NOTE

IS PERFORMING AN ABORTION A REMOVABLE OFFENSE? ABORTION WITHIN THE CRIMES INVOLVING MORAL TURPITUDE FRAMEWORK

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Before Roe v. Wade *was decided, the Board of Immigration Appeals ("BIA") found that performing an illegal abortion was a crime involving moral turpitude in the context of immigration law. As a result, pre-*Roe*, a noncitizen could be removed from or declared inadmissible to the United States if they were convicted of or admitted to performing an illegal abortion. Because the standard of moral turpitude is one that evolves with society as societal values change, it is unclear that the BIA would still find performing an illegal abortion to be a crime involving moral turpitude today. In order for a conviction to constitute a crime involving moral turpitude, the statute the defendant was convicted under must require sufficient intent and criminalize reprehensible conduct. This Note looks to the history of moral turpitude and the current tests applied in immigration law to determine whether performing an illegal abortion could be considered a crime involving moral turpitude post-*Dobbs v. Jackson Women's Health Organization*. After applying the relevant tests and comparing performing an illegal abortion to crimes that have previously been designated crimes involving moral turpitude, this Note reaches the conclusion that performing an illegal abortion should not be found to be a crime involving moral turpitude.*

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INTRODUCTION

In 1946, before *Roe v. Wade* or *Planned Parenthood of Southeastern Pennsylvania v. Casey* were decided,[1] the Board of Immigration Appeals ("BIA") determined that performing an illegal abortion was a crime involving moral turpitude ("CIMT") in the immigration context.[2] As a result, pre-*Roe*, a noncitizen could be removed from or declared inadmissible to the United States if they were convicted of performing an illegal abortion.[3] While there has not been an immigration case determining whether performing an illegal abortion is a CIMT post-*Roe*, the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*[4] creates the possibility that this may change. It is important for both criminal defense attorneys and immigration advocates to be aware of the implications of this reality.

This Note explores the history of moral turpitude and analyzes whether performing an illegal abortion would be considered a CIMT today. After the Supreme Court decided *Dobbs*, overturning *Roe* and *Casey*,[5] the United States faced, and still faces, a period of uncertainty regarding abortion laws. At the time *Dobbs* was decided, some states had trigger laws in place that immediately outlawed virtually all abortion as soon as *Roe* was overturned,[6] while other states passed new abortion bans,[7] the strictest of which criminalized abortion from the time of conception.[8] These new laws conflict with previously existing statutes at times[9] and

[1] See generally Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[2] Matter of M-----, 2 I. & N. Dec. 525, 528 (B.I.A. 1946).

[3] The current version of the Immigration and Nationality Act states that a noncitizen is inadmissible if they have been convicted of or admit to having committed a CIMT. 8 U.S.C. § 1182(a)(2)(A)(i)(I). A noncitizen who has been legally in the United States is removable if they are convicted of a single CIMT within five years of admission and if the conviction carried a potential imprisonment of at least one year. Id. § 1227(a)(2)(A)(i). A noncitizen is removable if they commit two CIMTs not arising out of a single scheme of criminal misconduct at any point after admission. Id. § 1227(a)(2)(A)(ii).

[4] 142 S. Ct. 2228 (2022).

[5] Id. at 2242.

[6] See, e.g., La. Stat. Ann. § 40:1061 (2023).

[7] See, e.g., West Virginia Gov. Jim Justice Signs Abortion Ban Into Law, Politico (Sept. 16, 2022, 2:17 PM), https://www.politico.com/news/2022/09/16/west-virginia-jim-justice-abortion-ban-law-00057255 [https://perma.cc/7GN9-UWKV].

[8] Ark. Code Ann. §§ 5-61-303 to 5-61-304 (Supp. 2023).

[9] Rebecca Boone & Claire Rush, Post-*Roe*, States Struggle With Conflicting Abortion Bans, AP News (July 1, 2022, 6:41 PM), https://apnews.com/article/abortion-state-governments-idaho-afa15cab32e3f46524997e0255fe8c8f [https://perma.cc/9NKK-JGXC].

create an unclear line between a legal abortion under federal law and a felony abortion under state law.[10] Other states have since passed new statutes to protect an individual's right to receive an abortion.[11] Immigration attorneys have recognized the danger these new abortion laws may present in immigration law.[12]

The term "crime . . . involving moral turpitude" first appeared in immigration law in the Immigration Act of 1891 as a ground for exclusion[13] and was designated by Congress as a ground for removal in 1917.[14] The term "crime involving moral turpitude" has never been defined by Congress[15] and instead has largely been left to judicial interpretation. The result is a patchwork area of law, with circuit splits

[10] Compare Exec. Order No. 14,067, 87 C.F.R. 42053 (July 8, 2022) (stating that abortion is "essential to justice, equality, and our health, safety, and progress as a Nation" and directing the Secretary of Health and Human Services to protect and expand access to abortion care), with Tex. Health & Safety Code Ann. § 170A.004 (West 2022) (classifying abortion as a felony of the first or second degree). A similar conflict is currently being litigated in the U.S. Court of Appeals for the Ninth Circuit with respect to Idaho's abortion law. United States v. Idaho, No. 23-35440, 2023 WL 6308107, at *1 (9th Cir. Sept. 28, 2023). The federal government argued that federal law could require abortions which are not included under the State's life of the mother exception. Id. at *3. The Ninth Circuit found in favor of the State, overturning a district court decision and granting a stay of the preliminary injunction on Idaho's abortion law. Id. at *1, *7. The Ninth Circuit panel stated that the state law did not restrict abortions required by federal law. Id. at *5. The Ninth Circuit later vacated the order and agreed to rehear the matter en banc. See United States v. Idaho, 82 F.4th 1296 (9th Cir. 2023). An en banc panel subsequently denied Idaho's motion to stay the injunction pending appeal. See United States v. Idaho, 2023 U.S. App. LEXIS 30135 (9th Cir. Nov. 13, 2023).

[11] As of sixty days after *Dobbs* was passed, sixteen states had "passed legislation to protect access to abortion before and in response to *Dobbs*." Larissa Jimenez, 60 Days After Dobbs: State Legal Developments on Abortion, Brennan Ctr. for Just. (Aug. 24, 2022), https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion [https://perma.cc/VB7W-SVPY].

[12] Immigration attorneys and advocates published an open letter to the Department of Homeland Security ("DHS") after *Dobbs*, requesting that DHS clarify that abortion-related convictions would not be used as a basis for immigration enforcement actions. Letter from Advocs. for Youth et al. to Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec. (July 19, 2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/coalition_urges_dhs_to_protect_the_right_to_abortion_after_dobbs.pdf [https://perma.cc/5LAJ-SXHP].

[13] Immigration Act of 1891, Pub. L. No. 51-551, § 1, 26 Stat. 1084.

[14] Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874.

[15] See Jordan v. De George, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting) ("Congress did not see fit to state what meaning it attributes to the phrase 'crime involving moral turpitude.'"); see also De Leon v. Lynch, 808 F.3d 1224, 1228 (10th Cir. 2015) ("The phrase 'crime involving moral turpitude' is not defined in the INA; instead, its contours have been shaped through interpretation and application by the Attorney General, the Board, and federal courts. It is 'perhaps the quintessential example of an ambiguous phrase.'").

both as to what constitutes a CIMT and what the correct test is to apply to make that determination. The current definition put forth by the BIA is that a CIMT is "conduct that is 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'"[16]

This Note will analyze total abortion bans enacted in the United States under the modern immigration CIMT framework and provide a basis for immigration advocates to argue that performing an illegal abortion is not a CIMT. Part I provides a brief history of CIMTs, both within and beyond immigration law. Part II provides an overview of the current frameworks used by the BIA and federal courts to determine if a conviction constitutes a CIMT. Part III analyzes how modern abortion bans are likely to fit within this framework, finding that these illegal abortions are unlikely to be considered CIMTs. Part IV discusses the potential implications were the BIA or a federal court to find that performing an abortion is a CIMT.

I. THE EVOLUTION OF THE LEGAL TERM "CRIMES INVOLVING MORAL TURPITUDE"

The term "crimes involving moral turpitude" has existed in the United States for over two hundred years, but court rulings of what behavior constitutes moral turpitude have been inconsistent, since courts have interpreted moral turpitude as having a meaning that evolves with modern societal morals.[17] The term was first introduced into American legal vocabulary in the slander context in 1809.[18] It was incorporated into immigration law about a century later as a ground for exclusion,[19] before later being added as a ground for removal as well.[20]

[16] Matter of Silva-Trevino, 26 I. & N. Dec. 826, 833 (B.I.A. 2016) (citation omitted) (interim decision).

[17] State v. Malusky, 230 N.W. 735, 737 (N.D. 1930) ("The term 'moral turpitude' is not new. It has been used in the law for centuries. . . . [It] 'is a term which conforms to and is consonant with the state of the public morals; hence it can never remain stationary.'" (citations omitted)).

[18] See Brooker v. Coffin, 5 Johns. 188, 188 (N.Y. Sup. Ct. 1809); see also Julia Ann Simon-Kerr, Moral Turpitude, 2 Utah L. Rev. 1001, 1010 (2012) ("Until the New York Supreme Court used it in *Brooker*, the phrase [moral turpitude] had made only descriptive appearances in judicial opinions in England and the United States.").

[19] Immigration Act of 1891, Pub. L. No. 51-551, § 1, 26 Stat. 1084.

[20] Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874.

A. Legal Origination of Crimes Involving Moral Turpitude

In 1809, a New York state court first introduced the term "crime involving moral turpitude" as a legal concept.[21] In *Brooker v. Coffin*, the trial court stated that if a defendant had allegedly accused a plaintiff of committing an act which constituted a CIMT, then the defendant's statement was actionable slander per se without the plaintiff needing to prove resulting damages.[22] The U.S. Supreme Court expressed support for this standard,[23] which was "very extensively adopted in the courts of other States."[24] Neither the *Brooker* court nor the Supreme Court, however, defined the phrase, possibly due to the assumption that it had a common understanding among the public.[25]

While courts in the nineteenth century applied the moral turpitude test for slander straightforwardly enough to crimes of "fraud or unchastity,"[26] courts occasionally struggled to apply the test to crimes that did not fit cleanly into either of these two categories,[27] or to crimes that occurred "at the margins."[28] As a result, some courts refused to adopt the moral turpitude standard for slander in cases where a judgment of morality was particularly divisive at that moment in culture.[29] In 1836, for example, the Supreme Court of North Carolina declined to apply the moral turpitude test and criticized the standard, stating that the court is "left in doubt what

[21] *Brooker*, 5 Johns. at 191; see also Simon-Kerr, supra note 18, at 1010.

[22] 5 Johns. at 191.

[23] Pollard v. Lyon, 91 U.S. 225, 234 (1875) (stating that "words falsely spoken of another may be actionable *per se* when they impute to the party a criminal offence for which the party may be indicted and punished, even though the offence is not technically denominated infamous, if the charge involves moral turpitude").

[24] Id. at 230.

[25] Professor Julia Ann Simon-Kerr states that, at the time of its introduction, "moral turpitude was a phrase that had clear content, even if its boundaries were less clear." Simon-Kerr, supra note 18, at 1010. When delving more deeply into the origination of moral turpitude, Simon-Kerr found that at the time of its introduction, the term was applied to men when a business deal was not honored, and when it was applied to women, it "signaled violations of female honor norms requiring sexual purity." Id. at 1013.

[26] Id. at 1020.

[27] Simon-Kerr suggests that this is due to a lack of guiding principles. Id.

[28] Id.; see also Birch v. Benton, 26 Mo. 153, 159 (1858) (rejecting the *Brooker* rule and stating that "[t]his rule lacks certainty; for the terms 'moral turpitude' and 'infamous' are of indefinite import, and men differ as to the quality of an act according to their own standard of morality").

