California Criminal Law & Immigration

Annotations and Chart on
Crimes Involving Moral Turpitude

2000 UPDATE

PLEASE INSERT THESE TWO (2) UPDATE PAGES AT THE BEGINNING OF THE TABLE "CRIMES INVOLVING MORAL TURPITUDE UNDER THE CALIFORNIA PENAL CODE." DO NOT REPLACE ANY CHAPTER PAGES OF THE 1999 EDITION.

How to understand the Update changes:

BOLD:	Affected offense
Italics:	Location on the Table of Crimes Involving Moral Turpitude Under the California Penal Code.

Please also consult Update to Chapter 4

Driving Under the Influence, Vehicle Code § 23101, Penal Code 367(d)
Numbers 24 and 25 on the Chart

The BIA reaffirmed the long-established rule that simple driving under the influence ("DUI") does *not* constitute a crime involving moral turpitude ("CMT"). However, it also held that the offense of driving under the influence while legally prohibited from driving *is* a CMT. *Matter of Lopez-Meza*, Int. Dec. 3423 (BIA 1999). A person convicted of DIU in the state of California should not be affected by the BIA's holding that conviction of the offense of DUI while prohibited from driving is a CMT. California does not have any single aggravated DUI offense that contains these two elements (i.e., prohibiting DUI while the license is suspended). A person can be convicted separately of driving while prohibited from doing so, and of driving under the influence, but the separate convictions should not come within the *Lopez-Meza* rule. However, when analyzing out-of-state DUI offenses, advocates must carefully check to see if the offense for which the person was convicted required proof both of DUI, and of a legal prohibition against driving. See Update to Chapter 4 for further discussion of *Lopez-Meza*.

Theft (Petty or Grand), Penal Code § 484 et seq., § 487

A divided BIA held that even a temporary taking of property, such as temporarily stealing a car to go "joyriding," can constitute theft for purposes of the aggravated felony definition. *Matter of V-Z-S-*, Int. Dec. # 3434 (BIA 2000). It is possible, but in no way established, that the Board would extend this ruling to the definition of theft for purposes of the moral turpitude ground. The decision is being appealed to the Ninth Circuit.

In this case the respondent was convicted under Calif. Penal Code 10851, a provision that prohibits taking another's vehicle with the intent to deprive the person of it permanently (which is auto

theft) or temporarily (often referred to as "joyriding"). The Board held that this was "theft." The Board appears to be clearly mistaken. Common law terms such as theft that appear in the aggravated felony definition should be interpreted according to their "ordinary, contemporary, and common meaning."[1] The definition of theft universally requires as an element the intent to *permanently* deprive the owner of property, or to approximate a permanent deprivation, under common law, the Model Penal Code, and generally under state law.[2] To support its conclusion that joyriding can amount to theft, the majority decision relied not upon common law sources, state laws, or treatises on the definition of theft, but on a particular federal statute that relates to taking stolen cars across state borders. For further discussion, see Update to Chapter 4 and discussion of theft as an aggravated felony at § 9.35.

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[1] See, e.g., United States v. Baron-Medina, 187 F.3d 1144 (9th cir. 1999); Taylor v. United States, 495 U.S. 575, 598 (1990). Matter of L-G-, In. Dec. 3254 (BIA 1995) (federal, not state, definition applies to determine whether a state drug offense is a "felony"); Kahn v. INS, 37 F.3d 1412 (9th Cir. 1994) (the INA "was designed to implement a uniform federal policy, and the meaning of concepts important to its application are "not to be determined according to the law of the forum, but rather require a uniform federal definition""(citation omitted).

[2] See, e.g., Black's Law Dictionary, Sixth Edition, West Publishing Company 1990; Model Penal Code and Commentaries pt. II, art. 223.9 cmt 4 (1980) (while some temporary takings at critical times or of great length could amount to theft, casual joyriding does not). See discussion in Matter of V-Z-S-, supra, Concurrence and Dissent, pp. 25-29.

TABLE

Crimes Involving Moral Turpitude Under the California Penal Code

CRIME	CAL. CODE SECTION	CRIME INVOLVING MORAL TURPITUDE?	KEY ELEMENT	LESSER INCLUDED OR RELATED OFFENSES NOT INVOLVING MORAL TURPITUDE
1. Arson	Penal §451	Yes	Willfully and maliciously sets fire.	Vandalism?
2. Assault	Penal §240, 241(a)	No*		
3. Assault a) with intent to commit rape. b) with a deadly weapon or force likely to produce great bodily harm	Penal §220 Penal §245	Yes Yes	Intent to commit crime of moral turpitude; Use of a deadly weapon, likelihood of great bodily injury.	Assault Exhibiting firearm in a threatening manner Breach of peace
4. Assault on peace officer of firearm	Penal §240	*		Assault Battery Resisting arrest
5. Battery	Penal §242, 243	No	No malice or anger, no serious bodily injury	Assault
6. Battery with serious bodily injury	Penal §243(d)	?*	Serious bodily injury.	Assault
7. Battery on a peace officer of firearm	Penal §243	Probably not*	No malice; no serious bodily injury	Battery Assault Resisting arrest
8. Bigamy	Penal §281	Yes		
9. Brandishing a deadly weapon	Penal §417	Probably not*		Assault Resisting arrest
10. Bribery	Penal §6, 92	Yes	Specific intent corruptly to influence.	
11. Burglary	Penal §459	*	Specific intent to steal or commit "felony."	Unauthorized entry Trespass Vandalism? Tampering with vehicle
12. Carrying concealed dagger; possession, manufacture, sale of prohibited weapons	Penal §12020	*		
13. Carrying firearm a) in public place without license b) concealed without license	Penal §12031 Penal §12025, 12021	Probably not*		Note: Result may differ where concealed firearms carried by convicted felon.
14. Child abduction of concealment	Penal §277, 278	Probably*	Malice, lack of good cause, specific intent to detain of conceal child from parent	

* Please refer to annotation for important qualification or exception

CRIME	CAL. CODE SECTION	CRIME INVOLVING MORAL TURPITUDE?	KEY ELEMENT	LESSER INCLUDED OR RELATED OFFENSES NOT INVOLVING MORAL TURPITUDE
15. Child beating	Penal §273(a)	Yes		Battery
16. Child concealment in violation of custody decree	Penal §278.5	Probably*	Specific intent to detain or conceal child from parent;violation of custody decree.	
17. Child molesting	Penal §647(a)	Probably	Motivated by unnatural, abnormal sexual interest.	
18. Conspiracy	Penal §182, 184	Yes, if underlying offense is CMT. No, if underlying offense is not CMT.		
19. Contributing to the delinquency of a minor	Penal §272			
20. Criminal trespass	Penal §602	Probably not*	Note: Different results may be possible for subsections requiring "malicious" act.	
21. Cruelty to children	Penal §273(a)	Probably*	Willfully causes or permits any child to suffer; or inflicts unjustifiable physical pain or mental suffering.	
22. Disturbance of public assembly or meeting	Penal §403	Probably not	No evil intent; offense is misdemeanor	
23. Disturbing the peace	Penal §415	Probably not*	Note: Subsection (2) requirement of "willful, malicious disturbance by noise" may involve moral turpitude.	
24. Driving under the influence (felony)	Vehicle §23101 Penal §367(d)	?*	Causing death or injury	Driving under the influence (misdemeanor)? Under the influence in public place
25. Driving under the influence (misdemeanor)	Calif. Code Vehicle §23152	Probably not		
26. Driving without license	Vehicle §12500	No		
27. Escape	Penal §4532	No*	May or may not involve force and violence.	

* Please refer to annotation for important qualification or exception

CRIME	CAL. CODE SECTION	CRIME INVOLVING MORAL TURPITUDE?	KEY ELEMENT	LESSER INCLUDED OR RELATED OFFENSES NOT INVOLVING MORAL TURPITUDE
28. Extortion	Penal §518	Yes	Use of force of fear.	
29. Failure to provide for child	Penal §270	No	No requirement that child be destitute.	
30. False imprisonment (felony)	Penal §236, 237	Yes	Effected by violence, menace, fraud, or deceit.	False imprisonment (misdemeanor) Assault
31. False imprisonment	Penal §236, 237	Probably not*	No malice or specific intent required; no use of force or fraud required.	
32. Forgery	Penal §470	Yes	Specific intent to defraud.	
33. Hit and run (felony)	Vehicle §20001, 20003	Probably	Knowing failure to stop and notify, death or injury to person.	Hit and run (misdemeanor)? Reckless driving Vehicle manslaughter
34. Hit and rum (misdemeanor)	Vehicle §20002(a)		Knowing failure to stop and notify; property damage.	Reckless driving?
-- Homosexual solicitation (see lewd conduct)				
35. Incitement to Riot	Penal §404.6	?	Intent to cause riot; or to urge others to commit acts of violence, or the burning or destroying of property.	
36. Indecent exposure	Penal §314(1)	Probably*	"Willfully and lewdly" exposing private parts.	
37. Issuing worthless check with intent to defraud	Penal §476(a)	Yes	Specific intent to defraud.	
38. Joy Riding	Penal §499b	No	No specific intent to deprive owner.	
39. Kidnapping	Penal §207	Yes	Force of fear of harm.	False imprisonment (misdemeanor)
40. Lewd act with child	Penal §288	Yes	Lewd acts with child under 14; intent to arouse or gratify sexual desire.	
41. Lewd conduct	Penal §647(a)	Probably*	Lewd conduct in public place.	
42. Loitering - "peeping Tom"	Penal §647(g) Penal §647(h)	Probably not*		

* Please refer to annotation for important qualification or exception

CRIME	CAL. CODE SECTION	CRIME INVOLVING MORAL TURPITUDE?	KEY ELEMENT	LESSER INCLUDED OR RELATED OFFENSE NOT INVOLVING MORAL TURPITUDE
43. Manslaughter, voluntary	Penal §192	Yes	Intent to kill.	Involuntary manslaughter
44. Manslaughter, involuntary		No*	No intent to kill or recklessness.	
45. Manslaughter, with motor vehicle (felony)	Penal §191.5, 192	*	*	Involuntary manslaughter Vehicular manslaughter (misdemeanor)? Reckless driving? Driving under the influence (misdemeanor)?
46. Manslaughter, with motor vehicle (misdemeanor)	Penal §192(c)(1) & (2)	Probably not*	Involuntary manslaughter with or without gross negligence.	
47. Marijuana, possession	Health & Safety §11357	Probably not*		
48. Marijuana - giving away, transporting	Health & Safety	Yes*	sale of drugs is evil	simple possession, under the influence
49. Mayhem	Penal §203	Yes*	Disfiguring injury, malice.	Assault Battery
50. Murder (first or second degree)	Penal §187	Yes	Intent to kill, malice.	Involuntary manslaughter
51. Obscenity	Penal §311.2	*	Knowingly produces, distributes, or possesses with intent to distribute, obscene material.	
52. Perjury	Penal §118	Yes	Knowledge of falsity of sworn statement; materiality of misstated matter.	
53. Possession of concealable firearm by drug addict or felon	Penal §12021	(See No. 13)		
54. Possession of drug paraphernalia	Health & Safety §11364	Probably not*		
55. Possession, purchase, or consumption of liquor by a minor	Business & Professions §25662	No		
56. Presence where controlled substance used	Health & Safety §11365	Probably not		

* Please refer to annotation for important qualification or exception

CRIME	CAL. CODE SECTION	CRIME INVOLVING MORAL TURPITUDE?	KEY ELEMENT	LESSER INCLUDED OR RELATED OFFENSE NOT INVOLVING MORAL TURPITUDE
57. Prostitution	Penal §647(b)	Yes*		
58. Rape	Penal §261	Yes	Non-consensual sexual intercourse	Assault Battery
-- Rape, statutory (See Unlawful sexual intercourse)				
59. Receiving stolen property	Penal §496	Yes	Knowledge that property was stolen	
60. Reckless driving	Vehicle §32103	?*	Willful or wanton disregard for the safety of persons of property; however, a petty offense.	
61. Resisting arrest	Penal §148	No	*	
62. Robbery (first or second degree)	Penal §211	Yes	Taking of property, from person, by means of force or fear.	Assault Battery False imprisonment (misd.)? Vehicle taking Brandishing firearm?
63. Sale of controlled substances	Health & Safety §11352(a)	Yes		Simple possession, under the influence
64. Selling liquor to a minor	Business & Professions §25658(a)	No	.	
65. Tampering with a vehicle	Vehicle §10852	Probably not	Misdemeanor; no requirement of malice of criminal intent.	
66. Theft (petty or grand)	Penal §484 et seq., §487	Divisible?	Usually intent to deprive owner permanently.	
67. Unauthorized entry	Penal §602.5	No		
68. Under the influence of controlled substance	Health & Safety §11550	Probably not*		
69. Under the influence of drugs or alcohol in public place (Disorderly conduct)	Penal §647(f)	Probably not	Unable to exercise care for own safety or the safety of others; obstructs or prevents the free use of any street.	

