Moral Turpitude

Julia Simon-Kerr
INTRODUCTION

This Article gives the first account of the moral turpitude standard, tracing its trajectory from the early American law of defamation to evidence law, where it has been used for witness impeachment, and then to legal areas as diverse as voting rights, juror disqualification, professional licensing, and immigration law, where it is used as a collateral sanctioning mechanism. “Moral turpitude” was formalized as a legal standard by common law courts seeking a manageable test for slander per se. If an allegedly damaging accusation suggested a plaintiff had committed a crime involving moral turpitude, reputational injury was presumed, and the plaintiff did not need to prove damages. At the same time, the

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1 See Brooker v. Coffin, 5 Johns. 188, 191–92 (N.Y. Sup. Ct. 1809) (adopting new definition of slander per se using “moral turpitude”).

2 See, e.g., People v. Rector, 19 Wend. 569, 573–74, 582 (N.Y. Sup. Ct. 1838) (employing “moral turpitude” in the context of witness impeachment).

3 See, e.g., ALA. CONST. of 1901, art. VIII, § 182 (providing for disenfranchisement of those convicted of crimes involving moral turpitude).

4 See, e.g., 3 REVISED LAWS OF THE STATE OF CALIFORNIA art. II, § 199 (1871) (“A person is not competent to act as a juror . . . [w]ho has been convicted of a felony or misdemeanor, involving moral turpitude.”); FIRST LEGISLATIVE ASSEMBLY OF THE TERRITORY OF ARIZONA, THE HOWELL CODE ch. 47 § 4, at 294 (1865) (“Nor shall any person be competent to act as juror who has been convicted of a felony or misdemeanor, involving moral turpitude.”).

5 See, e.g., GENERAL STATUTES OF THE STATE OF MINNESOTA § 19 (3d ed. 1881) (“Upon his being convicted of a felony, or of a misdemeanor involving moral turpitude, in either of which cases the record of his conviction is conclusive evidence.”); THE CODE OF ALABAMA, ch. 10, § 747 (1852) (“An attorney must be removed . . . [u]pon his being convicted of a felony other than manslaughter, or misdemeanor involving moral turpitude; in either of which cases the record of his conviction is conclusive evidence.”).


8 See id. at 119.
standard protected the defendant and the courts from suits over trifles. As moral turpitude spread and was appropriated for use in other fields, it functioned differently, working as a standard that purported to judge character instead of reputational harm. It was used not to sort out entitlement to civil damages, but instead to determine who should be permitted to join or continue to belong to a particular community or who could exercise basic citizenship rights. Today, although it continues in defamation law in some jurisdictions and as an evidentiary impeachment standard in a few significant others, its most prevalent use is as a sanctioning mechanism, particularly in the law of immigration, where it creates a category of offenses that warrant deportation.

Despite its presence in the law for over two centuries and its seeming relevance to continuing debates over the relationship between law and morality, the moral turpitude standard has received little scholarly attention. Only in the context of immigration law and professional licensing has it provoked limited comment, all of which has been critical. Yet there has been no systematic study

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9 Id. at 122, 129.
10 Infra Part III.
11 The two outliers are California and Texas. See infra Part II.
12 In the ten years leading up to the publication of this Article, the phrase “moral turpitude” has appeared in nearly 3,500 reported federal cases and almost 2,500 state cases, many involving immigration issues. These numbers do not include administrative-agency decisions, state or federal, or the often-unpublished proceedings of professional licensing boards. Yet, the term “moral turpitude” itself is an antique in contemporary popular culture. When it was cited by Warner Brothers as a reason for firing actor Charlie Sheen, a blogger asked, “Moral turpitude! How often do you get to use that in a sentence?” Charlie Sheen Is Fired—Bring on the Moral Turpitude, L.A. TIMES BLOGS (Mar. 7, 2011, 4:51 PM), http://latimesblogs.latimes.com/gossip/2011/03/charlie-sheen-fired-two-and-a-half-men-snl-remix.html.
14 The most frequently cited article on moral turpitude is a short Note published in the Harvard Law Review in 1929. Note, Crimes Involving Moral Turpitude, 43 HARV. L. REV. 117, 117–21 (1929). There have been six law journal articles devoted to the standard since the Harvard Law Review Note. All six are focused on its impact in immigration law. See Brian C. Harms, Redefining “Crimes Of Moral Turpitude”: A Proposal to Congress, 15 GEO. IMMIGR. L.J. 259 (2001) (concluding that a bright line approach to moral turpitude should be used in immigration cases); Mary Holper, Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness, 90 NEB. L. REV. 647 (2012) [hereinafter Holper, Deportation for a Sin] (arguing that moral turpitude is void for vagueness); Mary Holper,
of its history, its practical application, or the underlying rationales for its use across substantive areas of law. We have no theory for why this standard—which not only assumes moral consensus, but also the competence of judges to identify it—has salience in so many areas of our legal system. The standard has likewise received little attention from scholars interested in the descriptive enterprise of showing how “moral phraseology” functions in our legal system. Similarly, the standard


Perhaps the most widely studied standard that, like some iterations of moral turpitude, focuses on community morality is the Supreme Court test to identify obscene speech unprotected by the First Amendment. As framed in 1957, the test asks “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.” Roth v. United States, 354 U.S. 476, 489 (1957). The test provoked Justice Stewart’s famous comments about pornography:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Commonly held ideas of moral rectitude are also bound up in various common law doctrines, among them unconscionability. See, e.g., Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (N.J. 1960) (holding Automobile Manufacturers Association’s attempted disclaimer of implied warranty of merchantability inimical to public good and therefore invalid).

Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 463 (1897) (describing, for example, the legal use of words such as “malice” as requiring an inquiry into conduct rather than actual moral status or maliciousness, as suggested by its facial meaning).
has been unremarked in the growing legal literature that draws upon one or another conception of virtue ethics for insight into the work of judges\(^{17}\) and to interrogate substantive and procedural issues in various areas of the law.\(^{18}\)

Tellingly, the most frequent attention to the standard has come in a form that eschews analysis. Courts have described the standard as “notoriously plastic,”\(^{19}\) jurisprudence on moral turpitude as an “amorphous morass,”\(^{20}\) and its use as an “invitation to judicial chaos.”\(^{21}\) In the only case to date in which the U.S. Supreme Court examined the standard in immigration law, Justice Jackson wrote, in dissent, that moral turpitude had “no sufficiently definite meaning to be a constitutional standard for deportation.”\(^{22}\) The few scholarly articles on the standard, almost all in

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\(^{19}\) Ali v. Mukasey, 521 F.3d 737, 739 (7th Cir. 2008).


\(^{22}\) Jordan v. De George, 341 U.S. 223, 232 (1951) (Jackson, J., dissenting). Courts have cited Jackson’s dissent in *Jordan* in myriad subsequent opinions. See, e.g., *Ali*, 521 F.3d at 739 (noting that moral turpitude appeared “so ambulatory that some Justices . . . thought it unconstitutionally vague”). The judiciary’s discontent has produced no legislative response. The Supreme Court recently denied the retroactive application of an exclusion provision for moral turpitude convictions. See *Vartelas v. Holder*, 132 S. Ct. 1479, 1483–84 (2012). It seems inevitable that the Supreme Court will be forced to confront the question of what moral turpitude means in immigration law in the not-too-distant future. The Court has recently held that immigrants must be informed of the potential deportation consequences of their pleas, a task made herculean by the permutations of the moral turpitude standard. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010) (“[W]hen the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.”).
immigration law, have argued, in agreement, that it is unconstitutionally vague and invites inconsistent and unpredictable judgments.23

These criticisms are borne out, to an extent, by observable legal outcomes. Moral turpitude jurisprudence today suggests that society condemns as immoral the petty thief,24 but not the person who attacks a police officer.25 If the federal courts are to be believed and the standard taken at face value, then “aggravated fleeing”26 is inherently base, vile, and depraved, while some forms of aggravated assault do not violate community norms of morality.27 Drunk driving repeatedly is deemed not to involve moral turpitude,28 but drunk driving with a suspended license is assessed differently.29 All statutory rape involves moral turpitude, but so did same-sex sodomy, until it received constitutional protection in Lawrence v. Texas.30 In evidence law, moral turpitude jurisprudence holds that the prostitute lacks credibility31 but the batterer does not.32

The dearth of scholarship on the standard may thus be accounted for by some consensus that the problem with the standard is its vagueness and that further inquiry into what appears to be a morally infused doctrinal morass would not be fruitful. Further, the standard does not fit comfortably into traditional discussions of law and morality. Arguably, the standard is not normative because in most settings it applies after the fact to acts that have led to a criminal conviction, acts that by definition have been pronounced as wrongful. Yet, if as Holmes famously said, the law is “the witness and external deposit of our moral life,” moral turpitude deserves closer attention, and not simply because of the seriousness of the consequences it visits upon those who fall upon the wrong side of its lens. The standard asks courts not just to witness but also to testify to the nation’s moral life

23 See, e.g., Holper, Deportation for A Sin, supra note 14, at 663–701 (arguing that moral turpitude is void for vagueness); Moore, supra note 14, at 814–16; Wolper, supra note 14, at 1907–10; see supra text accompanying note 14.
24 Michel v. INS, 206 F.3d 253, 261 (2d Cir. 2000).
26 Mei v. Ashcroft, 393 F.3d 737, 741–42 (7th Cir. 2004) (affirming that “aggravated fleeing,” a crime under Illinois law, involves moral turpitude).
27 Carr v. INS, 86 F.3d 949, 950–51 (9th Cir. 1996).
29 Marmolejo-Campos v. Holder, 558 F.3d 903, 917 (9th Cir. 2009).
32 See, e.g., People v. Mansfield, 200 Cal. App. 3d 82, 88–89 (1988) (refusing to permit impeachment of a witness with a conviction of “felony battery” or “battery resulting in serious bodily injury” because that offense is not “a crime of moral turpitude”).
33 Holmes, supra note 16, at 459.
by making value judgments couched in moral terms with no other guidepost than, in the words of one judge, the court’s “extra-legal moral sense.”

This Article takes on the project of “deliberate reconsideration” of moral turpitude, a reconsideration that bears out another of Holmes’s observations—that without history we cannot know and examine “the precise scope of rules which it is our business to know.” In order to elucidate this standard across areas and over time and thereby “get the dragon out of the cave,” this Article addresses a series of questions: What is the origin of the phrase “moral turpitude”? How did it find its way into American law as a legal standard? How has it evolved over time and in what settings? How have courts defined it? How have they handled or shied from the task of applying their “extra-legal moral sense” to identify acts that deserve the label? And, finally, because law has an important educative function, what, if anything, does it tell us about our moral knowledge and preferences? Is this really a standard about morality or are we confusing what are really a set of honor norms with some deeper concept of virtue or goodness and making serious errors because of it? This Article reaches several conclusions.

First, courts have not been eager to use the discretion they have had to apply the moral turpitude standard according to their own, society’s, or philosophers’ notions of morality. Early on, they settled on a definition of moral turpitude as involving “conduct that is inherently base, vile, or depraved, and contrary to the private and social duties man owes to his fellow men or to society in general.” Also early on, courts decided that the question to be answered was whether the conduct “involv[es] grave infringement of the moral sentiment of the community.” Over the standard’s two-hundred-year history, however, few courts have been interested in exploring either of those disparate ideas of moral wrongfulness, which they have almost always elided. Even in early defamation cases, courts were troubled at the lack of familiar legal guideposts and disinclined to use the standard as a platform for their own views of moral conduct. Other courts simply declined to adopt the standard because it would require them to “search moral and ethical authors, rather than legal writers.” As one state supreme court justice wrote in 1991, “as society has increasingly become both more secular and pluralistic, there is less consensus about what is immoral.”

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34 United States ex rel. Griffio v. McCandless, 28 F.2d 287, 288 (E.D. Pa. 1928) (asserting agreement that the federal “moral turpitude” standard was intended to cover those acts “not only condemned by the law and denounced as criminal, but those which the extralegal moral sense pronounces to evidence moral turpitude or depravity” and concluding that an assault and battery conviction did not satisfy this test).

35 Holmes, supra note 16, at 469.

36 Id.

37 Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1068 (9th Cir. 2007).

38 Id. (citation omitted).

39 Infra Part I.B.

40 Skinner v. White, 18 N.C. (1 Dev. & Bat.) 471, 474 (1836) (per curiam).

41 In re Berk, 602 A.2d 946, 951 (Vt. 1991) (Morse, J. concurring).
“Moral turpitude,” he argued, “is a compass with the directional needle removed.”

Second, courts’ reluctance to confront moral questions on any deep level has interfered with their ability to engage in reasoned analysis of the issues the moral turpitude standard is supposed to resolve. When the standard moved to immigration law, federal judges were no more eager than state judges to make post facto moral value judgments without guidance. Beginning in the 1920s, the federal courts developed what is now called the categorical approach, a formalistic approach that prevents them from probing below the surface of a conviction to any of the facts that might inform a moral judgment about the act. Instead, the categorical approach focuses exclusively on whether a conviction required the element of scienter. The categorical approach has spread into areas as diverse as professional licensing and evidence. Yet even as this approach has come to control in many cases, courts insist, without explanation, that certain per se categories are not governed by it. Those categories are fraud and sex crimes.

Third, this account demonstrates that cultural norms that were salient when moral turpitude first entered the law still drive the outcomes of cases. This Article uses the phrases “honor norms” or “honor code” to describe these norms which were, as this Article shows, drawn from beliefs about moral rectitude that were widely held in the early nineteenth century. This early honor code was gendered, condemning a lack of chastity in women and deceptive business practices and dishonesty in men. Violent behavior, in contrast, was treated more forgivingly. In the exceptions to the present-day scienter rule—which require that crimes involving fraud or sexual deviance always fall within the standard even as crimes of violence can be excluded for lack of scienter—modern moral turpitude jurisprudence simply mimics a nineteenth-century system of values.

Viewing moral turpitude against the background of the honor code, this Article shows that the problem with the standard is not its vagueness but that it is overdetermined by its history. Rather than suffering from too little meaning, the standard suffers from too much. Although superficially both the strength and weakness of the standard might be seen as its plasticity, courts have declined to engage in the project of keeping it up to date with the ever-evolving and often-contested morals of a pluralistic society. Courts themselves have contributed to the misperception that they are treating moral turpitude as “necessarily adaptive,” and “defined by the state of public morals.” In fact, however, they have for the most

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42 Id.
43 infra Part III.B(2)(a).
44 infra Part III.B(2)(b).
45 Id.
46 Id.
47 Id.
48 infra Part I.A.
49 Id.
50 infra Part III.B(2)(b).
part ignored community moral sentiments when applying the standard. Nor do the opinions show courts exercising their own “extralegal moral sense” in making moral turpitude assessments. Rather, in the years since it entered American common law, moral turpitude has preserved, but not transformed, the set of morally framed norms of the early nineteenth century that first shaped its application.

This Article proceeds in three parts. Part I shows that moral turpitude was first formalized as a legal standard in 1809 when a New York court adopted the phrase as part of the test for slander per se. It illuminates moral turpitude’s origins in the political and social discourse of the late eighteenth century as a catchphrase that signaled fundamental breaches of a gender ed honor code. It argues that the honor code served as an implicit guide to courts applying the standard. Accordingly, in early defamation cases, courts had little difficulty finding that accusations of oath-breaking, fraud, and their extensions—such as theft or destruction of property belonging to someone else, as well as accusations of crimes of sexual deviance, particularly by women—imputed moral turpitude. As it reflected the honor code, the standard was, at least initially, a reasonable way to identify accusations that should be presumptively slanderous. Like other legal terms, it had “a core of settled meaning” that corresponded with those offenses against honor norms that would be most damaging to reputation and “a penumbra of debatable meaning.”

In cases at the debatable margins, moral turpitude still did not function as an adaptive legal standard. Courts’ reluctance to make overt moral judgments led them to resolve marginal cases by resorting to established common law formulas, such as the malum in se/malum prohibitum distinction, or an analysis grounded in scienter. In both the core and the marginal cases, however, most courts announced that moral turpitude meant inherently base, vile, or depraved conduct, or conduct contrary to community morality.

Part II turns to evidence law and describes the development of a jurisprudence of moral turpitude as an impeachment standard. It shows that courts continued to follow the core contours of the honor code, treating sex crimes and crimes involving deception or fraud as permissible for impeachment while excluding crimes involving violence. At the margins, just as in slander cases, courts used familiar proxies such as malum in se or evil intent to identify crimes that would be admissible to impeach witnesses. Yet these proxies were, if anything, even more removed from the question of credibility than from moral turpitude itself. The jurisprudential incoherence that resulted eventually proved untenable for most courts, and despite its use in many states, the standard was not adopted by the

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53 Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1086 (2009) (“A conventional argument for standards, as opposed to rules, is that standards ensure flexibility for the future, thus reducing the magnitude and number of mistakes.”).
54 See *infra* Parts I.B.2, II.B, III.B.2.
55 See Franklin v. INS, 72 F.3d 571, 573 (8th Cir. 1995); Vidal y Planas v. Landon, 104 F. Supp. 384, 390 (S.D. Cal. 1952); cases cited *infra* notes 221, 249, 389.
drafters of the Federal Rules of Evidence. Eventually, the vast majority of states abandoned moral turpitude as an impeachment standard.

Part III focuses on the use of moral turpitude as a collateral sanctioning mechanism in the context of voting rights and immigration. It shows that in these areas, the honor norms carried forward by the standard appealed to legislatures seeking to preserve existing hierarchies and social values. Moral turpitude was used to police the boundaries of an ideal polity and was used invidiously to enforce racial hierarchy.56 It appealed to state governments seeking to limit the franchise and to the federal government as a way to block the entry of undesirable immigrants.57

Just as it had in its common law iterations, moral turpitude created difficulties for the federal courts as an exclusion or deportation standard. Courts paid lip service both to the idea that the standard meant “inherently base, vile, or depraved” and to the suggestion that it should express the moral view of the community, here defined as the nation as a whole. Yet they rejected the discretion offered under either of these formulations. Instead, with remarkable fidelity, they reproduced the common law contours of the standard and essentially carried forward honor norms dating back to the early Republic. Certain core crimes—those involving deception, fraud, or sex—are still viewed as involving moral turpitude per se.58 Crimes of violence are still a separate, less-censured category. At the margins, the federal courts developed and continue to apply the decontextualized categorical approach that places off limits the facts underlying an immigrant’s conviction and focuses instead on whether the element of scienter was required for conviction.59

In showing how moral turpitude has spread and yet not evolved in the law, this Article lays a foundation for a broader conversation about its continuing efficacy as well as its relevance to ongoing debates about law, morality, and judicial behavior. Moral turpitude jurisprudence is remarkable today for the degree to which judges have structured it to avoid the moral pronouncements it seems to require, instead preserving old hierarchies and beliefs and drawing arbitrary lines in marginal cases. This Article suggests, among other things, that if we seek to base judicial intervention on moral judgment, we must look for other ways to accomplish that goal.

56 It was not until the mid-1980s that a state law using moral turpitude was struck down on equal protection grounds in the face of plain evidence that its purpose, as well as its effect, was to disenfranchise blacks. See Hunter v. Underwood, 471 U.S. 222, 233 (1985).
57 See infra Part III.A.
58 See, e.g., Castle v. INS, 541 F.2d 1064, 1066 (4th Cir. 1976) (labeling statutory rape “moral turpitude per se”).
59 Paradoxically, this abstracted approach to the moral turpitude analysis may have enabled its survival as a standard by substituting an analysis of the elements of crimes for an extralegal inquiry into community mores.
I. MORAL TURPITUDE AND THE LAW OF SLANDER

In 1809, the New York Supreme Court created a test for slander per se that was adopted so widely that it would be termed the “American Rule” by the end of the century.60 In Brooker v. Coffin,61 a defamation case involving a woman who had been accused of prostitution,62 the court held that a crime would be actionable as slander per se only if the words, if true, would result in “indictment for a crime involving moral turpitude, or subject [the person] to an infamous punishment.”63 Seeking a rule that would “conduce to certainty,”64 the court used the phrase “moral turpitude” to demarcate those accusations so harmful to reputation that a plaintiff would not need to offer proof of damages in order to prevail in a defamation suit.

Moral turpitude was not a new phrase in 1809, but it was new to a formal role in the common law. Until the New York Supreme Court used it in Brooker, the phrase had made only descriptive appearances in judicial opinions in England and the United States.65 Yet moral turpitude was a phrase that had clear content, even if its boundaries were less clear. In the early nineteenth century, moral turpitude was a familiar phrase, employed often by public figures to ascribe particular failings of character to their rivals.66 In order to elucidate its cultural meaning, this Part examines its grounding in the popular parlance of the early nineteenth century and shows how it functioned as a catchphrase for a gendered honor code. It then turns to the Brooker test and shows how moral turpitude’s cultural meaning shaped its legal applications.

