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**In the Determination of Aliens Deportable under 8 U.S.C.
1251(a)(4) the Crime of Statutory Rape Is Usually Classified as
Rape and Such a Crime Manifestly Involves Moral Turpitude.**

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The danger inherent in a liberal use of the kidnap laws, as raised in *Levy*, has led some states to adopt the rule in *Daniels*. Since every forcible movement must necessarily begin with some form of assault, the definition and scope of asportation set out in *Adams* provides practical guidelines for distinguishing between kidnapping and other crimes. Texas, and other states which have a strict asportation requirement in their statutes, have not been called upon to rule on the scope necessary to commit the offense.⁶⁰

N. E. Maryan

ALIENS—CONSTITUTIONAL LAW—MORAL TURPITUDE—DEPORTATION
—IN THE DETERMINATION OF ALIENS DEPORTABLE UNDER 8 U.S.C.
§ 1251(a)(4) THE CRIME OF STATUTORY RAPE IS USUALLY CLASSIFIED
AS RAPE AND SUCH A CRIME MANIFESTLY INVOLVES MORAL TURPI-
TITUDE. *Marciano v. Immigration and Naturalization Service*, 450 F.2d
1022 (8th Cir. 1971).

Roni David Marciano is an alien who was born in Morocco in 1942 and entered the United States on an immigration visa in 1967. He is a citizen of Morocco and Israel. Marciano was convicted of statutory rape in violation of Minnesota law¹ and was sentenced to three years imprisonment. His conviction was affirmed by the Minnesota Supreme Court.² Petitioner, Marciano, contends that his conviction does not form a basis for deportation under 8 U.S.C. § 1251(a)(4) because (1) the phrase "crime involving moral turpitude" is unconstitutionally vague and violates the due process clause of the fifth amendment;³ and (2) the state offense of which the petitioner stands convicted is not a crime involving "moral turpitude" under Minnesota statutes.⁴ Held—*Affirmed*. In the determination of aliens deportable under 8 U.S.C. § 1251(a)(4)

S.W.2d 254 (Tex. Crim. App. 1966), where the defendant sought the name of a prostitute and the court found this of adequate value to uphold conviction.

⁶⁰ It is interesting to note that the proposed revision of the Texas Penal Code section 20.01 redefines kidnapping as ". . . intentionally or knowingly . . . [detaining] . . . another for a *substantial period*, or intentionally or knowingly . . . [moving] . . . another a *substantial distance* from the vicinity where he is found, with intent: (1) to hold the other for ransom or . . . hostage; or (2) to facilitate the commission . . . of a felony; or (3) to inflict serious bodily injury or death on the victim . . . ; or (4) to terrorize the victim or another." (Emphasis added.)

¹ MINN. STAT. ANN. § 609.295(4) (Supp. 1971).

² *State v. Marciano*, 167 N.W.2d 41 (Minn. 1969).

³ U.S. CONST. amend. V.

⁴ MINN. STAT. ANN. § 609.295(4) (Supp. 1971). The statute makes sexual relations with a female between the ages of sixteen and eighteen a crime without proof of criminal intent. Also, the usual statutory rape defenses of reasonable mistake as to age, previous unchaste character, and intended marriage are unavailable to the petitioner.

the crime of statutory rape is usually classified as rape and such a crime manifestly involves moral turpitude.⁵

The present law under which the petitioner is being deported is the descendant of the Immigration Act of 1917.

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who . . . (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more. . . .⁶

The Immigration Act of 1917 was patterned after earlier immigration laws⁷ which had similar provisions concerning crimes involving moral turpitude. The statute, which provides for the deportation of aliens who have committed crimes involving "moral turpitude," has been troublesome to the courts over the years in their attempts to define this elusive phrase.⁸ Equally difficult and intertwined with the first problem has been the trauma generated concerning the *procedural* limitations which burden the courts in determining the existence of moral turpitude.⁹

At the congressional hearings which preceded the Immigration Act of 1917, it was mentioned that no one actually knew what constituted moral turpitude.¹⁰ A widely accepted definition of 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."¹¹ A precise definition of moral turpitude has never been es-

⁵ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1025 (8th Cir. 1971). See also *Ng Sui Wing v. United States*, 46 F.2d 755, 756 (7th Cir. 1931); *Bendel v. Nagle*, 17 F.2d 719, 720 (9th Cir. 1927).

