

The Muddle of Determining Moral Turpitude After *Silva-Trevino*

By Eric H. Singer

Your client, a former California gang member, finds himself in immigration proceedings facing removal from the United States under 8 U.S.C. § 1227(a)(2)(A), for having been previously convicted, supposedly, of “a crime that involves moral turpitude.” Specifically, he pleaded guilty to felony vandalism in violation of Cal. Penal Code § 594(a) for having maliciously defaced and damaged somebody else’s car window and having done so in association with, and for the benefit of, criminal street gang conduct. Those are all the facts that the California criminal information filed by the district attorney yield, and the judgment of conviction shows no more except that that he was sentenced to two years in prison plus another three for the fact that the crime was gang-related. However, hearsay accounts from the victim in the underlying police reports that find their way into the Immigration Court’s jacket show your client, along with three of his fellow gang members, was carrying a knife when he approached the home of the car’s owner, who was in her driveway when she saw the men coming and had to flee into her house, and that the four gang members wrote “Death to all Mexicans” on the car’s rear window before proceeding to smash it with beer bottles and a bat.

Will the immigration authorities be able to sustain their burden of showing by clear and convincing evidence, as they must, *see Matter of Tobar-Lobo*, 24 I. & N. Dec. 143, 144 (BIA 2007), that your client’s conviction for felony vandalism was a crime involving moral turpitude?

When most non-immigration lawyers think of the term “moral turpitude,” they may likely recall the old Model Code of Professional Responsibility’s Disciplinary Rule 1-102(A)(3), which forbade a lawyer from engaging in “illegal conduct involving moral turpitude.” Standards for how to measure “moral turpitude” under Rule 1-102(A)(3) were never fixed. Spiro Agnew’s conviction for willfully attempt to evade paying federal income taxes so obviously, or *per se*, involved moral turpitude that it warranted no factual analysis or discussion. *See Maryland State Bar Ass’n v. Agnew*, 271 Md. 543, 551 (1974). An offense like simple possession of cocaine did *not* inherently involve moral turpitude, yet that did not end the matter: bar counsel and the court might still find moral

turpitude “depending upon the facts surrounding the commission of the offense.” In *Re Gardner*, 650 A.2d 693, 697 (D.C. 1994).

In immigration law, the “moral turpitude” bar to entry to the United States against non-citizen criminals goes back 120 years, and the provision calling for the deportation or removal from the United States of noncitizens ostensibly convicted of a crime of moral turpitude, such as your client above, goes back almost 100 years. But, just as the two cases referred to above under DR 1-102(A)(3) hint at the tension between a *per se* or categorical analysis and a factual analysis for determining “moral turpitude,” this longevity has not meant that the methodology of determining what constitutes a crime of moral turpitude has remained unified and certain. This is particularly so in light of former Attorney General Michael Mukasey’s still relatively recent decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (Att’y Gen. 2008), which both synthesizes and materially modifies the methodology.

The Immigration and Nationality Act (“INA”) has never defined the term moral turpitude. One regulation mandates that a “Consular Officer must base a determination that a crime involves moral turpitude upon moral standards generally prevailing in the United States,” 22 C.F.R. § 40.21(a)(1) (2009), but that provides no definitional guidance either. And so immigration judges, enforcement bureaucrats, and practitioners are left with the term as it has been interpreted by agency -- namely, by the Board of Immigration Appeals (“BIA”), our country’s highest administrative authority on most immigration matters, or the BIA’s ultimate administrative overseer, the Attorney General.

Thus, “[t]o qualify as a crime of moral turpitude ..., a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.” *Matter of Silva-Trevino*, 24 I. & N. Dec. at 689 n.1. This general definition “rearticulates with greater clarity the definition that the Board (and many courts) have in fact long applied,” *id.*, namely, a crime involving “conduct that shocks the public conscience as being inherent base, vile, or depraved, contrary to the rules of morality and the duties owed between man and

man, either one's fellow man or society in general." *Matter of Perez-Contreras*, 20 I. & N. Dec. 615, 618 (BIA 1992).

The starting point, at least, in determining whether a crime "involves" moral turpitude, as vaguely defined above, has always been the statutory definition of the crime for which the noncitizen has actually been convicted -- *without* regard to the specific facts and circumstances under which the crime was committed. *See, e.g.*, *Matter of L-V-C*, 23 I. & N. Dec. 594 (BIA 1999). As Judge Learned Hand reiterated in a very early case, "When by its definition it (the crime) does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral Conversely, when it does, no evidence is competent that he was in fact blameless." *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1023 (2d Cir. 1931) (internal citations and quotations omitted).

This "categorical" approach was always thought to be the fairest mode of inquiry at the end of the day. As one federal district judge was quoted as stating, "I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon they were convicted and admit the one and exclude the other." *See Planas v. Landon*, 104 F. Supp. 384, 387 (S.D. Cal. 1952) (quoting *United States v. ex rel. Mylius v. Uhl*, 203 F. 152, 153 (S.D. N.Y. 1913)).

