

I WILL MULTIPLY THY SORROW AND THY CONCEPTION: ABORTION AS A CRIME OF MORAL TURPITUDE*

I. INTRODUCTION

“Abortion is an immoral, base crime; and he who aids and abets in its commission . . . is guilty of an act involving moral turpitude.”¹

“Moral turpitude” is as redundant as the phrase “ATM Machine.” Morality is folded into the concept of “turpitude.”² The term—turpitude—itself is old.³ Its Latin cognate appears as far back as the fifteenth century in a religious context: Dominican monk Girolamo Savonarola famously envisioned the downfall of Renaissance Florence with the prediction, “This place will no longer be called Florence but *turpitude* and blood and a den of thieves.”⁴ As a result, Florentines burned their “vanities,” so perhaps they understood what he was accusing them of.⁵ American courts, however, have struggled to pin down the word’s precise meaning.⁶

If the idea were limited to religious debates, it would hardly matter, but the determination of what constitutes a Crime Involving Moral Turpitude (CIMT) can have serious consequences for noncitizens living in America. The Immigration and Nationality Act (INA) of 1965 lists commission of a CIMT as both a bar to noncitizen admissibility and a basis for removal from the country.⁷ In fiscal year 2020, roughly 119,000 noncitizens were removed on criminality grounds, which includes CIMTs.⁸

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The title quote comes from *Genesis* 3:16 (King James) (“Unto the woman [God] said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee.”).

1. *Kemp v. Bd. of Med. Supervisors*, 46 App. D.C. 173, 183 (D.C. Cir. 1917).

2. *See Jordan v. De George*, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting) (“[T]urpitude alone means moral . . . depravity and moral turpitude seems to mean little more than morally immoral.”); *Miss. Comm’n on Jud. Performance v. Roberts*, 952 So. 2d 934, 942 (Miss. 2007) (defining moral turpitude circularly as “an action [that] must involve some immorality”).

3. LAURO MARTINES, *FIRE IN THE CITY: SAVONAROLA AND THE STRUGGLE FOR THE SOUL OF RENAISSANCE FLORENCE* 25 (2006).

4. *Id.* (emphasis added).

5. *See id.* at 115–16.

6. *See Zarate v. Att’y Gen.*, 26 F.4th 1196, 1200 (11th Cir. 2022) (“The BIA has, understandably, described ‘moral turpitude’ as a ‘nebulous concept.’” (quoting *Matter of Tran*, 21 I. & N. Dec. 291, 292 (B.I.A. 1996))); Derrick Moore, Note, “*Crimes Involving Moral Turpitude*”: *Why the Void-for-Vagueness Argument Is Still Available and Meritorious*, 41 CORNELL INT’L L.J. 813, 814 (2008).

7. 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I).

8. DHS, IMMIGRATION ENFORCEMENT ACTIONS tbl.41d (last updated Dec. 22, 2022), <https://www.dhs.gov/immigration-statistics/enforcement-actions> [<https://perma.cc/7HVW-QB2X>] (click on

Before *Roe v. Wade* and the establishment of a constitutional right to privacy,⁹ abortion was categorically a CIMT under both state¹⁰ and federal law.¹¹ In 1946, a noncitizen from Jamaica received a sentence of four to eight years in prison for manslaughter and assault with intent to commit abortion in New York State.¹² The recitation of his sins in his deportation appeal is strangely dry.¹³ The woman in his care suffered “mortal wounds, bruises, lacerations [sic] and contusions” resulting in her death,¹⁴ but the Board of Immigration Appeals (BIA) made no grand pronouncements on his crime’s inherent vileness.¹⁵ “[A]bortion is a crime involving moral turpitude,” the BIA stated matter-of-factly, and therefore so was assault with intent to commit abortion.¹⁶ Pre-*Roe*, abortion as a CIMT appears to have been uncontroversial.¹⁷

Fifty years as a constitutional right may have changed things.¹⁸ And yet, everything old seems new again: *Dobbs v. Jackson Women’s Health Organization*—the June 2022 Supreme Court decision that explicitly overturned *Roe* and allowed States to outlaw even early-term abortion—quoted thirteenth- and seventeenth-century authors to justify the criminalization of abortion as a deeply held American tradition.¹⁹ In anticipation of *Roe*’s demise, a number of States put abortion criminalization trigger laws²⁰ in place, while others, post-*Dobbs*, rushed to pass new laws²¹ or enforce old laws that were previously enjoined.²² The majority of these laws classify providing an abortion as a felony.²³

“Immigration Enforcement Actions 2021 Data Tables” and open table 41d). Noncitizens are removable on criminality grounds if their conviction (1) falls into a category of CIMT; (2) is an “aggravated felony,” part of an enumerated list of serious offenses; or (3) is a specific offense named in the INA as a basis for removal, such as possession or distribution of controlled substances. See § 1227(a)(2) (delineating the criminality grounds of removal). The number of noncitizen removals fluctuates depending on Executive Branch administration policy and congressional budget, among other factors, and removal hearings are subject to a significant backlog. See *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, TRAC IMMIGR. (Jan. 19, 2021), <https://trac.syr.edu/immigration/reports/637/> [https://perma.cc/B623-MFKE].

9. 410 U.S. 113, 152 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

10. *E.g.*, *In re Plotner*, 488 P.2d 385, 393 (Cal. 1971).

11. *E.g.*, *Kemp v. Bd. of Med. Supervisors*, 46 App. D.C. 173, 183 (D.C. Cir. 1917).

12. *Matter of M---*, 2 I. & N. Dec. 525, 525 (B.I.A. 1946).

13. *See id.* at 527.

14. *Id.*

15. *Id.* at 526.

16. *Id.* at 528.

17. *Id.* at 526.

18. See Maurice A. Roberts, *Sex and the Immigration Laws*, 14 SAN DIEGO L. REV. 9, 16 & n.47 (1976) (describing a 1974 case where the BIA declined to deport a noncitizen for a prior Mexican abortion conviction, due to recent U.S. abortion legalization under *Roe v. Wade*); *Portaluppi v. Shell Oil Co.*, 684 F. Supp. 900, 903 n.7 (E.D. Va. 1988) (suggesting that abortion was now “accepted” and “commonplace,” in addition to being a constitutional right).

19. 142 S. Ct. 2228, 2242, 2248–49 (2022).

20. *See, e.g.*, S.B. 1385, 65th Leg., 2d Reg. Sess. (Idaho 2020).

21. *See, e.g.*, FLA. STAT. ANN. §§ 390.011–.0112 (West 2023).

22. *See, e.g.*, *Planned Parenthood Ariz., Inc. v. Brnovich*, 524 P.3d 262, 266–69 (Ariz. Ct. App. 2022) (ruling that, while the 1864 abortion ban was no longer enjoined after *Roe*, physicians who perform abortions according to the newer fifteen-week ban could not be prosecuted under the old law); *see also* Jack Healy,

Given the intensity of the feeling behind these laws,²⁴ abortion as a CIMT could be on the verge of its own resurrection. If so, deportation of noncitizens convicted of abortion-related crimes may also be possible,²⁵ unless the definition of moral turpitude is reformed. This Comment explores the origin of moral turpitude in preserving an “ideal” American family unit by policing sexual pairings and pregnancy and threatening medical professionals not to interfere.²⁶ Under the traditional definition of moral turpitude, abortion can be classified as a CIMT, and noncitizens can be deported if convicted under a typical abortion ban.²⁷ This outcome can be avoided, however, if courts follow the lead of the Ninth Circuit in redefining moral turpitude.²⁸

Moral turpitude measures threat to society, not individual moral culpability.²⁹ For women in particular moral turpitude has always enforced marital and maternal roles, punishing lack of chastity, pregnancy avoidance, and perceived aberrant sexuality.³⁰ While older antiabortion statutes targeted both women and medical providers, newer antiabortion statutes tend to penalize medical providers only, leaving some doubt as to whether the woman’s moral turpitude in desiring an abortion can be imputed to the practitioner who assists her.³¹ This Comment explores another application of turpitude to medical practice—physician-assisted suicide—where a personal medical decision is at odds with societal obligations.³² The *Dobbs* decision echoes the Court’s prior holding in *Washington v. Glucksberg*,³³ endorsing a jurisprudence of “deeply rooted” national traditions—of which moral turpitude is a part—in contrast with the *Roe* Court’s focus on personal autonomy.³⁴ This Comment then discusses the history of the eugenics movement and how medical professionals were used to shape an ideal American polity.³⁵ Viewed through this lens, abortion providers work against, not for, societal interests, and criminalizing the practice restores control to the State.³⁶

Section II covers the overlap of CIMT and criminalization. Part II.A provides a brief background on CIMT over time, then focuses on two areas of comparative applications: perceived sexual deviancy and medical ethics. Part II.B covers abortion as a CIMT and the animating justifications behind criminalization efforts. Finally, Part II.C analyzes the overlap of criminal convictions and removal proceedings: first, how

Arizona Doctors Cannot Be Prosecuted Under 1864 Abortion Ban, Court Says, N.Y. TIMES (Dec. 30, 2022), <https://www.nytimes.com/2022/12/30/us/arizona-abortion-ban.html> [<https://perma.cc/2MB5-YA3C>].

23. See, e.g., § 390.0111(10).

24. See Julia Manchester, *Oz Likens Abortion to Murder in Unearthed Audio*, THE HILL (Aug. 31, 2022, 3:03 PM), <https://thehill.com/homenews/campaign/3622795-oz-likens-abortion-to-murder-in-unearthed-audio>.

25. See 8 U.S.C. § 1227(a)(2)(A)(i)(I).

26. See *infra* Part III.A.

27. See *infra* Section III.

28. See *infra* Part III.C.

29. See *infra* Section III.

30. See *infra* Section III.

31. See *infra* Part II.B.2.

32. See *infra* Part II.A.2.b.

33. 521 U.S. 702 (1997).

34. See *infra* Part II.A.2.b.

35. See *infra* Part II.A.2.b.

36. See *infra* Part III.B.

the BIA defines and applies CIMT precedent and, second, how circuit courts view the standard and whether they follow—or overrule—the BIA.

Section III brings these disparate considerations together and asserts that abortion can still be classified as a CIMT and result in deportation for noncitizens unless the definition of moral turpitude is reformed. Part III.A argues that CIMT has been, and is still, used to police procreation and enforce population replacement. Part III.B uses Texas’s abortion ban as a representative example of state abortion criminalization statutes and argues that conviction under this statute could result in deportation for noncitizens. Part III.C offers courts a way forward by suggesting they follow the Ninth Circuit’s lead in evolving the definition of moral turpitude, allowing courts to jettison the anachronistic and problematic focus on policing women’s sexuality.

Justice Robert Jackson once lamented that the “stealing of a watermelon” could be a CIMT, a clear indication to him that the standard was absurd.³⁷ But underlying this absurdity is a value judgment that those who steal cannot be trusted and that they invite disorder into society.³⁸ Understanding the connection between abortion providers and the watermelon thieves requires an examination of what CIMT classification is trying to accomplish.

II. OVERVIEW

A. *Crimes Involving Moral Turpitude*

1. Background

Immigration law first excluded those convicted of a CIMT in 1891, lumping the turpitudinous³⁹ in with “idiots,” “insane persons,” those with “loathsome diseases,” and polygamists.⁴⁰ CIMTs became a basis for deportation in 1917⁴¹ and have remained so ever since.⁴² The majority of legal commentators have argued moral turpitude ought to

37. *Jordan v. De George*, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting).

38. See Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1009, 1045–46 (arguing that moral turpitude defines “the boundaries of an ideal polity” and is used to protect against societal “moral infection”); *Matter of Shanu*, 23 I. & N. Dec. 754, 761 (B.I.A. 2005) (“[A]n alien who commits a crime involving moral turpitude . . . has betrayed the trust of his national community.”), *vacated on other grounds*, *Matter of Alyazji*, 25 I. & N. Dec. 397 (B.I.A. 2011).

39. “Turpitudinous” is the adjective form of “turpitude” and, like the term turpitude, has been in use in the United States for centuries. See, e.g., 26 CONG. REC. app. 414 (1894) (statement of Rep. Benton McMillin) (“If wealth corrupts, pray tell me where a man ceases to be honest and becomes a perjurer? If this be true, what accumulation indicates the turpitudinous point?”).

40. Immigration Act of 1891, ch. 551, 26 Stat. 1084. Noncitizens who could not lawfully immigrate to the United States were previously termed “excluded” under the law. See *id.* The preferred term now is “inadmissible.” 8 U.S.C. § 1182(a) (describing the categories of “inadmissible” noncitizens); see also Michael M. Watts, Note, “*In Like Circumstances, but for Irrelevant and Fortuitous Factors*”: *The Availability of Section 212(c) Relief to Deportable Legal Permanent Residents*, 51 ARIZ. L. REV. 465, 466 n.6 (2009).

41. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889.

42. Craig S. Lerner, “*Crimes Involving Moral Turpitude*”: *The Constitutional and Persistent Immigration Law Doctrine*, 44 HARV. J.L. & PUB. POL’Y 71, 75 (2021).

be more precisely defined or done away with entirely.⁴³ One of its most salient critiques is also its earliest: in 1929, an unnamed Harvard Law student published a Note heavily criticizing the CIMT “patchquilt” of offenses.⁴⁴

The Note contrasted turpitude’s notorious ambiguity with the stakes of attaching it to a conviction, arguing that “[m]en who are menaced with the loss of civil rights should know with certainty the possible grounds of forfeiture.”⁴⁵ The author suggested what will soon become a familiar-sounding fix: just enumerate in statute what offenses are CIMTs or specify some kind of minimum conduct.⁴⁶ Congress has still not taken up the suggestion.⁴⁷

In the absence of a precise definition of moral turpitude, judges have been forced to reason how societal moral sentiment requires them to rule.⁴⁸ Judge Learned Hand attempted to tease out the moral turpitude of an underlying alcohol crime committed during Prohibition.⁴⁹ It could not just be that the man had violated the law or that the violation was deliberate.⁵⁰ Judge Hand concluded that the *nature* of the crime informed the turpitude; the crime must be “shamefully immoral.”⁵¹ But that conclusion did not help him.⁵² There were some in the country who would regard any alcohol crime during Prohibition as shamefully immoral and others who would not.⁵³ It was the job of the judiciary to determine how “people generally feel,” which he conceded would be speculative on the court’s part.⁵⁴

Abortion is an instance in which how “people generally feel” is sharply divided.⁵⁵ In the decades after *Roe*, the depth of feeling on the subject has climbed in partisan

43. See, e.g., Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 685–86 (2012) [hereinafter Holper, *Deportation*] (“This type of discretion should have a more law-like character, or at least be more transparent, as it involves the agency setting guidance for future cases.”); Simon-Kerr, *supra* note 38, at 1002 & n.14; Brian C. Harms, *Redefining “Crimes of Moral Turpitude”: A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 278–82 (2001) (proposing multiple methodologies Congress can use to more precisely define CIMTs); John S. Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CALIF. L. REV. 9, 17–18 (1935). But see Lerner, *supra* note 42, at 76–78.

44. Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 117 (1929).

45. *Id.* at 121.

46. *Id.*; see also Harms, *supra* note 43, at 278–82, App. A.

47. See 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I) (failing to provide a list of CIMT offenses for either admissibility or removal purposes); see also Lerner, *supra* note 42, at 111–12 (arguing that Congress deliberately decided to leave CIMTs undefined).

48. See *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 385 (B.I.A. 2018).

49. *United States ex rel. Iorio v. Day*, 34 F.2d 920, 921 (2d Cir. 1929).

50. See *id.* (“All crimes violate some law; all deliberate crimes involve the intent to do so. Congress could not have meant to make the willfulness of the act a test . . .”).

51. *Id.*

52. See *id.*

53. *Id.*

54. *Id.*

55. *Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/> [https://perma.cc/R5G8-S65X].

intensity, fueling a determined conservative campaign to see that decision overruled.⁵⁶ If society's morals underlie turpitude, a divided public should rule out applying it to abortion. But societal morals are no longer the basis of turpitude. Moral turpitude is a nineteenth-century label of perceived antisocial behavior in two primary areas: (1) honesty⁵⁷ and (2) sexual reproduction.⁵⁸ When it comes to the latter, contemporary courts claim the moral turpitude standard is vague because they are uncomfortable articulating the regressive sexual worldview it perpetuates.⁵⁹

2. CIMT Case Law

Despite complaints about its vagueness, courts do apply a working definition of moral turpitude—"an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general"—that has changed very little over a century.⁶⁰ Some courts have concluded that crimes lacking scienter (intent) are not CIMTs, but that scienter alone is insufficient.⁶¹ Other courts have reasoned the scienter must be distinct: not just intent, but "evil intent."⁶² Some courts have tried to find turpitude's bright line in the categorical division between *malum in se* (morally wrong) and *malum prohibitum* (wrong only because of a prohibition), reasoning that only *malum in se* crimes can be CIMTs.⁶³ But courts have not found all *malum in se* crimes to be CIMTs either.⁶⁴

56. Michael Scherer, Josh Dawsey, Caroline Kitchener & Rachel Roubein, *A 49-Year Crusade: Inside the Movement To Overturn Roe v. Wade*, WASH. POST (May 7, 2022, 4:00 PM), <https://www.washingtonpost.com/politics/2022/05/07/abortion-movement-roe-wade/> [https://perma.cc/5B3Z-H62F].

