SHOCKING THE CONSCIENCE OF MANKIND: USING INTERNATIONAL LAW TO DEFINE "CRIMES INVOLVING MORAL TURPITUDE" IN IMMIGRATION LAW

by
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Immigration law dictates that resident aliens shall be removed upon conviction of a crime "involving moral turpitude," but does not define "moral turpitude." Courts and administrators have attempted for the last century to provide such a definition, but have largely failed due to a lack of objective criteria for moral turpitude. This Comment proposes that, when identifying crimes involving moral turpitude, courts and administrators should use objective sources from international law in order to determine the universal social values which moral turpitude violates. The use of such objective sources would allow for more defensible applications of moral turpitude as a standard of removal.

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I. INTRODUCTION

Suppose that we wipe all of this country's criminal law from our casebooks, treatises and statutes, and replace it with a single commandment: judges shall punish the commission of acts which are "just plain wrong" by removing the actors from society as we know it. Unless everyone in the resulting system agrees on what is "just plain wrong," it will produce

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unpleasant, unjust consequences. No one will know what conduct is punishable by law. Judges, lacking objective criteria on which to base their rulings, will be left to adjudicate according to personal prejudices. Decisions will lack uniformity: some judges will remove people for actions few would consider "just plain wrong," while others will fail to remove those who arguably deserve it. Finally, as inconsistencies and injustices pile up, the public will lose faith in the ideal of a neutral "rule of law." Anyone who would not want to live under such a system should find it troubling that we apply a very similar one to aliens residing in this country when we remove them for convictions of "crimes involving moral turpitude" (CIMT).[1]

This Comment addresses itself primarily to the first problem, i.e. the lack of adequate objective criteria for determining whether a crime involves moral turpitude.[2] The statute which establishes CIMTs as a basis for removal also fails to inform aliens, judges and administrators of exactly what CIMTs are. But the Supreme Court has declared that the statute is not unconstitutionally vague, so courts and administrators must interpret and apply it. Often this results in case law founded on reflexive citation to precedent or reliance on personal prejudice because the statute provides no basis for objective analysis. This problem has not gone unnoticed. Some courts have attempted to remedy it by examining precedent to derive general principles for determining whether a crime is a CIMT.[3] One author has proposed that Congress draft similar principles into the immigration law, in order to clarify the meaning of moral turpitude.[4] This Comment agrees that identifying such principles would improve the state of the jurisprudence on this subject, but argues for seeking them by reference to certain sources of international law, such as international accords and *jus cogens*. By doing so, this Comment hopes to provide a basis for delineating what the courts refer to as the "private and social duties which man

[1] *See* 8 U.S.C. § 1227(a)(2)(A) (2000). The Article focuses on the use of moral turpitude as a basis for removing aliens from the United States, largely because of the harsh consequences of its use in this setting. However, the phrase "crimes involving moral turpitude" appears in several other contexts. It is also used as a basis for the exclusion of arriving aliens. 8 U.S.C. § 1182(a)(2)(A)(i) (2000). In state law, the term is used to impeach the credibility of witnesses and indict public officers, among other things. *See* Patricia D. Petway, *Crimes of Moral Turpitude*, S.C. LAW., Dec. 1993, at 37.

[2] I should disclose that I agree wholeheartedly with the position espoused by Justice Jackson in his dissent to *Jordan v. DeGeorge*, 341 U.S. 223 (1951). Moral turpitude is an unconstitutionally vague term. Its use in the law rests upon a questionable belief in an objective, easily identifiable standard of morality that all people have access to. I am not sure whether such an objective moral standard actually exists (that question is better left to Hume, Kant, and their ilk), but I am convinced that even if it does, the difficulties inherent in identifying it are so great that they prevent it from providing a guideline for the fair and even administration of removal. Nonetheless, the Supreme Court announced decades ago that "moral turpitude" is a workable legal standard, so the rest of us must act as though it is and derive objective criteria from it as best we can. *See infra* Part II.B.

[3] *See generally* Mei v. Ashcroft, 393 F.3d 737 (7th Cir. 2004); Franklin v. INS, 72 F.3d 571 (8th Cir. 1995) (Bennett, J., dissenting); Rodriguez-Herrera v. INS, 52 F.3d 238 (9th Cir. 1995).

[4] *See* Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 281–83 (2001).

owes to his fellow man, or to society in general,"[5] which will be more objective and better supported than the reasoning on which our jurisprudence currently rests.

Part II of this Comment discusses the law that established moral turpitude as a basis for removal of aliens, the Supreme Court case upholding it, and the jurisprudence applying it. Part III explains why it is appropriate to use international law to determine the legal meaning of moral turpitude. Part IV shows how specific international materials can provide judges and administrators with analytical tools for identifying CIMTs. Part V concludes.

II. WHAT IS MORAL TURPITUDE?

A. The Statute

The Immigration Act of 1891 was the first immigration law to make aliens excludable if they had been convicted of a crime "involving moral turpitude."[6] Over one hundred years later, that phrase is still in use as a basis for the removal of aliens. If an alien commits a single CIMT with a potential prison sentence of one year within five years of admission, or multiple CIMTs at any time, he or she is removable.[7] However, Congress still has yet to provide a definition of a CIMT.[8] The courts seem to have accepted that the task is left to them and to administrative agencies.[9]

In the context of removal, the phrase is used as follows. When an alien is convicted of a crime, usually under state law, an officer of the Department of Homeland Security reviews his conviction. The officer bases her review on the

[5] BLACK'S LAW DICTIONARY 1008–09 (6th ed. 1990). The courts have formulated this phrase in different ways, but the basic content remains the same. *See, e.g.*, Hamdan v. INS, 98 F.3d 183, 186 (5th Cir. 1996).

[6] Immigration Act of 1891, ch. 551, 26 Stat. 1084; *see also* Harms, *supra* note 4, at 262.

[7] 8 U.S.C. § 1227(a)(2)(A)(i) provides:

> 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(j) 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.

8 U.S.C. § 1227(a)(2)(A)(ii) provides:

> 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 . . . is deportable.

[8] *See* Harms, *supra* note 4, at 260 ("Congress has never defined what constitutes a 'crime involving moral turpitude' in the over one hundred years that the term has been used in the immigration law.").

[9] *See* 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."); *cited with approval in* Knapik v. Ashcroft, 384 F.3d 84, 87 n.3 (3d Cir. 2004); Yousefi v. INS, 260 F.3d 318, 326 (4th Cir. 2001); *Hamdan*, 98 F.3d at 185; Franklin v. INS, 72 F.3d 571, 572 (8th Cir. 1995).

minimum elements of the crime as evinced by the record of conviction, and does not review the alien's particular conduct.[10] For the alien's crime to qualify as a CIMT, the officer must find that all conduct potentially prohibited by the law which the alien violated would "necessarily" involve moral turpitude.[11] If she determines that the crime involves moral turpitude, and meets other minimal criteria,[12] the officer will begin removal proceedings.

The Code of Federal Regulations (CFR) states that the officer must base her decision "upon the moral standards generally prevailing in the United States."[13] The CFR does not specify how the officer will assess those standards. If the alien appeals the officer's judgment to the Board of Immigration Appeals (BIA), or appeals the BIA's decision to a federal circuit court, those bodies will determine whether a crime involves moral turpitude, largely by reference to precedent. As a result, the BIA and the federal courts have supplied the current working definitions of moral turpitude, and have determined which crimes involve moral turpitude.

B. Challenges to the Statute

Criticisms of moral turpitude as an undefined concept date back nearly a century. These criticisms are legally moot, because in *Jordan v. DeGeorge*,[14] the Supreme Court held that moral turpitude was not an unconstitutionally vague term. Unfortunately, the Court's decision did not actually impart any greater clarity to the term, while the counterarguments raised by the dissenters—Justice Jackson, joined by Justices Black and Frankfurter—highlight flaws in the law which are present to this date.

Most administrative and judicial definitions of moral turpitude resemble one found in earlier editions of *Black's Law Dictionary*:

> [An] act of baseness, vileness, or . . . depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man.[15]

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[10] *See* Allen C. Ladd, *Protecting Your Non-Citizen Client from Immigration Consequences of Criminal Activity*, S.C. LAW., May 2004, at 38, 44; Okoro v. INS, 125 F.3d 920, 926 (5th Cir. 1997) ("Whether a crime involves moral turpitude depends on the inherent nature of the crime, as defined in the statute concerned, rather than the circumstances surrounding the particular transgression."). This method of review is not mandated by the immigration statute; it was developed by the courts and the BIA. For further discussion, see *infra* Part II.C.1.

[11] *See* Goldeshtein v. INS, 8 F.3d 645, 647 (9th Cir. 1993) ("For a crime to involve moral turpitude within the meaning of the INA, the crime 'must *necessarily* involve moral turpitude.'"); *Hamdan*, 98 F.3d at 187 ("As a general rule, if a statute encompasses both acts that do and do not involve moral turpitude, the BIA cannot sustain a deportability finding on that statute.").

[12] *See* 8 U.S.C. § 1227(a)(2)(A)(i); 8 U.S.C. § 1227(a)(2)(A)(ii).

[13] 22 C.F.R. § 40.21(a)(1) (2006).

[14] Jordan v. DeGeorge, 341 U.S. 223 (1951).

[15] BLACK'S LAW DICTIONARY 1008–09 (6th ed. 1990). For examples of how this definition is paraphrased by the courts, see, *e.g.*, Itani v. Ashcroft, 298 F.3d 1213, 1215 (11th

The definition assumes the existence of a universally recognized code for socially acceptable behavior: the "private and social duties which man owes to his fellow man, or to society in general." Moral turpitude is an act which violates these duties. The problem is, the definition does not state what these duties are, or provide examples of acts which violate them. Instead, it provides terms such as "baseness," "vileness," and "depravity," which better describe moral reactions to an act than the act itself. To use another's phrase, they are "conclusory but non-descriptive."[16]

As a legal standard, moral turpitude fails to inform anyone of what it requires. It fails to inform aliens of exactly what crimes are deportable, leaving them vulnerable to a serious loss of their civil rights.[17] State criminal laws inform aliens of what actions they prohibit, but they do not notify aliens that deportation is a consequence of those actions.[18] Moral turpitude also fails to inform administrators and judges of what crimes are deportable, creating a danger of non-uniform enforcement.[19] By inviting administrators and judges to rely on their personal notions of the "moral standards generally prevailing in the United States" when identifying deportable offenses, the law actually encourages non-uniform enforcement.[20]

These concerns did not deter the Supreme Court from upholding moral turpitude as a legal standard in *Jordan*. The case concerned an alien, Sam

Cir. 2002); *Hamdan*, 98 F.3d at 186 ("Moral turpitude refers generally to 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."). *See also* Partyka v. Attorney Gen. of U.S., 417 F.3d 408, 413 (3d Cir. 2005) (defining moral turpitude as "conduct that is contrary to justice, honesty, or morality") (citing BLACK'S LAW DICTIONARY 1030 (8th ed. 2004)).

[16] Jay Wilson, *The Definitional Problems with "Moral Turpitude"*, 16 J. LEGAL PROF. 261, 262 (1991). The author compares the tests for whether a crime involves moral turpitude to Justice Stewart's famous dictum regarding pornography: "I know it when I see it." *Id*. (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

[17] *See, e.g.*, Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 121 (1930) ("Men who are menaced with the loss of civil rights should know with certainty the possible grounds of forfeiture . . . It is hardly to be expected that words which baffle judges will be more easily interpreted by laymen[.]").

