

of the revised definition of ‘aggravated felony’ to *proceedings initiated* after September 30, 1996”). [But see *Biskupski v. U.S. Att’y Gen.*, 503 F.3d 274, 283 (3d Cir. 2007) (declining to follow *Tran* and holding he “actions taken” “to mean orders or decisions of the IJ or BIA which apply the ‘aggravated felony,’” regardless of when the proceedings were initiated); *Garrido-Morato v. Gonzales*, 485 F.3d 319 (5th Cir. 2007); *Kubali v. Reno*, 266 F.3d 93, 110-11 (2d Cir. 2001); *Xiong v. I.N.S.*, 173 F.3d 601 (7th Cir. 1999); *Choeum v. I.N.S.*, 129 F.3d 29 (1st Cir. 1997); *Mendez-Morales v. I.N.S.*, 119 F.3d 738, 739 (8th Cir. 1997); *Valderrama-Fonseca v. I.N.S.*, 116 F.3d 853 (9th Cir. 1997)].

- **ARGUE THAT DUE PROCESS PRECLUDES A CONVICTION FROM BEING DEEMED TO MEET THE AF DEFINITION WHERE THE CONVICTION WAS NOT AN AF AT THE TIME OF CONVICTION.** See *United States v. Ubaldo-Figueroa*, 347 F.3d 718 (9th Cir. 2003) (reversing noncitizen’s conviction for illegal reentry after finding that prior removal order was invalid as defendant had “plausible” claim that Congress’ retroactive application of IIRIRA § 321 [expanding categories of offenses falling within AF ground] violated due process); *United States v. Salvidar-Vargas*, 290 F. Supp. 2d 1210 (S.D. Cal. 2003) (following *Ubaldo-Figueroa*). [But see *Lovan v. Holder*, 574 F.3d 990, 997 (8th Cir. 2009) and decisions cited therein].

F. DENY “CRIME INVOLVING MORAL TURPITUDE” (CIMT) REMOVABILITY

There are many possible challenges to federal government charges that an individual is deportable, or otherwise disadvantaged under the immigration laws, based on a past conviction of a crime involving moral turpitude (CIMT). Possible challenges, some of which call for strict application of the categorical approach, see generally “Argue for strict application of the categorical approach,” *supra* Part III.D, include the following:

1. CIMT DEFINITIONAL ARGUMENTS

GENERAL STANDARDS. The BIA has stated that moral turpitude “refers generally to conduct which is inherently base, vile or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994). For an offense to be deemed a CIMT, the conduct prohibited must be “per se morally reprehensible and intrinsically wrong, or malum in se so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.” *Id.*; see, e.g., *U.S. ex rel. Manzella v. Zimmerman*, 71 F. Supp. 534 (E.D. Pa. 1947) (escaping from prison does not necessarily involve the element of baseness, vileness or depravity which has been regarded as necessarily inherent in the concept of moral turpitude). An offense is not a CIMT if it does not involve sufficient intent as well as vile and depraved conduct. See *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 689 (AG 2008) (stating that an offense is only a CIMT if it involves “both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.”); see also *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 553 n.3 (AG 2015) (vacating prior AG decision but stating that “[n]othing in this order is intended to affect Board determinations that an offense entails or does not entail ‘reprehensible conduct and some form of scienter’ and is or is not a crime involving moral turpitude for that reason”). Explaining that a finding of moral turpitude “involves

an assessment of both the state of mind and the level of harm required to complete the offense” the BIA has analyzed offenses on a continuum. See *Matter of Solon*, 24 I. & N. Dec. 239, 242 (B.I.A. 2007) (stating “as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude). The BIA has further stated: “Where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.” *Id.*