57. Simon-Kerr, *supra* note 38, at 1007.

58. See *infra* Part II.A.2.a for a discussion of CIMT case law on sexuality and reproduction.

59. Cf. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 264, 293–94 (1992) (tying the origin of contraception and antiabortion legislation to concerns about women "shirk[ing]" their maternal responsibilities and noting more recent court reluctance to admit these concerns).

60. Compare *In re Henry*, 99 P. 1054, 1055 (Idaho 1909) ("Moral turpitude is an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."), and *Fort v. Brinkley*, 112 S.W. 1084, 1084 (Ark. 1908) ("Moral turpitude is defined to be an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowmen or to society in general."), with *Daye v. Att'y Gen.*, 38 F.4th 1355, 1360 (11th Cir. 2022) ("This Court has ruled that moral turpitude means an 'act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.'" (quoting *Cano v. Att'y Gen.*, 709 F.3d 1052, 1053 (11th Cir. 2013))).

61. See, e.g., *Efagene v. Holder*, 642 F.3d 918, 925 (10th Cir. 2011) (holding that a non-CIMT did not turn into a CIMT by virtue of having intent as an element).

62. See, e.g., *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994) ("Even if evil intent is not explicit . . . we have held a crime nevertheless may involve moral turpitude if such intent is implicit in [its] nature." (internal quotation mark omitted) (quoting *Goldeshtein v. INS*, 8 F.3d 645, 648 (9th Cir. 1993))); *Jang v. Garland*, 42 F.4th 56, 60–61 (2d Cir. 2022) (calling "evil intent" the "indispensable component" of CIMT).

63. Holper, *Deportation*, *supra* note 43, at 678–81; Rob Doersam, Comment, *Punishing Harmless Conduct: Toward a New Definition of "Moral Turpitude" in Immigration Law*, 79 OHIO ST. L.J. 547, 559 (2018).

64. Holper, *Deportation*, *supra* note 43, at 656 & n.55; Doersam, *supra* note 63, at 582–83, 582 & nn.256–57 (noting that assault is often categorized as *malum in se*); Simon-Kerr, *supra* note 38, at 1022 (explaining that assault is not a CIMT).

Many courts simply repeat the CIMT standard formulaically, almost like a catechism, and do not always reckon with its weighty implications.⁶⁵ Professor Julia Simon-Kerr argues that courts are loathe to make the kind of moral judgments that a finding of turpitude requires of them, and so they dogmatically follow precedent.⁶⁶ The result is propagation of moral turpitude's archaic objectives, even when public morals have evolved.⁶⁷

Abortion is an unusual crime because it requires the conduct of two people: the pregnant woman⁶⁸ and a medical professional. If abortion is a CIMT, the law must take both behaviors into account. Part II.A.2.a–b examines comparable CIMTs, first, in policing female sexuality and reproduction⁶⁹ and, second, in placing societal obligation over individual rights in the making of personal medical decisions.⁷⁰

a. Sexuality and Reproduction

CIMT case law has always concerned itself with sexuality and reproduction.⁷¹ This Part explains how moral turpitude enforces women's reproductive role⁷² by first highlighting its longtime application to prostitution and then exploring the incoherent treatment of statutory rape in CIMT case law. Society has used moral turpitude to exclude and remove threats to traditional heterosexual pairings by holding women responsible for marriage, monogamy, and child-rearing.⁷³

65. See, e.g., *Daye*, 38 F.4th at 1360–61 (repeating the CIMT definition, then applying BIA precedent without the court itself weighing in on the crime's morality); *Matter of Sejas*, 24 I. & N. Dec. 236, 238 (B.I.A. 2007) (concluding, based on precedent, that domestic violence involves moral turpitude without explaining why battery of one's spouse is worse than battery of a stranger).

66. See Simon-Kerr, *supra* note 38, at 1009 (“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.”); see also Doersam, *supra* note 63, at 581 (“These criteria would sweep away the most problematic vestiges of nineteenth-century moral ideas that plague current moral-turpitude law. . . . [T]hese precedential rules have devolved from being meaningful distinctions related to reputational harm into exercises in fairly arbitrary nit-picking of *mens rea* elements.”).

67. See *Rudolph v. United States ex rel. Rock*, 6 F.2d 487, 487 (D.C. Cir. 1925) (“Many things which were not considered criminal in the past have, with the advancement of civilization, been declared such . . . [and] if it involves the violation of a rule of public policy and morals . . . may involve moral turpitude.”).

68. Throughout this Comment, I use the terms “woman” and “women” to describe those affected by pregnancy concerns and gendered sexuality laws. I do so because the laws and historical sources use these terms. However, the use of “women” is not intended to ignore the concerns of any otherwise identifying individual who can experience pregnancy.

69. See *infra* Part II.A.2.a.

70. See *infra* Part II.A.2.b.

71. Moral turpitude has been applied to a wide variety of “aberrant” sexual contact: anything other than procreative, monogamous, heterosexual pairings. See Roberts, *supra* note 18, at 15–25 (cataloging CIMTs to have included abortion, adultery, bigamy, prostitution, and homosexuality, but not fornication or “bastardy,” a crime in which an unmarried couple produced offspring).

72. Simon-Kerr, *supra* note 38, at 1013–14; see also Lindsay M. Kornegay & Evan Tsen Lee, *Why Deporting Immigrants for “Crimes Involving Moral Turpitude” Is Now Unconstitutional*, 13 DUKE J. CONST. L. & PUB. POL’Y 47, 57–58 (2017).

73. See Pooja R. Dadhania, *Deporting Undesirable Women*, 9 U.C. IRVINE L. REV. 53, 57 (2018) [hereinafter Dadhania, *Deporting*].

Prostitution, the “oldest profession,” is also an ancient ground of moral turpitude, at least for women.⁷⁴ The earliest known use of moral turpitude in the law is found in an 1809 slander case, where the plaintiff was a woman accused of prostitution.⁷⁵ Accusations of an indictable crime of moral turpitude were so injurious to a person’s reputation that, if untrue, they were slander *per se*.⁷⁶ While the court determined that prostitution was not such an accusation, it was because the disorderly persons statute also punished crimes like “palmistry,” and therefore possible indictment under the statute did not automatically include turpitude.⁷⁷ A dissenting judge argued, “[T]he words [‘she is a common prostitute’], besides imputing great moral turpitude, and tending to render the person odious in the opinion of mankind, may, if true, also subject the party to an infamous and disgraceful punishment,” noting that prostitutes could be sentenced to up to six months hard labor and even whipping.⁷⁸ For women, lack of chastity has always been the ultimate character flaw.⁷⁹

Courts believed that unchaste women risked not just personal depravity, but damage to societal order itself.⁸⁰ In a 1909 case about the *mens rea* necessary for statutory rape, the Delaware Supreme Court rejected the defendant’s argument that, because the girl had represented herself to be older than eighteen, his crime was similar to mistakenly selling liquor to a minor:

[I]t may be observed that while it is true that a considerable number of citizens believe the sale of liquor to be an injury to public morals . . . yet . . . on the other hand, the act of receiving and harboring a female . . . for . . . defilement or *prostitution* involves a moral turpitude revolting to the better instincts of the whole community, and is an act universally recognized to be not only a greivous [sic] wrong to the individual, but a serious injury to society . . .⁸¹

Prostitution has remained turpitudinous,⁸² but modern courts are more evasive about the origin of turpitude in sex work: in 2000, the Iowa Supreme Court asserted only that prostitution involves turpitude because it has “problematic moral

74. Simon-Kerr, *supra* note 38, at 1017; Dadhania, *Deporting*, *supra* note 73, at 78.

75. *Brooker v. Coffin*, 5 Johns. 188, 191 (N.Y. Sup. Ct. 1809).

76. *Id.*

77. *Id.* (“The same statute which authorises the infliction of imprisonment on common prostitutes, as disorderly persons, inflicts the same punishment for a great variety of acts . . . and to sustain this action would be . . . saying, that every one [sic] charged with any of the acts prohibited by that statute, would be entitled to maintain an action for defamation.”).

78. *Id.* at 190 (Sedgwick, J., dissenting); *see also id.* at 188 (declaring the allegedly defamatory phrase was “*She . . . is a common prostitute and I can prove it*”).

79. *See* Lisa R. Pruitt, *On the Chastity of Women All Property in the World Depends: Injury from Sexual Slander in the Nineteenth Century*, 78 *IND. L.J.* 965, 967 & nn.2–3 (2003) [hereinafter Pruitt, *Chastity*]; Bradway, *supra* note 43, at 17–18 (“This (moral turpitude) is an old phrase in the law, and its meaning . . . disclose[s] the inherent character, that he is of a depraved mind, and . . . not worthy of belief even under oath . . .” (quoting *Bartos v. United States Dist. Ct.*, 19 F.2d 722, 724 (8th Cir. 1927))).

80. *See* Roberts, *supra* note 18, at 10 (noting the importance of sexual morality to immigration laws); Lerner, *supra* note 42, at 141 (“American immigration law still enshrines the perhaps archaic idea that ‘virtue’ is a useful category in sorting those who are fit for inclusion in our community and those who are not.”).

81. *Brown v. State*, 74 A. 836, 841 (Del. 1909) (emphasis added).

82. *Reyes v. Lynch*, 835 F.3d 556, 559 (6th Cir. 2016); *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 386 (B.I.A. 2018); Dadhania, *Deporting*, *supra* note 73, at 74.

underpinnings.”⁸³ While the court euphemistically acknowledged more recent tolerance for “certain activities,” it pointed out that prostitution is illegal everywhere, “for utilitarian as well as religious and moral reasons,” none of which the court clarified.⁸⁴ In 1844, the court’s predecessor, the Iowa Territory Supreme Court, was less tactful: “The reputation of a female for chastity, by the common consent of mankind, is regarded with peculiar jealousy. The condition of women [as prostitutes] is . . . [to] be excluded from society”⁸⁵

Early anti-immigrant laws reflect this purging of perceived threats to the “traditional” American family.⁸⁶ The Page Act of 1875,⁸⁷ for example, ordered ports of entry to determine if Asian women were immigrating under “lewd and immoral” contracts.⁸⁸ The fear was twofold: that sex workers, generally, would lure men into extramarital sex, destabilizing the family and society,⁸⁹ and that immigrant sex workers, in particular, would reproduce, increasing minority populations and even introducing children of mixed-race, fueling racial panic.⁹⁰ While language targeting women has softened in subsequent immigration prohibitions against prostitution, the prohibitions remain and have even been expanded.⁹¹ In order to protect the respectability and legitimacy of children, women have continued to be seen as gatekeepers of sexual morality and responsible for either bringing men to—or tempting them away from—monogamous marriage.⁹² As famed eighteenth-century British writer Samuel Johnson once noted, “all property [inheritance] depends upon” the chastity of women.⁹³

83. Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Lyzenga, 619 N.W.2d 327, 330–31 (Iowa 2000).

84. *Id.* at 331 (quoting State v. Clark, 406 N.W.2d 802, 804 (Iowa Ct. App. 1987)).

85. Cox v. Bunker, 1 Morris 269, 270 (Iowa, 1844); *see also* Pruitt, *Chastity*, *supra* note 79, at 985 & n.83 (quoting Cox v. Bunker, 1 Morris 269, 270 (Iowa, 1844)).

86. *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 657–58 (2005) (“[P]rostitution ‘appeared to embody all the forces threatening the legitimacy of contract as a model of freedom. . . . [I]t revealed not simply the corrosive aspects of free market relations but also the fragility of home life as their institutional and emotional counterweight.’” (omissions in original) (second alteration in original) (quoting AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 175–217 (1998))).

87. Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974).

88. *Id.* §§ 1, 3, 5.

89. Dadhania, *Deporting*, *supra* note 73, at 57–58.

90. *Id.* at 58; Abrams, *supra* note 86, at 662–63; Edward A. Belcher, *Criminal Abortion*, 17 CRIM. L. MAG. & REP. 141, 142 (1895) (decrying as “appalling for the future of states” that “conservative and higher classes of society” were decreasing while “lower and communistic” populations were increasing).

91. Dadhania, *Deporting*, *supra* note 73, at 67–70 (noting later immigration law expanded prostitution-related exclusion, preventing any noncitizen who had ever engaged in prostitution from immigrating).

92. *Id.* at 57; Linda C. McClain, *The “Male Problematic” and the Problems of Family Law: A Response to Don Browning’s “Critical Familism”*, 56 EMORY L.J. 1407, 1414–16 (2007) (arguing that sexual gatekeeping by women is inherent to the marriage movement).

93. 2 JAMES BOSWELL, LIFE OF JOHNSON: AN EDITION IN FOUR VOLUMES 202 (Gordon Turnbull & Nancy E. Johnson eds., Yale Univ. Press 1998) (“[B]ecause the chastity of women being of the utmost importance, as all property depends upon it, they who forfeit it should not have any possibility of being restored to good character . . .”).

Statutory rape law—with its focus on age and consent—would seem to have little in common with prostitution as a CIMT.⁹⁴ But the most famous decision in CIMT case law illustrates the connection.⁹⁵ In 2004, Cristoval Silva-Trevino, a native of Mexico who had lawful permanent residency in the United States, pleaded no contest to “indecency with a child,” a second-degree felony in Texas.⁹⁶ The Texas statute penalized sexual contact between a defendant and any minor under the age of seventeen, if the age difference between the two was more than three years.⁹⁷ Silva-Trevino was sixty-four years old when he committed his crime.⁹⁸ The controversy generated by *Matter of Silva-Trevino (Silva-Trevino I)* exposes a wrinkle in the immigration enforcement system.⁹⁹ Immigration judges employ what is known as the “categorical approach”: rather than look at the facts of conviction, judges compare the criminal statute with a ground for deportation, such as commission of a CIMT.¹⁰⁰ If the statute punishes *any* conduct that does not meet the definition of a CIMT, *no* conviction by the statute can lead to deportation under that ground, even if the facts of the instant case would constitute turpitude.¹⁰¹

Silva-Trevino, a middle-aged man, engaged in sexual acts with a minor, but the Texas *statute* charging him with a crime was very broad and could theoretically punish “dirty dancing” between a twenty-year-old and someone just shy of their seventeenth birthday.¹⁰² Silva-Trevino, therefore, argued that his crime did not involve moral turpitude because the statute punished some conduct that was not turpitudinous.¹⁰³ The immigration judge disagreed and found him deportable and ineligible for relief, but the BIA, fearing reversal by the Fifth Circuit, overturned the decision.¹⁰⁴ The result—a sixty-four-year-old sex offender escaping deportation due to a purely hypothetical tango between a college sophomore and a high school junior—generated significant controversy in the legal community and an ongoing debate about the deficiencies of the categorical approach.¹⁰⁵

94. See 8 U.S.C. § 1182(a)(2)(D).

95. See *Matter of Silva-Trevino (Silva-Trevino I)*, 24 I. & N. Dec. 687 (A.G. 2008), *vacated*, 26 I. & N. Dec. 550 (A.G. 2015).

96. *Id.* at 690.

97. TEX. PENAL CODE ANN. § 21.11 (West 2008) (effective 2001) (amended 2009 and 2017). The statute also required that the perpetrator be of the opposite sex in order to assert an affirmative defense. *Id.* § 21.11(b)(1).

98. *Silva-Trevino I*, 24 I. & N. Dec. at 690.

99. See Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 314 (2011) [hereinafter Dadhania, *Categorical Approach*].

100. See Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1247–48 (2011).

101. See *id.*

102. *Silva-Trevino I*, 24 I. & N. Dec. at 692 (“This raises the possibility that a 20-year-old woman dancing suggestively with a youth just under the age of 17 . . . could be liable under the statute . . .”).

103. *Id.* at 691.

104. *Id.* at 691–92. See *infra* Part II.C.2 for a discussion of circuit court implementations of the categorical approach.

105. See Dadhania, *Categorical Approach*, *supra* note 99, at 324–29 (detailing the different circuit court categorical approaches); Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 291–94 (2012). *Silva-Trevino I* was Attorney General Michael Mukasey’s attempt to define a “realistic probability” version of

Curiously, the controversy only briefly touched on the inconsistent way moral turpitude is applied to statutory rape.¹⁰⁶ Criminal statutes that punish sexual acts with minors define a ceiling for the minor's age but a floor for the perpetrator's, punishing a wide range of conduct whose indecency grows with the age gap.¹⁰⁷ These statutes often do not have an intent element, which is usually a prerequisite for turpitude.¹⁰⁸ A minor's inability to consent is one explanation why courts overlook the intent requirement.¹⁰⁹ In this way, statutory rape can be equated with forcible rape, which is also a CIMT.¹¹⁰

But if the age of the child, not the age of the perpetrator, supplies the necessary turpitude, why would the hypothetical lascivious twenty-year-old in *Silva-Trevino I* be less depraved than Silva-Trevino himself?¹¹¹ The affirmative defense to the statute at the heart of *Silva-Trevino I* had two prongs: (1) minimal age difference and (2) opposite genders.¹¹² Statutory rape has wandered back and forth across the divide of *malum in se* and *malum prohibitum*, primarily based on the court's view of the abnormality of the sex.¹¹³ The closer the conduct to ordinary "fornication" between similarly-aged, opposite-sex individuals, the more the law wavers on its inherent depravity.¹¹⁴

In 1964, the California Supreme Court voiced its dislike of the fact that mistake of age was not a defense to statutory rape under state law.¹¹⁵ The law presumed ill intent even when the sex was "consensual," but, the court reasoned, the goal of the law was not to protect the "naive female" from predatory older men:

The law's concern with her capacity or lack thereof to so understand is explained in part by a popular conception of the social, moral and personal values which are *preserved by the abstinence from sexual indulgence on the*

the categorical approach that would allow immigration judges to still find a noncitizen deportable under an overly broad criminal statute if the "least culpable conduct" was unlikely to be prosecuted. *Silva-Trevino I*, 24 I. & N. Dec. at 698. The decision was widely criticized and eventually vacated by Mukasey's successor, Attorney General Eric Holder, and the BIA reaffirmed using the original categorical approach. *See* Matter of Silva-Trevino (*Silva-Trevino III*), 26 I. & N. Dec. 826, 829–31 (B.I.A. 2016). However, some circuit courts do now apply the "realistic probability" test instead of the traditional categorical approach. *See infra* Part II.C.2.

