Excerpts from Living With *Silva-Trevino*[1]

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§3.1 I. Introduction

On November 7, 2008, only two months before leaving office, Attorney General Mukasey decided *Matter of Silva-Trevino*,[2] in which he greatly modified the traditional analysis used to determine whether a given conviction constitutes a crime of moral turpitude (CMT) for removal purposes, if, indeed, he did not virtually scrap 100 years of jurisprudence altogether. He held that under certain circumstances, the immigration authorities may examine evidence beyond the record of conviction to decide whether the noncitizen in fact *committed* a crime of moral turpitude. The traditional categorical analysis did not allow this. This decision also uses different language to define the term "crime of moral turpitude," although it is not clear whether the definition has significantly changed.

On June 15, 2009, a unanimous Supreme Court in *Nijhawan*[3] reaffirmed the strict categorical analysis for deciding whether a conviction falls within a generic definition of a conviction-based ground of removal. It did allow evidence beyond the record of conviction to be used in limited circumstances, but it appears that "crime of moral turpitude" is not one of those circumstances. The current Attorney General has already been asked to vacate *Silva-Trevino* on a number of grounds, and it now appears that *Silva-Trevino* is inconsistent with the Supreme Court's categorical analysis handed down more recently in *Nijhawan*. If *Silva-Trevino* is vacated, the courts will likely continue to use the normal categorical analysis to determine whether a conviction is a crime of moral turpitude. Until then, while *Silva-Trevino* remains the law, this discussion will suggest how immigration counsel can use it in moral turpitude determinations.

A number of descriptions of this important decision have been published. After Mukasey issued *Silva-Trevino*, counsel for Mr. Silva-Trevino filed a motion for reconsideration, supported by an amicus curiae brief,[4] raising many powerful arguments why this decision should be vacated and the case reconsidered. The Attorney General denied this motion on January 15, 2009, a few days before leaving office. An additional motion for reconsideration has been filed, this time before incoming Attorney General Eric Holder, but it has not yet been decided. These motions provide an excellent checklist of objections to the *Silva-Trevino* analysis that counsel can raise in immigration proceedings and petitions for

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[2] Matter of Silva-Trevino, 24 I. & N. Dec. 687 (A.G. November 7, 2008).

[3] *Nijhawan v. Holder*, 557 U.S. ___, 129 S.Ct. 2294 (2009)(applying categorical analysis under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i)(offense involving fraud or deceit with a loss to the victim(s) in excess of $10,000)). See N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.7(E), 19.74 (2007).

[4] The brief of amici is posted at http://www.aila.org/Content/default.aspx?docid=27391. DHS filed a response to the motion to reconsider, and amici submitted a reply on January 6, 2009. See www.ilrc.org/criminal/php.

review. Every circuit, except the Seventh,[5] has held the traditional categorical analysis applies to determining whether a conviction constitutes a CMT, and *Silva-Trevino* may therefore have little or no impact at the end of the day. The Second Circuit has already rejected a similar effort by the BIA to modify the categorical analysis with respect to a different ground of deportation,[6] and other circuits may well follow suit, especially in view of the strength of the arguments against *Silva-Trevino* made in the motions for reconsideration mentioned above.

What do we do in the meantime? What has so far received less attention is the question: How can immigration counsel best represent immigrants in removal proceedings involving alleged crimes of moral turpitude under *Silva-Trevino*? What do we do before an Immigration Judge or BIA that feels bound to abide by *Silva-Trevino*? That is the subject of this discussion.

Granted *Silva-Trevino* contains language damaging to respondent's chances of persuading an immigration judge that a given conviction is not a CMT. The methodology, however, leaves more arguments open to respondents than might at first appear. We will outline how to interpret *Silva-Trevino* so that it will minimize damaging consequences to respondents and undercut the government's ability to establish that a given conviction is a CMT, while remaining faithful to what the former Attorney General says he is doing.

Summary. The Attorney General outlined the new CMT analysis as follows:

> In short, to determine whether an alien's prior conviction triggers application of the Act's moral turpitude provisions, adjudicators should: (1) look first to the statute of conviction under the categorical inquiry set forth in this opinion and recently applied by the Supreme Court in *Duenas-Alvarez*; (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator

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[5] *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. Apr. 4, 2008) (neither the *Taylor* categorical analysis, nor the limitation to the record of conviction for determining the nature of a conviction for immigration purposes, strictly applies to the determination of whether a conviction is a crime involving moral turpitude).

[6] *Gertsenscheyn v. USDOJ*, 544 F.3d 137 (2d Cir. Sept. 25, 2008). The Supreme Court, however, has indicated the Second Circuit was incorrect in its analysis. See *Nijhawan, supra*, at 2300-2301.

determines is necessary or appropriate to resolve accurately the moral turpitude question.[7]

The BIA recently summarized *Matter of Silva-Trevino's* categorical analysis of whether a conviction constituted a crime of moral turpitude as follows:

> Additionally, during the pendency of this appeal, the Attorney General issued a comprehensive decision clarifying the concept of moral turpitude and articulating a methodology for determining whether a particular offense is a crime involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). According to the Attorney General, a crime involving moral turpitude involves reprehensible conduct committed with some degree of scienter, either specific intent, deliberateness, willfulness, or recklessness. *Id.* at 706 & n.5.
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> In considering whether a particular offense constitutes a crime involving moral turpitude, we must first engage in the traditional categorical analysis of the elements of the statute. *See Gonzales v. Duenas-Alvarez,* 549 U.S. 183, 186 (2007) (citing *Taylor v. United States,* 495 U.S. 575, 599-600 (1990), as stating that in determining whether a particular conviction is for a certain type of offense, a court should normally look "not to the facts of the particular prior case," but rather to the statute defining the crime of conviction). In *Matter of Silva-Trevino, supra*, the Attorney General found that the "categorical inquiry" also requires an examination of the law of the convicting jurisdiction to determine whether there is a "'realistic probability,'" as opposed to a " 'theoretical possibility,'" that the statute under which the alien was convicted would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (quoting *Gonzales v. Duenas-Alvarez, supra,* at 193). This requires asking whether, at the time of the alien's removal proceedings, any actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any actual case, the Immigration Judge, in applying the "realistic probability" method, may reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.
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> Should the language of the criminal statute encompass both

[7] *Silva-Trevino*, *supra*, at 704.

> conduct that involves moral turpitude and conduct that does not, however, and there is a case in which the relevant criminal statute has been applied to the latter category of conduct, the Immigration Judge cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude. *Matter of Silva-Trevino, supra*, at 697. Should such an inquiry reveal that there is, in fact, a realistic probability that the statute would reach offenses that are not turpitudinous, we must then engage in a "modified categorical inquiry" in which we examine the record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript, in order to determine whether the particular conviction in question was for a morally turpitudinous offense. *Id.* at 698-99. Finally, if consideration of the conviction record does not reveal whether the alien's particular offense involved moral turpitude, we may then consider any other admissible evidence bearing on that question. *Id.* at 699-704.

(*Matter of Louissaint*, 24 I. & N. Dec. 754, 756-757 (BIA Mar. 18, 2009).)

