"Vague Laws Invite Arbitrary Power": Making the Case for Crimes Involving Moral Turpitude Being Void for Vagueness

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The Supreme Court in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) dramatically held that one aspect of the crime of violence definition contained within the aggravated felony provision of the Immigration and Nationality Act (INA) was unconstitutionally vague. An aggravated felony conviction can result in a non-citizen's swift removal from the United States, and thus the Supreme Court's decision in *Dimaya* provided much needed respite to non-citizens who have been charged with removability under the vague clause of the residual clause in the crime of violence provision. This led one to question whether a crime involving moral turpitude (CIMT) could similarly be challenged for being impermissibly vague under the Supreme Court's reasoning in *Dimaya*.

Unfortunately, on July 17, 2018, the Ninth Circuit in *Martinez-de Ryan v. Sessions* denied a petition for review of a foreign national's denied application for cancellation of removal based on a finding that she had committed a CIMT. No. 15-70759 (9th Cir. 2018). The Ninth Circuit rejected the Petitioner's arguments that the phrase 'crime involving moral turpitude' is unconstitutionally vague, and distinguished the Supreme Court's decisions in *Dimaya* and its predecessor, *Johnson v. United States*, 135 S. Ct. 2551 (2015). The relevant aggravated felony provision in *Dimaya* was the residual clause of the crime of violence definition at 18 U.S.C. § 16(b), which provides that "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense". The relevant provision in *Johnson* was the residual clause of "violent felony," as defined by 18 U.S.C. § 924(e)(2)(B), in the Armed Career Criminal Act, which similarly provides that a violent felony is one that "involves conduct that presents a serious potential risk of physical injury to another." The Supreme Court found in each respective case that the residual clauses created "grave uncertainty about how to estimate the risk posed by a crime" because it "tie[d] the judicial assessment of risk" to a speculative hypothesis about the crime's "ordinary case," but provided no guidance on how to figure out what that ordinary case was. *Dimaya* at 1213; *Johnson* at 2557. The residual clauses had resulted in reliance upon judge's "guesswork and intuition," and "fail[ed] to give ordinary people fair notice of the conduct it punishes," which invited "arbitrary enforcement" by judges. *Johnson* at 2557. Such arbitrary enforcement, the Court held, was determinative of impermissible vagueness.

Instead of following *Dimaya* and *Johnson*, the Ninth Circuit in *Martinez-de Ryan* found that it should follow precedent in *Jordan v. DeGeorge*, 71 S. Ct. 703 (1951) (finding that "whatever else the phrase … may mean," crimes involving fraud "have always been regarded as involving moral turpitude") and its Ninth Circuit corollary decision, *Tseung Chu v. Cornell*, 247 F.2d 929 (1957), which came after the enactment of the 1952 Act (which slightly changed the wording of the CIMT provision from the 1917 Act which controlled in *DeGeorge*). Though acknowledging that *Johnson* and *Dimaya* "cast some doubt on [*DeGeorge's*] general reasoning," the Ninth Circuit nevertheless reasoned that *Johnson* and *Dimaya* dealt with residual clauses, whereas the definition of CIMTs are "tethered to common law principles." *Martinez-de Ryan*, at *2.

It is unclear what the Ninth Circuit means when it states that CIMTs are tethered to common law principles. The impermissible vagueness of CIMTs are evident in courts' ongoing failure to

establish a consistent framework to evaluate whether a crime involves 'moral turpitude,' and inconsistent outcomes when dealing with the same crimes. In *Johnson,* the court acknowledged that the failure of persistent efforts to establish a legal standard can provide evidence of vagueness. 135 S. Ct. at 2558 (citing *United States v. L. Cohen Grocery Co*., 255 U.S. 81, 91 (1921)). As applied to CIMTs, the persistent failure to delineate a clear analytical framework that apprises people of common intelligence, and indeed learned judges, of its meaning is a clear indication of unconstitutional vagueness.

Courts have attempted to define moral turpitude in varying degrees, typically with reliance on Black's Law Dictionary, which currently defines the phrase as:

…shameful wickedness — so extreme a departure from ordinary standards of honest, good morals, justice, or ethics as to be shocking to the moral sense of the community. It has also been defined as an act of baseness, vileness, or depravity in the private and social duties which one person owes to another, or to society in general, contrary to the accepted and customary rule of right and duty between people.