A. Moral Turpitude: Reputation and Honor in Popular Consciousness

Moral turpitude was a popular phrase in the social and political discourse of the early nineteenth century. It owed its early cultural significance to the fact that male honor norms were a preoccupation of the elites who worked to shape the political landscape of the early Republic.67 In published letters, pamphlets, speeches, and even in their own private records, the leaders of the new country worried about “[s]incerity of character . . . and the assumption of honor that

60 See NEWELL & NEWELL, supra note 7, at 7 (labelling Brooker’s formulation the “American Rule”).
61 5 Johns. 188, 188–89 (N.Y. Sup. Ct. 1809).
62 Id. at 191.
63 Id.
64 Id. at 192.
66 See infra Part I.A.
formed the foundation of that sincerity.” 68 By extension, “[d]ishonor in print” was a central concern because it could “damn[] a man’s reputation for all time.” 69 As historian Joanne Freeman explains, “In a government lacking formal precedents and institutional routines, reputation was the glue that held the polity together.” 70 Thus, rather than a government of rules, the early American republic was, to an extent, “a government of character.” 71 Honor codes, in other words, were at the heart of the political enterprise.

As a term for honor’s opposite, and one that had been employed by the classical thinkers who were widely read and admired by educated elites, 72 moral turpitude was ripe for rhetorical use in political discourse. For example, the founders often cited Cicero when arguing for the existence of a “moral sense” that should transcend expediency as the rationale for action. 73 In De Finibus, Cicero argues for a form of absolute morality, asserting that although there may be no legal consequences, “the dishonesty of an action is . . . in itself execrable and frightful.” 74 As his words were translated in 1812, Cicero went on to say: “[A]s virtue or moral excellency is for itself to be valued and desired, so vice or moral turpitude is to be hated and avoided.” 75

Moral turpitude came to be used by early politicians as a catchphrase to sum up traits they deemed undesirable in the new Republic. The founders devoted considerable attention to the idea that the new nation could not survive without values that would promote a “wholesome control.” 76 In an 1819 letter, Thomas Jefferson wondered aloud to John Adams whether the Roman Empire could have been saved, even by Cicero’s leadership, when that nation was so “steeped in...

68 See id. at 129; see also WILLIAM J. NOVAK, THE PEOPLE’S WELFARE 11 (1996) (arguing that because of the focus on public welfare, in the early nineteenth century, civil liberty had to “conform to the superior power of self-governing communities to legislate and regulate in the public interest”).


70 Id. at 69.

71 Id.

72 Both the nation’s founders and the generally educated public shared an intense interest in the Stoics and Cicero. See Martha C. Nussbaum, Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism, 121 HARV. L. REV. 4, 50 (2007); see also GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 103 (1992) (“Public morality was classical morality; people could not read enough about Cato and Cicero.”).


74 3 CICERO, DE FINIBUS 158 (Jeremy Collier, ed., Samuel Parker, trans., 1812).

75 Id.; see also 3 CICERO, DE FINIBUS BONORUM ET MALORUM 256 (T. E. Page & W. H. D. Rouse, eds., 1914) (“Nihil est enim de quo minus dubitari posse quam et honesta experenda per se et eodem modo turpia per se esse fugienda.”).

corruption, vice, and venality.”77 According to Jefferson, the ancient nation most likely lacked “the inculcations necessary to render the people a sure basis for the structure of order and good government.”78 Among those inculcations were “in all cases, to follow truth as the only safe guide,” to be educated as to “what is right and what [is] wrong,” and “to be encouraged in habits of virtue, and deterred from those of vice.”79 Alexander Hamilton, too, saw a moral code centering on truthfulness as essential to the country’s success because of its importance in protecting reputation and property. “[W]here is the security for property, for reputation, for life,” he asked, “if the sense of moral and religious obligation deserts the oaths which are administered in courts of justice?”80 Jefferson, Hamilton, and others thus actively promoted a vision of “honor” characterized by oath-keeping, integrity, and industry.81

This developing American ethos that demanded integrity, hard work, and loyalty in male citizens82 meant that deception, disloyalty, and the failure to contribute productively to society were the primary traits condemned as moral turpitude in men. In post-Revolutionary newspaper polemics, most often penned by politicians and their allies, the phrase “moral turpitude” was used to connote disloyalty, oath-breaking, and deception in financial matters. A typical example is found in a best-selling 1803 pamphlet by William P. Van Ness, an Aaron Burr

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77 Id.
78 Id.
79 Id.
81 See ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 140 (1997) (“Hamilton hoped to foster the kind of bustling, productive, large-scale commercial polity that we identify today with liberal civic life . . . .”). Professor Smith explains that by seeking to “attract commercial and financial elites” to invest in the country, Hamilton also pursued a project that would inextricably tie the government to “wealthy leaders . . . reinforcing socioeconomic and political hierarchies.” Id. at 141. In Democracy in America, De Tocqueville observed the success of the promotion of industry in America. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 235 (Philips Bradley, ed., Alfred A. Knopf 1945) (1840). He wrote that honor in America was comprised of different qualities than the ones that defined it in European countries. Id. In Europe, conspicuous leisure was a badge of upper-class status and of honor. Id. at 152–53. In America, in contrast, work was deemed a virtue and the wealthy man had to strive to appear occupied lest he be thought a wastrel. Id. at 152–53, 235. De Tocqueville attributed the differences to the need for a strong work ethic that would foster exploration and development of the new country’s vast resources. To neglect the “quiet virtues which tend to . . . encourage business,” observed DeTocqueville, was to “incur public contempt.” Id. at 235.
82 William Novak describes the commitment to furthering “the welfare of the whole people and community” as a “fundamental ordering principle[] of the early American polity.” NOVAK, supra note 68, at 9.
supporter. Van Ness attacked DeWitt Clinton, a Hamilton supporter and one of Burr’s antagonists, as “an adept . . . in moral turpitude; profoundly skilled in all combinations of treachery and fraud.” Van Ness’s barb was well chosen: one reader analogized his invective to “a whip of scorpions.” His use of moral turpitude in conjunction with “treachery and fraud” invoked the Ciceronian concept that the virtues of loyalty and oath-keeping are the essence of moral integrity and character while the “dishonesty of an action” is execrable.

Another early public exchange, this one over an accusation that Thomas Jefferson had promoted a worthless transfer of American debt from the French to a Dutch company, dramatized the use of moral turpitude to frame accusations of deceptive business dealings. In a 1792 letter defending Jefferson, Attorney General Edmund Randolph wrote that such an accusation “involv[es] no small degree of moral turpitude” and would “render the accused, if guilty, unworthy [of] the confidence of his fellow citizens.” In yet another example, an 1811 letter to the editor of the Rhode Island American urged residents to withdraw their support from their governor because he had invoked the statute of limitations to avoid paying a debt to an elderly aunt. “Who of you,” the author asked, “worth the immense sum of one hundred and fifty thousand dollars, would thus have defrauded a widowed aunt? What heart but recoils at such moral turpitude and dishonor?”

In 1812, yet another pseudonymous letter attacked James Madison for the joint sins of fiscal irresponsibility and misplaced loyalty to the French. It concluded, “I arraign you of falsehood, private views, ignorance, and the worst of moral turpitude. As it involves not only your conscience, but the safety of millions, fraud in the management of the public weal, if not of treachery! Vindicate yourself if you can.” Notably, these early political writings contain no references to acts of violence as involving moral turpitude.

Moral turpitude had a different set of meanings when applied to women. Rather than suggesting intentional deception or disloyalty, the phrase signaled violations of female honor norms requiring sexual purity. Offenses against chastity


84 Aristides [William Van Ness], An Examination of the Various Charges Exhibited Against Aaron Burr, Esq. Vice-President of the United States 55 (1804).


89 Codrus, Letter to James Madison, President of the United States, Fed. Republican (Balt.), Feb. 6, 1812, at 3.
were, at least for the white elites whose letters filled the newspapers and whose ranks made up the judiciary, the female counterpart to male oath breaking. Women’s sexual virtue was of such paramount importance to perceptions of their integrity that attorneys routinely sought to impeach women with evidence of their lack of chastity, a practice that did not extend to men. In public discourse and in the courts, however, moral turpitude appeared far less frequently as a phrase to brand women for sexual misconduct than it did with reference to deceptive business practices. This asymmetry is not surprising. Women were largely off limits from the kind of public attacks leveled at men. They also appeared infrequently in opinions discussing fraud or contract violations. Once it entered the law of slander, however, moral turpitude when applied to women was used almost exclusively to signify breaches of sexual morality.

Throughout the nineteenth century, courts reinforced the notion that moral turpitude in men was characterized by oath-breaking and disloyalty but not violence, while in women it connoted failure to comply with norms of sexual conduct. An 1826 Pennsylvanian defamation case is illustrative. The plaintiff, a

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91 Different norms applied to African Americans in slavery, both men and women, and to Native Americans. For a nuanced discussion of racialized ideologies of virtue in the nineteenth century, see Francois Furstenberg, Beyond Freedom and Slavery: Autonomy, Virtue, and Resistance in Early American Political Discourse, 89 J. Am. Hist. 1295 (2003).


93 See id. at 1868–86.

94 A Westlaw search of cases in which moral turpitude and fraud or deception appeared in the same paragraph produced 366 instances before 1900, whereas a search for moral turpitude in the same paragraph as five words suggestive of sexual deviance, such as chastity, fornication, and their variants, produces only 93 pre-1900 cases.

95 Freeman, supra note 69, at 132 (explaining that the public perception that women were defenseless led to the lack of public attacks on women because “there was no honor in an unfair fight”). In one of the few published references to women and moral turpitude, an anonymous writer ascribed Sparta’s decline to the fact that “Spartan women became remarkable for indecency, and every other species of moral turpitude.” Female Education, and the Duties of the Female Sex: No. IX, Vt. Intelligencer & Bellow Falls Advertiser, July 14, 1817, at 2.

96 Although the influential English fraud case Haycraft v. Creasy, (1801) 102 Eng. Rep. 303; 2 East 92, did have a woman at its center, she was not a party to the eventual lawsuit. Id. at 303–04. The case had facts worthy of Trollope or Dickens: Miss Robertson, a former school teacher, began to give “herself out to the world as a person of considerable fortune.” Id. at 304. She borrowed money based on that pretense and established herself with a large house and a carriage, which only enabled her to borrow from more creditors. Id. Among those who were taken in by her apparent wealth was the defendant, Creasy, a currier who was in business near Miss Robertson’s house and had loaned her £2000 without security. Id. He also made the mistake of assuring Haycraft, an ironmonger, that Robertson was credit worthy. Id. at 304–05. Haycraft’s suit was based on that assertion. Id. at 304–05.

97 See infra text accompanying notes 126–136.
man, had been accused of theft, and on the issue of damages the state’s high court stated that “[t]he condition, and even the sex of the parties, [must be] considered.”98 The court went on to observe that “the imputation of want of chastity to a man is actionable; yet, unless under very particular circumstances, only nominal damages would be given.”99 On the other hand, an accusation of want of chastity in a woman was presumed to cause great injury, although her “condition in life” must be taken into account.100

A concurring opinion in an 1840 slander case from Louisiana gave a more pointed account of the distinction, while also expressing the view that moral turpitude did not necessarily encompass male crimes of violence. The concurring judge wrote:

I believe an action of slander can be, and ought sometimes to be maintained, for words which do not charge an offence that will subject the party to indictment. For instance, to charge a virtuous woman with a want of chastity. On the other hand, there are words which impute indictable offences that would not, in my estimation sustain an action for slander: As to say of a man, he was guilty of an assault and battery, or that he was the bearer of a challenge to fight a duel, or that he retailed spirituous liquors without a license.101

In other words, while violence in defense of a man’s honor102 or a simple assault did not violate honor norms so as to constitute moral turpitude, lack of chastity in a woman did.

For people of either sex, as an attorney explained in one Kentucky case, acts involving moral turpitude were set apart by the permanent harm they could inflict upon reputation. “We estimate the character of a man by the uniform tenor of his life,” the attorney reasoned, and “there are particular acts of moral turpitude, the commission of which, would be decisive of his infamy, and stamp an indelible stigma on his reputation . . . .”103 With its clearly understood meaning and its intimate connection with reputational harm, moral turpitude was thus a natural fit for the law of defamation.

99 Id.
100 Id.
102 The idea that fighting duels did not amount to moral turpitude appears with some regularity in an array of cases. For example, in a Virginia case involving the impeachment of a notary public who had assisted at a duel, the court’s analysis turned, in part, on its observation that “the violation of the anti-dueling law . . . [is] not supposed to involve so great a degree of moral turpitude.” Royall v. Thomas, 69 Va. 130, 134 (1877).
103 Johnson v. Moore’s Heirs, 11 Ky. (1 Litt.) 371, 380 (1822).
B. Moral Turpitude as Slander

By the late eighteenth century, England had established the rough principle that spoken words that “impute that the plaintiff has been guilty of a crime punishable with imprisonment” would be actionable without proof of damages.\textsuperscript{104} Still, the courts struggled to define the boundaries of this rule. Should a line be drawn between felonies and misdemeanors? What should be done about crimes punishable by hanging or by banishment? The early law of slander was, in part, a replacement for an extralegal honor system that had dealt with insults and false accusations through violence, often by dueling.\textsuperscript{105} But in seeking to curb private violence, the courts ran the risk of opening themselves to a flood of litigation over trivial grievances. In crafting a rule for slander per se, the courts sought to maintain a balance between providing redress for severe reputational wrongs and permitting litigants to bring their personal vendettas into court.\textsuperscript{106} In the early nineteenth century, however, that balancing act resulted in a “mass of conflicting decisions.”\textsuperscript{107} When it turned to the challenge of framing a test for slander in the new Republic, therefore, the nascent American legal system had unusual space to invent a new rule for an old tort.

When the New York Supreme Court decided 	extit{Brooker v. Coffin}\textsuperscript{108} in 1809, it did just that. Drawing from the popular parlance of honor, it ruled that a crime would be actionable as slander per se only if the words, if true, would result in “indictment for a crime involving moral turpitude, or subject [the person] to an

\textsuperscript{104} 4 ENCYCLOPÆDIA OF THE LAWS OF ENGLAND 466 (A. Wood Renton & Max A. Robertson, eds., 1907); see also 3 WILLIAM BLACKSTONE, COMMENTARIES *124 (“[Slander] may endanger a man by subjecting him to the penalties of the law, may exclude him from society, [or] may impair his trade.”).

\textsuperscript{105} See IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 502 (1965) (noting that the tort of slander emerged as “a substitute for the duel and a deterrent to murder”); see also Mark M. Carroll, “All for Keeping His Own Negro Wench”: Birch v. Benton (1858) and the Politics of Slander and Free Speech in Antebellum Missouri, 29 L. & Hist. Rev. 835, 858 (2011) (noting that “an obstinate cult of masculine honor that prevailed in both town and country,” particularly in the South, required “common men and politicians to respond to political insults with lethal violence” and contributed to a cultural stigma against bringing slander actions); Alison L. LaCroix, To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code, 33 Hofstra L. Rev. 501, 562 (2004) (“[L]ibel and slander law took up where the duel left off in that they addressed the same basic need of the individual to avenge and vindicate himself against a verbal attacker.”). But cf. James Q. Whitman, Enforcing Civility and Respect: Three Societies, 109 Yale L.J. 1279, 1375–79 (2000) (arguing that relative to European countries, the United States had a weak honor culture that was not actualized in the law, except to the extent necessary to prevent actual damage to reputation or business interests).

\textsuperscript{106} See NEWELL & NEWELL, supra note 7, at 108.

\textsuperscript{107} Id.

\textsuperscript{108} 5 Johns. 188 (N.Y. Sup. Ct. 1809).
When it reframed the tort in terms of moral turpitude, the cultural salience of the phrase was such that the court in *Brooker* did not trouble to define it. Nor did it specify the basis for its holding that the prostitution accusation did not qualify as slander per se under the new rule. Yet because prostitution was universally understood to involve moral turpitude, later courts read *Brooker* as turning on the fact that prostitution was not an indictable offense in New York at that time.110

Moral turpitude’s function in the *Brooker* test was to track reputational injury, a function that reflected its understood social meaning and the belief that there were reputation-defining norms of conduct that courts could easily discern. True to that understanding, courts routinely found that accusations of fraud, oath breaking, and related crimes such as theft, as well as accusations of sexual deviance, particularly by women, connoted moral turpitude. This consistency paralleled cultural understandings of what acts would destroy a person’s reputation. In the early slander cases involving violations of core honor norms, moral turpitude was thus superficially akin to the type of standard whose “content has not been specified in advance”111 but that provided guidelines for determining what would fall within and without its bounds. Courts’ approaches to moral turpitude in borderline cases, however, show the error in that understanding. In marginal cases, moral turpitude looked instead like a rule. It was a phrase with specific content that offered little guidance on how to evaluate cases that fell at its margins. Without that guidance, courts eschewed moral reasoning or speculation about community mores and instead turned to familiar legal proxies such as malum in se or the presence of evil intent, to resolve cases. That avoidance caused the moral turpitude to solidify around its core content, while demarcating the legal term’s boundaries along lines that had nothing to do with the underlying legal question. A sampling of the cases that followed *Brooker* illustrates the core stability of moral turpitude and the courts’ uses of blunt proxies in cases at the margins.

1. Moral Turpitude and Core Honor Norms

The early slander cases to some extent bear out the *Brooker* court’s assumption that accusations connoting moral turpitude could be recognized without difficulty. As one nineteenth-century treatise writer explained, the courts most commonly identified “breach[es] of honesty . . . and of chastity” as accusations that would rise to the level of slander per se.112 Accusations of crimes of violence, by contrast, rarely appeared in slander cases applying the standard. The moral turpitude standard thus enfolded into the law of slander commonly held beliefs about moral rectitude. A man’s honor depended on his integrity but was not affected by his violence, while a woman’s depended on her chastity. The courts

109 Id. at 191.
110 See infra Part I.B.1.
111 Sunstein, supra note 53, at 1086.
112 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 277 (2d ed. 1861).
applying the standard easily disposed of accusations that resonated with those core norms. The cases that follow show the pattern.

An 1851 Iowa case involving the destruction of property, for example, highlights the dichotomy between crimes of violence and crimes involving financial wrongs. The plaintiff sued for defamation because he had been accused of poisoning his neighbor’s cow, and the trial court ruled that the accusation did not qualify as slander per se.113 The Supreme Court of Iowa reversed and remanded, citing the *Brooker* rule.114 Cow poisoning, the court wrote, exhibits “more moral turpitude” than do crimes of a “higher legal grade, and hence the accusation of it may render a man more infamous in the estimation of the public.”115 The court contrasted homicide, explaining that “many circumstances,” such as the heat of passion, “may exist as palliations of moral guilt in the public mind.”116 But, it concluded, “no circumstances can possibly extenuate the moral turpitude of that wretch who will poison his neighbor’s horse or cow.”117

The cow-poisoning argument may seem odd to the modern reader, but it was likely an accurate reflection of cultural norms. Cows and horses were essential and usually beloved means of livelihood in agricultural communities. At the same time, violence, particularly in the South and West, was an acceptable tool for the defense of male honor.118 Revenge killings were not uncommon and often seen as justified.119 Although the farming communities of Iowa were not the focal point for that vision of honor, it is still not surprising to see the court identify the destruction of a neighbor’s cow, and thereby his livelihood, as more clearly morally problematic than his murder.120

In another example, a New Jersey court found that accusing a man of cheating in his business would support slander liability, but accusing him of frequenting prostitutes would not. The case involved accusations that the plaintiff was “a pretty man, riding the women along the street,” and that “[s]hort weights and measures” had paid for his horse and other property “by cheating the public.”121 The court applied the moral turpitude standard to find that the latter accusation, but not the former, constituted slander per se.122

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113 Burton v. Burton, 3 Greene 316, 316–19 (Iowa 1851).
114 *Id.* at 317–18.
115 *Id.* at 318.
116 *Id.*
117 *Id.*
119 *Id.*
120 Although it did not make a similar contrast to murder, the Supreme Court of Appeals of Virginia found, similarly, that “to call one a thief, to say of him, he stole my sheep, or he stole sheep, are words which impute a punishable offence, and are actionable” under the moral turpitude standard. Harman v. Cundiff, 82 Va. 239, 244 (1886).
121 Joralemon v. Pomeroy, 22 N.J.L. 271, 272 (1849) (internal quotation marks omitted).
122 *Id.* at 276–77.
Fraud and oath violations by men were routinely deemed to involve moral turpitude. In 1853, the Pennsylvania Supreme Court easily found that an accusation that an estate executor had both committed fraud and violated his oath constituted slander per se. Although the court insisted that the moral turpitude standard depends on mores that can and do change, the court made no reference to mores in resolving this case of alleged fraud by an estate fiduciary. It flatly observed, “[h]ere the moral turpitude is very gross, consisting of a positive and fraudulent breach of an official oath.”

Accusations that women were prostitutes, committed adultery, or fornicated outside of marriage, although they did not always support per se slander liability, were almost invariably found to involve moral turpitude. As the Supreme Court of the Territory of Iowa explained in 1844,

The reputation of a female for chastity, by the common consent of mankind, is regarded with peculiar jealousy. The condition of women is, therefore, as to this virtue, [that if an accusation that a woman is a strumpet] were believed she would be excluded from society, and set aside as infamous in the common sense of the term.

