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State-by-State Morality Superseding Federal Immigration Law: An Analysis of the "Crimes Involving Moral Turpitude" Distinction Through the Lens of Post-*Dobbs* Anti-Abortion Law

Coryn Johnson†

Introduction

The term "crimes involving moral turpitude" has been used for more than a century, permeating U.S. immigration law at nearly every stage of the admission, maintenance of legal status, and naturalization processes.[1] Lacking a statutory definition, courts generally agree that crimes involving moral turpitude, or CIMTs, include crimes of violence, crimes of fraud, and crimes "thought of as involving baseness, vileness or depravity."[2] And, while they are supposed to be defined by reference to current moral standards, the judicial doctrine of *stare decisis* binds judges to centuries-old concepts of morality. Based on this fuzzy characterization, noncitizens convicted of CIMTs may be deported without a hearing following a separate aggravated felony, disqualified from asylum relief or other forms of relief from removal, or become permanently inadmissible to the United States.[3] In many ways, what does and does not constitute a CIMT has the potential to impact every noncitizen. Rooted in outdated concepts of morality, the application of CIMTs in immigration law results in inconsistencies across—and within—jurisdictions.

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1. *See, e.g.*, Immigration Act of 1917, 8 U.S.C. § 155(a) (repealed 1952).

2. Jordan v. De George, 341 U.S. 223, 226–29 (1951).

3. Rob Doersam, *Punishing Harmless Conduct: Toward a New Definition of "Moral Turpitude" in Immigration Law*, 79 OHIO ST. L. J. 547, 554 (2018).

Such inconsistencies are especially notable in the context of U.S. abortion law. Following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*,[4] abortion law is left entirely in the hands of the states, resulting in near-outright bans on abortion in some and express constitutional protection in others.[5] Thus, giving or receiving an abortion may be perfectly legal (and considered perfectly moral) in one state while simultaneously illegal (and considered immoral) in another state. Even so, because morality is hard to determine, courts rely heavily on *intent* when deciding whether a crime involves moral turpitude.[6] As such, in states that criminalize the act of seeking or performing an abortion, abortion likely falls within the CIMT determination. Thus, giving or receiving an abortion would provide grounds for inadmissibility or removal in states that criminalize the act. In sharp contrast, these very same acts enjoy state constitutional protection as enumerated *rights* in other states, resulting in no repercussions on a noncitizen's immigration status.[7] In the context of federal immigration law, this inconsistency can have life or death consequences.

This Article seeks to examine CIMTs within immigration law through the lens of post-*Dobbs* anti-abortion law. Ultimately, this Article argues that, within immigration law, the CIMT determination must consider morality through a national lens. Even so, in practice, this is near impossible, particularly regarding acts such as abortion, where morality is harshly disputed. How can something meet the definition of "baseness, vileness or depravity" when the very same act is not merely permitted but, in fact, constitutionally protected in other states? The short answer is it cannot. Still, to reach this answer, it is imperative that one considers *which* societal view on morality matters—a state's or a nation's. In the context of federal immigration law, it must be the latter.

4. 597 U.S. 215 (2022).

5. *See infra* Part I.D.

6. *See* Sotnikau v. Lynch, 846 F.3d 731, 736 (4th Cir. 2017) ("For offenses that do not involve fraud or sex, the Board and courts typically turn to scienter to determine whether a crime involves moral turpitude.").

7. *See infra* Part I.D.

I. Background

A. History of Crimes Involving Moral Turpitude

American jurisprudence has used the concept of moral turpitude for over two centuries,[8] and CIMTs have played a pervasive role within immigration law for a majority of that time.[9] The CIMT classification has consistently been used to effectuate racist and classist policies, barring large groups of noncitizens from entry on the purported basis of public safety.[10] During the seventeenth century, the British government had a policy of exporting convicts to the colonies, incentivizing colonial America to exclude immigrants bearing foreign felony convictions.[11] This British practice continued far into the nineteenth century and, at least in part to curtail "the flow of convicts sent to America involuntarily,"[12] Congress passed the Page Act.[13] The Act denied admission[14] to those who had been convicted of or received an emigration-conditioned pardon for a felony.[15] Still, the far greater motivation behind the Act was to stop the entrance of Chinese sex workers into the United States, beginning a practice of excluding

8. *See* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1010 (2012) (mapping the centuries-long application of 'moral turpitude' through the law of defamation, evidence, voting rights, and immigration).

9. S. REP. NO. 81-1515, at 350 (1950) (tracing the evolution of "crimes involving moral turpitude" in federal immigration law back to 1891).

10. *See, e.g.*, David B. Oppenheimer, Swati Prakash & Rachel Bums, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 39 (2016) (noting that the Immigration Act of 1990 focused primarily on patrolling the U.S.-Mexico border by, among other tactics, streamlining criminal and deportation procedures and increasing penalties for immigration violations).

11. Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 261 (2001) (citing Act of Mar. 3, 1875, ch. 141, 18 Stat. 477).

12. *Id.*

13. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.

14. Today, "admission" means lawful entry "into the United States after inspection and authorization by an immigration officer." Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(13)(A). Thus, the concept of "seeking admission" encompasses more than a mere attempt to obtain a visa or cross a border. Noncitizens may be denied admission into the United States if any grounds of "inadmissibility" apply to them. *See* 8 U.S.C. § 1182 (listing the grounds of inadmissibility). Those deemed inadmissible when attempting to enter the United States are subject to "expedited removal," meaning they can be removed from the country without a hearing unless they are a lawful permanent resident (LPR) or have a credible claim to asylum. DAVID WEISSBRODT, LAURA DANIELSON & HOWARD S. MEYERS III, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 257 (7th ed. 2017).

15. Doersam, *supra* note 3.

noncitizens from specific countries based on purported criminal grounds.[16] This practice continues to date.[17]

Despite this legislation, widespread reports of criminal noncitizens remaining in the United States continued into the late 1880s.[18] As a result, Congress passed the Immigration Act of 1891 and, in doing so, introduced the concept of moral turpitude into immigration law.[19] Specifically, this statute excluded "persons who [were] convicted of a felony or other infamous crime or misdemeanor *involving moral turpitude*."[20] Perhaps because "moral turpitude" had a generally understood meaning at the time, Congress did not define the term within the Act.[21]

With the turn of the twentieth century, concerns regarding the presence of immigrant criminals in the United States continued, and in 1917, Congress extended the "moral turpitude" designation from its role as grounds for inadmissibility to also serve as a basis for removal[22] (still commonly referred to as deportation[23]). However, when Congress codified "moral turpitude" into the subsequent Immigration and Nationality Act (INA) in the mid-twentieth century, the term had fallen into disuse and lost its widely

16. George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women under the Page Law, 1875-1882*, 6 J. AM. ETHNIC HIST. 28, 28 (1986) ("Horace E. Page, the California congressman who introduced it, sought to end the danger of cheap Chinese labor and immoral Chinese women."). The first restrictive federal immigration law in the United States, the Page Act effectively prohibited the entry of Chinese women, marking the end of open borders. *Id.* at 29; *see also* JOHN SOENNICHSEN, THE CHINESE EXCLUSION ACT OF 1882, at xiii (2011) (noting that the Page Act denied citizenship to those of Chinese origin and prevented Chinese women and their spouses from immigrating to the United States). Seven years later, the 1882 Chinese Exclusion Act banned immigration by Chinese men as well. SOENNICHSEN at xiv (noting that the Chinese Exclusion Act barred Chinese immigration into the United States for a decade).

17. *See, e.g.*, Protecting the Nation From Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017) (using the terrorist acts of some individuals to deny entry to entire country populations).

18. Doersam, *supra* note 3, at 554.

19. *Id.*

20. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084 (emphasis added).

21. At the time, the term 'moral turpitude' was used in everyday vernacular, and Americans had a common understanding of its definition. *See* Harms, *supra* note 11, at 261 (citing Act of Mar. 3, 1875, ch. 141, 18 Stat. 477); *see* Simon-Kerr, *supra* note 8, at 1017–19.

22. Abel Rodriguez & Jennifer A. Bulcock, *Legislating Morality: Moral Theory and Turpitudinous Crimes in Immigration Jurisprudence*, 53 LOY. L.A. L. REV. 39, 44–45 (2019); Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889.