Under *Silva-Trevino*, analysis of a CMT conviction involves up to three steps. Step One is the traditional categorical analysis of the elements, with the added requirement that respondent must establish a reasonable probability that the criminal statute of conviction has indeed been applied in a factual situation that does not constitute a CMT.[8] If Step One gives an unambiguous answer to the CMT question, one way or the other, the analysis ends there.[9] If not, analysis proceeds to Step Two: the examination of the traditional record of conviction documents, to see whether they contain "facts" that bring the conviction within the CMT definition. If Step Two gives an unambiguous answer, one way or the other,

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[8] There is also a question whether the former Attorney General has preserved or abandoned the minimum conduct test of the categorical analysis in Step One. The Supreme Court in *Nijhawan*, however, has preserved the general applicability of the strict categorical analysis to all generic definitions of convictions. This is on the assumption that the *Nijhawan* analysis applies to crimes of moral turpitude.

[9] "If an immigration judge determines, based on application of the reasonable probability approach, that a prior conviction is categorically a crime involving moral turpitude, there is no reason to proceed to a second stage. The same would be true if the immigration judge were able to determine at the first stage that a prior conviction categorically was *not* a crime involving moral turpitude – i.e., if none of the circumstances in which there is a reasonable probability of conviction involves moral turpitude." *Silva-Trevino*, *supra*, at 699 n.2. See also *id*. at 708: "This categorical determination, however, does not end the moral turpitude inquiry. Instead, where, as here, the categorical inquiry does not resolve the moral turpitude question, an adjudicator should engage in a modified categorical inquiry, considering whether the facts of the alien's prior conviction in fact involved moral turpitude."

the analysis stops there. If the CMT question is still open, the adjudicator proceeds to Step Three in which the Immigration Judge may consider any reliable evidence s/he feels is necessary and appropriate to see whether the offense conflict involved moral turpitude.

§ 3.2 II. Limitations of the Decision

(A) Silva-Trevino *is Limited to Crime of Moral Turpitude Cases*. The Attorney General specifically limited this new decision to CMT cases: "This opinion does not, of course, extend beyond the moral turpitude issue—an issue that justifies a departure from the *Taylor/Shepard* framework because moral turpitude is a non-element aggravating factor that 'stands apart from the elements of the [underlying criminal] offense.' *Ali*, 521 F.3d at 743."[10] This new analysis therefore cannot be applied to convictions of aggravated felonies, crimes of domestic violence, firearms cases, controlled substances, or any of the twenty-four grounds of deportation – other than the CMT grounds -- that are triggered by a specified criminal conviction..[11]

(B) Silva-Trevino *is Limited to the Moral Turpitude Ground of Inadmissibility*. Despite the language of *Silva-Trevino*, counsel can argue that it applies only to the crime of moral turpitude ground of *inadmissibility*, and has no application to the moral turpitude grounds of deportability, because the case itself did not involve deportability and its rationale does not extend to deportability.

Matter of Silva-Trevino modified the categorical analysis used to determine whether a given conviction constitutes a crime of moral turpitude for purposes of inadmissibility.[12] Mukasey reasoned that because the CMT ground of inadmissibility refers to whether the immigrant admitted *commission* of a CMT, Congress intended that factual question to be relevant.

> The relevant provisions contemplate a finding that the particular alien did or did not commit a crime involving moral turpitude before immigration penalties are or are not applied. Section 212(a)(2)(A)(i)(I), the inadmissibility provision at issue in this case, refers to "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." (Emphasis added.) Section 237's removability provisions similarly pertain only to

[10] *Silva-Trevino*, *supra*, at 704.
[11] See N. TOOBY & J. ROLLIN, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS § 2.7 and Appendix A (2005)(listing 24 conviction-based grounds of deportation).
[12] INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).

> "[a]ny alien who is convicted of a crime involving moral turpitude" under certain enumerated circumstances, one of which relates to the alien's date of admission—a fact that would not typically be reflected in a criminal record of conviction. Sections 237(a)(2)(A)(i)-(ii) of the Act. To impose evidentiary limitations with the result that immigration penalties under section 212(a) or section 237 apply to aliens whose crimes did *not* involve moral turpitude, or with the result that aliens whose crimes *did* involve moral turpitude escape those penalties, is in tension with the text of those sections.[13]

The reference to the CMT ground of inadmissibility is apt: that ground of removal does indeed refer to the commission of an offense, or acts constituting an offense. *Silva-Trevino* was an inadmissibility case, not a deportation case.[14] The reference to the CMT ground of deportation, however, is *dictum*. Moreover, the language of the CMT deportation grounds does not refer to the *commission* of a CMT, or of *acts* constituting a CMT. It does refer, as *Silva-Trevino* pointed out,[15] to the date of admission, which would not typically be reflected in a criminal record of conviction and does not support the claim that Congress must therefore have intended to allow abandonment of the categorical analysis, and resort to the underlying facts of the offense itself. Therefore, the reasoning of *Silva-Trevino*, and its holding, do not apply to the CMT grounds of deportation. This difference between the two statutes is a distinction sufficient to require a different holding in a deportation case, which is technically not governed by the holding of *Silva-Trevino*, because the issue of deportability on account of a CMT conviction was not presented in that case.[16]

Immigration Judges have begun to adopt this reasoning. For example, in one case, the immigration judge reasoned as follows:

> It is unclear whether the portions [of the] Attorney General's decision allowing a factual inquiry into the nature of the acts engaged in by Respondent applies where, as here, ICE holds the

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[13] *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 699-700.
[14] INA § 237(a)(2), 8 U.S.C. § 1227(a)(2).
[15] *Id.* at 700.
[16] *R.A.V. v. City of St. Paul,* 112 S.Ct. 2538, 2545, 120 L.Ed.2d 305 (1992) ("It is of course contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented or even envisioned"); *United States v. Vroman*, 975 F.2d 669, 672 (9th Cir. 1992) (precedent not controlling on issue not presented to prior panel), cert. denied, 113 S.Ct. 1611, 123 L.Ed.2d 172; *United States v. Faulkner*, 952 F.2d 1066, 1071 n.3 (9th Cir. 1991) (same); *DeRobles v. INS*, 58 F.3d 1355 (9th Cir. 1995).)

> burden of proving a conviction for a CIMT under § 237(a)(2)(A)(i). First, the decision in Silva-Trevino rests on a rationale dependent in part upon language contained only in section 212(a)(2)(A)(i)(I), related to "admission" of certain "acts". [Footnote 4.]
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> [Footnote 4] The Attorney General Finds the statutory language to be ambiguous as to whether a factual inquiry is appropriate, rather than a strictly categorical one, holding that the language "cuts both ways." He finds that the language requiring a conviction cuts in favor of a purely categorical approach, but that language such as "involving" (which appears in both §212(a)(2)(A)(i)(I) and §237(a)(2)(A)(i)) and language such as "admits" the "commission" of certain "acts" (which appears only in §212 cut in favor of a factual inquiry. Thus, the language in §237 may be said to be less ambiguous, or at least less favoring of a factual inquiry, than is that in §212. See *Silva-Trevino*, *supra*, at 693 and 699.[17]

Therefore, counsel is free to argue, and Immigration Judges are free to decide, that *Silva-Trevino* applies only in cases charging CMT inadmissibility, but not in cases charging CMT deportability.

§ 3.3 III. Burden of Proof

(A) *Grounds of Deportation*. The government in deportation proceedings always bears the burden of proof of every fact necessary to establish the ground of deportation under applicable Supreme Court authority[18] and the statute.[19] See N. Tooby & J. Rollin, TOOBY'S CRIMES OF MORAL TURPITUDE §§ 5.1, 5.14(B), 10.7 (2008).

