CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

MATTER OF SILVA-TREVINO: AN UPDATE ON CRIMES INVOLVING MORAL TURPITUDE

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by

Patricia S. Mann[*]

Difficult as it is to imagine today, for most of the 19th Century, the U.S. had an essentially open-door immigration policy. Efforts to exclude particular categories of immigrants began in 1875 with new laws to provide for the exclusion of convicts and prostitutes. In 1882, we began our continuing history of distinguishing between more and less desirable nationalities, with the Chinese Exclusion Act, which was not repealed until 1943. Crimes Involving Moral Turpitude (CIMTs) were introduced in 1891, as part of this early effort to define those intending immigrants who could be excluded from the U.S.[1] CIMTs, crimes involving "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," have endured, not without controversy, as part of U.S. immigration law ever since.

The Attorney General's November 2008, *Matter of Silva-Trevino* decision, 24 I&N Dec.687 (A.G. 2008) (http://www.usdoj.gov/eoir/vll/intdec/vol24/3631.pdf) asserting the authority of the IJ and BIA to look beyond the formal record of conviction and to evaluate the underlying actions of the alien in determining if a CIMT has been committed, constitutes an extraordinary rejection of almost a century of CIMT jurisprudence. It is yet another instance of the current Administration's disregard for due process and other basic procedural requirements, as well as its disrespect for settled legal precedent, and the fundamental legal principles in which those precedents are grounded.[2] However, I will suggest that the excesses of *Silva-Trevino* provide the occasion

for a thorough-going debate over "severe problems" in CIMT law even before the *Silva-Trevino* monkey wrench.[3]

Crimes Involving Moral Turpitude: Unconstitutionally Vague?

As with many issues in immigration law, the complexities of the legal and extra-legal frameworks surrounding its application have stood in the way of appropriate critical engagement with CIMT- based exclusion of intending immigrants and legal permanent residents from the U.S. over the past century. However, the basic problem with CIMT-based exclusion can and should be stated quite clearly as a preface to further analysis. While the concept of "moral turpitude" may have valid uses in specific criminal law contexts, the concept of 'crimes involving moral turpitude' has never been defined within the immigration statutes or regulations, and has arguably suffered from unconstitutional vagueness from its inception.

In the sole Supreme Court case in which this issue was confronted, *Jordan v. De George*, Chief Justice Vinson overruled the 7th Circuit Court of Appeals which had held that the crime of conspiring to willfully defraud the U.S. government of tax on distilled spirits was not a CIMT, insofar as it was neither a crime of violence nor a crime involving baseness, vileness or depravity such as required for a CIMT.[4] Justice Vinson found that insofar as the phrase, 'crimes involving moral turpitude,' had been part of the immigration laws for more than sixty years, and it had been construed to embrace fraudulent conduct "without exception," the meaning of the phrase was not unconstitutionally vague, and conspiring to willfully defraud the government of taxes on the sale of homemade alcohol was a CIMT.[5]

However, the dissent of Justices Jackson, Black, and Frankfurter is more persuasive in its analysis of the problematic vagueness of this term, emphasizing that its application is inevitably based upon the highly variable moral standards of the particular judge ruling upon a particular case. Justice Jackson also includes a sampling of actual decisions demonstrating the capricious and unequal determination of what constituted or failed to constitute a CIMT in various federal courts, rendering an immigrant deportable or not deportable from the U.S. based upon the moral intuitions of particular judges rather than upon a uniformly applicable set of laws.[6]

In addition to the vagueness and morality-laden content of the concept, problems also arise with CIMT-based exclusion based on the manner in which it is applied within immigration law. A brief review of its usage within immigration law is in order. Although CIMTs are not defined within the Immigration and Nationality Act (INA), or in any other statutory venue, CIMTs render aliens both inadmissible and deportable under several provisions of the INA.[7] The Foreign Affairs Manual (FAM) identifies the statutory offenses ***most likely*** to be found to be CIMTs, helpfully explaining that the most common elements involving moral turpitude are: 1) Fraud; 2) Larceny; 3) Intent to harm persons or things. It then lists the more common crimes "***which may be held to involve moral turpitude for the purposes of visa issuance***," followed by lists of crimes not commonly held to involve moral turpitude.[8] Sodomy, for example, continues to be listed as one of the crimes against the person, family relationships, and sexual morality that does constitute moral turpitude as it relates to visa issuance.[9]

Division of Labor in the CIMT- Based Removal Process

While the criminal conviction upon which a CIMT judgment is based is rendered in state, federal, or even a foreign court, it is the Immigration Judge who makes the first determination of whether the crime an alien has been convicted of should be deemed a CIMT. Upon appeal of the IJ's decision, the BIA has the responsibility of reviewing the IJ's decision. The BIA has long defined a "crime involving moral turpitude" as "conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general," requiring an analysis of the level of *scienter* under the statute.[10] The alien may appeal the BIA's decision to federal courts of appeal. Fortunately, despite recent jurisdictional bars on judicial review of discretionary decisions by the immigration agency, the determination of whether a CIMT may be inferred from a particular criminal conviction has been deemed a question of law by most circuits, and so remains reviewable.