Similarly, the Connecticut Supreme Court ruled that accusing a woman of committing adultery constituted slander per se because the conduct involved moral turpitude. “By the common law of this state,” the court wrote, “words imputing to a woman, whether she is married or single, a violation of chastity, are in themselves actionable.” In 1891 the Vermont Supreme Court held that accusing a woman of keeping a house of ill fame supported per se liability because the conduct “involves moral turpitude and subjects the offender to imprisonment.”

When the Supreme Court of the United States eventually applied the Brooker rule in the District of Columbia, it did so in a case involving an accusation that a woman had been in bed with a man who was not her husband. The Court made

124 Id. at 524 (“Th[e] element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community.”).
125 Id. at 525. Some early courts made a distinction between embezzlement and “stealing and robbery” because “the latter imply a wrongful taking of another’s goods, but embezzlement denotes the wrongful appropriation and use of what came into possession rightfully.” Taylor v. Kneeland, 1 Doug. 67, 72 (Mich. 1843). That distinction does not seem to have been widespread, and the Pennsylvania court does not mention it. But it would appear again in the North Dakota statute that used moral turpitude as a standard requiring sterilization of persons convicted of certain crimes. While larceny and other forms of theft were included, embezzlement was not.
127 Frisbie v. Fowler, 2 Conn. 707, 708 (1818).
128 Id.
129 Posnett v. Marble, 20 A. 813, 816 (Vt. 1890).
clear that the slander charge would fail because fornication was not an indictable offense, not because it did not involve moral turpitude. In support of its dicta that the moral turpitude requirement was met, the court pithily stated that accusing a woman of fornication “[b]eyond all doubt” involves moral turpitude.

Along the same lines, in 1895, the Supreme Court of Idaho explained that an accusation of prostitution was not actionable because that offense was not indictable in the state, while acknowledging the general consensus that such conduct did involve moral turpitude. The court noted that other states had overcome that difficulty either by making “acts of unchastity indictable and punishable as such, or [making] words imputing to a female want of chastity actionable per se.” Yet, the court declined to add a category of per se slander by judicial fiat. In the course of its opinion, the court echoed the reasoning of the Iowa court in the cow-poisoning case. It noted that the closest indictable offense to prostitution was vagrancy, but it explained:

[V]agrancy is not, in the sense in which it is generally used and accepted, “a crime necessarily involving moral turpitude;” it is, perhaps, as often the result of misfortune, or of unfortuitous social conditions, as of any criminal or vicious acts or tendencies on the part of the person charged therewith.

Thus, although the court advanced the same kind of innocent explanation for vagrancy that the Iowa court had offered for murder, it glossed over the possibility that a similar justification might exist for prostitution. As in the cow-poisoning case, the court suggested that certain actions were simply never justifiable under prevailing codes of behavior.

2. Moral Turpitude at the Margins

When cases fell within uncontroversial boundaries set by social convention, moral turpitude was a serviceable standard for reputational injury. Cases at the margins, however, were problematic. Those borderline cases, which did not involve accusations resonating in fraud or unchastity, required that courts explain potentially controversial decisions with more than cursory reasoning. That proved so difficult that a few courts, notably in southern states, balked at adopting the standard. Their opinions are instructive because they foreground the difficulty courts faced when they sought to use moral turpitude as a guide rather than a label.

The two main cases in which courts rejected the moral turpitude standard both involved accusations touching upon the question of slavery. In each case, the court

131 Id. at 227–28.
132 Id. at 228.
134 Id.
135 Id.
136 See id.
made plain its distaste for the philosophical or sociological inquiries the moral turpitude standard seemed to require. In one, an 1836 North Carolina case, the plaintiff had been accused of harboring runaway slaves, an indictable offense in North Carolina, and the issue before the court was whether the accusation constituted slander per se. The court rejected the Brooker rule, preferring instead an English common law rule that slander per se is found if the offending words, if true, would subject their object to an infamous punishment at law. The court viewed the English rule as clear and the Brooker rule as both unworkable and beyond its competence. The moral turpitude standard, it wrote, would compel it “to search moral and ethical authors, rather than legal writers, in order to ascertain whether the case made be within the rule.” Applying the English rule, the court ruled that the accusation did not constitute slander per se.

Similarly, in an 1858 case also touching on fraught issues of slavery, gender, and antebellum politics, the Supreme Court of Missouri bluntly criticized the moral turpitude standard on the ground that moral relativism made it unworkable. A well-known Missouri Supreme Court judge had been accused by a political rival—an abolitionist and pro-union Senator—of whipping his wife after she accused him of having an affair with a slave. The judge responded with a slander suit. The trial judge instructed the jury that the words were “actionable of themselves,” and the jury found for the judge. In its opinion reversing the judgment, the supreme court acknowledged that the law of slander is designed to protect “good name and reputation,” and that wife-beating ought to “brand[] with shame” the perpetrator. Yet, the court reasoned that in the case of slander per se, courts generally focus on the “penal nature of the offence imputed” rather than on

137 Skinner v. White, 18 N.C. (1 Dev. & Bat.) 471, 472 (1836) (per curiam).
138 Id. at 472.
139 Id. at 473–74.
140 Id. at 474.
141 Id. The problematic nature of any searching moral or ethical analysis in cases involving the crime of harboring runaway slaves is self-evident. See, e.g., Smith v. Swormstedt, 22 F. Cas. 663, 680 (C.C.D. Ohio 1852) (noting there are people “who hold that the ownership or holding of slaves, under any conceivable circumstances, involves moral turpitude”), rev’d 57 U.S. 288 (1853).
142 Id., 18 N.C. (1 Dev. & Bat.) at 474–75.
143 See Carroll, supra note 105, at 884 (noting the dispute touched on domestic matters as well as “the morality and social consequences of slavery, the prime political controversy of the day”).
144 Birch v. Benton, 26 Mo. 153, 159 (1858).
145 Carroll, supra note 105, at 835.
146 Id.
147 Birch, 26 Mo. at 158.
148 Id. For a detailed history of this case, see Carroll, supra note 105. Carroll argues that while the courts sought a clear rule to govern slander cases, politicians and ordinary citizens in the trans-Mississippi Southwest for much of the nineteenth century continued to resolve the tension between protecting individual reputation and the imperatives of free expression with self-help. See id.
“the degree of discredit attached to the party.” It rejected the Brooker rule, explaining that the rule “lack[ed] certainty” because “the terms ‘moral turpitude’ and ‘infamous’ are of indefinite import.” Shifting to the example of liquor licensing laws, the court noted that differing views on the morality of selling liquor would lead to differing views on whether violations of a licensing law constituted moral turpitude. Without popular consensus, using moral turpitude as a criterion for liability would prove foolhardy. Accordingly, the court limited slander per se liability to those who made an accusation of an “indictable offense for which corporal punishment may be inflicted as the immediate punishment.” Because wife beating would not be punished corporally, the lower court’s instruction to the jury that it would constitute slander per se was reversed as erroneous.

The concerns articulated by these courts did not deter others from adopting the standard, but they suggest why those courts sought ways to cabin their inquiries to a realm perceived as legal, not moral. Courts using the standard were no more interested in resolving uncertainty by consulting works of moral philosophy than were those that rejected the standard. Yet, those courts had to find some way to manage the standard in borderline cases outside of the comfort zone presented by accusations of fraud or unchastity.

In 1855, the Supreme Court of Tennessee turned to Webster’s Dictionary when confronted with a case involving an accusation that a man sold liquor to slaves in violation of state law. Unlike its two southern counterparts, the Tennessee court adopted the Brooker test, which it viewed as the most “certain and definite rule” available. In Webster’s it found that “[m]oral turpitude is said to imply ‘inherent baseness or vileness of principle in the human heart; extreme depravity.’” The court understood that definition in terms of prevailing social norms. “It is easy to see,” the court wrote, “that trespass, assault, battery, and the like are not within the rule; while other misdemeanors, which imply extreme baseness and depravity of heart, are properly included.” True to the predominant honor codes, the court listed bribery, extortion, theft, keeping a bawdy house and offenses involving financial corruption as among those misdemeanors that did

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149 Birch, 26 Mo. at 159.
150 Id.
151 Id.
152 Id.
153 Id. at 159–60.
154 Id. at 158.
155 Smith v. Smith, 34 Tenn. (2 Sneed) 473, 479 (1855). The court was forced to consult Webster’s because in 1855 no law treatise or law dictionary included an entry for “moral turpitude.” Its citation of Webster’s provided a lasting definition that could be and often was quoted in cases necessitating a moral turpitude analysis. Eventually, it was incorporated almost verbatim into law treatises.
156 Id.
157 Id.
158 Id.
suggest extreme depravity. Yet, when it came to the actual crime at issue, the
offense of selling liquor to slaves, the court abandoned both the dictionary and the
idea of reinforcement through cultural allusion. Instead, the court flatly opined that
the “moral grade” of the offense “is odious, and . . . involves the highest degree of
moral turpitude.”

The Webster’s definition of moral turpitude would provide subsequent courts
with a helpful rote formulation, but those courts were as uninterested as the
Tennessee court in attempting to tease out the contours of vileness and depravity.
Instead, in borderline cases, most courts eventually settled on one of two common
law proxies for moral turpitude, both of which sidestepped the definition and any
analysis of social disapprobation or reputational harm. One proxy conflated moral
turpitude with infamous crimes or crimes and misconduct deemed malum in se.

A second understood the standard in terms of conduct involving evil intent or
scienter.

A case decided by the New Jersey Supreme Court in 1839 provides an early
equivalent of the use of the two doctrinal proxies that would come to predominate in
later opinions. The suit was a slander action brought by a postmaster accused of
opening letters before delivering them. The majority concluded that the
accusation imputed an indictable offense but expressly held that the words failed to
meet the moral turpitude prong of the tort as defined in _Brooker_. Although it
viewed the _Brooker_ rule as “expressed with precision,” the court focused on the
idea of “immoral intent” when it applied the rule. Reasoning that some
“fraudulent intent, or corrupt design” was required to “impute[] a want of
integrity,” the court could find no such design in the naked charge of

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159 Id. at 479–80.
160 Id. at 481.
161 That conflation was not without logic. Like moral turpitude, malum in se crimes
and infamous crimes were fuzzy standards that were at times defined with reference to
natural law concepts of moral right and wrong. See Reuben Oppenheimer, _Infamous
Crimes and the Moreland Case_, 36 Harv. L. Rev. 299, 300–01 (1923); Nancy Travis
Wolfe, _Mala in Se: A Disappearing Doctrine?_ 19 Criminology 131, 139–40 (1981);
_Note, The Distinction Between Mala Prohibita and Mala in Se in Criminal Law_, 30
Colum. L. Rev. 74, 83 (1930). Yet, both standards derived from English common law and
could be given more fixed meanings. In early cases, for example, malum in se crimes were
almost invariably identified simply as crimes that had been criminalized at common law.
_See, e.g., People v. Maxon_, 1 Idaho 330, 344 (1870) (identifying two classes of
misdemeanors: (1) “mala in se, or penal at the common law” and (2) “mala prohibita, or
penal by statute”) (citing 1 Francis Wharton, _A Treatise on the Criminal Law of the
United States_ 2 (1846)). Courts dealing with the question whether crime or punishment
was “infamous,” in turn, often resorted to a stock list of punishments or crimes. For
example, the Supreme Court held that crimes “punishable by imprisonment in the
penitentiary” were infamous. _Mackin v. United States_, 117 U.S. 348, 354 (1886).

163 Id. at 18–20.
164 Id. at 18–19.
165 Id. at 19.
letter-opening. In its view, the charge might signify impropriety, but it “did not necessarily imply that it was done with an immoral intent, with a design to commit a fraud or criminal wrong to the party.” The majority thus fell back on scienter, a preexisting legal concept related to questions of morality. The presence or absence of scienter would allow the court to differentiate between a violation of “one of the proprieties of conventional life” and the violation of a “moral duty.”

The court’s analysis suggested, unoriginally, that moral wrongfulness was entwined with intentionality. That formulation had deep roots in the criminal law, which demanded proof of mens rea to show the moral blameworthiness that would justify punishment. In tort law as well, the presence or absence of intent had long formed a boundary between innocent conduct that resulted in loss of property to another and actionable fraud. Indeed, in eighteenth-century English fraud cases, courts used the phrase moral turpitude descriptively to mark the difference between intentional and unintentional fraud when determining liability. In turning to evil intent as a signal of moral turpitude, the New Jersey majority thus used a familiar equation. At the same time, it deflected the inquiry from the harm to reputation at the core of the slander per se issue, avoiding a more contextual inquiry into community mores.

The scienter standard would eventually predominate in moral turpitude jurisprudence, but it was by no means the prevailing approach when the New Jersey case was decided. The concurring opinion in that case presented another approach. In it, the chief justice invoked the well-established, though also vexing, distinction between crimes deemed malum in se and crimes that are malum

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166 Id.
167 Id.
168 Id.
169 See, e.g., 22 C.J.S. Criminal Law § 37 (“[I]ntent is a sine qua non of criminal responsibility; generally, in every crime there must exist a union or joint operation of act or conduct and criminal intent or criminal negligence.”).
170 See, e.g., JOHN WILLIAM SALMOND, THE LAW OF TORTS § 148, at 417 (1st ed. 1907) (describing deceit as “making a willfully false statement with the intent that the plaintiff shall act in reliance on it, and with the result that he does so act and suffers harm in consequence. The false statement may be made either by words or by conduct”).
171 The phrase moral turpitude was already used at times in contract cases as a descriptive term for the kind of exchange that would invalidate a contract. This usage was tied to the Roman codes in which turpis causa was a way to delimit the enforceability of contracts. See, e.g., JOSEPH R. LONG, NOTES ON ROMAN LAW § 71, at 52 (1912) (“A contract induced by an illegal consideration (injusta or turpis causa) was not enforceable, even though the thing promised was itself lawful.”). In an echo of its Roman roots, the moral turpitude descriptor appeared most often in contract and certain fraud actions to express a conclusion about subjective intent. See, e.g., Yates v. Foot, 12 Johns. 1, 4 (N.Y. 1814); Bayard v. Malcolm, 2 Johns. 550, 553 (N.Y. 1807); Munro v. Gardner, 6 S.C.L. (1 Tread.) 1, 10 (S.C. 1812). Moral turpitude also appears in English cases during the same period. In 1801, for example, Lord Kenyon used the term in an influential dissent in an action for damages based on fraud. See Haycraft v. Creasy, (1801) 102 Eng. Rep. 303; 2 East 92.
The chief justice argued that even if the conduct were a statutory crime, an accusation of opening the mail would not amount to slander. His formulation of the test was straightforward. Because opening someone else’s letters was not “criminal in itself,” or malum in se, the chief justice reasoned, the accusation could not constitute slander per se.

As these cases show, when courts confronted borderline questions, they resorted to familiar doctrines and steered clear of the amorphous realm of moral wrongfulness and social disapprobation. The honor code, while it clearly condemned certain activities like intentional fraud or prostitution, was less clear when it came to behavior like unauthorized letter-opening, where motive and social class both played important roles in how the offense would be perceived. Similarly, cases that touched upon slavery placed particular pressure on a standard that makes an explicit call for moral judgments. Although resort to pre-existing legal standards begged the reputational injury question, the older doctrines offered a clear way to deal with a rule that might have required the courts to don their philosophers’ garb.

The result for slander law was not particularly problematic. Some fuzziness at the margins is the expected byproduct of any rule applied to distinct sets of facts. In the context of defamation litigation, the harm of under- or over-inclusiveness in the application of the rule was relatively slight, requiring that a defendant pay undeserved damages or that a plaintiff forgo deserved compensation for reputational injury. And for much of the nineteenth century, cases at the margins were relatively infrequent.

With the wave of morals legislation in the later nineteenth century, however, more pressure was placed on the standard. By that time, the phrase had moved from the law of slander into other legal areas in which its potential for harm was greater. In conjunction with the social upheaval worked by the Civil War and changes in popular mores, both the persistence of the core honor code in moral turpitude jurisprudence and the way that courts addressed cases on its margins became increasingly problematic.

II. MORAL TURPITUDE AND THE LAW OF EVIDENCE

As courts worked to formalize the definition of slander per se, they also grappled with unsettled questions in the area of evidence, such as whether and under what circumstances witnesses could be impeached, disqualified, or rehabilitated, and how that evidence would be introduced. Impeachment jurisprudence, like the law of slander, developed in the shadow of nineteenth-century honor norms. Those norms informed the early consensus that evidence

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172 McCuen, 17 N.J.L. at 16.
173 Id. at 16–17.
174 Id. at 17.
175 See, e.g., Hart, supra note 13, at 607.
176 See Simon-Kerr, supra note 92, at 1874–79.
of a person’s reputation was relevant to his or her credibility and could also be used to impeach or rehabilitate a witness’s character. Acts that would destroy a witness’s reputation, the logic went, would also impair his credibility. The question of credibility, therefore, could be addressed by admitting evidence of reputation.

Extending that logic, attorneys argued that evidence of a witness’s acts involving moral turpitude were relevant to his or her credibility because such evidence was “decisive of . . . infamy,” stamping an indelible mark on a person’s reputation. By the late nineteenth century, courts in states ranging from Alabama, Georgia, Texas, and California to Connecticut, Vermont, and Maine had all agreed that moral turpitude and credibility were related. Accordingly, all had endorsed formal rules permitting evidence of crimes or acts involving moral turpitude for impeachment or had found that the introduction of such evidence would justify the rehabilitation of a witness’s credibility. Courts applied the standard in this context in much the same way as they had in defamation cases. Although it was now used to identify evidence relevant to credibility rather than to approximate reputational harm, courts faced with marginal cases did not look to the underlying credibility issue. Instead, they drew upon the same proxies they had resorted to in slander cases. Those proxies, in turn, allowed courts to make legalistic rather than moralistic determinations about whether the standard applied.

Yet, in contrast to its arguable efficacy in slander law, moral turpitude proved an uneasy fit as a standard for impeachment evidence. Although character and reputation were equated through impeachment rules, many courts questioned the notion that all actions that would destroy a person’s general reputation would also destroy his or her character for truthfulness. As a path-breaking article on defamation described the issue, there is a difference between “[c]haracter,” which “is what a person really is,” and “reputation,” which “is what he seems to be.” Crafting a rule to identify damage to the latter in the law of slander had led courts to moral turpitude. But the many courts to examine moral turpitude as an evidentiary standard acknowledged that the term was better suited to understanding “the character imputed to [a person] by others” rather than to assessing the “principles and motives—be they known or unknown—which govern [a person’s] conduct.”

