§ N.7 Crimes Involving Moral Turpitude

I. Overview: Crimes Involving Moral Turpitude

Many offenses come within the immigration category of "crimes involving moral turpitude" ("CIMT"). There are two steps to analyzing the effect of a potential CIMT.

First, is the offense actually a CIMT? Begin by consulting secondary sources, including the *California Quick Reference Chart* on crimes at www.ilrc.org/chart. But because the law changes quickly, and not every offense is analyzed there, this may be the starting rather than the ending point of research, and it is good to have a grasp of the principles. The definition of CIMT depends on federal cases, not state cases regarding impeachment. The definition is discussed in more detail in **Appendix I**, but here are the basics.

While the general definition of CIMT is notoriously vague, courts have held that offenses with any of the following *elements* involve moral turpitude.

- Intent to defraud
- Theft with intent to permanently or substantially deprive the owner; theft with intent to temporarily deprive, such as joyriding, is not a CIMT
- Intent to cause or threaten great bodily harm, or assault with a deadly weapon
- Recklessness involving a conscious disregard of a known risk of death or bodily injury
- Some, but not all, offenses that involve lewd conduct; some types of "bad commerce" such as drug trafficking and prostitution; some obstruction of justice offenses; and other somewhat random conduct that authorities deem to be reprehensible
- **Note:** A CIMT does *not* include negligence (e.g., DUI with injury, child endangerment), an offensive touching (e.g., Pen C § 243(a), (d), (e)), a regulatory offense (e.g., operating without a license), or a strict liability offense.

Authorities must use the "categorical approach" to determine whether an offense is a CIMT. This is a defendant-friendly analysis that compares the CIMT definition to the least adjudicated elements of the offense at issue. See **Appendix I** for further discussion of how to determine whether an offense is a CIMT and how to use the categorical approach.

Second, if the offense is a CIMT, will the particular conviction make the particular defendant inadmissible or deportable under the CIMT grounds, and/or trigger some other penalty based on CIMTs? The immigration Act sets out certain formulae for when a CIMT conviction causes adverse consequences. For example, a single conviction of a CIMT can make a person inadmissible. However, a single CIMT will *not* make a noncitizen inadmissible if the person has never committed another CIMT, and the conviction has a potential sentence of one year or less, and a sentence imposed of six months or

less. See **Sections II and III** below for the rules governing when a CIMT conviction causes an individual to become inadmissible or deportable. See **Appendix II** for a Cheat Sheet listing these rules. **Section IV** discusses the unique moral turpitude bar to eligibility for "cancellation of removal for non-permanent residents."

Other removal grounds. A single offense can come within multiple removal grounds. Check the *California Quick Reference* Chart and other materials to see if the offense at issue might also be, for example, a deportable crime of domestic violence, crime of child abuse, or aggravated felony.

RESOURCE: Conviction of a CIMT can cause a range of penalties beyond making someone removable. For example, it can trigger mandatory detention, or be a bar to relief such as LPR or non-LPR cancellation. For a review of all immigration consequences of a CIMT and how to avoid them, see ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (2017) at www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude.

II. The CIMT Deportation Ground[1]

Which immigrants need to avoid a deportable conviction? Speaking generally, the penalty for having a deportable conviction is that a person who *already has lawful immigration status could lose that status*. Permanent residents, refugees, F-1 students and other noncitizens who have lawful status want to avoid becoming deportable, so that they can keep their status.

In contrast, most undocumented people are not harmed by a deportable conviction, because they don't have any lawful immigration status to lose. There are two exceptions to this rule, however. First, persons who will apply for any form of non-LPR cancellation can be barred by a deportable conviction. See discussion in ILRC, *Note: Relief Toolkit* (2018).[2] Second, persons who ever were admitted in any status might be subject to mandatory detention based on a deportable conviction. See ILRC, *Practice Advisory: How to Avoid Mandatory Detention* (2018).[3]

There are two ways that a person can become deportable under the moral turpitude ground.

A. Deportable for conviction of two CIMTs

A noncitizen who is convicted of two or more CIMTs any time after admission to the U.S. on any visa, or after adjustment of status, is deportable.[4]

> **Example:** Stan was admitted to the U.S. in 1991. He was convicted of theft in 2002 and fraud in 2012. He is deportable for conviction of two CIMTs since admission.

