DENYING FORMALISM'S APOLOGISTS: REFORMING IMMIGRATION LAW'S CIMT ANALYSIS

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Congress has long favored the "crime involving moral turpitude" as a statutory device to remove "undesirable" aliens from the United States. Unfortunately, Congress never bothered to define this important phrase. The judicial standard developed to address this shortfall has long been seen as unnecessarily formalistic, arbitrary, and both over- and under-inclusive. Until recently, however, these issues were ignored. In 2008, the Board of Immigration Appeals—rightly deferred to by the Seventh Circuit—and the Attorney General finally addressed these issues, making significant revisions to the traditional standard. The Third Circuit, rather than following the Seventh Circuit in allowing the reform of an unfair standard, instead chose to ignore Chevron *and its progeny, and rejected these reforms based upon a faulty and revisionist reading of history and precedent. This Comment begins by situating the phrase "crimes involving moral turpitude" within immigration law, and discusses the traditional standard. It then introduces the two recent reforms to the traditional standard with the assistance of an illustrative hypothetical based on the facts of director Roman Polanski's 1977 statutory rape conviction. It goes on to assess the failure of the Third Circuit to adequately justify its refusal to recognize the reforms under either* Chevron *or precedent. After eliminating the Third Circuit's holding as a permissible option, this Comment argues that the two recent reforms are nevertheless imperfect, and that a variation—defined herein—on the Board's new standard would constitute a more practicable and fair assessment of whether a crime involves moral turpitude.*

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INTRODUCTION

"[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude . . . is inadmissi-

ble."[1] It is undeniably clear what this statutory text means.[2] The references to the admissions and acts of an alien completely foreclose a court from looking at any particular admissions or acts of any particular alien.[3] Thus, instead of evaluating the conduct underlying a criminal conviction, a judge must conduct a formalistic analysis of statutory language to determine whether the statute defining the crime refers to morally turpitudinous conduct.[4] In this way, by peeking inside a criminal statute book, a judge can mystically intuit whether particular acts committed by any alien were, in fact, morally turpitudinous.[5] If a particular alien drugs and rapes a child but is convicted under a criminal statute that could hypothetically punish less serious crimes, obviously he must be allowed to stay in the United States.[6] The just disposition of a case simply must step aside if it goes contrary to a century of precedent discounting the actual conduct of aliens.[7] Worse yet, changing this interpretation of the statute could require a judge (or her clerk) to go out of her way to perform the immensely laborious task of, say, reading a plea transcript in a file delivered to her office.[8]

While I wish my opening paragraph was a satirical overstatement of existing law, it is not. It is an accurate depiction of immigration law's traditional crime involving moral turpitude ("CIMT") standard, which was recently reaffirmed by the Third Circuit in *Jean-Louis v. Attorney General*.[9] *Jean-Louis* is notable in a long line of similar cases only because it was the first volley by the defenders of formalistic statutory interpretation against two 2008 reforms of the CIMT standard previously announced by the Seventh Circuit[10] and the Attorney General.[11]

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1. Immigration and Nationality Act ("INA") § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i) (2006).
2. Jean-Louis v. Att'y Gen., 582 F.3d 462, 473 (3d Cir. 2009).
3. *Id.*
4. *Id.*
5. *Id.* at 474.
6. *See, e.g.*, Quintero-Salazar v. Keisler, 506 F.3d 688, 694 (9th Cir. 2007); *see also* discussion of Roman Polanski's crime *infra* Part II.
7. *Jean-Louis*, 582 F.3d at 479–80.
8. *Id.*
9. *Id.* at 464.
10. Ali v. Mukasey, 521 F.3d 737 (7th Cir. 2008).
11. Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008).

This Comment focuses on a problem most succinctly described by Judge Garnett Thomas Eisele in a 1971 dissent.[12] Judge Eisele noted that there are three categories of criminal statutes: statutes (or subcategories of statutes) that are inherently intended to only punish acts involving moral turpitude (e.g. premeditated murder); statutes that are not inherently intended to punish acts involving moral turpitude (e.g. speed limit violations); and statutes that may or may not be inherently intended to punish morally turpitudinous acts, depending on the particular facts of a case (e.g. bulk currency smuggling, which could either be the mere failure to file a particular form with customs or could be incident to the international trafficking of arms, drugs, or humans).[13] In their rush to establish easy categorical rules to govern CIMTs, Judge Eisele argued that courts have created a binary CIMT standard that ignores this third category of criminal statutes.[14]

Until the 2008 reforms, immigration law generally ignored the existence of this third category.[15] In other words, under the binary standard identified by Judge Eisele, a particular crime was either always a CIMT or never a CIMT. Crimes falling into the third category had to be shoved into either of the two existing categories. The binary standard is thus both over- and under-inclusive.[16]

The *Ali v. Mukasey*[17] and *Silva-Trevino*[18] reforms to the traditional, binary standard signal a shift towards acknowledging that particular facts matter in determining whether a given alien's crime constitutes a CIMT. However, numerous arguments and policy concerns are advanced in favor of the traditional standard, as highlighted by the Third Circuit's rejection of the 2008 reforms in *Jean-Louis*.[19] First, *Jean-Louis* argues that both *Ali* and *Silva-Trevino* allow courts to delve into the facts of particular cases, a practice that runs contrary to the overwhelming weight of precedent on the traditional standard.[20] However, the entire point of reform is exactly that: to

12. Marciano v. INS, 450 F.2d 1022, 1026 (8th Cir. 1971) (Eisele, J., dissenting).
13. *Id.* at 1028–29.
14. *Id.*
15. *See* Jean-Louis v. Att'y Gen., 582 F.3d 462, 478 (3d Cir. 2009).
16. *See Marciano*, 450 F.2d at 1028–29 (Eisele, J., dissenting).
17. 521 F.3d 737 (7th Cir. 2008).
18. 24 I. & N. Dec. 687 (A.G. 2008).
19. *See generally Jean-Louis*, 582 F.3d at 473.
20. *See id.* at 469–82.

overrule precedent. Thus, it is hard to imagine how this is any kind of real critique. Moreover, because *Chevron* deference is owed the Attorney General in this matter, this criticism must be brushed aside.

A second, better-reasoned critique asserts that *Ali* and *Silva-Trevino* go too far in allowing the wholesale retrying of previously-settled cases in an area of law where efficiency and procedural rights are already at a premium.[21] This criticism does not, however, justify rejecting reform wholesale; rather, it justifies rejecting unrealistic and poorly defined attempts at reform. Even granting this second critique, a better CIMT standard—one that better strikes a balance between fairness and efficiency—is clearly possible.

This Comment begins, in Part I, by tracing the development of the traditional CIMT standard, with a particular focus on the traditional role of judicial discretion in ameliorating the harshness of the categorical CIMT standard. Part II discusses the *Ali* and *Silva-Trevino* reforms of the traditional CIMT standard using director Roman Polanski's 1977 statutory rape conviction as an illustrative example. Part III considers the Third Circuit's critique in *Jean-Louis* of the two reformed CIMT standards. Part III argues that the Third Circuit's critique is based on a questionable understanding of both history and administrative law. Finally, Part IV lays out a proposal for a uniform and fair CIMT standard that will, at last, overcome the formalistic nonsense that permeates the traditional standard while remaining cognizant of the need for efficient, workable standards in today's overworked Immigration Court system.

I. DEVELOPMENT OF A STANDARD: DEFINING A CIMT

Tens of thousands of aliens[22] have been deported or excluded from the United States in the last century for committing a "crime involving moral turpitude." The definition of a CIMT is nebulous at best[23] and unconstitutionally vague at

21. *See* Patricia S. Mann, *Matter of* Silva-Trevino*: An Update on Crimes Involving Moral Turpitude*, IMMIGRATION DAILY (Feb. 12, 2009), http://www.ilw.com/articles/2009,0212-mann.shtm.

22. Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 259 (2001).

23. Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 357 (2005).

worst.[24] Despite repeated Congressional acknowledgment of the phrase's vagueness,[25] no statutory definition of "crime involving moral turpitude" has ever been provided by Congress.[26]

Today, a CIMT is generally defined by reference to a traditional boilerplate definition.[27] A CIMT consists of criminal conduct that "shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[28] Such conduct is "measured 'in terms either of the magnitude of the loss that [it] cause[s] or the indignation that [it] arouse[s] in the law-abiding public.' "[29] It is also conduct "which is per se morally reprehensible and intrinsically wrong, or malum in se," such that "it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude."[30] This boilerplate text seems to have been drawn from an early definition of moral turpitude found in Black's Law Dictionary.[31]

This dictionary definition largely no longer matters, however, because the statutory language referring only to acts and their particular impact has been transformed by courts into a requirement of formalistic analysis of statutory text. The history of this transformation must be understood in order to fully grasp any issue involving CIMTs. This part discusses the history of the CIMT standard in two sections. First, it reviews the

24. Derrick Moore, Comment, *"Crimes Involving Moral Turpitude": Why the Void-For-Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813, 842 (2008).

25. *See, e.g.*, Lofgren, *supra* note 23, at 357; 140 CONG. REC. S4059 (daily ed. Apr. 24, 1996) (statement of Sen. Bob Dole) (noting that statutory phrases in the immigration law, such as those related to CIMTs, "lack the certainty we should desire").

26. Harms, *supra* note 22, at 259.

27. *E.g.*, Franklin, 20 I. & N. Dec. 867, 868 (B.I.A. 1994).

28. Smalley v. Ashcroft, 354 F.3d 332, 336 (5th Cir. 2003) (quoting Hamdan v. INS, 98 F.3d 183, 186 (5th Cir. 1996)).

29. Silva-Trevino, 24 I. & N. Dec. 687, 705 (A.G. 2008) (quoting Mei v. Ashcroft, 393 F.3d 737, 740 (7th Cir. 2004)).

30. Franklin, 20 I. & N. Dec. at 868.

31. Harms, *supra* note 22, at 264 (quoting BLACK'S LAW DICTIONARY 1008–09 (6th ed. 1990) (defining moral turpitude as: "[an] act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man . . . . Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others . . . . The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita")).

statutory history of the phrase, tracing it through three eras: initial development, expansion, and contraction. Second, it briefly discusses the traditional common law CIMT standard that courts have developed in an attempt to correct the vagueness of the statutory text.

A. Statutory History

1. History and Scope of a Phrase: 1875 to 1952

In 1875, Congress passed its first immigration law excluding aliens on the basis of certain prostitution-related or felony convictions.[32] After the list of excludable categories was expanded in 1882 to include lunatics, idiots, and paupers,[33] the Act of March 3, 1891, heralded the first appearance of "moral turpitude" in immigration law in an effort to additionally broaden what could render an alien excludable.[34]

In 1903, President Theodore Roosevelt publicly demanded that Congress "devise some system by which undesirable immigrants shall be kept out entirely."[35] Congress responded by continuing to broaden the categories of excludable aliens.[36] In 1907, Congress introduced what would evolve into the modern CIMT formulation, authorizing the exclusion of "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude."[37] Additionally, Congress authorized the deportation of aliens who committed crimes after arriving in the United States, making convicted prostitutes deportable.[38] Thus, the concept of moral turpitude had become Congress's method of choice to keep out the President's "undesirable immigrants."