[29] Simon-Kerr, supra note 18, at 1021–22.

charges are embraced within the sentence—it lacks precision; we are compelled to search moral and ethical authors, rather than legal writers."[30]

Since its introduction in 1809, courts and legislatures have applied the term moral turpitude in other legal contexts. Courts have used a moral turpitude standard when impeaching witnesses,[31] disenfranchising voters,[32] revoking medical licenses,[33] and disbarring attorneys.[34] In *Jordan v. De George*,[35] the U.S. Supreme Court utilized the moral turpitude analysis in the immigration context.[36]

B. Moral Turpitude in Immigration Law

Although CIMT has become an important term in immigration law, Congress has never defined it.[37] Congress first introduced the term moral turpitude to immigration law in the 1891 Immigration Act.[38] The 1891 Immigration Act forbid entry to classes of immigrants who had previously been convicted of a CIMT.[39] Congress further ingrained the term moral turpitude into immigration law by including it in the Immigration Act of

[30] Skinner v. White, 18 N.C. 471, 474 (1836) (considering whether harboring a runaway slave was a CIMT); see Simon-Kerr, supra note 18, at 1020–25, for further discussion on the inconsistency of the term when it was introduced. Simon-Kerr discusses how courts in the 1800s, when "confronted [with] borderline questions," would "resort[] to familiar doctrines and steer[] clear of the amorphous realm of moral wrongfulness and social disapprobation." Id. at 1025.

[31] Jordan v. De George, 341 U.S. 223, 227 (1951).

[32] Simon-Kerr, supra note 18, at 1040 ("[D]isenfranchisement statutes used moral turpitude to sort acceptable character traits from those that were disqualifying in order to maintain a particular social order.").

[33] The Supreme Court was considering whether states could use a morality requirement applied retroactively when issuing and revoking medical licenses, but the crime at issue was an illegal abortion. Hawker v. New York, 170 U.S. 189, 189–91 (1898). The Court affirmed the lower court's decision of revoking the plaintiff's medical license for performing an illegal abortion. Id. at 200.

[34] See, e.g., In re Meyerson, 59 A.2d 489, 490 (Md. 1948); In re Kirby, 73 N.W. 92, 93 (S.D. 1897).

[35] 341 U.S. 223 (1951).

[36] Id. at 223, 232 (applying the moral turpitude test to hold that conspiracy to defraud the United States is a CIMT within the meaning of Immigration Act of 1917 and stating that the phrase 'crimes involving moral turpitude' is not unconstitutionally vague).

[37] Simon-Kerr, supra note 18, at 1046.

[38] Immigration Act of 1891, Pub. L. No. 51-551, § 1, 26 Stat. 1084 (stating that "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude" would be inadmissible to the United States); see also *Jordan*, 341 U.S. at 229 n.14 (noting that the "term 'moral turpitude' first appeared in the Act of March 3, 1891, 26 Stat. 1084").

[39] Immigration Act of 1891 § 1.

1917 and the Immigration and Nationality Act of 1952 ("INA").[40] Currently, per the U.S. Code, a noncitizen can be removed from the country if within the first five years of admission, they commit a CIMT that has a potential sentence of at least one year.[41] A noncitizen can also be removed for committing two CIMTs at any point after admission, so long as the convictions do not arise from a "single scheme of criminal misconduct."[42] A noncitizen can be denied admission if they have been convicted of or if they admit to committing a CIMT (other than a purely political offense).[43]

Because the term is inherently tied to society's current understanding of what is "moral,"[44] the BIA's and circuit courts' application of moral turpitude has evolved since its introduction to immigration law.[45] Judicial and agency interpretation of moral turpitude has had to adapt with federal and state laws. If an action is no longer criminalized, then it can no longer be a CIMT.[46] For example, sodomy was criminalized and considered a CIMT in the twentieth century.[47] In 2017, the U.S. Court of Appeals for

[40] Immigration Act of 1917, Pub. L. No. 64-301, §§ 3, 19, 39 Stat. 874; Immigration and Nationality Act, Pub. L. No. 414, §§ 212(a)(9), 212(a)(10), 66 Stat. 163 (1952); id. § 241(a)(4).

[41] 8 U.S.C. § 1227(a)(2)(A)(i).

[42] Id. § 1227(a)(2)(A)(ii).

[43] Id. § 1182(a)(2)(A)(i).

[44] See Jordan v. De George, 341 U.S. 223, 237–38 (1951) (Jackson, J., dissenting) ("Can we accept 'the moral standards that prevail in contemporary society' as a sufficiently definite standard for the purposes of the Act? This is a large country and acts that are regarded as criminal in some states are lawful in others. We suspect that moral standards which prevail as to possession or sale of liquor that has evaded tax may not be uniform in all parts of the country, nor in all levels of 'contemporary society.' How should we ascertain the moral sentiments of masses of persons on any better basis than a guess?").

[45] Compare In the Matter of D-----, 1 I. & N. Dec. 143, 145 (B.I.A. 1941) (finding that an intent to permanently deprive the owner of their property or "moral baseness" was necessary for a theft crime to be a CIMT), with Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847, 853 (B.I.A. 2016) (interim decision) ("[V]iewing the matter from a modern perspective, we conclude that our early jurisprudence does not provide us with good reasons to persist in the rule that moral turpitude requires a taking involving a *literally* permanent intended deprivation."). The BIA found that new legal developments created an "important aspect of modern American theft jurisprudence." Id. at 854. Given that the old theory was inconsistent with modern law and theory, "the mere antiquity of our case law is not a sound reason for continuing to adhere to it." Id. Thus, even though the BIA had ruled one way in the past, it was willing to reanalyze the same issue through the lens of modern law and reach a different conclusion.

[46] Chavez-Alvarez v. Att'y Gen. U.S., 850 F.3d 583, 590 (3d Cir. 2017) (discussing how the "crime" of sodomy is not a CIMT after *Lawrence v. Texas*, 539 U.S. 558 (2003), was decided).

[47] See In re Longstaff, 538 F. Supp. 589, 591–92 (N.D. Tex. 1982), *aff'd*, 716 F.2d 1439 (5th Cir. 1983).

the Third Circuit faced the question of whether an individual could be removed for a sodomy conviction when the conviction occurred while sodomy was considered illegal; the court determined that the individual could not be removed, because at the time of the removal hearing, sodomy was no longer a crime.[48]

In the reverse, some crimes that were previously found not to be CIMTs are now considered to be so by some circuits.[49] In 2020, the Eighth Circuit found in *Bakor v. Barr* that the failure to register as a sex offender is a CIMT,[50] despite four circuits previously holding that this act was not a CIMT.[51] The Eighth Circuit found that the failure to register is a CIMT due to the "consideration of the danger that the crime poses to society at large"[52] and the "compelling societal purpose behind sex offender registration statutes."[53] The decision suggests that some acts that were not previously criminalized—such as failing to register because one could not register before the registry existed—could still become CIMTs when new laws are created.

[48] *Chavez-Alvarez*, 850 F.3d at 585, 590.

[49] See Melissa London, Renewing the Vagueness Challenge to Crimes Involving Moral Turpitude, 97 Wash. L. Rev. 581, 609–10 (2022). London suggests that there are contrasting circuit court rulings pertaining to failure to register as a CIMT because the Eighth Circuit decision was "not based solely on whether moral turpitude necessarily inhered in the crime of failing to register as a sex offender; rather, the decision was heavily informed by the personal moral judgments of the judges on the Eighth Circuit." Id. at 611–12.

[50] 958 F.3d 732, 737 (8th Cir. 2020).

[51] Totimeh v. Att'y Gen. of the U.S., 666 F.3d 109, 116 (3d Cir. 2012) (finding that a violation of Minnesota's predatory offender registration statute is not a CIMT); Mohamed v. Holder, 769 F.3d 885, 889 (4th Cir. 2014) (finding that failing to register is not a CIMT because the court found "no moral norm requiring sex offenders to register or to provide information to the community" and that laws of the administrative nature "simply do not implicate any moral value beyond the duty to obey the law"); Pannu v. Holder, 639 F.3d 1225, 1229 (9th Cir. 2011) (vacating a BIA decision and remanding for the BIA to reconsider whether the failure to register as a sex offender is a CIMT); Efagene v. Holder, 642 F.3d 918, 925–26 (10th Cir. 2011) (providing examples of how the Colorado registration statute could be violated without a base, vile, or depraved act, such as "failing to register on or within one business day of his birthday" and thus holding that the statute can be violated without a reprehensible act).

[52] *Bakor*, 958 F.3d at 737.

[53] Id. at 738.

C. Abortion and Moral Turpitude Precedent

The history of abortion and moral turpitude dates back to the origin of moral turpitude in the slander context.[54] In multiple nineteenth century slander cases, performing an illegal abortion was found to be a CIMT.[55] Often, courts reached this conclusion with little explanation.[56] It is important to note, however, that the abortion laws discussed in these early cases were different from abortion laws today.[57] Abortion laws in the early nineteenth century often focused on the difference between pre- and post-"quickening."[58] Once a woman felt a fetus move,[59] she was

[54] See, e.g., Widrig v. Oyer, 13 Johns. 124, 124 (N.Y. Sup. Ct. 1816) (finding that the defendant's declaration that the plaintiff had an abortion is an actionable form of slander because abortion is a CIMT).

[55] See Bissell v. Cornell, 24 Wend. 354, 356 (N.Y. Sup. Ct. 1840). The statute relevant in *Bissell* stated that "every person who shall administer to any pregnant woman any medicine, [etc.] or use or employ any instruments, [etc.] with intent thereby to procure the miscarriage of any such woman, unless the same be necessary to preserve life," could be punished and that "the punishment is enhanced if the woman be quick with child." Id. The court found that an accusation of an attempt to procure an abortion, except in permitted instances, is "actionable *per se*." Id.; see also Smith v. Gaffard, 31 Ala. 45, 50 (1857) (holding that "the procurement of an abortion, under circumstances not allowed by law, is an offense involving moral turpitude").

[56] See *Gaffard*, 31 Ala. at 50 (characterizing the procurement of an abortion as a CIMT based only upon precedent); see also *Bissell*, 24 Wend. at 355 (holding, without analysis, that an abortion is an indictable offense that involves moral turpitude); Filber v. Dautermann, 26 Wis. 518, 520 (1870) (stating that abortion is "certainly a 'crime involving moral turpitude'" without offering any further analysis).

[57] Leslie J. Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973, at 10 (1997) ("It is crucial to recognize what these early-nineteenth-century laws did not cover: they did not punish women for inducing abortions, and they did not eliminate the concept of quickening.").

[58] The distinction between pre- and post-quickening began to be phased out when new laws were passed between 1860 and 1880. Id. at 13.

[59] Many, if not all, of the current and past abortion statutes refer to the individual on whom the abortion is being performed as a woman or a mother. Thus, for clarity, when discussing the law, this Note will use the language of the law and refer to the individual upon whom the abortion is being performed as a woman. This is not intended to detract from the reality that other individuals beyond cisgender women can receive an abortion. See AC Facci, Why We Use Inclusive Language to Talk About Abortion, ACLU (Jun. 29, 2022), https://www.aclu.org/news/reproductive-freedom/why-we-use-inclusive-language-to-talk-about-abortion [https://perma.cc/7X34-KAT3].

considered quick with child.[60] At common law, abortion was often only considered illegal if it occurred after quickening.[61]

In 1857, the Supreme Court of Alabama declared that, in cases of slander alleging that people received an abortion, "the procurement of an abortion, under circumstances not allowed by law, is an offense involving moral turpitude."[62] This specific Alabama court looked to both the abortion law at the time of the accusation and the common law view of abortion.[63] The court found that the relevant, current statute punished any person, not including the pregnant woman herself, "who willfully administers to any pregnant woman any drug or substance, to procure her miscarriage, unless the same is necessary to preserve her life."[64] While the statute itself did not include an exception for women who were not yet "quick with child," the court read in an exception when determining whether or not the act was a CIMT.[65] The court stated, "At common law, the production of a miscarriage was a punishable offense, provided the mother was at the time 'quick with child.'"[66] The plaintiff was accused of performing an abortion on herself, but because the accusation did not

[60] Monica E. Eppinger, The Health Exception, 17 Geo. J. Gender & L. 665, 688 (2016) (explaining the concept of "quickening" and its historical relation to abortion); see also Commonwealth v. Bangs, 9 Mass. 387, 388 (1812) ("[I]f an abortion had been alleged and proved to have ensued, the averment that the woman was quick with child at the time is a necessary part of the indictment.").

