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Crimmigration Beyond the Headlines: The Board of Immigration Appeals' Quiet Expansion of the Meaning of Moral Turpitude

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Introduction

The multiple entanglements of immigration and criminal law—known as "crimmigration"—include the reality that certain criminal convictions can lead to deportation, detention, and disqualification from immigration relief. "Crimes involving moral turpitude" (CIMTs) comprise one of the many categories of crimes that can elicit adverse immigration consequences, affecting thousands of people each year. But the precise meaning of moral turpitude has long been elusive. Courts have stated that CIMTs must involve an amorphously defined "culpable mental state" and "reprehensible conduct,"[1] and looked to the Board of Immigration Appeals (BIA)—a subagency of the Department of Justice that reviews immigration court decisions and is subject to some judicial review by the federal courts of appeal—to define the scope of moral turpitude. However, a series of BIA decisions over the last two years suggests that the Board has expanded the definition of moral turpitude in ways that defy common sense and undermine the prevailing methodology for assessing the immigration consequences of crime.

The methodology for determining whether a crime triggers immigration sanctions is known as the categorical approach. The categorical approach requires an immigration adjudicator to evaluate the elements of the relevant criminal and immigration statutes, but not the actual, underlying conduct. Over roughly the past decade, the Supreme Court has affirmed the use of a robust

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1. Silva-Trevino (*Silva-Trevino III*), 26 I&N Dec. 826, 834 (B.I.A. 2016).

categorical approach in the immigration context.[2] Under the categorical approach, in order to decide whether a conviction falls within a crime-based removal ground, courts must compare the elements of offenses in criminal statutes with grounds for removability in immigration statutes and follow strict analytic rules when making that comparison. Benefits of this approach include the promotion of "efficiency, fairness, and predictability in the administration of immigration law."[3] This methodology "enables aliens 'to anticipate the immigration consequences of guilty pleas in criminal court,' and to enter '"safe harbor" guilty pleas [that] do not expose the [alien defendant] to the risk of immigration sanctions.'"[4]

But the categorical approach has been the subject of controversy and contest. In 2008, the Bush Administration launched an ultimately unsuccessful attack on the use of the categorical approach by seeking to allow immigration judges to review the specifics of a person's criminal conduct when assessing the existence of a CIMT. The attempt to gut the categorical approach in the CIMT context ultimately failed, with the Board stating in 2016 that the categorical approach would apply when assessing CIMTs.

At first blush, the BIA's 2016 decision seems like progress for immigrants caught at the crossroads of immigration and criminal law. But since 2016, the BIA has quietly, yet significantly, expanded the scope of convictions that fall within the definition of a CIMT. The Board has done so while *purporting* to comply with the categorical approach. However, by expanding the very meaning of "moral turpitude," the BIA's jurisprudential interventions enable a broader spectrum of offenses to qualify as CIMTs. The subject matter has varied, including crimes involving shoplifting,[5] burglary,[6] assault,[7] animal fighting,[8] sexual assault offenses involving minors,[9] and misprision of (i.e., concealment and failure to report) a felony.[10] In doing so, the BIA is undercutting the categorical approach and engaging in questionable analysis, with negative policy consequences for immigrant populations.

Part I of this Essay provides a brief overview of the controversies associated with the use of the categorical approach in the CIMT context. Part II explains

2. *See* Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1169-70.
3. Mellouli v. Lynch, 135 S. Ct. 1980, 1987 (2015) (citing Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1725-42 (2011); and 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, 295-310 (2012)).
4. *Mellouli*, 135 S. Ct. at 1987 (alterations in original) (quoting Koh, *supra* note 3, at 307).
5. Diaz-Lizarraga, 26 I&N Dec. 847, 852 (B.I.A. 2016).
6. J-G-D-F-, 27 I&N Dec. 82, 88 (B.I.A. 2017).
7. Wu, 27 I&N Dec. 8, 15 (B.I.A. 2017).
8. Ortega-Lopez, 27 I&N Dec. 382, 398 (B.I.A. 2018).
9. Jimenez-Cedillo, 27 I&N Dec. 1, 7 (B.I.A. 2017), *vacated and remanded sub nom.* Jimenez-Cedillo v. Sessions, 885 F.3d 292 (4th Cir. 2018).
10. Mendez, 27 I&N Dec. 219, 225 (B.I.A. 2018).

how the generic definition of moral turpitude fits into the categorical approach. Part III argues that since 2016, the BIA has remained facially faithful to the categorical approach, and yet its decisions on CIMTs ultimately suggest a more sinister departure from the prevailing legal framework. In stretching the meaning of moral turpitude, the Board has made broad, lightly-supported announcements about the nature of socially reprehensible behavior, replaced the categorical approach's "minimum conduct" requirement with an unwritten "maximum conduct" test, and relied on the existence of mere criminalization as evidence of moral turpitude.

