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On Moral Grounds: Denouncing the Board's Framework for Identifying Crimes of Moral Turpitude

Frank George

ON MORAL GROUNDS: DENOUNCING THE BOARD'S FRAMEWORK FOR IDENTIFYING CRIMES OF MORAL TURPITUDE

*Frank George**

* Throughout my life, I have been uncommonly blessed. I have received opportunities that, sadly, most are never given. This Article is a product of that good fortune. I specifically thank my advisor Professor Elizabeth Knowles for her comments and edits on this paper, my Ursuline High School instructors for teaching me how to write and research, my friends—Bradley, Josh, and Liam—for showing me how to be a thinker, my girlfriend Jen for her love and support, and my family for everything I have.

I. INTRODUCTION

Immigration policies can represent a country's effort to circumscribe a national culture. Beyond merely regulating the size and diversity of a population, these policies also attempt to shape a nation's identity and social order.[1] As Daniel J. Tichenor—in his *Dividing Lines: The Politics of Immigration Control in America*—writes, nations "define themselves through the official selection and control of foreigners seeking permanent residence on their soil."[2] The United States is no exception, having used its immigration policy to define itself, at least in part, through national notions of morality.[3]

The United States has made admissibility and deportability decisions based on foreigners' moral conduct since 1891, when Congress expressly excluded from entry noncitizens who had committed a crime involving "moral turpitude" (CIMT).[4] Legislative history on the matter suggests that this represented an attempt to establish a national system of morals.[5] Rather than excluding noncitizens based on inherently wrongful conduct (or conduct that would be considered morally turpitudinous in their countries of origin), noncitizen conduct was judged according to U.S. standards.[6] Perhaps the most explicit acknowledgment of Congress's effort to create a national morality comes from case law; the "obvious Congressional purpose [of the moral turpitude provision] is to keep persons who are likely to be undesirable residents or sojourners from being in our midst."[7]

Though the decision to enforce a national system of morality (and to

1. DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 1 (2002).
2. *Id.*
3. S. REP. NO. 81-1515, at 350 (1950).
4. *Id.*
5. *Id*. at 351-54.
6. *Id.* at 351.
7. Knoetze v. United States, 472 F. Supp. 201, 231 (S.D. Fla. 1979).

hold noncitizens to this standard) makes some sense,[8] it has also posed certain challenges as cultural norms are not static; they inevitably change as society progresses.[9] Therefore, the definition of "moral turpitude" has proven elusive, and efforts to develop an acceptable framework for its application have failed.[10]

This is problematic because our application of the phrase "moral turpitude" is of profound importance for noncitizens.[11] For those seeking lawful entrance into the United States, for instance, a conviction of a CIMT renders them ineligible to receive a visa and ineligible for admission.[12] For those who have already been properly admitted to the country (lawful permanent residents), the commission of a CIMT can result in their removal.[13] Undocumented aliens are especially at risk of deportation.[14] While these noncitizens can typically request that the Justice Department prevent their deportation, this discretionary relief is not available for those who have been convicted of crimes involving moral turpitude.[15] Given its severe consequences, a conviction of a CIMT is clearly undesirable for a noncitizen. But without a uniform definition for the phrase "moral turpitude," defense attorneys often struggle to

8. S. REP. NO. 81-1515, at 353 ("While the visa instructions define moral turpitude as an act which in itself is one of baseness, vileness, or depravity, the applicability of the excluding provision often depends on what the individual officer considers to be baseness, vileness, or depravity.").

9. *Id.* at 351.

10. It should be noted that the Supreme Court has already rejected a "void for vagueness" argument. In Jordan v. De George, 341 U.S. 223, 232 (1951), the court determined that "difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness."

11. Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 316 (2011) ("The current INA imposes severe immigration penalties on a noncitizen, including a lawful permanent resident (LPR), for a CIMT conviction, such as inadmissibility, deportation, and ineligibility for discretionary adjustment of status.").

12. 8 U.S.C. § 1182(a)(2) (LEXIS through Pub. L. No. 114-244) ("[A]liens . . . are ineligible to receive visas and ineligible to be admitted to the United States [if] . . . convicted of, or . . . admits having committed or . . . admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude".).

13. 8 U.S.C. § 1227(a)(2) (LEXIS through Pub. L. No. 114-244) (stating that any alien who has been convicted of a CIMT and who could face a sentence of one year or longer, can be removed).

14. 8 U.S.C. § 1227(2)(A)(i) (2016) ("[A]ny alien who . . . is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and . . . is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.").

15. 8 U.S.C. § 1229b(b) (2016) indicates that "[t]he Attorney General may cancel removal of, and adjust the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien . . . has not been convicted of an offence under 1182(a)(2) . . . of this title." 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2016) provides that any alien convicted of "a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime" is inadmissible.

provide adequate advice to their clients, not knowing whether a plea bargain will result in their client's removal from the country.[16]

In this Article, I explore the creation, collapse, and recreation of a uniform framework for the application of the "moral turpitude" provisions in immigration law. Part II demonstrates that the collapse of the previous framework was instructive; it showed that identification of a CIMT hinges on the noncitizen's conviction, not the specific conduct that led to the conviction. Part III details the modern framework that the Board of Immigration Appeals (BIA) has applied to identify CIMTs—the realistic probability test. In Part IV, I criticize the BIA's modern framework. I, instead, advocate for application of the least culpable conduct test—an approach that limits the applicability of the phrase "moral turpitude." Unlike the realistic probability test, the least culpable conduct test has a rich legal history and preserves a noncitizen's access to justice. Part V concludes that whether the circuit courts owe deference to the BIA's modern framework is immediately questionable.

II. A HISTORY OF IDENTIFYING CIMTS

The BIA has offered a general definition of the phrase "moral turpitude," indicating that it refers to behavior that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or society in general."[17] The Immigration and Nationality Act (INA), however, neither defines the phrase "moral turpitude" nor establishes a framework with which to apply this language; as a result, courts have historically developed inconsistent applications of the act's moral turpitude provisions.[18]

16. *See* Eric H. Singer, *The Muddle of Determining Moral Turpitude After* Silva-Trevino, 45 MD. B.J. 54, 57 (2012) ("In short, after *Silva-Trevino*, your client may be left holding the proverbial bag after all, and you and your fellow practitioners and enforcement authorities are certainly left with what can be described only as an intellectual mess."); Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 259 (2012) ("Indeed, the process of determining whether a given criminal conviction triggers an immigration sanction can require extensive analysis of criminal and immigration statutes, prior caselaw, and scrutiny of the criminal record of conviction. At times, it is not an assessment that can be made quickly, or with obvious answers.").

17. In re Ajami, 22 I. & N. Dec. 949, 949 (B.I.A. 2014).

18. *See* Matter of Silva-Trevino, 24 I. & N. Dec. 687, 688 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 ("The Board of Immigration Appeals and the Federal courts have long struggled in administering and applying [the INA's] moral turpitude provisions."); Dadhania, *supra* note 11, at 317 ("Despite its severe ramifications and long history, moral turpitude is not defined in the INA. The legislative history of federal immigration statutes using the term suggests that the precise definition should be formulated by administrative and judicial decisions.").

