Nebraska Law Review

Volume 90 | Issue 3 Article 3

2012

Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness

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Manuel, a lawful permanent resident from El Salvador, is charged with the Virginia offense of being a passenger and leaving the scene of an accident where there was bodily injury. His public defender, wanting to help Manuel avoid deportation, consults a chart, written by a local immigration attorney, which lists the immigration consequences of various Virginia offenses. Happy to see that this offense does not render Manuel deportable for an "aggravated

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felony," or many other grounds of deportation, she reads that the offense "possibly" renders him deportable for a "crime involving moral turpitude."

I. INTRODUCTION

Manuel's fairly typical story is governed by two important Supreme Court cases. In the 1951 case of *Jordan v. De George*,[1] the Supreme Court decided that a statute authorizing deportation for a "crime involving moral turpitude" (CIMT) was not void for vagueness because courts had long held the noncitizen's offense, fraud, to be a CIMT, so he was on notice of his likely deportation. This case left noncitizens like Manuel and their criminal defense attorneys wondering: if the crime charged was not one that courts had held to be a CIMT, would deportation result? Then, the Court held in the 2010 case *Padilla v. Kentucky*,[2] that defense counsel has a Sixth Amendment duty to warn noncitizens only about immigration consequences that are "succinct, clear, and explicit" from a reading of the Immigration and Nationality Act.[3] Because the meaning of CIMT is not "succinct, clear, and explicit" in the statute, attorneys like Manuel's criminal defense lawyer have no clear obligation to read case law and warn him about deportability for a CIMT. Thus, the lawyer best situated to give noncitizens like Manuel notice of the meaning of CIMT, thanks to the vagueness of the term CIMT with respect to many offenses, cannot ascertain whether a client's conviction will be a CIMT; thanks to *Padilla*, she may not even be required to figure it out.

In this Article, I argue that courts should find the term CIMT in deportation law is void for vagueness, notwithstanding the *Jordan* decision. Courts are bound by *Jordan* with respect to the "easy" cases such as fraud.[4] However, for the world of offenses with no clear case law deciding whether they are CIMTs, the term is vague. Because the definition of CIMT used by the Board of Immigration Appeals (BIA) and courts is an act that is "base, vile, or depraved" and "contrary to the accepted rules of morality,"[5] it provides no useful definition. Rather, this ground for deportation casts judges in the role of God,[6]

1. 341 U.S. 223 (1951).
2. 130 S. Ct. 1473 (2010).
3. *See id*. at 1483.
4. *See Jordan*, 341 U.S. at 232 (reasoning that while there may be peripheral cases where the meaning of CIMT is in doubt, "[t]here is no such doubt present in this case" because "[t]he phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct").
5. Mehboob v. Att'y Gen., 549 F.3d 272, 275 (3d Cir. 2008); *In re* Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1989).
6. *See Jordan*, 341 U.S. at 236–37 (Jackson, J., dissenting).

assessing whether the offense offends the "moral standards generally prevailing in the United States."[7]

In Part II, I give the background leading up to a situation like Manuel's. I discuss some legislative history of the term CIMT and how it presently is defined by the courts and BIA. I also discuss the Supreme Court's recent holding in *Padilla*, which left defense counsel representing noncitizens with no clear obligation to read case law and determine whether a given offense will lead to deportation for a CIMT. In Part III, I discuss the Supreme Court's holding in *Jordan* that the term CIMT is not void for vagueness in a deportation statute. In Part IV, I argue that courts should find the term CIMT is void for vagueness in an as-applied challenge to an offense that is not an "easy" case such as fraud. I discuss examples in which the BIA and courts have sat in judgment of whether certain offenses are CIMTs by applying the "moral standards generally prevailing in the United States"[8] to demonstrate how the term CIMT allows judges to apply their own personal opinions of morality. I also discuss several Supreme Court cases, decided both before and after *Jordan*, which determined whether statutes were void for vagueness and apply this reasoning to the statute authorizing deportation for a CIMT. Finally, I argue that a vague term like CIMT is not necessary in deportation law because Congress has found ways to fulfill its legislative goal of deporting undesirable noncitizens through clearer terms.

II. BACKGROUND

A. Legislative History of CIMT in Deportation Law

An 1891 Act introduced the term CIMT into federal immigration law, excluding from the United States "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."[9] The term was adopted "without comment in the accompanying reports."[10] However, it appears the term may have

7. *See* 22 C.F.R. § 40.21(a)(1) (2011); *In re* McNaughton, 16 I. & N. Dec. 569, 573 (B.I.A. 1978).
8. 22 C.F.R. §40.21(a)(1).
9. Act of March 3, 1891, ch. 551, 26 Stat. 1084. The act excepted persons convicted of political offenses, "notwithstanding said political offense may be designated as a 'felony, crime, infamous crime, or misdemeanor, involving moral turpitude' by the law of the land whence he came or by the court convicting." *Id.* For an excellent discussion of the history of exclusion and deportation for crimes, see DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007).
10. Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L. J. 259, 262 (2001) (quoting STAFF OF HOUSE COMM. ON THE JUDICIARY, 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 102 (Comm. Print 1988) [hereinafter HISTORICAL BACKGROUND AND ANALYSIS].

been a response to joint congressional hearings in 1891, which recommended immigration laws to "separate the desirable from the undesirable immigrants, and to permit only those to land on our shores who have certain physical and moral qualities."[11] Acts of 1903 and 1907 included similar language, excluding noncitizens for, among other reasons, CIMTs.[12]

While CIMT remained a ground of exclusion, the 1917 Act was the first time that CIMT also became a ground of deportation.[13] The 1917 Act authorized deportation for commission of a CIMT within five years after entry for which a sentence of one year or more was imposed; also deportable was someone who committed two CIMTs at any time after entry.[14] Professor Daniel Kanstroom wrote about public opinion leading up to the 1917 Act, stating, "The idea of deportation for more types of post-entry crime easily garnered public support,"[15] as "there was clearly a general perception at the time of widespread and increasing crime."[16] A commission created to study immigration policy in 1911 recommended "a five-year period of deportability of aliens convicted of serious crimes after entry."[17] The legislative history indicates that no

11. KANSTROOM, *supra* note 9, at 115 (quoting SPECIAL COMM. ON IMMIGRATION AND NATURALIZATION, 51ST CONG., 2D SESS., REP. (II) (1891) (internal quotation marks omitted).

12. Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898, 898–99; Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214.

13. Act of Feb. 5, 1917, ch. 29, §§ 3, 19, Stat. 874, 875, 889–90 (repealed 1952); KANSTROOM, *supra* note 9, at 133–34. In *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the Court upheld the federal government's plenary power to exclude foreigners, which was incident to sovereignty. In *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the Court reasoned that the power to exclude included the power to deport; thus, the federal government's deportation laws also were subject to the plenary power: "The right of a nation to expel or deport foreigners . . . rests upon the same grounds and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country." *Id*. at 707. Professor Kanstroom wrote about the evolution of the grounds of exclusion and deportation. *See* KANSTROOM, *supra* note 9, at ch. 3. Early on, the laws did not deport persons for post-entry conduct; rather, persons were deportable for pre-entry conduct. *Id.* at 125. However, eventually, Congress created "post-entry social control deportation laws," which involved ideological and criminal deportations; this was in response to the early federal "war on crime." *Id.* (citing E. P. HUTCHISON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, 101 (University of Pennsylvania Press 1981)).

14. Act of Feb. 5, 1917, ch. 29, §§ 19, 39 Stat. 874, at 889.

15. KANSTROOM, *supra* note 9, at 133.

16. *Id.*

17. *Id.* (quoting U.S. IMMIGRATION COMM'N , REPORT 1:45–48 (1911)); *see also* 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05 (rev. ed. 2010) (citing S. REP. NO. 64-352 (1916)) ("Deportation for criminal activities in the United States first appeared in the Immigration Act of 1917 in response to a public outcry against the activities of noncitizen criminals.").

one sought to define the term CIMT;[18] rather, it appears that Congress deemed CIMT to be the equivalent of a "serious offense."[19]

The 1952 Immigration and Nationality Act (INA), which completely revised the immigration laws,[20] contained the same CIMT provisions of the 1917 act, rendering a noncitizen inadmissible for a CIMT and deportable for two CIMTs, or a single CIMT committed within five years of admission if a sentence of one year or longer was imposed.[21] The 1952 act was passed in another fearful, pro-deportation era; one of the coauthors of the act stated that "thousands of criminals and subversive aliens are roaming our streets, a continuing threat to the safety of our people."[22] Even those who opposed the act were "thoroughly in favor of deporting and excluding undesirable aliens."[23] The legislative history of the 1952 Act indicates some immigration inspectors and consular officers objected that the term CIMT as used in the exclusion statute was "too broad" and that "a listing of crimes and circumstances comprehended within the meaning of moral turpitude" would be helpful, because "the applicability of the excluding provisions often depends on what the individual officer considers to be baseness, vileness, or depravity."[24] However, a Senate report responding to these criticisms explained, "Although it might be desirable to have the crimes specifically set forth, difficulties might be encountered in getting a phrase that would be broad enough to cover the various crimes contemplated with the law and yet easier to comprehend than the present phrase."[25]

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA);[26] AEDPA and its counterpart, the Illegal Immi-

18. Homosexuality As Grounds For Exclusion, 3 Op. O.L.C. 457, 460, note 4 (1979) (citing S. REP. NO. 64-352 (1916)) (stating that two provisions of the 1917 act, exclusion for intended acts of "immoral purpose" and deportation for CIMTs "were left wholly undefined by the 1917 Act and by its legislative history"); *see also id*. ("The terms are also not explained in the legislative history of H.R. 6060, 63d Cong., 3d sess. (1916), in which the deportation category first appeared, or in the legislative history of the Act of February 20, 1907, 34 Stat. 898, 899, in which the exclusionary provision originated.").
19. *See* S. REP. NO. 64-352, at 15 (1916) (discussing House version of the bill that contained a provision "for the deportation of aliens who commit serious crimes within five years after entry" and for "aliens to be deported without limitation on the length of time after entry when they commit a second serious offense.").
20. *See* S. REP. NO. 82-1137, at 1 (1952).
21. Pub. L. No. 414, 66 Stat. 163, 182, 204 (1952).
22. KANSTROOM, *supra* note 9, at 174 (quoting Laurent B. Frantz, *Deportation Deliriums*: *Xenophobia in Action*, The Nation, (Mar. 26, 1955), at 258 (internal quotation marks omitted)).
23. *Id*. (quoting 98 CONG. REC. 5239 (1952) (internal quotation marks omitted)).
24. S. REP. NO. 81-1515, at 353 (1950).
25. *Id.*
26. *See* Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

gration Reform and Immigrant Responsibility Act (IIRIRA),[27] expanded the criminal grounds of deportability, particularly the "aggravated felony" category,[28] and enhanced the consequences of conviction for an aggravated felony.[29] IIRIRA also rendered deportable persons convicted of crimes of domestic violence, stalking, and child abuse, and those who had violated restraining orders.[30] The 1996 laws, adopted during the fearful time following the 1995 Oklahoma City bombings,[31] were a response to a belief that many noncitizens had committed crimes and thus needed to be deported in order to protect the safety of the American people.[32] AEDPA largely left the 1952 CIMT language intact yet made deportable a noncitizen

27. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 and 18 U.S.C.).

28. *See* § 440(e), 110 Stat. at 1277. The term "aggravated felony" was introduced by the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, 102 Stat. 4181. Originally, the term included only murder, drug trafficking, and weapons trafficking. *Id.* § 7342, 102 Stat. at 4469–70. The Immigration Act of 1990 expanded the definition of aggravated felony, as did the Immigration and Nationality Technical Corrections Act of 1994, AEDPA in 1996 and IIRIRA in 1997. *See* § 321(a), 110 Stat. at 3009-627 to 628; 440(e), 110 Stat. at 1277; Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320–21; Pub. L. 101-649, § 501(a)(3), 104 Stat. 4978, 5048; *see also* Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 592–605 (1998) (describing evolution of aggravated felony definition). Today, the term includes twenty-one categories of offenses. *See* 8 U.S.C. § 1101(a)(43)(A)–(U) (2006).

29. For example, the long-term waiver of deportation previously available to long-term permanent residents under the Immigration and Nationality Act (INA) § 212(c) was eliminated. *See* Pub. L. 414-477, § 212(c), 66 Stat. 163, 187 (1952) (repealed by § 304(b), 110 Stat. at 3009–597). At the same time, the replacement waiver, now called cancellation of removal, barred those convicted of an aggravated felony from seeking the relief. *See* § 304(a)(3), 110 Stat. at 3009-587 to 597, 8 U.S.C. § 1229(a) (Supp. IV 1998) (enacting cancellation of removal procedures).

30. § 350(a), 110 Stat. at 3009-639 to 640.

31. *See* Coonan, *supra* note 28, at 600 (quoting *Text of the President's Statement on Antiterrorism Bill Signing*, U.S. NEWSWIRE, Apr. 24, 1996, *available at* 1996 WL 5620927) ("Enacted in the wake of the 1995 Oklahoma City bombing, AEDPA reflected both popular and legislative determination to deter and punish terrorism. Notwithstanding President Clinton's acknowledgment that the bill 'made a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism,' he signed the bill into law on April 24, 1996." (footnote omitted)).

32. *See* Rep. Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking The Right Reasons*, 28 ST. MARY'S L. J. 883, 929–30 (1997) (arguing that "[i]n the early 1980s, approximately 1,000 inmates in federal prison facilities were foreign-born, a share of four percent," whereas "[c]urrently, there are more than 24,000 sentenced, non-citizen inmates in federal prisons, out of a total foreign born population exceeding 34,000" (footnotes omitted)); *see also* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v Davis, 2001 SUP. CT. REV. 47, 62–63 (2001) ("Cracking down on illegal immigration featured as a prominent theme in the election year of 1996, and a seeming competition erupted in Congress to see who could be toughest on criminal aliens.").

convicted for one CIMT committed within five years of admission only if the possible sentence was one year or more.[33]

B. CIMT Defined by the Courts and BIA

CIMT has no statutory definition;[34] thus, Congress has delegated power to define it to a few agencies and courts.[35] 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.[36] The decision is made by an immigration judge in the first instance; on appeal, the issue is decided by the Board of Immigration Appeals, a fourteen-member body[37] that decides appeals of decisions of immigration judges nation-wide.[38] The issue is then decided by the Circuit Court of Appeals for the federal circuit court in which the immigration judge completed proceedings.[39] The U.S. State

33. § 435, 110 Stat. at 1274. The Immigration Act of 1990, which preceded AEDPA, also amended the INA, yet retained the same language of the 1952 act regarding exclusion and deportation for CIMTs. § 237(a)(2)(A), 66 Stat. at 201, 8 U.S.C. § 1227(a)(2)(A), (amended by the Immigration Act of 1990, § 602, 104 Stat. at 5077).
34. Hamdan v. INS, 98 F.3d 183, 185 (5th Cir. 1996).
35. *See* Cabral v. INS, 15 F.3d 193, 195 (1st Cir. 1994).
36. A noncitizen in removal proceedings may be subject to the grounds of deportability under 8 U.S.C. § 1227 or the grounds of inadmissibility at 8 U.S.C. § 1182, both of which include crimes involving moral turpitude. 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006) (rendering inadmissible noncitizen who has been convicted of or admitted to the essential elements of a CIMT); 8 U.S.C. § 1227(a)(2)(A)(i) (proscribing removal for conviction for one CIMT committed within five years of admission if the crime is punishable by at least a one-year sentence); 8 U.S.C. § 1227(a)(2)(A)(ii) (removal for two CIMT convictions, not arising out of a single scheme of criminal misconduct, committed at any time after admission). A noncitizen may be subject to both the grounds of deportability and inadmissibility if, for example, he is deportable, yet seeks adjustment of status to lawful permanent residence as a defense to deportation. In this discussion of the agency case law on CIMTs, many of the BIA decisions were decided in the context of inadmissibility, yet they apply equally to deportability.
37. The BIA is authorized to have up to fifteen members, although there are currently fourteen permanent and five temporary Board members. 8 C.F.R. § 1003.1(a)(1) (2011); *EOIR Fact Sheet: Board of Immigration Appeals Biographical Information*, U.S. DEP'T JUSTICE, http://www.justice.gov/eoir/fs/biabios.htm (last updated Jan. 2012).
38. *See* 8 C.F.R. § 1003.1(b). The BIA is not necessarily the final arbiter of agency matters, as the Attorney General may vacate an immigration judge's or BIA panel's decision and certify an issue to him- or herself. *See id.* § 1003.1(h)(i).
39. 8 U.S.C. § 1252(b)(2). Circuit courts are required to give deference to an agency interpretation of its own statutory term, provided that the meaning of the term is ambiguous and the agency's interpretation is reasonable. *See* Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Even if the agency changes its interpretation of a statutory term, circuit courts should defer to the agency's new interpretation, provided that the statute is ambiguous and the new interpretation is reasonable. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

Department defines CIMT in the Foreign Affairs Manual,[40] which guides officers deciding who should be admitted from abroad to the U.S. on immigrant or non-immigrant visas; this definition largely synthesizes BIA and federal case law on the term.[41] The Citizenship and Immigration Services (CIS), whose officers are responsible for deciding which noncitizens should get immigration status such as permanent residence,[42] borrows the definitions of CIMT set forth by the BIA and courts.[43] How have the courts and BIA defined CIMT in immigration law?