⁶ 8 U.S.C. § 1251(a)(4) (1970) (previously enacted as Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889).

⁷ 8 U.S.C. § 1251(a)(4) (1970) (originally enacted as Immigration Act of 1903, ch. 1012, § 2, 32 Stat. 1213, re-enacted as Immigration Act of 1907, ch. 1134, § 2, 34 Stat. 898).

⁸ *Jordan v. De George*, 341 U.S. 223, 71 S. Ct. 703, 95 L. Ed. 886 (1951); *Giglio v. Neelly*, 208 F.2d 337 (7th Cir. 1953); *Bendel v. Nagle*, 17 F.2d 719 (9th Cir. 1927); *United States ex rel. Griffo v. McCandless*, 28 F.2d 287 (E.D. Pa. 1928); *In re Henry*, 99 P. 1054 (Idaho 1909).

⁹ *Pino v. Nicolls*, 119 F. Supp. 122 (D. Mass.), *aff'd*, 215 F.2d 237 (1st Cir. 1954), *rev'd per curiam on other grounds sub nom.*, *Pino v. Landon*, 349 U.S. 901, 75 S. Ct. 576, 99 L. Ed. 1239 (1955). See *United States ex rel. Robinson v. Day*, 51 F.2d 1022 (2d Cir. 1931); *Tillinghast v. Edmead*, 31 F.2d 81 (1st Cir. 1929); *United States ex rel. Mylius v. Uhl*, 210 F. 860 (2d Cir. 1914). Procedurally, the courts cannot look to the particular circumstances of the crime to determine moral turpitude.

¹⁰ Hearings before House Comm. on Immigration & Nat. on H.R. 10384, 64th Cong., 1st Sess. 8 (1917). (Cited in *Jordan v. De George*, 341 U.S. 223, 234 n.5, 71 S. Ct. 703, 709 n.5, 95 L. Ed. 886, 894 n.5 [1951]). "In 1926 the House Committee on Immigration and Naturalization determined to delete the phrase from the act. But to date Congress has been unable to agree on changes." 43 HARV. L. REV. 117, 121 n.43 (1929) (citations omitted).

¹¹ *In re Henry*, 99 P. 1054, 1055 (Idaho 1909); *Traders & Gen. Ins. Co. v. Russell*, 99 S.W.2d 1079, 1084 (Tex. Civ. App.—Fort Worth 1936, writ dismissed); BLACK'S LAW DICTIONARY 1160 (4th ed. 1951).

established primarily because the term refers to changing social standards rather than legal standards.¹² It has been generally agreed that a crime involving moral turpitude is such an act which grievously offends the moral code of society even in the absence of a statute prohibiting such activity.¹³

*United States ex rel. Mylius v. Uhl*¹⁴ is the oldest and probably most oft cited case on moral turpitude.

[T]he law must be administered upon broad, general lines and if a crime does not in its *essence* involve moral turpitude, a person found guilty of such a crime cannot be excluded because he is shown, aliunde the record, to be a depraved person.¹⁵

In *Mylius*, for the first time, the procedure was adopted whereby moral turpitude "must be determined from the judgment of conviction and not from the testimony adduced at the trial."¹⁶ This, and similar cases, have caused most of the problems in this area of the law because of the patent uncertainty of moral turpitude and because of the often questioned method of determining the presence of moral turpitude. *Mylius* still represents the prevailing view of the United States Courts of Appeals.¹⁷

*Pino v. Nicolls*¹⁸ represents the minority view and differs from the majority of the circuits in its classification of crimes which involve moral turpitude, but echoes *Mylius* concerning the procedure to be used in determining moral turpitude.

If the crime in its *general nature* is one which in *common usage* would be classified as a crime involving moral turpitude, neither the administrative officials in a deportation proceeding nor the courts on review of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma of moral obliquity.¹⁹

¹² *United States ex rel. Manzella v. Zimmerman*, 71 F. Supp. 534 (E.D. Pa. 1947); 3 AM. JUR. 2d *Aliens and Citizens* § 80 (1962).

¹³ *United States v. Carrollo*, 30 F. Supp. 3, 6 (W.D. Mo. 1939).

¹⁴ *United States ex rel. Mylius v. Uhl*, 210 F. 860 (2d Cir. 1914).

¹⁵ *Id.* at 863 (emphasis added).

¹⁶ *Id.* at 863.