Despite these concerns, for nearly a century, moral turpitude played a significant role in evidentiary decisions. As courts used the standard to admit or exclude evidence, they continued to hew to core cultural meanings and, at the margins, to avoid the moral imperative of the standard by resorting to doctrinal

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177 See id. at 1868–84 (showing evidence of attempted impeachment of women with evidence of their unchastity).
178 Johnson v. Moore’s Heirs, 11 Ky. (1 Litt.) 371, 380 (1822).
179 See infra Part II.A–B.
180 See infra Part II.A–B.
182 Id.
proxies. Eventually, however, as evidentiary rules matured and became rationalized, courts criticized the standard as indeterminate and unhelpful. Following the adoption of the Federal Rules of Evidence, most states abandoned moral turpitude as an evidence standard. Even so, the allure of moral turpitude remains. Courts in California and Texas still hold to it as a guide to credibility.183

A. Moral Turpitude Impeachment and Core Honor Norms

In the 1838 New York case that marks the first discussion of moral turpitude in the law of evidence, the court recognized the problematic nature of moral turpitude evidence even as it ratifed its use.184 The case was a manslaughter prosecution.185 A defense witness, Mr. Gillespie, had been an eyewitness to the fight that led to the criminal charge.186 Gillespie acknowledged that he frequented bars, had been unemployed for the last two years, had lived in an adulterous relationship surviving off of his savings, and would have been destitute had he paid his debts.187 The trial court disallowed testimony offered by the defense to rehabilitate Gillespie, finding that his character for truth had not been impeached.188 In its opinion reversing the trial court, the New York Supreme Court drew a link between general reputational damage and credibility, using moral turpitude as the linchpin.189 If a witness “make[s] disclosures showing his moral turpitude,” the court explained, “[counsel] may insist upon it as destroying his character, and therefore taking away his credit with the jury.”190

Financial irresponsibility was a core departure from honor norms that was only worsened when coupled with open adultery and a fondness for alcohol. Accordingly, the court had no difficulty viewing the evidence as involving moral turpitude and therefore likely to damage Gillespie’s credibility. At the same time, it was skeptical that such evidence was predictive of his truthfulness.191 The court rejected the idea that there was an inexorable link between what in modern parlance would be a bad credit rating and the ability to tell the truth. Reflecting an approach to witness impeachment that would predominate by the late twentieth century, the court observed that even a wastrel can be a truth-teller.192 It wrote:

[Gillespie] had for some time led an idle and intemperate life, the inmate of porter houses at hours unseasonably late. He had for two years been wasting his means in a course of adulterous lewdness, alienated from his

183 See infra Part II.C.
185 Id. at 573, 592.
186 Id. at 573.
187 Id. at 573–74.
188 Id. at 574.
189 Id. at 581.
190 Id.
191 Id. at 586.
192 Id.
family, unjust to them and to his creditors. Contrast a man embarked in such vicious courses, not yet shown to be attended by one redeeming virtue, with any reputable citizen, on a contradiction of fact before a jury, could they hesitate between the two characters? Yet these vices and more may abound in a character distinguished for an unyielding attachment to truth.\textsuperscript{193}

In the court’s view, while moral turpitude was congruent with reputational damage, it was not necessarily congruent with dishonesty or, indeed, with any attributes other than the ones named.\textsuperscript{194}

Despite the skepticism expressed in this and other early cases, moral turpitude eventually became formalized as an evidentiary standard.\textsuperscript{195} In this role, moral turpitude followed the same trajectory that had developed in slander law. Gendered honor norms, not surprisingly, were easily projected through the standard. The link between a reputation for sexual virtue and ideas of female honor was culturally powerful, and attorneys in nineteenth-century cases routinely attempted to impeach the credibility of female witnesses with evidence of their lack of chastity.\textsuperscript{196} For example, the Vermont Supreme Court considered a jury charge governing testimony by several female witnesses about their reasons for going to an alleged house of prostitution.\textsuperscript{197} The court approved the charge, which stated that “the character as to chastity of the witnesses is for you to consider in weighing their evidence as given in court.”\textsuperscript{198} In the same case, the court found that a woman could be impeached with evidence that she had been convicted of stealing and obtaining money on false pretenses: “The fact that the witness, on her plea of guilty, had several times been convicted of such an offense can hardly be said to be immaterial. It involved moral turpitude and affected her credibility.”\textsuperscript{199}

At the same time, crimes by men involving violence continued to be exempted from moral turpitude’s ambit. For example, in Texas, where the courts developed a rule disallowing impeachment with “convictions for misdemeanors

\textsuperscript{193} Id.
\textsuperscript{194} Courts in other states initially shared the view that a witness could be rehabilitated after the introduction of evidence of moral turpitude. See, e.g., McDaniel v. Walker, 29 Ga. 266, 268 (1859) (finding that if a witness disclosed “an act which exhibits moral turpitude in himself [(in this case, forgery)], especially such an act as falls under the denomination of \textit{crimen falsi},” the court would be justified in giving the jury an instruction that they should decide how far the act impaired the witness’s credibility).
\textsuperscript{195} See, e.g., H. C. Underhill, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 245, at 445 (2d ed. 1898) (“The modern rule is that the conviction . . . of a crime involving great moral turpitude, may be proved to impeach the credibility of the witness.”).
\textsuperscript{196} See Simon-Kerr, supra note 92, at 1864–65. By the early twentieth century, most courts had rejected this connection in all but rape cases. \textit{Id.} at 1886–93.
\textsuperscript{197} State v. Guyer, 100 A. 113, 115 (Vt. 1917).
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Id.} at 114.
which do not involve moral turpitude,\textsuperscript{200} the court of appeals found that a male witness’s assault conviction should be excluded. In that case, the court considered testimony by a witness who had been convicted for assault and battery and carrying a firearm.\textsuperscript{201} The court explained that these convictions did not qualify because they do not “show that [the witness] was lacking in integrity,—in other words, that he was not a person worthy to be believed on his oath.”\textsuperscript{202} Similarly, the Wyoming Supreme Court held that a conviction for carrying a concealed firearm, a misdemeanor, did not “tend to prove moral turpitude” or “lack of veracity” on the part of a male witness.\textsuperscript{203} The court therefore excluded the evidence without deciding whether the state’s rule limited impeachment to evidence going directly to veracity or to moral turpitude more generally.\textsuperscript{204} As in the law of slander, the moral turpitude standard carried with it the implication that being an honorable man at times required violence.

The failure to pursue honest work or financial misbehavior, however minor, was viewed differently. The Texas Court of Criminal Appeals observed in one impeachment case that being a man who “follows some disreputable vocation or calling for a living” is not presumed to be “as capable of telling the truth as one who pursues some legitimate or honorable vocation.”\textsuperscript{205} In 1893, the Georgia Supreme Court ruled that “the fact that a witness has been convicted of a crime involving moral turpitude is admissible for the purpose of discrediting his evidence.”\textsuperscript{206} Accordingly, the court found that a witness could be impeached with evidence that he had been convicted of simple larceny.\textsuperscript{207} The court provided no rationale for its apparent conclusion that the crime involved moral turpitude, most probably because this crime involving property theft was viewed as a breach of core honor norms.

Thus, the conventional boundaries of moral turpitude reproduced themselves in the law of evidence. The standard continued to be applied in this way even by courts that, under a relevance standard, recognized that conduct associated with moral turpitude did not bear on credibility. One striking example is the use of evidence of unchastity to impeach female witnesses. By the early twentieth century, courts in almost every jurisdiction had refused to admit evidence of a woman’s unchastity for the purpose of impeaching her credibility on the grounds that such evidence was irrelevant.\textsuperscript{208} When courts employed the moral turpitude standard rather than asking the credibility question directly, however, the result

\textsuperscript{201} Id.
\textsuperscript{202} Id. at 759.
\textsuperscript{203} Eads v. State, 101 P. 946, 951 (Wyo. 1909).
\textsuperscript{204} Id.
\textsuperscript{205} Curtis v. State, 81 S.W. 29, 29 (Tex. Crim. App. 1904).
\textsuperscript{206} Ford v. State, 17 S.E. 667, 667 (Ga. 1893).
\textsuperscript{207} Id.
\textsuperscript{208} See Simon-Kerr, supra note 92, at 1864–65. The exception was rape cases, where courts continued to admit unchastity evidence, in part because they perceived it to be relevant on the question of consent. Id. at 1886–93.
was different, and moral turpitude evidence continued to be admitted to impeach female witnesses. Whether a crime involved moral turpitude was simply not a question that prompted courts to assess the underlying legal reason the question was being asked. Instead, whether in defamation or evidence, moral turpitude was moral turpitude. The courts applied the standard with reference to itself. Thus, evidence of a woman’s lack of sexual virtue or of a man’s disreputable habits, such as his gambling or his failure to maintain financial stability, were accepted as valid impeachment material.

B. Moral Turpitude Impeachment at the Margins

Just as they had in the law of slander, courts applying the standard in the impeachment context struggled with cases at the margins. In these borderline cases that might have offered courts the chance to rethink the standard’s efficacy, moral turpitude instead prompted many courts to fall back on a scienter analysis or on other proxies such as the malum in se doctrine. These devices were ill suited to credibility determinations. On the issue of what information would likely discredit the witness, the malum in se equation was most clearly problematic. Taking the logic of the equation to its natural extension, a witness’s illegal activity would not be presumed to involve moral turpitude and thus impair his or her credibility unless the act was a crime at common law. And conversely, any common law crime could be used to impeach a witness’s credibility. Similarly, the requirement that a crime involve evil intent to be relevant to a person’s credibility meant that much evidence of law-breaking would be excluded as irrelevant and that courts might need to hold extensive hearings on the collateral issue of impeachment to determine whether a particular crime met the requisite level of intent. Given these problems, it is not surprising that courts failed to apply these doctrinal proxies consistently.

For example, Vermont courts, interpreting a statute permitting impeachment with crimes involving moral turpitude, adopted the malum in se formula.

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209 Id.
210 See, e.g., Vause v. United States, 53 F.2d 346, 351 (1931) (impeaching a government witness with evidence that he “was known to be a man who could and would indulge in trickery and fraudulent financial schemes, and was an ex-convict because of his previous practices in that regard”); State v. Williams, 87 S.W.2d 175, 182 (Mo. 1935) (citing 70 CORPUS JURIS § 1069 (William Mack & Donald J. Kiser eds., 1935)) (“[T]here are cases indicating a view that a man may bear a bad reputation for honesty, although not considered untruthful, as where he fails to pay his debts, or is a sharp trader, and the like.”).
211 See 7 THE ENCYCLOPAEDIA OF EVIDENCE 209 n.25 (Edgar W. Camp & John F. Crowe eds., 1905) (citing VT. STAT. 1894 § 1245). This statute “was enacted to remove a common-law disability or incompetency,” but at the same time, the Vermont Supreme Court noted, “it ma[de] it a matter of legal right to attack the credibility of a witness by showing by independent evidence that he has been convicted of a crime involving moral turpitude.” McGovern v. Smith, 53 A. 326, 327 (Vt. 1902).
Nevertheless, in the first case to reach the state’s supreme court under the statute, the court concluded that a witness could be impeached with evidence that he had sold illegal liquor.\(^{213}\) Although the court acknowledged that the alcohol offense did not “in legal sense, involve moral turpitude,”\(^{214}\) it found that the evidence was admissible.\(^{215}\)

Connecticut courts provided a variation on the same theme. In a 1920 case defining moral turpitude in terms of scenter, the court stated that for a crime to “carry with it the germs of moral turpitude,” it must involve “[i]ntentional wrong or improper purpose.”\(^{216}\) Yet, as in Vermont, when prohibition violations by a witness were at issue, the court ignored its own scenter test. In order to find that liquor law violations involved moral turpitude, the court resorted to the U.S. Constitution itself, explaining that disregard for liquor laws exhibited “baseness” and was “destructive of the people’s regard for the law of the land.”\(^{217}\)

By contrast, in Maine, fifteen years after the repeal of prohibition, the state supreme court again used the malum in se proxy to bolster its holding that liquor law violations were not morally suspect and that therefore it was error to permit a witness to be impeached with such evidence.\(^{218}\) But even though the malum in se formulation provided the court with the outcome it sought, it was not entirely satisfied with that analysis. It offered two other rationales for the finding that liquor law violations did not satisfy the standard. First, the court wrote, “a conviction does not show moral turpitude when the offense is such that a majority of good citizens would not so consider it, even though other good citizens, with minority ideas of reform, might positively affirm its existence.”\(^{219}\) And for good measure, the court tacked on a bit of history, noting that at common law, “[i]ntoxicating liquor was freely sold, and it was not considered morally wrong, by our Colonial ancestors.”\(^{220}\)

Courts also blatantly ignored their own proxies when core cases arose. In Alabama, for example, the courts routinely used the malum in se proxy to find that crimes that were not criminalized at common law, such as gambling and alcohol offenses, did not involve moral turpitude.\(^{221}\) Yet,

\(^{213}\) Id.
\(^{214}\) Id. at 327.
\(^{215}\) Id.
\(^{217}\) Kurtz v. Farrington, 132 A. 540, 542 (Conn. 1926).
\(^{218}\) State v. Jenness, 62 A.2d 867, 869 (Me. 1948).
\(^{219}\) Id.
\(^{220}\) Id. The Supreme Court of Alabama offered a similar rationale for finding that drug offenses, or at least a conviction for selling cocaine, did not involve moral turpitude. Pippin v. State, 73 So. 340, 342 (Ala. 1916) (“[W]e do not think that the offense of selling cocaine involves moral turpitude. This is a statutory crime, not punishable at common law. It is of the description mala prohibita, as there is no inherent immorality in such acts, and its illegality lies only in the fact of being prohibited.”)
\(^{221}\) See, e.g., Ex parte Marshall, 93 So. 471, 471–72 (Ala. 1922) (holding that because for an act to involve moral turpitude it must “itself be inherently immoral,” it was improper
Alabama courts routinely found that sex crimes involved moral turpitude, even though crimes such as statutory rape had not been prohibited at common law.222 Some states avoided the problem of justifying, fudging, or ignoring proxies for moral turpitude by refusing to define the term at all. In Georgia, for example, the courts retained total freedom to interpret moral turpitude in any way they saw fit.223 In a case upholding an unusual decision to permit the impeachment of a witness with evidence of a conviction for assault with intent to kill, a Georgia appellate court indicated that moral turpitude was a self-evident term.224 “[T]he term ‘moral turpitude,’” it declared, “is one of such obvious significance that it [is] not incumbent on the judge, in the absence of a written request, to define it [when charging the jury].”225

Even as they used moral turpitude increasingly in evidence jurisprudence, many state courts acknowledged that the standard was problematic. For example, for a witness to be impeached with evidence that he had been convicted of “making liquor”); Moses v. Alabama, 58 Ala. 117, 120 (1877) (holding that evidence of a conviction for illegal gambling was not admissible for impeachment because it was not malum in se and therefore the crime did not involve moral turpitude).

222 Alabama courts found that the increasing list of crimes involving sexual behavior involved moral turpitude. In 1974, for example, the Court of Criminal Appeals decided that a man on trial for rape could be impeached with evidence that he had a prior statutory rape conviction. Powell v. Alabama, 297 So. 2d 163, 167 (Ala. Crim. App. 1974). The court asserted that statutory rape undoubtedly involved moral turpitude even though it had not been a crime at common law. Statutory rape laws, declared the court, were meant “to protect young girls . . . from falling victims to the wiles, schemes, debasedness, and depravity of over-sexed men . . . who have lost their moral values.” Id. The court concluded that “all sex crimes are heinous, infamous and reprehensible.” Id. at 168.


224 Id.

225 Id. Georgia’s concern with leaving moral turpitude indefinite may have been motivated by its widespread use of the term in disenfranchisement and juror disqualification, where—as described in Part III.A and supra note 4, respectively—its amorphousness served the purpose of permitting far-reaching control over the franchise and jury pools. Georgia also treated liquor law convictions as not involving moral turpitude, and thus impermissible for use in impeachment. Wheeler v. State, 61 S.E. 409, 409 (Ga. Ct. App. 1908). But see Moulder v. State, 71 S.E. 682, 683 (Ga. Ct. App. 1911) (holding that a witness could be questioned about the defendant’s reputation for selling liquor illegally). Tennessee also took an expansive approach to the use of moral turpitude in impeachment. See, e.g., Posley v. Tennessee, 288 S.W.2d 455, 456 (Tenn. 1956) (describing as settled the rule that “as to questions relating to indictments for offenses involving moral turpitude, the cases permit them to be asked about”); Zanone v. Tennessee, 36 S.W. 711, 714–15 (Tenn. 1896). In an 1896 case showing the court’s preoccupation with prevailing honor norms, the court reversed a murder conviction due to the trial court’s decision to exclude testimony showing the moral turpitude of one of the state’s witnesses. The witness had married another state witness while that witness was married to someone else. He had then been indicted, presumably for bigamy. See Zanone, 36 S.W. at 714–15. The court also chided the trial court for excluding testimony from another state’s witness to the effect that she had lived in a bawdy house from a young age. Id.
the Maine court in the liquor law violation case wrote, “It is well recognized that moral turpitude cannot be exactly defined by a rule to fit all cases. It may be or may not be said to exist, depending on the facts, conditions and circumstances.”226 Rather than adapting to “the facts, conditions and circumstances” of each individual case, however, moral turpitude steered judges away from the underlying legal question: credibility. Their attempts to steer back to the issue in uncertain cases created a largely incoherent body of law riddled with unexplained exceptions to unexplained rules.

C. Toward a New Credibility Standard

It is no surprise that as evidence law became increasingly rationalized and preoccupied with efficiency,227 courts began to question and eventually to abandon the moral turpitude standard. Impeachment issues are collateral issues at trial. Moral turpitude could and often did mire courts in a definitional morass, and the old common law categories did not solve the problem. In 1965, the Connecticut Supreme Court abandoned the standard in an opinion that summed up its failings.228 According to the court, the moral turpitude standard had caused “not inconsiderable” difficulties for trial judges, “especially in the case of mala prohibita.”229 Noting the “uncertainty in the meaning and application of the phrase,” the court found that “a definite rule, of certain application, would eliminate problems and difficulties at the trial level . . . which in turn lead to mistakes and costly appellate procedure, if not to actual injustice.”230 In its place, the court announced a bright line rule that witnesses could be impeached with evidence of a crime punishable by imprisonment of more than one year, regardless of the “presence or absence of moral turpitude.”231

Similarly, in 1967, the Kansas Supreme Court wrote that while “[s]ome states have adopted the rule that crimes involving moral turpitude are worthy of testing credibility,” the term has “a vague and uncertain meaning which plagues the courts.”232 The court clarified that the state’s recently codified impeachment rule, which restricted impeachment to crimes “involving dishonesty or false statement,” did not permit using moral turpitude as a determinant for what crimes would qualify under that rule.233 In 1975, the Oregon Supreme Court rejected a claim that

226 State v. Jenness, 62 A.2d 867, 869 (Me. 1948).
227 This move towards rationalization and efficiency culminated with the adoption of the Federal Rules of Evidence in 1975. Rule 102, for example, read in part, “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence.” FED. R. EVID. 102 (1975).
228 Heating Acceptance Corp. v. Patterson, 208 A.2d 341, 343–44 (Conn. 1965).
229 Id.
230 Id.
231 Id.
233 Id. at 323–24.
the state’s evidence rule, enacted in 1861, had “‘restrict[ed] the scope of impeachment’ . . . to the conviction of crimes involving ‘moral turpitude.’”234 In so doing, the court reasoned that the legislature would not have meant to incorporate a standard that had led to “considerable uncertainty” and been “the subject of considerable criticism.”235

The Federal Rules of Evidence, adopted by Congress in 1975, did not include or even mention the standard.236 Rule 608(a) provided that character or reputation evidence could be used to attack witness credibility, but only if the evidence referred to character for truthfulness or untruthfulness.237 Rule 609, which covered impeachment with criminal convictions, provided that a witness could be impeached, subject to a balancing test, with evidence that he or she had been convicted of a crime punishable by death or a prison sentence in excess of one year.238 The Rule also provided that a court had no discretion to exclude evidence of a witness’s conviction of a crime that “involved dishonesty or false statement, regardless of the punishment.”239

Although there is no discussion of the standard in the advisory committee report,240 the congressional debate suggests that some legislators were drawn to the idea that credibility should be judged based on the perceived moral iniquity of a criminal conviction.241 For example, one congressman suggested that the moral value of the crime committed, rather than the severity of the crime, should be indicative of the moral worth of the witness and thereby his or her credibility.242 He offered the hypothetical of “malicious destruction of public property,” a crime which, he argued, showed more about a person’s “moral worth” and thus credibility than would a conviction for theft.243 Despite such arguments, Rule 609 eschewed any explicit reference to moral judgment, instead settling on allowing

234 Smith v. Durant, 534 P.2d 955, 961 (Or. 1975) (en banc).
235 Id. at 960.
236 This omission was not the product of haste or inattention. The Federal Rules were adopted after a deliberative process that involved seven years of drafting by an expert advisory committee, the contributions of legal scholars, and extensive congressional intervention and debate during the three-year period between their introduction and passage. See, e.g., Paul F. Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 GEO. L.J. 125, 125–27 (1973) (describing committee established to write proposed rules and commenting on amendments proposed by Congress in 1973, two years prior to their eventual enactment).
237 FED. R. EVID. 608(a) (1975).
238 FED. R. EVID. 609.
239 FED. R. EVID. 609(a).
243 Id. (“Personally I am more concerned about the moral worth of individuals capable of engaging in such outrageous acts as adversely reflecting on a witness’ character than I am of thieves . . . .”).
Courts applying Rule 609 highlighted the fact-specific nature of the inquiry into prior crimes called for by the “dishonesty and false statement” provision. Although there was controversy over the practice, most courts interpreted the rule to permit them to look at the evidence underlying a witness’s conviction to determine whether it qualified. In the most recent amendment to the Federal Rules, in 2006, the committee, chaired by then-Judge Samuel A. Alito, Jr., affirmed that Rule 609 permits an inquiry into the facts of prior crimes in order for courts to make a judgment about whether those crimes involved dishonesty. Rule 609 currently states that evidence of a crime must be admitted if “the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.”

A majority of states have now embraced the approach of the Federal Rules, either by adopting mirror rules or through judicial opinions. In Tennessee, for example, one year after the Federal Rules were adopted, the state’s high court confronted the issue of impeaching a defendant with evidence that he had been

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Mr. Dennis: . . . [I]f we are going to have a code and if we are going to try to reform things in it, this particular rule would be a place where some legitimate reform might be accomplished . . . by limiting the requirement to offenses that have some logical bearing on credibility . . .

Judge Friendly: I think I once took that view, but do you really think if you were on a jury, you would not like to know if the witness had committed a murder? I think I would like to know.

Hearings, supra.

245 See REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES § II.4, at 7 (May 16, 2005), available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Reports.aspx (describing the conflict in the courts over whether to look solely at the elements of the conviction and noting that most courts “look behind the conviction to determine whether the witness committed an act of dishonesty or false statement” in conjunction with the criminal conviction).

246 Id. at 8 (acknowledging that public commentators “generally favored a strict ‘elements’ test” for crimes involving dishonesty or false statement, but describing the Committee’s resolution expressly to “permit some limited inquiry behind the conviction”).