[61] Smith v. State, 33 Me. 48, 55 (1851) ("At common law, it was no offence to perform an operation upon a pregnant woman by her consent, for the purpose of procuring an abortion, and thereby succeed in the intention, unless the woman was 'quick with child.'"); *Gaffard*, 31 Ala. at 51 ("At common law, the production of a miscarriage was a punishable offense, provided the mother was at the time 'quick with child.'").

[62] *Gaffard*, 31 Ala. at 50. In *Gaffard*, the court specifically focused on an accusation that the plaintiff performed an abortion on herself. Id. at 49. The defendant allegedly stated that the plaintiff "'had taken something to make her lose' a child." Id. Before reaching the abortion discussion, the court discussed the accusation of being pregnant at all when unmarried. Id. at 48. While the complaint did not show that the plaintiff was unmarried at the time of the accusation, the court notes in dicta that "falsely impugning female chastity [is] actionable *per se*." Id. at 49; see also Filber v. Dautermann, 26 Wis. 518, 520–21 (1870). In *Filber*, the defendant had accused the plaintiff of "administering to her daughter pills to drive off a child. The natural meaning of this language is, to charge that [the plaintiff] attempted to procure an abortion upon her daughter." Id. at 520. The accusation the Supreme Court of Wisconsin discussed did not include whether or not the daughter was quick with child. Id. at 518. Ultimately, the court stated that a mother obtaining an abortion for her daughter was a CIMT. Id. at 520.

[63] *Gaffard*, 31 Ala. at 51.

[64] Id.

[65] Id.

[66] Id.

suggest that plaintiff was "quick with child," the defendant's statement was not actionable per se.[67] The court did not indicate that it found it conclusive that the relevant statute had an exception for the pregnant woman.[68]

Abortion-related crimes have also been discussed in terms of moral turpitude in the context of impeaching a witness,[69] revoking a medical license,[70] and disbarring an attorney.[71] For example, in 1917, what is now the D.C. Circuit affirmed the decision to revoke a doctor's medical license because the court found that the doctor had committed an act of moral turpitude when he mailed information explaining how to obtain an abortion.[72] The court stated, "Abortion is an immoral, base crime; and he who aids and abets in its commission by an unlawful use of the mails is guilty of an act involving moral turpitude."[73] In making this decision, the court simply relied on precedent and stated that "[a]bortion is held to involve moral turpitude."[74] Similarly, in 1948, what is now the Supreme Court of Maryland affirmed a lower court's decision to disbar an attorney for assisting a woman in obtaining an abortion, suggesting that the act was a CIMT.[75]

In 1946, the BIA stated that performing an abortion was a CIMT.[76] The case involved a seventy-year-old immigrant who administered illegal narcotics and anesthetic to a woman before performing an abortion on

[67] Id. at 50–51.

[68] Id. at 51.

[69] See United States v. Lloyd, 400 F.2d 414, 417 (6th Cir. 1968) ("But, a witness may be impeached by inquiry into prior misdemeanor convictions if these crimes involve moral turpitude."); see also United States v. White, 463 F.2d 18, 20 (9th Cir. 1972) (finding that a felony, regardless of whether it involves moral turpitude, may be used to impeach a witness, and thus not reaching the question posed by the defendant's argument that a conviction for manslaughter abortion was not a crime of moral turpitude).

[70] See Kemp v. Bd. of Med. Supervisors, 46 App. D.C. 173, 183 (D.C. Cir. 1917).

[71] In re Meyerson, 59 A.2d 489, 495–96 (Md. 1948).

[72] *Kemp*, 46 App. D.C. at 183.

[73] Id.

[74] Id. at 181.

[75] *In re Meyerson*, 59 A.2d at 494 (affirming on the basis that "causing, and conspiring to cause, an abortion are 'crimes involving moral turpitude,' that in appellant's case there were not mitigating but aggravating circumstances, and that he should be 'disbarred for life'").

[76] In the Matter of M-----, 2 I. & N. Dec. 525, 526 (B.I.A. 1946). The defendant had multiple charges relating to the abortion he performed; first, he was charged with first degree manslaughter under a statute stating that intentionally procuring a miscarriage, unless under a legal exception, which results in the death of the woman, is manslaughter in the first degree. Id. at 527. He was also charged with intent to procure a miscarriage. Id. at 528. Procuring an abortion was a felony. Id.

her.[77] As a result of the abortion procedure, the woman died.[78] After examining the relevant statutes to determine the scope of the defendant's crime, the court stated the defendant "was convicted of assault with intent to commit the felony of abortion. Since abortion is a crime involving moral turpitude, the conviction for assault with intent to commit abortion . . . also involves moral turpitude."[79] In making this determination, the BIA cited to an unreported case, *In the Matter of B-----*.[80] The BIA did not include any additional analysis as to why performing an abortion constituted a CIMT.[81]

In 1961, the BIA again suggested that the "crime of abortion" was a CIMT,[82] but ultimately decided the case on other grounds.[83] In dicta, the court stated that a conviction under the German statute constituted a CIMT, without clarifying exactly what the "crime of abortion" entailed.[84] It is unclear from the case whether the defendant had performed an illegal abortion or had received an illegal abortion.[85]

Additionally, in 1963, the BIA stated in dicta that encouraging abortion under a 1959 Connecticut law may be a CIMT.[86] The statute punished "[a]ny person who . . . encourages or prompts to the commission of" an abortion or who sells such devices to anyone other than a physician.[87] Ultimately, because the statute was broad and divisible with only some criminalized behavior reaching the level of moral turpitude, the BIA

[77] Id. at 525, 527.

[78] Id. at 527.

[79] Id. at 528.

[80] Id. at 526 (citing In the Matter of B-----, 56113/313 (renumbered AR-5695775) (June 24, 1943) ("Abortion has been held to be a crime involving moral turpitude.")). The BIA can hand down two types of decisions: published and unpublished. Unpublished decisions decide the case at hand but are not intended to be used as precedent for future parties. Nevertheless, immigration judges and government lawyers have cited to unpublished cases in the past. See, e.g., N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 987 F.3d 207, 211 (2d Cir. 2021).

[81] See *In the Matter of M-----*, 2 I. & N. Dec. at 526 (citing only to precedent without further analysis).

[82] Matter of K-----, 9 I. & N. Dec. 336, 336 (B.I.A. 1961).

[83] Id. at 338. Defendant was convicted of abortion under the German criminal code. Id. at 336.

[84] Id. at 336.

[85] Id.

[86] Matter of Cassisi, 10 I. & N. Dec. 136, 137 (B.I.A. 1963); see also In the Matter of D-----, 4 I. & N. Dec. 149, 153 (B.I.A. 1950) (listing abortion as a CIMT).

[87] *Matter of Cassisi*, 10 I. & N. Dec. at 137.

determined that the defendant could not be found to have been convicted of a CIMT.[88]

II. CURRENT IMMIGRATION MORAL TURPITUDE FRAMEWORK

Although Congress has never defined "moral turpitude," the BIA has defined it as "conduct that is 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'"[89] In order for a conviction to be considered one of moral turpitude, the statute must "require[] two essential elements: reprehensible conduct and a culpable mental state."[90] When determining whether the statute only convicts behavior that rises to the level of moral turpitude, the BIA and courts apply the categorical or modified categorical approach combined with (depending on the precedent of the jurisdiction) the appropriate standard, such as the realistic probability or least culpable conduct standard.

A. The Traditional Test for Establishing a Crime Involving Moral Turpitude

In order for a conviction to constitute a CIMT, the statute must include both a culpable mental state requirement and a reprehensible conduct requirement. If the statute does not require a sufficient mental state or punishes behavior that is not reprehensible, then a conviction under the statute is not a CIMT.

1. Culpable Mental State

The first prong of the two-part test to decide if a conviction constitutes a CIMT is to determine what level of intent the statute requires. Only crimes which meet the "culpable mental state" requirement are considered to be CIMTs. To meet this requirement, the statute must "require[] deliberation or consciousness, such as intent, knowledge, willfulness, or recklessness."[91] Further, the statute must require more than a general

[88] Id. at 137–38. Specifically, the BIA determined that the record of conviction did not clarify which portion of the statute the defendant was convicted under, so it was not clear if the defendant was convicted of a CIMT. Id. at 137.

[89] Matter of Silva-Trevino, 26 I. & N. Dec. 826, 833–34 (B.I.A. 2016) (interim decision) (quoting Cisneros-Guerrerro v. Holder, 774 F.3d 1056, 1058 (5th Cir. 2014)).

[90] Id. at 834.

[91] Matter of Vucetic, 28 I. & N. Dec. 276, 277 (B.I.A. 2021).

intent because crimes that "require general intent only and may be committed without the evil intent, depraved or vicious motive, or corrupt mind associated with moral turpitude"[92] are not CIMTs.[93] The Eighth Circuit, citing the BIA, has suggested that the required culpable mental state exists on a sliding scale with the harm resulting from the behavior.[94] The more severe the harm, the more likely the adjudicator is to find that recklessness is a sufficient intent to constitute moral turpitude. If the harm is less severe, a higher "level of conscious behavior" is required.[95]

The BIA does not always strictly abide by the intent prong. The BIA has made exceptions for statutes that do not include a specific mens rea requirement for all elements of the crime. For example, in cases involving a conviction for a sexual offense in violation of a statute designed to protect children, a defendant's conviction can be found to amount to a CIMT when the victim was particularly young, even if the relevant statute does not contain a mental state as to the victim's age.[96] In *Matter of Jimenez-Cedillo*, the BIA found that it was enough that the statute required a defendant to knowingly solicit a minor, despite the defendant's argument that the section does not require the defendant to "have a culpable mental state regarding the age of the victim."[97] The defendant argued an individual could conceivably be convicted under the statute if they knowingly solicited someone for sexual relationships without knowing that individual was a minor.[98] But the BIA held that—regardless

[92] Matter of Solon, 24 I. & N. Dec. 239, 241 (B.I.A. 2007).

[93] General intent requires proof that the defendant intended to commit the action, while specific intent requires a greater mens rea of intending to commit the criminal act. United States v. Starnes, 583 F.3d 196, 209 (3d Cir. 2009); United States v. Cortés-Cabán, 691 F.3d 1, 23 (1st Cir. 2012).

[94] Ortiz v. Barr, 962 F.3d 1045, 1049 (8th Cir. 2020) ("[A]s the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude." (quoting *Matter of Solon*, 24 I. & N. Dec. at 242)).

[95] Id.; see also Diaz Esparza v. Garland, 23 F.4th 563, 569 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 87 (2022) ("Because its low degree of harm was not offset by a 'more culpable mental state,' misdemeanor assault was not a CIMT. Deadly conduct, by contrast, demands an imminent threat of serious physical injury. Because its potential harm is grave, no countervailing, heightened mens rea is necessary for deadly conduct to constitute a CIMT; recklessness suffices."). Negligence, however, is typically not enough: "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." Rodriguez-Castro v. Gonzales, 427 F.3d 316, 323 (5th Cir. 2005).

[96] Matter of Jimenez-Cedillo, 27 I. & N. Dec. 1, 5 (B.I.A. 2017).

[97] Id. at 4–5.

[98] Id. at 3.

of the required mental state—the crime is a CIMT when "the victim is particularly young . . . or is under 16 and the age differential between the perpetrator and victim is significant."[99] If a crime is so contrary to the values of society, a conviction may still be found to be a CIMT even if there is no mens rea as to an element of the statute.[100]

2. Reprehensible Conduct

The second prong of the test is to determine if the conduct itself is sufficiently reprehensible for a conviction to be considered a CIMT. Conduct is considered reprehensible if it is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[101] Some characteristics, such as those involving fraud[102] or "involving grave acts of baseness or depravity,"[103] are considered "useful guideposts" in the analysis but are not necessary.[104] If a crime fits either of these two categories, it is likely to be considered a CIMT. If the crime does not fit into one of these two categories, the adjudicator considers whether the crime is "so contrary to the standards of a civilized society as to be morally reprehensible."[105]

There is no clear formula to determine what crimes meet this standard. Instead, there are a multitude of factors the BIA will consider, depending on the specific crime involved. For example, in reference to prostitution and incest, the BIA has stated that they are morally reprehensible because

[99] Id. at 5.