¹⁷ *Rassano v. Immigration & Nat. Serv.*, 377 F.2d 971 (7th Cir. 1966); *Wadman v. Immigration & Nat. Serv.*, 329 F.2d 812 (9th Cir. 1964); *Ablett v. Brownell*, 240 F.2d 625 (D.C. Cir. 1957); *United States ex rel. McKenzie v. Savoretti*, 200 F.2d 546 (5th Cir. 1952); *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir. 1939). "When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral." *Robinson v. Day*, 51 F.2d 1022 (2d Cir. 1931).

¹⁸ *Pino v. Nicolls*, 215 F.2d 237 (1st Cir. 1954).

¹⁹ *Id.* at 245 (emphasis added).

*Jordan v. De George*²⁰ is one of the few cases in this area which has been heard by the United States Supreme Court.²¹ The petitioner in *De George* was convicted of conspiring to violate the Internal Revenue Code by possessing and selling whisky without paying the appropriate tax. The Court found that the immigration statute in question had a sufficiently definite meaning to be a constitutional standard for deportation. The strong dissent in *De George* questions the constitutionality of the moral turpitude test by illustrating many instances in which courts have wrestled with the phrase and the inconsistency with which the term is applied.²²

In *Marciano*, the court rejected the petitioner's contention that the term moral turpitude was unconstitutionally vague.²³ The petitioner next contended that the crime of which he was convicted, statutory rape, did not involve moral turpitude.²⁴ The Minnesota statute, which is controlling in this case, provides:

Whoever has sexual intercourse with a female child under the age of 18 years and not his spouse may be sentenced as follows: . . .
(4) if the child is 16 years of age, but under the age of 18 years and the offender is 21 years of age or older, by imprisonment for not more than three years.²⁵

The statutes further provide that "[c]riminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question."²⁶ The Minnesota Supreme Court admitted that the application of MINN. STAT. ANN. 609.02 subd. 9(6) (1964) "may lead to unjust results," but concluded that *Marciano* was not such a case.²⁷

In the instant case, the question is whether or not a conviction on a charge of statutory rape *usually* and *manifestly* involves moral turpitude

²⁰ *Jordan v. De George*, 341 U.S. 223, 71 S. Ct. 703, 95 L. Ed. 886 (1951).

²¹ See also *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 53 S. Ct. 665, 77 L. Ed. 1298 (1933) (petitioner deported for counterfeiting).

²² *Jordan v. De George*, 341 U.S. 223, 239, 241, 71 S. Ct. 703, 712, 713, 95 L. Ed. 886, 896, 897 (1951).

²³ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1024 (8th Cir. 1971), citing *Jordan v. De George*, 341 U.S. 223, 71 S. Ct. 703, 95 L. Ed. 886 (1951).

²⁴ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1024 (8th Cir. 1971). See also *Forbes v. Brownell*, 149 F. Supp. 848, 850 (D.D.C. 1957). "When inquiring into the nature of a statutory crime, the definitive name, or label, attached to the proscribed conduct is not the criteria for determining whether such offense involves moral turpitude. The impact upon moral turpitude, inherent in a conviction under a criminal statute, must be measured by the language delineating the offense, for therein is found the elements of the crime; and, from the elements of the offense determination of whether or not moral turpitude is involved must be made."

²⁵ MINN. STAT. ANN. § 609.295 (Supp. 1971).

²⁶ MINN. STAT. ANN. § 609.02 subd. 9(6) (1964).

²⁷ *State v. Marciano*, 167 N.W.2d 41, 42 (Minn. 1969), citing *State v. Morse*, 161 N.W.2d 699, 703 (Minn. 1968).

without a thorough examination of all the circumstances of the case. The record shows that the petitioner admitted to having intercourse with the underaged female, knowing fully that she was underage and that he was the aggressor. This was enough to convict the petitioner and the record did not indicate anything *unusual* about the case.²⁸ The majority in *Marciano* concludes that the crime of statutory rape does not include the element of *mens rea*²⁹ because of the very nature of the offense and that as long as the necessary elements of the crime are present to convict under state law then the petitioner is guilty of committing a crime involving moral turpitude.³⁰

The dissent in *Marciano* questions the "traditional" rule which is followed by the majority of the United States Courts of Appeals.³¹

