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LEGISLATING MORALITY: MORAL THEORY AND TURPITUDINOUS CRIMES IN IMMIGRATION JURISPRUDENCE

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Congress could have framed the country's immigration policies in any number of ways. In significant part, it opted to frame them in moral terms. The crime involving moral turpitude is among the most pervasive and pernicious classifications in immigration law. In the Immigration and Nationality Act, it is virtually ubiquitous, appearing everywhere from the deportability and mandatory detention grounds to the inadmissibility and naturalization grounds. In effect, it acts as a gatekeeper for those who wish to enter and remain in the country, obtain lawful permanent residence, travel abroad after admission, or become United States citizens. With limited exceptions, noncitizens cannot obtain, maintain, or expeditiously surpass temporary status or lawful permanent residence without avoiding "turpitudinous conduct." This Article challenges the moral turpitude designation as a moral concept.

Legal scholars, legislators, and judges have leveled an abundance of critiques against the moral turpitude designation, particularly for its vague nature. Absent from this discussion, however, is a dedicated analysis of moral turpitude as it relates to established moral frameworks. Rather than rely on the vast intellectual tradition regarding questions of morality and ethics, the courts have opted instead for legal insularity, developing a specious approach to moral turpitude that is utterly incoherent in moral terms. The result is an arbitrary and anachronistic approach to determining whether conduct is turpitudinous. Serious consideration of the designation vis-à-vis moral theory casts

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considerable doubt on the virtually inscrutable standards that have evolved within moral turpitude jurisprudence.

Close analysis through the lens of moral theories, such as deontology, contractualism, and common morality, reveals why the crime involving moral turpitude should be eliminated from the country's immigration laws. Under the pretense of protecting the country's moral ethos, the legislature and courts have used the guise of morality to obfuscate an arbitrary mechanism of migration control. This Article demonstrates the limits of embedding explicit moral categories within the law and asserts that the judiciary has wielded morality as a proxy for its intent to exclude and remove broad swaths of noncitizens. Ultimately, a just immigration system must preclude the crime involving moral turpitude.

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I. INTRODUCTION

The crime involving moral turpitude is among the most pervasive and pernicious classifications in immigration law. In the Immigration and Nationality Act (INA), the term can be found within the grounds of inadmissibility,[1] the grounds of deportability,[2] and the good moral character grounds for naturalization.[3] In effect, it acts as a gatekeeper for those who wish to enter the United States, obtain lawful permanent residence, remain in the United States, travel abroad after admission, and become United States citizens. The crime involving moral turpitude subjects people to mandatory detention in immigration facilities[4] and, to some extent, impacts most forms of relief from removal.[5] With limited exceptions, noncitizens cannot obtain, maintain, or expeditiously surpass temporary status or lawful permanent residence in the United States without avoiding "turpitudinous conduct." It is present at each stage of the immigration and removal process, acting as a legal barrier to those convicted of—or, in some circumstances, simply admitting commission of—criminal conduct deemed morally objectionable under immigration law.[6]

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1. 8 U.S.C. § 1182 (a)(2)(A)(i)(I) (2012).
2. *Id.* § 1227(a)(2)(A)(i)(I).
3. *Id.* § 1101(f)(3).
4. *Id.* § 1226 (c)(1)(A)–(B).
5. *See, e.g.*, *id.* § 1154(a)(1)(A)(iii)(II)(bb); *id.* § 1154(a)(1)(B)(ii)(II)(bb); *id.* § 1154(a)(1)(iii) (including that noncitizen is "a person of good moral character" in order to qualify for immigration relief under VAWA); *id.* § 1182 (a)(2)(A)(i)(I); *id.* § 1229b(b)(1)(B) (requiring that a nonpermanent resident seeking cancellation of removal "has been a person of good moral character" during his or her ten or more years of continuous residence); *id.* § 1229b(d)(1)(B) (terminating the period of continuous residence required to qualify for cancellation of removal for noncitizens who have committed a crime of moral turpitude as delineated in § 1182(a)(2) or § 1227(a)(2)); *id.* § 1229c(b)(1)(B) (limiting voluntary departure to those noncitizens who have been persons of good moral character for at least five years immediately preceding application); *id.* § 1255(a)(2) (providing that a noncitizen who commits, or admits committing acts which constitute, a crime of moral turpitude is inadmissible, and therefore ineligible to adjust status to a legal permanent resident under § 1255(a)(2)); *id.* § 1255(h)(2)(B) (precluding the attorney general from waiving inadmissibility due to commission of a crime of moral turpitude under § 1182(a)(2)(A) for a noncitizen seeking relief under Special Immigrant Juvenile Status); *see also* 8 C.F.R. § 204.2(c)(1)(vii) (2019) (requiring that a self-petitioning spouse of an abusive citizen or legal permanent resident is a person of good moral character); 8 C.F.R. § 245.23(a)(4)–(5) (2013) (requiring that those who wish to adjust status from a nonimmigrant T-Visa to legal permanent residency are otherwise admissible and to have maintained good moral character since entering on a T-Visa); 8 C.F.R. § 240.65(c)(2) (2019); 8 C.F.R. § 1240.65(c)(2) (2012); 8 C.F.R. § 240.66(c)(3) (2019); 8 C.F.R. § 1240.66(c)(3) (2012) (limiting access to suspension of deportation and cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act to noncitizens demonstrating good moral character).
6. *E.g.*, 8 U.S.C. §§ 1101 (f)(3), 1182(a)(2)(A)(i) (2012). These sections include not only those who are convicted of particular crimes but any "alien" who "admits having committed" or

Ostensibly, the virtual ubiquity of the crime involving moral turpitude within immigration law protects the nation from individuals lacking the desired moral constitution, serving to exclude people from entry or citizenship who may diminish the country's moral fabric. In reality, however, it is a classification that has eschewed moral principles and whose evolution at the Board of Immigration Appeals[7] (the "Board") and in the courts has broadened to such an extent that even minor, innocuous violations—including misdemeanors and summary offenses—result in severe immigration penalties.[8] An examination of immigration jurisprudence over the past several decades reveals that inadmissibility and removal represent disproportionately punitive measures for activity that is difficult to defend as lacking morality.[9] To be sure, the expansive interpretation of crimes involving moral turpitude has very real significance, resulting in adverse immigration consequences for untold numbers of noncitizens involved with or suspected of even petty crimes.[10]

Utilizing the crime involving moral turpitude, the legislature, the Board, and the courts have wielded morality as a proxy for their intent to exclude and remove a broad range of individuals who may have engaged in criminal activity. For centuries, the courts have developed and expanded a moral barrier to regulate whether families are able to

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"admits committing acts which constitute the essential elements" of certain offenses. Although it is beyond the scope of this Article, inadmissibility and good moral character findings based on admission of an offense, rather than a conviction, leads to a host of problems, not the least of which include prompting noncitizens to incriminate themselves by eliciting disclosures of guilt and subsequently allowing immigration officials to determine whether particular behavior, as described by an applicant or respondent, constitutes the elements of a criminal offense. In the criminal context, such a complex determination would invoke the right to a jury.

7. The Board of Immigration Appeals is the administrative body for interpreting and applying immigration laws. *Executive Office for Immigration Review*, *About the Office, Board of Immigration Appeals*, U.S. DEPT. JUSTICE, https://www.justice.gov/eoir/board-of-immigration-appeals (lasted updated Oct. 15, 2018). It has nationwide jurisdiction to hear appeals from certain decisions rendered by immigration judges and by district directors of the Department of Homeland Security. *Id.*

8. Rob Doersam, *Punishing Harmless Conduct: Toward a New Definition of "Moral Turpitude" in Immigration Law*, 79 OHIO ST. L.J. 547, 550–53 (2018) (discussing a specific case involving removal for a non-violent offense and Judge Posner's view on the BIA developing a standard for examining that does not "sweep in harmless conduct").

9. 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, 1934–35 (2010).

10. While there are no precise data regarding the number of people impacted by moral turpitude findings, its existence for over a century, its pervasiveness in the immigration statutes, and its continually broadening definition in the courts make evident an intention to use the designation to impact a broad array of noncitizens convicted or suspected of crimes.

reunite in this country, whether respondents have the opportunity to present equities to an immigration judge, and whether lawful permanent residents can naturalize and vote. The courts have perpetuated this moral classification while failing to acknowledge the extensive existing body of literature grappling with morality and ethics. In immigration cases dealing with moral turpitude, immigration officials and judges invariably make moral determinations while overlooking centuries of theory, discussion, and spirited intellectual debate regarding questions of morality. The result is an arbitrary and anachronistic approach to determining whether conduct involves moral turpitude.

The judiciary, members of Congress, and legal scholars have leveled an abundance of legal critiques at the moral turpitude designation, particularly for its vague nature.[11] Given the paucity of consideration given to the designation as a distinctly moral classification within the law, however, this Article seeks to examine the crime involving moral turpitude through the lens of moral theory. Ultimately, this Article argues that the crime involving moral turpitude must be eliminated from United States immigration jurisprudence because it is a purported moral classification that lacks support from any existing understanding of moral principles. Part II provides a brief description of the crime involving moral turpitude within the immigration legal context. Part III examines the crime involving moral turpitude through the lens of moral theory. This Part focuses primarily on the principles of common morality and Immanuel Kant's Categorical Imperative, which serve to elucidate the shortcomings of the moral turpitude designation. Part IV considers the legal implications of an explicitly moral category within a legal system predicated on a categorical approach to crimes and stare decisis.

II. THE CRIME INVOLVING MORAL TURPITUDE

The notion of moral turpitude has existed in United States jurisprudence for over two centuries.[12] In 1891, the term was initially

11. Jordan v. De George, 341 U.S. 223, 233 (1951) (Jackson, J., dissenting); Doersam, *supra* note 8, at 549.

12. *See* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1010 (2012). Simon-Kerr provides an extensive historical background of moral turpitude, tracing the term's use through the law of defamation, evidence law, voting rights, and immigration law. *Id.* at 1001. Although use of the term predates its adoption into law, its formal acceptance as a legal standard is attributed to a case concerning slander per se in the early nineteenth century. Brooker v. Coffin, 5

incorporated into the country's immigration laws.[13] It appeared for the first time as a basis for deportation in the Immigration Act of 1917.[14]

Johns., 188, 188–89 (N.Y. Sup. Ct. 1809); *see also* Simon-Kerr, *supra*, at 1010 (describing the *Brooker* court's usage of moral turpitude in connection with slander per se).

13. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084; *see also* S. REP. NO. 81-1515, at 350 (1950) (tracing the evolution of the "crime of moral turpitude" in federal immigration law). The Immigration Act of 1891 was the first set of comprehensive immigration laws in the nation's history. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 11–12 (8th ed. 2016). The act was passed at a time of pronounced violence, particularly against non-whites, and xenophobia. *See id.* at 12 (noting that the 1891 Act "mirrored the concerns about the biological inferiority of immigrants" by adding new categories of exclusion). By 1891, restrictionist immigration policies had taken root, Jim Crow laws were in full effect, and lynchings were not uncommon. *See* Randall M. Miller, *Lynching in America: Some Context and a Few Comments*, 72 PA. HIST.: J. MID-ATLANTIC STUD. 275, 278–79 (2005) (discussing how lynching was used as a form of racial and social control and means of maintaining ethnic purity during the Jim Crow era). In 1891, the Chinese Exclusion Act, banning all Chinese workers from entering the United States and obtaining citizenship, had been in effect for nine of its sixty-one years of existence. *See* ALEINIKOFF ET. AL., *supra*, at 153–55 (recounting the history of the Chinese Exclusion Act). Women were severely scrutinized and penalized on moral grounds, particularly for their sexual conduct. *See* Simon-Kerr, *supra* note 12, at 1007. In the same year, the largest lynching in United States history took place in New Orleans, when a mob fueled by anti-immigrant sentiment killed eleven Italian-Americans**.** *See* Miller, *supra*, at 278 ("Indeed, the largest mass lynching in United States history was the 1891 murder of eleven Sicilian immigrants in New Orleans for allegedly assassinating the Irish-American police chief in Mafia fashion."). More than one hundred black Americans were lynched**.** *See Lynching, Whites and Negroes, 1882–1968*, TUSKEGEE UNIV. ARCHIVES, http://192.203.127.197/archive/bitstream/handle/123456789/511/Lyching%201882%201968.pdf. The following year, 1892, the country reported a record 230 lynchings. *Id.*; *see also 1959 Tuskegee Institute Lynch Report*, MONTGOMERY ADVERTISER, Apr. 26, 1959, *reprinted in* RALPH GINZBURG, 100 YEARS OF LYNCHING (1988) (reporting that the most lynchings in any single year was 230 in 1892, according to Tuskegee Institute statistics). It is in this historical context that the crime involving moral turpitude was introduced to the nation's immigration laws.

14. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889; *see also* 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05 (2019) (citing S. REP. NO. 64-352, at 390 (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."); *Jordan*, 341 U.S. at 229 n.14 (majority opinion) ("The term 'moral turpitude' first appeared in the Act of March 3, 1891, 26 Stat. 1084, which directed the exclusion of 'persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.' Similar language was reenacted in the Statutes of 1903 and 1907."). In 1917, heightened nativism in the United States motivated changes in the law that, coupled with existing policies, banned nearly all immigrants from the Asian continent. *See* ALEINIKOFF ET AL., *supra* note 13, at 14–16. Class and race-based restrictionism led to the adoption of a literacy test and subsequently national quotas tied to admission. *See id.* at 13–14 (describing the immigration policies used to preserve the racial and ethnic status quo during the early twentieth century, including literacy tests and national quotas, and per se bans on certain countries such as Japan and China). Women's suffrage would not be realized for another three years. Native Americans would be prohibited from United States citizenship for another seven years. *Id.* at 67 (explaining that the Supreme Court ruling that Native Americans were not citizens because they were not "subject to the jurisdiction" of the United States was not reversed until Congress passed legislation in 1924 and later in 1940 to grant citizenship to those born in the United States). It would be more than two decades before Chinese, Indian, and Filipino immigrants would be eligible to naturalize, and it would be more than three decades before naturalization would become entirely race-neutral. *See id.* at 99–105 (describing the racial

Since the inception of its appearance within United States immigration law, it has lacked a statutory definition.[15] Leaving the courts to interpret its significance, Congress has never provided any guidance regarding its meaning or scope.[16] Despite congressional and judicial objections to the term's ambiguity, it continues to occupy a prominent place among this country's immigration laws.[17] Judge Posner has offered one of the strongest condemnations of the classification, stating, "The concept of moral turpitude, in all its vagueness, rife with contradiction, a fossil, an embarrassment to a modern legal system, continues to do its dirty work."[18] In its current form, the crime

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restrictions in United States naturalization laws that precluded all but "free white person[s]" from naturalizing, expanded to include those of African descent in 1870, opened naturalization to Indian and Filipino immigrants only in 1946, and finally abolished racial prerequisites in 1952).

15. *See* H.R. REP. NO. 64-10384, at 8 (1916) ("[Y]ou know that a crime involving moral turpitude has not been defined. No one can really say what is meant by saying a crime involving moral turpitude.").