[100] But see Jimenez-Cedillo v. Sessions, 885 F.3d 292, 300 (4th Cir. 2018) (rejecting this approach). On remand, the BIA reaffirmed its position that statutory rape is still a CIMT, even if there was reasonable doubt as to the victim's age. Matter of Jimenez-Cedillo, 27 I. & N. Dec. 782, 793–94 (B.I.A. 2020).

[101] Matter of Ortega-Lopez, 27 I. & N. Dec. 382, 385 (B.I.A. 2018).

[102] As the Supreme Court stated, "Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude." Jordan v. De George, 341 U.S. 223, 227 (1951).

[103] Robles-Urrea v. Holder, 678 F.3d 702, 708 (9th Cir. 2012). The BIA has recognized that assault crimes are more likely to be considered a CIMT if they necessarily involve an aggravating factor "such as the use of a deadly weapon, the intentional infliction of serious bodily injury, or the intentional or knowing infliction of tangible bodily harm upon a member of a protected class." Ortiz v. Barr, 962 F.3d 1045, 1049 (8th Cir. 2020) (citing In re Sanudo, 23 I. & N. Dec. 968, 971–72 (B.I.A. 2006)).

[104] *Matter of Ortega-Lopez*, 27 I. & N. Dec. at 385–86. To see a list of crimes that have been determined to be CIMTs, see 2 Dan Kesselbrenner & Lory D. Rosenberg, Immigration Law and Crimes, at app. D (Fatma Marouf, Mirna Rodriguez, Graciela Ramirez & Kelly Fitzgerald eds., 2023).

[105] *Matter of Ortega-Lopez*, 27 I. & N. Dec. at 386.

their "socially degrading nature[s] . . . 'offend[] the most fundamental values of society.'"[106] In reference to failure to register as a sex offender, the Eighth Circuit considered "the danger that the crime poses to society at large."[107] Factors the courts have considered include comparisons to other crimes that have previously been evaluated,[108] public opinion,[109] whether the crime is illegal in all jurisdictions,[110] and the magnitude of harm caused by the action.[111]

It is helpful to compare abortion to other crimes with similar attributes in order to gauge the factors the BIA may consider particularly important in an analysis of abortion.[112] One of the first steps the BIA often takes in determining whether a crime is a CIMT is to compare the crime to previously evaluated crimes. In *Matter of Salad*, the BIA concluded that a threat to terrorize another did constitute a CIMT.[113] In making this determination, the BIA cited other crimes that were similar and had previously been determined to be CIMTs.[114] Alternatively, if a court finds that the crime in question is not a CIMT, it will distinguish the crime in question from previous CIMTs.[115]

Legislative history can be relevant when determining whether an action is a CIMT.[116] For example, when determining that animal fighting is a CIMT, the BIA found it relevant that the legislative history supporting the law "expressly states that the practice of dogfighting is 'dehumanizing, abhorrent, and utterly without redeeming social value.'"[117] This suggests that the expressed legislative view could be persuasive when determining if a crime is a CIMT.

The history of prohibition laws and relevant case law suggest that judges consider public opinion when determining whether violating a law

[106] Id. (quoting Rivera v. Lynch, 816 F.3d 1064, 1075 (9th Cir. 2016)).
[107] Bakor v. Barr, 958 F.3d 732, 737 (8th Cir. 2020).
[108] Rohit v. Holder, 670 F.3d 1085, 1089–90 (9th Cir. 2012).
[109] United States ex rel. Iorio v. Day, 34 F.2d 920, 921 (2d Cir. 1929).
[110] *Matter of Ortega-Lopez*, 27 I. & N. Dec. at 390.
[111] Granados v. Garland, 17 F.4th 475, 484 (4th Cir. 2021) (considering the harm to the public when determining that felony eluding is a CIMT).
[112] For example, in *Rohit v. Holder*, the court found that soliciting prostitution was a CIMT by comparing it to other crimes that had been classified as such. 670 F.3d at 1089–90.
[113] 27 I. & N. Dec. 733, 738–39 (B.I.A. 2020).
[114] Id.
[115] See, e.g., In re Erazo-Aguirre, No. AXXX XX0 548, 2018 WL 8062938, at *2 (B.I.A. Dec. 17, 2018) (distinguishing a Colorado statute from a similar Washington statute that was found to be a CIMT).
[116] Matter of Ortega-Lopez, 26 I. & N. Dec. 99, 102 (B.I.A. 2013).
[117] Id. (citing H.R. Rep. No. 94-801, at 10 (1976)).

is a CIMT. Similar to abortion laws, prohibition laws were unpopular and applied to acts that were legal before becoming illegal.[118] In two immigration cases from the prohibition era, courts ruled that violations of the prohibition laws in question did not constitute moral turpitude.[119] In *Skrmetta v. Coykendall*, a district court in Georgia determined for habeas purposes that violating prohibition laws did not constitute a conviction of a CIMT.[120] The judge stated, "standards of morals differ from time to time and at different places . . . I do not believe that in 1920 it could be said that to make alcoholic beverages . . . was a thing that would have been wicked without the existence of the law."[121] In a Second Circuit habeas case, Judge Learned Hand reached the same conclusion.[122] In his opinion, Judge Hand relied heavily on his perception of public opinion, stating that "it is impossible to decide at all without some estimate, necessarily based on conjecture, as to what people generally feel. We cannot say that among the commonly accepted mores the sale or possession of liquor as yet occupies so grave a place . . . ."[123] Both courts expressed that the opinion of the U.S. public was relevant to the decision.[124]

Particularly relevant to the abortion discussion is that an act being legal in some jurisdictions is not dispositive as to whether or not a conviction for that act rises to the level of moral turpitude. For instance, prostitution and crimes related to prostitution have long been considered CIMTs,[125]

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[118] Scott Schaeffer, The Legislative Rise and Populist Fall of the Eighteenth Amendment: Chicago and the Failure of Prohibition, 26 J.L. & Pol. 385, 401 (2011).

[119] See Skrmetta v. Coykendall, 16 F.2d 783, 784–85 (N.D. Ga. 1926), *aff'd*, 22 F.2d 120 (5th Cir. 1927); United States ex rel. Iorio v. Day, 34 F.2d 920, 921 (2d Cir. 1929). But see State v. Malusky, 230 N.W. 735, 739 (N.D. 1930). In a non-immigration case, the North Dakota Supreme Court found that violations of prohibition statutes did constitute CIMTs. Id. The court acknowledged:

> History discloses that all offenses were at some time merely *mala prohibita*, and, as civilization advanced and social and moral ideals and standards changed, they became one after another *mala in se*. Moral turpitude "is a term which conforms to and is consonant with the state of the public morals; hence it can never remain stationary."

Id. at 737.

[120] 16 F.2d at 784–85.

[121] Id. at 784.

[122] *Iorio*, 34 F.2d at 921.

[123] Id.

[124] *Skrmetta*, 16 F.2d at 784; *Iorio*, 34 F.2d at 921.

[125] In the Matter of W-----, 4 I. & N. Dec. 401, 402 (B.I.A. 1951) ("It is well established that the crime of practicing prostitution involves moral turpitude."); see also Gomez-Gutierrez v. Lynch, 811 F.3d 1053, 1059 (8th Cir. 2016) (solicitation); Matter of Lambert, 11 I. & N. Dec. 340, 342 (B.I.A. 1965) (interim decision) (pimping a prostitute); Ablett v. Brownell, 240 F.2d 625, 627 (D.C. Cir. 1957) (keeping a brothel).

despite prostitution being legal in some jurisdictions.[126] Similarly, animal fighting is legal in some U.S. territories,[127] but the BIA has determined that it is still a CIMT because "[t]he clear consensus in contemporary American society . . . is that sponsoring or exhibiting the spectacle of animal suffering is morally reprehensible."[128] These cases suggest that when there is a conflict between state laws, the BIA will look to see what the majority (at least, if there is a clear majority) of jurisdictions and federal laws have declared.[129]

In other circumstances, however, the fact that behavior is legal in other jurisdictions weighs against finding the act to be a CIMT. For example, although statutory rape is illegal in all states, the age of consent varies, suggesting that an act could be legal in one state, while illegal in another state. Statutory rape generally has long been considered a CIMT,[130] yet the Ninth Circuit has acknowledged that it may not always be a CIMT when ages differ across states.[131] California's law criminalizes a perpetrator over twenty-one who had sexual intercourse with a minor under sixteen.[132] The Ninth Circuit, however, ruled that a conviction under this statute was not a CIMT because the conduct captured by the

[126] See, e.g., Nev. Rev. Stat. Ann. § 201.354 (LexisNexis Supp. 2022).

[127] Matter of Ortega-Lopez, 27 I. & N. Dec. 382, 390 (B.I.A. 2018); Ortega-Lopez v. Barr, 978 F.3d 680, 687 (9th Cir. 2020).

[128] *Matter of Ortega-Lopez*, 27 I. & N. Dec. at 390.

[129] Another category of crimes that differ across states is drug convictions. While this category of crimes seems analogous to the crimes discussed above, it is different from abortion statutes because marijuana is still illegal on a federal level. Thus, even though some states have legalized the use of recreational or medical marijuana, it is still a federal crime, and thus grounds for removal. See generally 21 U.S.C. § 844 (criminalizing use of controlled substances, which includes marijuana); id. § 812(c), sched. I (c)(10) (listing "marihuana" as a controlled substance). In cases of prostitution, animal fighting, statutory rape, and abortion, there is no clear federal law criminalizing these acts, so the state laws act as a proxy for federal views. In contrast, because the federal drug laws are clear, no proxy is needed. Regardless, the Ninth Circuit stated, "Contemporary societal attitudes toward marijuana support the conclusion that offering to transport for sale and solicitation to possess for sale very small amounts of marijuana are not offenses that are so inherently base, vile, or depraved that they offend society's most fundamental values . . . ." Walcott v. Garland, 21 F.4th 590, 599 (9th Cir. 2021).

[130] Marciano v. Immigr. & Naturalization Serv., 450 F.2d 1022, 1025 (8th Cir. 1971); Bakor v. Barr, 958 F.3d 732, 738 (8th Cir. 2020).

[131] Quintero-Salazar v. Keisler, 506 F.3d 688, 693 (9th Cir. 2007); see also Rohit v. Holder, 670 F.3d 1085, 1090 (9th Cir. 2012) ("[W]e have found that public exposure and statutory rape are not categorically crimes of moral turpitude . . . . We . . . reasoned that the same conduct was legal in other states and that California's purpose in passing the law was more pragmatic than moral . . . .").

[132] Cal. Penal Code § 261.5(d) (Deering Supp. 2023).

statute was *malum prohibitum* rather than *malum in se*.[133] The court drew this distinction "because some conduct criminalized . . . would be legal if the adult and minor were married."[134]

B. Judicial Approaches to the Analysis: Categorical and Modified Categorical Approaches

In order to determine if a conviction contains the two essential elements, courts apply either the categorical or modified categorical approach. The BIA determined that these approaches "provide the proper framework" in 2016,[135] in response to a remand by U.S. Attorney General Michael Mukasey in 2015.[136] The defining characteristic of these approaches is that, except in limited circumstances, the adjudicator does not look to the actual acts of the defendant, but instead only looks to the text of the statute from the defendant's conviction.[137]

When applying the categorical approach, the adjudicator looks to the whole statute to determine what range of behaviors could be convicted under the statute.[138] If the statute only penalizes behaviors that rise to the level of moral turpitude, then the court determines that the defendant must have been convicted of a CIMT.[139] If, however, the court determines that the statute penalizes some behaviors that rise to the level of moral turpitude, but also includes some behaviors that do not, the court looks to see if the statute is divisible.[140] If the statute is not divisible, then the inquiry ends there, and the defendant cannot be found to have committed

[133] *Quintero-Salazar*, 506 F.3d at 693–94. *Malum in se* crimes are crimes that would be considered morally wrong, regardless of whether or not there was a statute criminalizing the act. *Malum prohibitum* crimes are crimes which are only considered wrong because they are illegal. Id. (citing Beltran-Tirado v. Immigr. & Naturalization Serv., 213 F.3d 1179, 1184–85 (9th Cir. 2000)).