Neither immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral.³²

The aforementioned rule is credited to *Mylius* and the reason stated for the rule is one of practical, administrative convenience. "[I]t would be extremely difficult and time-consuming for the Immigration Service to examine into the factual context of every conviction sustained by an alien to see whether moral turpitude was, or was not, present in the circumstances. . . ."³³ This administrative procedure was designed to afford uniform protection to the accused and to speed the administrative process, but the results have been anything but consistent.³⁴

²⁸ Federal courts have consistently held that statutory rape is a crime involving moral turpitude. *Pino v. Nicolls*, 215 F.2d 237, 240 (1st Cir. 1954); *Ng Sui Wing v. United States*, 46 F.2d 755, 756 (7th Cir. 1931); *Bendel v. Nagle*, 17 F.2d 719, 720 (9th Cir. 1927).

²⁹ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1025 (8th Cir. 1971), *citing* *Matter of Dingena*, 11 L. & N. Dec. 723 (1966).

³⁰ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1025 (8th Cir. 1971). *See also* *Tutrone v. Shaughnessy*, 160 F. Supp. 433, 435 (S.D.N.Y. 1958). "The essential question in determining whether a crime involves moral turpitude is whether the proscribed act, as defined by the law of the state in which it was committed, includes elements which necessarily demonstrate the baseness, vileness, and depravity of the perpetrator."

³¹ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1026 (8th Cir. 1971), *citing* *Rassano v. Immigration & Nat. Serv.*, 377 F.2d 971 (7th Cir. 1966); *Wadman v. Immigration & Nat. Serv.*, 329 F.2d 812 (9th Cir. 1964); *Ablett v. Brownell*, 240 F.2d 625 (D.C. Cir. 1957); *United States ex rel. McKenzie v. Savoretti*, 200 F.2d 546 (5th Cir. 1952); *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir. 1939).

³² *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1026 (8th Cir. 1971), *quoting* *Robinson v. Day*, 51 F.2d 1022 (2d Cir. 1931).

³³ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1027 (8th Cir. 1971).

³⁴ *Id.* at 1026 n.1. The two could have engaged in the act of intercourse in any one of twenty-seven states without *Marciano* being subject to prosecution for "statutory rape." In any of those states, he would not have committed this crime, and thus Congress' requirements for deportation would not have been met. It is obvious that there is a large element of happenstance involved in the determination of which aliens are deported and which are not, and it seems likely that Congress would have preferred a more nearly

The court in *Pino v. Nicolls* recognized the inadequacy of the traditional rule in which many criminals were allowed to remain in this country.³⁵ Some serious crimes could not be said to *necessarily* and *of their essence* involve moral turpitude. Therefore, *Pino* rejected the traditional rule embodied in *Mylius* and adopted its own rule that crimes which *common usage* would classify as a crime involving moral turpitude need not have their facts considered on appeal.³⁶

Both the majority and the dissent in *Marciano* agreed that the traditional rule of *Mylius* was defective. The majority adopted the better reasoned rule as expressed in *Pino*. The dissent takes issue with *Pino's* interpretation of congressional intent in this area indicating that an alien should be deported when the crime committed involves moral turpitude, not when that type of crime "commonly" or "usually" involves moral turpitude.³⁷ To illustrate the fallacy of the *Pino* rule, the dissent cites the landmark dissent in this area, *Tillinghast v. Edmead*.³⁸ In *Edmead* an uneducated, black domestic was deported for petty theft. In that case Judge Anderson did not feel that the *circumstances* warranted the severe punishment of deportation. The judge formulated several hypotheses to demonstrate the harm that could result from a procedure that prevented examination of the circumstances; a boy who steals an apple from an orchard, a mother who steals a bottle of milk for her hungry child or a foolish college student stealing a sign or a turkey. Judge Anderson concluded that the logical result of the majority opinion would render the aforementioned individuals guilty of crimes involving moral turpitude.³⁹ Judge Learned Hand hypothesized a similar situation in which he expressed his belief that it is the result of natural and normal curiosity for a boy to force his way into a vacant building, and that it would be pedantic to characterize this act as a crime inherently involving moral turpitude.⁴⁰ All of these hypothetical crimes involve criminal intent and criminal culpability even though none involve moral turpitude on its face. In the previous examples it is contended that any deportation without more information as to the particular circumstances of the crimes would be opposed to the plain language of the deportation statute. The *Marciano* dissent further suggests that the test to determine the presence of moral turpitude should be a question of fact as proposed in *Edmead*. It maintains that some

uniform treatment of aliens if it had anticipated this disparity in the law's application. However, this is a matter for the Congress rather than the courts.