The impact of the BIA's decisions is meaningful, although these developments have gone largely unnoticed by those not lawyering at the intersection of immigration and criminal law. CIMTs tend to capture low-level offenses that can impact particularly broad swaths of the immigrant population. And CIMT assessments carry high stakes, potentially leading to deportation, detention, and disqualification from immigration relief for noncitizens. Accordingly, the Board's decisions have tremendous potential to impact the lived reality of thousands of immigrants and to facilitate the Executive Branch's goals related to mass deportation and the hypercriminalization of immigrants.

Part IV focuses on how the federal courts may ultimately respond to the BIA's expansion of CIMTs in various ways. Retroactivity analysis presents one possible, albeit limited, judicial intervention. Courts may refuse to extend *Chevron*[11] deference to the Board's definitions of moral turpitude, particularly under step two of the *Chevron* analysis. Courts can apply arbitrary and capricious review to vacate specific BIA decisions. The judiciary also has an opportunity to take constitutional challenges to the CIMT definition itself more seriously, particularly void for vagueness challenges in light of the Supreme Court's decision in *Sessions v. Dimaya.*[12]

I. Overcoming *Silva-Trevino*'s Attempt to Undercut the Categorical Approach

The CIMT analysis has been contested, and particularly so over the past decade. In December 2008, in the last months of the George W. Bush Administration, Attorney General Michael Mukasey issued a decision in *Silva-Trevino I,* a case certified from the BIA.[13] *Silva-Trevino I* attempted to revolutionize the way immigration adjudicators analyzed CIMTs. The framework set forth in *Silva-Trevino I* would have allowed immigration judges and agency decision-makers to examine the factual circumstances surrounding

11. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
12. 138 S. Ct. 1204 (2018).
13. Silva-Trevino (*Silva-Trevino I*), 24 I&N Dec. 687 (A.G. 2008), *vacated*, Silva-Trevino (*Silva-Trevino II*), 26 I&N Dec. 550, 553 (A.G. 2015).

certain convictions in order to evaluate whether a noncitizen's crime was a CIMT, thereby marking a radical departure from the categorical approach.[14]

The *Silva-Trevino I* approach did not prevail. In 2016, after rounds of federal court litigation disavowing *Silva Trevino I*, Attorney General Eric Holder vacated the original decision (in a decision known as *Silva Trevino II*),[15] which was later replaced by a third decision from the BIA (*Silva-Trevino III*). *Silva-Trevino III* affirmed the use of the "categorical approach" in cases involving CIMTs.[16] *Silva-Trevino III* also underscored the role of "minimum conduct" analysis, a component of the categorical approach that requires an adjudicator "to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction." Focusing on minimum conduct ultimately narrows the number of offenses that constitute CIMTs and avoids a scenario in which adjudicators make broad generalizations about the activity associated with a particular crime.[17]

But despite *Silva-Trevino III*, as well as the Supreme Court's endorsement of the categorical approach, the approach remains controversial, both on the BIA and amongst segments of the federal bench. Some federal judges and Board members have long questioned the categorical approach's counterfactual, equity-blind nature. At a national training of immigration judges in June 2018, Board member Roger Pauley delivered a presentation on "'avoiding the use or mitigating the effect' of the 'categorical approach.'"[18] Indeed, since *Silva-Trevino III*, the Board's decisions suggest the existence of an unstated backlash against the categorical approach. While the Board claims to adhere to the categorical approach, its jurisprudence on the definition of moral turpitude is undermining the categorical approach's tendency to ameliorate the harsh impact of the immigration laws on noncitizens with prior convictions.

II. How a Generic Definition of Moral Turpitude Fits into the Categorical Approach

For readers not immersed in the categorical approach, this Part explains how the Board's expanding definition of moral turpitude fits into the broader categorical analysis to determine which convictions are CIMTs.