Because moral turpitude is undefined in the statute, several BIA decisions have defined it as "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."[44] When applying this definition, a few rules have emerged with respect to the meaning of CIMT.[45] For ex-

40. *See* 9 FOREIGN AFFAIRS MANUAL § 40.21(a), N2.
41. *See id.* (listing offenses that are CIMTs based on case law).
42. *See* 6 U.S.C. § 271(b).
43. *See generally* Patrick T. McDermott, *Crimes Involving Moral Turpitude,* SHUSTERMAN, http://www.shusterman.com/pdf/cmt04.pdf (last updated May 2004) (listing various CIMT's and citing cases related to them).
44. *In re* Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1989); *In re* Flores, 17 I. & N. Dec. 225, 227 (B.I.A. 1980); *In re* Baker, 15 I. & N. Dec. 50, 51 (B.I.A. 1974).
45. Dating back to when "moral turpitude" first appeared in the immigration laws, courts have preferred an elements-based analysis to determine whether an offense involves moral turpitude; this approach is commonly called the categorical approach. *See* United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914); *see also* Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 979–80 (2008) (stating that immigration adjudicators cannot substitute judgment for that of a criminal court to determine guilt or innocence). This analysis requires a judge to determine the elements of the criminal offense, i.e., the minimum acts that the prosecution must prove beyond reasonable doubt in order for the jury to convict; the judge then considers whether this minimum conduct involves moral turpitude. *See In re* Winship, 397 U.S. 358, 363 (1970); *In re* Short, 20 I. & N. Dec. 136, 137–38 (B.I.A. 1989). If there are offenses punishable under the statute that involve moral turpitude and some that do not, the judge consults the record of conviction to determine the nature of the conviction. *See In re* Pichardo-Sufren, 21 I. & N. Dec. 330, 334 (B.I.A. 1996). If the minimum conduct does not involve moral turpitude, an adjudicator cannot consider the underlying facts that led to the conviction. *See Mylius*, 210 F. at 863. This elements-based approach that traditionally existed has been upended by a 2008 Attorney General decision, which created a new three-part test to determine whether an offense is a CIMT. *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 689–704 (Att'y Gen. 2008). In the first step, an immigration judge "must determine whether there is a 'realistic probability, not a theoretical possibility,'" that the statute under which the noncitizen was convicted reaches "conduct that does not involve moral turpitude." *Id.* at 689–90. In the second step, if the statute is divisible, judges must use the traditional categorical approach, looking to the record of conviction to determine whether the offense involved moral turpitude. *Id.* at 690. The third step is where the Attorney General significantly broke with the traditional elements-based ap-

ample, crimes in which fraud is an essential element have been held to be CIMTs.[46] Theft offenses, where the statute punishes an offender for intending to permanently deprive the owner of the rights and benefits of ownership, have consistently been held to be CIMTs.[47] Many sexual offenses have been held to be CIMTs.[48] Assault crimes have been held to involve moral turpitude when the offense has an aggravating factor such as a deadly weapon.[49]

As indicated by this list of offenses, a key ingredient of many CIMTs in immigration law is scienter;[50] as one court stated, "it is in the intent that moral turpitude inheres."[51] While courts and the BIA have not required evil intent, offenses generally must have a mens rea of at least recklessness to be a CIMT.[52] The Seventh Circuit ex-

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proach: "When the record of conviction is inconclusive, judges may, to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction." *Id.*

46. *See* Jordan v. De George, 341 U.S. 223, 227 (1951).
47. *See In re* D-, 1 I. & N. Dec. 143, 144–45 (B.I.A. 1941) (holding that theft with intent to steal is a CIMT, whereas theft with intent to deprive the owner of his rights for a temporary period is not a CIMT); *see also* Tillinghast v. Edmead, 31 F.2d 81, 83 (1st Cir. 1929) (reasoning that either misdemeanor or felony theft is a CIMT because "theft or larceny was a crime at common law involving an act intrinsically and morally wrong and malum in se, and does not acquire additional turpitude from being declared unlawful by the municipal law").
48. *See, e.g.,* Mehboob v. Att'y Gen., 549 F.3d 272, 277–79 (3d. Cir. 2008) (finding indecent assault is a crime involving moral turpitude); *In re* Dingena, 11 I. & N. Dec. 723, 727 (B.I.A. 1966) (finding carnal knowledge of a minor is a CIMT).
49. *Compare* Yousefi v. INS, 260 F.3d 318 (4th Cir. 2001) (noting assault with a dangerous weapon, e.g., a rock, can be a crime of moral turpitude), *with Short*, 20 I & N. Dec. at 139 (stating simple assault is not a CIMT). In *In re Fualaau*, the BIA held that crimes against the person are CIMTs if the statute punishes a mens rea of at least recklessness plus causation of serious bodily injury. 21 I. & N. Dec. 475, 477–88 (B.I.A. 1996).
50. *See In re* Sweetser, 22 I. & N. Dec. 709, 712–17 (B.I.A. 1999) (finding conviction for criminally negligent child abuse is not a CIMT); *In re* Perez-Contreras, 20 I. & N. Dec. 615, 619 (B.I.A. 1992) ("Since there was no intent required for conviction, nor any conscious disregard of a substantial and unjustifiable risk, we find no moral turpitude inherent in the statute." (citing United States *ex rel*. Mongiovi v. Karnuth, 30 F.2d 825 (W.D.N.Y. 1929))); *In re* R-, 6 I. & N. Dec. 772, 774 (B.I.A. 1955) (noting that because knowledge was an essential element of the crime of receiving stolen goods, the crime involved moral turpitude).
51. United States *ex rel*. Meyer v. Day, 54 F.2d 336, 337 (2d Cir. 1931); *see also* Michel v. INS, 206 F.3d 253, 265 (2d Cir. 2000) ("[M]oral turpitude . . . is a question of the offender's evil intent or corruption of the mind." (quoting *In re* Serna, 20 I. & N. Dec. 579, 581–82 (B.I.A. 1989))); *Id.* at 263 ("[C]orrupt scienter is the touchstone of moral turpitude." (citing Hamdan v. INS, 98 F.3d 183, 187 (5th Cir. 1996))); *In re* Ajami 22 I. & N. Dec. 949, 950 (B.I.A. 1999) ("Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind.").
52. *See, e.g., Mehboob*, 549 F.3d at 276 (stating that "the 'hallmark' of moral turpitude has become 'a reprehensible act with an appreciable level of consciousness or deliberation.'" (quoting Partyka v. Att'y Gen., 417 F.3d 408, 414 (3d Cir. 2005))); *In re* Medina, 15 I. & N. Dec. 611, 614 (B.I.A. 1976) (concluding that moral turpi-

plained that if a statute includes a mens rea of intentional conduct, the offense must also be serious—deliberate, minor crimes are not CIMTs.[53] Also, crimes that are serious, yet lack a mens rea (i.e., strict liability crimes), are not CIMTs.[54] In this same vein, courts and the BIA also have looked to the common law distinction between *mala in se* and *mala prohibita* for a dividing line; it is often stated that only those offenses *mala in se* are CIMTs.[55]

What happens when an offense does not fit within one of the clearly-defined rules, such as Manuel's offense of being a passenger in a hit and run with bodily injury? In this type of case, the BIA and courts resort to the "inherently base, vile, or depraved" definition, which is derived from dictionaries.[56] Reference must be made to "moral standards generally prevailing in the U.S."[57] Under this standard, the BIA has stated, "the nature of a crime is measured against contemporary moral standards and may be susceptible to change based on the prevailing views of society."[58]

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tude inheres in aggravated assault with a deadly weapon even if one acts not with intent, but with recklessness, because the "definition of recklessness requires an actual awareness of the risk created by the criminal violator's action").

53. *See* Mei v. Ashcroft, 393 F.3d 737, 740 (7th Cir. 2004).

54. *See id.*; *In re* Abreu-Semino, 12 I. & N. Dec. 775 (B.I.A. 1968) (holding that regulatory offenses are not CIMTs). *But see* Castle v. INS, 541 F.2d 1064, 1066 (4th Cir. 1976) (holding that statutory rape is a CIMT, notwithstanding its lack of intent element, because the "inherent nature" of the offense "is so basically offensive to American ethics and accepted moral standards as to constitute moral turpitude per se"); *In re* Dingena, 11 I. & N. Dec. 723, 727 (B.I.A. 1966) (holding that statutory rape of a child is a CIMT).

55. *See, e.g., Serna*, 20 I. & N. Dec. 579; *In re* E-, 2 I. & N. Dec. 134, 141 (B.I.A. 1944). *But see* Nicanor-Romero v. Mukasey, 523 F.3d 992, 998 (9th Cir. 2008) ("The distinction between malum in se and malum prohibitum is one important indicator, but not all malum in se crimes categorically involve moral turpitude." (citation omitted)); *In re* Lopez-Meza, 22 I. & N. Dec. 1188, 1193 (B.I.A. 1999) ("While it is generally the case that a crime that is 'malum in se' involves moral turpitude and that a 'malum prohibitum' offense does not, this categorization is more a general rule than an absolute standard.").

56. *See* Jordan v. De George, 341 U.S. 224, 235 n.7 (1951) (Jackson, J., dissenting) (citing BOUVIER'S LAW DICTIONARY 2247 (Rawle, ed., 3d rev. 1892)); *In re* D-, 1 I. & N. Dec. 190, 193 (B.I.A. 1942) (quoting 20 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 872).

57. 22 C.F.R. § 40.21(a)(1) (2011). That regulation states that consular officers "must base a determination that a crime involves moral turpitude upon the moral standards generally prevailing in the United States." *Id.* While this regulation does not apply to BIA decisions, the BIA has adopted the "moral standards generally prevailing in the United States" as the test for moral turpitude. *See, e.g., In re* McNaughton, 16 I. & N. Dec. 569, 573 (B.I.A. 1978); *In re* O'N-, 2 I. & N. Dec. 319, 321 (B.I.A. 1945).

58. *In re* Torres-Varela, 23 I. & N. Dec. 78, 83 (B.I.A. 2001); *see also In re* G-, 1 I. & N. Dec. 59, 60 (B.I.A. 1941) (stating that the standards by which an offense is to be judged is "that prevailing in the United States as a whole, regarding the common view of our people concerning its moral character").

Manuel's public defender has no easy task in this situation.[59] No court has determined whether the offense of being a passenger in a hit and run situation is a CIMT. The Fifth and Ninth Circuits, whose opinions will not be binding on Manuel's removal proceedings,[60] have reasoned that a conviction under a statute punishing a driver who fails to render aid to persons injured in an accident is a CIMT.[61] Yet Manuel's charged offense does not specifically punish the passenger for failing to render aid, just failing to report the accident.[62] Analogizing the offense to assault, his attorney could determine that the ele-

59. Manuel is represented by court-appointed counsel in this scenario, as he risks jail time if he is convicted of this offense. *See* VA. CODE ANN. §§ 46.2-895 (2011) (describing offense of passenger hit and run), 46.2-900 (classifying offense as a class six felony where injury results), 18.2-10(f) (noting that punishment for class six felony is a term of imprisonment of not less than one year nor more than five years); *see also* Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (holding that Sixth Amendment right to counsel in a criminal case extends to all cases in which imprisonment may be imposed). However, there are many noncitizen criminal defendants who remain unrepresented, either because they are charged with an offense not punishable by imprisonment or because they have waived their rights to counsel. *See id; see also* Patterson v. Illinois, 487 U.S. 285, 298 (1988) (requiring, for a waiver of the right to counsel, that the accused be advised of "the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel").

60. Prior to 1996, noncitizens who had been admitted to the United States were in "deportation" proceedings, whereas those who were stopped attempting to enter the United States were in "exclusion" proceedings. The 1996 reforms to the INA combined these into "removal" proceedings. *See* GORDON ET AL., *supra* note 17, at § 64.01. Manuel's scenario takes place in Virginia; his removal proceedings thus are likely to be held in the Virginia immigration court, and therefore only Fourth Circuit case law will be binding on his case. *See* 8 U.S.C. § 1252(b)(2) (2006).

61. In *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007), the Fifth Circuit held that a conviction under a Texas hit-and-run statute, which punished a driver involved in an accident who fails to stop and render aid, was a CIMT because the statute "proscrib[ed] behavior that runs contrary to accepted societal duties." *Id*. at 288–90. In *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008), the Ninth Circuit considered a conviction under a California hit-and-run statute; the minimum conduct punishable was for a driver in an accident resulting in injury to stop and provide identification but fail to provide a vehicle registration number. *Id*. at 1167–69. The court held that this minimum conduct punishable was not a CIMT; the court reasoned that leaving the scene of an accident, as opposed to failing to affirmatively report identifying information, was a CIMT. *Id.* at 1169; *see also* Latu v. Mukasey, 547 F.3d 1070, 1073–76 (9th Cir. 2008) (holding that statute punishing as minimum conduct driver who stops and renders aid but fails to give requisite information to police is not categorically a CIMT); Orosco v. Holder, 396 Fed. App'x 50, 52–55 (5th Cir. 2010) (reasoning that statute punishing failure to report an accident where no injury resulted was not a CIMT).

62. *Compare* VA. CODE ANN. §§ 46.2-895, 900 (2010) (punishing passenger with knowledge of accident where injury or death resulted who fails to report accident), *with* § 46.2-894 (punishing driver involved in accident where injury or death resulted who fails to stop and report accident or fails to render reasonable assistance to injured persons).

ment of bodily injury *might* make the offense a CIMT.[63] However, it is not as though the elements require Manuel to have caused the bodily injury.[64] Therefore, assault is not the best analogy. The offense requires that he willfully leave the scene of the accident.[65] Thus, it would appear that the existence of a mens rea would lead to a conclusion that his offense is a CIMT. Yet, the existing case law requires both knowledge *and* that the act be bad enough to involve moral turpitude.[66] Thus, relying on scienter alone does not answer the question of whether Manuel's offense is a CIMT.

Manuel's public defender, confounded by the inability to come up with a clear answer for whether a plea to this offense will subject her client to deportation, might try to determine whether she is under any obligation at all to advise her client about possible deportation. As it turns out, the Supreme Court weighed in on this issue in 2010.

C. Padilla v. Kentucky

The Supreme Court, in its 2010 decision *Padilla v. Kentucky*,[67] decided that a criminal defense attorney commits ineffective assistance of counsel when she fails to notify a client about the immigration consequences of criminal charges, when those consequences "could easily be determined from reading the removal statute."[68] The Court held that defense attorneys have an obligation to advise only on the immigration consequences that are "succinct, clear, and explicit" from a reading of the INA.[69] If immigration consequences cannot be clearly read in the INA, defense counsel has the burden to advise only that the "pending criminal charges *may* carry a risk of adverse immigration consequences."[70]

The Court did not opine whether CIMT was an immigration consequence that "could easily be determined from reading the removal statute."[71] However, Justice Alito, in his concurring opinion, cited CIMT as one example of an immigration consequence that was not "succinct, clear, and explicit" in the INA.[72] He reasoned that the majority's opinion did not specify whether defense lawyers were required only to open up the INA and read about possible immigration consequences, or whether they were obligated to do a "cursory examination

63. *See, e.g., In re* Faulaau, 21 I. & N. Dec. 475, 477–88 (B.I.A. 1996).
64. *See id.*
65. *See, e.g., In re* Ajami, 22 I. & N. Dec. 949, 950 (B.I.A. 1999).
66. *See* Efagene v. Holder, 642 F.3d 918, 925 (10th Cir. 2011); *In re* H-, 1 I. & N. Dec. 394, 396 (B.I.A. 1943).
67. 130 S. Ct. 1473 (2010).
68. *Id.* at 1483.
69. *Id*.
70. *Id.*
71. *See id.*
72. *Id.* at 1490 (Alito, J., concurring).

of case law or administrative decisions [to] provide a definitive answer."[73]

In the wake of *Padilla*, courts have sought to clarify whether certain immigration consequences could easily be determined from reading the removal statute.[74] In one case, the Court of Appeals of Iowa determined whether counsel was ineffective for failing to warn that a conviction for tampering with records would lead to deportation for a CIMT.[75] The court, holding that counsel did not have a duty to warn specifically about CIMT as an immigration consequence, reasoned, "determining whether Lopez-Penaloza's conviction for tampering with records is a CIMT is not as simple as reading the text of the INA."[76] Since a proper advisal would have required counsel "to step into the 'labyrinth' of immigration law,"[77] which would have involved reviewing various decisions by the BIA and federal courts, the court held that counsel had the "more limited duty of advising her 'that pending criminal charges may carry a risk of adverse immigration consequences.'"[78] In another case, the District Court for the Western District of New York considered whether counsel was ineffective because he did not advise his client that he could be deported for a CIMT, since he was charged with perjury.[79] The court reasoned that immigration case law alone did not provide the requisite clarity about CIMT as an immigration consequence and therefore it was not ineffective assistance of counsel for defense counsel to have failed to warn about this as an immigration consequence.[80] The court stated, "Although the link between perjury and moral turpitude appears to have existed in immigration-related case law for decades . . . this case lacks the level of statutory clarity that was present in *Padilla*. Under these circumstances, petitioner's situation is not so close to that in *Padilla* . . . ."[81] In yet another case, a New York court considered defense counsel's failure to warn about deportability for two CIMTs; the court reasoned,

73. *Id.*

74. *See generally* César Cuauhtémoc Garcia Hernández, *When State Courts Meet* Padilla*: A Concerted Effort is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 LOY. J. PUB. INT. L. 299, 314–28 (reviewing six months following Padilla decision and finding one state court that engaged in the correct analysis, in which a Texas court found that a defense attorney could clearly read the deportation consequences of a theft offense, namely, that it was potentially an aggravated felony, since the definition of aggravated felony is clear).

75. Lopez-Penaloza v. State, 804 N.W.2d 537, 543–46 (Ct. App. Iowa 2011).

76. *Id.* at 545.

77. *Id.* (citing Garcia, *supra* note 74, at 308).

78. *Id.* at 546 (citing *Padilla*, 130 S. Ct. at 1483).

79. Bailey v. United States, 10-CV-324A, 96-CR-105A, 2010 U.S. Dist. LEXIS 88205 (W.D.N.Y. Aug. 25, 2010).

80. *Id.* at *7–8.

81. *Id.*

"[u]nder these circumstances, where the removal 'consequences of [defendant's] . . . plea[s] . . . [were] unclear or uncertain,' plea counsel was constitutionally obliged to 'do no more than advise [defendant] that pending criminal charges may carry a risk of adverse immigration consequences.'"[82]

Thus, it appears that Manuel's defense lawyer has no clear obligation to advise him about whether he is deportable for a CIMT; she need only advise him that the pending criminal charges *may* carry a risk of adverse immigration consequences.[83] However, even though she is not required to advise Manuel about potential deportation for a CIMT, she is not precluded from advising. The Supreme Court has indicated that "competent defense counsel, following the advice of numerous practice guides," would advise a noncitizen about the immigration consequences of a guilty plea;[84] the Court just would not go so far as to obligate defense counsel to warn about immigration consequences that are not clearly listed in the INA.[85] Trying to be that competent defense counsel, she searches for a guide. She finds many quick-reference charts for defense counsel to consult before advising a noncitizen client to accept a guilty plea.[86] Luckily for her, Virginia has such a chart, written by a local immigration attorney.[87]

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82. People v. Christache, 907 N.Y.S.2d 833, 843 (N.Y. Crim Ct. 2010) (quoting *Padilla*, 130 S. Ct. at 1483); *see also State v. Aguirre*, CA2011-03-001, 2012 Ohio App. LEXIS 100, *12 (Ct. App. Ohio Jan. 17, 2012) (reasoning that for an offense that fits within one or more of the "broad classification of crimes" covered by the INA, including CIMT and aggravated felony, counsel need only advise about the risk of adverse immigration consequences). *But see Ex Parte* Joel de los Reyes, 350 S.W.3d 723, 731 (Ct. App. Tx. 2011) (reasoning that "given the common understanding of the term 'moral turpitude,' counsel could have easily determined the consequences of two theft convictions from reading the statute").

83. *See Padilla*, 130 S. Ct. at 1483.

84. INS v. St. Cyr, 533 U.S. 289, 323 n.50 (2001).

85. *See Padilla*, 130 S. Ct. at 1483.

86. *See, e.g.*, *Legal Resources: Criminal and Deportation Defense*, NAT'L IMMIGR. PROJECT, http://nationalimmigrationproject.org/legalresources.htm (last visited Jan. 4, 2012) (compiling quick reference charts of the immigration consequences of offenses in several states, available under the subheading "Information About Immigration Consequences of Criminal Convictions").

87. *See* Mary Holper, *Immigration Consequences of Selected Virginia Statutes*, NAT'L IMMIGR. PROJECT (Oct. 2007), http://www.nationalimmigrationproject.org/legalresources/cd_so_Chart%20-%20Virginia%20-%202007.pdf. These quick-reference charts cannot be updated frequently enough to encompass all of the changes to immigration law. For example, the chart consulted by Manuel's attorney was last updated in 2007. *See Padilla*, 130 S. Ct. at 1483. Hence the difficulty of expecting defense counsel to educate themselves enough, in an area as complex as immigration law. *See id.* at 1489–90 (Alito, J., concurring) (reasoning that "[m]any . . . terms of the INA are . . . ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law" and "[t]he task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which

The Virginia chart indicates that Manuel's offense is "possibly" a CIMT.[88] Annotations to the chart indicate that because there is no case law on point, the author's best guess is that such an offense may offend the contemporary morals of the time.[89] Thus, Manuel's fate will fall into the hands of an Immigration and Customs Enforcement (ICE) officer who places him in removal proceedings,[90] an immigration judge who decides whether the ICE has met its burden of proving that he is deportable for a CIMT,[91] and the BIA[92] and circuit courts[93] (if Manuel chooses to appeal and either can successfully write the appeal himself, pay an attorney, or find a pro bono attorney).[94] At each level, the decision-maker will decide whether his offense is "base, vile, or depraved, contrary to the accepted rules of morality"[95] based on the decision-maker's assessment of the "moral standards generally prevailing in the U.S."[96]

Given the elusive nature of the term CIMT, it is unsurprising that the Supreme Court considered whether the deportation statute was void for vagueness.

