Crimes Involving Moral Turpitude: Why the Void-for-Vagueness Argument Is Still Available and Meritorious

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"Crimes Involving Moral Turpitude": Why the Void-For-Vagueness Argument is Still Available and Meritorious

Derrick Moore†

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Although it is not likely that a criminal will carefully consider the text of the law before he [commits a crime], it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.¹

"[T]he legislature . . . should express its will in language that need not deceive the common mind. Every man should be able to know with cer-

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41 Cornell Int'l L.J. 813 (2008)
tainty when he is committing a crime."\(^2\)

"[T]he loose terminology of moral turpitude hampers uniformity . . . . It is hardly to be expected that words which baffle judges will be more easily interpreted by laymen . . . ."\(^3\)

Introduction

The consequences for aliens committing criminal acts can be extremely serious. The Department of Homeland Security (DHS)\(^4\) and U.S. courts may exclude—refuse entry into the United States—or deport—remove from the United States—aliens for certain crimes.\(^5\) Because the possible punishment of deportation or exclusion is so severe,\(^6\) one would expect Congress to detail the exact crimes for which an alien could be deported or excluded. Unfortunately, Congress has done nothing to articulate a workable standard for such crimes. Instead, the determination of whether aliens should be deported or excluded is dependent upon whether an alien commits a "crime involving moral turpitude."\(^7\)

The phrase "crimes involving moral turpitude" has been described as "vague,"\(^8\) "nebulous,"\(^9\) "most unfortunate,"\(^10\) and even "bewildering."\(^11\) Since its inception into immigration law over one hundred years ago,\(^12\) the term has had a harrowing and disruptive existence.\(^13\) Legislators have sought to have the law amended\(^14\) and have even suggested eliminating the

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4. Effective March 1, 2003, the Immigration and Naturalization Service (INS) was abolished and became part of the Department of Homeland Security (DHS). See Blake v. Carbone, 489 F.3d 88, 91 n.1 (2d Cir. 2007). A vast majority of the comments and court opinions on immigration involve the INS, but this Note will refer to the current agency as the DHS.
6. Indeed, the U.S. Supreme Court has discussed the severity of deportation: "[D]eporation is a drastic measure and at times the equivalent of banishment of exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. . . . [T]he stakes are considerable for the individual . . . ." Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (internal citations omitted).
10. Note, supra note 3, at 121.
13. See discussion infra Part I.A.
term "moral turpitude" altogether. United States Courts of Appeal are split over what constitutes moral turpitude. Scholars have also expressed their dismay over the statute and have made recommendations to Congress for a more accurate definition of the term. Nevertheless, Congress has not amended the statute, defined the phrase, or articulated a list of crimes that meet this standard. Considering the vague nature of the phrase, and the reluctance of Congress to define it with greater specificity, this phrase looks to be a prime candidate for examination by the U.S. Supreme Court.

Although the Court could find the phrase unconstitutional for failing to have a "sufficiently definite meaning," the Supreme Court has declined to do so thus far. In Jordan v. De George, the Supreme Court held that "moral turpitude" is not void for vagueness. After Jordan, most courts have held that aliens are foreclosed from arguing that the phrase "crimes involving moral turpitude" is unconstitutional. Some scholars have agreed. Even scholars who agree that the phrase is vague have refrained from arguing vagueness or other unconstitutional grounds. Instead, they have used alternative means, such as recommending that Congress redefine crimes involving moral turpitude or that U.S. courts specify what crimes qualify as "involving moral turpitude." This Note argues that Jordan does not foreclose a void-for-vagueness attack and that the vagueness argument is still meritorious.

Part I of this Note explains the relevant background of crimes involving moral turpitude and how both the legislature and the courts have interpreted this phrase. Part I also examines the void-for-vagueness doctrine and explains how the Supreme Court determines that a statute is void for

15. Note, supra note 3, at 121 n.43 (citing H.R. REP. NO. 69-3, at 3 (1926) (stating that the House Committee on Immigration and Naturalization was "determined to delete the phrase from the act").
16. Compare Navarro-Lopez v. Gonzalez, 503 F.3d 1063, 1073 (9th Cir. 2007) (holding that "accessory after the fact" does not constitute moral turpitude), with Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002), and Cabral v. INS, 15 F.3d 193, 197 (1st Cir. 1994) (holding that alien convicted of being an accessory after the fact to murder committed a crime of moral turpitude).
20. See id. at 232.
21. See Marciano v. INS, 450 F.2d 1022, 1024 (8th Cir. 1971); see also Ramirez v. INS, 413 F.2d 403, 406 (D.C. Cir. 1969); Tseung Chu v. Cornell, 247 F.2d 929, 938-39 (9th Cir. 1957). But see Corp. of Haverford Coll. v. Reeher, 329 F. Supp. 1196, 1205 (E.D. Pa. 1971) (stating that Jordan was limited to crimes involving fraud and does not preclude a future void-for-vagueness attack).
23. See, e.g., Harms, supra note 17, at 260.
24. See id. ("Although the Supreme Court has held that the definition of 'crimes involving moral turpitude' was not unconstitutionally vague, the definition is vague enough to warrant a redefinition by Congress.").
vagueness. Part II discusses Jordan v. De George and various interpretations of the Court's decision. Part III argues that the Jordan decision has not foreclosed a void-for-vagueness attack on the immigration statutes and discusses three problems with the case: (1) the narrow holding is only binding on fraud cases, (2) the void-for-vagueness argument was raised sua sponte by the Court, and (3) other flaws in the majority opinion. Part IV argues that moral turpitude is an unconstitutionally vague standard predominantly by examining recent decisions in the immigration context. The Note concludes that the United States Supreme Court should grant certiorari on a recent circuit case and explore the vagueness argument.

I. Background

A. "Crimes Involving Moral Turpitude"

The phrase "crimes involving moral turpitude" is unclear and vague. Although courts and immigration officers since 1891 have utilized this phrase to deport and exclude tens of thousands of aliens, the definition has been highly criticized for its vagueness and ambiguity. To thoroughly understand the background of this controversial term, one should consider the attempts to find a suitable definition for the phrase, the statutory history, and specific crimes found to involve or not involve moral turpitude.

1. What is "Moral Turpitude?"

Congress has never defined what amounts to a "crime involving moral turpitude." The legislative history of the statutes indicate that Congress left interpretation of the term to U.S. courts and administrative agencies. Yet these entities have been unable to craft a clear definition. To help interpret statutory language, courts typically start with congressional guidance. Because this guidance appears to be absent from the statutory or legislative history, the most useful place to start may be the dictionary—the "last resort of the baffled judge." Obtaining a definition of "crime involving moral turpitude" either through precedent, deference to the Board of Immigration Appeals (BIA), or the dictionary is usually the first step in the discussion sections of court opinions and articles by

26. See Harms, supra note 17, at 259. In fact, it is the most-used exclusionary ground by DHS officers. Id. at 260 (stating that moral turpitude is "the criminal exclusion ground that the INS uses more than any other").
27. See, e.g., Carter, supra note 22.
28. See, e.g., Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983) ("We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.").
29. The legislative history is arguably slightly helpful in that it shows crimes involving moral turpitude might lead only to violent crimes, but very few courts have ever even discussed this. See infra notes 300-302 and accompanying text.
commentators. The most common definition of moral turpitude is similar to one found in early editions of Black's Law Dictionary:

[An] act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man . . . . Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others. . . . The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita.

Although many commentators believe this definition to be the one most commonly used, it is not the only definition. The Fifth Circuit in Hamdan v. INS, in an apparent paraphrasing of the Black's Law definition, defined moral turpitude as "conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." The court clarified this statement, remarking further that "[m]oral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong." Previously, the Fifth Circuit had defined the term as "[a]nything done contrary to justice, honesty, principle or good morals.

Other United States Courts of Appeal have used similar definitions to the one formulated by the Fifth Circuit. Some courts defined crimes involving moral turpitude as ones which "grievously [offend] the moral code of mankind." Other courts included the term "common law" in their definition, defining the crimes as acts that were "at common law

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34. See Heifetz, supra note 11, at 1284; see, e.g., Jordan, 341 U.S. at 227-30; Hyder v. Keisler, 506 F.3d 388, 391 (5th Cir. 2007); Itani v. Ashcroft, 298 F.3d 1213, 1215 (11th Cir. 2002); United States v. Smith, 420 F.2d 428, 431 (5th Cir. 1970).
35. Harms, supra note 17, at 264 (quoting BLACK'S LAW DICTIONARY 1008-09 (6th ed. 1990)); see also Smith, 420 F.2d at 431 (utilizing Black's Law Dictionary to define moral turpitude).
36. 98 F.3d 183 (5th Cir. 1996).
37. See id. at 186.
38. Id.
40. Recent cases have used both definitions. Compare Blake v. Carbone, 489 F.3d 88, 103 (2d Cir. 2007) (describing moral turpitude as "inherently base, vile, or depraved" (quoting Gill v. INS, 420 F.3d 82, 89 (2d Cir. 2005))), with De Leon-Reynoso v. Ashcroft, 293 F.3d 633, 636 (3d Cir. 2002) (describing moral turpitude as "contrary to justice, honesty, or morality"). The former definition has been the definition adopted by the Board of Immigration Appeals (BIA). See, e.g., Hyder v. Keisler, 506 F.3d 388, 391 (5th Cir. 2007). The Attorney General has approved, and courts have adopted, a combination of the two definitions as well. See Da Rosa Silva v. INS, 263 F. Supp. 2d 1005, 1011 (E.D. Pa. 2003); Matter of Serna, 20 I&N Dec. 579, 582 (BIA 1992).
intrinsically or morally wrong."42 The array of different judicial definitions for this phrase demonstrates the problem courts have had in determining what crimes fall within the category of "crimes involving moral turpitude."43 It also corroborates why many scholars still consider the phrase to be "undefined,"44 or at least not clearly defined.45