A. Silva-Trevino I*: The Creation of a Uniform Three-Step Analysis*

In 2008, Attorney General Michael Mukasey addressed this issue in *Matter of Cristoval Silva-Trevino I*; his opinion established a "uniform framework" for the application of the INA's moral turpitude provisions.[19] In this case, the respondent was a citizen of Mexico lawfully admitted to the United States as a permanent resident.[20] After he entered a plea of no contest to the offense of "indecency with a child,"[21] the Department of Homeland Security initiated removal proceedings against him.[22] The respondent requested discretionary relief from removal, arguing that the Texas statute under which he was convicted does not require a defendant to have knowledge of a child's age in order to be found guilty.[23] The respondent, therefore, reasoned that the statute "permits convictions in cases that do not involve moral turpitude," such as in cases "where the defendant honestly and reasonably believed his sexual contact was with a consenting adult."[24] The immigration judge rejected the respondent's argument, but the BIA reached a different conclusion and indicated that the respondent was eligible for discretionary relief.[25] The BIA held that the respondent's "conviction, whatever its actual facts, should *not* be considered a conviction for a crime involving moral turpitude because [the Texas statute] criminalizes at least some conduct that does not involve moral turpitude."[26]

Here the BIA applied a specific categorical approach—called the "least culpable conduct" test—to identify a CIMT. Under this framework, the court looks only at the respondent's conviction, determines the statutory elements necessary for that conviction, and asks whether morally turpitudinous behavior is required to meet those elements.[27] If one can conceive of a theoretical scenario where the statute can be violated without morally base conduct, the crime is not considered a CIMT.[28]

Rejecting the BIA's application of the least culpable conduct test,

19. *Matter of Silva-Trevino*, 24 I. & N. Dec. at 688.
20. *Id.* at 690.
21. *Id.*
22. *Id.* at 691.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 692.
27. Dadhania, *supra* note 11, at 326 ("The least culpable conduct test considers whether moral turpitude would inhere in the minimum conduct sufficiently to satisfy the elements of the offense."); Koh, *supra* note 16, at 283 ("[The] courts must identify the least culpable conduct that could possibly violate the statute.").
28. *Supra* note 27.

Attorney General Mukasey certified the case for review and applied a new approach to identify CIMTs—one that allowed inquiry beyond the statute of conviction.[29] Mukasey set forth a three-step analysis, indicating that adjudicators should first determine whether there is a realistic chance (rather than a theoretical possibility) that a statute reaches conduct that does not involve moral turpitude.[30] Where this first step proves inconclusive, immigration judges were to look at the respondent's "record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript."[31] Finally, if consideration of this record still did not resolve the inquiry, the third step allows judges to consider any other evidence necessary to "resolve accurately the moral turpitude question."[32] Applying this rule, Mukasey remanded the case to the BIA.[33] He reasoned that whether the respondent "knew or should have known the victim's age is a critical factor in determining whether his . . . crime involved moral turpitude for immigration purposes."[34]

Mukasey's three-step analysis represented a novel approach to the identification of CIMTs. Though it contained elements of traditional categorical approaches, its third step deviated substantially from accepted norms. The first step of Mukasey's analysis mirrors a type of categorical approach called the "realistic probability" test.[35] Under this test, a noncitizen must prove that there is a realistic probability that a statute could be violated without morally turpitudinous conduct.[36] To meet this burden, the noncitizen must point to specific cases where a defendant was found to have violated the statute without engaging in morally turpitudinous behavior.[37] Mukasey's second step exemplifies a "modern categorical approach." This approach is typically applied when a statute contains several portions, some of which can be violated without morally turpitudinous behavior and others that cannot.[38] When this is the case, a judge can look beyond the statute, consider the noncitizen's individual

29. *Matter of Silva-Trevino*, 24 I. & N. Dec. at 696.
30. *Id.* at 698.
31. *Id.* at 704.
32. *Id.*
33. *Id.* at 705.
34. *Id.*
35. Dadhania, *supra* note 11, at 327.
36. *Id.*
37. *Id.* at 328 ("Adjudicators focus on the actual scope of the statute of conviction by asking whether any actual case exists where the criminal statute was applied to conduct that was not turpitudinous. A noncitizen must provide evidence of an actual case where the statute in question was used to prosecute conduct not involving moral turpitude.").
38. *Id.* at 329.

"record of conviction," and determine what portion of the statute the noncitizen violated. The record of conviction consists of several documents (all related to the specific conviction in question): the charging document, the plea agreement, the record of the sentence, the plea colloquy transcript, the indictment, or the jury instructions.[39] If the inquiry is not resolved after looking at these documents, Mukasey's approach allowed the judge to go one step further and look into facts outside the record—whatever facts he deemed necessary. This third step broke from tradition and gave judges a great deal of discretion; with "Silva-Trevino, the previous limitations that prevented the immigration court from viewing the record and evidence supporting the conviction [were] essentially discarded, which significantly [increased] the risk of inconsistent application of the moral turpitude law."[40]

Following Mukasey's opinion, the BIA remanded the case back to the immigration judge, who applied the Attorney General's new rule and determined that the respondent was ineligible for discretionary relief from removal.[41]

B. The Deterioration of Mukasey's Silva-Trevino I *Standard*

Far from establishing a uniform interpretation of the phrase "moral turpitude," the third step of Mukasey's framework led to disagreement among the circuits—with some giving deference to his approach and others deciding that it was a clear violation of language contained in the INA.[42]

A minority of circuit courts—consisting only of the Seventh and Eighth Circuits—decided to apply the *Silva-Trevino I* standard.[43] In *Mata-Guerrero v. Holder*, an alien from Mexico sought a waiver of inadmissibility; he argued that his conviction for failing to register as a

39. *See* Wala v. Mukasey, 511 F.3d 102, 108 (2d Cir. 2007) (indicating that the charging document, plea agreement, verdict or judgment of conviction, record of the sentence and the plea colloquy transcript are part of the "record of conviction"); Taylor v. United States, 495 U.S. 575, 602 (1990) (indicating that the indictment and the jury instructions are parts of the "record of conviction").

40. Nathanael C. Crowley, Comment, Naked Dishonesty: Misuse of a Social *Security Number for an Otherwise Legal Purpose May Not be a Crime Involving Moral Turpitude After All*, 15 SAN DIEGO INT'L L.J. 205, 221 (2013).

41. Silva-Trevino v. Holder, 742 F.3d 197, 199 (5th Cir. 2014).

42. Matter of Cristoval Silva-Trevino, 26 I. & N. Dec. 550, 552 (Op. Att'y Gen. 2015) ("[F]ive courts of appeals [have] . . . rejected the third step of Attorney General Mukasey's framework as contrary to the unambiguous language of the statute and thus refused to accord the *Silva-Trevino* opinion deference.").

43. *Id.*

sex offender (as required under Wisconsin law) was not a CIMT.[44] Though the immigration judge and the BIA decided that the petitioner had committed a CIMT, the Seventh Circuit remanded and instructed the BIA to apply Mukasey's *Silva-Trevino I* standard.[45] In reaching this conclusion, the court noted that *Chevron* deference "assumes that an agency has taken a careful look at the general legal issue and has adopted a reasonably consistent approach to it."[46] Because the BIA had only applied a categorical approach to determine that the petitioner had committed a CIMT, the Seventh Circuit instructed the BIA to conduct an "individualized inquiry" into the petitioner's conviction—a fact-specific inquiry consistent with the third step of the *Silva-Trevino I* standard.[47]

In a similar case, the Eighth Circuit also afforded *Chevron* deference to the Attorney General's approach. In *Bobadilla v. Holder*, an alien from Canada was convicted of giving a false name to a peace officer.[48] Though the BIA decided that the alien's offense was categorically a CIMT, the circuit court remanded.[49] It found that the BIA had failed to apply the first step of the *Silva-Trevino I* standard and did not determine if there was a realistic probability that a conviction could arise from conduct that was not morally turpitudinous.[50]

Though the Seventh and Eighth Circuits decided to apply Mukasey's *Silva-Trevino I* standard, most other circuits rejected Mukasey's framework. The Third Circuit became the first to do so in 2009.[51] In *Jean-Louis v. Attorney General of the United States*, the appellant was a native citizen of Haiti.[52] After he pled guilty to committing simple assault against a child under 12 years of age, the Department of Homeland Security declared the appellant removable under the INA.[53] The appellant admitted removability but sought to cancel his removal, contending that cancellation was appropriate because he had resided in the United States for a period of seven years.[54] An alien's period of continuous residency