³⁵ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1028 (8th Cir. 1971).

³⁶ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1028 (8th Cir. 1971), *citing* *Pino v. Nicolls*, 215 F.2d 237 (1st Cir. 1954).

³⁷ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1028 (8th Cir. 1971).

³⁸ *Tillinghast v. Edmead*, 31 F.2d 81, 84 (1st Cir. 1929) (dissenting opinion).

³⁹ *Id.* at 84.

⁴⁰ *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939).

crimes are of such a character as might or might not involve moral turpitude and that as to this class the circumstances must be regarded to determine whether or not moral turpitude existed.⁴¹

In decisions involving moral turpitude the assumption is often made that moral turpitude is merely collateral to a finding of criminal culpability. Criminal culpability involves *mens rea*, but moral turpitude might not.⁴² By its definition moral turpitude involves a question of morals and an act can possibly involve moral turpitude without being a crime against the state.⁴³ Since moral turpitude and criminality are different, Judge Eisele, in the *Marciano* dissent, suggests that they be assessed separately. The morals of a nation are constantly shifting, and it is concededly difficult for the administrative agencies to determine morality at any given time.⁴⁴

In the instant case, the defendant was convicted under Minnesota's statutory rape statute⁴⁵ which requires only that an act of intercourse occur with an underaged girl. There is no provision for the defenses of previous unchaste character, reasonable mistake as to age, or mistaken belief of a valid marriage.⁴⁶ On the petitioner's appeal,⁴⁷ the Minnesota Supreme Court indicated that some situations might arise in which application of its rules might violate the petitioner's constitutional rights. This admission by the court indicated that no one can say whether any of the possible defenses would be allowed in the prosecution of a case. Presumably, Minnesota relies on the "good judgment of prosecutors and jurors" to avoid an unjust result.⁴⁸ Consequently, under a statute similar to the Minnesota Act, no one can reasonably say that a conviction for a violation of the statutory rape law involves moral turpitude. A factual investigation into the circumstances of the case

⁴¹ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1028 (8th Cir. 1971). See also *Tillinghast v. Edmead*, 31 F.2d 81, 84 (1st Cir. 1929) (dissenting opinion).

⁴² *Hirsch v. Immigration & Nat. Serv.*, 308 F.2d 562, 567 (9th Cir. 1962). "A crime that does not necessarily involve evil intent, such as intent to defraud, is not necessarily a crime involving moral turpitude." *Forbes v. Brownell*, 149 F. Supp. 848, 850 (D.D.C. 1957). Where a statutory offense does not include criminal state of mind, equivalent to common law *mens rea*, as an essential element, a conviction does not impeach defendant's character or render him ineligible for admission to the United States.

⁴³ *In re Henry*, 99 P. 1054, 1055 (Idaho 1909); BLACK'S LAW DICTIONARY 1160 (4th ed. 1951).

⁴⁴ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1029 (8th Cir. 1971) (dissent); *United States ex rel. Manzella v. Zimmerman*, 71 F. Supp. 534, 537 (E.D. Pa. 1947); 3 AM. JUR. 2d *Aliens & Citizens* § 80 (1961). The dissent in *Marciano* also makes the point that no matter how difficult it is for the Immigration Service to determine moral turpitude "considerations of administrative convenience should certainly be secondary to the determination and enforcement of the obvious legislative intent." *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1029 (8th Cir. 1971).

⁴⁵ MINN. STAT. ANN. § 609.295(4) (Supp. 1971).

⁴⁶ See, e.g., NEB. REV. STAT. ANN. art. 28-408 (1964) (over 15 years of age and unchaste character); TEX. PENAL CODE ANN. art. 1183 (1961) (previous unchaste character of girl over 15 years of age).

⁴⁷ *State v. Marciano*, 167 N.W.2d 41, 42 (Minn. 1969).