16. *Id.*

17. *See, e.g.*, *Jordan*, 341 U.S. at 233 (Jackson, J., dissenting) ("Congress knowingly conceived it in confusion. During the hearings of the House Committee on Immigration, out of which eventually came the Act of 1917 in controversy, clear warning of its deficiencies was sounded and never denied."); Barbosa v. Barr, 926 F.3d 1053, 1061 (9th Cir. 2019) (Berzon, J., concurring) (arguing that after "tortured attempts to find logical consistency" in the moral turpitude designation "the time is ripe for reconsideration" of the issue, particularly in light of recent void-for vagueness determinations in Johnson v. United States, 135 S. Ct. 2551 (2015) and Sessions v. Dimaya, 138 S. Ct. 1204 (2018)); Marmolejo-Campos v. Holder, 558 F.3d 903, 921 (9th Cir. 2009) (Berzon, J., dissenting) (deeming the Board's precedential case law regarding the meaning of moral turpitude "a mess of conflicting authority"); Garcia-Meza v. Mukasey, 516 F.3d 535, 536 (7th Cir. 2008) (calling the phrase crime involving moral turpitude "notoriously baffling"); H.R. REP. NO. 64-10384 (1917) (explaining that Congress has not defined a crime involving moral turpitude).

18. Arias v. Lynch, 834 F.3d 823, 835 (7th Cir. 2016) (Posner, J., concurring). In his concurrence, Posner levels a linguistic critique, stating that the moral turpitude definitions "approach gibberish," as well as his assessment of the legal profession more broadly, criticizing its affinity for antiquated verbiage and its penchant for jargon. *Id.* at 831–32. Legal scholars have also offered vigorous critiques of the crime involving moral turpitude. *See, e.g.*, Brian C. Harms, *Redefining Crimes of Moral Turpitude: A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 260 (2001) (arguing that, while not unconstitutionally vague, the definition of crimes involving moral turpitude is sufficiently vague and amorphous that Congress should intervene to define it); Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 648 (2012) (arguing that the crime involving moral turpitude is unconstitutionally vague and should be challenged in court); Lindsay M. Kornegay & Evan T. Lee, *Why Deporting Immigrants for "Crimes Involving Moral Turpitude" Is Now Unconstitutional*, 13 DUKE J. CONST. L. & PUB. POL'Y 48, 48–49 (2017) (making the case that Supreme Court decision *Johnson v. United States* renders the crime involving moral turpitude unconstitutionally vague, despite previous contrary decisions); Derrick Moore, *"Crimes Involving Moral Turpitude": Why the Void-for-Vagueness Argument Is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813, 816 (2008) (explaining why previous Supreme Court precedent does not foreclose an argument that the crime involving turpitude designation is void due to vagueness and why the Court should hold that it is indeed unconstitutionally vague); Doersam, *supra* note 8, at 549 ("The [crime involving moral turpitude]'s vagueness is problematic for immigrants, because it fails to provide reasonable notice to noncitizens

involving moral turpitude, to deleterious effect, acts as a catchall for a myriad of offenses that do not trigger more clearly defined crime-related statutes in the INA.[19]

The crime involving moral turpitude does its "dirty work" in a somewhat arbitrary fashion. Often illogical and internally inconsistent, immigration law functions as a patchwork of statutes that lead, at times, to absurd results defying its own implicit policy reasoning.[20] Statutes prohibiting conduct involving moral turpitude contribute to the confusion, leading to inconsistent treatment of noncitizens couched in moral terms. Within the INA, the grounds of deportability may treat a lawful permanent resident more harshly than the grounds of inadmissibility would treat an applicant for lawful permanent residence. A crime of moral turpitude that is punishable by one year of confinement, for instance, may lead to the removal of someone who has been lawfully admitted to the United States within the past five years, yet it would not bar a prospective noncitizen from gaining admission to the country.[21] In other words, even if both

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regarding their excludability or removability from the United States," allowing arbitrary and discriminatory immigration practices).

19. The crime involving moral turpitude is indeed particularly amorphous. Although other categories of criminal offenses within the INA, such as the controlled substance and aggravated felony grounds, provide more specificity statutorily, it is important to note, nonetheless, that they present their own complexities as well. *See, e.g.*, Coronado v. Holder, 759 F.3d 977, 981 (9th Cir. 2014) (holding that controlled substance offenses are divisible such that a modified categorical approach is appropriate); Ferreira v. Ashcroft, 390 F.3d 1091, 1098 (9th Cir. 2004) (holding that the modified categorical approach may be used to determine whether the respondent's conviction involved loss to a victim in excess of $10,000.00); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1942 (2000) ("[A]lmost any infraction that occurs during the period of adjustment to life in the United States makes a legal permanent resident subject to mandatory deportation.").

20. *See* Abel Rodríguez, *Crimes and Immigration: Civil Advocacy for Noncitizens at the Intersection of Criminal and Immigration Law*, *in* SOCIAL WORK WITH IMMIGRANTS AND REFUGEES: LEGAL ISSUES, CLINICAL SKILLS, AND ADVOCACY 175, 176–77 (Fernando Chang-Muy & Elaine P. Congress eds., 2d ed. 2016) (explaining that immigration law is rife with contradictions and internal inconsistencies that lead to incongruous results, such as rendering a legal permanent resident removable for conduct that would not prohibit another noncitizen from entering the United States).

21. *Compare* 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2012) (providing that a noncitizen is deportable if convicted of a crime involving moral turpitude within five years after admission, with no sentencing limitation), *with id.* § 1182(a)(2)(A)(ii)(II) (excluding a crime involving moral turpitude from the grounds for inadmissibility if the maximum possible penalty did not exceed one year of imprisonment and the noncitizen was not sentenced to more than six months imprisonment). The logical contradiction of removing noncitizens that would otherwise be admissible to the United States is also implicated by other offenses, such as firearms offenses and aggravated felonies. *Compare* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any [noncitizen] who is convicted of an aggravated felony at any time after admission is deportable."), *with id.* § 1182(a)(2) (declining to include

noncitizens had committed identical offenses carrying a maximum penalty of one year, an aspiring entrant finds herself in a favorable position as compared to a permanent resident who may have spent nearly five years integrating into her community and establishing positive equities in the country.[22]

Similarly, under the INA's grounds for inadmissibility, a lawful permanent resident may be subject to removal proceedings, while the grounds of deportability would have no impact on the same individual. This leads to questionable outcomes that are unsupportable in moral terms. For example, a lawfully admitted noncitizen may commit a crime of moral turpitude five years after admission without facing removal proceedings.[23] If that same noncitizen travels abroad, however, she may be placed in removal proceedings upon her return.[24] Denying reentry to noncitizens that otherwise would not be subject to removal, provided they remain in the country, defies logic.[25] It is

aggravated felony as a grounds for inadmissibility); *compare id.* § 1227(a)(2)(C) (rendering a noncitizen deportable for *any* conviction under *any* law for "purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying" or even "attempting or conspiring" such actions with regards to a firearm or destructive device), *with id.* § 1182(a)(2) (lacking a sweeping grounds for inadmissibility for firearms offenses and providing exceptions for certain crimes involving moral turpitude with short sentences).

22. The importance within immigration policy of lawful permanent residents accruing positive equities is evident given its significance in determining eligibility for cancellation of removal for certain permanent residents. 8 U.S.C. § 1229b(a)(1)–(3); *see also* C-V-T-, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) ("In some cases, the minimum equities required to establish eligibility for relief under section 240A(a) . . . may be sufficient in and of themselves to warrant favorable discretionary action."); Edwards, 20 I. & N. Dec. 191, 195, 198–99 (B.I.A. 1990) ("In balancing the various factors in the respondent's case, we take note of his favorable equities, which we found to be unusual or outstanding. However . . . we weigh these equities against the adverse factors of his extensive criminal record . . . .").

23. *See* 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2012).

24. *Id.* § 1182(a)(2)(A)(i)(I). Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the Fleuti Doctrine allowed lawful permanent residents whose departure from the United States was "brief, casual, and innocent" to return to the country without seeking admission. *Id.* § 1255a(a)(3)(B). Since 1996, however, IIRIRA dictates that reentering noncitizens are subject to admissions procedures, potentially resulting in removal proceedings for those having committed a crime of moral turpitude. *Id.* § 1101(a)(13) (defining "admission" and "admitted" to include any lawful "entry . . . into the United States after inspection and authorization by an immigration officer," with no separate treatment for legal permanent residents returning from brief departures).

25. The logical contradiction of denying admission to a noncitizen that has traveled abroad and would not otherwise be removable from the United States is also implicated by other offenses. For example, a noncitizen convicted of possession of less than thirty grams of marijuana would not be removable from the United States. If that noncitizen were to travel abroad, however, she would be subject to the grounds of inadmissibility. *Compare* 8 U.S.C. § 1227(a)(2)(B)(i) (excluding a single offense involving thirty grams or less of marijuana for one's own use from removable

difficult to comprehend how traveling abroad—in and of itself—exacerbates culpability, diminishes a person's morality, or adversely impacts a person's desirability as a resident of the country.

While the statutory construction of the INA leads to illogical results, case law does little to provide clarity or lend legitimacy to the moral turpitude designation. The Board defines the crime involving moral turpitude as "a nebulous concept which refers generally to conduct which is base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between man and man, either one's fellow man or society in general."[26] The vague nature of the term has led circuit courts, which have almost invariably adopted the Board's definition, to grapple with its consistent application to a broad array of criminal offenses.[27] As a result, case outcomes have varied considerably among the courts of appeals and within the Board itself.[28] Furthermore, the imprecise nature of the classification, as overtly admitted by the Board, provides little comfort to noncitizens attempting to determine whether they will be subject to the severe consequences stemming from turpitudinous conduct.

As the Board and the courts have attempted to give form and substance to the moral turpitude designation, they have created a cumbersome body of decisions that is challenging to navigate even for immigration experts. They have largely skirted the challenges associated with determining what is "base, vile, depraved," or within "accepted rules of morality," developing instead an approach prohibiting per se most activity involving fraudulent or sexually illicit conduct and, at the periphery of those categories of crimes, relying primarily on the mens rea associated with a given offense.[29] Fraud has

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controlled substance offenses), *with id.* § 1182(a)(2)(A)(i)(II) (violating any controlled substance regulation renders a noncitizen inadmissible, regardless of quantity).

26. Flores, 17 I. & N. Dec. 225, 227 (B.I.A. 1980); *see also* Franklin, 20 I. & N. Dec. 867, 868 (B.I.A. 1994) ("Moral turpitude refers generally to conduct which 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."); Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1988) ("Moral turpitude is a nebulous concept, which refers generally to 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.").

27. *See supra* note 17.

28. *See* Wolper, *supra* note 9, at 1911–12 (noting the variation between courts about what specific crimes constitute crimes involving moral turpitude, despite widespread acceptance of common definitions and categories).

29. *See* Simon-Kerr, *supra* note 12, at 1060 ("Rather than make the kind of case-specific, fact-specific, era-specific inquiry advocated by Judge Hand, federal courts handled the moral turpitude

generally been considered the central element to moral turpitude determinations,[30] and nearly all sex offenses, regardless of the associated intent or resultant effect, involve moral turpitude.[31] Even statutory rape, generally a strict liability offense, has been deemed to involve moral turpitude.[32] Antiquated honor norms, rather than contemporary moral principles, form the basis for these per se categories.[33]

For offenses that do not involve fraud or sex, the Board and courts typically turn to scienter to determine whether a crime involves moral

question by citing precedent that reproduced its core applications and then by looking for the element of scienter to resolve cases at the margins.").

30. Jordan v. De George, 341 U.S. 223, 227 (1951) ("Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude.").

31. The federal courts have long held that sexual offenses violate "accepted moral standards" and come within the category of "grave acts of baseness or depravity" and have thus applied the moral turpitude designation to a wide variety of sex-based offenses. *See, e.g.*, Morales v. Gonzales, 478 F.3d 972, 978 (9th Cir. 2007) (communicating with a child for immoral purposes is a crime involving moral turpitude); Sheikh v. Gonzales, 427 F.3d 1077, 1082 (8th Cir. 2005) (holding that "conviction under North Dakota law for encouraging or contributing to the deprivation or delinquency of a minor involved moral turpitude"); Maghsoudi v. Immigration & Naturalization Serv., 181 F.3d 8, 15 (1st Cir. 1999) (holding that indecent assault is a crime involving moral turpitude); Palmer v. Immigration & Naturalization Serv., 4 F.3d 482, 485 (7th Cir. 1993) (contributing to the delinquency of a minor is a crime involving moral turpitude); Castle v. Immigration & Naturalization Serv., 541 F.2d 1064, 1066 (4th Cir. 1976) ("It is well established that the Maryland statutory offense of carnal knowledge of a female between the ages of fourteen and sixteen years 'manifestly involves moral turpitude.'"); Marciano v. Immigration & Naturalization Serv., 450 F.2d 1022, 1024 (8th Cir. 1971) (holding that a statutory rape conviction is a conviction of a crime involving moral turpitude); Schoeps v. Carmichael, 177 F.2d 391, 394 (9th Cir. 1949) (finding that lewd and lascivious conduct is a crime involving moral turpitude). Additionally, courts have found that sexual offenses involve moral turpitude, regardless of injury to the victim. Nunez v. Holder, 594 F.3d 1124, 1141–42 (9th Cir. 2010) (Bybee, J., dissenting) ("Unlike other types of crimes falling into the category of grave and base acts, sexual offenses have generally been classified as crimes involving moral turpitude irrespective of any injury to the victim, physical or otherwise.").

32. Mehboob v. Attorney Gen. of U.S., 549 F.3d 272, 277 (3d Cir. 2008) (holding misdemeanor indecent assault is a crime of moral turpitude, regardless of the fact that it does not contain mens rea element as to the age of the victim); *Castle*, 541 F.2d at 1066 (finding statutory rape "manifestly involves moral turpitude"); *Marciano*, 450 F.2d at 1023–25 (holding that "if sexual intercourse is present, and . . . the female is under the age of consent, the element of mens rea does not enter because of the very nature of the offense and the interest of society in rendering such females incapable of giving consent").

33. *See* Simon-Kerr, *supra* note 12, at 1013–14. Simon-Kerr explains that these honor norms are derived particularly from concerns about honest business dealings and punishing women who were not chaste. *Id.* Given the centrality of Christianity in public life in England, the United States, and in the common law of both nations, it stands to reason that these honor norms presumably may be rooted in Christian values. *See generally* Stuart Banner, *When Christianity Was Part of the Common Law*, 16 L. & HIST. REV. 27 (1998) (describing the role of Christianity in the development of common law).

turpitude. In *Flores*,[34] the Board explains, "The test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or corrupt mind. An evil or malicious intent is said to be the essence of moral turpitude."[35] Indeed, the determination as to whether conduct involves moral turpitude typically hinges on scienter, whether stated explicitly in the relevant criminal statute or inferred by the adjudicator. From assault and arson to theft and counterfeiting offenses, intent is generally considered the touchstone of moral turpitude.[36] Nevertheless, the Board and courts have expanded their approach to moral turpitude over time, now finding that even some reckless offenses involve turpitudinous conduct.[37]

III. MORAL TURPITUDE AND MORAL THEORY

Congress could have framed the country's immigration policies in any number of ways. It opted to frame them, in significant part, in moral terms. Particularly within the disciplines of philosophy and theology, there has been no lack of consideration for the profoundly complex matters of moral action, right and wrong, and duties owed to our fellow members of society. Conspicuously absent in the existing moral turpitude case law, however, are any mention of, or regard for, established notions of moral thought. Rather than rely on the vast

34. 17 I. & N. Dec. 225 (B.I.A. 1980).

35. *Id.* at 230 (finding that uttering or selling false or counterfeit paper relating to registry of aliens inherently involves the intent to deceive and is, therefore, a crime involving moral turpitude).

36. *See* Efagene v. Holder, 642 F.3d 918, 921–22 (10th Cir. 2011) (citing *Flores*, 17 I. & N. Dec. at 227) (explaining that a crime involving moral turpitude "necessarily involves an evil intent or maliciousness in carrying out a reprehensible act").