44. Mata-Guerrero v. Holder, 627 F.3d 256, 257 (7th Cir. 2010).
45. *Id.* at 261.
46. *Id.* at 259.
47. *Id.* at 261.
48. Bobadilla v. Holder, 679 F.3d 1052, 1053 (8th Cir. 2012).
49. *Id.* at 1059.
50. *Id.*
51. Jean-Louis v. Att'y Gen. of the United States, 582 F.3d 462, 470 (3d Cir. 2009) ("We conclude that deference is not owed to *Silva-Trevino's* novel approach and thus will apply our established methodology.").
52. *Id.* at 464.
53. *Id.*
54. *Id.*

terminates, though, when the alien is convicted of a CIMT.[55] Both the immigration judge and the BIA determined that the appellant's conviction of simple assault constituted a CIMT.[56] But the circuit court reversed, holding that the appellant was not convicted of a CIMT.[57] The court adhered to its own precedent on the matter, applied a least culpable conduct test, and expressly rejected Mukasey's novel three-step analysis.[58]

The Third Circuit criticized step one of the *Silva-Trevino I* framework, stating that application of a realistic probability test is impracticable; unlike the least culpable conduct test, it does not allow courts to develop a body of case law that decides "whether various state criminal statutes fall within the scope of the 'crime involving moral turpitude' offense."[59] The Third Circuit also rejected the third-step in the *Silva-Trevino I* framework. The INA uses the term "convicted" when discussing crimes involving moral turpitude.[60] According to the court, this term "forecloses individualized inquiry into an alien's specific conduct and does not permit examination of extra-record conviction."[61]

After the Third Circuit rejected Mukasey's *Silva-Trevino I* standard, several others followed suit.[62] And upon reviewing the *Silva-Trevino I* case in 2014, the Fifth Circuit became the latest circuit to reject Mukasey's framework.[63] The Fifth Circuit acknowledged that when a statute is ambiguous and an implementing agency's interpretation of that statute is reasonable, *Chevron* demands that the court apply the agency interpretation.[64] But, like the Third Circuit, the court analyzed what it called the "convicted of" clause of the INA and found no ambiguity and, thus, no reason to give deference to Mukasey's interpretive framework.[65]

55. *Id*.
56. *Id*. at 465.
57. *Id.* at 482.
58. *Id.* at 470.
59. *Id.* at 482 (internal citation omitted).
60. *Id.* at 474.
61. *Id.*
62. *See* Olivas-Motta v. Holder, 716 F.3d 1199, 1209 (9th Cir. 2013) ("A CIMT . . . [is] a generic crime whose description is complete unto itself, such that 'involving moral turpitude' is an element of the crime. Because it is an element of the generic crime, an IJ is limited to the record of conviction."); Prudencio v. Holder, 669 F.3d 472, 482 (4th Cir. 2012) ("We conclude that the plain language of the moral turpitude statute is not ambiguous."); Farjardo v. United States Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011) ("We agree with the Third and Eighth Circuits that Congress unambiguously intended adjudicators to use the categorical and modified approach to determine whether a person was convicted of a crime involving moral turpitude.").
63. Silva-Trevino v. Holder, 742 F.3d 197 (5th Cir. 2014).
64. *Id*. at 199.
65. *Id.* at 200.

The act provides that "any alien convicted of . . . a crime involving moral turpitude" is inadmissible,[66] and, as a result, the alien is also ineligible for discretionary relief.[67] The court stated that the legislature established a limited list of documents that "may be considered as proof of such a conviction," and there is no evidence that additional extrinsic evidence may be considered to identify a CIMT.[68] Finding that the legislature unambiguously limited the court's inquiry to the record of conviction,[69] the Fifth Circuit joined four other circuit courts in refusing to give deference to Mukasey's three-step framework.[70]

Following the Fifth Circuit's rejection of the *Silva-Trevino I* framework, Attorney General Eric Holder issued an opinion—known as *Silva-Trevino II*—and expressly vacated Mukasey's approach:

> In view of the decisions of five courts of appeals rejecting the framework set out in Attorney General Mukasey's opinion—which have created disagreement among the circuits and disinformation in the Board's application of immigration law—as well as intervening Supreme Court decisions that cast doubt on the continued validity of the opinion, I conclude that it is appropriate to vacate the . . . opinion in its entirety.[71]

After Holder's decision to vacate the *Silva-Trevino I* three-step approach, it became clear that immigration judges could not look beyond a noncitizen's record of conviction to determine whether he committed a CIMT. But courts were left without a national standard for determining whether a crime involved moral turpitude.[72]

C. Confusion Following the Rejection of Silva-Trevino I

The lack of a clear standard led to confusion, and court decisions following Holder's opinion possessed limited precedential value. This is demonstrated by the Seventh Circuit's *Arias v. Lynch* decision, where it considered the following question: does social security number (SSN) misrepresentation necessarily involve morally turpitudinous behavior?[73]

The petitioner was an Ecuador native who came to the United States

66. 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2016).
67. 8 U.S.C. § 1229b(b) (2016).
68. *Silva-Trevino*, 742 F.3d at 200.
69. *Id.*
70. *See supra* note 62 and accompanying text.
71. Matter of Cristoval Silva-Trevino, 26 I. & N. Dec. 550, 553 (Op. Att'y Gen. 2015).
72. Arias v. Lynch, 834 F.3d 823, 830 (7th Cir. 2016) ("[W]e remand to the Board to consider Arias's case under an appropriate legal framework for judging moral turpitude.").
73. *Id*. at 824.

without authorization in 2000.[74] During her time in the States, the petitioner worked at a cabinet company in order to support her three children.[75] In 2010, the petitioner was sentenced to just one year probation for a conviction of falsely using a SSN in order to obtain employment at the cabinet company; the indictment charged her with an intent to deceive her employer.[76] After the petitioner served her year-long probation, however, she received employment authorization and was rehired by the same cabinet company.[77] As the court put it, the company "did not have a problem with [the petitioner's] deception and does not view itself as a victim."[78] Nevertheless, in 2010, the petitioner was asked to appear for removal proceedings; she admitted removability but requested discretionary relief.[79]

The immigration judge held that discretionary relief was unavailable because the petitioner had committed a CIMT.[80] On appeal, the BIA reached the same conclusion.[81] Acknowledging that the *Silva-Trevino I* framework had been vacated, the BIA claimed only to look at the record of conviction and concluded that a violation of 42 U.S.C. § 408(a)(7)(B) categorically involves morally turpitudinous behavior.[82] The BIA held that "'[a]n intent to deceive for the purpose of wrongfully obtaining a benefit is an element of the offense, and therefore the offense is categorically a crime involving moral turpitude.'"[83]

Though the BIA expressly stated that its inquiry was limited to the petitioner's record of conviction, the Seventh Circuit remanded the case and found that the BIA—whether it did so knowingly or not—looked beyond petitioner's conviction and, therefore, wrongly applied the vacated *Silva-Trevino I* approach.[84] The Seventh Circuit reached this conclusion by looking at the language of 42 U.S.C. § 408(a)(7)(B).[85] That statute criminalizes the misrepresentation of a SSN in order to either receive a benefit *or for any other purpose*.[86] The Seventh Circuit pointed

74. *Id.*
75. *Id.* at 825.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 826 (internal citation omitted).
84. *Id.* at 829-30.
85. *Id.* at 826.
86. 42 U.S.C. § 408(a) (LEXIS through Pub. L. No. 114-327) provides: "for the purpose of obtaining anything of value from another person, or for any other purpose . . . with the intent to

out that the BIA's opinion selectively quoted the statute, only including language regarding the misuse of a SSN to obtain a benefit.[87] The court reasoned, then, that the BIA tailored the statute to the petitioner's specific situation, acknowledged that the petitioner misused a SSN to obtain the benefit of employment, and deemed the crime an instance of moral turpitude; in other words, the BIA must have incorrectly applied the vacated *Silva-Trevino I* standard, looking beyond the record of conviction to consider the petitioner's specific conduct.[88] As a result, the Seventh Circuit remanded the case to the Board in order to "consider [petitioner's] case under an appropriate legal framework for judging moral turpitude."[89]

This case highlights the problems that arise when a uniform standard has not been adopted. First, the Seventh Circuit was simply unable to resolve the petitioner's issue. The court could merely defer the case to the BIA and request that it develop a uniform standard. Second, the Seventh Circuit's decision seems oddly contradictory, as it had to make assumptions regarding the BIA's approach to the identification of CIMTs. Consider the following inconsistency. The court first acknowledged that the petitioner's specific conduct shows that she only committed a victimless crime; yet, it concluded that the BIA must have considered this specific conduct in order to conclude that the petitioner's crime was morally turpitudinous.