Yet, there is some agreement on what constitutes a crime involving moral turpitude. First, crimes involving moral turpitude are a subset of all possible crimes; they are not simply unlawful acts.46 Acts that are statutorily prohibited, but are not immoral or inherently wrong, generally do not involve moral turpitude.47 Second, moral turpitude must be judged by moral, rather than legal, standards.48 Although neither of these statements create clear guidance, they do represent the common ground shared among the circuits and scholars regarding the definition of moral turpitude.49

After developing an appropriate definition of the phrase, courts then establish whether an alien’s conviction can be classified as a "crime involving moral turpitude."50 While each court applies its own precedent, a majority of courts follow a two-pronged test.51 The court first determines what law was actually violated and then decides whether all the conduct punished by the law involves moral turpitude.52 This test is known as the "categorical approach."53

The facts of the offense are not the important inquiry; instead, the issue is whether the "full range of conduct encompassed by the statute constitutes a crime of moral turpitude."54 In other words, the offense must be "always and under all circumstances" a crime involving moral turpitude.55 Courts and the BIA56 have argued that this rule is supported by the
literal text of the immigration statutes and for other policy reasons.\textsuperscript{57} Additionally, very few factors would actually give rise to a per se crime involving moral turpitude.\textsuperscript{58} For example, the seriousness of the crime,\textsuperscript{59} type of offense (e.g. felony or misdemeanor), sentencing term, and the name given to the offense are not per se determinative for the second prong of the test.\textsuperscript{60} Therefore, the second prong of the test is especially important.

The general rule of the categorical approach is if there is at least one situation where the acts do not involve moral turpitude, then a crime involving moral turpitude cannot rise out of violation of that law.\textsuperscript{61} However, there is one exception to this rule. If the statute is divisible—one part of the statute always involves moral turpitude and another section of the statute sometimes involves moral turpitude—then courts will apply what is known as a "modified categorical approach."\textsuperscript{62} In that situation, the court will look at the record of conviction\textsuperscript{63} to determine whether the offense falls under the section of the statute that always involves moral turpitude.\textsuperscript{64} Like the categorical approach, in the "modified categorical approach" the court does not look at the underlying facts of the conviction.\textsuperscript{65}

Although most courts apply the "categorical approach" or the "modified categorical approach,"\textsuperscript{66} some justices and scholars have expressed

\textsuperscript{56} "The Board of Immigration Appeals (BIA) [was] the highest administrative tribunal for immigration and nationality matters in the United States." Jessica R. Hertz, Comment, Appellate Jurisdiction over the Board of Immigration Appeal's Affirmance Without Opinion Procedure, 73 U. Chi. L. Rev. 1019, 1019 (2006).

\textsuperscript{57} See Carter, supra note 22, at 965. See discussion infra Part III.A.3 and Carter, supra note 22, at 965–68 for arguments that the public policy explanations are without merit. The literal text argument appears to be of some merit, but it aids in the void-for-vagueness argument. See discussion infra Part III.A.3.

\textsuperscript{58} See Harms, supra note 17, at 265–66.

\textsuperscript{59} See id. at 265. Heifetz goes one step further and argues that seriousness of the harm is not even a "standard element" in determining whether a crime involves moral turpitude. Heifetz, supra note 11, at 1285. But see Austin T. Fragomen Jr. & Steven C. Bell, Removal of Illegal Aliens, in 35TH IMMIGRATION & NATURALIZATION INSTITUTE, at 289, 314 (PLI Corporate Law & Practice, Course Handbook Series No. B0-01GH, 2002) (arguing that seriousness of the crime is a factor).

\textsuperscript{60} See CIMT Annotation, supra note 41, at 494–96; Harms, supra note 17, at 265–66.

\textsuperscript{61} See Cerezo v. Mukasey, 512 F.3d 1163, 1166–67 (9th Cir. 2008).

\textsuperscript{62} See id. at 1169.

\textsuperscript{63} The record of conviction consists of a "narrow, specific set of documents," Tokatly v. Ashcroft, 371 F.3d 613, 620 (9th Cir. 2004), including "the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings." Id. (quoting United States v. Rivera-Sanchez, 247 F.3d 905, 908 (9th Cir. 2001) (en banc)).

\textsuperscript{64} See Shepard v. United States, 544 U.S. 13, 17, 20–21 (2005); Wala v. Mukasey, 511 F.3d 102, 107–08 (2d Cir. 2007) (applying the modified categorical test to exclusion proceedings and stating that a tribunal may consider a charging document in a jury trial, a verdict or judgment of a conviction, a record of a sentence, a transcript of a plea colloquy, or a plea agreement under the modified categorical approach).

\textsuperscript{65} See Shepard, 544 U.S. at 17, 20–21; Wala, 511 F.3d at 107.

\textsuperscript{66} The First Circuit's opinion in Conteh v. Gonzales, 461 F.3d 45, 55–57 (1st Cir. 2006), discusses a split in how courts apply the modified categorical approach. The Ninth Circuit applies the more rigid and formal approach that was detailed in Taylor v.
disapproval of these approaches. For example, in his dissent in Marciano v. INS, District Judge G. Thomas Eisele noticed that the approach used by most courts produced results that were "contrary to those intended by the plain language of the deportation statute." Judge Eisele proposed that courts adopt the "three-classification" rule proposed by Judge Anderson in his dissent in Tillinghast v. Edmead. This alternative proposes that crimes can be classified into three groups: (1) crimes inherently involving moral turpitude, (2) crimes that do not involve moral turpitude, and (3) crimes that may or may not involve moral turpitude, depending upon the circumstances of the case. According to Judge Eisele, if a crime falls into the third category, the court should look to the actual circumstances and underlying facts of the case. This alternative, however, has never been adopted by the federal courts and the categorical approach remains the general rule.

2. Immigration Law Statutory History

The first time the United States Legislature designed to exclude certain aliens was in the Act of March 3, 1875. This Act prohibited con-

United States, 495 U.S. 575 (1990), and Shepard. See Conteh, 461 F.3d at 52-57. The First and Third Circuits apply a more liberal test. Id. at 55. However, the difference between the two versions of the test is small and for background purposes, both match the approach detailed in the text. See id. at 55-56 ("We emphasize that the difference between this approach and that of the Ninth Circuit is only a matter of degree.").

67. See Carter, supra note 22, at 967-68.
68. 450 F.2d 1022 (8th Cir. 1971).
69. District Judge Eisele for the Eastern District of Arkansas was sitting by designation. Id. at 1022. Interestingly, Judge Eisele was appointed District Judge only the year before the decision in Marciano. THE AMERICAN BENCH, JUDGES OF THE NATION 207 (Marie T. Finn et al. eds., 19th ed. 2009).
70. See Marchiano, 450 F.2d at 1027-28 (Eisele, J., dissenting).
71. 31 F.2d 81 (1st Cir. 1929). Technically, Anderson did not "propose" this rule; instead, he agreed with the District Court Judge's opinion in Ex parte Edmead, 27 F.2d 438 (D. Mass. 1928), and quoted the lower court's majority opinion in agreement. See Tillinghast, 31 F.2d at 84.
72. See Marchiano, 450 F.2d at 1028 (Eisele, J., dissenting): Whether any particular conviction involves moral turpitude under this test may be a question of fact. Some crimes are of such character as necessarily to involve this element; others . . . do not; and still others might involve it or might not. As to this last class, the circumstances must be regarded to determine whether moral turpitude was shown. Tillinghast, 31 F.2d at 84 (Anderson, J., dissenting) (quoting Ex parte Edmead, 27 F.2d at 439) (internal citation omitted).
73. See Marchiano, 450 F.2d at 1028 (Eisele, J., dissenting); Carter, supra note 22, at 967.
74. See Marchiano, 450 F.2d at 1028 (Eisele, J., dissenting).
75. Carter, supra note 22, at 967.
76. GROUNDS FOR EXCLUSION, supra note 12, at 6. This Committee Print unfortunately does not discuss the deportation statute at length; however, because the phrase "crimes involving moral turpitude" has been interpreted or discussed within the deportation and exclusion contexts interchangeably, this history is helpful for background discussion purposes.
victed criminals from entering the United States. The Act was apparently passed without any controversy, as there are no printed reports or records of floor debate in either the House or the Senate, and President Grant signed the bill within hours of its passing vote in the Senate. Since this original legislation, additional amendments to the Act and further legislation have increased the number of exclusionary rules and have led to stricter enforcement of the laws.

Five times between 1875 and 1917, Congress added more groups to the excludable class of convicted criminals and increased the number of excludable aliens under its immigration laws. The Act of March 3, 1891 is the most important legislation, however, because in this Act, the term "moral turpitude" first appeared in U.S. immigration laws. Between 1880 and 1890, twice the number of immigrants entered the United States as compared to the previous decade. Additionally, in 1905 alone, over one million people immigrated to the United States.

Further legislation in the form of a 1907 immigration statute excluded "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude." Stated more generally, aliens could be excluded for committing a crime involving moral turpitude. Interestingly enough, the term "moral turpitude" was added without any discussion in the reports accompanying the legislation. As a result, it is hard to discern why the term appears in the Act. If the goal was to "clearly distinguish desirable from undesirable immigrants," including the term "moral turpitude" was most likely not the best way to realize this objective because the statute lacks a clear definition of the term.

