[5] The Hart-Celler Act drastically changed the face of immigration law, and it also had a profound impact on the racial makeup of the United States population.[6]

However, as demographics continued to change, fears of increased crime and terrorism stoked a new change in immigration—towards crime-based enforcement.[7] Two significant pieces of federal legislation, the Antiterrorism and Effective Death Penalty Act of 1996[8] (AEDPA) and the Illegal

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2. *See, e.g.*, Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 69–70 (1999) (analyzing the national origins immigration system and its role in constructing a white race in America).

3. *See* Immigration Act of 1882, ch. 376, 22 Stat. 214 (1882) (excluding "convict[s], lunatic[s], idiot[s], or any person unable to take care of himself or herself without becoming a public charge"); Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118, 119 (1967) (finding a non-citizen deportable because his homosexuality implied that he was afflicted with "psychopathic personality," a removable category under the Immigration and Nationality Act).

4. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

5. *See* Muzaffar Chishti et al., *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POL'Y INST. (Oct. 15, 2015), https://perma.cc/V9BJ-9YVF (describing the repeal of the national origins quota and introduction of the family-preference immigration system).

6. *See id.* (discussing the unintended consequences of the law, including the significant increases in immigration from Latin America and Asia).

7. *See* Terry Coonan, *Dolphins Caught in Congressional Fishnets–Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 600 (1998) (describing the push for legislation punishing and deterring terrorism that followed the Oklahoma City bombing).

8. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Immigration Reform and Immigrant Responsibility Act of 1996[9] (IIRIRA), greatly increased the immigration consequences for criminal offenses.[10] Today, non-citizens must navigate a tangled web of criminal and immigration penalties.

Scholars have come to refer to the convergence of criminal and immigration law as "crimmigration."[11] The framework emphasizes that "[c]rime control and migration control have become so intertwined that they have ceased to be distinct processes or to target distinct acts."[12] Criminal law has reshaped immigration law such that harsher punishments result for immigrants and criminal law enforcement is deputized to enforce immigration law.[13] This raises proportionality issues.[14] Citizens who run afoul of the law risk only criminal punishment, but non-citizens with the same convictions face a second potential punishment—banishment by deportation.[15]

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9. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

10. *See* Coonan, *supra* note 7, at 590 (commenting on how the creation of the term "aggravated felony" broadened the bases of deportability through its application to increasingly minor offenses).

11. *See* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2013) (identifying the framework of crimmigration law).

12. *Id.* at 1459.

13. *See* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 135–36 (2009) (distinguishing major trends arising out of the convergence of criminal and immigration law).

14. *See* Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 144 (2012) ("[P]ermanent banishment from the United States as a result of minor criminal law contact offends similar principles regarding proportionality as does the banishment of U.S. citizens or lawful permanent residents.").

15. *See* Aaron S. Haas, *Deportation and Double Jeopardy After* Padilla, 26 GEO. IMMIGR. L.J. 121, 139 (2011) (exploring how the second punishment of deportation might be unfair to certain non-citizens and may pose constitutional issues). To some, deportation is a fair and intuitive result of a permanent resident's criminal conviction, if lawful presence is understood as "a contractual-type relationship with the government" with immigrant crime as a violation of that contract. McLeod, *supra* note 14, at 128. But this theory fails to justify crime-based immigration enforcement because not all criminality is serious enough to trigger such a consequence. *See id.* at 133 (noting that most criminal removal of lawful residents involves only minor criminal conduct).

Experts have also noted that the nativist and racist anti-immigrant narratives never truly faded away.[16] They persist in criminal immigration enforcement, which serves as a proxy for race.[17] Older anti-immigrant narratives based on nativism and a scarcity mindset have mingled with existing crime narratives that have racist undertones.[18] The biases that Americans held against criminals and gang members are projected onto immigrants.[19] Although non-citizens are less likely than the native-born population to engage in criminal activity, immigrants are increasingly seen as a threat to public safety.[20] Immigrants are routinely dehumanized and

16. *See, e.g.*, Kevin R. Johnson, *Fear of an Alien Nation: Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111, 118 (1996) (discussing the role of racist immigration narratives in politics in the 1990s); David B. Oppenheimer et al., *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 40–41 (2016) (positing that the United States's racial hierarchy impacts aspects of immigration from policy to immigrant integration).

17. *See* García Hernández, *supra* note 11, at 1502–03 ("Instead of employing overtly racist means of subjugating entire classes of nonwhite people, policymakers embraced the formal equality of crime control as a depoliticized marker of undesirability."); McLeod, *supra* note 14, at 160–61 (arguing that the use of criminal law as a proxy for immigration enforcement helps relieve cognitive dissonance surrounding racial anxiety and the norm of color-blindness).

18. *See, e.g.*, García Hernández, *supra* note 11, at 1503–09 (describing how racialized stereotypes about drug trafficking led to an expansion of the INA's entry-without-inspection rules).

19. *See* M. Kathleen Dingeman & Rubén G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 363, 387–88 (2009) (noting how "media sensationalization and politicization" of street gangs helped stereotype the migrant community as criminal); Elijah T. Staggers, Note, *The Racialization of Crimes Involving Moral Turpitude*, 12 GEO. J. L. & MOD. CRITICAL RACE PERSP. 17, 28–29 (2020) (discussing the racist underpinnings of the assumption that gang members are "depraved").

20. *See* Michael G. Vaughn & Christopher P. Salas-Wright, *Immigrants Commit Crime and Violence at Lower Rates Than the U.S.-Born Americans*, 28 ANNALS EPIDEMIOLOGY 58, 58 (2018) (analyzing survey data to conclude that immigrants were two to three times less likely than their U.S.-born counterparts to be involved in crime); Dingeman & Rumbaut, *supra* note 19, at 364–65 (detailing historic and current misconceptions about immigrant criminality).

stereotyped as criminals, and the list of convictions that lead to deportation is ever-expanding.[21]

The oldest criminal deportation standard consists of crimes involving moral turpitude, or CIMTs.[22] In our current era of expanding crimmigration, the CIMT's reach has grown as well, and immigration adjudicators now designate some minor and regulatory offenses as CIMTs.[23] This Note examines one example of CIMT expansion that was litigated recently in the Eighth Circuit.[24] There, the court found that failure to register as a sex offender under a state statute qualified as a CIMT and could lead to the non-citizen's removal.[25] This finding stood in contrast to cases from the Third, Fourth, Ninth, and Tenth Circuits, all of which previously determined that failure to register was not a CIMT.[26]

This Note argues that the Eighth Circuit's recent CIMT case was wrongly decided.[27] The crime of failure to register as a sex offender does not meet the requirements of moral turpitude, and the Eighth Circuit's decision relied on erroneous and outdated precedent.[28] Part I examines the history and use of the CIMT standard and identifies issues that arise when using the framework in immigration law. Part II discusses the Eighth

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21. *See* Dingeman & Rumbaut, *supra* note 19, at 366 (noting how stereotypes about immigrants and crime can shape policy, like California's Proposition 187); Coonan, *supra* note 7, at 592–604 (tracing the expansion of the aggravated felony category).

22. *See* 8 U.S.C. § 1227(a)(2)(A)(i) (stating that non-citizens convicted of crimes involving moral turpitude may be deportable); Immigration Act of 1891, ch. 551, 26 Stat. 1084 (1891) (containing the first mention of the term CIMT in immigration law).

23. *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, 271 (2019) (explaining how recent BIA decisions on CIMT determinations have expanded its application).

24. *See infra* Part II.A.

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

26. *See* Totimeh v. Att'y Gen., 666 F.3d 109, 116 (3d Cir. 2012); Mohamed v. Holder, 769 F.3d 885, 889–90 (4th Cir. 2014); Plasencia-Ayala v. Mukasey, 516 F.3d 738, 749 (9th Cir. 2008), *overruled on other grounds by* Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009); Efagene v. Holder, 642 F.3d 918, 925 (10th Cir. 2011).

27. *See infra* Part III.

28. *See infra* Part IV.

Circuit's reasoning in *Bakor v. Barr*[29] and its reliance on the Board of Immigration Appeals's (BIA) decision *Tobar-Lobo*.[30] Part III contends that the Eighth Circuit erred in finding that failure to register as a sex offender met the requirements to be a CIMT. Further, it explains why the BIA's precedent in that area was wrongly decided and should be abandoned, both by the BIA and by federal courts of appeals. Part IV evaluates alternative approaches to the CIMT framework such as redefining moral turpitude or abolishing the standard altogether. This Note concludes by arguing that since the use of CIMTs permits unfair application, the moral turpitude framework should no longer be used in immigration law.

I. GRAPPLING WITH CRIMES INVOLVING MORAL TURPITUDE

The majority of non-citizens who face deportation are placed in removal proceedings because of a criminal conviction or pending criminal charge.[31] Conviction of a CIMT is one such criminal conviction that carries immigration consequences. Specifically, a CIMT renders a non-citizen inadmissible for entry into the United States under the Immigration and Nationality Act[32] (INA).[33] A single CIMT conviction also subjects non-citizens to deportation if it occurs within five years of admission, and two CIMT convictions will render a non-citizen deportable at any time after admission.[34]

Since the consequences of deportation are so severe, a court's determination of whether a conviction is a CIMT is

29. 958 F.3d 732 (8th Cir. 2020).

30. 24 I. & N. Dec. 143 (B.I.A. 2007).

31. *See ICE Statistics*, ICE, https://perma.cc/VJS3-2XVF (last updated May 12, 2021) ("The vast majority of ICE ERO's interior removals—92 percent—had criminal convictions or pending criminal charges, demonstrating ICE ERO's commitment to removing those who pose the greatest risk to the safety and security of the United States.").

32. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1968).

33. *See* 8 U.S.C. § 1182(a)(2)(A) (stating that non-citizens who are convicted or admit committing the elements of a CIMT are inadmissible).

34. *See id.* §§ 1182(a)(2)(A), 1227(a)(2)(A) (delineating the deportation consequences for CIMT convictions). Generally, the conviction must be "of a crime for which a sentence of one year or longer may be imposed." *Id.* § 1227(a)(2)(A).

critical. Deportation separates families, curtails livelihoods, and can even place deportees in direct physical danger.[35] In addition, a finding that an immigrant has been convicted of a CIMT will often limit an individual's eligibility to seek relief from a removal order.[36] Nonpermanent residents with a CIMT conviction will almost always face a statutory bar against relief.[37] Permanent residents may also be denied cancellation of removal if their CIMT conviction occurred within seven years of admission.[38]

A. *Defining a CIMT*

The term CIMT refers to an offense involving conduct seen as "base, vile, or depraved," and outside of generally accepted rules of morality.[39] The BIA, the highest administrative body tasked with applying immigration law,[40] has specified that a CIMT must involve a reprehensible act and some level of

35. *See* Tanya Golash-Boza, *Punishment Beyond the Deportee: The Collateral Consequences of Deportation*, 63 AM. BEHAV. SCIENTIST 1331, 1336 (2019) (reporting findings about the impact of deportation on family left behind); HUMAN RTS. WATCH, DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE 27 (February 2020), https://perma.cc/EUK4-4S94 (PDF) (summarizing reports of individuals deported to situations with a high risk of danger).

36. *See* Paul B. Hunker III, *Cancellation of Removal or Cancellation of Relief—The 1996 IIRIRA Amendments: A Review and Critique of Section 240A(a) of the Immigration and Nationality Act*, 15 GEO. IMMIGR. L.J. 1, 16 (2000) (describing how a single CIMT can render a non-citizen ineligible for relief even in situations where the CIMT would not itself lead to deportation).

37. *See* 8 U.S.C. § 1229b(b)(1)(C) (establishing a bar to relief for some nonpermanent residents); Pedroza, 25 I. & N. Dec. 312, 315 (B.I.A. 2010) (noting that some nonpermanent residents with a CIMT conviction may still qualify for relief if their offense falls within the petty offense exception detailed in 8 U.S.C. § 1182(a)(2)(A)(ii)).

38. *See* 8 U.S.C. § 1229b(d)(1)(A) (stating the so-called "stop-time" rule under which CIMT conviction curtails the continuous residence requirement for permanent residents).