And the categorical approach (and later, the modified categorical approach noted below) was also thought to be the most administratively feasible. *See Marciano v. I.N.S.*, 450 F.2d 1022, 1027 (8th Cir. 1971) (Eisele, J., dissenting) (discussing original rationale that Immigration Service could not properly or timely examine underlying factual context of every conviction to ascertain moral turpitude). Indeed, the Fourth Circuit once stated adamantly it was never Congress' intention "to saddle the INS and the courts with the extremely difficult and time-consuming burden of developing the facts surrounding the commission of the crime for which the alien was convicted." *Castle v. I.N.S.*, 541 F.2d 1064, 1066 n.5 (4th Cir. 1976).

As doctrine evolved over time, however, if it was determined that *not* every violation of the particular criminal statute at issue necessarily involved moral turpitude -- that is, if there were a "realistic probability, not a theoretical possibility that the State would apply its statute to conduct that falls outside the generic definition" of moral turpitude, *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) -- the analysis could, and had to, continue. Under the "modified categorical approach" thereby triggered, the courts had

to look to the "record of conviction" -- namely, the prevailing indictment, the judgment of conviction, jury instructions, signed guilty pleas or pleas transcripts or colloquies -- "to see," in fact, "whether the *conviction in the particular case* involved moral turpitude." *Nunez v. Holder*, 595 F.3d 1124, 1129-1130 (9th Cir. 2010) (emphasis added). Under this "modified categorical approach," however, examining the actual evidence upon which the plea or verdict was rendered, or any other materials *other* than what constituted or was contained in the "record of conviction," remained prohibited. *See Matter of Short*, 20 I. & N. Dec. 136 (BIA 1989).

That was the formal state of moral turpitude methodology administratively and across the vast majority of federal circuits for literally decades until the Attorney General's decision added a radical third step in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (Att'y Gen. 2008). *See, e.g.*, Katherine Brody, *Preliminary Analysis of Nijhawan v. Holder*, 14 Bender's Immig. Bull. 923, 935 (2009). In that "bold" decision, as one commentator called it, *see Ann Attala, A User's Guide to Matter of Silva-Trevino*, 13 Bender's Immig. Bull. 1568, 1572 (2008), decision, the Attorney General decided that if the record of conviction, under the modified categorical approach, failed to resolve whether the noncitizen's criminal conviction involved moral turpitude, immigration enforcement authorities and adjudicators could "keep going," so to speak, and still consider, "if necessary and appropriate," *id.* at 699, "admissible evidence" outside the record of conviction "bearing on" the question of moral turpitude. *Matter of Louissant*, 24 I. & N. Dec. 754, 757 (BIA 2009).

Since the Federal Rules of Evidence do not apply in immigration proceedings and "admissible" evidence in such proceedings is that which is "probative" and "not fundamentally unfair," a great deal of relevant evidence could prove admissible, not necessarily just admissions made by the noncitizen or his or her testimony before an immigration judge. And, it has been feared, immigration judges could have a great deal of latitude in taking another bite at the apple to determine whether, in effect, "the" crime of which the alien was convicted involved moral turpitude, as opposed to the judge's being limited to whether the alien was convicted, generically, of "a crime of moral turpitude." Although, at the time of this writing, the United States Court of Appeals for the Third Circuit has blasted *Silva-Trevino's* allowance for this extra bite at the apple, *see Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 470-74 (3d Cir. 2009) as an impermissible interpretation of the INA, and the Eighth, Eleventh, and Fourth Circuits have also now expressly rejected *Silva-Trevino*, *see Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010), *Farjardo v. Att'y Gen.*,

659 F.3d 1303, 1310 (11th Cir. 2011), *Prudencio v. Holder*, No. 10-2382, 2012 U.S. App. LEXIS 1693 at *16-27 (4th Cir. Jan. 30, 2012), *Silva-Trevino* so far remains administratively binding throughout every other federal circuit in which an immigration proceeding originates.

What, then, of your client's case noted at the outset?

You begin with the definition of vandalism under the statute, here Section 594(a) of the California Penal Code under which he was convicted, which provides in relevant part:

Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:

- (1) Defaces with graffiti or other inscribed material.
- (2) Damages.
- (3) Destroys.

Section (b)(1) sets forth various penalties for vandalism depending in part on whether the damage caused by the vandalism is under or over \$400.

Cal. Penal Code § 7 defines "maliciously." "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."

Under the categorical approach, you (and the courts) must conduct an elements-only examination of Cal. Penal Code § 594(a) to determine whether a conviction necessarily falls within the general definition of a crime of moral turpitude (because, for example, a required element evidences moral turpitude) or "whether the conduct proscribed in the statute is broader than, and so does not categorically fall within, this generic definition." *Nunez*, 594 F.3d at 1129 (internal quotations and citation omitted). If the crime does not qualify as necessarily morally turpitudinous under the categorical approach, "we apply the modified categorical approach and look to documents within the record of conviction," namely, the indictment, judgment of conviction, jury instructions, signed guilty pleas or plea transcripts, "to see whether the conviction in the particular case involved moral turpitude." *Id.* at 1129-30.