Single scheme exception. If multiple offenses arise from a "single scheme of criminal misconduct," they will not cause deportability as two or more separate convictions for this purpose.[5] A single scheme of criminal misconduct has been interpreted to mean, essentially, that the charges must arise from the very same incident. For example, the Board of Immigration Appeals held that convictions for committing credit card fraud at multiple stores within a period of a few hours do not qualify for the "single scheme" exception.[6] To make the best effort at getting this defense, put in the record that the offenses arose from a single incident.

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[1] See 8 USC § 1227(a)(2)(A)(i), (ii) [INA §237].

[2] Available as *§ N.17: Relief Toolkit* at www.ilrc.org/chart.

[3] Available at https://www.ilrc.org/how-avoid-mandatory-ice-detention.

[4] See 8 USC § 1227(a)(2)(A)(ii) [INA § 237].

[5] *Id.*

[6] *Matter of Islam,* 25 I&N Dec. 637 (BIA 2011).

B. Deportable for Conviction of One CIMT

A noncitizen is deportable for one conviction of a crime involving moral turpitude ("CIMT") if (a) they committed the offense within five years after "admission" to the United States, and (b) the offense carries a maximum *potential* sentence of one year or more.

Defense strategy #1: A person who has only one CIMT conviction, and it carries a maximum potential sentence of 364 days or less, the person cannot be found deportable under this ground. This deportation ground applies only if the CIMT has a potential sentence of at least one year. Some California misdemeanors have a maximum potential sentence of six months or less; such a conviction will not trigger deportability under this ground. Other California misdemeanors, and felonies that were reduced to misdemeanors, have carried a maximum potential sentence of one year. However, effective January 1, 2015, Pen C § 18.5 changed the maximum potential sentence for those misdemeanors from one year to 364 days. Therefore, no single California misdemeanor conviction should trigger this deportation ground, because no misdemeanor has a potential sentence of a year. (But see warning below regarding pre-January 1, 2015 convictions.) This also applies to felonies reduced to a misdemeanor; see *Defense Strategy #2*, below.

Warning: Convictions from before January 1, 2015. Under the specific terms of Pen C § 18.5(a), the 364-day maximum potential sentence for a California misdemeanor applies retroactively to all California convictions, including those from before January 1, 2015. However, the Board of Immigration Appeals held that it will not give effect to the retroactivity provision of § 18.5(a). Instead it will evaluate the offense based on the maximum potential sentence that could have been imposed at the time of conviction, which for certain misdemeanors before January 1, 2015 was one year. *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018). Currently, authorities will hold that:

- A "one-year" misdemeanor from *before* January 1, 2015 has a maximum potential sentence of one year (and potentially can trigger this deportation ground) and
- A "one-year" misdemeanor received *on or after* January 1, 2015 has a 364-day maximum potential sentence (and thus cannot trigger this deportation ground).

Advocates hope to overturn this ruling on appeal to federal court, but it is binding law as of November 2018. Advocates should consider vacating a pre-January 1, 2015 conviction if needed to ensure eligibility for this relief. In removal proceedings, advocates should preserve this issue on appeal in order to be best able to take advantage of any positive future ruling. Note that this also affects eligibility for non-LPR cancellation. See Section IV, below.

While advocates will challenge *Velasquez-Rios* in federal court, it is binding law now, and immigration authorities will deem that a misdemeanor conviction (or a felony conviction, later reduced to a misdemeanor) that occurred before January 1, 2015, has a potential sentence of one year rather than 364 days. Therefore, it could trigger this deportation ground. If this will cause deportability, advocates should consider vacating the conviction, for example under Pen C § 1473.7. See resources at www.ilrc.org/immigrant-post-conviction-relief. In addition, advocates in removal proceedings who are fighting a deportation finding based on a conviction from before January 1, 2015 should contest *Velasquez-Rios* and preserve the issue on appeal, to be sure to take advantage of any future decision overturning the case. For further discussion, see online advisory on *Velasquez-Rios*.[7]

Even under *Matter of Velasquez-Rios*, a California misdemeanor conviction (or a felony conviction, later reduced to a misdemeanor) from on or after January 1, 2015 has a potential sentence of 364 days rather than one year. Such a conviction cannot trigger this deportation ground.

