§ N.9: Violence, Domestic Violence, and Child Abuse

(For more information, see Defending Immigrants in the Ninth Circuit, § 6.15)

I. OVERVIEW AND THE CATEGORICAL APPROACH

Overview. An offense that arises from a domestic violence incident can have immigration consequences in several ways. The good news is that in many cases, a knowledgeable defender can craft a plea that both satisfies the prosecution and avoids adverse immigration consequences.

A noncitizen is deportable under the 'domestic violence deportation ground" if he or she is convicted of the following: A) a ***crime of domestic violence****;* B) a ***crime of child abuse, neglect or abandonment,*** or C) ***stalking;*** or D) if found in civil or criminal court to have violated certain sections of a ***domestic violence protective order***. 8 USC § 1227(a)(2)(E). The conviction for the offense, or the behavior that is the subject of the finding of violation of the order, must occur after September 30, 1996 and after the noncitizen was admitted to the United States.

A conviction of a "crime of violence" defined at 18 USC § 16 is an ***aggravated felony*** if a sentence of one year or more is imposed on any singled count. 8 USC § 1101(a)(43)(F). Conviction of a ***sex offense*** also can cause consequences; see *§N.10 Sex Offenses.*

Some offenses relating to domestic violence are also ***crimes involving moral turpitude*****.**

The Categorical Approach: Minimum Conduct to Commit the Offense. Immigration judges must use the "categorical approach" to evaluate a prior conviction as a removal ground or bar to relief. Criminal defense counsel should understand this analysis, because it can provide tremendous benefits for defendants. As the Supreme Court recently clairified, unless the minimum conduct to commit an offense triggers an immigration penalty, *no* conviction of the offense triggers the immigration penalty. This is true whether the penalty is a ground of deportability or bar to relief. *Moncrieffe v. Holder*, 133 S.Ct. 1678, 738, 744 (2013).

> **Example:** The minimum conduct to violate P.C. §243(e) is an offensive touching. An offensive touching does not meet the definition of "crime of violence." Therefore *no* P.C. §243(e) conviction is a crime of violence, or a deportable crime of domestic violence, regardless of facts in the case. *U.S. v. Flores-Cordero,* 723 F.3d 1085, 1089 (9th Cir. 2013). Before this, a §243(e) conviction could be held a crime of violence, if the record of conviction showed use of actual violence in the particular case.

Divisible Statutes. What if a criminal statute sets out multiple offenses, separated by the word "or," and at least one offense does and one does not trigger the immigration consequence?

In that case, an immigration judge may consult the individual's record of conviction, to determine which statutory elements made up the offense of conviction. Then the judge will apply the minimum conduct test to that offense. *Descamps v. U.S.*, 133 S.Ct. 2276 (2013).

> **Example:** Felony false imprisonment by violence, menace, fraud, or deceit, Cal. P.C. § 236/237, is divisible as a crime of violence because "violence" involves violence but "fraud" does not. An immigration judge may consider the individual's record, but only to determine which element was the subject of the conviction. In contrast, misdemeanor false imprisonment is not divisible: it does not set out distinct elements in the alternative, separated by "or." An immigration judge may not review the conviction record but must consider only the minimum conduct to commit the offense.

A Vague (Inconclusive) Record of Conviction Has Limited Use. In crafting a plea to a divisible statute, it is best to plead to specific "good" elements (i.e., that do not carry adverse immigration consequences), rather than to create a vague record, e.g. pleading to the statute as a whole. For immigrants applying for relief, a vague record of conviction has no use at all: it has the same effect as a specific plea to the "bad" offense! [1] Here is the breakdown:

- If a permanent resident is not already deportable (e.g., does not have a prior conviction that makes her deportable), a vague record of a conviction that does not identify elements in a divisible statute *will* prevent the new conviction from making her deportable.

- An immigrant who needs to apply for relief or status - such as any undocumented person, or a permanent resident who already has a deportable conviction - needs a specific plea to "good" elements. For example, to avoid a crime of violence, the person must plead specifically to "fraud" or "deceit" under P.C. § 237. A vague plea is of no help.

For more information, see *§ N.3 Record of Conviction.* That section also describes the documents that comprise the reviewable record, which are generally the plea colloquy, plea agreement, complaint coupled with evidence of a plea to the specific count, certain jury instructions in a jury case, some notations on the Abstract or minute order, and any document stipulated to as providing a factual basis for the plea. It also points out that there must be some evidence that the identified "minimum conduct" actually is prosecuted under the criminal statute.

Don't Let Your Work Go To Waste – Photocopy the Legal Summary Provided and Hand it to the Defendant! Most noncitizens have no defense counsel in removal proceedings. Many immigration attorneys and immigration judges are not aware of all defenses relating to crimes, and may not realize the good you have done. **Appendix 9-I** following this Note contains short legal summaries of defense arguments based on the strategies set out here. *Please copy the paragraph/s from the Appendix that applies to the defendant and hand it to him or her,* so that the defendant can give it to the immigration judge. See instructions at **Appendix 9-I**.

[1] See discussion of *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) *(en banc)* at § *N.3 Record of Conviction, supra*.

II. CRIME OF DOMESTIC VIOLENCE and CRIME OF VIOLENCE AGGRAVATED FELONY

A. Overview of Strategies

Crime of domestic violence. A defendant is deportable for a conviction of a "crime of domestic violence" if (a) the conviction is a "crime of violence" as defined at 18 USC § 16 which is (b) committed against a victim with a protected domestic relationship as defined in the deportation ground. 8 USC §1227(a)(2)(E)(i). No particular sentence is required. In many cases, criminal defense counsel can craft a plea that both satisfies the prosecution and avoids this deportation ground. This section will discuss the following defense strategies.

1. ***Plead to an offense that is not a "crime of violence."*** An offense that does not meet the technical definition of "crime of violence" is never a "crime of domestic violence," even if it is clear that the defendant and victim had a domestic relationship. It is never an aggravated felony crime of violence, even if a sentence of a year or more is imposed. See discussion below and Charts for offenses that either automatically are not crimes of violence, or are not crimes of violence in some cases, for example if the record of conviction is carefully crafted. This includes offenses such as P.C. §§ 32, 69, 240, 243(a), (d), (e), 236/237, 136.1(b)(1), 314, 415, 460(b), 591, 653m(a), 647, 647.9. See Part B.2, *infra*, for discussion. (For an analysis of sex offenses such as §§ 261.5, 288, and 647.6, see *§ N.11 Sex Offenses*.)

2. ***Designate a victim not protected under state DV laws, or plead to violence against property.*** A plea to a crime of violence is not a "crime of domestic violence" if (1) the designated victim is someone not protected under the definition or the state's DV laws (e.g., the new boyfriend, a neighbor, the police), or (2) the crime involves violence against property as opposed to a person. See Parts B.3, 4, *infra*.

3. ***DV-related probation conditions are safe for the above pleas.*** At least with the pleas described in (1) and (2) above, it is safe to accept domestic violence counseling, stay-away orders, etc. as conditions of probation. (Note, however, that a civil or criminal court finding of a violation of a DV stay-away order will make the client deportable. See Part II.)

4. ***To keep a plea to a divisible statute safe, be sure that the entire record of conviction is consistent with the above instruction (1) and (2).*** If the statute is "divisible" so that the immigration judge may consult the record of conviction, keep that record clear of adverse information. For example, felony § 236, 237 is a "crime of violence" if the record shows the offense was convicted by menace as opposed to fraud. Therefore plead specifically to fraud, or at least keep the record vague. Remember not to stipulate to a document as a factual basis for the plea if it contains adverse information. For information on how to create a safer record and safer factual basis for the plea, see *§ N.3 Record of Conviction*.

5. ***Where possible, keep admissions of violent conduct out of the record of conviction in all cases,*** even where the IJ is not permitted to rely on the record. For example, recent Supreme Court precedent dictates that regardless of information in the record, *no* conviction of an offense that can be committed by an offensive touching (e.g., P.C. §§ 69 or 243) is a crime of

violence. This is true regardless of whether the question is deportability or eligibility for relief. See Part B.2, *infra*. However, in case a judge is not familiar with this rule, or ICE wishes to contest it, give your client extra protection by keeping the record clear of evidence of violence or, better yet, by specifying an offensive touching in the record where possible.

6. ***If you must plead to a crime of violence that in fact involved a DV-type victim, try to keep the domestic relationship out of the reviewable record of conviction.*** However, warn the client that this might not protect against being deportable for a crime of domestic violence. Under current law, only evidence from the record of conviction may be used to establish the relationship. In the future, however, the rule may change to permit the government to look beyond the record of conviction for this purpose. So if possible try to use other strategies such as those listed here to avoid deportability under this ground. See Part B.5, *infra*.

7. ***If you must plead to a crime of violence, avoid an aggravated felony by obtaining a sentence of 364 days or less on each count.*** A conviction for a crime of violence with a sentence imposed of one year or more is an aggravated felony. 8 USC § 1101(a)(43)(F). This is true regardless of whether there was a domestic relationship, the offense was against person or property, or the defendant was a minor. For a discussion of how to avoid a one-year sentence for immigration purposes while accepting more than a year in custody, see *§N.4 Sentence Solutions.*

8. ***Some but not all DV offenses also are crimes involving moral turpitude.*** Be sure to analyze the immigration effect under this category as well. See Part C below, and App. 9-II Chart.

9. ***While not good, it is not always fatal to immigration status to become deportable under the DV ground.*** The effect depends upon the individual defendant's immigration situation. For undocumented people, being deportable solely under this ground is not a basis for inadmissibility or an absolute bar to relief, with two exceptions: it will bar an application for "non-LPR cancellation" or for deferred action for childhood arrivals ("DACA"). For LPRs, while this has the serious effect of making the person deportable, it is not a bar to relief such as LPR cancellation. See *§N.17 Relief* for discussion of each of these immigration applications. Note that the offense also might cause other consequences (e.g. as a moral turpitude offense or bar to relief; see #8, #10), so you must consider these as well. If you have difficult choices about what to prioritiez in fashioning a plea, consult with a crimes and immigration expert.

10. ***Watch for special cases: asylum applicants; asylees or refugees; DACA applicants; and applicants for a § 212(h) waiver for moral turpitude.*** Certain offenses that actually involved violence may destroy eligibility for this relief, even if the offense is not technically a deportable crime of domestic violence. See *§N.17 Relief.*

11. ***Remember the other bases for deportation under this ground.*** A conviction for stalking or for certain crimes against minors, or a civil or criminal court finding of a violation of a stay-away order or any other portion of a DV protective order whose purpose is to prevent threats, violence, or harassment, are deportable dispositions. Again, to cause deportability under the

domestic violence ground, the conviction, or the conduct violating the protection order, must have occurred after admission to the U.S. and after September 30, 1996.

Crime of Violence Aggravated felony. A defendant is deportable, and barred from many forms of relief, if (a) convicted of a crime of violence as defined at 8 USC § 16, if (b) a sentence of a year or more was imposed on a single count. 8 USC §1101(a)(43)(F), 1227(a)(2)(A)(iii). The victim does not have to have a domestic relationship with the defendant. The conviction need not have occurred after September 30, 1996. To avoid this result, either avoid a crime of violence (see Part B.2) or avoid a sentence imposed of a year or more (see *§N.4 Sentence).*

B. Conviction of a Crime of Violence or Deportable Crime of Domestic Violence

1. Overview

A deportable "crime of domestic violence" is a crime of violence, defined at 18 USC § 16, which is committed against a person with whom the defendant has or had a certain domestic relationship. Conviction after admission and after September 30, 1996 is a basis for deportation. A deportable crime of domestic violence is defined at 8 USC § 1227(a)(2)(E)(i) as:

> any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic violence or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from the individual's acts under the domestic or family violence laws of the United States or any State, Indian Tribal government, or unit of local government.

A conviction is not a deportable "crime of domestic violence" unless ICE (immigration prosecutors) proves both factors: that the offense is a crime of violence under 18 USC § 16, *and* that the victim and defendant had the domestic relationship described above. In other words, an offense that does not meet the technical definition of crime of violence under 18 USC § 16 will not be held to be a deportable crime of domestic violence even if there is proof that the victim and defendant share a domestic relationship. Likewise, a conviction of a crime of violence is not a crime of domestic violence unless there is adequate proof of the domestic relationship.

ICE must prove that the conviction is of a crime of violence using the categorical approach, based on the minimum conduct required to commit the offense. ICE's evidentiary standard for proving the domestic relationship is less clear, as discussed below.

All of the following defense strategies will avoid a deportable conviction of a crime of domestic violence: (a) plead to an offense that is not a crime of violence, regardless of who the victim is; (b) plead to a crime of violence, but identify a victim who does not have the required domestic relationship (e.g. the ex-wife's new boyfriend, a neighbor, a police officer); and (c) plead to a crime of violence, but against property, not a person. See Parts 2-4, next. Another defense strategy upheld by significant precedent is (d) to plead to a crime of violence but keep

the record vague as to whether the victim had the required domestic relationship; however, because the rule might change in the future, this is the least desirable option. See Part 5.

2. Plead to an Offense That is Not a "Crime of Violence"

An offense that is not a "crime of violence" is not a "crime of domestic violence," regardless of who the victim is. One can accept counseling, anger-management class, stay-away orders, etc. as a condition of probation with this plea.

Under 18 USC § 16, a crime of violence for immigration purposes includes:

(a) "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or

(b) "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."