106. *See Silva-Trevino I*, 24 I. & N. Dec. at 691–92.

107. *See, e.g.*, TEX. PENAL CODE ANN. § 21.11(a), (b)(1) (West 2008) (effective 2001) (amended 2009 and 2017); MINN. STAT. ANN. § 609.342(1a)(e)–(f) (West 2023); CAL. PENAL CODE § 261.5(a)–(d) (West 2023).

108. *See supra* notes 61–62 and accompanying text.

109. Roberts, *supra* note 18, at 21–22.

110. *Id.* at 21.

111. *Silva-Trevino I*, 24 I. & N. Dec. at 691.

112. § 21.11(b)(1).

113. *Quintero-Salazar v. Keisler*, 506 F.3d 688, 693–94 (9th Cir. 2007); *see also* Richard L. Gray, *Eliminating the (Absurd) Distinction Between Malum in Se and Malum Prohibitum Crimes*, 73 WASH. U. L.Q. 1369, 1390 (1995).

114. Roberts, *supra* note 18, at 13 n.25. The BIA, in determining the Texas statute was overly broad, said that traditional statutory rape "typically involves penetration or something similar," implying that the turpitude of statutory rape had to do with its proximity to the act of intercourse and risk of pregnancy, not merely the sexual interest of an adult in a child. *Silva-Trevino I*, 24 I. & N. Dec. at 692.

115. *See* *People v. Hernandez*, 393 P.2d 673, 674 (Cal. 1964), *superseded by statute*, CAL. PENAL CODE § 261.5 (West 2023).

part of a young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and *the social mores by which the community's conduct patterns are established.* Hence the law of statutory rape intervenes in an effort to avoid such a disposition. This goal, moreover, is not accomplished by penalizing the naive female but by imposing criminal sanctions against the male, who is conclusively presumed to be responsible for the occurrence.¹¹⁶

The court was writing only a decade before *Roe*, as the women's movement began to upend traditional views of marriage and child-rearing.¹¹⁷ Women participating in employment, social life, and government upset traditional sexual politics.¹¹⁸ American society, which by convention assumed men were sexual aggressors and women sexual gatekeepers, was deeply uncomfortable with the idea of them intermingling as platonic equals.¹¹⁹ Moreover, society held women responsible when the reproductive relationship went awry.¹²⁰ Moral turpitude once inhered in nearly any "want of [a woman's] chastity" because the law saw societal harm in a woman who did not limit herself to monogamy and marriage.¹²¹ Statutory rape is a rare instance where the male is the culpable one, but only because society believes the underage female is incapable of consent.¹²²

Commentators have argued that while the moral turpitude standard may have once been linked to controlling reproduction through women, modern courts are no longer so preoccupied.¹²³ The Ninth Circuit has been straddling an awkward divide, keeping traditional CIMT precedent while trying to quietly transition away from policing

116. *Id.* (emphasis added).

117. See KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 92–93, 97 (Brian Barry & Samuel L. Popkin eds., 1984) (arguing that the abortion debate was relatively congenial until women started claiming abortion was part of a right to participate in broader society).

118. See *id.* at 194–95 (contrasting participation in the workforce of pro-life and pro-choice women in the decade post-*Roe*).

119. LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973*, at 228 (1997) ("Too many men on the Left had made it plain . . . that they regarded women as sex objects who were to serve their sexual pleasures as well as their coffee."); see also Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 *CORNELL L. REV.* 1169, 1190–91 (1998) (characterizing sexual harassment as "one of gender subordination" that "entrench[es] . . . a hierarchy between masculinity and femininity," enforcing traditional gender roles and identities). Professor Abrams frequently cites to the work of Professor Katherine Franke, who defined sexual harassment as a "technology of sexism." See generally Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 *STAN. L. REV.* 691 (1997).

120. Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 *VAND. L. REV.* 869, 929–32 (1996) (arguing that the "virgin/whore dichotomy" requires women to enact the "scripted narratives" of acceptable sexual interaction or risk reputational harm); Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 *MD. L. REV.* 401, 441–42 (2004) [hereinafter Pruitt, *Her Good Name*] ("We could not use her on account of her immorality . . . She was expelled from another school because she got to fooling around with some big boys . . ." (omissions in original) (quoting *Barth v. Hanna*, 158 Ill. App. 20, 21 (1910))).

121. Simon-Kerr, *supra* note 38, at 1014–15; see also Pruitt, *Chastity*, *supra* note 79, at 984 & n.78.

122. *People v. Hernandez*, 393 P.2d 673, 674 (Cal. 1964), *superseded by statute*, CAL. PENAL CODE § 261.5 (West 2023); see also J. ROBERT FLORES, U.S. DEP'T OF JUST., *STATUTORY RAPE KNOWN TO LAW ENFORCEMENT I* (2005) (95% of statutory rape victims are female and more than 99% of offenders are male).

123. Simon-Kerr, *supra* note 38, at 1053–54 (arguing that "[i]n the last century, the idea that moral turpitude is linked to sexual misconduct has lost much of its gendered dynamic").

women's sexuality.¹²⁴ Without fanfare, it made solicitation of prostitution a CIMT for the first time in 2012.¹²⁵ The court suggested that moral turpitude inhered in sexual acts only when sexual attention was unwanted (or, in prostitution's case, exploitive), but failed to explore more ancient rationales.¹²⁶ However, in 2018, the BIA asserted that prostitution is a CIMT not because it harms any one individual, but because it harms *society*:

In our view, conduct such as prostitution and incest is so contrary to the standards of a civilized society as to be morally reprehensible We recognize these crimes as morally reprehensible, not on account of the presence of harm or the need to protect a vulnerable segment of society, but because of the socially degrading nature of commercialized sexual services and incestuous sexual relations. These crimes “offend[] the most fundamental values of society.”¹²⁷

The Ninth Circuit also admitted that its law clerks did not have to search very hard for consensual sexual conduct that was turpitudinous “by virtue of its incompatibility with contemporary sexual attitudes” and not its “impact [on] victims.”¹²⁸ Recently, a district court in Texas asserted that statutory rape law existed to protect minors against “exploitation and coercion in their sexual interactions,”¹²⁹ but statutory rape law, paradoxically, with its disinterest in consent, does little to punish coercive conduct among minors.¹³⁰ The turpitude is easy to see in an adult like Silva-Trevino, but age-appropriate sexual encounters that nevertheless harm women and girls draw far less concern from the courts.¹³¹ In these instances, the “unwise disposition” of a woman's “sexual favor,” regardless of how it is extracted, is her own responsibility.¹³²

b. Medical Ethics

Because abortion involves both the pregnant woman and a medical professional, this Part examines how moral turpitude applies to another controversial medical

124. See *Rohit v. Holder*, 670 F.3d 1085, 1089–90 (9th Cir. 2012).

125. *Id.*; see also *Ortega-Lopez v. Lynch*, 834 F.3d 1015, 1018 (9th Cir. 2016) (redefining nonfraud CIMTs to involve “intent to harm,” actual harm, or action involving a protected class).

126. *Rohit*, 670 F.3d at 1089–90.

127. *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 386 (B.I.A. 2018) (alteration in original) (citations omitted).

128. *Nunez v. Holder*, 594 F.3d 1124, 1132 (9th Cir. 2010).

129. *Doe v. Beaumont Indep. Sch. Dist.*, 615 F. Supp. 3d 471, 489 (E.D. Tex. 2022) (quoting *United States v. Ramos-Sanchez*, 483 F.3d 400, 403 (5th Cir. 2007)).

130. Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFFALO L. REV. 703, 724–25 (2000) (detailing how a Florida court failed to hold three male adolescents, one of whom was nineteen, responsible for even statutory rape of a thirteen-year-old girl because she was “loose” and had agreed to at least some of the sexual contact).

131. *Id.* at 725–26.

132. See Oberman, *supra* note 130, at 718–21 (“[S]elf-identifying as a victim requires public acknowledgment of extremely personal feelings of shame and humiliation, and the risk of social ostracism from being identified as dirty.”). Sexual assault reports and arrests remain low. See *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/Q5H7-9LBG>] (last visited Nov. 25, 2023) (showing that only 310 out of every 1000 sexual assaults are reported, only 16% of reports lead to arrests, and only 9% of reports result in conviction).

practice: physician-assisted suicide. The practice of euthanasia¹³³ is not its own category of CIMT.¹³⁴ Instead, euthanasia falls under the intentional killing of another.¹³⁵ Suicide, however, is a CIMT, despite the inability of the law to punish it and the fact that its categorization primarily benefits life insurance companies.¹³⁶ The tradition of turpitude is a holdover from English common law which made suicide a felony, stripping the decedent's heirs of their inheritance and imposing highway burial on the offender.¹³⁷ Modern society is more ambivalent about its turpitude: the BIA held that attempted suicide was not a CIMT, despite being an indictable offense in a number of states.¹³⁸

Because courts employ the categorical method, the possibility of deportation for abortion-related conduct cannot be directly compared to deportation for participating in euthanasia—determining if someone has been deported for assisted suicide (a manslaughter charge) is nearly impossible,¹³⁹ though the practice is probably rare.¹⁴⁰ Moral turpitude also applies, however, to medical professionals in a different context: licensing.¹⁴¹ Professionals can lose their licenses if they commit a CIMT, a practice

133. Euthanasia (the killing of someone at their request) is not the same as assisted suicide (assisting someone with the means to kill themselves). Nicola Davis, *Euthanasia and Assisted Dying Rates Are Soaring. But Where Are They Legal?*, GUARDIAN (Jul. 15, 2019, 1:00 PM EDT), <https://www.theguardian.com/news/2019/jul/15/euthanasia-and-assisted-dying-rates-are-soaring-but-where-are-they-legal> [<https://perma.cc/W45F-PJ5Y>]. However, as both tend to be criminalized within the same statutes, I will use the terms interchangeably. See, e.g., N.Y. PENAL LAW § 125.15(3) (West 2023) (criminalizing both *causing* and *aiding* another's suicide).

134. *Cashion v. Smith*, 749 S.E.2d 526, 534–35 (Va. 2013) (McClanahan, J., dissenting).

135. See *Matter of B---*, 4 I. & N. Dec. 493, 496 (B.I.A. 1951) (noting that courts have consistently held that that only voluntary, not involuntary, manslaughter involves moral turpitude).

136. See, e.g., *Estate of Tedrow v. Standard Life Ins. Co.*, 558 N.W.2d 195, 197 (Iowa 1997). Because suicide involves moral turpitude, many states have imposed a presumption against decedent suicide in which the defendant insurance company has the burden of proof. See *Wellisch v. John Hancock Mut. Life Ins. Co.*, 56 N.E.2d 540, 543 (N.Y. 1944) (“[W]here evidence is susceptible of two constructions, the construction which does not imply criminality or moral turpitude is to be favored.” (emphasis added)).

137. *Matter of D---*, 4 I. & N. Dec. 149, 150 (B.I.A. 1950).

138. *Id.* At 152–53.

139. See *Matter of Szegedi*, 10 I. & N. Dec. 28, 29 (B.I.A. 1962) (stating that where a defendant has been convicted under a criminal statute that punishes multiple degrees of conduct, the BIA does not inquire into the facts but assumes the least culpable conduct), *overruled on other grounds*, *Matter of Franklin*, 20 I. & N. Dec. 867 (B.I.A. 1994); see also, e.g., *Matter of J---*, 2 I. & N. Dec. 477, 478 (B.I.A. 1946) (listing conduct punishable as manslaughter at the time in Florida to include “assisting self-murder, killing of an unborn child by injury to the mother, abortion, killing by mischievous animal, drowning in an overloaded vessel, death from a racing steamboat, and a killing by an intoxicated physician”).

140. In California, only ~0.0014% of deaths were attributable to physician-assisted suicide in 2020, despite its legality in the state (factoring in deaths due to COVID-19 only increases the rate to ~0.0016%). *Compare* CALIFORNIA END OF LIFE OPTION 2020 DATA REPORT, CA. DEP'T OF PUB. HEALTH 3 (2021), https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/CDPH_End_of_Life_Option_Act_Report_2020_FINAL.pdf [<https://perma.cc/QC78-UFN3>], with FUSION CTR., DATA BRIEF: 2020 AND 2021 INCREASES IN DEATHS IN CALIFORNIA, CA. DEP'T OF PUB. HEALTH 3 tbl.1 (2022), https://skylab.cdph.ca.gov/communityBurden/xMDA/2020_Excess_Mortality-FINAL.pdf [<https://perma.cc/M37Y-ZAQ2>] (showing only 435 physician-assisted deaths out of 316,962 deaths in total).

141. See Herbert Rakatansky, *Criminal Convictions and Medical Licensure*, 10 AMA J. ETHICS 712, 713–14 (2011) (stating that the “unwritten social contract” of doctors and patients is trust-based and that “aberrant extraprofessional behavior,” such as acts of moral turpitude, can affect that trust and therefore be grounds for restricting a physician's medical license).

licensing boards defend because it “protect[s] the public, the courts, and the profession against unsuitable practitioners.”¹⁴² And yet, in cases of abortion and assisted suicide, advocates do not focus on the part played by the physician.¹⁴³ Instead, they assert the right of *patient* autonomy—that people can do with their own bodies what they wish and that medical professionals who assist should not be held liable.¹⁴⁴

This dichotomy between individual rights and societal obligation has played out repeatedly in U.S. Supreme Court jurisprudence on due process.¹⁴⁵ In *Washington v. Glucksberg*—roughly contemporary with *Planned Parenthood v. Casey*¹⁴⁶—the Court explicitly rejected the personal autonomy argument for assisted suicide.¹⁴⁷ While historical legal tradition supported the right to refuse medical treatment, that same tradition excluded euthanasia.¹⁴⁸ Justice Alito’s majority opinion in *Dobbs*, tracing the historic criminalization of abortion, will look familiar to the *Glucksberg* reader.¹⁴⁹ Alito later made the link explicit:

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: “Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice].”¹⁵⁰

Asserting that “deeply rooted” tradition trumps personal autonomy is another way of saying that societal duty—exactly what moral turpitude is trying to enforce—trumps

142. *Id.* Both medical and bar licensing boards consider committing a CIMT reason to suspend or revoke a practitioner’s license. *See, e.g., In re Scott*, 802 P.2d 985, 991 (Cal. 1991); *Burke v. Md. Bd. of Physicians*, 250 A.3d 313, 317 (Md. Ct. Spec. App. 2021); *In re Jarnagin*, 537 S.E.2d 71, 72 (Ga. 2000).

143. *Cf.* Helen Y. Chang, *A Brief History of Anglo-Western Suicide: From Legal Wrong to Civil Right*, 46 S.U. L. REV. 150, 188–89 (2018) (linking the right to die with an individual’s constitutional right to privacy, as articulated in *Roe*); Robert A. Sedler, *Abortion, Physician-Assisted Suicide and the Constitution: The View from Without and Within*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 529, 553–54 (1998) (stressing personal autonomy as the root of both a right to abortion and a right to physician-assisted suicide).

144. Sedler, *supra* note 143, at 553.

145. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

146. 505 U.S. 833 (1992).

147. 521 U.S. 702, 725–28 (1997).

148. *Id.* (citing *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990)).

149. *Compare* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2250–53 (2022), *with* *Glucksberg*, 521 U.S. at 720–24 (“[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’” (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977))).