[7] See ILRC, *Practice Advisory: Matter of Velasquez-Rios and 364-Day Misdemeanors* (October 2018) at https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors.

Note that this deportation ground, Pen C § 18.5(a), and *Matter of Velasquez-Rios* all pertain to the maximum *potential* sentence a person could have received. *Velasquez-Rios* does not change the way immigration will treat an actual *imposed* sentence. The BIA will give effect to post-conviction relief that reduces the actual sentence imposed, for example pursuant to Pen C § 18.5(b) (which permits a judge to reduce a one-year sentence imposed on a misdemeanor by one day) or § 1473.7.[8]

Strategy #2: Reduce a wobbler from a felony to a misdemeanor. Immigration authorities should accept that a felony convictions obtained on January 1, 2015 or after is reduced to a 364-day, not one-year, misdemeanor. To make the situation clear, use a recent version of form CR-181 (revised January 1, 2017), which states that the reduced felony has a potential sentence of 364 days, or else state this clearly in your own proposed order. For felony convictions from before January 1, 2015 that are reduced to misdemeanors, under *Velasquez-Rios* the misdemeanor will have a potential sentence of one year. If that harms the client, try to vacate the conviction.[9] If that is not possible, in removal proceedings contest *Velasquez-Ruiz* and preserve the issue on appeal. Note that where there is a choice, for immigration purposes it probably is better to reduce a felony to a misdemeanor under Pen C § 17(b)(3) rather than Proposition 47. See discussion in practice advisory on *Matter of Velasquez-Rios*.[10]

Strategy #3: Plead to a felony committed more than five years after the "date of admission." The date of admission that starts the five-year count is the date that the person was admitted to the U.S. in any status. If the person never was admitted, it is the date the person adjusted status to lawful permanent residence. Generally, if a noncitizen was ***admitted into the U.S. under a visa*** – a green card, a tourist visa, a border-crossing card, or other status – that is the admission date that starts the five-year clock. This is true even if the person fell out of lawful status after the admission.[11]

> **Example:** Mabel was admitted to the U.S. as a tourist in 2001. Her permitted time ran out and she lived here unlawfully for some years. She married a U.S. citizen and through him "adjusted status" to become a lawful permanent resident in 2007. She was convicted of a felony CIMT for an offense she committed in 2010. It is her only CIMT conviction. She is not deportable based on the conviction. Her admission was in 2001, and she committed the CIMT in 2010, more than five years later. The fact that she was out of lawful status for some time does not affect this calculation.[12]
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> **Note:** If a permanent resident travels outside the U.S. for more than six months, or leaves the U.S. while inadmissible for crimes, the result may be different. Consult an immigration expert.

In contrast, if the person initially ***entered without inspection***, e.g. surreptitiously crossed the desert in Arizona, and later "adjusted status" to become a lawful permanent resident, the admission date is the date he or she was granted lawful permanent residency. [13]

> **Example:** Bernard entered without inspection in 1999. In 2003 he adjusted status to lawful permanent residence.[14] He was convicted of felony fraud that he committed in 2007. His "date of admission" is his 2003 adjustment of status date, because he has no prior admission. He

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[8] *Velasquez-Rios*, 27 I&N Dec. at n. 9.

[9] See ILRC materials on post-conviction relief at https://www.ilrc.org/immigrant-post-conviction-relief.

[10] See ILRC, *Practice Advisory: Matter of Velasquez-Rios and 364-Day Misdemeanors* (October 2018) at https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors.

[11] See *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011) and for further discussion see ILRC, *Practice Advisory* at www.ilrc.org/sites/default/files/resources/alyazji_advisory_moral_turpitude_deportation_ground_0.pdf.

[12] *Matter of Alyazji*, *supra.*

[13] *Ibid*, and see Practice Advisory, *supra*, for more information.