A conviction of a crime of violence is an ***aggravated felony*** if a sentence of a year or more is imposed on any single count. 8 USC § 1101(a)(43)(F). No domestic relationship is required. To avoid a crime of violence aggravated felony, obtain a sentence of 364 days or less on each count. See *§ N.4, Sentencing Solutions* for strategies on how to accept more than a year in custody without creating an aggravated felony.

Below is an analysis of some common offenses as crimes of violence. See Chart of additional offenses at Appendix 9-II, and see the *California Quick Reference Chart* at www.ilrc.org/crimes for analyses of other offenses. See *Defending Immigrants in the Ninth Circuit*, § 9.13, for more extensive discussion of cases and the definition of a crime of violence.

a. The Categorical Approach Applies To Crimes Of Violence

As discussed at Part I, *supra*, the federal "categorical approach" governs how an immigration (or federal criminal court) judge will evaluate a past conviction. In this approach, the client's conduct does not matter: if the *minimum conduct to commit the offense* does not trigger a particular immigration penalty, then *no* conviction of the offense will. A judge may not rely on information from the individual's record of conviction, other than to determine which offense in a multi-offense ("divisible") statute was the subject of the conviction.

> **Example:** An "offensive touching" does not meet the definition of "crime of violence." Spousal battery, Cal P.C. § 243(e), can be committed by an offensive touching. Therefore, no conviction of § 243(e) is a crime of violence or a crime of domestic violence. This is true even if the person pled to a charge alleging actual violence. See *U.S. v. Flores-Cordero*, 723 F.3d 1085, 1088-89 (9th Cir. 2013). *But see* Practice Tip.

Practice Tip: *Despite the above*, wherever possible it still is best practice to cleanse the record of any evidence of real violence, or better yet to plead specifically to conduct that is not a crime

of violence, such as offensive touching. This is because your client might encounter an immigration judge who is not familiar with the correct rule, or an ICE attorney who is hostile to it, and creating a good record will eliminate the issue. See §N.3 Record of Conviction.

b. California Misdemeanors as "Crimes of Violence"

It is harder for a misdemeanor conviction to qualify as a crime of violence than for a felony conviction. Under 18 USC § 16(a), a misdemeanor must have as an element of the offense the "use, attempted use, or threatened use of physical force" against the victim. There are several ways to avoid this.

Plead to an Offense that is Not Related to Violence. Some misdemeanor offenses do not have as an element intent to use or threaten violent force. These should include:

- **Trespass, theft, disturbing the peace** and other offenses with no relationship to violence
- **P.C. § 136.1(b)(1)** (misdemeanor nonviolent attempted persuasion not to file a police report); obtain less than one year on any single count
- **P.C. § 236** (misdemeanor false imprisonment)
- **P.C. § 591** (misdemeanor tampering with phone or TV line)
- **P.C. § 591.5** (tampering to prevent call to authorities)
- **P.C. § 653m(a)** (single annoying phone call)
- **P.C. § 243.4** (misdemeanor sexual battery) is not a crime of violence, because the minimum conduct includes restraint of the victim accomplished without force.[2] *Felony* § 243.4 always is a crime of violence.

De Minimus Force, Offensive Touching. Any misdemeanor offense that can be committed by *de minimus* force, e.g. an offensive touching, is not a crime of violence under 18 USC § 16 – even if the offense actually involved violent force.[3] (The same should be true of a felony offense that can be commited by offensive touching, but as described below, the law is more unstable.). Thus neither battery nor battery against a spouse under **Calif. PC § 243(a), 243(e),** nor resisting arrest under **PC § 69,** are crimes of violence.[4] Because **PC § 243(d)** can be committed by an offensive touching that is not intended or likely to cause injury,[5] at least any misdemeanor conviction also is not a crime of violence.[6]

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[2] *U.S. v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005) (Cal PC § 243.4(a) is not a crime of violence under a standard identical to 18 USC §16(a), because the restraint can be effected without force).
[3] See discussion in *U.S. v. Flores-Cordero*, 723 F.3d 1085, 1088-89 (9th Cir. 2013) and at Part I, above.
[4] *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (Cal PC § 242); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (minimum conduct to commit Cal PC §§ 242, 243(e) is not a crime of violence, crime of domestic violence, or crime involving moral turpitude); *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (Cal PC § 69).. CALJIC 16.141 (2005) defines "force" and "violence" in § 243 as synonymous; it can include force that causes no pain, and the slightest touching, if done in an insolent, rude or angry manner, is sufficient.
[5] See *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (1978) discussed in the section on felonies, below.
[6] For example, see discussion of moral turpitude, which here is determined by the same factors as crime of violence, in *Uppal v. Holder* (9th Cir 2010) 605 F.3d 712, 718-719 (Canadian felony similar to §243(d) is not a crime involving moral turpitude), citing *Matter of Muceros* (BIA 2000) A42 988 610 (Indexed Decision finding that felony §243(d) is not a crime involving moral turpitude).

In addition, any felony or misdemeanor offense that can be committed by offensive touching is not a crime involving moral turpitude.[7] This is true whether the issue is deportability or eligibility for relief.

In contrast **§ 273.5** is categorically (automatically) a crime of violence and a crime of domestic violence, and **§ 245** is categorically a crime of violence.

Negligence or recklessness is not a crime of violence. A crime of violence requires a purposeful intent to use violent force. Misdemeanor and felony offenses such as reckless infliction of injury or driving under the influence with injury are not crimes of violence.[8]

A threat to commit actual violence is a crime of violence, even as a misdemeanor, and if no force is used. A threat under **Cal. P.C. § 422** is automatically a crime of violence.[9]

Add "good" facts to the record where possible. Counsel should make every possible effort to keep facts regarding violent force out of the record of conviction, and/or to add beneficial facts, e.g. that the incident involved recklessness or offensive touching. Although this should not be required under the "minimum conduct" test, recall that the immigrant likely will be unrepresented, immigration judges are overworked and may not be familiar with the rule, and we want to avoid any mistaken litigation or rulings in immigration court.

c. California Felonies and Wobblers as "Crimes of Violence"

A felony conviction can be a crime of violence under either of two tests. First, like a misdemeanor, it will be held a crime of violence under 18 USC § 16(a) if it has as an element the use, or threatened or attempted use, of force.

Second, a felony conviction will be held a crime of violence under the more broadly defined § 16(b), if "by its nature, [it] 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 "risk" presented by the offense must be that violent force will be used intentionally, and not just that an injury might occur. Reckless infliction of injury, for example by felony reckless driving or child endangerment, is not a crime of violence.[10]

However, a felony offense that recklessly creates a situation where the perpetrator is likely to use aggressive, violent force is a crime of violence. The Ninth Circuit has ruled inconsistently on this issue. Until that is resolved, counsel should conservatively assume that felony P.C. § 243(d) might be held a crime of violence, even though the minimum conduct is offensive touching and this would appear to be an incorrect result.

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[7] The minimum conduct to commit spousal battery does not involve moral turpitude. See, e.g., *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004); *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006); *Sanudo, supra.*

[8] *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (negligence, felony DUI); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*) (under *Leocal,* recklessness that injury may occur is insufficient intent to constitute a crime of violence; that requires being reckless that the crime will result in a violent encounter).

[9] *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003) (P.C. § 422 is categorically a crime of violence).

[10] See *Leocal, supra; Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (*en banc*).

A California "wobbler" can be punished as either a felony or misdemeanor. It will be deemed a misdemeanor for all immigration purposes, including the definition of a crime of violence, if it is designated as or reduced to a misdemeanor under P.C. §§ 17, 19.[11] Otherwise it will be considered a felony.

Defense counsel should act conservatively and attempt to plead to a misdemeanor, or reduce a wobbler offense to a misdemeanor, where this is possible. For a discussion of whether these offenses are also crimes involving moral turpitude, see Part C, below.

Felony offenses that will be held crimes of violence.

- ***Residential felony burglary,*** P.C. §§ 459, 460(a) is a categorical (automatic) crime of violence under § 16(b). Courts have held that it creates risk that the perpetrator will use violence if he or she encounters the resident during commission of the offense.[12] The Ninth Circuit has held this despite the fact that § 460(a) includes a permissive entry. While immigration litigators continue to contest this holding, criminal defense counsel must assume it is a crime of violence. Obtain a sentence of a year or less to avoid an aggravated felony.

- ***Felony sexual battery under P.C. § 243.4*** is a categorical crime of violence under § 16(b).[13] Misdemeanor §243.4 is not; see above.

- ***Felony or misdemeanor corporal injury under P.C. § 273.5*** is a crime of violence and a crime of domestic violence.

- ***Felony or misdemeanor assault under P.C. § 245(a)*** is a crime of violence.[14]

Felony offenses that will not, or might not, be held crimes of violence.

- ***Nonviolently persuading someone not to file a police report under Calif. PC § 136.1(b), a felony,*** is not a crime of violence and therefore not a crime of domestic violence. Because it is a strike for criminal purposes it may be a useful option where counsel needs a substitute plea for a serious charge. Counsel should obtain no more than 364 days on any single count however, or ICE might charge that it is an aggravated felony as obstruction of justice.[15]

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[11] See, e.g., *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).
[12] E.g., *U.S. v. Becker*, 919 F.2d 568 (9th Cir. 1990); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011).
[13] *Lisbey v. Gonzales*, 420 F.3d 930, 933-934 (9th Cir. 2005) (felony § 243.4(a) is a crime of violence).
[14] *U.S. v. Grajeda*, 581 F.3d 1186, 1190 (9th Cir. Cal. 2009) (§ 245 meets the definition in USSG § 2L1.2, which is identical to 18 USC § 16(a)).
[15] PC § 136.1 should not be held to be an aggravated felony as obstruction of justice because it lacks a specific intent to prevent the apprehension or prosecution of the principal. See *Matter of Valenzuela Gallardo*, 25 I&N 838 (BIA 2012), reaffirming *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (which held that PC §32 is obstruction because it has this specific intent), and clarifying *Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999) (which held that federal concealment of a felony without specific intent to prevent the apprehension of the felon,18 USC § 4, is not obstruction of justice). The Board explained that misprision does not constitute "obstruction of justice" because "it lacks the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." *Espinoza* at 896. "This element--the affirmative and intentional

- ***Felony false imprisonment, P.C. §§ 236, 237,*** should not be held a crime of violence if the record establishes that it was accomplished by fraud or deceit as opposed to violence or menace.[16] It is likely to be held a crime involving moral turpitude, except perhaps by deceit.

- ***Felony commercial burglary, burglary of a vehicle*** should not be held to be a crime of violence.[17] It is possible that burglary with intent to commit theft will be charged as attempted theft, so counsel should try to avoid a sentence of a year or more on any single count or consider other strategies discussed at *§N.11 Burglary, Theft.* Counsel should assume that burglary will be a crime involving moral turpitude if the intended crime is, e.g., burglary with intent to commit larceny, is. See discussion at §N.11.

- ***Felony battery under P.C. § 243(d)*** should not be held a crime of violence because it can be committed with force that is not intended or likely to cause injury, including an offensive touching.[18] However, it is possible that it would be charged as a crime of violence, so counsel should try hard to plead to one or more misdemeanor § 243(d) convictions, or to a different offense. Section 243(d) should not involve moral turpitude, either as a felony or misdemeanor. If other options are not available, it is a far better plea than §§ 245 or 273.5.

- ***Felony accessory after the fact, P.C. § 32,*** is not a crime of violence even if the principle offense was a crime of violence,[19] and so is a good plea to avoid a crime of domestic violence. Counsel must obtain a sentence of 364 days or less on any single count, or it will be charged as an aggravated felony as obstruction of justice.[20] Assume conservatively that an immigration judge may (wrongly) find it is a crime involving moral turpitude if the underlying offense is,[21] so if possible specify an underlying offense that does not involve moral turpitude.

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attempt, with specific intent, to interfere with the process of justice--demarcates the category of crimes constituting obstruction of justice." *Valenzuela Gallardo* at 841. Section 136.1(b)(1) only requires an intent to dissuade the witness from filing a police report. CALJIC 7.14.

[16] A crime of violence must involve purposeful, violent and aggressive conduct. See, e.g., *Chambers v. United States*, 555 U.S. 122 (2009) (failing to report for weekend confinement under 720 ILCS 5/31-6(a) (2008) is not a crime of violence) and *Begay v. United States*, 553 U.S. 137 (2008) (driving under the influence).

[17] Unlike burglary of a dwelling, it does not carry a substantial, inherent risk that violence will be used against a person, and it can be committed without use of violence against property. *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).

[18] Felony battery can consist of a mere offensive touching with no intent or likelihood of causing injury. See, e.g., *People v. Hayes*, 142 Cal. App. 4th 175, 180 (Cal. App. 2d Dist. 2006). See *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978) (§243 "makes a felony of the act of battery which results in serious bodily harm to the victim no matter what means or force was used. This is clear from the plain meaning of the statute.").

[19] *U.S. v. Innie*, 7 F.3d 840 (9th Cir. 1993) (accessory after the fact to violence is not a crime of violence).

[20] *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012). While this might be challenged at the Ninth Circuit (see discussion in *Hoang v. Holder*, 641 F.3d 1157 (9th Cir. 2011) regarding Washington rendering criminal assistance offense), counsel should avoid 365 days on any single count.