150. *Dobbs*, 142 S. Ct. at 2253–54 (alterations in original) (quoting *Glucksberg*, 521 U.S. at 719). Henry de Bracton was a thirteenth-century cleric known for the *De Legibus et Consuetudinibus Angliæ* (“On the Laws and Customs of England”), though there is some debate whether he wrote it in its entirety. *See Bracton Online*, HARV. L. LIBR., <https://amesfoundation.law.harvard.edu/Bracton/> [<https://perma.cc/92M5-77CS>] (last updated Apr. 2003). The treatise says “he” who “strikes” or poisons a woman to kill a quickened fetus commits homicide but says nothing about a woman initiating or performing an abortion on herself. *See 2 HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND* 341 (Samuel Thorne, trans., Harv. Univ. Press 1997) (“If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, especially if it is quickened, he commits homicide.”).

individual civil liberties.¹⁵¹ But as CIMT case law on sexuality has shown, “deeply rooted” tradition can also be deeply problematic, supporting the notion that courts can engage in shaping the demographics of the American polity.¹⁵² When the *Glucksberg* Court endorsed the idea of following deep national tradition, it may not have realized it was also endorsing a return to a time when euthanasia was deeply embedded in immigration law and enjoyed “scientific” enthusiasm.¹⁵³ Twentieth-century eugenicists, disaffected by the plodding pace of “natural selection,” pushed for legislation that would improve the “stock” of the American family, including limits on immigration, marriage, and “unfit” birth. These lobbying efforts included legalizing euthanasia.¹⁵⁴ Moral turpitude was one method of sorting the “fit” from the “unfit.”¹⁵⁵

Eugenicists had the most success promoting involuntary sterilization.¹⁵⁶ In 1942, the Supreme Court ruled unconstitutional an Oklahoma statute that permitted the State to sterilize repeat offenders if they had been convicted of multiple “felonies involving moral turpitude,” but only because it would violate the Equal Protection Clause if the procedure were applied to some prisoners and not others.¹⁵⁷ Euthanasia and abortion are naturally adjacent to these concerns about American pedigree.¹⁵⁸ Just as the eugenics movement was gaining steam, news detailing the gruesome inhumanity of Nazi war crimes extinguished American enthusiasm for it.¹⁵⁹ Nevertheless, despite the taint of social Darwinism, moral turpitude remained a feature of immigration law, continuing to affect noncitizen entry into, and removal from, the United States.¹⁶⁰

The deeply rooted tradition esteemed in *Dobbs* and *Glucksberg* included using medical professionals against problematic people the State disfavored.¹⁶¹ In the

151. *Cf. Glucksberg*, 521 U.S. at 741 (Stevens, J., concurring in the judgment) (“The State has an interest in preserving and fostering the benefits that every human being may provide to the community The value to others of a person’s life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life.”); *Dobbs*, 142 S. Ct. at 2257 (calling *Casey*’s personalized “concept of existence, of meaning, of the universe, and of the mystery of human life” implausibly broad and asserting that one job of the judiciary is to define the limits of “ordered liberty” (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992))).

152. *See supra* Part II.A.2.

153. *See Chang, supra* note 143, at 176–78.

154. *Id.* at 184–85.

155. *See Lerner, supra* note 42, at 140–41.

156. *See generally* Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599 (2022); Chang, *supra* note 143, at 180–81.

157. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 537, 541–43 (1942). The Court previously upheld, under the Equal Protection Clause, a statute in Virginia forcing sterilization on the “feeble minded,” because the sterilized person could be “discharged with safety,” thereby freeing up space in the asylum for others. *Buck v. Bell*, 274 U.S. 200, 205–06, 208 (1927).

158. Chang, *supra* note 143, at 181 (“The race and gender implications of coercive eugenic sterilization would set the political stage for abortion, reproductive rights, and euthanasia in the years to follow.”); *see also* Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 427 & n.414 (1979) (addressing the issue of abortion of fetuses with serious birth defects).

159. *See Chang, supra* note 143, at 186–87.

160. *See Lerner, supra* note 42, at 84 (asserting that Congress added the moral turpitude standard in the Immigration Act of 1917 because of “concerns about immigration ‘of the wrong kind’” (quoting Harms, *supra* note 43, at 262)).

161. *See Chang, supra* note 143, at 180–81.

immigration context, moral turpitude enables elimination through exclusion and deportation.¹⁶² As one congressman put it, CIMTs allow immigration officials to distinguish between the merely criminal and the “criminal at heart.”¹⁶³

B. *Abortion as a CIMT*

The preceding Part illustrated how moral turpitude encompassed American concerns about women’s family and childrearing roles and how the concept is also coded as “societal obligation” deep in the country’s tradition, allowing the State to intervene in personal medical decisions.¹⁶⁴ This Part covers abortion’s journey from criminalization and CIMT to legality and then back, in preparation for Section III. Part II.B.1 covers pre-*Roe* classification as a CIMT and Part II.B.2 explores the rationales behind criminalization efforts.

1. History of Abortion as a CIMT

By 1816, moral turpitude had already attached itself to abortion in the law.¹⁶⁵ No legal commentators dispute that “want of chastity” once constituted moral turpitude for women,¹⁶⁶ but that does not explain why abortion also involved turpitude. After all, married women procuring abortions for presumably legitimate children were also guilty of moral turpitude.¹⁶⁷ Moral turpitude does not always attach to violence or the taking of a life either.¹⁶⁸ Courts, moreover, have said nothing about “evil intent”—nor investigated the intent at all—behind a woman’s choice to have an abortion.¹⁶⁹

In 1933, a California State appeals court affirmed the license revocation of a physician whose patient had died after undergoing an abortion.¹⁷⁰ The doctor had previously been acquitted of criminal charges, but the acquittal did not absolve him of “unprofessional conduct” which included “procuring, or aiding or abetting” an abortion.¹⁷¹ The purpose of licensure was “to protect the *public* by eliminating from the ranks of practitioners those who are found . . . to be dishonest, immoral, or disreputable.”¹⁷² Because his conduct did not involve dishonesty, it must have threatened “the public” in some other way.

162. Lerner, *supra* note 42, at 84.

163. *Id.* at 85 (quoting 53 CONG. REC. 5167 (Mar. 30, 1916) (statement of Rep. Adolph Sabath)).

164. *See supra* Part II.A.

165. *See* Widrig v. Oyer, 13 Johns. 124, 125 (N.Y. Sup. Ct. 1816) (“She . . . did, with the assistance of her mother, procure, and take medicine, or poison, in order, and with intent, to kill, and poison to death a bastard child she . . . was pregnant with . . .”).

166. Simon-Kerr, *supra* note 38, at 1015–18; Pruitt, *Her Good Name*, *supra* note 120, at 406 & n.7; *see also* 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS § 29, at 278–82 (4th ed. 1874) (describing torts associated with “want of chastity”).

167. *See* Kimberly v. Ledbetter, 331 P.2d 307, 308 (Kan. 1958).

168. Simon-Kerr, *supra* note 38, at 1028–29, 1065 n.458.

169. Bissell v. Cornell, 24 Wend. 354, 356 (N.Y. Sup. Ct. 1840) (categorizing criminal abortion as any intent, other than saving the woman’s life, to produce a miscarriage; sympathetic nonemergencies would not mitigate the act’s the turpitude). *See supra* Part II.A.2 discussing the intent element of CIMTs.

170. Bold v. Bd. of Med. Exam’rs, 26 P.2d 707, 707 (Cal. Dist. Ct. App. 1933).

171. *Id.* at 708–09.

172. *Id.* at 709 (emphasis added).

Historically, courts understood moral turpitude to mean that society is fragile and requires strict adherence to social roles.¹⁷³ While Professor Cyril Means, Jr.—whose seminal work tracing the roots of New York antiabortion law was cited repeatedly by Justice Blackmun in *Roe*¹⁷⁴—argued that “[i]n a pluralistic society, the secular law, where possible, should abstain from metaphysical controversies,” he admitted that legal disputes often turn on exactly these concerns.¹⁷⁵ A nineteenth-century author said, “An estimate of human turpitude ought to be made, not so much by surveying the depravity of the individual instance . . . [as] by anticipating how great will be the moral deterioration which . . . will almost certainly infect present and future generations.”¹⁷⁶ The Virginia Supreme Court, in denying recovery to a man whose wife died after an illegal abortion, explained why abortion fits in this category: “This [antiabortion] statute was passed, not for the protection of the woman, but for the protection of the unborn child and through it *society*. Unnecessary interruption of pregnancy is universally regarded as highly offensive to public morals and *contrary to public interest*.”¹⁷⁷ The court was asserting that women must continue their pregnancies, not for themselves, but for the good of the public at large.¹⁷⁸

Shortly before *Roe*, women’s options were rapidly expanding beyond child-rearing and the home, and the threat of recurrent, uncontrolled pregnancy interfered with those opportunities.¹⁷⁹ Later courts danced around admitting any animating public policies other than fetal or maternal health for antiabortion legislation¹⁸⁰ because it was no longer acceptable to say that women were walking away from their historical role and that calamity would follow in their wake.¹⁸¹ After

173. See Simon-Kerr, *supra* note 38, at 1011–15 (arguing that founding statesmen feared the young United States would fail without a moral consensus on activity and conduct, summarized in the “catchphrase” moral turpitude).

174. See *Roe v. Wade*, 410 U.S. 113, 132 n.21, 133 n.22, 151 n.47 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

175. Cyril C. Means Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 416 (1968).

176. W.G. Waters, *Elizabeth Canning, Impostor (1734-1773)*, in *THE LIVES OF TWELVE BAD WOMEN: ILLUSTRATIONS AND REVIEWS OF FEMININE TURPITUDE SET FORTH BY IMPARTIAL HANDS* 205, 205 (Arthur Vincent ed., 2d ed. 1894). One of the “twelve bad women” was Mary Bateman, a “thief,” “abortionist,” and “witch.” Arthur Vincent, *Mary Bateman, “The Yorkshire Witch” (1769-1809)*, in *THE LIVES OF TWELVE BAD WOMEN, supra*, at 261–62.

177. *Miller v. Bennett*, 56 S.E.2d 217, 221 (Va. 1949) (emphasis added).

178. See *id.*

179. REAGAN, *supra* note 119, at 194.

180. See *Comm. to Defend Reprod. Rts. v. Myers*, 625 P.2d 779, 780 (Cal. 1981) (“First, this case does not turn on the morality or immorality of abortion, and most decidedly does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical considerations involved in a woman’s individual decision whether or not to bear a child.”); *Roe v. Wade*, 410 U.S. 113, 148–50 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

181. See Siegel, *supra* note 59, at 264 (arguing that the Supreme Court talks about reproduction in purely physiological terms to avoid stereotyping women into “old notions of role” (quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976))); see also JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF A NATIONAL POLICY, 1800-1900*, at 174 (1978) (“Some great physical and moral improvement must be opposed to the onward progress of this evil [abortion], or it will undermine the very foundations of all domestic morals, and reduce marriage to a false and degraded position.” (quoting EDWIN M. HALE, *ON THE HOMOEOPATHIC TREATMENT OF ABORTION, ITS CAUSES AND CONSEQUENCES; WITH SOME SUGGESTIONS AND*

Roe, abortion as a CIMT entered legal purgatory, neither reversed nor advanced,¹⁸² waiting to see if the legalization would hold.

2. Criminalization of Abortion

Professor Craig S. Lerner has posited that criminal laws and findings of moral turpitude serve different purposes: criminal law targets individual conduct, while moral turpitude informs the class of people the United States wants to include in its citizenry.¹⁸³ Nevertheless, *why* conduct has been criminalized can point to whether that conduct is also a CIMT.¹⁸⁴ This Part explores the reasoning behind abortion criminalization.

Pre-*Roe* performance of abortion was both criminal and a ground for deportation,¹⁸⁵ but its legal underpinnings were more complicated.¹⁸⁶ The law has struggled to decide if women were abortion's victims or its perpetrators.¹⁸⁷ Prior to 1850, when abortifacients were primarily pharmaceutical, the law considered the fetus the victim, though only at common law and after quickening.¹⁸⁸ As abortion grew more medicalized later in the nineteenth century, criminalization statutes focused on the dangers posed to women's health and safety.¹⁸⁹ Before reliable contraceptives, and at a time of high infant and maternal mortality rates, potential children were less valuable than people already alive and in material need.¹⁹⁰

The medical profession ultimately drove the movement to outlaw abortion at all gestational stages.¹⁹¹ While protecting fetal life was the overt rationale, the increasing ease and publicity of abortion implicated a wider host of societal concerns.¹⁹² Upper- and middle-class white physicians worried that wealthier, married, and white American women were having abortions while lower-income and immigrant women

INDICATIONS FOR THE USE OF THE NEW REMEDIES 6 (1860)); *M. v. Super. Ct.*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring) (agreeing that "detrimental gender classifications by government" do not violate the Constitution when they are animated by "basic" physiological differences between men and women).

182. See Roberts, *supra* note 18, at 16 & n.47 (describing a 1974 case where the BIA declined to deport a noncitizen for a prior Mexican abortion conviction because abortion was no longer a crime).

183. See Lerner, *supra* note 42, at 140–41.

184. See *infra* Part II.C.1.

185. See *supra* notes 9–17 and accompanying text.

186. See Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1777–78 (1991).

187. See *id.* at 1783.

188. See, e.g., Act of June 5, 1830, ch. 1, § 16, 1830 Conn. Pub. Acts 253, 255. Abortion may not even be the appropriate terminology since the medical establishment could not prove a woman was pregnant before quickening (i.e., the first perceptible movements of the fetus). Lack of a period was labeled "obstructed menses" and abortifacients "cured" this condition. MOHR, *supra* note 181, at 6.

189. See, e.g., Act of Jan. 31, 1845, ch. 27, 1845 Mass. Acts 406, 406 (classifying abortion as a felony if the woman died as a consequence, but only a misdemeanor if she survived); see also Buell, *supra* note 186, at 1786–87.

190. See MOHR, *supra* note 181, at 152–53 (quoting a physician who expressed reservations about proposed antiabortion legislation in the 1850s because it valued the fetus over the mother who might have "a dozen [others] dependent on her for their daily bread").

191. Buell, *supra* note 186, at 1787–88.

192. See *id.* at 1788.

were not: Judge Belcher of the San Francisco County Superior Court wrote that “[m]edical writers have inveighed against the vile wretches who thrive off this dreadful business [abortion]” and that statistics showing a “decrease in population among the conservative and higher classes of society and an increase among the lower and communistic classes” would aid physicians in “stamp[ing] out the detestable practice.”¹⁹³ In addition to racial and class concerns, antiabortion forces of the time feared that married women were attempting to limit, and even step out of, their maternal role.¹⁹⁴

Law enforcement, however, targeted abortion providers, not women.¹⁹⁵ Some commentators have suggested the lopsided prosecution was a paternalistic relic, bolstered by statements like that of the New Jersey Supreme Court: “The statute regards her as the victim of the crime, not as the criminal; as the object of protection, rather than of punishment.”¹⁹⁶ But fears that the underclasses were over-reproducing while the upper classes were under-reproducing exposes a different rationale.¹⁹⁷ If the point of regulating abortion is to encourage the production of children, jailing the producer is counterproductive.¹⁹⁸

Professor Means said, “Propagation and continuance of the human species . . . remains . . . a perfectly legitimate object, constitutionally speaking, of legislative oversight and protection.”¹⁹⁹ In his opinion, antiabortion legislation in the 1800s targeted population replacement, due to the high death rate of the time, but he was acknowledging the validity of that concern in order to argue that improvements in medical science had eliminated it.²⁰⁰ This justification for state regulation did not make it into the *Roe* opinion,²⁰¹ and other commentators have criticized it.²⁰² But civil rights

193. Belcher, *supra* note 90, at 141–42; *see also* MOHR, *supra* note 181, at 87–89, 91, 93–95; Siegel, *supra* note 59, at 297–98.

194. MOHR, *supra* note 181, at 87–89 (citing several doctors and lecturers who “bemoaned the use of abortion by married women trying to hold down the size of their families”); *State v. Tippie*, 105 N.E. 75, 77 (Ohio 1913) (suggesting that abortion was a “vicious and craven custom amongst married pairs . . . to evade the responsibilities and burdens of rearing offspring”).

195. Mark A. Graber, *The Ghost of Abortion Past: Pre-Roe Abortion Law in Action*, 1 VA. J. SOC. POL’Y & L. 309, 322–26 (1994). The fact that abortion providers were more likely than women to suffer criminal penalties paradoxically democratized the “medical” field. An incomplete, and perhaps apocryphal, list of abortionists pre-*Roe* reads like the cast of characters from an Agatha Christie novel, including physicians and midwives but also barbers, laborers, elevator operators, farmers, bookies, and ministers. *Id.* at 325 (“One wom[a]n interviewed was convinced that her illegal abortionist was a police officer.”).

196. Buell, *supra* note 186, at 1790–91 (quoting *State v. Murphy*, 27 N.J.L. 112, 115 (1858)).

197. *See supra* notes 193–94 and accompanying text.

198. *See* Siegel, *supra* note 59, at 293 (tying antiabortion tracts and criminalization efforts to the female obligation to “perpetuate the species”); REAGAN, *supra* note 119, at 114 (noting that abortion investigations were aimed at putting abortionists “out of business,” and, shaming, but not jailing, the involved women).

199. Means, *supra* note 175, at 509.

200. *Id.* at 510.