In general, the categorical crimmigration analysis—i.e., the process of determining whether a particular conviction triggers an immigration sanction—tends to involve an excruciatingly granular analysis of legal elements. The first step involves identifying the so-called "generic offense." One can think

14. *See id.* at 699-704.
15. *Silva-Trevino II,* 26 I&N Dec. at 553.
16. *Silva-Trevino III,* 26 I&N Dec. at 831-33.
17. *Id.* at 831.
18. *See* Kevin Penton, *Immigration Judges Taught To Dodge "Categorical Approach,"* LAW360 (Aug. 22, 2018, 10:38 PM EDT), https://perma.cc/4DH4-TG2J.

of the generic offense as the bad conduct that Congress envisioned would lead to immigration sanctions. But any crime is more complex than its name alone suggests, and the analysis requires a consideration of the seemingly endless permutations of that crime. Take burglary, which can constitute its own deportability ground.[19] In making burglary a grounds for deportation, Congress used only the word "burglary"—but did not specify whether deportation for burglary requires an intent to commit a crime (and if so, what crime), whether burglary requires entry into a structure, whether the entry must be unlawful, and the types of structures (e.g., buildings, vessels, containers) that make it burglary. It is left up to courts to answer these questions.

A similar analysis is used for other categories of crime that trigger immigration penalties, including CIMTs. As with the burglary example, the immigration statute fails to define the meaning of "crimes involving moral turpitude." Accordingly, the BIA and federal courts have long struggled to define what a CIMT is. In *Silva-Trevino III*, the BIA reiterated the generic meaning of "moral turpitude," which is conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general,"[20] and that reflects two "essential elements: reprehensible conduct and a culpable mental state."[21]

In the past two years, almost every decision issued by the BIA has expanded the definition of moral turpitude to encompass more criminal activity.[22] Thus, under the BIA's current jurisprudence, for shoplifting to be a CIMT, property need not have been permanently taken from the owner.[23] For burglary to be a CIMT, a person need not be present at the time of the offenses so long as a person intermittently occupies the burglarized property.[24] For assault to be a CIMT, the defendant need not have possessed specific or reckless intent, so long as they possessed an awareness of the facts that could cause injury.[25] For misprision of a felony to be a CIMT, the underlying felony being concealed need not have been a CIMT.[26] For animal fighting to be a CIMT, a showing of

19. *See* 8 U.S.C. § 1101(a)(43)(G) (2017) (defining an aggravated felony as including "burglary" with term of imprisonment of one year or more); 8 U.S.C. § 1227(a)(2)(A)(iii) (including any aggravated felony as a deportability ground).
20. *Silva-Trevino III*, 26 I&N Dec. at 833 (quoting Cisneros-Guerrerro v. Holder, 774 F.3d 1056, 1058 (5th Cir. 2014)).
21. *Id.* at 834. This Essay does not question the stated definition of moral turpitude as articulated in *Silva-Trevino III*. Instead, it analyzes the way the Board has interpreted this definition.
22. *But see* Tavdidishvili, 27 I&N Dec. 142, 145 (B.I.A. 2017) (holding criminally negligent homicide does not involve a sufficiently culpable mental state to constitute a CIMT).
23. Diaz-Lizarraga, 26 I&N Dec. 847, 852-53 (B.I.A. 2016).
24. J-G-D-F-, 27 I&N Dec. 82, 88 (B.I.A. 2017).
25. Wu, 27 I&N Dec. 8, 14-15 (B.I.A. 2017).
26. Mendez, 27 I&N Dec. 219, 223 (B.I.A. 2018).

injury, intent to injure, or harm are not required.[27] At the end of the day, the broader the baseline definition of moral turpitude, the more likely that courts and adjudicators will find that related crimes are categorically CIMTs. While additional steps in the categorical approach exist to determine whether specific convictions fall within the generic definition of moral turpitude—the details of which fall outside the scope of this Essay—the expanding CIMT definition makes it difficult for those additional steps to limit the immigration consequences of criminal activity.

III. The BIA's Current, But Quiet, Expansion of the Meaning of Moral Turpitude

Since *Silva-Trevino III*, the BIA has purported to follow the rules associated with the categorical approach.[28] A closer look at the Board's decisions reveals that while the BIA has not explicitly resisted the categorical approach, the majority of its CIMT decisions issued since *Silva-Trevino III* reflect a significant expansion of the meaning of "moral turpitude." Furthermore, these decisions at times demonstrate a refusal to follow parts of the categorical approach methodology in practice, particularly the "minimum conduct" requirement.