39. Olquin-Rufino, 23 I. & N. Dec. 896, 896 (B.I.A. 2006).

40. *See Board of Immigration Appeals*, DOJ., https://perma.cc/88AY-AV95 (last updated June 22, 2021) (providing information about the BIA and its members). The BIA handles appeals of immigration matters, and its published decisions are binding precedent on immigration courts and in subsequent BIA cases. *Id.* BIA decisions may be appealed to federal courts of appeals. *Id.*

intent.[41] Still, the ambiguous process of defining CIMTs causes confusion for attorneys and non-citizens.[42]

1. The History and Origins of "Moral Turpitude"

In the early 1800s, the term "moral turpitude" referred to behavior that contravened the societal values of integrity and honor.[43] The phrase soon took on legal significance as a metric for reputational harm, especially in the context of slander.[44] Some legal experts came to define moral turpitude as a crime involving fraudulent intent,[45] while others relied on a distinction between *malum in se* and *malum prohibitum*.[46] *Malum in se* crimes included those that were intrinsically

41. *See* Silva-Trevino III, 26 I. & N. Dec. 826, 834 (B.I.A. 2016) (laying out the BIA's requirements for CIMTs). Courts are not consistent on what level of intent is required, although CIMT determinations have generally required a mental state of at least recklessness. *See* Mary Holper, *Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NEB. L. REV. 647, 655 (2012) (discussing the scienter requirement).

42. *See* Holper, *supra* note 41, at 648 (giving examples of uncertainties that arise for attorneys and immigrant clients); Hans Christian Linnartz, *Lies, Damn Lies, and Lies Involving Moral Turpitude: When Does a False Statement Carry Immigration Consequences?*, 11 CHARLESTON L. REV. 665, 674–75 (2017) (describing how the distinction between merely false and fraudulent statements has led to uneven immigration consequences).

43. *See* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1010–11 (2012) (noting that American elites and politicians at the time used the term "as a catchphrase to sum up traits they deemed undesirable in the new Republic"). Essentially, "moral turpitude" was defined as being the opposite of "moral rectitude." *See id.* at 1012, 1017 (giving examples of eighteenth-century honor standards in practice).

44. *See id.* at 1010, 1016–17 (citing the early "American rule" for slander, under which an accusation of a crime was actionable as slander if the statement, if true, could result in indictment for a crime that would involve moral turpitude).

45. *See id.* at 1023 (describing the New Jersey Supreme Court's rationale that "immoral intent" implied a lack of integrity). Other courts emphasized that moral turpitude inhered in crimes involving dishonor, but not those involving violence. *Id.* at 1018 (highlighting the distinction between violent crimes, which could be considered less morally repugnant if committed in the heat of passion, and financial crimes such as fraud and destruction of property, which were seen as having no extenuating circumstances).

46. *See id.* at 1024–25 (describing a competing rationale put forward in concurrence to the scienter rule).

wrong, where *malum prohibitum* crimes consisted of those that were criminal only because they were designated as such.[47]

Congress first inserted CIMTs into immigration terminology in the late 1800s without a definition or an explanation.[48] Throughout the twentieth century, lawmakers occasionally discussed the meaning of moral turpitude within immigration law, but ultimately decided against including a more detailed explanation.[49] The 1951 Supreme Court decision in *Jordan v. De George*[50] found that moral turpitude was defined clearly enough to encapsulate fraud and permit deportation for the offense.[51] In the absence of a statutory definition, the most straightforward definitions of the term come from the Board of Immigration Appeals and federal courts of appeals.[52] The BIA has typically adhered to a definition of CIMTs focused on intent, encompassing "base, vile, or depraved" conduct.[53] In recent

47. *See id.* at 1030 (explaining historical instances where judges used this doctrine as a proxy for evaluating CIMTs).

48. *See* Holper, *supra* note 41, at 649–50 (tracing the history of CIMTs in immigration law). While the legislature neglected to define moral turpitude, its clear goal was to protect the nation from the supposed threat posed by dishonest or corrupt newcomers. *See* Simon-Kerr, *supra* note 43, at 1046 (commenting on the nativist attitudes driving the 1891 Immigration Act). Notably, the introduction of a moral turpitude framework into immigration law paralleled the contemporaneous development of racially motivated disenfranchisement laws in some southern states. *Id.* at 1041 (explaining that while the states' voter exclusion laws did not always use the words "moral turpitude," they designated non-violent crimes associated with dishonor to exclude certain classes of voters).

49. *See* Simon-Kerr, *supra* note 43, at 1039 (describing the Immigration Act of 1891, which restricted entry to persons convicted of crimes involving moral turpitude); *id.* at 1048 (detailing the 1917 legislative history in which Congress discussed the immigration provisions on moral turpitude, which imply that Congress might have supported a scienter-based definition of moral turpitude); Holper, *supra* note 41, at 651 (describing 1950s legislative debates about the term).

50. 341 U.S. 223 (1951).

51. *See id.* at 227 (reasoning that since courts consistently found fraud to involve moral turpitude, the deportation provision was not void for vagueness).

52. *See* Holper, *supra* note 41, at 653 ("For noncitizens in removal proceedings, decisions made by the Executive Office for Immigration Review (EOIR) and federal courts govern whether a particular offense is a CIMT.").

53. *See* Abreu-Semino, 12 I. & N. Dec. 775, 777 (B.I.A. 1968) (stating that crimes without an element of evil intent could not be categorized as CIMTs)*;* Flores, 17 I. & N. Dec. 225, 230 (B.I.A. 1980) (finding that the respondent's

years, the BIA more clearly delineated its CIMT definition. It reaffirmed that the two elements are reprehensible conduct and a culpable mental state and prescribed a method for their determination.[54] At the same time, the BIA has seemingly expanded the number of offenses that fit into its definition of moral turpitude.[55]

2. Current CIMT Categorization

Categories of crimes that are currently designated as CIMTs include fraud, theft, aggravated assault, and sexual offenses.[56] Most sex offense crimes are typically included, so convictions of assault, statutory rape, incest, possession of child pornography, and contributing to the sexual delinquency of a minor are all considered CIMTs.[57] However, some courts have deemed "minor" sex offenses, such as low-level indecent exposure convictions, to be outside of the scope of moral turpitude.[58] Although violent crimes were historically excluded from the definition of moral turpitude, the modern standard includes offenses like murder, manslaughter, and some forms of

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fraudulent conduct met the definition of CIMT)*;* Simon-Kerr, *supra* note 43, at 1061 (discussing the BIA's treatment of moral turpitude).

54. *See* Silva-Trevino III, 26 I. & N. Dec. 826, 827, 834 (B.I.A. 2016) (defining CIMTs in the immigration context and concluding that the categorical approach is the proper framework for analysis).

55. *See* Koh, *supra* note 23, at 272–76 (giving examples where the BIA relied on rationales outside of the accepted categorical approach to make CIMT determinations).

56. *See* Holper, *supra* note 41, at 655 (listing crimes typically defined by the BIA as CIMTs).

57. *See* Simon-Kerr, *supra* note 43, at 1054 (listing sex crimes that are designated as CIMTs).

58. *See, e.g.*, Deemi v. Att'y Gen., 842 F. App'x 767, 768 (3d Cir. 2021) (holding that the BIA erred in finding that a second-degree sexual assault conviction was a CIMT); Henriquez Dimas v. Sessions, 751 F. App'x 368, 369–70 (4th Cir. 2018) (concluding that a fourth-degree sex offense conviction did not qualify as a CIMT).

assault.[59] Theft and fraud are almost always CIMTs, and even offenses such as animal fighting and bigamy are included.[60]

3. Criticisms of Moral Turpitude as a Theoretical Framework

Legal scholars have widely criticized the use of moral turpitude to define crimes, both in immigration law and in other contexts. Many of these criticisms relate to the antiquated nature of the term. Others focus on the potential for discriminatory application.

a. CIMT Structure Reinforces Sexism and Heteropatriarchy

Prescriptive gender roles from the early days of moral turpitude in law still drive the outcome of cases today.[61] Historically, courts employed moral turpitude to condemn "oath-breaking and disloyalty" in men and the lack of chastity in women.[62] Because courts lack a standard definition of which crimes involve moral turpitude, judges and immigration officials often rely on outdated precedent that no longer reflects current moral norms.[63] For example, in 1926, a British countess was

59. *See, e.g.*, St. Pierre v. Att'y Gen., 779 F. App'x 1000, 1002–03 (3d Cir. 2019) (finding that aggravated manslaughter is a CIMT). Assault offenses that are committed with purpose or knowledge are usually found to be CIMTs, whereas reckless assault crimes may not be. *See* Baker, 15 I. & N. Dec. 50, 51 (B.I.A. 1974) (noting that simple assault is not a CIMT); Medina, 15 I. & N. Dec. 611, 613, 615 (B.I.A. 1976) (finding that assault with a deadly weapon, whether with purpose, knowledge, or recklessness, is a CIMT); TANIKA VIGIL, BIA AND CIRCUIT COURT CASE LAW CHART: ASSAULT-RELATED CIMTS 6–7 (2021), https://perma.cc/5H8D-6C4V (PDF) (giving practical guidance on common assault CIMT findings).

60. *See* Simon-Kerr, *supra* note 43, at 1064, 1066 (noting that theft and fraud count as CIMTs); Koh, *supra* note 23, at 273 (discussing cockfighting as a CIMT); United States v. Campos, No. 1:16-CV-20777, 2016 WL 8678885, at *4 (S.D. Fla. Nov. 3, 2016) (noting that moral turpitude inheres in bigamy).

61. *See* Simon-Kerr, *supra* note 43, at 1007 (detailing how CIMTs are derived from "beliefs about moral rectitude that were widely held in the early nineteenth century" and deeply "gendered, condemning a lack of chastity in women and deceptive business practices and dishonesty in men").

62. *See id.* at 1014–15 (detailing nineteenth-century use of moral turpitude with emphasis on examples where judges specifically invoked gender in their decisions).

63. *See id.* at 1046–47 (asserting that because judges prefer to rely on previous decisions rather than their own moral compasses, CIMT jurisprudence reinforces moral views that may no longer be prevalent).

detained and nearly deported based on her previous adulterous conduct, while her equally adulterous (male) lover had recently been admitted without trouble.[64] The ensuing public uproar helped overturn her deportation order.[65] Further, until recently, the criminalization of homosexual relations in the United States meant that queer non-citizens faced systematic exclusion or deportation.[66] Even today, the gender bias that exists in the enforcement of some CIMTs, such as prostitution and spousal abuse, has the potential to create imbalances in immigration enforcement.[67]

b. Moral Turpitude Upholds White Supremacy

CIMT determination figures prominently in fields of law that are already heavily racialized, such as immigration and street gang enforcement.[68] In these contexts, moral turpitude has historically acted as a proxy for race, where shifting societal views attributed depravity to non-white groups and associated moral rectitude with whiteness.[69] In U.S. law, moral turpitude has also appeared in voter enfranchisement and professional

64. *See id.* at 1049.

65. *See id.* at 1050.

66. *See id.* at 1054 (describing sexual conduct and misconduct historically designated as CIMTs).

67. *See, e.g.*, Scott W. Stern, *Rethinking Complicity in the Surveillance of Sex Workers: Policing and Prostitution in America's Model City*, 31 YALE J.L. & FEMINISM 411, 496 (2020) (concluding that the convergence of policing, social conditions, surveillance, and gendered violence contributed to overenforcement against, and marginalization of, sex workers in New York City); DOJ, IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE 7 (2015), https://perma.cc/F4MA-29GC (PDF) (stating that police officers sometimes discriminate against domestic violence victims because of stereotypical assumptions about gender). Solicitation of a prostitute is also a CIMT, so facially the law has no gender bias. However, that assumes that prostitutes and those who solicit them are treated equally by law enforcement. *See* Stern, *supra*, at 441 (describing how female sex workers felt particularly targeted by police because of gender).

68. *See* Staggers, *supra* note 19, at 18–19 (detailing the purposeful uneven racial impact of CIMTs in immigration and gang enforcement).