23. Also referred to as deportation, "removal is the expulsion of a non-citizen who has already been admitted to the United States." WEISSBRODT, *supra* note 14, at 287. Noncitizens who are present in the United States in violation of the INA or any other law of the United States are removable. 8 U.S.C. § 1227(a)(1)(B).

understood meaning.[24] Despite the term's falloff, Congress failed to provide "moral turpitude" with a statutory definition.[25] In fact, it has yet to do so,[26] and "Congress has never provided any guidance regarding the term's meaning or scope."[27]

As a result of Congress's inaction on the topic, modern courts are left questioning how to apply a term that lost its meaning centuries ago. The Board of Immigration Appeals (BIA)[28] has described "moral turpitude" as a "nebulous concept."[29] Even so, this description grossly understates the universal confusion courts have when applying this term to the criminal convictions of noncitizens—an issue that stems from the term's basis in morality. As noted by one commentator, "[t]he term 'moral turpitude' is probably incapable of precise definition in a legal sense, since it basically involves moral or ethical judgments."[30] Despite this major—and well-documented—confusion, the "moral turpitude" distinction continues to occupy a prominent place within U.S. immigration law.[31]

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24. Doersam, *supra* note 3, at 554.

25. *See* Harms, *supra* note 11, at 259 (noting that, instead, "Congress left the power to define 'crimes involving moral turpitude' to the judicial system").

26. *See* Rodriguez et al., *supra* note 22, at 46 ("Since the inception of its appearance within United States immigration law, it has lacked a statutory definition." (citing H.R. REP. NO. 64-10384, at 8 (1916) ("You know that a crime involving moral turpitude has not been defined. No one can really say what is meant by saying a crime involving moral turpitude.")).

27. *Id.*

28. The BIA is an administrative appellate body within the United States Department of Justice. The BIA is responsible for reviewing U.S. immigration court decisions. To appeal a decision by the BIA, a party must petition for review to the associated federal circuit court. *Board of Immigration Appeals*, U.S. DEPT. OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/VCF8-F67B].

29. *In re* Tran, 21 I. & N. Dec. 291, 292 (B.I.A. 1996).

30. Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of [§§] 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. [§§] 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime[s]*, 23 A.L.R. Fed. 480 § 2[a] (1975 & 2021 Supp.).

31. *Id.*; *see also, e.g.,* Jordan v. De George, 341 U.S. 223, 233 (1951) (Jackson, J., dissenting) ("Congress knowingly conceived [the term CIMT] in confusion. During the hearings of the House Committee on Immigration, out of which eventually came the Act of 1917 in controversy, clear warning of its deficiencies was sounded and never denied."); Barbosa v. Barr, 926 F.3d 1053, 1061 (9th Cir. 2019) (Berzon, J., concurring) (arguing that after "tortured attempts to find logical consistency" in the moral turpitude designation, "the time is ripe for reconsideration" of the issue, particularly in light of recent void-for-vagueness determinations in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)); Marmolejo-Campos v. Holder, 558 F.3d 903, 921 (9th Cir. 2009) (Berzon, J., dissenting) (deeming the Board's precedential case law regarding the meaning of moral turpitude "a mess of conflicting authority"); Arias v. Lynch, 834 F.3d 823, 835

B. Modern Application of Crimes Involving Moral Turpitude in Immigration Law

i. Statutory Basis

The CIMT classification permeates nearly every aspect of U.S. immigration law. In the United States, conviction of a crime involving moral turpitude can make one deportable,[32] and merely admitting to the commission of a crime involving moral turpitude can bar a noncitizen from entering the country[33] or from eligibility for adjusting to permanent resident status.[34] In addition, committing a crime involving moral turpitude may subject a noncitizen to mandatory detention[35] or disqualify one from naturalization for failure to meet the "good moral character" requirement.[36] The concept of "turpitudinous conduct" exists at each stage of the deportation process, and it is nearly impossible for a noncitizen to obtain and maintain legal status in the United States without avoiding "turpitudinous conduct."[37]

Despite its pervasive presence in immigration law, the INA does not define "moral turpitude." And, outside of a few *per se*

(7th Cir. 2016) (Posner, J., concurring) ("The concept of moral turpitude, in all its vagueness, rife with contradiction, a fossil, an embarrassment to a modern legal system, continues to do its dirty work.").

32. 8 U.S.C. § 1227 (a)(2)(A)(i) ("Crimes of moral turpitude. Any alien who—(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255, of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.").

33. 8 U.S.C. § 1182 (a)(2)(A)(i) ("[A]ny alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible."). If the crime was committed by an individual under the age of eighteen and more than five years before the individual's application for a visa or other documentation, or if the maximum penalty for the crime does not exceed one year of imprisonment and the noncitizen was sentenced to a term of six months or less, the noncitizen is exempted from the admissibility bar. 8 U.S.C. § 1182 (a)(2)(A)(ii).

34. *See In re* Ortega-Lopez, 27 I. & N. Dec. 382 (B.I.A. 2018) (holding that any conviction of a CIMT is a bar to this relief, unless (1) it is the only CIMT the person has committed, (2) a sentence of six months or less was imposed, and (3) the offense carries a maximum possible sentence of 364 days or less).

35. 8 U.S.C. § 1226 (c)(1) ("The Attorney General shall take into custody any alien who—(A) is inadmissible by reason of having committed any offense covered in [8 U.S.C. § 1182 (a)(2)], [or] (B) is deportable by reason of having committed any offense covered in [8 U.S.C. § 1227 (a)(2)(A)(i)].").

36. 8 U.S.C. § 1101(f) (explaining that, for purposes of the INA, "[n]o person shall be regarded as, or found to be, a person of good moral character who . . . is, or was—(3) a member of one or more of the class of persons, whether inadmissible or not, described in [8 U.S.C. § 1182(a)]").

37. *See* Rodriguez, *supra* note 22, at 42.

classifications,[38] there exists no definitive list dictating which crimes do and do not involve "moral turpitude." As a result, courts have worked for centuries to create a meaningful definition of the term.[39]

ii. *Matter of Silva-Trevino* and Other Relevant Case Law

Case law does not clarify the definition of moral turpitude.[40] Courts generally employ the traditional characterization of moral turpitude, defining such as 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."[41] Additional characterizations include conduct which "shocks the public conscience"[42] or is "contrary to the accepted and customary rule of right and duty between man and man."[43]

That said, even provided these characterizations, the definition remains confusingly vague[44]—though not unconstitutionally so.[45] Courts have largely skirted the challenges associated with determining what is base, vile, or depraved by prohibiting *per se* most activity involving fraudulent[46] or sexually

38. *See* Jordan v. De George, 341 U.S. 223, 226–29 (1951) (noting that violent crimes and crimes involving fraudulent behavior are commonly considered CIMTs).

39. Doersam, *supra* note 3, at 551 (citing Arias v. Lynch, 834 F.3d 823, 825 (7th Cir. 2016)).

40. *See* Rodriguez, *supra* note 22, at 49.

41. *In re* Silva-Trevino, 26 I. & N. Dec. 826, 833 (B.I.A. Oct. 12, 2016); *see also Moral Turpitude*, BLACK'S LAW DICTIONARY (4th ed. 1968) ("An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."); *see also, e.g.*, *Arias*, 834 F.3d at 829 (citing the same definition); Rohit v. Holder, 670 F.3d 1085, 1089 (9th Cir. 2012) (same definition); Matter of Franklin, 20 I. & N. Dec. 867, 868 (B.I.A. 1994) (same definition); *In re* Flores, 17 I. & N. Dec. 225, 227 (B.I.A. 1980) (same definition); *Jordan*, 341 U.S. at 226 (same definition).

42. Sotnikau v. Lynch, 846 F.3d 731, 735–36 (4th Cir. 2017) (quoting Medina v. United States, 259 F.3d 220, 227 (4th Cir. 2001)).

43. Smith v. U.S. Att'y Gen., 983 F.3d 1206, 1210 (11th Cir. 2020) (quoting Keungne v. U.S. Att'y Gen., 561 F.3d 1281, 1284 (11th Cir. 2009)).