MORAL TURPITUDE, Black's Law Dictionary (10th ed. 2014); *see also*, e.g., *United States v. Smith*, 420 F.2d 428, 431 (5th Cir. 1970). The Board of Immigration Appeals (BIA) has added that a CIMT is "per se morally reprehensible and intrinsically wrong, or *malum in se* so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994). The varying definitions of moral turpitude in case law are as vague as the phrase itself.

These open-ended definitions have led to inconsistent application by judges, where they must rely upon their own biases, or on precedent decisions where other judges have relied upon their own biases, to determine what is morally reprehensible. In his powerful dissent in *DeGeorge*, Justice Jackson declared that "uniformity and equal protection of the law can come only from a statutory definition of fairly stable and confined bounds," not on the whims of judges. *DeGeorge*, at 242. He similarly rejected the *malum in se* versus *malum prohibitum* distinction, stating that "this classification comes to us from common law, which in its early history freely blended religious conceptions of sin with legal conceptions of crimes." *Id*. at 237. Even accepting the government's contention in *DeGeorge* that these crimes ought to be "measured against the moral standards in contemporary society," we would see uneven application throughout the country and overtime. *Id*. Justice Jackson concluded that "irrationality is inherent" when creating case law based on fluid morality, as opposed to finite statutory meaning. *Id*. at 239.

In future challenges to the CIMT provision, practitioners can point to various inconsistencies as evidence of arbitrary enforcement, and hence, vagueness. For example, some courts have treated 18 U.S.C. § 1001 (false statements) as a CIMT (see, e.g., *Ghani v. Holder*, 557 F.3d 836 (7th Cir. 2009)), and others have not (see, e.g., *Hirsch v. Immigration & Naturalization Serv.*, 308 F.2d 562 (9th Cir. 1962)). Similarly, some courts have treated certain money laundering crimes as a CIMT (*Matter of Tejwani*, 24 I&N Dec. 97 (BIA 2007), holding that the intentional use of monetary instruments to conceal or disguise proceeds of any crime was a CIMT), and others have not (*Goldeshtein v. I.N.S.*, 8 F.3d 645 (9th Cir. 1993), holding that structuring financial transactions to avoid currency reporting was not a CIMT). Admittedly, the arbitrary and inconsistent enforcement argument is difficult to make when it comes to crimes involving fraud (see, e.g., *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007), holding that trafficking of counterfeit good, even absence of an intent to defraud, is a CIMT; *see also*, *Planes v. Holder*, 652 F.3d 991, 997-98 (9th Cir. 2011), stating

"the longstanding rule that crimes that have fraud as an element" are CIMTs), and in the case of Ms. Martinez-de Ryan, bribery of an official under 18 U.S.C. § 666(a)(2) (*see also*, *Matter of V-*, 4 I&N Dec. 100 (BIA 1950), holding that attempted bribery was a CIMT).

Practitioners can also point out that the INA includes specific criminal grounds for deportability and inadmissibility, including the failure to register as a sex offender, domestic violence, stalking, and child abuse, and defines what each of those crimes mean. Congress has failed to similarly define what is meant by moral turpitude, allowing courts to unevenly apply CIMT analyses, rendering some folks removable/inadmissible and others not, despite being found guilty of committing the same crimes. In *Dimaya*, Justice Gorsuch in his concurring opinion wrote that "[v]ague laws invite arbitrary power…. Today's vague laws… can invite the exercise of arbitrary power… by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up." 138 S. Ct. at 1223 (2018) (concurring in judgment). Without a precise definition of a CIMT, one can argue that such vagueness invites judges to make the law up according to their own biases, resulting in the erroneous removal of non-citizens.

The Ninth Circuit's decision in *Martinez-de Ryan v. Sessions* is not the end of the road for finding a CIMT unconstitutionally vague. Although the Ninth Circuit followed a Supreme Court precedent in *DeGeorge*, *Dimaya* and *Johnson* have cast some doubt on its general reasoning. Specifically, in light of *Dimaya* and *Johnson*, one can argue that the vagueness of the CIMT definition has resulted in reliance upon judge's "guesswork and intuition," and has failed "to give ordinary people fair notice of the conduct it punishes," resulting in arbitrary enforcement by judges. *Dimaya* at 1223 (citing to *Johnson* at 2557). Those who are unable to apply for relief because they have been found to have either been convicted of or have admitted to a CIMT must continue to litigate in other circuits until a CIMT is also rightfully found to be unconstitutionally vague.

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