The Immigration Act of February 5, 1917 did not change the 1907 Act with regards to the exclusion of aliens. The statute, however, did allow

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77. See id. at 95. The first two exclusionary classes under the Act were aliens convicted of certain crimes and women imported for prostitution purposes. Id. at 6.
78. See id. at 7; Harms, supra note 17, at 261.
79. See GROUNDS FOR EXCLUSION, supra note 12, at 7-15. Specifically, Congress amended the statute in 1882, 1891, 1903, 1907, and 1910. Id. at 7-12.
80. See id. at 10.
81. See id. at 9 (noting that almost 5,250,000 immigrants entered the United States between 1880 and 1890 as compared to 2,800,000 immigrants between 1870 and 1880). For the latter decade, that is an average of 1500 immigrants per day.
82. See id. at 14. This is an average of almost 2800 immigrants per day—almost double that of a few years prior. During this time of increased immigration, President Theodore Roosevelt gave multiple speeches to Congress that expressed the sentiment of the nation regarding immigration. See id. On Dec. 7, 1903, he stated "[W]e cannot have too much immigration of the right kind, and we should have none at all of the wrong kind. The need is to devise some system by which undesirable immigrants shall be kept out entirely. . . ." Id. Two years later, he expressed a similar opinion: "The prime need is to keep out all immigrants who will not make good American citizens. The laws now existing . . . should be strengthened." Id. These statements demonstrate that in the early twentieth century there was a "general concern for the number and desirability of voluntary migration." See Harms, supra note 17, at 262.
83. GROUNDS FOR EXCLUSION, supra note 12, at 20.
84. Id. at 10.
85. See Harms, supra note 17, at 262-64.
86. GROUNDS FOR EXCLUSION, supra note 12, at 20.
for the deportation of persons convicted of a “crime involving moral turpitude” due to public opinion condemning illegal activity of aliens.87 During hearings in the House Committee on Immigration, Representative Sabath opined that the term “crime involving moral turpitude” had deficiencies and was not clearly defined.88 Nonetheless, Congress made no attempt to clarify the phrase.89

The Immigration and Nationality Act of 1952 kept the basic provisions of the 1917 Act,90 but made two important changes.91 First, the Act of 1952 eliminated the references to the kind of crime that involves moral turpitude, supporting the concept that exclusion should be based solely on moral turpitude.92 Second, the Act allowed for the exclusion of aliens who “commit acts which constitute the essential elements” of a crime involving moral turpitude.93

Not surprisingly, there was some disagreement before Congress passed the Act. For instance, President Truman vetoed it.94 Although the Act ultimately became law through a supermajority vote of the Senate, Truman made his opinion clear in his veto message by stating that some “changes made by the bill . . . would result in empowering minor immigration and consular officials to act as prosecutor, judge, and jury in determining whether acts constituting a crime have been committed.”95

The most recent version of the Immigration and Nationality Act allows for exclusion and deportation of immigrants.96 The law allows for exclusion of aliens who have been convicted of, or admitted to being convicted of, a crime involving moral turpitude, or who committed acts which amount to the essential elements of such a crime.97 Aliens can be deported for a conviction of a crime involving moral turpitude if (1) they committed the crime within five years of being admitted to the United States, (2) the sentence for the crime is for a year or longer,98 or (3) the crime committed

87. See Harms, supra note 17, at 262.
89. See id. at 234.
91. See GROUNDS FOR EXCLUSION, supra note 12, at 96.
92. See id.
93. See id. The purpose of this change was to allow INS officers to exclude aliens who admit the essential facts of a crime that would normally involve moral turpitude, but do not actually admit to committing the crime. Id.
94. See id. at 109.
95. See id.
is at least the second crime involving moral turpitude conviction. An essential difference between deportation and exclusion is that the DHS may only deport an alien for a conviction of a crime involving moral turpitude, whereas the DHS may exclude an alien without a conviction.  

Although Congress has neither changed the phrase "crime involving moral turpitude" nor given more lucidity to its definition, there have been multiple criticisms of the present law from various Congressional actors. In March 1981, the Select Commission on Immigration and Refugee Policy submitted a report on the current immigration and refugee law.  Of the sixteen Commissioners, thirteen agreed that Congress should reexamine the grounds for deporting aliens from the United States. On April 24, 1996, Senator Bob Dole addressed the Senate floor, stating that the term "crimes involving moral turpitude" is "vague" and "lack[s] the certainty we should desire." Nevertheless, the term still appears as an essential part of the deportation and exclusion statutes.

3. Crimes Found to "Involve Moral Turpitude"

There have been many disagreements among U.S. Courts of Appeal and general indecision as to whether specific crimes involve moral turpitude. Some of these circuit splits have arisen very recently. For example, in 2007, the Fifth Circuit held that a conviction for misusing a Social Security number is a crime involving moral turpitude. This holding is a direct contradiction of the Ninth Circuit's decision in Beltran-Tirado v. INS. The Fifth Circuit specifically acknowledged the Ninth Circuit's decision, but then clearly asserted that the Fifth Circuit was going to

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99. See Immigration and Naturalization Act § 237(a)(2)(A)(i)-(ii), 8 U.S.C. § 1227(a)(2)(A)(i) (2007) ("Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.").

100. See Harms, supra note 17, at 263.

101. See id. at 1-2.


103. See generally id.

104. See generally DAN KESSELBRENNER & SANDY LIN, SELECTED IMMIGRATION CONSEQUENCES OF CERTAIN FEDERAL OFFENSES (2003), http://www.nlada.org/DMS/Documents/1067629132.3/fedchart.pdf. In this chart, of the over 125 crimes listed, only 50 are consistently considered to be crimes involving moral turpitude and 7 do not involve moral turpitude. See generally id. The other approximately 70 crimes depend upon the factual or legal situation. See generally id.

105. Hyder, 506 F.3d at 392.

106. 213 F.3d 1179 (9th Cir. 2000).
"decline to follow Beltran-Tirado."

The court explained that Beltran-Tirado was not binding precedent, expanded a narrow exemption too far, and was inconsistent with the Fifth Circuit's existing precedents.

The Ninth Circuit added to the lack of clarity in 2007. In Navarro-Lopez v. Gonzalez, a majority of the court decided that accessory after the fact was not a crime involving moral turpitude, a conclusion that conflicted with every other circuit court that had specifically addressed the issue. A majority of the justices found cases in the Eleventh and Seventh Circuit courts to be unpersuasive and based on faulty reasoning.

Yet, there are some crimes that all circuit courts agree are deportable or exclusionary offenses. Some scholars and courts divide these offenses into different categories. Authorities agree that crimes involving an element of fraud, larceny, or intent to harm persons or things are crimes involving moral turpitude. Some courts combine the last two elements, intent to harm persons or things, into one generic category of "grave acts of baseness or depravity." The U.S. Department of State Foreign Affairs Manual divides crimes involving moral turpitude into three categories: (1) crimes against property, (2) crimes against the government, and (3) crimes committed against person, family relationship, and sexual morality.

Crimes involving acts of fraud, whether against individuals or the government, have historically been considered crimes of moral turpitude. Also, attempting to commit, being an accessory in the commission of, aiding and abetting in the commission of, and taking part in a conspiracy to commit a crime are only crimes involving moral turpitude if the attempted or aided crime also involves moral turpitude. Therefore, an attempted

107. Hyder, 506 F.3d at 393.
108. Id.
109. 503 F.3d 1063 (9th Cir. 2007).
110. Id. at 1074 (holding that "[a]ccessory after the fact" is not a crime involving moral turpitude).
111. See id. at 1080 (Tallman, J., dissenting) (discussing Itani v. Ashcroft, 298 F.3d 1213 (11th Cir. 2002) and Padilla v. Gonzales, 397 F.3d 1016 (7th Cir. 2005)).
112. Id. at 1077 (Reinhardt, J., concurring).
113. See, e.g., Carty v. Ashcroft, 395 F.3d 1081, 1083 (9th Cir. 2005) ("Crimes of moral turpitude are of basically two types, those involving fraud and those involving grave acts of baseness or depravity."); Harms, supra note 17, at 267–70 ("divid[ing] 'crimes involving moral turpitude' into four major categories: (1) crimes against the person; (2) crimes against property; (3) sex crimes and crimes involving family relationships; and (4) crimes of fraud against the government or its authority.").
115. See, e.g., Carty, 395 F.3d at 1083.
116. See MANUAL, supra note 114, § 40.21(a) N2.3.
117. See Jordan v. De George, 341 U.S. 223, 232 (1951) ("The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct."); CIMT Annotation, supra note 41, at 503. But see Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1069 (9th Cir. 2007) (Pregerson, J., special concurring opinion) ("Crimes involving fraud are not a per se category of crimes involving moral turpitude.").
118. See MANUAL, supra note 114, § 40.21(a) N2.4.
Crimes involving moral turpitude that are committed against property typically include either the element of fraud or involve an "inherently evil intent," such as intent to destroy.\footnote{119}{See id. § N2.3-1(a)-(b); see also Harms, supra note 17, at 268.} Examples of these crimes include arson, burglary, extortion, and forgery.\footnote{120}{See Manual, supra note 114, § 40.21(a) N2.3-1(b). But see Norton Tooby with Katherine A. Brady, 2 Criminal Defense of Immigrants 666 (3d ed. 2003) (citing Matter of M, 2 I&N Dec. 721 (BIA 1948) to represent that burglary is not a crime of moral turpitude).} Crimes that do not involve moral turpitude in this area include writing bad checks\footnote{121}{See id. § N2.3-1(a)-(b); see also Harms, supra note 17, at 268.} and breaking and entering without intent to steal.\footnote{122}{See Manual, supra note 114, § 40.21(a) N2.3-2(b).}

