SHOULD MISPRISION OF A FELONY BE CONSIDERED A CRIME INVOLVING MORAL TURPITUDE?

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INTRODUCTION

Misprision of a felony criminalizes having knowledge of a felony and concealing it. Currently there is a split between the Board of Immigration Appeals ("BIA") and the federal circuit courts, and between the circuits themselves, as to whether the crime involves moral turpitude.[1] While there are relatively few convictions for misprision of a felony,[2] it is important to examine this circuit split because it demonstrates the current lack of uniformity in our immigration system.

To analyze this split, this note first summarizes the history of misprision of a felony and the interpretation of its elements in case law. Part I discusses the definition of moral turpitude in immigration law and current approaches to determining whether a crime involves moral turpitude. Part II discusses the BIA's and Fifth, Ninth and Eleventh Circuits' decisions regarding whether misprision is a crime involving moral turpitude ("CIMT"), including the latest BIA decision, which came down in February 2018. Part III discusses common divisions between the two camps, including: (1) whether fraud can be read into the statute; (2) whether misprision has the

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[1] *See* Villegas-Sarabia v. Duke, 874 F.3d 871, 884 (5th Cir. 2017) ([M]isprision of a felony is a crime involving moral turpitude."); Robles-Urrea v. Holder, 678 F.3d 702, 712–13 (9th Cir. 2012) ("[M]isprision of a felony is [not] categorically a crime involving moral turpitude."); Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002) ("[M]isprision of a felony is a crime of moral turpitude"); *In re* Mendez, 27 I. & N. Dec. 219, 225 (B.I.A. 2018) ("[M]isprision of felony in violation of 18 U.S.C. § 4 is categorically a crime involving moral turpitude.").

[2] Misprision in U.S. Sentencing Commission statistics is included in the Administration of Justice category. *See* U.S. SENTENCING COMM'N, 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-169 (2017). In 2017, there were 1,064 offenders sentenced to a crime in this category. *See* U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2017, FIRST CIRCUIT 2 (2017).

requisite degree of scienter to be a CIMT; and (3) whether an "absurd result" result exists when misprision of a felony is a CIMT, but the underlying felony is not.

Ultimately, like accessory, misprision of a felony should not be considered a CIMT when the underlying felony is not. While deportation is not considered to be part of criminal sentencing, in practice it is an added punishment. To have a noncitizen be deported for misprision when the perpetrator of the underlying felony is not is fundamentally unfair and should not be tolerated in our immigration system.

I. BACKGROUND LAW

A. Misprision of a Felony

Misprision of a felony is a crime that has its roots in English common law.[3] Sir William Staunford in 1557 defined the crime as "when anyone learns or knows that another has committed treason or felony, and he does not choose to denounce him to the King or to his Council."[4] As the State was not actively involved in policing its citizens at the time, the individual was charged with an affirmative duty to report criminal activity to the authorities.[5] If a citizen witnessed a felony, a mortal wounding, or found a corpse and did not report such incidents to the State, he had run afoul of his duty to raise "the 'hue and cry'" that a crime was committed.[6] Mere knowledge of the criminal behavior was enough to secure a conviction for common law misprision of a felony.[7] Only a partial disclosure of the facts of a criminal offense would also result in a conviction.[8]

Privilege was the only defense to common law misprision, such as attorney-client privilege and physician-patient privilege.[9] However, privilege would not apply when the accused gave misinformation to the authorities "because lying was considered an affirmative act of concealment."[10] By the mid-1800s in England, there were so few

[3] *See* Christopher Mark Curenton, *The Past, Present, and Future of 18 U.S.C. § 4: An Exploration of the Federal Misprision of Felony Statute*, 55 ALA. L. REV. 183, 183 (2003).

[4] Gabriel D. M. Ciociola, *Misprision of Felony and Its Progeny*, 41 BRANDEIS L.J. 697, 699, n.1 (2003) (quoting Sykes v. Dir. of Pub. Prosecutions, [1962] AC 528 (HL) 557).