247 FED. R. EVID. 609(a)(2) (emphasis added).

248 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE, T-1 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997). Georgia, for example, recently clarified that by “adopt[ing] the language of the federal rule, [and] using ‘dishonesty or false statement’ instead of ‘moral turpitude’” the legislature showed that it did not intend for courts to continue applying a rule so broad it permitted evidence of “theft and shoplifting” to be used to impeach witnesses. Clements v. State, 683 S.E.2d 127, 129 (Ga. Ct. App. 2009).
charged with theft.\footnote{State v. Morgan, 541 S.W.2d 385, 388 (Tenn. 1976).} Before concluding that the evidence had prejudiced the defendant, the court observed that the state’s moral turpitude standard was contested and that its dictionary definition had provided no sure guidance.\footnote{Id. (defining moral turpitude as “[a]n act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowmen or to society in general, contrary to the accepted rule or right and duty between man and man”).} The court illustrated the “difficulty” judges faced in “applying a test that is vague and cannot be explicitly defined”\footnote{Id.} by describing several inconsistent rulings the standard had produced:

[I]n Davis v. Wicker [the court] held that defendant in a civil action was properly impeached by showing a conviction for not having a proper driver’s license. In McKenzie v. State, the Court apparently found that a conviction for inciting to riot involved moral turpitude, while a conviction for inciting children to leave school did not. In Everhart v. State, the Court held that a testifying defendant might be asked about convictions for violating the liquor law. The Court in Gray v. State, held that being a bootlegger does not involve moral turpitude.\footnote{Id. (citations omitted).}

The court, therefore, readily concluded that “adoption of the Federal Rules of Evidence on this question should achieve a higher degree of consistency, fairness and justice and better serve the quest for truth.”\footnote{Id.}

Other states, such as Vermont and Maine, amended statutes to eliminate moral turpitude from their evidence codes. In Vermont, the Reporter’s Notes to the 1989 Amendment to the state’s evidence code called the moral turpitude standard “troublesome” and “vague” and announced that it would be replaced with “more precise and relevant standards for determining the admissibility of prior convictions for impeachment.”\footnote{VT. R. EVID. 609 reporter note on 1989 amendment; see also In re Berk, 602 A.2d 946, 952 (Vt. 1991) (Morse, J., concurring) (quoting the reporter’s note).} In Maine, the Advisory Committee’s notes also referred to moral turpitude as a “troublesome phrase” when the state switched to an impeachment regime more akin to the Federal Rules.\footnote{MAINE R. EVID. 609 advisers’ note.}

At least one state that continued to use the concept of moral turpitude in impeachment attempted to disconnect the standard from its uses in other legal areas where the question it addressed had nothing to do with credibility. In 1981, the Maryland Supreme Court held that a man on trial for a sex offense should not have been impeached with evidence that he had previously been convicted of indecent exposure.\footnote{Ricketts v. State, 436 A.2d 906, 912–13 (Md. 1981).} Although a previous Maryland Supreme Court opinion had
treated indecent exposure as a crime of moral turpitude.\textsuperscript{257} The court distinguished the case because it involved a licensing board’s decision to revoke a dental license, not the impeachment of a witness.\textsuperscript{258} It was significant, the court reasoned, that in the licensing context, the board is “apprised of the circumstances” attending the conviction, whereas under Maryland impeachment practice, the rules did not permit much factual background relating to a prior conviction.\textsuperscript{259} Without that information, the court concluded that it was impossible to determine whether the crime showed “a moral depravity sufficient to impact upon his credibility.”\textsuperscript{260} Yet, the very fact that the court had to write an opinion stating that moral turpitude in evidence was different from moral turpitude in licensing highlights the reality that the standard traditionally functions independently of its legal context.

Two states remain outliers and continue to use moral turpitude in witness impeachment. Texas has never eliminated the standard from its evidence code.\textsuperscript{261} And, surprisingly enough, in the mid-1980s, California ratified the state’s use of moral turpitude as a standard for impeachment with prior crimes.\textsuperscript{262}

The California court reasoned that “the constitutional imperative of relevance prohibits impeachment with felonies which do not connote moral laxity of any kind.”\textsuperscript{263} Accordingly, it held that “it will be necessary to determine with respect to each felony conviction offered for impeachment—difficult though this may prove to be—whether it does or does not involve moral turpitude.”\textsuperscript{264} While it acknowledged that “[p]ermitting impeachment with crimes involving moral

\textsuperscript{257} Id. at 912 (citing Dental Examiners v. Lazzell, 191 A. 240 (Md. 1937)).

\textsuperscript{258} Id.

\textsuperscript{259} Id. Not all states follow the rule, and the Federal Rules currently permit some inquiry into the elements of a crime in order to determine whether it involved dishonesty or false statement. See, e.g., Fed. R. Evid. 609(a)(2) (permitting impeachment of a witness with evidence of a criminal conviction “if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement”); State v. Valtierra, 718 N.W.2d 425, 436 (Minn. 2006) (noting that for impeachment purposes “district courts may permit inquiring into underlying facts [of a prior conviction] when the defendant opens the door”) (internal quotation marks omitted).

\textsuperscript{260} Ricketts, 436 A.2d at 911. Similarly, in Virginia, although the courts continued to parrot the state’s rule that a witness could be impeached with evidence of a misdemeanor conviction involving moral turpitude, they seemed to equate the standard with a focus on crimes involving deception. See, e.g., Chrisman v. Virginia, 348 S.E.2d 399, 401–03 (Va. Ct. App. 1986) (invoking the moral turpitude standard before describing as “well settled” the rule that a witness’s credibility “cannot be impeached by proof of a prior conviction . . . unless the crime be one which involved the character of the witness for veracity”).

\textsuperscript{261} Tex. R. Evid. 609(a) (“For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude.”).

\textsuperscript{262} People v. Castro, 696 P.2d 111, 120 (Cal. 1985).

\textsuperscript{263} Id.

\textsuperscript{264} Id.
“moral turpitude” from an administrative perspective “has proved awkward.”265 The majority justified its decision to adopt the standard by stating that “considerable bodies of law” exist “in connection with other statutes” that characterize “felonies as involving or not involving moral turpitude.”266

Chief Justice Bird vigorously disputed the majority’s optimistic view that moral turpitude would be an administrable standard.267 “In adopting moral turpitude as the standard for determining which felonies are admissible to impeach the credibility of a witness,” she wrote, “the majority create enormous problems for our trial courts. Rather than providing clear guidance, the majority promulgate a rule which is guaranteed to have no certainty of application.”268 The chief justice went on to accuse her colleagues of “incorporating into the criminal law, vast bodies of noncriminal law where different applications of the term have been made.”269

True to Chief Justice Bird’s prediction, chief among the bodies of law California courts have looked to in making impeachment decisions has been federal immigration law, whose difficulties are discussed in the next Part of this Article. California courts have imported the two major idiosyncrasies of this area of federal moral turpitude jurisprudence into their own evidence law. Notably, in contrast to Rule 609, they refuse to look at anything beyond the elements of a witness’s prior conviction when making moral turpitude determinations.270 In addition, they have agreed with the federal courts that the way to make moral turpitude decisions in borderline cases is by looking for an element of evil intent.271 As these decisions demonstrate, the moral turpitude standard has steered California courts away from the question of credibility. Instead, California remains in a form of stasis in which certain crimes that historically involved moral turpitude still fall within the standard and are therefore viewed as relevant to credibility. For example, although almost a century ago most courts in the country reached a consensus that evidence of a woman’s lack of chastity was not relevant to her credibility, California courts continue to insist that evidence of prostitution is admissible on the issue of credibility because prostitution is a crime involving

265 Id. at 120 n.11.
266 Id.
267 Id. at 125 (Bird, C.J., concurring in part and dissenting in part).
268 Id. at 132.
269 Id. at 133.
270 See, e.g., People v. Campbell, 28 Cal. Rptr. 2d 716, 718 (Ct. App. 1994) (describing California’s rule that the court must consider the “least adjudicated elements” test, which requires that from “the elements of the offense alone—without regard to the facts of the particular violation—one can reasonably infer the presence of moral turpitude”); People v. Garrett, 241 Cal. Rptr. 10, 11 (Ct. App. 1987) (“A witness in a criminal trial may be impeached with a prior felony conviction if the least adjudicated elements of that felony necessarily involve moral turpitude.”).
271 See, e.g., Campbell, 28 Cal. Rptr. 2d at 718–19 (finding the malicious intent required for a conviction of felony vandalism betokens that “‘general readiness to do evil’ which constitutes moral turpitude”).
moral turpitude. Other crimes at the margins of the standard’s historical boundaries are deemed only relevant to credibility if they involve some degree of scienter, a line that in our current legal system, with its burgeoning criminal codes, often has little to do with truthfulness.

III. MORAL TURPITUDE AND LAWS OF EXCLUSION

In 1891, as its use in evidence and slander cases was at its height, Congress adapted the moral turpitude standard to yet another purpose: to police the shape of the polity. The Immigration Act of 1891 (Immigration Act) required the exclusion of “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude . . . .” In 1917, Congress expanded that provision to permit the deportation of immigrants convicted of crimes involving moral turpitude. Although it was an outgrowth of the common law, the federal standard did not signify reputational harm or link a bad reputation to dubious credibility. Instead, the standard was part of a character metric used to gauge the fitness of individuals to enter or remain in the country. As the latter section of this Part shows, despite that very different objective, courts maintained an approach to moral turpitude that privileged the original core honor norms that had shaped the standard’s early bounds. In marginal cases, courts continued to use proxies for moral turpitude that had little to do with underlying immigration policy goals.

The first section of this Part traces moral turpitude’s path into immigration law. That path highlights the character-policing function the standard acquired as it was appropriated by legislatures in search of rules for controlling access to the ballot and by professional groups seeking to establish norms of rectitude for members. It is in that capacity, as a delimiter of acceptable character, that moral turpitude plays its most prominent role today. Several professions use the standard as a membership criterion, states use it to screen jury pools and voting rolls,

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275 Moral turpitude had another role in federal law in the period between *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Paul v. Davis*, 424 U.S. 693 (1976). The standard had a function in due process cases analogous to its role in slander: it signaled accusations that implicate a liberty interest because they inflict severe reputational harm. See, e.g., Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 365–66 (9th Cir. 1976) (observing that Roth’s “notion of liberty, while imprecise, distinguishes between a stigma of moral turpitude, which infringes the liberty interest, and a charge of incompetence or inability to get along with coworkers which does not”).

276 For an account of moral requirements in the context of professional licensing, including a brief discussion of moral turpitude, see Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 *Yale L.J.* 491 (1985).

277 See infra Part III.A.
and it remains a significant element of federal immigration law. In these areas, moral turpitude functions both as an entry test and a collateral sanctioning mechanism—thereby depriving people of a right of residence, the privilege of voting, or a professional license after an initial adjudication of guilt and the imposition of a first-order punishment. The standard has presented legislatures with a seemingly flexible, socially and temporally adaptive method for imposing those sanctions in a way that purports to correlate to moral beliefs. Yet, as this section shows, the standard primarily serves to reinforce an ossified vision of core nineteenth-century honor norms or, in marginal cases, to track a formal legal conception of mens rea that leaves no space for moral reasoning.

A. Voter Disenfranchisement

When Congress broadened the immigration statute in 1891 to add crimes involving moral turpitude as an exclusion category, the nearest precedents for its use as a collateral sanction were post-Reconstruction laws aimed at disenfranchising black men. These disenfranchisement laws were specifically aimed at maintaining white supremacy in the post-Reconstruction South. Yet, like the federal immigration law, disenfranchisement statutes used moral turpitude to sort acceptable character traits from those that were disqualifying in order to maintain a particular social order. Moral turpitude functioned to mark a set of norm violations that had been singled out for opprobrium since the early days of the Republic. This function, combined with its fuzziness when applied to crimes at the margins, made it well suited to the purpose of selective disenfranchisement.

Unlike the sparse congressional record on the scope of the standard in the 1891 immigration bill, the background of state disenfranchisement provisions indicates that the standard was meant to track the traditional honor code, identifying crimes of deception, theft, and perceived sexual perversion, while focusing less on crimes of violence or statutory violations. Not surprisingly, the former crimes were viewed as crimes committed more frequently by the poor and disadvantaged.

Political scientist Alec Ewald has argued, persuasively, that criminal disenfranchisement laws were enabled, in part, by a republican ideology that held that the “health of the polity depends on the character of those who comprise it.” As described in Part I, the same interest in creating a union of responsible citizens

278 See infra Part III.B.
279 See infra notes 282–284 and accompanying text.
280 See infra notes 284–310 and accompanying text.
281 See Rhode, supra note 276.
283 See, e.g., Hunter, 471 U.S. at 226.
informed the cultural content of moral turpitude. Ewald shows how the project of creating a virtuous republic can all too easily merge with the goal of preserving racial hierarchies. Voting restrictions were a central tool used to this end in the post-Reconstruction South, setting a precedent for disenfranchisement regimes that are still active today. After the Civil War, moral turpitude and its honor code, by then well embedded in the common law, became part of the disenfranchisement toolkit.

In 1890, as Congress debated its new immigration legislation, Mississippi held a constitutional convention at which it framed its racially motivated disenfranchisement laws. Mindful of the Fifteenth Amendment, the Mississippi delegates modified a previous statute disenfranchising those guilty of “any crime” to exclude only those convicted of certain offenses. The drafters did not use the phrase moral turpitude, but the crimes they enumerated had striking parallels with moral turpitude as it had been applied in common law slander and impeachment cases. Those crimes included “bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy.”

In the first case to discuss the new statute, the Mississippi Supreme Court explained that the provision was intended within the “limitations imposed by the federal constitution” to “obstruct the exercise of the franchise by the negro race.” According to the court, the statute accomplished its aims because blacks had “certain peculiarities of habit, of temperament, and of character” that led them to commit “furtive offenses” rather than “the robust crimes of whites.” It went on to note that the drafters of the Mississippi Constitution had thus been able to avoid overt discrimination against black people by “discriminat[ing] against . . . the offenses to which [they] were prone.” Those convicted of violent crimes, such as “robbery and murder,” did not suffer the same loss of voting rights.

Georgia, South Carolina, and Alabama also passed laws aimed at disenfranchising black men by discriminating against certain offenses. In 1877, Georgia passed the first constitutional amendment to overtly use the moral

285 See id. at 1048.
286 Id. at 1091 (“[L]aws disenfranchising criminals were among the first tools employed by whites to remove blacks from politics after Reconstruction.”). Current felony disenfranchisement statutes continue to disadvantage African-American men primarily as a result of twentieth-century drug laws and enforcement patterns that lead to racially skewed conviction rates. See Jeff Manza & Christopher Uggen, Locked Out: Felon Disenfranchisement and American Democracy 107 (2006).
287 U.S. Const. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).
288 Ewald, supra note 284, at 1091.
289 Ratliff v. Beale, 20 So. 865, 867 (Miss. 1896).
290 Id. at 868.
291 Id.
292 Id.
293 Id.
The amendment disqualified “[t]hose who shall have been convicted . . . of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary.” In 1901, Alabama also included the moral turpitude standard in a constitutional amendment governing the franchise. The Alabama provision, after enumerating a long list of offenses such as treason, murder, receiving stolen property, perjury offenses, robbery, forgery, bribery, assault and battery on the wife, certain sex crimes, and miscegenation, added what the United States Supreme Court later termed a “catchall” provision “covering ‘any . . . crime involving moral turpitude.’”

Moral turpitude as a catchall could encompass the pettiest of misdemeanors, but it worked along lines similar to the enumerated offenses in the Alabama provision. As it had been applied, it would not cover assault and battery or, most likely, other violent crimes short of murder, but it would apply to even the most minor of thefts. Further, because of its lack of clarity at the margins, the standard would give voting officials the discretion to read “between the lines” for “the intent and expectation [was] that the phrase would be used in a discriminatory manner.” It was a discretion that officials used effectively, albeitopaquely, since they were not required to provide written justifications for their decisions.

The one Alabama case to discuss moral turpitude as a voter qualification preceded the 1901 constitutional amendment that made moral turpitude a constitutional ground for disenfranchisement. In a case applying an earlier provision that specified larceny as an offense that would warrant disenfranchisement, the Alabama Supreme Court invoked a connection between moral turpitude and overall character. It wrote:

The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that

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294 Ga. Const. of 1877, art. II, § 2, para. 1. The debate over the moral turpitude provision made no reference to disenfranchising black voters. Historians have found, however, that other disenfranchisement measures adopted at the convention, including poll taxes, were intended to disenfranchise blacks and poor whites. Arnold Fleischmann & Carol Pierannunzi, Georgia’s Constitution and Government 15, 40 (6th ed. 2006).
295 Ala. Const. of 1901, art. VIII, § 182.
297 See supra Parts I–II.
298 Ewald, supra note 284, at 1094.
299 See id. (“[A] historian hired by the Alabama state registrars found that by January 1903, the revised constitution ‘had disenfranchised approximately ten times as many blacks as whites.’” (quoting Hunter, 471 U.S. at 227)); see also Underwood v. Hunter, 730 F.2d 614, 616 n.2 (11th Cir. 1984) (“[The Alabama Attorney General] has acknowledged that the classification of presently unaddressed offenses will turn upon the moral standards of the judges who decide the question.” (internal quotation marks omitted)).
of ignorance, incapacity, or tyranny. . . . The presumption is, that one rendered infamous by conviction of felony, or other base offense *indicative of great moral turpitude*, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship. It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself, at least in close political contests.\(^{300}\)

In 1985, the United States Supreme Court, faced with plain evidence of animus, held that Alabama’s constitutional provision disenfranchising anyone convicted of a crime of moral turpitude violated the Equal Protection Clause of the Fourteenth Amendment.\(^{301}\) The case had been brought by two residents of the state who “were disfranchised for presenting worthless checks, a misdemeanor which the [state] registrars classified as a crime of moral turpitude.”\(^{302}\) The Court’s opinion reveals that the Alabama disenfranchisement regime mirrored the traditional bounds of the standard. Various minor nonfelony offenses such as “presenting a worthless check and petty larceny” fell within its sweep.\(^ {303}\) Yet, the “more serious nonfelony offenses such as second-degree manslaughter [and] assault on a police officer” did not invoke the collateral sanction.\(^ {304}\) Those crimes were “neither enumerated . . . nor considered crimes involving moral turpitude.”\(^ {305}\) The historical evidence made clear that “the crimes selected for inclusion . . . were believed by the [Alabama] delegates to be more frequently committed by blacks.”\(^ {306}\)

Justice Rehnquist, writing for a unanimous Court, held that the 1901 amendment had a disparate impact on blacks and had been enacted out of racial animus for exactly that purpose.\(^ {307}\) He noted that by as early as January 1903, the 1901 amendment “had disfranchised approximately ten times as many blacks as whites.”\(^ {308}\) The disparate impact persisted through the 1980s, and the Court noted

\(^{300}\) Washington v. State, 75 Ala. 582, 585 (1884) (emphasis added).

\(^{301}\) *Hunter*, 471 U.S. at 233. The Court had previously found that the moral turpitude standard had been used impossibly as a policing mechanism in violation of the equal protection clause of the Fourteenth Amendment. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 537–38 (1942). In that case, an Oklahoma law provided that the state could sterilize persons who were convicted three or more times of crimes “amounting to felonies involving moral turpitude.” *Id.* at 536, 539 (citations omitted).

\(^{302}\) *Underwood*, 730 F.2d at 615–16.

\(^{303}\) *Hunter*, 471 U.S. at 226.

\(^{304}\) *Id.* at 227.

\(^{305}\) *Id.*

\(^{306}\) *Id.*

\(^{307}\) *Id.* at 229–30.

\(^{308}\) *Id.* at 227 (quoting *Underwood* v. *Hunter*, 730 F.2d 614, 620 (11th Cir. 1984)). Recent studies have shown that felony disenfranchisement laws prevent approximately 5.3 million Americans from voting; disproportionate racial effects disqualify as many as one in four black men from voting in some states. See MANZA & UGGEN, *supra* note 286, at 77,
that “[i]n Jefferson and Montgomery Counties blacks are—by even the most modest estimates—at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses.”

Moral turpitude’s history as a disenfranchisement standard shows how readily the standard functioned to maintain social hierarchies. Not only was the standard opaque, particularly when applied by election officials, but also the very core honor norms of the early nineteenth century that inhered in the concept of moral turpitude made it an effective conduit for racial animus. The set of conduct standards that moral turpitude embodied were a product of a historical moment and the needs of a political class. As such, these standards tended to disfavor those who were less financially fortunate or who lived in ways that ran afoul of morals regulations. From moral turpitude’s earliest use in the law of slander, courts had distinguished between certain crimes of violence, which were viewed forgivingly, and crimes of deception, theft, and unchastity, which were viewed as debasing. As Hunter v. Underwood demonstrates, in the post-Reconstruction South, these factors made the standard ripe for appropriation as a tool for discrimination.

B. Immigration

The idea in the disenfranchisement statutes that the welfare of the state itself is threatened when persons “of great moral turpitude” are given political agency provides a key to understanding the standard’s current place in American immigration law. That immigration law has been described as “a 100-plus years social experiment.”


309 Hunter, 471 U.S. at 227 (quoting Underwood, 730 F.2d at 620).
310 Id. at 226–27. In the Eleventh Circuit’s opinion, on which the Supreme Court relied heavily in striking down the provision, the court noted that the selection of which nonprison offenses would qualify as crimes involving moral turpitude was suspicious for its arbitrariness. Underwood, 730 F.2d at 620.
citizenship to “free white persons.” Laws governing immigration and citizenship aided the project of protecting the polity from those deemed dangerous to the national character or unlikely to be good citizens. Morals legislation was prevalent in nineteenth-century criminal law, much of which reflected “a more general concern for order, ethics, good manners, respectable habits, and standards of decency.” That concern only increased as the century progressed—the product of a self-conscious quest to produce citizens who were disciplined to work, committed to frugality, and amenable to well-ordered governance. Scholars have identified laws as diverse as antiliquor legislation and quarantine regulations as an outgrowth of the larger project of the “policing of dangerous classes.” All such laws, to an extent, “established hierarchies of social difference” by distinguishing between “the orderly and the disorderly” or between wellness and sickness. At the same time, generalized concern for moral rectitude could easily mask animus towards particular groups. As is familiar history, our first immigration laws aimed at “undesirables” were impelled by hostility towards Chinese immigrants.