[21] The Ninth Circuit held that accessory after the fact never is a crime involving moral turpitude. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc). In a case arising outside the Ninth Circuit, the Board of Immigration Appeals held that accessory after the fact is a crime involving moral turpitude if the underlying offense is one; however, the Board specifically declined to state that it would not follow *Navarro-Lopez* in cases arising within the Ninth Circuit. *Matter of Rivens*, 25 I&N Dec. 623, 627 (BIA 2011). Until the BIA issues a precedent decision to the contrary, immigration judges should follow *Navarro-Lopez* in cases arising within the Ninth Circuit

- ***Felony reckless shooting at an inhabited vehicle, P.C. § 246.*** The Ninth Circuit held that this is not a crime of violence because the minimum conduct is recklessness. However, this is not necessarily a safe plea, since the judges stated that they were forced to so hold based on precedent, despite their belief was that this level of recklessness is a violent act. However, they found it "too speculative" to hold that the offense a crime of violence under a separate theory, as a reckless act that was likely to lead to a fight.[22]

3. Plead to a crime of violence against a specific victim who is not protected under state domestic violence laws

The immigration statute provides that a deportable crime of domestic violence is a crime of violence that is committed against a person with whom the defendant shares a certain domestic relationship; see next paragraph. If the victim does not have a protected relationship, a "crime of violence" is not a "crime of domestic violence." In California a plea to a crime of violence against**, e.g., the ex-wife's new boyfriend, a neighbor, or a police officer** would not be a crime of domestic violence, because these persons are not protected under state domestic violence laws. Counsel must obtain a sentence of less than one year on any single count or the conviction will be an aggravated felony as a crime of violence.

A crime of violence against the following victims *will* be a deportable domestic violence offense. The deportation ground, quoted in full in Part 1, *supra*, includes a current or former spouse, co-parent of a child, a person who has cohabitated as a spouse or someone similarly situated under state domestic or family violence laws, as well as "any other individual against a person who is protected from the individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government."[23] California family violence statutes protect the following persons (a) a current or former spouse or cohabitant;[24] (b) a person with whom the other is having or has had a dating or engagement relationship (defined as a serious courtship); (c) a person with whom the other has had a child, when the presumption applies that the male parent is the father of the child of the female parent;[25] (d) a child of a party or a child who is the subject of an action under the Uniform Parentage Act, when the presumption applies that the male parent is the father of the child to be protected, or (e) any other person related by consanguinity or affinity within the second degree."[26] The word co-habitant means "a person who resides regularly in the household."[27] It does not include people who simply sublet different rooms in a common home, if they are not otherwise part of the same household or do not have some close interpersonal relationship.[28]

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states. In case that does not happen, however, the best course is to identify a non-CIMT as the underlying offense, or if deportability rather than relief is the issue, leave the record vague.

[22] *Covarrubias-Teposte v. Holder*, 632 F.3d 1049 (9th Cir. 2011).

[23] Compare 18 USC §16 (crime of violence) with 8 USC § 1227(a)(2)(E)(i) (crime of domestic violence).

[24] California Family Code § 6209.

[25] California Family Code § 7600 et seq. (Uniform Parentage Act).

[26] Matthew Bender, California Family Law § 96.03[02], p. 96-6.

[27] *Id.* at § 96.03[3]; California Family Code § 6209.

[28] *O'Kane v. Irvine*, 47 Cal.App.4th 207, 212 (1966). Thanks to Norton Tooby for this summary of California law.

4. Plead to a crime of violence that is against property, not persons

While a "crime of violence" under 18 USC § 16 includes an offense against people or property, the statute setting out the deportable "crime of domestic violence" only includes an offense against "a person."[29] Thus immigration counsel has a very strong argument, although no published case law, that vandalism or other offenses against property will not support deportability under the domestic violence ground, even if the offense is a crime of violence. Avoid a sentence of a year or more to avoid an aggravated felony.

5. Plead to a crime of violence but keep the domestic relationship out of the official record of conviction – Changing law?

This section is for defense counsel who may be forced to plead to a crime of violence where the victim actually has the domestic relationship. It discusses why this is risky, and what steps may reduce the risk.

The problem. Immigration prosecutors ("ICE") must prove by "clear and convincing evidence" that a noncitizen is deportable.[30] In general, ICE must prove that a conviction causes deportability using the "categorical approach," which among other things requires that certain contemporaneous criminal court documents conclusively establish that the offense of conviction comes within the deportation ground. (For more on the categorical approach, see *§ N.3 Record of Conviction*)

Regarding a crime of domestic violence, the Ninth Circuit has held that evidence in the reviewable record of conviction must conclusively prove that the defendant and victim had the required domestic relationship.[31] However, ICE may argue that 2009 Supreme Court decisions permit a wider range of evidence to prove the domestic relationship, based on the particular language of the deportation ground.[32] Because criminal defense counsel must act conservatively, you should assume that the government will prevail and the Ninth Circuit will modify its stance. It is not clear what kind of evidence would be used if that occurred.

Advice. Again, the better strategy is to avoid pleading to a crime of violence at all, or to plead to a crime of violence against a specific person with whom the defendant does not have a domestic relationship, or to a crime of violence against property.

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[29] INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).
[30] INA § 240(c)(3)(A), 8 USC § 1229a(c)(3)(A).
[31] See, e.g., *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004) (testimony before the immigration judge about the relationship may not be considered); *Cisneros-Perez v. Gonzales*, 465 F.3d 385 (9th Cir. 2006) (information from various documents, including a stay-away order imposed as a condition of probation and a dropped charge, was not sufficiently conclusive proof of the domestic relationship).
[32] See *Nijhawan v. Holder*, 557 U.S. 29 (2009) (in rare cases, such as the aggravated felony definition of fraud with a loss to the victims exceeding $10,000, an aggravated felony definition is bifurcated, in that they contain a "generic offense" subject to the categorical approach, and "circumstance-specific" facts that need not be elements and may be proved by other evidence); and *U.S. v. Hayes*, 555 U.S. 415 (2009) (evidence from outside the record of conviction can be used to prove the domestic relationship, in a criminal domestic violence statute worded similarly to the DV deportation ground). For further discussion see *§ N.3 Record of Conviction*, *§ N.11 Burglary, Theft and Fraud*, and Brady, "*Nijhawan v. Holder*, Preliminary Defense Analysis" at www.ilrc.org/crimes.

If that is not possible, where the charge of a violent crime alleged the name of a victim with a domestic relationship, where possible plead to a slightly different offense in a newly crafted count naming Jane or John Doe. Even under the possible expanded evidentiary rules, information from dropped charges may not be considered. Also, keep the name and relationship outside of any sentencing requirements. If needed, plead to an unrelated offense, if possible against another victim (e.g. trespass against the next door neighbor, disturbing the peace) and take a stay-away relating to the domestic relationship on that offense. Under California law a stay-away order does not need to relate to the named victim. See very useful evidentiary discussion in *Cisneros-Perez v. Gonzales*, 451 F.3d 1053 (9th Cir. 2006).

C. Other Consequences: Domestic Violence Offenses as Crimes Involving Moral Turpitude, Aggravated Felonies

Aggravated felonies. A conviction of a crime of violence for which a sentence of a year has been imposed is an aggravated felony. 8 USC § 1101(a)(43)(F). To avoid the aggravated felony consequence, counsel must obtain a sentence of 364 days or less for any single count of a crime of violence. For instructions on how to accept more than a year in jail while taking 364 days or less on any single count for immigration purposes, see *§ N.4 Sentences.* No domestic relationship is required for the aggravated felony; only the crime of violence and the sentence.

Conviction of an offense that constitutes sexual abuse of a minor or rape is an aggravated felony regardless of sentence. See 8 USC § 1101(a)(43)(A) and *§ N.10 Sex Offenses.*

Crime involving moral turpitude. Offenses that involve intent to cause significant injury, or many offenses with lewd intent, will be held to be a crime involving moral turpitude (CIMT). The Ninth Circuit held that the full categorical approach applies to moral turpitude determinations. *Olivas-Motta v. Holder*, 716 F3d 1199 (9th Cir 2013), overruling *Matter of Silva-Trevino,* 24 I&N Dec 687 (AG 2008). Therefore, if the minimum conduct to commit an offense does not involve moral turpitude, no conviction of the offense is a CIMT.

A CIMT conviction may result in inadmissibility or deportability. A single CIMT conviction does not cause *inadmissibility* if it is a misdemeanor, the sentence imposed was six months or less, and the person has not committed other CIMTs. There is an additional inadmissibility exception for an (adult) conviction of a single CIMT committed while under age 18, if the conviction or end of resulting imprisonment occurred at least five years in the past.

A single CIMT conviction will cause *deportability* only if (a) the person committed the offense within five years after admission to the U.S., and (b) the offense has a potential sentence of one year or more. Note that a one-year misdemeanor can trigger deportability in this manner. Additionally, two CIMTs at any point after "admission" trigger *deportability*, unless they arise in a single scheme of criminal misconduct, often interpreted as the very same incident. For more information see *§N.7 Moral Turpitude*.

Criminal defense counsel should conservatively assume the following:

- Misdemeanor or felony sexual battery under **P.C. § 243.4** is a CIMT.

- Felony false imprisonment under **P.C. § 236/237** is committed by violence, menace, fraud or deceit. Defense counsel should assume conservatively that this is a CIMT, but also where possible should plead specifically to deceit, which at least arguably is not a CIMT.[33]

- Spousal battery under **P.C. § 243(e)** is never a CIMT because the minimum conduct to commit it, an offensive touching, is not a CIMT.[34] Still, where possible plead specifically to an offensive touching or at least leave the record vague.

- The Ninth Circuit held that **P.C. § 273.5** is not categorically a CIMT because it contains one narrow exception: if the injury is minor and the defendant and victim have only a tenuous relationship, such as a former non-exclusive co-habitation.[35] Immigration counsel will argue that therefore no § 273.5 conviction is a CIMT, because the minimum conduct to commit the offense is not. Criminal defense counsel should conservatively assume that this might be treated as a CIMT in the future, if the Ninth Circuit changes its interpretation of § 273.5.

- Misdemeanor **P.C. § 236,** false imprisonment, never is a CIMT because the minimum conduct to commit the offense is not a CIMT.[36]

- Defense counsel should conservatively assume that felony assault under **P.C. § 245(a)** is a CIMT. However, the Ninth Circuit *en banc* will consider the issue and might clarify that it is not a CIMT.[37]

III. COURT FINDING OF A VIOLATION OF A DOMESTIC VIOLENCE PROTECTIVE ORDER

A. **Bottom Line Advice:** A finding in civil or criminal court that a noncitizen violated portions of a DV protection order that protect against violence or repeated harassment is a basis for deportation (even if the *actual violation* did not involve violence or repeated harassment).

1. ***Do not plead to P.C. § 273.6*** for violating a protective order issued pursuant to Calif. Family Code §§ 6320 and/or 6389 – even if the conduct violating the order was innocuous. If you must plead to § 273.6, try to specify an order issued pursuant to a different section, or leave the record vague. See Part B.1.

2. ***Do not plead to violating a DV stay-away order*** or any court order not to commit an offense described in Family Code §§ 6320 or 6389, where the purpose of the order is

[33] See, e.g., *People v. Rios*, 177 Cal. App. 3d 445 (Cal. App. 1st Dist. 1986) (felony false imprisonment where father picked up infant during visitation and moved him to Mexico, telling the child he was his godfather).
[34] *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), *U.S. v. Flores-Cordero, supra.*
[35] *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009).
[36] *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir. 2010).
[37] On Sept. 19, 2013 the court granted a petition to reconsider *en banc* the panel opinion in *Ceron v. Holder*, 712 F.3d 426 (9th Cir 2013), which held that §245(a) is a CIMT. See the *Ceron* dissent by Judge Ikuta.

to protect a DV-type victim. A plea to P.C. § 166(a) can be safe under certain circumstances. See Part B.2, B.3.

3. ***Instead, plead to a new offense*** that will not have immigration consequences, e.g., trespass, an annoying phone call, or an offense such as § 243(e). Or consider P.C. § 166(a)(1-3), especially (a)(3). See Part B.3 for suggested pleas.

B. How to Avoid a Deportable Finding of Violation of a DV Protective Order

A noncitizen is deportable if ICE proves that he or she was found by a civil or criminal court judge to have violated certain portions of a domestic violence protective order. The conduct that violated the order must have taken place after the person was admitted into the U.S. and after September 30, 1996. The conduct itself does not have to be violent. *Any* stay-away order violation will suffice. The statute states:

> Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated, harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purposes of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a *pendente lite* order in another proceeding.[38]

Thus the record of conviction or judgment must establish that the purpose of the violated portion of the order was to protect a DV-type victim (including any person protected under California domestic violence laws) from violence, threats, injury, or repeated harassment. Violating an order relating to child support or custody, or not relating to domestic violence, does not trigger the ground. Violating an order relating to anger management classes might not trigger it.

1. Conviction under P.C. § 273.6 for violating a protective order always triggers this deportation ground, if it was issued pursuant to Calif. Family Code §§ 6320 and 6389.

A conviction under Calif. Penal Code § 273.6 for violating a protective order issued "pursuant to" Calif. Family Code §§ 6320 and 6389 *automatically* causes deportability as a violation of a protection order.