[18] *See* Harms, *supra* note 4, at 272. This places the alien criminal defendant at particular risk; he may plead guilty to a minor offense, which carries only a mild punishment, only to later discover that his plea has made him deportable. *See* Ladd, *supra* note 10, at 44 (advising defense attorneys to "[a]void guilty pleas if at all possible without first confirming the likely immigration consequences.").

[19] *See* Note, *supra* note 17, at 121 ("[T]he loose terminology of moral turpitude hampers uniformity; it is anomalous that for the same offense a person should be deported or excluded in one circuit and not in another . . . [I]f power must be delegated, it should be clearly circumscribed."); *Jordan*, 341 U.S. at 242 (Jackson, J., dissenting) ("Uniformity and equal protection of the law can only come from a statutory definition of fairly stable and confined bounds.").

[20] *See Jordan*, 341 U.S. at 242 ("We usually end up by condemning all that we personally disapprove and for no better reason than that we disapprove it."); United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947) (describing moral turpitude as "lacking in legal precision and, therefore . . . likely to result in a judge applying to the case before him his own personal views as to the mores of the community.").

DeGeorge, faced with deportation for a conviction of "conspiring to 'unlawfully, knowingly, and willfully defraud the United States of tax on distilled spirits.'"[21] DeGeorge argued that he should not be deported because his tax evasion crimes did not involve moral turpitude.[22] The Court disagreed, finding that "under an unbroken course of judicial decisions," crimes with an element of fraud, including attempts to defraud the United States, involved moral turpitude.[23]

The Court then raised *sua sponte* the question of whether the moral turpitude standard was unconstitutional for vagueness.[24] As the Court had recently stated in *Screws v. U.S.*,[25] a criminal law was unconstitutionally vague if it failed to set an "ascertainable standard of guilt,"[26] and exposed a person to punishment "for an offense, the nature of which the statute does not define and hence of which it gives no warning."[27]

Moral turpitude, the Court held, set an ascertainable standard of "guilt." First, the phrase had been used in immigration law for over sixty years,[28] and in a variety of other settings including disbarment of attorneys, revocation of medical licenses, and impeachment of witnesses.[29] The Court itself had construed "moral turpitude" in *United States ex rel. Volpe v. Smith*.[30] Second, the void-for-vagueness doctrine applied to criminal laws, and the moral turpitude law "does not declare certain conduct to be criminal. Its function is to apprise aliens of the consequences which follow after conviction and sentence of the requisite two crimes."[31] Finally, whatever the phrase meant in

[21] *Jordan*, 341 U.S. at 224–25 (majority opinion).

[22] *Id.* at 226.

[23] *Id.* at 229.

[24] *Id.*

[25] 325 U.S. 91 (1945).

[26] *Id.* at 95.

[27] *Id.* at 101. For a brief and more recent statement of the void-for-vagueness doctrine, see Hill v. Colorado, 530 U.S. 703, 732–33 (2000). For surveys of the doctrine, see Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[28] *Jordan*, 341 U.S. at 229.

[29] *Id.* at 227.

[30] 289 U.S. 422 (1933).

[31] *Jordan*, 341 U.S. at 230. The Court's reluctance to apply vagueness analysis to deportation laws was undermined by later holdings. The Court eventually subjected civil laws to scrutiny for vagueness, albeit at a lower intensity. *See* Goldsmith, *supra* note 27, at 281; Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) ("The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment."). The Court's rationale for this lesser scrutiny is that for "enactments with civil rather than criminal penalties . . . the consequences of imprecision are qualitatively less severe." *Id.* at 499. Given the Court's historical recognition of the severe consequences of removal, this reasoning suggests that the laws allowing removal for crimes involving moral turpitude should have been more carefully scrutinized for vagueness. *See infra* note 44.

"peripheral cases," across the term's history of use, fraud had "without exception" involved moral turpitude.[32]

Justice Jackson's vigorous dissent, unlike the majority opinion, began with an analysis of the phrase "moral turpitude" instead of the decisions surrounding it. Dictionary definitions of the term yielded no definite meaning.[33] "Seriousness" of the crime offered no guideline.[34] The common-law distinction between crimes *mala prohibita* and *mala in se*, which "freely blended religious conceptions of sin with legal conceptions of crime," was no help, and the Government's proposed standard, "the moral standards that prevail in contemporary society," essentially reverted to the same practice of blending sin with crime.[35] Justice Jackson concluded that moral turpitude offered judges no clearer guideline than their own consciences, inviting them to "condemn[] all that we personally disapprove and for no better reason than that we disapprove it."[36]

He then met the majority's argument that moral turpitude's long history of use had given it a settled meaning. First, the Court did not analyze the meaning of moral turpitude in *Volpe*; it "assumed without analysis or discussion a proposition not seriously relied on."[37] Second, on examining the lower court cases, his chief impression was that they rested "upon the moral reactions of particular judges to particular offenses."[38] As proof, he offered a list of cases with results that were, at best, difficult to reconcile.[39] Moral turpitude, he

[32] *Jordan*, 341 U.S. at 232.

[33] *Id.* at 234 (Jackson, J., dissenting).

[34] *Id.* at 236 ("All offenses denounced by Congress . . . must be deemed in some degree 'serious' or law enforcement would be a frivolous enterprise.").

[35] *Id.* at 236–37. Note the similarity between the proposed standard and that currently found in the Federal Regulations. *See* 22 C.F.R. § 40.21(a)(1) (2006).

[36] *Id.* at 242. For example, Justice Jackson found no "keen sentiment of revulsion" against those who evaded sales taxes or failed to pay parking meters. *Id.* at 241. He seems to suggest that a law stating that all forms of fraud involve moral turpitude cannot actually be based on commonly held morals, given that many people condone small instances of fraud in their daily life, and must instead be based on the personal disapproval of judges. "I have never discovered that disregard of the Nation's liquor taxes excluded a citizen from our best society and I see no reason why it should banish an alien from our worst." *Id.*

[37] *Id.* at 239. Looking at the case itself, it is hard to disagree with Justice Jackson. The Court's entire discussion of moral turpitude reads as follows: "In 1925 [the petitioner] pleaded guilty and was imprisoned under a charge of counterfeiting obligations of the United States—plainly a crime involving moral turpitude." United States *ex rel.* Volpe v. Smith, 289 U.S. 422, 423 (1933).

[38] *Jordan*, 341 U.S. at 239 (Jackson, J., dissenting). What this author finds most striking on reading these cases is not so much their caprice as it is the cursory nature of their analysis. *See infra* notes 102–06 and accompanying text.

[39] *Id.* at 239–40 n.13. The cases were as follows: Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929) (petty larceny involves moral turpitude); United States *ex rel.* Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939) (possession of a "jimmy" or tool for burglarizing, with intent to use it, does not involve moral turpitude); United States *ex rel.* Mazzillo v. Day, 15 F.2d 391 (S.D.N.Y. 1926) (second-degree assault by intoxicated man involves moral turpitude); United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534 (E. D. Pa. 1947) (jailbreaking does not involve moral turpitude); Rousseau v. Weedin, 284 F. 565 (9th Cir. 1922) (selling

concluded, was a phrase so vague that it "requires even judges to guess and permits them to differ," thus thwarting uniformity of decisions and equal protection of the law.[40]

Justice Jackson next stated that even if deportation is not technically a criminal proceeding, it should be treated as one for purposes of vagueness analysis.[41] Deportation proceedings are "practically" criminal "for they extend the criminal process . . . to include on the same convictions an additional punishment of deportation."[42] An alien and a citizen may commit the same crime and receive the same sentence, but at the end of the sentence, as a result of the same conviction, the alien faces "a life sentence of exile from what has become home."[43] Also, deportation is a "savage penalty" which is "equivalent to banishment or exile,"[44] traditionally criminal punishments,[45] and therefore "due process of law requires standards for imposing it as definite and certain as those for conviction of crime."[46]

Of course, Justice Jackson's arguments did not prevail, and legally the argument is closed.[47] But one could agree with every point that Jackson raised and still insist that, whatever its flaws in 1951, another fifty years of judicial interpretation have fashioned moral turpitude into a workable legal standard.[48] One could argue, much like the majority did, that the meaning of moral turpitude is settled for most crimes, and "doubt as to the adequacy of a standard

intoxicating liquor involves moral turpitude); Hampton v. Wong Ging, 299 F. 289 (9th Cir. 1924) (Narcotic Act conviction for opium possession does not involve moral turpitude).

[40] *Jordan*, 341 U.S. at 244–45 (Jackson, J., dissenting) (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

[41] *Id*. at 243. Justice Jackson's analysis is essentially a functional one: removal should be treated as a criminal punishment because 1) it is imposed in the same fashion as a criminal punishment and 2) it is as severe in its impact as a criminal punishment. For further arguments in favor of such an analysis, see Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771 (2000); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000). To date, however, the Court holds that removal "is a purely civil action," and as a consequence, aliens who are faced with it do not enjoy "various protections that apply in the context of a criminal trial." INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984), *cited with approval in* INS v. St. Cyr, 533 U.S. 289, 324 (2001).

[42] *Jordan*, 341 U.S. at 243 (Jackson, J., dissenting).

[43] *Id*.

[44] *Id*., *quoting* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). The *Jordan* majority also recognized the severity of deportation. *Jordan*, 341 U.S. at 231. *See also* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) ("To deport [someone] . . . obviously deprives him of liberty . . . [i]t may result also in loss of both property and life; or of all that makes life worth living.").

[45] For an argument that deportation is analogous to the historical practice of criminal banishment, see generally Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115 (1999).

[46] *Jordan*, 341 U.S. at 243 (Jackson, J., dissenting).

[47] For lower court cases holding as much, see Marciano v. INS, 450 F.2d 1022, 1024 (8th Cir. 1971); Ramirez v. INS, 413 F.2d 405, 406 (D.C. Cir. 1969).

[48] *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 562 (5th ed. 2003).

in less obvious cases does not render that standard unconstitutional for vagueness"[49] or even worthy of a critical piece of student writing.

There are several responses to such an argument. First, one of the original goals of the void-for-vagueness doctrine was to ensure notice to the public of the consequences of breaking the law, and the statute does not do that any more effectively now than it did when the Court decided *Jordan*.[50] Second, allowing judges to issue rulings according to such a vague legal mandate is essentially allowing them to legislate, and threatens the separation of powers.[51] The responsibility for setting standards for the criminal law lies with the legislature,[52] in light of the basic policy matters involved.[53] The power to set standards for deportation should also remain with the legislature, given the similarity of basic policy matters such as the individual interests at stake[54] and the functional similarities between criminal punishment and deportation,[55] not to mention the increasing convergence between immigration and criminal law in the wake of the September 11th attacks.[56]

Even if one brushes off those concerns and still insists that one hundred years of judicial interpretation will prevent arbitrary and discriminatory

[49] *Jordan*, 341 U.S. at 232 (majority opinion).

[50] *See* Goldsmith, *supra* note 27, at 283–84; Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning.") State criminal laws, which are the basis for a finding of moral turpitude, *do* provide notice of specific conduct which constitutes a crime. However, they fail to warn of the crime's consequences under immigration law, raising particular problems for alien criminal defendants. *See supra* note 18.

[51] *See* Goldsmith, *supra* note 27, at 284–86; United States v. Reese, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.").

[52] Smith v. Goguen, 415 U.S. 566, 575 (1974) (stating in a vagueness case that "legislatures may not . . . abdicate their responsibilities for setting the standards of the criminal law.").

[53] *Grayned*, 408 U.S. at 108–09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis . . . ."); Note, *supra* note 27, at 80–81 ("[W]here state legislatures have failed to say what they want in precise categories of cases . . . the balance between individual freedom and the needs of the state—whatever and however important these needs may be— must be struck without the enlightening support of a responsible a priori determination by the representatives of the community will.").