Thus, there has long been a very definite, but somewhat confusing and frequently problematic division of labor between criminal courts and immigration courts in the CIMT-based removal process. As first articulated by the Second Circuit Court of Appeals in *United States ex rel. Mylius v. Uhl,* a landmark decision issued in 1914, because immigration courts are

administrative rather than judicial bodies, they do not act as judges of the facts to determine guilt or innocence with regard to a criminal charge. As administrative bodies, they are not authorized to look beyond the adjudications of criminal courts of state, federal or foreign governments. Thus when an immigrant has been convicted of a crime, the only duty of the immigration court is to determine whether that crime should be classified as one involving moral turpitude.[11]

Having explained the outer limits of an immigration court's authority, the court in *U.S. v. Uhl* went on to explain constructively the process by which immigration courts should determine whether an alien has been convicted of a CIMT. Because immigration officers do not act as judges of the facts to determine from testimony in each case whether a particular criminal act has involved moral turpitude, immigration officials must instead begin with the judgment of conviction, and evaluate whether the statutorily specified crime requires an act of moral turpitude for conviction. *If an individual might be convicted of this particular crime without having committed an action of the degree of depravity requisite for categorization as a CIMT, then no person convicted of this crime can be found to have committed a CIMT.*

In *U.S. v. Uhl,* the individual had been convicted of defamatory libel in England. The *Uhl Court* found that while such libel might involve depravity on the level of treason, which would clearly be a CIMT, a conviction for criminal libel did not necessarily, or essentially involve such an aggravated crime, and so immigration officials were not warranted in finding this individual excludable based on a CIMT.[12] – It should be evident that the IJ and BIA, as well as the federal judges who may review the agency decision, have a huge amount of discretion in determining whether any particular criminal statute requires as a minimal finding for conviction that an individual has committed an act involving sufficient depravity to render it a CIMT.

The analytical methodology prescribed by the *Uhl Court* has become known as the 'categorical approach,' and its reasoning has provided the accepted foundation upon which immigration officials must ground their determination that an alien has been convicted of a CIMT, and upon which immigrants and their attorneys may contest these findings. Beginning in 1990, in *Taylor v. United States*, the Supreme Court described the basic structure and underlying rationale for what has come to be known as a 'modified categorical approach.'

The modified categorical approach allows judges to address with greater nuance cases in which a statute criminalizes different sets of offenses, some of which are crimes involving moral turpitude and some of which are not. Such statutes are often referred to as 'divisible statutes.'[13] When dealing with a divisible statute, immigration courts may inquire into the "record of conviction" in order to determine whether a petitioner's conviction was under the branch of the statute proscribing actions properly categorized as CIMTs.

Of course, insofar as IJs are allowed to look beyond the actual conviction in the CIMT-based removal process, there are issues about which parts of an immigrant's history can be reviewed and which cannot. As defined by the various Circuit Courts, the record of conviction includes a specific and limited set of documents: 'the charging document, a plea agreement, a verdict or judgment of conviction, a record of the sentence, or a plea colloquy transcript.'[14] As the circuit courts have repeatedly explained, the emphasis in the modified categorical approach remains upon ascertaining the nature of the crime for which there was a conviction, and the least culpable conduct necessary to sustain a conviction under the statute.[15] If the minimum criminal conduct necessary to sustain a conviction does not involve moral turpitude, the alien is not removable for having committed a CIMT.