[134] Id.

[135] Matter of Silva-Trevino, 26 I. & N. Dec. 826, 827 (B.I.A. 2016) (interim decision).

[136] Matter of Silva-Trevino, 26 I. & N. Dec. 550, 554 (A.G. 2015).

[137] Id. at 552–53; Matter of Silva-Trevino, 26 I. & N. Dec. 826, 831 (B.I.A. 2016) (interim decision).

[138] Matter of Silva-Trevino, 26 I. & N. Dec. 826, 831–32 (B.I.A. 2016) (interim decision).

[139] Id. at 835.

[140] A statute is divisible for this purpose if it is split into "discrete subsections of acts that are and those that are not CIMTs." Hamdan v. Immigr. & Naturalization Serv., 98 F.3d 183, 187 (5th Cir. 1996).

a CIMT.[141] If the statute is divisible, then the adjudicator moves to step two: the modified categorical approach.[142]

Under the modified categorical approach, the adjudicator looks to the defendant's record of conviction in order to determine which subsection of the statute the defendant was convicted under.[143] If the record of conviction is unclear, the adjudicator ends the analysis and finds that the defendant was not convicted of a CIMT.[144] If the defendant's record does clarify which section of the statute the defendant was convicted under, then the adjudicator applies the categorical approach to that specific subsection of the statute.[145]

1. Varying Standards for Statutes

One point of variation between the BIA and multiple circuits is what level of certainty must exist when determining whether a statute could result in a conviction of behavior that is not a CIMT. While some circuits only look to see whether it is theoretically possible that an individual could be convicted under the statute for a crime that is not base, depraved, or vile, other courts look to see how likely this is to actually occur.[146]

2. Realistic Probability

The BIA applies the realistic probability standard.[147] When applying this standard, the adjudicator determines the "minimum conduct that has

[141] Matter of Silva-Trevino, 26 I. & N. Dec. 826, 833 (B.I.A. 2016) (interim decision).

[142] Id.

[143] Id.

[144] If the government fails to prove which section the defendant was convicted under, they do not meet their burden of proof. Pereida v. Wilkinson, 141 S. Ct. 754, 761 (2021) ("[W]hen it comes to 'removal proceedings,' the INA assigns the government the 'burden' of showing that the alien has committed a crime of moral turpitude in certain circumstances." (citing 8 U.S.C. § 1229a(c)(3) (stating that the burden is on the government in cases of removal))). Note, this only applies when the government bears the burden of persuasion. In *Pereida v. Wilkinson*, the Supreme Court held that for the purpose of arguing cancellation of removal as a defense, the burden of proof is on the immigrant to prove that they were not convicted of a CIMT. 141 S. Ct. at 766.

[145] For an example of the BIA applying the modified categorical approach, see Matter of Nemis, 28 I. & N. Dec. 250, 253–55 (B.I.A. 2021). In *Matter of Nemis*, the BIA determined that the statute was divisible and that the charging documents specified which clause the defendant was convicted under; once this was determined, the BIA applied the categorical approach to this specific clause. Id.

[146] Matter of Silva-Trevino, 26 I. & N. Dec. 826, 832 (B.I.A. 2016) (interim decision) (discussing the approaches taken by different circuits).

[147] Id. at 831.

a realistic probability of being prosecuted under the statute of conviction."[148] In order to show a realistic probability, the offender "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues."[149] The defendant must prove that either his own conduct, or the conduct of another individual who was convicted under the same statute, did not rise to the level of moral turpitude. The realistic probability test is the BIA's preferred test, and it will apply this test "unless controlling circuit law expressly dictates otherwise," in which case the BIA would apply the preferred test of the controlling circuit.[150] In addition to the BIA,[151] the Fifth Circuit[152] and the Sixth Circuit[153] currently apply the realistic probability test.

3. Least Culpable Conduct

In contrast, the majority of circuits apply a less strict test that looks to the face of the statute to see if it could potentially criminalize behavior that does not reach the level of moral turpitude.[154] Although the exact

[148] Id.

[149] Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 193 (2007). But see Jennifer Lee Koh, Crimmigration Beyond the Headlines: The Board of Immigration Appeals' Quiet Expansion of the Meaning of Moral Turpitude, 71 Stan. L. Rev. Online 267 (2019), https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/03/71-Stan.-L.-Rev.-Online-Koh.pdf [https://perma.cc/WR79-L2X3]. Professor Koh argues that "[i]nstead of the 'minimum conduct' test it purports to follow, the Board has silently adopted a 'maximum conduct' standard for CIMTs." Id. at 273. She specifically points to the BIA's decision to declare animal fighting to be a CIMT in *Ortega-Lopez*, arguing that instead of focusing on the minimum conduct, the Board "focused its attention on the *worst hypothetical conduct* associated with the statute." Id.

[150] Matter of Silva-Trevino, 26 I. & N. Dec. 827, 832 (B.I.A. 2016) (interim decision).

[151] Id.

[152] Alexis v. Barr, 960 F.3d 722, 727 (5th Cir. 2020). But see Gomez-Perez v. Lynch, 829 F.3d 323, 327 (5th Cir. 2016) (applying a minimum reading test, stating that "a prior offense qualifies as a crime of moral turpitude if 'the minimum reading of the statute necessarily reaches *only* offenses involving moral turpitude' ").

[153] United States v. Burris, 912 F.3d 386, 398 (6th Cir. 2019).

[154] Rosa Pena v. Sessions, 882 F.3d 284, 287–88 (1st Cir. 2018) (remanding a case because the BIA did not consider the least culpable conduct under the statute); Giron-Molina v. Garland, 71 F.4th 95, 102 (2d Cir. 2023) ("We have been clear that the realistic probability test is not applicable when, as here, 'the statutory language itself . . . creates the realistic probability that a state would apply the statute to conduct beyond' the federal standard." (quoting Hylton v. Sessions, 897 F.3d 57, 63 (2d Cir. 2018))); Plasencia v. Att'y Gen. U.S., No. 20-cv-01242, 2023 WL 4837839, at *3 (3d Cir. July 28, 2023) (per curiam) ("We must consider whether 'the least culpable conduct necessary to sustain a conviction under the statute' would still qualify as a CIMT." (quoting Partyka v. Att'y Gen. of U.S., 417 F.3d 408, 411 (3d Cir. 2005))); Cruz v. Garland, No. 22-cv-01907, 2023 WL 4118011, at *3 (4th Cir.

standards vary by circuit and have been called different names,[155] the majority of circuit courts generally use what this Note will refer to as the "least culpable conduct test," and ask what behavior *could possibly* be prosecuted under the statute. The First Circuit, for example, requires that the BIA address the "moral reprehensibility of the least culpable conduct criminalized under the statute."[156] Unlike the realistic probability test, the defendant is not required to prove that any individual has actually been convicted under that statute for the "least culpable conduct," but simply that the statute criminalizes behavior that is not a CIMT.[157]

June 22, 2023) (per curiam) (applying a realistic probability standard, but its description of the standard more accurately describes a less strict standard: "[I]f the 'least culpable conduct' that could reasonably be criminalized by the statute is not morally turpitudinous, then the offense is not a CIMT" (quoting Salazar v. Garland, 56 F.4th 374, 378–79 (4th Cir. 2023))); Gonzalez v. Wilkinson, 990 F.3d 654, 660–61 (8th Cir. 2021) (rejecting the realistic probability approach); Said v. U.S. Att'y Gen., 28 F.4th 1328, 1331–33 (11th Cir. 2022) (explaining through an analysis of precedent that "a litigant can use facially overbroad statutory text to meet the burden of showing the realistic probability that the state law covers more conduct than the federal" even if the litigant does not point to a specific sample prosecution); see also Andrew Wachtenheim, Leila Kang, Nabilah Siddiquee & Khaled Alrabe, Practice Advisory: "Realistic Probability" in Immigration Categorical Approach Cases, National Immigration Project 5 (2021), https://www.immigrantdefenseproject.org/wp-content/uploads/Realistic-Probability-PA-FINAL-06.04.21-1.pdf [https://perma.cc/EVB4-RSLY] (discussing the test used by the majority of circuits).

[155] The Immigrant Defense Project refers to the test used by the First, Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits as the "express language rule." Wachtenheim et al., supra note 154, at 5; see also Emma Franklin, Note, The Immorality of Crimes Involving Moral Turpitude: Evaluating the Eighth Circuit's Split in *Bakor v. Barr*, 100 Neb. L. Rev. 1026, 1034 (2022) (referring to the "least culpable conduct test"). Another article refers to the least culpable conduct test (also called the minimum conduct test), the common-case approach, and the realistic probability approach. Sara Salem, Should They Stay or Should They Go: Rethinking the Use of Crimes Involving Moral Turpitude in Immigration Law, 70 Fla. L. Rev. 225, 234–36 (2018). This Note will focus on the tests at the extreme ends of the spectrum: the realistic possibility test and the least culpable conduct test. In reality, many circuits sit somewhere on a spectrum between these two tests. For example, in *Whyte v. Lynch*, the First Circuit stated that "courts are not to rely solely on their 'legal imagination' in positing what minimum conduct could hypothetically support a conviction under that law" but also did not find it dispositive that the defendant was unable to produce a case in which an individual was convicted for a lesser crime. 807 F.3d 463, 467 (1st Cir. 2015) (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). The First Circuit stated, "while finding a case on point can be telling, not finding a case on point is much less so." Id. at 469.

[156] *Rosa Pena*, 882 F.3d at 287.

[157] *Partyka*, 417 F.3d at 411.

C. Jurisdictional Variations in Crimes Involving Moral Turpitude Analysis

It is possible that an individual in one state could be found not to have committed a CIMT, while an individual in another state or circuit who engaged in the exact same behavior could be found to have committed a CIMT. Thus, it is important for practitioners to be aware of the specific law an individual is convicted under (rather than simply the general crime of committing abortion) and the precedent for that jurisdiction.

There are four main reasons for these jurisdictional variations. First, circuits apply different tests (usually realistic probability or least culpable conduct) to determine whether a crime is a CIMT.[158] Second, jurisdictions have different criminal codes. This sometimes leads to a specific act being criminalized in one jurisdiction, but not another.[159] Third, the text of the statutes may vary across jurisdictions, and it is the text of the statute that will often determine whether or not the conviction is deemed a CIMT.[160] The consequence of these jurisdictional variations is that the same behavior could be committed in two different states, but lead to different immigration results. If one statute is broader than a similar statute in another state, for example, the individual convicted under the broader statute is less likely to have been found to have committed a CIMT and thus less likely to be removed.[161] Fourth, circuit precedent is relevant when making a removability or admissibility determination. Even when statutes are textually similar, circuits have disagreed over whether specific crimes are CIMTs. As discussed above, one notable example is

[158] See discussion supra Section II.B.

[159] See discussion supra Subsection II.A.2. For a more in-depth discussion of the implications of states determining immigration law through their criminal code, see Note, States' Commandeered Convictions: Why States Should Get a Veto over Crime-Based Deportation, 132 Harv. L. Rev. 2322, 2334–38 (2019) [hereinafter, States' Commandeered Convictions]; Kevin J. Fandl, Putting States Out of the Immigration Law Enforcement Business, 9 Harv. L. & Pol'y Rev. 529, 530 (2015).

[160] Juliet P. Stumpf, States of Confusion: The Rise of State and Local Power over Immigration, 86 N.C. L. Rev. 1557, 1593–94 (2008) ("State legislatures and courts can often affect whether these deportability grounds apply by adjusting the scope of the definition or length of the sentence.").

[161] For example, although prostitution is generally considered a CIMT, in *Kepilino v. Gonzales*, the Ninth Circuit applied the modified categorical approach to determine that Hawaii's prostitution statute was overly broad and included conduct that did not necessarily involve sexual intercourse. 454 F.3d 1057, 1061–63 (9th Cir. 2006); see also States' Commandeered Convictions, supra note 159, at 2332 ("The noncitizen's actual conduct is irrelevant; what matters is what the state thought about her conduct, as expressed through its conviction.").

courts' disagreement over whether failure to register as a sex offender is a CIMT, despite sex offender registration statutes using similar language across jurisdictions.[162]

III. APPLYING THE FRAMEWORK TO CURRENT ABORTION LAWS

No two states have exactly the same abortion law, so it is essential to analyze each state's statutes independently. It is possible that a conviction under one state's abortion statute may be found to be a CIMT, while a conviction for the same behavior in another state or in a different circuit may not.