37. *See, e.g.*, Baptiste v. Attorney Gen. of the U.S., 841 F.3d 601, 621–22 (3d Cir. 2016) (finding New Jersey conviction for reckless second-degree aggravated assault to be a crime involving moral turpitude); Hernandez-Perez v. Holder, 569 F.3d 345, 348 (8th Cir. 2009) (holding that while operating a motor vehicle while intoxicated alone would not constitute a crime involving moral turpitude, doing so while endangering a child demonstrates a conscious disregard of a substantial risk to a child that is sufficient to qualify as a crime involving moral turpitude); Keungne v. U.S. Att'y Gen., 561 F.3d 1281, 1287 (11th Cir. 2009) (holding criminal reckless conduct under Georgia law was a crime involving moral turpitude); Godinez-Arroyo v. Mukasey, 540 F.3d 848, 849 (8th Cir. 2008) (finding that recklessly causing serious physical injury to another person is a crime involving moral turpitude because causing physical injury is an aggravating factor that increases the culpability of the offense); Franklin v. Immigration & Naturalization Serv., 72 F.3d 571, 573 (8th Cir. 1995) (holding it was not unreasonable for the BIA to find that "an alien who recklessly causes the death of her child by consciously disregarding a substantial and unjustifiable risk to life has committed a crime that involves moral turpitude"); Medina, 15 I. & N. Dec. 611, 613–14 (B.I.A. 1976) (explaining "that moral turpitude can lie in criminally reckless conduct" because "a corrupt or vicious mind is not controlling" in determining whether assault with a deadly weapon is morally turpitudinous).

intellectual tradition concerning issues of morality and ethics in framing their moral category, the Board and courts have opted instead for legal insularity, developing a standard for morality devoid of either a systematic approach to considering the "rules of morality," or established frameworks for moral consideration.

Of course, relying on diverse disciplines in creating legal standards and rendering legal decisions is, by no means, unprecedented or even uncommon. The law does not, and should not, exist in a vacuum. A few landmark decisions at the nation's highest court are illustrative of judicial reliance on scholarly expertise derived from various disciplines. In *Wisconsin v. Yoder*,[38] for instance, the Supreme Court relied considerably on the testimony of scholars of religion and education in holding that the First and Fourteenth Amendments prevented the state from compelling Amish parents to oblige their children to attend high school after the eighth grade.[39] In similar fashion, the Court gave notable deference in *Roe v. Wade*[40] to medical standards in holding that Texas criminal statutes prohibiting abortions at any stage of pregnancy, except to save the life of the mother, were unconstitutional.[41] Additionally, in *Brown v. Board of Education*,[42] the decision legally ending the scourge of racial segregation in public schools, the reasoning was famously bolstered by the scholarship of social scientists.[43]

Immigration law is riddled with legal fiction.[44] Among its persistent fictions is the notion that moral principles inhere in moral

38. 406 U.S. 205 (1972).

39. *Id.*

40. 410 U.S. 113 (1973).

41. *Id.* at 148–50 (explaining how modern medical techniques in performing abortion undermine the argument that criminal abortion statutes are needed to protect women from unsafe medical practices).

42. 347 U.S. 483 (1954).

43. *Id.* at 494–95 (citing to social science scholars to support the proposition that legally mandated segregation stigmatizes black children and negatively affects their educational outcomes).

44. For example, under immigration law, a noncitizen who has lived and lawfully worked in the United States, such as a DACA recipient, has not been "admitted" to the United States. *See* 8 U.S.C. § 1101(a)(13) (2012) (defining admission as "the lawful entry . . . into the United States after inspection and authorization by an immigration officer," and thus excluding those who enter without inspection, including DACA recipients). An "aggravated felony" need not include aggravating factors nor be a felony under state law to trigger immigration consequences. *See* Guerrero-Perez v. Immigration & Naturalization Serv., 242 F.3d 727, 737 (7th Cir. 2001) (holding that the term "aggravated felony" can include crimes classified as misdemeanors under state law). Detention and deportation are not considered punishment. *See* Demore v. Kim, 538 U.S. 510, 523 (2003) ("[T]his Court has recognized detention during deportation proceedings as a constitutionally

turpitude determinations. Although the moral turpitude designation purports to regulate moral depravity, judges have invariably eschewed an approach requiring meaningful application of moral principles or consideration of social mores. As a consequence of circumventing moral thought for over a century, the Board and courts have developed a specious approach to moral turpitude that is utterly incoherent in moral terms. Within moral theory, no framework exists that mirrors the approach to moral turpitude. No moral theory centers on fraud and sex and, absent those specific categories of activity, determines moral worth based on intent. In fact, serious consideration of moral turpitude vis-à-vis moral theory casts considerable doubt on the virtually inscrutable standards that have evolved within moral turpitude jurisprudence.

A. The Crime Involving Moral Turpitude as Defined

1. The "Accepted Rules of Morality"

One may object to consideration of the crime involving moral turpitude through the lens of contemporary moral theory, arguing that the notion of morality at play is not to be understood as a system of morality espousing objective truths, but rather as a conventional morality, i.e., a morality reached by social consensus. Support for this claim is found in Justice Jackson's dissent in *Jordan v. De George*.[45] In his dissent, Justice Jackson mentions the respondent's claim that the distinction between *mala prohibita* and *mala in se* can be used to determine which crimes should be considered crimes involving moral turpitude.[46] However, he contends that this distinction has historically been unclear and argues that the conception of crimes involving moral turpitude set forth by the government is meant to "be measured against the moral standards that prevail in contemporary society to determine whether the violations are generally considered essentially

valid aspect of the deportation process."); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that deportation and removal are not criminal punishments); *see also* César Cuauhtémoc García Hernández, *Lifting the Legal Fiction that Immigration Detention Isn't Punishment*, CRIMMIGRATION (Mar. 10, 2017), http://crimmigration.com/2017/03/10/lifting-the-legal-fiction-that-immigration-detention-isnt-punishment/ (arguing that "[r]ecent developments suggest that the rationale underlying the legal conclusion that immigration detention isn't punitive might be ripe for attack," such as public justification of civil immigration detention as a deterrent, and the harsh conditions of confinement, including solitary confinement).

45. 341 U.S. 223 (1951).

46. *Id.* at 236–37 (Jackson, J., dissenting).

immoral."[47] This approach is morality by consensus and may, in fact, be the most appropriate interpretation of what the Board means in defining crimes involving moral turpitude when they refer to "the accepted rules of morality and the duties owed between man and man."[48] If this approach is in fact intended by the Board, it is problematic.

As Justice Jackson instructively asks, "[h]ow should we ascertain the moral sentiments of masses of persons on any better basis than a guess?"[49] He is here pointing to an inherent problem with morality by consensus: it is near impossible to define reliably or determine what moral consensus is in practice. Further reinforcing this sentiment, Justice Jackson footnotes Justice Learned Hand, who states:

> Even though we could take a poll, it would not be enough merely to count heads, without any appraisal of the voters. A majority of the votes of those in prisons and brothels, for instance, ought scarcely to outweigh the votes of accredited churchgoers. Nor can we see any reason to suppose that the opinion of clergymen would be a more reliable estimate of our own.[50]

Without being able to determine definitively the common morality functioning within a society, any judgments made under the guise of such a theory are inherently suspicious. Justice Jackson, recognizing this eventuality, later states in his dissent that "[w]e usually end up by condemning all that we personally disapprove and for no better reason than that we disapprove of it."[51] In essence, an appeal to common morality is an appeal to a fictitious standard of morality that cannot reliably be determined, which culminates in judges making decisions in light of their own moral commitments. This assessment appears uncontroversial when one considers the conflicting decisions found among previous moral turpitude cases.[52] If judges and courts cannot

47. *Id.* at 237.

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

49. *Jordan*, 341 U.S. at 238.

50. *Id.* at 238 n.11 (quoting Schmidt v. United States, 177 F.2d 450, 451 (2d Cir. 1949)).

51. *Jordan*, 341 U.S. at 242.

52. *See* Moore, *supra* note 18, at 815 n.16 (noting conflicting decisions on whether being an accessory after the fact constitutes a crime involving moral turpitude), 839 n.280 (conflicting results on whether misuse of a Social Security number is a crime involving moral turpitude), 839 n.282 (identifying conflicting decisions regarding crimes with elements of fraud); Wolper, *supra* note 9, at 1912 n.30 (noting instances where courts evaluating the same crime have reached opposite conclusions on whether it is a crime involving moral turpitude), 1942 n.213 (contrasting conflicting

possibly be functioning within the confines of a common morality, and are ultimately only appealing to their personal moral commitments, it appears that the sense of morality appealed to is nothing more than the considered moral judgments of an individual. In the words of Justice Jackson, "[t]hat is not government by law."[53]

To explain further the problems with common morality, the writings of H. Tristram Engelhardt, Jr. are instructive. Discussing the postmodern context contemporary bioethics—and morality generally—finds itself in, Engelhardt challenges the idea that a secular society like the United States is capable of determining any content-full morality by which it can guide the actions of its citizens. He states:

> Substantial differences in belief and moral vision remain and define action, character, and virtue. These differences shape living communities of diverse moral understanding . . . .
>
> Morality is available on two levels: the content-full morality of moral friends, and the procedural morality binding moral strangers. As a consequence, much must be allowed in large-scale secular states that many . . . know to be grievously wrong and morally disordered. This circumstance will disappoint those who hoped that general society or a large-scale state would constitute *the* moral community, which could be guided by *the* content-full secular [morality]. Their hope is sociologically ungrounded and, in terms of the possibility of a secular morality, unjustifiable. Large-scale states compass numerous peaceable moral communities, a diversity that states have no secular moral right to suppress.[54]

Engelhardt acknowledges the plurality of moral communities that exist within large-scale states like the United States and the lack of justification for trying to enforce any particular vision of morality.

Vermont Supreme Court Justice James Morse, when considering how the concept of moral turpitude applies in the separate context of the professional behavior of lawyers, expresses similar sentiments.[55]

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decisions on whether disorderly conduct and joyriding constitute crimes involving moral turpitude); *see also* Patrick J. Campbell, Note, *Crimes Involving Moral Turpitude: In Search of a Moral Approach to Immoral Crimes*, 88 ST. JOHN'S L. REV. 147, 160–63 (2014) (describing the conflicting results federal appellate courts and the Board have reached on whether particular crimes, in factually similar circumstances, constitute crimes involving moral turpitude).

53. *Jordan*, 341 U.S. at 240.

54. H. TRISTRAM ENGELHARDT, JR., THE FOUNDATIONS OF BIOETHICS 9–10 (2d ed. 1996).

55. *In re* Berk, 602 A.2d. 946, 951 (Vt. 1991) (Morse, J., concurring).

He states, "[A]s society has increasingly become both more secular and pluralistic, there is less consensus about what is immoral."[56] He continues, "[M]oral turpitude is a compass with the directional needle removed. We are left only the temptation to label behavior we find personally repugnant 'immoral.'"[57] Due to the plurality of moral visions and an inability to rank any particular view as dominant or more justified than another, one is left with intractable moral disagreement. While one way out of this problem would be to allow the majority perspective to rule, the inevitable consequence of this solution is to deny those in the minority the right to realize the full vision of their moral lives. Such a state of affairs is in direct tension with the specifically American ideal of the autonomous individual. When it comes to determining which morality should guide a particular society, allowing the greatest number to rule may satisfy practical considerations, but it lacks any substantial justification for why that particular vision of morality is preferable to any other. Such an application of morality is biased, unjust, and prevents noncitizens from being able to foresee how the current moral standard would be applied to them.[58]

The words of Justices Jackson and Morse and the attendant conflicting decisions on what constitutes a crime involving moral

56. *Id.*

57. *Id.*

58. For void for vagueness arguments, see, for example, Nate Carter, Comment, *Shocking the Moral Conscience of Mankind: Using International Law to Define "Crimes Involving Moral Turpitude" in Immigration Law*, 10 LEWIS & CLARK L. REV. 955, 956 (2006) ("The statute which establishes CIMTs [crimes involving moral turpitude] as a basis for removal also fails to inform aliens, judges and administrators of exactly what CIMTs are . . . this results in case law founded on reflexive citation to precedent or reliance on personal prejudice because the statute provides no basis for objective analysis."); Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1132 (2016) (arguing for "the void for vagueness doctrine to apply greater scrutiny, as appropriate, to federal statutes that impose adverse immigration consequences on prior criminal activity for noncitizens residing in the United States"); Harms, *supra* note 18, at 260 (proposing that Congress define "crime involving moral turpitude" to combat the vague, ambiguous concept that fails to provide noncitizens adequate notice of what behavior is impermissible); Holper, *supra* note 18, at 648–49 (explaining why the courts should find the crime involving moral turpitude is void for vagueness, in a case presenting an as-applied challenge to a crime that is not an "easy" offense to resolve and thus falls outside the *Jordan* decision); Moore, *supra* note 18, at 816 (identifying flaws in the *Jordan* decision that leave open the possibility of a void-for-vagueness challenge to the CIMT and why such a claim should succeed under Supreme Court void-for-vagueness doctrine); Wolper, *supra* note 9, at 1909–19 (arguing that the crime involving moral turpitude is intolerably imprecise in the context of modern immigration law, and especially since the 1996 immigration law reforms, and thus the courts should find the term void for vagueness).

turpitude are further supplemented by the history of the debate over common morality within contemporary philosophy. This debate is most prominent in contemporary discussions over the appropriate moral principles to guide medical decision-making within the field of bioethics. Like law, medicine is a practically oriented discipline that requires moral guidance at the level of individual practitioners and patients and, therefore, appeals to wholly theoretical approaches to morality are untenable. However, theories of common morality, interpreted as 'morality by consensus,' have been eschewed by most contemporary philosophers, including Beauchamp and Childress, because they are "historical products relative to cultures" and, therefore, cannot be understood as "the set of norms shared by all persons committed to morality . . . applicable to all persons in all places [by which] we rightly judge all human conduct by its standards."[59]

What distinguishes the common morality discussed by Justice Jackson from a truly universal common morality,[60] like the one Beauchamp and Childress discuss, is the fact that on Beauchamp and Childress's account, "the common morality is not relative to cultures or individuals, because it transcends both."[61] For the moral turpitude designation to be a truly fair concept, it must be supported by a common morality like the one espoused by Beauchamp and Childress—that is, a truly universal common morality, and not the shallow notion unearthed by Justice Jackson's dissent. Such an approach presumes "all morally committed persons share an admiration of and endorsement of *some* moral ideals, and in this respect those ideals can be said to be shared moral beliefs in the common morality."[62] However, the moral *ideals* that this version of common morality rely on are different from moral principles and rules, which are binding. As Beauchamp and Childress state, "[m]orality includes nonbinding moral ideals that individuals and

59. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 3 (6th ed. 2009).

60. When discussing a "truly universal common morality," it is important to note that such a morality is abstract—that is, completely removed from socio-cultural-historical considerations—meaning that *any* rational agent would be able to access and appreciate such a system of morality. However, a morality divorced from real-world context is not useful for guiding or evaluating specific moral actions. Hence, why conflicting systems of morality exist in practice.