[14] Expert readers may wonder how Bernard adjusted status, since he entered without inspection. He would need to adjust under a special provision, such as INA § 245(i) for visa petitions submitted in 2001 or earlier, or through asylum, cancellation, or other special application.

committed the CIMT in 2007, within five years after that date. Bernard is deportable. (If we could reduce Bernard's 2007 conviction to a misdemeanor, we would argue that the misdemeanor has a potential sentence of 364 days under Pen C § 18.5(a) – although currently the BIA disagrees. See subsection 2, above.)

PRACTICE TIP: Avoid deportability for one CIMT by working with the five years. If there were ongoing offenses, plead to an offense that happened after the five years elapsed. In the example above, if Bernard's welfare fraud had continued into 2008, and if he pled guilty to a single 2008 incident that was five years after his admission date, he would not be deportable.

III. The CIMT Ground of Inadmissibility[15]

Which immigrants need to avoid being inadmissible? In general, it depends upon what the person is trying to do. Almost any application to become a lawful permanent resident (LPR) ultimately involves the grounds of inadmissibility. An undocumented person who wants to apply for relief often will need to avoid being inadmissible, because it is a bar to at least some forms of relief. An asylee or refugee wants to be admissible in order to apply for LPR status.

An LPR who is not deportable also would prefer to avoid being inadmissible, so they can safely travel outside the United States and perhaps naturalize to U.S. citizenship more quickly. An LPR who *is* deportable will need to apply for some relief, and thus might need to be admissible.

Not every form of relief requires the person to be admissible, however. And, with some applications, people who are inadmissible because of a CIMT at least can apply for a discretionary waiver to "pardon" the inadmissibility ground. For more information on specific applications, see the chart and short descriptions at *Note: Relief Toolkit* at www.ilrc.org/chart, or consult with an expert.

Inadmissible for Conviction of One CIMT. A noncitizen is inadmissible who is convicted of just one crime involving moral turpitude, whether before or after admission, regardless of potential or imposed sentence. Fortunately, there are two exceptions to this rule, referred to as the petty offense and youthful offender exceptions. A noncitizen who comes within one of these exceptions is not inadmissible at all. The person does not need to apply for a waiver; the inadmissibility ground simply does not apply. See subsections A and B, below.

Inadmissible for Admitting Commission of one CIMT. A noncitizen is inadmissible who makes a formal admission to officials of all of the elements of an inadmissible CIMT, even if there is no conviction. This inadmissibility ground does not apply if the incident was brought to criminal court, but the result was a disposition that is less than a conviction (e.g., charges dropped, conviction vacated).[16] The below exceptions apply here as well. Defenders should warn clients to not admit to uncharged conduct to a criminal court or immigration official. To date, this ground has been charged only rarely.

A. Petty Offense Exception

If a noncitizen (a) has committed only one moral turpitude offense ever, (b) the offense carries a maximum potential sentence of one year or less, and (c) the "sentence imposed" was less than six months, the person is automatically *not* inadmissible under the CIMT ground. [17]

Example: Freia is convicted of felony grand theft, the only CIMT offense she's ever committed. (She also has been convicted of drunk driving, but as a non-CIMT that does not affect this analysis.) The judge gives her three years' probation, suspends imposition of sentence, and orders her to spend

[15] 8 USC § 1182(a)(2)(A) [INA § 212].

[16] See, e.g., *Matter of CYC*, 3 I&N Dec. 623 (BIA 1950) (dismissal of charges overcomes independent admission) and discussion in *Defending Immigrants in the Ninth Circuit*, § 4.4 (www.ilrc.org).

[17] 8 USC § 1182(a)(2)(A)(ii)(II).

20 days in jail as a condition of probation. She is released after 10 days. The grand theft is reduced to a misdemeanor under Pen C § 17(b)(3).