In 1917, Congress acted again, this time authorizing the executive branch to deport aliens who were convicted of a

32. STAFF OF H. COMM. ON THE JUDICIARY, 100TH CONG., 2D SESS., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 6, 95 (Comm. Print 1988) [hereinafter GROUNDS FOR EXCLUSION].

33. *Id.* at 7.

34. *Id.* at 10.

35. 38 CONG. REC. 3 (1903).

36. GROUNDS FOR EXCLUSION, *supra* note 32, at 15.

37. *Id.* at 20.

38. Sara A. Rodriguez, Note, *Exile and the Not-So-Lawful Permanent Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Non-Citizen Convicted of Certain Crimes?*, 20 GEO. IMMIGR. L.J. 483, 488 (2006).

"crime involving moral turpitude."[39] The legislative discussion of this amendment was, however, rife with concern over the harshness of deportation in situations where a noncitizen was convicted of a minor offense or where other personal circumstances of the noncitizen merited leniency.[40] In response to these concerns, Congress devised the Judicial Recommendation Against Deportation ("JRAD")[41] and the potential for discretionary admission of Lawful Permanent Residents ("LPRs") who had committed CIMTs.[42]

A JRAD was a recommendation against deportation that could be issued by a sentencing judge in a criminal matter at the judge's discretion.[43] Congress clearly "considered deportation to be part of the penalty for a crime."[44] Given that the penalty for a crime depended largely upon the particular circumstances surrounding the criminal acts committed, and other circumstances relevant to a particular criminal defendant, Congress decided that the penalty of deportation should be taken off the table "in any case in which the judge who best knew the facts thought the drastic penalty of deportation was unwarranted."[45] In effect, while noncitizens could now be deported for being convicted of a CIMT in the United States, they could request a JRAD from their sentencing judge based upon a lack of severity in their particular criminal conduct or other factors unique to their case. JRADs were binding by statute on the Immigration and Naturalization Service ("INS")[46] and courts.[47]

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39. Harms, *supra* note 22, at 262.

40. *See, e.g.*, 53 CONG. REC. 5169 (1916) (statement of Rep. Sabath).

41. *See* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1144 (2002).

42. INS v. St. Cyr, 533 U.S. 289, 294 (2001). This provision was later construed to also allow for discretionary cancellation of deportation. *Id.*

43. Taylor & Wright, *supra* note 41, at 1143.

44. *Id.* at 1146. In contrast, the Supreme Court "has long understood that an 'order of deportation is not a punishment for crime.' " Negusie v. Holder, 129 S. Ct. 1159, 1169 (2009) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893)). Removal proceedings do not punish based on past actions or illegal entry, but only "look[ ] prospectively to the respondent's right to remain in this country in the future." INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

45. Janvier v. United States, 793 F.2d 449, 453 (2d Cir. 1986). *See also* 53 CONG. REC. 5171 (1916) (statement of Rep. Powers) ("[A]t the time the judgment is rendered and at the time the sentence is passed, the judge is best qualified to make these recommendations.").

46. The INS has been absorbed into the Department of Homeland Security ("DHS") and renamed U.S. Immigration and Customs Enforcement ("ICE"). *See* Authority of the Secretary of Homeland Security; Delegations of Authority; Immigration Laws, 68 Fed. Reg. 10,922 (Mar. 6, 2003). While distinctions between

2. Expanding Scope: 1952 to 1990

In 1952, Congress sought to eliminate some of the flexibility of the 1917 Act.[48] It removed all descriptions of particular CIMTs, and allowed noncitizens to be excluded if they "committ[ed] acts which constitute the essential elements" of a CIMT.[49] These revisions supported the idea that the presence of moral turpitude alone, instead of a mere variety of crime, should render a noncitizen inadmissible or deportable.

President Truman vetoed the Act, noting that some "changes made by the bill . . . would result in empowering minor immigration and consular officials to act as prosecutor, judge, and jury in determining whether acts constituting a crime have been committed."[50] Congress evidently found this result to be acceptable, and reaffirmed its intent to broaden the Act by overriding the President's veto.[51] Thus, Congress established that morally turpitudinous *acts*—not crimes alone—were punishable under the INA.[52]

Despite its desire to stiffen the Act, Congress nevertheless sought to "soften the extreme hardship imposed by exclusion by allowing waivers."[53] In the years immediately following the passage of the 1952 Act, Congress issued some 700 waivers—acts of Congress setting aside final removal orders—to criminal grounds for removal.[54] Further, Congress recodified its 1917 allowance for discretionary admittance in the new Immigration and Naturalization Act ("INA" or "the Act") section 212(c).[55]

INA section 212(c) endowed immigration judges with the discretion to cancel deportation and allow the preservation of LPR status.[56] Section 212(c) relief was available only to indi-

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INS, DHS, and ICE certainly exist, they are not pertinent to the subject matter of this Comment, and, as such, the acronyms will largely be used interchangeably.

47. *Janvier*, 793 F.2d at 452 ("[T]he sentencing judge [has] conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation.").

48. Harms, *supra* note 22, at 263.

49. *See* GROUNDS FOR EXCLUSION, *supra* note 32, at 96.

50. *Id.* at 109.

51. *Id.* at 66.

52. *Id.*

53. Harms, *supra* note 22, at 263.

54. *Id.*; *see also* BERNADETTE MAGUIRE, IMMIGRATION: PUBLIC LEGISLATION AND PRIVATE BILLS 148 (1997).

55. INS v. St. Cyr, 533 U.S. 289, 295 (2001).

56. *Id.*

viduals who had been LPRs for no less than seven years.[57] A judge's exercise of discretion was governed by a balancing test, which weighed various negative factors[58] relating to the individual alien's character and actions against various positive factors[59] relating to the alien and her family situation.[60]

In 1988, Congress created a new avenue for the deportation of criminal aliens: the "aggravated felony" conviction.[61] This reintroduced a statutory list of crimes that could categorically render a noncitizen removable.[62] The initial statutory list of aggravated felonies was partially coextensive with crimes that had been found to be CIMTs, absorbing various drug and firearms crimes, but also listed a number of additional crimes that were not traditionally CIMTs.[63] Once this provision was on the books, Congress continued to expand the list of aggravated felonies, over time adding rape, sex abuse, money laundering, drug trafficking, gambling, prostitution, and various crimes of dishonesty, including certain fraud and tax evasion convictions.[64]

Despite the advent of the aggravated felony standard for removability, the statutory CIMT provisions were nevertheless expanded in 1988 to apply to all convictions that *could* have resulted in punishment lasting over a year instead of only those crimes that were, in fact, punished with such a term.[65] This expanded the coverage of the CIMT provisions to encompass various minor offenses, such as the jumping of subway turnstiles in New York City.[66] At the same time, immigration judges received another discretionary tool—the express ability to allow noncitizens to choose "voluntary departure" over deportation. This process allowed aliens to leave the country

57. Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 61 (2010).

58. "[I]ncluding the nature and underlying circumstances of any immigration violation or ground for exclusion; the nature, seriousness, and recency of any criminal convictions; and other evidence of an applicant's bad character." *Id.*

59. "[I]ncluding family ties in the United States; residence of long duration; age at entry; hardship to the family or the applicant if deported; employment history; property; military service; service to the community; evidence of rehabilitation; and other evidence of good character." *Id.*

60. *Id.*

61. Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 387–88 (1999).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

without triggering the bars that deportation would normally set in the way of lawful reentry to the United States.[67]

3. Eliminating Discretion: 1990 to 2008

With the Immigration Act of 1990,[68] Congress eliminated the JRAD.[69] Not only did Congress repeal the prospective use of JRADs in the immigration context, but it also retroactively invalidated any previously issued JRADs.[70] In doing so, Congress severed the close bond between sentencing and removal actions that the Second Circuit had previously held to be "a critical stage of the prosecution" of criminal defendants.[71] Further, by throwing the JRAD by the wayside, Congress removed one manner in which the particular facts of an alien's conviction could influence the ultimate decision on the alien's immigration status.

Over the next decade, Congress also eliminated virtually all of the discretion formerly provided to immigration judges in section 212(c). The 1990 Act began by narrowing section 212(c) to preclude discretionary relief to "anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years."[72] However, this change would seem minor after further amendments in 1996, when Congress again narrowed the availability of discretionary relief and eventually repealed section 212(c) altogether.[73] While the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") did create a new statutory section under which the Attorney General could "cancel removal for a narrow class of inadmissible or deportable aliens," this section dramatically reduced immigration judges' discretion.[74] Immigration judges were completely stripped of their discretion when a noncitizen had been convicted of an aggravated felony, a drug offense, cer-

67. If removed from the U.S., at least a ten-year bar on reentry attaches. INA § 212(a)(9)(A); 8 U.S.C. § 1182(a)(9)(A) (2006).

68. Pub. L. No. 101-649, § 505(b), 104 Stat. 5050 (1990).

69. *See* Taylor & Wright, *supra* note 41, at 1143. Ex post facto clause arguments failed in challenging Congressional authority to retroactively nullify existing JRADs. *Id.* at 1146.

70. *Id.* at 1146–47.

71. *Janvier*, 793 F.2d at 455.

72. INS v. St. Cyr, 533 U.S. 289, 297 (2001).

73. *Id.* (discussing the effect of § 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 112 Stat. 1277 (1996), and IIRIRA, 110 Stat. 3009–597 (1996), on § 212(c)).

74. *Id.*

tain weapons offenses, or multiple CIMTs of any variety.[75] Combined with a near-total disappearance of Congressional waivers, and a corresponding increase in the number of removable individuals,[76] removal stemming from a CIMT conviction has become nearly inevitable.[77]

Upon this backdrop of statutory evolution, courts' interpretations of the CIMT standard and other applicable provisions have remained remarkably stagnant, clinging to a standard developed when multiple avenues for the exercise of discretion existed and removal was nowhere near as frequent as it is now. This static "traditional view" that constitutes the historical CIMT test in courts is discussed in the following section.