69. *See id.* at 24 (discussing the context and motives behind insertion of the phrase "moral turpitude" into immigration provisions).

licensing contexts.[70] Both of these frameworks deal with the exclusion of supposedly undesirable individuals from participation in a public or professional space.[71] Both areas have also historically excluded racial and gender minorities from full participation.[72] In these environments, moral turpitude has been, and may continue to be, a pretense for racial exclusion.[73]

c. CIMT Application Creates Arbitrary Outcomes

CIMT determination preserves antiquated moral ideas and allows immigration judges to make subjective determinations about whether non-citizens deserve to remain in the country.[74] This, coupled with a general confusion about how to apply moral turpitude, leads to unevenness in the law. For example, the Ninth Circuit has held that driving drunk on an expired license is a CIMT but has acknowledged that driving drunk is not itself a CIMT, even where multiple violations occur.[75]

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70. *See* Simon-Kerr, *supra* note 43, at 1040 (noting the role of moral turpitude analysis in voter suppression); Holper, *supra* note 41, at 688 (noting the use of moral turpitude as a standard in medical and legal licensing).

71. *See* Simon-Kerr, *supra* note 43, at 1039–40 (discussing the parallels between immigration and voter exclusion policies in the late 1800s); *id.* at 1044 ("Not only was the [CIMT] standard opaque, particularly when applied by election officials, but also the very core honor norms of the early nineteenth century that inhered in the concept of moral turpitude made it an effective conduit for racial animus.").

72. *See, e.g.*, Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, ABA (May 2, 2018), https://perma.cc/Z73C-L9MT (discussing underrepresentation of racial and ethnic minorities in the legal field).

73. Multiple scholars have contended that crime-based immigration controls serve as a proxy for previous standards of immigration desirability, most notably race. *See, e.g.*, McLeod, *supra* note 14, at 108–09 (2012) (criticizing the criminal framework of immigration control).

74. *See* Simon-Kerr, *supra* note 43, at 1009 ("Moral turpitude jurisprudence is remarkable today for the degree to which judges have structured it to avoid the moral pronouncements it seems to require, instead preserving old hierarchies and beliefs and drawing arbitrary lines in marginal cases."); *id.* at 1040 (noting that in the immigration context, moral turpitude "serves to reinforce an ossified vision of core nineteenth-century honor norms, or, in marginal cases, to track a formal legal conception of *mens rea* that leaves no space for moral reasoning").

75. *See* Marmolejo-Campos v. Holder, 558 F.3d 903, 913–14 (9th Cir. 2009) (en banc) (reasoning that drunk driving statutes typically impose strict

d. The Term "Moral Turpitude" May Be Unconstitutionally Vague

Some scholars have argued that the unclear and shifting definition of the CIMT category renders it void for vagueness.[76] When evaluating whether a penal[77] statute is unconstitutionally vague, courts evaluate whether the statute provides fair notice of its consequences and constrains arbitrary enforcement.[78] If concerns about these factors arise, the court must balance the interests of the government in the necessity of the statutory ambiguity to uphold an important purpose against the impact on affected individuals.[79] As applied, the CIMT standard creates significant Fifth Amendment[80] due process concerns—its

liability, but those driving on invalid licenses should know that their license has been suspended or revoked).

76. *See, e.g.*, Holper, *supra* note 41, at 690 (contending that in an immigration context, using CIMTs as grounds for removability presents an unconstitutional vagueness issue); Amy Wolper, Note, *Unconstitutional and Unnecessary: A Cost/Benefit Analysis of Crimes Involving Moral Turpitude in the Immigration and Nationality Act*, 31 CARDOZO L. REV. 1907, 1921 (2010) (arguing that CIMTs in the immigration context do not pass void-for-vagueness analysis). However, not all scholars agree that CIMTs could or should be judged void for vagueness. *See, e.g.*, Craig S. Lerner, *"Crimes Involving Moral Turpitude": The Constitutional and Persistent Immigration Law Doctrine*, 44 HARV. J.L. PUB. POL'Y 71, 125–26 (2021) (stating that the vagueness doctrine should only be applied to strike down laws that are impossibly vague).

77. Immigration removal is a civil, rather than criminal, procedure. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (stating that immigration proceedings are "in no proper sense a trial and sentence for a crime or offense"). Still, the Supreme Court has found that the stricter criminal void-for-vagueness doctrine applied in removal cases because of the "grave nature of deportation." Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (quoting Jordan v. De George, 341 U.S. 223, 231 (1951)). *But see* Lerner, *supra* note 76, at 122 (arguing that the *De George* Court's application of the stricter standard was conclusory).

78. *See Dimaya*, 138 S. Ct. at 1212 ("The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes."); Brian C. Harms, *Redefining Crimes of Moral Turpitude: A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 271 (2001) (stating that courts evaluate "concerns for notice or arbitrary enforcement").

79. *See* Harms, *supra* note 78, at 271 (describing the balancing test); Holper, *supra* note 41, at 697 (stating that when courts examine whether necessity outweighs individual interests, they "often look to whether that statutory goal could be achieved using more precise language").

80. U.S. CONST. amend. V.

meaning varies and is not precise enough to provide the impacted individuals with adequate notice of whether their actions will lead to immigration consequences.[81] Further, the provision fails the necessity balancing test because Congress can achieve its goal of excluding the immigrants it deems undesirable under narrower statutory terms.[82] Professor Mary Holper has proposed that an as-applied vagueness challenge to the CIMT deportation[83] provision would be successful in all but the most obvious cases (such as fraud), although no such specific challenge has made its way to the highest court.[84] The Supreme Court previously held that some fraud-based CIMTs definitely survive a void for vagueness challenge,[85] and some appellate court decisions also point towards CIMTs passing constitutional muster.[86] Other recent decisions suggest that the Supreme Court could reevaluate the issue,[87] so these ideas are still important in discussions of procedural fairness.[88]

B. *CIMT Determination Using the Categorical Approach*

Yet another subject of controversy surrounding CIMTs is the categorical approach, the prescribed method for judges to determine whether a given criminal conviction qualifies as a

81. *See* Holper, *supra* note 41, at 665–66 (explaining that "the vagueness doctrine is rooted in the Due Process Clause of the Fifth Amendment").

82. *See id.* at 698–99 (giving examples of precisely defined criminal grounds of deportation such as firearms and controlled substance offenses).

83. Professor Holper notes that CIMT inadmissibility provisions would not be found void for vagueness. *See id.* at 667–68 (explaining that the Fifth Amendment applies in deportation proceedings, but those procedural protections are absent in exclusion proceedings).

84. *See id.* at 665 (stating that while "the statute authorizing deportation for a CIMT would survive a facial challenge," an as-applied challenge could prevail).

85. *See* Jordan v. De George, 341 U.S. 223, 232 (1951) (rejecting the claim that the CIMT of fraud poses void-for-vagueness concerns).

86. *See, e.g.*, Martinez-de Ryan v. Whitaker, 909 F.3d 247, 252 (9th Cir. 2018) (affirming that CIMTs do not pose unconstitutional vagueness issues).

87. *See* Koh, *supra* note 23, at 279 (noting the Court's recent decision in *Sessions v. Dimaya*, which invalidated part of a criminal immigration provision on vagueness grounds).

88. *See* Holper, *supra* note 41, at 665–66 (discussing how the vague CIMT terminology could inhibit adequate notice).

CIMT.[89] The INA's criminal inadmissibility and deportation provisions generally define the contemplated crime or reference the applicable federal criminal statute.[90] However, the CIMT provision does not define by reference to other federal code sections.[91] Further, many criminal convictions occur under state statutes, so immigration adjudicators cannot automatically determine if the requirements for deportation are met.[92] In some instances, immigration judges may find controlling law on point where an adjudicator has determined the jurisdiction-specific conviction to be a CIMT. When no determination has yet been made, however, judges apply the categorical approach. By so doing, immigration proceedings avoid relitigating issues of fact from previous proceedings.[93] Adjudicators also apply the categorical approach in immigration proceedings that involve drug-related and aggravated felony convictions.[94]

Under the categorical approach, adjudicators examine the "generic" definition of the basis for removal, as contained in the INA or other federal statute.[95] Courts generally use the traditional common law definition of a CIMT for the generic definition of the removal provision, which covers actions that are "inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to

89. *See* Silva-Trevino III, 26 I. & N. Dec. 826, 827 (B.I.A. 2016) (concluding that the categorical approach is the appropriate framework for CIMT analysis).

90. *See, e.g.*, 8 U.S.C. § 1227(a)(2) (enumerating crimes that trigger deportability); *id.* § 1101(a)(43) (defining the term "aggravated felony").

91. *Id.* § 1227(a)(2)(A)(i).

92. *See Criminal Law*, LEGAL INFO. INST., https://perma.cc/5SUK-TKDG (giving an overview of the United States' system of criminal laws); Amit Jain & Phillip Dane Warren, *An Ode to the Categorical Approach*, 67 UCLA L. REV. DISC. 132, 149 (2019) (discussing the federalism interests in allowing states to define their own criminal laws).

93. Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1707 (2011) (articulating the Sixth Amendment concerns that weigh in favor of the categorical approach).

94. *See, e.g.*, Mathis v. United States, 136 S. Ct. 2243 (2016); Moncrieffe v. Holder, 569 U.S. 184 (2013).

95. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 31 (2015) (illustrating the basics of the categorical approach).

society in general."[96] CIMT decisions after 2016 also incorporate the two elements of reprehensible conduct and a culpable mental state into the definition.[97] Courts sometimes reference prior case law regarding the CIMT determinations for similar convictions and rely on the definitions in those cases. For example, in *Sejas*,[98] the BIA had to determine whether an assault conviction was a CIMT.[99] The Board examined other assault CIMTs and concluded that, in addition to the traditional CIMT definition, the convictions also required intentional infliction of serious bodily harm to involve moral turpitude.[100]

After identifying the removal provision's generic definition, adjudicators analyze the elements of the statute of conviction.[101] The adjudicator does not assess the individual's actual conduct, but instead considers the most innocent conduct that might realistically be punishable under the statute.[102] In *Sejas*, the Board noted that the Virginia assault law in question is violated when an individual "commits an assault and battery against a family or household member,"[103] including against the perpetrator's spouse, "whether or not he or she resides in the same home with the person."[104] Additionally, it observed that the elements of the assault and battery conviction in Virginia could be met even by minute instances of offensive touching.[105]

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96. *See, e.g.*, Sejas, 24 I. & N. Dec. 236, 237 (B.I.A. 2007) (quoting Olquin-Rufino, 23 I. & N. Dec. 896, 896 (B.I.A. 2006)).

97. *See* Silva-Trevino III, 26 I. & N. Dec. 826, 834 (B.I.A. 2016) (clarifying the two essential elements of a CIMT).

98. 24 I. & N. Dec. 236 (B.I.A. 2007).

99. *Id.* at 236.

100. *See id.* at 237 ("Assault and battery offenses requiring the '*intentional* infliction of *serious* bodily injury on another have been held to involve moral turpitude because such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching.'" (quoting Sanudo, 23 I. & N. Dec. 968, 971 (B.I.A. 2006))).

101. *See* GARCÍA HERNÁNDEZ, *supra* note 95, at 32 (introducing the second step of the categorical approach).

102. *See id.* (stating that courts identify the least culpable conduct by evaluating the text of the statute and applicable case law).

103. *Sejas*, 24 I. & N. Dec. at 236 (quoting VA. CODE ANN. § 18.2-57.2 (2004)).

104. *Id.* at 236 (quoting VA. CODE ANN. § 16.1-228 (2004)).

105. *See id.* at 238 ("A conviction for assault and battery in Virginia does not require the actual infliction of physical injury and may include any touching, however slight.").

Finally, the adjudicator determines whether the minimum punishable conduct matches the generic definition.[106] If the minimum punishable conduct falls within the generic definition, then the conviction is a CIMT.[107] However, if some conduct encompassed by the conviction could fall outside of the generic definition, then the statute is "overbroad" and no conviction under the statute can be considered a CIMT.[108] In *Sejas*, the Board compared the minimum conduct of offensive touching to the CIMT definition that involved intent and serious bodily injury.[109] The Board noted that while the Virginia offense did require intent to injure, it did not necessarily require any bodily harm.[110] As such, the Virginia offense was overbroad and a conviction under the statute could not be considered a CIMT, even if the respondent's actual conduct *did* involve bodily harm.[111]

If a statute of conviction lays out multiple offenses in the alternative, then the statute may be considered divisible.[112] In these cases, an adjudicator must apply the modified categorical approach to determine whether the discrete crime that the

106. *See* GARCÍA HERNÁNDEZ, *supra* note 95, at 33 (outlining the third step of the categorical approach).