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immigration law changes . . . ."); *id.* at 1490 ("[N]othing is ever simple with immigration law" (quoting R. MCWHIRTER, AM. BAR ASS'N, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS § 4.65, at 130 (2d ed. 2006; DAN KESSELBRENNER ET AL., IMMIGRATION LAW AND CRIMES § 2.1 (2008))); *see* GORDON ET AL., *supra* note 17, at § 71.05(a)(iii)(A) (discussing case law regarding CIMT in immigration law but stating, "[i]t should . . . be borne in mind that the tabulations represent only decided cases, the results of which sometimes may be altered by changing moral concepts and judicial decrees"). Thus, busy defense lawyers would still be required to consult ever-changing BIA and federal case law on the meaning of CIMT, which the Supreme Court has indicated they are not obligated to do to provide effective assistance of counsel.

88. *See* Holper, *supra* note 87, at 34. Many of these charts do not provide absolute certainty to a defense lawyer advising her noncitizens client, as they frequently use terms such as "possibly" and "probably" when answering the question of whether certain offenses will render a noncitizen deportable. *See, e.g.*, Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses*, NAT'L IMMIGR. PROJECT, www.nationalimmigrationproject.org/legalresources/fed_chart_2010%20update.pdf (last updated 2010).

89. *See* Holper, *supra* note 87, at 34.

90. *See* 8 C.F.R. §§ 1003.13, 1003.14(a), 1003.15(c) (2011).

91. *See* 8 U.S.C. § 1229a(c)(3)(A) (2006) (stating that the burden of proof in the case of deportable noncitizen is "clear and convincing evidence").

92. The BIA decides legal issues, such as whether an offense is a CIMT, de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

93. The circuit courts, on petitions for review, can only decide constitutional questions or questions of law. 8 U.S.C. § 1252(a)(2)(B), (D) (2006). Because the issue of whether an offense is a CIMT is a question of law, judicial review is likely.

94. Noncitizens in removal proceedings and appeals are not given court-appointed counsel. *See* 8 U.S.C. § 1229a(b)(4) (2006).

95. *See* Mehboob v. Att'y Gen., 549 F.3d 272, 275; *In re* Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1988).

96. 22 C.F.R. § 40.21(a)(1) (2011); *In re* McNaughton, 16 I. & N. Dec. 569, 573 (B.I.A. 1978).

III. *JORDAN V. DE GEORGE*

In 1951, in the case of *Jordan v. De George*,[97] the Supreme Court decided the case of an Italian noncitizen who had twice been convicted of conspiracy to defraud the U.S. of taxes on distilled spirits and faced deportation for two CIMTs.[98] Even though neither party had raised the vagueness issue,[99] the Court held the term CIMT was not void for vagueness.[100] To reach this conclusion, the Court relied on the term's use in other areas of law.[101] For example, the term appeared in legislation governing the disbarment of attorneys and the revocation of medical licenses; judges also used the term to disqualify and impeach witnesses, determine the measure of contribution between joint tortfeasors, and decide whether certain language is slanderous.[102] In addition to the term's "deep roots" in the law,[103] it also had been part of the immigration laws for more than sixty years.[104] Thus the pervasiveness of the term CIMT gave credence to it, notwithstanding its uncertain parameters.[105]

Additionally, the federal and state case law interpreting the term left no doubt in any noncitizen's mind that fraud crimes fell into the category of crimes involving moral turpitude.[106] The Court reasoned that "[i]mpossible standards of specificity are not required;"[107] rather, "[t]he test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[108] Because fraud was obviously a CIMT, there was no need to think about the difficulty of applying the term to "less obvious cases."[109]

Justice Jackson, dissenting, noted two groups baffled by the term CIMT: Congress and judges.[110] Citing the legislative history of the statute authorizing deportation for a CIMT, Justice Jackson stated, "Congress knowingly conceived it in confusion . . . clear warnings of its deficiencies were sounded and never denied."[111] Judges were no more

97. 341 U.S. 223 (1951).
98. *Id.* at 226.
99. *Id.* at 229.
100. *Id.* at 231–32.
101. *Id.*
102. *Id.* at 227.
103. *Id.*
104. *Id.* at 229.
105. *See id.* at 229–30.
106. *Id.* at 227–29.
107. *Id.* at 231.
108. *Id.* at 231–32.
109. *Id.* at 232.
110. *Id.* at 233–34 (Jackson, J., dissenting).
111. *Id*. (quoting *Hearings before House Committee on Immigration and Naturalization on H. R. 10384*, 64th Cong. (I) 8, (1915) (statements of Representative Sabath) ("[Y]ou know that a crime involving moral turpitude has not been de-

educated about the meaning of the term: "[i]f we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral."[112] Justice Jackson reasoned that the government's attempt to define CIMTs as those crimes that are *mala in se* as opposed to *mala prohibita* offered no assistance to explain the term, for "[t]his classification comes to us from common law, which in its early history freely blended religious conceptions of sin with legal conceptions of crime."[113] Justice Jackson also did not accept as a definition "the moral standards that prevail in contemporary society" as sufficiently definite, reasoning that "[t]his is a large country and acts that are regarded as criminal in some states are lawful in others."[114]

Thus, the Court appears to have given the term CIMT in deportation law its constitutional blessing.[115] In a case like Manuel's, is a challenge to the term CIMT still feasible?

IV. CHALLENGING CIMT AS VOID FOR VAGUENESS

Despite the *Jordan* decision, courts and the BIA have admitted that the term CIMT is not clear.[116] The following section explores

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fined. No one can say really what is meant by saying a crime involving moral turpitude.")).

112. *Id.* at 234 (quoting BLACK'S LAW DICTIONARY 374 (1st ed. 1849); BOUVIER'S LAW DICTIONARY 2247 (Rawles, ed. 3d rev. 1892)).

113. *Id.* at 237.

114. *Id.* at 237–38.

115. Several courts have decided, without discussion, that *Jordan* precluded any future vagueness challenge to the term CIMT in deportation law. *See, e.g.*, Tseung Chu v. Cornell, 247 F.2d 929, 938–39 (9th Cir. 1957); United States v. Circella, 216 F.2d 33, 40 (7th Cir. 1954); Ramirez v. INS, 413 F.2d 405, 405 (D.C. Cir. 1969).

116. *See, e.g.,* Garcia-Meza v. Mukasey, 516 F.3d 535, 536 (7th Cir. 2008) (describing the phrase CIMT as "notoriously baffling"); Mei v. Ashcroft 393 F.3d 737, 741 (7th Cir. 2004) ("Time has only confirmed Justice Jackson's powerful dissent in the [*Jordan*] case, in which he called 'moral turpitude' an 'undefined and undefinable standard.'" (quoting *Jordan*, 341 U.S. at 235 (Jackson, J., dissenting))); De Leon-Reynoso v. Ashcroft, 293 F.3d 633, 635 (3d Cir. 2002) ("The term 'moral turpitude' defies a precise definition."); *Tseung Chu*, 247 F.2d at 933 (noting that the "myriad [of] decisions sponsoring various concepts of moral turpitude" has not offered any "well settled criteria"); *In re* Tobar-Lobo, 24 I. & N. Dec. 143, 144 (B.I.A. 2007) ("We have observed that the definition of crime involving moral turpitude is nebulous." (citing *In re* Lopez-Meza, 22 I. & N, Dec. 1188, 1191 (B.I.A. 1999); *In re* Ajami, 22 I. & N. Dec. 949, 950 (B.I.A. 1999))); *see also* United States *ex rel*. Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947) ("While the term 'moral turpitude' has been used in the law for centuries it has never been clearly or certainly defined. This is undoubtedly because it refers, not to legal standards, but rather to those changing moral standards of conduct which society has set up for itself through the centuries."); United States *ex rel*. Mylius v. Uhl, 203 F. 152, 154 (3d Cir. 1914) ("'Moral turpitude' is a vague term. Its meaning

why this lack of clarity should lead courts to void the term CIMT in deportation law in an as-applied challenge involving a statute that does not fit an easy case such as fraud.

A. Scope of the Vagueness Challenge to CIMT

1. Facial v. As-Applied Challenge

There are two types of vagueness challenges: facial and as-applied. To facially void a vague law, the statute must prohibit a substantial amount of conduct that is protected by the First Amendment[117] or the law must "fail[ ] to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests."[118] In either of these situations, there is a constitutionally-protected interest at stake, which justifies facial review of the law.[119] For challenges that implicate no constitutionally protected conduct, the Court rejects automatic facial review and determines whether a law is constitutional as applied to the petitioner.[120] In these cases, a facial vagueness challenge should be upheld "only if the enactment is impermissibly vague in all of its applications."[121] Thus, as one scholar

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depends to some extent upon the state of public morals."); *In re* D-, 1 I. & N. Dec. 190, 193 (B.I.A. 1943) ("Moral turpitude is a vague term. Its meaning depends to some extent upon the state of public morals."); Immigration Laws-Offenses Involving Moral Turpitude, 37 Op. Att'y Gen. 293, 294 (1933) ("[Moral turpitude] is a vague term, its meaning depending to some extent upon the state of public morals . . . ." (quoting 41 C.J. § 212)); HISTORICAL BACKGROUND AND ANALYSIS, *supra* note 10, at 109 ("The term 'moral turpitude' as used in the exclusion and deportation provisions of the Immigration and Nationality Act has been the source of some confusion over the years.").

117. City of Chicago v. Morales, 527 U.S. 41, 52 (1999); *see also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 904 (1990) (distinguishing between the ordinary or non-First Amendment vagueness doctrine and the First Amendment vagueness doctrine and reasoning that the latter is "best conceptualized as a subpart of First Amendment overbreadth doctrine").

118. *Morales*, 527 U.S. at 52; Kolender v. Lawson, 461 U.S. 352, 361 (1983) (holding that a "stop and identify" statute is "unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute").

119. *Morales,* 527 U.S. at 51; *Kolender*, 461 U.S. at 361.

120. *See* United States v. Mazurie, 419 U.S. 544, 550 (1975); United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963).

121. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95 (1982). In *Hoffman Estates*, the Court reasoned that "[i]n reviewing a business regulation for facial vagueness . . . the principal inquiry is whether the law affords fair warning of what is proscribed." *Id.* at 503. The Court determined that the business regulation gave sufficient notice to the petition with respect to at least certain items sold; therefore, the facial challenge was rejected. *See id.* at 495 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.").

stated, "it should be recognized that claims of facial vagueness that prove successful are the exception rather than the rule."[122]

It is very likely that the statute authorizing deportation for a CIMT would survive a facial challenge. Because the statute does not implicate First Amendment or other constitutional rights, a noncitizen raising such a challenge would have to prove that the statute was vague in all of its applications.[123] This would be very difficult in the clear cases such as theft, fraud, and sexual offenses, because agency interpretations and federal case law have provided notice that these statutes will be CIMTs.[124] However, there will always be offenses for which there is no case on point.[125] Manuel's case provides such an example. This Article thus proposes an as-applied challenge to CIMT when it does not involve one of the "easy cases" such as fraud.[126]

2. Challenging CIMT in the Deportation v. Exclusion Statute

The term CIMT appears in both the exclusion and deportation statutes, both of which are civil in nature.[127] How does this impact the application of the vagueness doctrine? Despite the fact that many of the original vagueness cases involved criminal statutes,[128] the vagueness doctrine has been applied to civil statutes.[129] Moreover, the vagueness doctrine is rooted in the Due Process Clause of the Fifth

122. John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 277 (2002).

123. *See Hoffman Estates*, 455 U.S. at 494–95.

124. *See, e.g.*, Jordan v. De George, 341 U.S. 223, 227 (1951); *In re* Dingena, 11 I. & N. Dec. 723, 727 (B.I.A. 1966); *In re* D., 1 I. & N. Dec. 143, 144–45 (B.I.A. 1941); *see also* Farrell-Murray v. INS, No. 92-9549, 1993 U.S. App. LEXIS 10085, *7–8 (10th Cir. Apr. 28, 1993) (reasoning that theft offenses, like fraud offenses, have historically been held to be CIMTs and therefore the term CIMT is not vague as to the petitioner, who was convicted of shoplifting).

125. *See* Mei v. Ashcroft, 393 F.3d 737, 741 (7th Cir. 2004) ("The holdings of the Board of Immigration Appeals are consistent with regard to some crimes but 'there are a number of miscellaneous cases involving indecent acts, gambling, perjury, and other crimes where findings of moral turpitude vary widely.'" (quoting Toutounjian v. INS, 959 F. Supp. 598, 603 (W.D.N.Y. 1997))).

126. *See* Franklin v. INS, 72 F.3d 571, 594–95 (8th Cir. 1995) (Bennett, J., dissenting) (describing that the *Jordan* majority "pulled what I must respectfully suggest was an intellectual sleight of hand" because it said that "as long as the case requires the court to tread only the familiar territory of well-cultivated precedent, the phrase 'crime involving moral turpitude' provides no uncomfortable uncertainty;" however, the issue decided in *Franklin*, whether involuntary manslaughter was a CIMT, presented one of those "peripheral" or "less obvious" cases).

127. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

128. *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939); United States v. Reese, 92 U.S. 214, 221 (1875).

129. *See, e.g.*, A. B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925).

Amendment.[130] Professor Hiroshi Motomura has observed that vagueness challenges "draw upon the principles of procedural due process because vague statutes fail to provide affected individuals with adequate notice—a fundamental element of procedural fairness."[131]

130. United States v. Williams, 553 U.S. 285, 304 (2008); *see also* Cline v. Frink Dairy Co., 274 U.S. 445, 458 (1927) (reasoning that the same vagueness analysis, which is rooted in the Due Process Clause of the Fifth Amendment, should apply when interpreting state statutes because of the Due Process Clause of the Fourteenth Amendment). There has been some discussion that the doctrine also has origins in the Sixth Amendment's requirement that the accused be informed of the nature and cause of the accusations against him or her; "without statutory certainty the Sixth Amendment would have provided empty protection." Rex Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L. Q. 195, 204 (1954). *But see* Note, *The Void-for-Vagueness Doctrine in the Supreme Court: A Means to an End*, 109 U. PA. L. REV. 67, 67 n.3 (1960) [hereinafter *A Means to an End*] ("[I]nasmuch as state criminal convictions have been reversed on void-for-vagueness grounds despite very specific indictments, this ground is at best very questionable." (citing Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Herndon v. Lowry, 301 U.S. 242 (1937))). Early courts employing the doctrine did not mention a constitutional basis for their decisions. Christina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 263 (2010); *A Means to an End, supra*, at 67 n.2. While scholars have suggested the vagueness doctrine "has nonconstitutional roots in the common-law practice of the judiciary to refuse enforcement to legislative acts deemed too uncertain to be applied," the Court needed a constitutional justification to strike down state statutes. *See* Ralph W. Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831, 850 (1923); *A Means to an End*, *supra*, at 67 n.2; Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L J. 272, 278 (1947) [hereinafter *Escape from Statutory Interpretation*] The due process clause was on the rise during that time; as Professor Amsterdam noted, "[t]he void-for-vagueness doctrine was born in the reign of substantive due process and throughout that epoch was successfully urged exclusively in cases involving regulatory or economic-control legislation." *A Means to an End, supra*, at 74 n.38; *see also Escape from Statutory Interpretation*, *supra*, at 278 (discussing that in the early vagueness cases, "the concept was still primarily a principle of construction and had not yet received the sanctity of being associated with the constitutional requirement of due process," but that "it seems a coincidence of some moment that the device of invalidating a statute for vagueness should develop on the federal level concurrently with the growth of the tool of substantive due process"). Professor Amsterdam wrote, however, that "vagueness alone, although helpful and important, does not provide a full and rational explanation of the case development in which it appears so prominently;" he noted that in the majority of early vagueness cases in the Supreme Court "there lurked some other more or less tenable claim of liberty from government restraint." *A Means to an End*, *supra*, at 74, 75 n.39. He argued that the Supreme Court used the vagueness doctrine to create "an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms." *Id.* at 75.

131. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1644 (1992); *see also* Collings, *supra* note 130, at 196–97 (describing procedural due process vagueness cases as those in which the statutory language is so obscure that it fails to give notice or provide proper standards for adjudication whereas substantive due process cases are those where the statutory language is so broad

In the 1903 case *Yamataya v. Fisher*,[132] the Supreme Court held procedural due process applies to deportation proceedings.[133] The Court in *Yamataya* reasoned that a noncitizen's entry into the U.S., which made her "subject in all respects to [United States] jurisdiction, and a part of its population, although alleged to be illegally here"[134] meant she could not be deported without "giving [her] all opportunity to be heard upon the question involving [her] right to be and remain in the United States."[135] Thus, for noncitizens who have entered the U.S. whom the government is seeking to deport, *Yamataya* unquestionably guarantees the right to procedural due process in those proceedings.[136] In fact, the Fifth Amendment Due Process clause is the only

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that it prohibits conduct the legislature is not allowed to prohibit such as freedom of speech); Austin W. Scott, Jr., *Constitutional Limitations on Substantive Criminal Law*, 29 ROCKY MOUNTAIN. L. REV. 275, 288 (1956) ("The [void for vagueness] rule is part of the broader principle of constitutional law that due process requires proper notice, and is closely analogous to the more specific rule of procedural due process that trial upon a vague indictment or information is similarly unconstitutional."). *But see* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 130 n.147 (1998) (reasoning that "vagueness cases sit at the border of substance and procedure" because knowing the law is a substantive concern in addition to a procedural right, and curbing arbitrary decisions is "closely tied to contemporary notions of procedural due process"). Professor Tammy W. Sun writes, "[T]he vagueness doctrine has dual aspects—it is a procedural rule concerned with fair notice, on one hand, and a substantive rule concerned with equality, on the other." Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 HARV. C.R.-C.L. L. REV. 149, 150 (2011). She reasons that "[i]n the latter half of the 20th century, the Supreme Court has gone so far as to privilege the substantive strand of the doctrine as 'perhaps the most meaningful aspect of the vagueness doctrine.'" *Id.* at 151 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)); *see also* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 661 (1980) (describing that in a case like *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), "vagueness doctrine—a procedure-oriented constitutional jurisprudence—is in this manner used to strike down substantively objectionable statutes").