Freia comes within the petty offense exception. She has committed only one CIMT, it has a maximum potential sentence of one year or less,[18] and the sentence imposed was 20 days. (For more information on sentences, see *Note: Sentencing* at www.ilrc.org/chart)

B. Youthful Offender Exception

This comes up more rarely, but it can help people who were convicted as adults for acts they committed while under the age of 18. (If instead the case was handled in delinquency proceedings, this exception is not needed. A disposition in juvenile delinquency proceedings is not a conviction and has no relevance to moral turpitude determinations.) A noncitizen who committed only one CIMT ever, and while under the age of 18, ceases to be inadmissible based on the conviction as soon as five years have passed since the conviction or the release from resulting imprisonment.[19]

> **Example:** Raoul was convicted as an adult for felony assault with a deadly weapon, based on an incident that took place when he was 17. He was sentenced to eight months and was released from imprisonment when he was 19 years old. He now is 25 years old. This conviction does not make him inadmissible for moral turpitude.

IV. The CIMT Bar to Eligibility for Non-LPR Cancellation, and Other CIMT Penalties

One or more CIMT convictions can cause additional penalties, beyond making the person inadmissible or deportable. They might subject the person to mandatory detention, or act as a bar to specific forms of relief. For a discussion of all of these consequences, see ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (2017).[20]

This section will focus on just one of the consequences: the CIMT bar to eligibility for "10-year" cancellation of removal for non-permanent residents. We focus on this because many undocumented people are potentially eligible for this relief if it is not destroyed by a conviction, and they will need it if they ever are put in removal proceedings. Being eligible for relief also may help them win release from detention on bond.

An undocumented person who has lived in the United States for ten years and meets other strict requirements may be able to apply for 10-year cancellation of removal, as a defense against removal (deportation). Reading the unique language in this statute, the Board of Immigration Appeals combined the CIMT inadmissibility and deportability grounds and came up with a hybrid standard. They held that a single CIMT conviction is a bar to eligibility for 10-year cancellation if either (a) it has a maximum potential sentence of *a year or more*, or (b) a sentence of *more than six months* was imposed.[21]

The applicant can have one CIMT conviction, but it must have a maximum potential sentence of 364 days or less. As discussed in **Section II**, above, under Pen C § 18.5(a), effective January 1, 2015, the maximum possible sentence for any California misdemeanor (or felony that is reduced to a

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[18] See Pen C § 18.5(a) defining California misdemeanors as 364 days, and see discussion of *Matter of Velasquez-Rios* in Section II, above. But note that reducing a felony to a misdemeanor can make a person eligible for the petty offense exception regardless of whether the offense has a potential sentence of 364 days or one year. This is because to qualify, the maximum potential sentence must be *one year* or less, not less than one year. See *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003), partially overturned by *Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir 2014) *(en banc)*.

[19] 8 USC § 1182(a)(2)(A)(ii)(I).

[20] See https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude.

[21] See INA § 240A(b)(1)(C), 8 USC § 1229b(b)(1)(C), interpreted by *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010) and *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010), and see ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (2018) at www.ilrc.org/crimes.

misdemeanor) is 364 days rather than one year. Therefore a single California misdemeanor conviction of a CIMT does not destroy eligibility for this form of cancellation. Section 18.5(a) specifically applies this retroactively to all California misdemeanor convictions, regardless of date. However, the Board of Immigration Appeals held that it will not give effect to the retroactivity provision in Pen C § 18.5(a).[22] Instead, authorities will hold that a "one-year" misdemeanor from *before* January 1, 2015 has a maximum potential sentence of one year (and thus is a bar to this relief if the offense is a CIMT). They will hold that a "one-year" misdemeanor received *on or after* January 1, 2015 has a 364-day maximum potential sentence (and thus is not necessarily a bar, even if it is a CIMT).

Advocates hope to overturn this ruling on appeal, but it is binding law now. Advocates should consider vacating a pre-January 1, 2015 conviction if needed to ensure eligibility for this relief. In removal proceedings, advocates should preserve this issue on appeal in order to be best able to take advantage of any positive future ruling.

The second requirement to avoid the bar is that the sentence actually imposed on the single CIMT conviction must not exceed six months.

Note that this CIMT bar to eligibility for non-LPR cancellation is slightly different from the petty offense exception to the CIMT inadmissibility ground, discussed at **Section III**, above. The difference is that while the petty offense exception requires a potential maximum sentence of *a year or mor*e, eligibility for 10-year cancellation requires a potential sentence of *less than one year*.