The Ninth Circuit found that the focus of the deportation ground is the *purpose of the order violated,* not the individual's conduct. The court found that all activity described in §§ 6320 and 6389 has as its purpose "protection against credible threats of violence, repeated harassment, or bodily injury" of the named persons. Thus, a conviction under this section will

[38] INA § 237(a)(2)(E)(ii), 8 USC §1227(a)(2)(E)(ii).

cause deportability even if the *conduct* that constituted the violation of the order did not itself threaten "violence, repeated harassment or bodily injury."[39]

The Ninth Circuit held that P.C. § 273.6 is a divisible statute for this purpose, because that section covers orders that had nothing to do with domestic violence protective orders.[40] A plea to violating P.C. § 273.6 with a record that it is not issued pursuant to §§ 6320 or 6389 and/or does not specify the type of court order violated should not be a deportable offense.

2. Avoid a judicial finding of <u>any</u> violation of a DV stay-away order, or an order not to commit <u>any</u> offense described in Cal. Family C §§ 6320 or 6389.

A criminal or civil finding of violation of a portion of any order prohibiting the conduct that is described in Calif. Family Code §§ 6320 and 6389 is a basis for deportation. The conduct that violated the protective order must have occurred on or after September 30, 1996.

This includes any violation that would come within § 6320 or 6389, no matter how innocuous. The court considered the case of a permanent resident who was found by an Oregon court to have violated a 100-yard stay-away order, when he walked his child up the driveway instead of dropping him off at the curb, after visitation. Because Calif. F.C. § 6320 includes stay-away orders, the court concluded that this violation was a deportable offense.[41] The BIA has extended this rule nationally.[42]

A finding regarding the following conduct would be deportable. Section 6320(a) permits a judge in a domestic violence situation to enjoin a party from "molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members." Section 6320(b) permits a judge in a domestic violence situation to enjoin a party from taking certain actions against the victim's pet. Section 6389 prohibits a person from owning, possessing, purchasing or receiving a firearm by a person subject to a protective order.

3. Suggested Pleas; Avoiding § 273.6

Any judicial finding that a defendant violated a portion of a domestic violence order involving conduct described in Calif. Family C. §§ 6320 and 6389, including minor violations involving stay-away orders or phone calls, causes deportability. Alternatives include:

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[39] *Alanis-Alvarado v. Holder*, 558 F.3d 833, 835, 836-838 (9th Cir. 2009), amending, with the same result, 541 F.3d 966 (9th Cir. 2008). A petition for rehearing and rehearing en banc was denied.
[40] *Id.* at 837 (noting that P.C. § 273.5 includes an order issued pursuant to Cal. Civ. Proc. Code 527.6(c) (temporary restraining order against any person) which would not be a domestic violence protective order).
[41] *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009).
[42] *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011).

- Plead to a new offense instead of to violating an existing order. Spousal battery, trespass, P.C. § 653m, and several other offenses are not crimes of domestic violence. See Part A, *supra,* regarding safer new pleas. These new pleas can include new protective order and probation provisions relating to domestic violence. Make sure that the plea is *not* to a "crime of domestic violence," to "stalking" (see Part IV, below), or some other deportable offense. Finally, even if § 237.6 is not charged, to be safe make sure that the judge does not make an (extraneous) finding that the new offense was a violation of the protective order.[43]

- Plead to P.C. § 166(a) (contempt of court). Section 166(a)(3) sets out specific actions that do not cause deportability. Parts (a)(1) and (a)(2) also are good.

- Plead to a violation of an order under 166(a)(4) and either keep the record from specifying that the order related to a domestic situation, or confine it to support or custody requirements. It is possible, although not guaranteed, that failure to attend anger management classes also avoids the deportation ground.

- If necessary, plead to P.C. 273.6 but not for violating a protective order issued "pursuant to" Calif. Family Code §§ 6320 and 6389. Plead to § 273.6 pursuant to other provisions in the section (elder abuse, employee abuse, protective orders not tied to domestic violence), or if permitted, simply to P.C. § 273.6 with a record that does not identify the order.[44]

  As a last resort, if counsel must plead to a charge of violating P.C. § 273.6 pursuant to §§ 6320 and 6389, take a *West* plea to, e.g., "Count 2," but refuse to plead specifically "as charged in" Count 2. This at least will give immigration counsel an argument that the record does not establish that the plea was pursuant to these Family Code sections.[45]

IV. CRIME OF CHILD ABUSE, NEGLECT OR ABANDONMENT

Warning for U.S. citizen and permanent resident defendants: A U.S. citizen or permanent resident who is convicted of sexual conduct or solicitation, kidnapping, or false imprisonment where the victim is under the age of 18 faces a serious penalty: he or she may be barred from filing a family visa petition to get lawful immigration status for a close relative. See further discussion at *§ N.13 Adam Walsh Act.*

A. Overview and Definitions of Child Abuse, Neglect, or Abandonment for Immigration Purposes

[43] The categorical approach applies to this part of the deportation ground. *Alanis-Alvarado*, *supra at* 836-838. Therefore where the offense is not charged as a violation of a protective order, it cannot be found to be one. However, these decisions could change, and a finding could give ICE something to argue about.
[44] This has been held not to be a deportable offense. *Ibid.* (It is less desirable only because the law could change.)
[45] Why is "as charged in" important? See discussion of As discussed of *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007)(en banc) in *§ N. 3 Record of Conviction.*

A noncitizen is deportable if, after admission and after September 30, 1996, he or she is convicted of a "crime of child abuse, child neglect, or child abandonment."[46] There is no requirement that the person have a particular relationship with the child, or that a particular sentence was imposed. At this time ICE appears to be charging almost any offense that has a minor victim as an element, or where the record of conviction shows that the victim was under 18, as a crime of child abuse. It might even so charge **P.C. § 272**.

This is due in part to the vague definition of child abuse. In *Matter of Velazquez-Herrera*,[47] the BIA defined a "crime of child abuse" as follows:

> [We] interpret the term "crime of child abuse" broadly to mean any offense involving an ***intentional, knowing, reckless, or criminally negligent act or omission*** that constitutes maltreatment of a child or that ***impairs a child's physical or mental well-being***, including sexual abuse or exploitation. At a minimum, this definition encompasses convictions for offenses involving ***the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse,*** including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes, such as drug trafficking. Moreover, as in the "sexual abuse of a minor" context, we deem the term "crime of child abuse" to refer to an offense committed against an individual who had not yet reached ***the age of 18 years***. *Cf. Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006). [W]e do ***not*** limit the term to those offenses that were ***necessarily committed by the child's parent or by someone acting in loco parentis.***

This also serves as the definition of child neglect and abandonment. For brevity, we will refer to a deportable "crime of child abuse."

Not just harm, but ***risk of harm such as child endangerment,*** is sufficient to be a deportable crime of child abuse. In *Matter of Soram*[48] the Board held that a Colorado child endangerment statute was an "act or omission that constitutes maltreatment of a child" under the *Velazquez-Herrera* definition. Counsel must assume that all conduct covered by Cal. P.C. § 273a(a) constitutes child abuse; it is not clear whether all of § 273a(b) does. See Part C, below.

B. Best Plea: An Age-Neutral Statute Where the Record Does Not Show a Minor Victim (or Even Where It Does)

In *Matter of Velazquez-Herrera, supra*, the Board of Immigration Appeals held that the categorical approach applies in determining whether a conviction is a deportable crime of child abuse, neglect, or abandonment. The Board interpreted this to mean that a plea to an age-neutral

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[46] INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).
[47] *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 513 (BIA 2008), defining child abuse in 8 USC § 237(a)(2)(E)(i).
[48] *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (unreasonable action that causes a threat of injury under Colorado Rev. Stat. 18-6-401(7)(b)(I) is a deportable crime of child abuse, even if no injury is actually caused; disapproves *Fregozo v. Holder*, 576 F.3d 1030, 1037-38 (9th Cir. 2009) that under the BIA's own test, actual harm must occur.)

offense (an offense that does not have as an element that the victim is under age 18) is a crime of child abuse only if the victim's minor age is conclusively proved in the reviewable record of conviction. The Board held that the following evidence did not offer sufficiently conclusive proof that the victim was a minor: a Washington state no-contact order involving a child (the birth certificate was provided), which does not necessarily identify the victim of the offense of conviction; and a restitution order to the "child victim," since restitution in Washington is established by a preponderance of the evidence and so was not part of the "conviction."

Note, however, that under recent Supreme Court precedent it appears that *no* conviction under an age-neutral statute is a "crime of child abuse," because the minimum conduct to violate an age-neutral statute does not require a minor victim. This is true even if the record of conviction indicates that the victim was a minor. See the "Minimum Conduct" Box at start of Note, and *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013). This intervening Supreme Court precedent governs application of the categorical approach in removal proceedings, and should be held to overturn the Board's prior holding. (Counsel still should keep the age out of the record where possible; see next paragraph.)

Bottom line advice: To avoid a deportable crime of child abuse, best practice is to plead to an age-neutral offense and keep a victim's minor age out of the record of conviction. This avoids any possible issue and permits the case to go quickly through immigration proceedings. However, if you are analyzing the immigration situation of a defendant who already has an age-neutral conviction where age did appear in the record, do not assume that the person already is deportable for a crime of child abuse. While litigation might be required to resolve the issue, the person ought to win. Therefore it is worth it to continue to keep the defendant from coming within a ground of deportability.

C. Risk of Non-Serious Harm and P.C. § 273a(b)

Counsel should conservatively assume that a conviction for § 273a(b) will be charged as a deportable crime of child abuse, but there are strong arguments that it should not be. The Board held that a Colorado child endangerment statute that punishes a person who "permits a child to be *unreasonably* placed in a situation that poses a *threat of injury to the child's life or health*" is a deportable crime of child abuse or neglect.[49] The statute required a "reasonable probability" that the child's health or life will be endangered. Unfortunately, the Board stated that it will decide whether a state's child endangerment statute is child abuse on a case-by-case basis. Because § 273a(b) includes a less serious risk of harm, it might not be held child abuse.

Until this is resolved, defense strategies may include:

- If possible, plead to an age-neutral offense with a record that does not specify the age of the victim. This is the safest plea.

[49] *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (mere risk of harm can amount to child abuse, disapproving the Ninth Circuit's contrary finding in *Fregozo v. Holder*, 576 F.3d 1030, 1037-38 (9th Cir. 2009) as a misinterpretation of the BIA's own definition.) See Part A, *supra.*

- If one must plead P.C. § 273a(b), plead specifically to negligently permitting "a child to be placed in a situation where his or her person or health may be endangered," other than great bodily injury or death. For example, negligently failing to double-check that the child had put on her seatbelt during a brief trip. Warn the client that ICE still may charge this as a deportable crime of child abuse, and it is not clear what the immigration judge will do.

- If that is not possible, try to leave the record vague. Here too, warn the client of the high risk that immigration authorities will charge it as a deportable crime of child abuse or neglect.

- Assume that any conviction under § 273a(a) will be held a crime of child abuse.

D. Offense Involving Sexual Intent Or Injury To Morals

The definition of a crime of child abuse includes "sexual abuse" and "mental or emotional harm, including acts injurious to morals." Sexual abuse includes "direct acts of sexual contact, also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification." Thus, an omission that induces a child to engage in sexually explicit conduct, as well as an act that involves the use of a child as an object of sexual gratification is a crime of child abuse.

Again, the best plea is to an age-neutral offense in which the record of conviction does not identify the victim's name, or age of the victim. If lewd intent is required, **P.C. § 314** might be used. Assume that § 314 will be held a CIMT, although there is conflict in the law.[50] Assume that ICE will charge **P.C. § 261.5** and other explicit, consensual acts with an older minor as "child abuse." The Ninth Circuit might rule against this, but there is no guarantee. See further discussion of offenses such as Cal P.C. **§261.5, 288,** and **647.6** *at §N.10 Sex Offenses,* at ILRC California Chart and Notes, www.ilrc.org/crimes.

E. Other Consequences: Child Abuse Offenses as an Aggravated Felony, Crime Involving Moral Turpitude

Aggravated felony: Crime of Violence. An offense that is a "crime of violence" as defined by 18 USC § 16, for which a sentence of a year or more has been imposed, is an aggravated felony. 8 USC § 1101(a)(43)(F). To avoid the aggravated felony consequence, counsel must obtain a sentence of 364 days or less for any single count of a crime of violence. Assume that a conviction for the following offenses are ***not*** crimes of violence: **Cal P.C. §§ 261.5(c), 647.6(a),** and **negligent conduct under §273a**. See also Section II.B, above. As always, by far the best course is to avoid a sentence of a year or more on any single count, in case the law changes.

[50] See *Matter of Corte-Madera*, 26 I&N Dec. 79 (BIA 2013), disapproving *Nunez v. Holder*, 594 F.3d 1194 (9th Cir. 2010). *Nunez* held that § 314(1) is not automatically a CIMT because it had been used to prosecute erotic dancing in clubs, for an audience that was not offended. *Corte-Madera* declined to follow this on the grounds that in practice § 314(1) is no longer used to prosecute erotic performance.

Despite apparently conflictive precedent, the Ninth Circuit held that **felony §§ 288(c)** is a crime of violence.[51] Directly inflicting pain under **§ 273a** may be so held.