Crimes committed against the government, such as counterfeiting, perjury, and bribery, typically involve moral turpitude.\footnote{123}{See Maryellen Fullerton & Noah Kingstein, Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys, 23 Am. CiM. L. Rev. 425, 435 (1986).} Yet, if a relevant statute is regulatory in character or lacks a sufficient intent requirement, the crime does not involve moral turpitude.\footnote{124}{See generally Matter of Franklin, 20 I&N Dec. 867 (BIA 1994). In Franklin, the BIA held that involuntary manslaughter in which recklessness was an element is a crime involving moral turpitude. Id. Therefore, courts must look to the statute to see whether a "conscious disregard of a substantial and unjustifiable risk" is an element of the crime. Markus D. Dubber, Criminalizing Complicity: A Comparative Analysis, 5 J. Int'l Crim. Just. 977, 992 (2007). Yet, reckless homicide is not a crime involving moral turpitude. See Tooby & Brady, supra note 120, at 669 (citing Matter of Szegedi, 10 I&N Dec. 28 (BIA 1962)).} Examples of such crimes include escaping from custody,\footnote{125}{See Fullerton & Kingstein, supra note 123, at 433-34; Harms, supra note 17, at 267-69.} possession of firearms, gambling, and drunk driving.\footnote{126}{See, e.g., Bogdan, supra note 98, at 32.}

Crimes committed against the person, family relationship, or sexual morality usually do not involve moral turpitude if they are minor sexual offenses or the elements of the crime do not require malicious intent.\footnote{127}{See id. at 435-36; see also Manual, supra note 114, § 40.21(a) N2.3-2(b).} For example, non-reckless involuntary manslaughter\footnote{128}{See generally Matter of Franklin, 20 I&N Dec. 867 (BIA 1994). In Franklin, the BIA held that involuntary manslaughter in which recklessness was an element is a crime involving moral turpitude. Id. Therefore, courts must look to the statute to see whether a "conscious disregard of a substantial and unjustifiable risk" is an element of the crime. Markus D. Dubber, Criminalizing Complicity: A Comparative Analysis, 5 J. Int'l Crim. Just. 977, 992 (2007). Yet, reckless homicide is not a crime involving moral turpitude. See Tooby & Brady, supra note 120, at 669 (citing Matter of Szegedi, 10 I&N Dec. 28 (BIA 1962)).} and simple assault\footnote{129}{See id. at 435-36; see also Manual, supra note 114, § 40.21(a) N2.3-2(b).} are not crimes involving moral turpitude. Alternatively, murder, kidnapping, rape, adultery, and abortion are crimes that involve moral turpitude.\footnote{130}{See, e.g., Bogdan, supra note 98, at 32.}

Other scholars give a list of crimes that involve moral turpitude\footnote{131}{See, e.g., Bogdan, supra note 98, at 32.} or a list of crimes that do not involve moral turpitude.\footnote{132}{See, e.g., Bogdan, supra note 98, at 32.} Although lists of crimes that involve or do not involve moral turpitude are not exhaustive,
they provide insight into how courts have attacked the lack of Congressional advice on this issue.

B. Void-For-Vagueness Doctrine

The void-for-vagueness doctrine is "among the most important guarantees of liberty under law." For over 125 years, the Supreme Court has invalidated statutes because of their "unconstitutional uncertainty." The Court has, on occasion, eloquently described the void-for-vagueness doctrine. Justice Holmes articulated one of the most famous descriptions of the doctrine:

[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, . . . he may incur the penalty of death.

More often then not, however, the Supreme Court has declined to give a detailed description of the doctrine.

A statute can be considered unconstitutionally vague for "either of two independent reasons." First, a law may be unconstitutionally vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct [the law] prohibits." One basic purpose of this part of the analysis is notice, which the Due Process Clause requires. Notice allows citizens to "steer between lawful and unlawful conduct." Laws should provide citizens with unambiguous definitions

134. See id.
135. See Harms, supra note 17, at 270.
137. Id. at 377. This excerpt is an oft-quoted articulation of the limits of the void-for-vagueness policy. See, e.g., Goldsmith, supra note 133, at 281; Benjamin D. Jackson, Case Note, (Griffen v. Arkansas Judicial Discipline and Disability Commission: An Unclear Opinion on Vagueness, 58 Ark. L. Rev. 983, 983 (2006).
140. Id. at 732.
142. Sarah Sparks, Case Note, Deteriorated v. Deteriorating: The Void-For-Vagueness Doctrine and Blight Takings Norwood v. Horney, 75 U. Cin. L. Rev. 1769, 1771 (2007). (quoting Grayned v. Rockford, 408 U.S. 104, 108 (1972)). In Grayned, the Supreme Court specifically discussed the requirement of notice:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . Because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.
of crimes so citizens know if their behavior is constitutionally protected. A law must set out "relatively clear guidelines as to prohibited conduct and provide objective criteria to evaluate whether someone has committed an unlawful act.

Second, a statute is vague "if it authorizes or even encourages arbitrary and discriminatory enforcement." Statutes, therefore, must present "explicit standards for those who apply them." Laws with vague language "impermissibly delegate basic policy matters . . . on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." In 1945, Supreme Court Justice Owen Roberts first articulated the arbitrary enforcement concept in his dissenting opinion in Screws v. United States. Although Roberts offered no precedent which supported his argument, the Supreme Court has applied his reasoning in many subsequent decisions. In 1971, the Supreme Court in Papachristou v. Jacksonville, implicitly placed the arbitrary enforcement prong on equal footing with the lack of notice prong.

In 1983, Roberts' standard officially become part of the modern-day test. Recently, the Court "elevated the [arbitrary enforcement] prong to greater importance than its more senior counterpart," the notice prong. In its discussions of the arbitrary enforcement prong, the Court has consid-

408 U.S. at 108.

143. Sparks, supra note 142, at 1771.
146. Grayned, 408 U.S. at 108.
147. Id. at 108-09.
148. 325 U.S. 91, 149 (1945) (Roberts, J., dissenting); Goldsmith, supra note 133, at 286 ("The specter of arbitrary enforcement did not appear in any Justice's vagueness analysis until the 1945 case of Screws v. United States.").
149. Goldsmith, supra note 133, at 287.
151. 405 U.S. at 162. The Court stated that the ordinance at issue "is void for vagueness, both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, and because it encourages arbitrary [enforcement]." Id. (internal citations omitted).
152. See Kolender v. Lawson, 461 U.S. 352, 357 (1983). Sometimes, the vagueness doctrine is posed as a two-pronged test. See, e.g., Sparks, supra note 142, at 1771. Yet, the two-pronged test and the independent reasons tests are the same; in essence, they are contrapositives. In the "test" format, a law is considered constitutional if it passes both prongs of the test. See id. Under the "independent reasons" formulation, the statute is void if it does not pass either of the two reasons. See, e.g., Goldsmith, supra note 133, at 280-81. Because the Supreme Court more recently used the latter of the two formulations, this Note will refer to the test in that sense. See United States v. Williams, 128 S.Ct. 1830, 1845 (2008); Hill v. Colorado, 530 U.S. 703, 732 (2000); Chicago v. Morales, 527 U.S. 41, 56 (1999). But see Gonzalez v. Carhart, 127 S.Ct. 1610, 1628 (2007) (formulating the void-for-vagueness doctrine as a two-part test).
153. Goldsmith, supra note 133, at 289; see also Smith v. Goguen, 415 U.S. 566, 574 (1974). The Supreme Court makes this most clear in Goguen:

We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.
ered the risks of actions not only by law enforcement personnel, but also by prosecutors, judges, and juries.154

Scholars have also described the vagueness doctrine as a way of maintaining the separation of powers of the U.S. government.155 Laws that are too vague allow the legislative branch to “abdicate their responsibilities for setting the standards of the criminal law.”156 The separation of powers rationale at one point was the second prong in the vagueness doctrine;157 however, the majority of the Court has not used it since Smith v. Goguen in 1974.158 The rationale for this transition appears to be the Court’s recognition that the delegation of legislative power to other branches of government may, but will not necessarily, lead to inconsistent or arbitrary enforcement.159 Still, justices in concurring and dissenting opinions continue to cite the separation of powers rationale as a reason for vagueness analysis.160

II. Jordan v. De George: The Supreme Court Tiptoes Around the Void-for-Vagueness Doctrine

In 1951, the Supreme Court made its sole proclamation on the constitutionality of the term moral turpitude.161 The facts of the case are very straightforward. Sam De George, an Italian immigrant, had lived in the United States since 1921.162 In 1937, De George pleaded guilty to conspiracy to defraud the United States of taxes on distilled spirits.163 After serving his sentence, he was convicted of the same crime again in 1941.164 Both of De George’s sentences were for more than one year.165 During his last sentence, the BIA began deportation proceedings against De George under § 19(a) of the Immigration Act, which allows deportation of aliens who commit multiple crimes involving moral turpitude with a term of imprisonment of one or more years.166 In 1946, the BIA ordered the deportation of De George.167

In response to the deportation order, De George filed a petition for writ of habeas corpus in the United States District Court for the Northern

415 U.S. at 574 (internal citations omitted).
155. See, e.g., Grayned, 408 U.S. at 108-09 (noting that vague laws have the effect of unlawfully delegating policy matter resolution to policemen, judges, and juries).
156. Sparks, supra note 142, at 1773 (quoting Goguen, 415 U.S. at 575).
157. Id.
158. Goldsmith, supra note 133, at 288; see also Goguen, 415 U.S. at 574.
159. Goldsmith, supra note 133, at 289.
160. Id. at 288 n.88.
161. CIMT Annotation, supra note 41, at 497.
163. Id. at 223, 226.
164. Id. at 225.
165. Id. at 224–25. The first sentence was for a year and a day, and the second sentence was for two years. Id.
166. Id. at 225 (citing Immigration Act of 1917, ch. 29, § 19(a)(1), 39 Stat. 889, amended by 8 U.S.C. § 155(a)).
167. Id. at 225.
District of Illinois. The district court dismissed the petition, and the Seventh Circuit reversed the district court's order. The Seventh Circuit started its opinion with a discussion of the "many definitions of moral turpitude." Then, after distinguishing or discounting the three major decisions from other courts of appeal, the Seventh Circuit determined that crimes involving moral turpitude include only crimes of violence or crimes that are commonly thought of as involving "baseness, vileness, or depravity." "Such a classification does not include the crime of evading the payment of tax on liquor, nor of conspiring to evade that tax."