201. *See Roe v. Wade*, 410 U.S. 113, 147–52 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

202. *See* Dellapenna, *supra* note 158, at 401–02 (arguing that no state or legislature has ever advanced population control as an argument for abortion regulation).

groups openly worried that Black women having abortions amounted to “genocide.”²⁰³ Moreover, in *Dobbs*, Justice Alito famously cited a Centers for Disease Control and Prevention report that noted the “domestic supply of infants” for adoption had dried up.²⁰⁴ Meanwhile, in 2021, cable television host Tucker Carlson, in an echo of early antiabortion rhetoric that signaled fear of white extinction, gave voice to “The Great Replacement,” a white supremacist conspiracy theory espousing the idea that pro-immigration policies seek to replace white citizens with nonwhite immigrants.²⁰⁵ According to journalist David Gilbert, reporting for *Vice News*, American Conservative Union Chairman Matt Schlapp called the reversal of *Roe* an “appropriate first step” to avoid a “quote-unquote replacement” by “allowing our own people to live.”²⁰⁶

The legal abortion landscape after *Dobbs* continues to change as new or previously enjoined laws go into effect and challenges work through the courts.²⁰⁷ As of November 2023, fourteen states completely ban the procedure,²⁰⁸ four states have attempted to enact bans or early gestational limits but have been blocked by the

203. See generally Robert G. Weisbord, *Birth Control and the Black American: A Matter of Genocide?*, 10 DEMOGRAPHY 571 (1973). See Brenda Hyson, Opinion, *New York City Passed New Abortion Law Effective July 1, 1970*, THE BLACK PANTHER, July 4, 1970, at 2 (“The abortion law[] hides behind the guise of helping women, when in reality it will attempt to destroy our people.”); JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT 85–86, 137–38 (2003) (explaining how women of color faced both external and internal group pressures on abortion, including the fear of some civil rights groups that abortion was “genocide”); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783–86 (2019) (Thomas, J., concurring) (arguing that eugenicists supported both contraception and abortion as a means of racial control).

204. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2259 n.46 (2022); Gretchen Sisson, *Alito Touted Adoption as a Silver Lining for Women Denied Abortions*, WASH. POST (July 6, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/07/06/alito-touted-adoption-an-option-women-denied-abortions/> [<https://perma.cc/ZFJ7-6UC4>].

205. NAT’L IMMIGR. F., THE ‘GREAT REPLACEMENT’ THEORY, EXPLAINED 1–2 (2022).

206. David Gilbert, *CPAC Head Promotes Abortion Ban to Stave Off ‘Great Replacement’*, VICE NEWS (May 19, 2022, 1:45 PM), <https://www.vice.com/en/article/qjb7ad/cpac-head-promotes-abortion-ban-to-stave-off-great-replacement> [<https://perma.cc/MF2L-CW2L>]. *Vice News* is the only source for this quote from Schlapp, though other news sources have repeated it. Gilbert interviewed Schlapp outside the conference center for the Conservative Political Action Conference, which took place in Hungary in 2022. David Gilbert, *CPAC Just Decided To Not Let Any US Journalists Inside*, VICE NEWS (May 19, 2022, 10:46 AM), <https://www.vice.com/en/article/93bxm8/cpac-hungary-us-journalists-blocked> [<https://perma.cc/B2JJ-XNB6>].

207. *Tracking Abortion Bans Across the Country*, N.Y. TIMES <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/P5AS-DUDP>] (last updated Nov. 7, 2023, 9:15 PM EST).

208. Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia. *Id.* A Wisconsin circuit court held that the state’s 1849 law that criminalized “intentionally destroying the life of an unborn child” did not apply to abortion procedures and the case will now move to the state supreme court. Mitchell McCluskey, *Planned Parenthood Will Resume Abortions in Wisconsin Next Week After Judge Rules 1849 State Law Doesn’t Apply*, CNN (Sept. 4, 2023, 4:41 PM EDT), <https://www.cnn.com/2023/09/14/us/wisconsin-abortion-resume-planned-parenthood-1849-law/index.html> [<https://perma.cc/FEY7-JB3N>]. Georgia and South Carolina both passed a six-week gestational limit, which is technically not a total ban, but as many as one in three pregnancies go undetected before six weeks, missing the legal abortion window in that state. Lauren J. Ralph, Diana Greene Foster, Rana Barar & Corinne H. Rocca, *Home Pregnancy Test Use and Timing of Pregnancy Confirmation Among People Seeking Health Care*, 107 CONTRACEPTION 10, 15 (2022) (reporting that women with unplanned pregnancies—the same demographic that seek abortions—were more likely than women with planned pregnancies to take a pregnancy test after six weeks gestation).

courts;²⁰⁹ and most of the remaining states have gestational limits across a broad spectrum,²¹⁰ though a few allow abortion at any gestational stage.²¹¹

Fetal life is the primary justification advanced for current antiabortion legislation.²¹² Images of fetuses have dominated the pro-life movement since John and Barbara Wilkes, medical professionals and antiabortion activists, published the *Handbook on Abortion*, containing graphic, post-abortion pictures.²¹³ Yet, focusing on fetal protection ignores the physiological complexity of pregnancy: roughly ten to twenty percent of pregnancies end in spontaneous miscarriage,²¹⁴ leading to sick women being turned away from hospitals because procedures to treat miscarriage are identical to those for abortion.²¹⁵ Centering preservation of fetal life makes pregnancy and fetal development seem more orderly than they are.²¹⁶

Concern for fetal life has also not translated into better care nor parole for pregnant noncitizens, even under a pro-life regime.²¹⁷ In fact, pro-life sentiment has

209. Iowa, Montana, Ohio, and Wyoming. *Tracking Abortion Bans Across the Country*, *supra* note 207. Enforcement of Arizona's complete abortion ban was enjoined both before *Roe* and after *Dobbs*, but the state enacted a new law with a fifteen-week gestational limit. *Id.* Florida has instituted a new ban with a six-week gestational limit, up from its earlier fifteen-week limit, which is under review by the state supreme court. *Id.*

210. In addition to Georgia and South Carolina, whose six-week gestational limits are essentially a ban, there are Arizona (fifteen weeks), California (viability), Connecticut (viability), Delaware (viability), Florida (fifteen weeks), Hawaii (viability), Illinois (viability), Kansas (twenty-two weeks), Maine (viability), Maryland (viability), Massachusetts (twenty-four weeks), Michigan (viability), Nebraska (twelve weeks), Nevada (twenty-four weeks), New Hampshire (twenty-four weeks), New York (viability), North Carolina (twelve weeks), Pennsylvania (twenty-four weeks), Rhode Island (viability), Virginia (viability), Utah (eighteen weeks) and Washington (viability). *Id.*

211. Alaska, Colorado, Minnesota, New Jersey, New Mexico, Oregon, Vermont, and D.C. have no gestational limit on abortion. *See id.*

212. Jennifer L. Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, ORG. OF AM. HISTORIANS, <https://www.oah.org/tah/issues/2016/november/abolishing-abortion-the-history-of-the-pro-life-movement-in-america/> [<https://perma.cc/J8YX-AGQN>] (last visited Nov. 25, 2023).

213. *Id.*

214. Because miscarriage can occur before a pregnancy has been discovered, actual percentages may be even higher. *Miscarriage*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/symptoms-causes/syc-20354298> [<https://perma.cc/PW8Z-H2BS>] (last visited Nov. 25, 2023).

215. *See* Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. TIMES (July 17, 2022), <https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html> [<https://perma.cc/4F6U-3TGB>]; Shirin Ali, *The Five Horrifying Near-Death Experiences Behind the New Texas Abortion Lawsuit*, SLATE (Mar. 7, 2023, 5:03 PM), <https://slate.com/news-and-politics/2023/03/texas-abortion-ban-lawsuit-plaintiffs-near-death-experiences.html> [<https://perma.cc/G8NY-Y3MJ>].

216. Even now, gestational age is counted from a woman's last period, not date of conception which cannot be accurately measured. *Calculating Conception*, AM. PREGNANCY ASS'N, <https://americanpregnancy.org/getting-pregnant/calculating-conception/> [<https://perma.cc/KPS3-9E5J>] (last visited Nov. 25, 2023). Pro-legal-abortion advocates are frustrated by antiabortion legislation that misunderstands female anatomy and pregnancy complications. Bethany Irvine, *Why "Heartbeat Bill" Is a Misleading Name for Texas' Near-Total Abortion Ban*, TEX. TRIB. (Sept. 2, 2021, 4:00 PM), <https://www.texastribune.org/2021/09/02/texas-abortion-heartbeat-bill/> [<https://perma.cc/M7N7-TD86>]; Sarah Jones, *The Pseudoscience that Could Kill Women*, N.Y. MAG. (Mar. 15, 2022), <https://nymag.com/intelligencer/2022/03/the-anti-abortion-movements-deadly-pseudoscience.html> [<https://perma.cc/AA2V-PEW2>] (explaining that ectopic pregnancies are never viable and abortion is their only method of treatment).

217. Lauren A. Varga, *Does Fear of Immigration Trump Love for Fetal Life? How Trump's Policies Quietly Endanger Migrant Fetuses in Spite of the Administration's Pro-Life Agenda*, 35 GEO. IMMIGR. L.J.

often been at odds with anti-immigration policies, as pregnant noncitizens have been subjected to horrific detention practices.²¹⁸ As recently as 2019, immigrant women have even undergone coercive hysterectomies and sterilization.²¹⁹ Noncitizen prenatal care is equally controversial, and even ostensibly pro-life state officials have argued that breaking immigration laws invalidates a noncitizen’s access to healthcare, even for her fetus.²²⁰

In 1992, Professor Reva Siegel argued that the focus on fetal life and development intentionally divorces the fetus from the woman.²²¹ The purpose of the woman’s body becomes simply housing and food for the unborn.²²² While pregnancy regulation appears to be physiologically based, not sociologically constructed, Siegel pointed out that there is little interest in regulating men, despite the role male fertility and sperm defects play in fetal health.²²³ The *Dobbs* dissent also contended that constitutional originalism obscures the male political domination of the time period, so asserting that the Fourteenth Amendment contains no inherent reproductive right erroneously turns male indifference into a deliberate exclusion.²²⁴ It continued, “[P]recedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women’s lives, where they safeguard a right to self-determination.”²²⁵

a. A Typical Antiabortion Total Ban

Texas’s total abortion ban, the Human Life Protection Act of 2021, is typical of its kind.²²⁶ The statute went into effect thirty days after *Dobbs*²²⁷ and is the most restrictive of the Texas antiabortion statutes in force.²²⁸ Like most bans, it contains no

631, 644–47 (2021). The Trump administration reversed an Obama-era policy of paroling—releasing into the United States—pregnant noncitizens while their immigration cases were pending. *Id.* Detention increases risks to fetal and maternal health, including miscarriage. *Id.* at 646–49.

218. *Id.* at 647–50.

219. *Id.* at 652–54.

220. Rachel E. Fabi, Brendan Saloner & Holly Taylor, *State Policymaking and Stated Reasons: Prenatal Care for Undocumented Immigrants in an Era of Abortion Restriction*, 99 MILBANK Q. 693, 702–03 (2021).

221. Siegel, *supra* note 59, at 325.

222. *Id.* at 326.

223. *Id.* at 337–38.

224. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2324–25 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting) (“But, of course ‘people’ did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights When the majority says that we must read our foundational charter as viewed at the time of ratification . . . it consigns women to second-class citizenship.”).

225. *Id.* at 2327.

226. Compare TEX. HEALTH & SAFETY CODE ANN. §§ 170A.001–007 (West 2023), with ALA. CODE §§ 26-23H-4 to 26-23H-8 (2023), and MO. ANN. STAT. §§ 188.010–188.375 (West 2023).

227. H.B. 1280, 87th Leg., Reg. Sess. § 3(1) (Tex. 2021); *After Roe Fell: Abortion Laws by State—Texas*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/state/texas/> [<https://perma.cc/9X55-TWKU>] (last visited Nov. 25, 2023).

228. See, e.g., TEX. HEALTH & SAFETY CODE ANN. §§ 170.001–.002, 171.004 (West 2023) (requiring, respectively, abortions to be limited to after viability, and sixteen-week abortions to be done in a surgical center or hospital).

exceptions for rape, incest, gestational stage, or fetal abnormality.²²⁹ The statute does allow abortion when the pregnant woman has a “life-threatening physical condition” or the pregnancy poses a “serious risk of substantial impairment of a major bodily function.”²³⁰ A woman threatening to hurt herself if an abortion is not performed does not count as a “life-threatening physical condition,” and neither does serious mental illness.²³¹ The physician performing the abortion must attempt to save the fetus absent some additional risk to the woman’s life, though the statute excludes unintentional fetal injury from prosecution.²³² Performing an abortion is a first- or second-degree felony,²³³ potentially subjecting the provider to life in prison²³⁴ and a \$100,000 civil fine per violation.²³⁵ Criminal penalties do not preclude civil suits either.²³⁶ The law does explicitly exempt the pregnant woman from prosecution,²³⁷ though it does not address whether a woman could be prosecuted for attempting an abortion on herself in violation of the law’s requirement that only licensed physicians perform them.²³⁸

Local prosecutors, however, have discretion to apply the law, presenting a potential impediment to the statute’s enforcement.²³⁹ Multiple Texas district attorneys have vowed not to enforce it.²⁴⁰ The Texas Legislature has since considered a number of bills to force even duly elected prosecutors to apply state law,²⁴¹ including threat of removal from office.²⁴² Because a noncitizen can only be deported for a CIMT if

229. *Id.* § 170A.002.

230. *Id.* § 170A.002(b)(2).

231. *Id.* § 170A.002(c); see also Britny Eubank & Ashley Goudeau, *Mental Health Crises Don’t Fall Under Exceptions to New Abortion Law*, KVUE (Aug. 25, 2022, 6:57 PM CDT), <https://www.kvue.com/article/news/health/texas-abortion-trigger-law-mental-health/269-a844f836-e1b4-4fa7-88c8-90f3c66f39ed> [<https://perma.cc/ZQ3E-D44N>].

232. HEALTH & SAFETY § 170A.002(b)(3), (d).

233. *Id.* § 170A.004(b).

234. TEX. PENAL CODE ANN. §§ 12.32–33 (West 2023).

235. HEALTH & SAFETY § 170A.005.

236. *Id.* § 170A.006.

237. *Id.* § 170A.003.

238. Even prior to *Dobbs*, some states prosecuted women attempting to end their own pregnancies. See, e.g., Liam Stack, *Woman Accused of Coat-Hanger Abortion Pleads Guilty to Felony*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/tennessee-abortion-crime.html> [<https://perma.cc/EP6X-CKPM>].

239. Joint Statement from Elected Prosecutors, Fair and Just Prosecution (May 9, 2023), <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> [<https://perma.cc/74UH-2SGG>].

240. *Id.*

241. Eleanor Klibanoff, *Texas Republicans, Once Allied with Prosecutors, Seek to Rein Them in*, TEX. TRIB. (Mar. 28, 2023, 5:00 AM CST), <https://www.texastribune.org/2023/03/28/texas-legislature-district-attorneys/> [<https://perma.cc/38LB-8E8Q>].

242. H.B. 1350, 88th Leg. Sess., Reg. Sess. § 1 (Tex. 2023); Bret Jaspers, *These Texas DAs Refused to Prosecute Abortion. Republican Lawmakers Want Them Stopped*, NPR (Mar. 3, 2023, 5:06 AM EST), <https://www.npr.org/2023/03/03/1160475174/these-texas-das-refused-to-prosecute-abortion-republican-lawmakers-want-them-sto> [<https://perma.cc/JL78-S7XS>]. In Georgia, Governor Brian Kemp recently signed Senate Bill 92 into law, creating a “Prosecuting Attorneys Qualifications Commission” that can remove a district attorney or solicitor-general from office for “[w]illful and persistent failure to carry out statutory duties.” Press Release, Off. of Gov. Brian Kemp, Gov. Kemp Signs Legislation Creating Prosecuting Attorneys Qualifications Commission (May 5, 2023), <https://gov.georgia.gov/press-releases/2023-05-05/gov-kemp-signs->

convicted, prosecutors choosing not to bring abortion-related charges would exempt noncitizens from immigration consequences.²⁴³

C. CIMT and Immigration Consequences

Even if historical CIMT precedent and reasoning points to abortion being a CIMT today, courts would still need to find and enforce that holding in order for abortion convictions to result in deportations. This Part analyzes how courts make CIMT determinations. It is a two-step process: the BIA would need to find that (1) abortion is categorically a CIMT and (2) a statute banning abortion, like that in Texas, is a categorical match to the genericized abortion CIMT. While the BIA has broad latitude in defining CIMTs and is entitled to deference in its determinations, the potential for circuit court appeal adds a wrinkle to this process. Circuit courts can, and often do, overrule the BIA. Part II.C.1 details how the BIA determines which crimes involve moral turpitude. Part II.C.2 details circuit court CIMT jurisprudence, focusing on the Ninth and Fifth Circuits as examples.

1. BIA Definition and Application of CIMTs

As the administrative body tasked with removability decisions, the BIA has wide latitude in defining which crimes involve moral turpitude.²⁴⁴ The BIA (if not simply applying precedent)²⁴⁵ appears to have a two-prong approach: (1) label a category of conduct “reprehensible” then (2) search for an intent element in the statute.²⁴⁶ The intent element may be broad, including not only “intentional” and “knowing” conduct,

legislation-creating-prosecuting-attorneys-qualifications [https://perma.cc/D4UQ-VC8C]. In Florida, Governor Ron DeSantis suspended a state attorney after he refused to prosecute abortion-related crimes. Alison Durkee, *Judge Declines To Reinstate Florida Prosecutor Gov. DeSantis Fired—At Least for Now*, FORBES (Sep. 19, 2022, 2:21 PM), <https://www.forbes.com/sites/alisondurkee/2022/09/19/judge-declines-to-reinstate-florida-prosecutor-gov-desantis-fired-at-least-for-now> [https://perma.cc/CBS3-HFLT].