[54] *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[55] *See* Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, *supra* note 41, at 781 ("[T]he label of punishment should be applied, if appropriate, to deportation as the *product* of a functional, historical, and intentional analysis . . . . The deportation of long-term, legal permanent residents for post-entry conduct is imposed as a direct consequence of a prior "bad" act . . . . These are indicia of punishment.").

[56] *See generally* Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005).

enforcement,[57] the jurisprudence only does so if a case falls within the meaning of established precedent. To effectively prevent arbitrary enforcement, a statutory standard must provide guidance in the "less obvious cases" as well. Or, as Judge Bennett phrased it while dissenting from the Eighth Circuit in *Franklin v. INS*:[58]

> [T]he phrase "crime involving moral turpitude" had a concrete meaning and conveyed sufficiently definite warning in the *Jordan* case only because courts had always held that the kind of crime in question fits the standard, whatever that standard may mean. Thus, as long as a case requires the court to tread only the familiar territory of well-cultivated precedent, the phrase "crime involving moral turpitude" provides no uncomfortable uncertainty. But . . . [in] one of those uncomfortable "peripheral" or "less obvious" cases . . . the standard, even if its adequacy were free from doubt, is plainly of dubious certainty in its application.[59]

Cases which test the outer edges of a statute's meaning are inevitable, but when these cases arise, the statute must provide a court with at least a hint of how to proceed. The phrase "crimes involving moral turpitude" provides no such hint, except to suggest that a judge should consider whether he or she personally finds the alien's crimes to be base, vile, or depraved. Judicial precedent cannot reliably indicate the intent of Congress if Congress never spoke clearly in the first place. It is far more likely to indicate a judicial transformation of that intent.[60]

C. The Judicial Guidelines for Moral Turpitude

But the best argument for taking a new approach to moral turpitude lies within the jurisprudence itself. The cases infusing moral turpitude with content reach back over a century and their results have been described as "nebulous,"[61] lacking in "well settled criteria,"[62] and full of "wearisome repetition of clichés" in which "the guiding line seems to have no relation to the result reached."[63] That is not an entirely fair assessment. The rules which govern *what* a judge or administrator may examine to identify a CIMT are consistent, if questionable. The rules which govern *how* to identify a CIMT are not.

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[57] The Court has recently held that this is the more important purpose of the void-for-vagueness doctrine. *See* Goldsmith, *supra* note 27, at 282 (concluding that the above goals of vagueness analysis "have largely been abandoned in favor of . . . preventing arbitrary and discriminatory law enforcement."); Kolender v. Lawson, 461 U.S. 352, 358 (1983).

[58] 72 F.3d 571 (8th Cir. 1995).

[59] *Id.* at 595 (Bennett, J., dissenting).

[60] *See* Goldsmith, *supra* note 27, at 285 ("[A]s judges repeatedly interpret the outer reaches of a vague legal standard they can easily—and accidentally—transform such a standard 'from A to B to C to D . . . even if legal decision makers would not have gone from A to D directly.'"), *quoting* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1114 (2003).

[61] *Franklin*, 72 F.3d at 573.

[62] Tseung Chu v. Cornell, 247 F.2d 929, 933 (9th Cir. 1957).

[63] Jordan v. DeGeorge, 341 U.S. 223, 239 (1951) (Jackson, J., dissenting).

1. Statutory Definition / Nature of the Crime

When deciding whether a crime involves moral turpitude, administrators and judges may not examine "the specific conduct that resulted in the conviction" or the circumstances surrounding the crime.[64] Their task is more philosophical: they must review the "statutory definition" of the offense, or the "nature of the crime," and determine whether all criminal conduct prohibited by the law which the alien violated would "necessarily" or "inherently" involve moral turpitude.[65] The BIA and the courts have argued that this rule is grounded in the text of the statute[66] and have given numerous policy justifications for it: it reduces the administrative burden on the reviewing officers,[67] it promotes uniform application of the law,[68] and it "insures" aliens against being tried twice for the same offense.[69]

But does the rule truly promote uniform application of the law? By forcing administrators and courts to determine a crime's moral turpitude from an abstract concept of the alien's offense, rather than the actual circumstances of it, the rule makes a questionable assumption about morality itself: that it consists of rules which are clear and immutable, rather than responses to particular facts.[70] Not all judges would agree that the morality of an act can be

[64] McNaughton v. INS, 612 F.2d 457, 459 (9th Cir. 1980).

[65] *See* United States *ex rel.* Guarino v. Uhl, 107 F.2d 399, 400 (2d Cir. 1939).

[66] *See* United States *ex rel.* Castro v. Williams, 203 F. 155, 156–57 (D.C.N.Y. 1913):

> It is to be noted that Congress has required in respect to this particular class of aliens proof of a specified kind and no other, viz., either a conviction in the country where the crime was committed or an admission by the alien. . . . This provision must have been intended as a limitation upon the power of the immigration authorities. It deprives them of the right to try the question of guilt at all.

[67] *See In re* R., 6 I. & N. Dec. 444, 448 n.2 (BIA 1954) (defending the rule "because a standard must be supplied to administrative agencies" and because "it eliminates the burden of going into the evidence in a case[.]"); United States. *ex rel.* Mylius v. Uhl, 210 F. 860, 862–63 (2d Cir. 1914) ("How could the law be speedily and efficiently administered if an immigrant convicted of perjury, burglary or murder, is permitted to show from the evidence taken at the trial that he did not commit a felony, but a misdemeanor only?"). For an opposing view, see Marciano v. INS, 450 F.2d 1022, 1027 n.3 (8th Cir. 1971) (Eisele, J., dissenting):

> In contemporary government we are quite prepared to delegate innumerable complicated and subtle questions like this one to administrative agencies. To the extent that the rule was developed because of a then-justified fear of administrative incapacity . . . it should long since have lost its force.

[68] *See In re R.*, 6 I. & N. Dec. at 448 n.2 (noting that the rule "prevents the situation occurring where two people convicted under the same specific law are given different treatment because one indictment may contain a fuller or different description of the same act than the other indictment"); *Mylius*, 210 F. at 862 (asserting, concerning a conviction of libel against the King of England, that a "decision which makes the infamy of the libel dependent upon the rank of the person libeled cannot be defended either in law or ethics.").

[69] *See In re R.*, 6 I. & N. Dec. at 448 n.2 ("[The rule] eliminates the situation where a nonjudicial agency retries a judicial matter. . . ."); *Castro*, 203 F. at 157 (describing the rule as "a privilege to aliens because it insures them against any such trial.").

[70] For a debate between two such viewpoints in the field of developmental psychology, compare Lawrence Kohlberg, *The Claim to Moral Adequacy of a Highest Stage of Moral Judgment*, 70 J. PHIL. 630, 632 (1973) (articulating a theory of development in which the

divorced from the details of its circumstances or results.[71] In *Jordan*, Justice Jackson, citing John Stuart Mill, pointed out that "[a]ssassination . . . whose criminality no one doubts, has been the subject of serious debate as to its morality."[72] In *Tillinghast v. Edmead*,[73] Judge Anderson stated that it seemed "monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude."[74] And in *Pino v. Nicolls*,[75] the First Circuit noted, in partial agreement with Judge Anderson, that "it is possible to conceive of circumstances under which almost any crime might be committed for the purest of motives,"[76] and thereby not involve moral turpitude.

The results reached by this rule thus depend heavily on the moral reasoning of the person applying the rule. For example, take an alien who is convicted of petty larceny and argues that his crime is not a CIMT. If the judge hearing his argument adheres to a morality which is based on fixed principles (e.g., that theft is wrong regardless of why it is committed), he will be less likely to conceive of circumstances under which the alien could have committed the crime without it involving moral turpitude, and the alien will be deported. If the judge believes that the morality of an action depends in part on the circumstances in which it occurs (e.g., that between stealing bread to feed one's family and letting them starve, theft may be the lesser of two evils), he will be more likely to conclude that not all petty larceny necessarily involves moral turpitude, and the alien will not be deported. Either way, the alien's future residence in this country swings on the subjective views of the judge.

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highest stage of moral reasoning is identified by its reliance on "self-chosen *ethical principles* appealing to logical comprehensiveness, universality, and consistency.") with Carol Gilligan, *Woman's Place in Man's Life Cycle*, 49 HARV. EDUC. REV. 431, 444 (1979) (identifying a "responsibility conception" as a guiding principle in moral decision-making, which "has to do with 'responsibility and caring about yourself and others, not just a principle that once you take hold of, you settle [the moral problem]. The principle put into practice is still going to leave you with conflict.'"). For a famous but admittedly one-sided literary example of such a debate, apply the philosophy of Lieutenant Javert to the situation of Jean Valjean in *Les Miserables* (Lascelles Wraxall trans., Heritage Press 1938) (1862).

[71] *See* Tillinghast v. Edmead, 31 F.2d 81, 84 (1st Cir. 1929) (Anderson, 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 . . . 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.

See also Marciano v. INS, 450 F.2d 1022, 1026–27 n.2 (8th Cir. 1971) (Eisele, J., dissenting) (using a largely textual argument that "'crime' in the phrase 'crime involving moral turpitude' . . . must consist in the *acts* in violation of that legal statement."); Michel v. INS, 206 F.3d 253, 270 (2d Cir. 2000) (Calabresi, J., dissenting) (noting that because the traditional definition of moral turpitude "appears to require some analysis of whether a particular crime is 'inherently base, vile, or depraved' . . . it is hard to understand how the gravity of the crime can play *no* part in the inquiry.").

[72] Jordan v. DeGeorge, 341 U.S. 223, 241 (1951) (Jackson, J., dissenting).

[73] 31 F.2d 81 (1st Cir. 1929).

[74] *Id.* at 84 (Anderson, J., dissenting).

[75] 215 F.2d 237 (1954).

[76] *Id.* at 245.

Both of the above applications of the rule have their dangers. By ignoring the possibility of mitigating factors, the first application is potentially over-inclusive. It risks the possibility that aliens who committed crimes that did not actually involve moral turpitude "may be deported if such crimes are *generally* ones that, when committed, involve moral turpitude."[77] The First Circuit uses a variant of the rule which increases this danger: a crime involves moral turpitude if the crime "in its *general nature* is one which in *common usage* would be classified as a crime involving moral turpitude."[78] The second application, on the other hand, is potentially under-inclusive in that it conceives of mitigating factors where none may actually exist. It "would prevent the deportation of many persons who had committed crimes actually involving moral turpitude."[79] Judge Eisele, dissenting from the Eighth Circuit in *Marciano v. INS*,[80] proposed an alternative: some crimes inherently involve moral turpitude, some do not, and some may or may not involve moral turpitude depending on the circumstances of the case.[81]

The federal courts have not adopted Judge Eisele's approach, and it is difficult to say which of the other two approaches they have adopted. Cases upholding removal orders for seemingly petty crimes such as driving under the influence, engaging in consensual sodomy, possession of stolen bus transfers, and purchasing food stamps from welfare recipients all suggest that federal courts are using a more strict, over-inclusive approach.[82] Other cases suggest that they are not.[83] As to which approach the courts *should* use, the general rule

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[77] *Marciano*, 450 F.2d at 1031 (Eisele, J., dissenting).

[78] *Pino*, 215 F.2d at 245 (emphasis in original), *cited with approval in* Cabral v. INS, 15 F.3d 193, 196–97 n.6 (1st Cir. 1994).