107. *See id.* (stating that in the third step, courts "engage in the most important and complicated step in the categorical analysis" when "identifying whether a match exists between the federal immigration category and the statute of conviction").

108. *See* Descamps v. United States, 570 U.S. 254, 276–77 (2013) (noting that a California burglary statute was overbroad since it criminalized conduct not covered by the generic federal statute).

109. *See* Sejas, 24 I. & N. Dec. 236, 238 (B.I.A. 2007) (noting that "any touching, however slight," not necessarily actual physical injury, could result in an assault and battery conviction under the statute).

110. *Id.* ("[T]he Virginia law of assault and battery requires an intent or imputed intent to cause injury, [but] 'the intended injury may be to the feelings or mind, as well as to the corporeal person.'" (quoting Wood v. Commonwealth, 140 S.E. 114, 115 (Va. 1927))).

111. *Id.* ("We therefore find, in concert with *Matter of Sanudo*, that the offense of assault and battery against a family or household member in violation of section 18.2-57.2 of the Virginia Code is not categorically a crime involving moral turpitude.").

112. *See* GARCÍA HERNÁNDEZ, *supra* note 95, at 35 (explaining that the modified categorical approach applies when the existence of multiple alternative offense elements "renders opaque which element played a part in the defendant's conviction").

non-citizen was convicted of is a categorical match.[113] The modified categorical approach allows the adjudicator to look at "a limited class of documents" such as the charging document or plea agreement to determine which alternative element or set of elements led to conviction.[114] If the adjudicator can determine which element was the basis for the conviction, he or she will continue applying the categorical approach using that element alone as the statute of conviction.[115]

Many courts seem perplexed by the categorical approach. Some, including the BIA, have been unable to properly apply its standards, and other legal experts maintain that its results are unfair.[116] This insufficiency has led some to suggest that the methodology should be done away with entirely.[117] Misapplication of the categorical approach is one reason for the continuing conflict about whether failure to register as a sex offender qualifies as a CIMT.[118]

II. DIFFERING APPROACHES TO FAILURE TO REGISTER AS A SEX OFFENDER

A. *The Eighth Circuit's Recent Decision to Classify Failure to Register as a CIMT*

In May 2020, the Eighth Circuit held in *Bakor v. Barr* that a non-citizen's conviction for his knowing failure to comply with a sex offender registration statute was a CIMT.[119] The court's

113. *See* Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) (defining the modified categorical approach).

114. *See* GARCÍA HERNÁNDEZ, *supra* note 95, at 35 (quoting *Descamps*, 570 U.S. at 254)).

115. *See id*. (detailing how judges utilize the categorical approach with divisible statutes).

116. *See, e.g.*, Simon-Kerr, *supra* note 43, at 1062 (noting that the categorical approach decontextualizes the conviction from the facts, and its focus on scienter "accomplishe[s] a dubious objectivity at the expense of coherence").

117. *See* Kaitlyn Burton, *Judges Bemoan Categorical Approach in Immigration Case*, LAW360 (Jan. 29, 2020, 9:08 PM), https://perma.cc/Y5EG-8LFZ (reporting on a case where federal judges asked the Supreme Court to "rescue" them from the categorical approach).

118. *See infra* Part II–III.A.

119. *See* Bakor v. Barr, 958 F.3d 732, 738 (8th Cir. 2020) (affirming the BIA's finding that a sex offense registration violation was a CIMT).

decision upheld that of the BIA, including its reliance on *Tobar-Lobo*, a published BIA decision.[120] The Eight Circuit maintained that Bakor's conviction qualified as a CIMT because it included both reprehensible conduct and a culpable mental state.[121] The court stressed that Bakor's conviction met the culpability requirement because the conviction required proof that he knew of the registration requirement at the time of the violation.[122]

In addition to finding that Bakor's conviction met the culpability requirement, the Eighth Circuit also found that his conviction carried the inherent moral baseness to qualify as a CIMT.[123] Relying on *Tobar-Lobo*, the Eighth Circuit affirmed that failure to register as a sex offender is reprehensible conduct because it "frustrates society's efforts to monitor serious offenders and to protect vulnerable victims from predictable recidivism."[124]

The Eighth Circuit's decision declined to seriously consider Bakor's contention that his registration violation conviction was a regulatory offense that was outside of the scope of moral

120. *See* Tobar-Lobo, 24 I. & N. Dec. 143, 147 (B.I.A. 2007) (finding that "the regulatory nature of this offense does not foreclose its status as a crime involving moral turpitude"); *Bakor*, 958 F.3d at 737 ("The Board reasonably concluded that knowing and willful failure to register as a sex offender . . . is the sort of morally turpitudinous criminal conduct that subjects an alien to removal from the country.").

121. *See Bakor*, 958 F.3d at 737 (concluding that the respondent's knowing failure to register was inherently base or vile and involved a culpable mental state).

122. *See id.* at 738 (noting that "a forgetful failure to register would not have sufficed" and that although the statute had previously been construed to involve forgetful violations, that had not been the case since 2017). This means that the conviction would still have included an inadvertent failure in 2015, when Bakor was convicted, but the court does not comment on that fact. The constitutional prohibition on *ex post facto* laws does not apply in the deportation context. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 594–95 (1952) (referring to this "long-settled doctrine"). This is just one example of how the lack of due process protections in immigration proceedings creates unjust results. *See* Darlene C. Goring, *A False Sense of Security: Due Process Failures in Removal Proceedings*, 56 S. TEX. L. REV. 91, 92–95 (2014) (detailing a recent history and background of immigrants' rights in immigration proceedings).

123. *See Bakor*, 958 F.3d at 737 (affirming the BIA's conclusion that willfully failing to register as a sex offender was inherently base because of the risk involved and the duty owed to society).

124. *Id.*

turpitude.[125] Downplaying the distinction between *malum in se* and *malum prohibitum* as overly controversial, the court stressed that since it had found reprehensible conduct and willfulness, the crime could be a CIMT even if categorized as regulatory.[126]

In dissent, Judge Kelly acknowledged that Bakor's offense had involved a culpable mental state, but ultimately disagreed with the majority on the requirement of reprehensible conduct because the minimum conduct criminalized by the Minnesota statute would not necessarily involve moral turpitude.[127] For example, Judge Kelly suggested that a person could be convicted for not "immediately" updating one's registration about a minor detail of the car he drives, although tardiness is not conduct that society sees as inherently base.[128] Further, the dissent maintained that the purpose of the Minnesota sex registration statute was regulatory, as it was designed to assist law enforcement in investigations instead of to punish.[129] While the majority had declined to exclude regulatory offenses from being categorized as CIMTs, Judge Kelly pointed out that the BIA generally does not categorize regulatory offenses as such.[130] Further, the dissent recommended that the Eighth Circuit follow the Third, Fourth, Ninth, and Tenth Circuits in finding that failure to register as a sex offender is not a CIMT.[131]

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125. *See id.* at 738 ("We see no bright line rule that excludes a regulatory offense from the scope of the statute.").

126. *See id.* (giving examples of *mala prohibita* that are CIMTs); *see also supra* Part I.

127. *See Bakor*, 958 F.3d at 740 (Kelly, J., dissenting) (stating that the BIA's interpretation was unreasonable because the minimum culpable conduct for conviction under the sex registration statute is not reprehensible).

128. *See id.* at 740–41 (asserting that this type of violation is not morally reprehensible or shocking to the public conscience).

129. *See id.* at 741 (citing the stated purpose of the sex registration statute).

130. *See id.* (noting that whether the crime is regulatory is "crucial"); Abreu-Semino, 12 I. & N. Dec. 775, 776 (B.I.A. 1968) ("We have many times held that the violation of a regulatory, or licensing, or revenue provision of a statute is not a crime involving moral turpitude.").

131. *See* Bakor v. Barr, 958 F.3d 732, 741 (8th Cir. 2020) (Kelly, J., dissenting) (citing cases from circuits that decided this issue differently). It is interesting that the dissent states that "every" circuit to address the issue decided the issue separately, without mentioning Bushra v. Holder, 529 F. App'x 659 (6th Cir. 2013). *Id.*

B. *The Eighth Circuit Should Have Rejected the BIA's Reasoning in Tobar-Lobo*

The BIA's decision in *Tobar-Lobo* has been the basis for all of its subsequent determinations that failure to register as a sex offender is a CIMT.[132] There, the BIA evaluated a California sex offense registration statute under which a person could be convicted based on unintentional conduct.[133] It found that a conviction under the statute carried both the requisite willfulness and the moral baseness to qualify it as a CIMT.[134]

First, the BIA determined that moral baseness was inherent in violation of the statute because of "the serious risk involved in a violation of the duty owed by this class of offenders to society."[135] To find that a conviction under the statute met the willfulness requirement, the BIA acknowledged that a forgetful violation could result in conviction, but noted that the obligation to register is "simply too important" to be forgotten.[136] In other words, forgetting to register is so morally wrong that it "implicitly involves evil intent."[137] The majority bolstered this argument by classifying it in the category of CIMTs that, like statutory rape, does not require the intent element.[138] In contrast, the dissent reasoned that the statute was overbroad and could not be a CIMT under the categorical approach.[139] Since the offense was actually regulatory in nature, and since it did not cause particularized harm to any victim, the dissenting board member contended that it lacked both the depravity and willfulness elements.[140]

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132. *See, e.g.*, *Bakor*, 958 F.3d at 738 (majority opinion) (affirming BIA's decision following *Tobar-Lobo*); Efagene v. Holder, 642 F.3d 918, 920 (10th Cir. 2011) (stating that the BIA relied on its decision in *Tobar-Lobo*).

133. *See* Tobar-Lobo, 24 I. & N. Dec. 143, 145 (B.I.A. 2007) (noting that while the statute's text required a willful failure to register, California courts have interpreted it to include instances of forgetful failure to register).

134. *See id.* at 147 (finding failure to register to be a CIMT).

135. *Id.* at 146.

136. *Id.*

137. *Id.* at 147.

138. *Id.* at 145 (listing examples of CIMTs in this category).

139. *See id.* at 149 (Filppu, B.M., dissenting) (noting that the California statute "has cast a wide net").

140. *See id.* at 149–50 ("Because California has decided to criminalize the conduct of those who fail to register as sex offenders regardless of their . . . evil

The Eighth Circuit is not the only court of appeals to affirm the BIA's reasoning in *Tobar-Lobo*. In a per curiam decision, the Sixth Circuit in 2013 denied a petition to review a BIA decision that relied on *Tobar-Lobo*.[141] The court did not conduct its own analysis of whether a Michigan failure-to-register violation constituted a CIMT based on depravity and willfulness.[142] Although the petitioner alleged that his failure to register had not been committed with intent, the court accepted the BIA's mistaken reasoning that the Michigan conviction had required willfulness and concluded that the petitioner's offense must have been intentional.[143] It declined to rehear the facts of the petitioner's original criminal case, since they were not properly before the court.[144] While it is not entirely clear why the Sixth Circuit followed the BIA's reasoning, the length and nature of the opinion suggest that it does not carry great weight.

C. *Rejecting the BIA's Reasoning*

Since the BIA's decision in *Tobar-Lobo*, various higher authorities that investigated the issue have questioned the accuracy of the ruling. Just a year after the decision, Attorney General Michael Mukasey issued *Silva-Trevino I*,[145] where he sought to harmonize the application of the categorical approach to CIMTs.[146] In particular, his opinion stressed that both

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intent, or even the harm arising from the offense itself, I would find that the respondent's violation . . . has not been shown to involve moral turpitude.").

141. *See* Bushra v. Holder, 529 F. App'x 659, 661 (6th Cir. 2013) (per curiam) (denying respondent's petition). The opinion was not selected for full publication and is subject to limitations on citations in Sixth Circuit courts. *Id.* at 660.

142. *See id.* at 660 (declining to disturb the finding of moral turpitude).

143. *See id.* at 661

> The BIA is entitled to rely on the fact of his convictions as evidence that he was guilty of all elements of the offenses, including the willfulness or scienter elements; Bushra may not challenge the moral turpitude finding on the basis of facts that were necessary to his prior convictions.