44. *See Jordan*, 341 U.S. at 233 (Jackson, J., dissenting).

45. *Id.* at 232 (holding that the phrase "crime involving moral turpitude" was not unconstitutionally vague); *see also* Islas-Veloz v. Whitaker, 914 F.3d 1249, 1250 (9th Cir. 2019) (holding that the Supreme Court's more recent decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) did not reopen inquiry into the constitutionality of the phrase).

46. *Jordan*, 341 U.S. at 229 (Jackson, J., dissenting) ("[F]raud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.").

illicit conduct[47] and, at the periphery of those categories, relying primarily on the *mens rea,* or intent, associated with a given offense.[48]

Outside of these *per se* categories,[49] courts generally use a two-pronged framework to determine whether conduct falls within the bounds of moral turpitude. "A crime involving moral turpitude must involve conduct that not only violates a statute but also independently violates a moral norm. That is to say, to involve moral turpitude, a crime requires two essential elements: a culpable mental state and reprehensible conduct."[50] Thus, in short terms, turpitudinous conduct is that which is "base, vile or depraved," (i.e., reprehensible) *and* knowingly committed (i.e., committed with a "culpable mental state").

Even so, in many cases, the *mens rea* requirement seems to play the deciding role, dubbing conduct that arguably does not rise to the level of "depravity" as morally turpitudous simply because it was committed knowingly in violation of some existing criminal code.[51] Criminally reckless conduct may also meet the *mens rea* requirement for crimes involving moral turpitude.[52] In contrast, crimes involving criminal negligence are generally excluded from the morally turpitudinous classification.[53] Inheriting this

47. *See, e.g.*, Reyes v. Lynch, 835 F.3d 556, 560 (6th Cir. 2016) ("Specifically, the BIA has found that the act of prostitution is a CIMT." (citing *In re* W, 4 I. & N. Dec. 401, 402 (B.I.A. 1951))).

48. Sotnikau v. Lynch, 846 F.3d 731, 736 (4th Cir. 2017) ("For offenses that do not involve fraud or sex, the Board and courts typically turn to scienter to determine whether a crime involves moral turpitude.").

49. *See* Rodriguez, *supra* note 22, at 49–50 ("Antiquated honor norms, rather than contemporary moral principles, form the basis for these per se categories.").

50. *Sotnikau*, 846 F.3d at 735–36 (internal citations omitted).

51. *See In re* Perez-Contreras, 20 I. & N. Dec. 615, 618 (B.I.A. 1992) ("Where knowing or intentional conduct is an element of an offense," the BIA has "found moral turpitude to be present."); *see also, e.g.*, Arias v. Lynch, 834 F.3d 823, 835 (7th Cir. 2016) (remanding the case for reexamination under the *Silva-Trevino* categorical framework following the immigration judge's determination that the felony charge of knowingly using a false social security number constitutes a crime involving moral turpitude); Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929) (finding that a misdemeanor conviction of intentional 'petit larceny' to be a crime involving moral turpitude); *Jordan*, 341 U.S. at 223 (finding that the crime of conspiracy to defraud the United States of taxes on distilled spirits constituted a crime involving moral turpitude); Velez-Lozano v. I.N.S., 463 F.2d 1305 (D.C. Cir. 1972) (finding criminalized consensual sodomy to be morally turpitudinous).

52. *In re* Medina, 15 I. & N. Dec. 611, 613–14 (B.I.A. 1976) (explaining "that moral turpitude can lie in criminally reckless conduct" because "a corrupt or vicious mind is not controlling" in determining whether assault with a deadly weapon is morally turpitudinous).

53. *See, e.g.*, Rodriguez-Castro v. Gonzales, 427 F.3d 316, 323 (5th Cir. 2005) (recognizing that "negligence-based crimes usually do not amount to [crimes

definition, *Matter of Silva-Trevino* (*"Silva-Trevino III"*) lays the present framework for determining whether a specific crime involves moral turpitude.[54]

In *Matter of Silva-Trevino* ("*Silva-Trevino II*"),[55] the Attorney General ordered the BIA to develop a uniform standard to determine whether a particular criminal offense constitutes a crime involving moral turpitude.[56] In response, the BIA "conclude[d] that the categorical and modified categorical approaches apply" when determining whether a noncitizen's criminal conviction constitutes a crime involving moral turpitude.[57] For the purposes of this Article, only the categorical approach is of interest.

Under the categorical approach, using what has been dubbed the "realistic probability test," the court asks whether the minimum conduct that has a realistic probability of being prosecuted under the statute involves moral turpitude.[58] Again, this itself requires two determinations: (1) a culpable mental state, or *mens rea*, on behalf of the respondent; and (2) "inherently base, vile, or deprave[d]" conduct that is "contrary to the accepted rules of morality."[59] In making this determination, the court may only look to the language of the state criminal statute *itself*, without considering any of the underlying facts of the specific case at hand.[60] In other words, the court first determines the minimum conduct likely to be prosecuted under the statute. Next, the court decides if the minimum conduct (1) requires *mens rea* and (2) is inherently base, vile, or depraved. If the answer to both is affirmative, the minimum conduct potentially prosecuted under the statute *does* involve moral turpitude—then that crime is automatically one involving moral turpitude.

For example, in *Zarate v. United States Attorney General*, the Eleventh Circuit held that the BIA failed to properly apply the categorical approach in finding that a noncitizen's use of another person's social security card was a crime involving moral

involving moral turpitude]").

54. 26 I. & N. Dec. 826 (B.I.A. Oct. 12, 2016) [hereinafter *Silva-Trevino III*].

55. 26 I. & N. Dec. 550 (A.G. 2015) [hereinafter *Silva-Trevino II*].

56. *Silva-Trevino III*, 26 I. & N. Dec. at 826.

57. *Id.* at 830.

58. *Id.* at 831.

59. Zarate v. U.S. Att'y Gen., 26 F.4th 1196, 1208 (11th Cir. 2022).

60. *Silva-Trevino III*, 26 I. & N. Dec. at 831; *see also* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) (explaining that to show a realistic probability that the statute includes conduct not involving moral turpitude, the respondent "must at least point to his own case or other cases in which the state courts in fact did apply the statute in a special (nongeneric) manner for which he argues"); Moncrieffe v. Holder, 133 S. Ct. 1678, 1694–95 (2013).

turpitude.[61] Under the categorical approach, the Eleventh Circuit explained that the BIA should have looked *only* to the elements of Mr. Zarate's conviction, which included "(1) false representation of a Social Security number, (2) with intent to deceive, (3) for any purpose."[62] Without sufficient analysis, the BIA had incorrectly equated "intent to deceive" with "fraud"—a *per se* crime involving moral turpitude.[63] However, the Eleventh Circuit explained that while these elements *could* encompass fraudulent activity, the categorical approach analyzes the "*least* culpable conduct necessary to sustain a conviction."[64] Such an analysis would include "the false representation of the Social Security number for 'any other purpose,' i.e., for a *non-fraudulent purpose*."[65] Thus, reasoned the Eleventh Circuit, Mr. Zarate's conviction was not a *per se* crime involving moral turpitude.[66] Because the BIA failed to *separately* analyze (1) whether Mr. Zarate exhibited a culpable mental state and (2) whether his "offense was inherently base, vile, or depraved, and contrary to the accepted rules of morality," but instead incorrectly equated his false representation to fraud, the Eleventh Circuit remanded the case for proper review.[67]

Despite *Silva-Trevino*'s attempt "to develop a uniform standard for determining whether a particular criminal offense is a crime involving moral turpitude," inconsistencies prevail.[68] The *Silva-Trevino* board expressly acknowledged the limitations of establishing uniformity in the application of such an ambiguous term, and the "[f]ederal courts of appeals differ on whether to extend the realistic probability test to the context of crimes involving moral turpitude."[69] Though most circuit courts follow the realistic probability test,[70] the Third and Fifth Circuits have

61. *Zarate*, 26 F.4th 1196 (11th Cir. 2022).

62. *Id.* at 1202 (citing United States v. Harris, 376 F.3d 1282, 1291 (11th Cir. 2004)).