[79] *Marciano*, 450 F.2d at 1031 (Eisele, J., dissenting).

[80] *Id*. at 1026.

[81] *Id*. at 1028–29. Judge Eisele based his approach on Judge Anderson's dissent in *Tillinghast v. Edmead*, 31 F.2d 81, 84 (1st Cir. 1929).

[82] "In 1929, it happened to an alien convicted of petit larceny, a misdemeanor. In 1951, it happened to an alien twice convicted and sentenced for the crime of conspiracy to defraud the United States of taxes on distilled spirits. In 1972, it happened to an alien convicted of consensual sodomy. Most recently, in 1999, it happened to an alien twice convicted of driving under the influence." Harms, *supra* note 4, at 259. Harms respectively cites *Edmead*; Jordan v. DeGeorge, 341 U.S. 223 (1951); Velez-Lozano v. INS, 463 F.2d 1305 (D.C. Cir. 1972); and an unpublished decision by the Board of Immigration Appeals (BIA).

For further examples, *see, e.g.*, Abdelqadar v. Gonzales, 413 F.3d 668 (7th Cir. 2005) (holding that purchase of food stamps from welfare recipients involves moral turpitude); Smriko v. Ashcroft, 387 F.3d 279, 283 (3d Cir. 2004) (holding that shoplifting involves moral turpitude, over defendant's argument that "it is a prevalent crime in our modern world"); Chanmouny v. Ashcroft, 376 F.3d 810 (8th Cir. 2004) (holding that threatening someone with violence in order to "terrorize" them involves moral turpitude); Michel v. INS, 206 F.3d 253 (2d Cir. 2000) (holding that possession of stolen bus transfers involves moral turpitude); United States v. Esparza-Ponce, 193 F.3d 1133 (9th Cir. 1999) (holding that petty theft involves moral turpitude).

[83] *See, e.g.*, Hamdan v. INS, 98 F.3d 183 (5th Cir. 1996) (vacating a BIA decision on the grounds that, regarding the kidnapping statute which the alien violated, it was possible to conceive of violations which did not involve moral turpitude); Rodriguez-Herrera v. INS, 52 F.3d 238, 240 (9th Cir. 1995) (holding that malicious mischief is not necessarily a crime

when construing deportation statutes is that "any doubts in deciding such questions must be resolved in the alien's favor,"[84] due to the severe consequences of deportation.[85] This rule of lenity, as it is called, strongly suggests that the courts should interpret the law in a way that risks under-inclusion, rather than over-inclusion, when deporting aliens for CIMTs. It is not clear that they actually do so.

2. Intent and Seriousness

Judges and administrators examine the statutory definition of an offense, or nature of a crime, for two ill-defined elements which identify a CIMT. The first is commonly described as "evil intent."[86] The BIA arguably "equates" evil intent with moral turpitude.[87] The courts seem to agree with this finding, referring to evil intent as "the touchstone of moral turpitude."[88] The rationale appears to be that a violation of "the moral law" which is "committed with knowledge and intention" involves moral turpitude, but such a violation committed "innocently" does not.[89] But there is not as much agreement on exactly what evil intent is. Some hold it is "a criminal state of mind equivalent

involving moral turpitude because the law's "reach . . . extends to include pranksters with poor judgment.").

[84] *In re* Serna, 20 I. & N. Dec. 579, 586 (BIA 1992).

[85] *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile . . . since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.").

[86] *In re* Khourn, 21 I. & N. Dec. 1041, 1046 (BIA 1997). *See also In re* Fualaau, 21 I. & N. Dec. 475, 478 (BIA 1996) ("[A]n analysis of an alien's intent is critical to a determination regarding moral turpitude."); *In re* Flores, 17 I. & N. Dec. 225, 227 (BIA 1980) ("An evil or malicious intent is said to be the essence of moral turpitude.").

[87] Knapik v. Ashcroft, 384 F.3d 84, 89 (3d Cir. 2004) (discussing the above BIA decisions as part of a strain that "equates moral turpitude with evil intent"). *But see In re* Olquin, 23 I. & N. Dec. 896 (BIA 2006) (holding that possession of child pornography is a CIMT without any discussion of intent).

[88] Michel v. INS, 206 F.3d 253, 263 (2d Cir. 2000) ("[C]orrupt scienter is the touchstone of moral turpitude"). Other circuits have cited *Michel* with approval. *See, e.g.*, Partyka v. Attorney Gen. of U.S., 417 F.3d 408, 413 (3d Cir. 2005); Rodriguez-Castro v. Gonzales, 427 F.3d 316, 323 (5th Cir. 2005). But the idea that moral turpitude *requires* evil intent is not necessarily universally held. *Compare Rodriguez-Castro*, 427 F.3d at 323 ("As a general rule, laws that authorize criminal punishment without proof that the offender intended or recklessly disregarded the potential consequences of his act do not define CIMTs."); Hirsch v. INS, 308 F.2d 562, 567 (9th Cir. 1962) ("A crime that does not necessarily involve evil intent, such as intent to defraud, is not necessarily a crime involving moral turpitude.") *with* Chanmouny v. Ashcroft, 376 F.3d 810, 814 (8th Cir. 2004) (defining moral turpitude as including "acts accompanied by 'a vicious motive or a corrupt mind'" but not necessarily *requiring* that element) *and* Guerrero de Nodahl v. INS, 407 F.2d 1405, 1406–07 (9th Cir. 1969) (dispensing with the "evil intent" requirement in a child abuse case because "[w]hen the crime is this heinous, willful conduct and moral turpitude are synonymous terms.").

[89] *In re* D, 1 I. & N. Dec. 190, 194 (BIA 1942) (quoting an opinion of the Department of Labor).

to the common law *mens rea*."[90] More recently it has expanded to include criminal recklessness.[91] The Fifth and Ninth Circuits, however, have held that "the intent to commit a crime is not the equivalent of the evil intent of a CIMT,"[92] implying that not all intentional actions prohibited by law are inherently "evil."[93]

The second element which identifies a CIMT is the gravity of the offense. As Judge Posner phrased it, "a person who *deliberately* commits a *serious* crime is regarded as behaving immorally and not merely illegally."[94] Unfortunately, the definition of a "serious" crime is no more clear than that of "evil" intent. The Ninth Circuit, in *Rodriguez-Herrera v. INS*,[95] suggested that crimes fell into two categories: those "not of the gravest character," such as malicious mischief, and those "involving rather grave acts of baseness or

[90] Forbes v. Brownell, 149 F. Supp. 848, 850 (D.D.C. 1957). The requirement seems to be one of intent to commit a specific crime. *See* Chanmouny v. Ashcroft, 376 F.3d 810, 814–15 (8th Cir. 2004) (drawing a difference between "general intent" and "a vicious motive, corrupt mind, or evil intent."). For example, a crime which includes an element of fraudulent intent "is clearly a crime involving moral turpitude." Notash v. Gonzales, 427 F.3d 693, 698 (9th Cir. 2005) (quoting Winestock v. INS, 576 F.2d 234, 235 (9th Cir. 1978)). *See also In re* Perez-Contreras, 20 I. & N. Dec. 615, 618 (BIA 1992) ("Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. . . . However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.").

[91] *In re* Medina, 15 I. & N. Dec. 611, 613 (BIA 1976). This assertion was later upheld by the Eighth Circuit, over Judge Bennett's vigorous dissent that it went against both common-law tradition and the BIA's own decisions. Franklin v. INS, 72 F.3d 571, 587–94 (8th Cir. 1995) (Bennett, J., dissenting). The Third Circuit also agreed with the BIA in *Knapik*, 384 F.3d at 90 n.5 ("With regard to reckless acts, moral turpitude inheres in the conscious disregard of a substantial and unjustifiable risk of severe harm or death."). *But see* Reyes-Morales v. Gonzales, 435 F.3d 937, 945 (8th Cir. 2006) (noting that in such cases "reckless conduct is typically coupled with an aggravating factor.").

[92] Hamdan v, INS, 98 F.3d 183, 188 (5th Cir. 1996); *see also* Goldeshtein v. INS, 8 F.3d 645, 648 (9th Cir. 1993) (asserting that "conviction of willful conduct . . . does not establish the evil intent required for a crime of moral turpitude.").

[93] This position is arguably more consistent with the older idea that moral turpitude identifies conduct which is inherently wrong and not just prohibited by law. *See* United States v. Carrollo, 30 F. Supp. 3, 6 (W.D. Mo., 1939) ("'[M]oral turpitude' must exist entirely apart from the fact that some statute has been violated."). *But see* Mei v. Ashcroft, 393 F.3d 737, 741 (7th Cir. 2004) (complaining that this distinction "is unhelpful. If the crime is a serious one, the deliberate decision to commit it can certainly be regarded as the manifestation of an evil intent.").

[94] *Mei*, 393 F.3d at 740. *See also* Partyka v. Attorney Gen. of U.S., 417 F.3d 408, 414 (3d Cir. 2005) ("[T]he hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation."); Rodriguez-Castro v. Gonzales, 427 F.3d 316, 324 (5th Cir. 2005) (holding that attempted child abandonment is not a CIMT because "it does not shock the public conscience as being inherently base, vile, or depraved . . . and it is not accompanied by a vicious motive or a corrupt mind."); Grageda v. INS, 12 F.3d 919, 922 (9th Cir. 1993) ("[I]t is the combination of the base or depraved act and the willfulness of the action that makes the crime one of moral turpitude.").

[95] 52 F.3d 238 (9th Cir. 1995).

depravity," such as spousal abuse, child abuse, and first-degree incest.[96] For offenses in the first category, "the bare presence of some degree of evil intent is not enough to convert a crime that is not serious into one of moral turpitude[.]"[97] Judge Bennett, dissenting from the Eighth Circuit in *Franklin v. INS*,[98] examined the Ninth Circuit's jurisprudence and that of other circuits, and proposed the following "taxonomy of moral turpitude":

> 1) "[E]vil intent," either explicit or implicit, is necessary, but not sufficient to define a crime as one necessarily involving moral turpitude;
>
> 2) for relatively minor crimes, mere "evil intent" may be too attenuated to define a crime in which moral turpitude necessarily inheres;
>
> 3) baseness and depravity, while not necessary, are always sufficient to define a crime as one involving moral turpitude, because implicit in such crimes is the necessary "evil intent" as well as sufficient moral obliquity contrary to accepted moral standards.[99]

The approaches proposed by Judge Bennett, and used by the Ninth Circuit, initially seem like an improvement over the "baseness, vileness, or depravity"[100] standard cited earlier, but they suffer from a similar flaw. They still rely on a distinction between "relatively minor" crimes and crimes of "baseness and depravity" which, as discussed before, does not necessarily provide a judge with guidance unless he relies on personal opinions about what crimes fall into what category.

3. Proposed Solutions and Why They Are Inadequate

The distinctions between crimes which are "serious" or "grave" and those which are not, as well as between "evil" intent and its absence, reflect a fundamental problem with the moral turpitude jurisprudence. Those cases which are not based on precedent give one no reason to suspect that they are based on the universally recognized morality to which moral turpitude refers. Instead they appear to be based, as Justice Jackson phrased it, "upon the moral reactions of particular judges to particular offenses."[101] Any system which attempts to define moral turpitude by reference to existing federal common law must deal with this uncomfortable fact.

For instance, consider the cases which the *Jordan* Court listed to establish that, "without exception," crimes with an ingredient of fraud involved moral

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[96] *Id.* at 240. *See also Goldeshtein*, 8 F.3d at 648 ("Because 'evil intent, such as an intent to defraud' is not necessarily an element of the crime of which Goldeshtein was convicted, and his offense is not of the gravest character, we conclude that this crime does not involve moral turpitude.") (*quoting* Hirsch v. INS, 308 F.2d 562, 567 (9th Cir. 1962)).