A vision of social rectitude drove the adoption of the moral turpitude standard in the 1891 Immigration Act, just as it had eighty years earlier when politicians used the phrase as an insult and courts turned it into a legal standard. In the same way that contemporaneous criminal-disenfranchisement statutes aimed at “[t]he perceived need to protect society against moral infection,” moral turpitude as an immigration standard functioned to protect the polity from persons identified as not belonging. As in criminal disenfranchisement, the Immigration Act gave

312 James E. Pfander & Theresa R. Wardon, Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency, 96 VA. L. REV. 359, 368 (2010) (arguing that Congress began controlling citizenship well before the 1875 Act through its “broad power to define which classes of persons were entitled to citizenship”).


314 See NOVAK, supra note 68, at 149.

315 Id. at 150, 154.

316 Id. at 178–86, 216.

317 Id. at 216.

318 The first federal immigration law, the Page Law of 1875, targeted contract laborers from China and Chinese women engaged in prostitution for exclusion. Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974); see also, Abrams, supra note 313, at 694 (noting that in support of the passage of the Page Law, Senator Page expressed “a fear that China was sending its most debased citizens to the United States—cooler laborers and prostitutes, not respectable merchants—and that America would be weakened as a result”).

319 Ewald, supra note 284, at 1084 n.166.

320 The xenophobia that provoked the first immigration statutes has been well documented. See, e.g., Abrams, supra note 313, at 643 (documenting animus against Chinese that led to passage of the Page Law); Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 HARV. L. REV. 853, 855–56, 856 n.11 (1987) (identifying among reasons for the Page Law, “growing
legal force to Congress’s concern with “character, and with particular forms of sickness which are held to be more dangerous than others to the body politic.”

The 1891 immigration amendments were explicitly intended to respond to a “universal and emphatic” demand for stricter immigration requirements and enforcement. To that end, Congress replaced exclusion rules that had previously barred “all foreign convicts except those convicted of political offenses,” with a stricter provision that specifically excluded “persons who have been convicted of a felony or other infamous crimes or misdemeanors involving moral turpitude.” As had the *Brooker* court, Congress evidently assumed that the meaning of moral turpitude would be well understood. It did not debate the precise wording of the new bill and provided no definition for the term. Nevertheless, the historical context suggests that the goal was to filter out those immigrants who were perceived to pose the greatest threat to American values. Those who had committed mere political crimes in other countries were still exempted. As Congress continued to reenact the moral turpitude bar in immigration statutes over the course of the twentieth century, it continued to leave the term undefined, delegating the responsibility for fathoming moral turpitude’s meaning to immigration officials and the federal courts.

Like the state courts, the federal courts continued to adhere to the core valence of moral turpitude when they applied the standard. At the margins as well, a now-familiar pattern repeated itself. Like their state counterparts, federal judges sought ways to make moral turpitude operational by couching the question in the terms of clearer common law concepts. The courts’ desire to avoid moral pronouncements in unclear cases pushed them away from determinations about community moral beliefs. Instead, they hewed to per se categories of crimes involving moral turpitude that had long formed the core of the standard even as they created a categorical approach that removed decisions at the margins from the realm of morality. In so doing, the courts arguably took a positive step away

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321 Ewald, *supra* note 284, at 1086. In his address to Congress before passage of the 1875 Immigration Act, President Grant stated that the exclusion of prostitutes, in particular, was vital lest they “disgrace . . . the communities” where they settled and “demoraliz[ed] the youth of th[o]se localities.” *See* HUTCHINSON, *supra* note 320, at 65 (quoting President Grant’s message to Congress of December 7, 1874). In 1903, President Theodore Roosevelt observed that the difficulty lay in how “to devise some system by which undesirable immigrants shall be kept out entirely.” 38 CONG. REC. 3 (1903) (statement of Mr. B. F. Barnes).


324 Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084.


326 Moral turpitude also functions as a standard for collateral sanctions in myriad state professional licensing and public benefit contexts, which at present account for many of the
from the kind of biased enforcement that occurred in states using the standard to disenfranchise voters. At the same time, by implicitly clinging to the historic essence of the standard while ignoring moral nuance in difficult cases, the courts have applied a set of rules and values to the deportation of immigrants that make its announced definition a nullity and at the very least deserve to be reevaluated.

1. Moral Turpitude and Core Honor Norms

When Congress expanded the reach of the moral turpitude standard in 1917 to cover deportation as well as exclusion, it added language that created a two-tiered approach to moral turpitude deportation. Aliens who were sentenced to terms of one year or more for fresh moral turpitude crimes—that is those opinions emanating from the state courts on the standard. Even a cursory review of these cases and the legal literature shows that in this context, despite the benefit of fully developed records and hearings, the standard looks much the same as it does in federal immigration law. Courts applying it rely on analogues to scienter or malum in se, and reinforce entrenched ideas that fraud and crimes of sexual deviance are at the heart of moral turpitude. See, e.g., In re Conduct of Chase, 702 P.2d 1082, 1086 (Or. 1985) (noting that Oregon has decided attorney sanctioning cases “on the basis of the nature of the crime itself, often applying the common law distinction between a crime malum in se, a crime inherently evil and wrong in itself, and a crime malum prohibitum, a crime wrong only because it is prohibited by legislation”); see also In re Caplan, 691 A.2d 1152, 1152 (D.C. Cir. 1997) (per curium) (disbarring attorney because “[c]riminal offenses involving theft and fraud inherently involve moral turpitude”); In re Lesansky, 17 P.3d 764, 767 (Cal. 2001) (finding that “[i]n the attorney discipline context, the term ‘moral turpitude’ includes ‘particular crimes that are extremely repugnant to accepted moral standards such as . . . serious sexual offenses’”); Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Lyzenga, 619 N.W.2d 327, 331 (Iowa 2000) (holding that attorney who accepted payment from undercover police officers to perform acts of sexual self-gratification was guilty of conduct involving moral turpitude because prostitution has always been a crime of moral turpitude and “society in general still views prostitution as immoral conduct”); Oltman v. Maryland State Bd. of Physicians, 875 A.2d 200, 212 (Md. Ct. Spec. App. 2005) (finding physician’s assistant who obtained Ritalin prescriptions for his son after his son was no longer covered by insurance should lose his license for moral turpitude because “[i]t is settled that whatever else it may mean, [moral turpitude] includes fraud and . . . a crime in which an intent to defraud is an essential element is a crime involving moral turpitude”); In re Howard, 681 P.2d 775, 776 (Or. 1984) (approving attorney’s admission that his misdemeanor conviction for paying a fee to engage in sexual conduct constituted “a conviction of a misdemeanor involving moral turpitude”); Rhode, supra note 276, at 577–81 (describing interest in marital relations and sexual conduct by bar licensing bodies).

327 Immigration Act of 1917, ch. 29, 39 Stat. 874. In 1892, the Supreme Court had held that the 1891 Act was constitutional insofar as it provided for the appointment of an inspector of immigration who would make final exclusion determinations subject to limited administrative review. Nishimura Ekiu v. United States, 142 U.S. 651, 664 (1892). The Act was amended in 1903 to eliminate the reference to “infamous crimes.” Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213 (1903).
committed within five years of entry to the country—were deportable.\textsuperscript{328} In addition, aliens would be deportable if they were “sentenced more than once to . . . a term of imprisonment [of one year or more] because of conviction in this country of any crime involving moral turpitude” regardless of the timing of the convictions.\textsuperscript{329} By removing any time limitation on the second moral turpitude conviction, the revised law invested the standard with more power than most other deportation standards.\textsuperscript{330} A second conviction for a crime involving moral turpitude is still one of the ways in which the government can deport a person long after he or she has come to the country.\textsuperscript{331}

The 1917 legislative history provides little guidance on congressional understanding of the standard. Nevertheless, there is some evidence to suggest that Congress anticipated a case-specific analysis that would be sensitive to an individual’s unique circumstances. There is also evidence that Congress, if forced to articulate a theory, would have approved an analysis focusing on guilty knowledge or mens rea. For example, Representative Sabath of Illinois, as part of a debate on moral turpitude deportations, explained that he had “no desire to protect the real criminal, a man who is criminal at heart, a man who is guilty of a second offense involving moral turpitude.”\textsuperscript{332} His goal, he said, was to protect the first offender, the man who “without thinking and without really knowing it is an offense, does something which may be designated technically as a crime involving moral turpitude.”\textsuperscript{333} To demonstrate his concern for the first offender, he stated that “[i]n certain sections of this country the larceny of a few pennies or of a piece of coal or a loaf of bread is considered a crime involving moral turpitude.”\textsuperscript{334} Whether that argument was a reference to differing community mores or to federalism and local and regional variations in criminal codes, it shows that one representative, at least, anticipated that the standard would be used with reference to local mores.\textsuperscript{335}

\begin{thebibliography}{99}
\bibitem{328} Immigration Act of 1917 § 19.
\bibitem{329} Immigration Act of 1917 § 19. The Act reflected anti-German xenophobia stemming from World War I and was passed over President Wilson’s veto. DEBRA L. DE LAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 31 (2000); see also KANSTROOM, supra note 311, at 140–41 (describing anti-German rhetoric in connection with deportation laws).
\bibitem{330} Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law, 119 YALE L.J. 458, 515 (2009) (“Congress time-limited nearly all grounds of deportability in the first three decades of federal immigration law.”).
\bibitem{333} Id.
\bibitem{334} Id.
\bibitem{335} The scant case law on moral turpitude was not a factor in the 1917 legislative history. However, it seems unlikely that Representative Sabath would have approved of Judge Noyes’s formalistic analysis, discussed \textit{infra} in Part III.B.2(a), that focused only on mens rea. Under that analysis, larceny of a few pennies could qualify as a crime involving moral turpitude.
\end{thebibliography}
The reality was different. As applied by the federal courts, moral turpitude continued to track the honor norms of the previous century. In 1926, the standard became the source of a scandal that dramatized the extent to which conventional mores—in this case sexual double standards—were at work in administrative decision making. That reality has since been documented more broadly by immigration scholars, but the attempted deportation of a minor celebrity, Vera, Countess of Cathcart, brought moral turpitude to the headlines.

Countess Cathcart had divorced her second husband after having an affair with the then-married (and aptly named) Earl of Craven. The affair was long over, and Vera was on her way to New York to sell a play she had written when she caught the attention of immigration officials at Ellis Island. Those officials declared that Vera’s adultery was an excludable offense because it qualified as a crime of moral turpitude under the Immigration Statute. Vera’s youth, title, and the fact that, despite his equally adulterous past, the Earl of Craven had recently been admitted to the country without incident, attracted a swell of press attention to her plight. American feminists became involved, arguing that there should be “a single standard of morals” for women and men. Mayor LaGuardia wrote publicly on behalf of the countess, also arguing against the moral double standard. The New York Times reprinted an editorial from London’s Evening Standard, which pointed out, among other things, that “[i]t may provoke a smile to compare the moral standards of Ellis Islands with those of Hollywood.” American writers expressed similar sentiments. One prominent Lutheran minister preached a sermon in which he told his audience, “Our popular lack of reverence was never more clearly illustrated than in the fact that many of us seem actually puzzled whether adultery constitutes ‘moral turpitude.’”

The resulting legal proceedings involved a parade of American notables. One year after his work on the Scopes trial, Arthur Garfield Hays agreed to represent moral turpitude—if any jurisdiction were to punish this type of offense with a sentence of over a year—because it was a crime that required at least a mens rea of knowledge.

See, e.g., CANNATO, supra note 14, at 246 (“Women of all nationalities fell victim to the prying investigations of immigration officials [as] . . . enforcing the nation’s immigration laws often meant enforcing middle class ideas of sexual morality.”); see also CLARK, supra note 14, at 493–94 (reproducing questions asked of sixteen-year-old girl seeking to enter the country in 1926, including whether she had “immoral relations” with boys).

CANNATO, supra note 14, at 260.

Id. at 260–61.

Id. at 261.

Id. at 262.


Id.


Id.
the countess.346 When the Secretary of Labor upheld Vera’s deportation order, the New York Times gave her story front page billing, noting that her attorneys would appeal for a writ of habeas corpus to none other than Judge Learned Hand.347 The case did not reach Judge Hand. After several weeks of public uproar, a judge sitting in the Southern District of New York issued the writ, thus overturning the exclusion order and permitting Vera entry into the country.348 The Cathcart scandal led some in Congress to question the broad delegation of discretion to immigration officials that moral turpitude represented, and a bill was introduced in the House of Representatives that would have limited the grounds for exclusion of aliens to the commission of a felony.349 The bill apparently failed or was withdrawn after the case was resolved and congressional attention waned when the issue left the headlines.350

In the meantime, the changes made in the 1917 Immigration Act resulted in a dramatic increase in the number of judicial opinions reviewing exclusions or deportations for moral turpitude.351 Those opinions showed the continued pull of the honor norms, even as cultural values were shifting and the idea of a shared moral compass seemed increasingly discordant with reality. In 1926, for example, a federal judge sitting in the District Court of Massachusetts found that an assault on a police officer with a razor blade did not constitute moral turpitude.352 In a rare effort to explain a core demarcation of moral turpitude in terms of its definition, the court explained:

If one ordinarily law-abiding, in the heat of anger, strikes another, that act would not reveal such inherent baseness or depravity as to suggest the idea of moral turpitude. If, on the other hand, one deliberately assaulted an officer of the law with a dangerous weapon and with felonious intent, or for the purpose of interfering with the officer in the performance of his duty, the attendant circumstances showing an inclination toward lawlessness, the act might well be considered as one involving moral

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346 See CANNATO, supra note 14, at 262.
347 Countess Cathcart Is to Be Deported by Davis’s Order, N.Y. TIMES, Feb. 18, 1926, at 1.
348 Countess Cathcart Wins Right to Stay, N.Y. TIMES, Mar. 6, 1926, at 1. Countess Cathcart’s association with moral turpitude would endure. In 1942, when William Langer, a Senator from North Dakota, was accused of “moral turpitude” as a State official and almost impeached after some less-than-honorable business dealings, Life Magazine described the event as “giving that charge its first national workout since the Countess of Cathcart was barred from the U.S. in 1926.” See Senate Seats Langer: Dakota Boss Wins Over “Moral Turpitude” Charge, LIFE MAG., Apr. 6, 1942, at 28, 28.
350 There appears to be no report of the bill other than the one New York Times article.
351 A Westlaw search reveals a total of forty-nine opinions containing the word “alien” and the phrase “moral turpitude” prior to 1917. In the twenty years following the passage of the Immigration Act of 1917, the same search terms produce 162 cases.
Faced with such a line-drawing problem, the court chose the less controversial avenue, finding that the assault was not a crime involving moral turpitude.\textsuperscript{354}

Other courts followed. The Second Circuit, for example, found that a man convicted of assault in the second degree should not be deported.\textsuperscript{355} The court noted the general principle that “a mere assault does not involve moral turpitude.”\textsuperscript{356} Almost a century later, it is still the rule that assaults that do not involve deadly weapons do not involve moral turpitude even when a police officer is injured. For example, the Eastern District of New York held in 2005 that “a second degree assault, in which a police officer is injured when the assaulting party intentionally interferes with the officer’s lawful duty, is not a crime involving moral turpitude.”\textsuperscript{357} The court explained that it was merely following well-established precedent: “According to the [Board of Immigration Appeals],” it wrote, “simple assault is not a crime of moral turpitude, but assault with a deadly weapon is; a conviction for misconduct that caused bodily injury is not a crime of moral turpitude, but where the conduct caused serious bodily injury, it is.”\textsuperscript{358}

Just as the moral turpitude honor code has always been forgiving of crimes involving violence, crimes involving deception have always been treated as core violations.\textsuperscript{359} The federal courts, for example, have consistently adhered to the idea that fraud is the essence of moral turpitude. The United States Supreme Court in

\begin{footnotes}
\footnotetext{353}{Id.}
\footnotetext{354}{Id.}
\footnotetext{355}{United States ex rel. Zaffarano v. Corsi, 63 F.2d 757, 758 (2d Cir. 1933).}
\footnotetext{356}{Id.}
\footnotetext{357}{Zaranska v. U.S. Dep’t of Homeland Sec., 400 F. Supp. 2d 500, 511 (E.D.N.Y. 2005).}
\footnotetext{358}{Id. at 514 (citing Toutounjian v. INS, 959 F. Supp. 598, 603–04 (S.D.N.Y.1997)).}
\footnotetext{359}{See, e.g., Abdelqadar v. Gonzales, 413 F.3d 668, 671 (7th Cir. 2005) (Easterbrook, J.) (“Crimes entailing deceit or false statement are within the core of the common-law understanding of ‘moral turpitude.’”).}
\end{footnotes}
Jordan v. De George, its landmark case on moral turpitude in the deportation context, reasoned that the standard was not vague precisely because courts had consistently found that fraud involved moral turpitude. At issue in Jordan was “whether conspiracy to defraud the United States of taxes on distilled spirits is a ‘crime involving moral turpitude’ within the meaning of . . . the Immigration Act of 1917.” Showing, once again, that the standard’s core meaning traveled irrespective of the legal question it was intended to address, the Supreme Court ignored the fraught questions surrounding the immorality of liquor law violations and relied instead on the long history of state court treatment of fraud as a moral turpitude offense. The Court went on to list myriad fraud offenses that federal courts had found to involve moral turpitude. The list included the deportation of Charles Ponzi, who was ultimately sent out of the country for mail fraud. It also included obtaining goods under fraudulent pretenses, conspiracy to defraud by deceit and falsehood, forgery with intent to defraud, execution of chattel mortgage with intent to defraud, concealing assets in bankruptcy, and issuing checks with intent to defraud.

Jordan v. De George has cast a long shadow, both in ratifying a bright-line rule for fraud cases and, as discussed in the next section, in shaping how the federal courts approach borderline cases. For example, in a recent en banc opinion involving an accessory-after-the-fact conviction, the Ninth Circuit ruled that “‘[a] crime having as an element the intent to defraud is clearly a crime involving moral turpitude.’” In a concurrence that was the controlling opinion on the fraud issue, Judge Reinhardt insisted that fraud is a per se category of moral turpitude. He reasoned that this per se approach was necessary to prevent the

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361 Id. at 227 (“Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude.”).
362 Id. at 223–24.
363 Id. at 227–28 (noting that in the state courts, “crimes involving fraud have universally been held to involve moral turpitude”).
364 Id. at 228.
366 Bermann v. Reimer, 123 F.2d 331, 332 (2d Cir. 1941).
367 Mercer v. Lence, 96 F.2d 122, 124 (10th Cir. 1938).
368 United States ex rel. Popoff v. Reimer, 79 F.2d 513, 515 (2d Cir. 1935).
372 See, e.g., Abdelqadar v. Gonzales, 413 F.3d 668, 670 (7th Cir. 2005) (Easterbrook, J.) (upholding deportation order for man convicted of buying food stamps from welfare recipients because, after Jordan, “crimes of deceit are the classic exemplars of moral turpitude” (citing Jordan v. De George, 341 U.S. 223 (1951)).
373 Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1074 (9th Cir. 2007) (Reinhardt, J., concurring) (quoting Winestock v. INS, 576 F.2d 234, 235 (9th Cir. 1978)), overruled by United States v. Aguilera-Montes De Oca, 655 F.3d 915 (9th Cir. 2011).
374 Navarro-Lopez, 503 F.3d at 1074.
fraud rule from diluting what he viewed as the proper analysis for other crimes. Because even the pettiest crimes involving fraud had been labeled moral turpitude, Judge Reinhardt sought to put those crimes into a separate box from other crimes, such as assault, which were not always found to involve moral turpitude. While nonfraud offenses would only fall within the standard if they were particularly base, vile or depraved, Judge Reinhardt argued that fraud offenses were always crimes involving moral turpitude, regardless of their inherent depravity. By Judge Reinhardt’s account, the per se fraud rule saved the courts from the uncomfortable position of being “compelled to label all crimes involving fraud as base, vile and depraved, and thus to deem all instances of fraud more offensive to society than the numerous serious and even violent felonies that are punishable by lengthy sentences but that we deem not turpitudinous.”