This means that even if an Immigration Judge has heard testimony during the immigration hearing indicating that the alien committed actions that constitute a CIMT, the IJ does not have the legal authority to rule based on that testimony that the alien has committed a CIMT and is removable on that basis. The IJ has no right to retry the facts of the alien's criminal conduct. The INA states that the alien is inadmissible or deportable based upon being convicted of a CIMT, and if the crime she was convicted of does not require behavior rising to the level of a CIMT, the IJ may not rule that her behavior was a CIMT.[16]

As should be evident from this brief description of the CIMT-based removal process, the authority and discretion of individual IJs to determine precisely which convictions under a vast array of different state and federal laws constitute CIMTs leads to highly variable results, and arguably demonstrates that the whole process of CIMT-based exclusion is unfair to the point of violating basic principles of due process and equal protection. Moreover, the significance of these troubling features of CIMT-based removal has been

greater since the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) both enacted in1996, expanded the criteria for crimes of moral turpitude, and increased the likelihood of CIMT-based exclusion proceedings for legal permanent residents by requiring them to seek re-admission after even a short absence from the U.S., making CIMTs committed even 25 years earlier a potential basis for inadmissibility and deportation.

Matter of Silva-Trevino

Unfortunately, the Attorney General's recent decision in *Matter of Silva-Trevino* threatens to dramatically increase the unfairness of the CIMT- based exclusion process. This is an opinion that was issued without providing either the respondent or other interested parties with notice of its certification to the Attorney General, with no opportunity for the respondent or *amici* to brief the Attorney General on relevant issues. It is also an opinion that seeks to overturn "a century of jurisprudence" addressing the methodology of CIMT-based exclusion, as made very clear in the Memorandum of Law of *Amici Curae*, written in immediate response to the publication of *Matter of Silva-Trevino*. (http://bibdaily.com/pdfs/Silva%20Trevino%20Amicus%20Brief.pdf) The *Amicus* brief requests that the Attorney General withdraw the decision based upon both the procedural flaws in its submission, as well as the legal chaos that will result from its irresponsible assertion of new law regarding CIMT determination by Immigration Courts.

A brief outline of the new rules asserted in the Attorney General's opinion, may be sufficient to indicate how an already problematic methodology has been made a great deal more so. First, the Attorney General's opinion revises the basic categorical approach. Under the standard categorical approach accepted by federal courts and immigration courts for the past century, an alien has not committed a CIMT unless the 'least culpable conduct necessary to sustain a conviction under a particular criminal statute involves moral turpitude.' By contrast, according to the Attorney General's new standard, an alien may be found to have committed a CIMT unless there is a "realistic probability" that the criminal statute under which she was convicted would be applied to conduct not involving moral turpitude.[17] The IJ's discretion to find that an alien has committed a CIMT under a particular criminal statute is magnified enormously by this change in the standard, as are the grounds for finding the notion of a

CIMT unconstitutionally vague.

Second, the Attorney General asserts that in those cases in which neither the new categorical approach nor the modified categorical approach, whereby the IJ considers the record of conviction, yields a determination that the alien has been convicted of a CIMT, the IJ is now authorized to "consider evidence beyond the formal record of conviction....in order to accurately resolve the moral turpitude question."[18] However, as the federal courts have all recognized, and as the Attorney General and BIA have recognized numerous times over the past 75 years, such an individualized assessment of facts underlying the conviction is contrary to the explicit limits on the administrative authority of the agency. Immigration courts and the BIA may not consider extrinsic evidence, evidence outside the record of conviction as an evidentiary basis for a finding of removal. As the BIA, itself, emphasized in *In re Pichardo-Sufren*, "Such an endeavor (evaluating extrinsic evidence such as testimony of the alien within an immigration court hearing) is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence."[19]

In fact, the BIA tested the proposition that it has the authority to go beyond the record of conviction in more limited contexts in two precedential decisions in 2007, in both cases asserting their authority to consider a presentencing report as the basis for determining whether an alien had committed an act "for commercial advantage," or committed an act where the loss to the victim exceeded $10,000, as required for finding the alien was removable for committing an aggravated felony.[20]

The 2d Circuit Court of Appeals repudiated the BIA's rationale for going beyond the record of conviction in one of these decisions, *In re Gertsenshteyn,* in no uncertain terms, in September 2008. Citing a 2008 BIA decision, *In re Velazquez-Herrera*, re-stating the accepted legal proposition that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, "the focus of the immigration authorities must be on the crime of which the alien was convicted, to the exclusion of any other criminal or morally reprehensible acts he may have committed," Judge Calabresi holds that the BIA's decision in *Gertsenshteyn* "departs, with insufficient reason, from the legal framework that we have long used to decide whether an alien charged with

removability under 8 U.S.C. § 1227(a)(2)(A)(iii) has been convicted of an aggravated felony."[21]