(B) *Grounds of Inadmissibility*. In *Silva-Trevino*, the Attorney General fails to mention that the BIA placed the burden of persuasion on the government to prove that a returning LPR was inadmissible.[20]

> In *Chew v. Rogers,* 257 F.2d 607 (DC Cir. 1958), the court said flatly "... if Chew is to be deprived of his status ... the Immigration and Naturalization Service may do so only in proceedings in which the Service is the moving party, and it bears the burden of proof ...." (Emphasis supplied.) This Board has already affirmed its awareness

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[17] *Matter of Arroyo*, A091 666 399 (IJ Carol King, San Francisco, May 5, 2009), Appendix C(6), *infra*.
[18] *Woodby v. INS*, 385 U.S. 276 (1999).
[19] INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A).
[20] *Matter of Becera-Miranda*, 12 I. & N. 358 (BIA 1967).

of *Chew v. Rogers* in *Matter of Becera-Miranda*, 12 I&N 358 (BIA 1967).[21]

Counsel with clients in inadmissibility proceedings can continue to argue that under *Matter of Becera-Miranda*, the government bears the burden of proving that a conviction is a CMT, since these authorities were not explicitly mentioned or overruled in *Silva-Trevino*. See generally N. Tooby & J. Rollin, TOOBY'S CRIMES OF MORAL TURPITUDE §§ 5.7, 4.1(C), 6.6(B) (2008).

(C) *Bars to Relief*. In *Matter of Almanza-Arenas,*[22] the BIA held that the REAL ID provisions overruled Ninth Circuit precedent, so that in the Ninth Circuit the *respondent* bears the burden of document production to establish that a conviction under a divisible statute is *not* a bar to relief. See K. Brady, Practice Advisory, Defense Arguments: *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009), included as Appendix D, *infra*. See generally N. Tooby & J. Rollin, TOOBY'S CRIMES OF MORAL TURPITUDE § 3.1 (2008).

§ 3.4 IV. Step One: Traditional Categorical Analysis

The Attorney General's first step is the traditional first step, the categorical analysis almost universally used to answer the CMT question for 100 years, with the addition of the reasonable-probability refinement from *Duenas*.[23] He specifically adopted the normal categorical analysis used by the Supreme Court recently in *Duenas-Alvarez*.[24] (This is consistent with the Supreme Court's analysis in *Nijhawan*, except that the Supreme Court did not mention the reasonable-probability requirement. .)

The Step One categorical analysis is an elements-only test, and completely ignores the facts of the case. The Supreme Court explicitly used the traditional categorical analysis: "the lower courts uniformly have applied the approach this Court set forth in *Taylor v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)."[25] Therefore, all normal categorical analysis rules and defenses apply to this stage. As usual, the categorical analysis ignores the facts completely. Under this analysis, a court seeking to determine whether a particular prior conviction falls within a ground of removal should normally look to the state statute defining the crime of conviction, "not to the facts of the particular prior case."[26]

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[21] *Matter of Kane*, 15 I. & N. Dec. 258, 264 (BIA 1975).
[22] *Matter of Almanza-Arenas,* 24 I. & N. Dec. 771 (BIA 2009).
[23] *Silva-Trevino*, *supra*, at 688, 704.
[24] *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 127 S.Ct. 815 (Jan. 17, 2007).
[25] *Id.* at 185.
[26] *Duenas*, *supra*, at 186, quoting *Taylor*, *supra*, at 599-600.

§ 3.5 A. Minimum Conduct Test

The minimum-conduct test also arguably continues to apply, since that is what the Supreme Court used in *Taylor*, and the Supreme Court applied the *Taylor* analysis to the removal context in *Duenas*, which the Attorney General adopted in *Silva-Trevino*. This is also the rule under the Supreme Court's analysis in *Nijhawan*. The Attorney General also listed this as something on which the federal and immigration courts agreed:

> There are a few basics on which the Board and the Federal courts have generally agreed. To begin with, they generally agree that in deciding whether an alien's prior criminal conviction constitutes a conviction for a crime involving moral turpitude—that is, whether moral turpitude "necessarily inheres" in a violation of a particular State or Federal criminal statute, *Matter of Torres-Varela*, 23 I&N Dec. 78, 84 (BIA 2001)—immigration judges and the Board should engage in a "categorical" inquiry and look first to the statute of conviction rather than to the specific facts of the alien's crime.[27]

As mentioned above, if the Step One analysis results in a conclusion, based on the elements, that a conviction is *always* a CMT, that ends the inquiry. "The same would be true if the immigration judge were able to determine at the first stage that a prior conviction categorically was *not* a crime involving moral turpitude – i.e., if none of the circumstances in which there is a reasonable probability of conviction involves moral turpitude."[28] The third logical possibility – that the Step One analysis does not establish a conviction under the statute is *always* or *never* a CMT – allows the adjudicator to move on to Step Two. This is what happened in *Silva-Trevino* itself. "Because Texas Penal Code § 21.11(a)(1) has been applied to conduct that does not involve moral turpitude (the defendant in *Johnson* was convicted despite his contention that he had no reason to know that his sexual conduct was directed at a child), respondent's conviction cannot categorically be treated as one that did involve moral turpitude."[29] The adjudicator therefore moves on to Step Two of the Analysis.

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[27] *Silva-Trevino*, *supra*, at 688; accord, 696 ("The Department and the Federal courts agree that, to determine whether a crime involves moral turpitude, immigration judges should first engage in a "categorical" inquiry and look to the statute of conviction rather than to the specific facts of an alien's crime.").

[28] *Silva-Trevino*, *supra*, at 699 n.2.

[29] *Silva-Trevino*, *supra*, at 708.

In Silva-Trevino's case, however, the Attorney General did not appear to apply the "minimum conduct test" at Step One. Under this test, the minimum conduct that can be penalized under the Texas statute did not involve moral turpitude, since it was in effect a strict liability statute. However, the Attorney General concluded that the Step One analysis did not resolve the CMT question, and proceeded to Step Two. While his language in general adopted the ordinary categorical analysis, including the minimum conduct test, his actual decision in *Silva-Trevino* ignored the minimum conduct test.

Because the question of deportability hangs on this analysis, and because the Attorney General is in effect issuing a regulation that affects these substantial rights, there seems no reason to suppose that the "rule of lenity" would not apply to the *Silva-Trevino* decision.[30] If so, then the courts should construe this ambiguous portion of *Silva-Trevino* in favor of respondent, and hold that the Attorney General's analysis is indeed consistent with that of the Supreme Court in *Taylor* and *Duenas*, and apply the minimum conduct analysis at Step One.

In addition, the Supreme Court in *Nijhawan* reaffirmed the application of the strict categorical analysis, including the minimum conduct test, to generic definitions of conviction-based grounds of removal.. Moreover, its analysis of what is a generic definition (to which the categorical analysis applies) and what is a specific circumstance that may be proven at the removal hearing by other evidence, establishes that a "crime of moral turpitude" is a generic definition analyzed under the categorical analysis.