144. *See id.* at 660–61 (noting the question of fact).

145. 24 I. & N. Dec. 687 (A.G. 2008).

146. *Id.* at 689–89 (expressing the Attorney General's purpose of clarifying the categorical approach). The Attorney General has the authority to refer immigration cases to him or herself, and those subsequent decisions are binding on the BIA and immigration courts nationwide. *See* Bijal Shah, *The*

elements, depravity and willfulness, were essential,[147] and that there must be no realistic probability that conviction would result for conduct that did not meet these elements.[148] Seven years later, Attorney General Eric Holder vacated the decision.[149] The BIA later reevaluated the case, and its most recent iteration reaffirms the principle that both elements are essential.[150]

Though later courts to examine the *Tobar-Lobo* precedent have criticized its finding that the willfulness requirement was satisfied by the California sex registration statute in question,[151] the willfulness requirement appears to be less significant than the second element. For example, the Tenth Circuit declined to determine whether a misdemeanor conviction for failure to register in Colorado had the requisite intent.[152] The court observed that while the felony failure-to-register offense did specify intent, it was unclear whether the misdemeanor required the same level of intent.[153] However, since the court concluded that moral turpitude was not inherent in violating the

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Attorney General's Disruptive Immigration Power, 102 IOWA L. REV. ONLINE 129, 130, 134 (2017) (explaining the mechanism behind Attorney General immigration decisions).

147. *See Silva-Trevino I*, 24 I. & N. Dec. at 706 ("A finding of moral turpitude under the Act requires that a perpetrator have committed the reprehensible act with some form of scienter.").

148. *Id.* at 698 (discussing the relative merits of the "realistic probability" approach).

149. *See* Silva-Trevino II, 26 I. & N. Dec. 550, 550 (A.G. 2015) (vacating and remanding *Silva-Trevino I*).

150. *See* Silva-Trevino III, 26 I. & N. Dec. 826, 834 (B.I.A. 2016) (underscoring the two elements). A now-defunct third step of analysis allowed adjudicators to sidestep the categorical approach "if doing so [was] necessary and appropriate to ensure proper application of the [INA's] moral turpitude provisions." *Silva-Trevino I*, 24 I. & N. Dec. at 699. This step was later eliminated to "provide a uniform national framework for deciding whether a crime involves moral turpitude" and conform to the standard categorical analysis that had recently been clarified by the Supreme Court. *Silva-Trevino III*, 26 I. & N. Dec. at 831.

151. *See* Plasencia-Ayala v. Mukasey, 516 F.3d 738, 746 (9th Cir. 2008) (finding that the BIA's reliance on *Tobar-Lobo* was flawed), *overruled on other grounds by* Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009).

152. *See* Efagene v. Holder, 642 F.3d 918, 926 (10th Cir. 2011) (ending the inquiry after the statute failed the depravity element).

153. *See id.* at 925 (noting that a previous holding about the level of intent for the felony failure to register did not necessarily apply to the misdemeanor).

registration statute, the issue was not dispositive.[154] Similarly, the Fourth Circuit held that even where the willfulness requirement appeared to be met by a Virginia registration statute proscribing a "knowing" violation, the conviction still was not for a CIMT since the second element of depravity was not met.[155] Regardless of whether willfulness is required by state sex registration statutes, these courts of appeals have determined that failure to register does not trigger the second element, depravity.

The Third Circuit's analysis of both elements is particularly interesting, since the court in *Totimeh v. Attorney General*[156] evaluated the same sex registration statute that the Eighth Circuit did in *Bakor*.[157] To explain its departure from *Totimeh* in establishing willfulness, the Eighth Circuit pointed to a development in Michigan law that limited the state's ability to convict for unintentional violations.[158] Notably, however, the *Bakor* court neglected to distinguish its finding on the element of depravity from that of the Third Circuit.[159]

The Third, Fourth, Ninth, and Tenth Circuits agree that depravity or moral baseness is not present in failure to register as a sex offender.[160] For example, the Fourth Circuit noted that failing to register does not violate a moral norm and is not seen

154. *See id.* at 926 (finding no inherently base conduct).

155. *See* Mohamed v. Holder, 769 F.3d 885, 888–90 (4th Cir. 2014) (noting the knowing requirement and finding no depravity).

156. 666 F.3d 109 (3d Cir. 2012).

157. *See* Bakor v. Barr, 958 F.3d 732, 738 (8th Cir. 2020) (mentioning the previous decision in *Totimeh*).

158. *See id.* (claiming that *Totimeh* was superseded by a 2017 case that dispensed with the possibility of conviction for a forgetful offense).

159. *See id.* at 742 (Kelly, J., dissenting) (noting the majority's failure to address why their determination on the depravity requirement departed from *Totimeh*).

160. *See Mohamed*, 769 F.3d at 889 (finding that violation of a purely administrative or regulatory provision was not a CIMT); Totimeh v. Att'y Gen., 666 F.3d 109, 116 (3d Cir. 2012) (finding that violation of a regulatory or licensing provision of a statute was not a CIMT); *Efagene*, 642 F.3d at 925 (establishing that the BIA erred in finding a Colorado misdemeanor failure to register as a sex offender offense was a CIMT); *Plasencia-Ayala*, 516 F.3d at 748–49 (finding that a violation regulatory in nature was not a CIMT).

by society as depraved.[161] These courts explained this in terms of the distinction between regulatory and punitive statutes.[162] For example, the Ninth Circuit noted that the stated reason for the California sex registration regulation was to help law enforcement, which was an important purpose but not itself a "socially desirable good."[163] The Tenth Circuit emphasized how the BIA's longstanding precedent points towards recognizing a distinction for regulatory offenses.[164] The court pointed out that the sex registration law was self-described as regulatory in nature, rather than punitive, and that it was analogous to other regulatory requirements for reporting and licensing that other courts have specifically excluded from the CIMT category.[165]

Several courts of appeals have also been critical of how *Tobar-Lobo* classified failure to register as a sex offender with other CIMTs that do not require intent, such as spousal abuse or incest.[166] These courts have criticized the determination on the ground that failure to register does not create any direct or particularized injury to a victim, which is the cohesive factor between the other non-intent CIMTs.[167] This highlights another error in *Tobar-Lobo* that the Ninth and Tenth Circuits

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161. *See Mohamed*, 769 F.3d at 889 ("A conviction under the registration statute involves only administrative conduct, not the violation of a moral norm.").

162. *See* Efagene v. Holder, 642 F.3d 918, 922–23 (10th Cir. 2011) (establishing that the Colorado sex-offense registration statute is regulatory); Plasencia-Ayala v. Mukasey, 516 F.3d 738, 747 (9th Cir. 2008) (noting that the Nevada Supreme Court had designated the statute as regulatory rather than punitive), *overruled on other grounds by* Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009).

163. *Plasencia-Ayala*, 516 F.3d at 748.

164. *See Efagene*, 642 F.3d at 922 (reiterating the BIA's position that a regulatory offense is not a CIMT).

165. *See id.* (describing cases about regulatory requirements such as liquor licensing and financial reporting); Mohamed v. Holder, 769 F.3d 885, 889 (4th Cir. 2014) (comparing failure to register as a sex offender to failure to register for the military draft).

166. *See* Tobar-Lobo, 24 I. & N. Dec. 143, 145 (B.I.A. 2007) (listing a class of "categorically turpitudinous crimes" that do not involve the intent requirement).

167. *See Efagene*, 642 F.3d at 922 ("Those crimes, however, are inherently different from failing to register because in each of those instances, the crime necessarily involves an actual injured victim."); *Plasencia-Ayala*, 516 F.3d at 748 ("As with most regulatory statutes, a violation of § 179D.550 causes no direct or particularized injury.").

criticized—namely, that the BIA confused the failure to register with the underlying sex offense.[168] In the case of failure to register, the moral outrage is sparked by the initial criminal conduct, such as the abuse or sex offense, rather than the failure to submit to administrative procedures.[169]

D. *The BIA's Determination Does Not Demand Deference*

Most circuits accord some deference to reasonable decisions by the BIA.[170] Generally, these decisions must be precedential (meaning that they are decided by at least three BIA members and published) or rely wholly on a prior precedential decision.[171] However, the Third, Fourth, Ninth, and Tenth Circuits have chosen not to accord deference to BIA decisions relying on *Tobar-Lobo*, finding that the Board's determination in that case was patently unreasonable based on its misapplication of the categorical approach and previous BIA precedent.[172] The Tenth Circuit further noted that the BIA is only entitled to deference on its interpretation of the Immigration and Nationality Act, but not for interpretations of the substance of state law offenses.[173]

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168. *See Plasencia-Ayala*, 516 F.3d at 748 (stating that it is only the underlying sex offense that is reprehensible, not the failure to register); *Efagene*, 642 F.3d at 924 (same).

169. *See* Totimeh v. Att'y Gen., 666 F.3d 109, 116 (3d Cir. 2012) ("Sexual assault, child abuse, and spousal abuse are no doubt inherently vile and elicit strong outrage. But this outrage is directed at the underlying crimes that resulted in the passage of offender registration statutes.").

170. *See, e.g.*, *id.* at 113 ("The BIA's determination of whether a specific crime involves moral turpitude qualifies for *Chevron* deference."); Koh, *supra* note 23, at 277 (stating that the judiciary generally defers to the BIA's decisions about the definition of moral turpitude, since Congress "presumably delegated interpretive authority to the BIA" by leaving the term undefined).

171. *See* Marmolejo-Campos v. Holder, 558 F.3d 903, 909, 911 (9th Cir. 2009) (en banc) (designating that BIA determinations of whether a crime is categorically a CIMT receives *Chevron* deference if precedential and *Skidmore* deference if issued by only one Board Member).

172. *See, e.g.*, Efagene v. Holder, 642 F.3d 918, 926 (10th Cir. 2011) (reversing the decision of the BIA); Mohamed v. Holder, 769 F.3d 885, 889 (4th Cir. 2014) (same); *see also* Shane E. Strong, Note, *What Did Mork Say to Mindy When He Forgot to Register?* Pannu, Pannu*! What* Pannu v. Holder *Reveals about Crimes Involving Moral Turpitude and Failure-to-Register Statutes*, 45 CREIGHTON L. REV. 617, 633–34 (2011) (discussing some courts' refusal to afford deference to the BIA's decision in *Tobar-Lobo*).

173. *See Efagene*, 642 F.3d at 921 ("As an initial matter, the BIA is owed no deference to its interpretation of the substance of the state-law offense at

Since the BIA's interpretation is wrong as a matter of law, courts of appeals do not owe deference to the BIA's determination that failure to register is a CIMT.

III. THE BIA ERRONEOUSLY DETERMINED THAT FAILURE TO REGISTER IS A CIMT IN *TOBAR-LOBO*

A. *Tobar-Lobo Misapplied the Categorical Approach*

The BIA's decision in *Tobar-Lobo* purported to apply the categorical approach to failure to register as a sex offender.[174] In reality, the Board improperly applied the categorical approach in concluding that this offense constituted a CIMT.[175] This may partly be because the *Tobar-Lobo* Board rendered its opinion before the issuance of current case law that significantly clarifies the categorical approach.[176] However, the BIA was aware of the dual requirement of depravity and willfulness at the time of its decision in *Tobar-Lobo*.[177] While a crime must at least include "reprehensible conduct and a culpable mental state" to involve moral turpitude,[178] the BIA concluded wrongly on both elements and improperly conflated the two. It is baffling that the Board continues to rely on its erroneous CIMT analysis after the Attorney General and the Board itself clarified the required elements.

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issue, as Congress has not charged it with the task of interpreting a state criminal code.").

174. *See Tobar-Lobo*, 24 I. & N. Dec. at 144 ("Under the 'categorical approach,' which we will utilize here, we look not to whether the 'actual conduct constitutes a crime involving moral turpitude, but rather, whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude.'" (quoting Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1163 (9th Cir. 2006))).

175. *See* Plasencia-Ayala v. Mukasey, 516 F.3d 738, 746 (9th Cir. 2008) (holding that the BIA erred), *overruled on other grounds by* Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009).

176. *See, e.g.*, Silva-Trevino I, 24 I. & N. Dec. 687 (A.G. 2008); Silva-Trevino III, 26 I. & N. Dec. 826 (B.I.A. 2016).