B. Common Law History—The "Traditional View" of the CIMT Standard

The common law analysis of CIMTs consists of a two-pronged test known as the "traditional view." The aforementioned boilerplate definition[78] of what a CIMT is supposed to consist of is only invoked after a court decides whether a statute refers to a CIMT using the traditional view.[79] The Board of Immigration Appeals announced the quintessential description of this test in 1954:

> The test requires us to first determine what law or specific portion thereof has been violated, and then, without regard to the act committed by the alien, to decide whether that law inherently involves moral turpitude; that is, whether violation of the law under any and all circumstances, would involve moral turpitude. If we find that violation of the law under any and all circumstances involves moral turpitude, then we must, conclude that all convictions under that law involved moral turpitude although the particular acts evidence no immorality. If, on the other hand, we find that the

75. *Id.*

76. Susan Bibler Coutin, *Exiled By Law: Deportation & The Inviability of Life*, *in* THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT 351, 358 (2010) (noting in table of figures that removals increased from 33,189 in 1991, to 319, 382 in 2007).

77. That is to say, inevitable absent a showing of extreme hardship, which is an immensely difficult showing to make. *See* INA § 212(h), 8 U.S.C. § 1182(h) (2006).

78. *See supra* note 31 and accompanying text.

79. Maryellen Fullerton & Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 AM. CRIM. L. REV. 425, 432–33 (1986).

> law punishes acts which do not involve moral turpitude as well as those which do involve moral turpitude, then we must rule that no conviction under that law involves moral turpitude, although in the particular instance conduct was immoral.[80]

Stated differently, a court looks at the record of conviction only to ensure the fact of conviction and to ascertain the citation for the statute, or part of a statute, that the noncitizen was convicted of violating.[81] The court then ignores all of the other information contained in the record of conviction.[82] If the text of the statute of conviction describes a CIMT in the mind of an immigration judge, the noncitizen is held to have committed a CIMT and the boilerplate applies.[83] If the statute of conviction does not necessarily describe a CIMT, the defendant is held to have not committed a CIMT, even if the noncitizen respondent's crime fits into the boilerplate definition that is nominally supposed to be the standard.[84]

The traditional view was rebranded after the Supreme Court decided two cases assessing what documents may be used under the Sixth Amendment to determine whether aggravating factors not found in statutes of conviction were present in a particular case. After the introduction of aggravated felonies into immigration law in 1988, the Supreme Court, in *Taylor v. United States*[85] and *Shepard v. United States*,[86] settled whether courts may look beyond the statutory definitions of crimes to determine whether aggravating factors are present. These cases establish that, in these situations, courts should use a "categorical approach" and "look only to the fact of conviction and the statutory definition of the prior offense."[87] If particular parts of a statute of conviction can sustain a conviction based upon different sets of conduct, however, a court should apply a "modified categorical approach" to "go beyond the mere fact of conviction" and determine if the factual findings of the court of conviction sustain a conviction upon the specific aggra-

80. R-----, 6 I. & N. Dec. 444, 448 (B.I.A. 1954) (emphasis, internal citations, and quotation marks omitted).
81. *Id.*
82. *See id.*
83. *Id.*
84. *See id.*
85. 495 U.S. 575 (1990).
86. 544 U.S. 13 (2005).
87. *Taylor*, 495 U.S. at 602.

vating factors.[88] To use an example under the aggravated felony analysis, a criminal statute defines felonious fraud as either defrauding anyone out of $100,000 (a clearly deportable offense) or accepting any amount of money while wearing a funny hat (probably not a deportable offense). Presented with this statute, a court can look to the facts underlying a particular conviction using the modified-categorical approach to see whether the respondent bilked someone out of a large sum of money, or was merely exchanging money while sporting a not-so-sharp chapeau.[89]

Because the "categorical" and "modified categorical" approaches are similar to the traditional CIMT analysis, many courts have been quick to incorporate the Supreme Court's guidance in *Taylor* and *Shepard* into CIMT cases.[90] Under this rebranded CIMT analysis, a court first applies the categorical approach: it looks only to the statute under which the non-citizen defendant was convicted to determine whether the crime categorically involves moral turpitude.[91] If the non-citizen defendant could have been convicted under that statute without committing a CIMT, then the non-citizen defendant has not committed a CIMT. This is the case unless the statute is "divisible," meaning that distinct parts of the statute apply to crimes that are categorically CIMTs, while other parts do not.[92] If a statute is divisible, a court will look to a limited "record of conviction" to determine which divisible part of the statute a particular crime fits into.[93] The record of conviction generally only includes indictments, judgments of conviction, jury instructions, guilty pleas, and plea transcripts,[94] although circuits vary somewhat on which documents are includable in the record.[95]

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88. *Id.* The Supreme Court added this latter test, known as the "modified categorical approach," to the immigration law aggravated felony analysis in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007).

89. This is not to imply that one's choice in humorous headwear cannot be sartorially appropriate in certain situations.

90. *See* Tokatly v. Ashcroft, 371 F.3d 613, 620 (9th Cir. 2004); *but see* Conteh v. Gonzales, 461 F.3d 45, 55 (1st Cir. 2006) (noting that the Sixth Amendment issues dealt with by *Taylor* and *Shepard* are "irrelevant" in the context of immigration law); Ali v. Mukasey, 521 F.3d 737, 743 (7th Cir. 2008) (noting that—given the direct inapplicability of *Taylor* and *Shepard* to non-criminal law and the existence of statutory guidance on the matter—the statute governs).

91. Silva-Trevino, 24 I. & N. Dec. 687, 689–99 (A.G. 2008).

92. *Id.*

93. *Id.*

94. *Id.*; INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (2006).

95. *See* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 72-4 (11th ed. 2008).

The above section explains the general state of CIMT case law until 2008, when *Ali* and *Silva-Trevino* were decided, and generally represents the regime that the Third Circuit reaffirms as correct in *Jean-Louis*.[96] The *Ali* and *Silva-Trevino* revisions are discussed in the next part.

II. *ALI* AND *SILVA-TREVINO*: REVISING THE TRADITIONAL APPROACH

Having laid out a basic history of the CIMT standard both in Congress and the courts, this Comment now turns to the two 2008 revisions of the traditional standard in *Ali* and *Silva-Trevino*. To provide a basis to compare the various CIMT standards now in existence, Section A begins by setting out a common fact pattern. Section B analyzes the fact pattern using the traditional approach, an exercise intended to clarify the problems with the traditional CIMT standard. Then, Section C discusses *Ali*'s reforms to the traditional standard and applies this new standard to the common fact pattern. Section D repeats this process for the Attorney General's standard in *Silva-Trevino*.

A. Roman Polanski: A Demonstrative Example

A common fact pattern will be helpful in elucidating the differences among the traditional, *Ali*, and *Silva-Trevino* CIMT standards. Because the facts of a particular case do not traditionally matter in CIMT cases, courts will generally gloss over the underlying facts when writing opinions.[97] Thus, for a fact pattern to be useful, it must come from outside the body of settled CIMT cases.

The following fact pattern is derived from noted director Roman Polanski's 1977 conviction[98] on statutory rape

96. *See* Jean-Louis v. Att'y Gen., 582 F.3d 462 (3d Cir. 2009).

97. *See, e.g.*, *id.* The treatment of the facts underlying respondent Jean-Louis's conviction in the Third Circuit opinion—which weighs in at roughly 11,500 words, taking up a full 20 pages in the Federal Reporter, Third—is reproduced as follows, in its entirety: "Jean-Louis struck his wife's daughter, who was under the age of 12, to discipline her . . . ." *Id.* at 464.

98. *See* Transcript of Plea at 17, California v. Polanski, No. A-334139 (Cal. Super. Ct. Aug. 7, 1977), *available at* http://www.thesmokinggun.com/file/roman-polanski-plea-transcript (last visited Feb. 16, 2011).

charges.[99] The facts depicted are graphic, but this serves the purpose of leaving no doubt in the reader's mind as to whether the crime committed by Mr. Polanski involved moral turpitude. This is not an area consisting of dry statutory interpretation; recall that CIMTs are supposedly "measured in terms of the . . . indignation that [they] arous[e] in the law-abiding public."[100]

Polanski, a citizen and national of France,[101] pled guilty on August 8, 1977, to committing the crime of having unlawful sexual intercourse with a female, not his wife, under the age of eighteen, in violation of California Penal Code section 261.5.[102] In the course of entering his plea, he admitted that he knew that the victim, Samantha Geimer (then Samantha Gailey), was thirteen years of age.[103]

After taking a number of photographs—some nude—of Geimer at various locations,[104] Polanski drove Geimer to the home of Jack Nicholson.[105] There, he took additional nude photographs of Geimer while she drank champagne.[106] Po-

99. Several assumptions are necessary to make this example helpful in examining the different CIMT standards. While none of these assumptions change the material facts surrounding the crime committed by Polanski, a brief description of these assumptions is nonetheless appropriate.

First, one must assume that Polanski would have received an identical plea offer and taken it, but not have fled the United States before sentencing in this matter, thereby allowing for him to be sentenced under the charge to which he pled guilty. *See id.* at 12–13; *see also* Kate Harding, *Reminder: Roman Polanski Raped a Child*, SALON (Sept. 28, 2009), http://www.salon.com/mwt/broadsheet/feature/2009/09/28/polanski_arrest.

Second, one must assume that modern CIMT statutory, regulatory, and case law would apply to the Polanski matter. It would be speculative to analyze what the Ninth Circuit would have done in the late 1970s with an issue of first impression based on this fact pattern. Instead, it will be assumed that modern CIMT principles will be applied in this matter and the only matter at issue would be the presence of a CIMT conviction.

Third, one must assume that removal proceedings against Polanski, upon completing whatever sentence was handed down in this matter, would be opened, and that Polanski would contest removal rather than summarily accept voluntary departure if offered.

100. Silva-Trevino, 24 I. & N. Dec. 687, 705 (A.G. 2008) (internal quotation marks omitted).

101. *See* Clare Dyer, *How Did The Law Catch Up With Roman Polanski?*, THE GUARDIAN, Sept. 29, 2009, *available at* http://www.guardian.co.uk/film/2009/sep/29/law-catch-roman-polanski.

102. *See* Transcript of Plea, *supra* note 98, at 17.

103. *Id.* at 14.

104. Transcript of Grand Jury Testimony of Samantha Geimer, California v. Polanski, No. A-334139 at 69–72 (Apr. 4, 1977), *available at* http://www.radaronline.com/sites/default/files/RomanPolanskiTranscripts.pdf (last visited Apr. 5, 2011).

105. *Id.* at 73–74.