Beyond the specific actions declared morally turpitudinous, the modes of reasoning employed by the BIA to justify its expansive approach to moral turpitude bear noting, particularly since they seem poised for replication in future cases. The Board's designation of itself as an arbiter of moral standards in the U.S., its unwritten imposition of a "maximum conduct" test that is at odds with the categorical approach's "minimum conduct" requirement, and its treatment of criminalization as evidence of moral turpitude, have permitted its move in this direction.[29] In doing so, the Board has engaged in reasoning that undermines the perception that it operates with decisional independence and as a legitimate and neutral appellate agency.

For instance, the BIA has made strong, but loosely supported, proclamations regarding what it views as morally reprehensible behavior in U.S. society in general, and on the basis of those statements, it has widened the definition of moral turpitude. *Ortega-Lopez*, a 2018 case involving a federal statute that criminalized sponsoring or exhibiting an animal in an animal fighting venture, serves as one example. The question of animal fighting was before the BIA a second time, following a remand from the Ninth Circuit in which the federal court had asserted that "harm to chickens is, at first blush, outside the normal realm" of a CIMT and emphasized that an intent to injure,

27. Ortega-Lopez, 27 I&N Dec. 382, 387-88 (B.I.A. 2018).

28. *See, e.g.*, *J-G-D-F-*, 27 I&N Dec. at 83; *Wu*, 27 I&N Dec. at 10; Jimenez-Cedillo, 27 I&N Dec. 1, 3-4 (B.I.A. 2017), *vacated and remanded sub nom.* Jimenez-Cedillo v. Sessions, 885 F.3d 292 (4th Cir. 2018).

29. *See infra* Part III.

actual injury, or harm to a protected class of victims ought to be present for a crime to be a CIMT.[30]

The Board based its conclusion that animal fighting in violation of federal law is a CIMT on the notion that certain crimes—crimes that have nothing to do with either animals or fighting, much less animal fighting—are beyond the pale of civilization. "[P]rostitution and incest," the Board declared, are "so contrary to the standards of a civilized society as to be morally reprehensible."[31] To support its conclusion that moral turpitude need not satisfy an intent/injury/harm requirement, the Board emphasized the overall reprehensibility of prostitution and incest. According to the BIA, "the socially degrading nature of commercialized sexual services and incestuous sexual relations," which offend "'the most fundamental values of society,'" make prostitution and incest reprehensible irrespective of whether injury or harm occurs.[32] Because prostitution and incest are *per se* reprehensible, the Board implied, other categories of behavior might also be so offensive as to permit dispensing with the need for intent, injury, or harm-related requirements.

The Board's rationale in *Ortega-Lopez* appears to constitute a silent departure from the categorical approach. The categorical approach calls for an analysis of whether the *minimum conduct* that could violate the statute is morally turpitudinous. By contrast, the BIA focused its attention on the *worst hypothetical conduct* associated with the statute. According to the BIA, animal fighting is like prostitution and incest—inherently reprehensible, with or without injury—and unforgivably offensive to society "because the conduct encompassed [by the statute] celebrates animal suffering for one's personal enjoyment."[33] *Ortega-Lopez* described the worst dimensions of animal fighting *in general* in provocative and graphic language, emphasizing that animal fighting involves "the exhibition and celebration of suffering," and "senseless brutality, which demonstrate[s] a reprehensible desire to relish in the infliction of pain."[34] With respect to cockfighting, it quoted the president of the Humane Society of the U.S. describing "'bloodletting, gauged eyes, punctured lungs'" and other injuries that result from cockfighting.[35] Under a proper minimum conduct analysis, the BIA would identify the least culpable conduct punishable by 7 U.S.C. § 2156(a)(1), the specific statute in question, and would ask whether the narrow act of sponsoring one animal in a fight is vile or reprehensible. Instead of the "minimum conduct" test it purports to follow, the Board has silently adopted a "maximum conduct" standard for CIMTs.

30. *Ortega-Lopez*, 27 I&N Dec. at 383 (quoting Ortega-Lopez v. Lynch, 834 F.3d 1015, 1018 (9th Cir. 2016)).

31. *Id.* at 386.

32. *Id.* (quoting Rivera v. Lynch, 816 F.3d 1064, 1075 (9th Cir. 2016)).

33. *Id.* at 387.

34. *Id.* at 388.

35. *Id.* (quoting *Animal Fighting Prohibition Enforcement Act of 2005: Hearing on H.R. 817 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 5 (2006) (statement of Wayne Pacelle, President and CEO, Humane Society of the U.S.)).

My purpose here is not to defend the practice of cockfighting. However, by emphasizing that a particular activity is irredeemably repugnant, the BIA ignores the possibility that degrees of wrongdoing exist (for instance, sponsoring a single chicken in a cockfight versus operating an entire dogfighting tournament) and that not every crime related to a particular social problem is equally loathsome.