Step One asks whether the elements of the statute of conviction *always* or *never* fall within the definition of crime of moral turpitude. If they always fall within the ground of deportation, then Step One concludes that all convictions under the statute are CMTs. If they never fall within the definition, then the conviction is categorically *not* a CMT. For example, it is well-established that merely regulatory offenses do not constitute crimes of moral turpitude, because there is nothing inherently wrong with engaging in the particular activity, except that someone has passed a law against it.[31] *Silva-Trevino* does not alter this rule. "The definition [of moral turpitude] also faithfully implements the Act's distinction between crimes involving moral turpitude (which trigger specific immigration consequences) and criminal conduct generally (which the Government has a valid interest in punishing whether or not it qualifies as morally offensive or involves scienter) by more clearly articulating the subjective, or

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[30] See N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 16.38 (2007).
[31] See N. TOOBY, J. ROLLIN AND J. FOSTER, TOOBY'S CRIMES OF MORAL TURPITUDE § 9.44 (2008).

intent, element that has long characterized judicial and administrative recognition of crimes involving moral turpitude in the immigration context."[32]

It is only necessary to proceed to Step Two if Step One does not resolve the inquiry. "Second, where this categorical analysis does not resolve the moral turpitude inquiry in a particular case, an adjudicator should proceed with a "modified categorical" inquiry."[33]

Arguably, the only sense in which the minimum conduct approach has been modified in *Silva-Trevino* is that after applying it, the adjudicator will apply the *additional* "reasonable probability" requirement first enunciated in *Duenas*:

> I thus find the analysis in *Duenas-Alvarez* persuasive and conclude that, in evaluating whether an alien's prior offense is categorically one that involved moral turpitude, immigration judges should determine whether there is a "realistic probability, not a theoretical possibility," that a State or Federal criminal statute would be applied to reach conduct that does not involve moral turpitude. *Duenas-Alvarez*, 549 U.S. at 193.[34]

The "reasonable probability" requirement is satisfied by a showing that "the criminal statute in issue has at some point been applied to conduct that did not involve moral turpitude . . . ."[35]

The reasonable probability test was not mentioned by the Supreme Court in *Nijhawan*. It is possible to infer, therefore, that it is not a part of the normal categorical analysis, since it looks to the underlying facts of the case which is normally forbidden under this analysis. Under this view, it does not apply where the plain meaning of the statute defining the offense is overbroad with respect to the generic definition of the ground of removal, but only where immigration counsel has exercised considerable imagination to come up with an unlikely interpretation of the statute.

This "reasonable probability" test

> focuses the adjudicator on a criminal statute's actual scope and application and tailors the categorical moral turpitude inquiry by asking whether, at the time of an alien's removal proceeding, any actual (as opposed to hypothetical) case exists in which the relevant

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[32] *Silva-Trevino*, *supra*, at 689 n.1.
[33] *Silva-Trevino*, *supra*, at 690.
[34] *Silva-Trevino*, *supra*, at 698, quoting *Duenas*, *supra*, at 193.
[35] *Silva-Trevino*, *supra*, at 698.

> criminal statute was applied to conduct that did not involve moral turpitude. *Cf. Duenas-Alvarez*, 549 U.S. at 193. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude. In such circumstances, the history of adjudication generally establishes no realistic probability that the statute, whatever its language may hypothetically allow, would actually be applied to acts that do not involve moral turpitude. *See id.* By contrast, if the language of the criminal statute could encompass both conduct that involves moral turpitude and conduct that does not, *and* there is a case in which the relevant criminal statute has been applied to the latter category of conduct, the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude. *See id.* at 185-88, 193.[36]

The traditional categorical analysis of *Taylor*, *Duenas* and *Nijhawan* also contemplates that the elements of the statute of conviction categorically establish that no conviction under the statute falls within the generic definition. In fact, that was the holding in *Taylor* and *Duenas*.

Silva-Trevino might be read as placing the burden of proof of a reasonable probability on the noncitizen, even in deportation proceedings. "Because such a statute will ordinarily be subject to categorical treatment under the realistic probability approach, it is the alien who must "point to his own case or other cases" in which a person was convicted without proof of the statutory element that evidences moral turpitude."[37] Immigration counsel, however, should argue that the government in deportation proceedings always bears the burden of proof of every fact necessary to establish the ground of deportation under applicable Supreme Court authority[38] and the statute.[39] See § 3.3(A), *supra*.

The Fifth and Ninth Circuits have taken different approaches to the *Duenas* reasonable probability issue. On the one hand, the Fifth Circuit appears to take a very narrow view -- requiring the noncitizen or defendant provide either personal evidence (from his or her own case) or case law showing that the statute of conviction reaches conduct that falls outside the definition of the ground of deportation. In *United States v. Ramos Sanchez*,[40] the court rejected the contention

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[36] *Silva-Trevino*, *supra*, at 697.
[37] *Id.* at 704 n.4.
[38] *Woodby v. INS*, 385 U.S. 276 (1999).
[39] INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A).
[40] *United States v. Ramos-Sanchez*, 483 F.3d 400, 404 (5th Cir. Apr. 2, 2007) ("Though it is theoretically possible that Kansas might punish such an act, Ramos-Sanchez points to no

that an indecent solicitation statute at issue was overbroad because it could be used to prosecute a minor. Even though the statute at issue *had* been used to prosecute a 17-year-old for having sex with his 15-year-old girlfriend, the court found that case inapplicable, since the age of consent in Kansas was 16.[41] The Fifth Circuit has also applied the "ordinary case" test established by the Supreme Court in *James v. United States*.[42] In that case, courts look to whether the hypothetical non-CMT conduct is "ordinarily" punished under the statute.[43]

On the other hand, the Ninth Circuit does not require the noncitizen to provide "specific examples" of a state prosecuting people "for acts that would fall outside the generic definition of crimes of moral turpitude."[44] Rather the court stated that:

> The issue is not whether in some cases violators of section 32 have been involved in a crime of moral turpitude. The issue is whether everyone prosecuted under that section has *necessarily* committed a crime involving moral turpitude. There is nothing inherent in the crime of accessory after the fact that makes it a crime involving moral turpitude in all cases.[45]

Likewise, in finding that the California offense of leaving the scene of an accident resulting in bodily injury was *not* a crime of moral turpitude, the Ninth Circuit found that looking to the statutory language, "a driver in an accident resulting in

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evidence of the realistic possibility of such a prosecution."). See also *United States v. Balderas-Rubio*, 499 F.3d 470 (5th Cir. Sept. 5, 2007) (although violation of Okla. Stat. tit. 21, § 1123, making it unlawful to "to intentionally look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any lewd or lascivious manner ...." could include the act of viewing a child in a lewd manner from a significant distance (using binoculars), and without the knowledge of the child, the defendant "failed to show a realistic probability that [Oklahoma] would in fact punish conduct of the type he describes . . . .", and the offense is considered "sexual abuse of a minor" for illegal re-entry sentencing purposes).

[41] Note that here the court seems to be looking *exclusively* to prosecution of the law of the state. The court did not consider that 17 years old is *below* the age of consent in other states, or even that 17 years old is under the age of consent for (at least some) federal purposes. See, e.g., *Matter of VFD*, 23 I. & N. Dec. 859 (BIA 2006) (for purposes of aggravated felony sexual abuse of a minor, a "minor" is a person who is under the age of 18).

[42] *James v. United States*, 550 U.S. 192 (2007).

[43] See, e.g., *Perez-Munoz v. Keisler*, 507 F.3d 357 (5th Cir. Nov. 6, 2007) ("Although it may be possible to commit this offense by an intentional act without the use of physical force (such as by placing poison in a child's food or drink), this is not the ordinary, usual way the crime is committed. The crime, when committed by an act, is usually committed with the use of some force, or at least through conduct that presents the substantial risk that force may be used. The BIA correctly found that Perez had been convicted of an aggravated felony.").