[22] See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA Oct. 4, 2018) and see ILRC, *Practice Advisory: Matter of Velasquez-Rios and 364-Day Misdemeanors* at https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors.

APPENDIX I. Is the Offense a Crime Involving Moral Turpitude?

The first step to see if an offense is a crime involving moral turpitude ("CIMT") is to consult the *California Quick Reference Chart* at www.ilrc.org/chart or other crimes and immigration law sources. But because this area of the law often changes, this may be a starting, not an ending point for research. You also should check for updates, and should understand the basic principles.

A. The Categorical Approach Applies to Moral Turpitude Determinations

To determine whether a conviction is of a crime involving moral turpitude (CIMT), the immigration judge or officer must use the federal "categorical approach." This approach is one of the most important defense tools for immigrants with criminal convictions – especially since the U.S. Supreme Court in 2013 and 2016 has reaffirmed its strict limits. (The California Supreme Court also has adopted the categorical approach, at least partially. *People v. Gallardo* (2017) 4 Cal 5th 120.) The categorical approach is discussed in detail in other materials,[23] but here is a brief summary using analysis of CIMTs as an example.

Note that from 2008-2015, the Attorney General held that the categorical approach did not fully apply to CIMTs. In 2015 he withdrew from that position. [24] Some cases published during that period are now overturned, to the extent that they do not fully apply the categorical approach to CIMTs.

Immigration authorities use the categorical approach to determine whether a criminal conviction comes within certain grounds of inadmissibility or deportability. Using this approach, the adjudicator compares the *elements* of the offense of conviction (i.e., the least criminalized act under a California statute) with the *elements* of the criminal law term listed in the removal ground (called the "generic" definition). If under this test the criminal offense is broader than the generic definition in the removal ground, the removal ground does not apply.

> **Example:** Courts have held that the generic definition of a CIMT specifically excludes an offensive touching. The least criminalized act to commit simple battery, Pen C § 243(a), is an offensive touching. Paul pled guilty to § 243(a) after he violently punched someone. He is not convicted of a CIMT because the least criminalized act to violate § 243(a) is an offensive touching, and that does not meet the generic definition of a CIMT. The facts of his case do not matter at this point. We say that § 243(a) is "overbroad" for this purpose.
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> Another way to state this test is to ask if there is any way a person could be found guilty of the California statute, but *not* be found guilty of the generic offense. A person who pushes or spits on another person can be found guilty of § 243(a), but they would not be found guilty of a generic CIMT. Therefore § 243(e) is overbroad.

An additional step applies only if the defendant was convicted under a statute that is "divisible" between discrete crimes. If a statute is truly divisible in se, then immigration authorities may consult the individual's record of conviction in order to identify of which crime the person was convicted. Only a few criminal statutes are divisible under this test. To be divisible, a statute must set out alternatives (i.e., using the word "or") that describe multiple offenses. The alternatives establish different offenses only if they are elements (facts that must be proved in each case for guilt) rather than mere "means" (a list of examples of how an offense may be committed, where a jury does not need to unanimously decide between them).

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[23] See ILRC, *Practice Advisory: How to Use the Categorical Approach Now* (2017) at www.ilrc.org/how-use-categorical-approach-now.

[24] See *Matter of Silva-Trevino*, 26 I&N Dec. 550 (AG 2015), overturning 24 I&N Dec 687 (AG 2008). The BIA further discussed this in *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

If a statute is overbroad *and* indivisible (i.e., it describes only one offense, and that offense is broader than the generic definition), no conviction under the statute is a CIMT for any immigration purpose, whether it is deportability or eligibility for relief. Facts on the record or in the plea do not matter: the immigration judge may not rely on any information in the individual's conviction record to determine if the conviction triggers a removal ground.

> **Example:** Battery under Pen C § 243(a) is not divisible. First, the statute is not phrased in the alternative for purposes of a CIMT (e.g., it does not prohibit "an offensive touching *or* violent force"). Even if it were, a jury is not required to decide unanimously whether there was an offensive touching or violent force, in order to find guilt. Therefore, the statute is overbroad and indivisible, and *no* conviction of Pen C § 243(a) (or of §§ 243(d) or (e)) is a CIMT.