The BIA's 2017 decision in *Jimenez-Cedillo* suffers from similar flaws, in that it points to broad statements about sexual offenses against minors *generally* to justify broadening the moral turpitude definition. There, the BIA held that sexual offenses in violation of statutes designed to protect minors are CIMTs, even if the statute does not require a culpable mental state with respect to the age of the child, so long as the statute protects children under age fourteen or applies where a significant age gap between the minor and the perpetrator exists. To justify its conclusion that a violation of the statute was categorically a CIMT, the BIA pointed to the broader evils associated with sexual assault. "Because such offenses contravene society's interest in protecting children," the Board stated, "we conclude that they are reprehensible," and "as the age gap between a victim under 16 and an older perpetrator increases, the more reprehensible the offense becomes."[36] Interestingly, the Board issued *Jimenez-Cedillo* despite its own precedent, discussed in separate parts of *Silva-Trevino I* that were not vacated, requiring a culpable mental state with respect to the age of a child.[37] The Fourth Circuit vacated the Board's decision in March 2018, finding that the BIA had failed to adequately explain—or even acknowledge—its departure from prior cases requiring the "minimum conduct" in the state to require knowledge or reckless disregard of the age of the minor.[38]

Despite the Fourth Circuit's intervention, the Board's willingness to redefine sexual offenses without citing any particular impetus for its revision is troubling, particular when placed in the context of its broader movement in this area. The fundamental purpose of the categorical approach is to avoid relying on sweeping generalizations about certain types of crime in order to assess crimmigration consequences. Nonetheless, *Jimenez-Cedillo* appeared to subvert that careful analysis in favor of blanket pronouncements about morality in the U.S. to justify scooping an increasing number of crimes into the moral turpitude definition.[39]

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36. Jimenez-Cedillo, 27 I&N Dec. 1, 5-6 (B.I.A. 2017), *vacated and remanded sub nom.* Jimenez-Cedillo v. Sessions, 885 F.3d 292 (4th Cir. 2018).

37. *Jimenez-Cedillo*, 885 F.3d at 297-99.

38. *Id.* at 298-300.

39. *Cf.* Mendez, 27 I&N Dec. 219, 222-23 (B.I.A. 2018) (misprision of felony "necessarily involves" deceit and dishonesty, despite statute's failure to explicitly include elements of deceit or dishonesty); J-G-D-F-, 27 I&N Dec. 82, 88 (B.I.A. 2017) (burglary of intermittently occupied building is morally turpitudinous because it "raises the probability of a person's presence at the time of the offense and involves the same justifiable expectation of privacy and personal security" found morally reprehensible in an earlier case).

Another way that the BIA has justified its expansion of the moral turpitude definition is by pointing to trends in the criminal law as proof of broader societal condemnation—and therefore moral reprehensibility—of particular conduct. In *Diaz-Lizarraga*, for instance, the BIA expanded the reach of moral turpitude with respect to theft crimes. In doing so, the Board changed course from nearly seventy years of its own precedent, which had previously held that theft offenses were CIMTs "if—and only if—[they are] committed with the intent to *permanently* deprive an owner of property."[40] In announcing that even shoplifting offenses for which a permanent taking of property was not an element would be CIMTs, the Board explained that the *criminal* law had changed over the prior decades to treat nonpermanent takings as equally culpable as permanent ones.[41] It discussed an amended definition of deprivation under the Model Penal Code (MPC) and observed that most states had endorsed the amended MPC definition. On the basis of the criminal law's expansion of the meaning of deprivation, the Board concluded that "a taking or exercise of control over another's property . . . is itself a potentially reprehensible act that is inherently base and contrary to the moral duties owed between persons and to society in general," regardless of whether the taking is permanent or not.[42]

A similar mode of reasoning, in which the Board relied on developments in criminal law, has formed the basis for other Board decisions. Take *Mendez*, a 2018 case in which the Board expanded the circumstances under which misprision of a felony could be a CIMT. In concluding that the CIMT designation would attach regardless of whether the felony being concealed was itself a CIMT, the BIA relied on the fact that the federal misprision statute imposes the same criminal punishment irrespective of the seriousness of the felony being concealed.[43]

The BIA has not consistently relied on criminalization in order to make a moral turpitude finding, though. In *Ortega-Lopez*, the Board acknowledged that animal fighting is not illegal in every state, but reiterated the "profoundly degrading" nature of those actions and the "clear consensus in contemporary American society" of their wrongfulness.[44] Yet after treating state criminalization as unnecessary for moral turpitude to exist, the BIA treated federal criminalization as evidence of moral turpitude, stating: "Congress' criminalization of the mere act of attending animal fighting ventures further reflects society's rejection of this activity."[45] The Board thus appears to treat criminalization as evidence of, but not a prerequisite to, the existence of moral turpitude, with no articulated rule to determine when criminalization matters.