[44] *Navarro-Lopez v. Gonales*, 503 F.3d 1063, 1072 (9th Cir. Sept. 19, 2007) (*en banc*)

[45] *Ibid.*

injury who stops and provides identification, but fails to provide a vehicle registration number, has violated the statute."[46] The court then rejected the DHS's argument that such an offense would not be prosecuted:

> We cannot . . . ignore the plain language of § 20001(a). *Duenas-Alvarez* does caution us against "conjur[ing] up some scenario, however improbable, whereby a defendant might be convicted under the statute in question even though he did not commit the act encompassed by the federal provision." *United States v. Carson*, 486 F.3d 618, 610 (9th Cir. 2007) (*per curiam*). But where, as here, the state statute plainly and specifically criminalizes conduct outside the scope of the federal definition, we do not engage in judicial prestidigitation by concluding that the statute "creates a crime outside the generic definition of a listed crime." *Duenas-Alvarez*, 127 S.Ct. at 822.[47]

Other courts may also follow this analysis,[48] and counsel outside the Ninth Circuit could argue that the same reasoning should be followed.

Under *Silva-Trevino*, immigration counsel can argue that an offense is not a CMT because the statute of conviction punishes non-CMT conduct. Immigration counsel can prove that there exists a reasonable probability of prosecution, i.e., that a single case that lies outside the CMT definition has in fact been prosecuted, in a variety of ways:

(1) A reported decision under the statute.

(2) An unreported decision under the statute.

(3) The defendant's own case.

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[46] *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. Jan. 14, 2008).
[47] *Ibid*.
[48] See, e.g., *Wala v. Mukasey*, 511 F.3d 102 (2d Cir. Dec. 12, 2007) ("However improbable, Wala could have been taking the jewelry with the intent to loan it to his girlfriend for one "night on the town" and then return it. Or, he could have been taking the credit cards with the intent to use them for a one-time identification purpose. The point is that either would have been sufficient to sustain Wala's guilty plea and conviction under Connecticut penal law. Thus, although it may have been reasonable for the BIA to infer that Wala intended permanently to keep the items he admitted taking, the modified categorical approach does not permit the BIA to draw inferences of this kind.").

(4) Any other case, proven by the declaration of defense counsel or anyone else. Criminal defense listservs may be used to announce the search for a specific case, and to obtain a declaration from defense counsel in that case.

(5) Form jury instructions should also be acceptable. For example, if an auto theft instruction informs the jury that the defendant must be found guilty of unauthorized driving no matter how short the distance or period of time, that sufficiently establishes a reasonable probability of prosecution because the courts were anticipating actual cases in which the jury needed guidance on this point.

§ 3.6 B. Advice for Criminal Defense Counsel

While the subject of this discussion is representation before an immigration judge, a word about advising criminal defense counsel in the criminal case is in order. Immigration counsel should suggest they seek a plea to a "safe haven" offense that cannot constitute a CMT under the elements test, such as any other offense that cannot be said to be reprehensible on the elements, nor even to include reprehensible conduct. The offense selected should not be a divisible offense, but should have only one set of elements, so immigration counsel can argue that there is no ambiguity and the noncitizen wins at Step One, before reaching the Step Two record of conviction analysis. These would include offenses with a scienter element less than "specific intent, deliberateness, willfulness, or recklessness."[49] Examples include offenses with a mens rea of mere negligence or strict liability, as well as forms of "recklessness" that amount to no more than gross negligence, and nearly all "regulatory offenses" punishing conduct not itself reprehensible other than being unauthorized.[50]

§ 3.7 V. Step Two: Traditional Modified Categorical Analysis

Silva-Trevino's Step Two consults the traditional record of conviction to see whether it contains "facts" that bring the conviction within the CMT ground of deportation, but only when the categorical analysis of Step One does not give a definitive answer to the CMT question: "where a statute encompasses both conduct that involves moral turpitude *and* conduct that does not (as evidenced by its application to the latter category in an actual case)."[51] The Attorney General held that the record of conviction should be consulted "in every case where (because the criminal statute in issue has at some point been applied to conduct

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[49] *Id.* at 687.

[50] See *Silva-Trevino*, *supra*, at 689 n.1. For comprehensive collections of cases defining crimes of moral turpitude, see D. KESSELBRENNER & L. ROSENBERG, IMMIGRATION LAW AND CRIMES, Chapter 6 and Appendix C (2009); N. TOOBY, J. ROLLIN & J. FOSTER, TOOBY'S CRIMES OF MORAL TURPITUDE (2008).

[51] *Silva-Trevino*, *supra*, at 698.

that did not involve moral turpitude) the categorical analysis does not end the moral turpitude inquiry."[52]

> The record used here is the traditional record of conviction.
>
> Most courts, however, have limited this second-stage inquiry to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the plea transcript. *See, e.g., Nicanor-Romero*, 523 F.3d at 1007 ("We do not look beyond such documents … to determine what particular underlying facts might have supported [the prior] conviction.") (internal quotation marks and citations omitted). In my view, when the record of conviction fails to show whether the alien was convicted of a crime involving moral turpitude, immigration judges should be permitted to consider evidence beyond that record if doing so is necessary and appropriate to ensure proper application of the Act's moral turpitude provisions.[53]

Step Two is also so limited. Unlike the traditional record of conviction analysis, however, *Silva-Trevina's* inquiry does not stop here. Under the normal analysis, if the record of conviction does not establish that the conviction necessarily involved moral turpitude, then the government cannot sustain its burden of proof of deportability by clear and convincing evidence, and the court must conclude respondent is not deportable.

For example, some theft statutes, such as California's vehicular theft statute, can be violated with intent either to permanently or temporarily deprive the owner of the vehicle. Intent to permanently deprive would constitute moral turpitude.[54] Joyriding, however, with intent only temporarily to deprive, however, does not constitute moral turpitude.[55] If criminal defense counsel specifies, in the plea, that the conviction is for intent only temporarily to deprive, then the Step Two inquiry

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[52] *Id*. at 698-99.
[53] *Silva-Trevino*, *supra*, at 698.
[54] *Matter of Grazley*, 14 I. & N. Dec. 330, 333 (BIA 1973); *Matter of N*, 7 I. & N. Dec. 356 (BIA 1956) ("Moral turpitude exists where there is a taking with intent to permanently deprive the owner of property."); *Matter of T*, 3 I. & N. Dec. 641 (BIA 1949).
[55] *Matter of P*, 2 I. & N. Dec. 887 (BIA 1947) (conviction of "joy-riding" in violation of Canada Criminal Code § 285(3) does not involve moral turpitude); *Matter of H*, 2 I. & N. Dec. 864 (BIA 1947); *Matter of M*, 2 I. & N. Dec. 686 (BIA 1946) (conviction of "joy-riding" in violation of Canada Criminal Code § 285(3) does not involve moral turpitude because defendant did not intend to effect a permanent taking), citing *Matter of C*, 56172/434 (Oct. 14, 1944); *Matter of D*, 1 I. & N. Dec. 143 (BIA 1941) (driving an automobile without the consent of the owner in violation of former California Vehicle Code § 503 is not a crime involving moral turpitude).

is conclusive. It absolutely specifies the conviction occurred under the non-CMT portion of the statute, and the respondent is not removable.

Similarly, a plea to burglary where the target offense is identified in the record of conviction as trespass (a non-CMT offense), cannot constitute a CMT, so the removal proceedings should be ordered terminated at Step Two, without proceeding to Step Three.