* Please refer to annotation for important qualification or exception

CRIME	CAL. CODE SECTION	CRIME INVOLVING MORAL TURPITUDE?	KEY ELEMENT	LESSER INCLUDED OR RELATED OFFENSE NOT INVOLVING MORAL TURPITUDE
70. Unlawfully causing fire	Penal §452(d)	Probably*	"Recklessly" sets fire; aware of and consciously disregards substantial and unjustifiable risk; gross deviation from reasonable conduct.	
71. Unlawful sexual intercourse (statutory rape)	Penal §261.5	Yes	Sexual intercourse; age of female.	
72. Vandalism	Penal §594	?*	Maliciously defaces, damages, of destroys property; may be felony, misdemeanor, or petty offense, depending on amount of damage.	
73. Vehicle taking	Vehicle §10851	No/probably not*	Specific intent to deprive owner or title or possession permanently or temporarily.	
74. Wife or Husband beating, Co-habitant abuse	Penal §273.5	Yes	Intentional infliction of bodily injury to cause trauma; special relatioship.	Assault Battery

* Please refer to annotation for important qualification or exception

Annotations:

Crimes Involving Moral Turpitude under the

California Penal Code

Introduction to the Annotations.

The following annotations discuss the precedents underlying the conclusions presented in the chart on crimes involving moral turpitude. Defense attorneys should consult the annotations where the corresponding chart entry is inconclusive about whether the crime involves moral turpitude. Certain annotations may provide a basis for making an educated guess about the character of the offense.

The decisions cited in the annotations come from three sources: the Board of Immigration Appeals ("BIA"), federal courts, and state courts. The BIA is the administrative appellate body reviewing decisions of immigration courts nationwide. From the BIA, decisions may be appealed to the U.S. Circuit Court of Appeals of the circuit where the case originated. A decision from the Court of Appeals is binding precedent upon any subsequent BIA or immigration court decisions arising within that circuit. If the Circuit Court has not spoken on the issue, decisions of the BIA are binding precedent for all immigration courts.

Because published precedents are relatively scarce for many of the crimes, decisions of Courts of Appeals from circuits other than the one from which a given case arises, as well as older federal district court decisions (rendered before the creation of the BIA in the early 1940's), are given great weight as precedents. However, because criminal statutes for a given offense may vary considerably from one jurisdiction to the next, and records of conviction may vary from case to case, the practitioner should not assume that any precedent is strictly controlling.

Decisions from the California courts are binding on federal tribunals to the extent that those decisions define the elements of California crimes. California decisions as to whether a crime involves moral turpitude -- typically in the context of disbarment or witness impeachment -- do not bind immigration or federal courts on the moral turpitude issue. However, where no federal precedent controls, such state decisions may be persuasive.

Note to Immigration Practitioners. These annotations were prepared for a conservative purpose: to advise criminal defense counsel as to which offenses may potentially be held by reviewing authorities to involve moral turpitude. However, many of the following penal code sections are not controlled by binding precedent, and strong arguments can be made that certain offenses which we indicated might be held to involve moral turpitude should not be so held. These annotations may be of use to immigration practitioners primarily in outlining the parameters of arguments on both sides.

WARNING: Aggravated Felonies. Many crimes involving moral turpitude also are aggravated felonies. One group of offenses is an aggravated felony if and only if a one year sentence is imposed. This includes common offenses such as theft, burglary, the broadly defined "crime of violence," perjury, obstruction of justice. Others are aggravated felonies if an amount of $10,000 or greater was involved. This includes offenses related to fraud, as well as possibly non-turpitudinous offenses such as income tax

evasion, money laundering, and certain illlegal money transactions. Some are aggravated felonies regardless of sentence, such as rape, murder, and sexual abuse of a minor. Counsel should always check conviction of a crime of moral turpitude against the list of aggravated felonies provided at Appendix 9-A following Chapter 9, to make sure the offense is not an aggravated felony.

WARNING: Domestic Violence, Firearms Offenses, Drug Offenses, etc. Conviction of any "crime of violence," a broadly defined term discussed at § 9.10, is a basis for deportation under the domestic violence ground if the victim was a current or ex-spouse, person co-habitating as a spouse, co-parent, or similarly situated individual protected by domestic violence laws. Thus offenses such as simple battery that do not involve moral turpitude satill might be a basis for deportation if the INS discovers that the actual victim was a former live-in girlfriend. See discussion of INA § 237(a)(2)(E) in § 6.15.

Counsel also must check moral turpitude offenses against the other grounds of inadmissibility and deportability relating to crimes, especially the deportation ground for firearms (see § 6.1) and the controlled substances ground (See Chapter 3). Use the "ADIR" analysis discussed in Chapter 1.

1. Arson -- M.T.

Penal §451 defines arson as "willfully and maliciously" setting fire. In Matter of S, 3 I&N 617 (1949), the BIA held arson to be a crime of moral turpitude under a Canadian statute, where the statute required the fire to be set "purposefully with an evil intention . . . deliberately, intentionally, corruptly." People v. Thompson, 175 Cal. App. 3d 1012, 221 Cal. Rptr. 282 (1986) defines arson as a crime of moral turpitude for purposes of witness impeachment.

2. Assault -- Not M.T.

Simple assault has been held not to involve moral turpitude. United States ex rel. Valenti v. Karmuth, 1 F. Supp. 370, 375 (D.N.Y. 1932); Matter of B, 5 I&N 538 (1953). Indeed, even where "aggravated assault and battery" was charged, the court held that moral turpitude was not conclusively involved where the nature of the aggravation was not specified in the record of conviction, since "assault and battery may or may not" involve moral turpitude. United States ex rel. Griffo v. McCandless, 28 F.2d 287 (E.D. Pa. 1928).

Where the assault statute in question is divisible, such that it includes, by its terms, simple assault as well as aggravated assault, the court may look to the record of conviction to find moral turpitude in the circumstances of a particular assault. See United States ex rel. Mazzillo v. Day, 15 F.2d 391 (S.D.N.Y. 1926) (2nd degree assault under New York Penal Code, "committed with the intention of ousting persons from the possession of their property," held to involve moral turpitude). Under the California Penal Code, simple assault appears to be clearly separate from aggravated forms of assault. However, in pleading to simple assault, the defendant should be careful not to admit allegations which might support a conviction for an aggravated assault.

3. Aggravated assault -- M.T.

Assault with the intent to commit mayhem or specified sex offenses (rape, sodomy, oral copulation, etc.) under Penal §220 clearly involves moral turpitude because of the higher level of violence implicit in such assault and because the intended crimes themselves involve moral turpitude. See United States ex rel. Schladvian v. Warden of Eastern States Penitentiary, 45 F.2d 204 (E.D. Pa. 1930) (assault with intent to kill); Matter of Quadara. 11 I&N 457 (1966) (assault with intent to rob); Matter of I, 2 I&N 477 (1946) (assault with intent to commit manslaughter).

Assault with a deadly weapon or with force likely to produce great bodily injury under Penal §245 was held to involve moral turpitude in Matter of G.R., 2 I&N 733 (1946). The BIA noted that the modern version of assault with a deadly weapon under §245 no longer included the phrase "intent to do bodily harm" but found the intent implicit, making the crime just as serious. Accord Gonzales v. Barber, 207 F.2d 398 (9th Cir.) aff'd sub nom Barber v. Gonzales, 347 U.S. 637 (1953). Note that a simple assault was held not to involve moral turpitude for immigration purposes, even where the defendant had a dangerous weapon on his person but did not use it. Ciambelli ex rel. Maranci v. Johnson, 12 F.2d 465 (D.Mass. 1926).

4. Assault on a peace officer -- *

Whether assault on a peace officer involves moral turpitude depends upon factors which would normally determine assault. Thus, conviction of simple assault against a police office under P.C. § 240 should not be held to involve moral turpitude. Conviction under P.C. § 245(c) or (d) of assault with a deadly weapon against a peace officer would be held to involve moral turpitude, as would any such assault with a deadly weapon..

A simple assault is not transformed into a crime of moral turpitude where the victim happens to be a peace officer. See Ciambelli ex rel. Maranci v. Johnson, 12 F.2d 465 (D. Mass 1926). The Maranci court relied on the fact that the police officer had charged into a brawl in a restaurant and was hit by the defendant in trying to break up the brawl. The court went on to note that certain facts, such as the use of a deadly weapon or the intent to commit a felony, would make assault on a peace officer a crime of moral turpitude. In pleading to charges under Penal §241, the non-citizen defendant should attempt to avoid admitting allegations of felonious intent in connection with the

assault.

Matter of O, 4 I&N 301 (1951) also held that assault on a police officer, under a German statute, did not involve moral turpitude; however, the court relied on the fact that the statute in question did not require the defendant to have knowledge that the assault victim was a police officer. Such knowledge is an element of Penal §241.

In Matter of Danesh, Int. Dec. 3068 (BIA 1988), however, the BIA found moral turpitude in aggravated assault that required the following elements: 1) the assaulted must sustain bodily injury; 2) the accused must have known the person assaulted was a peace officer; and 3) the peace officer must have been engaged in the lawful discharge of an official duty. This is close to the elements in P.C. § 245(c) and (d), which involve assault with a deadly weapon on someone the accused knew or had reason to know was a police officer engaged in performance of his or her duties.

5. Battery -- Not M.T.

No authorities deal with an offense denoted "battery" as such. The offense "aggravated assault and battery" was held not conclusively to imply moral turpitude because "assault and battery may or may not" involve moral turpitude. United States ex rel. Griffo v. McCandless, 28 F.2d 287 (E.D. Pa. 1928). Simple battery under Penal §242 is not likely to involve moral turpitude, however, because the mere touching of the victim is sufficient to establish a battery, and no serious injury need be shown. However, if the victim of the battery was a current or former spouse, person co-habitating as a spouse, or co-parent of a child, conviction of battery may serve as a basis for deportation under the domestic violence ground. See INA § 237(a)(2)(E), discussed in §6.15, *supra.*

6. Battery with serious bodily injury -- ?

Battery with serious bodily injury, under Penal §243, deals with the actual injury inflicted on the victim; by contrast, assault by means of force likely to produce great bodily harm, Penal §245, focuses on the force used by the defendant. People v. Hopkins, 78 Cal. App. 3d 316, 142 Cal. Rptr. 572 (1978). Although neither battery nor assault involve a specific intent to do bodily harm, and an aggravated assault under §245 involves moral turpitude, §243 battery may not involve moral turpitude. Because §243 focuses on harm to the plaintiff, it could conceivably be imposed for negligent acts or acts in which the injury is greater than one might have expected from the nature of the battery (e.g., the "eggshell skull" victim). In this light, crimes analogous to involuntary manslaughter may be included. (See "Manslaughter, involuntary" infra).