III. *SILVA-TREVINO* REVISITED: THE MODERN FRAMEWORK

In response to both judicial confusion regarding this area of the law and Attorney General Eric Holder's decision to vacate the *Silva-Trevino I* standard, the BIA revisited the *Silva-Trevino* case and articulated the current standard for identifying CIMTs. Once circuit courts established that an immigration judge cannot look beyond a noncitizen's record of conviction, it logically followed that the BIA had to apply a traditional categorical approach: either the realistic probability test or the least culpable conduct test. It chose to apply the realistic probability test, the same categorical approach that was to be applied under step one of the vacated *Silva-Trevino I* standard.[90]

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deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person . . . shall be guilty of a felony." (emphasis added in text).

87. *Arias*, 834 F.3d at 830.

88. *Id.*

89. *Id.*

90. Matter of Silva-Trevino, 26 I. & N. Dec. 826, 831 (B.I.A. 2016) ("In evaluating the criminal statute under the categorical approach, unless circuit court law dictates otherwise, we apply

In other words, it does not matter whether a scenario can be imagined where a statute can be violated without morally turpitudinous behavior. Instead, under this realistic probability test, there has to be a realistic chance that a statute could be applied to conduct that does not constitute moral turpitude.[91] A noncitizen can meet this burden by pointing to a specific case where the statute was violated without morally base behavior.[92] As is the case with any categorical approach, the realistic probability test forbids inquiry into the noncitizen's specific behavior.[93] Only when a statute contains multiple provisions—some that reach morally turpitudinous behavior and others that do not—can the court look beyond the statute and consider the noncitizen's record of conviction.[94] This record can only be used for the limited purpose of determining under what part of the statute the noncitizen was convicted.[95]

Applying this new standard, the BIA analyzed the Texas statute criminalizing indecency with a child, noted that conviction under this statute does not require knowledge of the victim's age, and, therefore, concluded that the respondent's crime does not categorically involve moral turpitude.[96]

IV. ARGUMENT: THE BIA SHOULD APPLY THE LEAST CULPABLE CONDUCT TEST

Silva-Trevino I was vacated because it incorrectly allowed a judge to look beyond a noncitizen's record of conviction. Thus, the BIA was correct to apply a traditional categorical approach to the identification of CIMTs. But no categorical test is perfect. Because neither the realistic

the realistic probability test. This requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation of that statute.").

91. *See* Matter of Silva-Trevino, 24 I. & N. Dec. 687, 688 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 ("Imagination is not, however, the appropriate standard under the framework set forth in this opinion. Instead, the question is whether there is a 'realistic probability, not a theoretical possibility,' that the Texas statute would be applied to reach conduct that does not involve moral turpitude.") (internal citation omitted).

92. *Matter of Silva-Trevino*, 26 I. & N. Dec. at 831.

93. *Id.*

94. *Id.* at 833 ("In cases where the statute of conviction includes some crimes that involve moral turpitude and some that do not, adjudicators must determine if the statute is divisible and thus susceptible to a modified categorical analysis. Under such an analysis, resort to the record of conviction is permitted to identify the statutory provision that the respondent was convicted of violating.").

95. *Id.*

96. *Id.* at 835 ("Because section 21.11(a)(1) is broad enough to punish behavior that is not accompanied by the defendant's knowledge that the victim was a minor, the offense does not necessarily involve moral turpitude.").

probability test nor the least culpable conduct test considers the noncitizen's specific conduct, it is inaccurate to suggest that either categorical approach is truly equipped to assess a noncitizen's morality.

When we acknowledge this reality, we must reach the following conclusion: the categorical approach that most favors the noncitizen must be applied,[97] for it is the noncitizen facing the severe consequence of removal. Not only does a history of strong legal precedent support this conclusion, but our notions regarding access to the legal system demand it.

A. Legal Precedent Requires Application of the Least Culpable Conduct Test

1. Historically, the Least Culpable Conduct Test was Widely Accepted

Prior to Mukasey's *Silva-Trevino I* opinion, application of the least culpable conduct test was common. In that opinion, Mukasey suggested that the circuit courts have traditionally applied differing categorical tests, with some applying the realistic probability test and others applying the least culpable conduct test.[98] This characterization may not have been entirely accurate.[99] Research suggests that the least culpable conduct test has a much richer history than does the realistic probability test. Thus, Mukasey was correct to point out that the Third and Fifth Circuits have historically applied the least culpable conduct test.[100] But his claim that the First and Eighth Circuits applied the realistic probability test was

97. *See infra* Part II. The Supreme Court has recognized that removal is akin to a criminal punishment, in that it is a particularly severe legal consequence. As a result, the Court has consistently held that noncitizens facing removal—like defendants in a criminal case—are afforded certain protections. Among those protections is the immigration rule of lenity. Just as criminal statutes are to be interpreted in a manner that favors the accused, the immigration rule of lenity mandates that immigration statutes be interpreted in favor of the noncitizen. *See infra* Part II.

98. Matter of Silva-Trevino, 24 I. & N. Dec. 687, 693 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 ("The absence of an authoritative administrative methodology for resolving moral turpitude inquiries has resulted in different approaches across the country.").

99. Cate McGuire, Note, *An Unrealistic Burden: Crimes Involving Moral Turpitude and* Silva-Trevino's *Realistic Probability Test*, 30 REV. LITIG. 607, 623 (2011) ("In highlighting the perceived lack of uniformity among circuits in applying the . . . [realistic probability test], the Attorney General referred to the First and Eighth Circuits as having 'considered the "general nature" of the crime and its classification in "common usage"' to make the moral turpitude determination.") (citing *Matter of Silva-Trevino*, 24 I. & N Dec. at 693-94).

100. *Matter of Silva-Trevino*, 24 I. & N. Dec. at 693. The Third and Fifth Circuits, for example, have held that convictions under a criminal statute may categorically be considered crimes involving moral turpitude only if an examination of the statute reveals that even the most minimal conduct that could hypothetically permit a conviction necessarily would involve moral turpitude. *Id.*

probably an overstatement.[101]

An analysis of case law shows that the least culpable conduct test is deeply embedded in our legal history. From as early as 1939, circuit courts applied reasoning that resembled the least culpable conduct test. In *United States ex rel. Guarino v. Uhl*, for instance, the Second Circuit considered whether the noncitizen's conviction for possession of a jimmy (a small crow bar) with the intent to commit a crime was a CIMT.[102] The court reasoned that the answer to this question turns on the intended illicit use of the jimmy.[103] The court recognized, however, that deporting officials may not consider the noncitizen's particular conduct that gave rise to the conviction.[104] Therefore, the court decided that the noncitizen's possession of a jimmy with the intent to commit a crime is only a CIMT so long as "all crimes which he may intend are 'necessarily', or 'inherently', immoral."[105] In other words, the court applied the least culpable conduct test, identifying the minimal conduct for which a person can be convicted under the statute. The court concluded that youthful boys often use a jimmy to forcefully enter buildings out of a love for mischief, conduct that the court considered entirely innocent.[106] As the court put it, "[s]uch conduct is no more than a youthful prank, to which most high-spirited boys are more or less prone; it would be to the last degree pedantic to hold that it involved moral turpitude and to visit upon it the dreadful penalty of banishment."[107]

The Fifth Circuit borrowed the Second Circuit's reasoning. In its *Hamdan v. INS* case, the petitioner had been convicted under Louisiana's simple kidnapping statute.[108] The petitioner argued that the Louisiana statute defines five categories of kidnapping, one of which criminalizes removal of a child by a parent lacking custody.[109] Citing the Second Circuit's *Guarino v. Uhl* decision, the court provided: "absent specific evidence to the contrary in the record of conviction, the statute must be read at the minimum criminal conduct necessary to sustain a conviction under the statute."[110] Because the statute extends to at least some conduct

101. McGuire, *supra* note 99, at 694.

102. United States *ex rel*. Guarino v. Uhl, 107 F.2d 399, 400 (2d Cir. 1939) (internal citations omitted).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id*.