63. *Id.*

64. *Id.* at 1203 (quoting Gelin v. U.S. Att'y Gen., 837 F.3d 1236, 1241 (11th Cir. 2016) (emphasis added)).

65. *Zarate*, 26 F.4th at 1203. This meets the realistic probability standard, as it showcases conduct outside the scope of 'moral turpitude.'

66. *Id.*

67. *Id.* at 1208 (internal citations omitted).

68. *Silva-Trevino III*, 26 I. & N. Dec. at 826.

69. *Id.* at 831 ("[T]o provide a uniform national framework for deciding whether a crime involves moral turpitude—*to the extent that is possible in light of divergent rulings in the Federal appellate courts*—we will apply the categorical and modified categorical approaches as defined by the recent Supreme Court precedent.") (emphasis added).

70. Four circuits have explicitly adopted the realistic probability standard. *See* Cano-Oyarzabal v. Holder, 774 F.3d 914, 917 (7th Cir. 2014); Leal v. Holder, 771

expressly rejected this test as applied to crimes involving moral turpitude.[71]

C. The Relationship Between Crimes Involving Moral Turpitude and Abortion

Following the decision in *Dobbs v. Jackson Women's Health Org*.[72] and the resulting rapid criminalization of abortion by many states,[73] immigration judges may hold that illegal abortions constitute crimes involving moral turpitude, making noncitizens convicted under these statutes inadmissible or subject to removal.[74] That said, case law interpreting whether providing or receiving an abortion constitutes a crime involving moral turpitude is slim. Nearly fifty years ago, *Roe v. Wade* held that, during the first trimester, a state government could place no restrictions on women's ability to choose to abort pregnancies other than imposing minimal medical safeguards.[75] This holding was affirmed in 1992 by *Casey v. Planned Parenthood*, in which the majority further noted that constitutional protections applied to those seeking an abortion up until fetal viability.[76] Thus, during the nearly fifty years between *Roe* and *Dobbs*, states could not criminalize abortion prior to fetal viability. During this period, abortion law jurisprudence remained largely undeveloped.

F.3d 1140, 1145 (9th Cir. 2014); Villatoro v. Holder, 760 F.3d 872, 877–79 (8th Cir. 2014); Rodriguez-Heredia v. Holder, 639 F.3d 1264, 1267 (10th Cir. 2011). Another four circuits follow the "categorical approach based on Supreme Court precedent, without expressly addressing the realistic probability test." *Silva-Trevino III*, 26 I. & N. Dec. at 831; *see, e.g.*, Walker v. U.S. Att'y Gen., 783 F.3d 1226, 1229 (11th Cir. 2015); Efstathiadis v. Holder, 752 F.3d 591, 595 (2d Cir. 2014); Yeremin v. Holder, 738 F.3d 708, 715 (6th Cir. 2013); Prudencio v. Holder, 669 F.3d 472, 484 (4th Cir. 2012). The First Circuit looks "to the inherent nature of the crime conviction" when applying the categorical approach. *Silva-Trevino III*, 26 I. & N. Dec. at 831 ("In evaluating the criminal statute under the categorical approach, *unless circuit court law dictates otherwise*, we apply the realistic probability test." (citing Da Silva Neto v. Holder, 680 F.3d 25, 29 n.7 (1st Cir. 2012))) (emphasis added).

71. *Silva-Trevino III*, 26 I. & N. Dec. at 832. *See also* Jean-Louis v. U.S. Att'y Gen., 582 F.3d 462, 481–82 (3d Cir. 2009) (declining to use the realistic probability test in the context of crimes involving moral turpitude); Gomez-Perez v. Lynch, 829 F.3d 323, 327 (5th Cir. 2016) (labeling an offense as a crime involving moral turpitude if "the minimum reading of the statute [of conviction] necessarily reaches *only* offenses involving moral turpitude").

72. 142 S. Ct. 2228 (2022).

73. *See infra* notes 108–09.

74. *See* Asees Bhasin, Dobbs v. Jackson Women's Health *and Its Devastating Implications for Immigrants' Rights*, HARVARD L. PETRIE-FLOM CTR.: BILL OF HEALTH (Sept. 27, 2022), https://blog.petrieflom.law.harvard.edu/2022/09/27/dobbs-immigrants-rights/ [https://perma.cc/V5EV-3G7T].

75. 410 U.S. 113 (1973).

76. 505 U.S. 833 (1992).

There is little—if any—historical evidence indicating that *receiving* an abortion was considered a crime involving moral turpitude.[77] One of the earliest mentions of abortion in the context of crimes involving moral turpitude occurred in *Matter of M,* a 1946 decision by the Board of Immigration Appeals finding that to "procure a miscarriage," (i.e., the performance of an abortion—as opposed to seeking or receiving an abortion) constituted a crime involving moral turpitude.[78] In *Matter of M*, the respondent, a noncitizen and native of Jamaica, "was arrested in 1942 on a charge of abortion."[79] He was later convicted and sentenced to "a term of not less than 4 nor more than 8 years."[80] The respondent had also been arrested in 1927 for performing an abortion.[81] However, "the District Attorney permitted him to plead guilty to assault," where he was then sentenced to "not less than 2 nor more than 5 years."[82] The assault conviction covered two other indictments: "manslaughter, first degree, and, feloniously possessing a narcotic and anaesthetic [sic]."[83] Because the respondent could only be deported if each of his two charges involved moral turpitude, the BIA analyzed whether both abortion and assault met this standard.[84] The BIA first found that "[a]bortion has been held to be a crime involving moral turpitude,"[85] seemingly marking the crime as one that would be considered to *categorically* involve moral turpitude under the modern legal framework.[86] In contrast, the BIA next noted "that the crime of assault in the second degree . . . does not *necessarily* involve moral turpitude."[87] However, because the respondent committed "assault with intent to commit the felony of

77. Bhasin, *supra* note 74.

78. *In re* M, 2 I. & N. Dec. 525, 528 (B.I.A. 1946) ("'Procuring or attempting to procure a miscarriage of a woman', is the felony defined in section 80. We therefore conclude that the alien was convicted of assault with intent to commit the felony of abortion. Since abortion is a crime involving moral turpitude, the conviction for assault with intent to commit abortion under section 242, subdivision (5) of the New York Penal Law also involves moral turpitude.").

79. *Id.* at 525.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 526.

84. *Id.*; *see* Fong Haw Tan v. Phelan, 333 U.S. 6, 9–10 (1948) (authorizing "deportation only where a[] [noncitizen] having committed a crime involving moral turpitude and having been convicted and sentenced, *once again* commits a crime of that nature and is convicted and sentenced for it") (emphasis added).

85. *In re* B, 56113/313 (renumbered AR-5695775) (June 24, 1943).

86. *See Silva-Trevino III*, 26 I. & N. Dec. at 846.

87. *In re M*, 2 I. & N. Dec. at 526 (emphasis added) (citing U.S. *ex rel.* Zaffarano v. Carsi, 63 F.2d 757 (2d Cir. 1933)).

abortion"—already determined to be a crime involving moral turpitude—the respondent's assault conviction also involved moral turpitude.[88] As such, the respondent was ordered "deported to Jamaica."[89]

Foreign convictions of crimes involving moral turpitude also provide grounds for inadmissibility and removability. For example, in the 1961 case *Matter of K*, the respondent, a native of the Soviet Union, was convicted of "the crime of abortion in violation of paragraphs 218 and 47 of the German Criminal Code."[90] As in *Matter of M*, the court noted, without further explanation, that "[t]he crime [of abortion] does involve moral turpitude."[91] However, the respondent in *Matter of K* was not deported, as her crime had been pardoned by the United States High Commissioner for Germany.[92] Unlike the crime of procuring an abortion, courts have held that the crime of *encouraging* abortion does not *per se* involve moral turpitude. For example, in *Matter of Cassisi*, decided in 1963, the BIA found that "the section of law of which the respondent was convicted [was] a broad, divisible statute which enumerates several acts, the commission of which may or may not involve moral turpitude."[93] Because the record of conviction did not provide enough information to show whether the respondent's particular acts involved moral turpitude, the proceedings were dismissed.[94]

However, all these cases precede modern CIMT analysis, which places greater emphasis on *mens rea* and the resulting societal harm attributed to a crime. Specifically, these cases lack express analysis under the categorical approach, as defined in *Silva-Trevino III*.[95] Likely due to abortion's constitutionally-protected status recognized in *Roe v. Wade*[96] and *Casey v. Planned*

88. *Id.* at 528.