The Second Circuit has similarly repudiated the BIA's reasoning in a recent non-precedential decision, *In re Marcin Wala*, in which the Board's deportation ruling was based on inferring conduct constituting a CIMT from a pre colloquy transcript, evidence extrinsic to the record of conviction. In *Wala v. Mukasey*, Judge Sotomayer concluded, "The BIA, by looking to the facts of Wala's conviction to infer such an intent (for a permanent taking), therefore transgressed the permitted scope of the modified categorical approach."[22]

In the face of such emphatic, unqualified reiterations that IJ inquiry must not go beyond the record of conviction, the Attorney General relies upon a single circuit court decision for support. In *Ali v. Mukasey*, Judge Easterbrook rules, contrary to previous decisions in the 7th circuit, that "that when deciding how to classify convictions under criteria that go beyond the criminal charge - such as the amount of the victim's loss, or whether the crime is one of "moral turpitude," the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction."[23] However, insofar as this is not an en banc decision, it does not override prior panel decisions to create valid federal precedent even in the 7th Circuit. As the Amicus Brief emphasizes, it is evident from recent decisions such as *Gertsenshteyn v. Mukasey* and *Wala v.Mukasey* that circuit courts will not defer to the Attorney General's new rule. However, insofar as IJs begin to follow the new rules encouraging individualized, fact-based moral turpitude inquiries, havoc will ensue, given the high case loads of immigration courts,[24] never mind the increased appeals of agency decisions to the circuit courts.

The Attorney General asserts two further changes in the determination of CIMTs, both having to do with the degree of intent or level of knowledge necessary for the commission of a CIMT, both making it easier for an IJ to find that an alien has been convicted of a CIMT, both problematic and sure to be challenged in the federal courts. What is most remarkable about this opinion is its calm, post-legal tone, assuring us that the adjudicator must be allowed to consider whatever additional evidence is necessary "to resolve accurately the moral turpitude question."[25]

Conclusion

We can hope that a new administration will bring renewed support for social justice and the rule of law internationally as well as domestically. The Amicus Brief makes an excellent case for the withdrawal of *Matter of Silva-Trevino* by a new Attorney General who may not want to be saddled with such an "improvidently issued," decision, misrepresenting CIMT case law egregiously, and destructively impacting on thousands of immigrants in CIMT- based removal proceedings.

However, CIMT- based removal was problematic even before *Silva-Trevino*, and perhaps this is a good time to take on "the moral turpitude question" in a more fundamental way, asking anew whether the CIMT inquiry remains unconstitutionally vague, as Justices Jackson, Black and Frankfurter suggested 75 years ago. Were that our conclusion, rather than resolving the moral turpitude question, we might find ourselves constructively dissolving it.

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*__Patricia S. Mann is an Associate at Cyrus D. Mehta & Associates, PLLC where she works on immigration and nationality law matters. She has, for example, successfully represented clients seeking asylum, consular processing with 601 waivers, and adjusting status based on extraordinary ability, as well as national interest waivers. Pat received her J.D. in 2005 from New York University, and is admitted to practice in the Second Circuit, as well as the Eastern and Southern Districts. She is a member of the American Immigration Lawyers Association, as well as the National Immigration Project, and the City Bar Committee on Immigration and Nationality Law.__

[1]The Act of March 3, 1891, 26 Stat. 1084, directed "the exclusion of 'persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."; reenacted in 1903, 32 Stat. 1213, and in 1907, 34 Stat. 898, and finally in the Act of February 5, 1917, 39 Stat. 889, the language was expanded to include any person "convicted" of, or who "admits" the commission of a crime or misdemeanor involving moral turpitude. *Jordan v. De George*, 341 U.S. 223, 230 n.14 (1951).
In 1952, when the modern Immigration and Nationality Act ("INA") was first debated, some suggested expanding CIMT deportation grounds, but the final bill left only the conviction-based ground for CIMT deportability, indicating

Congressional desire to limit the immigration agency's review of underlying facts.
See also, *In re Cristoval Silva-Trevino*, Memorandum of Law of Amici Curiae American Immigration Lawyers Association, et al ("Amicus Brief"), in response to Silva Trevino, in support of its reconsideration, December 5, 2008, p. 31.

[2] *See also*, most recently, *Matter of Compean*, 24 I&N Dec.710 (A.G. 2009).

[3] See, for example, Judge Calabresi's Concurring Opinion in *Wala v. Mukasey*, 511 F.3d 103, 110 (2d Cir. 2007), where he states, "I concur completely with the reasoning of the Court and its application to this case. I write separately simply to say that this case seems to me to demonstrate the severe problems that adhere to the categorical approach and to the modified categorical approach."