A. Current Abortion Laws in the United States

Since the Supreme Court decided *Dobbs v. Jackson Women's Health Organization* in June 2022, abortion laws have been rapidly changing throughout the United States. Some states have reenacted abortion bans that were created before *Roe v. Wade*[163] or which were created after *Roe* but initially blocked from being enforced.[164] Other states have created new abortion bans in response to *Dobbs*.[165] In contrast, some states have enacted laws to more strongly protect an individual's right to receive or provide an abortion.[166]As of October 4, 2023, there are fourteen states

[162] Compare Efagene v. Holder, 642 F.3d 918, 926 (10th Cir. 2011) (finding that failure to register as a sex offender was not a CIMT), with Bakor v. Barr, 958 F.3d 732, 736 (8th Cir. 2020) (holding that failure to register as a sex offender is a CIMT). See also London, supra note 49, at 609 (highlighting the unpredictability of the current CIMT framework as it applies to sex offender registration statutes).

[163]See, e.g., Okla. Stat. tit. 21, § 861 (2021) ("Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years.").

[164] Referred to as "trigger bans," these bans were enacted prior to *Dobbs* and contain language similar to La. Stat. Ann. § 40:1061 (2023), stating that the act would become effective immediately if the Supreme Court were to reverse *Roe*.

[165] See, e.g., West Virginia Gov. Jim Justice Signs Abortion Ban Into Law, Politico (Sept. 16, 2022, 2:17 PM), https://www.politico.com/news/2022/09/16/west-virginia-jim-justice-abortion-ban-law-00057255 [https://perma.cc/7GN9-UWKV].

[166] States that expanded abortion access include Washington, Oregon, California, Minnesota, Illinois, Maryland, New York, New Jersey, Connecticut, and Vermont. After Roe Fell: Abortion Laws by State, Ctr. for Reprod. Rts., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/C375-Q87T] (last visited Aug. 27, 2023).

with almost total abortion bans,[167] two states with an abortion ban applying after fetal heartbeat is detected,[168] five states with laws banning abortions after twelve to eighteen weeks gestation,[169] and five states with abortion bans being disputed or blocked from enforcement by pending litigation.[170] Some abortion bans include exceptions for rape or incest,[171] while others include no exceptions except to protect the life of the pregnant mother.[172]

This Note focuses on total abortion bans that are not currently blocked by pending litigation. These bans reflect some of the most extreme efforts to prevent access to abortions in the United States today. Although no two

[167] Tracking Abortion Bans Across the Country, N.Y. Times, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/DX3Q-WB7T] (last visited Oct. 4, 2023).

[168] Ga. Code Ann. § 16-12-140 (2018); Ga. Code Ann. § 16-12-141 (Supp. 2023); S.C. Code Ann. § 44-41-630(B) (Supp. 2023) (providing criminal penalties for abortions performed after a fetal heartbeat is detected, unless an exception applies). Although neither statute states the six-week timeframe, the dissent of a recent Supreme Court of South Carolina decision about the constitutionality of the ban addressed the discussion around "six weeks." Planned Parenthood S. Atl. v. State, No. 2023-000896, 2023 WL 5420648, at *15 (S.C. Aug. 23, 2023) (Beatty, C.J., dissenting). The dissent addressed the misnomer of calling this ban a "six-week" ban. Id. The dissent also criticized the majority's decision to leave "for another day" the meaning of "fetal heartbeat." Id. Georgia's ban also does not mention a six-week timeframe but does require the following information to be listed on the State's website: "As early as six weeks' gestation, an unborn child may have a detectable human heartbeat." Ga. Code Ann. § 31-9A-4(a)(3) (Supp. 2023).

[169] Arizona, Florida, Nebraska, North Carolina, and Utah. See Tracking Abortion Bans Across the Country, supra note 167.

[170] Iowa (ban blocked), Ohio (ban blocked), Montana (several bans blocked), Wyoming (several bans blocked), and Wisconsin (ban disputed). Id.

[171] Often these exceptions include requirements that the woman seeking an abortion must meet in order to be granted an exception. West Virginia currently has a statute that states there is an exception for rape and incest, so long as the survivor reports the rape or incest to the police; while this law has not been officially repealed, it is unclear if it still stands now that West Virginia has enacted a new statute on December 12, 2022, which appears to be a total ban with no exception. Compare W. Va. Code Ann. § 16-2r-3 (LexisNexis Supp. 2023) (effective Sept. 13, 2022) (stating the exception for rape and incest), with id. § 61-2-8 (effective Dec. 12, 2022) (omitting any reference to an exception for rape and incest). Conflicting and ambiguous abortion statutes have not been uncommon in the wake of *Dobbs*, adding another level of complication to determining whether or not an action is a CIMT. Rebecca Boone, In Aftermath of Supreme Court's Overturning of *Roe*, States Struggle with Conflicting Abortion Bans, PBS (July 1, 2022, 1:00 PM), https://www.pbs.org/newshour/politics/in-aftermath-of-supreme-courts-overturning-of-roe-states-struggle-with-conflicting-abortion-bans [https://perma.cc/EW96-C7YE].

[172] Ark. Code Ann. § 5-61-404(d) (Supp. 2023) ("It is an affirmative defense to prosecution under this section if a licensed physician provides medical treatment to a pregnant woman which results in the accidental or unintentional physical injury or death to the unborn child.").

states' statutes are the same, there are some similarities between the statutes. One important similarity is that the statutes focus on the individual who is performing the abortion or procuring the abortion for the pregnant individual by explicitly excluding the pregnant individual who receives the abortion from being prosecuted.[173] The range of persons prosecutable under the statutes, however, is wider than just doctors performing abortion procedures. In Nebraska, for example, a mother was prosecuted and sentenced to two years in prison for obtaining abortion pills for her daughter.[174] Likewise, in Texas, three women were subject to a civil lawsuit for "wrongful death and conspiracy" for allegedly helping their friend obtain an abortion.[175] Idaho has extended the range of prosecutable persons even further by enacting an abortion trafficking statute which penalizes an adult who assists a minor in obtaining an abortion in one of the stated ways without the parent's or guardian's knowledge.[176]

[173]See, e.g., Idaho Code § 18-622(5) (Supp. 2023) ("Nothing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty."); Tex. Health & Safety Code Ann. § 170A.003 (2022). Nevertheless, soon after *Roe* was overturned, a Texas woman was arrested and charged for performing a self-induced abortion. The charges were later dropped when prosecutors admitted that there was no legal basis for the arrest. Mary Ziegler, Lizelle Herrera's Texas Arrest Is a Warning, NBC News (Apr. 16, 2022, 4:30 AM), https://www.nbcnews.com/think/opinion/lizelle-herreras-texas-abortion-arrest-warning-rcna24639 [https://perma.cc/HF5Q-FYGF].

[174] Margery A. Beck, Nebraska Mother Sentenced to 2 Years in Prison for Giving Abortion Pills to Pregnant Daughter, AP News (Sept. 22, 2023, 5:31 PM), https://apnews.com/article/abortion-charges-nebraska-sentence-36b3dcaadd6b705ca2315bc95b99bdc1 [https://perma.cc/ZK6H-UEG6]. Additionally, the daughter was sentenced to ninety days in jail and two years' probation for "burning and burying [the] fetus." Margery A. Beck, 18-Year-Old Nebraska Woman Sentenced to 90 Days in Jail for Burning Fetus After Abortion, AP News (July 20, 2023, 1:55 PM), https://apnews.com/article/abortion-charges-nebraska-f330455d60aa3c01534bcb74216f8404 [https://perma.cc/Q5HW-8HKV].

[175] Doha Madani, Texas Man Sues Ex-Wife's Friends, Alleging They Helped Her Get Abortion Pills in Violation of State Law, NBC News (Mar. 12, 2023, 11:20 AM), https://www.nbcnews.com/news/us-news/texas-man-sues-ex-wifes-friends-allegedly-helping-get-abortion-pills-v-rcna74541 [https://perma.cc/HDK9-2AWA].

[176] Idaho Code § 18-623 (Supp. 2023) (penalizing an adult who assists a minor in procuring or obtaining an abortion by "recruiting, harboring, or transferring" the pregnant minor within the state without the consent of the minor's parents or guardians).

B. Applying the Immigration Crimes Involving Moral Turpitude Framework to Current Abortion Laws

When determining whether or not a conviction is a CIMT, the adjudicator will often ask whether that crime has been established as involving moral turpitude before, what intent is required under the statute, and whether or not the behavior captured by the statute is reprehensible. This framework is challenging to apply to abortion laws because there is no direct precedent for adjudicators to reference under any of the current abortion laws. Ultimately, however, it is unlikely that the BIA would find performing an abortion to be a CIMT.

1. Precedent in Removal and Exclusion Proceedings

The BIA and circuit courts first look to precedent to determine if the conviction is a CIMT.[177] The non-immigration precedent canvassed above may be persuasive for demonstrating historical views on abortion, but the only precedent pertaining to performing an abortion in the immigration context and CIMT comes from pre-*Roe* convictions, based on either pre-*Roe* statutes[178] or statutes from other countries.[179] Thus, while the BIA may consider precedent finding performing an illegal abortion to be a CIMT persuasive, it likely will not find the precedent binding.[180] Further, between the time that the pre-*Roe* decisions were decided and now, *Roe* was both decided and overruled, suggesting that there may have been a relevant cultural shift in views regarding abortion that are not adequately reflected in pre-*Roe* decisions. Since moral turpitude has been interpreted by the courts as changing with the morals of society, the current cultural view of abortion is relevant to the courts' analysis.[181]

That being said, many courts found performing an illegal abortion to be a CIMT before *Roe*. The BIA heavily weighs previous findings that a

[177] Rohit v. Holder, 670 F.3d 1085, 1089 (9th Cir. 2012) ("[I]t is often helpful to 'determine whether a state crime involves moral turpitude by comparing it with crimes that have previously been found to involve moral turpitude.'" (quoting Mendoza v. Holder, 623 F.3d 1299, 1302 (9th Cir. 2010))).

[178] In the Matter of M-----, 2 I. & N. Dec. 525, 527–28 (B.I.A. 1946).

[179] Matter of K-----, 9 I. & N. Dec. 336, 336 (B.I.A. 1961) (convicting the defendant of the crime of "abortion" under a German statute).

[180] Ceron v. Holder, 747 F.3d 773, 780 (9th Cir. 2014) (discussing the importance of analyzing the language of the specific statute and not only looking at the label of the crime).

[181] See supra Subsection II.A.2.

crime is a CIMT.[182] If the BIA were to consider the question today, it would likely give weight to the fact that performing an illegal abortion has previously been found to be a CIMT. Despite the weight of this precedent, defendants could make strong arguments against a finding of CIMT by pointing to the impertinence of pre-*Roe* precedent, the differences in abortion statutes across jurisdictions, and the significant cultural shift in attitudes towards abortion care and moral turpitude.

2. Intent

When determining whether the intent prong of the test is met, the adjudicator will look to the text of the statute and the minimum intent required to be convicted under the statute. The categorical and modified categorical approaches require the BIA or relevant court to only look to the applicable statute the defendant was convicted under. The first step in making this determination is to apply the categorical approach and look to the whole statute to determine what behavior could be convicted by the statute. Whether or not an adjudicator finds that these abortion laws meet the intent standard, however, may come down to whether or not they apply a realistic probability approach or a least culpable conduct approach.

i. The Realistic Probability Standard

Under the realistic probability standard, the first step is to determine the minimum conduct that could *realistically* be prosecuted under the statute.[183] Since abortion bans differ from state to state, a separate analysis for each statute would be necessary to determine the minimum conduct and corresponding intent that is criminalized by the statute. Modern abortion bans tend to include some mens rea requirement, suggesting that these bans would meet the intent requirement under the categorical approach.[184] As it relates to performing an abortion, the intent requirement is clearly stated and applied throughout the statutes. West Virginia defines abortion as "the use of any instrument . . . *with intent* to terminate the pregnancy of a patient known to be pregnant and with *intent to cause the death* and expulsion or removal of an embryo or a fetus."[185]

[182] See supra Subsection II.A.2.
[183] Matter of Silva-Trevino, 26 I. & N. Dec. 826, 831 (B.I.A. 2016) (interim decision).
[184] See, e.g., W. Va. Code Ann. § 16-2r-2 (LexisNexis Supp. 2023).
[185] Id. (emphasis added).