[97] *Rodriguez-Herrera*, 52 F.3d at 241. However, the court expressly reserved opinion on "whether evil intent is sufficient for a crime to involve moral turpitude in the fraud context." *Id.*

[98] 72 F.3d 571 (8th Cir. 1995).

[99] *Id.* at 600 (Bennett, J., dissenting).

[100] BLACK'S LAW DICTIONARY 1008–09 (6th ed. 1990).

[101] Jordan v. DeGeorge, 341 U.S. 223, 239 (1951) (Jackson, J., dissenting).

turpitude.[102] Several simply cited precedent without further analysis or explanation.[103] Some stated that an intent to defraud necessarily involves moral turpitude because it amounts to "shameful wickedness."[104] One noted that the gravity of the alien's offense, "which left in its wake such a large number of victims," meant that his crime would, "of necessity," involve moral turpitude.[105] Finally, one judge stated that it was "hardly necessary to cite authority to support the proposition that the commission of a fraud involved moral turpitude[,]" and said no more.[106] This is the rock, as it were, on which reformers such as Judge Bennett and the Ninth Circuit would build their churches.[107] One could argue that many of these judges were simply using common sense—*of course* fraud involves moral turpitude. But to claim that a decision uses "common sense" is to jump to a conclusion that all right-thinking observers of the decision would agree with the judge, without providing an objective reason why. Common sense can reflect personal prejudice as easily as it can reflect objective fact: as the Seventh Circuit has noted, "[o]ne person's 'common sense' is another's bête noire."[108]

An idea proposed by Brian Harms in a recent article[109] also builds on this flawed foundation. Harms calls for Congress to step in and provide courts and administrators with guidelines for identifying CIMTs.[110] He suggests several approaches, leaning most toward using existing common-law precedent to distill "bright line rules supplemented by a flexible standard that could adapt to changing moral norms," and, like Judge Eisele, allowing judges to examine the circumstances surrounding some convictions.[111] Harms' system is an excellent idea, but it would still codify case law about moral turpitude which was often poorly reasoned in the first place. The Code of Federal Regulations states that

[102] *Id.* at 227–28 (majority opinion).

[103] Bermann v. Reimer, 123 F.2d 331, 332 (2d Cir. 1941); Mercer v. Lence, 96 F.2d 122, 124 (10th Cir. 1938); United States *ex rel.* Portada v. Day, 16 F.2d 328, 329 (D.N.Y. 1926).

[104] United States *ex rel.* Medich v. Burmaster, 24 F.2d 57, 58 (8th Cir. 1928) ("Confessedly [the alien] withheld and concealed assets which he knew belonged to the [bankruptcy] trustee for distribution to his creditors. This was done contrary to honesty and good morals, and was shameful wickedness on his part, and thus involved moral turpitude."); United States *ex rel.* Popoff v. Reimer, 79 F.2d 513, 515 (2d Cir. 1935) ("Criminal frauds with respect to property have universally, so far as we are advised, been deemed to involve moral turpitude. . . . That the fraud relates to obtaining rights of citizenship rather than to property does not, we think, make it any the less contrary to community standards of honesty and good morals.").

[105] Ponzi v. Ward, 7 F. Supp. 736, 738 (D. Mass. 1934). The crime was mail fraud, and the alien was none other than the infamous Charles Ponzi.

[106] United States *ex rel.* Millard v. Tuttle, 46 F.2d 342, 345 (E.D. La. 1930).

[107] I do not mean to belittle Judge Bennett or the Ninth Circuit by this comment. For that matter, I do not mean to belittle Mr. Harms or any of the reformers whose proposals are rejected here. On the contrary, I admire their skills as legal craftsmen. My concern is that they are working with sub-par materials.

[108] Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998).

[109] Harms, *supra* note 4.

[110] *Id*. at 278.

[111] *Id*. at 281–82.

moral turpitude is to be identified by "moral standards generally prevailing in the United States."[112] Even if such standards can be identified, it is debatable whether the reactions of particular judges from the early twentieth century accurately reflect the moral standards which prevail in current society.[113]

If we are to continue using moral turpitude as a legal standard, we should take it at face value. If we say that a crime can violate the private and social duties which a man owes to his fellow men and to society in general (or the moral standards generally prevailing in the United States, or whatever formulation one prefers), and that this violation can have legal effect, then we are obligated, at the very least, to attempt a careful delineation of exactly what those duties are. For the most part, the cases of the last hundred years do not seem to have done so. They have identified no objective sources for these duties. This Comment proposes that such sources, which would lend assistance and credibility to decisions identifying CIMTs, exist in international law.

III. WHY INTERNATIONAL LAW?

Justice Scalia has frequently criticized the use of foreign law in American jurisprudence, particularly constitutional cases.[114] One of his primary criticisms is that the purpose of using such law is "to be sure that we're on the right track, that we have the same moral and legal framework as the rest of the world. But we *don't* have the same moral and legal framework as the rest of the world, and never have."[115] This presents an argument against the use of international law to identify CIMTs. International law cannot reflect American morals if Americans have an entirely unique moral and legal framework. However, the American moral and legal framework is *not* entirely unique. At the very least, the fact that the U.S. has signed, ratified, or recognized certain international accords and customs evinces that we agree with the rest of the world on a few commonly held values. To paraphrase Justice Kennedy, the express affirmation of these values by other nations underscores their centrality within our own heritage[116] and provides us with objective evidence that they are commonly held. Recognizing these values enables us to then identify offenses which violate them, i.e., which involve moral turpitude.

Justice Jackson noted in his *Jordan* dissent that judges tread on "treacherous grounds . . . when we undertake to translate ethical concepts into legal ones, case by case."[117] However, our legal system, particularly our

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[112] 22 C.F.R. § 40.21(a)(1) (2006).

[113] *See* Jordan v. DeGeorge, 341 U.S. 223, 232 (1951) (Jackson, J., dissenting).

[114] *See* Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting); Roper v. Simmons, 125 S. Ct. 1183, 1225–229 (2005) (Scalia, J., dissenting).

[115] *A Conversation Between U.S. Supreme Court Justices*, 3 INT'L J. OF CONST. L. 519, 521 (2005).

[116] *Simmons*, 125 S. Ct. at 1200 (majority opinion) ("[T]he express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.").

[117] *Jordan*, 341 U.S. at 242 (Jackson, J., dissenting).

constitutional jurisprudence, is full of attempts to do just that.[118] For example, the Constitution requires our government to observe legal processes which are "due,"[119] and to refrain from inflicting punishments which are "cruel and unusual."[120] Due process is an ethical concept.[121] It requires the government, when acting upon the governed, to refrain from violating "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ."[122] Cruel and unusual punishment is also an ethical concept. It requires the government, when punishing the governed, to refrain from violating "the evolving standards of decency that mark the progress of a maturing society."[123] Both concepts require the Court to search for extra-legal, commonly held values.[124] The Court then applies these values on a case-by-case basis, transforming them into legal standards. To confirm the existence of these values, the Court often consults international law.[125]

In *Lawrence v. Texas*,[126] for example, the Court looked in part to foreign law to determine whether the Due Process Clause prohibited state anti-sodomy laws from interfering with what the Court described as a right of intimate association.[127] The Court determined that it did, overruling the contrary holding of *Bowers v. Hardwick*.[128] *Bowers* stated that homosexual conduct was "subject to state intervention throughout the history of Western civilization," and briefly cited "Judeao-Christian moral and ethical standards" and Roman law as evidence of this universal condemnation.[129] The *Lawrence* court recognized that "*Bowers* relied on values we share with a wider civilization," and did not hold that this reliance was improper.[130] Instead, it cited decisions of the

[118] One could argue, however, that it is more appropriate to do this when interpreting a Constitution, which sets out broadly worded legal principles meant to guide the workings of government over hundreds of years, than when interpreting a statute, which is created to deal with immediate problems in specific terms.

[119] U.S. CONST. amend. V.

[120] U.S. CONST. amend. VIII.

[121] *See* Palko v. Connecticut, 302 U.S. 319, 326 (1937).

[122] *Id*. at 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

[123] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[124] Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 46 (2004) (describing such values as "community standards").

[125] *See id*. ("[T]he Court has looked outside the United States when a U.S. constitutional concept, by its own terms, implicitly refers to a *community standard*—e.g., 'cruel and *unusual*,' '*due* process of law,' '*unreasonable* searches and seizures.' In such cases, the Court has long since recognized that the relevant communities to be consulted include those outside our shores.") (emphasis in original).

[126] 539 U.S. 558 (2003).

[127] The bulk of the Court's opinion, however, was dedicated to an analysis of American laws regarding homosexual conduct.

[128] 478 U.S. 186 (1986).

[129] *Id*. at 196 (Burger, C.J., concurring).

[130] *Lawrence*, 539 U.S. at 576. The *Lawrence* court seems to imply that, by invoking broader standards of Western civilization as the basis for its decision, the *Bowers* court "opened the door" for the use of international law to evaluate these standards. Justice Scalia objected to this argument and insisted that the majority opinion in *Bowers* did not rely on "values we share with a wider civilization." *Id*. at 598 (Scalia, J., dissenting). This is

European Court of Human Rights, and the practices of other nations, as evidence that "the reasoning and holding in *Bowers* have been rejected elsewhere," and that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."[131] *Bowers* did not err in relying on values that we share with a wider civilization. It simply misinterpreted what those values were.[132]

What allowed the *Lawrence* court to state that it identified those values correctly, while *Bowers* identified them incorrectly?[133] The answer seems to be twofold. First, the *Bowers* court did not research the question thoroughly enough. Its "sweeping references . . . to the history of Western civilization and to Judeo-Christian moral and ethical standards" failed to account for "other authorities pointing in an opposite direction,"[134] such as acts of the British Parliament and decisions of the European Court of Human Rights.[135] Second, *Bowers* relied on outdated ideas and material. Its interpretation of ancient traditions was rejected by more modern sources.[136] This suggests that when defining commonly held values by reference to international law—or, arguably, any law—a court should cite specific sources rather than general statements of custom, and prefer recent sources to ancient ones.

Bowers and *Lawrence* were not the first due process cases in which the Court looked to the rest of the world to validate its judgments about commonly held values. In *Washington v. Glucksberg*,[137] the Court held that the Due Process Clause did not recognize a right to assisted suicide.[138] To bolster this conclusion, Chief Justice Rehnquist cited a Canadian decision, discussing

partially true; the *Bowers* majority opinion dedicates most of its ink to analysis of American legal history. *Bowers*, 478 U.S. at 192–94. However, the Court begins this analysis by noting that it is "obvious" that a right to engage in homosexual conduct is not "'implicit in the concept of ordered liberty'" because "[p]roscriptions against that conduct have ancient roots[,]" and then it cites a study which traces legal arguments against homosexuality back to Plato's Laws. *Id*. at 192–94; the study cited is Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986). In other words, the *Bowers* majority did, to some extent, base its holding on values we share with a wider civilization.

[131] *Lawrence*, 539 U.S. at 576–77.

[132] When the Texas Court of Appeals upheld the statute which *Lawrence* later struck down, it also "cited ancient Roman law, Blackstone, and Montesquieu to support the claim that 'Western civilization has a long history of repressing homosexual behavior by state action.'" Koh, *supra* note 124, at 51.