Because a conviction under § 594(a) does require *scienter* -- in this case, the element of malice -- the crime contains at least *one* factor needed to qualify as a crime involving moral turpitude. See *Silva-Trevino*, 24 I. & N. Dec. at 689 n.1. However, the presence of that required *mens rea* element alone proves

insufficient to convert the crime into involving one necessarily involving moral turpitude *per se*. See *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240-41 (9th Cir. 1995) (rejecting the proposition that requirement of malice or evil intent alone suffices to show that such a non-fraud based crime necessarily involves moral turpitude and holding that "the bare presence of evil intent is not enough to convert a crime that is not serious into one of moral turpitude leading to deportation. . ."). As the Court in *Rodriguez-Herrera* stated in discussing a conviction under comparable Washington state statute "malicious mischief," or vandalism, "One can be convicted of malicious mischief for destroying as little as \$250.00 of another's property with an evil wish to annoy. . . The Washington statute's reach thus extends to include pranksters with poor judgment," and does not necessarily involve an "act of baseness or depravity contrary to accepted moral standards." *Rodriguez-Herrera*, 52 F.3d at 240 (internal citation omitted).

And, indeed, as you examine annotated cases under Cal. Penal § 594(a), you find that the quality of reprehensibility does not necessarily inhere in every conviction there either. Thus, one may be convicted of felony or misdemeanor vandalism under Cal. Penal § 594(a) for: 1) writing the initials "RTK" (supposedly standing for "right to crime") with a red marker on the glass window of a projection booth in a local movie theatre, even if the marking can be easily removed, see *In re Nicholas Y.*, 85 Cal. App. 4th 941, 943-44 (Cal. Ct. App. 2000); 2) egging the home of a neighbor who apparently decided not to participate in passing out candy to trick-or-treaters on Halloween night, see *In re Brittany L.*, 99 Cal. App. 4th 1381, 1384 (Cal. Ct. App. 2002); 3) destroying one spouse's both separate and community property contained within the marital home during a fit of rage after being called a "crack-head" by the spouse and told to leave the house, see *People v. Wallace*, 123 Cal. App. 4th 144, 147 (Cal. Ct. App. 2004); and 4) for causing a rip to a window screen, damage to a bedroom door, a chip to a kitchen floor tile, and a liquid spill on a carpet during an unapproved going-away party for oneself at one's grandmother's house while one's grandmother is out of town, see *In Re Leanna W.*, 120 Cal. App.4th 735, 737, 740 (Cal. Ct. App. 2004).

Thus, because § 594(a) "does not require proof of an element or fact that categorically evidences moral turpitude" -- that is, because § 594(a)'s alternative elements of "defacing with graffiti," "damaging," or "destroying" do not categorically evidence "baseness" and "depravity" -- the burden shifts to the government to prove, under a modified categorical inquiry, "that the alien's individual conviction was for a crime that in fact involved moral turpitude." *Silva-Trevino*, 24 I. & N. Dec. at 703 n. 4. Doesn't it?

That is a good thing, you think for you client, because his "record of conviction" is silent. The criminal information and the alleged facts therein to which your client plead guilty simply shows that he was convicted of the malicious destruction of a car window, and that he committed the offense in association with a criminal street gang. The record of conviction is relatively colorless: it conveys no manner of destruction or damage and no animus. You wonder how any rational adjudicator can glean reprehensibility from this record and thus believe the inquiry should be over in your client's favor.

You would be likely wrong, however, under *Silva-Trevino* and its progeny. In order for the inquiry to stop under the modified categorical approach, so the BIA has found since *Silva-Trevino*, the record of conviction must "conclusively" establish that a conviction does *not* involve moral turpitude. See *Matter of Guzman*, 25 I. & N. Dec. 465 (2011). That the record of conviction is silent is on the issue of reprehensibility in your client's case is not to say it "resolves" or is "conclusive" about whether the conviction involves moral turpitude in the BIA's view, apparently. See *Matter of Alfaro*, 21 I. & N. Dec. 417, 424 (BIA 2011) (where no documents in record of conviction showed that alien convicted of statutory rape knew or should have known his victim was a child, immigration judge *must* proceed to third stage of the inquiry.)

And you are left to wonder whether the immigration judge will deem admissible the hearsay accounts within the police reports showing that your client approached the victim's residence carrying lethal weapons and carrying out a defacement and destruction in the spirit of a "hate crime" – something, perhaps, so depraved and contrary to accepted moral standards that his conviction suddenly *could* evidence moral turpitude.

In short, after *Silva-Trevino*, your client may be left holding the proverbial bag after all, and you and your fellow practitioners and enforcement authorities are certainly left with what can be described only as an intellectual mess.

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