A. Supreme Court's Majority Opinion

On November 27, 1950, the Supreme Court granted certiorari to review the Seventh Circuit's decision. At both the appellate level and at the Supreme Court, the sole question presented was whether conspiracy to defraud the United States of taxes on distilled spirits is a crime involving moral turpitude. Chief Justice Vinson's opinion explicitly defined the issue before the Court as a narrow inquiry "to [determine] whether this particular offense involves moral turpitude." Unlike the opinion of the court of appeals, which began by looking at the definition of moral turpitude, the Supreme Court based its opinion predominantly on the "unbroken course of judicial decisions" that show conspiracy to defraud the United States of taxes on distilled spirits to involve moral turpitude.

However, despite Vinson's own declaration of the Court's limited inquiry, the opinion of the Court went beyond the narrow issue. The Court raised sua sponte the question of whether the moral turpitude language was unconstitutionally vague. This issue was "not raised by the parties nor argued before [the] Court." In fact, Justice Jackson first raised this issue in his dissent.

At the time of the Supreme Court's decision, a criminal law was unconstitutionally vague if it failed to set an "ascertainable standard of
guilt."\textsuperscript{183} According to the Court, the test was whether "the language convey[ed] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."\textsuperscript{184} The Court expressed reluctance about applying the vagueness test because the immigration statute was not a criminal law.\textsuperscript{185} However, because of the "grave nature of deportation\textsuperscript{186}" and the general "penal nature of deportation,\textsuperscript{187}" the Court continued the vagueness analysis.\textsuperscript{188}

The Court relied predominantly on three reasons for its holding.\textsuperscript{189} First, moral turpitude had been used for over sixty years in immigration laws.\textsuperscript{190} Although the Court recognized that the existence of a statute for an extended time does not foreclose a constitutionality attack,\textsuperscript{191} this argument was mitigated by the fact that the Court itself had previously construed crime involving moral turpitude in \textit{United States ex rel. Volpe v. Smith}.\textsuperscript{192} Second, state courts have used the phrase "crime involving moral turpitude" for various purposes outside of the immigration context.\textsuperscript{193} Finally, and most importantly,\textsuperscript{194} the Court determined that fraudulent conduct involved moral turpitude "without exception."\textsuperscript{195} As stated in the concluding paragraph:

Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpi-

\textsuperscript{183} See Carter, supra note 22, at 960 (citing Screws v. United States, 325 U.S. 91 (1945)).
\textsuperscript{184} \textit{Jordan}, 341 U.S. at 231-32.
\textsuperscript{185} See \textit{id.} at 230.
\textsuperscript{186} See \textit{id.} at 231.
\textsuperscript{187} Harms, supra note 17, at 272.
\textsuperscript{188} See \textit{Jordan}, 341 U.S. at 231.
\textsuperscript{189} My determination of the three main majority arguments corresponds to the framework identified by Justice Jackson in his dissenting opinion. \textit{Id.} at 238 (Jackson, J., dissenting). Some scholars, however, do not analyze the majority's argument in the same fashion. One scholar combined the first two quoted reasons and maintained that the void-for-vagueness doctrine only applied to criminal laws. See Carter, supra note 22, at 960. Because the immigration laws are not criminal, this doctrine was inapplicable. See \textit{id.} This is an incorrect interpretation of the majority opinion. Although the majority expressed reluctance in applying the vagueness analysis, the Court still applied the analysis because of the penal nature and severe consequences of deportation. See \textit{Jordan}, 341 U.S. at 230-32. If a criminal statute cannot be considered void for vagueness, why would the Court have even bothered continuing to analyze the question of vagueness?
\textsuperscript{190} See \textit{Jordan}, 341 U.S. at 229-30.
\textsuperscript{191} See \textit{id.} at 229 n.14.
\textsuperscript{192} See \textit{id.} at 230 (citing United States \textit{ex rel. Volpe} v. Smith, 289 U.S. 422 (1933)).
\textsuperscript{193} See \textit{id.} at 238.
\textsuperscript{194} Although the Court never states that the fraudulent conduct reason is most important, this seems to be an accurate conclusion since the concluding paragraph of the majority opinion dwells on this concept the most. See \textit{id.} at 232; Corp. of Haverford Coll. v. Reeher, 329 F. Supp. 1196, 1205 (E.D. Pa. 1971) ("[T]he majority in \textit{Jordan} seems to have considered the determinative issue to be whether 'crime involving moral turpitude' was unconstitutionally uncertain in reference to a particular conviction.") (emphasis added). \textit{But see} Boutilier v. INS, 387 U.S. 118, 131 (1967) (Douglas, J., dissenting) (implying that moral turpitude having "deep roots in the law" was the determinative issue).
\textsuperscript{195} See \textit{Jordan}, 341 U.S. at 232.
We therefore decide that Congress sufficiently forewarned respondent that the statutory consequence of twice conspiring to defraud the United States is deportation.196

B. Justice Jackson's Dissent

Justices Jackson, Black, and Frankfurter dissented in Jordan with Justice Jackson authoring the dissenting opinion.197 Unlike the majority opinion, Justice Jackson began with an analysis of moral turpitude, including a quick recognition that no basic definition of this term exists.198 He explained that Congress was aware of the confusion over the phrase and purposely left interpretation of the phrase up to the courts and administrative bodies.199 According to Jackson, the typical tools that courts use to define moral turpitude—the seriousness of the crime, the common-law distinction between crimes mala prohibita and mala in se, the standards that the Government and Respondent proposed,200 and even dictionaries—were unable to provide an unambiguous meaning.201

Justice Jackson next responded to the majority's three main arguments. He first explained that the majority was incorrect in stating that moral turpitude has been an element of immigration laws for sixty years.202 Jackson discussed how the Act of 1891 allowed deportation for a conviction of any felony or crime with a sentence of a year or longer and for "misdemeanors involving moral turpitude."203 It was not until the Act of 1917 that all crimes needed to involve moral turpitude for deportation to occur.204 Moreover, the majority's reliance on United States ex rel. Volpe v. Smith was also inaccurate, because in Volpe the Court neither analyzed nor discussed the vagueness of moral turpitude.205 Furthermore, Jackson analyzed a group of lower court cases to show how "unguiding" and "capricious" they had been in enforcing the Act of 1917.206

Next, Jackson quickly rebutted the majority's idea that state courts' use of moral turpitude could be useful to the federal courts. He reasoned that the federal government does not allow for common law crimes, and state courts have been just as unsuccessful as federal courts in articulating

196. See id.
197. See id. at 232 (Jackson, J., dissenting).
198. See id. at 233.
199. See id.
200. The Government's proposed definition was that moral turpitude should be based on "the moral standards that prevail in contemporary society." See Carter, supra note 22, at 961 (quoting Jordan, 341 U.S. at 236-37 (Jackson, J., dissenting)). The Respondent proposed that the standard be only crimes of violence. See Jordan, 341 U.S. at 235.
201. See Jordan, 341 U.S. at 234-38.
202. See id. at 238.
203. Id. at 230 n.12.
a clear definition of moral turpitude.\textsuperscript{207}

Finally, the dissent looked more specifically at the crime at issue—the nonpayment of a tax—and used legal common sense in questioning whether the "disregard of the Nation's liquor taxes . . . should banish an alien from [society."