177. *See* Tobar-Lobo, 24 I. & N. Dec. 143, 148 (B.I.A. 2007) (Filppu, B.M., dissenting) (pointing out that a CIMT determination requires depravity and a culpable mental state).

178. *Silva-Trevino III*, 26 I. & N. Dec. at 834.

1. The Willfulness Requirement

Although California's registration statute can be violated by an inadvertent failure to register, the BIA in *Tobar-Lobo* found implicit intent in the conviction because of the importance of the requirement.[179] Under the categorical approach, the California statute should have failed the willfulness requirement because a conviction could realistically result from conduct that did not involve a culpable mental state.[180] In an attempt to overcome this obstacle, the BIA wrongly classified failure to register with the narrow strict liability CIMT category, which includes child and spousal abuse, incest, and statutory rape.[181] Categorizing failure to register with non-intent CIMTs does not make sense, since the strict liability category was created to protect direct victims of these crimes.[182] In contrast, failure to register does not involve a particularized injury to a distinct victim and so does not fit in this category.[183]

The Eighth Circuit in *Bakor* also erred when determining that the statute met the intent requirement.[184] The court maintained that a conviction under the statute must have involved intent because of a 2017 clarification of the law by the Minnesota Supreme Court.[185] However, the *Bakor* court overlooked that the respondent's conviction occurred in 2015, when a conviction could still have resulted for a non-willful

179. *See Tobar-Lobo*, 24 I. & N. Dec. at 146 (noting that "[s]ome obligations, once imparted by proper notification, are simply too important not to heed").

180. *See id.* at 148 (Filppu, B.M., dissenting) (contending that the statute was overbroad).

181. *See id.* at 145 (majority opinion) (listing the CIMTs that do not have an intent requirement).

182. *See id.* at 149 (Filppu, B.M., dissenting) (describing the justifications for non-intent CIMTs). For a discussion of these policy reasons, see Strong, *supra* note 172, at 643.

183. *See Tobar-Lobo*, 24 I. & N. Dec. at 149 (Filppu, B.M., dissenting) (reaffirming that failure to register did not meet these requirements).

184. *See* Bakor v. Barr, 958 F.3d 732, 738 (8th Cir. 2020) (finding willfulness).

185. *See* State v. Mikulak, 903 N.W.2d 600, 603 (Minn. 2017) (specifying that to be convicted for violation of the statute, the defendant must have had knowledge of the registration requirement at the time the violation occurred).

violation.[186] Even if the current Minnesota law included forgetful conduct, however, the Eighth Circuit would likely have found "implicit" intent, as the BIA did in *Tobar-Lobo*.[187]

2. The Depravity Requirement

The BIA also erred in *Tobar-Lobo* by finding that failure to register constituted reprehensible conduct.[188] The opinion stressed that the harm to society by failure to register, including subjecting vulnerable persons to the risk of a previous offender recidivating, was substantial enough to qualify it as a CIMT.[189] However, failure to submit or update information at the appropriate time does not "shock[] the public conscience."[190] Indeed, there is nothing inherently vile about an act such as filing paperwork five days after one's birthday, especially since it might comply with the law in one jurisdiction but count as a violation in another.[191] The BIA appeared to equate failure to

186. *See Bakor*, 958 F.3d at 734 (giving the date of conviction). For example, at the time of Bakor's guilty plea or at any time prior to 2017, conviction might have resulted if he had at any point been informed of the requirement, even if he did not intentionally violate the requirement. *See, e.g.*, State v. Larson, No. A15-1085, 2016 Minn. App. Unpub. LEXIS 881, at *13 (Sep. 6, 2016) (sustaining a conviction for knowing failure to register within twenty-four hours even though the defendant had been told by his caseworker and believed that he had five days to register). In *Larson*, the court noted that the defendant had been "provided with accurate information on numerous occasions . . . . [and] was responsible for knowing and complying with that registration obligation." *Id.* at *14. The court also reiterated that "ignorance of the law is no excuse," a proposition that the *Mikulak* court expressly contradicted. *Id.* at *13 (quoting State v. King, 257 N.W.2d 693, 697 (Minn. 1977)); *Mikulak*, 903 N.W.2d at 603 ("Although ignorance of the law generally does not excuse criminal liability, we have previously stated that when knowledge of the law is an element of the offense, mistake of law is a defense because it negates the existence of the required mental state.").

187. *See* Tobar-Lobo, 24 I. & N. Dec. 143, 147 (B.I.A. 2007) (concluding that the offense included the requisite intent).

188. *See Bakor*, 958 F.3d at 737 (stating that the BIA's finding of depravity was reasonable).

189. *See Tobar-Lobo*, 24 I. & N. Dec. at 146 ("Given the serious risk involved in a violation of the duty owed by this class of offenders to society, we find that the crime is inherently base or vile and therefore meets the criteria for a crime involving moral turpitude.").

190. *See* Mohamed v. Holder, 769 F.3d 885, 888 (4th Cir. 2014) (describing the general requirements for conduct to qualify as a CIMT).

191. *See Efagene*, 642 F.3d at 924

register with the depraved conduct of a prior or potential future sex offense.[192] This analysis is especially confusing because other administrative violations do not constitute CIMTs. For example, evading required financial reports has not been established to be a CIMT,[193] but the correlated underlying offense of fraud almost always is.[194] As such, the BIA's finding that failure to register was itself morally base was improper.

3. The BIA Wrongly Combined the Intent and Depravity Elements

In finding "implied intent" in the depravity involved with failure to register, the BIA incorrectly conflated the two elements required to find a CIMT.[195] Although CIMT law was fairly established at the time of the *Tobar-Lobo* opinion,[196] the decade that followed the decision saw some clarification and development of the topic.[197] In particular, the outcome of *Silva-Trevino III* refined the application of the categorical

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> While there is no question a sex offense itself often involves serious harm to the victim and constitutes a depraved act, an individual can be convicted of failure to register if he, for example, changes residences and notifies law enforcement six rather than five business days later. This type of conduct is not conduct society deems inherently base, vile, or depraved, but rather is wrong only because a statute requires the action be taken within five business days.

192. *See* Plasencia-Ayala v. Mukasey, 516 F.3d 738, 748 (9th Cir. 2008) ("[I]t is the sexual offense that is reprehensible, not the failure to register."), *overruled on other grounds by* Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009).

193. *See* Efagene v. Holder, 642 F.3d 918, 923 (10th Cir. 2011) (discussing other regulatory offenses that are not CIMTs).

194. *See* Jordan v. De George, 341 U.S. 223, 232 (1951) (upholding fraud as a CIMT).

195. *See Tobar-Lobo*, 24 I. & N. Dec. at 148 (Filppu, B.M., dissenting) ("[I]t is *the combination* of the base or depraved act *and* the willfulness of the action that makes [a] crime one of moral turpitude." (alteration in original) (quoting Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1165 (9th Cir. 2006)).

196. *See, e.g.*, Abreu-Semino, 12 I. & N. Dec. 775, 776 (B.I.A. 1968) (stating that the BIA had by that point addressed some CIMT issues "many times").

197. *See, e.g.*, Silva-Trevino III, 26 I. & N. Dec. 826, 830 (B.I.A. 2016) (attempting to clarify a uniform standard for the categorical approach to CIMT analysis).

approach with regard to CIMTs.[198] That case also reaffirmed the significance of both elements,[199] meaning that *Tobar-Lobo*'s conflation of the elements is inconsistent with prior and subsequent case law.

In addition, the logic of *Tobar-Lobo* diminishes the meaning of the words "moral turpitude" and could be extended to a finding that all crimes qualify as CIMTs.[200] In its rationale, the BIA emphasized that failure to register as a sex offender breaches a societal duty by endangering other individuals.[201] This standard, however, would raise moral turpitude implications in all crimes, as crimes by definition breach societal trust.[202] This interpretation essentially renders the phrase "moral turpitude" meaningless, such that any crime, no matter how minor, could potentially subject a non-citizen to deportation. The BIA's interpretation would essentially rewrite the INA's provision on criminal deportation to permit deportation for all crimes.[203]

4. The BIA's Precedent Subverts the Policy Reasons for the Categorical Approach

By focusing on the sex registration statute's purpose rather than on the nature of the conviction, the BIA undermined the

198. *See id.* at 831 (detailing the categorical approach).

199. *See id.* at 830 (reaffirming that CIMTs require "reprehensible conduct and some form of scienter").

200. *See Efagene*, 642 F.3d at 925 ("Were moral turpitude to reach any breach of duty to society . . . the words 'moral turpitude' would be rendered superfluous and a noncitizen would be removable if convicted of 'two or more crimes' of any kind."); Koh, *supra* note 23, at 277 (finding that the BIA's interpretation of CIMT could fail *Chevron* step one because Congress "at minimum, plainly indicated that CIMTs must be distinguishable from crimes in general").

201. *See* Tobar-Lobo, 24 I. & N. Dec. 143, 146 (B.I.A. 2007) (noting the "serious risk involved in a violation of the duty owed by this class of offenders to society").

202. *See* Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1070–71 (9th Cir. 2007) (observing that under this standard, "every crime would involve moral turpitude").

203. *See* Mohamed v. Holder, 769 F.3d 885, 888 (4th Cir. 2014) ("Congress meant to refer to more than simply the wrong inherent in violating the statute. Otherwise, the requirement that moral turpitude be involved would be superfluous.").

aims of the categorical approach.[204] The categorical approach promotes a fair and uniform process in immigration proceedings by ensuring that those convicted of the same crime will face the same immigration consequences.[205] The categorical approach also ensures some amount of due process is retained in immigration proceedings by putting non-citizens on notice of what evidence will be considered.[206] A significant feature of the categorical approach is that adjudicators are prevented from investigating the underlying circumstances and relitigating facts that are not up for debate.[207] In doing so, the legal system can avoid double jeopardy and due process concerns that would otherwise be involved with revisiting a criminal case.[208] The BIA's focus on the societal interest in securing justice for potential future victims led it to misapply the categorical approach and potentially allow adjudicators to make findings of fact about future respondents' behavior. Additionally, permitting judges to water down the categorical approach increases the risk that they will arbitrarily determine whether a non-citizen deserves access to relief.[209]

B. *The BIA Erred in Finding Depravity Inherent in Potential Recidivism*

Tobar-Lobo's rationale for finding that the failure-to-register statute met the depravity element was based in the notion that violations could expose children and other citizens to danger from "convicted sex offenders, a high

204. *See id.* at 889 ("In short, it based its conclusion on the statute's *purpose* and not on the nature of a *conviction* under the statute.").

205. *See* Das, *supra* note 93, at 1734 (discussing the constitutional demands of uniformity).

206. *See id.* at 1728–29 (decrying the consequences that a circumstance-specific approach would signify for due process).

207. Evan Tsen Lee, Mathis v. U.S. *and the Future of the Categorical Approach*, 101 MINN. L. REV. HEADNOTES 263, 268–69 (2016) (discussing the immigration-CIMT landscape, the modified categorical approach, and when judges may look at underlying facts).

208. *See, e.g.*, Haas, *supra* note 15, at 125 (discussing the eroding distinction between criminal law and immigration law).

209. *See* Holper, *supra* note 41, at 684 (comparing CIMT determination with discretionary relief); *infra* Part IV.C.

percentage of whom are recidivists."[210] In other words, the BIA believed that this harm to potential victims was an adequate reason to find depravity.[211] However, this standard holds registrants responsible for crimes that they have not yet committed—and may never commit. The BIA compared the harm of failing to register to the harm caused when children experience neglectful abuse and the potential danger caused by driving while intoxicated.[212] These analogies are inapt. Child abuse always harms an actual victim, while no one is directly hurt by the act of an untimely registration.[213] Additionally, the comparison to drunk driving is inapplicable because a DUI by itself is not in fact a CIMT.[214] Given the stated reasons for the registration requirement, treating failure to register as a deportable offense rather than a regulatory requirement means punishing individuals for their statistical likelihood of committing a theoretical sex offense in the future. Imposing punishment for theoretical and not actual criminal conduct creates a thought crime and raises serious constitutional concerns.[215]

Treating failure to register as depraved based on the probability of reoffending also ascribes criminal intent where it does not necessarily exist. Where a sex offender may have failed

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210. *See Tobar-Lobo*, 24 I. & N. Dec. at 146 (stating the California Supreme Court's reasoning for the registration statute).