Note that conviction of "willful infliction of corporal injury" on a spouse in violation of Cal. Pen. Code § 273.5 involves moral turpitude. Grageda v. INS, 12 F.3d 919 (9th Cir. 1993). See discussion in section 74, "Wife or Husband Beating."

Also note that if the victim of the battery was a current or former spouse, person co-habitating as a spouse, or co-parent of a child, the conviction may serve as a separate basis for deportation under the domestic violence ground. See INA § 237(a)(2)(E), discussed in §6.15, *supra*

7. Battery on a peace officer -- Probably not M.T.

Simple battery on a peace officer, in which no injury is inflicted, is a misdemeanor and probably does not involve moral turpitude for the same reason that simple assault on a peace officer does not involve moral turpitude.

Battery on a peace officer is a felony where an injury is inflicted "requiring professional medical treatment." This degree of injury appears to be less than the "serious physical impairment" required to establish "battery with serious bodily injury." Assuming that "professional medical treatment" may in some sense be "required" for peace officers receiving minor scrapes or bruises, this crime includes at least some acts which do not involve moral turpitude. The statute should be held not turpitudinous because the minimum conduct required to violate it does not necessarily involve moral turpitude. Moral turpitude could conceivably be found for a conviction of felony battery on a peace officer where the record of conviction indicates serious injury to the peace officer. On the other hand, if such serious

battery is not turpitudinous (see supra), the result should not change simply because the victim is a peace officer.

8. Bigamy -- M.T.

Gonzalez-Martinez v. Landon, 203 F.2d 196, 197 & n. 1 (9th Cir.), cert. denied, 345 U.S. 998 (1953), holds that bigamy under Penal §281 involves moral turpitude. Although Penal §281 does not list intent as an element of the crime, case law has established a defense of reasonable good-faith mistake of fact; therefore, bigamy under §281 is interpreted as a crime requiring guilty knowledge. People v. Vogel, 46 Cal. 2d 798, 803-04, 299 P.2d 850 (1956). See also Matter of V.L., 3 I&N 10 (1947) (bigamy is crime of moral turpitude).

Braun v. INS, 992 F.2d 1016 (9th Cir. 1993) held that an alien who admitted to the existence of a first marriage at the time the second marriage took place but believed that the first marriage was void did not admit all of the elements of bigamy.

Under statutes in which bigamy is a strict liability offense, so that a defendant's honest mistake of fact is not a defense, some cases have held that moral turpitude was not involved. Forbes v. Brownell, 149 F. Supp. 848 (D.D.C. 1957); see Greenwood v. Frick, 233 F. 629, 632 (6th Cir. 1916); contra Whitty v. Weedin, 68 F.2d 127, 130-31 (9th Cir. 1933); Matter of E, 2 I&N 328 (1945).

9. Brandishing a deadly weapon -- Probably not M.T.

Subsection (a) of Penal §417 defines the offense as brandishing a loaded or unloaded firearm or other deadly weapon "in a rude, angry or threatening manner or unlawfully us[ing] same in a fight or quarrel." In Matter of G.R., 2 I&N 733, 738-39 (1946), the BIA observed that "the seriousness of the offense of assault with a deadly weapon [under California law] is emphasized by the presence in the California statute of a lesser crime which includes the mere threat to use the weapon or the brandishing of an unloaded gun." The BIA cited People v. Sylva, 143 Cal. 62, 76 P. 814 (1904) which held that the pointing of an unloaded gun at a person, "accompanied by a threat to discharge it without any attempt to use it except by shooting, does not constitute an assault. There is in such case no present ability to commit a violent injury on the person threatened . . . ." These authorities suggest that the offense of brandishing a deadly weapon does not rise to the level of assault. In addition, §417 implies no assaultive intent and includes conduct which is not serious or violent in nature. It should therefore be held not morally turpitudinous.

Subsection (b) of Penal §417 deals with the brandishing of a firearm in front of a peace officer, making that offense a felony, but with a six month minimum sentence. Although a felony, this subsection seems to include conduct that does not rise to the level of an assault, and has no requirement of evil intent. It probably does not involve moral turpitude.

10. Bribery -- M.T.

Because Penal §§6, 92 make "specific intent corruptly to influence" an element of bribery, this crime clearly involves moral turpitude. See Matter of H, 6 I&N 358 (1954); United States ex rel. Sollazzo v. Esperdy, 285 F.2d 341 (2nd Cir.), cert. denied, 366 U.S. 905 (1961).

11. Burglary -- M.T.

Penal §459, which defines burglary to include "intent to commit grand or petty larceny or any felony," has been held to involve moral turpitude. Matter of Z, 5 I&N 383 (1953); Baer v. Norene, 79 F.2d 340, 341 (9th Cir. 1935); Matter of V.T., 2 I&N 213 (1944).

California burglary where the intent was to commit grand or petty larceny involves moral turpitude because larceny involves moral turpitude. (Compare "Unauthorized entry" and "Criminal trespass.") Lesser degrees of burglary under statutory definitions which depart from common law burglary may not necessarily involve moral turpitude. For example, a conviction under a New York Penal Code Section defining burglary to include "being in any building, commit[ting] a crime therein and break[ing] out of same," was held not to involve moral turpitude in

Matter of M, 2 I&N 721 (1946), where the record of conviction did not say what crime was committed inside the building.

If the record of conviction, including the charging papers, plea or verdict, and sentence shows only that the person was convicted of an offense involving the intent to commit "any felony," then the crime is not adequately specifically defined to constitute a crime involving moral turpitude. See, e.g., Matter of Short, Int. Dec. 3125 (BIA 1989) (assault with intent to commit "a felony" upon a minor is not adequately defined to be a crime involving moral turpitude where felony is not specified) and discussion of divisible statutes in § 4.11. See also discussion of burglary as an aggravated felony in § 9.11, including the argument that California burglary should not be defined as an aggravated felony even if a one year sentence has been imposed.

12. Carrying concealed dagger; manufacture, possession, import, or sale of prohibited weapon -- *

Possession of prohibited weapons or tools has been held not inherently turpitudinous. United States ex rel. Guarino v. Uhl, 107 F.2d 399 (2nd Cir. 1939) (possession of burglary tools); Matter of S, 6 I&N 769 (1955) (same); Matter of Granados, 16 I&N 726 (1979) (possession of sawed-off shotgun). In addition, possession of a prohibited weapon in violation of Penal §12020 has been held not to involve moral turpitude, for the purposes of witness impeachment under California law. People v. Thompson, 175 Cal. App. 3d 1012, 1022, 221 Cal. Rptr. 288-89 (1986).

Note that, while weapons possession is not turpitudinous, a conviction for possession of a sawed-off shotgun or automatic weapon constitutes a ground of deportation under 8 U.S.C. 1251(a)(14). See Chapter 6.Non citizens should not plead to this offense.

Possession of prohibited weapons will be held turpitudinous where there is intent to use them in a crime of moral turpitude. Thus, in the Matter of S, 8 I&N 344 (1959), the violation of a Minnesota "deadly weapons" statute very similar to the California statute was held to involve moral turpitude only because the statute also included intent to use the weapon against a person.

Regarding the manufacture, import or sale of prohibited weapons, moral turpitude might be found in the added elements of pecuniary gain. (The element of pecuniary gain has been noted as creating the distinction between fornication, which has been held not to involve moral turpitude, and prostitution, which has. Matter of R, 6 I&N 444, 451 (1954)).

13. Carrying loaded firearm in public without a license; Carrying a concealed weapon without a license -- Probably not M.T.

Carrying a concealed weapon without a license has been held not to involve moral turpitude, because an act licensed by the state cannot properly be considered morally turpitudinous. Ex parte Saraceno, 182 F. 955, 957 (Cir. Ct. N.Y. 1910); United States ex rel. Andreacchi v. Curran, 38 F.2d 498 (S.D.N.Y. 1926).

Penal §12025 is a felony if the offense is committed by a convicted felon or drug addict. Arguably this should not make the offense one involving moral turpitude, since the operative element remains the lack of a license, combined with the status of the offender.

If the charge involves a shotgun or automatic or semi-automatic weapon, see "Carrying concealed dagger", supra, and Chapter 6, §6.1, supra.

14. Child abduction -- Probably M.T.

Violation of Penal §§ 277, 278 probably involves moral turpitude because the elements of this crime include malice and a lack of good cause.

15. Child beating -- M.T.

Guerrero de Nodahl v. INS. 407 F.2d 1405 (9th Cir. 1969) holds that purposely or willfully inflicting cruel or inhuman corporal punishment or injury on a child is so offensive to American ethics that Cal. Penal Code §273a clearly involves moral turpitude.

16. Child concealment in violation of custody decree – Probably M.T.

It is unclear whether a violation of Penal §278.5, child concealing or detention in violation of a custody decree, which requires a specific intent to deprive the parent of the right to physical custody or visitation, involves moral turpitude. The most pertinent authority on this issue is Matter of Farinas, 12 I&N 467 (1967), which held that the abduction of a female under the age of 18 for the purpose of marriage, without the consent of the parents, did not involve moral turpitude, because the same acts could be rendered moral or legal by the consent of the parents. Arguably, the consent of the deprived parent could have a similar effect on a violation of §278.5.

17. Child molesting – Probably M.T.

The terms "annoy" and "molest" which are elements of child molesting under Penal §647a imply "abnormal sexual motivation." People v. Moore, 137 Cal. App. 2d 197, 290 P.2d 40 (1955). This intent element is likely to make this crime one involving moral turpitude. See Matter of P, 2 I&N 117 (1944)("indecent exposure" did not involve moral turpitude where record of conviction did not show "lewd or lascivious intent or [intent] to arouse the sexual desires of the children.")

In Gonzalez-Alvarado v. INS, 39 F.3d 245 (9th Cir. 1993) the Ninth Circuit found incest to be a crime involving moral turpitude under a Washington statute requiring the person to have engaged in sexual intercourse with a close relative. It held that incest "involves an act of baseness or depravity contrary to accepted moral standards" and that a "crime involving the willful commission of a base or depraved act is a crime involving moral turpitude, whether or not the statue requires proof of evil intent."

18. Conspiracy

"Conspiracy to commit a certain crime involves moral turpitude if the basic crime involves moral turpitude." Matter of P, 5 I&N 444, 446 (1963). Conversely, if the basic crime does not involve moral turpitude, neither does the conspiracy.

19. Contributing to the delinquency of a minor – *

Penal §272 proscribes any act or omission "which causes or tends to cause or encourage" a minor to become delinquent or which "induces or endeavors to induce a person under the age of 18...to fail or refuse to conform to a lawful order of the juvenile court." A conviction under the broadly and vaguely worded Penal §272 can encompass acts which may or may not involve moral turpitude. A key question is whether the reviewing authority will look to the record of conviction in an effort to determine the circumstances of the offense. In Matter of V.T., 2 I&N 213, 216-17 (1944), the BIA considered the California offense of "contributing to the delinquency of a minor" under a predecessor statute substantially similar to Penal §272, holding that the offense "is extremely broad in scope and would include many offenses which may or may not involve moral turpitude." Non-turpitudinous offenses covered by this statute included: encouraging a 16 year old boy to play cards for money; selling or serving intoxicating liquor to a minor; and making amorous advances on a 17 year old woman who was married to someone else. See Matter of C, 2 I&N 220 (1944) (conviction under California "contributing to a delinquency of a minor" statute for encouraging a minor to become a truant from school was not a crime of moral turpitude).

Nevertheless a conviction under Penal §272 would probably be held to involve moral turpitude if from the record of conviction it was apparent that the defendant was convicted of a sex offense involving a minor. Thus, in Matter of P, 3 I&N 290 (1949), a California conviction for "contributing to the delinquency of a minor" was held to involve moral turpitude when the record of conviction showed the underlying conduct to be unlawful sexual intercourse with a 19 year old female.

20. Criminal trespass -- probably not M.T.

Penal §602 defines as misdemeanors the commission of several offenses involving damage to or unauthorized taking of various forms of property, including plants and wildlife, as well as unauthorized entries onto land or into buildings.