243. See 8 U.S.C. § 1227(a)(2)(A)(i)–(ii) (requiring criminal conviction for removal).

244. See *Silva-Trevino III*, 26 I. & N. Dec. 826, 830 (B.I.A. 2016); *Rohit v. Holder*, 670 F.3d 1085, 1087–88 (9th Cir. 2012).

245. See, e.g., *Matter of Wong*, 28 I. & N. Dec. 518, 527–28 (B.I.A. 2022) (“[A]n offense that ‘involves deceit and an intent to impair the efficiency and lawful functioning of the government’ necessarily involves moral turpitude.” (quoting *Rodriguez v. Gonzales*, 451 F.3d 60, 64 (2d Cir. 2006))).

246. See, e.g., *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 385, 387 (B.I.A. 2018) (holding that a CIMT involves “culpable mental state and reprehensible conduct” and if the conduct element is met, some measure of intent will satisfy the other element); *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1194–95 (B.I.A. 1999) (finding a DUI to be a CIMT only if the offender knows they should not be driving due to license restrictions); *Matter of Acosta*, 27 I. & N. Dec. 420, 423 (B.I.A. 2018) (holding that all drug possession with intent to distribute is turpitudinous); *Matter of J-G-P-*, 27 I. & N. Dec. 642, 647–49 (B.I.A. 2019) (holding “menacing” to be turpitudinous, even though it contained no definable conduct other than intent to create a fear of “imminent serious physical injury,” regardless of whether the victim was actually afraid); see also *Matter of Aguilar-Mendez*, 28 I. & N. Dec. 262, 265 (B.I.A. 2021) (conflating the reprehensibility of assault with the intentionality of the injury); *Garcia-Martinez v. Barr*, 921 F.3d 674, 679 (7th Cir. 2019) (“It is true that a ‘crime of moral turpitude’ is an odd match for the categorical approach. The moral turpitude label refers to a particular quality of conduct, as opposed to an act that can be broken into specific elements. But the Board has addressed this problem by defining various generic crimes that do have specific elements as either categorically evincing moral turpitude or not.”).

but also having a “vicious motive or a corrupt mind,”²⁴⁷ or simply being “criminally reckless.”²⁴⁸ In the case of sexual abuse of a minor, the intent is “implicitly satisfied by the commission of the proscribed act.”²⁴⁹

Professor Jennifer Koh has argued that, under the guise of applying the categorical approach, the BIA has engaged in a quiet expansion of moral turpitude over the years.²⁵⁰ The purpose of the categorical approach is to “avoid . . . sweeping generalizations about certain types of crime in order to assess [immigration] consequences,” but the BIA “subvert[s] that careful analysis in favor of blanket pronouncements about morality,” treating every crime “related to a particular social problem” as “equally loathsome.”²⁵¹ Professor Koh highlights the case *Matter of Jimenez-Cedillo*, where the BIA again dismissed a mistake-of-age defense when finding sexual contact with a minor was a CIMT, because “such offenses contravene society’s interest in protecting children from sexual exploitation.”²⁵²

The Fourth Circuit reversed and remanded the case, concluding the BIA had deviated from its own precedent without sufficient explanation.²⁵³ On remand, the BIA affirmed its decision.²⁵⁴ New laws to catch online sexual predators often did not require the perpetrator to know the victim’s age, and failing to apply moral turpitude to these convictions was an “absurd result.”²⁵⁵ The BIA stated that criminal courts had more recently determined that a lack of mistake-of-age defense did not offend due process, because it “reflects the public’s desire to protect its most vulnerable victims.”²⁵⁶

Professor Koh’s Article preceded the BIA’s revision of the case, but the result fits her thesis that the BIA has been equating moral turpitude with trends in criminalization.²⁵⁷ The BIA justified its finding on intent because laws targeting sexual predators had changed (i.e., dropping the mistake-of-age defense in line with other sexual crimes that are CIMTs).²⁵⁸ The BIA recently judged animal fighting to be turpitudinous because “the laws of all 50 States and the District of Columbia and Federal law” made it a crime.²⁵⁹

247. *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (B.I.A. 1994).

248. *Matter of Medina*, 15 I. & N. Dec. 611, 614 (B.I.A. 1976).

249. *Matter of Jimenez-Cedillo (Jimenez-Cedillo I)*, 27 I. & N. Dec. 1, 6 (B.I.A. 2017).

250. Jennifer Lee Koh, *Crimmigration Beyond the Headlines: The Board of Immigration Appeals’ Quiet Expansion of the Meaning of Moral Turpitude*, 71 STAN. L. REV. ONLINE 267, 272 (2019) [hereinafter Koh, *Crimmigration*].

251. *Id.* at 274.

252. 27 I. & N. Dec. at 5–6; Koh, *Crimmigration*, *supra* note 250, at 274.

253. *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 299–300 (4th Cir. 2018).

254. *Matter of Jimenez-Cedillo (Jimenez-Cedillo II)*, 27 I. & N. Dec. 782, 783–74 (B.I.A. 2020).

255. *Id.* at 787.

256. *Id.*

257. Koh, *Crimmigration*, *supra* note 250, at 275.

258. *Jimenez-Cedillo II*, 27 I. & N. Dec. at 787–92; *see also supra* notes 94–122 and accompanying text.

259. *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 390 n.9 (B.I.A. 2018); *see also* Koh, *Crimmigration*, *supra* note 250, at 275 (noting that the BIA highlighted as evidence of animal fighting’s turpitude the fact that mere attendance at an animal-fighting event is a crime).

However, commentators looking for trends in BIA turpitude jurisprudence may still find its evaluative process inscrutable.²⁶⁰ Some of the chaos spawns from the fact that the BIA does not “write on a blank slate,” but rather must defer to the judgment of the circuit court in which the jurisdiction over the case resides.²⁶¹ Circuit court splits can leave the turpitude of an offense in doubt, even after the BIA has ruled on it.²⁶²

2. Circuit Court Definition and Application of CIMTs

The INA has limited federal circuit court jurisdiction over removal orders to questions of law and constitutional issues.²⁶³ In practice, the circuit courts vary in their standards of review and the deference they afford to BIA CIMT determinations.²⁶⁴ Circuit courts have also split on how to apply the categorical approach to CIMTs.²⁶⁵ Subject to this variety of approaches, the BIA must conform its method to the sitting circuit court’s or risk being reversed.²⁶⁶

A full tour of circuit court disagreement would necessitate its own treatment,²⁶⁷ so this Part compares only two circuits: the Ninth, which has been redefining moral turpitude away from its roots, and the Fifth, a more traditional body and the circuit where a conviction under the representative Texas abortion statute would be evaluated.

260. See Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 311–13 (1997) (noting that state criminal statutes vary from jurisdiction to jurisdiction such that every new statutory interpretation of superficially similar crimes presents a “question of first impression”).

261. *Matter of Salad*, 27 I. & N. Dec. 733, 737 (B.I.A. 2020).

262. Misprision of a felony is an instance where the circuit courts disagree on the moral turpitude of the crime. Compare *Robles-Urrea v. Holder*, 678 F.3d 702, 707 (9th Cir. 2012), with *Villegas-Sarabia v. Sessions*, 874 F.3d 871, 880–81 (5th Cir. 2017).

263. *Reyes v. Lynch*, 835 F.3d 556, 559 (6th Cir. 2016).

264. As an administrative adjudicative body, the BIA is entitled to *Chevron* deference in its interpretation of the INA. See *Debique v. Garland*, 58 F.4th 676, 680–81 (2d Cir. 2023). But the BIA is not accorded deference in its interpretation of state or federal criminal statutes. See, e.g., *Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014) (reviewing BIA decisions de novo that require state statutory interpretation). Unfortunately, this results in a quagmire for the BIA: it should be permitted to define the INA’s CIMT standard, but defining that standard requires application to a state or federal criminal statute. See, e.g., *Coelho v. Sessions*, 864 F.3d 56, 60–61 (1st Cir. 2017) (stating first that “[w]e review the BIA’s legal conclusions de novo, but we afford *Chevron* deference to the BIA’s interpretation of the [INA], including its determination that a particular crime qualifies as one of moral turpitude, unless that interpretation is arbitrary, capricious, or clearly contrary to law,” but then stating, “we give deference to the BIA’s construction of the term moral turpitude, but we do not give deference to its reading of an underlying criminal statute (as to which it has no expertise)” (second alteration in original) (emphases added) (internal quotation marks omitted) (first quoting *Da Silva Neto v. Holder*, 680 F.3d 25, 28 (1st Cir. 2012); and then quoting *Patel v. Holder*, 707 F.3d 77, 79 (1st Cir. 2013))).

265. *Silva-Trevino III*, 26 I. & N. Dec. 826, 831–33 (B.I.A. 2016); see also Evan F. McCarthy, Note, *Justices, Justices, Look Through Your Books, and Make Me a Perfect Match: An Argument for the Realistic Probability Test in CIMT Removal Proceedings*, 104 IOWA L. REV. 2269, 2278–82 (2019).

266. See *Hernandez v. Lynch*, 823 F.3d 279, 280 (5th Cir. 2016).

267. See generally McCarthy, *supra* note 265.

a. *Ninth Circuit Approach to CIMTs*

The Ninth Circuit employs its own definition of CIMT,²⁶⁸ having called the BIA's case law on the subject "a mess of conflicting authority."²⁶⁹ The court divides CIMTs into two categories: (1) fraud and (2) "grave acts of baseness or depravity."²⁷⁰ For nonfraud cases, CIMTs must involve an intent to injure someone, an actual injury, or a protected class of victims.²⁷¹ This reading of CIMTs is more akin to an individual rights framework and stands at odds with the traditional CIMT definition focused on social moral orthodoxy.²⁷² The BIA rejected the Ninth Circuit's formulation in *Matter of Ortega-Lopez*, holding that societal injury, not personal injury, forms the basis of turpitude.²⁷³

The Ninth Circuit called the BIA's determination "well-reasoned" and entitled to deference but did not disavow its own definition.²⁷⁴ The court has reiterated its view in more recent cases as well.²⁷⁵ For this reason, the Ninth Circuit is more likely to justify applying turpitude due to the harm or potential harm caused by someone's conduct rather than the intent behind the act.²⁷⁶ It also employs the "realistic probability" version of the categorical approach, to avoid dismissing merely because the statute theoretically, but not plausibly, punishes non-CIMT conduct.²⁷⁷

In the absence of a precise definition of moral turpitude, the Ninth Circuit evaluates its prior holdings less for their precedential value than for their rationale in applying moral turpitude.²⁷⁸ The Ninth Circuit has discarded "the rigid imposition of austere moral values on society as a whole."²⁷⁹ The court even rejects majority public moral sentiment as the basis of CIMTs:

Today, 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. Indeed, as with all crimes, if the conduct at issue were not offensive to at least a majority, there would be no reason to prohibit it and thus render it a criminal act. More is required for moral turpitude.²⁸⁰

268. *Menendez v. Whitaker*, 908 F.3d 467, 472–73 (9th Cir. 2018).

269. *Nunez v. Holder*, 594 F.3d 1124, 1131 (9th Cir. 2010) (citing *Marmolejo-Campos v. Holder*, 558 F.3d 903, 921 (9th Cir. 2009) (Berzon, J., dissenting)).

270. *Menendez*, 908 F.3d at 472–73 (quoting *Carty v. Ashcroft*, 395 F.3d 1081, 1083 (9th Cir. 2005)).

271. *Nunez*, 594 F.3d at 1131.

272. *See supra* Part II.A.2.b.

273. *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 386 (B.I.A. 2018).

274. *Ortega-Lopez v. Barr*, 978 F.3d 680, 687 (9th Cir. 2020).

275. *Walcott v. Garland*, 21 F.4th 590, 598–99 (9th Cir. 2021).

276. *See Escobar v. Lynch*, 846 F.3d 1019, 1024 (9th Cir. 2017) ("[W]here a protected class of victim is involved, such as children or individuals who stand in a close relationship to the perpetrator, both the BIA and this court have been flexible about the intent 'requirement.'" (quoting *Nunez v. Holder*, 594 F.3d 1124, 1131 n.4 (9th Cir. 2010))).

277. *See, e.g., Betansos v. Barr*, 928 F.3d 1133, 1140 (9th Cir. 2019).

278. *Nunez v. Holder*, 594 F.3d 1124, 1130–32 (9th Cir. 2010).

279. *Id.* at 1132.

280. *Id.* at 1132–33 (citing *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1071 (9th Cir. 2007)).

However, the Ninth Circuit is keeping with the majority public opinion of its circuit, so its professed indifference to prevailing beliefs may be disingenuous.²⁸¹ It has reasoned just the opposite in other cases,²⁸² and expressed concern that its moral turpitude jurisprudence is inconsistent.²⁸³ Regardless, the back-and-forth of the *Ortega-Lopez* cases demonstrated that the BIA and the Ninth Circuit have fundamentally different views on the purpose and rationale of moral turpitude.²⁸⁴ The Ninth Circuit continues to distance itself from the BIA's traditional application of the standard.²⁸⁵

b. Fifth Circuit Approach to CIMTs

The Fifth Circuit's application of moral turpitude relies on precedent more than moral analysis and resists new application.²⁸⁶ When other circuits debated the underlying morality of misprision (concealment) of a felony with historical references and comparable crimes,²⁸⁷ the Fifth Circuit held that its precedent establishes deceitful conduct as CIMT and that misprision involves deceit.²⁸⁸

In cases of first impression, the Fifth Circuit has been skeptical about expanding the moral turpitude standard.²⁸⁹ In *Hamdan v. Immigration and Naturalization Service*, the court disagreed with the BIA that kidnapping was always a CIMT, dismissed evidence of noncustodial conduct, and called the term "with force and arms" merely "archaic boilerplate."²⁹⁰ In a case of public lewdness, the court discussed at length whether touching a breast in public was turpitudinous (concluding it was not),²⁹¹ and in a child abandonment case, it complained the legislature had overreached in its attempt

281. *See Views About Homosexuality by State*, PEW RSCH. CTR. (2014), <https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-homosexuality/by/state/> [https://perma.cc/E3S2-CPMT] (finding that a strong majority in each state in the Ninth Circuit believe homosexuality should be accepted).

282. *See Walcott v. Garland*, 21 F.4th 590, 601 (9th Cir. 2021) ("A determination that an offense is base, vile, or depraved, or contrary to accepted moral standards depends on the accepted moral standards or prevailing views at the time.").

283. *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 998 (9th Cir. 2008), *overruled on other grounds*, *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911–12 (9th Cir. 2009).

284. *Compare Ortega-Lopez v. Lynch*, 834 F.3d 1015, 1018 (9th Cir. 2016), *with Matter of Ortega-Lopez*, 27 I. & N. Dec. 382 (B.I.A. 2018), *and Ortega-Lopez v. Barr*, 978 F.3d 680 (9th Cir. 2020). *See Betansos v. Barr*, 928 F.3d 1133, 1139 (9th Cir. 2019) ("We have hesitated to defer to the BIA's general understanding of the term 'moral turpitude' Instead '[w]e [have] rel[ied] on our own generalized definition . . .'" (alterations in original) (quoting *Rivera v. Lynch*, 816 F.3d 1064, 1071 (9th Cir. 2016))).

285. *See Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1258–59 (9th Cir. 2019) (Fletcher, J., concurring) (compiling cases where the Ninth Circuit has criticized the CIMT case law of the BIA).

286. *See, e.g., Hyder v. Keisler*, 506 F.3d 388, 393 (5th Cir. 2007) (focusing on the fact a Ninth Circuit decision is not precedential rather than arguing with its definition of moral turpitude).

287. *See, e.g., Itani v. Ashcroft*, 298 F.3d 1213, 1216–17 (11th Cir. 2002).

288. *Villegas-Sarabia v. Sessions*, 874 F.3d 871, 881 (5th Cir. 2017).

289. *See, e.g., Hamdan v. INS*, 98 F.3d 183, 189 (5th Cir. 1996). *But see Diaz Esparza v. Garland*, 23 F.4th 563, 570–71 (5th Cir. 2022) (finding persuasive other circuit court determinations that "deadly conduct" was a CIMT even though it had no precedent of its own).

290. *Hamdan*, 98 F.3d at 188–89.