89. *Id.* at 529.

90. 9 I. & N. Dec. 336, 336 (B.I.A. 1961).

91. *Id.*

92. *Id.* at 339.

93. 10 I. & N. Dec. 136, 137 (B.I.A. 1963). *See* CONN. GEN. STAT. § 53-31 (1989) (repealed 1990) ("Any person who, by publication, lecture or otherwise or by advertisement or by sale or circulation of any publication, encourages or prompts to the commission of the offenses described in section 53-29 [Attempt to Procure Miscarriage] or 53-30 [Abortion or Miscarriage], or who sells or advertises medicines or instruments or other devices for the commission of any of said offenses except to a licensed physician or to a hospital approved by the department of health services, or who advertises any so-called monthly regulator for women, shall be fined not more than five hundred dollars or imprisoned for not more than one year or both.").

94. 10 I. & N. Dec. at 138.

95. *See supra* Part II.B.ii.

96. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022), *modified*, Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833

Parenthood,[97] no cases since have analyzed abortion as a CIMT. As such, the few decisions analyzing abortion as a CIMT hold little precedential weight.

D. Post-Dobbs *Abortion Law*

On June 24, 2022, the Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Org.*,[98] which overturned *Roe v. Wade*[99] and *Casey v. Planned Parenthood*[100] and held that no right to an abortion exists under the Constitution.[101] The sweeping decision returned the question of abortion's legality to the states, resulting in vastly differing protections (or prohibitions), time constraints, conditions under which abortions can be obtained, and criminal standards and means of enforcement.[102] Those advocating for the criminalization of abortion often do so on alleged moral grounds.[103] In fact, the *Dobbs* majority opinion flaunts language of morality throughout.[104] States criminalize abortion because an alleged majority of their populations consider the act immoral,[105]

(1992).

97. 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

98. 597 U.S. 215 (2022).

99. 410 U.S. 113 (1973).

100. 505 U.S. 833 (1992).

101. *Dobbs*, 597 U.S. at 230.

102. *See, e.g.*, state statutes cited *infra* note 109 (criminalizing abortion in their respective states) and state common law cited *infra* note 115 (finding a constitutionally protected right to abortion in their respective state constitutions).

103. *America's Abortion Quandary*, PEW RSCH. CTR. (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/ [https://perma.cc/WQA6-3YZH].

104. *See, e.g., Dobbs*, 597 U.S. at 223 ("Abortion presents a profound moral issue on which Americans hold sharply conflicting views."); *id.* at 255 ("Men and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy even in its earliest stage." (citing Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992))), 257 ("None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion."), 258 ("Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless."), 269 ("[T]he [*Roe*] Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.").

105. *See, e.g.*, *Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act*, OFF. ALA. GOVERNOR (May 15, 2019) https://governor.alabama.gov/newsroom/2019/05/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act/ [https://perma.cc/6D2U-TSRJ] ("[T]his legislation stands as a powerful testament to Alabamians' deeply held belief that every life is precious and that every life is a sacred gift from God."); *see also Views About Abortion By State*, PEW RSCH. CTR.: RELIGIOUS LANDSCAPE STUDY, https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-abortion/by/state/ [https://perma.cc/X2FH-TNPC]

and receiving or procuring an abortion clearly involves intent.[106] Thus, in states that criminalize abortion, such conduct likely falls within the purview of what would be deemed a crime involving moral turpitude.

Following the decision in *Dobbs* and the 2022 November elections, twelve states have passed a total ban on abortion,[107] with limited exceptions for rape, incest, or the life of the mother.[108] This ban is effectuated either through criminalization of administering an abortion,[109] or both administering and receiving an abortion.[110] That said, some of these statutes are in partial limbo under preliminary injunctions by state district courts. For example, an Idaho district court judge issued a preliminary injunction on August 24, 2022, partially blocking the enforcement of Idaho Code § 18-622, which outright banned the procurement and receival of an

(showing that, in most states that have criminalized abortion, the majority of residents agreed that abortions should be illegal in all or most cases).

106. *See infra* Part III.A.i. (discussing the *mens rea* requirement of different state anti-abortion statutes).

107. There is significant overlap between anti-abortion and anti-immigration ideology. *See* Bhasin, *supra* note 74 (noting the long-held, dangerous stereotypes of immigrant parents as "being hyper-fertile and giving birth to 'anchor babies'"). Former President Donald Trump campaigned with the promise to restrict abortion and immigration. Many of his supporters "underst[ood] opposition to abortion and immigration as intertwined—as a means of preserving white, Christian America." Reva Siegel & Duncan Hosie, *Trump's Anti-Abortion and Anti-Immigration Policies May Share a Goal*, TIME (Dec. 13, 2019), https://time.com/5748503/trump-abortion-immigration-replacement-theory/ [https://perma.cc/W35X-LD5R]. He largely kept this promise, appointing federal judges hostile to reproductive rights and issuing sweeping change to United States immigration law based on the demonization of immigrants. This ideology is reflected in the dangerous emergence of the 'Replacement Theory.' "An extension of colonialist theory, [the 'Replacement Theory'] is predicated on the notion that white women are not having enough children and that falling birthrates will lead to white people around the world being replaced by nonwhite people." Nellie Bowles, *'Replacement Theory,' a Racist, Sexist Doctrine, Spreads in Far-Right Circles*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/2019/03/18/technology/replacement-theory.html [https://perma.cc/LPK2-YA2N].

108. As of November 2, 2023, Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia have all passed legislation that presently criminalizes abortion—regardless of the age of the fetus—within the respective state penal code. *Abortion Policy Tracker*, *State Health Facts*, KFF, https://www.kff.org/other/state-indicator/abortion-policy-tracker/ [https://perma.cc/9EHL-TDER].

109. *See* ALA. CODE § 26-23H-4 (2019) (Alabama); ARK. CODE ANN. § 5-61-304 (2023) (Arkansas); KY. REV. STAT. ANN. § 311.787 (West 2022) (Kentucky); LA. STAT. ANN. § 40:1061 (2022) (Louisiana); MISS. CODE ANN. § 41-41-45 (2023) (Mississippi); MO. REV. STAT. § 188.017 (2019) (Missouri); OKLA. STAT. tit. 63, § 1-746.7 (2023) (Oklahoma); S.D. CODIFIED LAWS § 34-23A-69 (2023) (South Dakota); TENN. CODE ANN. § 39-15-211 (2023) (Tennessee); TEX. HEALTH & SAFETY CODE ANN. § 171.204 (West 2021) (Texas); W. VA. CODE § 16-2R-3 (2022) (West Virginia).

110. *See* IDAHO CODE ANN. §§ 18-605, 606 (2023).

abortion.[111] The injunction prevents the enforcement of the ban when an abortion is necessary to avoid: (1) seriously jeopardizing the health of the pregnant person, (2) a serious impairment to bodily functions of the pregnant person, or (3) a serious dysfunction of body part of the pregnant person[112] (pursuant to the Emergency Medical Treatment and Labor Act (EMTALA)[113]). Though the ruling barred the state from enforcing the abortion ban in medical emergencies, nearly all abortions remain illegal in Idaho.[114]

In sharp contrast to those banning abortion, nearly one-third of states have recognized protections for the right to receive an abortion within their own state constitutions.[115] For example, in 1995, the Minnesota Supreme Court interpreted the state constitutional right to privacy to include the right to receive an abortion up to twenty weeks after conception.[116] This right not only permits abortions up to twenty weeks following conception, but also "protects the woman's *decision* to abort" and requires *practical access* to abortions.[117] Practical access to the right to an abortion means more than the mere freedom from criminal liability in

111. United States v. Idaho, 623 F. Supp. 3d 1096, 1117 (D. Idaho 2022), *reconsideration denied*, No. 1:22-CV-00329-BLW, 2023 WL 3284977 (D. Idaho May 4, 2023), *cert. granted before judgment sub nom.* Moyle v. United States, No. 23A469, 2024 WL 61828 (U.S. Jan. 5, 2024), *cert. granted before judgment*, No. 23A470, 2024 WL 61829 (U.S. Jan. 5, 2024).