61. BEAUCHAMP & CHILDRESS, *supra* note 59, at 4.

62. *Id.* at 5.

groups accept and act on, communal norms that bind only members of specific moral communities."[63] That is, while there are overarching moral ideals, like "killing is wrong," moral communities actualize them differently, leading to the adoption of different moral rules and principles.[64]

So, even on this account we can claim that there are moral ideals shared by all, but to be able to apply them in the real world would require a very limited notion of morality, with very few moral principles, and serious contextual consideration of the situation one hopes to assess morally. Once again, under this definition of common morality, it seems current moral turpitude designations cannot be understood on this model. The categorical approach to turpitudinous conduct identifies rules of morality that are far too specific to be considered moral ideals capable of being shared among all moral communities.[65] Furthermore, the contextual approach required by moral ideals is lost in the abstract way in which crimes involving moral turpitude are evaluated, making it impossible to consider the noncitizen's context or intention during the commission of an act. Julia Ann Simon-Kerr aptly observes that the categorical approach is "a formalistic approach that prevents [courts] from probing below the surface of a conviction to any of the facts that might inform a moral judgment about the act."[66] Consequently, on any available interpretation of common morality, the standards found in United States immigration law for judging turpitudinous conduct cannot be moral standards.

2. The "Duties Owed to Others"

Returning to consider the language of the moral turpitude definition set forth by the Board, the suggestion that one has "duties owed between man and man, either one's fellow man or society in general" suggests that there are moral duties generated by one's

63. *Id.* at 6.

64. WALTER SINOTT-ARMSTRONG & ROBERT AUDI, RATIONALITY, RULES, AND IDEALS: CRITICAL ESSAYS ON BERNARD GERT'S MORAL THEORY viii (2002); *see* BERNARD GERT, COMMON MORALITY: DECIDING WHAT TO DO (2004). Bernard Gert is well known in some circles for his work on "common morality." *See* GERT, *supra*. A strategic decision was made to use Beauchamp and Childress's approach rather than Gert's because Beauchamp and Childress set forth an approach fully within the context of an applied ethics—bioethics—whereas Gert, while informed by his work in clinical ethics, does not.

65. *See infra* Section III.A.

66. Simon-Kerr, *supra* note 12, at 1007.

obligations to other individuals or to society in general.[67] This kind of language is very familiar to the social contract tradition within philosophy, which traditionally generates our moral and political duties and rights through an imagining of uncivilized individuals—usually referring to those lacking a supreme authority like God or the government—contracting to limit their unfettered freedom for the benefit and protection of all.[68] That is, each individual agrees to give up certain freedoms, for example, taking what they want, in exchange for protection, such as rules and punishments regarding theft or bodily harm, and other beneficial goods granted to them by the social contract, such as sharing of knowledge or resources.[69] The contract is most commonly enforceable by the state.[70] Among the most well-known traditional social contract theorists are Thomas Hobbes,[71] John Locke,[72] and John-Jacques Rousseau.[73]

Within the social contract tradition there is a division between contractarians and contractualists. The difference here is that the contractarian is concerned with how self-interested individuals can make mutually advantageous agreements, while the contractualist recognizes the equal moral worth of all agents and therefore seeks to pursue her own interests in a way that is justifiable to others who are also pursuing their own interests.[74] For the discussion at hand, the contractualist account is preferable because—much like the United States legal system, which recognizes all individuals, at least in theory, as equal before the law—it attributes equal worth to all rational and

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

68. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 275–77, 330–31 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (describing how people living in the chaotic and disordered state of nature may enter into a compact to create a body politic, or government, that restrains violence and promotes order in a society, while constraining some of the freedom enjoyed in the state of nature).

69. *Id.*

70. *Id.* at 330–33 (explaining how, by consenting to form a political society, man exits the state of nature and cedes certain powers of enforcement, for example protection of property and punishment for misdeeds, to a shared government).

71. THOMAS HOBBES, LEVIATHAN (Hackett Publ'g Co., 1994) (1668).

72. LOCKE, *supra* note 68.

73. JEAN-JACQUES ROSSEAU, DISCOURSE ON THE ORIGIN OF INEQUALITY (Donald A. Cress trans., Hackett Publ'g Co., 1992) (1755); SOCIAL CONTRACT THEORISTS: CRITICAL ESSAYS ON HOBBES, LOCKE, AND ROUSSEAU ix (Christopher W. Morris, ed. 1999).

74. For further discussion of the distinction between contractarians and contractualists, see Elizabeth Ashford & Tim Mulgan, *Contractualism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 30, 2007), https://plato.stanford.edu/entries/contractualism/.

autonomous agents.[75] If one were to take a contractarian approach, the contractarian would only be willing to limit her own self-interest if she were explicitly required to do so by law (i.e., the social contract). Additionally, given well-recognized concerns regarding the vagueness of moral turpitude legislation and what constitutes turpitudinous conduct, it appears that a contractarian would resist working within an inherently vague system of law.[76] The contractualist, on the other hand, may be better able to accommodate the vagueness of moral turpitude legislation because she, as a rational agent, is inherently concerned with justifying her behavior to others and is able to do so by considering what a reasonable person would not object to.[77] That is, the individual, as a rational, autonomous, moral agent, would be able to determine what behaviors would not be justifiable, effectively eliminating any vagueness in moral turpitude law. Thus, because the agent is independently able to make moral judgments, the claim that crimes involving moral turpitude are too vague to guide actions is easily addressed by the contractualist.

Thomas Scanlon, who sets forth his contractualist account in his book titled *What We Owe to Each Other*, is perhaps the most well-known contemporary contractualist.[78] According to his theory, "an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement."[79] On Scanlon's account, the wrongness of an action is constituted by the fact that it is unjustifiable to others.[80] Having fundamental concern for whether we can justify our actions to others gives priority to our relationships to others and guarantees that if we are moral, we provide them with the full respect that a rational, autonomous being deserves.[81] As a rational, autonomous being, one is

75. *Id.* Morality, like law, recognizes that those who are not fully rational or autonomous—for example, children or those with cognitive impairments—present special cases and therefore may have mitigated or enhanced rights, duties, or protections depending on the specific case.

76. *See In re* Berk, 602 A.2d 946, 951 (Vt. 1991) (Morse, J., concurring).

77. This is especially true of Thomas Scanlon's account. *See* THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER (2000). Scanlon is the most well-recognized, contemporary contractualist and it is his account that will be representative of the contractualist approach in this paper. Ashford & Mulgan, *supra* note 74.

78. SCANLON, *supra* note 77.

79. *Id.* at 153.

80. *Id.*

81. *Id.* at 154.

also capable of determining what others might deem unjustifiable conduct. For Scanlon, unjustifiability is established if one can reasonably reject the intended action.[82] Reasonable rejection requires not only a direct harm to an individual but also, to be reasonable, consideration of the harms to others if the action were not to be taken.[83] Essentially there is a version of the "burdens principle" invoked by reasonable rejection: one may only reasonably reject an action if the harm one will suffer from the performance of the action is greater than the harm others would suffer if the action was not taken. Therefore, reasonable rejection requires consideration of all others and their interests when determining whether an action is unjustifiable.[84]

Because Scanlon's account gives significant focus to what we owe to each other, it is a good fit for addressing issues within immigration law—specifically the moral turpitude designation—because it takes seriously how we might be bound to others to whom we do not have formal legal obligations. In particular, we need to consider what obligations noncitizens have to United States citizens and vice versa. However, taking seriously the idea of having to justify behaviors to all rational, autonomous beings results in significant obligations not only for noncitizens entering or remaining in the United States but also for United States citizens considering how they ought to act regarding noncitizens.

On Scanlon's contractualist approach, it stands to reason that noncitizens, under moral turpitude law, will be answerable for any and all behaviors that are found to be morally unjustifiable to others. For example, with cases of assault that are not explicitly prohibited by the laws of one's country of origin, it is easy to see that without a reason sufficient to override the harm caused to another, such as self-defense or preventing serious harm to another, one would be unjustified in assaulting another. Therefore, denial of entry to or continued residence within the United States to a noncitizen who commits an inexcusable assault would be justified on this account. The noncitizen should have been able to determine that the action was unjustifiable, and therefore, the lack of existing law in the country of origin would not be a justifiable excuse. Consequently, enforcement of the moral turpitude standard would be permissible and justifiable.

82. *See id.* at 213–14.
83. *Id.* at 195–97.
84. *Id.*

However, Scanlon's contractualist approach also requires consideration of the duties United States citizens have to noncitizens. When considering the supposed harms done to United States citizens by allowing noncitizens to enter or remain within the United States, the bar for denial is rather high on any interpretation of the burdens principle. Assuming a noncitizen has not committed a crime involving moral turpitude, discoverable by considering what constitutes an unjustifiable action, United States citizens must have a justifiable reason to deny entry to or continued residence within the United States. It would require a significant level of harm for United States citizens to override the interests of the noncitizen.

While full consideration of which cases of exclusion would be justifiable is far too involved to be fully fleshed out within the confines of this Article, many of the proposed justifications for denial are set forth in the open versus closed borders debate. Justifications for maintaining closed borders typically include reasons, such as preserving a state's culture,[85] sustaining the economy,[86] distributing state benefits,[87] and national security.[88] Therefore, one must weigh the

85. The concern here is that a state has the right to preserve its distinctive culture, which purportedly is threatened by the introduction of noncitizens from other cultures. The problem with this concern is that it is not obvious that individuals have a moral right to the protection of their culture, and it would only preclude immigration from countries that have significantly different cultures from the United States.

86. Here the concern is that an influx of immigrants would harm the economy, especially by "stealing" jobs from United States citizens. While unskilled laborers may be most threatened in this case, it is not clear there is a moral right to those jobs for United States citizens. Additionally, it seems the economy would benefit from immigration by increasing cheap labor and increasing the demand for goods. *See* NAT'L RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 4–7 (James P. Smith & Barry Edmonston eds., 1997) (using a basic economic model to demonstrate the benefit to the United States economy of immigration, which results in net economic gain and increased employment opportunities for native-born workers, although some workers, usually in unskilled or low-wage industries, will be displaced); *see also* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 342–50 (12th ed. 2016) (providing an empirical analysis of the net economic benefits of immigration, known as an immigration surplus, including to employers, who benefit from the supply of workers, workers in complementary industries experiencing demand and wage increases, and consumers, who benefit from lower prices).

87. This argument is concerned with the distribution of welfare benefits like insurance or access to healthcare. There are two ways to easily resolve this issue: (1) abandon the welfare state; or (2) delay access to benefits until one has significantly contributed to the system. *See* Alan O. Sykes, *The Welfare Economics of Immigration Law*, *in* JUSTICE IN IMMIGRATION 158 (Warren F. Schwartz ed., 1995) (suggesting that one-way states may lessen the economic burden of immigrants is by excluding noncitizens from state entitlement programs).

88. Concerns over maintaining the security of a state, particularly prohibiting entry of terrorists, is easily answerable. First, it is unlikely that terrorists will be deterred from immigrating to a state if immigration is illegal. Second, the existence of temporary visas and allowance for short-

potential harms to each United States citizen, as expressed by the aforementioned concerns, against the potential harm of barring entry for or terminating the residency of a noncitizen. In other words, one must employ the burdens principle.

The arguments raised against open borders are both empirical and normative in their content. That is, it is not yet definitively demonstrable that the empirical conditions these arguments project will, in fact, come to fruition and each requires value judgments. For the sake of argument, one may prima facie accept these arguments and interpret them as possible harms to United States citizens, resultant from allowing noncitizens to enter or remain in the country. Reasonable rejection then requires one to weigh the concerns of preserving culture, sustaining the economy, distributing state benefits, and/or maintaining security against any harms that a noncitizen would suffer in this context. Depending on the particular situation of the noncitizen, the harms may vary. However, these harms commonly include a need to escape religious or political persecution, civil war or unrest, cultures of violence, oppressive regimes, poverty, or other forms of immediate threats to one's life or safety. Given that reasonable rejection requires that the harm one would suffer from the performance of an action—in this case barring entry or terminating continued residence—must be greater than the harm others would suffer if the action was not taken—in this case the harms of having open borders—one must consider which harm would in fact be greater.

Considering that the purported harms of open borders are generally aggregate harms (meaning a single noncitizen cannot constitute this harm), are empirically indeterminate, and often can be solved through reconsideration of economic or political structures, it appears that the definite and immediate harms to a noncitizen seeking entry or continued residence are more substantial. Additionally, as Thomas Nagel notes of Scanlon's approach, morality does not allow for "promoting a collective human good in which the interests of a

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term travel make entry to the state possible. *See* Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, CATO INST. POLICY ANALYSIS, Sept. 13, 2016, at 1, 15, https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_2.pdf (comparing deaths by terror attack in the United States between 1975 and 2015 according to immigration status of the perpetrator, or the visa used by the perpetrator to enter the United States, and concluding that nonimmigrants on tourist visas have the highest rate of acts of terror, including the perpetrators of the 9/11 attacks who entered on tourist B visas).

minority may be outweighed by the greater aggregate interests of a majority."[89] As such, the large-scale concerns of a citizenry cannot outweigh the concerns of an individual or a minority, such as noncitizens, with justifiable reason to enter or remain within the United States. Therefore, immigration policy enforcing closed borders requires unjustifiable actions on this account.

To summarize the argument so far, on Scanlon's contractualist account, noncitizens wishing to enter or remain within the United States would be bound by moral turpitude legislation even for actions taken prior to entering the United States because, as rational, autonomous agents, they should have known their conduct was unjustifiable. This effectively solves the vagueness charge against moral turpitude legislation. However, the other consequence of Scanlon's contractualist approach is that the United States could not deny entry or continued residence to noncitizens who have not committed a crime involving moral turpitude because the burdens principle indicates that the harm to United States citizens in accepting noncitizens does not outweigh the harm to noncitizens of being turned away or deported. Consequently, the contractualist approach can make sense of and defend moral turpitude legislation, but it can only do so by employing an approach that would mandate open borders for any noncitizen who has not committed a crime involving moral turpitude.

It may be the case that there are valid objections to the issues and to Scanlon's contractualist approach discussed above.[90] Assuming the

89. Thomas Nagel, *One-to-One*, 21 LONDON REV. BOOKS 3, 4 (1999), https://www.lrb.co.uk/v21/n03/thomas-nagel/one-to-one.

90. As previously mentioned, the debate over open borders is complex, extensive, and well beyond the scope of this Article. For some philosophical sources on the open versus closed borders debate, see JOSEPH H. CARENS, THE ETHICS OF IMMIGRATION 225–54 (2013) (arguing that freedom of movement between states is a moral right and that closed borders "are incompatible with our deepest democratic values" and perpetuate a contemporary form of feudalism); PHILIP COLE & CHRISTOPHER HEATH WELLMAN, DEBATING THE ETHICS OF IMMIGRATION: IS THERE A RIGHT TO EXCLUDE? 13–15 (2011) (making the case for the right to exclude based on the right of states to political self-determination, which includes the freedom of association and the freedom not to associate with those excluded); Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice?*, *in* DEBATING IMMIGRATION 63, 80–81 (Carol M. Swain ed., 2007) (arguing that open borders cannot be morally justified, under a Rawlsian conception of social justice, because immigration has a negative effect on the least-well-off segment of the United States population, such as poor, low-wage workers); David Miller, *Immigration: The Case for Limits*, *in* CONTEMPORARY DEBATES IN APPLIED ETHICS 363, 363–64 (Andrew Cohen & Christopher Heath Wellman eds., 2d ed. 2014) (defending the concept of closed borders and restrictive immigration policies based on culture and population but limiting restrictions as they apply to the moral duty to admit certain groups of immigrants such as refugees); Walter Block, *A Libertarian Case for Free Immigration*, 13 J. OF LIBERTARIAN STUD. 167, 167–

analysis is accurate and considered undesirable by some, however, there is another interpretation of Scanlon's account—what will be called the "relativist interpretation"—that can be considered. The relativist interpretation does not solve the vagueness problem, but it does limit the scope regarding the agents to which one must justify one's actions.