Most of these provisions are probably not turpitudinous because they are minor offenses that do not contain an element of malicious or criminal intent. It has been held that mere "breaking and entering" or "unlawful entry" do not involve moral turpitude where an intent to commit a crime of moral turpitude is not part of the offense. Matter of M, 9 I&N 132 (1960); Matter of M, 2 I&N 721 (1946); Matter of G, 1 I&N 403 (1943). In addition, misdemeanor property damage offenses that do not necessarily involve malicious intent have been held not to involve moral turpitude. Matter of N, 8 I&N 466 (1959). Although certain provisions, such as subsection (b), "carrying away any kind of wood or timber," resemble theft offenses, these §602 offenses lack the element of specific intent to deprive the owner permanently of title or possession, an element which has been held necessary to make such offenses morally turpitudinous. (See "Joy riding," "Theft," and "Vehicle taking," infra.)

A problem is raised by subsections (c), (f), and (h), which contain as elements "maliciously injuring" or "maliciously tearing down." To the extent that malice is an element of these subsections, they may involve moral turpitude, despite the fact that the offenses are misdemeanors. The offense of "malicious mischief" was held to involve moral turpitude in two cases, Matter of M, 3 I&N 272 (1948), in which the defendant "maliciously and wantonly injured and destroyed two hogs" with an axe; and Matter of R, 5 I&N 612 (1954), in which the defendant was convicted of willfully and maliciously attempting to damage property by means of explosives. However, in Matter of N, 8 I&N 466 (1959), a conviction under a Delaware malicious mischief statute, defining the offense as "unlawfully, maliciously and mischievously" destroying or injuring property, was held not to involve moral turpitude. The information charged that the defendant "did commit an act of malicious mischief by causing damage to the furnishing of the Wilmington Girls Club." The BIA was unable to determine from the indictment whether the alien was "convicted of offenses perpetrated maliciously and wantonly and not for acts accompanied by negligence or carelessness." It is not clear whether the distinguishing feature of these two results is the seriousness of the offense or the fact that the indictment or information in one case failed to allege that the damage was caused maliciously. Nevertheless, Matter of N arguably stands for the proposition that the malice element in a malicious mischief statute does not automatically make a violation of that statute morally turpitudinous.

Thus, it is of some significance that California courts have suggested that the "malice" requirement under Penal §602(c) is satisfied by a criminal complaint which alleges that the act was done "willfully and unlawfully." Messick v. Superior Court, 57 Cal. App. 3d 340, 342, 207 P. 58 (1922). Arguably, because malice is not required to violate the sections of Penal §602 which refer to malicious acts, those sections may not involve moral turpitude.

Moreover, the Ninth Circuit has held that malicious mischief as defined by a Washington statute is not a crime involving moral turpitude. Rodriguez-Herrera v. INS, 52 F.3d 238 (9th Cir. 1995). Under that statute, "malice" could be inferred if the act was "wrongfully done without just cause or excuse." The court found that the statute included "pranksters with poor judgment" and, consequently, malicious mischief did not necessarily involve an act of baseness or depravity contrary to accepted moral standards. Id. at 240.

21. Cruelty to child -- Probably M.T.

Penal §273a applies to a person who "wilfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering." This offense is a felony where committed "under circumstances or conditions likely to produce great bodily injury" and probably involves moral turpitude because it is so similar to child beating (defined as intentionally inflicting cruel or inhuman punishment or injury), which has been held to involve moral turpitude.

Even as a misdemeanor, Penal §273a probably involves moral turpitude. Child neglect has been held to involve moral turpitude where the neglect is "willful" and the child is destitute, the latter element "necessarily imput[ing] to a violator thereof a baseness of character consistent with the finding of moral turpitude." Matter of S, 2 I&N 553

(1946); Matter of R, 4 I&N 192 (1950). The offense of willfully failing to provide for a destitute child appears very similar to that of willfully causing or permitting any child to suffer.

22. Disturbance of public assembly or meeting -- Probably not M.T.

Because this is a misdemeanor that has no requisite element of evil intent, it is probably not a crime of moral turpitude.

23. Disturbing the peace -- Probably not M.T.

Matter of P, 2 I&N 117, 122 (1944), in dictum, noted that, "most states also have, in the exercise of their police powers, 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." Because disturbing the peace under Penal §415 is a petty offense, a conviction under it arguably should not involve moral turpitude.

A problem arises under the second of the three separate offenses which come under §415, which is defined as a willful and malicious disturbance by noise. The statutory requirement that an act be done "maliciously" has typically been held to make a crime morally turpitudinous, where the crime is more serious in nature, and even in certain cases involving nonfelonious destruction of property. On the other hand, the presence of the word "malicious" or "maliciously" in the definition of a minor offense is not necessarily dispositive. (See Annotations for "Criminal Trespass" and "Vandalism.") Defense counsel should be aware that a conviction for malicious disturbance by noise, where the term "malicious" appears in the information or indictment, could possibly be held turpitudinous. However, the Ninth Circuit has held that malicious mischief as defined by a Washington statute is not a crime involving moral turpitude. Rodriguez-Herrera v. INS, 52 F.3d 238 (9th Cir. 1995). Under that statute, "malice" coudl be inferred if the act was "wrongfully done without just cause or excuse." The court found that the statute included "pranskters with poor judgment" and, consequently, malicious mischief did not necessarily involve an act of baseness or depravity contrary to accepted moral standards. Id. at 240.

The first subsection of §415, proscribing unlawful fighting, probably does not involve moral turpitude. The use of offensive words "inherently likely to provoke," set forth in the third subsection should not be held to involve turpitude either. Although California case law has interpreted this subsection to preclude a conviction where the defendant reasonably and in good faith did not believe the words would provoke, see In re John V., 167 Cal. App. 3d 761, 213 Cal. Rptr. 503 (1985), the absence of such reasonable, good faith belief needed to sustain a conviction is not tantamount to criminal intent.

24. Driving under the influence (felony) -- ?

A violation of Vehicle §23153 is established by showing that the defendant 1) was intoxicated and 2) failed to perform or violated some legal duty which 3) proximately caused injury to a person. People v. Oyaas, 173 Cal. App. 3d 663, 667, 219 Cal. Rptr. 243 (1985). The unlawful act or omission required for element 2) of this offense may be established by conduct which "amounts to no more than ordinary negligence." Id. at 669; People v. DeSpenza, 203 Cal.App.2d 283, 290, 21 Cal. Rptr. 275 (1962) (merely negligent act sufficient to establish felony vehicular manslaughter).

Under the existing immigration precedents, this offense should not be held turpitudinous because it lacks an element of criminal intent or even recklessness. "To drive an automobile while under the influence of intoxicating liquor (as defined by the California courts) is not, per se, a wilful and wanton disregard of the safety of persons or property." People v. Clenney, 165 Cal. App. 2d 241, 248, 331 P.2d 696 (1958). Driving under the influence "is a separate and distinct offense" from reckless driving; to establish reckless driving, "there must be some evidence that would justify a finding of the intentional doing of some unlawful act or acting with a reckless disregard of the consequences." People v. Thurston, 212 Cal. App. 2d 713, 716, 28 Cal. Rptr. 254 (1963).

See also discussion of "recklessness" in this chapter.

Public sentiment has taken a much sterner view of drunk driving in the past few years, prompting a good deal of legislative activity. In the public mind, drunk driving may indeed be reckless or immoral. In the future, the reviewing immigration authority may hold this crime turpitudinous by following changing social mores rather than legal precedents. In addition, the fact of bodily injury could persuade the reviewing authority to find the offense turpitudinous. However, to the extent that only minor injuries would support a felony drunk driving conviction, it could be argued that the minimum conduct necessary to violate the statute is not turpitudinous.

The BIA has held that driving under the influence is a "crime of violence," so that with a one year sentence imposed the offense is an aggravated felony. Matter of Magallanes, Int. Dec. 3341 (BIA 1998). This ruling should be challenged. See discussion in §9.10 and Appendix 9-E following Chapter 9.

25. Driving under the influence (misdemeanor) -- Probably not M.T.
(See "Driving under the influence (felony)," supra.)

The argument for finding moral turpitude in felony drunk driving is considerably less persuasive where no bodily injury occurs and the offense is only a misdemeanor under Vehicle §23152. Although there is no published decision on this point, in practice immigration judges hold misdemeanor driving under the influence to be not turpitudinous. Generally, misdemeanor offenses with no criminal intent or serious injury to the victim are not turpitudinous. Under California case law, driving under the influence is not reckless per se, and does not require a showing of wanton disregard for the safety of others. People v. Clenney, 165 Cal. App. 2d 214, 331 P.2d 696 (1958); People v. Thurston, 212 Cal. App. 2d 713, 28 Cal. Rptr. 254 (1963). Thus, no criminal intent or recklessness is an element of the offense.

26. Driving without a license -- Not M.T.

Violation of Vehicle §12500 should be deemed not to involve moral turpitude on the principle that an act licensed by the State cannot be morally turpitudinous. See Ex parte Saraceno, 182 F. 955, 957 (Cir. Ct. N.Y. 1910).

27. Escape -- not M.T.

Merely escaping custody, or "breaking prison" with a minimal amount of force, does not involve moral turpitude. United States ex rel. Manzella v. Zimmerman, 71 F. Supp. 534 (E.D.Pa. 1947). See also Matter of I, 4 I&N 512 (1951) (attempt to escape does not involve moral turpitude).

Penal §4532 defines the crime of escape without regard to whether the use of force or violence is involved. For that reason, the crime has been held not to involve moral turpitude for the purpose of witness impeachment. People v. Thompson, 175 Cal. App. 3d 1012, 221 Cal. Rptr. 282 (1986); See also People v. Lopez, 6 Cal. 3d 45, 51-52, 98 Cal. Rptr. 44, 489 P.2d 1372 (1971) (escape in the abstract is not inherently dangerous to human life, and therefore does not support application of felony murder rule).

Because simple assault does not involve moral turpitude either, an attempted escape in which the defendant beat a guard was held not to involve moral turpitude in Matter of B, 5 I&N 538 (1953).

28. Extortion -- M.T.

United States ex rel. Dentico v. Esperdy, 280 F.2d 71, 73 n.2 (2d Cir. 1960) (conspiracy to extort money involved moral turpitude).

29. Failure to provide for child -- not M.T.

Matter of Y, 1 I&N 137 (1941), held that Penal §270 does not involve moral turpitude.

As set forth in Matter of E, 2 I&N 134 (1944), a child neglect law must contain two elements to be a crime involving moral turpitude: (1) willful neglect and (2) a destitute child. Penal §270 requires willful neglect, but

contains no requirement that the child be destitute. In statutes where the child must be destitute for a conviction to be had, moral turpitude does attach. (Compare "Cruelty to Child," supra.)

30. False imprisonment (felony) -- M.T.

Felony false imprisonment, as defined by Penal §§ 236, 237 and California case law, is the unlawful restraint of the victim's liberty effected by violence, menace, fraud or deceit against the victim or other person. People v. Rios, 177 Cal. App. 3d 445, 450, 222 Cal. Rptr. 913, 915 (1986). Crimes of which fraud or deceit are elements are always held to involve moral turpitude; the use of violence or menace to restrain a person's liberty probably involves moral turpitude, as does kidnaping, which differs from felony false imprisonment by virtue of the element of forced movement of the victim. Cf. Matter of C.M., 9 I&N 487 (1961) (defendant conceded that kidnapping as defined by California Penal Code involved moral turpitude).