[5] *See* Curenton, *supra* note 3, at 183; Ciociola, *supra* note 4, at 699.

[6] Curenton, *supra* note 3, at 183–84. Citizens also were charged with the responsibility to arrest the offender. *See id.* at 184.

[7] *See id.* at 184.

[8] *See id.*

[9] *See id.*

[10] *Id.* at 184–85.

misprision prosecutions that the crime was considered to be obsolete, and it was eventually repealed in 1967.[11]

While prosecutions of misprision waned in England,[12] the first United States Congress codified the crime in 1790.[13] Federal misprision of a felony is currently defined as:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.[14]

Federal misprision of a felony is a vestige of this common law "duty to raise the hue and cry."[15] To ignore this affirmative duty to report remains "a badge of irresponsible citizenship."[16] Unlike the common law crime, knowledge that criminal activity has occurred does not constitute misprision of a felony.[17] To be convicted, the accused must have: "(1) knowledge that a felony was committed; (2) fail[ed] to notify the authorities of the felony; and (3) [took] an affirmative step to conceal the felony."[18]

In their opinions on whether misprision is a CIMT, the Fifth, Ninth, and Eleventh Circuits focus most of their analysis on the affirmative concealment element of the offense.[19] Affirmative concealment constitutes hiding tangible or intangible evidence or providing misinformation to another regarding the crime.[20]

Hiding tangible evidence, such as a car implicated in the crime, constitutes affirmative concealment.[21] In *United States v. Brantley*, the defendant was in the car with her boyfriend when he shot two

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[11] *See* Percival v. People, 61 V.I. 187, 191–192 (2014) (quoting Pope v. State, 396 A.2d 1054, 1070 (Md. 1979)). "Misprision of a felony was replaced [in England] with the offense of compounding, which [is the crime of] 'withholding information with regard to certain offense for [a] consideration other than restitution.'" *Percival*, 61 V.I. at 192 n.3.

[12] Some commentators debate whether misprision of a felony is truly gone in England. *See Pope*, 396 A.2d at 1070.

[13] *See* Roberts v. United States, 445 U.S. 552, 558 (1980).

[14] 18 U.S.C. § 4 (2018).

[15] *See* Curenton, *supra* note 3, at 183, 185.

[16] *Roberts*, 445 U.S. at 558.

[17] *See* Curenton, *supra* note 3, at 185.

[18] Villegas-Sarabia v. Duke, 874 F.3d 871, 878 (5th Cir. 2017).

[19] *See, e.g.*, *id.*; Robles-Urrea v. Holder, 678 F.3d 702, 710, 711 (9th Cir. 2012); Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002).

[20] *See Duke*, 874 F.3d at 879.

[21] *See, e.g.*, United States v. Brantley, 803 F.3d 1265, 1274–75 (11th Cir. 2015).

police officers during a traffic stop.[22] The boyfriend fled on foot as she sped away in her car.[23] The defendant hid the car after discussing it with her boyfriend on the phone and by text message.[24] The act of hiding the car is the "affirmative act" of concealing tangible evidence.[25]

Concealing the ongoing actions of the principal perpetrators of the underlying felony themselves also constitutes affirmative concealment.[26] In *United States v. Gravitt*, the defendant drove the bank robbers, with his wife, baby, and boat in tow as camouflage, to retrieve clothing, guns, and money.[27] As the use of his wife, baby, and boat was meant to conceal the bank robbers from detection, the court held that the defendant's actions constituted affirmative concealment.[28]

Hiding illicit financial transactions through "creative accounting" is affirmative concealment of intangible evidence.[29] In *U.S. v. White Eagle*, the defendant covered up a scheme to defraud a tribal credit program by arranging for the principal offender's husband to payoff outstanding loans implicated in the crime to throw off investigators.[30] Making false entries in financial accounts and sending false statements to the Federal Reserve to cover up financial crimes also constitutes active concealment.[31]

For affirmative concealment, misinformation is knowingly providing another with false information to conceal a felony.[32] In *United States v. Hodges*, the defendant lied to an FBI agent stating that he did not know how to contact the principal offender, who kidnapped a child, and he had not seen the child-victim when he had in fact met the principal offender with the victim earlier that

[22] *See id.* at 1268.