The relativist interpretation of Scanlon's theory recognizes the difficulty and perhaps undesirability of having to justify one's actions to *all* rational, autonomous beings and, consequently, circumscribes our need to justify actions such that one only needs to take into consideration our compatriots or others to whom we have special relationships.[91] Nagel, commenting on the work of Scanlon, states:

> There is room in Scanlon's theory for a degree of relativism, in two senses. The first is what he calls 'parametric universalism,' according to which the appropriate ways to show respect for certain general values such as privacy or loyalty will vary with different social conventions or traditions. The second is that people in different social circumstances or from different traditions may have reasons to accept or reject different principles.[92]

On the relativist interpretation then, the relativity of moral content is conditioned by one's cultures and traditions, and therefore, one does not have to justify one's actions to *all* rational, autonomous agents. That is, one would only have to justify one's actions to those who share the same traditions and/or cultures. Consequently, on the relativist interpretation, it appears that the cultural preservation argument against open borders is saved, which may be important to someone who takes issue with the consequence of open borders from the original interpretation of Scanlon's approach discussed previously.

However, a consequence of limiting the scope of agents to which one must justify one's actions is that others cannot justifiably be held

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68 (1998) (arguing in favor of open borders and freedom of movement from a libertarian perspective); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 251–52 (1987) (drawing on the moral theories of Robert Nozick, the utilitarian approach, and John Rawls, in particular, to argue that closed borders, and the inherent distinction between citizens and noncitizens, cannot be morally justified); Christopher H. Wellman, *Immigration and Freedom of Association*, 119 ETHICS 109, 109–11 (2008) (appealing to the freedom of association as a justification for the right of a state to close its borders to all forms of immigration, including refugees and asylum seekers).

91. *See* Nagel, *supra* note 89.

92. *Id.*

to a standard derived from "duties owed between man and man, either one's fellow man or society in general"[93] if they do not share the culture and traditions the standard is rooted in—in this case—American culture and traditions. Consequently, on the relativist interpretation, crimes involving moral turpitude cannot be used to penalize—in this case, meaning deny entry to—those who are from different cultures or traditions. As such, the crimes involving the moral turpitude definition in the immigration context short-circuits itself because it can only be justifiably applied to United States citizens. That is, the "duties owed between man and man" cannot apply to noncitizens seeking entry to the United States because they do not share the same cultures or traditions.

For those noncitizens who are seeking to remain in the country, the analysis is slightly different. On the relativist interpretation, those seeking to remain in the country would only be bound by the cultures and traditions of the United States once they had remained within the United States for the period of time necessary to learn and understand American culture and the traditions by which they would be bound. It would also require that noncitizens be treated identically to United States citizens within the legal system because there is no justifiable reason for differing treatment. If an action is unjustifiable for a noncitizen, then it would also be unjustifiable for a citizen, and therefore, sanctions ought to be similar. Consequently, deportation would not be a justifiable sanction for noncitizens because it is not a possible penalty for United States citizens.

Taking the relativist interpretation of Scanlon's theory seriously, one can justify closed borders using a cultural preservation argument, but one can only apply the crimes involving moral turpitude designation to United States citizens because noncitizens do not share the culture and traditions undergirding the concept. As such, it appears that the content of the Board's definition of crimes involving moral turpitude, followed to its logical conclusion on the relativist account, is a nonsensical and impotent concept.

In reviewing both interpretations of Scanlon's approach as it applies to the crime involving moral turpitude in the immigration context, one can choose between two sets of consequences: (1) the original interpretation solves the vagueness problem but only if one

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

also adopts an open borders policy, effectively rendering the crime involving moral turpitude moot; or, (2) on the relativist interpretation, one takes a closed-border approach based on cultural preservation but also short-circuits the crime involving moral turpitude concept because it becomes an unjustifiable and unenforceable standard for evaluating the entry and continued residence of noncitizens.

B. The Crime Involving Moral Turpitude as Applied

1. Contextualizing an Intent-Driven Approach

Contemporary moral theory, recognizing the complexity of making moral judgments in particular cases, focuses on the creation of moral systems that provide methods, most commonly guiding principles, based on conceptions of the right, such as actions that are right actions, and the good, meaning that which has intrinsic value, rather than trying to identify particular categories of action deemed moral or immoral.[94] In creating moral theories based on conceptions of the right and the good, it is unnecessary to imagine all possible cases and contexts in which one may have to make moral judgments. Rather, one simply appeals to the moral system adopted to determine the method by which one would make such judgments, whether that be a method that favors analyzing actions, a method that favors prioritizing certain inherently valuable goods, such as virtuous character or well-being, or some combination of the two. Consequently, the general approach of contemporary moral theory appears to be in direct tension with the categorical approach to moral turpitude designations taken by the Board and the courts.[95]

There are reasons why adopting a particular moral system to make moral turpitude determinations is impractical. Most immediate is the expected difficulty of immigration adjudicators appropriately understanding and consistently applying complex moral theory. However, the complexity and discretion required by moral theory appears to be no more challenging to the individual than trying to understand and apply the current guidelines for turpitudinous conduct,

94. For an extensive discussion of the concepts of "right" and "good," see DAVID ROSS, THE RIGHT AND THE GOOD 1, 65 (Philip Stratton-Lake ed., Oxford Univ. Press, 2d ed. 2002) (defining and discussing in-depth the meaning of "right" and what makes an act right, and the meaning, nature, and degrees of "goodness" and what makes a thing good, in the context of moral philosophy).

95. *See infra* Section III.A.

which have largely been informed by outdated and counterintuitive social norms regarding how a lady or gentleman should act in polite society.[96] Consequently, the inherent complexity of moral theory does not appear to be a sufficient reason for the Board and the courts to sidestep its use.

While there are obvious tensions between moral theory and how crimes involving moral turpitude have legally been constructed, it is worth considering whether one can, on any moral account, attempt to make sense of or charitably interpret the crime involving moral turpitude designation as a uniquely moral concept. To approach this task, consideration of contemporary moral theory in conjunction with the language used in the Board's definition of "good moral character" can provide direction regarding which moral theories can most reasonably be used to assess the usefulness and plausibility of the crimes involving moral turpitude definition in moral terms. In determining on which theory one should base their analysis, consideration of the most prominent moral theories is necessary. Arguably, these theories include natural law theory, W.D. Ross's account of prima facie duties,[97] utilitarianism, feminist care ethics, virtue ethics, and deontology, primarily Kantian ethics.[98]

Of these six moral theories, four can be discharged fairly quickly by examining the limits of the moral theories themselves as well as the contours of the crime involving moral turpitude definition and its practical application. Natural law theory, Ross's prima facie duties, utilitarianism, and feminist care ethics are not natural allies for the moral turpitude designation. Taking natural law theory first, this approach traces back to St. Thomas Aquinas in the thirteenth century.[99] It is traditionally considered to be a theological approach because it sets forth a theory of intrinsic value favoring four basic human goods—life, procreation, knowledge, and sociability—

96. *See* Simon-Kerr, *supra* note 12, at 1021–23 (describing how courts have used prevailing social norms and "honor codes" to interpret the crime involving moral turpitude).

97. Ross's account is not a legalist account; he uses the term "prima facie duties" to indicate that the moral duties we have, of which he has a particular, though non-exhaustive list, are all binding on us "on their face" but can be overridden by other, more compelling duties in a particular context. ROSS, *supra* note 94, at 19–20.

98. Many introductory textbooks to moral theory would include these six accounts, though some contemporary philosophers resist the inclusion of any theory beyond deontology, consequentialism, and virtue ethics as they constitute the traditional canon.

99. THOMAS AQUINAS, BASIC WRITINGS OF SAINT THOMAS AQUINAS (Anton C. Pegis ed., Hackett Publ'g Co., 1997) (1945).

considered to be objective facts about human nature, endowed by nature—that is, a transcendent being or God.[100] On this approach, any action that violates any of the human goods is immoral.[101] Given natural law theory's close association with theological contextualization, in particular the Catholic tradition, it stands to reason that it would not be an appropriate theory to embed within United States law, given the Constitution's protections regarding freedom of religion and the separation of church and state.[102] Additionally, given the plurality of religions practiced in the United States, intuitions about what is "normal" or "natural" for all human beings varies widely among individuals, including those charged with making decisions regarding turpitudinous conduct. Furthermore, a secularist approach to this theory would create further complications regarding how to define the normalcy or naturalness of humankind as there would be no obvious answer as to which account—biological or otherwise—should take priority. As such, it appears that the use of natural law theory within immigration law would render it vulnerable to charges of either importing a characteristically religious approach or favoring a secularist approach that is overly contentious.

Next, on W.D. Ross's prima facie duties approach, he adopts a plurality of prima facie duties that are binding on individuals at all times.[103] However, when two or more duties conflict, the individual must consider which of the duties in question is an "all-things-considered" duty—that is, the duty that should override all others.[104] Ross outlines seven prima facie duties: justice, beneficence, self-improvement, nonmaleficence, fidelity, reparation, and gratitude.[105] Ross's theory is one of few approaches that combines consequentialist and deontological approaches. Accordingly, his approach allows one to maintain that there are moral duties incumbent on us all but also that the context of the situation in which one finds oneself is of ultimate importance and therefore determines which moral duty

100. *Id.*
101. *Id.*
102. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").
103. *See* ROSS, *supra* note 94, at 30–31.
104. *Id.*
105. *Id.* at 21.

should guide our actions in any particular circumstance.[106] While this has been recognized as an exceptional contribution to moral theory on Ross's part, when considering his theory as a potential approach to the crimes involving moral turpitude designation, one immediately is faced with the reality that the categorical approach employed to analyze crimes involving moral turpitude is the antithesis to Ross's approach.[107] He specifically developed his approach to avoid such simple categorizations because of a need to recognize the nuances of one's context when making moral judgments.[108] So, while Ross's theory may provide a rather nuanced and intuitive approach to judging moral actions, it remains the case that it is in tension with the current categorical approach to crimes involving moral turpitude.

Utilitarianism, while being one of the most popular and oft-thought most intuitive moral theories, is not a viable approach to the crimes involving moral turpitude designation. The primary reason is that utilitarianism makes moral assessments on the basis of possible outcomes prior to the actions occurring, without any real concern for the *actual* consequences or outcomes of the action taken. This is largely in conflict with the point at which American law assesses actions—after the action has occurred and consequences are known—and, consequently, the point at which crimes involving moral turpitude are evaluated. Utilitarianism, credited to the works of Jeremy Bentham and John Stuart Mill, holds that the right action is the action that produces the most utility in the world.[109] Utility is defined as well-being, pleasure, or happiness, depending on which utilitarian theory one adopts.[110] Whichever good one chooses to prioritize, one's actions should be selected such that the action one chooses is the one that would maximize that particular good in the world, or that would at least minimize harm.[111] In essence, the utilitarian maximizes the

106. *Id.* at 42 ("This sense of our particular duty in particular circumstances, preceded and informed by the fullest possible reflection we can bestow on the act in all its bearings, is highly fallible, but it is the only guide we have to our duty.").

107. *See infra* Section III.A.

108. *See* ROSS, *supra* note 94.

109. *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford Clarendon Press 1907) (1789); JOHN STUART MILL, UTILITARIANISM (George Sher ed., Hackett Publ'g Co., 2d ed. 2001) (1861).

110. BENTHAM, *supra* note 109, at 2 (defining the principle of utility).

111. *Id.* at 3 ("An action then may be said to be conformable to the principle of utility . . . when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.").

greatest good for the greatest number.[112] On this account, all individuals are considered equal and their achievement of good counts equally to that of any other. This framework has a nice leveling effect, but in practice it also means that there is no concept of individual rights because, in maximizing the aggregate good, one may be sacrificed (caused harm) if it means many others will experience a combined greater benefit. Taking this into account—and the fact that our legal system is founded on the conception of the importance of rights in protecting the individual—it seems that utilitarianism is a poor fit for any moral assessment within the law, including crimes involving moral turpitude.

The last implausible approach, feminist care ethics, came into being during the 1980s when there began to be significant criticism of the canon of moral theory as male-centered because it favored the construction of the individual as autonomous and advanced a legalistic conception of moral theory as rights- and rule-based.[113] Carol Gilligan and Nel Noddings are commonly credited with this approach and, in different ways, focus on constructing a theory that centers on the close personal relationships we share with one another and the responsibilities they generate.[114] The focus, therefore, is not on *an* individual but on an individual *inextricably* linked to others.[115] Communitarianism, as a moral and political theory, also came about during this time, favoring a conception of the individual that was responsive to and/or constituted by one's engagements with and commitments to the community.[116] Both of these moral theories are in

112. *Id.*

113. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984).

114. GILLIGAN, *supra* note 113, at 73 (exploring how women understand a "moral problem as a problem of care and responsibility in relationships rather than as one of rights and rules"); NODDINGS, *supra* note 113, at 2–4 (interpreting ethical behavior in the context of natural caring, as between mother and child, as a means of including a feminine perspective in the field of ethics, traditionally dominated by masculine concepts, rigid rules, and cold principles).

115. *See* GILLIGAN, *supra* note 113, at 73, 98–100 (explaining how many women do not distinguish the self from the other when making moral decisions, but rather integrate a sense of responsibility for others into moral decision-making).

116. For examples of communitarian theories, see generally ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (Univ. of Notre Dame Press, 3d ed. 2007) (critiquing the abstraction of traditional moral philosophy and arguing instead that morality must be understood in relation to the community); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1998) (criticizing concepts of moral philosophy based on the metaphysical individual, such as

direct tension with the conception of the individual within American law. The United States has an inarguably autonomous conception of the individual within the law and within the American political system more generally. Therefore, while feminist care and communitarian approaches may serve as natural critiques of the American conception of the individual, it is not a viable theory for considering how to understand the crimes involving moral turpitude designation. However, in considering crimes involving moral turpitude, it is worthwhile to note that many countries and cultures do espouse a communitarian or feminist care ethic, making their moral assessments and laws decidedly different from those encoded in American law.[117] Therefore, a noncitizen may innocently, and with good moral intentions, act in a way that may be deemed morally turpitudinous under United States immigration law. This consideration raises issues regarding the reality of moral diversity in our world and perhaps the need to consider a significant degree of moral pluralism in the moral turpitude designation.

The two theories that seem most naturally to apply to the case of crimes involving moral turpitude are virtue ethics and deontology, albeit for very different reasons. Considering the legal context within which crimes involving moral turpitude are situated, it appears reasonable that virtue ethics, specifically Aristotelian ethics, which is primarily concerned with an individual's character when making moral assessments, may be useful in analyzing the moral justifications behind the designation.[118] While consideration of the Board's definition of crimes involving moral turpitude is not immediately suggestive of a virtue ethics approach, the designation ostensibly exists as a means for judging the moral character of those hoping to remain legally in the United States. Lacking an explicit standard in the moral turpitude definition, consideration of how good moral character is interpreted in the immigration context can be instructive. In particular, the "good moral character" requirement used as a standard

Rawls and Dworkin, and arguing instead that the individual must instead be understood in context of her community and the moral obligations that stem of membership in a particular community).

117. Examples of a communitarian society would be China or Singapore. In these societies laws and policies are meant to protect the common good rather than the autonomy of each individuals.