40. Diaz-Lizarraga, 26 I&N Dec. 847, 849 (B.I.A. 2016).
41. *Id.* at 851.
42. *Id.* at 852-53.
43. *Mendez*, 27 I&N Dec. at 223.
44. Ortega-Lopez, 27 I&N Dec. 382, 390 (B.I.A. 2018).
45. *Id.* at 390 n.9.

The problem with the Board's "it is a crime, therefore it is a CIMT" analysis is that Congress set forth crimes *involving moral turpitude*—not all criminalized acts—as a trigger point for immigration sanctions. As the Ninth Circuit stated in *Robles-Urrea v. Holder*, a misprision of felony/CIMT case that the Board left intact but refused to adopt in *Mendez*, "[t]hat an offense contravenes 'societal duties' is not enough to make it a crime involving moral turpitude; otherwise, every crime would involve moral turpitude."[46]

IV. Potential Judicial Interventions and Responses: Retroactivity, Deference, Arbitrary and Capricious Review, and Vagueness

The BIA's expansion of the CIMT definition may seem like an endless exercise in legal contortionism, but the BIA's decisions impact thousands of immigration adjudications across the country. The trends identified here are not new, although they have appeared with increasing frequency since *Silva-Trevino III* and take on added urgency given the Executive Branch's immigration enforcement policy agenda. By bringing more offenses into the CIMT definition, the BIA is empowering the Department of Homeland Security to more aggressively detain, declare ineligible, and deport noncitizens.

The policy impact of the BIA's expansive approach to CIMTs will evoke a range of responses amongst readers. Still, the BIA's trajectory should raise concerns irrespective of one's position on the normative benefits and harms of immigration enforcement today. That a specialized government agency with a questionable record of decisional independence and minimal public accountability is invoking its authority to make broad generalizations about contemporary morality and societal duties—and with strong liberty interests at stake—should provide reason to pause. Relatedly, thorough decision-making and consistency are bedrock principles of a democratic legal system, yet those principles appear minimally present in the Board's decisions. And a government agency that purports to follow the legal framework in place while simultaneously subverting it—whether intentionally or not—seems to cut against basic notions of fair adjudication, regardless of one's sensibilities about immigration.

To the extent the BIA seeks to broaden the CIMT definition and strengthen its authority to widen the scope of CIMTs, its efforts could ultimately experience pushback in the federal courts in at least four ways: retroactivity, declining *Chevron* deference, arbitrary and capricious review, and vagueness.

Retroactivity. The courts could curtail the reach of BIA decisions on retroactivity grounds, as several circuits have done in response to *Diaz-*

46. Robles-Urrea v. Holder, 678 F.3d 702, 705 (9th Cir. 2012).

Lizarraga, the nonpermanent takings theft case.[47] Retroactivity is an important but limited intervention. Judicial findings of impermissible retroactive effect mean that persons with convictions received prior to the Board's decision are insulated from that holding, but do not disturb future cases arising under new decisions. Further, retroactivity typically requires an abrupt departure from well-settled, existing precedent, and a showing that the balance of reliance interests favors the noncitizen.[48] Still, there is an argument for judicial findings limiting the retroactive application of the BIA's CIMT decisions, particularly with respect to the reliance prong of retroactivity analysis, given the Court's recognition of the value of predictability and notice for noncitizens during criminal proceedings.[49]

Deference. The federal courts may decline to extend *Chevron* deference to the Board's attempts to redefine moral turpitude. In the past, the judiciary has deferred to the Board's decisions on the meaning of moral turpitude, finding that Congress left the CIMT term undefined, presumably delegated interpretive authority to the BIA, and that the Board's decisions have been reasonable even if not ideal.[50]

But *Chevron* is far from a monolithic doctrine of deference, and the courts might respond to the Board's claims of moral authority in several ways. Under *Chevron* step zero, deference may be limited only to situations in which the BIA's decisions are published with precedential designation and are directly controlling.[51]