[23] *Id.*

[24] *See id.* at 1269.

[25] *See id.* at 1277.

[26] *See* United States v. Gravitt, 590 F.2d 123, 125–126 (5th Cir. 1979).

[27] *See id.* at 126.

[28] *See id.*

[29] *See* United States v. White Eagle, 721 F.3d 1108, 1119 (9th Cir. 2013); *see also* United States v. Bolden, 368 F.3d 1032, 1034, 1037 (8th Cir. 2004) (covering up a conspiracy to distribute cocaine by structuring deposits in such a way as to avoid currency reporting requirements).

[30] *See White Eagle*, 721 F.3d at 1119.

[31] *See* Curenton, *supra* note 3, at 190. Daiwa Bank Ltd. pled guilty to misprision of a felony for concealing unauthorized trading by making false entries in its books, preparing and sending false account statements filing a false report with the Federal Reserve, and engaged in the fictitious transfer of $600 million of non-existent securities. *See id.*

[32] *See* United States v. Hodges, 566 F.2d 674, 675 (9th Cir. 1977) (holding that although silence alone is insufficient for a conviction of misprision, providing untruthful statements is sufficient to sustain a conviction).

month.[33] The court held that providing "an untruthful statement to authorities is a sufficient act of concealment," while also acknowledging that there is no obligation to report a crime.[34]

Yet, not providing a full account of a crime does not constitute active concealment.[35] In *United States v. Johnson*, the defendant failed to disclose to a federal agent that two of his acquaintances were engaged in attempted export of arms and ammunitions.[36] The court held that this was not affirmative concealment because he merely failed to report a felony and a "partial disclosure d[oes] not result in any greater concealment of the crime" than if the defendant said nothing at all.[37]

Misprision does not require active concealment of the underlying felony from law enforcement.[38] An investigation or adjudication of the underlying felony is not an element of misprision.[39]

Convictions under misprision also encompass conduct in which the accused's relationship to the principal offender was only that of a friend or family member, and not a co-conspirator or an accessory.[40] In *United States v. Adams*, the defendant lived in a house that her boyfriend paid for with drug proceeds.[41] The title to the house was eventually transferred to the defendant.[42] After the title transfer, the defendant used profits from illicit activities to pay off the mortgage on the house.[43] The mortgage payments constituted affirmative concealment of her boyfriend's involvement in illegal narcotics distribution and racketeering.[44] She knew the money came from

[33] *See id.*

[34] *Id.*

[35] *See* United States v. Johnson, 546 F.2d 1225, 1226–27 (5th Cir. 1977).

[36] *See id.* at 1226.

[37] United States v. Ciambrone, 750 F.2d 1416, 1418 (9th Cir. 1984) (holding that partial disclosures do not constitute concealment sufficient to establish misprision); *see Johnson*, 546 F.2d at 1227 (holding that failure to report a crime is not concealment in violation of 18 U.S.C. § 4).

[38] *See* United States v. White Eagle, 721 F.3d 1108, 1111–12, 1119–20 (9th Cir. 2013) (falsely telling a private individual that his wife had outstanding loans to conceal the felony); *see also* United States v. Walkes, 410 F. App'x. 800, 803–04 (5th Cir. 2011) (concealing fraudulent billing practices by assuring employees that these practices were in compliance with federal regulations); United States v. Robinson, 344 F. App'x 990, 991 (5th Cir. 2009) (agreeing to be billed by a third party to conceal the distribution of child pornography).