118. *See generally* ARISTOTLE, NICOMACHEAN ETHICS 18 (Terence Irwin ed. & trans. 2d ed. 1999) ("Virtue of character . . . results from habit [*ethos*]; hence its name 'ethical', slightly varied from 'ethos'.").

in the naturalization process and for certain forms of relief from removal can provide insight into the immigration system's understanding of moral character. Crimes involving moral turpitude, not including political or petty offenses, may trigger a bar on good moral character during this process. Consequently, crimes involving moral turpitude, within the context of immigration law generally, can be characterized as a means of assessing one's character. As such, virtue ethics appears to be a useful approach.

Taking Aristotle's moral theory as representative of the virtue ethics tradition, he holds that moral actions are those that originate from an individual with good moral character or one who is virtuous.[119] One develops character by practicing the virtues—that is, acting virtuously.[120] Humans are not born virtuous.[121] Rather, through the process of observing others who are exemplars of virtue we begin to understand what virtue is and through practicing virtuous behavior we become virtuous ourselves.[122] That is, through habituation we become virtuous and develop good moral character.[123] However, it is not enough to act virtuously because we recognize that it is something a virtuous agent would do; the action must flow from our character and the virtues we hold.[124] Furthermore, Aristotle employs what has been referred to as "the golden mean" to determine what would be virtuous in a particular context.[125] The virtuous action will be that action that is at the mean of two extremes, where the extremes are both excesses and, therefore, vices.[126] For example, the virtue of courage is located at the golden mean between the vices of cowardice and

119. *Id.* at 9 ("And so the human good proves to be activity of the soul in accord with virtue . . . .").

120. *Id.* at 18–20 (explaining that virtue of character develops though habit, by acting rightly or in accordance with virtue).

121. *Id.* at 18 ("Hence it is also clear that none of the virtues of character arises in us naturally.").

122. *Id.* at 18–19 (explaining that "[v]irtues, by contrast, we acquire, just as we acquire crafts, by having first activated them" and likening development of virtue to learning the craft of building, playing the harp, or acting bravely).

123. *Id.* at 19 ("To sum it up in a single account: a state [of character] results from [the repetition of] similar activities.").

124. *Id.* at 22 (differentiating between virtuous action and virtuous character).

125. *Id.* at 25. ("Virtue, then, is a state that decides, consisting in a mean, the mean relative to us, which is defined by reference to reason . . . . It is a mean between two vices, one of excess and one of deficiency.").

126. *Id.*

rashness.[127] However, a courageous action will depend on the particular individual acting and the context of the situation.[128]

Given this account of Aristotelian virtue ethics, it becomes clear that although crimes involving moral turpitude are employed as a means for assessing moral character, the notion of character being employed is far different from that which exists within moral theory. Taking the definition of good moral character—defined as "character which measures up to the standards of average citizens of the community in which the applicant resides"[129]—one can see that character assessment is not based on the actions of moral exemplars or virtuous human beings but rather on the standards "average citizens" determine through their actions. Furthermore, given the categorical approach[130] to crimes involving moral turpitude, the requirement that virtuous conduct be sensitive to the context of the situation and the particular agent involved in the action, it is clear that turpitudinous conduct is not based on a philosophical notion of character, but rather the norms of society.

Lastly, when one considers the Board's definition, which defines moral turpitude as "a nebulous concept which refers generally to conduct which is base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between man and man, either one's fellow man or society in general," the talk of "accepted rules of morality" and "duties owed" seems to indicate that a rule-based or duty-based approach to morality is at issue.[131] This approach most naturally aligns itself with deontology, which, coming from the Greek words *deon* (duty) and *logos* (science or study of), literally means the study of duty.[132] As with any moral theory, there are a number of adherents to the deontological method. However, Immanuel Kant's moral theory[133] is most appropriate for understanding turpitudinous

127. *Id.* at 28.

128. *Id.* at 29.

129. *Good Moral Character*, *USCIS Policy Manual*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/policymanual/Print/PolicyManual-Volume12-PartF.html#footnote-1 (last updated Oct. 30, 2018); *see also* 8 C.F.R. 316.10(a)(2) (2012) ("[T]he Service shall evaluate claims of good moral character on a case-by-case basis taking into account the elements enumerated in this section and the standards of the average citizen in the community of residence.").

130. *See infra* Section III.A.

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

132. *See* Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA PHIL. (Nov. 21, 2007), https://plato.stanford.edu/entries/ethics-deontological/.

133. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor & Jens Timmermann eds., Cambridge Univ. Press rev. ed. 2012) (1785).

conduct because his approach focuses largely on one's intentions, in particular, the intention to act in accord with the moral law or one's moral duty. This approach is much more in line with the scienter requirement set forth in *Silva-Trevino*.[134] As discussed in further detail below, however, the definitions of intention employed by Kant and the scienter requirement are different in crucially important ways.

2. Intent as the "Essence of Moral Turpitude"

Lacking any coherent intellectual underpinning for moral turpitude, the Board and courts have largely retreated to a standard that elevates scienter, rather than considerations of morality, as its legal benchmark. As legal scholar Julia Ann Simon-Kerr avers, scienter has developed as a proxy for moral consideration and courts "apply an explicitly moral standard while deciding cases based on the completely decontextualized question, one which centers on the degree of intent required for a conviction, irrespective of a particular individual's actual motivation, circumstances, or even conduct."[135] An analysis focused on intent provides judges a more manageable approach for legal determinations, but it fails to adhere to standards of morality. It is possible, nonetheless, to attempt to understand the Board and the courts' focus on intent in terms of moral theory.

Among moral theorists, Immanuel Kant sheds the most light on the approach developed to determine whether conduct involves moral turpitude in the immigration context, not because the courts have relied overtly on his moral propositions but due to the parallels that can be gleaned from their reasoning. Presumably unwittingly, seeing as there is no direct mention of moral philosophy in the relevant case law, the Board and the courts have developed a system of moral reasoning that represents a sort of legal corollary to Kantian ethics. Both moral turpitude determinations and Kant's principles concerning morality coincide in their focus on intention rather than effect. If the Board and courts were to attempt to legitimize the intent-driven approach to moral turpitude with moral reasoning, Kant would provide their most effective support. In particular, Kant's "Categorical

134. 24 I. & N. Dec. 687, 687 (B.I.A. 2008) ("To qualify as a crime involving moral turpitude for purposes of the [Immigration and Nationality] Act, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.").

135. *See* Simon-Kerr, *supra* note 12, at 1062.

Imperative" provides the theoretical context in which to better understand the reasoning of the moral turpitude jurisprudence.[136]

The Categorical Imperative developed by Kant is a normative ethical theory that seeks to provide a framework to determine that which is morally permissible and morally obligatory.[137] Originally published in 1785, Kant's theory intends to approach morality *a priori*, or independent of observable human reality or experience, rather than empirically.[138] It rests on three primary propositions. First, to have moral worth, an action must be done from duty.[139] Second, the action done from duty derives its moral worth from the maxim, or rule of conduct, by which it is determined, and therefore, depends "merely on the *principle of volition* by which the action has taken place," not its purpose, object of desire, or effect attained.[140] Third, duty is derived from the necessity of acting from respect for the law.[141] When a maxim is established, all actions must be such that it "should become a universal law," envisioning all rational beings to act in like fashion under comparable circumstances.[142]

In Kant's estimation, an action is only truly righteous when rooted purely in a sense of duty, independent of one's disposition or concern for the consequences of one's action.[143] Critical to whether an action stems from a sense of duty is the intention underlying the action.[144] It is the intention, not the desired outcome or effect, that determines the moral value of the act. Kant provides some explanatory examples to which he applies his principles, including suicide.[145] For one whose choice to live supersedes the possibility of precipitating death, the morality of the action to maintain one's life is contingent upon the intention to act from a sense of duty despite wishing for death, rather than a fear of death or inclination to continue living.[146] The action to preserve one's life, based in duty, must then be pursued only if the

136. *See* KANT, *supra* note 133, at xiii.

137. IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS 21–23 (Thomas Kingsmill Abbott trans., Dover Publ'ns 2005) (1785).

138. *Id.* at 25.

139. *Id.* at 23.

140. *Id.* at 24–25.

141. *Id.* at 25. In this context, by "law" Kant does not mean a system of legislative or judicial laws; rather, he is referring to moral rules.

142. *Id.* at 27.

143. *Id.* at 27–28.

144. *Id.* at 22–23.

145. *Id.* at 22.

146. *Id.* at 58.

preservation of life presents no logical contradictions in all instances of consideration of ending an undesired life.[147]

Kant's focus on intention is mirrored in the moral turpitude reasoning. For Kant, intention to act according to one's duty is critical to moral action. A Kantian approach questions what may and must be done in moral terms. The Board and the courts have applied analogous logic to evaluate whether actions warrant moral opprobrium within the country's immigration laws, focusing on the mens rea associated with particular offenses. While the Kantian approach and moral turpitude determinations regard intention as the touchstone of the morality of one's actions, neither particularly gives regard to the role of effects. Kant contends that "the moral worth of an action does not lie in the effect expected from it, nor in any principle of action which requires to borrow its motive from this expected effect."[148] Likewise, moral turpitude determinations look primarily to intent, irrespective of the relative effects of particular actions.[149]

At first glance, tethering the Board and the courts' analysis to Kant's moral framework may appear to bolster the legitimacy of the intent-driven approach to moral turpitude determinations. This is not the case. Although Kant's Categorical Imperative appears to be the most apt moral analogue to the moral turpitude designation, it ultimately does little to strengthen the approach taken by the Board and the courts, which have placed themselves in an untenable position with regard to moral turpitude. The current approach to moral turpitude renders it vulnerable to critique due to its lack of support from established moral standards. On the other hand, if the Board and the courts adopted an explicitly Kantian framework in order to bolster

147. *Id.*

148. *Id.* at 26.

149. Perhaps as troubling as the lack of regard for moral principles are the egregious inconsistencies in moral turpitude determinations. While consequences are generally disregarded in moral turpitude cases, assault offenses provide one exception. In the immigration legal context, courts have considered the role of effects in finding that a crime involves moral turpitude when reckless assault results in serious bodily injury. In other words, despite the lack of intent typically required, courts have considered the resulting level of injury in justifying a finding of turpitudinous conduct for reckless action. *See, e.g.*, Godinez-Arroyo v. Mukasey, 540 F.3d 848, 849 (8th Cir. 2008) (finding that recklessly causing serious physical injury to another person is a crime involving moral turpitude because causing physical injury is an aggravating factor that increases the culpability of the offense); Fualaau, 21 I. & N. Dec. 475, 478 (B.I.A. 1996) ("In order for an assault of the nature at issue in this case [simple assault] to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury.").

its moral legitimacy, such an approach would continue to be vulnerable to attack on both legal as well as moral grounds. Several factors would contribute to casting a long shadow on the moral turpitude designation were a Kantian approach adopted by the Board and courts.

First, it is important to acknowledge that the parallels between Kantian ethics and the current moral turpitude jurisprudence are limited. Although Kant's theories represent the closest moral parallel to crimes involving moral turpitude, one's confidence would be misplaced to accept that the moral turpitude jurisprudence has simply followed a Kantian approach, albeit unknowingly, and therefore holds moral integrity on those grounds. Even if the Board and the courts were to adopt an approach akin to the Categorical Imperative, it would be susceptible to critique absent adjustments to the moral turpitude reasoning. Ultimately, the failure of Kantian ethics to support the moral turpitude designation leads to the conclusion that there is no fitting moral theory for moral turpitude.

For instance, incompatibilities arise in the respective approaches to intention. The coinciding focus on intention and indifference to effects provide poignant points of intersection between moral turpitude and Kantian ethics, but their approaches are an imperfect match. The notion of intention is fraught with complexity both in philosophy and in law.[150] Whereas the law typically determines intent

150. Among philosophers, much attention has been given to the complexities of the notion of intention. *See, e.g.*, G. E. M. ANSCOMBE, INTENTION 14 (2000) (describing the relationship between action and intention, which gives meaning to action); MICHAEL BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 3–13 (1987) (expressing skepticism about philosophical theories of future-directed intention and instead introducing a functionalist "planning theory" to describing intention); GEORGE M. WILSON, THE INTENTIONALITY OF HUMAN ACTION 7–8 (1989) (approaching the concept of intention through the lens of philosophical language and providing a linguistic framework to discuss and describe intention); Luca Ferrero, *Intending, Acting, and Doing*, PHIL. EXPLORATIONS, Oct. 2017, at 13–14 (arguing that intending an action and acting are not conceptually distinct, but rather are part of a continuous, extended course of action). In the legal realm, legal scholars and courts have acknowledged the challenges of grappling with scienter. *See, e.g.*, Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 637 (1993) ("[F]ew conceptual pursuits in any area of the law have proven so beguiling as the attempt to give an accurate account of the so-called mental element required for criminal liability."); Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 26 (2001) ("The groundbreaking Model Penal Code attempted to exorcize this demon but failed in great part, instead simply adding more confusion to an already confused area."); Frances Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) (stating that "when it comes to attaching a precise meaning to *mens rea*, courts and writers are in hopeless disagreement"); *see also* United States v. Bailey, 444 U.S. 394, 403 (1980) ("Few areas of criminal law pose more difficulty than the proper definition of the

within a range of mental states, Kant presents intention toward duty in contradistinction to fear and inclination. For Kant, intention is prospective, to be derived within a framework of individual freedom when faced with the possibility for action. In the moral turpitude context, immigration adjudicators conduct a retrospective examination related to the mental state required for particular offenses, which may or may not have been determined by a criminal court. For Kant, the locus of moral worth is strictly individualistic and purely internal, rooted in the reason of rational beings. In the moral turpitude context, external adjudicators determine moral worth of actions within standards established by precedent.

Further incongruity between the Kantian and moral turpitude approaches presents itself in the conspicuous lack of consistency in the moral turpitude context. Despite the complexity and acknowledged impracticality of the Categorical Imperative, Kant successfully crafts a rule that provides a uniformity lacking in the realm of moral turpitude.[151] For Kant, the moral analysis does not vary: act with intention for duty and eschew actions leading to resultant inconsistencies if the rule is applied universally. On the other hand, the Board and the courts have wielded the unruly definition of moral turpitude in an egregiously haphazard manner. To involve moral turpitude, some categories of offenses require intent, others qualify with diminished intent if particular factors are present, while others require no intent whatsoever. If the Board and the courts were to adhere to established moral standards and adopt a Kantian approach, their approach would require significant adjustment to achieve some semblance of consistency in moral terms.

Second, even if the moral turpitude analysis were seamlessly analogous to Kant's theories, it would be subject to scrutiny due to its

mens rea required for any particular crime."). This language from *Bailey* has been quoted by the First, Second, Third, Eighth, Ninth, and Tenth Circuits. *E.g.*, United States v. Lamott, 831 F.3d 1153, 1156 (9th Cir. 2016); United States v. Tobin, 552 F.3d 29, 32 (1st Cir. 2009); United States v. Starnes, 583 F.3d 196, 210 (3d Cir. 2009); United States v. Unser, 165 F.3d 755, 761 (10th Cir. 1999); Gilmour v. Rogerson, 117 F.3d 368, 370 (8th Cir. 1997); United States v. Townsend, 987 F.2d 927, 930 (2d Cir. 1993).