31. False imprisonment (misdemeanor) -- probably not M.T.

Penal §§236, 237 define misdemeanor false imprisonment as the unlawful, intentional restraint of liberty. Since the use of force, violence, fraud, or deceit would raise the crime to felony false imprisonment, a defendant who pleads guilty to misdemeanor false imprisonment presumably does not admit any allegations as to the use of violence, fraud, etc. As defined, misdemeanor false imprisonment does not involve malice or specific intent. "'[T]he wrong may be committed by acts or by words, or both, and by merely operating upon the will of the individual, or by personal violence or both . . . .' The conduct may involve merely the simple act of announcing without probable cause the making of a citizen's arrest . . . ." People v. Henderson, 19 Cal. 3d 86, 94, 137 Cal. Rptr. 1 (1977) (citations omitted). Since, as set forth in Henderson, the minimal conduct required to violate the statue does not necessarily involve malice, criminal intent, violence or fraud, this offense probably does not involve moral turpitude.

32. Forgery -- M.T.

See, e.g., Morasch v. INS, 363 F.2d 30 (9th Cir. 1966); United States ex rel. Robinson v. Day, 51 F.2d 1022 (2d Cir. 1931).

33. Hit and run (misdemeanor) -- Probably not M.T.

A person can be convicted under Vehicle §20002 where it is established that he or she was involved in an auto accident, knew that property damage occurred, and willfully left the scene without providing the necessary identification information. People v. Crouch, 108 Cal. App. 3d Supp. 14, 21, 166 Cal. Rptr. 818 (1980).

This is probably not a crime involving moral turpitude, even though the willful failure to identify oneself as a driver involved in an accident carries an implication of dishonesty. To be held turpitudinous, misdemeanors involving property damage or property taking typically must contain an element of malice or of specific intent (to defraud or steal). Hit and run requires neither malice nor specific or fraudulent intent. See id. at 22 & n.5. It is no defense that the defendant reasonably believed he was not responsible for the accident. Id. at 19.

34. Hit and run (felony) -- *

To convict under Vehicle § 20001, it must be shown that the defendant (1) was involved in an accident resulting in injury (or death) to another, (2) knew or should reasonably have known that injury occurred, and (3) knowingly and willfully left the accident scene without providing identifying information or without rendering reasonable assistance to the injured person.

Section 20001 appears to be a "divisible statute," including both conduct that is and that is not turpitudinous. It should be noted that the defendant need not have been "responsible" for the injury under this statute. See People v. Crouch, 108 Cal. App. 3d Supp. 14, 21-22, 166 Cal. Rptr. 818 (1980); see also Karl v. C.A. Reed Lumber Co., 275 Cal. App. 2d 358, 361, 79 Cal. Rptr. 852 (1969). Rather, the crime is the defendant's willful failure either (1) to

furnish information which would preclude the defendant's evasion of civil or criminal liability; or (2) to aid an injured person. A conviction may flow from either omission.

The failure to provide information, without more, probably does not involve moral turpitude. No intent to defraud or specific intent to evade legal accountability need be proven. In the absence of perjury or fraud, the evasion of civil or criminal liability may not be turpitudinous. Cf. Annotation for "Escape," supra.

A conviction for failure to aid an injured person does not require a showing of recklessness or malice, nor does it establish the defendant's responsibility for the victim's injury or the extent of that injury. Arguably, this prong of the offense is not turpitudinous either.

However, it is conceivable that the reviewing authority will disregard these arguments and find the crime turpitudinous because it is a felony in which bodily injury is involved, and the defendant has, by implication, shown callous disregard for the victim's distress. Where facts in the record of conviction indicate the defendant's causation of the accident -- such as where the defendant's car was the only one involved in hitting a pedestrian -- a finding of moral turpitude is more likely.

Because the reviewing authority may hold this vaguely worded section to be a divisible statute, and then examine the record of conviction, defense counsel should attempt to keep the record clear of facts showing that the defendant was responsible for the injury or that the injury was serious.

35. Incitement to riot -- ?

Penal §404.6 defines this offense as conduct which, "with intent to cause a riot ... urges a riot or urges others to commit acts of force or violence, or the burning or destroying of property." In Matter of O, 4 I&N 301, 312-313 (1951), the BIA held that the offense of "riot" under the German penal law did not involve moral turpitude where the statute defined the defense broadly enough to include passive participation as well as participation with acts of force or violence. By implication, Penal §404.6 may involve moral turpitude, since it requires an intent to bring about acts of force or violence or the destruction of property.

36. Indecent exposure -- probably M.T.

Penal §314(1) defines the offense of "willfully and lewdly" exposing one's "private parts" in public in the presence of persons who might be offended or annoyed. The element of "lewdness" means that a conviction under this statute "requires proof beyond reasonable doubt that the actor not only meant to expose himself, but intended to direct public attention to his genitals for purposes of sexual arousal, gratification or affront." In re Smith, 7 Cal. 3d 362, 366, 102 Cal. Rptr. 335 (1972) (mere nudity, or nude sunbathing does not by itself establish an offense under §314(1)). The requirement of a specific intent to create sexual arousal, gratification or affront probably makes this offense turpitudinous. Cf. Matter of H, 7 I&N 301 (1956) (indecent exposure in front of five-year-old girl at playground not crime of moral turpitude because statute had no requirement of specific intent, but instead could include exposure through negligent disregard or physical necessity); Matter of Mueller. 11 I&N 268 (1965) (same); Matter of P, 2 I&N 117, 122 (1944) (dictum) (operating nudist camp not crime of moral turpitude, because no evil intent implicit).

37. Issuing worthless checks with intent to defraud -- M.T.

In Matter of MacLean, 12 I&N 551 (1967), the BIA held Penal §476(a) to be a crime involving moral turpitude because a requisite element of this crime is the intent to defraud. See Burr v. INS, 350 F.2d 87, 91-92 (9th Cir. 1965), cert. den. 383 U.S. 915 (1966). See also Matter of Bart, Int. Dec. 3166 (BIA 1992)(Georgia). Where an intent to defraud is not an element of a worthless check offense, the crime does not involve moral turpitude. Matter of Balao, Int. Dec. 3167 (BIA 1992), Matter of Stasinski, 11 I&N 202 (1965); Matter of Bailie, 10 I&N 679 (1964).

38. Joy riding -- not M.T.

Penal §499(b) defines the offense, commonly known as "joy riding," as taking any automobile, bicycle, motorcycle or other vehicle "for the purpose of temporarily using or operating the same." "Joy riding" does not involve moral turpitude. Matter of M, 2 I&N 686 (1946); See Matter of D, 1 I&N 143 (1941). Joy riding, unlike vehicle-taking under Vehicle §10851, does not require proof of a specific intent to deprive the owner permanently or temporarily of title to or possession of the automobile. People v. Barrick, 33 Cal. 3d 115, 187 Cal. Rptr. 716 (1982). (In addition, one could conceivably "take" a vehicle within the meaning of Vehicle §10851 without having the purpose of using or operating it in violation of Penal §499(b). Id.)

39. Kidnaping – M.T.

In Matter of C.M.. 9 I&N 487 (1961), the defendant conceded that kidnaping, defined by Penal §207 as forcible asportation of a person, involves moral turpitude. See also Matter of P, 5 I&N 444 (1953) (kidnaping for ransom under 18 U.S.C. 1201 involves moral turpitude); Matter of Nakoi, 14 I&N 208 (1972) (same).

40. Lewd Act with Child -- M.T.

Penal §288 defines this offense as a lewd act with a child under 14, with intent to arouse or gratify sexual desire. This type of offense has been held to involve moral turpitude. Matter of Garcia, 11 I&N 521 (1966) (indecent liberties, such as common sense of society would regard as indecent and improper, without committing or intending rape, held to involve moral turpitude); Marinelli v. Ryan, 285 F.2d 474 (2nd Cir. 1961) (touching boy under 16 with sexual intent was morally turpitudinous).

41. Lewd conduct – probably M.T.

Matter of Alphonso-Bermudez, 12 I&N 225 (1967) held that a conviction under Penal §647(a) for homosexual solicitation was a crime of moral turpitude. See Hudson v. Esperdy, 290 F.2d 879 (2d Cir. 1961), cert. den., 368 U.S. 918 (New York law punishing loitering in public place for purpose of soliciting homosexual acts was crime of moral turpitude). Note that an admission of homosexuality may render a non-citizen excludable under 8 U.S.C. 1182 (a)(4).

Penal §647(a) proscribes "soliciting a person to engage, or engaging in, lewd and dissolute conduct in a public place." This statute has been applied to other acts which would probably be held morally turpitudinous. See, e.g., People v. Reed, 114 Cal. App. 3d Supp. 1, 170 Cal. Rptr. 770 (1980) (masturbation).

However, there is authority for the proposition that where a statute is broad and general in its scope, as this one is, and where the information or indictment is couched in general language not specifying the conduct, the conviction does not involve moral turpitude because non-turpitudinous offenses may be covered by the statute. See Matter of Z, 2 I&N 316 (1945) (statute proscribing "any acts of gross indecency with another male person" did not involve moral turpitude); Matter of S, 5 I&N 576 (1953).

42. Loitering – probably not M.T.

Penal §647(g) proscribes loitering "without visible or lawful business," and subsection (h) proscribes a similar offense that adds the element of "peeking" into a door or window.

A minor and vaguely defined offense such as this one should not be held to involve moral turpitude. See Matter of P, 2 I&N 117, 122 (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.")

California case law has defined this offense as loitering "for the purpose of committing a crime, as opportunity may be discovered. It excludes the notion of waiting for a lawful purpose." People v. Caylor, 6 Cal. App. 3d 51, 56, 85 Cal. Rptr. 497 (1970). In addition, the term "wandering" in this section means "movement for 'evil purposes.'" Id. A reviewing court should not view the notion of "loitering for the purpose of committing a crime, as opportunity may

be discovered," as rising to the level of a cognizable intent to commit a crime; and in any case, this definition does not specify whether the would-be crime existing in the loiterer's mind is a crime involving moral turpitude or not. Therefore, Penal §647(g) and (h) should not be viewed as involving moral turpitude.

43. Manslaughter, voluntary – M.T.

In jurisdictions following the common law classification of manslaughter into voluntary and involuntary, the crime of voluntary manslaughter contains an element of intent to kill and therefore involves moral turpitude. E.g., De Lucia v. Flagg, 297F.2d 58 (7th Cir. 1961), cert denied, 369 U.S. 837. Voluntary manslaughter under Penal §192(a) is distinguished from involuntary manslaughter by an intent to kill.

Where the conviction is from a jurisdiction that does not use the common law classification of manslaughter into voluntary and involuntary, the reviewing authority looks at the record of conviction to see whether the elements of voluntary manslaughter are present. If so, the crime is one of moral turpitude. Note that an intent to kill has sometimes been inferred from the use of a deadly or dangerous weapon. United States ex rel. Allessio v. Day, 42 F.2d 217 (2nd Cir. 1930) (homicide in heat of passion without intent to kill, but in cruel manner or with dangerous weapon, is crime of moral turpitude); Matter of Ptasi, 12 I&N 790 (1968) (manslaughter with deadly or dangerous weapon is crime of moral turpitude); but see Matter of Lopez, 13 I&N 725 (1971); Vidal y Planas v. Landon, 104 F. Supp. 384 (S.D. Cal. 1952). Where the alien is indicted for murder and pleads to manslaughter in jurisdictions where no voluntary/involuntary distinction exists, the crime has been considered voluntary and therefore turpitudinous. Matter of Sanchez-Marin, 11 I&N 264 (1965); Matter of D, 3 I&N 51 (1947).

44. Manslaughter, involuntary – Not M.T.

Penal §192(b) defines involuntary manslaughter as homicide in commission of a non-felonious unlawful act, or in commission of a lawful act which might cause death, in an unlawful manner, or without due caution. Involuntary manslaughter has been held not to involve moral turpitude because of the absence of malice or criminal intent. United States ex rel. Mongiovi v. Karnuth, 30 F.2d 825 (2nd Cir. 1929); In re Schiano Di Cola, 7 F.Supp. 194 (D.R.I. 1934) (involuntary manslaughter by means of reckless driving not crime of moral turpitude); see Vidal y Planas v. Landon, 104 F. Supp. 384 (S.D. Cal. 1952); Matter of Lopez, 13 I&N 725 (1971) (use of word "feloniously" to describe assault or killing does not compel finding of voluntary, morally turpitudinous manslaughter under Alaska statute which did not distinguish voluntary from involuntary, where indictment merely said "did feloniously kill . . . by shooting").