> **Example:** The Ninth Circuit held that felony hit and run with injury, Veh C § 20001(a), is divisible as a CIMT. The various statutory alternatives in § 20001(a) are elements; a jury must decide unanimously between them in order to find guilt. Therefore, § 20001(a) sets out multiple crimes. Of these crimes, stopping but failing to provide registration is not a CIMT, while failing to stop at all is a CIMT. Because it is a divisible statute, the immigration judge is permitted to rely on certain documents from the record of conviction (the plea agreement and colloquy, charge pled to, factual basis for the plea, judgment) to see if they establish which crime the person was convicted of.[25] (Apart from certain drug offenses, § 20001 is one of the few identified California divisible statutes.)

Finally, even though the beneficial categorical approach applies to CIMTs, and even though most statutes are indivisible, for defenders the best practice is, *where possible, create a "good" factual record.* Try to do this even though it is not legally necessary. The majority of immigrants in removal proceedings are unrepresented, and some immigration judges do not fully understand the categorical approach and wrongly look to facts in the record. Try to prevent problems by creating the best factual record that you can.

> **Example**: Paul's defender arranged for him to state on the plea form or in the plea colloquy that he violated Pen C § 243(a) by committing "an offensive touching." Because § 243(a) is overbroad and indivisible as a CIMT, this is not legally necessary. However, it may help Paul in case authorities do not understand the law. (In fact, many immigration judges do know that Pen C §§ 243(a) and (e) never are CIMTs, but are less familiar with other offenses.)

B. Which Offenses Involve Moral Turpitude?

"Moral turpitude" is a vague term that has been defined entirely by case law. Whether a particular offense constitutes a CIMT for immigration purposes is determined by federal immigration cases, not state rulings that define CIMTs for purposes of witness impeachment or license limitations. Generally, federal courts and the Board of Immigration Appeals have found moral turpitude for offenses with the following elements.

Intent to cause great bodily harm or to assault with a deadly weapon. The generic definition of a CIMT does **not** include felony or misdemeanor offenses that can be committed by *de minimus* force, including "offensive touching." This excludes from the definition of a CIMT Pen C §§ 243(a), (e)[26] and should be held to exclude felony §§ 243(d) and 236/237.[27] Defenders must assume that § 245(a) will be held a

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[25] *Conejo-Bravo v. Sessions*, 875 F.3d 890 (9th Cir 2017).

[26] See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (Pen C § 243(e) committed by offensive touching is not a CIMT). Recent Supreme Court precedent has reaffirmed the definition of a divisible statute, and 243(e) is not divisible. See, e.g., *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013), discussing this change.

[27] See discussion 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

CIMT, although immigration advocates still may argue that it should not.[28] The Ninth Circuit held that § 273.5 is not a CIMT if committed against a former co-habitant.[29] See discussion of individual offenses in the California Chart.

Intent to defraud. Any offense that requires intent to defraud, or intent to knowingly misrepresent a material fact in order to get a benefit, will be held to involve moral turpitude.

Theft with intent to permanently or "substantially," but not temporarily, deprive the owner.[30] To date courts have held that theft as defined at Pen C § 484 is a CIMT, because all conduct listed there either involves theft with intent to permanently deprive, or some kind of fraud. In contrast, Veh. C. § 10851 never is a CIMT, because the minimum conduct includes intent to deprive temporarily and the statute is not divisible between temporary and permanent intent.[31] While the BIA recently the added intent to "substantially" deprive the owner to the definition of CIMT,[32] this does not appear to be an element of any California offenses and so does not affect their analysis.

Some types of recklessness that risk death or injury. Recklessness that is defined as conscious disregard of a known risk of serious injury or death has been held to involve moral turpitude.[33] Where the risk is less, for example injury to person or property, recklessness should not be a CIMT.