151. Indeed, Kant has even been critiqued for attempting to create an adherence to law too closely resembling his thoughts on science and natural law. *See* Felix Adler, *A Critique of Kant's Ethics*, 11 MIND 162, 167 (1902) ("There is, indeed, a capital difference between the certainties of science and those of ethics. The former are verified in experience while the latter are not capable of such verification. It cannot be proved, Kant tells us, that a single human being has ever obeyed the Categorical Imperative, that a single human being has ever pursued the line of conduct which yet he must admit to be universally binding.").

outdated approach. The very existence of a moral turpitude designation within the country's immigration laws has faced broad critique for its archaic nature.[152] The fact that the closest moral analogue to the intent-driven approach rests in theory conceived in the eighteenth century does little to dispel this notion. Similar to the moral turpitude designation, detractors have considered Kant's approach to morality outdated for decades. It is unquestionable that Kant has profoundly influenced the fields of ethics, natural science, and social science. Philosophers and scholars of philosophy, nonetheless, have continually commented on Kant's ideas as antiquated and inadequate for application to particular present-day challenges.[153]

Third, a Kantian approach to moral turpitude would be subject to critique on moral grounds. Since Kant developed his approach to morality in the eighteenth century, moral philosophers have subjected it to vigorous scrutiny on theoretical grounds, thereby eroding his moral theories. In particular, key facets of the Categorical Imperative have been insightfully scrutinized—from the impracticality of constructing maxims[154] and the implausibility of formulating universal laws,[155] to the deficiencies inherent in eschewing

152. *See* Arias v. Lynch, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring) ("It is preposterous that that stale, antiquated, and, worse, meaningless phrase should continue to be a part of American law."); MARGARET REGAN, DETAINED AND DEPORTED 16 (2015) (describing moral turpitude as "an old-fashioned label with more than a hint of Victorian prurience").

153. *See* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE xliii (John Ladd trans., Hackett Publ'g. Co., 2d ed. 1999) (1797) (introducing the text of Kant's work, translator and scholar John Ladd concludes that "Kant's answers about ethics and law grew out of the problems of his day, his century, and he could not have anticipated present-day problems emerging from the Industrial Revolution and from advances in technology"); ARTHUR SCHOPENHAUER, THE WORLD AS WILL AND REPRESENTATION 416 (E.F.J. trans., Dover Publ'ns 1966) (1819) (stating that, although he believed his nineteenth century contemporaries were mistaken, "many at the present day look upon [Kant's works] as already antiquated").

154. *See* G. E. M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 1 (1958) ("Concepts of obligation, and duty—*moral* obligation and *moral* duty, that is to say—and of what is *morally* right and wrong, and of the *moral* sense of 'ought,' ought to be jettisoned if this is psychologically possible; because they are survivals, or derivatives from survivals, from an earlier conception of ethics which no longer generally survives, and are only harmful without it.").

155. *See* Adler, *supra* note 151, at 185, 189 (arguing that "practical moral commands are incapable of being derived from the Kantian formula" because the universalizing of actions "is based on the error that the same rule of action, adopted by all men, would lead in each case to the same result"); *see also* GEORG W.F. HEGEL, PHILOSOPHY OF RIGHT 58 (S.W. Dyde trans., Dover Publ'ns 2005) (1821) (stating that, without passing into the ethical system, the universalizing of one's maxims is "reduced to empty formalism, and moral science is converted into mere rhetoric about duty for duty's sake").

motivations such as benevolence or compassion in decision making[156] and the oppressive implications of Kant's views for subaltern peoples.[157] Indeed, there is no dearth of criticism with regard to Kant's views on morality.

Given the complexity of moral thinking, any singular approach to moral turpitude genuinely adhering to principles of ethics would be subject to challenge on moral grounds. To adopt and defend a moral approach, the courts would be forced to grapple with questions that have "occupied the most gifted intellects and divided them into sects and schools carrying on a vigorous warfare against one another."[158] Adopting a Kantian approach would be no exception. If the moral turpitude designation rested on Kantian principles, consequentialism would present particular challenges to Kant's deontological approach. Consequentialists, such as John Stuart Mill, have critiqued an approach relying on *a priori* principles as lacking the requisite concrete specificity to guide right action.[159] For Mill, a coherent system of morality must possess a self-evident central rule or a system to choose between conflicting principles.[160] The moral turpitude designation lacks a central rule and the consistency to meet the standard Mill envisioned.

To assess moral worth, moreover, a consequentialist approach seeks to examine the consequences and motivations of actions, factors generally ignored within the reasoning of the Categorical Imperative as well as the moral turpitude analysis.[161] A consequentialist approach readily reveals contradictions in the intent-driven approach to moral

156. *See* SCHOPENHAUER, *supra* note 153, at 526–27 ("This demand by Kant that every virtuous action shall be done from pure, deliberate regard for and according to the abstract maxims of the law, coldly and without inclination, in fact contrary to all inclination, is precisely the same thing as if he were to assert that every genuine work of art must result from a well-thought-out application of aesthetic rules. The one is just as absurd as the other."). In addition, Schopenhauer critiques Kant's Categorical Imperative for being an elaborated and embellished version of the Golden Rule: "Do unto others as you would have them do unto you." *Id.*

157. James Samuel Logan, *Immanuel Kant on Categorical Imperative*, *in* BEYOND THE PALE: READING ETHICS FROM THE MARGINS 69, 76–77 (Miguel A. De La Torre & Stacey M. Floyd-Thomas eds., 2011) (concluding that, based on the contradictions between Kant's Categorical Imperative and his odious defense of racial hierarchy, "[a]ll subaltern peoples of the world might do well to refuse the intellectual and moral dictates of the Categorical Imperative as formulated by Kant").

158. MILL, *supra* note 109, at 1.

159. *Id.* at 2–3.

160. *Id.* at 3.

161. It is important to note Mill's unvarnished critique that, to be coherent, Kant's test regarding logical contradictions must involve consideration of the consequence of actions. *Id.* at 4.

turpitude.[162] For example, the moral turpitude analysis renders a noncitizen who commits a theft with the intent to deprive the owner permanently of her property susceptible to a charge of committing a crime involving moral turpitude.[163] A noncitizen that commits a de minimis taking lacking the intent to deprive permanently, on the other hand, has not committed a crime involving moral turpitude and is not subject to the attendant immigration consequences.[164] Yet, these outcomes are difficult to defend in moral terms, particularly when motivations and consequences enter the analysis.

Imagine a noncitizen who intends to deprive permanently and commits a petty theft in order to provide medicine to her sick child; compare this scenario with a noncitizen who commits a temporary taking while engaged in "joyriding," resulting in the victim's losing her job because she was unable to drive herself to work in time for an

162. While the crime involving moral turpitude analysis generally does not consider effects or consequences of actions, there are exceptions. As the crime involving moral turpitude has continued to evolve and expand, effects have been incorporated into the Board's analysis. For instance, simple assault offenses, which historically did not involve moral turpitude, are now turpitudinous crimes if serious bodily injury results, even if the offense is committed only recklessly. Fualaau, 21 I. & N. Dec. 475, 478 (B.I.A. 1996) ("In order for an assault of the nature at issue in this case [similar to simple assault] to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury."). In addition, theft offenses were traditionally only considered crimes involving moral turpitude when accompanied by the intent to deprive the owner permanently of her property. Grazley, 14 I. & N. Dec. 330, 333 (B.I.A. 1973) (finding that "a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended"); H, 2 I. & N. Dec. 864, 865 (B.I.A. 1947) ("[T]he element which must exist before the crime of theft or stealing is deemed one involving moral turpitude is that the offense must be one which involves a permanent taking as distinguished from a temporary one."). In 2016, however, the Board significantly expanded seventy years of reasoning by broadening the definition of theft crimes that involve moral turpitude to include, not only the permanent intent to deprive, but also those "under circumstances where the owner's property rights are substantially eroded." Diaz-Lizarraga, 26 I. & N. Dec. 847, 853 (B.I.A. 2016). These developments in assault and theft offenses related to considering effects appear to be more a function of the Board's intention to continue expanding the moral turpitude category, ensuring adverse immigration consequences for a broader range of noncitizens, rather than a principled approach to considering the importance of consequences in determining the moral worth of actions. Although their treatment has changed, theft offenses remain illustrative, nonetheless, of the inherent flaws in an intent-driven approach.

163. *Diaz-Lizarraga*, 26 I. & N. at 853 ("[A] theft offense is a crime involving moral turpitude if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded.").

164. Alonso, 2018 WL 1872021, at *4–*5 (B.I.A. Jan. 23, 2018). Although *Alonso* is an unpublished decision, it provides insight to the Board's view regarding joyriding offenses after *Diaz-Lizarraga*. *See also* D, 1 I. & N. Dec. 143, 145–46 (B.I.A. 1941) (holding that driving an automobile without the consent of the owner is not a turpitudinous offense because the statute reached cases where there was only an intent to temporarily deprive, which might involve mere prankishness).

important meeting. Further imagine that losing her job has caused devastating effects for the victim's family. In moral terms, it is difficult to justify a finding that the petty thief is more morally depraved, as the moral turpitude analysis requires, than the temporary taker with dubious justifications and devastating effects related to her actions. As this example illustrates, the perfunctory determination required by the moral turpitude analysis—that an offense involving intentional conduct, regardless of motivation or consequences, involves moral turpitude—leads to indefensible results in moral terms.

Lastly, Kant's own broader theories present perhaps the most formidable obstacle to a Kantian framework to moral turpitude. In particular, Kant's theories concerning justice undermine an approach utilizing law to regulate conduct on moral grounds. In *Metaphysical Elements of Justice*, Kant draws sharp distinctions between internal and external legislation.[165] Legislation derived external to the will of a person, although it may influence duty and ethics, cannot dictate morality.[166] While external factors may impact moral determinations, they may not enjoin moral action.[167] In the realm of ethics, legislation must be of internal derivation, commanding individuals to act according to individual duty. Kant unequivocally concludes that internal, ethical determinations must be created, to some extent, independent of external legislation.[168] In Kant's estimation, even God is incapable of externally legislating morality. Kant argues:

> Duties arising from juridical legislation can only be external duties because such legislation does not require that the Idea of this duty, which is internal, be of itself the ground determining the will of the agent. Because such legislation still requires a suitable motive for the law, it can only join external motives with the law. In contrast, ethical legislation also makes internal actions duties, without, however, excluding external actions. Rather, it applies generally to everything that is a duty. But, for the very reason that ethical legislation incorporates in its law the internal motive of the action (the Idea of duty), which is a determination that must by no means be joined with external legislation, ethical

165. KANT, *supra* note 153, at 24.
166. *Id.* at 23–24.
167. *Id.*
168. *Id.*

> legislation cannot be external (not even the external legislation of a divine Will), although it may adopt duties that rest on the external legislation and take them, insofar as they are duties, as motives in its own legislation.[169]

Though impossible to divine Kant's thinking as it would pertain to modern legal classifications, a Kantian approach to moral regulation through legal means appears, at best, dubious. Legal scholar George P. Fletcher argues that although a conventional approach "treats law and morality as intersecting sets of rules and rights, the Kantian view treats the two as distinct and nonintersecting. The moral does not petition for inclusion in the legal and the legal cannot determine the moral."[170] Fletcher finds that "Kant's teachings enable us to fathom the claim that we cannot legislate morality."[171] Juridical legislation exists in the external realm; therefore, it is incapable of establishing independent ethical duties and rendering moral determinations. The crime involving moral turpitude represents an external legal classification regulating noncitizen actions in explicitly moral terms, bestowing courts and the Board with a mechanism to act as external moral arbiters. As a positive law classification embedded within juridical legislation, the moral turpitude designation runs contrary to Kant's notions of morality and justice.[172]

Kant's theories on justice are also at odds with the honor norms reflected in the crime involving moral turpitude category. Kant espouses honor norms, but his approach differs markedly from the crime involving moral turpitude. With regard to moral turpitude, the courts have historically lent leniency to assault offenses, presumably as a reflection of duel culture and a society permissive of violence as a means to defend men's honor.[173] Kant, on the other hand, does not condone assault. Instead, his approach generally condemns assault and homicide as actions that, if left unpunished, may result in societal regression to the state of nature.[174] With uncharacteristic clarity and specificity, however, Kant carves out exceptions for particular

169. *Id.* at 23.

170. George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 534 (1987).

171. *Id.*

172. *Id.*

173. Simon-Kerr, *supra* note 12, at 1015.

174. KANT, *supra* note 153, at 141.

homicide offenses.[175] Specifically, Kant advises mercy for both soldiers who kill those insulting their honor as well as unwed mothers who slay their illegitimate children.[176] Unlike the moral turpitude designation, the honor norm exceptions conjured by Kant rest not on intent or protection of property but the social position or circumstances of the offender.

Although cursory, Kant gives direct consideration to deportation in his writings on justice.[177] Kant is a proponent of expulsion, yet he does not view it as a means to regulate morality.[178] Instead, Kant proposes deportation as a mechanism to protect society from dangerous individuals, regardless of immigration status as conceived today.[179] By contrast, the standard for crimes involving moral turpitude disregards "dangerousness," focusing largely instead on deceit and intent. The crime involving moral turpitude contributes to a system of deportation far more expansive than that imagined by Kant, leading to the removal of people who commit even minor, relatively innocuous offenses that do not place others in peril. A Kantian approach simply does not envision deportation as a means to regulate, dictate, or banish on moral grounds.

IV. LEGAL IMPLICATIONS OF MORAL DETERMINATIONS

In addition to its significant limitations as a moral classification, the crime involving moral turpitude faces additional challenges when examined in its broader context. As a legal classification, crimes involving moral turpitude must sustain a moral analysis within well-established legal doctrines, such as the categorical approach and stare decisis. As discussed in this section, each poses unique challenges to an explicitly moral category embedded within the law. In particular, the crime involving moral turpitude is susceptible to critique because it perpetuates questionable, decontextualized moral judgments as well as moral determinations locked within a relatively rigid system of precedents.

175. *Id.* at 141–43.
176. *Id.* at 143.
177. *Id.* at 145.
178. *Id.* at 145–46.
179. *Id.* at 145 ("In the case of a subject [regarded also as citizen] who has committed a crime that makes association with his fellow citizens dangerous to the state, the country's ruler has the right to banish that person to a province outside the country, where he will no longer participate in any of the rights of a citizen; that is, he may be deported.").

A. The Categorical Approach

Subject to a categorical, decontextualized analysis, moral turpitude determinations are based on evaluations of the elements of particular criminal statutes rather than a factual inquiry into noncitizens' actions.[180] Among moral theories, nearly all necessitate a contextualized approach to moral considerations. While essential in the legal context, a decontextualized inquiry to crimes poses significant challenges for a moral category in the law. In particular, immigration adjudicators render perfunctory moral determinations with little regard for the nuance necessary in the complex realm of morality.

Stemming from sentencing enhancement determinations in criminal cases,[181] the categorical approach is employed in the immigration context to determine whether offenses, including potential crimes involving moral turpitude,[182] trigger particular immigration consequences.[183] To determine whether a conviction

180. Taylor v. United States, 495 U.S. 575, 600 (1990).

181. *Id.* (applying "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions."); *see also* Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) ("To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case."); Descamps v. United States, 570 U.S. 254, 257 (2013) (describing the categorical approach and the modified categorical approach previously approved by the Supreme Court for determining sentencing enhancements); Johnson v. United States, 559 U.S. 133, 144 (2010) ("When the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not, the 'modified categorical approach' that we have approved . . . permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record . . . ."); Shepard v. United States, 544 U.S. 13, 16 (2005) (holding that a later sentencing court "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" and may not look at other documents to contextualize the conviction, such as police reports").

182. Silva-Trevino, 26 I. & N. Dec. 550, 553 (Att'y Gen. 2015) (vacating a previous decision by Attorney General Mukasey on how to apply the categorical approach and leaving the Board to develop a uniform standard for applying the categorical approach to the crime involving moral turpitude).