132. 189 U.S. 86, 100–01 (1903).
133. *Id.*
134. *Id.* at 101.
135. *Id.*
136. *Id.* at 100–01. What sort of process is due in deportation proceedings is another question altogether. Professor Motomura wrote that while the *Yamataya* decision "planted the seed from which the procedural due process exception [to the plenary power doctrine] grew . . . the results did not match the rhetoric." Motomura, *supra* note 131, at 1638. He reasons that courts could easily rationalize limited procedural protections, because the Court in *Yamataya* "found no procedural due process violation where the government had deported an alien who did not understand English, had not received notice of the charges against her, and had not been allowed to consult with friends or with a lawyer." *Id.* (citing *Yamataya*, 189 U.S. at 90, 101–02); *see also id.* ("Other decisions during the 1950s repeated the earlier pattern of readiness to recite a procedural due process requirement and a reluctance to apply it for an alien's benefit." (citing Carlson v. Landon, 342 U.S. 524 (1952); Galvan v. Press, 347 U.S. 522 (1954))).

source of constitutional rights in deportation proceedings; other constitutional protections such as the Sixth Amendment right to counsel and trial by jury do not apply.[137] Therefore, despite the fact that the consequences of a civil deportation statute are civil only, the vagueness doctrine, which is rooted in the Due Process Clause, should apply.[138]

A challenge to the term CIMT in the exclusion statute, however, is unlikely to prevail. In exclusion proceedings, due process rights are virtually nonexistent.[139] Because of Congress' plenary power over immigration law, which stems from its powers to regulate national security and sovereignty,[140] Congress ultimately has complete power to decide what process is due.[141] As the Supreme Court famously stated in 1950, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[142] Due to these nonexistent due process rights, the Supreme Court has refused to apply the vagueness doctrine to a statute dealing with exclusion.[143]

137. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 392–93 (2006) ("[O]nly the Due Process Clause protects noncitizens in deportation proceedings . . . Fifth and Sixth Amendment rights, prominent features of criminal trials, do not apply in deportation proceedings except to the limited extent that 'fundamental fairness' requires them.").

138. *See* Jordan v. De George, 341 U.S. 223, 231 (1951).

139. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 560 (1990) (discussing key immigration due process decisions from the 1950s and reasoning that "aliens 'outside' the United States would continue to find it very difficult to raise any constitutional challenge to immigration decisions"); Stumpf, *supra* note 137, at 392–93.

140. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); Chae Chan Ping v. United States, 130 U.S. 581, 603–04, 606 (1889) (reasoning that if the U.S. could not exclude noncitizens, "it would be to that extent subject to the control of another power" because it could not defend itself against "vast hordes of . . . people crowding in upon us").

141. United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

142. *Id.* Professor Henry Hart, in his famous dialogue on the power of Congress to control jurisdiction of the federal courts, criticized the Court's holding in *Knauff*, stating: "[T]he Constitution always applies when a court is sitting with jurisdiction in habeas corpus." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1393 (1953). Professor Hart reasoned:

> Granting that the requirements of due process must vary with the circumstances, and allowing them all the flexibility that can conceivably be claimed, it still remains true that the Court is obliged, by the presuppositions of its whole jurisdiction in this area, to decide whether what has been done is consistent with due process—and not simply to pass the buck to an assertedly all-powerful and unimpeachable Congress.

Id. at 1394.

143. *See* Boutelier v. INS, 387 U.S. 118 (1967). In *Boutelier*, the Court upheld a statute that authorized the deportation of a person who was excludable at the time of entry into the U.S. The noncitizen was excludable at his entry because he "was afflicted with a class A condition, namely, psychopathic personality, sexual devi-

However, there is an exception to the rule that noncitizens "outside" the U.S. cannot claim due process protections.[144] The Supreme Court held in *Landon v. Plasencia*[145] that lawful permanent residents who are placed in exclusion proceedings upon a return from a trip abroad[146] may invoke due process protections.[147] The Court rea-

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ate," due to his homosexual conduct. *Id.* at 120. The Court repeatedly stated that he was not being deported for post-entry conduct, which would have triggered due process rights. *Id.* at 123–24; *see also* Yamataya v. Fisher, 189 U.S. 90, 100–01 (1903) (holding that procedural protections of Due Process clause apply in deportation proceedings). Finding there was "no indication that the post-entry evidence [of homosexual acts] was of any consequence in the ultimate decision of the doctors, the hearing officer or the court," the Court reasoned that due process did not require any warning about acts that would cause deportation, since they were already committed upon entry, when his due process rights were essentially nonexistent. *Boutelier*, 387 U.S. at 123–24. Thus, even though the *Boutelier* case involved a deportation statute, it involved a condition that existed at entry; therefore, the Court held, "[t]he constitutional requirement of fair warning has no applicability to standards such as are laid down in § 212(a)(4) for admission of aliens to the United States." *Id.* at 123. The Court did engage in some vagueness analysis notwithstanding its decision that the doctrine did not apply to the statute at issue, stating: "It may be, to some, that 'psychopathic personality' is a medically ambiguous term, including several separate and distinct afflictions," the Court discussed how the legislative history narrowed the meaning of the term such that it was clear that homosexual conduct was included in the definition of "psychopathic personality." *Id.* at 124; *see also* Massieu v. Reno, 915 F. Supp. 681, 701 (D.N.J. 1996), *rev'd*, 91 F.3d 416 (3d Cir. 1996) (reasoning that in *Boutelier*, "the statute, read in conjunction with its legislative history, provided notice—though somewhat fictitiously so—that homosexual aliens were excludable").

144. *See* Motomura, *supra* note 139, at 579 (discussing the case of *Landon v. Plasencia*, 459 U.S. 21 (1982), in which the Court held that a returning permanent resident can invoke the Due Process clause even though she is technically "outside" the United States).

145. 459 U.S. 21 (1982).

146. The petitioner in *Landon* was subject to the "reentry doctrine," whereby any attempted entry by a noncitizen, not just her first entry, subjects her to all of the exclusion grounds. *See* Motomura, *supra* note 131, at 1643 n.91, 1653 n.148; *see also* United States *ex rel*. Volpe v. Smith, 289 U.S. 422, 425 (1933) (interpreting the statutory definition of "entry" to include those who seek to reenter the U.S. and therefore applying exclusion ground to returning resident). In *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), the Supreme Court held a returning permanent resident was not subject to the exclusion grounds if his absence was "innocent, casual, and brief." *Id.* at 461–62. In *Landon*, the petitioner's departure was not innocent and she faced exclusion. *Landon*, 459 U.S. at 29–30. Congress later codified when lawful permanent residents would be subject to the exclusion grounds; 8 U.S.C. § 1101(a)(13)(C) (2006) states that lawful permanent residents "shall not be regarded as seeking an admission into the United States" unless the lawful permanent resident has abandoned or relinquished that status, has been absent from the United States for a continuous period in excess of 180 days, has engaged in illegal activity after having departed the United States, has departed from the United States while in removal proceedings, has committed an offense rendering him inadmissible, or is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the

soned, "[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, [her] constitutional status changes accordingly."[148] This Article, therefore, does not go so far as to propose that the term CIMT in the exclusion statute should be void for vagueness. Only when the term CIMT is applied to exclude lawful permanent residents from admission should it be void for vagueness.[149]

3. Strictness of the Vagueness Test

How strict a vagueness test should courts apply to a deportation statute? Deportation is nothing close to an economic regulation, which the Court has held requires a less strict vagueness test.[150] The Court has reasoned that economic regulations are narrower in scope.[151] In addition, businesspersons who are potentially subject to economic regulation are expected to use greater diligence in figuring out where the line is drawn to subject them to statutory prohibi-

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United States after inspection and authorization by an immigration officer. Several courts of appeals have reasoned that the so-called "*Fleuti* doctrine" did not survive following the passage of 8 U.S.C. § 1101(a)(13)(C). *See, e.g.*, De Vega v. Gonzales, 503 F.3d 45, 47–48 (1st Cir. 2007); Malagon de Fuentes v. Gonzales, 462 F.3d 498, 501 (5th Cir. 2006); Tineo v. Ashcroft, 350 F.3d 382, 394–95 (3d Cir. 2003).

147. *See Landon*, 459 U.S. at 32–34. Professor David Martin, discussing the *Landon* decision, reasoned that what process is due, or "owed" to a noncitizen rightly does not depend on the arbitrary line between whether the noncitizen is in exclusion or deportation proceedings. *See* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 192, 214–15 (1983). Rather, he argues that a noncitizen's level of membership in the U.S. should govern how much process is due to the noncitizen; a returning lawful permanent resident has "high-level membership" in the United States, which is unaffected by her travel abroad. *See id.* A noncitizen arriving for the first time, by contrast, is in the outer-most ring of membership, "at the threshold of entry into the national community;" therefore, the returning resident should be given more process. *See id.* at 192, 216. *But see* T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties:" A Response to Martin*, 44 U. PITT. L. REV. 237, 244–45 (1983) (arguing that due process should turn not on the person's membership in the United States community—the United States' relationship to her—but rather on her community ties—what the United States is taking from her).

148. *Landon*, 459 U.S. at 329.

149. *See* 8 U.S.C. § 1101(a)(13)(C)(v) (2006) (stating that a lawful permanent resident "shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . . has committed an offense identified in [8 U.S.C. § 1182(a)(2)] . . . ."); 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006) (rendering inadmissible a noncitizen convicted of, or who admits having committed the essential elements of, a CIMT).

150. *See* Kolender v. Lawson, 461 U.S. 352, 358 (1983); Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982).

151. *See Hoffman Estates*, 455 U.S. at 498; Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

tions.[152] In contrast, CIMT is quite broad, a legislative "catch-all" as some have stated,[153] leaving "ample room for differing definitions of the term."[154] Also, noncitizens, unlike businesspersons, "are not in business and not alerted to the regulatory schemes"[155] of deportation laws; "and we assume that they would have no understanding of their meaning and impact if they read them."[156]

This Article proposes that courts apply the same vagueness analysis to CIMT in deportation law as it would to a criminal statute. The Supreme Court has given its blessing to this approach; in *Jordan*, the Supreme Court stated it would analyze the deportation statute under the "established criteria of the 'void for vagueness' doctrine" because of deportation's harsh consequences, notwithstanding deportation being civil in nature.[157] The Court cited vagueness decisions interpreting criminal law statutes as the "established criteria" of the vagueness doctrine.[158] In addition, a recent decision by the Second Circuit interpreted *Jordan* to authorize applying the vagueness doctrine to a deportation statute as though it were a criminal statute, due to the severity of deportation.[159]

One court, discussing the civil-criminal distinction when applying the vagueness analysis, stated that rather than focus on whether a statutory term merely has a label of "civil" or "criminal," a more functionalist approach guides courts to apply the vagueness doctrine based on "the seriousness of what is at stake under the statutory scheme."[160] The Supreme Court has stated deportation is a "drastic measure."[161] The Court in *Padilla* discussed several changes to immigration law "that have dramatically raised the stakes of a noncitizen's criminal

152. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.3(a), at 147 n.8 (2d ed. 2003).

153. *See* John S. Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CALIF. L. REV. 9, 14 (1935).

154. *In re* Lopez-Meza, 22 I. & N. Dec. 1188, 1191 (B.I.A. 1999) (quoting Franklin v. INS, 72 F.3d 571, 573 (8th Cir. 1995)).

155. *See Papachristou*, 405 U.S. at 162–63.

156. *See id.*

157. *See* Jordan v. De George, 341 U.S. 223, 231 (1951).

158. *See id.* at 230 (citing Lanzetta v. New Jersey, 306 U.S. 451 (1939); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921)).

159. *See* Arriaga v. Mukasey, 521 F.3d 219, 223 (2d Cir. 2008) (holding that the deportation ground for crimes of stalking at 8 U.S.C. § 1227(a)(2)(E)(i) (2006) is not void for vagueness). The court reasoned, however, "We need not decide whether the INA stalking provision should be assessed as a civil or criminal statute because even under the close scrutiny accorded criminal laws, Arriaga's vagueness challenge fails." *Id.*

160. Corp. of Haverford Coll. v. Reeher, 329 F. Supp. 1196, 1203 (E.D. Pa. 1971).

161. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

conviction."[162] Using a functionalist approach, deportation is quite serious, "quasi-criminal" indeed,[163] and therefore merits a "relatively strict [vagueness] test."[164]

One also can argue the Supreme Court's decision in *Padilla* now brings deportation out of its "quasi-criminal" status, into the realm of criminal punishment.[165] The Court reasoned that because of the changes in immigration law, deportation is "practically inevitable" as a result of a conviction for a removable offense.[166] Thus, the Court stated that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes"[167] and that it is "'most difficult' to divorce the penalty from the conviction in the deportation context."[168] Professor Kanstroom argues that although the Court did not say deportation is punishment, the "majority opinion cannot fully be squared with the historical, formalist relegation of deportation to the realm of civil, collateral consequences . . . ."[169] Because of the Court's most recent discussion of deportation as more than even "quasi-criminal,"[170] courts should analyze CIMT in a deportation statute as though it were a criminal statute.

B. Fair Notice

The Court has given two primary reasons for the void-for-vagueness doctrine: (1) providing fair notice to persons affected by the statute; and (2) discouraging arbitrary and discriminatory enforcement of

162. *See id.*; *see also* Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 121 (1929) [hereinafter *Crimes Involving Moral Turpitude*] (arguing that "it is in the Immigration Act that the phraseology [CIMT] seems most unfortunate. Though proceedings under the act are not criminal, they are sufficiently severe in their application to be in their nature penal.").

163. *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000).

164. *See Hoffman Estates*, 455 U.S. at 499.

165. *See* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky: *The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1507 (2011); Peter Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1306 (2011).

166. *Padilla*, 130 S. Ct. at 1480.

167. *Id.*

168. *Id.* at 1481. Professor Kanstroom argues that the "virtually inevitable" reasoning in *Padilla* "enabled the Court to build an analytic bridge between criminal prosecution and deportation without going too far too fast." Kanstroom, *supra* note 165, at 1486.

169. Kanstroom, *supra* note 165, at 1466.

170. *See Padilla*, 130 S. Ct. at 1480–81; Kanstroom, *supra* note 165, at 1463.

the statute.[171] This Article focuses on the fair notice rationale for the vagueness doctrine. The Court has described the fair notice requirement as follows: "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[172] To determine whether a law has provided fair notice, a court must ask whether the law is "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits."[173] Courts have focused not on a particular defendant, but on a hypothetical ordinary person.[174] The Court has explained that the fair notice requirement prevents trapping the innocent.[175] The Court has expressed concern that "uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone

171. *See* Hill v. Colorado, 530 U.S. 703, 732 (2000). In the early vagueness cases, the Court focused on separation of powers and notice as the two rationales for voiding vague statutes. *See, e.g.*, United States v. Reese, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."). The separation of powers rationale faded, however, and the concern for preventing arbitrary and discriminatory enforcement came to be a primary reason for voiding vague statutes. *See, e.g.,* Kolender v. Lawson, 461 U.S. 351, 358 (1983); Smith v. Goguen, 415 U.S. 566, 574 (1974) ("[P]erhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement."); Andrew Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 282 (2003).

172. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

173. Giacco v. Pennsylvania, 382 U.S. 399, 402 (1966). The Court added that a vague statute "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Id.* at 402–03.

174. *See* United States v. Williams, 553 U.S. 285, 304 (2008) (writing that a vague statute is one that fails "to provide a person of ordinary intelligence fair notice of what is prohibited"); City of Chicago v. Morales, 527 U.S. 41, 58 (1999) ("[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. 'No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes.'" (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939))); Robert Batey, *Vagueness and the Construction of Criminal Statutes—A Balancing Act*, 5 VA. J. SOC. POL'Y & L. 1, 4 (1997).

175. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); *see also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-31, at 1033 (2d ed. 1988) ("[I]n any particular area, the legislature confronts a dilemma: to draft with narrow particularity is to risk nullification by easy evasion of the legislative purpose; to draft with great generality is to risk ensnarement of the innocent in a net designed for others.").

than if the boundaries of the forbidden areas were clearly marked."[176] If, out of caution, individuals avoid certain behavior because they do not know what the law prohibits, they may avoid constitutionally protected[177] or desirable behavior.[178]

An otherwise vague statutory term will not be invalidated if the statutory language has come to mean something through case law,[179] legislative history,[180] specialized definitions,[181] common understanding,[182] context,[183] or when law enforcement agencies have created a

176. *Grayned*, 408 U.S. at 109.

177. *See A Means to an End, supra* note 130, at 75 (reasoning that the vagueness doctrine creates an "insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms"); Collings, *supra* note 130, at 196–97, 218–19.

178. In *Papachristou*, the Supreme Court voided a vagrancy ordinance, stating its concern that the broad language of the statute could prevent such innocent acts as walking, strolling, loafing, loitering, or wandering. Papachristou v. City of Jacksonville, 405 U.S. 156, 164. (1972). While the Court did not declare such activities constitutionally protected, the Court reasoned "these activities are historically part of the amenities of life as we have known them." *Id.*

179. *See* Skilling v. United States, 130 S. Ct. 2896, 2929 (2010) ("It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."); Wainwright v. Stone, 414 U.S. 21, 22 (1973) (reasoning that when evaluating a vagueness challenge a court must evaluate the statute as it has been interpreted by the highest court of the state). Professor Amsterdam noted that this rationale allowing state courts' gloss on a statute to clarify otherwise vague statutory terms is inconsistent with the Supreme Court's reasoning in *Reese* that "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." *A Means to an End, supra* note 130, at 74 (quoting United States v. Reese, 92 U.S. 214, 221 (1875)).

180. *See* Boutilier v. INS, 387 U.S. 118, 124 (1967); Schellong v. INS, 805 F.2d 655, 661–62 (7th Cir. 1986).

181. *See* Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925); Omaechevarria v. Idaho, 246 U.S. 343, 348 (1917).

182. To glean a common understanding, the Court has consulted dictionaries to define a seemingly vague term; this exercise does not always yield a sufficiently clear meaning. *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 501 (1982); Jordan v. De George, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting); Lanzetta v. New Jersey, 306 U.S. 451, 455 n.3 (1939). Statutes that have been in existence for a long period of time also can accumulate a common understanding. *See* Goldsmith, *supra* note 171, at 303; Note, *Due Process and Definiteness in Statutes*, 62 HARV. L. REV. 76, 83 (1948); *see also* United States v. Ragen, 314 U.S. 513, 524 (1942) ("For years, thousands of corporations have filed income tax returns in accordance with the direction to deduct 'a reasonable allowance for salaries or other compensation for personal service actually rendered,' and there has not been any apparent general confusion bespeaking inadequate statutory guidance."). *But see Jordan*, 341 U.S. at 230 n.14 ("Of course, the mere existence of a statute for over sixty years does not provide immunity from constitutional attack. We have recently held an equally vague statute unconstitutional for vagueness." (citing Winters v. New York, 333 U.S. 507 (1948))); *id.* at 238–39 (Jackson, J., dissenting) ("[V]enerability of a vague phrase may be an argument

meaning.[184] Similarly, courts are less likely to void statutes for vague terms when the legislature has empowered an administrative agency to make interpretive regulations,[185] when the legislature adds narrowing definitions to an otherwise vague term,[186] or when the statute has adopted common law terms.[187] Such language survives vagueness challenges because courts have somewhere else to look to determine a statute's meaning,[188] provided that the interpretation sufficiently narrows the statute's meaning.[189] Also, a lawyer repre-

for its validity when the passing years have by administrative practice or judicial construction served to make it clear as a word of legal art.").

183. For example, the Supreme Court in *Grayned* upheld an antinoise ordinance, which unlike a "vague, general 'breach of peace' ordinance, ... [was] written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of school." Grayned v. City of Rockford, 408 U.S. 104, 112 (1972). The Court reasoned, "Given this 'particular context,' the ordinance gives 'fair notice to those to whom [it] is directed.'" *Id.* (citing American Commc'ns Ass'n v. Douds, 339 U.S. 382, 412 (1950)).

184. *See* Kolender v. Lawson, 461 U.S. 352, 355–57; Ward v. Illinois, 431 U.S. 767, 771–76 (1977); Goldsmith, *supra* note 171, at 295–301.