112. *Id.* (granting a preliminary injunction enjoining the state and its officers from enforcing Idaho Code § 18-622 when the health of the pregnant person is at risk, on grounds that it may violate EMTALA).

113. 42 U.S.C. § 1395ddI(1)(A)(i)–(iii).

114. United States v. Idaho, 623 F. Supp. 3d at 1117; *see also* Rebecca Boone, *Idaho Asks Judge to Rethink Temporary Block on Abortion Ban*, AP NEWS (Sept. 22, 2022), https://apnews.com/article/abortion-health-religion-idaho-c3c2df4884f16dbf6cea3f3c854663b4 [https://perma.cc/8PVV-A32H] (explaining that the preliminary injunction does not impact the remaining majority of abortions that fall outside of emergency medical situations).

115. The State Supreme Courts of Alaska, Florida, Iowa, Kansas, Minnesota, and Montana recognize the right to abortion under the state constitution. California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington all have laws protecting abortion. Specifically, Colorado, the District of Columbia, New Jersey, Oregon, and Vermont protect the right to abortion throughout the pregnancy, not just to the point of viability. *Abortion Policy Tracker*, *State Health Facts*, KFF, https://www.kff.org/other/state-indicator/abortion-policy-tracker/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/9EHL-TDER].

116. *See* Women of the State v. Gomez, 542 N.W.2d 17, 32 (Minn. 1995) ("[U]nder our interpretation of the Minnesota Constitution's guaranteed right to privacy, the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor.").

117. *Id.* at 31 (emphasis in original).

Minnesota; it also requires state-run healthcare to pay for abortions for indigent women.[118] And, on January 19, 2023, the Minnesota Legislature passed the Protect Reproductive Options (PRO) Act, codifying the state constitutional right to an abortion.[119] The PRO Act expressly establishes that "[e]very individual has a fundamental right to make autonomous decisions about the individual's own reproductive health," including abortion and contraception.[120] Similarly, the Supreme Court of California also recognized a right to abortion under the California Constitution in 1969, four years before *Roe*.[121] In November 2022, Californians approved Proposition 1, which explicitly added abortion and contraception rights to the state constitution.[122]

In short, the current state of abortion law presents drastic inconsistencies from state to state. Other crimes present state-to-state inconsistencies in the CIMT context. For example, the Stand Your Ground law in Florida[123] provides an affirmative defense to what could be considered murder in Connecticut.[124] However, the drastic difference in the legal treatment of abortion is unmatched.[125]

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118. *Id.* at 30–31 ("We believe that this tradition compels us to deviate from the federal course on the question of denying funding to indigent women seeking therapeutic abortions . . . . Indigent women . . . are precisely the ones who would be most affected by an offer of monetary assistance, and it is these women who are targeted by the statutory funding ban . . . . We conclude, therefore, that these statutes constitute an infringement on the fundamental right of privacy.").

119. MINN. STAT. § 145.409 (2023).

120. *Id.*

121. People v. Belous, 458 P.2d 194, 199 (Cal. 1969) ("The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." (citing Griswold v. Connecticut, 381 U.S. 479, 485, 486, 500 (1965); Loving v. Virginia, 388 U.S. 1, 12 (1967))).

122. S. CONST. AMEND. NO. 10, 2021–22 Sess. (Cal. 2022); *California Proposition 1 Election Results: Constitutional Right to Reproductive Freedom*, N.Y. TIMES (Dec. 20, 2022), www.nytimes.com/interactive/2022/11/08/us/elections/results-california-proposition-1-constitutional-right-to-reproductive-freedom.html [https://perma.cc/U3JG-7DET].

123. FLA. STAT. § 776.013 (2017) ("A person who is in a dwelling or residence in which the person has a right to be has no duty to retreat and has the right to stand his or her ground and use or threaten to use . . . [d]eadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.").

124. CONN. GEN. STAT. § 53a-19(b) (2022) ("[A] person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety . . . by retreating . . . .").

125. *Compare* VT. CONST. ch. I, art. 22 ("That an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means."), *with* IDAHO CODE ANN. § 18-605(1)

Considering the inchoate standards currently applied for determining CIMTs, future immigration removal or admissibility decisions will hinge on whether courts choose to apply moral turpitude to abortion statutes.

II. Analysis

With the release of *Dobbs*, more than twenty states have passed near-outright bans on abortion.[126] A survey of the statutory language criminalizing abortion shows that each statute includes a "culpable mental state," meeting the first essential requirement for crimes involving moral turpitude.[127] However, the issue lies in the morality consideration. How can an action that is both criminalized and immoral in one state enjoy state constitutional protection in another? Can morality differ so widely from state to state? Or, in the context of federal immigration law, should morality be considered from a national standpoint? This analysis explores these questions.

A. The Impact of Dobbs *on Abortion as a Crime Involving Moral Turpitude*

i. State Abortion Bans and the *Mens Rea* Requirement

Following *Dobbs*, many states passed a total ban on abortion, with limited exceptions for rape, incest, or the life of the mother.[128] Each of the respective statutes includes a *mens rea* requirement. For example, South Dakota penalizes the provider under an "intentional[] or reckless[]" *mens rea* requirement:

> It is a Class 6 felony to *intentionally or recklessly* perform, or attempt to perform, an abortion of an unborn child capable of feeling pain unless it is a medical emergency. No penalty may be assessed against the woman upon whom the abortion is performed, or attempted to be performed.[129]

Similarly, many other states criminalize abortion that is provided "knowingly," as exemplified by the relevant Louisiana statute:

> No person may *knowingly* administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may *knowingly* use or employ any instrument or procedure

(2023) (criminalizing abortion as a felony with up to five years imprisonment).

126. *See supra* notes 108–09.

127. *See infra* Part III.A.i.

128. *See supra* notes 108–09.

129. S.D. CODIFIED LAWS § 34-23A-69 (2023) (emphasis added).

> upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.[130]

or "purposely," as provided in the Arkansas statute:

> A person shall not *purposely* perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.[131]

Currently, only Idaho criminalizes the abortion provider, the person receiving an abortion, and any "accomplice or accessory."[132] Specifically, any person—a licensed provider or not:

> who knowingly . . . provides, supplies or administers any medicine, drug or substance to any woman or uses or employs any instrument or other means whatever upon any then-pregnant woman with intent thereby to cause or perform an abortion shall be guilty of a felony and shall be fined not to exceed five thousand dollars ($5,000) and/or imprisoned in the state prison for not less than two (2) and not more than five (5) years.[133]

Likewise:

> [e]very person who, as an accomplice or accessory to any violation of section 18-605 . . . induces or knowingly aids in the production or performance of an abortion; and . . . [e]very woman who knowingly submits to an abortion or solicits of another, for herself, the production of an abortion, or who purposely terminates her own pregnancy otherwise than by a live birth . . . shall be deemed guilty of a felony and shall be fined not to exceed five thousand dollars ($5,000) and/or imprisoned in the state prison for not less than one (1) and not more than five (5) years . . . .[134]

However, unlike many of the other state statutes criminalizing abortion, Idaho expressly notes that:

> no hospital, nurse, or other health care personnel shall be deemed in violation of this section if in good faith providing services in reliance upon the directions of a physician or upon the hospital admission of a patient for such purpose on the authority of a physician.[135]

As expressed in the above language, Idaho imposes a "knowing" *mens rea* requirement on abortion providers, those receiving an abortion, and any accomplice or accessory. Thus, this survey of the statutory language criminalizing abortion shows that each statute includes a "culpable mental state," meeting the first

130. LA. STAT. ANN. § 40:1061(c) (2022) (emphasis added).
131. ARK. CODE ANN. § 5-61-304(a) (2023) (emphasis added).
132. IDAHO CODE ANN. §§ 18-605(1), 606(1)–(2) (2023).
133. *Id.* at § 18-605(1).
134. *Id.* at §§ 18-606(1)–(2).
135. *Id.* at § 18-606(2).