106. *Id.* at 78.

lanski produced a Quaalude, which Geimer took.[107] Polanski then asked Geimer to get into a Jacuzzi while nude.[108] She acquiesced while he took pictures of her before disrobing and joining her in the Jacuzzi.[109]

Once in the Jacuzzi, Polanski grabbed Geimer around the waist and began to grope her.[110] She struggled away from him and left the Jacuzzi.[111] When Polanski followed her, she faked an asthma attack and told him that she had to go home to get her asthma medication.[112]

Instead of taking her home, Polanski coaxed her into the bedroom, ignoring admonishments like "No, keep away," and "Come on, let's go home."[113] Polanski began to perform cunnilingus on her while she said "No. Come on. Stop it[,]" and was "ready to cry."[114] A few minutes later, Polanski began having vaginal intercourse with her over her repeated cries of "No, stop."[115]

After some period of time, Polanski paused and asked Geimer whether she was on the pill and when her last period was.[116] Apparently not liking the answers to his questions, he asked, "Would you want me to go in through your back?"[117] She responded, "No."[118] Polanski ignored this answer, penetrated Geimer anally, and began sodomizing her,[119] eventually ejaculating inside her anus.[120] Later, after leaving the thirteen-year-old Geimer to weep alone in his car for some time, he drove her home.[121]

B. The Traditional Approach: A Broken Baseline

Before discussing the 2008 reforms of the CIMT standard, it is worthwhile to observe how the traditional approach would

107. *Id.* at 81.
108. *Id.* at 85.
109. *Id.* at 85–86.
110. *Id.* at 87–88.
111. *Id.* at 88.
112. *Id.* at 89.
113. *Id.* at 90–91.
114. *Id.* at 91.
115. *Id.* at 93.
116. *Id.* at 94.
117. *Id.*
118. *Id.*
119. *Id.* at 95.
120. *Id.* at 96.
121. *Id.* at 99.

deal with the Polanski facts. Keep in mind that a CIMT is supposed to consist of criminal conduct that "shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[122] It is conduct that is "measured [by the] indignation that [it] arouse[s] in the law-abiding public,"[123] or that "is per se morally reprehensible and intrinsically wrong, or malum in se, [such that] it is the nature of the act itself and not the statutory prohibition of it which renders a crime one that involves moral turpitude."[124]

1. Drugging and Raping a Thirteen-Year-Old is Moral Behavior

Applying the traditional approach[125] to Polanski's conviction, there is no doubt that a court would hold that Polanski had *not* committed a CIMT. Therefore, Polanski would not be removable or excludable from the United States. Indeed, the above facts would be entirely irrelevant to his case in the Immigration Court because the specific criminal acts of an alien play no part in the traditional CIMT analysis.

In fact, this would be a routine case easily settled by precedent. In *Quintero-Salazar v. Keisler*,[126] the Ninth Circuit Court of Appeals held that the precise statute that Polanski pled guilty to violating[127] did not categorically refer to a CIMT, nor was it "divisible" such that Polanski could have violated some aspect of it specifically applicable to CIMTs.[128] All of this would be true despite the Ninth Circuit recognizing that, as a factual matter, *malum in se* conduct like Polanski's would be morally turpitudinous.[129] Further, even though all of the facts

122. Smalley v. Ashcroft, 354 F.3d 332, 336 (5th Cir. 2003) (quoting Hamdan v. INS, 98 F.3d 183, 186 (5th Cir. 1996)).

123. Silva-Trevino, 24 I. & N. Dec. 687, 705 (A.G. 2008) (quoting Mei v. Ashcroft, 393 F.3d 737, 740 (7th Cir. 2004)).

124. Franklin, 20 I. & N. Dec. 867, 868 (B.I.A. 1994).

125. *See* discussion *supra* Part I.B.

126. 506 F.3d 688 (9th Cir. 2007). Given that it was decided under the traditional approach, no facts pertaining to the underlying crime in this case are mentioned at all beyond the fact that Mr. Quintero-Salazar was convicted of violating CAL. PENAL CODE § 261.5(d). *See id.*

127. *See* Polanski v. Superior Ct., 102 Cal. Rptr. 3d 696, 701 n.4 (Cal. App. 2009) (noting that the statutory language Polanski pled to violating is now located at § 261.5(d)).

128. Quintero-Salazar, 506 F.3d at 694.

129. *See id.* at 693.

discussed above could easily have been gathered from Polanski's record of conviction, the only use that the traditional approach would have for that packet of documents would be to indicate what statute Polanski pled guilty to violating.

2. The Need for Reform

According to the traditional approach, the statutory language unambiguously requires that Polanski be allowed to remain in the country because he so clearly did not commit a CIMT.[130] However, if Congress, in defining CIMTs, intended to make *any* particular criminal activities removable conduct, surely the intentional drugging, rape, and forceful sodomy of a thirteen-year-old girl by a forty-three-year-old in a position of trust would qualify. It strains the mind to think of a crime that a large portion of the population—including violent felons in prisons[131]—would consider more "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[132]

However, the simplest alternative—flipping the standard and categorizing all statutory rapes as CIMTs—would be similarly unfair. Taking a hypothetical used by the court in *Quintero-Salazar*, it is easy to envision a situation where one member of a young couple having consensual sexual intercourse could end up in court, faced with a violation of the same California statute under which Polanski was convicted, simply as a consequence of reaching another birthday.[133] According to the Ninth Circuit, while such unwed sexual behavior "may be unwise and socially unacceptable to many," it does not meet the extreme standard of being "inherently base, vile, or depraved."[134] Yet, if California's statutory rape statute was considered to be categorically a CIMT, then such behavior would result in removal in exactly such a situation. Therefore, the traditional view produces equally undesirable results no matter how this California statutory rape statute is classified. If it is

130. *See* Jean-Louis v. Att'y Gen., 582 F.3d 462, 473 (3d Cir. 2009).

131. *See* Jennifer L. Cordle, Note, State v. Wilson: *Social Discontent, Retribution, and the Constitutionality of Capital Punishment for Raping a Child*, 27 CAP. U. L. REV. 135, 144–45 (1998) (noting that child molesters tend to be targeted for maltreatment by their fellow prisoners based on their criminal conduct).

132. Smalley v. Ashcroft, 354 F.3d 332, 336 (5th Cir. 2003) (quoting Hamdan v. INS, 98 F.3d 183, 186 (5th Cir. 1996)).

133. *See* 506 F.3d at 693.

134. *Id.* (internal quotation marks omitted).

classified as a CIMT, the older partner in the consensual sexual tryst is unfairly deported. If it is not classified as a CIMT, Polanski would not be removable on CIMT grounds despite his morally egregious crime.

This situation highlights the problem of both over-inclusiveness and under-inclusiveness in applying the traditional CIMT standard. The binary system, absent a divisible statute,[135] inherently lends itself to unfair and unjust outcomes. Thankfully, the doors to reform have been thrown open.

C. Ali*: The BIA's Holding on Factual Analysis Warrants Deference*

In *Ali v. Mukasey*,[136] the Seventh Circuit assessed whether courts must defer[137] to a Board of Immigration Appeals ("BIA") choice to go beyond the list of approved documents contained in section 240A(c)(3)(b) of the INA when determining whether a particular crime is a CIMT. Judge Easterbrook announced in *Ali* that the BIA's discretion to consult additional documents was, indeed, entitled to judicial deference, thereby establishing the first alternative approach to CIMT cases.[138]

The Seventh Circuit reasoned that, while the BIA was probably foreclosed from using a "presentence report" to determine under what statute Ali was convicted under the traditional approach, the BIA did not use the report for that purpose.[139] Instead, the BIA applied the traditional approach and determined which statute Ali had been convicted under from one of the allowable documents listed in the Act.[140] The BIA only turned to the presentence report, and the facts contained therein, to ensure that it did not misclassify the particular crime in question as a CIMT.[141] In other words, the BIA used

135. Common sense suggests that state legislators are unlikely to consider whether they are creating easily divisible statutory texts for immigration law purposes when drafting criminal statutes.

136. 521 F.3d 737 (7th Cir. 2008).

137. The Seventh Circuit referred to the doctrine of judicial deference to administrative interpretations of ambiguous statutes under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and modified in *United States v. Mead Corp.*, 533 U.S. 218 (2001). *See* discussion *infra* Part II.C.1.

138. *See* 521 F.3d at 743.

139. *Id.*

140. *Id.*

141. *Id.* As Judge Easterbrook noted, the BIA was merely ensuring the presence of "deceit, rather than just a conspiracy to violate a record-keeping law." *Id.*

the traditional record of conviction to determine which statute was violated, as required by section 240A(c)(3)(b) of the Act, and then used a different document to double-check for the presence of a CIMT, a separate process upon which the Act is silent.[142] *Ali* thus held that courts must accord *Chevron* deference to a BIA decision to consult information outside the traditional record of conviction in determining the presence of moral turpitude.[143]

This section begins with an introduction of the doctrine of *Chevron* deference as it has evolved through the years. It will continue in Subsection 2 with a discussion of the form of the BIA's revision affirmed in *Ali*. It will conclude in Subsection 3 by applying the *Ali* revision to the facts of the Polanski matter.

1. *Chevron* Deference Through *Brand X*

In 1984, the Supreme Court decided *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*,[144] a case that, for the first time, definitively established what level of deference courts should provide administrative agencies involved in formal rulemaking and adjudications. This subsection summarily introduces the analysis known as the *Chevron* two-step,[145] discusses the revisions made to *Chevron* by the Supreme Court in *United States v. Mead Corp.*,[146] and then concludes with a discussion of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[147] and its rejection of the idea that prior agency or court constructions of a statute preclude *Chevron* deference to an agency construction.