These results should be unchanged, since the Step Two record of conviction analysis does not have an inconclusive result in such a case. It is only where the normal record of conviction documents reaches an "inconclusive" result that the *Silva-Trevino* analysis proceeds to Step Three.

In **Nijhawan**, the Supreme Court appeared to limit the modified categorical analysis to its traditional role: determining which offense, among more than one offense contained in a divisible statute, was the offense of conviction. It does not allow searching the record of conviction for "facts" to use in bringing a conviction within a generic definition of a conviction to establish a ground of removal. Using the record of conviction to establish facts is improper under the traditional modified categorical analysis affirmed by *Nijhawan*, which does not go outside the actual elements of the offense of conviction. It merely aids the adjudicator determine which set of elements to use.

§ 3.8 VI. Step Three: Consideration of Any Other Evidence Necessary and Appropriate

Under *Silva-Trevino*, if the record of conviction is inconclusive, the immigration court proceeds to Step Three: "In my view, when the record of conviction fails to show whether the alien was convicted of a crime involving moral turpitude, immigration judges should be permitted to consider evidence beyond that record if doing so is necessary and appropriate to ensure proper application of the Act's moral turpitude provisions."[56] "The sole purpose of the [Step Three] inquiry is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself."[57] This should apply to both the government and the respondent: neither party is allowed to contradict elements of the statute of conviction that were in fact adjudicated in the criminal case.

This new Step Three rule places great discretion in the hands of the Immigration Judge:

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[56] *Id.* at 699.
[57] *Id.* at 703 (footnote 3 omitted).

> And where a party meets, or fails to meet, its burden of proof on an issue related to application of the Act's moral turpitude provisions based solely on the record of conviction and documentary evidence, the immigration judge need not consider additional evidence or testimony except when and to the extent he or she determines that it is necessary.[58]

In other words, the Immigration Judge can decline to hear evidence beyond the record of conviction if s/he finds it it is not "necessary" or "appropriate" to do so, and in that case, where the Step Two record of conviction remains inconclusive, the party with the burden of proof loses. See § 3.3, *supra*.

The moral turpitude question left open to proof by necessary and appropriate evidence in Step Three is a narrow one. Categorical analysis of the elements of the statute alone in Step One has not given a decision in favor of either party. Respondent has shown a realistic probability that this statute would be applied to conduct beyond the pale of moral turpitude by showing a single instance in which this was done. The Step Two examination of the traditional record of conviction is likewise inconclusive, showing that the facts underlying the conviction might or might not have involved moral turpitude. Neither party may contest the elements of the statute, or the factors found true as part of the modified categorical analysis of the record of conviction. The remaining question is whether, within this narrow area, the defendant's conduct for which s/he was convicted *in fact* involved moral turpitude.

This last question becomes in effect a conduct-based ground of removal, subject to proof by any "necessary and appropriate evidence" like any other fact on which removal depends. Percipient witnesses, including the respondent, can testify. Character evidence can be submitted to buttress the credibility of any witness, including the respondent, and evidence of respondent's character for a pertinent trait, e.g., honesty, can be submitted for the purpose of proving conduct in conformity with that trait on the occasion in question. Evidence of the bias of any witness can be offered. Objections can be offered to any evidence, on grounds of unreliability or fundamental unfairness. Counsel can also argue for the application of the Federal Rules of Evidence; while not currently binding, an Immigration Judge is certainly free to follow them in any given instance.

In a theft-type case, for example, in which the elements and record leave open the question whether the defendant intended to deprive the owner of the property permanently (CMT) or only temporarily (non-CMT), the respondent could submit any available evidence that his intent was merely the latter. Where a

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[58] *Id.* at 703

conviction can be had under an assault statute for mere negligence, respondent can submit evidence that his intent did not exceed the merely negligent.

If the inquiry becomes too burdensome, the Immigration Judge could decide that it is not "necessary or appropriate" to listen to 25 witnesses. What the court cannot do is listen only to the evidence of one side, and exclude pertinent evidence offered by the other.[59] Due process also prohibits a tribunal from allowing one party to offer evidence on an issue, but precluding the other party from doing so.[60]

§ 3.9 VII. Definition of Moral Turpitude

Silva-Trevino also stated: "To qualify as a crime involving moral turpitude for purposes of the Immigration and Nationality Act, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness."[61]

> A finding of moral turpitude under the Act requires that a perpetrator have committed the reprehensible act with some form of scienter. *See, e.g., Partyka*, 417 F.3d at 414 ("[T]he hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation"); *Wei Cong Mei v. Ashcroft,* 393 F.3d at 740 ("[A] person who deliberately commits a serious crime is regarded as behaving immorally and not merely illegally") (emphases omitted); *Michel v. INS,* 206 F.3d 253, 263 (2d Cir. 2000) ("corrupt scienter is the touchstone of moral turpitude," hence the Board's "long-standing" rule that, "where knowledge is a necessary element of a crime under a particular criminal statute, moral turpitude inheres in that crime"). [FN5][62]

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[59] See *Wardius v. Oregon*, 412 U.S. 470 (1973) (due process requires procedural rules to be even-handed in their application, striking down a state law requiring the defendant to produce discovery for the prosecution, but not vice versa).

[60] *Green v. Georgia,* 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (per curiam)(reversing sentence because trial court excluded testimony offered by the defense under Georgia's hearsay rules, but allowed the prosecution to introduce the same evidence in a codefendant's trial); *Gray v. Klauser*, 282 F.3d 633, 644 (9th Cir. 2002) (Idaho deprived petitioner of right to present a defense under Sixth Amendment when trial court used different standard for determining admissibility of hearsay statements from two dead victims. "A state rule or state judge may not without justification impose stricter evidentiary standards on a defendant . . . than it does on the prosecution.").

[61] *Id.* at 687.

[62] *Id.* at 706.

This definition, according to the Attorney General, "encompasses and describes existing Board precedents classifying many different crimes . . . ."[63] It therefore does not purport to alter the actual definition of moral turpitude for immigration purposes.

To constitute moral turpitude, the offense must (1) be reprehensible, and (2) require sufficiently culpable mens rea, which includes (a) specific intent, (b) deliberation, (c) willfullness, or (d) recklessness.[64] Therefore, as with aggravated felony crimes of violence under *Leocal*,[65] an offense with an element of mere negligence or strict liability cannot constitute a crime of moral turpitude.[66]

Criminal defense counsel can select an incident that does not involve moral turpitude in its underlying facts as the incident to which to plead guilty. For example, if a person engaged in unauthorized access to a computer, and thereby obtained information, on two occasions in violation of 18 U.S.C. § 1030(a)(2)(C), one committed in January and the other in March, he might plead guilty to the initial violation if there was no CMT conduct underlying the conviction, and avoid the March violation in which he entered the computer of another and intentionally committed major damage. The government could not use conduct that underlay a March charge, when the defendant entered a plea to the January incident.