183. Sessions v. Dimaya, 138 S. Ct. 1204, 1207 (2018) (applying the categorical approach to first-degree burglary under California law and finding the respondent deportable); Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1568 (2017) (finding that a California statutory rape law does not constitute an aggravated felony for immigration purposes after applying the categorical approach); Mellouli v. Lynch, 135 S. Ct. 1980, 1986–88 (2015) (applying the categorical approach to a drug paraphernalia conviction and finding the respondent not deportable); Moncrieffe v. Holder, 569 U.S. 184, 192–95 (2013) (applying the categorical approach and finding that respondent's conviction for possession with intent to distribute under Georgia law is not an aggravated felony); Nijhawan v. Holder, 557 U.S. 29, 38 (2009) (rejecting the categorical approach

forms the basis for adverse immigration action, adjudicators must compare the elements of the relevant criminal statute to the generic immigration definition. If the generic definition encompasses all conduct within the statute of conviction, it is a categorical match, resulting in the attendant immigration consequences. If there is at least a reasonable probability of prosecution for conduct not encompassed by the generic definition, the offense is not a categorical match, and the immigration consequences are not applicable. When the relevant offense is divisible, meaning the criminal statute is comprised of different elements, some of which satisfy the generic definition, courts employ the modified categorical approach.[184] The modified categorical approach allows adjudicators to look beyond the statute to particular documents within the record of conviction—such as the indictment, jury instructions, plea agreement, and plea colloquy—for the purpose of determining the crime of which the individual was convicted.[185] Generally speaking, the categorical approach prohibits factual inquiry.[186]

Among moral theories, Kant's Categorical Imperative again provides the closest moral analogue to the categorical approach. Kant's framework parallels the categorical approach in its objective, decontextualized determinations. Whereas the categorical approach

for circumstance-specific aggravated felony, "an offense that . . . involves fraud or deceit in which the loss to the . . . victims exceeds $10,000," which is distinguishable from the more generic crimes included in the definition of aggravated felony in the INA); Chairez-Castrejon, 26 I. & N. Dec. 819, 821–22 (B.I.A. 2016) (applying the categorical approach to determine if a firearms offense under Utah law is a crime of violence).

184. Although the need for a modified categorical approach was anticipated in *Taylor*, *Shepard* was the first Supreme Court case in which it was employed. *Shepard*, 544 U.S. at 16–17; *see also* Michael McGivney, Comment, *A Means to an Element: The Supreme Court's Modified Categorical Approach After* Mathis v. United States, 107 J. CRIM. L. AND CRIMINOLOGY 421, 427 (2017) (explaining that the Court in *Taylor* imagined a hypothetical generic offense that would require a modified approach, which the *Shepard* Court was the first to apply).

185. *Shepard*, 544 U.S. at 16.

186. *But see Nijhawan*, 557 U.S. at 38–40 (allowing circumstance-specific approach for the amount of loss in aggravated felony determinations); United States v. Price, 777 F.3d 700, 705 (4th Cir. 2015) (allowing circumstance-specific approach for sex offense); United States v. Rogers, 804 F.3d 1233, 1237–38 (7th Cir. 2015) (allowing fact-based inquiry related to consenting adult exception in sex offense); United States v. White, 782 F.3d 1118, 1132 (10th Cir. 2015) (using circumstance-specific approach to determine age in sex offense); United States v. Gonzalez-Medina, 757 F.3d 425, 429–31 (5th Cir. 2014) (applying circumstance-specific approach to determine age differential in sex offense); Dominguez-Rodriguez, 26 I. & N. Dec. 408, 410–12 (B.I.A. 2014) (allowing circumstance-specific approach for personal use exception in controlled substance determinations); Davey, 26 I. & N. Dec. 37, 39 (B.I.A. 2012) (allowing circumstance-specific approach to determine whether noncitizen was involved in single offense for personal use in controlled substance determinations).

prohibits adjudicators from making contextualized, factual inquiries in legal determinations, Kant's method renders factual basis and effects relatively immaterial to moral assessments. Both categorical analyses hold general categories of actions to a generic standard in determining, in the case of morality, their moral worth and, in the case of crimes involving moral turpitude, their applicability to established immigration standards. While parallels exist between the two approaches, on the other hand, their juxtaposition exemplifies yet another stark contrast that emerges in conflating legal and moral approaches. While not without its challenges, the decontextualized nature of the categorical approach seems well-suited to a legal determination and has been upheld repeatedly to ensure fairness for individuals facing deportation or lengthier sentences. In contrast, Kant's reasoning has been widely critiqued because of the sometimes absurd results stemming from such an unwavering approach in moral thinking.[187]

With the exception of Kant's fairly anomalous and vehemently critiqued method, the plurality of moral theories eschews a decontextualized approach to moral considerations. Generally speaking, moral frameworks contemplate the underlying motives, context, and effects of particular actions. As such, a legal categorical approach that evaluates the moral relevance of crimes, such as in moral turpitude determinations, lacks support among most moral theories, which require a more contextualized inquiry. Indeed, a categorical approach to crimes prohibits consideration of, for instance, the effects of actions necessary within a utilitarian analysis, the significance of moral exemplars in virtue ethics, and the importance of theistic considerations in natural law theory. Absent the ability to contextualize its analysis beyond evaluating the elements of criminal

187. Perhaps the epitome of Kant's critiqued examples is the "murderer at the door," in which Kant condemns lying to a murderer seeking a victim in one's home. *See* Helga Varden, *Kant and Lying to the Murderer at the Door . . . One More Time: Kant's Legal Philosophy and Lies to Murderers and Nazis*, 41 J. SOC. PHIL. 403, 403 (2010). According to Kant's reasoning, for instance, Miep Gies, if asked, may have had a moral obligation to tell S.S. officers that the Frank family was hidden in their home because lying is categorically immoral. *Id.*; *see also* Michael Cholbi, *The Murderer at the Door: What Kant Should Have Said*, 79 PHIL. & PHENOMENOLOGICAL RES. 17, 19–20 (2009) (arguing that lying in the above situation is actually morally required because of the duty of self-preservation combined with the duty to treat others similarly situated to ourselves in a similar fashion); James Edwin Mahon, *Kant on Lies, Candour and Reticence*, 7 KANTIAN REV. 102, 123 (2003) (exploring the scope of the prohibition against lying and suggesting that the intended scope is narrow).

statutes, a categorical approach to moral determinations renders itself vulnerable to the scrutiny of a variety of moral approaches. In contemporary notions of moral theory, a categorical approach to moral determination is essentially untenable.

To be sure, neither adopting a Kantian approach nor undermining the categorical approach would remedy the challenges associated with a decontextualized approach to moral turpitude determinations. As previously discussed, a Kantian approach to moral turpitude, while the most viable option for an adoptable moral approach for courts, is rife with flaws and contradictions. Furthermore, it seems unwise to modify or jettison the categorical approach for the sake of salvaging the deeply flawed crime involving moral turpitude. The Supreme Court has clearly spoken as to the importance of the categorical approach to crimes.[188] To exempt crimes involving moral turpitude from categorical analyses would lead to further incoherence in an already inconsistent area of law. To abandon the categorical approach altogether would inevitably lead to the significant problems the Supreme Court has previously addressed—such as failing to adhere to congressional intent,[189] causing the practical difficulties and potential unfairness of a factual inquiry,[190] and potentially violating the Sixth Amendment right to a jury.[191]

B. Stare Decisis

If one is still unwilling to abandon crimes involving moral turpitude in totality, despite the litany of aforementioned critiques, there remain further considerations regarding the use of stare decisis in moral turpitude cases. As is commonly understood, stare decisis mandates that one is bound by case precedent when deciding new cases.[192] In the context of crimes involving moral turpitude there are two concerns: (1) that stare decisis allows for personal morality to be

188. *See supra* note 181.

189. *See* Taylor v. United States, 495 U.S. 575, 580 (1990) (discussing Congress' intent in defining burglary for the purpose of the statute).

190. *Id.* at 601 ("[T]he practical difficulties and potential unfairness of a factual approach are daunting.").

191. *See* Descamps v. United States, 133 S. Ct. 2276, 2287 (2013) (explaining how the categorical approach avoids Sixth Amendment concerns "that would arise from sentencing courts' making findings of fact that properly belong to juries").

192. H. Campbell Black, *The Principle of Stare Decisis*, 34 AM. L. REG. 745, 745 (1886) (describing the principle of stare decisis, which is the policy of courts to abide by the decisions of previous courts in subsequent litigation rather than disturb settled law).

encoded into the law on a larger scale than previously discussed; and (2) that stare decisis actually impedes the concept of crimes involving moral turpitude from making moral progress without timely and difficult attempts to repeal outdated precedents.

Regarding the first concern, since stare decisis is a common and widespread practice within the law, one would think there is no special harm in employing it in the cases of crimes involving moral turpitude. However, because crimes involving moral turpitude were intentionally crafted such that "the Board and other immigration officials are both required and entitled to flesh out its meaning,"[193] there is reason to be concerned with how cases are decided and what additional influence personal morality will have on future cases through precedent. As explained previously, it is problematic, yet seemingly unavoidable, for judges to codify their own personal morality into the law when making decisions regarding moral turpitude cases. This concern is, therefore, exacerbated when one considers that it is not only binding on individual cases but also on all of the cases that follow. As was also mentioned above, similar concerns were raised by Justice Jackson in his dissent in *Jordan v. De George*, although he did not explicitly consider the additional harms brought about by precedent.[194] As Justice Jackson proclaimed, the infusion of personal morality into the law "is not government by law."[195] Consequently, the heavy reliance on precedent in moral turpitude cases compounds the initial harm of allowing personal morality to guide a judicial decision. That is, a judge's personal morality not only affects contemporary decisions, but future decisions as well, even when a judge's personal morality may not only be in contention with the moral sentiments of others but an anathema to the general social norms of the day.

Regarding the second concern, the creation of the crimes involving moral turpitude category without an exhaustive list of crimes to fill out the definition indicates that Congress wanted a concept that was fluid and could easily change over time—that is, one that would be capable of mirroring moral progress. This idea is further reinforced when one considers that the introduction of a list of aggravated felonies in 1988 did not supplant the crimes involving moral turpitude category. As Wolper points out:

193. Ali v. Mukasey, 521 F.3d 737, 739 (7th Cir. 2008).
194. Jordan v. De George, 341 U.S. 223, 239–40 (1951) (Jackson, J., dissenting).
195. *Id.* at 240.

> Congress presumably maintained the category of [crimes involving moral turpitude], notwithstanding the addition of the aggravated felony category, because it believed [crimes involving moral turpitude] would continue to provide some benefit. Unlike the list of aggravated felonies, [the crime involving moral turpitude] remains a fluid category that can adapt over time without legislative involvement.[196]

An ideal interpretation is that the fluidity provided by the crime involving moral turpitude allows it to be responsive to the times and to capture the prevailing moral concerns of the day rather than being constrained by a static law that requires legislative involvement or judicial repeal to make any sort of progress.

However, stare decisis and the heavy reliance on precedent within moral turpitude decisions certainly qualifies, if not disproves, this claim. This is especially true when one considers the sua sponte response to vagueness by the *Jordan v. De George* majority, in which it states,

> In view of these decisions, it can be concluded that fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude. It is therefore clear, under an unbroken course of judicial decisions, that the crime of conspiring to defraud the United States is a "crime involving moral turpitude."[197]

Therefore, one can interpret the Court as stating that moral turpitude law is not vague because precedent has the power to guide one in determining what constitutes a turpitudinous action. This interpretation gives substantial power to any precedent as it essentially functions as the guiding force of the law in moral turpitude designations. Further, it also arrests the notion of moral progress because it is not sufficient for one to ask what morality would have one do but rather what precedent would have one do. Current morality and the morality encoded in precedent may conflict because they are the products of different time periods with potentially different social and moral norms. Given that precedent is binding until it is overturned,

196. Wolper, *supra* note 9, at 1938.
197. *Jordan*, 341 U.S. at 229.

the morality encoded in a precedent determined years, if not decades before, will still be binding.

Using a precedential standard informed by outdated moral norms appears to nullify all claims of fluidity within the law and also introduces unpredictable and contentious moral norms as a means for guiding and evaluating actions. Julia Ann Simon-Kerr expresses similar concerns as she notes, "[I]n the years since it entered American common law, moral turpitude has preserved, but not transformed, the set of morally framed norms of the early nineteenth century that first shaped its application."[198] This preservation can be seen by the primacy given to prostitution and fraud within crimes involving moral turpitude. That is, it reflects the "early honor code [of the nineteenth-century that] was gendered, condemning a lack of chastity in women and deceptive business practices and dishonesty in men."[199] In effect, "modern moral turpitude jurisprudence simply mimics a nineteenth-century system of values."[200] As such, Congress's initial hope that crimes involving moral turpitude would be flexible and responsive to the time in which it was applied simply has not been the practical upshot of its use. It also seems clear that the reluctance of judges to engage with moral thought has led to an overreliance on precedent in making moral turpitude determinations. Judges, not wanting to be moral arbiters, have sidestepped the role of moral arbiters by deferring to precedent that may not be reflective of contemporary values. Consequently, this deference to precedent serves to arrest moral progress within moral turpitude law and also exacerbates concerns regarding the codification of personal morality within the law.

V. CONCLUSION

As Justice Kagan affirms in *Mathis v. United States*,[201] "[c]oherence has a claim on the law."[202] For decades, the vague and arbitrary nature of the moral turpitude designation has perplexed practitioners, judges, and legal scholars. Absent a central rule and consistent application of a legal standard, the crime involving moral turpitude lacks legitimacy as a legal classification. Additionally, the

198. Simon-Kerr, *supra* note 12, at 1008.
199. *Id.* at 1007.
200. *Id.*
201. 136 S. Ct. 2243 (2016).
202. *Id.* at 2257.

moral turpitude designation lacks coherence as a moral designation. In rendering moral turpitude determinations, adjudicators overlook established notions of morality, applying instead a contrived notion of right and wrong to minor offenses and morally defensible actions. There exists no individual moral framework effectively able to lend credence or integrity to the moral turpitude designation. Even earnest attempts to bolster the designation with contemporary moral theory fail. The crime involving moral turpitude continues to represent an intractable impediment to a coherent system of immigration law and policy.

Perpetuating the application of the crime involving moral turpitude is, somewhat ironically, an act of intellectual dishonesty. The moral turpitude designation reflects, at best, the judiciary's complicity or, at worst, its intent to wield morality as a means to restrict the movement of broad categories of noncitizens. While moral turpitude purports to exclude and remove the vile and depraved from the country, it instead acts as an instrument of social constraint, excluding or removing broad swaths of noncitizens who may have engaged in even petty offenses. It has done so shrouded in moral terms, thereby diminishing the chances of public opposition to a designation that ostensibly preserves the country's moral ethos. With its moral veneer, the moral turpitude designation ensures its continued existence as a mechanism to limit the movement of significant numbers of aspiring immigrants.

The crime involving moral turpitude represents the perpetuation of an injustice within American jurisprudence. Congress introduced the moral turpitude designation when the nation's laws explicitly and systematically subjugated women, people of color, and noncitizens. While the law generally has evolved since that time to be more neutral, at least on its face, in its treatment of historically marginalized people, the crime involving moral turpitude has continued to expand to adversely impact larger numbers of noncitizens. As a practical matter, moral turpitude has served to limit the movement of people experiencing, and resisting through migration, the devastating effects of entrenched colonialism, systemic racism, and global inequality. Given its myriad failings, the moral turpitude designation must be eliminated from the country's immigration laws. The nation's collective conscience cannot tolerate otherwise.