185. *See* Parker v. Levy, 417 U.S. at 752–53 (upholding a vagueness challenge to certain articles of the Uniform Code of Military Justice and reasoning that otherwise vague statutory terms have been clarified through regulations, an agency manual, and decisions of the United States Court of Military Appeals); *see also* Jeffrey I. Tilden, *Big Mama Rag: An Inquiry Into Vagueness*, 67 VA. L. REV. 1543, 1558–59 (1981) ("Where a responsible governmental entity, such as the Federal Election Commission, the general counsel of a particular agency, or a state liquor authority, can rule in advance whether the proposed conduct would violate the statute in question, the Court may be less sympathetic to a vagueness challenge."); Note, *Requirement of Definiteness in Statutory Standards*, 53 MICH. L. REV. 264, 270 (1954) ("[I]t has been asserted that less definiteness is required of an administratively executed statute, the sole requisite being that the basic standards set up must be sufficiently definite and precise to enable those affected to determine whether the administrator or quasi-legislative board is exceeding his or its authority in promulgating a regulation under the statute.").

186. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2720 (2010); Posters 'N' Things v. United States, 511 U.S. 513, 526 (1994).

187. *See, e.g.*, Rose v. Locke, 423 U.S. 48, 50 (1975); Nash v. United States, 229 U.S. 373, 377 (1913); *see also* Morissette v. United States, 342 U.S. 246, 263 (1952) (reasoning that when the legislature "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken").

188. *See* LAFAVE, *supra* note 152, § 2.3(b), at 146–47; *cf.* Coates v. City of Cincinnati, 402 U.S. 611, 613 (1971) (voiding a Cincinnati unlawful assembly ordinance for vagueness because the state courts had not limited the definition in any meaningful way, which left the Court "relegated, at best, to the words of the ordinance itself"); Winters v. New York, 333 U.S. 507, 514 (1948) ("The interpretation by the [state court] puts these words in the statute as definitely as if it had been so amended by the legislature.").

189. *See Winters*, 333 U.S. at 518–19 (reasoning that the judicial interpretations of a vague statute did not save it from being voided because "even considering the gloss put upon the literal meaning by the [state court] . . . we find the [statute] too uncertain and indefinite to justify the conviction of this petitioner"); Connally v.

senting a person potentially affected by the statute can develop an educated guess as to the term's meaning and thus give fair notice to the regulated party of what conduct to avoid.[190] There are, however, limits to these "cures."[191] For example, when a term is used in other statutes, this does not necessarily create meaning;[192]

Gen. Constr. Co., 269 U.S. 385, 394–95 (1926) (reasoning that although court decisions interpreted a vague statutory term, "the result is not to remove the obscurity, but rather to offer a choice of uncertainties"); United States v. L. Cohen Grocery Co., 255 U.S. 81, 89–90 (1921) (noting that conflicting interpretations of a statute does not cure, but rather highlights, the vagueness of the statute).

190. *See* LAFAVE, *supra* note 152, § 2.3(b), at 146–47. The problem with the rationale of fair notice is that it really is what Professor John Calvin Jeffries calls "lawyer's notice"—whether an advocate representing a person potentially facing charges of violating a statute can figure out that certain acts violate the statute. *See* John Calvin Jeffries, *Legality, Vagueness, and the Construction of Criminal Statutes*, 7 VA. L. REV. 189, 208, 211 (1985) (reasoning that in "the ordinary case, the notice given must be recovered from sources so various and inaccessible as to render the concept distinctly unrealistic"); *see also* Batey, *supra* note 174, at 4–5 ("The trouble with this standard [fair notice] is that ordinary people do not spend much of their time reading statute books. Nor do they spend any time studying the cases that interpret criminal statutes, even though it is settled law that such glosses on criminal statutes can 'cure' their vagueness."); *Due Process Requirement of Definiteness in Statutes*, *supra* note 182, at 79 ("the wider latitude thus allowed terms with well-settled legal meanings does not impair statutory definiteness from the standpoint of legal experts, but it is certainly incompatible with a requirement of precise notice to the layman himself of just what he can and cannot do"). *But see* Lockwood, *supra* note 130, at 311–13 (disagreeing with Jeffries' characterization of this rationale as "lawyer's notice" by citing several Supreme Court opinions that, when discussing fair notice, refer consistently to "common" or "ordinary men" and reasoning that the Court has never "required [that] the law provide actual notice or even precise guidelines, but has instead set the standard at reasonable certainty within the language of the enacted law, and has advised that individuals bear some risk in having to estimate whether their behavior is 'perilously close' to prohibited conduct").

191. *See* Goldsmith, *supra* note 171, at 294–95.

192. *See* Smith v. Goguen, 415 U.S. 566, 582 n.31 (1974) (holding a statute void for vagueness despite "the universal adoption of [similar] statutes by the Federal and State governments"); *Winters*, 333 U.S. at 511, 519. *But see* Grayned v. City of Rockford, 408 U.S. 104, 111 (1972) (referencing Illinois Supreme Court opinions interpreting a Chicago, Illinois, ordinance prohibiting disturbing the peace, which limited the statute's application to situations where there is an imminent threat of violence, to a Rockford, Illinois, ordinance with similar language); Jordan v. De George, 333 U.S. 223, 227 (1951). Andrew Goldsmith, referencing *Jordan*, wrote that "the Court has not used one [federal] statute to lend meaning to another since 1951;" this is because such a method of construction would create federal criminal common law. Goldsmith, *supra* note 171, at 305–06; *see also Jordan*, 341 U.S. at 240 (Jackson, J., dissenting) ("The use of the phrase [CIMT] by state courts for various civil proceedings affords no teaching for federal courts. The Federal Government has no common-law crimes and the judges are not permitted to define crimes by decision, for they rest solely in statute."); Screws v. United States, 325 U.S. 91, 152 (1945) (Roberts, J., dissenting) ("It was settled early in our history that prosecutions in the federal courts could not be founded on any undefined body of so-called common law."); Franklin v. INS, 72 F.3d 571,

nor can related statutes illuminate the meaning of a vague term.[193]

The Supreme Court in *Jordan* held that the term "CIMT" gives adequate notice to noncitizens. From what sources did the Court import meaning into the term, to "cure" the vagueness? This is not a statutory term for which Congress has taken care to "add narrowing definitions."[194] Nor does the legislative history shed any light on the meaning of the term, as "Congress knowingly conceived it in confusion."[195] Congress's only legislative goal appears to have been to deport undesirable noncitizens from the U.S.[196] The only common understanding of the term is its dictionary definition, which refers to "an act of baseness, vileness, or depravity."[197] This is just as vague as the words "moral turpitude;"[198] the meaning of these words can vary depending on the decision-maker's idea of what is base, vile, or depraved.[199] The Court has found statutes to be void for vagueness when the "judicial gloss" given a statutory term by a state court does not remedy the statute's uncertainty.[200]

According to the majority in *Jordan*, the term was clearly defined in case law, at least with respect to fraud offenses.[201] As discussed above, a statute will not be invalidated for vagueness if the meaning of the term has developed a meaning in case law.[202] In addition, vague

595 (8th Cir. 1995) (Bennett, J., dissenting) (criticizing the *Jordan* majority's reliance on the use of the term CIMT in other areas of law to overcome the statute's uncertainty and reasoning that "[c]omparative uncertainty isn't the standard for 'vagueness;' due notice of consequences, by the Court's own statement, is the applicable standard" (citing *Jordan*, 341 U.S. at 231–32; *Connally*, 269 U.S. at 385)).

193. *See Goguen*, 415 U.S. at 579 (rejecting government's argument that the challenge statute took on meaning from the more specific accompanying language in the statute); Herndon v. Lowry, 301 U.S. 242, 262 (1937); Goldsmith, *supra* note 171, at 303.

194. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2720 (2010); *see also* Hamdan v. INS, 98 F.3d 183, 185 (5th Cir. 1996) (stating that the term CIMT is undefined in the statute).

195. *See Jordan*, 341 U.S. at 233 (Jackson, J., dissenting); *see also* Harms, *supra* note 10, at 260 (proposing that Congress should define the term to CIMT to remedy the lack of clarity about the term).

196. *See supra* section II.A.

197. *See, e.g.*, *In re* Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1988).

198. *See Jordan*, 341 U.S. at 234–35 (Jackson, J., dissenting).

199. *See* Bradway, *supra* note 153, at 16 ("The relative character of the words 'baseness,' 'vileness,' 'depravity' makes an absolute definition of little value.").

200. *See* Winters v. New York, 333 U.S. 507, 518–19 (reasoning that "even considering the gloss put upon the literal meaning by the Court of Appeals . . . we find the [statute] too uncertain and indefinite to justify conviction of this petitioner.). *But cf. In re* D-, 1 I. & N. Dec. 143, 193 (B.I.A. 1941) (reasoning that these words give the otherwise vague term CIMT "a definition sufficiently accurate for this case").

201. *See Jordan*, 341 U.S. at 227–29.

202. *See* Wainwright v. Stone, 414 U.S. 21, 22 (1973).

terms are permissible when an agency can apply the first gloss to give them meaning.[203] Congress gave the BIA authority to interpret the term CIMT;[204] accordingly, the term CIMT has spawned much BIA case law, thus giving the term a somewhat settled meaning. The State Department also has adopted guidance on its meaning.[205] These agency definitions can cure the ambiguity in the term CIMT, giving noncitizens and their lawyers cases and agency guidance to consult.[206] Judges and immigration officers can rely on agency guidance, precedent decisions by the BIA, and federal court decisions defining CIMT; for example, convictions involving fraud,[207] theft,[208] and sexual offenses[209] all have been held to be CIMTs.

However, there are numerous statutes, like the one Manuel was charged with violating, that do not fit into one of these "easy" categories. In these cases, the immigration judge must decide whether a certain offense is "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general,"[210] by reference to "moral standards generally prevailing in the U.S."[211] Under this standard, the BIA has stated, "the nature of a crime is measured against contemporary moral standards and may be susceptible to change based on the prevailing views of society."[212]

1. Deportation for a Sin?

The term CIMT allows immigration judges to make judgments about the "moral standards prevailing at the time,"[213] thus placing them in the role of God, passing judgment on the morals of the nonci-

203. *See* Parker v. Levy, 417 U.S. 733, 752–53 (1974).
204. *See* Cabral v. INS, 15 F.3d 193, 195 (1st Cir. 1994) (reasoning that the legislative history behind CIMT, which indicated a lack of clarity on the meaning of the term, "leaves no doubt . . . that Congress left the term 'crime involving moral turpitude' to further administrative and judicial interpretation").
205. *See* 9 FOREIGN AFFAIRS MANUAL § 40.21(a), N2 (synthesizing BIA and federal court decisions on the meaning of CIMT).
206. *See* Goldsmith, *supra* note 171, at 294–95.
207. *See* Jordan v. De George, 341 U.S. 223, 227 (1951); *In re* Flores, 17 I. & N. Dec. 225, 228 (B.I.A. 1980).
208. *See* Tillinghast v. Edmead, 21 F.2d 81, 83 (1st Cir. 1929); *In re* D-, 1 I. & N. Dec. 143, 144–45 (B.I.A. 1941).
209. *See* Mehboob v. Att'y Gen., 549 F.3d 272, 277–79 (3d Cir. 2008); *In re* Dingena, 11 I. & N. Dec. 723, 727 (B.I.A. 1966).
210. *See In re* Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1988).
211. 22 C.F.R. § 40.21(a)(1) (2011); *In re* McNaughton, 16 I. &. N. Dec. 569, 573 (B.I.A. 1978).
212. *In re* Torres-Varela, 23 I. & N. Dec. 78, 83 (B.I.A. 2001); *In re* G-, 1 I. & N. Dec. 59, 60 (B.I.A. 1941).
213. 22 C.F.R. § 40.21(a)(1) (2011); *McNaughton*, 16 I. & N. Dec. at 573.

tizens whose cases lie in their hands.[214] Looking more closely at the history of the term CIMT, one learns of its inherently religious nature. The term CIMT did not make its way across the Atlantic with the Pilgrims, yet its oft-used substitute, *mala in se*, derives from English common law.[215] William Blackstone, in his famous *Commentaries on the Laws of England*, highlighted the religious connotation of the distinction between *mala in se* and *mala prohibita*, writing that "crimes and misdemeanors that are forbidden by the superior laws and therefore styled *mala in se* . . . contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature, in all these cases acts only . . . in subordination to the great lawgiver, transcribing and publishing his precepts."[216] On the other hand,

214. *See* United States *ex rel*. Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947) (reasoning that it is "most unfortunate that Congress has chosen to base the right of a resident alien to remain in this country upon the application of a phrase so lacking in legal precision and, therefore, so likely to result in a judge applying to the case before him his own personal views as to the mores of the community"); United States *ex. rel*. Griffo v. McCandless, 28 F.2d 287, 288 (E.D. Pa. 1928) (discussing legislative intent of term CIMT in 1917 deportation statute and stating that Congress may "have had in mind those acts which are not only condemned by the law and denounced as criminal, but those which the extralegal moral sense pronounces to evidence moral turpitude or depravity").

215. *See Crimes Involving Moral Turpitude, supra* note 162, at 118. Unlike many legal terms that were adopted into the U.S. system from the English system, the term CIMT was never used in English case law. *See id.* at 118 n.7. English law classified crimes as either a felony or misdemeanor or *mala in se* or *mala prohibita*; other categories of offenses were *crimen falsi* and infamous crimes. *See id.* at 118 (defining *crimen falsi*, a term imported from the civil law, to cover such crimes as forgery, perjury, and dealing with false weights or coins and stating that infamous crimes have been regarded as including *crimen falsi*). U.S. legislators rejected these traditional English categories of crimes due to their uncertainty and conflicting precedent on the meaning of the terms. *Id.* As civil statutes referred to criminal offenses, legislators needed a classification that was less tenuous; thus was introduced the term CIMT into U.S. common law. Note, *The Distinction Between* Mala Prohibita *and* Mala in Se *in Criminal Law*, 30 COLUM. L. REV. 74, 86 (1930) [hereinafter *The Distinction Between* Mala Prohibita *and* Mala in Se] (while this student note is unsigned, it was written by Professor Herbert Weschler when he was a law student). There are many courts that classify offenses as crimes involving moral turpitude if the crimes are *mala in se* as opposed to *mala prohibita*. *See, e.g.*, Efagene v. Holder, 642 F.3d 918, 922 (10th Cir. 2011); Castle v. INS, 541 F.2d 1064, 1066 (4th Cir. 1976); *In re* E-, 2 I. & N. Dec. 134. 141 (1944). *But see* Nicanor-Romero v. Mukasey, 523 F.3d 992, 998 (9th Cir. 2008); *McCandless*, 28 F.2d at 288. Professor Herbert Weschler has suggested that courts fell back on the familiar *mala in se*/*mala prohibita* distinction when defining CIMT, even though the term was introduced to shed this traditional English classification. *See The Distinction Between* Mala Prohibita *and* Mala in Se, *supra*, at 85–86. Therefore, it appears the term CIMT is merely a New World label to an English common law tradition. *See id.* at 86; *Crimes Involving Moral Turpitude, supra* note 162, at 118.

216. 1 WILLIAM BLACKSTONE, COMMENTARIES *54. Blackstone cited common law offenses such as murder, theft, and perjury as *mala in se* offenses. *Id.* at *54–58.

wrote Blackstone, *mala prohibita* offenses involve no "moral offense, or sin," and "no moral guilt."[217] The distinction required that humans not only believe in a fundamental divine law, but also be able to discern and implement that law.[218] As Judge Anderson of the First Circuit Court of Appeals wrote in 1929, "Blackstone's assumption of personal knowledge from 'the Great Lawgiver' as to what offenses were mala in se and 'can contract no additional turpitude by being declared unlawful by the inferior Legislature,' I think absurd."[219]

The problem with both terms, CIMT and *mala in se*, is that they are loaded with religious overtones and hark back to a day when

217. *Id.* at *57–58; *see also* Nancy Travis Wolfe, Mala in Se: *A Disappearing Doctrine*, 19 CRIMINOLOGY 131, 139 (1981) ("In other words, the 'evil' [of a *mala prohibita* offense] is imputed by the state."). The first judicial use of the terms *mala in se* and *mala prohibita* was by Chief Justice Fineux in 1496. *The Distinction Between* Mala Prohibita *and* Mala in Se, *supra* note 215, at 74. The term was used in connection with the dispensing power of the crown; the king could grant an individual leave to commit an offense *malum prohibitum*, but not one *malum in se*. *See id.* Acts of parliament, which were exercises of the king's legislative prerogative, could be violated at the king's will. *See id.* at 76–77. However, because the church held ultimate authority over questions of morality, it was not possible that the king, a mere mortal, could allow his favorites to contravene the laws of God. *See id.* The practice of dispensations was abolished by the Bill of Rights in 1689; however, the term did not disappear when the dispensation power disappeared from law. *See id.* at 77.

218. Wolfe, *supra* note 217, at 136–37.

219. Tillinghast v. Edmead, 31 F.2d 81, 84 (Anderson, J., dissenting); *see also* JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES 80 (Charles Warren Everett ed., 1928) (describing "that acute distinction between mala in se, and mala prohibita; which being so shrewd and sounding so pretty, and being in Latin, has no sort of an occasion to have any meaning to it: accordingly it has none."); J. W. C. Turner, *The Mental Element in Crimes at Common Law, in* THE MODERN APPROACH TO CRIMINAL LAW 195, 221 (L. Radzinowicz & J. W. C. Turner eds., 1945) ("Some of the weak points in the doctrine were detected by an early editor of Blackstone, and in modern times it is generally regarded as quite discredited."). Not all definitions of *mala in se* overtly cite religious authority. For example, jurists have described *mala in se* offenses as those that violate the laws of nature. Wolfe, *supra* note 217, at 137. However, "citation of natural law as the source of the mala in se designation implies a sense of right and human nature which has a universal quality." *See id.* at 137. Professor Calvin Woodard wrote that because the sixteenth and seventeenth centuries saw the rise of the secular state and a decline in the authority of the church, legal thinkers of the time "sought to establish legal systems, based on scientific principles deduced from the nature of man and things, that would guide individual behavior of metaphysical man in directions that would promote political order and assure a measure of protected individual dignity." Calvin Woodard, *Thoughts on the Interplay between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784, 788 (1989). Sovereigns of the seventeenth and eighteenth centuries, therefore, promulgated legal codes "consisting of religious commandments, quasi-human moral values, and civil virtues all couched in the language of legal proscriptions proclaimed and enforced by sovereigns of secular states." *Id.* The *mala in se*/*mala prohibita* distinction fit well into this scheme of laws that were grounded in religion, yet claimed authority from natural law. *See id.*

judges played God, assigning blame for sin.[220] The terms assume that judges are "the prophet[s] to [whom] is revealed the state of morals of the people or the common conscience."[221] Professor Herbert Weschler, writing in 1930 on the distinction between *mala in se* and *mala prohibita*, argued that the distinction invites judges into "a realm of discourse in which courts are not to be trusted" and therefore, "[i]t is time that the legal vocabulary renounce this vestige of the law's ecclesiastical heritage."[222]

One might argue that judges do not have to rely on their own ideas of morality to decide what is a CIMT, since judges can look to common law to define which crimes are *mala in se* and therefore involve moral turpitude.[223] However, reference to common law offenses sheds no additional light on the distinction between *mala in se* and *mala prohibita* or on the meaning of moral turpitude. Common law offenses also were created by human beings, who merely attempted to rationalize them by reference to a higher authority.[224] Also, the labels *mala in se* and CIMT have come to incorporate offenses beyond the common law crimes.[225] As one judge wrote in 1930, "History discloses that all offenses were at some time merely mala prohibita, and, as civilization

220. *See* Jordan v. De George, 341 U.S. 223, 236–27 (1951) (Jackson, J., dissenting); *see also In re* Berk, 602 A.2d 946, 951 (Vt. 1991) (Morse, J., concurring) (stating, in an attorney disciplinary proceeding for a crime involving moral turpitude, "[t]he term is rooted in common law and was developed at a time when concepts of religion and law were more closely interwoven and sin and crime were virtually synonymous . . . . But, as society has increasingly become both more secular and pluralistic, there is less consensus about what is immoral.").