essential requirement for crimes involving moral turpitude.[136] However, *mens rea* is a common requirement underlying most criminal law—and such was never the issue with the CIMT classification. Instead, as many others have expressed and this Article echoes, the issue lies in the morality consideration.[137] In the context of abortion, this consideration is especially ripe for contradicting views.

ii. The Morality Consideration

Justice Samuel Alito opens and closes the *Dobbs* opinion expressly noting his view that deep moral implications underly abortion law: "Abortion presents a profound moral issue on which Americans hold sharply conflicting views . . . . We end this opinion where we began. Abortion presents a profound moral question."[138] Unlike crimes such as murder, rape, or even fraud—which are near-universally considered immoral—abortion is penalized as a criminal felony in some states and enjoys state constitutional protection in others. This sentiment is exactly why the morality consideration embedded into crimes involving moral turpitude leads to sharp inconsistencies,[139] inconsistencies Justice Alito himself uses as a basis for his argument that abortion laws should be left to the states. However, a state-by-state determination on abortion's legality, of course, does little to help federal courts answer the morality question consistently—in many ways, it actually contravenes this effort. As such, many courts have seemingly opted to avoid the question of what is "base, vile, depraved," or within the "accepted rules of morality" by relying instead on the *mens rea* associated with a given offense.[140] Under

136. Sotnikau v. Lynch, 846 F.3d 731, 736 (4th Cir. 2017) ("[T]o involve moral turpitude, a crime requires two essential elements: a culpable mental state and reprehensible conduct." (quoting *In re* Ortega-Lopez, 26 I. & N. Dec. 99, 100 (B.I.A. 2013))).

137. *See, e.g.*, Rodriguez, *supra* note 22, at 49–50 ("Antiquated honor norms, rather than contemporary moral principles, form the basis for these per se categories.").

138. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240, 2284 (2022).

139. These inconsistencies are exacerbated by the doctrine of *stare decisis*, which bakes the individual moral judgment of judges into binding precedent. *See* Rodriguez, *supra* note 22, at 85 ("[T]he crime involving moral turpitude is susceptible to critique because it perpetuates questionable, decontextualized moral judgments as well as moral determinations locked within a relatively rigid system of precedents.").

140. *See* Simon-Kerr, *supra* note 8, at 1060 ("Rather than make the kind of case-specific, fact-specific, era-specific inquiry advocated by Judge Hand, federal courts handled the moral turpitude question by citing precedent that reproduced its core applications and then by looking for the element of scienter to resolve cases at the

this approach, criminal abortion would certainly meet the standard for turpitudinous conduct, given the various *mens rea* requirements outlined above. However, using *mens rea* as a proxy for morality is exactly the method rejected by the Eleventh Circuit in *Zarate*.[141] So, yet again, one is left with inconsistent results based on conflicting approaches, ideologies, and understandings of morality itself.

iii. Abortion Under the Categorical Approach

The minimum conduct that could realistically be prosecuted under state anti-abortion statutes is likely either the procurement of an abortion or, in states that criminalize "accomplices" to abortion, assisting one in procuring or receiving an abortion.[142] Whether the crime of abortion is classified as one involving moral turpitude hinges on whether abortion *itself* 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,"[143] as the categorical approach gives no weight to the thoughts or circumstances behind the decision to provide or receive an abortion.[144]

This approach fails in the context of abortion, where many consider its morality based on circumstances behind the choice to receive an abortion rather than looking only at the act itself.[145] One could argue that courts may avoid the morality consideration altogether, based on precedent dubbing abortion a *per se* crime involving moral turpitude.[146] However, not only is this precedent far

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margins.").

141. Zarate v. U.S. Att'y Gen., 26 F.4th 1196, 1207–08 (11th Cir. 2022).

142. *Silva-Trevino III*, 26 I. & N. Dec. 826, 831 (B.I.A. 2016).

143. *Id.* at 833.

144. As a whole, the categorical approach contradicts the understanding of many that morality is entirely context dependent. Modern moral theorists focus "on the creation of moral systems that provide methods, most commonly guiding principles, based on conceptions of the rights, such as actions that are rights actions, and the good, meaning that which has intrinsic value, rather than trying to identify particular categories of action deemed moral or immoral." Rodriguez, *supra* note 22, at 67. Under this theory, one focuses on the methods and reasons for taking certain actions, rather than the actions themselves—in direct tension with the categorical approach adopted by the BIA, which explicitly prohibits any analysis outside the action described by the statute. *See* Rodriguez, *supra* note 22, at 67 (citing DAVID ROSS, THE RIGHT AND THE GOOD 65 (Philip Stratton-Lake ed., 2d ed. 2002) (discussing in-depth what makes an act "right" and a thing "good" in the context of moral philosophy)).

145. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022).(explaining that some believe "abortion should be allowed under *some but not all circumstances*") (emphasis added).

146. *In re* M, 2 I. & N. Dec. 525, 528 (B.I.A. 1946) (holding that the "procurement" of abortion constitutes a crime involving moral turpitude); *In re* K, 9 I. & N. Dec. 336,

too slim to justify a sweeping *per se* distinction,[147] but some cases actually contravene such a holding. *Matter of Cassisi* leaves the morality determination open to the deciding judge's discretion in the context of *encouraging* an abortion.[148] Regardless, even when taking a more black-and-white approach to abortion's morality, the categorical analysis inevitably leads to the roadblock[149] created by the drastically different views of abortion—on one end, a passionate minority liken it to murder,[150] and on the other end, supporters consider it an enumerated right inherent in one's exercise of bodily autonomy.[151] In the immigration context, with no current analysis encompassing what it means when states disagree on the morality of an action, judges are left to either adopt the alleged views of the state or turn to their own beliefs of morality—both of which pose major issues for an area of law that falls exclusively under federal jurisdiction.

B. The Problem with a 'Morality Standard—Can 'Morality' Differ from State to State?

Because crimes involving moral turpitude are necessarily based on notions of morality (and therefore inherently rooted in

336 (1961) ("The crime [of abortion] does involve moral turpitude.").

147. As compared to, for example, fraud, which is based on a much richer precedential history. *See* Jordan v. De George, 341 U.S. 223, 229 (1951).

148. *In re* Cassisi, 10 I. & N. Dec. 136, 137 (B.I.A. 1963).

149. Additionally, an approach modifying the categorical approach "for the sake of salvaging the deeply flawed crime involving moral turpitude" would only lead to further confusion and inconsistencies. Rodriguez, *supra* note 22, at 89. The Supreme Court has expressly noted the importance of the categorical approach in criminal law. Taylor v. United States, 495 U.S. 575, 600 (1990) (applying "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions"). Abandoning this method would ignore congressional intent and require factual inquiry by the appellate courts, posing major Sixth Amendment concerns. Rodriguez, *supra* note 22, at 86 n.181 (citing Shepard v. United States, 544 U.S. 13, 16 (2005) (holding that a later sentencing court "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" and may not look at other documents to contextualize the conviction, such as police reports)).

150. *Dobbs*, 142 S. Ct. at 2240 ("Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life."); *see also Nearly a Year After* Roe's *Demise, Americans' Views of Abortion Access Increasingly Vary by Where They Live*, PEW RSCH. CTR. (Apr. 26, 2023), https://www.pewresearch.org/politics/2023/04/26/nearly-a-year-after-roes-demise-americans-views-of-abortion-access-increasingly-vary-by-where-they-live/ [https://perma.cc/M54B-ZEQN] (presenting evidence that a minority of Americans (36%) believe that abortion should be illegal in all or most circumstances).