Aggravated Felony: Sexual Abuse of a Minor. Conviction of an offense that constitutes "sexual abuse of a minor" is an aggravated felony, regardless of sentence. 8 USC § 1101(a)(43)(A). This includes all convictions of P.C. **§ 288(a)**, but at least in the Ninth Circuit should not include any conviction of **§§ 261.5, 288(c), or 647.6(a**). However, outside the Ninth Circuit, however, all of these will be held sexual abuse of a minor. See *§ N.10 Sex Offenses.*

Crime Involving Moral Turpitude. Offenses that involve intent to cause significant injury, or many offenses with lewd intent, will be held to be a crime involving moral turpitude (CIMT). Assume that offenses that require intentional serious injury to a child, or reckless actions that threaten such injury, will be held a CIMT. In contrast, negligent action, including negligent offenses in Cal. P.C. § 273a, should not be held a CIMT. Assume that felony, but not misdemeanor, false imprisonment under P.C. § 236 is a CIMT. See further discussion at *§ N.7 Crimes Involving Moral Turpitude*, and see the *California Quick Reference Chart.*

IV. CONVICTION FOR STALKING

Calif. P.C. § 646.9 is a deportable "stalking" offense. A conviction of "stalking" triggers deportability if it was received after admission and after September 30, 1996.[52] The Board of Immigration Appeals held that "stalking" involves repeated conduct directed at a specific person, with the intent to cause the person or his or her immediate family members to be placed in fear of bodily injury or death. The Board found that § 646.9 is always "stalking."[53]

Section 646.9 as a crime of violence aggravated felony. A "crime of violence" is an aggravated felony if a sentence of a year or more is imposed. Counsel should make every effort to obtain a sentence imposed of 364 days or less on each count of § 646.9. See *§ N.4 Sentence Solutions.* If that is not possible, counsel should plead specifically to "harassing" under § 646.9, which is not a crime of violence in cases arising within the Ninth Circuit, but is in cases arising elsewhere.[54] It is far better to get a sentence of less than one year on each count of § 646.9, to eliminate any possibility of an aggravated felony: the person will still be deportable for a stalking conviction, but will avoid the even greater penalty of an aggravated felony.

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[51] Compare *Rodriguez-Castellon v. Holder*, -F.3d- (9th Cir. Oct. 22, 2013) (felony § 288(c), lewd conduct toward a person aged 14 or 15 by a person at least 10 years older, is a crime of violence under 18 USC § 16(b), because the "ordinary" case carries a substantial risk that violent force will be used) with *U.S. v. Christensen*, 559 F.3d 1092 (9th Cir. 2009) (felony sexual intercourse between a person under age 15 and a person at least four years older, under a Washington statute, is not a crime of violence under standard similar to § 16(b)) and *Valencia-Alvarez v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006) (Cal. P.C. § 261.5(c), intercourse between a person under age 18 and a person at least three years older, is not a crime of violence). See also *U.S. v. Castro*, 607 F.3d 566, 567-58 (9th Cir. 2010) (P.C. § 288(c) is not categorically sexual abuse of a minor).

[52] 8 USC § 1227(a)(2)(E)(i).

[53] *Matter of Sanchez-Lopez*, 26 I&N Dec. 71, 73-74 (BIA 2012). The Board did not decide whether to also require that the victim was actually afraid, and/or that a reasonable person in like circumstances would have been.

[54] *Malta-Espinoza v. Gonzales* 478 F.3d 1080 (9th Cir 2007); *Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012).

Appendix 9-I

LEGAL SUMMARIES TO HAND TO THE DEFENDANT

The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes, and they might not recognize the defense you have created. This paper may be the only chance for the defendant to benefit from your work.

1. ***Please give a copy of the applicable paragraph/s to the Defendant,*** *with instructions to present it to an immigration defense attorney or the Immigration Judge. Please include a copy of any* ***official documents*** *(e.g. plea form) that will support the defendant's argument.*

2. ***Please give or mail a second copy to the defendant's immigration attorney, friend, or relative, or mail it to the defendant's home address****. Authorities at the immigration detention center may confiscate the defendant's documents. This will provide a back-up copy accessible to the defendant.*

This Appendix provides defense analyses of the following offenses: Cal. P.C. §§ 32, 69, 136.1(b)(1), 236/237, 243(a), 243(d), 243(e), 243.4, 591, 594, 602, 646.9, 647, 647(h), (i).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Accessory after the fact, Cal. P.C. § 32, never is a crime of violence, deportable crime of domestic violence, drug offense, etc., regardless of the underlying offense, because it does not take on the character of the underlying offense. *See, e.g., U.S. v. Innie*, 7 F.3d 840 (9th Cir. 1993) (accessory after the fact to a crime of violence is not a crime of violence); *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (accessory after the fact to a drug crime is not a controlled substance offense); see generally *U.S. v. Vidal* 504 F.3d 1072, 1077-1080 (9th Cir. 2007) (en banc) (accessory after the fact to theft is not theft).

Accessory after the fact, Cal. P.C. § 32, is not a crime involving moral turpitude in immigration proceedings arising in the Ninth Circuit, because it lacks the requisite intent as an element. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*). In *Matter of Rivens*, 25 I&N Dec. 623, 629 (BIA 2011), the BIA specifically declined to state that *Navarro-Lopez* should not be followed in the Ninth Circuit. Until the BIA issues a precedent decision stating that *Navarro-Lopez* should not be followed, immigration judges are bound by *Navarro-Lopez* in cases arising within the Ninth Circuit. Outside the Ninth Circuit, the BIA's rule is that accessory after the fact involves moral turpitude only if the underlying offense does. *Rivens* at 627.

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California P.C. § 69, resisting arrest, is not a crime of violence, either as a felony or misdemeanor. The minimum conduct to commit this crime includes an offensive touching, which is not a crime of violence. *Flores-Lopez v. Holder*, 685 F.3d 857, 863 (9th Cir. 2012). If the minimum conduct to commit an offense is not a crime of violence, then no conviction of the offense is. This is true regardless of information in the record of conviction, and it applies both to deportability and applications for relief. See *Moncrieffe Holder*, 133 S. Ct. 1678, 1684, 1692 (2013) (the categorical approach requires an immigration court to evaluate a prior conviction based solely upon the minimum conduct required to commit the offense; this applies in applications for relief as well as deportability); *U.S. v. Flores-Cordero,* 723 F.3d 1085 (9th Cir. 2013) (where the minimum conduct to commit an offense is an offensive touching, no conviction of the offense is a crime of violence under the categorical approach).

Similarly, ***P.C. § 69 is not a crime involving moral turpitude,*** because the minimum conduct to commit the offense involves an offensive touching. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (battery with offensive touching is not a crime involving moral turpitude or a crime of violence, even when the victim is a spouse); *Olivas-Motta v. Holder,* 716 F3d 1199 (9th Cir 2013) (the categorical approach governs moral turpitude determinations, overruling *Matter of Silva-Trevino,* 24 I&N Dec 687 (AG 2008)).

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California P.C. § 136.1(b) is an attempt, without use of force a threat, to persuade a victim or witness from filing a police report, supporting prosecution, etc. See, e.g., *People v. Upsher*, 155 Cal. App. 4th 1311, 1320 (2007); *People v. Wahidi*, 222 Cal. App. 4th 802 (2013). Compare §§ 136.1(b) to 136.1(c)(1), which does involve force or threat.

The offense is not an aggravated felony even if a sentence of a year or more is imposed. Subsection 136.1(b) is not an aggravated felony as a "crime of violence" because it does not include persuasion by force or threat. Compare to § 136.1(c)(1).

Nor is it an aggravated felony as "obstruction of justice" because it lacks the element of specific intent to prevent the apprehension or prosecution of the wrongdoer, which the BIA held is necessary for obstruction of justice. See *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838, 841 (BIA 2012), where the Board reaffirmed and clarified its decision in *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999) that the crime of affirmatively concealing a felony (misprision of felony, 18 USC § 4) is not obstruction of justice, because it lacks this specific intent. "We concluded that misprision does not constitute 'obstruction of justice' because 'it lacks the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice.' Id. at 896. This element--the affirmative and intentional attempt, with specific intent, to interfere with the process of justice--demarcates the category of crimes constituting obstruction of justice." Section 136.1(b)(1) amounts to an attempt to persuade someone to commit misprision, except that misprision requires an affirmative act of concealment. See also *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 862-63 (9th Cir. 2008) (federal misprision of felony, 18 USC § 4, is not obstruction of justice). Like misprision, §136.1(b)(1) contains no element of specific intent to prevent the apprehension or prosecution of the felon. It only requires an intent to dissuade the witness from, e.g., filing a police report. CALJIC 7.14.

It is not a crime involving moral turpitude, because it does not require fraud and can be committed with innocent intentions. See, e.g., *People v. Wahidi*, 222 Cal. App. 4th 802 (2013), where a conviction was upheld under the following circumstances. Mr. Wahidi had punched Mr. Kahn, a fellow Muslim, and was being criminally charged. Mr. Wahidi approached Mr. Kahn following prayer services, apologized for his actions, and asked if they "could just settle this outside the court in a more Muslim manner family to family, have our families meet and settle this out of court and not take this to court." Mr. Khan understood that Mr. Wahidi did not want him to testify at the preliminary hearing, and wanted to resolve the case in a traditional manner. Mr. Khan was sympathetic to this idea. He went to the preliminary hearing and asked the prosecutor if the case could be handled another way. This led to Mr. Wahidi's conviction for non-violently attempting to persuade Mr. Kahn. *Id.* at 804-805.

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Felony false imprisonment is an unlawful violation of personal liberty that may be committed by violence, menace, fraud or deceit. ***Calif. P.C. §§ 236, 237(a).*** Because fraud and deceit do not involve the inherent risk that violence will ensue, the offense is divisible as a ***crime of violence*** under 18 USC § 16. If the record of conviction is vague, or indicates fraud or deceit, the conviction is not a deportable crime of domestic violence or aggravated felony as a crime of violence. The offense should be held divisible as a ***crime involving moral turpitude*** because it can be committed by deceit rather than fraud.

Misdemeanor false imprisonment is simply an unlawful violation of personal liberty of another. It is a general intent crime that contains no intent to harm the victim, and may be based on an honest mistake. See, e.g., *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 625 (9th Cir 2010). It is not a ***crime involving moral turpitude*** because the minimum conduct to violate the statute does not involve moral turpitude. See *Ibid*, and see *Moncrieffe Holder*, 133 S. Ct. 1678, 1684 (2013) (the categorical approach requires an immigration court to evaluate a prior conviction based solely upon the minimum conduct required to commit the offense; this is true for purposes of both deportability and eligibility for relief); *Olivas-Motta v. Holder*, 716 F3d 1199 (9th Cir 2013) (the categorical approach governs moral turpitude determinations, overruling *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687)). It is not a ***crime of violence*** because it does not have use or threat of violent force as an element. 18 USC § 16(a).

Neither misdemeanor nor felony false imprisonment is a crime of child abuse, for several reasons. First, the BIA has held that a "crime of child abuse" is a generic offense subject to the categorical approach. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 516-17 (BIA 2007). The Board interpreted this to mean that if a criminal statute does not have minor age of the victim as an element, the conviction will be a crime of child abuse only if the reviewable record of conviction conclusively establishes that the victim was a minor. *Ibid.* Thus where the record does not establish a minor victim, the conviction is not a crime of child abuse. Second, even if the defendant's record establishes a minor victim, the offense is not a deportable crime of child abuse. After the BIA decided *Velazquez-Herrera*, the Supreme Court clarified that under the categorical approach an immigration judge must evaluate an offense based solely on its elements, as determined by the minimum conduct to commit the offense. *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013); *Descamps v. United States*, 133 S.Ct. 2776 (2013). Therefore no conviction of an age-neutral statute such as § 236 is a crime of child abuse, because § 236 has no element pertaining to the victim's age, and the minimum conduct to violate the statute includes an adult victim. Third, assuming arguendo a minor victim could be established, misdemeanor § 236 still would not meet the definition of child abuse because the minimum conduct to commit the offense does not require actual or risked harm to the child. *See* discussion of standard in *Matter of Soram*, 25 I&N Dec. 378, 380-381 (BIA 2010). This should be held true for felony false imprisonment by fraud or deceit, as well.

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California P.C. § 243, assault or battery that can be committed by de minimus force ("offensive touching") cannot be held a crime of violence under 18 USC § 16 or a crime involving moral turpitude, because the minimum conduct to commit the offense is not. This is true regardless of the record of conviction, and applies to deportability and applications for relief. See *Moncrieffe Holder*, 133 S. Ct. 1678, 1684, 1692 (2013) (the categorical approach requires an immigration court to evaluate a prior conviction based solely upon the minimum conduct required to commit the offense; this applies in applications for relief as well as deportability); *Olivas-Motta v. Holder*, 716 F3d 1199 (9th Cir 2013) (the categorical approach governs moral turpitude determinations, overruling *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008)); and *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013) (where the minimum conduct to commit an offense is an offensive touching, no conviction of the offense is a crime of violence under the categorical approach, citing *Moncrieffe, supra*, and *Johnson v. United States*, 130 S.Ct. 1265, 1273 (2010)).