- **THE BIA AND FEDERAL COURTS HAVE LONG HELD THAT CIMT CONVICTION DETERMINATIONS MUST BE MADE UNDER THE CATEGORICAL APPROACH, FOCUSED ON THE INHERENT NATURE OF THE CRIME AS DEFINED BY STATUTE AND INTERPRETED BY THE COURTS, AND NOT THE ACTUAL UNDERLYING CONDUCT.** *See Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 827 (BIA 2016) (on remand from the Attorney General, reaffirmed longstanding body of case law in the immigration context that CIMT determinations must be made under the categorical and modified categorical approaches); *see also U.S. ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-23 (2d Cir. 1931) (“Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral.”). Under the categorical approach, the adjudicator must consider the minimum conduct covered under the statute of conviction. *See, e.g., Mahn v. U.S. Att’y Gen.*, 767 F.3d 170, 174 (3d Cir. 2014) (“we look to the elements of the statutory offense to ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute”) (citation omitted); *Jean-Louis v. Att’y Gen.*, 582 F.3d 462, 471 (3d Cir. 2009) (“the possibility of conviction for non-turpitudinous conduct, however remote, is sufficient to avoid removal”); *see generally*, “Argue for strict application of the categorical approach,” *supra* Part III.D.
- **NOT A CIMT IF MINIMUM CONDUCT IS NOT SUFFICIENTLY VILE AND DEPRAVED.** *See, e.g., Hernandez-Cruz v. U.S. Att’y Gen.*, 764 F.3d 281, 285-86 (3d Cir. 2014) (holding that Pennsylvania child endangerment statute is not a CIMT because “the combination of a knowing mens rea and the violation of a duty of care owed to a child, without anything more, does not necessarily implicate moral turpitude” and there is nothing inherently base, vile, or depraved about, e.g., exposing children to filthy living conditions); *see also Mohamed v. Holder*, 769 F.3d 885, 888 (4th Cir. 2014) (“[T]he phrase ‘involving moral turpitude’ . . . refers to more than simply the wrong inherent in violating the statute. Otherwise the requirement . . . would be superfluous.”). [*But see Matter of Jimenez-Cedillo*, 27 I. & N. Dec. 782, 791 (B.I.A. 2020) (“Strict liability morality offenses, like indecent assault . . . are crimes involving moral turpitude because of the community consensus that such offenses, which are enacted for the protection of the child, are inherently antisocial and depraved.”) (quoting *Mehboob v. Att’y Gen. Of U.S.*, 549 F.3d 272 (3d Cir. 2008)); *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 387, 390 (B.I.A. 2018) (noting that the recent criminalization across all 50 states of sponsoring animal fighting demonstrates “clear consensus” the behavior is morally reprehensible and finding that the enjoyment of animal suffering combined with intent “transgresses the socially accepted rules of morality” and makes the crime a CIMT)].
- **NOT A CIMT IF DOES NOT INVOLVE REQUISITE MENS REA TO BE A CIMT.** *See Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 689 (AG 2008) (stating that an offense is only a CIMT if it involves

“both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.”); *see also* *Nunez-Vasquez v. Barr*, 965 F.3d 272, 283 (4th Cir. 2020) (holding that negligence does not meet culpable mens rea required of CIMT); *Ortiz v. Barr*, 962 F.3d 1045 (8th Cir. 2020) (finding Minnesota obstruction of legal processes to be a general intent crime and therefore not categorically a CIMT); *Hirsch v. I.N.S.*, 308 F.2d 562, 567 (9th Cir. 1962) (“A crime that does not necessarily involve evil intent, such as intent to defraud, is not necessarily a crime involving moral turpitude.”). [*But see Matter of Jimenez-Cedillo*, 27 I. & N. Dec. 1, 4 (B.I.A. 2017) (“[A] sexual offense in violation of a statute enacted to protect children is a crime involving moral turpitude where the victim is particularly young— that is, under 14 years of age—or is under 16 and the age differential between the perpetrator and victim is significant, or both, even though the statute requires no culpable mental state as to the age of the child.”); *see also Partyka v. Att’y Gen.*, 417 F.3d 408 (3d Cir. 2005) (finding third degree assault on a law enforcement officer with a deadly weapon not categorically a CIMT because it did not require intent, only negligence; however, statute was divisible and, if DHS could prove conviction under reckless mens rea sub-statute, then it would be a CIMT)].

- NOT A CIMT IF HAD RECKLESS MENS REA, AND NO SUBSTANTIAL HARM RESULTED FROM THE ACT.** *See Gomez-Perez v. Lynch*, 829 F.3d 323, 328 (5th Cir. 2016) (finding Texas simple assault offense statute was not a CIMT because it “can be committed by mere reckless conduct and thus does not qualify as a crime involving moral turpitude, which requires a more culpable mental state”); *Mahn v. U.S. Att’y Gen.*, 767 F.3d 170 (3d Cir. 2014) (finding Pennsylvania reckless endangerment offense not a CIMT because statute required recklessness and only the possibility of serious bodily harm to another); *see also Matter of Fualaau*, 21 I. & N. Dec. 475, 478 (B.I.A. 1996) (finding a Hawaii 3d degree assault statute not a CIMT because a reckless mens rea must be coupled with an offense involving serious bodily injury in order to be a CIMT). [*But see Birhanu v. Wilkinson*, 990 F.3d 1242, 1256 (10th Cir. 2021) (holding that even where no physical harm results, “recklessly threatening substantial property damage with the intent of interrupting public access to a portion of a building is a CIMT”); *Estrada-Rodriguez v. Lynch*, 825 F.3d 397 (8th Cir. 2016) (holding that Arkansas’ reckless endangerment statute is a CIMT because it requires a conscious disregard of a substantial risk of death or serious physical injury to another); *Baptiste v. U.S. Att’y Gen.*, 841 F.3d 601 (3d Cir. 2016) (holding that New Jersey reckless second degree aggravated assault is a CIMT because reckless mens rea can be sufficient to find CIMT if the underlying conduct is serious enough; such as conscious disregard of a substantial and unjustifiable risk that serious injury or death would follow); *Idy v. Holder*, 674 F.3d 111, 118–19 (1st Cir. 2012) (finding that New Hampshire reckless conduct statute is a CIMT because reckless mens rea plus possibility of serious bodily injury to another is sufficiently depraved); *Hernandez-Perez v. Holder*, 569 F.3d 345, 348 (8th Cir. 2009) (holding that reckless endangerment involving risk of severe bodily harm to a child is a CIMT because “[a]lthough moral turpitude is typically found in crimes committed intentionally or knowingly, the courts have held that reckless conduct may be sufficient if an aggravating factor is present”); *Keungne v. U.S. Att’y Gen.*, 561 F.3d 1281 (11th Cir. 2009) (holding that Georgia reckless conduct conviction was a CIMT because recklessness was a sufficiently culpable mental state where the minimum conduct involved an act of baseness, and the fact that no actual injury occurred was irrelevant); *Matter of Hernandez*, 26 I. & N. Dec. 464 (B.I.A. 2015) (finding Texas “deadly conduct” offense, which requires only mens rea of recklessness, a CIMT); *Matter of Leal*, 26 I. & N. Dec. 20 (B.I.A. 2012) (holding that Arizona reckless endangerment involving substantial