§ 3.10 VIII. Retroactivity Argument

Immigration counsel can argue before the immigration courts that *Silva-Trevino* should not be applied retroactively to pleas that were entered before November 7, 2008, the date on which it was published. In *Miguel-Miguel v. Gonzales,*[67] the Ninth Circuit held that *Matter of YL*,[68] which held that drug trafficking is almost always a particularly serious crime, cannot be applied retroactively to a plea entered before its publication date, because *Matter of YL* announced a new substantive, definitional rule. *St. Cyr* also provides support for this argument.[69]

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[63] *Id.* at 706 n.5.
[64] *Id.* at 687.
[65] *Leocal v. Ashcroft*, 543 U.S. 1 (2004).
[66] A conviction does not constitute a crime of moral turpitude if the minimum intent required to commit the offense is criminal or gross negligence, defined as a lack of awareness of a substantial risk, unless the record of conviction shows noncitizen pleaded to a greater intent. *Matter of Perez-Contreras*, 20 I. & N. 615 (BIA 1992) (3d degree assault); *Matter of Sweetser*, 22 I. & N. Dec, 709 (BIA 1999) (child abuse); *Matter of B*, 2 I. & N. Dec. 867 (BIA 1947) (Canadian conviction for willfully damaging property not CMT, where "willfully" defined to include gross or wanton negligence).
[67] *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 947 (9th Cir. 2007).
[68] *Matter of YL*, *AG*, and *RSR*, 23 I. & N. 270 (A.G. 2002).
[69] *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001) (Congress will not be construed as

§ 3.11 IX. Post-Conviction Relief

Even though many defenses remain, it seems more likely that a given conviction will be found to be a CMT under the new rules. Therefore, it becomes even more important to consider post-conviction relief in the criminal courts at an early stage in removal proceedings, although fewer alternative dispositions may be safe under the *Silva-Trevino* analysis. If a conviction is vacated on grounds of legal invalidity, under *Pickering*,[70] then there is no conviction-based CMT ground of removal. The government cannot go into the facts of the case to show a conviction is for a CMT if there is no conviction at all. Second, if the immigration court does conclude a conviction is a CMT, counsel should be prepared with arguments for relief from removal. Third, counsel can raise the many objections against the validity of the *Silva-Trevino* analysis on petition for review in the federal courts.

§ 3.12 X. Controlled Substances Offenses as Crimes of Moral Turpitude.[71]

In the aftermath of *Silva-Trevino*, immigration authorities are pursuing claims that certain controlled substances offenses constitute crimes of moral turpitude. This section will consider various common drug offenses to determine whether they are crimes of moral turpitude.

Offenses consisting of nothing more than simple possession of a controlled substance cannot constitute crimes involving moral turpitude, since they are purely regulatory offenses. The offense consists of *unauthorized* possession. There are many instances in which it is obviously not inherently evil or reprehensible to possess a controlled substance. Someone who picks up a drug momentarily solely for the purpose of flushing it down the toilet is not performing an action that shows moral turpitude. A police officer confiscating drugs would clearly not be performing an evil act; nor would a pharmacist or police training officer exhibiting controlled substances in an educational setting, nor a museum. As a purely factual matter, simple possession is not a crime involving moral turpitude.

§ 3.13 A. Regulatory Offenses

Criminal convictions for violation of regulatory statutes are generally not considered to involve moral turpitude because there is nothing inherently wrong

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intending to apply a new rule retroactively, to a plea entered prior to its publication, where to do so would disturb settled expectations, unless it speaks with unmistakable clarity).

[70] *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003).

[71] This discussion is based on N. TOOBY & J. ROLLIN, TOOBY'S CRIMES OF MORAL TURPITUDE § 9.7 (2008).

with engaging in the particular activity in itself, except that it is unlicensed, unauthorized, or someone has merely passed a law against it.[72] In determining whether a conviction constitutes a crime of moral turpitude, many courts consider whether the offense is *malum in se* (bad in of itself) or *malum prohibitum* (bad because it is prohibited).[73] In finding that statutory rape was *not* a crime of moral turpitude, the Ninth Circuit identified some factors that may be used to determine whether an offense should be considered *malum prohibitum:* would the act be legal if the defendant's legal status were different (e.g., if s/he were married to the victim); is the conduct legal in other states; was the legislative purpose in passing the prohibition focused on pragmatic (e.g., controlling teen pregnancy) or moral control; is the prohibition a strict liability offense, or does it require proof of intent?[74] The court noted in another case that regulatory offenses generally cause "no direct or particularized injury" to others.[75] "While it is generally the case that a crime that is '*malum in se*' involves moral turpitude and that a '*malum prohibitum*' offense does not, this categorization is more a general rule than an absolute standard."[76]

The BIA has agreed, for example, that "simple DUI is ordinarily a regulatory offense that involves no culpable mental state requirement, such as intent or knowledge."[77] "We find that the offense of driving under the influence under Arizona law, does not, without more, reflect conduct that is necessarily

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[72] *Chaunt v. United States*, 364 U.S. 350, 81 S.Ct. 147 (1960) (conviction of distributing handbills in violation of city ordinance, concealed in the course of a naturalization proceeding, held not to be a crime involving moral turpitude); *United States v. Carrollo*, 30 F.Supp. 3 (W.D. Mo. 1939) (conducting a lottery was not considered a crime of moral turpitude); *Matter of S*, 9 I. & N. Dec. 688 (BIA 1962) (violation of gambling laws); *Matter of K*, 8 I. & N. Dec. 310 (BIA 1959) (ration law violation); *Matter of B*, 6 I. & N. Dec. 98 (BIA 1954) (conviction of conspiracy to violate New York Banking Law §§ 340 (which prohibits the conduct of a small loan business without a license) and 357 (which prohibits a nonlicensee from charging more than 6 percent interest) (usury) is not a crime involving moral turpitude since those sections are only a licensing and regulatory enactment, and do not require any criminal intent, as negligent over-collection of interest is sufficient for conviction); *Matter of J*, 2 I. & N. Dec. 99 (BIA 1944) (selling liquor to Native Americans).

[73] Annot., *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of §§ 212(a)(9) and 241(a)(5) of Immigration and Nationality Act (8 U.S.C. §§ 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. FED. 480, § 12[a], n.65 (1975).

[74] *Quintero-Salazar*, 506 F.3d 688, 693-694 (9th Cir. Oct. 9, 2007).

[75] *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. Feb. 7, 2008).

[76] *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1193 (BIA Dec. 21, 1999) ("aggravated" driving under the influence convictions, under Arizona state law, constitute convictions of crimes involving moral turpitude since the statutory elements require that the driver know s/he is prohibited from driving under any circumstances). See also, *Mei v. Ashcroft*, 393 F.3d 737 (7th Cir. Dec. 29, 2004).

[77] *Id*. at 1194.

morally reprehensible or that indicates such a level of depravity or baseness that it involves moral turpitude."[78]

While the Ninth Circuit found that California's statute punishing failure to stop following an accident, in order to provide pertinent information to the other person involved, was not a CMT because it was a regulatory offense written for the purpose of enforcing a general obligation to provide information, and did not require any evil intent.[79] On the other hand, the Fifth Circuit found a Texas conviction for failure to stop and render aid where injury or death resulted was a crime of moral turpitude, as the offense required an "intentional attempt to evade responsibility."[80]

In *Plasencia-Ayala v. Mukasey*,[81] the Ninth Circuit found that failure to register as a sex offender was a regulatory offense, requiring no intent, and passed for the practical purpose of assisting law enforcement to track recidivist sex offenders. While in an earlier decision, the BIA did not dispute that the offense was regulatory in nature, it found the crime was nonetheless a CMT.[82]

§ 3.14 B. Simple Possession

A simple possessory offense or its equivalent does not trigger deportation as a crime of moral turpitude, at least as long at the criminal statute of conviction does not require proof of intent, since it is a regulatory offense.[83]

§ 3.15 C. Unauthorized Disposal of Drugs

Similarly, the offense of unauthorized disposal of controlled substances is not a crime of moral turpitude.[84]

§ 3.16 D. Import and Export

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[78] *Ibid*. See *Marmolejo-Campos v. Gonzales,* 519 F.3d 907 (9th Cir. March 14, 2008) (Arizona conviction for violation of A.R.S. § 28-1383(A)(1), driving under the influence with knowledge that defendant did not have valid license to drive, is a crime involving moral turpitude for immigration purposes).