221. Bradway, *supra* note 153, at 22; *see also* Silver v. State, 79 S.E. 919, 921 (Ga. 1913) ("[W]e would hesitate to concur in the soundness of the view that the unlawful act . . . must be malum in se; for, outside of those things which are condemned as evil or wrong by the Holy Scriptures, the question of what would be evil or wrong in its nature depends on individual conception and environment.").

222. *The Distinction Between* Mala Prohibita *and* Mala in Se, *supra* note 211, at 86. Professor John Bradway wrote that "[a]t one time the code of morals was in tangible form, consisting of the Bible, the Canon and Civil Law, and Aristotle." Bradway, *supra* note 153, at 21 n.43 (citing 2 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 128 (1923)). The Ecclesiastical Court was responsible for the moral code's enforcement. *Id*. at 21 n.43 (citing A. T. CARTER, A HISTORY OF THE ENGLISH COURTS 146 (5th ed. 1927)). He wrote that "[i]n the latter part of the 19th century ethical thought was influenced by Darwinian theories . . . [which] conflicted with that of the middle ages. *Id.*at 21 n.43 (citing 10 ENCYC. SOC. SCI 643–49 (1933)).

223. *See* BLACKSTONE, *supra* note 216, at *54–58 (citing common law offenses such as murder, theft, and perjury as mala in se offenses).

224. Wolfe, *supra* note 217, at 137 (citing 6 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 603 (1924)).

225. *See* LAFAVE, *supra* note 152, § 1.6(b), at 52 n.28 ("Perhaps . . . the 'sense of a civilized community' may change somewhat in the course of time, so that a court might find that conduct which constituted a common law crime is no longer malum in se although still prohibited by statute.").

advanced and social and moral ideals and standards changed, they became one after another mala in se."[226]

It is helpful to explore a few examples of the BIA and courts playing God, applying what they deem to be society's morals to new statutory crimes to decide whether that offense involved moral turpitude. Consider the example of domestic violence. In 1993, the Ninth Circuit held that spousal abuse was a CIMT,[227] extending its prior holding that child abuse was a crime involving moral turpitude to the domestic abuse context.[228] The Ninth Circuit reasoned that because spouses are in a committed relationship of trust with the perpetrator, "spousal abuse is an act of baseness or depravity contrary to accepted moral standards,"[229] whereas violence between strangers or acquaintances did not necessarily contravene accepted moral standards.[230] Extending the Ninth Circuit's holding, the BIA held in 1996 that abuse against a cohabitant was a CIMT.[231] The BIA reasoned that "[v]iolence between the parties of [a cohabitant] relationship is different from that between strangers or acquaintances . . . [i]n our opinion, infliction of bodily harm upon a person with whom one has such a familial relationship is an act of depravity which is contrary to accepted moral standards."[232]

Aggravated DUI is another offense where the BIA has defaulted to "contemporary moral standards" to define it as a CIMT. In a 1999 case, the BIA decided that an aggravated DUI offense, which required the driver to commit a DUI knowing that he or she was prohibited from driving under any circumstances, was a CIMT.[233] The BIA introduced its analysis by stating that moral turpitude is a "'nebulous concept' with ample room for differing definitions of the term,"[234] and that "the nature of the crime is measured against contemporary moral standards and may be susceptible to change based on the prevailing

226. State v. Malusky, 230 N.W. 735, 737 (N.D. 1930); *see also* Mei v. Ashcroft, 393 F.3d 737, 741 (7th Cir. 2004) ("In application . . . the distinction [between mala in se and mala prohibita] turns out to be paper thin."); LAFAVE, *supra* note 152, § 1.6(b), at 52 n.30 ("The trouble is that 'moral turpitude' is just as vague an expression as '*malum in se*,' so it helps very little to define one term by reference to the other.").

227. Gregeda v. INS, 12 F.3d 919 (9th Cir. 1993).

228. Guerrero de Nodahl v. INS, 407 F.2d 1405 (9th Cir. 1969). The Ninth Circuit reasoned that "an adult is not as helpless of a victim as a child; nevertheless, a spouse is committed to a relationship of trust with, and may be dependent upon, the perpetrator." *Gregeda*, 12 F.3d at 922.

229. *Gregeda,* 12 F.3d at 922.

230. *See id.*

231. *See In re* Phong Nguyen Tran, 21 I. & N. Dec. 291, 293–94 (B.I.A. 1996).

232. *Id.* at 294.

233. *In re* Lopez-Meza, 22 I. & N. Dec. 1188, 1196 (B.I.A. 1999).

234. *Id.* at 1191 (quoting Franklin v. INS, 72 F.3d 571, 573 (8th Cir. 1995) (internal quotation marks omitted)).

views in society."[235] The BIA reasoned that while simple DUI is a mere regulatory offense and therefore not a CIMT, it is a "marginal crime" that might involve moral turpitude,[236] then stated, "when that crime is committed by an individual who knows that he or she is prohibited from driving, the offense becomes such a deviance from the accepted rules of contemporary morality that it amounts to a crime involving moral turpitude."[237]

Failure to register as a sex offender is yet another example of the BIA defaulting to the "contemporary moral standards" to define it as a CIMT. In 2007, the BIA held that a California failure to register as a sex offender offense was a CIMT, thus rendering a noncitizen removable.[238] The BIA introduced its analysis by observing that "the definition of a crime involving moral turpitude is nebulous,"[239] and then cited the usual definition of moral turpitude: "Moral turpitude refers generally to conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[240] The BIA then stated, "Under this standard, the nature of a crime is measured against contemporary moral standards and may be susceptible to change based on the prevailing views in society."[241]

These examples demonstrate that the term CIMT has no common understanding, as the majority in *Jordan* suggested.[242] The BIA is constantly deciding issues of first impression, trying to "translate ethical concepts into legal ones, case by case."[243] But is the law now more settled for noncitizens facing convictions for domestic violence, aggravated DUI, and failure to register as a sex offender? Not quite, as evidenced by subsequent immigration case law on these very topics.[244] Moreover, there always will be new statutory offenses that

235. *Id.* at 1192.
236. *Id.* at 1196. The BIA cited *Jordan v. De George* 341 U.S. 223, 231 (1951) for the notion that "there is inherent difficultly in determining whether marginal offenses are crimes involving moral turpitude" and then stated, "[i]n our view, a simple DUI offense is such a marginal crime." *Lopez-Meza*, 22 I. & N. Dec. at 1196.
237. *Lopez-Meza*, 22 I. & N. Dec. at 1196. The BIA rejected the dissent's argument that the finding of moral turpitude in the case simply arose from an amalgamation of distinct offenses, yet stated: "[R]ather, it results from a building together of elements by which the criminalized conduct deviates further and further from the private and social duties that persons owe to one another and to society in general." *Id.*
238. *See In re* Tobar-Lobo, 24 I. & N. Dec. 143, 145–46 (B.I.A. 2007).
239. *Id.* at 144.
240. *Id.*
241. *Id.*
242. *See* Jordan v. De George, 341 U.S. 223, 227 (1951).
243. *See id.* at 242 (Jackson, J., dissenting).
244. For example, three circuit courts have called into question the BIA's holding in *Tobar-Lobo* that failure to register as a sex offender is a CIMT; these courts cited

states create in order to adapt to new criminal behavior.[245] As these offenses come before the BIA, it will sit in judgment of whether they offend contemporary moral standards, leaving noncitizens without fair notice of whether they will be subjected to deportation for a CIMT.[246]

One might argue, however, that judges applying society's morals to the CIMT question is no different than an immigration judge deciding whether a noncitizen merits discretionary relief from removal. Immigration law is full of what Professor Kanstroom describes as delegated discretion;[247] immigration judges are given discretion to decide whether a noncitizen merits relief such as cancellation of removal,[248]

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to both longstanding BIA precedent and the Attorney General's subsequent holding in *Silva-Trevino* that scienter is essential to a finding of CIMT. *See* Pannu v. Holder, 639 F.3d 1225, 1228–29 (9th Cir. 2011) (reasoning that *Tobar-Lobo* is inconsistent with the subsequent holding in *Silva-Trevino* that scienter is essential to the finding of CIMT and remanding the case to the BIA); *see also* Totimeh v. Att'y Gen., Nos. 10-3939, 11-1998, 2012 U.S. App. LEXIS 610, *14–17 (3d Cir. Jan. 12, 2012) (reasoning that *Tobar-Lobo* is inconsistent with BIA precedent that regulatory offenses are not CIMTs and holding that a predatory offender registration is not categorically a CIMT); Efagene v. Holder, 642 F.3d 918, 921–22 (10th Cir. 2011) (reasoning that *Tobar-Lobo* is inconsistent with BIA precedent that regulatory offenses are not CIMTs and holding that failure to register as a sex offender is not categorically a CIMT); *In re* Silva-Trevino, 24 I. & N. Dec. 687, 706 (Att'y Gen. 2008). In the domestic violence context, the BIA, ten years after its holding in *Tran*, decided that a domestic violence offense punishing de minimus force on the partner was not a CIMT. *In re* Sejas, 24 I. & N. Dec. 236, 238 (B.I.A. 2007). In the aggravated DUI context, two years after its holding in *Lopez-Meza*, the BIA held that an aggravated DUI offense that punished DUI with two or more prior DUI convictions was not a CIMT. *See In re* Torres-Varela, 23 I. & N. Dec. 78, 86 (B.I.A. 2001).

245. *See* Albert Lévitt, *Extent and Function of the Doctrine of Mens Rea*, 17 ILL. L. REV. 578, 588 (1922) ("Social progress means that more acts are found to be harmful to society and so are forbidden by statutory enactments.").

246. Opinion Of Hon. Homer Cummings, *Immigration Laws-Moral Turpitude-Political Offense-Abnormal Conditions In Foreign Jurisdiction*, 39 OP. ATTY GEN. 215, 221 (1938) (quoting Rudolph v. United States *ex rel* Rock, 6 F.2d 487 (D.C. Cir. 1925) ("Many things which were not considered criminal in the past have, with the advancement of civilization, been declared such by statute; and the commission of the offense, if it involves the violation of a rule of public policy and morals, is such an act as may involve moral turpitude.").

247. *See* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 751–58 (1997).

248. Cancellation of removal is a discretionary waiver for long-term permanent residents who have been convicted of a removable offense. A noncitizen must show that he has been a lawful permanent resident for at least five years, has resided continuously in the United States for at least seven years, and has not been convicted of an "aggravated felony." 8 U.S.C. § 1229(b) (2006). Once a noncitizen has shown that he is eligible, the judge "may" grant him cancellation of removal; the judge balances factors such as residence of long duration, hardship to the noncitizen and his family, and genuine rehabilitation against the seriousness of his criminal conviction. *See id.*; *In re* C-V-T-, 22 I. & N. Dec. 7, 11 (B.I.A. 1998). Cancellation of removal is also available to non-permanent residents who have

asylum,[249] or adjustment of status.[250] The Supreme Court has described delegated discretion of the sort used in deciding relief from removal as "unfettered."[251] The Court thus would "import no substantive standards into this realm."[252] Delegated discretion decisions thus are inherently unpredictable, leaving wise immigration lawyers to suggest, "know your judge." Even those that apply a predictable set of factors can have vastly different outcomes, as they often involve a balancing test of some sort.[253]

An immigration judge deciding whether an offense is a CIMT involves interpretive as opposed to delegated discretion.[254] However, Interpretive discretion is the process by which the agency develops meaning for immigration law terms such as CIMT.[255] This type of discretion should have a more law-like character, or at least be more

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been continuously present in the U.S. for ten years, have good moral character, are not removable for certain offenses, and for whom removal would result in "exceptional and extremely unusual hardship" for a spouse, child, or parent who is a U.S. citizen or permanent resident. *See* 8 U.S.C. §1229b(b)(1). In addition, battered spouses or children may seek cancellation of removal if the battery or extreme cruelty was perpetrated by a spouse or parent who is or was a U.S. citizen and the applicant has been physically present in the U.S. for three years, has good moral character, is not removable for certain offenses, and can prove that removal would result in extreme hardship to the applicant or the applicant's child or parent. *Id.* §1229b(b)(2).

249. *See* 8 U.S.C. § 1158(b). An asylum applicant must prove that he is a "refugee," which means that he is outside of his country of origin and is unable or unwilling to return due to a "well-founded fear or persecution on account of his race, religion, nationality, political opinion, or membership in a particular social group. *Id.*; *see id.* § 1101(a)(42)(A).

250. *Id.* § 1225(a). Adjustment of status is the means by which a noncitizen who is in the U.S. seeks to obtain permanent residency. Generally, an applicant must show that he was inspected and admitted or paroled into the U.S., an immigrant visa is immediately available to him, and that he is not subject to any of the grounds of inadmissibility listed in 8 U.S.C. § 1182. *See id.* § 1255(a).

251. *See* Jay v. Boyd, 351 U.S. 345, 354 (1956). In *Jay*, the petitioner was deportable for being a member of the Communist Party and he applied for suspension of removal under former 8 U.S.C. § 1254(a), which was a discretionary form of relief. *Id.* at 348–49. The special inquiry officer found that he met the statutory prerequisites for the relief, but that he did not "'warrant favorable action' in view of certain 'confidential information;'" the Board of Immigration Appeals upheld this determination. *Id.* at 349–50 (internal quotation marks omitted). The petitioner challenged a regulation that provided for the use of confidential information in ruling on suspension applications if disclosure of the information would be prejudicial to the public interest, safety, or security. *Id.*at 352. The Court held that the use of confidential information in a suspension hearing was properly within the exercise of the agency's discretion; the Court reasoned, "In view of the gratuitous nature of the relief, the use of confidential information in a suspension proceeding is . . . clearly within statutory authority." *Id.* at 359, 361.

252. Kanstroom, *supra* note 247, at 756.

253. *See, e.g., C-V-T-,* 22 I. & N. Dec. at 11.

254. *See* Kanstroom, *supra* note 247, at 759–61.

255. *Id.* at 761.

transparent, as it involves the agency setting guidance for future cases.[256] For this reason, most of the BIA's interpretive discretion decisions resemble a court engaging in statutory interpretation, examining, for example, the legislative history of a term or the term's longstanding use in immigration law.[257] In the CIMT realm, however, the BIA can simply state that an offense, such as failure to register as a sex offender, offends society's morals and therefore is a CIMT; this summary conclusion about society's morals then governs future cases.[258] As Justice Jackson stated in his dissenting opinion in *Jordan*, "Irrationality is inherent in the task of translating the religious and ethical connotations of the phrase [CIMT] into legal decisions."[259]

256. For this reason, the Supreme Court, in *United States v. Mead Corp.*, 533 U.S. 218 (2001), held that it would not accord deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to an agency's decision that was the result of informal procedures, which are not binding on future parties. *Mead*, 533 U.S. at 234. The Court reasoned, "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230; *see also* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action,* 58 VAND. L. REV. 1443, 1450 (2005) (discussing the argument that *Chevron* deference should be restricted "to the fruits of notice-and-comment rulemaking or formal adjudication"); Cass R. Sunstein, *Chevron Step Zero,* 92 VA. L. REV. 187, 223–25 (2006) (questioning the reasons why relatively formal procedures are relevant in determining whether *Chevron* deference applies).

257. *See, e.g.*, *In re* Alyazji, 25 I. & N. Dec. 397, 397, 404–05 (B.I.A. 2011) (interpreting 8 U.S.C. § 1227(a)(2)(A) (2006), which renders deportable a noncitizen for a conviction for one CIMT committed within five years of admission, and reaching a conclusion of the meaning of "admission" in part by analyzing the legislative history of the terms "admission" and "entry"); *In re* J-E-, 23 I. & N. Dec. 291, 292, 294–99 (B.I.A. 2002) (deciding whether a noncitizen qualified for relief under Article 3 of the Convention Against Torture by parsing the legislative history and other countries' interpretations of the definition of "torture").

258. *See In re* Tobar-Lobo, 24 I. & N. Dec. 143, 146 (B.I.A. 2007).

259. *See* Jordan v. De George, 341 U.S. 223, 239 (1951) (Jackson, J., dissenting); *see also* Marciano v. INS, 450 F.2d 1022, 1029 (8th Cir. 1971) (Eisele, J., dissenting) (reasoning that it is difficult for administrators "to make continual determinations of the nation's shifting and often indistinct moral standards"); United States *ex. rel*. Iorio v. Day, 34 F.2d 920, 921 (2d Cir. 1929) ("While we must not, indeed, substitute our personal notions as the standard, it is impossible to decide at all without some estimate, necessarily based on conjecture, as to what people generally feel."); State *ex. rel*. Mays v. Mason, 43 P. 651, 652 (Or. 1896) ("The term [moral turpitude] lacks precision, and necessitates the examination of the works of moral and ethical authors, rather than the textbooks of legal writers, to ascertain whether a given case falls within or without the rule." (quoting Skinner v. White, 1 Dev. & Bat. 471 (1836))); *What Constitutes a Crime Involving Moral Turpitude*, 23 A.L.R. FED. 480, § 1(a) (1975) ("The term 'moral turpitude' is probably incapable of precise definition in a legal sense, since it basically involves moral or ethical judgments.").

2. Failing to Draw Meaning from CIMT in Other Areas of Law

Contrary to the reasoning of the majority in *Jordan*, the use of the term CIMT in other areas of law does not give noncitizens any idea what the term means.[260] Courts and scholars alike have commented that the term as used in other areas of law is uncertain, leading to inconsistent results.[261] As early as 1935, scholars critiqued the term "CIMT" for its lack of a clear definition.[262] Criticizing the term CIMT as used in the context of attorney discipline, Professor John Bradway recognized the need for a "catch-all" phrase such as CIMT in order to "trip that old time professional villain now called 'the lawyer-crimi-

260. *See Jordan*, 341 U.S. at 227.

261. *See, e.g.*, Du Vall v. Bd. of Med. Exam's, 66 P.2d 1026, 103 (Ariz. 1937) (considering whether to revoke a medical license because of a CIMT and reasoning that "[t]he expression 'moral turpitude' is susceptible of more than one interpretation. A crime might be held to involve moral turpitude, when gauged by the public morals of one community, and in another community the same offense would not be so considered." (quoting *In re* Dampier, 267 P. 452, 454 (Idaho 1928))); *In re* Jacoby, 57 N.E.2d 932, 936 (Ohio Ct. App. 1943) (considering whether to discipline an attorney for a CIMT and reasoning that "[t]he question as to whether the violation of a particular penal statute involved moral turpitude has principally caused the diversity of decision"); *In re* Finch, 287 P. 677, 678 (Wash. 1930) (considering whether to disbar an attorney for a CIMT and reasoning that "[t]his element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community" (quoting Beck v. Stitzel, 21 Pa. 522, 524 (Pa. 1853))); *see also* State v. Malusky, 230 N.W. 735, 737 (N.D. 1930) (considering whether a defendant had a prior CIMT to justify an enhanced sentence and reasoning that "'moral turpitude' is a term which conforms to and is consonant with the state of public morals; hence it can never remain stationary" (internal quotation marks omitted) (quoting Drazen v. New Haven Taxicab Co., 111 A. 861, 863 (Conn. 1920))); *Mays*, 43 P. at 652 (considering whether an attorney should be disbarred for a CIMT and reasoning that "'moral turpitude' is involved only when so considered by the state of public morals, and hence it might be applied in some sections and denied in others, thus rendering a satisfactory definition of the term difficult if not impossible"); *Crimes Involving Moral Turpitude*, *supra* note 162, at 119–20 (describing certain offenses that are sometimes classified as crimes involving moral turpitude, depending on the jurisdiction, stating: "Decisions dealing with violations of liquor statutes but demonstrate the geographical variability of morals").