107. *Id*.

108. Hamdan v. INS, 98 F.3d 183, 184 (5th Cir. 1996).

109. *Id.* at 187.

110. *Id.* at 189.

that is not inherently morally turpitudinous, the court remanded the case to the BIA to determine (from the record of conviction) under what section of the statute the petitioner had been convicted.[111]

The Fifth Circuit again applied this logic in 2006. In *Amouzadeh v. Winfrey*, the petitioner had been convicted of two crimes: knowingly procuring naturalization contrary to law and drug trafficking.[112] In determining whether these crimes involved morally turpitudinous behavior, the Fifth Circuit applied the least culpable conduct test, stating that the statute should be read at "its minimum."[113] If the statute might criminalize conduct that is not morally turpitudinous, the Fifth Circuit reasoned, then the conviction is not one involving moral turpitude.[114] Though the court only considered the minimum conduct necessary to sustain the petitioner's convictions, the petitioner was found to have committed two CIMTs (as both of his convictions required a culpable state of mind).[115]

Following the Second Circuit's *Guarino v. Uhl* decision and the Fifth Circuit's *Hamdan* decision, other circuits followed suit and chose to apply the least culpable conduct test. In *Partyka v. Attorney General*, the Third Circuit considered whether a petitioner's conviction under a New Jersey aggravated assault statute constituted a CIMT.[116] Indicating that it must "ascertain the least culpable conduct necessary to sustain a conviction under the statute," the court considered the elements of New Jersey's aggravated assault statute.[117] The language of that statute permits convictions based on the negligent infliction of bodily harm.[118] As a result, the court reached this conclusion: "the hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation. The negligent infliction of bodily injury lacks this essential culpability requirement."[119]

Lastly, the Ninth Circuit applied the same categorical approach in its *Quintero-Salazar v. Keisler* decision. In that case, the petitioner was convicted of a California statute that prohibits a person 21 years-old or older from engaging in sexual intercourse with any person under the age

111. *Id.*
112. Amouzadeh v. Winfrey, 467 F.3d 451, 453 (5th Cir. 2006).
113. *Id*. at 455.
114. *Id.*
115. *Id.* at 458.
116. Partyka v. Att'y Gen. of the United States, 417 F.3d 408, 412 (3d Cir. 2005).
117. *Id.* at 411.
118. *Id.* at 412.
119. *Id.* at 414.

of 16.[120] Again, the court looked not at the petitioner's specific conduct but at the entire range of conduct prohibited by the statute.[121] The court theorized that this specific statute could criminalize consensual intercourse between a college sophomore and a high-school junior and that the relationship could have begun when both were high school students.[122] Given this theoretical scenario, the court decided that the statute criminalizes at least some behavior that is not morally turpitudinous; "such behavior may be unwise and socially unacceptable to many, but it is not 'inherently base, vile, or depraved.'"[123]

The cases discussed above demand the following realization: prior to Mukasey's *Silva-Trevino I* decision, there was strong legal precedent supporting application of the least culpable conduct test. The same cannot be said for application of the realistic probability test in the context of CIMTs.

2. The Emergence of the Realistic Probability Test is Based on Faulty Logic Contained in Mukasey's *Silva-Trevino I* Opinion

According to the BIA's modern standard, immigration judges must apply the realistic probability test. A noncitizen must prove that there is a realistic chance that a statute could be applied to conduct that is not morally turpitudinous. This differs from the least culpable conduct test in that it requires a noncitizen to point to an actual case where a particular statute was violated without moral turpitude.

Unlike the least culpable conduct test, this realistic probability test has a shallow history. Its application to the identification of CIMTs is largely born out of Mukasey's *Silva-Trevino I* opinion—an opinion that employed questionable logic to support its conclusions.

First, in support of his application of the realistic probability test, Mukasey incorrectly relied upon the Supreme Court's holding in *Gonzales v. Duenas-Alvarez*.[124] (The BIA's modern framework has borrowed this reasoning and also overstates the *Duenas-Alverez* holding.[125]) Although the Supreme Court applied a realistic probability

120. Quintero-Salazar v. Keisler, 506 F.3d 688, 693 (9th Cir. 2007).

121. *Id.* at 692.

122. *Id.* at 693.

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

124. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) ("Moreover, in our view, to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.").

125. Matter of Silva-Trevino, 26 I. & N. Dec. 826 (B.I.A. 2016).

test in that case, it did not do so in order to identify morally turpitudinous conduct, and it remains unclear whether the Supreme Court's reasoning can extend beyond the context in which the *Duenes-Alverez* case was decided.[126]

In *Gonzales v. Duenas-Alvarez*, the respondent faced deportation after he was convicted under a California statute that criminalizes theft of a vehicle (and aiding and abetting a theft of a vehicle).[127] Because the INA calls for removal when a noncitizen has been convicted of a generic theft offense,[128] the federal government began removal proceedings against the respondent.[129] A major issue in this case can be articulated as follows: does the California statute criminalize generic theft offenses?

The respondent argued that his conviction was not an adequate ground for removal. He claimed that the California statute criminalized behavior that most jurisdictions would not consider "theft"; he said that "California's doctrine, unlike that of most other States, makes a defendant criminally liable for conduct that the defendant did not intend, not even as a known or almost certain byproduct of the defendant's intentional acts."[130] In support of this contention, the respondent suggested that a person who wrongly purchased alcohol for an underage drinker could be convicted under the California statute for that drinker's unforeseen reckless driving.[131] While the immigration judge and the BIA found the petitioner to be removable, the Ninth Circuit held that the California statute extends to conduct that is not generic theft and remanded the case to the BIA.[132] The Supreme Court, however, vacated the Ninth Circuit's decision, remanding the case for further proceedings.[133]

According to the Supreme Court, the respondent's argument failed because it was rooted in fiction, not fact:

> To find that a state statute creates a crime outside the generic definition

126. Moncrieffe v. Holder, 569 U.S. 184 (2013). The Supreme Court has decided at least one other case where it cited its own *Duenas-Alvarez* decision. The Supreme Court's subsequent discussion of the case's holding, however, does nothing to suggest that the realistic probability test can be used to identify CIMTs. Instead, it merely quotes language from the *Duenas-Alvarez* decision and applies this language to a case regarding the classification of a drug trafficking conviction. *Id.*

127. *Gonzales*, 549 U.S. at 187-89.

128. 8 USC § 1227 (LEXIS through Pub. L. No. 114-244) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); 8 USC § 1101(a)(43)(G) (LEXIS through Pub. L. No. 114-244) ("[A]ggravated felony means . . . a theft offense . . . or burglary offense for which the term of imprisonment [is] at least one year.").

129. *Gonzales*, 549 U.S. at 187.

130. *Id.* at 191.

131. *Id.*

132. *Id.* at 184, *syllabus.

133. *Id*. at 188.