Chevron dictates that, when presented with an agency interpretation of a statute, courts must perform a two-step analysis to determine whether deference is owed to the agency.[148] The first step of this analysis assesses "whether Congress has directly spoken to the precise question at issue."[149] This step requires a court to delve into statutory construction, looking

142. *Id.*
143. *Id.* at 741–43.
144. 467 U.S. 837 (1984).
145. For a more detailed discussion of the doctrine and its effect, *see* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).
146. 533 U.S. 218 (2001).
147. 545 U.S. 967 (2005).
148. *See Chevron*, 467 U.S. at 842–43.
149. *Id.* at 842.

first at whether the statutory language is at all ambiguous as to the issue settled by the agency interpretation and, second, whether Congress clearly intended a particular result.[150] If there is clear Congressional intent on an issue, there is no gap for an agency to fill with its own interpretation, and the agency is given no deference.[151]

If the unambiguous intent of Congress cannot be ascertained, the court must move on to step two of the *Chevron* analysis.[152] In step two, a court assesses whether the agency interpretation of the statute "is based on a permissible construction of the statute."[153] This is to say that a court must assess whether the agency interpretation is reasonable in light of the statutory scheme.[154] If the agency interpretation is, in fact, reasonable, the court is not to impose an interpretation it believes to be preferable to the one used by the agency.[155]

In the years after *Chevron*, the Supreme Court continually refined the *Chevron* doctrine. Among the most important cases refining the standard was *Mead*, where the Supreme Court reiterated that *Chevron* deference is due "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[156] However, the Court added that the amount of deference due to an agency was, with the exception of instances where Congress clearly felt that no formal procedures were necessary, a function of the formality of the process used by the agency in adopting a rule.[157] Thus, it became clear that the amount of deference due to an agency interpretation exists on a spectrum, with formal adjudications and formal rulemaking on the maximum deference end of the scale[158] and "policy statements, agency manuals, and enforcement guidelines" on the other end, requiring no *Chevron* deference.[159]

150. *Id.* at 842–43.
151. *Id.*
152. *Id.* at 843.
153. *Id.*
154. *Id.*
155. *See id.*
156. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).
157. *See id.* at 230–31.
158. *See id.*
159. *Id.* at 234 (internal citations omitted). *But see id.* at 235 (explaining that such informal agency interpretations may still warrant some level of deference based on their persuasiveness under the standard established in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

In the 2005 case *Brand X*, the Supreme Court again revisited *Chevron* to clear up how much deference is owed to an agency that interprets a statute against the backdrop of prior inconsistent agency and judicial constructions of a statute's text.[160] Regarding inconsistency with prior agency practices and interpretations, the Court stated that "[a]gency inconsistency is not a basis for declining to analyze [an] agency's interpretation under the *Chevron* framework."[161] While such inconsistency—if not sufficiently explained—could be grounds for challenging the change under the Administrative Procedure Act,[162] the Court held that inconsistency with prior practice alone does not change the level of deference due to an agency interpretation.[163]

Similarly, when an agency's interpretation conflicts with a court's prior interpretation of a statute, the "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[164] This is to say that previous judicial constructions of a statute only preclude further agency interpretations if the court found that the statute was complete and unambiguous and not subject to further interpretation by agencies or the courts.[165] Accordingly, *Chevron* deference is required unless a court previously found that agency interpretations were precluded under step one of the *Chevron* analysis.[166] Thus, absent a previous conclusive and binding court finding of statutory unambiguousness under step one of *Chevron*, a court must still defer to any reasonable agency construction of a statute if that construction was derived from a formal adjudication or rulemaking procedure.

2. The Form of the BIA's Revision Affirmed in *Ali*

According to the BIA decision in *Ali*, analyzed and deferred to by the Seventh Circuit, the CIMT analysis should be divided

160. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
161. *Id.* at 981.
162. 5 U.S.C. §§ 701–706 (2006).
163. *See Brand X*, 545 U.S. at 981.
164. *Id.* at 982.
165. *Id.* at 982–83.
166. *Id.*

into two distinct processes. The first process is effectively the traditional CIMT standard. A court uses the traditional record of conviction to determine what statute an individual was convicted of violating and then subjects that statute to the categorical and modified-categorical tests. In the second process—a new and separate test appended to the end of the traditional approach by the BIA in *Ali*—the court looks at the particular facts underlying the conviction to verify the results of the first process.

Using the facts of a case contained in additional documents to verify the veracity of a CIMT classification allows a court to dispense with the possible unfairness of the traditional CIMT analysis.[167] However, this additional step does not throw open the doors to an endless series of *ad hoc* determinations. Instead, it keeps the traditional approach in its entirety and then provides a second step that allows a court to examine information from the traditional record of conviction, or from substantively similar documents, for the limited purpose of verifying the presence of the elements described in the traditional analysis.[168] The traditional document restrictions remain, as do the elements of CIMTs identified in previous cases.

3. *Ali* and Polanski

Because *Ali* merely adds an additional verification step to the process, it does not affect the first-step review of the statute of conviction. The statutory rape statute that Polanski was convicted under would not magically become divisible on its terms. As such, his statute of conviction would remain categorically not a CIMT.[169]

However, the underlying *conduct* covered by the statute would be divisible into the two categories of conduct discussed by the court in *Quintero-Salazar*: the morally-turpitudinous variety to which Polanski pled guilty and the non-morally-turpitudinous variety based on a conviction stemming from an incidental difference in dates of birth.[170] In verifying the re-

167. *See* Ali v. Mukasey, 521 F.3d 737, 743 (7th Cir. 2008).

168. *See id.*

169. *See* Quintero-Salazar v. Keisler, 506 F.3d 688 (9th Cir. 2007).

170. *See id.* at 693 ("In other words, among the range of conduct criminalized by § 261.5(d), would be consensual intercourse between a 21-year-old (possibly a college sophomore) and a minor who is 15 years, 11 months (possibly a high school junior). That relationship may very well have begun when the older of the two was a high school senior and the younger a high school freshman and have con-

sults of the traditional approach in the Polanski matter, any reasonable court would find that Polanski committed a CIMT, especially in light of the near universal classification of non-strict liability statutory rape statutes as CIMTs.[171] In sum, because the California statutory rape statute could apply to both CIMT and non-CIMT conduct, the deference shown to the agency in *Ali* would allow an immigration court to look at the particular facts of Polanski's crime contained in the record of conviction. Based on these particular facts, the court could classify Polanski's crime as a CIMT.

D. Silva-Trevino*: Rewriting Everything*

Silva-Trevino[172] is the second recent reform of the CIMT standard. There, Attorney General Mukasey fundamentally rewrote the traditional approach to CIMT analysis. This new standard shifted the focus from a strict analysis of the statute of conviction to a focus on the particular acts underlying a conviction. The new standard not only rewrites the categorical approach, but also adds a new second step that effectively trumps the results of the revised categorical approach. These two significant changes will be discussed below, followed by an analysis of the Polanski facts under this new standard.

1. Rewriting the Categorical Approach

Both the traditional approach and the approach affirmed in *Ali* require courts to analyze the statute of conviction in isolation, as discussed above.[173] However, in *Silva-Trevino*, the Attorney General established that this traditional restriction is no longer binding.[174] Now, an immigration judge is required to use a "realistic probability" test in assessing whether a crime is

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tinued monogamously without intercourse for two to three years before the offending event. On its face, such behavior may be unwise and socially unacceptable to many, but it is not 'inherently base, vile, or depraved[ ]' . . . .").

171. See Adonia R. Simpson, *Judicial Recommendations Against Removal: A Solution to the Problem of Deportation for Statutory Rape*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 489 (2009), for a discussion of statutory rape in immigration law.

172. 24 I. & N. Dec. 687 (A.G. 2008).

173. *See supra* Part II.B–C.

174. *See Silva-Trevino,* 24 I. & N. Dec. at 698.

categorically a CIMT and not merely analyze a statute absent any real-world context.[175]

The realistic probability test—drawn from a Supreme Court case in the aggravated felony context that the Attorney General felt to be analogous[176]—is defined in the negative, looking to whether any actual case (as opposed to a hypothetical case) has ruled that conduct punishable under a particular statute was not a CIMT.[177] This test does not refer to whether any court has held that a particular crime is a CIMT in an immigration context, but instead refers to whether a case exists in *any* context applying the criminal statutory language in question to *conduct* that is not morally turpitudinous.[178] If no case applying a particular statute to non-morally turpitudinous conduct exists, then the statute, presumptively, categorically describes a CIMT.[179]

In other words, looking back to the California statute at issue in the Polanski matter, the Attorney General is instructing courts to look for a real case in which the statute was applied to non-morally turpitudinous conduct. This is to say that the Attorney General is not satisfied by the idea that the statute could hypothetically punish one of the two imaginary young lovers introduced above: he would want an actual case—which he terms a "realistic probability"—where the statute was applied in such a manner in order to trigger the reluctance that the *Quintero-Salazar* court exhibited.

2. A New Second Stage

If the results of the realistic probability test do not foreclose the potential presence of a CIMT, the Attorney General requires a "second-stage inquiry" to settle the CIMT question.[180] However, the Attorney General's approach differs from the BIA's second stage affirmed in *Ali* because it does not limit

175. *See id.*

176. The Attorney General drew the realistic probability test from the Supreme Court's opinion in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), where the Court established a uniform method—using the realistic probability test—to assess whether a state statute covers a broader range of aggravated felonies than a comparable federal statute.

177. *Silva-Trevino*, 24 I. & N. Dec. at 698.

178. *See id.*

179. *See id.*

180. *Id.* at 698–99.

the second stage inquiry to the traditional record of conviction or analogous documents.[181]

Under *Silva-Trevino*, if the documents contained in the traditional record of conviction cannot foreclose the possibility that an alien committed a CIMT, or if the result of the first-stage of the CIMT analysis remains ambiguous in any way, the immigration judge may look to "any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question."[182] Stated simply, in this second step, a court may examine *any* evidence regarding the underlying facts of a case, whether the evidence exists in court documents related to the case, other miscellaneous documents or reports, or was gathered through live testimony before an immigration judge.[183]

The Attorney General presented several justifications for his reforms. First, he noted that the language of the INA focuses the inquiry on the actions of individuals, not the intent of a legislature in drafting a statute.[184] Next, he rejected the applicability of the Sixth Amendment precedents in the CIMT context.[185] This is notable because it waves aside the idea that the Supreme Court's document limitations announced in *Shepard* and *Taylor* are binding for purposes of applying the CIMT standard.[186] Finally, the Attorney General dismissed the "administrative burdens" argument against an individualized test, noting that efficiency concerns are secondary when Congress clearly intended to exclude aliens individually guilty of committing CIMTs and that the Agency should be the final arbiter of what it wishes to spend its time on.[187]

3. *Silva-Trevino* and Polanski

In applying the loose and unpredictable *Silva-Trevino* standards to the Polanski case, an immigration judge could take one of two possible approaches. First, the immigration judge could find that there was no realistic probability that the statute could apply to non-morally turpitudinous conduct and deport Polanski based on a first-stage determination. Taking

181. *See id.* at 699–704.
182. *Id.* at 704.
183. *See id.*
184. *Id.* at 699–700.
185. *See id.* at 700–02.
186. *Id.*
187. *Id.* at 702–03.

this path depends on the existence of actual cases where the California statutory rape statute had been applied to conduct that was not morally turpitudinous. In other words, an immigration judge would have to conclude that no actual cases existed where the statute was used to convict someone—an alien or otherwise—based upon criminal conduct that was not morally turpitudinous. Such a conclusion would depend on the individual moral proclivities of a particular immigration judge in looking at prior statutory rape cases because she would be the arbiter of what punished acts in the past were truly morally acceptable.

That said, in *Quintero-Salazar v. Keisler*,[188] the Ninth Circuit stated that it believed it was possible that the statute at issue in the Polanski case applied to both CIMTs and non-CIMTs.[189] It would take quite a bold immigration judge to attempt to administratively nullify the judgment of his or her geographical circuit, even absent the existence of any case law applying the statute in question to non-morally turpitudinous acts. In any event, because it is now a possibility under *Silva-Trevino* that Polanski could be removed in the "traditional approach" stage, it is clear that the first-stage inquiry has significantly changed the traditional standard.