Note that recent BIA cases have held that "reckless homicide" statutes involve moral turpitude where "reckless" is defined as a conscious disregard of a substantial and unjustifiable risk, that constitutes a gross deviation from a reasonable person's standard of care. Matter of Franklin, Int. Dec. 3228 (BIA 1994). Matter of Wojtkow, 18 I&N 111 (1981); Matter of Medina, 15 I&N 611 (1976). However, the Board has never held that a crime involving reckless conduct is per se a crime involving moral turpitude. Matter of Fualaau, Int. Dec. 3285 (BIA 1996). These holdings do not affect California involuntary manslaughter, which does not include recklessness as an element.

The Ninth Circuit and the BIA have held that involuntary manslaughter is a crime of violence. Therefore it would be an aggravated felony if a sentence of a year is imposed. However, these holdings should be challenged. See discussion of crime of violence in § 9.10 and Appendix 9-E following Chapter 9.

45. Manslaughter, vehicular (felony) – *

Penal §191.5, "gross vehicular manslaughter," is defined as involuntary manslaughter with a motor vehicle, while intoxicated, with gross negligence.

Penal §192(c)(3), "felony vehicular manslaughter," is defined as involuntary vehicular manslaughter, committed while intoxicated but without gross negligence.

Involuntary vehicular manslaughter, with gross negligence, but with no element of intoxication, may be either a

felony or a misdemeanor under §192(c)(1).

Because involuntary manslaughter is not morally turpitudinous, Penal §192(c)(1) vehicular manslaughter should not be deemed morally turpitudinous unless the added element of "gross negligence" makes the offense turpitudinous. The BIA has in the past suggested that "gross negligence" does not involve moral turpitude. See Matter of C, 2 I&N 716, 719-20 (1947) (dictum) ("If the statute is so broad that it covers gross negligence, we think that the offense cannot be regarded as inherently base, vile or depraved.") However, BIA cases have held reckless homicide to be a crime of moral turpitude, where the definition of "recklessness" requires that the defendant (1) is actually aware of but consciously disregards (2) a substantial and unjustifiable risk; such that the conduct constitutes a gross deviation from the standard of reasonable care. Matter of Wojtkow, 18 I&N 111 (1981), Matter of Medina, 15 I&N 611 (1976).

Thus, the question is whether "gross negligence" under California law is the same as this definition of recklessness. The answer appears to be that the two concepts are not the same. In People v. Watson, 30 Cal. 3d 290, 179 Cal. Rptr. 43 (1981), the California Supreme Court defined gross negligence, for purposes of the vehicular manslaughter statutes, in terms of an objective standard: if a reasonable person would have been aware of the risk, the defendant's awareness is presumed. Gross negligence is "the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences." 30 Cal. 3d at 296. The "recklessness" standard articulated by the BIA, requiring actual appreciation of the risk and conscious disregard, appears to be what the Watson court meant by "implied malice." "Malice may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life. . . . [I]mplied malice contemplates a subjective awareness of a higher degree than does gross negligence, and involves an element of wantonness which is absent in gross negligence." 30 Cal. 3d at 296 (citations omitted). The Watson court went on to note that a 1941 predecessor version of the vehicular manslaughter statute was more strict, in that it required a subjective test for liability defined in terms of "willful indifference or reckless disregard." Under California law, then, "gross negligence" involves less culpability than recklessness as defined by the BIA, and should not be deemed to rise to the level of criminal intent necessary to support a finding that this form of vehicular manslaughter involves moral turpitude.

The element of intoxication required to convict under §191.5 or §192(c)(3) may or may not make either of those crimes turpitudinous. (See annotation for "Driving while intoxicated (felony)," supra.) California case law has held that "driving while intoxicated" is not reckless per se. People v. Clenney, 165 Cal. App. 2d 241, 331 P. 2d 696 (1958); see People v. Thurston, 212 Cal. App. 2d 713, 716, 28 Cal. Rptr. 254 (1963). Thus, under a strict application of immigration precedents, the element of intoxication should not be deemed to involve moral turpitude. Arguably, the addition of non-turpitudinous elements, such as intoxication or gross negligence, to the non-turpitudinous crime of involuntary manslaughter, should not make the resulting crime one involving moral turpitude. Under this reasoning, even gross vehicular manslaughter should not be a crime of moral turpitude.

On the other hand, the reviewing authority may instead focus on the seriousness of the injury and on some perception that society is taking an increasingly harsh view towards intoxicated drivers, to find that moral turpitude inheres in felony vehicular manslaughter while intoxicated. The legislative findings associated with the enactment of Penal §191.5 stated that: "In view of the severe threat to public safety which is posed by the intoxicated driver, there is compelling need for more effective methods to identify and penalize those who voluntarily consume alcoholic beverages to the point of legal intoxication and thereafter operate a motor vehicle . . ." The importance of this finding is ambiguous, suggesting both that the statute is "regulatory" in nature and that it reflects society's moral opprobrium.

46. Manslaughter, vehicular (misdemeanor) – Probably not M.T.

Penal §192(c)(1) defines this crime as involuntary manslaughter with a motor vehicle, with gross negligence. This offense may be a felony or a misdemeanor. As noted above, this offense should not be deemed to involve moral turpitude because the element of "gross negligence" under California law does not rise to the level of criminal intent or even to the level of "recklessness," defined by the BIA as a subjective, conscious disregard of the risk. (See discussion of "Manslaughter, vehicular (felony)"). The fact that this offense can be a misdemeanor may add

persuasiveness to the position that the offense does not involve moral turpitude.

Penal §192(c)(2) defines the offense of involuntary manslaughter with a motor vehicle, but without gross negligence. California cases point out that one can violate this statute by committing a traffic infraction or an act of ordinary negligence under a civil negligence standard. People v. DeSpenza, 203 Cal. App. 2d 283, 290, 21 Cal. Rptr. 275, 279 (1962). This misdemeanor offense has the same elements as involuntary manslaughter (which is not turpitudinous) except for the fact that the specified instrument is a motor vehicle. That element should not add moral turpitude to an otherwise non-turpitudinous offense. See In re Schiano Di Cola, 7 F.Supp. 194 (D.R.I. 1934) (involuntary manslaughter by means of reckless driving not a crime of moral turpitude).

47. Marijuana, possession -- Probably not M.T.

Conviction for possession of more than 30 grams of marijuana carries fatal immigration consequences aside from the question of moral turpitude. Every effort should be made to avoid the conviction. See Chapter 3. However, possession of 30 grams or less of marijuana is a reasonable plea; the person is not deportable or ineligible to establisb good moral character. The person is excludable, but waiver under INA § 212(h) is available. This waiver changed drastically under the Immigration Act of 1990; see § 11.10.

Health & Safety §11357 establishes various degrees of possession offenses, using 28.5 grams as a distinguishing amount. Although no federal immigration authorities have decided the issue, California cases suggest that simple possession of marijuana probably does not involve moral turpitude. In re Higbie, 6 Cal. 3d 562, 572, 99 Cal. Rptr. 865 (1972) (simple possession or use of marijuana not morally turpitudinous for disbarment purposes); People v. Castro, 38 Cal. 3d 301, 211 Cal. Rptr. 719 (1985) (simple possession of heroin not a crime of moral turpitude for witness impeachment). A conviction for more than simple possession may have a different result. (See "Marijuana, giving away," supra.) §11357(d) makes it an offense for a person over 18 to possess up to 28.5 grams of marijuana at a scbool. While §11357(d) may somehow suggest "corrupting minors," it should arguably not involve moral turpitude since no attempt to deal or give away marijuana is established by a conviction for that offense.

48. Marijuana, giving away -- *

Health & Safety §11360, prohibiting "unlawful transportation, importation, sale or gift" of marijuana, contains at least one offense -- sale -- that would be held to involve moral turpitude. Matter of Khourn, Int. Dec. 3330 (BIA 1997). Thus the statute is at best a divisible one that includes both turpitudinous and non-turpitudinous offenses.

Regardless of whether this section involves moral turpitude, it should never be pled because of the fatal immigration consequences which flow from "drug trafficking," which includes selling and giving away, and from a conviction of an offense relating to controlled substances. Formerly there was an exception to this rule are that a lawful permanent resident generally will not be brought under deportation proceedings under 8 U.S.C. §1251(a) (11) (the narcotics section) based on convictions for possession, importation or giving away (one conviction) of 100 grams or less of marijuana, but this was eliminated. Former INS Operations Instructions 242.1(a)(28).

49. Mayhem -- M.T.

Penal §203 defines Mayhem as the infliction of a disfiguring injury with malice and unlawful intent. Matter of Santoro, 11 I&N 607 (1966), held a mayhem conviction, on an indictment alleging that the act was done "voluntarily and maliciously," to be a crime involving moral turpitude "in view of the evil intent required and the serious nature of the crime."

Although §Penal 203 makes malice an element of the offense, California cases have held that "malice aforethought" or "specific intent" need not be shown. E.g., People v. Garcia, 5 Cal. App. 3d 15, 18, 85 Cal. Rptr. 37-38 (1970). Whether or not the import of these cases is to eliminate the malice requirement from the statutory definition of mayhem, the seriousness of the injury involved in mayhem would render this crime one of moral turpitude, as is the case with aggravated assault.

50. Murder (First or Second Degree) -- M.T.

E.g., Fong Haw R. Tan v. Phelan, 162 F.2d 663 (9th Cir. 1947), rev'd on other grounds, 333 U.S. 6 (1948).

51. Obscenity -- ?

Penal §311.2 makes it an offense knowingly to produce, distribute, exhibit or possess obscene material with intent to distribute it.

The subsections dealing with child pornography are likely to be held morally turpitudinous.

Matter of D, 1 I&N 190 (1942) held that the knowing mailing of obscene material under 18 U.S.C §334 was not necessarily a crime of moral turpitude. "Not every offense contrary to good morals involves moral turpitude," defined in that case as vicious motive or corrupt mind. The BIA noted that because a person who mailed a letter suggesting fornication (which the BIA had held not turpitudinous) could be indicted under this statute, the minimum violative conduct under that statute was not turpitudinous. 1 I&N at 194 n.1.

Conceivably, moral turpitude may inhere in the aspect of "commercialized vice" that is contained in this offense. (Compare "prostitution," infra).

52. Perjury -- M.T.

Matter of H, 1 I&N 669 (1943), held perjury to be a crime of moral turpitude where one of the requisite elements of the offense was that the misstatement must be material. Materiality is an element of perjury under Penal §118, so that an offense under that section is turpitudinous Cf. Matter of L, 1 I &N 324 (1942) (perjury not a crime of moral turpitude where materiality not an element).

54. Possession of drug paraphernalia -- Probably not M.T.

Health & Safety §11364 prohibits possession of devices used for "unlawfully injecting or smoking" controlled substances. This offense has been considered a less serious crime than simple possession of narcotics. People v. Sullivan, 234 Cal. App. 2d 562, 565, 44 Cal. Rptr. 524 (1965). Simple possession of narcotics is probably not a crime of moral turpitude, see People v. Castro, 38 Cal. 3d 301, 317, 211 Cal. Rptr. 719 (1985) (simple possession of heroin does not involve moral turpitude, for witness impeachment). Therefore §11364 should not involve moral turpitude. (See "Under the influence of controlled substance," infra.)

However, counsel should under no circumstances accept this plea, because of the possibility that the offense will be held to be one "relating to" controlled substances, and will make the person deportable and excludable for a drug conviction. See "Under the influence of drugs," infra; and Chapter 3, §3.1 and note 5, supra.