Jackson further stated that the constitutionality of the standard "moral turpitude" cannot be reconciled with previous Supreme Court decisions declaring other statutes vague.\textsuperscript{209} The statutes in those cases were "certainly no more vague than the one before [the Court] now and had not caused even a fraction of the judicial conflict that 'moral turpitude' has."\textsuperscript{210} In conclusion, Jackson acknowledged that the Court should be very hesitant to declare a statute unconstitutionally vague, but in \textit{Jordan} it was necessary to do so.\textsuperscript{211}

C. Interpretation of \textit{Jordan}

The exact reach of the Supreme Court's holding in \textit{Jordan} is speculative. At first, most courts and scholars interpreted \textit{Jordan} as barring any vagueness challenges to the term moral turpitude.\textsuperscript{212} Courts did little more than cite or quote the \textit{Jordan} opinion for this proposition. The Seventh Circuit in \textit{United States ex rel. Circella v. Sahli}\textsuperscript{213} devoted less than a paragraph to the void-for-vagueness "discussion."\textsuperscript{214} In \textit{Tseung Chu v. Cornell},\textsuperscript{215} the Ninth Circuit quoted verbatim seven paragraphs of the \textit{Jordan} decision and then added the conclusion that "while it is true that Mr. Justice Jackson . . . wrote a strong dissent, we feel bound by the language and reasoning of the majority."\textsuperscript{216} Scholars agreed, with one commentator calling Jackson's dissent one of his "boldest attempt[s]" to mitigate the danger of vague laws.\textsuperscript{217}

With the passing of time, courts and scholars began to give further

\begin{itemize}
\item \textsuperscript{207} See id. at 240.
\item \textsuperscript{208} See id. at 241.
\item \textsuperscript{209} See id. at 243-44.
\item \textsuperscript{210} See id. at 244.
\item \textsuperscript{211} See id. at 245.
\item \textsuperscript{212} See Harms, \textit{supra} note 17, at 272.
\item \textsuperscript{213} 216 F.2d 33 (7th Cir. 1954).
\item \textsuperscript{214} The Court's discussion on the vagueness issue was as follows:
\begin{quote}
[Respondent's] final contention is that the Immigration and Nationality Act of 1952 is unconstitutional. He contends that this Act as well as the 1917 Act is unconstitutional because the use of the phrase "involving moral turpitude" to describe the type of crimes the commission of which is to make an alien subject to deportation makes the law "void for vagueness." The Supreme Court decided this question . . . in \textit{Jordan v. De George} . . . . The Court there said that the descriptive phrase, "involving moral turpitude," conveys "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."
\end{quote}
\begin{quote}
\textit{Id.} at 40 (internal citations omitted). The Seventh Circuit made no attempt to interpret \textit{Jordan} beyond this one quotation. See generally \textit{id}.
\end{quote}
\item \textsuperscript{215} 247 F.2d 929 (9th Cir. 1957).
\item \textsuperscript{216} \textit{Id.} at 938-39.
\item \textsuperscript{217} Louis L. Jaffe, \textit{Mr. Justice Jackson}, 68 \textit{Harv. L. Rev.} 940, 983-84 (1955). Jaffe's dismissal of Jackson's dissent is evident where he uses the rare exclamation point to express his view: "The standard, [Jackson] insisted with considerable force, wit, and
credence to Justice Jackson's dissent and started to interpret the Jordan holding as narrower than originally understood. In Ramirez v. INS, the D.C. Court of Appeals claimed that Jordan foreclosed a vagueness argument, but stated that the "Supreme Court [was] the proper forum for presentation" of this question. Two years later, the District Court for the Eastern District of Pennsylvania recognized that the holding of Jordan was limited to fraudulent crimes. The court held that a state statute allowing the denial of financial aid to students convicted of a "misdemeanor involving moral turpitude" was unconstitutionally vague. Although the decision could have triggered other courts to reconsider this issue, no courts have done so thus far.

Some courts of appeal and prominent justices still question the usefulness of the term moral turpitude. In 2004, Judge Posner, in a Seventh Circuit decision, declared in dicta that "[t]he term may well have outlived its usefulness," but that this question was "not for [the circuit court] to decide." Moreover, Judge Posner implied the vagueness of the term by stating that "[t]ime has only confirmed Justice Jackson's powerful dissent in the De George case, in which he called 'moral turpitude' an 'undefined and undefinable standard.'" Multiple courts, including the Ninth Circuit, have quoted Posner's language in subsequent opinions with approval. Scholars are divided as to the reach of the Jordan decision.
This Note argues that the *Jordan* holding should be interpreted narrowly and that therefore, the broader constitutional question remains open.

III. *Jordan* Does Not Block a Vagueness Attack

A. Preliminary Issues

"The void-for-vagueness doctrine is itself vague," because it does not explicitly state when a statute is too vague to be constitutional. Still, the reluctance expressed by some commentators to apply the void-for-vagueness doctrine to civil statutes is misguided. The void-for-vagueness doctrine applies to both criminal and civil statutes. In fact, the Supreme Court has declared civil statutes vague without discussing the distinction between civil and criminal statutes.

The policy reasons for applying the same standards to civil and criminal statutes, especially immigration and deportation statutes which are penal in nature, are apparent. The consequences of committing a crime of moral turpitude are extremely severe. The punishment is imposed in the same fashion and is as severe as a criminal sentence. For these reasons, this Note will treat the removal statutes as though they were criminal statutes for the purpose of the void-for-vagueness doctrine.

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233. See Keyishian, 385 U.S.; Corp. of Haverford Coll. v. Recheer, 329 F. Supp. 1196, 1203 (E.D. Pa. 1971) (discussing Keyishian). Previously, the Supreme Court made it clear that the civil-criminal distinction is very important in the void-for-vagueness inquiry. Winters v. New York, 333 U.S. 507, 515 (1948). In *Jordan*, 341 U.S. 223, the court cited the dissent in *Winters*, which begs the question of whether *Winters* is still good law. Id. at 230, 244 n.19 (Jackson, J., dissenting). Granted, the Court has made clear that aliens who are faced with the possibility of deportation do not receive "various protections that apply in the context of a criminal trial." INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984). But in *INS v. Lopez-Mendoza*, the Court proceeded to list the "various protections" and the void-for-vagueness doctrine was not mentioned. Id. at 1038-39.

234. See supra notes 96-100 and accompanying text.

235. Carter, supra note 22, at 962 n.41 (discussing Justice Jackson's dissenting opinion in *Jordan*).
B. Concerns with the Jordan Decision

There are three main criticisms or interpretational problems with the Jordan opinion which suggest that Jordan does not foreclose the void-for-vagueness attack on moral turpitude. First, the holding in the case is extremely narrow and only pertains to a specific type of crime. This criticism is the main reason that the broader constitutional issue is not foreclosed today. The second and third concerns—the sua sponte problem and other flaws in the majority opinion, respectively—are reasons to give less deference to the decision.

1. Narrow Holding Binding Only “Easy” Fraud Cases

Despite the conflict over the breadth of the Jordan holding, the decision is “quite clearly limited to holding that the phrase ‘crime involving moral turpitude’ is not constitutionally vague where the crime was one of fraud.” The last paragraph of the Jordan opinion, where the court actually gives its holding, makes this point unambiguous:

We conclude that [the test as to whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices] has been satisfied here. Whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. We have recently stated that doubt as to the adequacy of a standard in less obvious cases does not render that standard unconstitutional for vagueness. But there is no such doubt present in this case. Fraud is the touchstone by which this case should be judged. The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct. We therefore decide that Congress sufficiently forewarned respondent that the statutory consequence of twice conspiring to defraud the United States is deportation.

There are two important points in this paragraph. First, looking at the first three sentences, the void-for-vagueness test was fulfilled only for fraud cases. The Court only discussed the test for “peripheral cases,” and expressed an obvious reluctance. Second, we see that the holding of Jordan is limited solely to fraudulent conduct. In the last three sentences of the opinion, arguably the most important portion, the court performs a straightforward analysis; because fraud is the outcome-determinative reason in this case and fraud always involves moral turpitude, the Court

236. See infra Part III.B.1.
237. See infra Part III.B.2.
238. See infra Part III.B.3.
239. See supra Part II.C.
240. CIMT Annotation, supra note 41, at 503.
242. See id. (“Fraud is the touchstone by which this case should be judged.”).
243. See id. (“The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.”).
concludes that defrauding the United States government involves moral turpitude.244

Courts have repeatedly misinterpreted the Jordan opinion. The Ninth Circuit in a subsequent case conveniently left out most of the last paragraph of the Jordan opinion despite quoting almost an entire page of its analysis.245 Another appellate court summarized Jordan by quoting the void-for-vagueness standard and giving almost no explanation of how it was fulfilled.246 Some courts have used nonbinding precedent to avoid the void-for-vagueness argument.247

Jordan, the Supreme Court's only proclamation on this issue,248 should be narrowly construed to cases involving fraudulent conduct. The literal language of the holding in the concluding paragraph of the opinion demonstrates that the broader constitutional issue is still open.249

2. Void-for-Vagueness Argument Raised Sua Sponte

The Supreme Court has never received a brief or heard oral argument on the question of whether moral turpitude is unconstitutionally vague.250 Although the Court is allowed to raise issues sua sponte, the dangers of doing this have been expressed both by Supreme Court Justices251 and

244. See id. ("We therefore decide that Congress sufficiently forewarned respondent that the statutory consequence of twice conspiring to defraud the United States is deportation.").
246. United States ex rel. Circella v. Sahli, 216 F.2d 33, 40 (7th Cir. 1954). The Seventh Circuit claimed that the Supreme Court held "that the descriptive phrase 'involving moral turpitude,' conveyed] 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" Id. However, this is taken out of context of the opinion. The Supreme Court's actual wording was as follows:

The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

We conclude that the test is satisfied here. Whatever else the phrase "crime involving moral turpitude" may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged.