211. *See id.* at 147 ("A convicted sex offender's failure to obey the lawful requirement to register with appropriate authorities so that others may become aware of the potential danger posed by such an offender is also 'despicable.'").

212. *See id.* at 146 n.6, 147 (comparing failure to register to other offenses).

213. *See id.* at 149 (Filppu, B.M., dissenting) ("No persons are directly and personally victimized solely through the simple forgetfulness of a sex offender who is a few days late in updating a prior registration.").

214. *See* Efagene v. Holder, 642 F.3d 918, 924 (10th Cir. 2011) ("The BIA's comparison of failure to register as a sex offender to driving under the influence does not support its position."); Torres-Varela, 23 I. & N. Dec. 78, 86 (B.I.A. 2001) (holding that the respondent's third violation of an Arizona drunk driving offense was not a CIMT). *But cf.* Lopez-Meza, 22 I. & N. Dec. 1188, 1196 (B.I.A. 1999) (determining that an Arizona conviction for drunk driving on a revoked or suspended license was a CIMT).

215. *See* William Federspiel, Note, 1984 *Arrives: Thought(Crime), Technology, and the Constitution*, 16 WM. & MARY BILL RTS. J. 865, 872–73 (2008) (discussing First and Fourth Amendment consequences of thought crime prosecution).

to register out of forgetfulness or confusion, this analysis assumes that the non-registrant's motive must have been to enable him to commit another sex offense. In reality, even a willful violation could have occurred for a multitude of other reasons, such as the desire to maintain stable housing or employment.[216] This reasoning also assumes that any previous sex offender who is not forever incapacitated by up-to-date registration will inevitably reoffend, when in reality sex offenders who fail to register do not reoffend more often than those who comply with registration requirements.[217] The BIA's finding that failure to register involves depravity because of a crime that has not yet been committed is both legally and logically flawed.

C. *The BIA Should Have Preserved the Distinction Between Regulatory and Punitive Provisions*

While the BIA in *Tobar-Lobo* acknowledged that regulatory or administrative violations generally did not qualify as CIMTs, the Board nevertheless decided to classify failure to register as a CIMT.[218] In doing so, the BIA contradicted its own prior case law.[219] Traditionally, depravity does not inhere in regulatory offenses.[220] This distinction relies on the idea that regulatory offenses are wrong only because of their proscription, instead of being intrinsically wrong.[221] The BIA did not provide a reasoned explanation for its decision to create an exception to its

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216. *See* Grant Duwe & William Donnay, *The Effects of Failure to Register on Sex Offender Recidivism*, 37 CRIM. JUST. & BEHAV. 520, 521 (2010) (reviewing research on sex offense registration).

217. *See* Jill Levenson et al., *Failure to Register as a Sex Offender: Is It Associated with Recidivism?*, 27 JUST. Q. 305, 317 (2010) (reporting that researchers found "no significant difference in the proportion of sexual recidivists and nonrecidivists with [failure-to-register] offenses").

218. *See* Tobar-Lobo, 24 I. & N. Dec. 143, 147 (B.I.A. 2007) (creating an exception for failure to register).

219. *See, e.g.*, Abreu-Semino, 12 I. & N. Dec. 775, 776 (B.I.A. 1968) ("We have many times held that the violation of a regulatory . . . provision of a statute is not a crime involving moral turpitude.").

220. *See id.* (distinguishing regulatory violations from CIMTs).

221. *See Efagene*, 642 F.3d at 923 (stating that there is "nothing inevitable" about the enactment of regulatory provisions).

precedent.[222] It determined that the regulatory scheme's social purpose was so important as to make the violation depraved, but all regulatory requirements further a public interest.[223] Later, while following *Tobar-Lobo*, the Eighth Circuit erroneously claimed that no such distinction for regulatory offenses ever existed.[224]

In contrast, the courts that did not classify failure to register as a CIMT have stressed that failure to register is merely an administrative offense and does not involve any inherently depraved acts.[225] Additionally, violation of regulatory statutes almost never involves any "direct or particularized injury."[226] Excluding failure to register from being a CIMT keeps the law consistent, especially when other reporting, licensing, and filing requirements cannot be classified as CIMTs.[227] These courts also recognized that the purpose of regulatory requirements such as registration is to provide law enforcement with information, rather than to punish registrants for depravity.[228] The BIA must abandon its reliance on *Tobar-Lobo* in order to make its case law on the regulatory offense exception consistent.

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222. *See Tobar-Lobo*, 24 I. & N. Dec. at 147 (finding that because of the registration statute's importance, "the regulatory nature of this offense does not foreclose its status as a crime involving moral turpitude").

223. *See* Bakor v. Barr, 958 F.3d 732, 741 n.5 (8th Cir. 2020) (Kelly, J., dissenting) ("Presumably, most regulatory schemes are enacted to further a public interest. But this does not necessarily render the regulated conduct morally reprehensible.").

224. *See id.* at 741 (discussing the long history of an exception for regulatory offenses).

225. *See, e.g.*, Mohamed v. Holder, 769 F.3d 885, 889 (4th Cir. 2014) (stating that violations of sex-offender registration statutes are administrative, rather than moral).

226. Plasencia-Ayala v. Mukasey, 516 F.3d 738, 748 (9th Cir. 2008), *overruled on other grounds by* Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009).

227. *See* Totimeh v. Att'y Gen., 666 F.3d 109, 115 (3d Cir. 2012) (describing the BIA's precedent about regulatory offenses).

228. *See id.* at 116 (explaining that the stated purpose of the Minnesota provision is regulatory); *Bakor*, 958 F.3d at 741 (Kelly, J., dissenting) (stressing the distinction between punitive and regulatory statutes).

IV. RECONSIDERING THE ROLE OF MORAL TURPITUDE

Even if the BIA abandoned its flawed precedent and recognized that failure to register as a sex offender should not qualify as a CIMT, similar problems could persist. Rather than waiting for the BIA and courts of appeals to evaluate whether every crime involves moral turpitude, scholars and commentators have suggested other alternatives to solve this broader problem.

A. *Updating the Definition of Moral Turpitude*

Some authors have pushed to overhaul the definition of moral turpitude. This type of proposal often focuses on modernizing the CIMT definition that courts rely on so that it better corresponds to modern sensibilities.[229] One way to modernize the definition would be to introduce a new test for whether moral turpitude inheres in a crime.[230] An alternate approach would be to clarify the meaning of moral turpitude so that adjudicators could apply it more evenly.[231] Legislators could create a federal generic CIMT definition, possibly by codifying the prevailing common law definitions.[232] Another author has proposed simply updating the words to ones that mean more to a modern ear.[233] A clearer definition could remove confusion for

229. *See* Rob Doersam, Note, *Punishing Harmless Conduct: Toward a New Definition of Moral Turpitude in Immigration Law*, 79 OHIO STATE. L.J. 547, 576–77 (2018) (remarking that the reason crimes not involving moral turpitude often seem just as serious as CIMTs is that modern moral sentiments no longer match judicial precedent).

230. *See id.* at 581 (proposing a CIMT test based on current moral norms that requires (1) a purposeful or knowing *mens rea* and (2) a five-year punishment, or in the alternative, a sex crime, domestic violence crime, a crime inflicting harm to children, animals, and the elderly, or a hate crime).

231. *See* Harms, *supra* note 78, at 278 (calling on Congress to better define the term).

232. *See* Colleen Muñoz, Note, *Reevaluating the Adjudication of Crimes Involving Moral Turpitude*, 24 LEWIS & CLARK L. REV. 325, 354 (2020) (arguing that a generic federal definition of CIMT would "promote transparency and predictability for adjudicators and advocates alike"); Harms, *supra* note 78, at 281 (recommending that Congress amend the INA to include generally accepted principles for determining whether a crime is a CIMT).

233. *See* Sean Grady, Note, *Crimes Involving Moral Turpitude: What Happens When an Antiquated Phrase is Used in Modern Immigration Law*, 88 MISS. L.J. 373, 408–09 (2019) (noting that the common law language of "base,

adjudicators while lessening the immigration penalties that follow from low-level non-violent crimes.[234]

Furthermore, some commentators have recommended that the immigration CIMT jurisprudence could be clarified by enumerating CIMT-type offenses in the INA.[235] Rather than relying on case law that might be flawed or uneven, adjudicators would simply check whether the type of offense is listed in the statute as a CIMT and utilize the categorical approach to see if the non-citizen's conviction triggers deportation.[236] If Congress amended the INA, this approach would be feasible because it mirrors how aggravated felonies are currently enumerated in the INA.[237]

B. *Exacerbating the CIMT Problem Using an Ad Hoc Analysis*

Because of the confusion surrounding use of the categorical approach in CIMT determination, some authors and judges have urged for a departure from an elements-based analysis to an ad hoc approach that lets adjudicators look at the non-citizen's underlying conduct.[238] The argument maintains that allowing the adjudicators to look at the underlying conduct would help simplify the CIMT analysis in situations where the categorical

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vile, or depraved" could be replaced with more meaningful synonyms such as "deceitful, fraudulent . . . or grossly unethical").

234. *See* Doersam, *supra* note 229, at 580, 590 (suggesting that the Department of Justice should draw a bright-line rule for moral turpitude that errs on the side of designating fewer crimes as CIMTs and excluding low-level crime).

235. *See* Harms, *supra* note 78, at 279–80 (suggesting an amendment to the INA listing categories of CIMTs).

236. *See* Grady, *supra* note 233, at 397, 401 (arguing that CIMT jurisprudence would be less troublesome if adjudicators compared convictions to an enumerated CIMT list rather than making case-by-case determinations of depravity).

237. *See* 8 U.S.C. § 1101(a)(43) (listing categories of offenses that qualify as aggravated felonies).

238. *See* Grady, *supra* note 233, at 401–02 (making a case for why immigration adjudicators should be allowed to look at the record of conviction and giving examples of when the categorical approach produced results that downplayed serious crimes or exaggerated non-serious crimes); Prudencio v. Holder, 669 F.3d 472, 489 (4th Cir. 2012) (Shedd, J., dissenting) (calling for a circumstance-specific, rather than categorical, analysis).

approach leads to an inconclusive or nonsensical result.[239] However, this viewpoint fails to address the uniformity and procedural protection issues inherent in letting immigration adjudicators look at the record of conviction and make factual findings.[240] While adjudicators might only be permitted to look at the record of conviction when the result is confusing or if a party has requested the ad hoc approach by motion,[241] the CIMT analysis alone is sufficiently confusing, so the ad hoc approach would be frequently used, adding strain on an already backlogged immigration system.[242] It also ignores that the BIA recently rejected this type of approach to CIMT analysis.[243] Finally, it fails to fix the underlying problem: that adjudicators do not always correctly determine whether a crime is a CIMT. Knowing the immigrant's specific conduct would not help if the meaning of CIMT is not clear or uniform.

C. *A Simpler Option—Eliminating the CIMT Framework*

Given the confusion surrounding CIMTs and the potential for unfair and unpredictable application, it may be time to dispose of the framework altogether. Whether based on its vagueness, unworkability, or its potential for bias, Congress ought to reevaluate using moral turpitude as a benchmark for deportability.

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239. *See* Grady, *supra* note 233, at 401 (contending that a fact-based determination for CIMTs helps judges "come to a more fair and informed determination of whether the crime meets the standard").

240. *See* Das, *supra* note 93, at 1709–10, 1733 (stating rationales for the categorical approach).

241. *See* Grady, *supra* note 233, at 401, 406 (noting the author's proposed limitations for when the ad hoc approach should be used). *But see* Muñoz, *supra* note 232, at 351–52 (recommending retention of the categorical approach and disposal of the modified categorical approach, limiting the circumstances where adjudicators could view the record of conviction).

242. *See* EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS 1 (2021), https://perma.cc/V8KP-MD4W (PDF) (showing over 1.2 million pending adjudications in EOIR immigration courts in the first quarter of 2021, up from just over half a million in 2016). If parties had the option of moving to disclose the immigrant's underlying conduct, it is safe to assume that either the non-citizen or the Department of Homeland Security would automatically file such a motion in nearly every case.