Judge Reinhardt’s opinion illustrates three key points about moral turpitude doctrine. First, courts still suggest that the standard will typically require an analysis of the relative baseness of crimes. Judge Reinhardt’s discussion of the relative depravity of violent felonies as compared with petty thefts would not be needed if the standard were not meant to reflect society’s moral beliefs. Yet, as this Article has shown, most courts, state and federal, in fact eschew any inquiry into the relative moral wrongfulness of crimes when writing moral turpitude opinions. Second, Judge Reinhardt’s desire to distinguish fraud from other crimes shows, albeit implicitly, that the rule treating fraud crimes as invariably involving moral turpitude is flawed. It is, for example, difficult to justify treating shoplifting as more depraved than slashing a police officer with a razor. Although Judge Reinhardt attempts to solve this problem by placing shoplifting in a separate “fraud crime” category in order to avoid labeling it as base, the attempt is incoherent. All moral turpitude crimes are still defined as inherently base, vile and depraved and contrary to community morality, whether they are so because of a per se rule or because a court has made a thoughtful analysis of their relative vileness. Third, any effort to rationalize moral turpitude jurisprudence will founder unless the evolution of that jurisprudence is taken into account. Current cases that single out fraud for special disapprobation simply continue to embody values that derive from the honor code that the standard once defended. Fraud and deceptive dealings have always been at the heart of moral turpitude, while crimes of violence have always been on its margins.

With a similar lack of coherent explanation, courts applying the federal standard have consistently found that sexual crimes involve moral turpitude. Prostitution was listed as its own ground for exclusion under the immigration law and thus did not need to be classified as involving moral turpitude in order to justify exclusion or deportation. However, as the Countess of Cathcart’s case shows, the moral turpitude standard was used to single out women for exclusion

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375 Id. at 1075.
376 Id.
377 Id.
based on offenses against chastity that were regarded differently when committed by men. In the last century, the idea that moral turpitude is linked to sexual misconduct has lost much of its gendered dynamic as it has spread to encompass sex crimes most often committed by men, such as statutory rape and, until recently, sodomy.379

Nevertheless, federal courts continue to treat most sexual offenses in the same categorical way as fraud. Indecent assault,380 lewd and lascivious conduct,381 incest,382 and contributing to the sexual delinquency of a minor383 have all been regularly found to be within the standard. Although courts have drawn the line at certain indecent exposure convictions and declined to treat them as covered by the standard, most sex offenses, “[u]nlike other types of crimes falling into the category of grave and base acts, . . . have generally been classified as crimes involving moral turpitude irrespective of any injury to the victim, physical or otherwise.”384 Statutory rape is the most obvious example of the per se classification of sex crimes as crimes involving moral turpitude. It has consistently been treated as a crime involving moral turpitude, even when it is fully consensual and there is only a small age difference between participants.385 The explanation

379 The moral turpitude provision for many years resulted in the systematic exclusion of gay men from the country. See Margot Canaday, “Who is a Homosexual?”: The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law, 28 LAW & SOC. INQUIRY 351, 353, 359–61 (2003). In 1982, for example, the Northern District of Texas held that a gay man from England was excludable because he had been convicted of sodomy, a crime recognized as involving moral turpitude. In re Longstaff, 538 F. Supp. 589, 591 (N.D. Tex. 1982), aff’d, 716 F.2d 1439 (5th Cir. 1983); see also Velez-Lozano v. INS, 463 F.2d 1305, 1307 (D.C. Cir. 1972) (finding that a man who had been convicted of consensual sodomy under a Virginia statute was deportable because sodomy was a crime involving moral turpitude). Only recently has a court pointed out that this per se rule is no longer applicable after Lawrence v. Texas. Nunez v. Holder, 594 F.3d 1124, 1132 (9th Cir. 2010) (noting that after Lawrence, “consensual sexual conduct among adults may not be deemed ‘base, vile, and depraved’ as a matter of law simply because a majority of people happen to disapprove of a particular practice”).

380 See Maghsoudi v. INS, 181 F.3d 8, 10–11 (1st Cir. 1999).

381 Schoeps v. Carmichael, 177 F.2d 391, 394 (9th Cir. 1949).

382 Gonzalez-Alvarado v. INS, 39 F.3d 245, 247 (9th Cir. 1994). Moral turpitude as a ground for exclusion, and in particular exclusion for incest, figures briefly in Jeffrey Eugenides’s best-selling 2002 novel, Middlesex. JEFFREY EUGENIDES, MIDDLESEX 134 (2002).

383 Sheikh v. Gonzales, 427 F.3d 1077, 1082 (8th Cir. 2005).

384 Nunez v. Holder, 594 F.3d 1124, 1142 (9th Cir. 2010) (Bybee, J., dissenting) (holding that indecent exposure conviction was not a crime involving moral turpitude).

385 See, e.g., Dingena, 11 I. & N. Dec. 723 (B.I.A. 1966) (finding that statutory rape conviction of nineteen-year-old for sexual intercourse with a fifteen-year-old qualified as a crime involving moral turpitude despite the lack of a mens rea element for the offense under Wisconsin law). But see Quintero-Salazar v. Keisler, 506 F.3d 688, 693 (9th Cir. 2007) (reversing BIA decision that conviction of a twenty-one-year-old for sexual intercourse with a fifteen-year-old constituted a crime involving moral turpitude); see also id. at 695 (Kleinfeld, J. dissenting) (citing cases to show that “precedent[] leave[s] no room
for the per se approach to sex crimes lies, as with fraud, in the history of the standard. Crimes involving sexual deviance have always been part of the core valence of moral turpitude.386

2. Moral Turpitude at the Margins

(a) The Genesis of the Categorical Approach

In cases at the margins, moral turpitude in immigration jurisprudence produced a more organized version of the avoidance techniques practiced by state courts in slander and evidence cases. Although the standard had no doubt been discussed in immigration proceedings, the first federal judicial opinion on the standard’s meaning in immigration law came in 1913 in a case involving, fittingly enough, a defamation conviction. In that opinion, Judge Noyes of the Southern District of New York set forth two principles that still form the core of today’s federal doctrine on the standard as it operates in borderline cases: (1) that the inquiry should be confined to the record of conviction; and (2) that the term would be equated with the element of scienter.387

The case that reached Judge Noyes was a habeas action involving a journalist, Edward F. Mylius, who had been convicted in England of defaming King George V by accusing him of bigamy.388 United States immigration officials examined a report of the English trial proceedings and decided that Mylius should be excluded because his acts involved moral turpitude.389 Judge Noyes reversed on the ground that this analysis was improper. Instead, he held that officials should have focused on only two questions: “(1) Is the conviction of crime established? (2) Is the crime one which involves moral turpitude?”390 Describing moral turpitude as a “vague term” whose “meaning depends to some extent upon the state of public morals,”391 Judge Noyes, paraphrasing a law dictionary, wrote, “A crime involves moral turpitude when its nature is such that it manifests upon the part of its perpetrator personal depravity or baseness.”392

386 This is not to say that sex crimes do not, or should not, provoke moral outrage. The point is, rather, that the moral turpitude standard does not track that outrage, but is instead better explained by its historical trajectory.
387 United States ex rel. Mylius v. Uhl, 203 F. 152, 153 (S.D.N.Y. 1913) aff’d, 210 F. 860 (2d Cir. 1914).
388 Mylius is Shut Out; Courts to Get Case, N.Y. TIMES, Jan 17, 1913, at 3.
389 United States ex rel. Mylius, 203 F. at 153 The opinion does not include the substance of Mylius’s defamatory statement.
390 Id.
391 Id. at 154.
392 Id. The dictionary he turned to defined moral turpitude as “[a]n act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or to society . . . .” 20 THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 872 (Garland & McGehee, eds., 1902) (defining “moral turpitude”). Judge Noyes here had an advantage
Judge Noyes did not pause to explain how he could assess the perpetrator’s “personal depravity” without considering his background or any of the facts underlying his conviction. Instead, he ignored the definition and moved to externalize and narrow the inquiry. The court’s role, he argued, is not to consider the actual facts of the crime, but instead to discern the fundamental nature of the offense. Under his analysis, the sole question was whether the crime itself necessarily involves personal depravity or baseness. In turn, because libel law in England “goes far beyond this,” often targeting publishers and editors who had been without knowledge of the libel, Judge Noyes found that “the offense . . . does not in its inherent nature involve moral turpitude” and “in classifying it under the immigration laws, it must be designated as one which does not possess that element.”

In these few moves, Judge Noyes decontextualized the federal moral turpitude standard in favor of an abstracted focus on the elements of the crime. In so doing, he articulated the framework for the modern “categorical approach,” which is now used by federal courts both in immigration determinations and in the federal sentencing guidelines. Other factors, such as the respective institutional roles of immigration officials and federal courts, may have informed Judge Noyes’s decision that the officials should not serve as secondary fact finders by probing the circumstances underlying a conviction. However, the holding was a natural over his predecessors in being able to find a law dictionary definition. Perhaps instigated by the passage of the voting restrictions and the 1891 Immigration Act, the American and English Encyclopaedia of Law had added an entry for “moral turpitude” in between the 1891 and 1902 editions. Compare 15 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 715–16 (John Houston Merrill, ed. 1891) (defining “moral character” and “morality” but not “moral turpitude) with 20 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 872 (Garland & McGehee, eds. 1902) (defining “moral turpitude”). The editors prefaced the entry with the observation that it was “difficult, if not impossible, to render a satisfactory definition.” 20 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 872 n.6 (Garland & McGehee, eds. 1902).

393 United States ex rel. Mylius, 203 F. at 154.
394 Id.
395 Id.
396 Id. at 155. One can speculate that Mylius’s reputation might have been enhanced, or at least not seriously harmed, had his reputation been known in many American jurisdictions of the day. In this sense, it is arguable that had Judge Noyes applied a contextual community mores analysis, the result would have been the same.

397 See, e.g., Rebecca Sharpless, Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law, 62 U. MIAMI L. REV. 979, 994 (2008) (discussing United States ex rel. Mylius v. Uhl as the first iteration of the categorical approach); see also Dadhania, supra note 14, at 324 (describing recent developments in applying the categorical approach in immigration law).

extension of judicial responses to moral turpitude in slander and evidence cases. The categorical approach facilitated courts’ desire to avoid moral assessments in favor of mechanical rules of decision by removing much of the factual material upon which an evaluation of an individual’s moral character could be made. All that would be necessary to determine whether a criminal conviction involved moral turpitude was to look at the elements required for the conviction and to see if those elements necessarily involved scienter.

Although its adoption was not universal in the early part of the twentieth century, the Noyes formulation proved a lasting decisional guide for courts. In 1926, the Southern District of New York, perhaps still scarred by the Cathcart scandal, applied Noyes’s categorical analysis, even though the court acknowledged that ignoring the actual conduct involved led it to a result that was “harsh and unjust.” The petitioner was an Italian fruit seller who had come to New York in 1913. According to the district court, he had paid for a load of fruit in California with a check for $100 and had then been asked to send a second check because the vendor claimed that the first one had been lost. He sent the second check without stopping payment on the first. The vendor cashed both checks and the second check bounced, at which point the vendor had the fruit seller charged with embezzlement. The fruit seller, acting on poor legal advice, pleaded guilty to the charge and then faced deportation proceedings. Because he had reentered the country after a recent trip to Italy, the conviction was viewed as meeting the time limitation.

The district court, albeit reluctantly, found that the fruit seller had pleaded guilty to a provision of the California Penal Code that required intent to defraud. In the court’s view, this was dispositive. Going back to the usual dichotomy between fraud and crimes of violence, the district court distinguished the case of simple possession of “narcotics or a pistol” which does not necessarily “carry with it a vicious intent or moral depravity . . . because the intention of committing an act of baseness or viciousness was absent or not proven.” Here, by contrast, the court found that “the relator has pleaded guilty to a willful intention to defraud,” an act that unquestionably involved moral turpitude. The perverse result was that the moral turpitude determination was unaffected by the court’s own conclusion that the fruit seller did not, in fact, intend to defraud anyone. Although the court insisted that it was assessing the “moral depravity” of the crime, the only

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400 Id.
401 Id.
402 Id.
403 Id.
404 Id.
405 Id.
406 Id.
407 Id.
408 Id.
decisional standard apparently at work was Noyes's approach that made its underlying facts off limits.\textsuperscript{409}

Curiously, there is little to suggest that Congress would have approved such an approach. The 1917 immigration bill included a provision implicitly acknowledging that the category, “crimes involving moral turpitude,” might be difficult to apply when unmoored from any direct review of the facts of the crime and the circumstances of the offender.\textsuperscript{410} The provision allowed the sentencing judge to make a recommendation against deportation “at the time of . . . passing sentence” no matter what type of crime had been committed.\textsuperscript{411} One Congressman argued that “the objection” that immigrants would be deported for petty crimes was “taken care of by the provision in the bill which forbids deportation if the judge who enters the sentence does not desire to have a man deported.”\textsuperscript{412} Despite the Noyes opinion, the congressional record gives no indication that when Congress allowed sentencing judges to make recommendations; it anticipated that the federal courts would bar themselves entirely from reviewing the facts of the crimes supporting deportation orders.\textsuperscript{413}

Executive Branch officials did little to clarify the situation. In 1933, Attorney General Homer Cummings issued an advisory opinion that appeared to approve the idea that moral turpitude meant immorality according to the mores “prevailing in the United States as a whole, regarding the common view of [its] people concerning its moral character.”\textsuperscript{414} Yet, the opinion simultaneously endorsed Noyes’s categorical approach. It stated that “[i]f the alien has been convicted of a crime such as indicated and the conviction is established, it is not the duty of the administrative officer to go behind the judgment in order to determine purpose, motive, and knowledge, as indicative of moral character.”\textsuperscript{415} Cummings provided no guidance to the courts on how they were to identify a “crime such as indicated.” Nevertheless, his message—that courts should consider the crime itself stripped of facts and context—proved far more popular with courts than the idea that they

\textsuperscript{409} Id.

\textsuperscript{410} Immigration Act of 1917, ch. 29, § 19, 39 Stat. 890.

\textsuperscript{411} Immigration Act of 1917 § 19.


\textsuperscript{414} Immigration Laws—Offenses Involving Moral Turpitude, 37 Op. Att’y Gen. 293, 294 (1933).

\textsuperscript{415} Id. at 294–95.
should identify the moral beliefs of the increasingly pluralistic country in making their rulings.\footnote{416}{The idea that courts should only look at the elements of a criminal conviction rather than any underlying facts has found favor with courts in professional licensing cases as well. See, e.g., In re Lock, 54 S.W.3d 305, 308 (Tex. 2001) (noting that under moral turpitude analysis in bar fitness cases, Texas courts “look solely to the elements of [the attorney’s] crime to determine if those elements involve any of the kinds of acts or characteristics encompassed within our definition of moral turpitude”).}

(b) The Scienter Requirement

The federal courts, predictably, responded to the mixed messages in the Cummings directive by ignoring any requirement that they assess views of moral character. Instead, as had Judge Noyes and his predecessors, state judges in slander and evidence actions, the federal courts called upon familiar stand-ins for moral turpitude in cases at the margins. While some federal courts sought to mechanize moral turpitude by equating it with crimes malum in se,\footnote{417}{For example, in a deportation case involving a West Indian woman, Phyllis Edmead, who had been sentenced to a one-year county jail term for petit larceny for stealing fifteen dollars from her employer, Tillinghast v. Edmead, 31 F.2d 81, 82 (1st Cir. 1929), the district court granted habeas on the ground that “petit larceny did not necessarily [involve moral turpitude], and . . . the circumstances must be inquired into to determine whether moral turpitude was shown.” Id. at 82. The First Circuit, over a strenuous dissent, reversed. The majority resorted to Blackstone’s thoughts on natural law to explain the district court’s error. Id. at 83 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *54–58). Petit larceny involves moral turpitude, it concluded, because “theft or larceny was a crime at common law involving an act intrinsically and morally wrong and malum in se.” Id. But see United States ex rel. Grippo v. McCandless, 28 F.2d 287, 288 (E.D. Pa. 1928) (finding agreement among the federal courts that moral turpitude did not signify malum in se). More recently, Judge Posner noted that the distinction “between crimes that are malum in se and crimes that are malum prohibitum” is reflected in moral turpitude jurisprudence. Mei v. Ashcroft, 393 F.3d 737, 741 (7th Cir. 2004).} the scienter analysis that appeared early in the nineteenth century and later formed part of Judge Noyes’s seminal opinion eventually became the favored approach.

The focus on scienter was an outgrowth of the idea that fraud is at the heart of moral turpitude, but courts did not limit their use of the scienter test to fraud cases. For example, Judge Noyes’s opinion in the Mylius case contained the germ of an intent-based analysis by suggesting, with its reference to a missing “knowledge” element in the English libel law, that only those crimes that required a mens rea of actual knowledge or more would qualify an immigrant for exclusion under the standard.\footnote{418}{See, e.g., United States ex rel. Mylius v. Uhl, 203 F. 152, 154 (S.D.N.Y. 1913) aff’d, 210 F. 860 (2d Cir. 1914).} As was the case in slander and impeachment cases, proxies for moral turpitude were employed most commonly in cases at the margins of the old system of norms, particularly those having to do with violations of liquor laws.
The scienter-based approach had early critics who argued forcefully that the scienter question was the wrong one to ask in a moral turpitude analysis. For example, in *United States ex rel. Iorio v. Day*, an early deportation case involving a prohibition violation, Judge Learned Hand insisted that an interpretation focusing only on willfulness would make a nullity of the “moral turpitude” language in the 1917 Act because “[a]ll crimes violate some law” and “all deliberate crimes involve the intent to do so.” Judge Hand argued that because Congress “added as a condition that [a crime] must itself be shamefully immoral” it “could not have meant to make the willfulness of the act a test.” Determining whether something is “shamefully immoral,” he claimed, requires instead that courts make “some estimate, necessarily based on conjecture, as to what people generally feel.” In the case before him, Judge Hand refused to find that the crime of selling or possessing whiskey in violation of a prohibition law was a crime of moral turpitude. It was not clear to him “that among the commonly accepted mores the sale or possession of liquor . . . occupies so grave a place . . ., rightly or wrongly.”

Judge Hand’s position that the standard necessitated reference to community mores was anomalous, as was his confidence in his ability to assess those mores. Even he acknowledged that federal courts were already divided on the question of whether liquor law violations involved moral turpitude, a division that belied his assertion of moral consensus on the issue. The very fact that the standard seemed to call for the almost impossible task of determining “what people generally feel” led the courts to take refuge in a substitute. Rather than make the kind of case-specific, fact-specific, era-specific inquiry advocated by Judge Hand, federal courts handled the moral turpitude question by citing precedent that reproduced its core applications and then by looking for the element of scienter to resolve cases at the margins. Indeed, a decade after Judge Hand’s opinion in *Iorio*, the Second Circuit changed course on prohibition offenses and, over his dissent, relied on the scienter test to classify a liquor law violation as a crime involving moral turpitude.

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419 34 F.2d 920 (2d Cir. 1929).
420 *Id.* at 921.
421 *Id.*
422 *Id.*
423 *Id.* Learned Hand’s approach to liquor violations was a minority position. The Second Circuit, and later the Supreme Court, affirmed that any crime with an element of fraud, even violations for failure to pay liquor taxes, would qualify, per se, as involving moral turpitude. See *United States ex rel. Berlandi v. Reimer*, 113 F.2d 429, 430 (2d Cir. 1940); *Jordan v. De George*, 341 U.S. 223, 223–24 (1951).
424 *United States ex rel. Iorio*, 34 F.2d at 921 (noting D.C. Circuit opinion finding that liquor law violations constituted crime involving moral turpitude).
425 See *United States ex rel. Berlandi*, 113 F.2d at 430. The charge in *Berlandi* was for a conspiracy to violate the liquor laws, and the majority’s analysis focused on the intent required for conspiracy. *Id.* In this sense, the case is distinguishable from *United States ex rel. Iorio*, which involved an outright sale in violation of the prohibition laws. Augustus
In 1951, the United States Supreme Court helped solidify the centrality of scienter in modern moral turpitude jurisprudence.426 As discussed above, that seminal case, *Jordan v. De George*, involved a failure to pay taxes on liquor sales and ultimately turned on the fact that the offense involved fraud. Yet, the court’s language suggested more broadly that fraudulent or evil intent, rather than any analysis of national or community moral beliefs, was the proper criterion for identifying moral turpitude.427

Following the *Jordan* decision, the lower courts created a line of precedent equating moral turpitude with scienter. In 1968, the Board of Immigration Appeals (BIA) was so confident in this approach that it wrote that “moral turpitude normally inheres in the intent. Thus, crimes in which evil intent is not an element, no matter how serious the act or how harmful the consequences, do not involve moral turpitude.”428 By 2005, the Third Circuit referred to the idea that “evil intent is a requisite element for a crime involving moral turpitude” as a “longstanding test employed by the [BIA] to determine the existence of moral turpitude.”429 Similarly, the Second Circuit “concluded that ‘corrupt scienter is the touchstone of moral turpitude.’”430 The Ninth Circuit also characterizes itself as “requir[ing] ‘willfulness’ or ‘evil intent’ in order for a crime to be classified as one involving moral turpitude.”431 In 2008, Attorney General Mukasey affirmed that a “finding of

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427 *Id.* at 227 (citing United States ex rel. Berlandi, 113 F.2d at 430).
429 Partyka v. Att’y Gen., 417 F.3d 408, 413 (3d Cir. 2005) (citations omitted); see also Flores, 17 I. & N. Dec. 225, 227 (B.I.A. 1980) (“An evil or malicious intent is said to be the essence of moral turpitude.”); Abreu-Semino, 12 I. & N. Dec. at 777 (“[M]oral turpitude normally inheres in the intent . . . .”); P—, 2 I. & N. Dec. 117, 121 (B.I.A. 1944) (“One of the criteria adopted to ascertain whether a particular crime involves moral turpitude is that it be accompanied by a vicious motive or corrupt mind. ‘It is in the intent that moral turpitude inheres.’” (quoting United States ex rel. Meyer v. Day, 54 F.2d 336 (2d Cir. 1931))).
430 *Partyka*, 417 F.3d at 413 (citing Michel v. INS, 206 F.3d 253, 263 (2d Cir. 2000)); Chamouny v. Ashcroft, 376 F.3d 810, 814–15 (8th Cir. 2004); Hamdan v. INS, 98 F.3d 183, 186 (5th Cir. 1996).
moral turpitude . . . requires that a perpetrator have committed [a] reprehensible act with some form of scienter."