55. Possession, purchase or consumption of liquor by a minor -- Not M.T.

Business & Professions §25662 makes it unlawful for any person under 21 to possess an alcoholic beverage in a public place. This is clearly a regulatory offense, which the state could legalize if it so chose. It does not involve moral turpitude. (See "Selling liquor to a minor," infra; cf. "Carrying firearm," supra.)

56. Presence where controlled substance used -- Probably not M.T.

Health & Safety §11365 makes it unlawful "to visit or to be in any room or place where any controlled substances... are being unlawfully smoked or used with knowledge that such activity is occurring." While a conviction under §11365 will not be sustained for mere presence and knowledge, People v. Cressey, 2 Cal. 3d 836, 848, 87 Cal. Rptr. 699 (1970), the cases are vague as to what minimum conduct will violate the statute. See In re Elisabeth H., 20 Cal. App. 3d 323, 329-30, 97 Cal. Rptr. 565 (1971). Convictions under §11365 have been

sustained where the "room or place" was the defendant's dwelling or car and the evidence showed use or possession by defendant. See Cressey, supra; see also People v. Rogers 5 Cal. 3d 129, 135, 95 Cal. Rptr. 601 (1971) (person in control of a car may be responsible to stop others from smoking marijuana in it). Even if use and possession were the minimum conduct required to establish a violation -- and it appears that use and possession exceed the minimum conduct -- §11365 should not involve moral turpitude, to the extent that simple possession or use of marijuana does not involve moral turpitude. (See "Marijuana, possession," supra.)

However, counsel should under no circumstances accept this plea, because of the possibility that the offense will be held to be one "relating to" controlled substances, and will make the person deportable and excludable for a drug conviction. See "Under the influence of drugs," infra; and Chapter 3, §3.1 and note 5, supra.

57. Prostitution -- M.T.

Penal §647(b) describes the offense of "soliciting, agreeing to engage in or engaging in prostitution."

Engaging in the business of prostitution is an independent ground of exclusion under 8 U.S.C. §1182(a)(12) and deportation under 8 U.S.C. §1251(a)(12). Cases that have reached the moral turpitude issue bave all found prostitution to be a crime involving moral turpitude. Ablett v. Brownell, 240 F.2d 625 (D.C. Cir. 1957) (keeping a brothel is a crime of moral turpitude); Matter of W, 3 I&N 231 (1948) (same); Matter of P, 3 I&N 290 (1948) (pandering held turpitudinous); Matter of W, 4 I&N 401 (1951) (practicing prostitution held turpitudinous); Matter of Lambert, 11 I&N 340 (1965) (soliciting for prostitution, and letting rooms to be used for prostitution, involved moral turpitude). However, a landlord who permits others to solicit and engage in prostitution on her premises may not be guilty of a crime involving moral turpitude. See Ablett v. Brownell, 240 F.2d at 627-28 (dictum); Matter of A, 3 I&N 168 (1948) (statute imposing criminal liability on persons maintaining or keeping a building used for prostitution, regardless of knowledge, did not involve moral turpitude). Note that Penal §647(b) does not sweep so broadly because it requires an act of soliciting or engaging in prostitution or an agreement with specific intent and some act manifesting acceptance.

Customers are included under the proscription of §647(b). Leffel v. Municipal Court, 54 Cal. App. 569, 126 Cal. Rptr. 773 (1976). While customers are not penalized under the separate exclusion and deportation grounds involving prostitution, the question remains as to whether they are guilty of a crime involving moral turpitude. This issue has not been decided specifically. However, analogy to decisions regarding the crimes of "adultery" and "fornication" may be instructive. To the extent that a customer engaging an act of sexual intercourse for consideration under Penal §647(b) commits adultery, the conviction probably involves moral turpitude. Adultery convictions have been held to involve moral turpitude. Matter of H, 7 I&N 616, 617 (1957); Matter of A, 3 I&N 168 (1948); United States ex rel. Tourney v. Reimer, 8 F. Supp. 91 (S.D.N.Y. 1934); see also Matter of C, 3 I&N 790 (1949) ("open lewdness" charge against couple co-habiting out-of-wedlock held to be morally turpitudinous).

Fornication, defined as sexual intercourse between two unmarried persons, has been held not to involve moral turpitude. Ex parte Isojocki, 22 F. 151 (C.D. Cal. 1915). However, the BIA, in Matter of R, 6 I&N 444, 452-54 (1954), while holding that fornication did not involve moral turpitude, noted that there may be a distinction between simple fornication and sexual intercourse involving "commercialized vice or a pecuniary motive." 6 I&N at 451. Under this reasoning, the customer, as a participant in commercialized vice, may also be guilty of a crime of moral turpitude.

58. Rape -- M.T.

See, e.g., Bendel v. Nagle 17 F.2d 719 (9th Cir. 1927); Matter of Beato, 10 I&N 730 (1964) (assault with intent to commit carnal abuse and rape held to involve moral turpitude).

Forcible rape, defined under Penal §261 as sexual intercourse without the victim's consent, is regarded as so clearly involving moral turpitude that most of the reported cases involve statutory rape or attempted rape. These offenses, too, have been held invariably to involve moral turpitude. (See "Unlawful sexual intercourse," infra).

59. Receiving stolen property -- M.T.

(See, e.g., Wadman v. INS, 329 F.2d 812 (9th Cir. 1964); Matter of G, 2 I&N 235 (1945); Matter of Z, 7 I&N 253 (1956): Matter of A, 7 I&N 626 (1957)).

To establish a violation of Penal §496, it must be shown that the defendant knew that the property was stolen. This element of knowledge "connotes a 'readiness to do evil' and, thus, receiving stolen property is a crime which connotes turpitude" for purposes of witness impeachment. People v. Thompson, 175 Cal. App. 3d 1012, 1021, 221 Cal. Rptr. 282, 287-88 (1986).

The crime of possessing stolen property, where guilty knowledge is not an element of the offense, does not necessarily involve moral turpitude. Matter of K, 2 I&N 90 (1944).

60. Reckless driving -- ?

Reckless driving may be one of those petty offenses that is, anomalously, a crime of moral turpitude. Vehicle §23103 defines recklessness as "willful or wanton disregard for the safety of persons or property." This definition is probably indistinguishable from the definition of criminal recklessness found to involve moral turpitude in recent BIA decisions. See Matter of Medina, 15 I&N 611 (1976); Matter of Wojtkow, 18 I&N 111 (1981). In those cases, dealing with reckless homicide, recklessness was defined as a conscious disregard for a substantial and unjustifiable risk, constituting a gross deviation from a reasonable standard of care. Reckless driving contains the similar element of wanton, intentional disregard. People v. Thompson, 41 Cal. App. 2d Supp. 965, 108 P.2d 105 (1940). Negligence and gross negligence fall short of constituting reckless driving because they are not willful misconduct. People v. McNutt, 40 Cal. App. 2d Supp. 835, 105 P.2d 657 (1940); see People v. Watson, 30 Cal. 3d 290, 296, 179 Cal. Rptr. 43 (1981).

Arguably, however, these recent BIA holdings on criminal recklessness should be limited in their applications to the homicide offenses with which those cases specifically dealt. Older authorities have held reckless driving not to involve moral turpitude. See In re Schiano Di Cola, 7 F. Supp. 194 (D.C.R.I. 1934) (involuntary manslaughter by means of reckless driving did not involve moral turpitude); see also Matter of C, 2 I&N 716, 719-20 (1947) (dicta stating that neither reckless driving nor gross negligence involved moral turpitude).

Although, technically, the severity or mildness of the penalty imposed for an offense does not determine whether that offense involves moral turpitude, the relatively minor penalties attached to reckless driving might weigh in favor of an argument that reckless driving under Vehicle §23103 should not be held turpitudinous. Under this section, the penalty is 5 to 90 days in jail, and/or a fine of $145 to $1,000. Where bodily injury results, Vehicle §23104 provides for a penalty of 30 days to six months and a fine of $220 to $1,000. (Where serious bodily injury results, and the defendant has a previous reckless or drunk driving conviction, Vehicle §23104 violations can be a felony or misdemeanor.)

It is noteworthy that this section punishes disregard for the safety of person or property. Arguably, the disregard for the safety of property should not be turpitudinous. See Matter of M, 2 I&N 686, 691 (1946). In that Case, the BIA, considering a Canadian malicious mischief statute, noted that "the mere doing of anything likely to cause danger to valuable property, regardless of the actor's intent, is punishable. We do not think that the commission of an act which is likely to cause danger to property where person is not in danger should be held to involve moral turpitude. The offense appears to be somewhat comparable to driving an automobile in a negligent manner." This dictum might not apply to Vehicle §23103, however, to the extent that willful or wanton disregard comes closer to criminal intent than does gross negligence.

61. Resisting arrest -- not M.T.

The court in United States ex rel. Zaffarano v. Corsi, 63 F.2d 757 (2d Cir. 1933), held that moral turpitude did not attach to a conviction under New York Penal Law §242(5), "assault with intent to prevent or resist the execution of any lawful process or mandate of any court or officer." The court reasoned that this offense would include "putting

forth the mildest form of intentional resistance against an officer."

Penal §148 makes it a misdemeanor to willfully resist, delay or obstruct any public officer in the discharge of his duty, when no other punishment is prescribed. This statute is substantially similar to the one held not turpitudinous in Zaffarano, supra. Moreover, the phrase "no other punishment" seems to preclude an inference of more serious conduct underlying the conviction, such as assault.

Unlike the crime of "assault on a peace officer" under Penal §241, resisting arrest does not require knowledge that the victim is a peace officer. A "resisting arrest" offense where such knowledge was not an element was held not to involve moral turpitude in Matter of O, 4 I&N 301 (1951).

62. Robbery -- M.T.

United States ex rel. Cerami v. Uhl, 78 F.2d 698 (2d Cir. 1935); Matter of G.R., 2 I&N 733 (1946) (robbery under Cal. Penal §211 involves moral turpitude); Matter of Kim, 17 I&N 144 (1979) (same).

63. Sale of Controlled Substances -- M.T.

The BIA held that selling unlawful drugs involves moral turpitude where knowledge or intent is an element of the offense because it is inhernetly evil. Matter of Khourn, Int. Dec. 3330 (BIA 1997).

Because sale of controlled substances is an aggravated felony, the question of whether it involves moral turpitude normally would not be important. This question arose in an odd fact pattern that may become more common. After the respondent's past drug conviction had been waived under the former 212(c), he was convicted of a second crime of moral turpitude. The government alleged that he was now deportable for conviction of two moral turpitude offenses: the 212(c) waived drug offense and the new theft offense. Formerly waived convictions can "come to live" against for the two moral turpitude offenses ground. See Matter of Balderas, 20 I&N 389 (BIA 19991).

64. Selling liquor to a minor -- not M.T.

Selling liquor to a minor in violation of Business & Professions §25658(a) is a strict liability offense, which does not require knowledge that the purchaser is a minor or permit a defense that the seller had a good faith, reasonable belief that the purchaser was over the required age. Violation of regulatory laws, particularly where the offense is one of strict liability, generally does not involve moral turpitude.

"Violations of liquor laws do not involve moral turpitude, and we do not believe [convictions for selling liquor to a minor] would be deportable offenses." Matter of P, 2 I&N 117, 120-21 (1944) (dictum). In Matter of V. T., 2 I&N 213, 216-17 (1944), the BIA, in viewing the California offense of contributing to the delinquency of a minor, listed various California convictions under that law which would not involve moral turpitude, including a conviction for selling or serving intoxicating liquor to a minor. See also United States ex rel. Iorio v. Day, 34 F.2d 920 (2d Cir. 1929) (not every violation of a prohibition law involves moral turpitude): Skrmetta v. Coykendall, 22 F.2d 120 (5th Cir. 1927) (making bootlegged wine for personal use not a crime of moral turpitude).