risk of imminent death statute is a CIMT, even where recklessness includes unawareness of risk due to voluntary intoxication); *Matter of Medina*, 15 I. & N. Dec. 611, 614 (B.I.A. 1976) (recklessness may be sufficient mens rea for a CIMT)].

a) Perjury, false statement or other alleged fraud offenses

- Perjury is not a CIMT if the statute does not include all the elements of common law perjury. *Rosales Rivera v. Lynch*, 816 F.3d 1064 (9th Cir. 2016) (ruling that California written perjury statute is not a CIMT because it did not include the same elements as common law perjury; specifically, it did not require an intent to defraud); *Matter of H-*, 1 I. & N. Dec. 669 (B.I.A. 1943) (holding offense not a CIMT if it does not require materiality of falsehood). [But see *Matter of Alvarado*, 26 I. & N. Dec. 895 (B.I.A. 2016) (holding that California written perjury statute is a CIMT because it does not substantially diverge from the common law definition)].
- Federal misprision of a felony, or other accessory after the fact offense, is not a CIMT if it does not necessarily involve the requisite intent or depraved conduct. See *Mendez v. Barr*, 960 F.3d 80 (2d Cir. 2020) (stating that intent to defraud must be explicitly written into statute as an element and cannot be implied as inherent; most crimes involve some dishonest or deceitful behavior, and Congress intended to create a small subclass of crimes with the CIMT designation); *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012) (holding misprision, or unlawful concealment, of a felony is not categorically a CIMT because does not require specific intent, only knowledge, but statute may be divisible); *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc) (ruling California conviction for accessory after the fact was not a CIMT because does not require sufficient depravity to be a CIMT); *Matter of Rivens*, 25 I. & N. Dec. 623 (B.I.A. 2011) (holding accessory after the fact not categorically a CIMT because it covers conduct that is not sufficiently depraved to be a CIMT); *Matter of Espinoza-Gonzales*, 22 I. & N. Dec. 889, 896 (B.I.A. 1999) (stating, before BIA's later decisions in *Matter of Robles-Urrea* and *Matter of Mendez*, that misprision of a felony “lacks the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice”). [But see *Villegas-Sarabia v. Sessions*, 874 F.3d 871, 877-81 (5th Cir. 2017) (misprision of a felony is categorically a CIMT because it requires an intentional act of deceit); *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005) (holding Illinois obstruction of justice statute is a CIMT even though it lacked the element of fraud, because making false statements and concealing criminal activity is sufficiently depraved to constitute a CIMT, and dishonesty or lying tend to involve moral turpitude); *Smalley v. Ashcroft*, 354 F.3d 332 (5th Cir. 2003) (finding that the affirmative act of concealing felony requires deceit and is thus a CIMT, and fraud is not necessary to make it a CIMT); *Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002) (finding that misprision of a felony is a CIMT because it necessarily involves an affirmative act of concealment or participation in a felony); *Cabral v. I.N.S.*, 15 F.3d 193 (1st Cir. 1994) (granting deference to BIA's decision that a Massachusetts conviction for being an accessory after the fact to murder is a CIMT)]. The Board has twice held that misprision is categorically a CIMT, *Matter of Mendez*, 27 I. & N. Dec. 219 (B.I.A. 2018) (misprision is categorically a CIMT, because the affirmative act of concealing a known felony is deceitful and dishonest); *Matter of Robles-Urrea*, 24 I. & N. Dec. 22 (B.I.A. 2006) (if the underlying felony is a CIMT then misprision of that felony is also a CIMT), but both times they have been overruled, first by the Ninth Circuit in *Robles-Urrea v. Holder*, and then in the Second Circuit by *Mendez v. Barr*.