262. *See, e.g.*, Bradway, *supra* note 153, at 26–27 ("The term [CIMT] does not have definite meaning in spite of judicial efforts to clarify it. So far no one has found the fundamental factor which will distinguish between those acts which do and those which do not involve moral turpitude. The search appears to breed as much confusion as the original phrase."); *see also* Donald T. Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 276 (1969) ("Despite long and frequent use of the concept of 'moral turpitude,' it is both too vague and too broad to be effectively employed as a standard for professional discipline."); Jay Wilson, *The Definitional Problems with 'Moral Turpitude*,' 16 J. LEGAL PROF. 261, 262 (1991) ("What can be learned from the variety of definitions is that moral turpitude means slightly different things to different judges.").

nal.'"[263] However, despite the need for such flexibility, he argued the judicial process of deciding what is a CIMT "is subject to the criticism that a judge may unconsciously mistake his own bias for an intuitive perception of the common conscience."[264] He wrote:

> A judge applying the test of 'moral turpitude' is not merely expounding a principle of law. He is setting a moral standard, legislating perhaps, interpreting the public mind. Unless the legislature has supplied a precise definition the judge of necessity makes an exploratory excursion into the field of morals. This is not primarily a judicial function and the results all too often are in conflict.[265]

At the time the Supreme Court decided *Jordan*, CIMT enjoyed widespread use; laws governing the licensing of professionals, disbarment of attorneys and the disqualification of witness testimony all employed the term.[266] However, a closer examination of those areas of law demonstrates that the term CIMT may be falling out of favor.[267]

In one notable example, the American Bar Association (ABA) recognized how unworkable the term CIMT was in the context of attorney discipline. In its 1969 Model Code of Professional Responsibility, the DR-102(A) provided that "a lawyer shall not . . . engage in illegal conduct involving moral turpitude."[268] When the ABA developed the Model Rules of Professional Responsibility in 1983, the term CIMT disappeared; replacing it was Rule 8.4, which states "it is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[269] The comment to Rule 8.4 states that the concept of moral turpitude "can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to the fitness for the practice of law."[270]

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263. Bradway, *supra* note 153, at 14 (internal quotation mark omitted).

264. *Id.* at 21.

265. *Id.*

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

267. For example, some states that previously allowed a witness to be impeached upon conviction of a crime involving moral turpitude have brought their rules of evidence in line with *Federal Rule of Evidence* 609, which permits proof of conviction for impeachment purposes if the elements of the witness's prior offense required dishonesty or false statements. *See* FED. R. EVID. 609; *see also* Debbie N. Whittle, *Evidence Law: Impeachment of Witnesses: Application of South Carolina Rule of Evidence 608(b) and 609(a)(2)*, 49 S.C. L. REV. 1183 (1998) (discussing implementation of Rule 609 in South Carolina.); J. Walton Jackson, Commentary, *Impeachment of a Witness by Prior Convictions Under the Alabama Rule of Evidence 609: Everything Remains the Same, or Does it?*, 48 ALA. L. REV. 253 (1996) (describing the implementation of Rule 609 in Alabama).

268. MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3) (1969).

269. MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (2011).

270. *Id.* R. 8.4 cmt.1.

One scholar, discussing the term's use in several state codes for attorney discipline, even after the ABA had eliminated the term from its Model Rules of Professional Conduct, described the term CIMT as "conclusory but non-descriptive."[271] Arguing that "moral turpitude means slightly different things to different judges," he wrote: "It seems appropriate to liken the test for ascertaining whether a crime involves moral turpitude to Justice Stewart's famous test for obscenity—'I know it when I see it'—set forth in his concurrence in *Jacobellis v. Ohio*."[272]

Thus, if Manuel and his public defender consult only BIA and federal immigration case law, they may be confused and at best can only be certain if they come within the "easy" cases like fraud or theft.[273] If they consult case law on the meaning of CIMT from other contexts, this sheds no additional light on the term.[274] Nor do the BIA and courts always follow the case law on the meaning of CIMT outside of the immigration context.[275] If anything, reviewing case law about the meaning of CIMT in any one context shows that as society creates more new offenses, courts must deal with whether those offenses are CIMTs,[276] leaving noncitizens to wonder which offenses are included

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271. Wilson, *supra* note 262, at 262.

272. *Id.* (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

273. *See* Tseung Chu v. Cornell, 247 F.2d 929, 933 (9th Cir. 1957) (noting that the "myriad [of] decisions sponsoring various concepts of moral turpitude" has not offered any "well settled criteria"); Quilodran-Brau v. Holland, 232 F.2d 183, 184 (3d Cir. 1956) ("The borderline of 'moral turpitude' is not an easy one to locate.").

274. *See* Mei v. Ashcroft, 393 F.3d 737, 740 (7th Cir. 2004) ("Had the parties broadened their research to take in cases in which moral turpitude is found (or not found) in criminal as distinct from immigration cases, they would have found a couple of cases more nearly in point than any that either of them cites. But unfortunately the cases point in opposite directions. We are writing on a clean slate." (citations omitted)); *see also* Jordan v. De George, 341 U.S. 223, 239 (1951) (Jackson, J., dissenting) ("There have . . . been something like fifty cases in lower courts which applied this phrase [CIMT]. No one can read this body of opinions and feel that its application represents a satisfying, rational process."); LaFave, *supra* note 152, § 1.6(c), at 56 (stating that "the definition of the phrase 'crimes involving moral turpitude' may depend somewhat on the setting in which the phrase occurs").

275. *See, e.g.*, Cerezo v. Mukasey, 512 F.3d 1163, 1168–69 (2008) (when deciding whether a California hit-and-run statute was a CIMT for purposes of deportation, refusing to follow a California state court's determination that the same statute was a CIMT in evidence law).

276. For example, one scholar discussed the difficulty of determining whether violations of state prohibition laws following the passage of the Eighteenth Amendment were CIMTs. *See* Note, *Moral Turpitude and the Eighteenth Amendment*, 17 Iowa L. Rev. 76, 77–78 (1931). He wrote that, when courts are attempting to determine whether an offense involves moral turpitude, they must ascertain the public conscience and he questions whether the passage of the Eighteenth Amendment shows "that the people considered the act they prohibited by that Amendment as involving moral turpitude." *Id.* at 78; *see also* Note *Moral Turpitude and Its Connection with the Infraction of Liquor Laws*, 75 U. Pa. L. Rev. 357,

in the definition. The BIA itself has conceded, "[s]ubsequent to the Supreme Court's decision in *Jordan*, both the courts and this Board have referred to moral turpitude as a 'nebulous concept' with ample room for differing definitions of the term.[277] One district court observed,

> While the term 'moral turpitude' has been used in the law for centuries it has never been clearly or certainly defined. This is undoubtedly because it refers, not to legal standards, but rather to those changing moral standards of conduct which society has set up for itself through the centuries.[278]

Thus, it does not appear that "passing years have by administrative practice or judicial construction served to make [CIMT] clear as a word of legal art."[279]

3. Supreme Court Vagueness Challenges to Similar Statutes

The case law as developed in the Supreme Court both before and after the *Jordan* decision support a finding that CIMT is void for vagueness in the deportation context. For example, statutory terms such as CIMT have been held to be void for vagueness when the meaning of a term changes from one generation to the next.[280] The "moral standards prevailing at the time" certainly changes from one generation to the next.[281] The Supreme Court in *Smith v. Goguen*[282] struck down as void for vagueness a statute that punished defacing or treating contemptuously the flag of the United States;[283] the Court reasoned, "because the display of the flag is so common and takes so many forms, changing from one generation to another and often difficult to distinguish in principle, a legislature should define with some care the flag behavior it intends to outlaw."[284] This concern for the transient meaning of the statutory term is particularly salient in the deportation context, because noncitizens come from many different countries and thus cannot be assumed to have a common understand-

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360 (1926) ("Since prohibition has been grafted onto the Constitution . . . courts have more generally held that traffic in liquor shows an attitude in direct opposition to the expressed moral tone of the people.").

277. *In re* Lopez-Meza, 22 I. & N. Dec. 1188, 1191 (B.I.A. 1999) (citing Franklin v. INS, 72 F.3d 571, 573 (8th Cir. 19951); *In re* Perez-Contreras, 20 I. & N. Dec. 615, 617–20 (B.I.A. 1992)).

278. United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947).

279. *See Jordan*, 341 U.S. at 238–39 (Jackson, J., dissenting).

280. *See* Smith v. Goguen, 415 U.S. 566, 616–17 (1974).

281. *See* GORDON ET AL., *supra* note 17, § 71.05(d)(i) ("Moral turpitude hardly can be characterized as a precise and easily defined term. Indeed, its flexibility apparently evinces a design to accommodate the legislative command to changing norms of behavior.").

282. 415 U.S. 566 (1974).

283. *See id.* at 568–69 (citing MASS. GEN. LAWS ch. 264 § 5 (Supp. 1973)).

284. *See id.* at 581–82.

ing of the "moral standards generally prevailing" at any given time in the U.S.[285] In addition, it would be difficult for noncitizens to ascertain the public morals when they can vary among communities.[286]

Statutory terms also have been voided for vagueness when, although the statute uses a common term, i.e., "annoying," the statute does not indicate upon "whose sensitivity a violation . . . depend[s]—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man."[287] Moral turpitude is not exactly a common term such as "annoying"; nor is it clear whose morals a noncitizen must offend—the morals of the judge, the arresting officer, or the hypothetical reasonable man.[288] Rather, the term CIMT relies on "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."[289] While there are some settled legal meanings of CIMT in the immigration context, as described above, there are plenty of examples where the settled case law does not help define the term.

There are several cases in which the Court has found to be vague terms that sound very similar to CIMT or its oft-cited dictionary definition, "moral wickedness or depravity,"[290] in that they call for subjective judgment and have no common understanding. For example, in *Winters v. New York*,[291] the Court struck down as vague a state statute that, as interpreted by the state court, punished the publication or distribution of publications of "criminal news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes."[292] In *Joseph Burstyn, Inc. v. Wilson*,[293] the

285. The District Court of Pennsylvania, holding the term CIMT was void for vagueness in a statute that prohibited a student from receiving financial aid if he or she had been convicted of a misdemeanor that Pennsylvania determined to be a CIMT, stated: "If the state insists on legislating morality, we will insist at least that it spell out is moral code, particularly when those affected by the statute are of a different generation from the lawmakers and generally share a somewhat different outlook on what is and is not moral." Corp. of Haverford Coll. v. Reeher, 329 F. Supp. 1196, 1206 (D. Pa. 1971).

286. *See* Skrmetta v. Coykendall, 16 F.2d 783, 784 (D. Ga. 1926) ("I realize that standards of morals differ from time to time and at different places, and moral turpitude must necessarily be a somewhat loose expression."); Weckstein, *supra* note 262, at 278 (arguing that the term CIMT is too vague to be a reason for attorney discipline and stating, "A test like 'prevailing moral standards' varies too much with time and place and judge").

287. Coates v. City of Cincinnati, 402 U.S. 611, 613 (1971).

288. *See id.*

289. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2720 (2010) (quoting United States v. Williams, 553 U.S. 285, 306 (2008)).

290. Jordan v. De George, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting) (citing BLACK'S LAW DICTIONARY (4th ed. 1951)).

291. 333 U.S. 507 (1948).

292. *Id* at 518. The Court held that the statute, "even considering the gloss put upon the literal meaning by the Court of Appeals," was "too uncertain and indefinite to justify the conviction of this petitioner." *Id.* at 518–19. The Court's conclusion

Court determined that a statute permitting the banning of motion pictures on the ground that they are "sacrilegious" was vague,[294] because "the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies."[295] Following the reasoning in *Joseph Burstyn, Inc.*, the Court, in per curium opinions, struck down as vague the following film licensing standards: "immoral" or "tending to corrupt public morals"[296] and "cruel, obscene, indecent or immoral, or such as tend to debase or corrupt public morals."[297] Also, in *Interstate Circuit, Inc. v. City of Dallas*,[298] the Court voided for vagueness a city ordinance that permitted censorship of films "not suitable for young persons,"[299] which included films "[d]escribing or portraying . . . sexual promiscuity . . . in such a manner as to be, in the judgment of the [Motion Picture Classification] Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or appeal to their prurient interest."[300] The Court reasoned that such vague standards were problematic because "individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law."[301]

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rested on the lack of scienter required to be convicted under the statute, that the clause had no common law or technical meaning, and that the clause did not gain meaning from the section of the law in which it appeared. *See id.* at 519.

293. 343 U.S. 495 (1952).

294. *See id.* at 497, 506. The Court, having determined that "sacrilegious" was vague, stated: "[I]t is not necessary for us to decide . . . whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films." *Id.* at 505–06.

295. *Id.* at 504–05.

296. Superior Films, Inc. v. Dep't of Educ., 112 N.E.2d 311 (Ohio 1954), *rev'd per curiam*, Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954). In a companion case, *Superior Films, Inc. v. Department of Education*, 346 U.S. 587 (1954), the Court also struck down as void an ordinance that prohibited licensing to films that were "harmful." *Id.*

297. Holmby Prods., Inc., v. Vaughn, 282 P.2d 412 (Kans 1955), *rev'd per curiam*, 350 U.S. 870 (1955).

298. 390 U.S. 676 (1968).

299. *Id.* at 678, 690.

300. *Id.* at 681.

301. *Id.* at 685 (Clark, J., concurring) (quoting Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 701 (1959)). The Motion Picture Classification Board clarified that films are "likely to incite or encourage crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted." *Id.* at 688. However, the Court underscored how subjective this standard was, reasoning that "[w]hat may be to one viewer the glorification of an idea as being 'desirable, acceptable or proper' may to the notions of another be entirely devoid of such a teaching." *Id.* (alteration in original) (quoting *Kingsley Int'l Pictures Corp.*, 360 U.S. at 701).

One can argue that these cases are not instructive on the issue of whether CIMT is unconstitutionally vague in the deportation statute because they involved films protected by the First Amendment, and therefore "[p]recision of regulation must be the touchstone."[302] However, Professor Laurence Tribe has noted that "[d]iscussions of vagueness in first amendment cases often borrow 'fair notice' concepts from vagueness challenges of other sorts," even though "in the first amendment area, the objectionable aspects of vagueness need not depend upon the absence of fair notice."[303] While the Court has required more specificity of a statute that potentially infringes on free speech rights than in other contexts,[304] "no doctrinal formulation of the required increment in specificity has seemed possible."[305] Thus, the Court's findings that terms such as "inciting violent or depraved crimes," "sacrilegious," "immoral," "tending to corrupt public morals," and "encouraging sexual promiscuity" are vague should be instructive to courts determining whether CIMT can withstand a vagueness attack.

Outside of the First Amendment context, the Court has considered vagueness challenges to terms similar to CIMT. For example, in *Musser v. Utah*,[306] the Court considered a vagueness challenge to a Utah criminal statute that punished persons for conspiring "to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of laws."[307] Stating that "this is no narrowly drawn statute" and that it was "admittedly very general,"[308] the Court reasoned that "it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notion of what was good for health, morals, trade, commerce, justice or order."[309] However, instead of voiding the statute for vagueness, the Court remanded the case to the Supreme Court of Utah to determine whether there was a state court interpretation that limited the reach of the statute.[310] Interestingly, the majority opinion in *Jordan* did not mention the *Musser* case, although it had just been de-

302. *Id.* at 682 (alteration in original) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
303. TRIBE, *supra* note 175, § 12-31, at 1034.
304. *See* Smith v. Goguen, 415 U.S. 566, 572–73 (1974).
305. TRIBE, *supra* note 175, § 12-31, at 1034.
306. 333 U.S. 95 (1948).
307. *Id.* at 96 (quoting UTAH CODE ANN. § 103-11-1(5) (West 1943)).
308. *Id.* at 96, 97.
309. *Id.* at 97.
310. *Id.* at 97–98.

cided by the Court and involved a vagueness challenge to a statute with language similar to CIMT.[311]

There are other statutory phrases that seem just as vague as CIMT and yet have withstood vagueness attacks because the Court has reasoned that they had a shared common understanding. For example, there is a "reasonableness" standard in negligence cases.[312] In obscenity cases, juries must decide, "applying contemporary community standards," whether the work "appeals to the prurient interest."[313] Yet, as Professor Robert Batey suggests, lurking beneath the surface of these Court decisions upholding seemingly vague statutory terms is the Court's understanding of the necessity of such vague language to uphold an important statutory purpose.[314] As discussed below, the

311. *See* Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) ("Strangely enough, the Court does not even pay the tribute of a citation to its recent decision in Musser v. Utah, 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562, where a majority joined in vacating and remanding a decision which had sustained convictions under the Utah statute which made criminal a conspiracy 'to commit acts injurious to public morals.'").

312. In *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927), the Supreme Court struck down a Colorado statute that prohibited combinations in restraint of trade except where the purpose was "to obtain only a reasonable profit in such products or merchandise as can not yield a reasonable profit except by marketing them under the combinations previously condemned." *Id.* at 456. The Court rejected an argument that "reasonableness" was an acceptable standard in negligence cases, stating that in negligence cases, "[reasonableness] is a standard of human conduct which all are reasonably charged with knowing and which must be enforced against every one in order that society can safely exist." *Id.* at 464-65. Professor Robert Post, discussing the holding in *Cline*, wrote, "judgments of reasonableness . . . involve 'common social duty,' whereas judgments of reasonableness in the area of market pricing transactions are vague because they have no ascertainable referents." Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491, 500 (1994).

313. Miller v. California, 413 U.S. 15, 24 (1973) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)). The Supreme Court in *Miller* set forth a three-part test for obscenity prosecutions:

> (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. The Court has upheld this "contemporary community standards" test against vagueness challenges. *See* Smith v. United States, 431 U.S. 291, 309 (1977) (upholding a federal statute that punished the mailing of obscene materials, as interpreted by *Miller*, against a vagueness challenge); Roth v. United States, 354 U.S. 476, 489, 491–92 (1957) (rejecting vagueness challenge to both state and federal obscenity statutes, applying the test of "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" and reasoning that this language conveys sufficient definite warning as to the proscribed conduct).