This statute explicitly states that the intent required is not simply the intent to administer the drug, but the intent to cause a miscarriage or an abortion. The Texas abortion ban is similarly specific, stating that "[a] person may not *knowingly* perform, induce, or attempt an abortion."[186] Mississippi's statute likewise specifies that "[a]ny person *willfully and knowingly* causing, by means of any instrument . . . any woman pregnant with child to abort or miscarry"[187] is guilty of a felony. Therefore, in many cases, abortion ban statutes meet the intent requirement under a realistic probability approach because the intent applies to the intended outcome of the act, which is the abortion.

Because many abortion statutes are new, and there have been few prosecutions under them thus far, a realistic probability analysis would depend on what prosecutions had occurred at the time the particular defendant's case was being litigated, as well as the facts of the particular defendant's actions, if the defendant is arguing that their own conduct does not meet the moral turpitude standard.

ii. The Least Culpable Conduct Standard

If the BIA or a circuit court were to apply the least culpable conduct standard, there is a plausible argument that the intent of the statute only applies to intentionally performing an abortion, not intentionally performing an *illegal* abortion. Most abortion statutes frame the required intent as the "intent to produce a miscarriage or abortion"[188] or "knowingly . . . [a]dminister to . . . any pregnant woman any medicine . . . with the specific intent of causing or abetting the termination of the life of an unborn human being,"[189] rather than an intent to perform or procure an illegal abortion. There are *legal* exceptions in most statutes for the health of the mother. It is therefore theoretically possible that a doctor could *intentionally* perform the abortion after making a reasonable judgment call that the abortion was required to save the mother's life, while *unintentionally* performing what a jury or judge determines to be an illegal abortion.[190]

[186] Tex. Health & Safety Code Ann. § 170A.002(a) (West Supp. 2022) (emphasis added).
[187] Miss. Code Ann. § 97-3-3(1) (2020) (emphasis added).
[188] See, e.g., Ga. Code Ann. § 16-12-140 (2018).
[189] Ky. Rev. Stat. Ann. § 311.772(3)(a)(1) (LexisNexis 2019).
[190] Without guidance from legislatures, hospitals and doctors are being forced to make risky decisions. Dave Dillon, a spokesman for the Missouri Hospital Association, stated that the life of the mother exception "will be decided probably by litigation" and that doctors may be

In nearly all states, the abortion ban has some exception to save the life or secure the safety of the mother, whether it be an express exception or a provision for an affirmative defense.[191] The issue is whether the knowing mens rea only applies to the action of performing an abortion, which could conceivably include a doctor trying to do his job in good faith, or further extends to the intentional performing of an illegal abortion. After the doctor has performed the abortion, the prosecution and/or jury could review the case and determine that the doctor had incorrectly evaluated the situation and that an abortion was not necessary to save the mother's life. Because there is limited relevant case law, this hypothetical is unlikely to be successful under a realistic probability standard unless the defendant's own case tracks this fact pattern, but it may be successful under a least culpable conduct standard.

While this argument may sound like legal fiction, since the post-*Dobbs* abortion bans were enacted, doctors and hospitals have been struggling to determine what qualifies as a medical emergency, leading to fear among physicians.[192] To complicate this fear further, there has been a legal struggle in the courts as to what controls: state abortion bans or the federal emergency medicine statute.[193]

forced to make a decision, knowing that they may face a lawsuit. J. David Goodman & Azeen Ghorayshi, Women Face Risks as Doctors Struggle with Medical Exceptions on Abortion, N.Y. Times (July 20, 2022), https://www.nytimes.com/2022/07/20/us/abortion-save-mothers-life.html [https://perma.cc/FP8D-B65S].

[191] Mabel Felix, Laurie Sobel & Alina Salganicoff, A Review of Exceptions in State Abortions Bans: Implications for the Provision of Abortion Services, KFF (May 18, 2023), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/ [https://perma.cc/BDP5-ARFG].

[192] Doctors Worry Abortion Laws Will Hinder Treatment of Patients in Life-or-Death Situations, PBS (July 19, 2022, 6:35 PM), https://www.pbs.org/newshour/show/doctors-worry-abortion-laws-will-hinder-treatment-of-patients-in-life-or-death-situations [https://perma.cc/RW4K-DQNA] ("And there's a lot of fear among OB-GYNs, who don't know when we could proceed on behalf of mothers' health or not."); Lauren Coleman-Lochner, Carly Wanna & Elaine Chen, Doctors Fearing Legal Blowback Are Denying Life-Saving Abortions, Bloomberg L. (July 12, 2022, 10:30 AM), https://news.bloomberglaw.com/health-law-and-business/doctors-fearing-legal-blowback-are-denying-life-saving-abortions [https://perma.cc/4NF6-7JV2] ("Now physicians are grappling with the added stress of having to determine when it's legally okay to intervene. There's also the question of what happens when a patient has to undergo a treatment like chemotherapy, which can be toxic to a fetus.").

[193] See Christine Vestal, Some Abortion Bans Put Patients, Doctors at Risk in Emergencies, Stateline (Sept. 1, 2022, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/09/01/some-abortion-bans-put-patients-doctors-at-risk-in-emergencies [https://perma.cc/P33T-SES4].

In contrast, the abortion statutes of some states are more precise. South Dakota's statute expands on the intent requirement, stating that the required intent is the "intent . . . to procure an abortion, unless there is appropriate and reasonable medical judgment that performance of an abortion is necessary to preserve the life of the pregnant female."[194] Rather than simply stating an exception for when the abortion was necessary to save the life of the mother, this statute more specifically focuses on "appropriate and reasonable medical judgment."[195] The wording of this statute appears to give the doctor more leeway and potentially makes it less likely for a doctor to be convicted under the statute if a jury or other fact finder later finds that the abortion was unnecessary, so long as the doctor's judgment was "appropriate and reasonable."[196] Similarly, the West Virginia statute provides that an abortion may not be performed "unless in the reasonable medical judgment of a licensed medical professional" an enumerated exception to the statute exists.[197] This statute provides more protection to a doctor performing an abortion than statutes like the Mississippi statute.

Overall, whether or not the intent prong will be met will likely largely depend on the text of the statute, on whether the court is applying a standard more similar to the realistic probability standard or the least culpable conduct standard, and on the actions of the particular defendant. When reading most statutes, a plausible argument could be made under the least culpable conduct test that the intent is not specific enough. A few specific statutes, including South Dakota and West Virginia, however, are narrow enough in the behavior they criminalize that intent is likely satisfied under either standard.

3. Reprehensible Conduct

The reprehensible conduct prong is a challenging prong to apply to abortion laws because there is no relevant precedent under modern abortion laws. While fourteen states have harsh laws that virtually ban abortion altogether, the majority of states still do not criminalize abortion at conception.[198] Further, seven states and Washington, D.C., allow

[194] S.D. Codified Laws § 22-17-5.1 (Supp. 2023).
[195] Id.
[196] Id.
[197] W. Va. Code Ann. § 16-2R-3(a) (Supp. 2023).
[198] Tracking Abortion Bans Across the Country, supra note 167.

abortions to be performed throughout the duration of the pregnancy.[199] The inconsistency in how state laws treat abortion is paralleled by the contrasting views of citizens. As Justice Alito stated in *Dobbs*, "Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality."[200] Still, the views of individuals on abortion are difficult to determine. Pollsters who have asked about citizens' opinions on abortion have discovered just how challenging the issue is to gauge.[201]

One of the first steps courts will take is deciding if the conduct in question constitutes fraud or a violent crime,[202] although "the absence of an intent to injure, an injury to persons, or a protected class of victims is not determinative."[203] Performing abortion does not have any element of fraud involved, and whether abortion involves violence again depends on one's personal view of abortion. Those who, as Justice Alito discussed, view abortion as "end[ing] an innocent life" would likely claim that performing an abortion is akin to committing murder, and thus should be a CIMT because most violent crimes are morally turpitude.[204] If the government were attempting to make a case for removal based on an abortion statute, it would likely argue that performing an abortion is an act of violence against the fetus and that under the evolving fetal personhood laws,[205] the fetus should be considered equal to any adult human.

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[199] Id. (listing Alaska, Colorado, Minnesota, New Jersey, New Mexico, Oregon, Vermont, and Washington, D.C., as places in which abortion is legal through the duration of pregnancy).

[200] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022).

[201] Tresa Undem, Why So Many Polls Get American Attitudes About Abortion Wrong, Vox, https://www.vox.com/a/abortion-decision-statistics-opinions/abortion-polling-mistakes [https://perma.cc/G4YE-YFKK] (last visited Sept. 19, 2023).

[202] Jordan v. De George, 341 U.S. 223, 227, 232 (1951) ("The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct."); Walcott v. Garland, 21 F.4th 590, 598–99 (9th Cir. 2021) ("[N]on-fraudulent [CIMTs] 'almost always' involve the intent to injure, actual injury, or a protected class of victims." (quoting Turijan v. Holder, 744 F.3d 617, 619 (9th Cir. 2021))).

[203] Matter of Ortega-Lopez, 27 I. & N. Dec. 382, 387 (B.I.A. 2018) (interim decision).

[204] *Dobbs*, 142 S. Ct. at 2240.

[205] In addition to abortion bans, some states have enacted versions of "fetal personhood" laws. In 2003, Texas amended the Texas Penal Code to include an "unborn child at every stage of gestation from fertilization until birth" as an "[i]ndividual." Tex. Penal Code Ann. § 1.07(26) (2021) ("Individual means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." (internal quotation marks omitted));

In *Ortega-Lopez v. Barr*,[206] the BIA cited precedent in which they had previously considered the relevant legislative history of state statutes in other cases.[207] The states that have passed abortion bans have often done so with strong language condemning abortion. For example, when Mississippi passed its fifteen-week abortion ban, it stated that such an act, when performed for "nontherapeutic or elective reasons [was] a *barbaric practice*, dangerous for the maternal patient, and *demeaning* to the medical profession."[208] Taken on its face, this language would suggest that the crime is both violent and harming society as a whole. Although the BIA could consider this language, it would not be as persuasive as the language cited in *Ortega-Lopez*, because the language in *Ortega-Lopez* was about a federal act, rather than a state statute, and immigration law is a federal issue.[209] If a court wanted to consider the Mississippi language, it would need to balance the language against the consideration that many states do not ban abortion until much later in the pregnancy, if at all.

Nevertheless, the immigrant attempting to avoid removal would have the stronger argument. They would argue that abortion is not akin to violence against an adult human because a fetus is not a person under federal law,[210] and if the fetus is not a person, no violence has been committed against a person when an abortion is performed. Despite a few states enacting fetal personhood laws, immigration law is inherently federal. Even when a court is looking at a state statute to determine if the

see also H.B. 521, 88th Leg., Reg. Sess. (Tex. 2022) (proposing that a high occupancy vehicle lane may be occupied by a pregnant individual, "regardless of whether the vehicle is occupied by a passenger other than the operator's unborn child"). Georgia also passed a fetal personhood law in 2019 called the LIFE Act; the Act states that "[i]t shall be the policy of the State of Georgia to recognize unborn children as natural persons." H.B. 481, 2019 Leg., Reg. Sess. (Ga. 2019). Despite the exceptions listed in Section F of the statute, these laws open up a new avenue for prosecutors to prosecute pregnant mothers for ending their pregnancy. See Ga. Code Ann. § 16-5-80 (2019). But see Tex. Penal Code Ann. § 19.06(1) (2003) (stating that the chapter in question does not apply to mother of unborn child charged with criminal conduct). Such prosecutions have already been occurring throughout the country. Michele Goodwin, Pregnancy and the New Jane Crow, 53 Conn. L. Rev. 543, 558–59 (2021).

[206] 978 F.3d 680 (9th Cir. 2020).