Second, if the morally turpitudinous nature of the statute remains unclear after the categorical analysis—as it probably would—the Immigration Court would then look to other "necessary or appropriate" evidence in the second stage of the *Silva-Trevino* analysis. This is where the unpredictability of decisions and total lack of concern for efficiency under *Silva-Trevino* enter in full force.

In the second stage of the *Silva-Trevino* analysis, per the comments of the Attorney General in *Silva-Trevino* itself, the fact that Polanski admitted that he knew the girl to be only thirteen years old should be dispositive evidence of moral turpitude.[190] However, such a ruling is not certain. A court could decide that no further investigation would be necessary or appropriate and order Polanski removed, or it could simply accept the results of the traditional CIMT standard and summarily grant him adjustment or entry. As a third alternative, a particular immigration judge may feel that she does not have enough evidence to make a decision at all. In such a case, the

188. 506 F.3d 688 (9th Cir. 2007).
189. *Id.* at 694.
190. *See* 24 I. & N. Dec. at 703.

judge could look to any other "necessary or appropriate" evidence, such as court documents, news media stories, or even live testimony from Polanski or another witness. However unlikely it would be, there is nothing in *Silva-Trevino* to stop a judge from completely retrying a criminal case against an alien.

Because the second stage *Silva-Trevino* analysis is effectively unlimited, on its face, *Silva-Trevino* establishes a very loose and unpredictable standard.

III. *JEAN-LOUIS*: A CRITIQUE OF *ALI* AND *SILVA-TREVINO*

Having examined the doctrinal and practical differences between the two CIMT reform proposals and the traditional approach, this Comment now moves to the Third Circuit's complete rejection of the *Ali* and *Silva-Trevino* standards in *Jean-Louis v. Attorney General*.[191] In analyzing *Jean-Louis*, it is important to understand its larger significance. *Jean-Louis* is not merely a case where a circuit declines to follow the precedents of an agency and another circuit. Instead, *Jean-Louis* is the first volley against the proponents of CIMT reform. Its reasoning is likely to stand as a paradigm for like-minded jurists in the future, and has already been cited by other circuits to support disregarding *Silva-Trevino*.[192] As such, it is especially important to highlight the faulty reasoning that underlies its blanket rejection of reform.

This section addresses the Third Circuit's critique in two parts. First, Section A discusses what appears to be a relatively unremarkable attack on *Ali* where the Third Circuit simply disagreed with the Seventh Circuit's reasoning and reaffirmed the traditional approach.[193] While the Third Circuit's reason for disregarding *Ali* is ultimately unconvincing, it is within the prerogative of the Third Circuit to decline to follow the precedent of another circuit affirming an unpublished BIA opinion. Such a prerogative does not exist, however, for the Third Circuit's refusal to defer to the Attorney General's ruling in *Silva-Trevino*. The refusal to follow *Silva-Trevino* is discussed in Section B. While *Jean-Louis* does make some worthwhile critiques of *Silva-Trevino*, the Third Circuit must nevertheless defer to the Attorney General's opinion in *Silva-Trevino*

191. 582 F.3d 462 (3d Cir. 2009).
192. *See*, *e.g.*, Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010).
193. *See generally Jean-Louis*, 582 F.3d at 462.

per the requirement of administrative deference under *Chevron*.

A. The Third Circuit Rejects Ali

This section addresses the Third Circuit's rejection of *Ali*'s deference to the BIA. It begins with a discussion of the burden issue identified in *Jean-Louis*. Next, it discusses the BIA efficiency pronouncement that the *Jean-Louis* court fabricates out of dicta to underline its greater argument. Finally, this section disputes the Third Circuit's argument that the longevity of a rule can justify its unfairness.

Leading off its attack on *Ali*, *Jean-Louis* rejected the Seventh Circuit's contention that the conservation of judicial resources rationale does not " 'come into play' in the immigration context."[194] The *Jean-Louis* court noted that Immigration Courts are overworked and quoted the Ninth Circuit as stating that "[i]f we were to allow evidence that is not part of the record of conviction . . . we essentially would be inviting the parties to present any and all evidence bearing on an alien's conduct[.]"[195]

While America's immigration courts are clearly overburdened,[196] this critique fundamentally misunderstands the Seventh Circuit's contention in *Ali*. *Ali* does not allow for an unlimited inquiry into "any and all evidence" related to the moral turpitude question; it merely allows a court to consult equally probative legal documents not traditionally included in the record of conviction to verify the court's own finding.

Flipping through a few pages in a file to examine a document routinely provided to a court should not be unduly taxing upon a judge.[197] If the categorical approach is at all accurate

194. *Id.* at 478.

195. *Id.* at 478–79 (quoting Tokatly v. Ashcroft, 371 F.3d 613, 621 (9th Cir. 2004)).

196. *See* AMERICAN BAR ASS'N COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES, at ES-5–7 (2010), *available at* http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf.

197. Given how overburdened the immigration court system is, each additional case assigned to an immigration judge *is* an unreasonably excessive additional burden, *see id.*, but that is not to say that immigration judges *should* be able to dispense with fundamental principles of fairness simply because the system has not provided adequate resources for them to carry out their important duties. In the grand scheme of the additional burdens that could be placed upon immigra-

in identifying CIMTs, this additional step of verification would take a very small amount of time in the vast majority of cases as it will simply affirm what a judge already knows from performing the categorical approach. If, however, the verification stage fails to confirm the results of the categorical approach, the respondent *did not commit any variety of crime involving moral turpitude*. Thus, whatever minimal extra burden the verification stage will place on courts, such confirmation of results is worth the effort because it leads to more accurate results. The Third Circuit's critique instead eschews accurate application of the law based on a specious argument that requiring familiarity with the facts of a particular case would wildly overtax the Immigration Court system.

The Third Circuit next addressed the Seventh Circuit's assertion that "how much time the agency wants to devote to the resolution of particular issues is, we should suppose, a question for the agency itself rather than the judiciary."[198] The Third Circuit rejected this argument out of hand, stating that there was no need to reassess the validity of such a claim because the BIA already considered, and rejected, the issues raised by the Seventh Circuit twelve years earlier[199] in *Pichardo-Sufren*[200].

This critique rests upon an impermissible variety of legal argument. *Ali* merely affirms *the BIA's* choice to look at a presentence report to verify the existence of moral turpitude in a particular case.[201] There are only two interpretive choices here: either the previous statements of the BIA on the matter are distinguishable, or the BIA has overruled itself. In reality, it was the former, as the question that the BIA settled in *Pichardo-Sufren* regarded whether it would look behind a record of conviction in an aggravated felony context to determine whether an alien in removal proceedings actually committed the crime for which he was convicted.[202] The BIA held that, based on constitutional and efficiency concerns it listed in dicta, it is not the duty of an immigration judge to retry a criminal case to determine whether an alien actually did what she was convicted by a jury of doing.[203]

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tion judges, reading a few paragraphs in files already available to them can hardly be characterized as an insurmountable burden.

198. *Jean-Louis,* 582 F.3d at 479.

199. *Id.*

200. Pichardo-Sufren, 21 I. & N. Dec. 330, 335–36 (BIA 1996).

201. *See* Ali v. Mukasey, 521 F.3d 737 (7th Cir. 2008).

202. *Pichardo-Sufren*, 21 I. & N. Dec. at 335.

203. *Id.*

Eleven years later, in *Gertsenshteyn*,[204] a published, authoritative opinion, the BIA distinguished *Pichardo-Sufren* in situations analogous to those where a CIMT was present. *Gertsenshteyn* held that:

> where Congress has defined an aggravated felony to include a component . . . that is neither an element of the underlying offense nor a basis for a sentence enhancement, and thus would not normally be alleged in a criminal charging instrument, it would defeat the statute to require the application of the categorical (or modified categorical) approach, in which only the statute itself and the limited materials constituting the record of conviction may be consulted.[205]

In other words, when removability is dependent upon some element not in any record of conviction—such as the presence of an aggravating factor or moral turpitude—the BIA feels that it is appropriate to seek out the presence of that element in the specific facts of a case.[206] The BIA reached this conclusion notwithstanding the *Pichardo-Sufren* efficiency concerns, which the BIA felt were limited to situations where the aggravating factors were, in fact, listed in the statute of conviction and, as such, would not require delving into the particular facts of a case.[207] Instead, the BIA reasoned that the additional burden posed by looking to the facts of a case for a discrete factor was "minor."[208]

While the Second Circuit disagreed with the BIA's holding in *Gertsenshteyn*,[209] and the Third Circuit apparently shares the Second Circuit's concerns, it is simply not true that the BIA has spoken to the issue at hand in *Jean-Louis* and disposed of it, contrary to the assertions of the Third Circuit. The BIA has specifically stated that the efficiency concerns that the Third Circuit is so troubled by are "minor" and should not stand in the way of the just disposition of a case.[210]

Indeed, the BIA continues to apply the *Gertsenshteyn* rule, consistently distinguishing *Pichardo-Sufren* whenever INA

204. Gertsenshteyn, 24 I. & N. Dec. 111 (BIA 2007), *rev'd*, Gertsenshteyn v. U.S. Dept. of Justice, 544 F.3d 137 (2d Cir. 2008).

205. *Id.* at 114.

206. *Id.*

207. *See id.* at 116.

208. *Id.*

209. *See* Gertsenshteyn v. U.S. Dept. of Justice, 544 F.3d 137 (2d Cir. 2008), *rev'g* 24 I. & N. Dec. 111 (BIA 2007).

210. *Gertsenshteyn*, 24 I. & N. Dec. at 116.

provisions turn on elements that are elements of a particular statute of conviction. For instance, in *Matter of Babaisakov*,[211] the BIA applied *Gertsenshteyn* to the "amount of loss" element in removable fraud convictions,[212] a fact not lost on the Seventh Circuit.[213] The *Jean-Louis* court addressed the continued BIA use of this rule by ignoring it and dealing with the Seventh Circuit's use of the rule by asserting that the Seventh Circuit referred to *Babaisakov* improperly in that *Babaisakov* applies only to a particular variety of aggravated felony conviction.[214] However, since the Seventh Circuit never said otherwise, and because it only used *Babaisakov* merely as an example of when additional information may be necessary, it is hard to see how this constitutes any type of real critique.

In this way, the *Jean-Louis* court effectively disregarded the BIA's current holdings on efficiency concerns in favor of some kind of "efficiency rule" the Third Circuit derived from an off-point, twelve-year-old statement the BIA made in dicta.[215] Further, the Third Circuit's efficiency-rule argument ignores the fact that the Attorney General *is* the agency.[216] If ever there was such a BIA efficiency rule, the Attorney General has unambiguously abrogated it—the BIA is a creation of the Attorney General and is beholden to the Attorney General's rulings on all immigration matters, and the Attorney General's holding in *Silva-Trevino* overruled any BIA rules that emphasize efficiency to the exclusion of all other considerations.[217]

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211. *Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007).