The use of a scienter analysis as a proxy for moral turpitude has accomplished a dubious objectivity at the expense of coherence. Far from rationalizing moral turpitude doctrine, the analysis makes it difficult for courts to explain the continued treatment of certain core crimes, such as statutory rape, as involving moral turpitude. It also has led dissenters to criticize the standard as damaging to the language of the law and thereby to the law itself. In something like the reverse of Jeremy Bentham’s vision that the public should hear conduct rules while judges hear individual cases, judges under the scienter approach apply an explicitly moral standard while deciding cases based on the completely decontextualized question, one which centers on the degree of intent required for a conviction, irrespective of a particular individual’s actual motivation, circumstances, or even conduct. Unlike Bentham’s idea, which erred on the side of allowing judges to exercise lenity while giving the public stricter conduct rules to follow, the current moral turpitude standard suggests to the public that crimes will be evaluated on a moral spectrum, when in fact their classification depends on the minutiae of mens rea gradations.

Judge Reinhardt’s argument—that fraud must be a separate per se category of moral turpitude in order to save the standard from incoherence—could extend with equal force to the notion that moral turpitude is simply a question of scienter. Unless there is some principled way to separate crimes that are morally repugnant because they involve some degree of scienter from those that are inherently base, vile, or depraved, the jurisprudence on moral turpitude produces results that are difficult to justify. For example, crimes such as petty theft in the fifth degree or drunk-driving on a suspended license are classified as crimes involving moral turpitude because they require scienter. By contrast, repeated drunk-driving convictions, like many convictions for assault and battery, do not require proof of scienter and thus are held not to involve moral turpitude. Given the definition of moral turpitude, those outcomes would suggest that it is depraved to shoplift or to


433 See, e.g., Efagene v. Holder, 642 F.3d 918, 922 (10th Cir. 2011) (attempting to identify a category of “exceptional regulatory offense classified as crimes involving moral turpitude” in order to reconcile holding that a conviction for failing to register as a sex offender did not involve moral turpitude due to lack of the requisite intent, with longstanding precedent holding that statutory rape is a crime involving moral turpitude despite lack of mens rea requirement).


435 Marmolejo-Campos, 558 F.3d at 905 (en banc) (involving drunk-driving on a suspended license); Michel v. INS, 206 F.3d 253, 253 (2d Cir. 2000) (involving petty theft in the fifth degree).

drive with a suspended license while drunk, while it is not depraved to assault someone or to repeatedly drive drunk. Judge Reinhardt’s argument that fraud is simply a separate category of moral turpitude fails to explain why all scienter crimes are morally depraved while many violent crimes that lack scienter elements are not. The consistent inclusion of any crime with a scienter element within the scope of moral turpitude cannot be explained away with the confusing expedient of announcing a per se rule for fraud.

A recent Second Circuit case illustrates the problem with the scienter approach. *Michel v. INS*[^437] involved a Haitian man who was ordered deported because he had been found “in possession of stolen bus transfers.”[^438] Jean Patrick Michel was a lawful permanent resident who had entered two separate guilty pleas to charges of “criminal possession of stolen property in the fifth degree.”[^439] The convictions, based on the bus transfer thefts, were classified as involving moral turpitude.[^440] Then-Judge Sotomayor used a version of the scienter rule to conclude that the BIA’s classification was reasonable.[^441] Joined by Judge Cabranes, she found that the stolen bus transfer conviction was a deportable offense because it “specifically requires the violator’s knowledge that the property was stolen.”[^442] In dissent, Judge Calabresi echoed Judge Hand’s argument from over half a century earlier. He pointed out the contradiction arising from a rule that focuses solely on the element of “knowledge” yet claims to make a decision about the state of community morality.[^443] Inflexibly equating immorality with intent, he argued, “violates [the] long-standing definition of ‘moral turpitude.’”[^444] Although he did not rest his position on “the alleged triviality” of the theft, he would have required that the BIA at least “seek to show that the stealing of transfers (or whatever behavior it determines constitutes the minimum conduct for violating the statute), even if seemingly a trivial act, [is] an ‘inherently base, vile, or depraved’ crime.”[^445] “It is hard,” he wrote, “to understand how the gravity of the crime can play no part in the inquiry.”[^446]

[^437]: 206 F.3d 253 (2d Cir. 2000).
[^438]: *Id.* at 261.
[^439]: *Id.* at 256. Michel had been a lawful permanent resident in the United States for eighteen years, since the age of nineteen. *Id.*
[^440]: *Id.* at 259.
[^441]: *Id.* at 262–65.
[^442]: *Id.* at 263.
[^443]: *Id.* at 270 (Calabresi, J., dissenting).
[^444]: *Id.*
[^445]: *Id.* at 271.
[^446]: *Id.* at 270. Judge Berzon offered a similar critique of BIA decisions in her dissent from a moral turpitude opinion by an en banc panel of the Ninth Circuit:

[T]he BIA has declared that the definition of a [Crime Involving Moral Turpitude] is “‘an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.’” Yet, the BIA has designated offenses ranging from the knowing possession of child
Ironically, because courts confronting such core cases as statutory rape and fraud do not follow the scienter-based approach, the approach does not provide a robust explanation for much of moral turpitude jurisprudence. As Judge Berzon wrote in a recent dissent, the current scienter requirement is virtually meaningless because it is ill-defined and overrun by exceptions. While the BIA looks for “the specific intent to defraud” in certain cases, in other cases, such as “violent crimes, theft offenses and other crimes against property, sex offenses, [or] drug offense,” the BIA “appears to require a prescribed degree of intent that varies depending on which subcategory is at issue.” In essence, “one could find support for any proposition if one’s search pool includes all of the BIA’s precedential [moral turpitude] opinions over the last seven decades.”

The case that provoked Judge Berzon’s dissent exemplifies the abstruse lines drawn by the scienter rule. Sitting en banc, the Ninth Circuit ruled that drunk-driving on a suspended license is a crime involving moral turpitude, while acknowledging that drunk-driving, even repeatedly, is not. Despite the acknowledged dangers of drunk-driving, the majority reasoned that “a long historical acceptance” of precedent treating drunk-driving convictions as not involving moral turpitude was justified because “statutes that prohibit driving under the influence typically do not require intent, but rather ‘are, or are most nearly comparable to, crimes that impose strict liability.’” Drunk-driving on a suspended license, by contrast, required that the person “knew or should have


In most instances, convictions for offenses involving fraud satisfy the scienter test. There are, however, a number of offenses sounding in fraud that do not technically require a finding of fraudulent intent to support a conviction. Marmolejo-Campos, 558 F.3d at 927 (Berzon, J., dissenting). Courts, nonetheless, invariably find that those offenses are crimes involving moral turpitude because they involve fraud.

Id.

Id.

Id.

Id.

Id. at 913 (majority opinion) (quoting Lopez-Meza, 22 I. & N. Dec. 1188, 1194 (B.I.A. 1999)).

Id. (quoting Begay v. United States, 553 U.S. 137, 145 (2008) (“[T]he conduct for which the drunk driver is convicted (driving under the influence) need not be purposeful or deliberate.”)); see Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (stating that a DUI offense involves “accidental or negligent conduct”).
known of the suspension or revocation of his or her license, and therefore met the Attorney General’s “some form of scienter” requirement.

Using scienter to distinguish drunk-driving with a suspended license from other drunk-driving offenses might make sense if this scienter-based approach were applied in every case, but it is not. Courts use the approach with seemingly rule-like exactness in some cases. Yet, in others, courts continue to find the core crimes to be outside the rule, either by treating those offenses as exceptional or by stretching the scienter requirement to encompass them. For example, in keeping with moral turpitude’s continued resonance with the codes that regulate sexual mores, federal courts often abandon the scienter requirement in cases involving sex crimes. The most prominent and consistent exception is for statutory rape. In

454 Marmolejo-Campos, 558 F.3d at 910.
455 Id. at 912, 916 (referencing Silva-Trevino, 24 I. & N. Dec. 687, 688, 706 (2008)).
456 At times, courts stretch the scienter rule for reasons unknown. For example, the Seventh Circuit found that aggravated fleeing is a crime involving moral turpitude because, although under Illinois law no mens rea was required for a conviction, the nonaggravated version of the offense requires willfulness. Mei v. Ashcroft, 393 F.3d 737, 741–42 (7th Cir. 2004).
457 See Gonzalez-Alvarado v. INS, 39 F.3d 245, 246 (9th Cir. 1994) (holding, in cases involving incest convictions, that “[a] crime involving the willful commission of a base or depraved act is a crime involving moral turpitude, whether or not the statute requires proof of evil intent”); see also Maghsoudi v. INS, 181 F.3d 8, 15 (1st Cir. 1999) (finding that indecent assault conviction was a crime involving moral turpitude); Ahmed v. INS, 92 F.3d 1196, *2 (10th Cir. 1996) (unpublished table decision) (upholding BIA’s deportation order based on two convictions for crimes involving moral turpitude: sexual conduct in the third degree and patronizing a prostitute); Babouris v. Esperdy, 269 F.2d 621, 623 (2d Cir. 1959) (affirming deportation order without explanation for a man convicted of “soliciting men for the purpose of committing a crime against nature or other lewdness” on moral turpitude grounds). Some sexual crimes no longer come up under the moral turpitude classification because they are also considered to be felonies. See Ganzhi v. Holder, 624 F.3d 23, 30 (2d Cir. 2010) (finding conviction for sexual abuse of a minor made alien removable as having been convicted of an aggravated felony); Restrepo v. Att’y Gen., 617 F.3d 787, 791 (3d Cir. 2010) (“The [Immigration and Nationality Act] defines aggravated felony to include, inter alia, ‘murder, rape, or sexual abuse of a minor.’”).
458 Courts have also struggled over manslaughter convictions, which typically require only a showing of recklessness. Compare, e.g., Vidal y Planas v. Landon, 104 F. Supp. 384, 390 (S.D. Cal. 1952) (finding involuntary manslaughter not to be a crime involving moral turpitude), with Franklin v. INS, 72 F.3d 571, 573 (8th Cir. 1995) (finding manslaughter—which requires at most a mens rea of recklessness—to be a crime involving moral turpitude). Federal courts initially tended to draw a distinction between involuntary and voluntary manslaughter, but if a conviction did not distinguish between the two, contrary to their usual practice, they would err on the side of including it within the standard. See, e.g., Sanchez-Marín, 11 I. & N. Dec. 264, 266 (B.I.A. 1965) (finding that it was reasonable to conclude that an alien indicted for second-degree murder, but who pleaded guilty to the lesser offense of manslaughter, had committed an intentional crime involving moral turpitude). Later, some federal courts widened this exception to the scienter requirement by holding that reckless manslaughter involved moral turpitude,
an oft-cited opinion, the Eighth Circuit upheld a deportation order for a man who had pleaded guilty to the strict liability offense of having “sexual relations with a female between sixteen and eighteen years of age.”\footnote{Marciano v. INS, 450 F.2d 1022, 1023, 1025 (8th Cir. 1971) (holding that “[i]f sexual intercourse is present, and it is established that the female is under the age of consent, the element of mens rea does not enter because of the very nature of the offense and the interest of society in rendering such females incapable of giving consent”); \textit{see also} Castle v. INS, 541 F.2d 1064, 1066 (4th Cir. 1976) (quoting Bendel v. Nagle, 17 F.2d 719, 720 (9th Cir. 1927)) (finding statutory rape under Maryland law “manifestly involves moral turpitude” (internal quotation marks omitted)).} Dismissing the objection that the elements of the crime did not require any proof of criminal intent, the majority reasoned that both the BIA and federal courts had “consistently” found statutory rape to be a crime involving moral turpitude.\footnote{Id. at 1025 (citations omitted); \textit{see also} Pino v. Nicolls, 119 F. Supp. 122, 128 (D. Mass.), \textit{aff’d}, 215 F.2d 237, 247 (1st Cir. 1954), \textit{rev’d on other grounds sub nom.} Pino v. Landon, 349 U.S. 901, 901 (1955) (per curium); Ng Sui Wing v. United States, 46 F.2d 755, 756 (7th Cir. 1931); \textit{United States ex rel. Marks v. Esperdy}, 203 F. Supp. 389, 396–97 (S.D.N.Y. 1962).} Beyond that, its logic seemed to be that because rape itself is a crime of moral turpitude and statutory rape is classified as rape, then statutory rape must involve moral turpitude.\footnote{Marciano, 450 F.2d at 1025 (quoting \textit{Bendel}, 17 F.2d at 720).} The dissenting judge argued, as Judge Hand noted years ago, that “the clear intent of Congress” required the court to determine whether “the petitioner’s criminal conduct here did or did not, factually, ‘involve moral turpitude.’”\footnote{Id. at 1026 (Eisele, J., dissenting).}

Even cases involving fraud create problems for courts applying a scienter-based analysis. Fraud is the quintessential moral turpitude crime precisely because it was understood as involving evil intent at common law and thus violated a core honor norm requiring honest business dealings. Yet, modern statutory offenses that sound in fraud often are framed as strict liability crimes. To bring those offenses under the umbrella of moral turpitude, courts must ignore or strain the scienter rule. For example, in a recent Ninth Circuit case, the petitioner, a legal permanent resident, obtained credit cards on false pretenses and then used those cards to obtain goods.\footnote{Tijani v. Holder, 628 F.3d 1071, 1073 (9th Cir. 2010).} The petitioner was ordered deported for a conviction under a strict liability statute prohibiting making a false financial statement.\footnote{Id. at 1081.} Judge Noonan, writing for the majority, began his opinion with a rarity in federal moral turpitude opinions: a discussion of values. He explained that the case turned on “the place of credit in our economy.”\footnote{Id.} As he elaborated:

Credit comes into existence through confidence—confidence that one human being may rely on the representations of another human being. On this utterly unmechanical, uniquely human understanding, a credit

\footnote{Franklin, 72 F.3d at 573.} despite the absence of intent. \textit{Franklin}, 72 F.3d at 573.
economy is formed and wealth is created. To exploit, pervert and destroy the confidence that creates credit is a vicious act. The abuse of the distinctively human capacities to reason and to engage in rational speech, using these capacities to harm another human, may well be considered an act of moral turpitude.466

Judge Noonan went on to rule that the false statement violation was a crime involving moral turpitude.467 Taking up the “counterintuitive” task of assessing only the elements of the crime, he acknowledged that intent to defraud was not a statutory element.468 Nevertheless, he reasoned that “[f]raud is implicit in the nature of a crime” under the California statute because “[t]he fraudster intentionally seeks and obtains something of value by means of his misrepresentation.”469 Fraud, in turn, is always a crime involving moral turpitude. Judge Tashima, in dissent, pointed out that an identical Connecticut statute had been found by the BIA not to involve the requisite scienter for moral turpitude.470 The debate between the two judges shows the strength of the honor code link between fraud and moral turpitude and the malleability of the scienter analysis when judges wish it to stretch. It also illustrates why courts are reluctant to apply the moral turpitude standard by engaging in value-laden analyses grounded in their views of community mores. Many nineteenth-century judges were loath to do this in the simpler context of assessing reputational injury.471 Contemporary judges now confront a world in which judgments based on extra-legal moral beliefs, even though authorized by the legislature, can invite criticism from colleagues, if not also from the media and legislators. In his dissent, Judge Tashima not only asserted that Judge Noonan was wrong about the law, he also described the majority opinion as “an elaborate apologia of Wall Street and the banking industry [which] engages in speculation on the causes of the ‘current economic crisis.’”472 In his view, the task of the judge was not to think about society’s needs or the true nature of the crime, but instead to determine whether a conviction under the statute necessarily required proof of fraudulent intent.473 The majority’s failure to apply the categorical approach, he argued, as well as its unabashed use of normative and even condemnatory language, led it to transmute a ninety-seven-year-old statute that “was enacted decades before the credit card was invented” into a law against credit card fraud.474 One wonders, however, if Judge Noonan’s approach was not

466 Id.
467 Id. at 1078–79.
468 Id. at 1075.
469 Id. at 1075–76.
470 Id. at 1082 (Tashima, J., dissenting) (quoting Kinney, 10 I. & N. Dec. 548, 549 (B.I.A. 1964)).
471 See supra Part I.
472 Tijani, 628 F.3d at 1082–83 (Tashima, J., dissenting).
473 Id. at 1083.
474 Id.
more in keeping with the purpose of the moral turpitude standard than the acontextual scienter test he eschewed.

CONCLUSION

Despite its failings, the allure of moral turpitude is undeniable. Historically, it offered the promise of an easy proxy for reputational harm, and then more simply, for a bad reputation with attendant assumptions about character. Still later, the country found itself in need of a way to identify persons who should be prohibited from entry. In 1985, the California Supreme Court proved that moral turpitude is not a relic when it elected to retain the standard, despite its flaws, as a test for impeachment evidence. It may be that the persistence of the standard—beyond a story of congressional disinterest and judicial avoidance—reflects a continuing longing for legal standards that invoke our common conscience. Codes cannot fill all of the gaps, nor do we want them to. At the same time, this Article suggests that we must be wary of the path we take to accomplish that goal.

Viewed in the context of its longer history, the moral turpitude standard provides a powerful counterpoint to the claim, made frequently in recent years, that judges are eager to judge based on their own moral intuitions rather than the law. Paradoxically, the very standard that would provide most leeway for judges to be activist in the service of their own values has instead produced judgments so rigid in their adherence to precedent that nineteenth-century honor norms are still the best predictor of their outcomes. Courts seem more likely to reason about community moral beliefs or absolute right and wrong if they are adjudicating disputes over speeding tickets than if they are determining whether a particular crime involved moral turpitude.

Recent criticism of judicial activism provides one possible explanation for courts’ avoidance of the moral in moral turpitude. Yet, modern criticism cannot explain why nineteenth-century judges decided difficult moral turpitude cases based on anything but moral reasoning. That avoidance may come, instead, from the inherent difficulty of making and justifying decisions about ambiguous moral questions. Unlike many legal standards that implicitly rely on moral judgments, moral turpitude used the word moral baldly, calling on courts to make a moral pronouncement with no legal phraseology with which to cover it. Rather than do so, as this Article shows, courts opted to blindly follow precedent wherever possible and to use proxies that were better understood and easier to explain when considering difficult cases on the margin.

475 See, e.g., Jackie Calmes, Court’s Potential to Goad Voters Swings to Democrats, N.Y. TIMES, Apr. 5, 2012, at A14 (describing opportunity for Democrats to win votes by criticizing recent judicial activism by conservative members of the Supreme Court); Nicholas D. Kristof, Op-Ed., Order in the Court, N.Y. TIMES (Oct. 4, 2005), http://query.nytimes.com/gst/fullpage.html?res=9C01E0DE1130F937A35753C1A9639C8B63 (calling on liberals to join conservatives in opposing “judicial activism” by “undemocratic courts”).
Why, given its tortured history, the strange boundaries it creates in current law, and the blatant inefficiency that comes from using such a contested and ill-understood standard in a law as vital as the immigration statute, is moral turpitude still with us? Legislatures, it seems, are no more comfortable with difficult moral line-drawing questions than are courts. Even as many of its members have criticized courts for allegedly overreaching on values questions, Congress has held on to a standard that provides an open, if largely unaccepted invitation to judges to do just that.

Perhaps most troubling from this account of moral turpitude is the lack of transparency from courts administering the standard. Courts’ insistence that they are basing judgments on the baseness, vileness, or depravity of an action, when in fact they are simply looking for “some form of scienter,” has created such confusion that the courts themselves seem lost when trying to account for their own doctrine. The Supreme Court has recently held that the Constitution requires that a defendant be informed of the deportation consequences of his or her plea. Given the vagaries of the federal moral turpitude standard, even with an existing “Handbook on Moral Turpitude,” this will be no simple task.

Finally, this account suggests the need to grapple with a founding vision of the polity that is still very much alive in the law. It may be that the vision of hard-working citizens whose goods are sound and who never cheat, lie, or steal remains our ideal. But how closely we would demand that lawful permanent residents stick to a strict version of that ideal in order to remain in this country may be an open question. Also open to debate may be moral turpitude’s suggestion that minor violent crime is less problematic than minor sex crimes, or that women who are prostitutes are less truthful than men who commit assaults. These substantive issues, as well as the more theoretical questions about law, morality, delegation, and judging, among others, will be important in any dialogue on the future of the moral turpitude standard. That future will, no doubt, continue to be informed by its past.