> of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.[134]

The Supreme Court stated that the respondent could demonstrate this realistic probability by either pointing to his own case or to another case where a court actually applied the statute to the conduct that respondent described.[135]

Several circuit courts criticized Mukasey's decision to apply this holding to the identification of CIMTs. In its *Jean-Louis* decision, the Third Circuit "seriously doubt[ed] that the logic of the Supreme Court in *Duenas-Alvarez* . . . is transferable to the CIMT context."[136] In the *Duenas-Alvarez* case, the respondent's theoretical/imaginary criminal conduct—buying alcohol for an underage drinker—may not have even been a violation of the California statute criminalizing theft of a vehicle.[137] Proper application of a least-culpable conduct test, according to the Third Circuit, does not involve this kind of "imagination."[138] When the elements of a statute are clearly enumerated, the theoretical scenario can unmistakably meet those elements; speculation as to whether the conduct can lead to a conviction is unnecessary.[139]

After incorrectly citing the Supreme Court's *Duenas-Alvarez* case to support his application of the realistic probability test, Mukasey then asserted that some circuit courts have also used this test to identify CIMTs.[140] Specifically, Mukasey mentioned the First Circuit's *Pino v. Nicolls* decision and the Eighth Circuit's *Marciano v. INS* decision.[141] Again, these cases did not clearly support application of the realistic probability test.

In its *Pino* v. *Nicolls* decision, the First Circuit merely recognized that there is criticism regarding categorical approaches because they do

134. *Id*. at 193.

135. *Id.*

136. Jean-Louis v. Att'y Gen. of the United States, 582 F.3d 462, 481 (3d Cir. 2009).

137. *Id.* ("In fact, the parties vigorously disputed whether California courts would permit application of the statute to a defendant who had committed acts *resulting* in a crime, but where the commission of the crime itself was not intended.").

138. *Id.*

139. *Id.* ("Here, by contrast, no application of 'legal imagination' to the Pennsylvania simple assault statute is necessary. The elements of 2701 are clear, and the ability of the government to prosecute a defendant under subpart 2701(b)(2)—even where the defendant is unaware of the victim's age—is not disputed.").

140. *See* Matter of Silva-Trevino, 24 I. & N. Dec. 687, 694 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550.

141. *Id.*

not allow the immigration judge to consider facts beyond the record of conviction.[142] In that case, the issue was whether the petitioner had been convicted of a crime of larceny, not whether the crime of larceny should be classified as a CIMT.[143] Therefore, the First Circuit's discussion regarding the identification of CIMTs is only considered dicta.

In this discussion, the court acknowledged that the accuracy of categorical approaches are limited: if pure motives result in criminal activity (like the theft of food for one's hungry child or the stealing of a turkey as a college prank) and these pure motives do not constitute a legal defense, a categorical approach cannot recognize those pure motives.[144] Nevertheless, the court concluded that immigration judges should not assess a noncitizen's specific conduct:

> if the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude, neither the administrative officials in a deportation proceeding nor the courts on review of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense.[145]

Mukasey interpreted the "general nature" and "common usage" language as an endorsement of the realistic probability test.[146] Others have interpreted this language differently, contending that the First Circuit did not actually subscribe to a realistic probability approach. Instead, it merely emphasized that categorical approaches forbid judges to look beyond the noncitizen's record of conviction and consider the noncitizen's actual conduct.[147]

To further support his claim that the circuits were divided as to which categorical approach to apply, Mukasey cited the dissenting opinion of the Eighth Circuit's *Marciano v. INS* decision.[148] Though the dissent characterized the majority as having applied a realistic probability

142. Pino v. Nicolls, 215 F.2d 237, 245 (1st Cir. 1954).

143. *Id.* ("Appellant has made no contention in this court that the crime of larceny is not properly to be classified in the general category of crimes involving moral turpitude. It is well-settled that, in ordinary acceptation, the crime of larceny, whether grand or petty, is a crime involving moral turpitude.").

144. *Id.*

145. *Id.*

146. Matter of Silva-Trevino, 24 I. & N. Dec. 687, 694 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550.

147. McGuire, *supra* note 99, at 624 (2011) ("In other words, the court was emphasizing the importance of the categorical approach. Because criminal statutes by their plain language do not make non-criminal intentions an affirmative defense, moral turpitude will necessarily inhere even when the underlying facts demonstrate pure intentions.").

148. 450 F.2d 1022 (8th Cir. 1971).

approach, it is unclear whether the majority actually did so.[149]

In the *Marciano* case, the petitioner was an alien from Morocco who was convicted of statutory rape under a Minnesota statute.[150] The petitioner argued that his conviction was not a CIMT because the statute criminalizes sexual relationships with a person between the ages of 16 and 18 years of age without requiring proof of criminal intent.[151] In assessing the petitioner's argument, the majority never mentioned application of the realistic probability test. Instead, the court cited prior cases regarding statutory rape,[152] and it looked at the record of conviction to determine that the petitioner knew of the victim's age.[153] The majority then held that the petitioner had committed a crime involving morally turpitudinous behavior.[154]

Only the dissenting judge deliberated over how to properly identify CIMTs.[155] He criticized the First Circuit's *Pino v. Nicolls* decision, claiming that it was wrong to look only at the "general nature" of a statute to determine whether that statute is used to criminalize morally turpitudinous conduct.[156] The dissenting judge claimed that the majority had, in effect, adopted this logic.[157] But it does not appear that the dissenting judge criticized the majority for applying what he considered a realistic probability test; instead, it seems as though he was critical of all categorical approaches, as they do not allow consideration of the noncitizen's specific conduct.[158] In fact, despite concerns regarding

149. McGuire, *supra* note 99, at 624.

150. *Marciano*, 450 F.2d at 1023.

151. *Id.*

152. *Id.* at 1025 ("Federal courts have consistently held that statutory rape is a crime involving moral turpitude.").

153. *Id.* ("The court also found and determined that [the petitioner] was told by his victim that she was fifteen or sixteen years of age prior to the commission of the offense, that the petitioner had sexual intercourse with the victim on the date charged, and that petitioner was the aggressor.").

154. *Id.* ("The Board properly determined that the statutory rape charge upon which the petitioner was convicted is a crime involving moral turpitude.").

155. *Id.* at 1026 (Eisele, J., dissenting).

156. *Id.* at 1028 (Eisele, J., dissenting) ("I cannot agree that Pino v. Nicolls adopted the best rule when it asked that the Service and the reviewing courts look only to the 'general nature' of the crime and its classification in 'common usage.'").

157. *Id.* (Eisele, J., dissenting) ("The majority here takes the same approach, and this is the point at which my disagreement begins.").

158. *Id.* at 1029 (Eisele, J., dissenting) ("Since moral turpitude is different from criminality, the statute seems to require that that element be assessed separately. Undoubtedly it is difficult for the Service to make continual determinations of the nation's shifting and often indistinct moral standards. Nevertheless, it seems to me that such determinations are what the law requires. Considerations of administrative convenience should certainly be secondary to the determination and enforcement of the obvious legislative intent. It may or may not be wise to charge an administrative agency with this sort of duty, but Congress has done so and the Supreme Court has said that the standard provided is

judicial efficiency, the dissenting judge advocated for a factual inquiry into the petitioner's actual behavior.[159]

A close reading of the cases discussed in *Silva-Trevino I* shows that—unlike the least culpable conduct test—the realistic probability test was not widely applied prior to 2008. To the contrary, application of the realistic probability test in the context of CIMTs seems to be based on unsound legal reasoning. (It is worth noting that in its latest *Silva-Trevino III* opinion, the BIA cited several circuit cases that have applied the realistic probability standard; most of those cases, however, merely adopted this standard based on the *Silva-Trevino I* opinion.[160])

As one scholar concluded, this "erosion of immigration law precedent is based largely on a faulty interpretation of a Supreme Court case combined with mischaracterization of the tests employed by the various circuits when applying the categorical approach."[161]

B. The Realistic Probability Test Violates the Immigration Lenity Doctrine

Not only is the realistic probability test the product of questionable legal reasoning, it may also constitute a violation of the immigration lenity doctrine.