Sometimes lewd intent, malice, and bad commerce. Malice is defined only as intent to "vex or annoy," and the Ninth Circuit held that a Washington state offense, malicious mischief causing damage over $400, that is similar to California vandalism, is not a CIMT. *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995). The BIA has held that drug trafficking and even distribution is a CIMT. Being a prostitute is a CIMT and the Ninth Circuit held that any conviction of Pen C 647(b), including being a customer, also is a CIMT. See *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012). Some but not all offenses involving lewd intent are held to be CIMTs. Check the *California Chart.*

No offenses involving negligence or strict liability. Simple drunk driving, even with injury or as a repeat offense, is not a CIMT.[34] Child endangerment based on negligence is not a CIMT, but note that Pen C § 273a(a), but not § 273a(b), is a deportable crime of child abuse.

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finding that felony §243(d) is not a crime involving moral turpitude). See, e.g., *Turijan v. Holder*, 744 F.3d 617, 621 (9th Cir. 2014) (felony § 237 by menace is not a CIMT) and see further discussion at *California Chart*.

[28] In *Ceron v. Holder*, 747 F.3d 773 (9th Cir 2014) *(en banc)* the Ninth Circuit disapproved past precedent on the issue of whether Pen C § 245(a) is a CIMT and remanded to the BIA. In *Matter of Wu*, 27 I&N Dec. 8 (BIA 2017) the BIA held that all of § 245(a) is a CIMT. The Ninth Circuit has not yet reviewed *Matter of Wu*.

[29] *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009). Arguably, § 273.5 is not divisible and therefore no conviction should be a CIMT, regardless of victim, but defenders should conservatively assume that unless the record indicates a former co-habitant the conviction is for a CIMT.

[30] See, e.g., *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160-61 (9th Cir. 2009), *Matter of Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006).

[31] *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016) (en banc).

[32] *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016); *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016). Because it sets out a new rule, courts have held that the *Obeya* definition does not apply to convictions from before its publication date of November 16, 2016.

[33] See, e.g., *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012).

[34] *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

APPENDIX II. Cheat Sheet – Deportable or Inadmissible for Moral Turpitude

I. DEPORTABLE FOR MORAL TURPITUDE, 8 USC § 1227(a)(2)(A)(i), (ii)

Deportable for *One* Conviction of a Crime Involving Moral Turpitude ("CIMT"), if:

a) Convicted of one CIMT
b) That has a potential sentence of one year or more
c) And that was committed within five years after date of admission

To prevent deportability for a single CIMT:

a) Avoid a "conviction" by getting pre-plea diversion or treatment in juvenile proceedings; *or*
b) Plead to an offense that is not a CIMT; *or*
c) Avoid a potential one-year sentence by pleading to a California misdemeanor, or by reducing a felony to a misdemeanor, or (depending on the outcome of appeal of *Matter of Velasquez-Rios*[35]) by vacating a prior from before January 1, 2015; *or*
d) Plead to a felony that happened more than five years after the "date of admission." This is (a) the date the person was first admitted into the U.S. with any kind of visa or card, or (b) *if* the person entered without inspection – i.e., never was admitted on any visa –the date that the person became a permanent resident by "adjusting status" within the U.S. If the person left the U.S. after becoming inadmissible for crimes, or for more than six months, get more advice.

Deportable for Conviction of *Two* or More CIMTs After Admission

a) Both convictions must be after the person was admitted to the U.S. or adjusted status
b) The convictions may not spring from the same incident ("single scheme")

II. INADMISSIBLE FOR MORAL TURPITUDE, 8 USC § 1182(a)(2)(A)

Inadmissible for Just One Conviction of a CIMT, but:

Petty Offense Exception: The defendant automatically is not inadmissible for CIMT if:

a) Defendant has committed only one CIMT ever
b) The offense has a potential sentence of one year or less.
c) Sentence imposed is six months or less. For example, suspended imposition of sentence, three years' probation, and six months' jail ordered as a condition of probation is six months or less.

Youthful Offender Exception benefits youth who were convicted as adults. The defendant automatically is not inadmissible for CIMT if: he or she committed only one CIMT ever; was convicted as an adult for an offense committed while under the age of 18; and the conviction or release from resulting imprisonment occurred at least five years ago.

[35] See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA Oct. 4, 2018) and see ILRC, *Practice Advisory: Matter of Velasquez-Rios and 364-Day Misdemeanors* at https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors and discussion at Section II, above.