Cal. P.C. § 243(e), spousal battery, is not a ***crime of violence, a deportable crime of domestic violence***, or a crime involving moral turpitude because the minimum conduct to commit the offense is offensive touching. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (minimum conduct to commit §§ 242, 243(e) is not a crime of violence, domestic violence offense or crime involving moral turpitude); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (misdemeanor battery in violation of Calif. PC § 242 is not a crime of violence or a domestic violence offense). Because the minimum conduct to violate § 243(e) does not carry these consequences, no conviction under the statute does. See *Flores-Cordero*, *Moncrieffe*, *supra.*

Calif. P.C. § 243(d) prohibits any battery that results in injury. The minimum conduct to violate § 243(d) is a mere offensive touching that was neither intended nor even likely to cause the injury, under the same definition as for P.C. §§ 242, 243(e). See, e.g., *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978) (§ 243(d) is "the act of battery which results in serious bodily harm to the victim no matter what means or force was used."). Therefore, like § 243(a) and (e), ***§ 243(d) is categorically not a crime of violence, deportable crime of domestic violence, or a crime involving moral turpitude.*** See, e.g., *Matter of Muceros*, A42 998 610 (BIA 2000) Indexed Decision, www.usdoj.gov/eoir/vll/intdec/ indexnet.html (§ 243(d) is not a crime involving moral turpitude because it involves only an offensive touching), cited in *Uppal v. Holder*, 605 F.3d 712, 718-19 (9th Cir. 2010) (discussing §243(d) and holding that a Canadian statute with similar elements also is not a crime involving moral turpitude).

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Misdemeanor sexual battery, Calif. P.C. § 243.4 never is a crime of violence under the 18 USC §16(a) standard, because the restraint can be effected without force. This is true regardless of the record of conviction, and applies both to deportability and applications for relief. See *U.S. v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005) (minimum conduct to commit misdemeanor § 243.4 is not a crime of violence); *Moncrieffe Holder*, 133 S. Ct. 1678, 1684 (2013) (the categorical approach requires an immigration court to evaluate a prior conviction based solely upon the minimum conduct required to commit the offense, for purposes of deportability and eligibility for relief).

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Tampering with phone lines under Cal. P.C. § 591 requires intent to maliciously and unlawfully obstruct a telephone or appurtenance. Under California law, "maliciously" means "with intent to vex, annoy, or injure." Cal P.C. § 7. Section 591 is not a ***crime of violence*** because it is a misdemeanor that does not have as an element the intent to use, threaten, or attempt violent force. 18 USC § 16. It is not a ***crime involving moral turpitude***, because it includes vexing or annoying conduct that causes no harm. See, e.g., *People v. Tafoya*, 92 Cal. App. 4th 220 (Cal. App. 4th Dist. 2001) (§ 591 is violated by removing battery from a cell phone during an argument, when another phone is available).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Vandalism under Cal. P.C. § 594 prohibits maliciously defacing, damaging or destroying property. Maliciously "imports a wish to vex, annoy, or injure" a person. Cal. P.C. § 7. Defacing under § 594 includes conduct as minor as writing on a glass surface with marker that can be easily washed off. *In re Nicholas Y.*, 85 Cal. App. 4th 941 (Cal. App. 2d Dist. 2000).

An offense is a crime involving moral turpitude only if the minimum conduct to commit the offense is. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (the categorical approach requires an immigration court to evaluate a prior conviction based solely upon the minimum conduct required to commit the offense); *Olivas-Motta v. Holder*, 716 F3d 1199 (9th Cir 2013) (the categorical approach governs moral turpitude determinations, overruling *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008)). ***Vandalism under § 594 is not a crime involving moral turpitude*** because the minimum conduct to commit the offense is not one. See, e.g., *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 (9th Cir. 1995) (conviction for vandalism causing damage exceeding $250, under a Washington statute with the same *mens rea* as § 594, "does not rise to the level of either depravity or fraud that would qualify it as necessarily involving moral turpitude.").

The minimum conduct to commit vandalism under P.C. § 594 is ***not a crime of violence*** because it does not inherently involve the risk that violent force will be used to commit the offense. See, e.g., *U.S v Landeros-Gonzales*, 262 F.3d 424 (5th Cir 2001) (felony graffiti is not a crime of violence). Even if § 594 were a crime of violence, it is not a crime of domestic violence because it is a crime against property, while the definition of crime of domestic violence is a "crime of violence … against a person…" INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

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Trespass under Cal. P.C. § 602 is not a ***crime involving moral turpitude.*** Most of the offenses involve minor conduct in an unpermitted place, with no requirement of malice, which is not moral turpitude. See *Matter of M*, 9 I&N Dec. 132 (BIA 1960); *Matter of M*, 2 I&N Dec. 721 (BIA 1946); *Matter of G*, 1 I&N Dec. 403 (BIA 1943). *Matter of N*, 8 I&N Dec. 466 (BIA 1959). Although certain provisions, such as subsection (b), "carrying away any kind of wood or timber," resemble theft offenses, they lack the element of specific intent to deprive the owner permanently of title or possession, which is required for moral turpitude. The offenses that do involve malice are similar to vandalism charges. The Ninth Circuit held that malicious mischief under a similar Washington statute is not a crime involving moral turpitude. *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995).

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Cal. P.C. 647(h) prohibits loitering, prowling, or wandering upon the private property of another, and in the case of loitering with the purpose of committing a crime as opportunity may be discovered. ***Cal. P.C. § 647(i)*** prohibits this activity along with ***peeking into a door or window*** of an inhabited building or structure, without visible or lawful business with the owner or occupant. These are not ***crimes involving moral turpitude***. Minor and vaguely defined offenses such as these are not held to involve moral turpitude. See *Matter of P*, 2 I&N Dec. 117, 122 (BIA 1944) (*dictum*) ("most states also have, in the exercise of their police power, statutes punishing the disturbance of the peace, sauntering and loitering, and like trivial breaches of the peace. It could be hardly contended that a violation of such statutes involves moral turpitude.") Section 647(i) is a general intent offense that is completed by peeking. *In re Joshua M.*, 91 Cal. App. 4th 743 (4th Dist. 2001).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Stalking under Cal. P.C. § 646.9 is divisible a crime of violence in immigration proceedings arising within the Ninth Circuit, because it can be committed by harassment, and the minimum conduct to commit harassment is not a crime of violence. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (the categorical approach requires an immigration court to evaluate a prior conviction based solely upon the minimum conduct required to commit the offense). Therefore it is not categorically an aggravated felony as a crime of violence even if a sentence of one year or more is imposed. *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007) (this holding); see also *Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012), affirming that it must follow *Malta-Espinoza v. Gonzales* in cases arising within the Ninth Circuit.

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Appendix 9-II

- CHART -

Immigration Effect of Selected California Offenses Relating to Domestic Violence or Child Abuse[1]

Note on legal standard for evaluating a prior conviction. With few exceptions, an immigration (or federal criminal court) judge will use the "categorical approach" to evaluate a prior conviction. The Supreme Court has clarified that under this approach, if the minimum conduct to commit an offense does not trigger an immigration penalty, *no* conviction of the offense triggers the immigration penalty. This is true regardless of the actual conduct in the individual's case. *Moncrieffe v. Holder,* --U.S.--, 133 S.Ct. 1678 (2013). For example, an offensive touching does not meet the definition of a "crime of violence." If the minimum conduct to commit an offense is an offensive touching, then *no* conviction of that offense is a crime of violence. *U.S. v. Flores-Cordero,* 723 F.3d 1085 (9th Cir. 2013). Before this, an offense that included offensive touching could be held a crime of violence if the record of conviction showed use of actual violence in the particular case.

An additional step occurs when a "divisible" statute sets out multiple offenses, separated by the word "or," and at least one offense does and one does not trigger the immigration consequence. Here and here alone, an immigration judge may consult the individual's record of conviction, to determine which statutory elements made up the offense of conviction. Then the judge will apply the minimum conduct test to that offense. *Descamps v. United States*, --U.S.--, 133 S.Ct. 2276 (2013), overruling *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011)(*en banc*). For example, Cal. P.C. §§ 236/237, felony false imprisonment by "violence, menace, fraud, or deceit," is divisible as a crime of violence because "violence" involves violence but "fraud" does not. An immigration judge may consider the individual's conviction record to determine which element was the subject of the conviction. In contrast, California misdemeanor false imprisonment is not divisible: it does not set out distinct elements in the alternative, separated by "or," only some of which are crimes of violence. An immigration judge may not review the record.

Note that in 2013 the Ninth Circuit held that the categorical approach fully applies to moral turpitude determinations for immigration purposes. *Olivas-Motta v. Holder,* 716 F3d 1199 (9th Cir 2013), declining to follow *Matter of Silva-Trevino,* 24 I&N Dec 687 (AG 2008). Now the same "minimum conduct" test applies to moral turpitude as to other removal grounds.

CALIF. PENAL CODE SECTION and OFFENSE ***Summary of Immigration Consequences***	**AGGRAVATED FELONY (AF)** **-Crime of Violence (COV) and Obstruction of Justice are AFs only if sentence of at least 1 yr is imposed[2]** **- Sexual Abuse of a Minor and Rape are AFs regardless of sentence[3]**	**CRIME INVOLVING MORAL TURPITUDE (CIMT)[4]**	**OTHER DEPORTATION GROUNDS or Consequences** **-Deportable Crime of Domestic Violence (DV)[5] or vio. of DV protective order[6]** **-Deportable Child Abuse[7]** **-Block a US Citizen or LPR from petitioning for family member, Adam Walsh Act[8]**
Any Felony or Misdemeanor Conviction	Might be an AF, with or without a one-year sentence imposed. See Chart and Note: Aggravated Felonies, Note: Sentence Solutions at www.ilrc.org/crimes	Might be a CIMT. See Chart and Note: Moral Turpitude at www.ilrc.org/crimes	One felony or two misds bars Temporary Protected Status (TPS).[9] One felony or three misds, or one "significant" misd, bars DACA status; a domestic violence crime is a "significant" misdemeanor.[10]
P.C. §32 **Accessory after fact** ***Summary**: Good plea to avoid deportable DV or drug offense, but get 364 days or less*	To avoid AF as obstruction of justice, avoid 1 y or more sentence imposed on any single count.[11]	Is not a CIMT in Ninth Circuit, but imm judge might improperly hold that it is a CIMT if principle offense is a CIMT.[12] Identify an underlying non-CIMT offense, or plead to 243(d), (e), 415, etc.	Because accessory does not take on character of the principal offense for, e.g. drugs or violence[13] it is a good alternative plea to §273.5, 245, or other COV involving a domestic relationship.
P.C. § 69 **Resisting Arrest** ***Summary:** Potential good plea for DV*	Not a COV because minimum conduct is offensive touching.[14] As always, best practice still is to avoid 1 yr on any single count.	Not a CIMT because minimum conduct is not CIMT; see prior endnote	None
P.C. §136.1(b)(1) **Nonviolent attempt to persuade witness or victim not to file police report** ***Summary:** Should be few or no consequences if less than 1 year.*	Obtain sentence of 364 days or less on each count. If 1 yr or more is imposed, ICE might charge AF as obstruction of justice, although this appears to be incorrect and in conflict with BIA precedent.[15]	Should not be held a CIMT, but no case on point.[16]	Because a felony offense is a strike, this may be acceptable to the prosecution instead of another serious felony. The author believes this is not obstruction of justice or a CIMT, but there is no precedent decision directly on point.

OFFENSE	AGGRAVATED FELONY (AF)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
P.C. §166(a)(1)-(4) **Contempt of court or violation of court order (generic)** ***Summary**: Can be good alternative to 273.6 to avoid domestic violence deportation ground.* *Note **166(b) and (c)** are bad immigration pleas.*	This is not a COV because the minimum conduct to commit the offense does not require a COV. (In addition, this has a maximum 6 months)	Sections (a)(1)-(3) shd not be CIMTs because disorderly or insolent behavior, or disturbing the peace, is not a CIMT. "Willfully" violating an order set out in (a)(4) might be a CIMT if (a) the prohibited conduct set out in the order is held to be an element of this offense and (b) that conduct is necessarily a CIMT.	Avoid deportable civil or crim court finding of violation of section of a DV order that protects against violence, threat or repeat harassment.[17] Sec (a)(1-3) will avoid this. For (a)(4), don't ID a violation of a *DV* order; or if DV order admitted, ID violation relating to custody, support, or perhaps counseling, or get vague ROC. *Any violation of DV stay-away order* is deportable. Better plea is to 243(e) or other new offense.
P.C. §§ 236, 237 **False imprisonment (felony)** ***Summary:** With careful plea, a felony may avoid immigration effect except for a CIMT.*	To surely avoid AF, get 364 days or less on each count. If sentence is 1 yr or more, plead to fraud or deceit, which shd not be held a COV. A plea to violence or menace will be COV.	Assume it is a CIMT, altho imm counsel can argue that deceit is not. To avoid CIMT, plead to 69, 243(d), 243(e), or other offense that involves offensive touching, or see Chart	A COV is a deportable DV offense if committed against a DV-type victim, and Agg Fel if 1-yr imposed. . Plead to fraud or deceit to avoid COV. If V is under age 18, see § 240(a) regarding deportable crime of child abuse, and Adam Walsh Act.
P.C. §236, 237 **False imprisonment (misdemeanor)** ***Summary:** Not COV or CIMT, but see Advice*	Not AF as COV: minimum conduct is not a COV. But where possible, obtain 364 days or less and/or state the offense did not involve use or threat of violence	Not a CIMT.[18]	If V is under age 18, see § 240(a) regarding deportable crime of child abuse, and Adam Walsh Act.
P.C. §240(a) **Assault, simple** ***Summary:** No immigration effect. See also battery*	Not a COV because the minimum conduct to commit the offense is threatened offensive touching. (Also no one year sentence)	Not a CIMT because the minimum conduct to commit the offense is threatened offensive touching.[19]	To avoid charge of deportable crime of child abuse, do not let ROC show V under 18 yrs.[7] See *§N.9 DV and Child Abuse.* If ROC shows V under 18 yrs, conviction may block a USC or LPR's future ability to immigrate family members, under Adam Walsh Act.[8] See *§N.13 Adam Walsh Act.*