[79] *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. Jan. 12, 2008).

[80] *Garcia-Maldonada v. Gonzales*, 491 F.3d 284, 290 (5th Cir. Jun. 29, 2007).

[81] *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. Feb. 7, 2008).

[82] *Matter of Tobar-Lobo*, 24 I. & N. Dec. 143 (BIA Apr. 23, 2007).

[83] *Matter of Abreu-Semino*, 12 I. & N. Dec. 775 (BIA 1968) (conviction for unlawful possession of LSD under 21 U.S.C. §§ 331(q)(3) was not crime involving moral turpitude because intent was not an essential element of the offense); *Hampton v. Wong Ging*, 299 F. 289, 290 (9th Cir. 1924) (possession conviction under the Narcotic Act was not a crime of moral turpitude).

[84] *Matter of R*, 4 I. & N. Dec. 644 (BIA 1952) (conviction of disposing of narcotic drugs unlawfully in violation of the laws of Washington Crim. Code, Chapter 249 (S.B. 300) is not an offense involving moral turpitude, since no element of intent, motive or knowledge is required for conviction).

Even import or export of a controlled substance, without more, should not be considered a crime of moral turpitude.[85]

§ 3.17 E. Drug Trafficking

On the other hand, drug trafficking has been held to involve moral turpitude.[86]

Sale of a Controlled Substance has been held to involve moral turpitude.[87]

§ 3.18 F. Distribution of a Controlled Substance

(A) *Distribution*. Even distribution without a commercial element has been held to involve moral turpitude, where knowledge and intent are elements of the offense.[88]

(B) *Transportation of a Controlled Substance* should not be considered categorically to be a moral turpitude offense, since it might consist of nothing

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[85] *Matter of YMK*, 3 I. & N. Dec. 387 (BIA 1948) (conviction in 1935 for violation of the Narcotic Drugs Import and Export Act (act of Feb. 9, 1909, as amended, 21 U.S.C. § 174) does not trigger exclusion because of the admission of the commission and/or conviction of this offense, since this offense does not involve moral turpitude); *Matter of V*, 1 I. & N. Dec. 293 (BIA 1942) (importation of narcotics in violation of the Narcotic Drugs Import and Export Act, 21 U.S.C. § 171-185, is not a crime involving moral turpitude, since the statute defines a regulatory offense).

[86] *United States ex rel. Dentico v. Esperdy*, 280 F.2d 71 (2d Cir. 1960); *DeLuca v. O'Rourke*, 213 F.2d 759 (8th Cir. 1954) (while there may be technical, inadvertent, and insignificant violations of the laws relating to narcotics which do not involve moral turpitude, there can be nothing more depraved or morally indefensible than conscious participation in the illicit drug traffic, and dealing with narcotic drugs known to have been smuggled into the United States is certainly no less reprehensible and probably no less a fraud upon the revenues than the offenses involved in the *Jordan* case).

[87] *Matter of Y*, 2 I. & N. Dec. 600 (BIA 1946) (Canadian conviction of violation of § 4(1)(f) of the Dominion Opium and Narcotic Drug Act for unlawful sale and possession of drugs was held a crime involving moral turpitude, since Canadian courts held that the statute violated was neither a licensing nor a revenue statute, but had been enacted to prevent the commission of a crime and to punish criminals).

[88] *United States ex rel. Abbenante v. Butterfield*, 112 F.Supp. 324 (D. Mich. 1953) (forging of narcotics prescriptions in violation of 18 U.S.C. § 494, which makes it a federal offense to forge, falsely make, or counterfeit "any bond, bid, proposal, contract, guaranty, security, official bond, public record, affidavit, or other writings for the purpose of defrauding the United States," constituted a CMT); *Matter of Khourn*, 21 I. & N. Dec. 1041 (BIA 1997) (distribution of cocaine, under 21 U.S.C. § 841(a)(1) (1988), is a conviction for a crime involving moral turpitude, where knowledge or intent is an element of the offense), overruling *Matter of Abreu-Semino*, 12 I. & N. Dec. 775 (BIA 1968) (conviction for unlawful sale of LSD under 21 U.S.C. § 331(q)(2) was not crime involving moral turpitude because intent was nowhere mentioned in defining the prohibited acts).

more than walking across a hotel parking lot with a small, personal-use quantity of drugs in one's pocket.[89] The statute may also be violated "without regard to the particular purpose for which the transportation was provided."[90]

The Fifth Circuit has concluded, however, that this offense does constitute a crime of moral turpitude.[91]

§ 3.19 G. Anticipatorial Offenses

The subject of anticipatorial or inchoate offenses, such as accessory after the fact, misprision of a felony, solicitation, facilitation, and the like, involves special considerations. For example, in the related area of the controlled substance ground of deportation, the BIA has held that "facilitation" of sale constitutes a deportable conviction of violating a law relating to a controlled substance.[92] On the other hand, the CMT ground of inadmissibility specifically states that "attempt" and "conviction" are included, but does not mention "facilitation." This gives rise to the argument that "facilitation" is not included.[93] This topic is treated elsewhere. See N. TOOBY & J. ROLLIN, CRIMES OF MORAL TURPITUDE § 8.24 (2008); also see index under name of particular offense. See also N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS, Appendix G (2007).

§ 3.20 XI. Conclusion

Silva-Trevino may be vacated. If not, however, we may have to live with it. Using its own language, counsel can argue forcefully that its principles have equal application to both parties. Since due process requires procedural rules to be even-handed, respondents may indeed be able to win termination of proceedings at Step One, Step Two, or Step Three.

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[89] *People v. Ormiston*, 105 Cal.App.4th 676 (Cal. Ct. App. Jan. 22, 2003) (California Penal Code § 11379, transportation of drugs, can be violated by walking across a parking lot with drugs in a pocket).

[90] *People v. Rogers*, 5 Cal.3d 129 (1971).

[91] *Smalley v. Ashcroft*, 354 F.3d 332 (5th Cir. Dec. 15, 2003) (travel in interstate commerce with intent to conceal or disguise nature, location, source, ownership, or control of property believed to be the proceeds of unlawful drug activity is CMT as *per se* morally reprehensible and contrary to accepted rules of morality); *Nunez-Payan v. INS*, 811 F.2d 264 (5th Cir. 1987) (noncitizen was statutorily precluded from proving Good Moral Character as basis for suspension of deportation by previous Texas conviction for transporting one pound of marijuana).

[92] *Matter of Del Risco*, 20 I. & N. Dec. 109 (BIA 1989) (conviction of facilitation of the unlawful sale of cocaine renders a noncitizen deportable on account of a conviction of violating a law relating to a controlled substance).

[93] *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001)(citing *Leyva-Licea v. INS,* 187 F.3d 1147, 1150 (9th Cir. 1999); *Coronado-Durazo v. INS,* 123 F.3d 1322 (9th Cir. 1997) (Arizona conviction for solicitation to commit a drug offense did not constitute a drug-related conviction)).