⁴⁸ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1030 (8th Cir. 1971), citing *State*

would be required to determine whether or not moral turpitude was involved as suggested in *Edmead*.⁴⁹

The trial court granted a post-conviction evidentiary hearing. From the hearing and from the statements made in Marciano's guilty plea, it was determined that Marciano knew the girl's age and that they had discussed marriage prior to the date of the crime. The girl had been staying in his apartment, and she had told him that she was pregnant by another man. The petitioner contends that she left her separate bed in the early morning hours on the day of the crime, approached him, and invited him to have relations.⁵⁰ The Minnesota courts did not determine the truth of these statements. The trial court, after the post-conviction hearing, did find that Marciano was the "aggressor." It seems that Minnesota must find an "aggressor" and a "victim" in every act of intercourse with an underaged girl.⁵¹ This is the only indicia of evidence from the hearing which might indicate that petitioner's crime involved moral turpitude. Judge Eisele questions the reality of the "aggressor" rule and maintains that "[w]hen ascertaining the presence or absence of moral turpitude surrounding an act of consensual intercourse, it is not reasonable to assume that there must be an aggressor and a victim."⁵² The Minnesota courts did not rule that the petitioner's acts involved moral turpitude, and their decision was not questioned. The problem is that Congress has entrusted to the Immigration Service, and ultimately, to the federal courts, the interpretation of the Minnesota conviction.⁵³ The Minnesota finding that the petitioner was the aggressor does not automatically establish the issue of moral turpitude in federal court.⁵⁴ The *Marciano* dissent suggests that the majority determination, that the crime involved moral turpitude, is a conclusion of law and that the case should be remanded to determine the essential fact question.⁵⁵

In analyzing *Marciano*, it is obvious that there is a problem nationwide in determining when a crime involves moral turpitude.⁵⁶ Difficulties arose initially because of the inherent problems in defining the term and subsequently, because crimes involving moral turpitude can change

v. Morse, 161 N.W.2d 699, 703 (Minn. 1968).

⁴⁹ Tillinghast v. Edmead, 31 F.2d 81, 84 (1st Cir. 1929).

⁵⁰ State v. Marciano, 167 N.W.2d 41, 42 (Minn. 1969). By uncontroverted allegations the girl was sixteen years old and Marciano was twenty-five.

⁵¹ Marciano v. Immigration & Nat. Serv., 450 F.2d 1022, 1030 (8th Cir. 1971).

⁵² *Id.* at 1030.

⁵³ *Id.* at 1030.

⁵⁴ Marciano v. Immigration & Nat. Serv., 450 F.2d 1022, 1031 (8th Cir. 1971).

⁵⁵ *Id.* at 1031.

⁵⁶ See Jordan v. De George, 341 U.S. 223, 71 S. Ct. 703, 95 L. Ed. 886 (1951); Giglio v. Neely, 203 F.2d 337 (7th Cir. 1953); United States v. Francioso, 164 F.2d 163 (2d Cir. 1947); United States *ex rel.* Sollazzo v. Esperdy, 187 F. Supp. 753 (S.D.N.Y. 1960); Zgodda v. Holland, 184 F. Supp. 847 (E.D. Pa. 1960); Vidal y Planas v. Landon, 104 F. Supp. 384 (S.D. Cal. 1952); United States *ex rel.* Griffo v. McCandless, 28 F. Supp. 287 (E.D. Pa. 1928).

as the *mores* of our society change.⁵⁷ The courts agree that the best way to determine whether or not crime involves moral turpitude is to limit any investigation of the circumstances of the case to the record of conviction. The record includes the indictment or information, the plea, the verdict or judgment, and the sentence.⁵⁸

The judicial trend is toward maintaining the split of authority between the majority and the minority methods of determining the existence of moral turpitude.⁵⁹ Beginning with *Mylius*, the courts devised the traditional, simple test by which the Immigration Service could determine whether or not aliens should be deported. Any crime which did not inherently involve moral turpitude would not support a deportation. This rule was adopted as an administratively convenient way to effect the wishes of Congress.⁶⁰ In most cases, such as armed robbery, murder and forcible rape, the element of moral turpitude is evident and justice is done while doing the will of Congress. It is only in the borderline cases that the simple, administrative procedure fails and blind obedience to its precepts results in injustice.⁶¹ Some opinions, while citing weighty precedent to the contrary, admit the inequity or possible inequity of their decisions,⁶² while other cases contain strong dissents to the injustices.⁶³

The procedural technique proposed by the dissent in *Marciano* offers a solution to this theoretical problem of determining which offenses involve moral turpitude. It suggests that instead of being tied to a rigid formula by which moral turpitude is determined, the court should disregard fixed formulas and examine all of the circumstances of the case instead. By examining the circumstances the courts can determine if moral turpitude in fact exists in each case without being bound by

⁵⁷ *Jordan v. De George*, 341 U.S. 223, 238, 71 S. Ct. 703, 711, 95 L. Ed. 886, 895 (1951) (dissent); *United States ex rel. Manzella v. Zimmerman*, 71 F. Supp. 534, 537 (E.D. Pa. 1947).