291. *Cisneros-Guerrero v. Holder*, 774 F.3d 1056, 1059–61 (5th Cir. 2014).

to stop “increasing incidence of appalling parental desertions.”²⁹² The new statute could punish “a mother’s quick trip next door to borrow some sugar while carelessly leaving a toddler alone in a kitchen” and therefore the minimum conduct did not have the requisite intent.²⁹³ Because the Fifth Circuit applies the “minimum reading of [a] statute” (i.e., the least culpable conduct) version of the categorical approach, any de minimis conduct that could theoretically be punished by a statute will end its CIMT determination.²⁹⁴

The court does begin each CIMT case by reciting the BIA’s definition of moral turpitude and emphasizing that it defers to the BIA in INA statutory interpretation.²⁹⁵ Unlike the Ninth Circuit, however, which has remanded to the BIA to expand on its reasoning in cases where the two disagree,²⁹⁶ the Fifth Circuit tends to impose its interpretation on the BIA and is not necessarily persuaded by BIA reasoning.²⁹⁷

III. DISCUSSION

This Section combines the analysis of the prior Sections and argues that, without reform of moral turpitude’s definition, abortion can be reclassified as a CIMT and that doing so can lead to deportation of noncitizens. Because moral turpitude is deeply ingrained in the law and traditions of the country, it is unlikely to disappear, but courts like the Ninth Circuit have demonstrated a path forward: redefining turpitude to focus more on harm done to individuals and less on the traditional societal conformity. Part III.A analyzes how moral turpitude jurisprudence in matters of sexuality and medical ethics shapes abortion classification. Part III.B looks at the representative Texas abortion statute and argues, first, how the BIA can classify statutory violations as CIMTs and, second, how circuit court determinations, using the Fifth and Ninth Circuit approaches as examples, would apply their own standards. Part III.C argues that while moral turpitude is too gray-haired to be plucked from the law at this point, courts can acknowledge its masculinist origins and evolve the definition to sever its archaic roots in the sexual control of women.

A. *Moral Turpitude Polices Female Sexuality and Reproduction*

The legal standard of moral turpitude—“an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general”²⁹⁸—remains nebulous, but sexual morality jurisprudence advances a more straightforward definition: the protection of an idealized American society.²⁹⁹ Moral

292. *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 322 (5th Cir. 2005).

293. *Id.* at 322–24.

294. *See, e.g., Cisneros-Guerrero*, 774 F.3d at 1058–60 (quoting *Esparza-Rodriguez v. Holder*, 699 F.3d 821, 825 (5th Cir. 2012)).

295. *See Diaz Esparza v. Garland*, 23 F.4th 563, 567–68 (5th Cir. 2022).

296. *See Ortega-Lopez v. Lynch*, 834 F.3d 1015, 1018 (9th Cir. 2016).

297. *See, e.g., Hamdan v. INS*, 98 F.3d 183, 188–89 (5th Cir. 1996).

298. *Daye v. Att’y Gen.*, 38 F.4th 1355, 1360 (11th Cir. 2022) (quoting *Cano v. Att’y Gen.*, 709 F.3d 1052, 1053 (11th Cir. 2013)).

299. *See Simon-Kerr, supra* note 38, at 1011–12 (arguing that moral turpitude helped define how colonists transitioned into citizens of the early United States).

turpitude, then, is not based primarily on public moral sentiment.³⁰⁰ Judges and legislatures do not engage in this analysis.³⁰¹ It rests on concerns of societal stability,³⁰² the vestige of a once-understood cultural code about honor and trustworthiness that was put into effect in a young America to ensure the new nation would survive.³⁰³ It has remained in contexts where ferreting out the untrustworthy—testimonial veracity, legal and medical ethics, and immigration—is considered vital to societal cohesion.³⁰⁴

In this sense, the watermelon stealers from Justice Jackson’s dissent are no longer an example of moral turpitude run amok.³⁰⁵ Trustworthiness is based in predictability and those who steal (and lie and deceive, etc.) are unpredictable.³⁰⁶ Similarly, perceived “aberrant” sexuality also breaks the social contract.³⁰⁷ Society is interested in the reproduction of new humans and has delegated that responsibility to women.³⁰⁸ Women who operate outside these narrow parameters, and those who encourage and assist them, are viewed as socially corruptive.³⁰⁹ Moral turpitude is the legal tool by which the government can root this corruption out.³¹⁰

Abortion can be held to involve moral turpitude.³¹¹ Professor Simon-Kerr argued that moral turpitude arises out of nineteenth-century honor norms and the “perceived need to protect society against moral infection.”³¹² However, she incorrectly asserted that sexual deviance in moral turpitude has lost its gendered dynamics.³¹³ Professor Lerner more accurately claims that in CIMT case law “[t]here is not ‘pervasive

300. *See id.*

301. *See Daye*, 38 F.4th at 1360 (applying CIMT precedent without explanation). In Arizona, no opinion on the legality of abortion clears a fifty percent majority, but this divide has not informed the legislature’s choice to pass antiabortion statutes. *See Views About Abortion by State*, PEW RSCH. CTR. (2014), <https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-abortion/by/state/> [<https://perma.cc/J3V2-AMJL>].

302. *See LUKER*, *supra* note 117, at 174 (“[T]he argument that individuals should arrive at a *personal* decision about the moral status of this intermediate category [potential human life] is as strange to [pro-life advocates] as arguing that individual soldiers in wartime should act according to their own judgment of the wisdom of the army’s battle plan.”).

303. Simon-Kerr, *supra* note 38, at 1011–12.

304. *See Lerner*, *supra* note 42, at 141–43 (explaining that immigration law is interested in identifying those of “good moral character,” not in punishing bad actors (quoting 8 U.S.C. § 1101(f))).

305. *Jordan v. De George*, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting).

306. *See Matter of Shanu*, 23 I. & N. Dec. 754, 761 (B.I.A. 2005), *vacated on other grounds by Matter of Alyazji*, 25 I. & N. Dec. 397 (B.I.A. 2011) (“[A]n alien who commits a crime involving moral turpitude . . . has betrayed the trust of his national community.”).

307. Simon-Kerr, *supra* note 38, at 1013–14 (calling want of chastity “the female counterpart to male oath breaking”).

308. Means, *supra* note 175, at 509–10 (“[T]he real thrust [of antiabortion legislation] is a demographic one—the propagation and continuance of the human race.”).

309. *See Kemp v. Bd. of Med. Supervisors*, 46 App. D.C. 173, 180–83 (D.C. Cir. 1917) (calling license revocation for moral turpitude “a remedy for the protection of society from being imposed upon by persons of immoral character practising medicine”).

310. *See Lerner*, *supra* note 42, at 141.

311. *See supra* Parts II.A–B.

312. Simon-Kerr, *supra* note 38, at 1045–46, 1047–55 (quoting Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1084 n.166 (2002)).

313. *Id.* at 1053–54 (pointing to male-aimed anti-sodomy and statutory rape laws).

disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider,” though he does not address the sexual dynamics at play.³¹⁴ Moral turpitude is neither vague nor beyond gendered considerations.³¹⁵ It continues to enforce a female societal role focused on childbearing and rearing.³¹⁶ The *Roe* decision inflamed societal fears³¹⁷ and created the impression of rampant sexual impropriety, woman-led rejection of societal norms, and the ending of untold “potential life.”³¹⁸ Not only were women as a group walking away from traditional roles, but racist concerns about *which* women were having abortions lurked behind the debate.³¹⁹

CIMT case law demonstrates this concern for societal order through the policing of women’s sexuality.³²⁰ Prostitution is arguably a victimless crime so long as both vendor and buyer are voluntary participants, but its status as a CIMT has seldom been questioned.³²¹ The relic of moral disapproval only explains so much.³²² Instead, the turpitude inheres in women for providing an improper outlet for the sexual proclivities of men and, in doing so, removing themselves from a traditional procreative role.³²³ Anti-immigration legislators feared both white dilution and immigrant overpopulation and rushed to enact laws targeting immigrant sex workers.³²⁴ When the Ninth Circuit finally made solicitation of prostitution a CIMT in 2012, it said nothing about the centuries of disconnect between the two turpitude classifications.³²⁵ So far, courts have expressed little interest in “the need to grapple with a founding vision of the polity that is still very much alive in the law.”³²⁶ According to the BIA, prostitution remains a CIMT because “[t]hese crimes ‘offend[] the most fundamental values of society.’”³²⁷

314. Lerner, *supra* note 42, at 131–32 (quoting *Johnson v. United States*, 576 U.S. 591, 601 (2015)).

315. *Id.* at 141–43; Dadhania, *Deporting*, *supra* note 73, at 63, 78–80.

316. Siegel, *supra* note 59, at 293–94; REAGAN, *supra* note 119, at 115 (“[A]ll women [were warned] that those who strayed from marriage and motherhood would suffer death and shameful publicity.”).

317. Madison Alder, *Roe Abortion Decision Fueled Supreme Court Confirmation Wars*, BLOOMBERG L. (Nov. 30, 2021, 4:45 AM), <https://news.bloomberglaw.com/us-law-week/roe-abortion-decision-fueled-supreme-court-confirmation-wars> [<https://perma.cc/S7VV-2RBQ>].

318. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2257 (2022) (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973)).

319. *See supra* Part II.B.2.

320. Simon-Kerr, *supra* note 38, at 1039 (tying moral turpitude to “a character metric” that demonstrates “fitness . . . to enter or remain in” the United States).

321. *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 386 (B.I.A. 2018).

322. *Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Lyzenga*, 619 N.W.2d 327, 331 (Iowa 2000).

323. Siegel, *supra* note 59, at 302–03 (tying physician disapproval of abortion to women’s “egoism” in rejecting a traditional maternal role).

324. Abrams, *supra* note 86, at 661–62; *see also supra* Part II.A.2.a.

325. *Rohit v. Holder*, 670 F.3d 1085, 1089–90 (9th Cir. 2012) (“We hold that soliciting an act of prostitution is not significantly less ‘base, vile, and depraved’ than engaging in an act of prostitution. Solicitation is the direct precursor to the act. A person who solicits an act of prostitution does not become appreciably more morally turpitudinous when the other party accepts or the two engage in the act.”); *see also* Dadhania, *Deporting*, *supra* note 73, at 63 (“However, absent from [prior law] was any mention of penalties for buyers of sex.”).

326. Simon-Kerr, *supra* note 38, at 1069.

327. *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 386 (B.I.A. 2018) (second alteration in original) (quoting *Rivera v. Lynch*, 816 F.3d 1064, 1075 (9th Cir. 2016)).

But the BIA does not explain what those “fundamental values” are because the explanation centers on the preservation of female chastity.³²⁸

Statutory rape laws also support the idea that moral turpitude rests on the “unwise disposition” of a woman’s “sexual favor.”³²⁹ Courts have disagreed whether statutory rape is a CIMT, because the sex is hypothetically mutual and blurry age boundaries confuse the issue of consent.³³⁰ The law shows little interest in punishing age-appropriate perpetrators when the girl, who is supposedly incapable of legal consent, agrees to sexual interaction but ends up harmed by it.³³¹ That disinterest continues throughout an adult woman’s life.³³² That is, unless she becomes pregnant, but then the law is primarily interested in the pregnancy.³³³

Pregnancy regulation extends beyond abortion.³³⁴ The fact that women have not traditionally been prosecuted for abortion and that most abortion bans now exempt women from prosecution does not mean that the policymakers behind the law consider women less culpable.³³⁵ Jailing women simply does not serve the purpose of enforcing societal norms and stability.³³⁶ Some commentators have argued that exempting women from abortion prosecution is based in paternalism or the belief the woman is a victim of her abortion provider,³³⁷ but these arguments ignore the commonsense conclusion that women are *necessary* for the perpetuation of the population.³³⁸ Abortion regulation does not distinguish between accidental, intentional, consensual, or nonconsensual pregnancy.³³⁹ The law intends that the pregnancy continue, regardless of its origin.³⁴⁰

328. Siegel, *supra* note 59, at 296 (“Were woman intended as a mere plaything, or for the gratification of her own or her husband’s desires, there would have been need for her of neither uterus nor ovaries, nor would the prevention of their being used for their clearly legitimate purpose have been attended by such tremendous penalties as is in reality the case.” (quoting HORATIO ROBINSON STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* 80–81 (Boston, Lee & Shepard 1866))). Storer drove much of nineteenth-century antiabortion legislation. MOHR, *supra* note 181, at 148–50.

329. *People v. Hernandez*, 393 P.2d 673, 674 (Cal. 1964); *see also* Gray, *supra* note 113, at 1389–90.

330. *See* Roberts, *supra* note 18, at 23 (finding that courts were troubled by high statutory ages of consent).

331. Oberman, *supra* note 130, at 718–19, 725–26.

332. *See The Criminal Justice System: Statistics*, *supra* note 132.

333. Most modern abortion bans have no exceptions for rape. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2023); *see also* *Tracking Abortion Bans Across the Country*, *supra* note 207.

334. Siegel, *supra* note 59, at 329–30.

335. *Cf.* Ken Paxton, Att’y Gen. of Tex., *Advisory on Texas Law upon Reversal of Roe v. Wade* (June 24, 2022), <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory.pdf> [<https://perma.cc/KZ9L-Q383>] (writing “I will do everything in my power to protect the unborn” and failing to mention protection of women as an animating policy (emphasis added)); *see also* Manchester, *supra* note 24.

336. *See* Siegel, *supra* note 59, at 293–94; REAGAN, *supra* note 119, at 114–15.

337. *See* Buell, *supra* note 186, at 1821–23.

338. *See* Siegel, *supra* note 59, at 293–94.

339. *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.001 (West 2023).

340. Scherer et al., *supra* note 56 (noting that as the *Roe* decision aged, eliminating abortion access at any stage of pregnancy became an animating force of the pro-life movement).

In this way, targeting providers, not women, for abortion law violations furthers the goal of continuing pregnancy by eliminating access to the procedure.³⁴¹ The Supreme Court has taken aim at the concept of personal autonomy, not just in private abortion decisions³⁴²—which at least arguably implicate the status of both the woman and her fetus—but also in private end-of-life decisions that only implicate the patient.³⁴³ These Court decisions espouse a jurisprudence of societal obligation to maintain life that overrides an individual’s right to make personal medical choices.³⁴⁴ In asserting that the law protected “vulnerable” patients, the *Glucksberg* Court endorsed the view that the State had an interest in that person’s life that overrode that person’s own interest in it.³⁴⁵ The *Dobbs* Court endorsed the same view of a woman’s pregnancy.³⁴⁶ In asserting that the State might have an interest in a woman staying pregnant against her will, the Court was necessarily asserting that society shared that interest—an idea at the core of moral turpitude.³⁴⁷

B. *Immigration Consequences for Noncitizens Who Violate Antiabortion Laws*

With most abortion bans in place and enforceable, the question remains how and when they will be applied. If current enforcement parallels historical practices, some women would still be able to access abortions, aided by income and a personal relationship with a private physician.³⁴⁸ However, pre-*Roe* abortion restrictions were not the result of a culture-war victory, and states had less incentive then to demonstrate their commitment to abortion regulation.³⁴⁹ Today, existing prosecutors have expressed reluctance to enforce these laws,³⁵⁰ but state officials can replace adverse appointees and even punish noncompliant, locally elected district attorneys.³⁵¹ It remains to be seen whether prosecutors will resist state pressure long-term.³⁵²

341. REAGAN, *supra* note 119, at 114, 193.

342. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2257 (2022).

343. *See* *Washington v. Glucksberg*, 521 U.S. 702, 726–28 (1997).

344. *See supra* Part II.A.2.b.

345. *Glucksberg*, 521 U.S. at 728–30.

346. *Dobbs*, 142 S. Ct. at 2284.

347. *See supra* Part II.A.2. The Supreme Court instituted the “ordered liberty” test when it began incorporating the Bill of Rights under the Fourteenth Amendment. *Dobbs*, 142 S. Ct. at 2242. “Ordered liberty” means freedom may be limited when it interferes with necessary societal order. *Id.* at 2246. A much-maligned assertion in *Planned Parenthood v. Casey*—*see* Clifford R. Goldstein, *Justice Kennedy’s “Notorious Mystery Passage”*, LIBERTY MAG. (Jul./Aug. 1997), <https://www.libertymagazine.org/article/justice-kennedys-notorious-mystery-passage> [<https://perma.cc/V8S7-S498>]—stated that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” 505 U.S. 833, 851 (1992). Both the *Dobbs* and *Glucksberg* Courts reasserted the concept of “ordered liberty” in response to *Casey*’s individual rights framework. *Dobbs*, 142 S. Ct. at 2246–48; *Glucksberg*, 521 U.S. 702, 727–28; *see also* Lerner, *supra* note 42, at 136.

348. Graber, *supra* note 195, at 337–38.

349. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992) (arguing that a less decisive ruling in *Roe* that merely struck down the law at issue would not have led to a “twenty-year controversy”).

350. Joint Statement from Elected Prosecutors, *supra* note 239.

351. *See supra* Part II.B.2.a.

352. *See supra* Part II.B.2.a.