[133] Of course, a skeptic could say that neither court had really identified such values and that the decisions in both cases rested "not upon the moral perceptions of America [or the world], but upon the moral perceptions of the justices." *A Conversation Between U.S. Supreme Court Justices*, *supra* note 115, at 526 (quoting Justice Scalia). If one accepts that argument, however, it also casts doubt on the long line of cases identifying crimes involving moral turpitude, and supports the need for an objective indicator, other than those cases, of the "moral perceptions" by which such crimes can be identified.

[134] *Lawrence*, 539 U.S. at 572.

[135] *Id*. at 572–73.

[136] *Id*. at 576–77.

[137] 521 U.S. 702 (1997).

[138] *Id*. at 728.

assisted-suicide provisions throughout Europe as proof that "in almost every western democracy . . . it is a crime to assist a suicide."[139] He also noticed that "[o]ther countries are embroiled in similar debates" as that in the U.S. over whether to legalize assisted suicide.[140] In *Palko v. Connecticut*,[141] the Court suggested in dicta that the Due Process Clause of the Fourteenth Amendment does not provide protection from compulsory self-incrimination.[142] Justice Cardozo opined that "[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice" was impossible without such protection, in part because compulsory self-incrimination was "part of the established procedure in the law of Continental Europe."[143]

The Court's Eighth Amendment jurisprudence contains even more examples of the use of international law to search for the values that we share with a wider civilization. The landmark case is *Trop v. Dulles*,[144] in which the Court struck down a federal law which allowed expatriation of deserters. Chief Justice Warren stated that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[145] and then proceeded to draw such meaning from an international "society" by noting that expatriation was "a fate universally decried by civilized people" and "a condition deplored in the international community of democracies."[146] As proof of this, he cited a survey by the United Nations.[147] Since then, the Court has continued to use international law to assist its determination of what punishment is "cruel and unusual."[148] Most recently, in *Roper v. Simmons*,[149] the Court supported its decision to ban the execution of minors with references to the U.N. Convention on the Rights of the Child, other international accords, and the death penalty laws of other countries, using these materials "to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[150]

Moral turpitude is also defined by values that we as Americans share with a wider civilization. Like violations of due process, crimes involving moral turpitude "shock the public conscience."[151] Like cruel and unusual

[139] *Id*. at 710.
[140] *Id*. at 718 n.16.
[141] 302 U.S. 319 (1937).
[142] *Id*. at 325–26.
[143] *Id*.
[144] 356 U.S. 86 (1958).
[145] *Id*. at 101.
[146] *Id*. at 102.
[147] *Id*. at 103.
[148] *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988); Stanford v. Kentucky, 492 U.S. 361, 389–90 (1988) (Brennan, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 316–17 n.21 (2002).
[149] 125 S. Ct. 1183 (2005).
[150] *Id*. at 1200.
[151] *Compare* Hamdan v. INS, 98 F.3d 183, 186 (5th Cir. 1996) ("Moral turpitude refers generally to conduct that shocks the public conscience as being inherently base, vile, or

punishments, CIMTs are identified by their violation of commonly held "rules" or "standards."[152] Furthermore, while the Code of Federal Regulations specifies that moral turpitude should be defined by American morals, the broad language which the courts and the BIA use to describe it—conduct which is "contrary to the accepted rules of morality" and "per se morally reprehensible and intrinsically wrong"—suggests an appeal to a morality which is universally held, rather than being uniquely American.[153] In light of the Court's recent jurisprudence, it is therefore appropriate to consult international law to confirm values which we as Americans share with a wider civilization, and use these values to determine the substantive content of moral turpitude.

There is another reason relating to commonly held values which supports using international law to define moral turpitude. Commentators and judges have criticized the moral turpitude law as vague.[154] But the Court has announced that "a scienter requirement [i.e. a requirement of intent] may mitigate a law's vagueness," specifically regarding "the adequacy of notice to the complainant that his conduct is proscribed."[155] That is, a law which sanctions someone for doing something wrong is less vague and unfair if, as a condition of sanction, the person must *know* he did something wrong.[156]

If moral turpitude is used as a basis for deporting aliens for acts which they actually know are profoundly wrong—not just illegal, but base, vile, or depraved—that may mitigate the vagueness of those laws.[157] A court cannot

depraved[.]") *with* Rochin v. California, 342 U.S. 165, 172 (1952) (describing the forced pumping of a student's stomach as "conduct that shocks the conscience . . . bound to offend even hardened sensibilities."); County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (noting that "for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.").

[152] *Compare Hamdan*, 98 F.3d at 186 (describing moral turpitude as "conduct . . . contrary to the accepted rules of morality and the duties owed between persons or to society in general.") *with* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

[153] *Hamdan*, 98 F.3d at 186. The language cited actually seems to draw on "religious conceptions of sin," rather than mores specific to American culture. Jordan v. DeGeorge, 341 U.S. 223, 237 (Jackson, J., dissenting).

[154] *See supra* notes 16–20 and accompanying text.

[155] Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

[156] *See* Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952) ("The statute punishes only those who knowingly violate [it]. This requirement of the presence of culpable intent . . . does much to destroy any force in the argument that application of the [law] would be so unfair that it must be held invalid.").

[157] Again, this separates the question of whether or not the alien was aware that specific *conduct* was prohibited (which is a question of state criminal laws) from the question of whether the alien was aware of the *consequences* of the prohibition, namely deportation (which is a question of moral turpitude). *See supra* notes 17–18 and accompanying text. For arguments that a scienter requirement does *not* mitigate the vagueness of a law, *see* Reynolds v. Tennessee, 414 U.S. 1163, 1167 (1974) (Douglas, J., dissenting from denial of certiorari) (arguing that a requirement of intent "adds no greater precision, since this element of intent is not proved separately but was inferred from the conduct constituting the violation.");

read the alien's mind and thereby determine the contours of his conscience, but it can and does impute a knowledge of right and wrong to him.[158] And when dealing with aliens, many of whom did not spend their formative years in the United States, such imputation is more likely to be accurate if based on legal and moral principles which are shared by the world at large.

This is not to say that moral turpitude should be defined by international standards alone. Rather, international standards should set rough limits on the definition. In both *Lawrence* and *Roper*, the Court began its discussion by searching American law for "evidence of national consensus" about homosexuality or the juvenile death penalty, respectively.[159] A court that wishes to determine whether a crime involves moral turpitude can begin in a similar fashion, by examining state laws for evidence of consensus as to the elements of the crime, the penalty imposed, and other such matters. But the inquiry should not stop there. The BIA holds that an act which involves moral turpitude is inherently wrong, "so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude."[160] The prohibition of an act by state legislatures provides evidence that it violates a commonly held standard, but that evidence is not conclusive.[161] International law can provide evidence of universal disapproval of an act, evinced not just by independent nations but by agreements between those nations, and thus make a compelling case that this act truly violates duties owed between persons or to society in general, i.e. that it involves moral turpitude. Conversely, if a state legislature disapproves of an act but the act is not mentioned in international law, or is explicitly protected, that gives rise to a presumption that the act is not, in fact, a violation of those universal duties.

Goldsmith, *supra* note 27, at 302 (arguing that "Justice Douglas's critique does not go far enough.").

[158] *See, e.g.*, Mei v. Ashcroft, 393 F.3d 737, 742 (7th Cir. 2004) (noting, of an alien convicted of aggravated fleeing, "that a person who deliberately flees at a high speed from an officer who, *the fleer knows, wants him to stop,* thus deliberately flouting lawful authority and endangering the officer, other drivers, passengers, and pedestrians . . . *has to know that he is greatly increasing the risk of an accident.*") (emphasis added).

[159] Roper v. Simmons, 125 S. Ct. 1183, 1192 (2005). "The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. This data gives us essential instruction." *Id. See generally* Lawrence v. Texas, 539 U.S. 558, 568–73 (2003); *Simmons*, 125 S. Ct. at 1192–194.

[160] *In re* Franklin, 20 I. & N. Dec. 867, 868 (BIA 1994). *See also* United States v. Carrollo, 30 F. Supp. 3, 6 (W.D. Mo. 1939) ("In a sense, it is immoral to violate any law, even a traffic ordinance, but here the words 'involving moral turpitude' clearly suggest something much more serious, for otherwise they are pure surplusage . . . If a crime is one involving moral turpitude it is because the act denounced by the statute grievously offends the moral code of mankind and would do so even in the absence of a prohibitive statute.").

[161] There is a similar rule used to identify customary international law, i.e. international laws which are actually binding on the community of nations. The Second Circuit has held that universal condemnation of an act does not create an international law against that act: "[T]he mere fact that every nation's municipal [*i.e.*, domestic] law may prohibit theft does not incorporate 'the Eighth Commandment, 'Thou Shalt not steal' . . . [into] the law of nations.'" Flores v. S. Peru Copper Corp., 414 F.3d 233, 249 (2d Cir. 2003), *quoting* Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980).

However, because the purpose of consulting international law is to confirm values that we *share* with a wider civilization, a court should restrain its inquiries concerning moral turpitude to international accords which are signed, ratified, or recognized in some way by the United States.[162] The United States Government represents the will of the American people. If the President of the United States ratifies an international accord, he does so as a representative of the people. The Senate acts in the same capacity when it consents to a ratification. Such actions provide a basis for concluding that values announced in such accords represent the values of Americans as well as the world,[163] at least in theory.[164] Alternatively, if domestic courts have recognized the "moral authority" of an international accord, that provides evidence that it reflects or at

[162] I express no views here on whether the Court should do the same as part of its analysis of due process or cruel and unusual punishment.

[163] In theory, ratification by the President, with the consent of the Senate, makes the United States legally accountable for the obligations set by an accord. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., § 312 cmt. *j*. (1986). However, the Senate often gives its consent subject to conditions, such as modifications or reservations of the accord's terms. *Id*. § 303 cmt. *d*. For example, the United States has expressly declared that several of the treaties it has ratified are not enforceable under domestic law. *See* Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the 21st Century*, 23 FORDHAM URB. L.J. 1075, 1127 (1996).

[164] In reality, the relationship between international law and American morals appears to be more complicated than that. Consider the recent scandal over the treatment of Iraqi prisoners at Abu Ghraib, which several authorities, including the Red Cross, described as "tantamount to torture." *See, e.g.*, John Barry, Michael Hirsh & Michael Isikoff, *The Roots of Torture*, NEWSWEEK, May 24, 2004, *available at* http://www.msnbc.msn.com/id/4989481/. Part of what fueled this scandal was public perception that the treatment of these prisoners violated the Geneva Conventions. *See id.*

The Geneva Conventions forbid inflicting "cruel treatment and torture" and "outrages upon personal dignity" upon prisoners of war. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. At first blush, these seem to prohibit the actions taken at Abu Ghraib. However, Attorney General Alberto Gonzales apparently advised President Bush, long before the scandal broke out, that "the war against terrorism . . . renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions . . . ." Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush 2 (Jan. 25, 2002), *available at* http://msnbc.msn.com/id/4999148/site/newsweek/. The most recent Congressional response to the scandal was to pass a bill that allows President Bush to determine the applicability of the Geneva Conventions to detainees, effectively de-clawing them. *See* Scott Shane & Adam Liptak, *Detainee Bill Shifts Power to President*, N.Y. TIMES, Sept. 30, 2006, *available at* http://www.nytimes.com/2006/09/30/us/30detain.html?ex=1317268800&en=a3b420d3ad6008e7&ei=5088&partner=rssnyt&emc=rss. Both actions suggest a desire to treat the Geneva Conventions as irrelevant.