⁵⁸ *Wadman v. Immigration & Nat. Serv.*, 329 F.2d 812 (9th Cir. 1964); *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933); *United States ex rel. Teper v. Miller*, 87 F. Supp. 285 (S.D.N.Y. 1949); *United States ex rel. Griffo v. McCandless*, 28 F.2d 287 (E.D. Pa. 1928).

⁵⁹ *Wadman v. Immigration & Nat. Serv.*, 329 F.2d 812 (9th Cir. 1964); *United States ex rel. McKenzie v. Savoretti*, 200 F.2d 546 (5th Cir. 1952); *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933); *United States ex rel. Mylius v. Uhl*, 210 F. 860 (2d Cir. 1914) (majority).

Marciano v. Immigration & Nat. Serv., 450 F.2d 1022 (8th Cir. 1971); *Pino v. Nicolls*, 215 F.2d 237 (1st Cir. 1954); *United States ex rel. Sollazzo v. Esperdy*, 285 F.2d 341 (2d Cir. 1960) (minority).

⁶⁰ *Pino v. Nicolls*, 215 F.2d 237 (1st Cir. 1954); *United States ex rel. Mylius v. Uhl*, 210 F. 860 (2d Cir. 1914); *Zgodda v. Holland*, 184 F. Supp. 847 (E.D. Pa. 1960).

⁶¹ *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir. 1939); *Tillinghast v. Edmead*, 31 F.2d 81 (1st Cir. 1929); *Zgodda v. Holland*, 184 F. Supp. 847 (E.D. Pa. 1960).

⁶² *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022 (8th Cir. 1971); *Zgodda v. Holland*, 184 F. Supp. 847 (E.D. Pa. 1960); *Vidal y Planas v. Landon*, 104 F. Supp. 384 (S.D. Cal. 1952).

⁶³ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022 (8th Cir. 1971); *Tillinghast v. Edmead*, 31 F.2d 81 (1st Cir. 1929).

which crimes *necessarily* or *generally* involve moral turpitude. The plea that the record standing alone should not be controlling in determining the existence of moral turpitude is definitely the minority view, but there has been support for this in cases other than *Edmead*.⁶⁴

On occasion, the courts, while saying that they are confined to the record, appear to look to the circumstances of the case and make exceptions. In *Rassano v. Immigration and Naturalization Service*, the court, while paying lip service to the traditional procedure for determining the existence of moral turpitude, remanded its own deportation verdict for further review and determination at the request of the defendant alien.⁶⁵ In *Vidal y Planas v. Landon* the court had enough circumstantial knowledge of the defendant's situation to hold that his homicidal act did not involve moral turpitude.⁶⁶ In *Vidal y Planas* the court justified its decision to exonerate the defendant by quoting the Solicitor of the Department of Justice wherein he defined some crimes involving moral turpitude and excepted others. The Solicitor ruled that some offenses which do not involve moral turpitude are "the outcome merely of natural passion, of animal spirits, of infirmity of temper, of weakness of character, or of mistaken principles, unaccompanied by a vicious motive or corrupt mind."⁶⁷ In *United States v. Francioso* the alien requested citizenship, but was challenged by the Immigration and Naturalization Service because Francioso had been living with his niece.⁶⁸ Judge Learned Hand obtained enough information to determine that *incest* did not include moral turpitude and the petitioner was allowed to become a citizen. In *Zgodda v. Holland* the court deported the petitioner for petty theft.⁶⁹ These convictions, which occurred twelve years before the petitioner entered the United States, were enough to place the case under the "arbitrary" deportation rules. In *Zgodda* the court, while acknowledging that the petitioner's thefts were motivated by privation, said:

Counsel's argument makes a powerful appeal to reason and conscience. It poses the question whether the moral quality of an act

⁶⁴ *Marciano v. Immigration & Nat. Serv.*, 450 F.2d 1022, 1030 (8th Cir. 1971) (dissent); *Zgodda v. Holland*, 184 F. Supp. 847 (E.D. Pa. 1960); *United States ex rel. Valenti v. Karnuth*, 1 F. Supp. 370 (N.D.N.Y. 1932); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass. 1926).