314. *See* Batey, *supra* note 174, at 10–13 (discussing obscenity cases and stating that the majority of the Supreme Court indicated a "desire to inflate the importance of

statutory goals of the term CIMT, deporting undesirable noncitizens, is a goal that can be achieved using more precise statutory terms.[315]

In the immigration context, the Court, in the 1924 case *Mahler v. Eby*,[316] rejected a vagueness challenge to a statute authorizing deportation if a noncitizen was found to be an undesirable resident.[317] Reasoning that "the expression 'undesirable residents of the United States' is sufficiently definite to make the delegation quite within the power of Congress."[318] The Court first noted that the longstanding requirement for naturalization that a person be "of good moral character, attached to the principles of the Constitution of the United States, and well-disposed to the good order and happiness of the same" put

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statutes banning obscene expression and thus to increase the force of the argument that some ambiguity in defining obscenity is necessary to achieve such an important goal"). In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), Justice Brennan, in a dissenting opinion, reasoned that the Court's various obscenity tests are vague, but that the Court has defended them because "no one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully suppressible expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment." *Id.* at 83–87 (Brennan, J., dissenting). He wrote, "[A]s we have increasingly come to appreciate the vagueness of the concept of obscenity, we have begun to recognize and articulate the state interests at stake." *Id.* at 105. Thus, "the state interests in protecting children and in protecting unconsenting adults may stand on a different footing from the other asserted state interests." *Id.* at 106.

315. *See infra* section IV.C. The case of *Parker v. Levy*, 417 U.S. 733 (1974), also can be interpreted through the lens of necessity. In *Parker*, an army captain was convicted of violating Article 133 of the Uniform Code of Military Justice, which prohibits "conduct unbecoming an officer and a gentleman." *Parker*, 417 U.S. at 738 n.3 (quoting 10 U.S.C. § 933 (2006)). The Court upheld the statute, reasoning that Article 133 was defined by "the longstanding customs and usages of the services," which the army captain would know due to his membership in the military. *Id*. at 748–49. In a similar vein, the term "CIMT" has an arcane meaning, which harks back to another time, when the "provision[ ] did not offend the sensibilities of the federal judiciary in a wholly different period of our history." *Id*. at 783 (Stewart, J., dissenting); *see also Jordan*, 341 U.S. at 236–37 (Jackson, J., dissenting) (reasoning that the term *mala in se*, which is used to define CIMT, "comes to us from the common law, which in its earliest history freely blended religious conceptions of sin with legal conceptions of crime"). Applying the reasoning of *Parker*, the term CIMT could withstand a modern vagueness challenge, even though it rests on archaic notions of morality. However, the holding in *Parker* rested largely on the need for such ambiguity; because the Court reasoned that the military needs "to maintain the discipline essential to perform its mission effectively," such a vague term was constitutionally permissible. *See Parker*, 417 U.S. at 744; *see also* Kolender v. Lawson, 461 U.S. 352, 358 n.8 (reasoning that in *Parker*, the Court "deliberately applied a less stringent vagueness analysis '[because] of the factors differentiating military society from civilian society'" (quoting *Parker*, 417 U.S. at 756)). In contrast, the term CIMT in immigration law is not necessary to achieve statutory goals. *See infra* section IV.C.

316. 264 U.S. 32 (1924).

317. *See id.* at 39–41.

318. *Id.* at 40 (quoting Act of May 10, 1920, ch. 174, 41 Stat. 593).

the term "undesirable resident" in context and indicated that history had created a common understanding of the term.[319] Next, the Court pointed to another immigration law term, the "likely to become a public charge" ground of exclusion, that is not "any more vague or uncertain or any less defined," yet had never been questioned for its vagueness.[320] Finally, the Court reasoned that because the statute did not involve criminal penalties, "[t]he rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards."[321]

While the *Mahler* holding suggests that a vagueness challenge to CIMT in a deportation statute should fail, the Court's reasoning has been called into question by subsequent changes in both immigration law and the vagueness analysis. While the phrases "good moral character" and "likely to become a public charge" still exist in immigration law, Congress or the agency has since defined them by statute[322] or regulation.[323] For example, the legislative history of the 1952 Act, which defined "good moral character," indicates that this term's definition "provides standards as an aid for determining whether a person is one of good moral character within the meaning of those provisions of the bill."[324] Congress never bothered to create such standards for the term CIMT. The Court also has rejected the notion that nearby terms describing specific conduct can give meaning to vague statutory terms.[325] In addition, as discussed above, the Court has developed a regard for deportation that makes it "quasi-criminal" in nature, thus meriting a "relatively strict [vagueness] test."[326]

The Supreme Court also has held that scienter can cure vagueness.[327] In the immigration law context, the BIA and courts frequently have held that a statute must have a mens rea of at least recklessness to be a CIMT.[328] Thus, it would seem that the scienter requirement negates any vagueness challenge. However, courts have not unanimously concluded that a statute must have scienter in order

319. *Id.*
320. *Id.* at 40–41.
321. *Id.* at 41.
322. *See* 8 U.S.C. § 1101(f) (2006) (defining "good moral character").
323. *See* 22 C.F.R. § 40.41 (2011) (defining steps intending immigrant must take in order to overcome public charge ground of inadmissibility and defining "likely to become a public charge" by reference to the federal poverty line).
324. S. REP. NO. 82-1137, at 6 (1952). This report also states, "[b]y providing who shall not be regarded as a person of good moral character, it is believed that a greater degree of uniformity will be obtained in the application of the 'good moral character' tests under the provisions of the bill." *Id.*
325. *See* Smith v. Goguen, 415 U.S. 569, 579 (1974).
326. *See supra* section IV.A.
327. *See, e.g.*, Screws v. United States, 325 U.S. 91, 102 (1945).
328. *See In re* Fualaau, 21 I. & N. Dec. 475, 477–78 (B.I.A. 1996); *In re* Perez-Contreras, 20 I. & N. Dec. 615, 619 (B.I.A. 1992).

to be a CIMT.[329] Also, the case law requiring mens rea in order for a statute to be a CIMT does not give any special notice that the offense will later be a CIMT. The term has no clear meaning and "[o]ne cannot know or have an evil purpose to do what is unknowable."[330]

C. Balancing Necessity Against Vagueness

The Court has recognized that no statutory language can be perfectly precise.[331] Yet, when courts examine whether a statute is void for vagueness, they often look to whether that statutory goal could be achieved using more precise language.[332] Professor Batey argues that if a statute raises problems of fair notice or risk of arbitrary enforcement, courts should engage in a balancing test, in which a judge balances the necessity of the ambiguity against the chilling effect of the statute on protected or desirable conduct.[333] A court should ask whether the vague language is necessary to achieve some legislative goal that cannot be achieved through more precise terms.[334] This rationale is why common law crimes can withstand any vagueness challenges;[335] it was critical for the makers of the common law crimes to

329. *See, e.g.,* Castle v. INS, 541 F.2d 1064, 1066 (4th Cir. 1976); *In re* Tobar-Lobo, 24 I. & N. Dec. 143, 146 (B.I.A. 2007); *In re* Dingena, 11 I. & N. Dec. 723, 728 (B.I.A. 1966).

330. Collings, *supra* note 130, at 229.

331. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989) ("[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."); Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."); Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952) ("But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions."); Nash v. United States, 229 U.S. 373, 377 (1913) ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.").

332. *See, e.g.*, TRIBE, *supra* note 175, § 12-31, at 1034; Batey, *supra* note 174, at 30–31; Jeffries, *supra* note 190, at 196; *Void-for-Vagueness Doctrine in the Supreme Court, supra* note 130, at 95.

333. *See* Batey, *supra* note 174, at 9–26.

334. *See id.* at 9. Batey cites as an example the cases of *United States v. Petrillo*, 332 U.S. 1 (1947), and *Parker v. Levy*, 417 U.S. 733 (1974), in which the necessity of the vague language ultimately prevailed over the concerns for notice and arbitrary and discriminatory enforcement. Batey, *supra* note 174, at 9.

335. *See* Batey, *supra* note 174, at 12. Professor Batey also notes that common law crimes have meanings derived from centuries of case law; however, he argues that "[a] more forthright explanation would focus on the significance of such crimes to the very concept of criminal law and on the consequent necessity of the vagueness in their statement." *Id.*; s*ee also* Rose v. Locke, 423 U.S. 48, 50 (1975) ("[T]he phrase 'crimes against nature' is no more vague than many other terms used to describe criminal offenses at common law and now codified in state and federal penal codes.").

punish, for example, assaults, thefts, murder, and rape.[336] Statutes punishing new crimes, however, have had potentially vague terms called into question. This explains why legislation creating "new" (i.e. not common law) crimes is more susceptible to a vagueness attack.[337] When considering the validity of such statutes, the Court has engaged in a discussion of the necessity of such laws.[338]

What did Congress intend to do when it authorized deportation for a CIMT? It appears that the legislative goal of the term CIMT was to deport undesirable noncitizens from the U.S.,[339] or at least deport someone within five years of entry if he committed a serious crime.[340] Is a vague term like CIMT necessary to achieve this legislative goal?

Today, the INA includes criminal grounds of deportation that are much more clearly defined than CIMT. For example, convictions of crimes involving controlled substances and crimes involving firearms

336. *See* Batey, *supra* note 174, at 2; *see also* PETER W. LOW, CRIMINAL LAW 358–59 (rev. ed. 1990) ("No murder, theft, or rape statutes has ever been held unconstitutionally vague, even though there is plenty of uncertainty in the phrases of the common law that have traditionally been used to define these offenses."). Professor Batey states, "Few courts admit that in order to compute the necessity of vague language, they must evaluate the significance of the legislative goal." Batey, *supra* note 174, at 10. This is because balancing is "a baldly political assessment, not one that judges (even elected ones) are expected to perform, which is likely why judges are virtually silent about this aspect of the weighing necessity." *Id.*

337. *See* Batey, *supra* note 174, at 10–14; *see also Void-for-Vagueness Doctrine in the Supreme Court, supra* note 130, at 84 ("'Old' common-law terms may have no more illuminating clarity to the layman offender than the neologisms of Ronsard, but they do present an effective means by which one bench of judges can supervise the law administration of another.").

338. *See* Batey, *supra* note 174, at 10–15. (discussing case examples). Whether necessity actually can defend a vague statute, however, is a matter of dispute. Andrew Goldsmith has argued that the Court has rejected such a balancing of the necessity of the statute against vagueness concerns in more recent cases. *See* Goldsmith, *supra* note 171, at 308 ("[A]s weighty as [concern with criminal activity] is . . . it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." (quoting Kolender v. Lawson, 461, U.S. 352, 361 (1983))); *see also* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 689–90 (1968) (rejecting the government's defense of a vague statute that it was adopted for the statutory purpose of protecting children); M. Kraus & Bros., Inc. v. United States, 327 U.S. 614, 626 (1946) ("[C]ertainly a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language."). Professor Batey, however, discusses *Kolender* as an example of the Court finding that the stop-and-identify statute was not important enough to outweigh the vagueness concerns. *See* Batey, *supra* note 170, at 13–15. Batey argues that although it would be difficult to achieve the legislative goals of the statute at issue in *Kolender* with more precision, the Court did not even suggest more precise language, which "may reflect its disdain not so much for the legislature's drafting ability as for its decision to enact such a statute in the first place." *Id.* at 14.

339. *See supra* section II.A.

340. *See supra* section II.A.

or destructive devices are grounds of deportability;[341] these grounds reference other federal statutes for precise definitions of "controlled substance,"[342] "firearm," and "destructive device."[343] In addition, crimes involving domestic violence, stalking, child abuse, and violations of protection orders render noncitizens deportable.[344] As one court observed, "[t]he legislative history suggests that Congress added these deportation grounds to close potential loopholes for aliens who commit crimes against women and children that did not clearly fall within other categories of deportable crimes such as CIMTs and aggravated felonies."[345] Moreover, Congress clearly defined what it meant by crimes of domestic violence[346] and violations of protection orders.[347] And the death sentence in immigration law, the "aggravated felony," has a detailed definition in the INA, which includes twenty-one categories of crimes.[348] Thus, when Congress wanted to clearly define ways that someone could be deported for undesirable behavior, it knew how to do so.[349] It appears that Congress's concern that "difficulties might be encountered in getting a phrase that would be broad enough to cover the various crimes contemplated within the

341. 8 U.S.C. § 1227(a)(2)(B)–(C) (2006).

342. *Id*. § 1227(a)(2)(B) (referencing 21 U.S.C. § 802 for definition of controlled substance).

343. *Id.* § 1227(a)(2)(C) (referencing 18 U.S.C. § 921(a) for definitions of firearm and destructive device).

344. *Id.* § 1227(a)(2)(E).

345. Arriaga v. Mukasey, 521 F.3d 219, 225 at n.3 (2d Cir. 2008) (citing 142 CONG. REC. S4058-02 (daily ed. Apr. 24, 1996)).

346. Congress referenced the federal "crime of violence" statute, 18 U.S.C. § 16 (2006), to define a crime of domestic violence for the purposes of deportation. 8 U.S.C. § 1227(a)(2)(E)(i).

347. *See* 8 U.S.C. § 1227(a)(2)(E)(ii). While Congress did not define "stalking" by reference to a federal statute, the Second Circuit, considering a vagueness challenge to this ground of deportability, reasoned that at the time Congress authorized deportation for stalking, there were several state statutes and a model federal statute on stalking, which provided a generally accepted contemporary meaning of the term. *See Arriaga*, 521 F.3d at 225–27.

348. *See* 8 U.S.C. § 1101(a)(43)(A)–(U); *see also* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH & LEE L. REV. 469, 484 (2007) ("In its nascent 1988 form, the aggravated felony definition was defined narrowly, in keeping with [its] harsh consequences . . . The term included only murder, weapons trafficking, and drug trafficking. It is now a colossus.").

349. *See Void-for-Vagueness Doctrine in the Supreme Court, supra* note 130, at 95 n.150 ("The 'necessity' of a particular mode of regulation will depend upon comparison with alternative modes—not limited to other possible verbal forms but including also other possible enforcement methods."); *cf.* United States v. Petrillo, 332 U.S. 1, 7 (1947) ("Clearer and more precise language might have been framed by Congress to express what it meant by [the statutory term]. But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose.").

law and yet easier to comprehend than [CIMT]"[350] has been alleviated. So why does the term CIMT still linger in the INA?

One can argue that the term CIMT can easily adapt without legislative involvement, so Congress wanted to keep such a fluid category of removal in the INA.[351] However, the term "aggravated felony" has had no shortage of adaptation by courts without legislative involvement. The Supreme Court alone has ruled on the meaning of the term aggravated felony on numerous occasions in the past decade.[352] Numerous courts of appeals also have adapted the meaning of the term on various occasions.[353] One also can argue that aggravated felony does not ensnare all noncitizens who have committed crimes, as many aggravated felony categories require, for example, a one-year term of imprisonment.[354] Thus, CIMT truly can be a "catch-all" category that allows for deportation of criminal offenders.[355] Yet, aggravated felony catches quite a lot of noncitizens, as Congress has defined "term of imprisonment" to include suspended sentences,[356] thus ensnaring many first-time offenders and persons convicted of misdemeanors.[357] In some categories of offenses, the aggravated felony ground of deportability ensnares more noncitizens than CIMT.[358]

350. S. REP. NO. 81-1515, at 353 (1950).

351. *See* Amy Wolper, *Unconstitutional and Unnecessary: A Cost/Benefit Analysis of "Crimes Involving Moral Turpitude" in the Immigration and Nationality Act*, 31 CARDOZO L. REV. 1907, 1938 (2010).

352. *See, e.g.*, Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010); Nijhawan v. Holder, 129 S. Ct. 2294 (2009); Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007); Lopez v. Gonzales, 549 U.S. 47 (2006); Leocal v. Ashcroft, 543 U.S. 1 (2004).

353. *See, e.g.*, Berhe v. Gonzales, 464 F.3d 74 (1st Cir. 2006); Soliman v. Gonzales, 419 F.3d 276 (4th Cir. 2005); Nugent v. Ashcroft, 367 F.3d 162 (3d Cir. 2004).

354. *See, e.g.*, 8 USC § 1101(a)(43)(F) (2006) (conviction for a crime of violence with a term of imprisonment of one year is an aggravated felony); *id*. § 1101(a)(43)(G) (conviction for a theft offense with a term of imprisonment of one year is an aggravated felony).

355. For example, in the case of *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005), the offense at issue, involuntary manslaughter, would be a CIMT, even though it was not an aggravated felony because the court held that the offense was not a "crime of violence." *See id.* at 446–47; *see also In re* Faulaau, 21 I. & N. Dec. 475, 477–78 (B.I.A. 1996) (holding that statute punishing reckless conduct resulting in serious bodily injury is a CIMT).

356. 8 U.S.C. § 1101(a)(48)(B).

357. *See, e.g.*, Guerrero-Perez v. INS, 242 F.3d 727, 737 (7th Cir. 2001) ("We . . . are constrained to conclude that Congress, since it did not specifically articulate that aggravated felonies cannot be misdemeanors, intended to have the term aggravated felony apply to the broad range of crimes listed in the statute, even if these include misdemeanors.").

358. *Compare In re* V-Z-S-, 22 I. & N. Dec. 1338, 1345–46 (B.I.A. 2000) (holding that a statute punishing theft with intent to temporarily *or* permanently deprive the owner of the rights and benefits of ownership is a theft offense aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(G)), *with In re* D-, 1 I. & N. Dec. 143, 144–45 (B.I.A. 1941) (holding that theft with intent to steal is a CIMT, whereas theft

Additionally, the term aggravated felony already largely encompasses the "easy" CIMT cases[359]: fraud, theft, aggravated assaults, and many sexual offenses are likely to be classified as aggravated felonies, if the term of imprisonment or loss to the victim also meets the statutory requirement.[360] Because those who are sufficiently certain about their deportation for a CIMT also are likely to face deportation for an aggravated felony, either way, the law achieves the goal of deporting the undesirable noncitizen. The only legislative accomplishment of the term CIMT is to violate the due process rights of those noncitizens whose offenses are not clearly defined as CIMTs by case law.

If courts void the statute authorizing deportation for a CIMT, Congress loses some flexibility. However, Congress has the ability to amend the INA to add new criminal grounds of deportability as new crimes plague society. Indeed, this is exactly what Congress did in 1996 when it added stalking, domestic violence, and crimes against children to the grounds of deportability.[361] Thus, as new crimes arise, Congress can amend the INA, using clear terms, rather than allowing the BIA and courts to determine whether each new crime offends society's morals.

V. CONCLUSION

The term CIMT has long outlived its usefulness in deportation law. Its parameters are uncertain, with the exception of a few categories of crimes such as fraud, the offense at issue when the Supreme Court last heard a vagueness challenge to the term in its 1951 *Jordan* decision. Its "clarifying" definition, an act that is "base, vile, depraved, or contrary to the rules of morality" gives no more clarification of the term. Rather, the term CIMT casts judges in the role of God, deciding according to the "moral standards generally prevailing in the United States," whether a certain offense involves moral turpitude. This allows neither noncitizens nor their criminal defense attorneys to predict which offenses will lead to deportation for a CIMT. Nor does resorting to the term's use in other areas of law clear up its uncertainty. It is time for courts to seriously consider a vagueness challenge to the term CIMT in deportation law. As Judge Posner has

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with intent to deprive the owner of his rights for a temporary period is not a CIMT).

359. *See* Wolper, *supra* note 351, at 1939.

360. *See* 8 U.S.C. § 1101(a)(43)(F), (G), (M).

361. *See Immigration Reform and Immigrant Responsibility Act* Pub. L. No. 104-208, § 350, 110 Stat. 3009, 3009-639 to -640 (codified as amended at 8 U.S.C. § 1227(a)(2)(E) (2006)).

stated, "[t]ime has only confirmed Justice Jackson's powerful dissent in the [*Jordan*] case, in which he called 'moral turpitude' an 'undefined and undefinable standard.'"[362]

362. Mei v. Ashcroft, 393 F.3d 737, 741 (7th Cir. 2004) (quoting Jordan v. De George, 341 U.S. 223, 235 (1951) (Jackson, J., dissenting)).