243. Silva-Trevino III, 26 I. & N. Dec. 826, 831 (B.I.A. 2016) (clarifying that immigration adjudicators should not look at the facts underlying the respondent's violation when making a CIMT determination).

The use of CIMTs to trigger immigration removal could be designated void for vagueness.[244] In the absence of clarity about which crimes involve moral turpitude, non-citizens do not have fair notice about the immigration consequences of those actions.[245] Vagueness, either because of the lack of fair notice or as a result of arbitrary enforcement, is permissible only when the statutory ambiguity is necessary to further the statute's purpose.[246] Here, the CIMT standard would only survive if there were a reason that the immigration law needed to be ambiguous—such as the need for a malleable and unpredictable immigration statute that allows immigration adjudicators to subjectively determine whether a non-citizen is deserving enough to remain in the country.[247] All immigration law necessarily involves judgments about who is welcome in the country, under what circumstances, and for how long. The problem arises when these judgments are inconsistent, relatively hidden, and mingled with individual perceptions about morality and race. Even if the government has a strong need for subjective determinations in immigration law, the INA can accommodate this need without unpredictable removal provisions that hold the potential for biased decision-making.[248]

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244. *See supra* Part I.A.3.

245. *See supra* Part IV.B; Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (reaffirming the requirement of fair notice); Holper, *supra* note 41, at 683 (stating that the BIA "is constantly deciding issues of first impression" when it comes to CIMTs, making it difficult for non-citizens to be on notice whether a conviction will have immigration consequences).

246. *See* Harms, *supra* note 78, at 271 (describing the necessity balancing test).

247. Professor Lerner follows this line of thinking, pointing to what he sees as a distinction between criminal and immigration law. *See* Lerner, *supra* note 76, at 140 ("[C]riminal 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."). He argues that moral turpitude was included in immigration law as a "screening device," so that Congress could ensure that only desirable individuals could successfully immigrate and naturalize. *Id.* at 83–84. What Professor Lerner fails to acknowledge is the looming background of racism and nativism. *See supra* INTRODUCTION. These inextricable notions—desirability, morality, belonging, and race—should give us pause when deciding if this subjective immigration consequence is still worthwhile.

248. The INA already contains discretionary provisions that allow immigration adjudicators to make subjective decisions about individual immigrants' worthiness to remain in the country. *See, e.g.*, 8 U.S.C. § 1229b(a)

While the Supreme Court's decision in *Jordan v. De George* appeared to foreclose the possibility of a vagueness finding for the CIMT standard,[249] the Court recently determined that part of the definition of the "crime of violence" provision as used in the INA was unconstitutionally vague.[250] This opens up the possibility that the argument could successfully be applied to the words "crime involving moral turpitude" as well.[251]

Finally, modern use of the CIMT immigration provisions suggests that the phrase has lost its meaning and become redundant. Professor Holper argues that the term "crime involving moral turpitude" has no consistent meaning, as evidenced by the fact that courts frequently apply the CIMT framework to new crimes.[252] This argument has particular significance since the BIA appears to be engaged in a steady expansion of the term's application.[253] One method the BIA employs to expand the CIMT category consists of pointing to and following broader trends in criminalization.[254] However, the Board's reasoning—that moral turpitude inheres because criminal consequences follow—could be applied to any crime, essentially rendering the words "moral turpitude"

(stating that the Attorney General may cancel removal of a non-citizen who has been a lawful permanent resident for at least five years, has resided in the United States for at least seven years, and has not been convicted of an aggravated felony).

249. *See* Jordan v. De George, 341 U.S. 223, 232 (1951) (finding that "crimes in which fraud was an ingredient" involve moral turpitude).

250. *See Dimaya*, 138 S. Ct. at 1223 (stating that the residual clause "produces more unpredictability and arbitrariness than the Due Process Clause tolerates" (quoting Johnson v. United States, 576 U.S. 591, 598 (2015))).

251. *See* Koh, *supra* note 23, at 279 (listing the vagueness doctrine among other possible solutions for the problem of CIMT expansion).

252. Holper, *supra* note 41, at 683 (illustrating that "the term CIMT has no common understanding" and thus is not defined clearly enough to evade a vagueness argument).

253. *See* Koh, *supra* note 23, at 272 (explaining how the BIA has misapplied the categorical approach to expand CIMT application to a broader array of criminal offenses).

254. *See id.* at 275 (citing instances where the BIA pointed to developments in criminal law to argue that offenses previously not considered to be CIMTs could qualify because they now carried a similar criminal punishment as other established CIMTs).

unnecessary.[255] By diluting the term CIMT to potentially encompass any crime, the BIA has created a "'catch-all' category" for criminal deportation.[256] Not only does this use of the term CIMT ignore Congress's intention behind the words "involving moral turpitude," but it also allows adjudicators to exercise discretion to remove any non-citizen they perceive as undesirable, whether or not their rationale is based on the terms outlined by Congress.[257] Such discretion poses extraordinary dangers to the proper functioning of a fair immigration system.[258]

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255. *See id.* at 276 ("The problem with the Board's 'it is a crime, therefore it is a CIMT' analysis is that Congress set forth crimes *involving moral turpitude*—not all criminalized acts—as a trigger point for immigration sanctions."). This argument has similar logical flaws to the rationale put forward by the *Tobar-Lobo* Board, discussed *supra* Part II.C, which contended that failure to register breached a duty to society and therefore involved moral turpitude, although in theory all crimes breach a duty to society.

256. Holper, *supra* note 41, at 700.

257. *See, e.g.*, Staggers, *supra* note 19, at 38 (concluding that the government prosecutes and deports non-white and non-citizen gang members based on a racist fiction that conflates non-whiteness with immorality); Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 421–22 (2011) (explaining that "modern or aversive prejudice" has wound its way into immigration law and can be expressed in subtle and rationalizable ways). Immigration judges may not always be aware of, or be able to counter, the way that unconscious biases influence their decisions. *See id.* at 432–37 (explaining that the high-stress environments, like those found in the fast-paced and backlogged immigration court system, make individuals "highly susceptible" to basing decisions on implicit bias).

258. *See* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 239–42 (2012) (arguing that the exercise of discretion in immigrant bond hearings and cancellation of removal determination is tainted by unconscious bias). Professor Keyes posits that in these settings, immigration judges who encounter respondents for short periods of time with limited facts fall back on familiar stories about "good" and "bad" immigrants. *Id.* at 244. Since familiar immigration narratives often have racial undertones, immigrants of color are doubly disadvantaged. *See id.* at 224 n.63 (commenting on how race and sex may influence the ways in which non-citizens facing criminal immigration proceedings may be perceived). Unlike requests for bond and cancellation of removal, CIMT categorization is not a determination for which adjudicators have purposefully been granted discretion, so it is extremely troubling that CIMTs also allow for this. *See, e.g.*, 8 U.S.C. § 1226(a) (directing an exercise of discretion over immigrant bond hearings); *id.* § 1229b (directing an exercise of discretion over cancellation of removal); *id.* § 1227(a)(1)(H) (directing an exercise of discretion to waive a ground of inadmissibility).

While immigration adjudicators justify the expansion of the CIMT designation by saying that it is designed to be adaptable to modern moral sensibilities,[259] legislators, rather than adjudicators, should be the ones to decide what our society's morals are.[260] Instead of providing adjudicators with a vague category in which their biases—whether conscious or unconscious—can work against non-citizens, Congress should consider disposing of the CIMT category altogether. One alternative Congress may contemplate is consolidating the typical CIMT-type offenses into the enumerated aggravated felony provision.[261] The aggravated felony category already has considerable overlap with serious CIMTs and involves a somewhat more workable analysis.[262] If Congress still wishes to create immigration consequences for crimes that it perceives as

259. *See* Holper, *supra* note 41, at 656 (stating that the BIA measures the nature of a crime "against contemporary moral standards" that "may be susceptible to change based on the prevailing views of society" (quoting Torres-Varela, 23 I. & N. Dec. 78, 83 (B.I.A. 2001))).

260. *See id.* at 682 (describing the expansion of the CIMT definition as immigration adjudicators improperly "playing God, applying what they deem to be society's morals" to criminal convictions). *But see* Lerner, *supra* note 76, at 131–32 (asserting that "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" non-citizens based on morality). In Professor Lerner's view, immigration adjudicators can be trusted to impart society's consensus about what crimes are immoral. *See id.* at 132–35 (explaining how the BIA recently used the "familiar framework" of the categorical approach to determine that cock-fighting constitutes a CIMT). Professor Lerner contends that the BIA's determination about animal fighting is proof that adjudicators can summarize contemporary moral values, in part because such schemes are criminalized in all fifty states. *Id.* at 135. Of course, the criminalization of an act is not enough for CIMT status. *See infra* Part III.A.3. The public consensus could well be that animal fighting is particularly despicable—but the BIA's decision there merely shows that adjudicators can accurately make morality calls when they *properly* apply the categorical approach. In *Bakor* and *Tobar-Lobo* they clearly did not. *See infra* Part III.

261. *See* Grady, *supra* note 233, at 408 (arguing that the CIMT definition could be narrowed because "the introduction of the aggravated felony standard already encompasses many removable crimes that used to be covered by the crime of moral turpitude standard").

262. *See id.* at 408–09 ("Crimes like domestic violence, armed robbery, rape, and human trafficking are already enumerated in the INA as separate grounds of removal, so the definition for crimes involving moral turpitude no longer needs to be so broad as to encompass crimes that society deems to be heinous or serious.").

particularly morally reprehensible, then it may include those offenses as aggravated felonies.[263]

CONCLUSION

In immigration removal, crimes involving moral turpitude are among the most opaque and bewildering of the criminal bases of deportation. Because of the inconsistent case law in this area, CIMTs can blindside non-citizens with immigration consequences. They also potentially enable arbitrary and even discriminatory immigration enforcement.[264]

This Note examined a typical example of this confusing jurisprudence: the application of the CIMT designation to sex offender registration violations. In *Bakor v. Barr*, the Eighth Circuit erred in finding that failure to register could qualify as a CIMT, because the statute of conviction did not necessarily involve intent or depravity.[265] The decision relied on erroneous precedent from the BIA, *Tobar-Lobo*, which should be abandoned by courts of appeals and by the BIA.[266] In April 2021, the Supreme Court denied Bakor's petition for certiorari, so the Court will not decisively clarify the CIMT jurisprudence in the near future.[267] When the time comes for Congress to reevaluate the Immigration and Nationality Act, legislators should reformulate the Act's removal provisions by eliminating the phrase "crime involving moral turpitude."

This question will become increasingly pertinent as the courts consider more cases of first impression in the CIMT category. The potential for CIMTs to apply to regulatory offenses, for example, would significantly alter the risk of deportation for non-citizens.[268]

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263. *See* Holper, *supra* note 41, at 701 (recommending that Congress exercise its authority to add new criminal grounds of deportability "using clear terms, rather than allowing the BIA and courts to determine whether each new crime offends society's morals").

264. *See supra* Part IV.C.

265. *See supra* Part III.

266. *See supra* Part III.

267. *See* Brief for the Petitioner, Bakor v. Wilkinson (2020) (No. 20-837); Bakor v. Barr, 958 F.3d 732 (8th Cir. 2020), *cert. denied sub nom.* Bakor v. Garland, No. 20-837, 2021 WL 1602650 (U.S. Apr. 26, 2021).

268. *See supra* Part III.C.

Finally, this Note proposed that the CIMT framework no longer belongs in immigration enforcement. The definition of moral turpitude has become unworkable and is often indistinguishable from crime in general.[269] Proponents of the CIMT category have praised its flexibility in allowing the immigration system to adapt to shifting moral standards.[270] However, this is not necessarily a positive when reliance on public morals can lead to discriminatory results.[271] Further, all laws can change in response to developments in moral sensibilities, and an appropriate solution is to let the legislature amend the INA rather than creating a vague all-inclusive deportation category.[272] Immigration adjudicators should note this and more carefully consider the consequences of future moral turpitude cases.

269. *See supra* Part IV.

270. *See supra* Part IV. Part I.A.3., *supra*, gives several examples of behaviors that are no longer considered to involve moral turpitude.

271. *See, e.g.*, Staggers, *supra* note 19, at 37–38 (noting the issues inherent in relying on public morality in gang enforcement).

272. *See supra* Part IV.