Jordan, 341 U.S. at 231-32 (emphasis added). Therefore, the Seventh Circuit was mistaken.
247. See Marciano v. INS, 450 F.2d 1022, 1024 (8th Cir. 1971) (citing Ramirez v. INS, 413 F.2d 405 (D.C. Cir. 1969)).
248. See CIMT Annotation, supra note 41, at 497.
249. See supra notes 236-241 and accompanying text.
250. See Jordan, 341 U.S. at 229 ("The question of vagueness was not raised by the parties nor argued before this Court."); CIMT Annotation, supra note 41, at 499 (stating Jordan is the Supreme Court's only decision on the vagueness of moral turpitude). But see United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929) (upholding the constitutionality of an exclusion statute, albeit with less than a paragraph of discussion).
251. See Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 572 (1993) (Souter, J., concurring in part and concurring in the judgment) ("Sound judicial decisionmaking requires [that] . . . a constitutional rule announced sua sponte is entitled to less deference than one addressed on full briefing and argument."); Monell v. Dep't of Social Serv., 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring) ("I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing
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scholars. raising and deciding issues sua sponte, as in Jordan is especially problematic because it denies the parties the opportunity to be heard. These decisions are contrary to the adversarial system as they counteract the “active parties and an inactive court” policy that is widespread in the law.

A recent article written by Professor Adam A. Milani and Professor Michael R. Smith, which details the evils of sua sponte decisions, sets forth three recommendations that can clarify this issue. First, once the court members identify an issue which was not previously raised, appellate courts should request supplemental briefs and arguments from counsel. The Jordan court did not request supplemental briefs. Second, appellate courts making sua sponte decisions should grant the losing party’s request for rehearing as a matter of right. The Supreme Court denied the request for a rehearing after oral arguments in Jordan. Finally, similar to dicta, sua sponte decisions do not fully consider the issue and therefore, should be given less deference.

3. Flaws of the Majority Opinion

The majority opinion’s premise and analysis appear to rest on flawed or incorrect grounds. Some of these grounds can be found in Justice Jackson’s dissent; others are simple observations by the author of this Note.

First, the Court’s argument that the “deep roots” of moral turpitude had given it settled meaning rested on multiple flawed premises. For example, it was misleading for the Court to claim that it had previously construed moral turpitude in Smith. The Court’s only “discussion” of moral turpitude in that case was its proclamation that counterfeiting is “plainly a crime involving moral turpitude.” The Court’s suggestion that constitutionality is proven by the appearance of moral turpitude in the statute at issue for over sixty years and in a variety of other settings is also of no value. Although the longevity of a statute may be evidence of the validity of a statute, this is only true when “the passing years have by


252. See, e.g., Note, Appellate-Court Sua Sponte Activity: Remaking Disputes and the Rule of Non-Intervention, 40 S. Cal. L. Rev. 352 (1966) [hereinafter Sua Sponte Note].


254. See Sua Sponte Note, supra note 252, at 353.

255. See Milani & Smith, supra note 253, at 294-315.

256. Id. at 294.

257. See supra note 250 and accompanying text.

258. See Milani & Smith, supra note 253, at 304.

259. 341 U.S. 956 (1951) (denial of rehearing).

260. Id. at 239 (Jackson, J., dissenting).


262. Id. at 294 (Jackson, J., dissenting).

263. See Carter, supra note 22, at 961 n.37 (citing United States ex rel. Volpe v. Smith, 289 U.S. 422, 423 (1933)).
administration practice or judicial construction served to make it clear as a word of legal art.\textsuperscript{264} Courts are still bewildered by the vague term "moral turpitude" over fifty years after the \textit{Jordan} decision.\textsuperscript{265}

Also, the Court did not appear to have completely considered the constitutional issue of vagueness.\textsuperscript{266} At the time \textit{Jordan} was decided, a law was "unconstitutionally vague if it failed to set an 'ascertainable standard of guilt."\textsuperscript{267} However, the majority opinion never uses the phrase "ascertainable standard of guilt" or the word "notice" in its void-for-vagueness discussion.\textsuperscript{268} One wonders if the Court actually fully considered the issue of constitutionality, or instead, "disposed" of the issue.

Also, one can easily argue that because the broader constitutional question was not included in the petition for certiorari the Court was precluded from considering it.\textsuperscript{269} Supreme Court Rule 14.1(a) states that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court."\textsuperscript{270} Questions that are complementary and not subsidiary to the question presented to the Court are not "fairly included therein."\textsuperscript{271} In \textit{Jordan}, the sole question presented was "whether conspiracy to defraud the United States of taxes on distilled spirits is a 'crime involving moral turpitude.'"\textsuperscript{272} The vagueness of the statute regarding fraudulent crimes was arguably a subsidiary question, so the Court could, and did, consider that question.\textsuperscript{273} However, the question of whether the entire statute is void for vagueness was not part of the certiorari petition and thus was not considered a subsidiary question.\textsuperscript{274} This is

\textsuperscript{264} \textit{Jordan}, 341 U.S. at 238-39 (Jackson, J., dissenting).
\textsuperscript{265} See, e.g., discussion infra Part IV. Despite over 110 years of statutory presence, the Ninth Circuit's fragmented decision in \textit{Navarro-Lopez v. Gonzales}, 503 F.3d 1063 (9th Cir. 2007), is a simple demonstration of the this bewilderment.
\textsuperscript{266} But see Ramirez v. INS, 413 F.2d 405, 406 (D.C. Cir. 1969) ("Upon full consideration of the question the \textit{[Jordan]} Court upheld the statute as constitutional.").
\textsuperscript{267} Carter, supra note 22, at 960 (quoting Screws v. United States, 325 U.S. 91, 95 (1945)).
\textsuperscript{268} See \textit{Jordan}, 341 U.S. at 229-32. The Court does use the word "notice" when it introduces the purpose of the "void-for-vagueness" doctrine, id. at 230, but does not use the word in the actual discussion, meaning when it articulates a "test" or during the application of the law. See id. at 229-32.
\textsuperscript{269} No commentators appear to have made this argument regarding the \textit{Jordan} decision; however, Supreme Court Justices have discussed this rule. See, e.g., Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400-01 (1995) (O'Connor, J., dissenting) (arguing that the broad constitutional challenge should not have been considered because it was not presented in the petition for certiorari).
\textsuperscript{270} Sup. Ct. R. 14.1(a).
\textsuperscript{271} Yee v. Escondido, 503 U.S. 519, 537-38 (1992) (following Rule 14.1(a) in considering only the question raised and refusing to consider the regulatory taking question because it was "related to the one petitioners presented, and perhaps complementary" to it, but was not subsidiary to it).
\textsuperscript{272} \textit{Jordan}, 341 U.S. at 223-24.
\textsuperscript{273} Id. at 227-28 (stating that courts have held that a crime in which fraud is an ingredient involves moral turpitude and concluding that the vagueness doctrine's standards of specificity had been satisfied in the case because the crime charged was "conspiracy to defraud").
\textsuperscript{274} Id. at 229 (noting that the question of vagueness was not raised by the parties nor argued before the Court).
yet another reason why the Jordan holding is narrow and its decision should be accorded less deference.

Thus, the void-for-vagueness argument should be available today. The narrow holding in Jordan and the many flaws of the opinion keep this avenue open.

IV. "Crimes Involving Moral Turpitude" is Unconstitutionally Vague

A statute can be void for vagueness for either of two independent reasons. The immigration statutes at issue could be found unconstitutional under both prongs.

Moral turpitude "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." In Jordan, the Court stated that "doubt as to the adequacy of a standard in less obvious cases does not render the standard unconstitutional for vagueness." However, it is not the "less obvious cases" that "remain under the shadows of constitutional doubt and lack of forewarning, but the entire body of moral turpitude law that happens to lie outside the fraud context." Courts are only comfortable when "tread[ing] . . . the familiar territory of well-cultivated precedent." Beyond this narrow context, the number of splits among courts of appeal and ambiguities of the term are rampant.

Even the so-called "well-cultivated precedent" has been called into doubt. The resident alien in Jordan may have had sufficient forewarning of the consequences of his actions because fraudulent crimes were without exception crimes involving moral turpitude. However, the Ninth Circuit, in a recent, extremely fractured en banc decision, addressed the fraudulent crimes discussion again and created additional conflict. Of the

276. Id.
277. Jordan, 341 U.S. at 232. In American Communications Association v. Douds, 339 U.S. 382, 412 (1950), the Court emphasized a similar point by stating, "[t]here is little doubt that imagination can conjure hypothetical cases in which the meaning of these terms will be in nice question."
278. Heifetz, supra note 11, at 1293–94; see also Franklin v. INS, 72 F.3d 571, 595 (8th Cir. 1995) (Bennett, J., dissenting) (defining the case as "one of those uncomfortable 'peripheral' or 'less obvious' cases" where the application of the void-for-vagueness standard is uncertain).
279. See Franklin, 72 F.3d at 595 (Bennett, J., dissenting).
280. Compare Hyder v. Keisler, 506 F.3d 388, 393 (5th Cir. 2007) (holding that the misuse of a Social Security Number is a crime involving moral turpitude), with Beltran-Tirado v. INS, 213 F.3d 1179 (9th Cir. 2000) (holding that the misuse of a Social Security Number is not a crime involving moral turpitude).
281. Heifetz, supra note 11, at 1293–94. However, even this assertion can be called into question because the Supreme Court granted certiorari for the purpose of resolving a circuit split. Jordan, 341 U.S. at 226 ("We granted certiorari to review the decision . . . as conflicting with decisions of the court of appeals in other circuits.").
282. Compare Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1069 (9th Cir. 2007) (stating that crimes involving fraud are not a per se category of crimes involving moral turpitude), with Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002) (holding that misprision of a felony is a crime of moral turpitude), and Padilla v. Gonzales, 397 F.3d
fifteen justices hearing the case, 283 nine justices thought that accessory after the fact was not a crime involving moral turpitude 284 and six thought that it did involve moral turpitude. 285 Four different opinions were written about whether this crime involved fraud and how fraud should be analyzed. 286 Judge Harry Pregerson, the author of the majority opinion, in a special concurring opinion with which the rest of the majority disagreed, even stated that "crimes involving fraud [were] not a per se category of crimes involving moral turpitude." 287 When fifteen justices arrive at four distinct conclusions, one wonders where to look for an "unambiguous definition" that can let U.S. citizens know if they have engaged in illegal conduct. 288

The term also authorizes or encourages arbitrary and discriminatory enforcement. When trying to prevent discriminatory enforcement, "the question is not whether discriminatory enforcement occurred [in a specific factual situation], but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." 289 The fact that Congress originally relied on judges to define the term "crimes involving moral turpitude" already implies unpredictability and arbitrariness. 290

The lack of adequate standards can be seen in some recent decisions at the federal appellate level. For example, in a Ninth Circuit opinion, a three-judge panel found that engaging in intercourse with a minor who is under sixteen years of age when the perpetrator is twenty-one years of age or older, known as statutory rape, is not a crime that categorically involves

1016, 1020 (7th Cir. 2005) (expanding the meaning of fraud to include "concealing criminal behavior" and holding that because obstruction of justice entails an intent to conceal criminal activity, it involves moral turpitude).