[207] Id. at 691–92; see also Moreno v. Att'y Gen. of the U.S., 887 F.3d 160, 165 (3d Cir. 2018) (analyzing the legislature's past actions in downgrading one crime while not downgrading another, suggesting that the crime which was not downgraded was a CIMT).

[208] Miss. Code Ann. § 41-41-191(2)(b)(i)(8) (2018) (emphasis added).

[209] Matter of Ortega-Lopez, 27 I. & N. Dec. 382, 382 (B.I.A. 2018) (interim decision).

[210] Gomez Fernandez v. Barr, 969 F.3d 1077, 1084 (9th Cir. 2020) ("Because federal law defines the term 'human being' to exclude an unborn fetus, 1 U.S.C. § 8, California Penal Code § 187(a), which criminalizes the unlawful killing of an unborn fetus, is broader than the federal generic definition.").

act is a CIMT, the court is applying federal moral values to the statute—not the values of that particular state.[211] Additionally, while some acts have been found to be CIMTs despite being legal in some jurisdictions, those cases differed greatly from abortion. For example, as discussed earlier in the piece, prostitution is only legal in select counties in Nevada, and animal fighting is only legal in a U.S. territory.[212] Abortion, in comparison, is only criminalized at conception in fourteen states.[213]

Additionally, the other factors discussed in Subsection II.A.2 weigh against finding abortion to be a CIMT. First, it is not a crime that physically harms or has potential to physically harm bystanders, as was considered by the BIA when determining the status of felony eluding.[214] Second, not only was abortion legal until *Dobbs*, it was considered a constitutionally protected right.[215] Third, public opinion supports abortion. In 2022, 61% of Americans believed that abortion should be legal in most or all situations.[216] If over half of Americans believe that abortion should be legal, then it is difficult for the government to make the argument that it is "base, vile, or depraved" and so contrary to the values of society as to be considered a CIMT.[217]

Taking together the limited precedent, the unclear intent requirement of the statutes, and the inconsistency among states in determining that abortion at time of conception is illegal, it is unlikely that the BIA would find that abortion is a CIMT. Although existing precedent may weigh slightly in favor of finding performing an abortion to be a CIMT, the fact that many states still allow abortion through twenty weeks weighs strongly against this conclusion.[218] The current laws of the majority of states, coupled with the lack of a federal abortion ban, strongly suggests that performing an illegal abortion is not reprehensible conduct.

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[211] If a federal fetal personhood law were passed, this analysis might come out differently. Presumably, however, if a federal fetal personhood law were passed, abortion would be illegal throughout the country (as it would be classified as murder), so the discussion itself would be different.

[212] See discussion supra Subsection II.A.2.

[213] Tracking Abortion Bans Across the Country, supra note 167.

[214] Granados v. Garland, 17 F.4th 475, 484 (4th Cir. 2021).

[215] Roe v. Wade, 410 U.S. 113, 114 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992).

[216] Public Opinion on Abortion, Pew Rsch. Ctr. (May 17, 2022), https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/ [https://perma.cc/5AZ5-9GBD].

[217] Matter of Silva-Trevino, 26 I. & N. Dec. 826, 833 (B.I.A. 2016) (interim decision).

[218] Tracking Abortion Bans Across the Country, supra note 167.

IV. IMPLICATIONS IF THE BOARD OF IMMIGRATION APPEALS WERE TO FIND THAT ABORTION IS A CRIME INVOLVING MORAL TURPITUDE

The vast uncertainty relating to abortion laws necessitates that criminal defense attorneys and immigration attorneys be aware of the potential consequences of a court disagreeing with the conclusion that performing an illegal abortion is not a CIMT. As abortion laws rapidly evolve, there is a chance that in the future abortion will be more widely outlawed or that a court may disagree with the analysis above. Additionally, there is the possibility of courts disagreeing with each other, leading to a circuit split.

A. Implications to Individuals and Society

If the BIA or a circuit court were to determine that performing an abortion is a CIMT, many people (both citizens and noncitizens) would be impacted by that decision. First, as has already been seen across the country, criminalizing abortion chills doctors from providing medical care to women in need. Obstetricians have already begun moving out of states that outlaw abortion out of fear of criminal prosecution and not being able to help female patients who may require an abortion to save their lives.[219] Additionally, some doctors have expressed reluctance to move to these states for similar reasons.[220] This is particularly relevant because the United States relies on foreign-born doctors; as of 2016, almost 7% of physicians in the United States were not U.S. citizens.[221] If doctors are already disincentivized from providing medical care to pregnant women, chilling consequences will likely increase if a conviction could result in a doctor being removed from the country.

Although the INA states that a noncitizen can be removed for committing a single CIMT within five years after admission if convicted

[219] Sheryl Gay Stolberg, As Abortion Laws Drive Obstetricians from Red States, Maternity Care Suffers, N.Y. Times (Sept. 7, 2023), https://www.nytimes.com/2023/09/06/us/politics/abortion-obstetricians-maternity-care.html?smid=url-share [https://perma.cc/2D82-HKAF] (specifically discussing doctors leaving Idaho).

[220] Christopher Rowland, A Challenge for Antiabortion States: Doctors Reluctant to Work There, Wash. Post (Aug. 6, 2022, 12:05 PM), https://www.washingtonpost.com/business/2022/08/06/abortion-maternity-health-obgyn/ [https://perma.cc/Z4NK-C49A] (discussing difficulties filling OB/GYN position vacancies in red states).

[221] Joanne Finnegan, U.S. Healthcare Industry Relies on Foreign-Born Doctors and Other Workers, Fierce Healthcare (Dec. 6, 2018, 12:16 PM), https://www.fiercehealthcare.com/practices/u-s-healthcare-industry-relies-foreign-born-doctors-and-other-workers [https://perma.cc/HAS8-95YH].

of a crime for which a sentence of longer than one year could be imposed,[222] the term "admission" applies more broadly than simply when the immigrant first enters the country. For instance, an adjustment of status is considered an "admission."[223] Additionally, even if five years have passed since admission, a noncitizen can still be removed if they commit two or more crimes involving moral turpitude, not arising out of a single criminal scheme, at any time.[224] These two considerations greatly expand the number of people who may be exposed to removal as a result of a conviction of a CIMT.

Further, although this Note focuses on the impact of abortion being found a CIMT for purposes of removal, this classification would also have impacts on exclusion. Section 212(a)(2)(A)(i)(1) of the INA lists conviction or admission of committing a CIMT as grounds for inadmissibility. Thus far, it is unclear whether or not performing an illegal abortion in another country would be grounds for exclusion in the United States if abortion is only illegal in some states. Nevertheless, it is important for immigration advocates to be aware of this possibility.

B. Implications for the Crimes Involving Moral Turpitude Framework

Academics and judges alike have long criticized the CIMT framework.[225] Academics have argued that despite the Supreme Court's holding in *Jordan v. De George*, recent case law makes the concept of CIMTs void for vagueness.[226] Justices and judges have also chimed in.

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[222] 8 U.S.C. § 1227(2)(A)(i) (2018).

[223] Matter of Alyazji, 25 I. & N. Dec. 397, 399 (B.I.A. 2011) (interim decision) ("[T]he Board has often held that adjustment of status is an 'admission.'"); id. at 400 ("[T]he 5-year clock is reset each time an alien is admitted, such that a crime involving moral turpitude committed within 5 years after *any* such admission would suffice, upon conviction, to render the alien deportable.").

[224] 8 U.S.C. § 1227(2)(A)(ii) (2018).

[225] In 1931, Jane Perry Clark, Ph.D., stated that "[i]t seems that the 'moral turpitude' provision of the deportation law has outlived its usefulness and become a trap for the unfortunate administrator as well as the luckless alien who runs afoul of this section of the law." Jane Perry Clark, Deportation of Aliens from the United States to Europe 213 (1931).

[226] See Derrick Moore, Crimes Involving Moral Turpitude: Why the Void-for-Vagueness Argument is Still Available and Meritorious, 41 Cornell Int'l L.J. 813, 832–39 (2008) (outlining errors in reasoning in *Jordan v. De George* and arguing that moral turpitude is unconstitutionally vague); London, supra note 49, at 583 (arguing that the moral turpitude framework results in unfairly and arbitrarily varied results across jurisdictions); Sean Grady, Crimes Involving Moral Turpitude: What Happens When an Antiquated Phrase Is Used in Modern Immigration Law, 88 Miss. L.J. 373, 375 (2019) (advocating for a change in moral turpitude doctrine to prevent uneven application of the doctrine across courts). But see Craig

For example, Justice Robert Jackson dissented in *Jordan*, stating that the phrase moral turpitude "has no sufficiently definite meaning to be a constitutional standard for deportation,"[227] and Judge Richard Posner of the Seventh Circuit similarly stated, "It is preposterous that that stale, antiquated, and, worse, meaningless phrase should continue to be a part of American law."[228] Judge Posner even called the term "an embarrassment to a modern legal system."[229] The Ninth Circuit similarly stated, "We have acknowledged that the phrase 'crime involving moral turpitude' is inherently ambiguous, and neither we nor the BIA have established any clear-cut criteria 'for determining which crimes fall within that classification and which crimes do not.'"[230]

In *Jordan*, the Supreme Court case where the Court most recently considered crimes involving moral turpitude in the immigration context, the Court defended the phrase, stating, "We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness."[231] While that statement may have been accurate at the time it was made, the analysis of whether abortion is a CIMT pokes holes in an already flawed framework. While individuals are likely to disagree as to whether or not an abortion is a CIMT, they will likely agree that it is not a "marginal" issue. Those who argue that abortion is a CIMT will argue that it is a violent crime that harms society. In contrast, those who view abortion as a female autonomy issue and do not believe that fetal personhood begins at conception will not think that abortion is crime at all, much less a CIMT. The analysis of abortion also emphasizes the lack of consistent morals across the United

S. Lerner, "Crimes Involving Moral Turpitude": The Constitutional and Persistent Immigration Law Doctrine, 44 Harv. J.L. & Pub. Pol'y 71 (2021) (defending CIMT as an avenue to allow executive officials to have discretion over immigration law).

[227] Jordan v. De George, 341 U.S. 223, 232–33 (1951) (Jackson, J., dissenting).

[228] Arias v. Lynch, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring).

[229] Id. at 835.

[230] Ortega-Lopez v. Barr, 978 F.3d 680, 685 (9th Cir. 2020) (quoting Nunez v. Holder, 594 F.3d 1124, 1130 (9th Cir. 2010) *superseded on other grounds by* Matter of Cortes Medina, 26 I. & N. Dec. 79 (B.I.A. 2013)); see also Michel v. Immigr. & Naturalization Serv., 206 F.3d 253, 263 (2d Cir. 2000) ("[N]othing in the statute or its legislative history informs our understanding of the term moral turpitude . . . ."); Islas-Veloz v. Whitaker, 914 F.3d 1249, 1261 (9th Cir. 2019) (Fletcher, J., concurring) ("Now, almost seventy years after *De George*, 'moral turpitude' is as undefined and undefinable as ever.").

[231] 341 U.S. at 231.

States, and thus the inherent difficulty in applying a test that relies on morals to determine federal immigration law.

CONCLUSION

The *Dobbs* decision has upset reproductive rights throughout the country, causing ripple effects in other areas of law as well. The full impact of *Dobbs* on immigration law still remains to be seen, specifically in the space of CIMTs. Ultimately, however, bans criminalizing abortion from conception do not seem to reach the kind of "base, vile or depraved"[232] conduct that would qualify as a CIMT under *Matter of Silva-Trevino*. Further, many of the abortion bans do not meet the two elements of the traditional test for a CIMT: culpable mental state and reprehensible conduct. Many bans do not include an adequate intent requirement, and even the bans that do include a sufficient intent requirement do not penalize behavior which rises to level of being reprehensible.

The difficulty involved in applying the CIMT analysis suggests that abortion is unlike any other crime that has been considered under the moral turpitude framework. The complications that arise when determining whether or not abortion is a CIMT push at the seams of the CIMT definition and associated precedent.

[232] Matter of Silva-Trevino, 26 I. & N. Dec. 826, 833 (B.I.A. 2016) (interim decision).