65. Tampering with vehicle -- probably not M.T.

Vehicle §10852 proscribes willfully injuring or tampering with any vehicle. Because this misdemeanor offense involves no element of malice or criminal intent, it is probably not turpitudinous. (See annotations for "Criminal trespass", "Vandalism").

66. Theft (petty or grand) -- divisible?

Theft offenses, as set forth in Penal §§ 484 et seq., require a specific intent permanently to deprive the owner of title to or possession of property. People v. Kunkin, 9 Cal. 3d 245, 107 Cal. Rptr. 184 (1973). The element of specific intent to steal or permanently deprive the owner of property makes theft a crime involving moral turpitude, no

matter how small the value of property stolen. See, e.g., Matter of Garcia, 11 I&N 521 (1966). See generally Annotation, 23 ALR Fed. 480, 542-43 (setting forth extensive list of federal court cases from all judicial circuits holding larceny to involve moral turpitude).

Where a theft statute does not specify whether a conviction implies an intent to deprive the owner permanently, as opposed to temporarily, of the property, the reviewing authority may look to the circumstances of the case to determine whether a permanent taking was intended. See Matter of N, 3 I&N 723 (1949); Matter of M, 2 I&N 686 (1946). (See Annotations of "Vehicle taking," and "Joy-riding".)

There is an argument that conviction for theft under Calif. Penal Code §§ 484 or 487 is a divisible statute for moral turpitude purposes, because not every offense included in the statute involves an intent to permanently deprive the owner of property. The California theft statute encompasses various types of offenses under the heading theft, such as false pretenses, fraud and embezzlement, for example. See, e.g., People v. Turner, 73 Cal.Rptr. 263 (1968) (offense of theft includes offense formerly known as larceny, obtaining property by false pretenses and embezzlement). The statute does not contain as a required element the intent to permanently deprive the owner of property. While most offenses listed in the statute have been held to require a permanent taking, a conviction of some of the offenses listed in the statute appears possible even where the intent is to deprive only temporarily. People v. Britz, 95 Cal.Rptr. 823 (1968); People v. Silver, 1212 Cal.Rptr. 153 (1975). If held to be a divisible statute with some subsections requiring intent to deprive the owner permanently and others with intent to deprive the owner temporarily of property, the theft statute would be judged similar to the "joyriding" statute, California Vehicle Code §10851, which involves the taking of a vehicle "with intent either to permanently or temporarily deprive the owner therefor of his or her title to or possession of the vehicle..."

67. Unauthorized entry -- not M.T.

Penal §602.5 makes it an offense to enter or remain in a non-commercial dwelling without the owner's consent. Breaking and entering, or unlawful entry, do not involve moral turpitude where an intent to commit a crime of moral turpitude is not an element of the offense. Matter of M, 9 I&N 132 (1960); Matter of M, 2 I&N 721 (1946); Matter of G, 1 I&N 403 (1943).

68. Under the influence of controlled substance -- Probably not M.T.

Health & Safety §11550 makes it a misdemeanor to use or be under the influence of a controlled substance or narcotic. §11550 has been considered a less serious crime than possession of narcotics. People v. Sullivan, 234 Cal. App. 2d 562, 565, 44 Cal. Rptr. 524 (1965). Because simple possession of narcotics is probably not a crime of moral turpitude, see People v. Castro,38 Cal. 3d 301, 317, 211 Cal. Rptr. 719 (1985) (simple possession of heroin does not involve moral turpitude, for purposes of witness impeachment), using or being under the influence of narcotics should not involve moral turpitude either. Arguably, too, a "victimless" crime from which the defendant neither seeks to profit nor to corrupt or injure others, should not be held turpitudinous. Cf. Matter of D, 4 I&N 149 (1950) (attempted suicide held not to involve moral turpitude).

However, counsel should not plead to Health & Safety §11550, because this offense has been held to be one "relating to" controlled substances. Conviction will bring the person within the narcotics exclusion and deportation grounds. Matter of Hernandez-Ponce, Int. Dec. 3055 (BIA 1988). 1986 Amendments to the INA changed the definition of a controlled substance offense from one involving "possession of" drugs to one "relating to" drugs. Under the new wording, counsel must assume that any conviction even remotely related to unlawful drugs may trigger exclusion and deportation. The one exception is, under some circumstances, a first conviction for unlawful possession of under 30 grams of marijuana. See §3.1 and note 5.

69. Under the Influence of drugs or alcohol in a public place -- Probably not M.T.

Penal §647(f) proscribes the state of being "unable to exercise care for [one's] own safety or safety of others, or... obstruct[ing] or prevent[ing] the free use of any street, sidewalk or other public place." The purpose of this statute is "to protect the offender from his own folly as well as the general public from danger attendant in the presence of such persons on the streets or highways and in other public places." People v. Belanger, 243 Cal. App. 2d 654, 52 Cal. Rptr. 660 (1966). Thus, Penal §647(f) appears to be one of those "trivial breaches of the peace" which states enact "in the exercise of their police power" of which "it could hardly be contended that the violation of such statute involves moral turpitude." See Matter of P, 2 I&N 117, 122 (1944) (dictum).

Subsection (ff) adds that an offender under Penal §647(f) shall be placed in "civil protective custody" for 72 hours treatment and evaluation, with no criminal or juvenile prosecution, except where: (1) the offender is under the influence of controlled substances or narcotics; (2) there is probable cause that offender has committed another felony or misdemeanor; or (3) the offender is likely to attempt to escape. In other words, a criminal conviction under Penal §647(f) implies one of these three things about the offender. Nevertheless, these would not raise a conviction under this section to one of moral turpitude. Probable cause is, of course, not tantamount to a conviction or even an intent to commit a crime; and, in any case, the phrase "felony or misdemeanor" does not specify whether such crime is one involving moral turpitude. The crime of escape, explicitly mentioned, does not involve moral turpitude. (See "Escape," infra.) Finally, even where the record of conviction shows that the offender was under the influence of prohibited drugs, such a conviction should not involve moral turpitude where the record of conviction shows no guilty knowledge that the person had taken drugs.

However, counsel should under no circumstances accept a plea to this offense where the record shows that the person was under the influence of a controlled substance (as opposed to alcohol), because it may make the person excludable and deportable under the controlled substance sections. See "Under the influence of controlled substances," supra, and Chapter 3, §3.1 and note 5, supra.

70. Unlawfully causing a fire – probably M.T.

Penal §452 defines this offense as "recklessly setting fire" to "any structure, forest land or property." Recklessness, for purposes of §452, means awareness of and conscious disregard for substantial and unjustifiable risk, and a gross deviation from reasonable conduct. Cal. Pen. §450(f); People v. Budish, 131 Cal.App. 3d 1043, 182 Cal. Rptr. 653 (1982). Recent BIA cases dealing with homicide have held that criminally reckless conduct can involve moral turpitude. Matter of Medina, 15 I&N 611 (1976); Matter of Wotjkow, 18 I&N 111 (1981). The definition of recklessness in those cases is identical to the definition of recklessness required under Penal §452.

The distinction between this offense and arson, which also involves moral turpitude, is that the setting fire must be "willful and malicious" to establish arson and "reckless" to establish unlawfully causing a fire.

71. Unlawful sexual intercourse (statutory rape) – M.T.

A defendant charged with violating Penal §261.5, sexual intercourse with a female (not the wife of the perpetrator) who is under 18 years of age, may raise as a defense his good faith, reasonable belief that the victim was 18 years or older. People v. Hernandez, 61 Cal. 2d 529, 39 Cal. Rptr. 361 (1964). Thus, a criminal intent must be established to obtain a conviction under this statute.

However, statutory rape has been held to involve moral turpitude even where it is a strict liability offense, with no defenses available. Marciano v. INS 450 F.2d 1022 (8th Cir. 1971), cert. denied, 405 U.S. 997 (1972); Bendel v. Nagle, 17 F.2d 719 (9th Cir. 1927); Matter of Dingena, 11 I&N 723 (1966).

72. Vandalism -- ?*

Penal §594 defines the crime of vandalism as the malicious defacing, damaging or destruction of real or personal property not belonging to the defendant. If the amount of damage exceeds $5,000, the offense is a felony; if less than $5,000, a misdemeanor; and if less than $1,000, a petty offense.

Malicious mischief statutes dealing with property damage, such as this one, are not always held to involve moral turpitude, even though the statute appears to set forth a malice requirement. (See discussion under "Criminal trespass"). In Matter of N, 8 I&N 466 (1959), the BIA held that a conviction under a Delaware statute for "unlawfully, maliciously and mischievously destroy[ing] or injur[ing] any real or personal property" of less than $100 value did not involve moral turpitude where the information alleged that the defendant "did commit an act of malicious mischief by causing damage to the furnishing of the Wilmington Girls' Club." The court's rationale seemed to be that the information did not allege that the damage was done maliciously. Arguably, however, the relative lack of seriousness of the offense may have been persuasive to the court. The reviewing authority is likely to look at the record of conviction where this statute is at issue.

There is also authority for the proposition that malicious damage to property does involve moral turpitude under malicious mischief or vandalism statutes. Matter of R, 5 I&N 612 (1954) (willfully and maliciously damaging or attempting to damage property by means of explosives); Matter of M, 3 I&N 272 (1948) (maliciously and wantonly killing to hogs with an axe).

However, the Ninth Circuit has held that malicious mischief as defined by a Washington statute is not a crime involving moral turpitude. Rodriguez-Herrera v. INS, 52 F.3d 238 (9th Cir. 1995). Under that statute, "malice" could be inferred if the act was "wrongfully done without just cause or excuse." The court found that the statute included "pranksters with poor judgment" and, consequently, malicious mischief did not necessarily involve an act of baseness or depravity contrary to accepted moral standards. Id. at 240.

73. Vehicle taking – probably not M.T.

Vehicle §10851 defines this offense as driving or taking a vehicle, with intent to deprive the owner of title or possession permanently or temporarily, with or without intent to steal. The forerunner to this statute, former Vehicle §503, defining the offense with substantially the same elements as Vehicle §10851, was held not to involve moral turpitude in Matter of D, 1 I&N 143 (1941). The BIA noted that this statute included "pure prankishness" as well as theft, stating that "unless every violation of the statute creating the offense would involve moral turpitude, no violation of it would involve that element."

Arguably, this reasoning is superseded by "divisible statute" analysis. To the extent that Vehicle§ 10851 defines two crimes, taking with intent permanently to deprive (which is turpitudinous), and taking with intent temporarily to deprive (which is not), the reviewing authority could look to the record of conviction to determine whether a permanent taking was intended or not. In such a case, where the record of conviction does not show an intent permanently to deprive the owner, the conviction does not involve moral turpitude. See Matter of D, supra; Matter of M, 2 I&N 686 (1946); Matter of N, 3 I&N 723 (1949). (Compare "Joy-riding", Penal §499(b), infra.)

74. Wife or Husband Beating, Co-habitant Abuse – M.T.

Grageda v. US INS, 12 F.3d 919, 922 (9th Cir. 1993). The Ninth Circuit found that similarly to child abuse, moral turpitude inheres in the combination of willfull infliction of injury sufficient to cause traumatic condition with the fact that spouse "is committed to a relationship of trust with, and may be dependent upon, the perpetrator." The court declined to rule on whether this injury inflicted against a "person of the opposite sex with whom he or she is cohabiting", also a felony under Penal * 273.5, involves moral turpitude.

Extending the Ninth Circuit's holding in Grageda, the BIA held that the willful infliction of injury on a cohabitant or parent of the offender's child in violation of Cal. Penal Code 274.5(a) is a crime of moral turpitude. Matter of Tran, Int. Dec. 3271 (BIA 1996).

Also note that conviction of a crime of violence against a current or former spouse, person co-habitating as a spouse, co-parent of a child, or similarly situated person protected under the domestic violence laws is a separate basis for deportation under the domestic violence ground. See INA § 237(a)(2)(E), discussed in §6.15, *supra*. Conviction of this offense would meet this test.