One could look at this situation and conclude that, if the actions of the President and Congress represent the will of the people, then practices tantamount to torture which inflict "outrages upon personal dignity" must be acceptable to Americans, and the Geneva Conventions do not reflect American morals. One could also conclude that the domestic reaction against Abu Ghraib is evidence that the Geneva Conventions *do* reflect American morals. *See* Barry et al., *supra*. I do not know which position is correct, if either is, but both suggest that this Comment's assumptions about international law and American morals should be taken with a grain of salt.

least correlates with American morals, or at least the courts' interpretation of them.[165]

While no document, international or otherwise, could entirely sum up the differing moral views of all Americans, international law does offer objective written evidence of the commonly held values which are required for the identification of CIMTs. It is not a perfect solution to the problems posed by vague legal terms like moral turpitude. However, to paraphrase Justice Jackson, it allows judges and administrators to "ascertain the moral sentiments of masses of persons on [a] better basis than a guess."[166]

IV. WHAT INTERNATIONAL LAW?

When the Court wishes to invoke the "opinion of the world community,"[167] it considers several different legal sources, including the domestic laws of other countries,[168] particularly the United Kingdom;[169] the decisions of international courts;[170] and international accords.[171] Of these sources, international accords are the most likely to reflect the "accepted and customary rule of right and duty" between persons, and those international accords which are signed, ratified, or recognized by the United States are most likely to reflect "moral standards generally prevailing in the United States." The domestic laws of other countries and the decisions of international courts may provide evidence that certain acts are widely condemned, but if America has no part in formulating these laws or decisions, then there is no reason to believe that they would evince American moral opinions as well as, or any better than, our existing jurisprudence.[172]

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[165] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) (noting the "moral authority" of the Universal Declaration of Human Rights while denying it domestic legal effect); *Filartiga*, 630 F.2d at 883 (describing the Declaration as "an authoritative statement of the international community.").

[166] Jordan v. DeGeorge, 341 U.S. 223, 238 (1951) (Jackson, J., dissenting).

[167] Roper v. Simmons, 125 S. Ct. 1183, 1200 (2005).

[168] *See id.* at 1199 (noting that "only seven countries other than the United States have executed juvenile offenders since 1990"); Lawrence v. Texas, 539 U.S. 558, 576 (2003) ("Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.").

[169] *See Simmons*, 125 S. Ct. at 1199; *Lawrence*, 539 U.S. at 572–73.

[170] *See Lawrence*, 539 U.S. at 573 (citing a decision of the European Court of Human Rights).

[171] *See Simmons*, 125 S. Ct. at 1199 (citing the U.N. Convention on the Rights of the Child and "other significant international covenants.").

[172] There is an avenue of inquiry which this Comment does not pursue: what of other countries who use moral turpitude as a basis for the exclusion or removal of aliens? If another nation's courts had to interpret that phrase, could their attempts to infuse it with substantive content be instructive to our courts, even if their decisions did not reflect the moral standards prevailing in the United States? I would be grateful if anyone reading this were to take up this question. I chose not to explore it because my impression, on surveying the jurisprudence of one such country, was that such an inquiry would not be helpful.

Canada, for example, excluded and deported aliens guilty of crimes involving moral turpitude until 1978. *See* Bryce v. Minister of Immigration, [1978] 22 N.R. 530 (Can.); Erin

International accords can aid a judge or administrator who seeks to define moral turpitude in two primary ways. First, they provide examples of the duties owed between man and man, or to society in general. Second, they provide examples of specific actions which violate these duties.

A. International Accords

International accords spell out duties which are morally, if not legally, binding on their participating countries. These duties bind both individuals and states, and may be described as duties owed between persons or to society in general. Crimes which violate those duties involve moral turpitude. Judges and administrators can thus use international accords to develop principled guidelines for exactly why specific actions involve moral turpitude.

For instance, the Universal Declaration of Human Rights (UDHR), which the Second Circuit has recognized as "an authoritative statement of the international community,"[173] notes that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind," and proclaims itself as "a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society*, keeping this Declaration constantly in mind, shall strive . . . to secure [the] universal and effective recognition and observance [of these rights.]"[174] The accords sets forth rights[175] and a universal duty, between persons and to society in general, to secure them. It follows that in the eyes of the parties to the

Kruger et al., *Canada After 9/11: Security Measures and "Preferred" Immigrants*, MEDITERRANEAN Q., Fall 2004, at 72, http://mq.dukejournals.org/cgi/reprint/15/4/72. But the Canadian cases interpreting "moral turpitude" frequently rely on the same sources as the American decisions, and sometimes directly cite the American decisions themselves, without providing much analysis that is not present in our own jurisprudence. *See, e.g.*, Button v. Minister of Manpower & Immigration, [1975] F.C. 277, 291–92 (Can.); Turpin v. Minister of Manpower & Immigration, [1969] 3 C.R.N.S. 330, 345–46 (Can.); King v. Brooks, [1960] 24 D.L.R.(2d) 567, 572–75 (Can.).

[173] Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980). The *Filartiga* court went on to suggest that the UDHR was "*in toto*, a part of binding, customary international law." *Id*. However, the Second Circuit backed away from that position in *Flores v. S. Peru Copper Corp.*, holding that only "clear and unambiguous rules by which States universally abide" are part of customary international law, as opposed to "international pronouncements that promote amorphous, general principles." 414 F.3d 233, 252 (2d Cir. 2003). This section refers to the UDHR as a source of recognized moral principles, but not legal obligations. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) (acknowledging the "moral authority" of the UDHR, but stating that it "does not of its own force impose obligations as a matter of international law"). Whether the UDHR does, in fact, impose such obligations is a matter for debate beyond the scope of this Comment.

[174] Universal Declaration of Human Rights, Preamble, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR] (emphasis added).

[175] These rights include a right to "life, liberty, and security of person," UDHR, *supra* note 174, art. 3; a right to be free of "cruel, inhuman or degrading treatment or punishment," *id*. art. 5; a right to be free of "arbitrary interference with [one's] privacy, family, home or correspondence" and "attacks upon [one's] honour and reputation," *id*. art. 12; and a right not to be "arbitrarily deprived of [one's] property," *id*. art. 17.

UDHR, including the United States, a breach of that duty involves moral turpitude.

To illustrate how a judge or administrator might use international covenants as evidence that a crime involves moral turpitude, consider Article 3 of the UDHR, which states that "[e]veryone has the right to life, liberty and security of person."[176] The judge could extrapolate that one of the duties owed between persons is to recognize and observe these rights. Crimes which violate that duty involve moral turpitude. The judge then has a basis for concluding that murder is a CIMT, because it violates the duty to recognize another person's right to his life; kidnapping is a CIMT, because it violates the duty to recognize another person's right to liberty of movement; assault is a CIMT, because it violates the duty to recognize another person's right to security of person; and so forth.[177]

Which accords may judges and administrators consult to discover such rights and duties? The list of accords signed or ratified by the United States includes[178] the U.N. Charter,[179] the International Covenant on Civil and Political Rights,[180] the Convention Relating to the Status of Refugees,[181] the Convention Against Torture,[182] the Convention on the Prevention and Punishment of the Crime of Genocide,[183] and the Geneva Conventions.[184] Our

[176] *Id*. art. 3. One might ask what this clause provides, regarding insight into American or global morals, that the similarly worded Due Process Clauses of the Fifth and Fourteenth Amendments do not. First, the Due Process Clauses explicitly limit the actions of the State and Federal *governments*, while the Articles of the Universal Declaration announces moral principles which apply to "every individual and every organ of society." *Id.* pmbl. Second, the text of the Due Process Clauses appears to focus on procedure (the doctrine of substantive due process notwithstanding), while the text of the UDHR clearly announces substantive rights.

[177] For an example of a court identifying violations of the right to life, liberty and security of person, *see* Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386, 2002 WL 319887, at *11 (S.D.N.Y. Feb. 28, 2002) (identifying "beating and shooting a civilian engaged in peaceful protest" as a violation of said right). *See also* Forti v. Suarez-Mason, 694 F. Supp. 707, 710 (N.D. Cal. 1988) (holding that plaintiffs established an "international proscription of the tort of 'causing disappearance'" in part by demonstrating that "disappearance" violates several provisions of the UDHR).

[178] This is not an exhaustive list. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. pt. VII, introductory note (1986); Hernandez-Truyol, *supra* note 163, at 1127; David Stoelting, *Status Report on the International Criminal Court*, 3 HOFSTRA L. & POL'Y SYMP. 233, 249–52 (1999).

[179] Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, T.S. No. 993.

[180] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171.

[181] Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

[182] Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

[183] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

domestic courts also recognize the "moral authority"[185] of the Universal Declaration of Human Rights.[186]

But identifying which accords to use is only the first step. The accords set forth moral principles which apply both to private and state actors, and a judge should be conscientious in identifying which is which. This is not to say that international law cannot apply to private actors. Our federal courts recognize that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[187] The problem is that in practice, criminal law deals exclusively with the violations of social duties by private citizens, while many international accords declare rights which citizens lack the capacity to violate. A citizen could easily deprive another individual of his right to "life, liberty and security of person,"[188] and the prevention of such deprivations is the object of laws which prohibit murder, kidnapping, or assault. But what criminal laws protect a person's right to "an effective remedy by the competent national tribunals,"[189] to "freedom of movement and residence within the borders of each state,"[190] or to "a nationality"?[191] These obvious examples should not confuse judges and administrators too badly, but they still highlight a need for caution.

Likewise, the substantive content of individual articles within these accords is not always obvious. One of the problems of international law is that "as a practical matter, it is impossible for courts to discern or apply in any rigorous, systematic, or legal manner international pronouncements that promote amorphous, general principles."[192] A judge or administrator might easily conclude that a crime which deprives another of liberty, security of person, or property is a CIMT, but he or she still must define "liberty," "security of person," or "property."[193] This approach does not remove all

[184] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 164.

[185] Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004).

[186] UDHR, *supra* note 174.

[187] Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995). *See also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (noting "the handful of crimes to which the law of nations attributes individual responsibility."). These statements echo an earlier one from the Nuremberg Judgment: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *See* Stoelting, *supra* note 178, at 252.

[188] UDHR, *supra* note 174, art. 3.

[189] *Id*. art. 8.

[190] *Id*. art. 13.

[191] *Id*. art. 15.

[192] Flores v. S. Peru Copper Corp., 414 F.3d 233, 252 (2d Cir. 2003).

[193] *Id*. at 254 (rejecting plaintiffs' claims of "'right to life' and 'right to health'" as "insufficiently definite to constitute rules of customary international law," and describing the UDHR provisions which plaintiffs relied on as "vague and amorphous."). The difference between the analysis proposed here and *Flores* is that, here, the UDHR is meant to be a source of moral principles rather than legal obligations; however, because these principles

problems of interpretation. Instead, it changes the terms which must be interpreted. There is still a risk that judges will deploy personal prejudice when they interpret terms such as "liberty," "security of person" and "property." But it is less of a risk than that posed by the interpretation of terms such as "baseness," "vileness" and "depravity," which are conclusory descriptions of moral reactions and invite nothing *but* personal prejudice.

The use of international accords would also mesh well with the current rule that moral turpitude must be inherent to the nature of the crime.[194] This is not necessarily a good thing. For example, a judge or administrator could conclude that because every person has a right to the security of his person, any crime which deprives him of that right must necessarily involve moral turpitude. Such an approach is still subject to Judge Eisele's criticism from *Marciano v. INS*: a rule which states that every deprivation of personal security or property is a CIMT may be over-inclusive and result in removals for actions which do not strike the majority of Americans as base, vile, or depraved.[195] To avoid this problem, the judge or administrator will need to reference specific actions or crimes which the world community has recognized as violations of the rights enumerated in international accords. In other words, moral principles alone are not enough: the judge will need specific examples of those principles in action. The accords themselves, and the doctrine of *jus cogens*, provide such examples.