151. *Id.* ("Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality.").

individualist determinations of "right" and "wrong"), no altered approach or clarifying definition will overcome the classification's inconsistencies and ultimately fatal flaws. Some have proposed focusing more heavily on the *mens rea* requirement, which, as previously noted, ignores the embedded concept of morality to the point that it becomes a null distinction from other criminal classifications used as a basis for inadmissibility or deportation.[152] Others have proposed shifting the understanding of morality to better reflect modern moral standards, a sort of "morality . . . by social consensus" approach.[153] While morality by consensus may best align with the BIA's definition of moral turpitude under "the accepted rules of morality and the duties owed between man and man,"[154] such an approach will never account for the individualistic and unobjective nature of morality. Universal morality does not exist—as is made abundantly clear in the context of abortion law.[155] In fact, the absence of universal morality serves as a necessary basis for Justice Alito's argument for leaving the decision of abortion's protection or criminalization to the states.[156] Still, by setting state-wide legal treatment, states have intrinsically adopted the idea of morality-by-consensus on a state level, criminalizing abortion when the majority of state voters deem it to be morally reprehensible.[157] Our government is built around attempting to democratize morality. As such, in the context of CIMTs within *federal* immigration law, courts should analyze morality-by-consensus on a *national* level. By looking purely at the statutory language of *state* laws, they fail to do so.

Throughout the *Dobbs* majority opinion, Justice Alito references the contrasting views regarding the morality of

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152. *See supra* Part III.A.i.

153. Rodriguez, *supra* note 22, at 53; *see also* Doersam, *supra* note 3, at 581 (proposing a substitute of "modern moral sensibilities that actually correspond to reputational harm by penalizing crimes of violence, crimes that hurt vulnerable victims, or alternatively, crimes that occasion harsh sentences"); Jordan v. De George, 341 U.S. 223, 237 (1951) (Jackson, J., dissenting) (suggesting that the understanding of moral turpitude should be "measured against the moral standards that prevail in contemporary society to determine whether the violations are generally considered essentially immoral").

154. Islas-Veloz v. Whitaker, 914 F.3d 1249, 1256 (9th Cir. 2019).

155. *See id.* at 1256–57 (discussing numerous examples of conflict interpretations in different legal contexts).

156. *See Dobbs*, 142 S. Ct. at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. 'The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.'" (citing Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992))).

157 *See, e.g.*, Hartig, *supra* note 168.

abortion.[158] Perhaps no other issue receives such widely variable treatment in United States law, with some states criminalizing abortion as a felony, punishable by up to five years in prison,[159] and others expressly protecting it as an enumerated right under their state constitutions.[160] If a noncitizen physician performs an abortion in Texas, for example, they may face deportation for committing a crime involving moral turpitude.[161] However, if that same noncitizen were to do so in California, their actions would be perfectly legal.[162] How can an action that is both criminalized and immoral in one state enjoy state constitutional protection in another? Can morality differ from state to state? It seems ridiculous to claim so.

Interestingly, Justice Alito raises a parallel argument to defend his decision to leave abortion to the states. He attacks the previous reasoning adopted in *Roe* and *Casey* that analyzes the constitutional right to an abortion through the trimester framework with a focus on fetus viability.[163] "[A]ccording to *Roe*'s logic," he explains, "States now have a compelling interest in protecting a fetus with a gestational age of, say, 26 weeks, but in 1973 States did not have an interest in protecting an identical fetus. How can that be?"[164] He continues:

> Viability also depends on the quality of the available medical facilities. Thus, a 24-week-old fetus may be viable if a woman gives birth in a city with hospitals that provide advanced care for very premature babies, but if the woman travels to a remote area far from any such hospital, the fetus may no longer be viable. *On what ground could the constitutional status of a fetus*

158. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2240 ("Abortion presents a profound moral issue on which Americans hold sharply conflicting views."); *id.* at 2256 ("Men and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy even in its earliest stage." (citing *Casey*, 505 U.S. at 850 (1992)); *id.* at 2258 ("None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion."); *id.* at 2258 ("Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless."); *id.* at 2265 ("[A] question of profound moral and social importance that the Constitution unequivocally leaves for the people.").

159. *E.g.*, IDAHO CODE §§ 18-605, 606 (2024).

160. *See supra* notes 116–22 (noting that Minnesota and California protect abortion access statutorily and under their state constitutions).

161. *See* TEX. HEALTH & SAFETY CODE § 171.204 (2021). Note, however, that this statute's validity has been questioned in *United States v. Texas*, 566 F. Supp. 3d 605 (W.D. Tex. 2021).

162. People v. Belous, 458 P.2d 194, 199 (Cal. 1969).

163. *Dobbs*, 142 S. Ct. at 2269 ("[V]iability is heavily dependent on factors that have nothing to do with the characteristics of a fetus.").

164. *Id.* at 2269–70.

> *depend on the pregnant woman's location?* And if viability is meant to mark a line having universal moral significance, can it be that a fetus that is viable in a big city in the United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country?[165]

Likewise, "On what ground could the [morality of a noncitizen's conduct] depend on the [noncitizen's] location?"[166] Justice Alito's own concern with what he considers to be an arbitrary determination for constitutional protection—the location of a pregnant person—showcases the problem with embedding something as nuanced and individualized as morality into laws that hold life-or-death consequences for some noncitizens. That said, morality and the law have always been intertwined,[167] making the application of moral standards in legal contexts unavoidable. But, if courts must use a 'morality by social consensus' approach, and 'count heads,' so to speak, they must first consider which population should serve as the denominator.

In the context of immigration law—which is exclusively federal—morality is necessarily a *national* question. It would seem that "universal morality" should thus be based on the majority view of the entire United States population (a view which supports access to legal abortions).[168] Defining the national population raises the additional question of whether the moral views of noncitizens should be considered, as they are the only ones directly impacted by the underlying moral interpretations. Notably, their views are not expressly considered in a democratic sense, given their noncitizen status and inability to vote. The ideals animating federalism present another potential issue. If morality were considered on a national level for purposes of CIMT analysis, would that violate principles of federalism, both in the context of criminal law generally (which is traditionally under the jurisdiction of the state) and abortion law specifically (which *Dobbs* expressly left to state-by-state determination)? Would the concept of universal morality be subject to gerrymandering practices, or would "morality by consensus" be determined by pure popular vote?

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165. *Id.* at 2270 (emphasis added) (internal citations and quotations omitted).

166. *Id.*

167. Simon-Kerr, *supra* note 8, at 1010.

168. *See* Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should Be Legal in All or Most Cases*, PEW RSCH. CTR. (June 13, 2022) https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/ [https://perma.cc/4YTU-DUV2] (noting that in June 2022, approximately "61% majority of U.S. adults say abortion should be legal in all or most cases, while 37% think abortion should be illegal in all or most cases").

In short, *true* morality by consensus is impossible to determine in practice. Still, in the context of federal immigration law, courts must look to a *national* sense of morality in determining CIMT classifications. If an act considered a crime in some states[169] is explicitly lawful in more than half of the states and the District of Columbia,[170] can it actually be "base, vile, or depraved"?[171] How does a rejection of the underlying state moral judgment by a large proportion of the nation's population figure into the CIMT analysis under immigration law? This question is undoubtedly hard to answer, which may lead to the conclusion that the CIMT classification itself must be eliminated, as express reliance on a morality standard inherently leads to inconsistencies and embeds the personal biases of judges into the law far more than other types of criminal classifications. However, before reaching this solution, the question must first be posed. As things currently stand, such an inquiry has been largely ignored in the scholarship and judicial decisions analyzing CIMTs.

Conclusion

Since the beginning of U.S. immigration law, the concept of moral turpitude has led to deeply flawed inconsistencies. Rooted in dated, Judeo-Christian notions of morality, the application of CIMTs hardly reflects the modern understanding. Even so, morality itself defies universal consensus, showcased most clearly through the lens of post-*Dobbs* abortion law. Under the post-*Dobbs* framework, noncitizens who illegally receive or perform an abortion could potentially be deported without a hearing, disqualified from asylum relief, or become permanently inadmissible to the United States—all under the guise of so-called morality. This framework builds on the dangerous converging ideologies of the anti-immigration and anti-abortion movements. Embedding individual state concepts of morality into federal law allows the ideologies of a passionate minority to bleed into national judicial precedent. Such interference violates notions of federalism, and a just immigration system cannot operate under this flawed framing.

Ultimately, in the context of federal immigration law, courts must look to a *national* sense of morality in determining CIMT classifications. Only then can courts, academics, and Congress alike

169. *See* KFF, *supra* note 108.
170. *Id.*
171. *Silva-Trevino III*, 26 I. & N. Dec. 826, 833 (B.I.A. 2016).

properly consider whether the classification itself must be eliminated altogether.