[4] *United States ex rel. De George* v. *Jordan*, 183 F.2d 768,772 (7th Cir, 1950); *Jordan v. De George*, 341 U.S. 223, 226 (1951).

[5] *Jordan v. De George*, 229-230, 232.

[6] *Jordan v. De George*, 233 - 240.

[7] Under INA § 212(a)(2)(A)(i)(I), 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 (CIMT) (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible. Under the deportation section, INA § 237(a)(2)(A)(i), any alien who is convicted of a CIMT committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) after the date of admission and is convicted of a crime for which a sentence of a year or longer may be imposed is deportable. In addition, under subsection (a)(2)(A)(ii), any alien who at any time after admission is convicted of two CIMTs, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore, and regardless of whether the convictions were in a single trial, is deportable. *See* Gerald Seipp, Immigration Briefings, March 2008, "Criminal and Related Grounds of Inadmissibility and Deportability - Similarities, Differences, and Anomalies with an Attitude," p. 47.

[8] Foreign Affairs Manual, Chapter 9 Visas, 9 FAM 40.21(a)(N2)

[9] 9 Fam 40.21(a) N2.3-3.

[10] *See Rodriguez v. Gonzales,* 451 F.3d 60, 63 (2d Cir.2006);*In re M-,* 2 I. & N. Dec. 721, 723 (B.I.A.1946); *See also Matter of Solon*, 24 I&N Dec.239,240 (BIA 2007); Matter of Torres-Varela, 23 I&N Dec.78,83 (BIA 2001); Matter of Fulaau, 21 I&N Dec. 475,477 (BIA 1996); Matter of Danesh, 19 I&N Dec.669,670 (BIA 1988); Matter of Baker, 15 I&N Dec.50,51 (BIA 1974); Matter of S-, 2 I&N Dec.353,357 (BIA 1945). See also, Bouvier's Law Dictionary, Rawles Third Revision, p. 2247, for a similar definition. Cited by Justice Jackson, *Jordan v. De George*, 235.

[11] *United States ex rel. Mylius v. Uhl*, 210 F.860, 863 (2d Cir. 1914). The various circuit courts have agreed with this analysis over the past century, as has the BIA., beginning with the earliest decisions of the Attorney General on immigration law. *See Op. of Hon. Cummings*, 37 Op.Atty Gen. 293 (AG 1933) and *Op. of Hon. Cummings*, 39 Op.Atty Gen. 215 (AG 1938) ("Neither courts nor immigration officers may go outside such record to determine facts or whether in the particular instance the alien's conduct was immoral.") *See also* pp. 27-30, 39 of Amicus Brief for more extensive Circuit and BIA citations.

[12] *Uhl, 862-3.*

[13] *See Dulal-Whiteway v. U.S. Dept. o Homeland Sec*., 501 F.3d 116, 124 (2d Cir. 2007), where the Court cites *Taylor v. United States*, 494 U.S. 575 (1990), and its progeny, *Shepard v. United States*, 544 U.S. 13, 17 (2005), as two sentencing cases in which the Supreme Court described the basic structure and underlying rationales of the modified categorical approach. The applicability of the modified categorical approach to the immigration court context was immediately apparent.

[14] *Wala v. Mukasey*, 511 F.3d 102, 107-108 (2d Cir. 2007)

[15] *See*, for example, *Partyka v. AG of the United States*, 417 F.3d 408, 411-412 (5th Cir. 2005);
Jaadan v. Gonzales, 211 Fed.Appx. 422, 427 (6th Cir. 2006); et al.

[16] *See In re Pichardo-Sufren*, 21 I&N Dec. 330 (BIA 1996) for a clear statement of the BIA's commitment to what it terms the "settled proposition" that an IJ may not "adjudicate guilt or innocence" and so may not rely upon what it terms

"extrinsic evidence" such as immigration court testimony to determine that an alien has committed actions making him deportable for a CIMT. *See also INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984).

[17] *Matter of Silva Trevino*, p.2

[18] *Matter of Silva Trevino*. pp.2, 12, 14.

[19] *In re Pichardo-Sufren, supra* Note 16. See also *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984).

[20] *See In re Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007); *In re Babaisakov*, 24 I&N Dec. 306 (BIA 2007).

[21] *Gertsenshteyn v. U.S. Dept. Of Justice*, 544 F.3d 137, 145,149 (2d Cir. 2008); *In re Velazquez-Herrera*, 24 I&N Dec. 503,513 (BIA 2008).