OFFENSE	AGGRAVATED FELONY (AF) Crime of Violence (COV) Sex Abuse of a Minor (SAM)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
P.C. §243(a) **Battery, Simple** ***Summary**: No immigration effect*	Not a COV; see § 243(e). (Also no one year sentence)	Not a CIMT; see §243(e).	Never DV offense. See § 240(a) regarding deportable crime of child abuse, and Adam Walsh Act.
P.C. §243(d) **Battery with bodily injury** ***Summary:** At least misdemeanor is not a COV; good substitute to avoid violent or CIMT plea. Important to give client the argument because this result is counter-intuitive.*	Misdemeanor is not a COV because the minimum conduct to commit the offense is the same offensive touching as §243(a), not intended or even likely to cause injury.[20] Get 364 or less on each count. Felony is at risk of charge as a COV because law on felony COVs is confusing, so try hard to plead to misd, and/or to get to 364 days or less on each count.	Neither felony nor misd is CIMT because minimum conduct is an offensive touching. See COV endnote.[21] For CIMT and COV, it is especially important to give D the written legal summary so that immigration judges understand the defense. See Appendix II.	See § 240(a) regarding deportable crime of child abuse, and Adam Walsh Act. If misd or felony is (wrongly) held to be a COV, could be a deportable DV offense if D and V share domestic relationship.
P.C. §243(e)(1) **Battery against spouse, date, etc.** ***Summary:** No effect (except on DACA?). Good immigration plea with secure case law*	Not a COV because the minimum conduct to commit the offense is offensive touching. [22] As always, however, it is best to get 364 or less on each count.	Not a CIMT because the minimum conduct to commit the offense is offensive touching.[23]	Never DV offense. See § 240(a) regarding deportable crime of child abuse, and Adam Walsh Act. DACA is barred by an undefined "DV offense"; unknown if 243(e) is a problem
P.C. §243.4 **Sexual battery** ***Summary:** Alternative plea to avoid rape or sexual abuse of a minor*	To avoid AF as COV: Get 364 days or less on any count. If 1 yr or more imposed: -Felony is AF as COV.[24] -Misd is not AF as COV.[25] Shd not be AF as rape because minimum conduct does not require penetration. See PC 240(a) if minor victim. See *§N.10 Sex Offenses* at www.ilrc.crimes/org	Yes CIMT.	A COV is deportable DV offense if committed against DV type victim. See § 240(a) regarding deportable crime of child abuse, and Adam Walsh Act if minor victim. Shd not let record show V under age 18. An age-neutral offense cannot be sexual abuse of a minor[26] but caution: someday legislation might change this.

OFFENSE	AGGRAVATED FELONY (AF) Crime of Violence (COV) Sex Abuse of a Minor (SAM)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
P.C. §245(a) (effective 1/1/2012) **Assault with a deadly weapon or with force likely to produce great bodily harm** ***Summary:*** *With careful plea can avoid Agg Felony or deportable DV offense. Probably a CIMT.*	This is a COV. To avoid an AF, get 364 days or less on any single count 245(a)(3) is an AF as a federal firearms analogue, even with a sentence of less than one year. See *§N.12 Firearms.*	Conservatively assume yes CIMT, although there is conflicting case law and the issue is before the Ninth Circuit en banc at this writing.[27]	A COV is deportable crime of DV if committed against DV type victim. If V is under 18, do not let this appear on record and see PC 240(a). To avoid deportable firearms offense,[28] keep ROC of conviction clear of evidence that offense was 245(a)(2) or (3); consider PC 17500, 236, 243(d) and 136.1(b)(1) and see *§N.12 Firearms.*
P.C. §§ 261, 262 **Rape, Spousal Rape** ***Summary****: Automatic aggravated felony, CIMT*	Yes AF as rape, regardless of sentence imposed. Includes if V is incapacitated or other contexts not including force. Consider PC 243(d), 243.4, 236, 136.1(b)(1)	Yes CIMT	§ 262 always is a deportable crime of DV; § 261 is if committed against DV type victim, e.g. date. To avoid deportable crime of child abuse, don't let ROC show V was under 18
P.C. § 261.5(c), (d) **Sex with a Minor** ***Summary:*** *Good plea in the Ninth Circuit. See more information at §N.10 Sex Offenses*	Not AF as sexual abuse of a minor, rape, or a crime of violence within the Ninth Circuit - but could be so held if D is put in immigration proceedings elsewhere.	Not a CIMT because no element of knowing that the victim is underage	Likely charged as child abuse, especially 261.5(d). Note: If the D leaves the US and re-enters illegally, felony 261.5(d) is a bad prior. See *§N.10 Sex Offenses.*
P.C. § 273a(a), (b) **Child Abuse** ***Summary:*** *Even 273a(b) may be deportable child abuse offense; to avoid this consider age-neutral statutes without minor age in the record*	§273a is either divisible as a COV, or not a COV. A specific plea to criminally negligent conduct is not a COV. [29] Infliction of pain or suffering might not be a COV, if 273a has been held to include causation of pain by other than violent means. Best practice: avoid a 1-yr sentence imposed on any single count.	A specific plea to criminal negligence shd not be held a CIMT.[30] "Willful" in §273a(a) does not require an intent to risk or cause harm.[31] However, still some danger §273a(a) might be held CIMT.	273a(a) will be, and 273a(b) might be, held a deportable crime of child abuse. To avoid this, plead to an age-neutral offense and do not put age in ROC. If must plead to 273a(b), plead specifically to negligent actions.

OFFENSE	AGGRAVATED FELONY (AF) -Crime of Violence (COV) -Sex Abuse of a Minor (SAM)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
P.C. § 273ab(a), (b) **Severe Child Assault** ***Summary:*** *Bad plea for immigration.*	To avoid AF as COV, get 364 days or less on each count. If that is not possible, see §273d for alternate pleas	Yes CIMT	See § 273d
P.C. § 273d **Child Injury** ***Summary:*** *Deportable crime of child abuse, CIMT, but can avoid AF with a sentence of less than 1 yr*	To avoid AF as COV, [32] get 364 days or less on any single count. -If 1 yr is imposed, to avoid AF see 236, 243(d), (e), 273a. If minor age is kept out of the ROC under an age-neutral statute, this also will avoid deportable child abuse.	Yes CIMT. See alternate pleas in first box	Deportable crime of child abuse. If child is protected under Cal. DV laws, also a deportable DV crime. May eliminate USC or LPR's ability to file a visa petition for a family member under Adam Walsh Act.[8]
P.C. §273.5 **Spousal Injury** ***Summary:*** *Deportable DV, may be CIMT, but can avoid AF with a sentence of less than 1 year*	To avoid AF as COV, get 364 days or less on any single count. To avoid COV and deportable crime of DV, see PC 243(a), (d), (e), 236. Consider 136.1(b)(1), with less than one year, to avoid a COV for DV purposes. Can accept batterer's program probation conditions on these.	Divisible as CIMT because minimum conduct against ex-cohabitant is not CIMT. Specific plea to ex-cohabitant avoids CIMT for any purpose; vague plea to statute avoids deportable CIMT. Because rule could change, however, attempt to plead to other offense if it is crucial to avoid CIMT.	Deportable crime of DV. To avoid deportable crime of child abuse, don't let ROC show V was under 18.
P.C. §273.6 **Violation of protective order** ***Summary:*** *Bad plea: civil or criminal finding is a likely deportable DV offense. See last column for suggested pleas.*	Shd not be COV, but best course is to get 364 days or less for any single count or plead to another offense. If 1 yr sentence imposed, do not let ROC show violation was by threat or use of violence	Unclear. Might be CIMT based on what conduct was; plead specifically to non-violent, minor conduct. With vague plea, imm judge may do factual inquiry, for CIMT purposes only.	§ 273.6 "pursuant to" Cal. Family Code §§ 6320 and 6389 is *automatically* deportable as a violation of a DV protection order. Consider plea to 166(a) with a vague ROC, or to a new offense that is not deportable, e.g. 243, 591, 653m

OFFENSE	AGGRAVATED FELONY (AF) -Crime of Violence (COV) -Sex Abuse of a Minor (SAM)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
P.C. §281 **Bigamy**	Not AF	Yes CIMT	No
P.C. §§ 288(a), (c) **Lewd conduct with minor** ***Summary:*** *288(a) is terrible plea, 288(c) is less bad*	288(a) is an AF as SAM regardless of sentence, and AF as a COV if 1 yr imposed. 288(c) is not SAM, but will be held AF as COV if 1 yr is imposed. (That holding may be open to challenge.) Therefore get 364 days or less on any one count	Not clear, but assume that 288(a) is a CIMT and 288(c) might be.	Assume that they will be charged as deportable crime of child abuse. If a protected domestic relationship is shown, 288(c) is a deportable crime of domestic violence.
P.C. §403 **Disturbing assembly**	Not AF	Not CIMT	No.
P.C. §415 **Disturbing the peace**	Not AF	Not CIMT	No.
P.C. §422 **Criminal threats** ***Summary:*** *A generic crime of violence and CIMT*	Yes AF as COV if 1-yr sentence imposed.[33] Obtain 364 days or less on any single count. If 1 yr can't be avoided, see 243(d), (e), felony 236, etc.	Yes CIMT	As a COV, it is a deportable crime of DV if ROC shows committed against DV-type victim. To avoid deportable crime of child abuse, don't let ROC show V was under 18.
P.C. § 591 **Tampering with phone, TV lines** ***Summary****: Good plea; no immigration effect*	Not a COV.	Not a CIMT. Can be violated by, e.g., removing battery from a cell phone with when another phone is available.[34]	Not deportable DV offense b/c not COV.
P.C. § 591.5 **Tampering w/ cell phone to prevent call for assistance or law enforcement** ***Summary****: Might be CIMT; note 6 month max*	Not a COV.	Appears not to be a CIMT, but might be so held. Because it has 6-month maximum, it is not an inadmissible or deportable CIMT offense if D has only one CIMT conviction.	Not deportable DV offense b/c no element of intent to threaten or use violent. To avoid possible deportable crime of child abuse, do not let ROC show V under age 18

OFFENSE	AGGRAVATED FELONY (AF)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
P.C. §594 **Vandalism, Felony or Misd** ***Summary:*** *May avoid any immigration effect.*	Not COV because minimum conduct does not require violent force.[35] But as always, it is best to obtain 364 days or less and to keep violence out of ROC.	Shd not be CIMT, especially (b)(2): Ninth Cir held similar statute with damage of $250 or more is not a CIMT.[36] But some imm judges still may hold §594 a CIMT; consider §602.	Good plea to avoid a deportable DV offense: even if it were a COV, a deportable DV offense only reaches violence against persons. (Note that pre -2000, §594 has maximum 6 month sentence, which is good for CIMTs.)
P.C. §602 **Trespass misd** ***Summary:*** *little or no effect, except firearm*	Not AF (even if it were a COV, it has a 6-month maximum sentence)	It appears that no section is a CIMT because minimum conduct is not.	§602(l)(4) is deportable firearm offense.
P.C. §646.9 **Stalking** ***Summary:*** *Deportable offense as "stalking." Consider PC 243(e) and other offenses cited at last column*	Avoid AF as a COV by avoiding 1 yr or more for any single count. If 1 yr is imposed: In the Ninth Circuit, not a COV if ROC indicates offense involved harassment[37] but outside Ninth Circuit § 646.9 is an automatic COV.[38]	Yes a CIMT. See alternate pleas in next column.	Yes, deportable under the DV ground as "stalking" even if it is not a COV. To avoid imm consequences, see, e.g. §§ 136.1(b)(1), 166, 243(a), (e), 236, 653m, or similar offenses.
P.C. §647(c), (e), (h) **Disorderly conduct**	Not AF.	Not CIMT.	No.
P.C. §647(i) **Disorderly conduct: "Peeping Tom"**	Not AF, although keep evidence of minor age of victim out of the ROC.	Shd not be CIMT because minimum conduct is general intent peeking.[39] Give client the legal summary, App 9-I	To avoid possible deportable crime of child abuse, do not let ROC show V under age 18

P.C. § 653m(a), (b) **Annoying, harassing phone calls** ***Summary:*** *Shd have no immigration effect but see information here.*	Not AF as COV because no 1-year sentence.	Shd not be a CIMT but with (a), plead conservatively to obscene language rather than threats	To avoid possible deportable DV, do not plead to threats of injury under (a) Multiple calls (b) are not stalking,[40] but still try to plead to (a), one call. If multiple calls are in violation of DV protective order, get help. To avoid possible deportable crime of child abuse, do not let ROC show V under age 18, but see PC 240 regarding age-neutral offenses.

ENDNOTES

[1] By Katherine Brady, Immigrant Legal Resource Center. For additional information see Brady, Tooby, Mehr, and Junck, *Defending Immigrants in the Ninth Circuit ("Defending Immigrants")* at www.ilrc.org. If you are viewing this Chart separately, see also the California Quick Reference Chart and Notes at www.ilrc.org/crimes, §*N.9 Violence, Domestic Violence, and Child Abuse.* For additional information on recent Supreme Court decisions see ILRC advisories such as Brady and Yi, "Advisory: 14 New Crim/Imm Defenses under *Moncrieffe v. Holder*" at www.ilrc.org/crimes, and advisories at the National Immigration Project of the National Lawyers Guild, at www.nipnlg.org.