⁶⁵ *Rassano v. Immigration & Nat. Serv.*, 377 F.2d 971 (7th Cir. 1966).

⁶⁶ *Vidal y Planas v. Landon*, 104 F. Supp. 384 (S.D. Cal. 1952).

⁶⁷ *Id.* at 389. Similar reasoning could quite possibly be applied to the case of the petitioner, Marciano. If all of the circumstances of the crime were known, the court might have found that, despite the statutory regulations, his crime of statutory rape was the "outcome of natural passion" to which the taint of moral turpitude did not attach.

⁶⁸ *Cf. United States v. Francioso*, 164 F.2d 163 (2d Cir. 1947). This case resembles the instant case in that both involve moral relationships which were "statutorily" condemned.

⁶⁹ *Zgodda v. Holland*, 184 F. Supp. 847 (E.D. Pa. 1960). The thefts which resulted in conviction occurred in Germany in the aftermath of World War II when petitioner was only a young girl.

can be assessed apart from the impact of attendant circumstances. Unfortunately for this petitioner, the question is not an open one. We regret that we are not free, as we understand the law, to go back of the convictions.⁷⁰

The recurring theme in the examples above and throughout the area of moral turpitudes and aliens is that a great deal of injustice has been done by the courts in their arbitrary method of determining moral turpitude.⁷¹ The injustice is not entirely one-sided. Aliens have been freed who should have been deported due to the quirks in the administration of the immigration laws.⁷² The situation as it exists today is inequitable because the appellate courts receive more circumstantial information about some cases than others,⁷³ and some courts are more reluctant than others to utilize the information at their disposal to do equity.⁷⁴ A modification of the rules to allow the courts to study the circumstances of *Marciano* and similar cases would produce more equitable results for the United States and for the respective aliens. Intelligent and just decisions can only be made where all available facts and circumstances of the particular case are made known to the court.

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⁷⁰ *Id.* at 851.

⁷¹ *Jordan v. De George*, 341 U.S. 223, 233, 71 S. Ct. 703, 708, 95 L. Ed. 886, 893 (1951) (dissent).

⁷² See *Jordan v. De George*, 341 U.S. 223, 239 n.13, 71 S. Ct. 703, 712 n.13, 95 L. Ed. 886, 896 n.13 (1951).

How unguiding the guide "moral turpitude" is, in relation to the enforcement of the Act of 1917, can be shown by three pairs of cases:

(1) In *Tillinghast v. Edmead* (citations omitted), the First Circuit over a pungent dissent, held that a conviction for petty larceny by an "ignorant colored girl" working as a domestic was an offense involving "moral turpitude." On the other hand, in *United States v. Uhl* (citations omitted), the Second Circuit held that conviction for possession of a jimmy, with intent to use it in the commission of some crime, the jimmy being "adapted, designed and commonly used for the commission of the crimes of burglary and larceny" was not for an offense involving "moral turpitude."

(2) In *United States v. Day* (citations omitted), Judge Knox held that an assault in the second degree, though by one intoxicated, constituted a crime involving "moral turpitude." But in *United States v. Zimmerman* (citations omitted), Judge Maris held that jail breaking by a bank-robber awaiting trial was not an offense involving "moral turpitude."

(3) In *Rousseau v. Weedon* (citations omitted), the Ninth Circuit held that one who was convicted of being a "jointist" under a Washington statute prohibiting "the unlawful sale of intoxicating liquor" was deportable as having committed a crime involving "moral turpitude." While in *Hampton v. Wong Ging* (citations omitted), it held (with the same judges sitting in both cases) that a conviction under the Narcotic Act was not of itself a crime of "moral turpitude," since the record did not show whether the offense for which conviction was had was "of such an aggravated character as to involve moral turpitude."

⁷³ *Hirsch v. Immigration & Nat. Serv.*, 308 F.2d 562 (9th Cir. 1962). The record contained no indictment, therefore, the petitioner could not be deported for the crime of knowingly making false statements to a federal agency. In *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass. 1926) an assault and battery on a police officer was held not to involve moral turpitude where the allegations of the indictment did not warrant a finding of moral turpitude.

⁷⁴ See *Zgodda v. Holland*, 184 F. Supp. 847 (E.D. Pa. 1960).