With respect to *Chevron* step one, given that the INA uses the CIMT term without defining it, it may seem difficult to stake out the position that no deference is warranted. But Congress has, at minimum, plainly indicated that CIMTs must be distinguishable from crimes in general. To the extent the Board continues to assert that activity is morally turpitudinous because it is criminalized, then courts could find the Board's rationale to conflict with Congress's clearly articulated intent. Similarly, the courts have in categorical approach cases long stated that the BIA is not entitled to deference with respect to its direct interpretations of state criminal statutes.[52] If the Board's assessments of the scope of moral turpitude depend on its analysis of state

47. *See* Garcia-Martinez v. Sessions, 886 F.3d 1291, 1296 (9th Cir. 2018); Obeya v. Sessions, 884 F.3d 442, 448-50 (2d Cir. 2018); Lucio-Rayos v. Sessions, 875 F.3d 573, 578 (10th Cir. 2017), *cert. denied*, No. 18-64, 2019 WL 113529 (Jan. 7, 2019).

48. *See, e.g.*, Olivas-Motta v. Whitaker, 910 F.3d 1271, 1278-79 (9th Cir. 2018) (finding no retroactivity concerns where a BIA decision regarding a CIMT was counter to prior unpublished, but not published, BIA opinions); *Garcia-Martinez*, 886 F.3d at 1295 (discussing relevant factors in retroactivity analysis).

49. *See supra* note 4 and accompanying text; *see also* Jimenez-Cedillo v. Sessions, 885 F.3d 292, 300 (4th Cir. 2018).

50. *See* Marmolejo-Campos v. Holder, 558 F.3d 903, 911 (9th Cir. 2009) (en banc).

51. *See, e.g.*, Ramirez v. Sessions, 887 F.3d 693, 702-03 (4th Cir. 2018).

52. *See, e.g.*, *id.* at 701-02.

criminal laws, then an argument that the BIA's analysis falls outside the scope of its expertise exists, thereby suggesting that *Chevron* deference need not apply.

Chevron deference might face further limitations under step two, which permits deference to agency action only where the agency action constitutes a reasonable interpretation of the statute. As Judge Berzon of the Ninth Circuit stated in dissent in an en banc case finding that the Board's 1999 approach to driving under the influence on a suspended license warranted *Chevron* deference, "agencies are *not* free, under *Chevron*, to generate erratic, irreconcilable interpretations of their governing statutes and then seek judicial deference."[53] There, Judge Berzon detailed the many analytic shortcomings in the Board's reasoning, and why she and three other judges would not extend *Chevron* deference under step two, to "this latest interpretive whim of an agency that continually refuses to state a coherent definition of, or follow a coherent approach to, the vague CIMT statutory term it is charged with applying."[54] In many respects, Judge Berzon's dissent provides a roadmap for questioning the reasonableness of the Board decisions discussed in this Essay.

Arbitrary and Capricious Review. The Administrative Procedure Act (APA) states that courts have authority to "hold unlawful and set aside agency action . . . [that is] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."[55] As the Supreme Court made clear in *Judulang v. Holder*, arbitrary and capricious review applies in the immigration context, and *Judulang* arguably provides an opening for the courts to apply independent assessments of agency action.[56] Federal courts have also relied on arbitrary and capricious review to temporarily enjoin various Trump Administration policy initiatives, including: the attempted invalidation of Deferred Action for Childhood Arrivals (DACA),[57] the so-called "asylum ban" seeking to bar the granting of asylum to any individual not processed through an official port of entry,[58] and the attempt to issue expedited removal orders to nearly all asylum-seekers claiming persecution on gender- and gang-based grounds.[59]

Arbitrary and capricious review has developed into an arguably fluid doctrine requiring that any federal administrative agency action reflect

53. *Marmolejo-Campos*, 558 F.3d at 919 (Berzon, J., dissenting).

54. *Id.*

55. Pub. L. No. 79-404, § 10(e), 60 Stat. 237, 243 (1946) (codified at 5 U.S.C. § 706(2) (2017)). Some courts also treat *Chevron* step two analysis as overlapping with arbitrary and capricious review. *See Marmolejo-Campos*, 558 F.3d at 920-21 (Berzon, J., dissenting).

56. *See* 565 U.S. 42, 52-53 (2011); *see also* Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement,* 96 WASH. U. L. REV. 337, 382-88 (2018) (discussing arbitrary and capricious review in the immigration context).

57. Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 908 F.3d 476, 520 (9th Cir. 2018).