212. *Id.* at 312–13.

213. Ali v. Mukasey, 521 F.3d 737, 742 (7th Cir. 2008).

214. Jean-Louis v. Att'y Gen., 582 F.3d 462, at 480 (3d Cir. 2009).

215. *Id.* at 479. The court apparently concluded that the BIA "clearly and unequivocally" resolved the issue against individual inquiries in a manner that can never be altered or departed from by the BIA with this statement from *Pichardo-Sufren*:

> If we were to make an exception here and accept the respondent's testimony as proof of his deportability . . . there would be no clear stopping point where this Board could limit the scope of seemingly dispositive but extrinsic evidence bearing on the respondent's deportability. We believe that the harm to the system induced by the consideration of such extrinsic evidence far outweighs the beneficial effect of allowing it to form the evidentiary basis of a finding of deportability.

Id. (quoting Pichardo-Sufren, 21 I. & N. Dec. 330, 335–36 (BIA 1996)).

216. *See* INA § 103, 18 U.S.C. § 1103 (2006). This fact does not seem to be lost on the Third Circuit, given that it refers to the Attorney General as "the agency" numerous times in its opinion. *See, e.g.*, *Jean-Louis*, 582 F.3d at 469.

217. *See id.*

Therefore, the Third Circuit's argument here rests upon an unquestionably overruled proposition.

Finally, the Third Circuit asserted that, even if the current rule promotes injustice, there have been no changes to the law that warrant any departure from its previous CIMT standard.[218] This argument defies reason. Simply because a law has promoted injustice for over a century should not warrant the continuation of the manifest injustice effected by the old standard. It is also unclear why a complete rewriting of the legal standard applied to CIMT cases by the Attorney General would not, in itself, represent "a significant development—legal, policy, or otherwise—justifying departure" from such a system of known injustice.[219]

While the Third Circuit is entitled to disagree with the Seventh Circuit and the BIA, *Jean-Louis* does a poor job of justifying its split with the standard affirmed in *Ali*.

B. The Third Circuit Rejects Silva-Trevino

Having dealt with the *Ali* decision, the Third Circuit launched its attack on *Silva-Trevino* by outlining two ways in which *Silva-Trevino* departs from established precedent. First, *Silva-Trevino* "eschews [the categorical approach's practice] of analyzing the least culpable conduct hypothetically sufficient to sustain conviction," and, second, it "renders the strict 'categorical' approach not 'categorical.' "[220] Because the Third Circuit found that *Silva-Trevino* was based on an impermissible reading of an unambiguous statute, it held that the Attorney General's ruling was not entitled to *Chevron* deference.[221]

This section argues that *Jean-Louis* does not make a valid argument for not deferring to the Attorney General under *Chevron*. Subsection 1 discusses how the Third Circuit bafflingly chooses to focus its *Chevron* stage-one analysis on the lack of ambiguity in a single word—convicted—and then ignores the remainder of the Attorney General's argument in

218. *See Jean-Louis*, 582 F.3d at 479.

219. *Id.*

220. *Id.* at 471.

221. *See* discussion of *Chevron* deference, *supra* Part II.C.1. In general, an agency's interpretation of an ambiguous statute within its purview and expertise is entitled to deference. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps."); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

Silva-Trevino. Subsection 2 then looks at how the Third Circuit ignores *Brand X* and tries to cure an ambiguity it previously claimed did not exist by arguing that "crimes involving moral turpitude" is a term of art, even though no court—including the Supreme Court, in a case that should have been directly on point—has ever come to such a conclusion before.

1. Ambiguity

Stage one of the *Chevron* analysis looks to whether a statute contains an ambiguity or gap that has impliedly been left to agency guidance to interpret or fill.[222] The Third Circuit began its argument that deference is not owed to the Attorney General's opinion in *Silva-Trevino* by asserting that there is no ambiguity in the term "convicted" and that any such "ambiguity that the Attorney General perceives in the INA is an ambiguity of his own making."[223] Therefore, according to the Third Circuit, the INA is unambiguous in dictating a CIMT standard.[224]

For instance, argues the Third Circuit, take the statutory language: "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime."[225] The court believes that, contrary to long-standing precedents, the Attorney General imagines ambiguity between "convicted" and "committed."[226] The court then notes that "convicted" has forever been held by the BIA, courts of appeals, and prior Attorneys General to mean only "convicted," not "committed," for purposes of applying the categorical approach.[227] Additionally, "convicted" is clearly defined in the INA.[228]

What any of this has to do with the ambiguity of that statutory phrase or the arguments of the Attorney General is completely unclear; the Third Circuit's analysis is borderline nonsensical. First off, even if the *word* "convicted" is totally unambiguous and means exactly what it says in the statute (something that nobody on Earth has ever called into question

222. *Chevron*, 467 U.S. at 842–43.
223. *Jean-Louis*, 582 F.3d at 473.
224. *Id.*
225. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006).
226. *Jean-Louis*, 582 F.3d at 473.
227. *Id.*
228. *Id.* at 474 (citing 8 U.S.C. § 1229a(c)(3)(B)).

in this context), the *statute* may still be unclear. The Attorney General asserted that looking at whether an alien was convicted of a CIMT, at least intuitively, is very different than looking at whether an alien "admits committing acts which constitute the essential elements of [a CIMT]."[229] Looking purely at whether an alien was convicted of a CIMT, the statute at least plausibly lends itself towards the categorical approach's superficial analysis of a statute (although that is hardly an uncontentious proposition).[230] On the other hand, the phrase "committing acts" could easily have at least something to do with a person's actual actions.[231] The Attorney General is doubtlessly not imagining a difference between the two terms,[232] and none of the statutory language *necessarily* calls for the application of the categorical approach, even if such an approach could plausibly be used consistently with the statutory dictates.

Furthermore, the fact that, until recently, courts have uniformly interpreted the statute to require the categorical approach does not render the statute unambiguous. *Chevron* refers to ambiguity *in the statute*; it does not say anything about what ambiguity may remain after the effect of judicial interpretation of that statute.[233]

The standard under *Chevron* is whether "Congress had an intention on the *precise* question at issue" ascertainable from statutory construction, not whether a lot of courts have cobbled together a workable standard over the years.[234] No top-level administrative guidance, until now, has addressed this issue,[235] nor has there been a *Brand X* definitive finding of unambiguousness of these provisions under step one of *Che-*

229. Silva-Trevino, 24 I. & N. Dec. 687, 692 (A.G. 2008).

230. *See id.* at 693.

231. *Id.*

232. Indeed, the fact that the two terms have separate meanings figured heavily in the 1952 override of President Truman's veto of the INA. *See supra* notes 50–52 and accompanying text.

233. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). Short of a previous clear finding of non-ambiguousness by the court during the first step of a *Chevron* analysis, which has not occurred here, *Chevron* deference is required. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. 545 U.S. 967, 982–83 (2005).

234. *Chevron,* 467 U.S. at 843 n.9 (emphasis added).

235. The two Attorney General advisory opinions cited in *Jean-Louis* are not binding upon any court or agency; indeed, they are fairly poor representations of the point for which they are supposed to stand. Jean-Louis v. Att'y Gen., 582 F.3d 462, 472 n.12 (3d Cir. 2009).

vron.[236] Therefore, it cannot be said that the agency has spoken definitively on the meaning of this phrase or that the agency was judicially foreclosed from doing so by prior interpretation. Thus, *Silva-Trevino* must be credited as creating the definitive CIMT standard under *Chevron*.

2. "Crimes Involving Moral Turpitude" as a Term of Art

Next, the Third Circuit asserts that the Attorney General impermissibly read the INA by treating " 'crime' and 'involving moral turpitude' as distinct grammatical units and, accordingly, [wrongly] reason[ed] that the [latter] clause . . . modifies 'crime.' "[237] This is impermissible, according to the Third Circuit, because "crime involving moral turpitude" is a "term of art, predating even the immigration statute itself."[238] Thus, because terms of art are always indivisible, "the central inquiry is whether moral depravity inheres in the crime . . . not the alien's underlying conduct."[239] Because this argument is not based upon any prior judicial identifications of "crime involving moral turpitude" as a term of art, and misuses the English language, it is invalid.

If the phrase "crimes involving moral turpitude" existed as an indivisible term of art prior to its first arrival in an immigration statute, as the Third Circuit suggests, this fact appears to have eluded the attention of courts and scholars for over a century. Justice Jackson, in his dissent to *Jordan v. De George*,[240] at least fifty years after the supposed advent of this term of art, straightforwardly stated that "[the phrase 'crime involving moral turpitude'] is not one which has settled significance from being words of art in the profession"—a sentiment not discredited by the majority in that case.[241] Further, as the statutory history summarized in Part I demonstrates, while the Third Circuit is correct that the term does predate the passage of the INA, the INA is not the operative statute at issue. "Crimes involving moral turpitude" existed in its current form

236. *See* Ali v. Mukasey, 521 F.3d 737, 742 (7th Cir. 2008).
237. *Jean-Louis*, 582 F.3d at 477.
238. *Id.* (citing a completely unsupportive, non-immigration case from 1902 and a discussion of the term "moral turpitude," not "crime involving moral turpitude").
239. *Id.*
240. 341 U.S. 223, 234 (1951) (Jackson, J., dissenting).
241. *Id.*

in immigration law long before the INA came into existence. Indeed, the oldest citation the Third Circuit could find for this supposed term of art is only from 1902,[242] more than a decade after the first appearance of the term "moral turpitude" in immigration law.[243] In fact, this early case cited by the Third Circuit does not at all support the Third Circuit's argument because, in the case, the phrase is used in the exact way the Third Circuit accuses the Attorney General of using it.[244]

Further, even if the phrase has turned into a term of art at some point since Justice Jackson analyzed it, it remains true that *Chevron* still refers only to *statutory* ambiguity, not to whether any judicial ambiguity remains after a century of precedent if said precedent has not made an explicit *Brand X* ruling. The only credible argument that the Third Circuit makes from the statutory phrase itself is that "[b]ecause the INA requires the conviction of a *crime*—not the commission of an *act*—involving moral turpitude, the central inquiry is whether moral depravity inheres in the crime . . . not the alien's underlying conduct."[245] Of course, given that *Black's Law Dictionary* defines "crime" as "[a]n *act* that the law makes punishable," the Attorney General was surely justified in finding some connection between a crime and an act.[246]

Thus, the Third Circuit's rejection of *Silva-Trevino* falls as flat as its critique of *Ali*. While the Third Circuit is not bound to follow precedents of other circuits, the Third Circuit may not similarly disregard the Attorney General's ruling in *Silva-Trevino*. Accordingly, the treatment of *Silva-Trevino* in *Jean-Louis* was in error.