B. Jus Cogens *Violations*

Actions identified as *jus cogens* violations help to flesh out the principles listed in international accords by providing examples of violations of those principles. *Jus cogens* is formally defined by the Vienna Convention on the Law of Treaties as a body of "peremptory norm[s] of general international law . . . from which no derogation is permitted[.]"[196] This body of norms imposes obligations *erga omnes*, or obligations owed to all mankind.[197] These obligations, like the duties enumerated in the aforementioned accords, represent an international conception of the duties owed between all persons or to society

would ultimately delineate a legal decision, i.e. whether or not an alien will lose his right to remain in this country, they must be defined with precision.

[194] *See supra* Part II.C.1.

[195] Marciano v. INS, 450 F.2d 1022, 1031 (8th Cir. 1971) (Eisele, J., dissenting).

[196] Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102, cmt. *k* (1986) ("Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them."). The Vienna Convention has not been ratified by the United States, but "[t]he Department of State has on various occasions stated that it regards particular articles of the Convention as codifying existing international law." *Id*. pt. III, introductory note.

[197] *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 306 (S.D.N.Y. 2003) ("Violations of *jus cogens* norms constitute violations of obligations owed to all ('*erga omnes*')."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 702, cmt. *o*.

in general, and crimes which violate such duties involve moral turpitude. The difference between *jus cogens* duties and the duties announced in international human rights covenants, such as the UDHR, is that *jus cogens* duties have legal force and are binding as such on all members of the world community, at least in theory.[198] Therefore, express international accords which state a duty, and allow no derogation from it, may serve as persuasive evidence of a *jus cogens* duty, but they are not sufficient in and of themselves.[199] The actual law and practice of nations, and decisions by international tribunals, must uphold the duty as "an obligatory rule of higher standing" before it will be accepted as *jus cogens*.[200]

Although these duties originally bound only the relationships between states,[201] courts and commentators, influenced in no small part by the Nuremberg Trials,[202] have more recently stated that "*jus cogens* violations may entail not only state but individual responsibility."[203] Under international law, states are actually given universal jurisdiction to punish individuals who commit such violations, regardless of the state's relationship to the individual.[204] A federal district court explained why this is the case:

> The fact that they are treated differently under international law (by permitting states to exercise universal jurisdiction over these crimes, and by entailing individual responsibility) reflects the fact that these acts are offenses of universal concern by virtue of the "depths of depravity the conduct encompasses, the often countless toll of human suffering the

[198] *See* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 65–68 (1996) (taking the position that "the implications of *jus cogens* are those of a duty and not of optional rights . . . . Consequently, these obligations are non-derogable," but noting that the question of these implications "has neither been resolved in international law nor addressed by ICL doctrine.") As Bassiouni observes, the legal and moral impact of *jus cogens* is not a settled subject. For the sake of brevity, this Comment assumes that *jus cogens* norms have, at least, moral force. For a more skeptical view of the legal force of *jus cogens*, *see* Alfred P. Rubin, Actio Popularis, Jus Cogens, *and* Offenses Erga Omnes*?*, 35 NEW ENG. L. REV. 265 (2001) (questioning the legal validity of universal jurisdiction).

[199] David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of* Jus Cogens*: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 233 (2005).

[200] *Id*. at 235.

[201] *Id*. at 228 ("Although the notion of *jus cogens* was originally conceived at the Vienna Convention as a restriction on state action from violating the interests of the community of states through international agreements thereof, the principle has expanded to include both unilateral state and individual action based on the compelling importance of the rights and values embodied in *jus cogens* and the reprehensibility of specific crimes sufficient to shock the public conscience.").

[202] *See* Stoelting, *supra* note 178, at 252.

[203] Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 306 (S.D.N.Y. 2003).

[204] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 404 (1986) (allowing universal jurisdiction to punish offenses "recognized by the community of nations as of universal concern[.]").

> misdeeds inflict upon their victims, and the consequential disruption of the domestic and international order they produce."[205]

Like crimes involving moral turpitude, violations of *jus cogens* are identified in part by their "depravity," and are universally condemned and punished partly because of that depravity.[206] They are acts which "shock the conscience of mankind."[207] They therefore provide a useful guide as to what offenses would truly violate the duties owed between persons or to society in general that moral turpitude is concerned with. Essentially, *jus cogens* is concerned with violation of the duties owed between all persons, everywhere.

Because *jus cogens* duties must be upheld as such in international law and practice before being recognized, they are much more difficult to identify than the duties named in international covenants. As one author noted, "there is no scholarly consensus on the methods by which to ascertain the existence of a [*jus cogens*] norm, nor to assess its significance or determine its content."[208] This presents a compelling reason for judges and administrators *not* to use *jus cogens* duties to identify crimes involving moral turpitude.

However, while the duties imposed by *jus cogens* are a matter of debate, there is some consensus as to specific crimes which violate those duties, and thereby involve moral turpitude.[209] The Restatement (Third) of Foreign Relations Law of the U.S. identifies some such offenses of "universal concern": piracy, the slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and "certain acts of terrorism"[210] including "assaults on the life or physical integrity of diplomatic personnel, kidnapping, and indiscriminate violent assaults on people at large."[211]

A judge or administrator using principles from the UDHR to identify CIMTs but needing to supply those principles with more specific substantive

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[205] *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 306 (quoting Tachiona v. Mugabe, 234 F. Supp. 2d 401, 415–16 (S.D.N.Y. 2002)).

[206] There is also a practical reason to provide universal jurisdiction for *jus cogens* violations, which the Court identifies: "the consequential disruption of the domestic and international order they produce." In other words, states are universally permitted to punish such violations because they so offend the international community that their very commission may create turbulence between nations.

[207] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, May 28, 1951, 1951 I.C.J. 15, 23 (noting also that one purpose of the Convention is "to confirm and endorse the most elementary principles of morality[.]").

[208] Bassiouni, *supra* note 198, at 67.

[209] *Id*. at 68.

[210] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 404 (1986). The *Kadic* court interpreted this list to apply to individuals, as opposed to states alone. Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995). *See also* Mitchell, *supra* note 199, at 231–33 ("[T]here is no agreement on what constitutes the corpus of *jus cogens* norms. Generally speaking, however, such a list would presumably include . . . [goes on to list the above offenses]."); Bassiouni, *supra* note 198, at 68 ("The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*.").

[211] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 404, cmt. *a*.

content could use *jus cogens* violations, and their salient features, to do just that. For example, suppose a judge was interpreting UDHR Article 3's provision that everyone has a right to "security of person," and wanted to know if all violations of security of person involved moral turpitude, or if it was a matter of degree. The judge could look for specific examples of *jus cogens* violations, as described in international accords ratified by the United States. War crimes and genocide are widely considered to be *jus cogens* violations.[212] The Geneva Convention Relative to the Protection of Civilian Persons in Time of War identifies some salient features of war crimes:

> … wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial . . . taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[213]

And the Convention on Prevention and Punishment of the Crime of Genocide defines "genocide" as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[214]

The judge might note that, as part of the prohibition on war crimes and genocide, these accords prohibit causing "great suffering or serious injury to body or health," or "torture or inhuman treatment," or "serious bodily or mental harm" to others. The use of these qualifying words, "great" and "serious," suggests that not all violations of personal security are of equal concern to the international community; there is universal condemnation of acts which inflict "great suffering," but acts which inflict less suffering do not shock the conscience of mankind quite so badly. The judge would be justified in concluding that while a violation of "security of person" *may* involve moral turpitude, it is necessary to inquire how great the violation was before giving a

[212] *Id*.

[213] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 184, art. 147.

[214] Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 183, art. 2.

definitive answer. The judge could then rule that, for instance, aggravated assault and battery is a CIMT, but simple assault is not.[215]

There is an aspect of *jus cogens* violations which presents a serious argument against this approach. Some hold that *jus cogens* violations, like all violations of international law, deal with "wrong[s] . . . of mutual, and not merely several, concern,"[216] meaning wrongs committed on such a grand scale that they are "capable of impairing international peace and security,"[217] far beyond the scope of most domestic crimes. *Jus cogens* violations, the argument goes, are not identified as such because they provoke moral outrage—they are identified as such because they have a political dimension, because they interfere with the way that nations relate to one another.[218] Is it appropriate to determine that, for instance, murder is a crime involving moral turpitude by analogizing it to genocide, even though genocide has a political dimension which murder does not?

First, vast crimes such as genocide are not whole units; they are concatenations of much smaller crimes. "Genocide" encompasses thousands to millions of individual counts of murder, not to mention uncountable instances of kidnapping, assault, rape, and various other crimes which are tried in domestic courthouses every day. Second, the purpose of this section is not to elevate crimes such as murder to the status of *jus cogens* violations, but to provide objective evidence that they involve moral turpitude. The universal condemnation of genocide provides evidence of a worldwide belief in a duty to not take the lives of others. Third, while *jus cogens* violations may attain that status because of their political impact, their impact is due in no small part to the degree of moral outrage that they provoke. This moral outrage, in turn, is due in part to the large number of victims involved, but also to the nature of the acts committed against the victims. Suppose that, during World War II, the Nazis had simply run all over the continent throwing feces at civilians, instead of rounding millions of people into camps and murdering them. Would the nations aggrieved by this behavior still have adopted the Geneva Conventions in response?

There are difficulties inherent in using international accords and *jus cogens* violations as yardsticks for moral turpitude, but these difficulties are not insurmountable. Again, the advantage of this approach over the current system is that it uses objective evidence of commonly held moral standards, both of America and the larger world, in order to distill a general idea of what the

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[215] Alternatively, the judge could conclude that assault falls into Judge Eisele's category of offenses which "may or may not" involve moral turpitude.

[216] Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980).

[217] Flores v. S. Peru Copper Corp., 414 F.3d 233, 249 (2d Cir. 2003).

[218] *Id*. To support this position, the Second Circuit cited *The Malek Adhel*, in which Justice Story explained "why piracy . . . is proscribed by the law of nations, while robbery is not": "'A pirate is deemed, and properly deemed, *hostis bumani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of *any or all nations*, without any regard to right or duty, or any pretence of public authority.'" *Id.* (quoting The Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844) (second emphasis added by the *Flores* court)).

duties owed between persons or to society in general are. There is no guarantee that the decisions of a judge or administrator who uses this approach would actually match the commonly held view of such duties (if such a thing is even possible). But a judge who draws on the Universal Declaration of Human Rights for his map of the societal conscience will at least stand on more solid footing than a judge who draws on "baseness, vileness and depravity."

V. CONCLUSION

This Comment has argued that international law can provide the phrase "crimes involving moral turpitude" with more specific substantive content, and that using it to do so would improve the jurisprudence on the subject. International law provides an objective reference point for the duties owed between persons which a CIMT violates. The current case law does not. It is unlikely, given the current (and in some respects understandable) hostility on the current federal bench to the use of international law in domestic courts, that the approach outlined herein will see the light of day. But this author hopes that, if nothing else, this Comment will spark conversation about the use of moral turpitude as a standard for the removal of aliens, and lead to either clarification of the phrase, or its eradication.

An alien threatened with removal faces, in the words of Justice Brandeis, the potential loss of "all that makes life worth living."[219] A country which imposes such a penalty on anyone by vague, subjective standards such as "baseness, vileness and depravity" has no business claiming that it is governed by a neutral rule of law. As long as we use moral turpitude as a standard for removing aliens, we are obligated to make this standard as definite and objective as we can.

[219] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).