1. Prosecution Under the Texas Abortion Ban

The Texas law forbids “knowingly” performing, inducing, or attempting an abortion by any person, medical professional or otherwise.³⁵³ It does exempt licensed physicians who perform an abortion for a woman with a “life-threatening physical condition” placing her at “risk of death” or “serious risk of substantial impairment of a major bodily function.”³⁵⁴ The physician must, however, attempt to save the fetus’s life, unless doing so would increase the risk of death or serious injury to the mother.³⁵⁵

Given that violation of these provisions is a first-degree felony with no safeguard against further civil fines or liability,³⁵⁶ reputable providers are unlikely to take the risk, even for a patient in serious medical distress.³⁵⁷ Underground abortion is likely to flourish, and with many noncitizens in the medical field, immigrant populations may rely on in-community referrals to ensure discreet care.³⁵⁸ Abortion bans may serve both antiabortion and anti-immigration purposes, despite the inherent tension between pro-life and anti-immigration policies in a unified political philosophy.³⁵⁹ State enforcement can target immigrant communities providing noncitizens with clandestine reproductive care.³⁶⁰ If convicted of a CIMT, noncitizen medical providers risk both deportation and permanent inadmissibility.³⁶¹

2. How the BIA Might Classify a Violation of the Texas Abortion Ban

Under the BIA definition, conduct must be both reprehensible and intentional to be classified as a CIMT.³⁶² Three barriers stand against the BIA finding that abortion under the Texas statute is a CIMT: (1) lack of public consensus on abortion’s morality,³⁶³ (2) lack of “evil intent” in abortion,³⁶⁴ and (3) lack of categorical match between the statute and the genericized abortion CIMT.³⁶⁵ All three barriers are surmountable.

First, the BIA may be reluctant to classify abortion as a CIMT given the country’s wide division over it,³⁶⁶ but public consensus is unnecessary for turpitude.³⁶⁷ The BIA

353. TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2023).

354. *Id.* § 170A.002(b)(1)–(2).

355. *Id.* § 170A.002(b)(3).

356. *Id.* §§ 170A.004–005.

357. *See supra* note 215 and accompanying text.

358. *See REAGAN, supra* note 119, at 30–31, 73–74 (describing close-knit immigrant communities that assisted one another with pregnancy care and, when necessary, located abortion providers who were themselves often immigrant women).

359. *Cf. Fabi et al., supra* note 220, at 698–99, 702–03.

360. *Cf. Graber, supra* note 195, at 378 (arguing that new abortion restrictions will disproportionately fall on poor women and women of color).

361. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I).

362. *Jimenez-Cedillo II*, 27 I. & N. Dec. 782, 793 (B.I.A. 2020).

363. *See Public Opinion on Abortion, supra* note 55.

364. *See Bissell v. Cornell*, 24 Wend. 354, 356 (N.Y. Sup. Ct. 1840) (ignoring sympathetic nonemergencies when evaluating the turpitude of abortion).

365. *See supra* notes 99–105, 251–52 for discussions of the categorical approach.

366. *Public Opinion on Abortion, supra* note 55.

367. *See supra* Part III.A.

said in *Matter of Ortega-Lopez* that public consensus in favor of prostitution legalization would not change its CIMT classification.³⁶⁸ Antiabortion activists waged a long legal battle against *Roe*.³⁶⁹ If the BIA claimed the public did not view abortion as a CIMT, it would have to do so in defiance of pro-life amicus curiae briefs, press coverage, and condemnation by state officials who have passed these bans.³⁷⁰

Moreover, the BIA appears to weigh mere criminality in its CIMT decisions.³⁷¹ Recent abortion bans overwhelmingly hold abortion to be a felony, with sentences ranging from five years to life.³⁷² The circumstances of the abortion have no effect on the severity of the crime either, so the “back-alley” abortion performed by an unqualified practitioner is punished the same as one done in a sterile medical setting by professionals.³⁷³ As the BIA has repeatedly held, turpitude inheres in the conduct, so applying identical criminal consequences to all abortions supports that it is the act of abortion, not its circumstances, that is turpitudinous.³⁷⁴

The BIA is also not an independent body in its CIMT jurisprudence.³⁷⁵ It is subject to reversal by the circuit courts, some of which consist entirely of states instituting bans.³⁷⁶ As the BIA must view a crime through the lens of the circuit court that has jurisdiction, it would be unlikely to find that abortion is not a CIMT when adjudicating in a region that has outlawed it.³⁷⁷ Public sentiment will not restrain finding abortion a CIMT.

Second, CIMTs do require an intent element.³⁷⁸ However, the intent requirement has loosened considerably over the years,³⁷⁹ and the BIA has even admitted that “such a specific [evil] intent is not a prerequisite to finding that a crime involves moral turpitude.”³⁸⁰ The BIA may have even reduced intentionality to mere voluntariness, so long as the underlying conduct was sufficiently depraved.³⁸¹

368. 27 I. & N. Dec. 382, 386 (B.I.A. 2018).

369. Scherer et al., *supra* note 56.

370. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 *passim* (2022) (acknowledging the intense public interest in the case and the submission of multiple amicus curiae briefs).

371. Koh, *Crimmigration*, *supra* note 250, at 275.

372. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 170A.004 (West 2023); IDAHO CODE ANN. § 18-622 (West 2023).

373. TEX. HEALTH & SAFETY CODE ANN. §§ 170A.002–.004 (West 2023).

374. See, e.g., *Matter of E---*, 2 I. & N. Dec. 134, 159 (B.I.A. 1944) (“The doing of the act itself and not its prohibition by statute fixes the moral turpitude.”).

375. *Matter of Salad*, 27 I. & N. Dec. 733, 737 (B.I.A. 2020).

376. For example, the Fifth and Eleventh Circuits. See Admin. Off. U.S. Cts., *Geographical Boundaries of United States Courts of Appeals and United States District Courts*, SUP. CT, https://www.supremecourt.gov/about/Circuit_Map.pdf [<https://perma.cc/YYP4-5DDJ>] (last visited Nov. 25, 2023).

377. See Paxton, *supra* note 335.

378. *Jimenez-Cedillo II*, 27 I. & N. Dec. 782, 792 (B.I.A. 2020).

379. See *supra* Part II.C.1.

380. *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1192 (B.I.A. 1999).

381. *Id.* (noting that “willful” commission is sufficient for turpitude if the conduct itself is “depraved” (quoting *Gonzalez-Alvaredo v. INS*, 39 F.3d 245, 246 (9th Cir. 1994))).

The Texas abortion statute has an intent element,³⁸² and where abortion has been criminalized, legislators view it as a depraved act against the unborn.³⁸³ Beliefs about women's roles as child bearers in society and lack of exceptions in the law for incest, rape, or youth indicate that continuing the pregnancy is the primary goal.³⁸⁴ If the act of abortion is believed to be sufficiently depraved, any level of intent in the statute will allow the BIA to hold abortion a CIMT.

Finally, the BIA will apply the categorical approach to a genericized abortion CIMT.³⁸⁵ Depending on the circuit court that has jurisdiction, the BIA will apply the "realistic probability" test or some version of the "least culpable conduct" test. In either of these instances, the BIA can find that the Texas statute is a match to a generic abortion crime.

A sympathetic use case—youth, sexual assault, and early term—requires little imagination and is, unfortunately, not fanciful.³⁸⁶ However, prior abortion CIMT jurisprudence makes no mention of mitigating factors,³⁸⁷ and, with the rare exception for death or serious injury, the Texas ban reflects that.³⁸⁸ With precedent, trends in criminalization, and sufficient intent, the BIA can inhere moral turpitude in any act of intentional abortion.³⁸⁹ Moreover, the BIA has already held that if conduct is a CIMT, attempt is also a CIMT.³⁹⁰ Any violation of the Texas statute would satisfy the categorical approach.

3. How the Circuit Courts Might Classify Violation of an Abortion Ban

The Ninth Circuit holds nonfraud crimes to be CIMTs if they involve "an intent to injure someone, an actual injury, or a protected class of victims."³⁹¹ Because the Ninth Circuit is not as concerned with the intent requirement, a crime causing individual

382. TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2023) ("A person may not *knowingly* perform, induce, or attempt an abortion." (emphasis added)). The definition of abortion in Texas law also emphasizes that intent is necessary. *See* § 245.002(1) ("'Abortion' means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means *with the intent* to cause the death of an unborn child of a woman known to be pregnant." (emphasis added)).

383. *See* Paxton, *supra* note 335.

384. *See supra* Part III.A.

385. *See, e.g.,* Garcia-Martinez v. Barr, 921 F.3d 674, 679–80 (7th Cir. 2019) (describing the categorical approach).

386. Katie Robertson, *Facts Were Sparse on an Abortion Case. But that Didn't Stop the Attacks.*, N.Y. TIMES (July 14, 2022), <https://www.nytimes.com/2022/07/14/business/media/10-year-old-girl-ohio-rape.html> [<https://perma.cc/8FE5-W9CN>] (recounting the story of a ten-year-old sexual assault victim who traveled from Ohio to Indiana for an abortion); Bethany Bruner, Monroe Trombly & Tony Cook, *Arrest Made in Rape of Ohio Girl that Led to Indiana Abortion Drawing International Attention*, COLUMBUS DISPATCH (Jan. 24, 2023, 3:48 PM EST), <https://www.dispatch.com/story/news/2022/07/13/columbus-man-charged-rape-10-year-old-led-abortion-in-indiana/10046625002/> [<https://perma.cc/33FT-8C4C>].

387. *See, e.g.,* Kemp v. Bd. of Med. Supervisors, 46 App. D.C. 173, 183 (D.C. Cir. 1917).

388. TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2023).

389. Matter of E--, 2 I. & N. Dec. 134, 159 (B.I.A. 1944) ("The doing of the act itself and not its prohibition by statute fixes the moral turpitude.").

390. Matter of M--, 2 I. & N. Dec. 525, 526 (B.I.A. 1946).

391. Turijan v. Holder, 744 F.3d 617, 621 (9th Cir. 2014).

injury does not require evil motive to be turpitudinous.³⁹² The Ninth Circuit also remains more flexible on modernizing its turpitude jurisprudence, calling out sister courts for adhering to “oppress[ive]” precedent.³⁹³

Regardless of the BIA’s findings, the Ninth Circuit is unlikely to hold abortion to be a CIMT.³⁹⁴ While it includes states like Idaho that have criminalized abortion, the majority of the region has not done so,³⁹⁵ and the Ninth Circuit tends to follow the majority sentiment of its circuit, even if it claims otherwise.³⁹⁶ The Ninth Circuit has also not been afraid to overrule the BIA when it fails to see the reasoning in its findings.³⁹⁷ Its CIMT jurisprudence is trending toward individual culpability rather than protecting traditional societal concerns.³⁹⁸ Even if the BIA did hold abortion to be a CIMT, the Ninth Circuit is likely to overrule it, as it has done in similar cases.³⁹⁹

The Fifth Circuit, on the other hand, would likely hold abortion to be a CIMT, even if the BIA did not, despite skepticism on applying moral turpitude to cases of first impression. First, abortion is not a case of first impression in CIMT law.⁴⁰⁰ Until *Roe*, abortion was a CIMT and uncontroversially so.⁴⁰¹ The Fifth Circuit relies primarily on precedent for finding CIMTs, so it may simply decide that now that abortion has been returned to the states, pre-*Roe* precedent that was not overruled remains in effect.⁴⁰²

The Fifth Circuit has also not refused to decide whether certain conduct “shocks the public conscience” when suited.⁴⁰³ The three states in its circuit (Texas, Louisiana, and Mississippi) have all instituted total abortion bans, so unlike in the Ninth Circuit, abortion would be illegal anywhere the court has jurisdiction.⁴⁰⁴ In its case on “deadly conduct,” the court called conduct that created a mere fear of imminent serious injury “reprehensible,” even when the defendant had only reckless intent.⁴⁰⁵ The Fifth Circuit expands its CIMT jurisprudence when it deems necessary and is likely to do so here.⁴⁰⁶

392. *Escobar v. Lynch*, 846 F.3d 1019, 1024 (9th Cir. 2017).

393. *See Walcott v. Garland*, 21 F.4th 590, 601 (9th Cir. 2021).

394. *See supra* Part II.C.2.a.

395. *Tracking Abortion Bans Across the Country*, *supra* note 207.

396. *See supra* note 281 and accompanying text.

397. *See Ortega-Lopez v. Lynch*, 834 F.3d 1015, 1018 (9th Cir. 2016).

398. *See Nunez v. Holder*, 594 F.3d 1124, 1132–33 (9th Cir. 2010). *But see Betansos v. Barr*, 928 F.3d 1133, 1140–41 (9th Cir. 2019) (deferring to the BIA in redefining the moral turpitude of the indecency statute that *Nunez* found not to be categorically a CIMT).

399. *See Nunez*, 594 F.3d at 1129, 1132–33 (indicating that it will only defer to the BIA’s determination of moral turpitude in an unpublished decision if it “has the power to persuade” and in a published decision if it is “reasonable,” permitting the court wide latitude to overrule the BIA).

400. *See, e.g., Matter of M---*, 2 I. & N. Dec. 525, 528 (B.I.A. 1946).

401. *See Kemp v. Bd. of Med. Supervisors*, 46 App. D.C. 173, 183 (D.C. Cir. 1917); *Roberts, supra* note 18, at 16.

402. *Cf. Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2252–54 (2022) (recounting the criminalization history of abortion in America); TEX. HEALTH & SAFETY CODE ANN. §§ 170.001–002, 171.001–008 (West 2023) (pre-*Roe* Texas antiabortion laws that became enforceable after *Dobbs*).

403. *Cisneros-Guerrero v. Holder*, 774 F.3d 1056, 1058 (5th Cir. 2014) (quoting *Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 288 (5th Cir. 2007)).

404. *Tracking Abortion Bans Across the Country*, *supra* note 207.

405. *Diaz Esparza v. Garland*, 23 F.4th 563, 570 (5th Cir. 2022), *cert. denied*, *Diaz-Esparza v. Garland*, 214 L. Ed. 2d 14 (2022)).

406. *See id.*

C. *What Can Be Done: Evolving the Definition of Moral Turpitude*

Despite frequent challenges to its legitimacy, moral turpitude will remain a fixture of immigration law.⁴⁰⁷ One advantage of its imprecision and supposed commitment to changing with “contemporary moral standards”⁴⁰⁸ is that courts can abandon precedent more readily than other areas of common law.

Professor Lerner has mocked the Ninth Circuit for its “ever-narrowing reading of the CIMT provisions” and its “comically inventive use of the categorical approach.”⁴⁰⁹ He rattled off a list of instances where the court has diverged from traditional CIMT findings.⁴¹⁰ But the Ninth Circuit has been reckoning with moral turpitude in a way that many other courts, such as the Fifth Circuit, have not.⁴¹¹ The Ninth Circuit has reasoned that “the drafters of the Constitution ‘knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.’”⁴¹² It has embraced its own CIMT definition that focuses on intent to do harm—not to the improvised, judicially constructed “morals” of society, but to the individuals of which that society is composed.⁴¹³

The Ninth Circuit approach—that of prioritizing the individual—is at odds with traditional CIMT case law.⁴¹⁴ But so is freeing women from societal and legal control of their sexuality.⁴¹⁵ As the court has said, “Not all offenses against the accepted rules of social conduct qualify as crimes at all.”⁴¹⁶ While the U.S. Supreme Court is unlikely to take up the charge of individual autonomy again after *Dobbs*,⁴¹⁷ the Ninth Circuit’s approach can end centuries of policing women’s sexuality by using the very malleability often complained of in the moral turpitude standard. Other courts should follow its lead.

IV. CONCLUSION

This inquiry into turpitude began in the moral failings of fifteenth-century Florence, and it has ended in the immigration courts of America. Courts have frequently complained that moral turpitude is a cipher, a vague and frustrating code of shifting definition, but they apply it anyway, bound by its presence—and centuries of

407. Lerner, *supra* note 42, at 97–98, 103 (noting Congress’s repeated renewal of the phrase in the law).

408. Holper, *Deportation*, *supra* note 43, at 656 (quoting *Matter of Torres-Varela*, 23 I. & N. Dec. 78, 83 (B.I.A. 2001)).

409. Lerner, *supra* note 42, at 109–10.

410. *Id.*

411. *See supra* Parts II.C.2, III.B.3.

412. *Walcott v. Garland*, 21 F.4th 590, 601 (9th Cir. 2021) (quoting *Lawrence v. Texas*, 539 U.S. 558, 579 (2003)).

413. *See supra* Part II.C.2.a.

414. Lerner, *supra* note 42, at 110 (“In arriving at these conclusions, the Ninth Circuit has employed a definition of CIMTs (‘[o]nly truly unconscionable conduct’) that reflects an unwarranted contraction from the traditional definition of CIMTs.” (alteration in original) (quoting *Robles-Urrea v. Holder*, 678 F.3d 702, 708 (9th Cir. 2012))).

415. *See supra* Part II.A.2.a.

416. *Robles-Urrea*, 678 F.3d at 708.

417. *See supra* Part II.B.2.a.

precedent—in the law. And yet, turpitude is not so amorphous as claimed. Turpitude is a tool to funnel sexual impulses toward an archaic vision of the American family cemented in the early days of the nation, and it does so by policing women, enforcing old notions of chastity, and isolating them from reproductive options.

The law must necessarily answer “metaphysical controversies” because the law governs how society survives.⁴¹⁸ So long as that law adheres, however, to a narrowly defined vision of that society, created by men and for men, moral turpitude will be wielded against women. As the *Dobbs* dissent declared, “[T]he expectation of reproductive control is integral to many women’s identity and their place in the Nation.”⁴¹⁹ Reproductive rights order a woman’s “thinking” and “living.”⁴²⁰ The courts of the nation have used, and can still use, moral turpitude to do the same.

418. See Means, *supra* note 175, at 416.

419. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2345 (2022) (Breyer, Sotomayor, and Kagan, J.J., dissenting).

420. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).