58. East Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1248 (9th Cir. 2018).

59. Grace v. Whitaker, 344 F. Supp. 3d 96, 125-27 (D.D.C. 2018), *motion for stay denied pending appeal*, No. 18-1853, 2019 WL 329572 (D.D.C. Jan. 25, 2019).

reasoned decision-making.[60] A critical component of reasoned decision-making is that agencies provide adequate explanations of their actions, including changes in course,[61] and that agencies consider all relevant factors and important aspects associated with a problem.[62] As the Fourth Circuit emphasized when vacating the Board's *Jimenez-Cedillo* decision, "[b]ecause the Board's 'path' from [its prior precedent] to Jimenez-Cedillo's [case] cannot 'reasonably be discerned,' its decision is arbitrary and capricious and must be set aside."[63] Arguably, much of the analysis discussed in Part III of this Essay could come under judicial scrutiny with arbitrary and capricious review.

Vagueness. Finally, the federal courts have an opportunity to take more seriously void for vagueness challenges to the entire CIMT definition in light of the Supreme Court's 2018 decision in *Sessions v. Dimaya*. The Court invalidated a portion of the immigration law definition of a "crime of violence" because, among other things, the federal courts had no clear way to identify the conduct entailed in the crime's "ordinary case" and found that the definition ultimately produced unconstitutional levels of unpredictability and arbitrariness.[64] At bottom, the void for vagueness doctrine is premised on providing fair notice to individuals as well as preventing the arbitrary and unfair enforcement of the law.[65] Because the CIMT definition invites judicial abstraction and the application of subjective moral standards that change and can be selectively applied over time, it arguably runs afoul of the vagueness doctrine.

Thus far, the vagueness argument as applied to CIMTs has not succeeded in the federal courts of appeal,[66] which have clung to the Supreme Court's 1951 decision in *Jordan v. DeGeorge*, where the Court declined to find the CIMT definition vague despite a vigorous and thorough dissent from Justice Jackson.[67] But on February 4, 2019, Ninth Circuit Judge William Fletcher authored a lengthy and powerful concurrence arguing that the CIMT definition as applied to crimes not involving fraud "is as vague today as it was in 1951."[68]

60. *See* Motor Vehicle Mfrs. Ass'n. of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

61. *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125-26 (2016).

62. *See State Farm*, 463 U.S. at 43.

63. Jimenez-Cedillo v. Sessions, 885 F.3d 292, 299-300 (4th Cir. 2018) (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

64. 138 S. Ct. 1204, 1213-16 (2018).

65. *See* Koh, *supra* note 2, at 1133-40.

66. *See* Martinez-de Ryan v. Sessions, 895 F.3d 1191, 1191, 1194 (9th Cir. 2018) (rejecting void for vagueness challenge to CIMT definition), *amended by and reh'g denied sub nom.* Martinez-de Ryan v. Whitaker, 909 F.3d 247 (9th Cir. 2018); *see also* Moreno v. Attorney Gen., 887 F.3d 160, 165 (3d Cir. 2018); Boggala v. Sessions, 866 F.3d 563, 567 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 1296 (2018); Dominguez-Pulido v. Lynch, 821 F.3d 837, 842 (7th Cir. 2016).

67. 341 U.S. 223, 232 (1951); *see also id.* at 243-44 (Jackson, J., dissenting).

68. *Islas-Veloz v. Whitaker*, No. 15-73120, 2019 WL 419184, at *6 (9th Cir. Feb. 4, 2019) (Fletcher, J., concurring).

The vagueness argument may still prevail in the federal courts, and should be amplified by the Board's recent decision-making on CIMTs.

Conclusion

The current legislative paralysis and toxic public discourse around immigration makes it difficult to engage in balanced, fair conversations about how, and whether, criminal convictions serve as an appropriate proxy for determining membership in the U.S. In the meantime, the Board's decisions on moral turpitude matter deeply for immigrants who call the U.S. home. The BIA is quietly but meaningfully expanding the definition of moral turpitude in the immigration context. These developments operate far below the steady stream of immigration-related daily news that has shocked segments of the public. In doing so, the Board is undercutting the operation of and values associated with the categorical approach, the prevailing legal methodology for assessing the immigration consequences of crime. The Board's trajectory on CIMTs raises questions about its institutional competence, and highlights the need for ongoing judicial review of administrative immigration decisions. The judiciary has an opportunity to provide course correction to the BIA using a variety of doctrinal tools discussed in this Essay, but in the long run, a much deeper evaluation of the immigration system is in order.