[2] *If* a sentence of a year or more is imposed, a "crime of violence" as defined at 8 USC § 16 is an aggravated felony under 8 USC § 1101(a)(43)(F), and obstruction of justice is an aggravated felony under § 1101(a)(43)(S).

[3] Sexual abuse of a minor and rape are aggravated felonies under 8 USC § 1101(a)(43)(A), regardless of sentence.

[4] Depending on various factors, one or more convictions of a crime involving moral turpitude (CIMT) are a basis for deportability and inadmissibility. See 8 USC §§ 1182(a)(2)(A), 1227(a)(2)(A)(i). See *§ N.7 Crimes Involving Moral Turpitude.* Note that in 2013 the Ninth Circuit held that the categorical approach fully applies to moral turpitude determinations for immigration purposes. *Olivas-Motta v. Holder*, 716 F3d 1199 (9th Cir 2013), declining to follow *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008). Now the same "minimum conduct" test applies to moral turpitude as to other removal grounds.

[5] A noncitizen is deportable who is convicted of stalking, or of a statutorily defined crime of domestic violence. 8 USC § 1227(a)(2)(E)(i). A crime of domestic violence (a) must be a crime of violence as defined by 18 USC 16, and (b) must be committed against a victim who is protected under the state's DV laws or is a current or past co-habitant, co-parent, or spouse. *Ibid.* The conviction must have occurred after September 30, 1996 and after the defendant was admitted to the U.S. While a "crime of violence" is evaluated under the regular categorical approach, in the future courts might hold that the domestic relationship may be proved with evidence from outside the record of conviction. In light of this, the most secure defense is to plead (a) to an offense that is not a "crime of violence" (in which case the conviction will not be a deportable DV offense even if the domestic relationship can be proved) or (b) to an offense, including a crime of violence, against a victim not protected under DV laws, e.g. the new boyfriend, a neighbor, a police officer. Remember that any conviction of a crime of violence is an aggravated felony if a sentence of a year or more is imposed on a single count. 8 USC § 1101(a)(43)(F). See *§ N.9 Domestic Violence and Child Abuse* at www.ilrc.org/crimes.

[6] Under 8 USC § 1227(a)(2)(E)(ii), a noncitizen is deportable based upon a civil or criminal court finding of a violation of a portion of a domestic violence protection order that protects against violence, threats of violence, or repeated harassment. Because the focus is the *purpose* of the clause violated rather than the severity of the violation, even a finding of an innocuous violation of a stay-away order (walking a child up the driveway rather than dropping

him off at the curb) triggers this ground. *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009); *Alanis-Alvarado v. Holder*, 558 F.3d 833, 835 (9th Cir. 2009); *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011). The conduct that violated the protective order must have occurred on or after September 30, 1996. See *§ N.9 Domestic Violence and Child Abuse*.

[7] A noncitizen is deportable for conviction of a crime of child abuse, neglect, or abandonment, if the conviction occurred on or after September 30, 1996 and after admission into the U.S. 8 USC § 1227(a)(2)(E)(i). A conviction under an age-neutral statute is not a crime of child abuse as long as the record of conviction does not establish that the victim was under age 18. See *§ N.9 Domestic Violence and Child Abuse*. While immigration counsel have a strong argument that no age-neutral offense is a crime of child abuse, it still is likely to be so charged until the Board of Immigration Appeals clarifies this point. The argument is: the Board has acknowledged that "crime of child abuse" is a generic offense subject to the categorical approach. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 516-17 (BIA 2007). The Board interpreted this to mean that if a criminal statute does not have minor age of the victim as an element, the conviction will be a crime of child abuse only if the reviewable record of conviction conclusively establishes that the victim was a minor. *Ibid.* After the BIA decided *Velazquez-Herrera*, the Supreme Court clarified that under the categorical approach an immigration judge must evaluate an offense based solely on its elements, as determined by the minimum conduct to commit the offense. *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013); *Descamps v. United States*, 133 S.Ct. 2776 (2013). Therefore no conviction of an age-neutral statute may be held a crime of child abuse, even if the record of conviction indicates the non-element fact that the victim was under age 18.

[8] Under the Adam Walsh Act a conviction for certain offenses, including assault or false imprisonment, against a victim under the age of 18 can prevent a permanent resident or U.S. citizen from petitioning to get a green card for close family members in the future. The person will have to win a waiver based on a non-reviewable finding as to whether he or she would pose a threat to a family member. See *§ N.13 Adam Walsh Act*.

[9] Temporary Protected Status (TPS) is given to nationals of certain countries designated by the U.S. after having suffered recent natural disaster or civil unrest, for example post-earthquake Haiti, if the nationals were in the U.S. and registered for TPS as of certain dates. See *§ N.17 Relief* and see www.uscis.gov under "Humanitarian."

[10] Deferred Action for Childhood Arrivals ("DACA") provides employment authorization and at least two years protection from removal for certain persons who came to the U.S. while under 16 years of age, have resided in the U.S. at least since June 15, 2007, and were not over age 30 as of June 15, 2012. Conviction of one felony (potential sentence of more than one year); of three misdemeanors of any type (potential sentence from five days to one year); or of one "significant misdemeanor" is a bar to DACA. DHS states that a "significant misdemeanor" is a federal, state, or local criminal offense punishable by imprisonment of one year or less, but more than five days and is an offense of domestic violence, sexual abuse or exploitation, unlawful possession or use of a firearm, drug sales, burglary, driving under the influence of drugs or alcohol, or of any other misdemeanor for which the jail sentence exceeded 90 days. See *§ N.17 Relief*, or go to www.ilrc.org or to www.uscis.gov ("Humanitarian," see FAQ's)).

[11] The Board of Immigration Appeals held that P.C. § 32 is automatically obstruction of justice. *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012). Avoid a 1-year sentence imposed on any single count.

[12] The Ninth Circuit held that accessory after the fact never is a crime involving moral turpitude, because it lacks the requisite intent. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc). In a case arising outside the Ninth Circuit, the BIA held that accessory after the fact is a crime involving moral turpitude if the underlying offense is one. *Matter of Rivens*, 25 I&N Dec. 623, 629 (BIA 2011). However, BIA specifically declined to state that it will not follow *Navarro-Lopez* in the Ninth Circuit. *Id*. at 627. Until the BIA issues a precedent decision to the contrary, it appears that immigration judges must follow *Navarro-Lopez* in cases arising within the Ninth Circuit states. In case that does not happen, however, the conservative course is to assume that the BIA's rule will govern, and to avoid a CIMT by designating an underlying offense that is not a CIMT or (if deportability rather than eligibility for relief is what is at stake) by leaving the record vague as to the underlying offense.

[13] P.C. § 32 does not take on the character of the underlying offense. See, e.g., *United States v. Innie*, 7 F.3d 840 (9th Cir. 1993) (accessory after the fact to a crime of violence is not a crime of violence); *Matter of Batista-Hernandez*, *supra* (accessory after the fact to a drug offense is not a drug offense).

[14] If the minimum conduct to commit an offense is *de minimus* force, the offense is not a crime of violence. *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013) (Arizona resisting arrest is not a crime of violence based on the minimum conduct test). Penal C § 69 can be committed by de minimus force: its definition of "force and violence"

is the same as simple battery. *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012). Therefore it is not a crime of violence.

[15] As discussed at note 11, the BIA held that accessory after the fact under P.C. § 32 is obstruction of justice. Based upon this, ICE might charge that § 136.1(b)(1) also is obstruction of justice and thus an aggravated felony if a sentence of a year or more is imposed. Counsel should avoid this issue by obtaining a sentence of 364 days or less on each count, but note that § 136.1(b) should not be held "obstruction of justice" because it lacks the element of specific intent to prevent the apprehension or prosecution of the wrongdoer, which the BIA held is necessary for obstruction. See *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838, 841 (BIA 2012), where the Board reaffirmed and clarified its decision in *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999) that the crime of affirmatively concealing a felony (misprision of felony, 18 USC § 4) is not obstruction of justice, because it lacks this specific intent. See also *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 862-63 (9th Cir. 2008) (federal misprision of felony, 18 USC § 4, is not obstruction of justice).

[16] Immigration counsel will argue that the minimum conduct to violate the statute is not a CIMT. Specifically, it does not require fraud or malicious intent, lacks specific intent to obstruct justice, and can be committed with humanitarian intentions, e.g. out of concern for the reporting witness.

[17] See note 6, discussing the deportation ground based on violation of DV-protective order.

[18] *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir. 2010).

[19] See, e.g., *Matter of B-*, 5 I&N 538 (BIA 1953) (simple assault is not a CIMT); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (assault is CIMT only with aggravating factors, such as serious assault against a police office).

[20] Like simple battery, § 243(d) can be committed with de minimus force, with no intent to cause injury or likelihood of doing so; §§ 243(a) and (d) differ only in the result. See *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978). A crime of violence involves purposeful, aggressive, violent conduct. Felony is riskier because gov't could assert that this force, while not itself violent, is likely to lead to violent fight; immigration counsel should fight that. A wobbler that is designated or reduced to a misdemeanor is a misdemeanor with a potential sentence of one year for immigration purposes. *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

[21] *Matter of Muceros*, A42 998 610 (BIA 2000) Indexed Decision, www.usdoj.gov/eoir/vll/intdec/indexnet.html (P.C. § 243(d) is not a CIMT if committed with offensive touching); *Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010) (similar Canadian statute).

[22] See, e.g., *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (Calif. P.C. § 242 is not a crime of violence if it involves offensive touching); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (same for § 243(e)).

[23] *Matter of Sanudo, supra* (§ 243(e) is not a CIMT if it involves offensive touching).

[24] *Lisbey v. Gonzales*, 420 F.3d 930, 933 (9th Cir. 2005).

[25] *U.S. v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005) (misdemeanor PC §243.4 is not categorically a crime of violence under 18 USC §16(a) standard since the restraint can be effected without force). Because the minimum conduct to commit the offense is not a crime of violence, no conviction should be. However, keep information about violence out of the record of conviction.

[26] The aggravated felony "sexual abuse of a minor" is evaluated under the categorical approach, so the minor age of the victim must be an element of the offense. *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012).

[27] In *Ceron v. Holder*, 712 F.3d 426 (9th Cir 2013) a divided panel held that P.C. § 245(a)(2) is a CIMT, despite precedent to the contrary regarding California assault with a firearm. On Sept. 19, 2013 the court granted a petition for rehearing *en banc* and withdrew the panel opinion. See Judge Ikuta's dissent in *Ceron*, and see also *People v. Jones*, 123 Cal. App. 3d 83, 95 (2d Dist. 1981). Section 245(a) reaches conduct while voluntarily intoxicated or otherwise incapacitated. See, e.g., *People v. Velez*, 175 Cal.App.3d 785, 796, (3d Dist.1985) (defendant can be guilty of assault even if the defendant was drunk or otherwise disabled and did not intend to harm the person).

[28] A noncitizen is deportable if convicted of almost any offense relating to a firearm. 8 USC § 1227(a)(2)(C). (An exception is where the California statute includes an "antique" firearm. See Brady and Yi, "Advisory: 14 Crim/Imm Defenses under *Moncrieffe v. Holder*" at www.ilrc.org/crimes.)

[29] Section 273a can be violated by negligence that is aggravated, culpable, gross, or reckless, according to an objective standard. *People v. Valdez* (2002) 27 Cal 4th 778. Felony or misdemeanor negligence or recklessness is not a crime of violence. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006)(*en banc*).

[30] Moral turpitude requires a scienter of recklessness or more. *Matter of Silva-Trevino* 24 I&N Dec 687) (AG 2008).

[31] The term "willful" in §273a(a) "does not require intent to injure the child but implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." People v. Pointer (1984, Cal App 1st Dist.) 151 Cal App 3d 1128.

[32] Calif. P.C. § 273d has same elements re violence as § 273.5, which has been held an automatic crime of violence.

[33] *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003).

[34] See, e.g., *People v. Tafoya*, 92 Cal. App. 4th 220 (Cal. App. 4th Dist. 2001) (during an argument with his estranged wife in her home, defendant removed the battery from the wife's cordless phone when the wife tried to call her mother. The wife used a different phone in the home to call the police).

[35] Vandalism can be committed by less than violent force, e.g., "keying" a car. See, e.g., *In re Arthur V.*, 166 Cal. App. 4th 61 (Cal. App. 4th Dist. 2008) (caused person to drop cellphone, which broke); *In re Nicholas Y.*, 85 Cal. App. 4th 941 (Cal. App. 2d Dist. 2000) (drew on glass with marker).

[36] See *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995) (Washington statute prohibiting damage over $250 with intent to annoy is not CIMT) and *US v Landeros-Gonzales*, 262 F.3d 424 (5th Cir 2001) (graffiti not CIMT).

[37] *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007).

[38] *Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012), declining to follow *Malta-Espinoza* outside Ninth Circuit.

[39] A general intent offense that is completed by peeking. *In re Joshua M.*, 91 Cal. App. 4th 743 (4th Dist. 2001).

[40] The Board of Immigration Appeals defines stalking as repeated conduct directed at a specific person, with the intent to cause the person or his or her immediate family members to be placed in fear of bodily injury or death. *Matter of Sanchez-Lopez*, 26 I&N Dec. 71, 73-74 (BIA 2012). The minimum conduct to commit § 653m(b) does not involve the element of fear or threat.