C. What Should Be Salvaged from Jean-Louis

Despite the flaws of *Jean-Louis*, the efficiency and predictability concerns *Jean-Louis* invalidly touches upon with *Ali* stand as legitimate critiques of *Silva-Trevino*.[247] To say that *Silva-Trevino* is not concerned with administrative efficiency or

242. Baxter v. Mohr, 76 N.Y.S. 982 (N.Y. City Ct. 1902).

243. GROUNDS FOR EXCLUSION, *supra* note 32, at 10.

244. Indeed, it looks to the particular conduct committed by the defendant in that case. *Baxter*, 76 N.Y.S. 982 (N.Y. City Ct. 1902). Moreover, *Baxter* has nothing at all to do with immigration law. *See id.*

245. Jean-Louis v. Att'y Gen., 582 F.3d 462, 477 (3d Cir. 2009).

246. BLACK'S LAW DICTIONARY 399 (8th ed. 2004) (emphasis added).

247. *See Jean-Louis*, 582 F.3d at 478–79.

predictability would be an understatement.[248] Its loosely-defined "necessary and appropriate" guideline for permissible evidence could shove CIMT provisions across the border into unconstitutional vagueness, possibly even forcing the Supreme Court to revisit its earlier rulings that the CIMT provisions in the INA were not unconstitutionally vague.[249]

However, the fact that *Silva-Trevino* is imperfect does not warrant a reaffirmation of the overly-formalistic traditional approach. A more reasonable approach can be built upon the BIA's reasoning in cases like *Gertsenshteyn* and *Babaisakov*, as affirmed in the CIMT context by the Seventh Circuit in *Ali*. Such an approach is further supported by a recent Supreme Court decision on the aggravated felony standard.

IV. AN ENHANCED *ALI*: A PROPOSAL

Having demonstrated the faulty reasoning of *Jean-Louis* and the potential issues with a broad adoption of the *Silva-Trevino* standard, this Comment now offers an affirmative proposal for reform. This proposal seeks to institute a new CIMT standard that addresses the problems of both over-inclusiveness and under-inclusiveness ignored by the traditional approach, while also addressing the concerns of administrative efficiency and predictability ignored in *Silva-Trevino*.

The proposed standard is roughly based upon the two processes defined in the *Ali* opinion and is reinforced by the Supreme Court's reasoning in a recent case dealing with aggravated felonies in the area of immigration law. Section A will begin with a discussion of that Supreme Court precedent. Section B will lay out the proposed new CIMT standard.

A. Nijhawan v. Holder

In *Nijhawan v. Holder*,[250] the Supreme Court unanimously upheld the addition of a fact-specific analysis to the *Shepard-Taylor* categorical/modified-categorical approach in the aggravated felony context. Similar to the traditional CIMT analysis, traditional aggravated felony jurisprudence prohibited courts

248. *See supra* Part II.D.3 (discussing potential outcomes of the Polanski matter under the *Silva-Trevino* standard).

249. *See* Jordan v. De George, 341 U.S. 223 (1951) (holding that CIMT-based immigration laws are not unconstitutionally vague).

250. 129 S. Ct. 2294 (2009).

from looking beyond the statute and record of conviction in determining whether a felony was aggravated.[251]

In *Nijhawan*, the Supreme Court was presented with an alien who had successfully conspired with three other men to defraud banks out of more than $600 million in a metal-trading scheme.[252] However, because none of the various statutes Nijhawan violated specified that losses had to exceed $10,000—the aggravating factor that made an offense deportable under the INA—Nijhawan's crimes could not categorically be classified aggravated felonies.[253] However, the statutes of conviction were divisible, so the court moved on to the second-stage, modified-categorical approach, and looked for the amount of losses in the record of conviction.[254] Unfortunately, the jury did not make any findings as to the amount of losses, nor was an amount of losses found in any other documents in the record of conviction.[255]

On these facts, the Supreme Court held that "obtaining from a jury a special verdict on a fact that . . . is not an element of the offense" was not necessary to prove the amount of loss in a particular case.[256] Thus, looking beyond the record of conviction was authorized in this situation because it would not be overly burdensome for a court to look at other reliable judicial documents not traditionally in the record of conviction to determine the amount of loss.[257]

The Court in *Nijhawan* noted the absurdity of requiring strict adherence to the modified-categorical approach when facts relevant to the aggravated nature of a crime are easily attained by looking at documents already possessed by the court, but are not in the traditional record of conviction.[258] This raises the question in the context of CIMT analyses: If there is low-hanging fruit necessary to ensure a fair result, why should courts close their eyes and pretend that it does not exist? That

251. *Id.* at 2298–99, 2303.

252. *See* Robert F. Worth & Riva D. Atlas, *Four Men Are Charged With $600 Million Bank Fraud Linked to Metal Trading*, N.Y. TIMES, May 15, 2002, *available at* http://www.nytimes.com/2002/05/15/business/four-men-are-charged-with-600-million-bank-fraud-linked-to-metal-trading.html?pagewanted=all&src=pm.

253. *Nijhawan*, 129 S. Ct. at 2303.

254. *Id.*

255. *Id.* at 2302–03.

256. *Id.* at 2298.

257. *Id.*

258. Of note, however, the *Jean-Louis* court considers *Nijhawan* to be completely inapplicable, even by analogy, to the CIMT analysis. *See* Jean-Louis v. Att'y Gen., 582 F.3d 462, 480 (3d Cir. 2009).

is, why should courts look only at a criminal statute and record of conviction when they could ensure more just results by simply reviewing the record?

B. A Proposal

A uniform system should be established across all Circuit Courts that preserves the categorical and modified-categorical approaches in a single, traditional form.[259] However, unlike in the past, the traditional approach should be tempered by the second-stage checking mechanism supported by the *Ali* court and informed by the Supreme Court's reasoning in *Nijhawan*. This will not only serve to make the system more fair—something sorely lacking in the removal context since the demise of the JRAD—but will also keep in mind the burdens on immigration courts ignored by the Attorney General in *Silva-Trevino*.

The traditional categorical approach ought to remain and constitute the first step of the analysis. That is, courts should first look to the language of the statute of conviction to determine whether it necessarily refers to morally turpitudinous conduct. The traditional categorical approach would not, however, serve as the final categorizer of statutes of conviction. Under the new proposal, this first step could produce two types of results. First, in situations where the categorical approach would have traditionally been dispositive, it would now only establish a presumption that a particular criminal either did or did not commit a CIMT. Second, in all other situations (that is, when the modified-categorical approach would have been referred to), it would establish no presumption and merely pass the analysis onto the second step in the process.

Going back to the Polanski case, the application of this first step would produce the second result. The statute Polanski was convicted under potentially refers to CIMTs (like the one committed by Polanski, discussed above in Part II.A) and non-CIMTs (like the hypothetical involving the young lovers' tryst, discussed above in Part II.B.2). Therefore, the first-step analysis would not result in any presumptions and would defer the analysis to the second step. During the second stage of the analysis, the court would review the facts of the particular crime to ultimately determine whether the crime is a CIMT. If

259. *See supra* Part I.B (discussing the traditional standards).

the first stage had created a presumption, the second stage would require a strong showing of facts to overcome that presumption. If the first stage had not created a presumption, the judge would base her entire CIMT determination on the particular facts uncovered in the second stage. This second stage is very similar to the verification stage discussed in *Ali*, only with the allocation of the burdens more clearly established.

In the interest of administrative efficiency,[260] the Department of Homeland Security ("DHS") would assume the burden of producing a complete paper record of conviction, including those additional documents described by the *Ali* and *Nijhawan* courts as analogous to those in the traditional record of conviction. Because the burdens on the DHS's time and resources are comparable to those on the immigration courts, a DHS trial attorney would be unlikely to demand the review of extraneous evidence and take on the associated additional administrative burden of having to integrate it into a case. Thus, the efficiency concerns announced in the *Jean-Louis* opinion relating to noncitizens attempting to bury the courts in evidence would largely take care of themselves.

This aspect also better ensures fairness in the system because the burden of production is placed on the party with better access to the required documents. This feature is important because it is unlikely that a noncitizen respondent would be equipped to produce a complete record of conviction, especially given the lack of legal assistance possessed by the average noncitizen respondent and the likelihood that she would be in detention.

Armed with this paper record, and only this paper record—thereby eliminating the possibility of *Silva-Trevino* mini-trials—the immigration judge would review the facts underlying the conviction. In situations where the first step resulted in a presumption, the record of conviction would be reviewed for support of the presumption established by the categorical approach. If the facts support this presumption, the presumption holds, and the noncitizen respondent is either ordered removed or is granted status accordingly with the requisite showing of clear and convincing evidence presumed. If the

260. A necessary interest given the very high burdens placed on the modern understaffed and underfunded Immigration Courts. *See* Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57 (2008).

presumption is not supported, and a CIMT is present in the case by clear and convincing evidence according to the traditional common law analysis of what constitutes a CIMT, the noncitizen respondent would be removed. If a CIMT is clearly not present, or is not demonstrably present by clear and convincing evidence, regardless of the presumption established by the categorical approach, removal of the noncitizen respondent would be cancelled. An example of this last situation is where the DHS fails to provide a complete record of conviction. There, the government will not have met its burden of production, and the case must be dismissed.

If the first stage inquiry creates no presumption, the facts of the case would be analyzed by the court, based on the paper record—as the facts were analyzed by the Supreme Court in *Nijhawan*—to determine the presence of a CIMT on an *ad hoc* basis. Again, if a CIMT is not demonstrably present by clear and convincing evidence, removal of the noncitizen respondent cannot proceed.

In the Polanski case, the second-step review of the paper record would, absent a failure by the State in producing his record of conviction, show that Polanski committed a CIMT by clear and convincing evidence. Therefore, Polanski would be removed or barred entry under this standard. Congressional intent to remove and bar those convicted of CIMTs such as Polanski will have been effected in a manner that would not shock the average American if she were to learn about it.

Because this proposal accounts for administrative efficiency better than *Silva-Trevino* while still addressing the injustice inherent in the binary nature of the traditional approach, it offers a better path forward than the rigid adherence to tradition advocated by the Third Circuit in *Jean-Louis*.

CONCLUSION

While the new CIMT standards promoted in *Silva-Trevino* and *Ali* are imperfect, they demonstrate a willingness to expose the old, formalistic CIMT standard to the light of day. The Third Circuit's arguments in *Jean-Louis*, while representing the response of traditional jurisprudence on this matter, are ultimately misguided and stand as a barrier to the guarantee of a fair and just outcome for all aliens who pass through the American immigration system. A new system that balances the issues of fairness and efficiency must be allowed to overcome ob-

jections from those who would prop up a manifestly unjust interpretation of an arcane phrase grounded in nothing but formalistic nonsense.