284. See id. at 1065, 1074 (listing the names of the author of the majority opinion and the author and joiners of a concurring opinion which garnered a majority of the justices).

285. See id. at 1078 (Tallman, J., dissenting, joined by O'Scannlain, J., Rawlinson, J., Clifton, J., Bybee, J.); id. at 1084 (Bea, J., dissenting, joined by O'Scannlain, J.).

286. Both the majority and concurring opinions apply the categorical and modified categorical approaches. See id. at 1067 (majority opinion); id. at 1074 (Reinhardt, J., concurring) (agreeing with the general approach and holding of the majority opinion). However, in a special concurrence by Justice Pregerson, he said that crimes involving fraud should be analyzed under the same standard as other crimes. Id. at 1068-69.

The rest of the majority disagreed with Judge Pregerson and argued that crimes involving fraud should be analyzed under a special standard. See id. at 1075-76 (Reinhardt, J., concurring). Justice Tallman's opinion, the first of two dissents, claimed that accessibility after the fact involves fraud and that he would use the Ninth Circuit precedent in Goldeshtein v. INS, 8 F.3d 645 (9th Cir. 1993), to hold that this crime involves moral turpitude. Navarro-Lopez, 503 F.3d at 1078-84 (Tallman, J., dissenting). Justice Bea, who wrote the second dissent, would not use the categorical approach, but instead would "look to the manner in which the term 'moral turpitude' has been applied by judicial decision," to determine if this crime involves moral turpitude. Id. at 1085-86 (Bea, J., dissenting) (quoting Jordan, 341 U.S. at 227).

287. Navarro-Lopez, 503 F.3d at 1069.

288. For statutory interpretation and the vagueness doctrine, see Sparks, supra note 142, at 1771.


290. See Harms, supra note 17, at 273.
moral turpitude.\textsuperscript{291} The holding basically rested on the proposition that it would be feasible for statutory rape to occur between two people who met in high school and continued a relationship.\textsuperscript{292} In other words, because such a factual scenario has the slightest chance of occurring, statutory rape does not categorically involve moral turpitude.\textsuperscript{293} Courts and the BIA have argued that this rule is supported by the literal text of the immigration statutes and for other policy reasons.\textsuperscript{294} Even if this is the case, how could this argument—allowing justices to search for factual scenarios unrelated to the facts at hand to come to a conclusion about whether a statute involves moral turpitude—represent adequate guidelines for the term moral turpitude?

The Supreme Court has recognized "eight ways to defend statutes against vagueness allegations."\textsuperscript{295} None of these defenses could feasibly be argued for the immigration statutes here. These eight defenses are: (1) judicial interpretation adequately narrows the statute, (2) legislative history illuminates the meaning, (3) specialized definitions illuminate the meaning, (4) common understanding of language illuminates the meaning, (5) context of prohibited conduct illuminates the meaning, (6) law enforcement agencies have given the statute adequate meaning, (7) the statute requires scienter, and (8) the statute is easy to apply in practice.\textsuperscript{296}

Foremost, federal appellate courts have been unable to provide a narrowing construction of the immigration statutes. Fair warning should be "whether the ordinary and ordinarily law-abiding individual would have received some signal that his or her conduct risked violation of the . . . law."\textsuperscript{297} Statutes must use words with "well-defined and universally accepted meanings."\textsuperscript{298} The term moral turpitude has never been well-defined and has never had a single accepted definition.\textsuperscript{299} The defense of a narrowing construction should therefore be unavailable.

Legislative history, specialized definitions, common understanding of language, context of prohibited conduct, and law enforcement agencies have all been unable to illuminate the meaning of the term moral turpitude. In fact, the legislative history only demonstrates the vagueness of the stat-

\textsuperscript{291} Quintero-Salazar v. Keisler, 506 F.3d 688, 691 (9th Cir. 2007).
\textsuperscript{292} Id. at 693 ("Among the range of conduct criminalized by [the statute] would be consensual intercourse between a 21-year-old (possibly a college sophomore) and a minor who is 15 years, 11 months (possibly a high school junior). That relationship may very well have begun when the older of the two was a high school senior and the younger a high school freshman and have continued monogamously without intercourse for two to three years before the offending event.").
\textsuperscript{293} See id.
\textsuperscript{294} See Carter, supra note 22, at 965.
\textsuperscript{295} Goldsmith, supra note 133, at 294.
\textsuperscript{296} See id. at 295-303.
\textsuperscript{297} Id. at 296 (quoting John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 VA. L. REV. 189, 211 (1985)).
\textsuperscript{299} See, e.g., supra Part I.A.1.
The Police Commissioner of New York City was very influential in his congressional testimony before the enactment of the Act of 1917. His testimony strongly supports the idea that Congress had in mind only crimes of violence as crimes involving moral turpitude, but this interpretation has never been adopted.

The deportation and exclusionary statutes are also not easy to practically apply. In *United States v. Ragen*, the Supreme Court upheld a statute prohibiting willful tax evasion because the statute had been in existence for years without "any apparent general confusion bespeaking inadequate statutory guidance." The United States immigration statutes, while having been on the books for approximately one hundred years, do not fall into this category. The statutes do not contain a scienter requirement, as it is not necessary for an alien to knowingly or purposely commit a crime. In fact, one scholar has proposed that requiring knowledge or purpose would be an adequate substitute for the vague moral turpitude standard.

**Conclusion**

Even a terse analysis of the immigration statutes regarding crimes involving moral turpitude reveals a problem with interpretation. "Moral turpitude" is an unconstitutionally vague term and *Jordan v. De George* does not foreclose such an argument. Congress knowingly conceived the term in confusion; and this confusion has never settled. If the Department of Homeland Security had crafted a clear definition of moral turpitude, it should receive deference, but the DHS never has.

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300. See, e.g., Cabral v. INS, 15 F.3d 193, 195 (1st Cir. 1994) ("The legislative history leaves no doubt . . . that Congress left the term 'crime involving moral turpitude' to future administrative and judicial interpretation.").


302. *Id.* at 235 n.8. The Police Commissioner's testimony explicitly asked for provisions to allow for the deportation of violent aliens:

> I would make provisions to get rid of an alien in this country who comes here and commits felonies and burglaries, holds you up on the streets, and commits crimes against our daughters, because we do not want that kind of alien here, and they have no right to be here. . . . The rule is that if we get a man in this country who has not become a citizen, who knocks down people in the street, who murders or who attempts to murder people, who burglarizes our houses with blackjack and revolver, who attacks our women in the city, those people should not be here.

*Id.* (quoting Hearing on H.R. 10384 Before the H. Comm. on Immigration and Naturalization, 64th Cong., 14 (1916)).


305. See Heifetz, *supra* note 11, at 1286 (arguing that "a crime whose statutory definition does not require purpose or knowledge should never constitute a crime involving moral turpitude").

306. *Id.* at 1294 (arguing that it is imperative that purpose or knowledge be requisite elements of any offense subject to the categorization of moral turpitude).

307. See *supra* notes 8-19, 28-30 and accompanying text.
Resident aliens, like all United States citizens, are entitled to due process of law.\textsuperscript{308} If Congress had decided upon an expansive list of deportable and exclusionary crimes, the void-for-vagueness problem would not be an issue.\textsuperscript{309} Instead, Congress knowingly conceived of a vague and nebulous term which gives no one—resident aliens, lawyers, and judges alike—a definition or even an adequate roadmap to follow.\textsuperscript{310} The term "crimes involving moral turpitude" is "notoriously plastic . . . [and] so ambulatory that some Justices have thought it unconstitutionally vague."\textsuperscript{311} Over fifty years ago, the Supreme Court in\textit{Jordan} was unclear in its holding; the next time it must be more specific and declare the statute void for vagueness.

\begin{itemize}
\item \textsuperscript{308} Zadvydas v. Davis, 533 U.S. 678, 679 (2001) ("[T]he Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent."); Galvan v. Press, 347 U.S. 522, 530 (1954) (stating that "an alien [who legally became part of the American community] has the same protection for his life, liberty, and property under the Due Process Clause as is afforded to a citizen"); Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting).
\item \textsuperscript{309} See Franklin v. INS, 72 F.3d 571 (8th Cir. 1995).
\item \textsuperscript{310} See Marmolejo-Campos v. Gonzales, 503 F.3d 922 (9th Cir. 2007).
\item \textsuperscript{311} Ali v. Mukasey, 521 F.3d 737, 739 (7th Cir. 2008).
\end{itemize}