In *Fong Haw Tan v. Phelan*, the Supreme Court recognized that deportation is a "drastic measure"—that it "is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."[162] From that decision, the immigration lenity doctrine emerged; the Supreme Court decided that deportation decisions are to be construed strictly in favor of the noncitizen.[163] Since that decision, the Supreme Court—along with lower courts—has consistently maintained the immigration lenity doctrine.[164] (Moreover, there is legal evidence to suggest that this doctrine does not merely apply to issues of deportability, but that its applicability extends to issues of admissibility as well.[165])

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sufficiently definite that administrators will be able to apply it.").

159. *Id.* at 1031 (Eisele, J., dissenting) ("On the present record, neither this Court, nor anyone else, could accurately and fairly determine whether [petitioner's] crime involved moral turpitude. I would remand the case in order that this essential factual question might be determined.").

160. Rodriguez-Heredia v. Holder, 639 F.3d 1264, 1267 (10th Cir. 2011).

161. McGuire, *supra* note 99, at 636-37.

162. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

163. Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 519 (2003) ("The Supreme Court has a long history of construing immigration statutes narrowly in favor of noncitizens in certain circumstances.").

164. *Id.*

165. *Id.* at 525.

For the reasons that follow, I propose that the BIA's interpretation of moral turpitude provisions violates the long-standing immigration lenity doctrine. The BIA has not interpreted the INA in a manner most favorable to noncitizens facing removal. Instead, its adoption of the realistic probability test creates confusion, possibly limiting legal arguments available to noncitizens and inappropriately placing a burden of proof on noncitizens facing removal.

1. Unlike the Least Culpable Conduct Test, The Realistic Probability Test Contains Ambiguities

The least culpable conduct test is unambiguous. To classify a conviction as a CIMT, this test undoubtedly requires a reading of the statute, a determination of the statute's elements, and a finding that all convictions under the statute require morally turpitudinous conduct.[166] Application of the realistic probability test is not nearly as clear.

As indicated above, the realistic probability test forces the court to look at actual case law to identify a CIMT. To prove that his crime is not a CIMT, a noncitizen must find a case demonstrating that the statute under which he was convicted has previously been applied to conduct short of moral turpitude.[167]

It is unclear, however, what forms of evidence are acceptable to prove the existence of such a case. At least one law review article provides that acceptable forms of evidence include "published decisions, unpublished decisions, and plea transcripts, including those from a noncitizen's own criminal case."[168] The same law review article suggests that when the noncitizen uses plea transcripts from his own criminal case, the realistic probability test no longer functions as a strictly categorical approach. It, instead, allows consideration of the facts underlying the conviction and forces the court to determine if the noncitizen's specific conduct involved moral turpitude.[169]

166. Jean-Louis v. Att'y Gen. of United States, 582 F.3d 462, 465, 482 (3d Cir. 2009). The least culpable conduct test merely requires the court to ascertain the elements of a statute and determine whether all convictions under that statute involve moral turpitude. Therefore, courts applying this test have been able to develop a body of precedent that details which convictions constitute CIMTs and which do not. *Id.*

167. Dadhania, supra note 11, at 328 ("Adjudicators focus on the actual scope of the statute of conviction by asking whether any actual case exists where the criminal statute was applied to conduct that was not turpitudinous. A noncitizen must provide evidence of an actual case where the statute in question was used to prosecute conduct not involving moral turpitude.").

168. *Id.*

169. *Id.* at n.75 ("If a noncitizen uses her own case to demonstrate that the criminal statute has been applied to conduct that does not involve moral turpitude, the court must determine whether her

This is problematic for two reasons. First, Mukasey's *Silva-Trevino I* opinion was vacated because it allowed inquiry beyond a noncitizen's record of conviction and into the particular facts of the noncitizen's case. Circuit courts considered this external inquiry a clear violation of the unambiguous language of the INA.[170] Use of the noncitizen's own record to satisfy the realistic probability test comes dangerously close to this vacated inquiry, inasmuch as it requires courts to assess the noncitizen's actual conduct.[171] Second, the BIA's latest framework seems to plainly forbid the noncitizen from using facts contained in his own record to satisfy the realistic probability test. The BIA's latest framework states that the record of conviction can only be considered when a statute is divisible; it is permitted for the limited purpose of identifying "the statutory provision that the respondent was convicted of violating."[172]

If a noncitizen cannot point to the facts of his own case to show that a particular statute can be violated without moral turpitude, the realistic probability test creates a very serious problem. It eliminates a potential argument for a noncitizen who was convicted of a crime under an entirely novel set of facts—perhaps the only set of facts that led to a particular conviction without involving moral turpitude.

To illustrate this point, imagine that noncitizen Brinsley has been convicted under State X's hypothetical burglary statute. After Brinsley's landlord wrongly used self-help to retake possession of the house in which Brinsley had been living, she found herself without access to shelter and without adequate protection from the cold weather. To prevent the possible onset of frostbite, Brinsley broke a storefront's expensive window, intending to steal a pair of winter boots she saw on a store shelf. But as she left the scene, the store owner—who lived in an apartment above the store—hurried down the stairs and called the police. Brinsley was subsequently charged with burglary, which is defined in State X as trespass in an occupied habitation with the intent to commit any criminal offense. Brinsley's defense of necessity failed, and she was convicted of burglary. Following her conviction, removal proceedings were initiated against Brinsley. In an attempt to obtain discretionary relief from removal, Brinsley sought to establish that her conviction did not constitute a CIMT. Though Brinsley's actions may not seem morally depraved, there are no

actions involved moral turpitude, arguably going beyond a categorical approach. Although the categorical approach generally forbids inquiry into the facts underlying a conviction, the realistic probability test would permit such an inquiry under these circumstances.").

170. *See supra* note 62 and accompanying text.

171. Dadhania, *supra* note 11, at n.75.

172. Matter of Silva-Trevino, 26 I. & N. Dec. 826, 833 (B.I.A. 2016).

State X opinions that detail a burglary conviction resulting from conduct that was short of moral turpitude.

Under the realistic probability test, Brinsley might not be able to point to the facts of her own criminal case to establish that the statute can be violated without morally turpitudinous behavior. Moreover, the court would not be able to consider the entire range of hypothetical situations that could lead to a burglary conviction. As a result, Brinsley's conviction might be inaccurately labeled a crime of moral turpitude.

2. The Realistic Probability Test Places a Heavy Burden of Proof on the Noncitizen

It remains unclear whether a noncitizen will be able to satisfy the realistic probability test with facts from his own case. But the fact that the noncitizen has to point to facts of *any* case is problematic.

The INA details removability proceedings.[173] These proceedings govern both inadmissibility and deportability decisions, as both determinations can lead to a noncitizen's removal from the country. In a proceeding that determines a noncitizen's admissibility, the noncitizen always bears the burden of proof.[174] In proceedings regarding deportability, though, the INA places the burden of proof squarely on the government; the "[s]ervice has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."[175]

Despite the fact that the INA provides these removability procedures, the realistic probability test—as it is described in the *Duenas-Alvarez* case—requires the noncitizen to show that the statute under which he was convicted can be violated without morally turpitudinous conduct.[176] (He does so by citing a case where the statute has been violated without moral turpitude.[177]) When the realistic probability test is applied during a deportability proceeding, the realistic probability test may violate the

173. 8 U.S.C. § 1229a (LEXIS through Pub. L. No. 114-244) ("In general. An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.").

174. 8 U.S.C. § 1229a(c)(2) (LEXIS through Pub. L. No. 114-244) ("In the proceeding the alien has the burden of establishing— (A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or (B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.").

175. 8 U.S.C. § 1229a(c)(3) (LEXIS through Pub. L. No. 114-244).

176. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 192 (2007).

177. Dadhania, supra note 11, at 328.

INA's statutory language. Some have expressed concern that the test impermissibly shifts the government's burden of proof onto the noncitizen.[178]

The Third Circuit's *Jean-Louis v. Attorney General of the United States* decision addressed this concern:

> Also unanswered is whether the government or the alien bears the burden of demonstrating a prior application of the statute of conviction to non-turpitudinous conduct, and the applicability of unreported criminal cases . . . Although the INA allocates the burden of establishing removability to the government . . . *Duenas-Alvarez* appears to shift this burden to the alien.[179]

Even if application of the realistic probability test does not violate the INA's burden of proof provisions, the test still poses a practical problem for many noncitizens facing removal.

Although noncitizens have a right to representation in immigration court,[180] most go unrepresented.[181] And not surprisingly, those who go without representation fare much worse in court.[182] Using relief from removal and termination charges as measurements of an immigrant's success in court, one study concluded that there is a strong correlation between representation and success.[183] For example, represented noncitizens that had never been detained experienced legal success in 60% of removal cases, while similarly situated pro se litigants experienced success in just 17% of the same kind of cases.[184]

By demanding that noncitizens provide evidence of case law during removability proceedings, the realistic probability test could severely hinder a noncitizen's ability to succeed in court. Without representation,

178. McGuire, supra note 99, at 626 ("Courts criticizing the realistic probability test have noted that it may impermissibly shift the burden of demonstrating realistic probability to defendant noncitizens in deportation proceedings, even though the government has the burden of proof in demonstrating removability.").

179. Jean-Louis v. Att'y Gen. of the United States, 582 F.3d 462, 482 (3d Cir. 2009).

180. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015).

181. *Id*. at 75 ("We reveal that during the time period of our study, 63% of all immigrants went to court without an attorney. Detained immigrants were even less likely to obtain counsel—86% attended their court hearings without an attorney.").

182. *Id.* at 9 ("With respect to the efficacy of representation, we find that immigrants who are represented by counsel do fare better at every stage of the court process—that is, their cases are more likely to be terminated, they are more likely to seek relief, and they are more likely to obtain the relief they seek.").

183. *Id.* at 49 ("Using termination and relief as a combined measurement of success, we find that both detained and nondetained immigrants with counsel had higher success rates.").

184. *Id.* at 50.

many noncitizens will not have access to bodies of case law.[185] Those that do, may not know how to adequately interpret this law—as successful interpretation would require a command on the English language and an understanding of complicated legal vocabulary.[186] To put this into perspective, there are significant requirements that must be met before one can practice law. These include the following: acquisition of a bachelor's degree from an accredited institution,[187] completion of a standardized admissions test and a law school curriculum,[188] and passage of the bar examination.[189]

C. Continued Disparities Between Different Jurisdictions Requires the Development of a Truly Uniform Standard

When Attorney General Holder vacated the *Silva-Trevino I* decision, he directed the BIA to develop a uniform framework for the identification of CIMTs.[190] Strictly speaking, the BIA failed to do so. Recognizing that some circuits have rejected application of the realistic probability test, the BIA has allowed these jurisdictions to apply their existing precedent:

> In light of this disparity, and in the interest of setting forth a uniform national standard, we will apply the Supreme Court's realistic probability test in deciding whether an offense categorically qualifies as a crime involving moral turpitude, unless controlling circuit law expressly dictates otherwise.[191]

The BIA's language makes little sense. It concurrently expresses an interest in the creation of a uniform standard and allows for different jurisdictions to apply differing frameworks. That is hardly a uniform standard.

On the one hand, this is comforting, as it suggests that circuit courts that have traditionally applied the least culpable conduct test (like the

185. McGuire, *supra* note 99, at 629 ("Perhaps the greatest difficulty for most noncitizens who must demonstrate realistic probability in such removal proceedings is the pervasive lack of legal representation.").

186. McGuire, *supra* note 99, at 629 ("Even assuming a perfect sample of reported cases, the task will still be difficult. Most noncitizens' proficiency in English is limited. Noncitizens trying to demonstrate realistic probability using cases other than their own must be able to read and understand the complicated English contained in legal resources. For these reasons, noncitizens will likely have difficulty demonstrating realistic probability, even if one exists.").

187. *ABA Standards & Rules of Procedure for Approval of Law Schools*, 2016 A.B.A. SEC. LEG. EDUC. AND ADMIS. TO THE BAR 32.

188. *Id.* at 15.

189. *Id.* at 24.

190. Matter of Silva-Trevino, 26 I. & N. Dec. 826, 826 (B.I.A. 2016).

191. *Id.* at 832.

Third and Fifth Circuits) will likely continue to do so. On the other hand, the BIA's failure to create a truly uniform framework presents its own problems. First, the decision to develop a uniform framework for assessing CIMTs emerged from the circuit courts' longstanding struggle to apply the INA's moral turpitude provisions.[192] By allowing circuit courts to apply differing categorical tests, the BIA has done nothing to eliminate the "patchwork of different approaches" that Mukasey sought to address in his *Silva-Trevino I* approach.[193] Additionally, inconsistent approaches leads to a troubling realization: noncitizens' morality will be determined based on the jurisdiction's categorical approach, rather than on the conviction. One law review article stressed the importance of a uniform framework; "A uniform policy would ensure that immigration laws do not depend on the location of removal proceedings or on the wording of criminal statutes, but on a consistent nationwide application of the immigration laws."[194]

V. CONCLUSION

In an attempt to advance a national system of morals, the legislature has long decided to base noncitizens' deportability and admissibility—at least in part—on the severity of their criminal activity. But making consequential legal decisions based on a country's notions of morality is inherently problematic, as morality is a nebulous concept. It is subject to change as society changes.

Not surprisingly, then, the circuit courts have historically struggled to apply the INA's moral turpitude provisions, oftentimes adopting differing frameworks. Recognizing this problem, Attorney General Mukasey established a standard approach to identify CIMTs. Though Mukasey's *Silva-Trevino I* standard has since been vacated, its collapse has at least clarified one point: the INA forbids consideration of a noncitizen's specific conduct to determine whether a conviction involved moral turpitude. In other words, immigration judges must effectively assess a noncitizen's morality without ever considering the noncitizen's behavior.

In response to the collapse of *Silva-Trevino I*, the BIA has revisited this issue and has adopted a new, categorical approach to identify CIMTs.

192. *See* Matter of Silva-Trevino, 24 I. & N. Dec. 687, 688 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 ("The Board of Immigration Appeals and the Federal courts have long struggled in administering and applying the Act's moral turpitude provisions, and there now exists a patchwork of different approaches across the nation.").

193. *Id.*

194. Dadhania, *supra* note 11, at 355.

Under this approach, immigration judges are to apply the realistic probability test, unless controlling circuit decisions have directed otherwise. According to the BIA's latest framework, a noncitizen can only avoid removal by pointing to an actual case where the statute in question has been violated with conduct not involving moral turpitude. This standard is troubling: it lacks historical support; it places a heavy burden of proof on underrepresented noncitizens; and it has done nothing to establish a truly uniform approach to the identification of CIMTs. For these reasons, the BIA's latest framework might be classified as a violation of the immigration lenity doctrine; it has failed to interpret the INA's moral turpitude provisions in a manner favorable to noncitizens. The framework's reasonableness, then, is immediately questionable, and whether circuit courts owe it deference is unclear.

I have, therefore, advocated for the universal application of a different categorical approach—the least culpable conduct test. This test has a rich legal history and correctly places the burden of proof squarely on the government. In order to remove a noncitizen, under this test, the government must prove the following: the minimal conduct necessary for a conviction under a given statute involves moral turpitude. This is important. So long as immigration judges cannot look beyond a noncitizen's record of conviction to consider his particular behavior, the categorical approach that most favors the noncitizen must be applied. That approach is the least culpable conduct test.