[39] *See* Lancey v. United States, 356 F.2d 407, 409–10 (9th Cir. 1966).

[40] *See generally* United States v. Adams, 961 F.2d 505, 507, 508 (5th Cir. 1992) (arguing that the factual basis for defendant's guilty plea was established by her receiving title to a home bought with funds from illegal activities).

[41] *See id.* at 507.

[42] *See id.* at 507–08.

[43] *See id.* at 507, 512.

[44] *See id.* at 512.

illicit activities and did not report it to the authorities.[45] To the court, living in the house purchased with the proceeds of illegal activity and using such funds to continue making mortgage payments was enough to sustain her plea to misprision of a felony.[46] In *United States v. Pittman*,[47] the defendant was convicted of misprision for concealing her husband's participation in a bank robbery by giving misinformation to the authorities.[48]

As the BIA, and the Fifth, Ninth, and Eleventh Circuits reference the history of misprision in the U.S. and case law addressing affirmative concealment in their opinions,[49] this information is integral to understanding the split between these appellate bodies.

B. Crime Involving Moral Turpitude

The second step to understanding why there is a split between the BIA and the Circuits and within the Circuits themselves is to examine the evolution of CIMT jurisprudence. A noncitizen who is convicted or admits to a crime involving moral turpitude may be deported or excluded from the United States.[50] The term "crime involving moral turpitude" first appeared in the immigration context in 1891.[51] Despite the grave consequences for immigrants convicted

[45] *See id.*

[46] *See id.* at 512, 513.

[47] United States v. Pittman, 527 F.2d 444 (4th Cir. 1975).

[48] *See id.* at 445.

[49] *See* Villegas-Sarabia v. Sessions, 874 F.3d 871, 878 (5th Cir. 2017); Robles-Urrea v. Holder, 678 F.3d 702, 709–10 (9th Cir. 2012); Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002); Matter of Mendez, 27 I. & N. Dec. 219, 221 (B.I.A. 2018); In Re Robles-Urrea, 24 I. & N. Dec. 22, 25–26 (B.I.A. 2006) .

[50] *See* Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i), (2012). In the INA a conviction is defined as "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (2012). While the terms deportation and exclusion are still used in immigration law, under the Illegal Immigration Reform and Responsibility Act of 1996 deportation and exclusion proceedings have now been replaced with removal proceedings for cases commenced on or after April 1, 1997. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, §§ 304, 309(c)(1); DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 6:1 at 6-1 (2001).

[51] *See* Jordan v. De George, 341 U.S. 223, 230 n.14 (1951) (noting that the term has been used since in multiple iterations of immigration statutes). Moral turpitude is also used in professional licensing, rule of evidence—specifically impeachment, contribution between joint tortfeasors, slander, and voting rights. *See id.* at 227; *see also* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001,1001 (2012) (tracing the development of moral turpitude in the areas of slander, impeachment, voting rights, and immigration).

of a CIMT,[52] Congress has not provided a definition of "a crime of moral turpitude."[53] Rather, Congress, in its silence, has left the term to be defined by "future administrative and judicial interpretation."[54]

1. Definition of Moral Turpitude

The current definition of moral turpitude is derived from BIA and U.S. Attorney General decisions.[55] The courts give deference to this interpretation of moral turpitude, but they have the authority to review *de novo* whether specific crimes are CIMTs.[56] The BIA defines moral turpitude as "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."[57] Crimes that are malum in se or "per se morally reprehensible and intrinsically wrong" rather than malum prohibitum are classified as CIMTs because it is the act itself, and not its statutory prohibition, that renders a crime one of moral turpitude.[58] Courts have also explained morally turpitudinous conduct to be "'grave acts of baseness or

[52] Such consequences include inadmissibility, deportation, and ineligibility for discretionary adjustment of status for good moral character. *See* KESSELBRENNER & ROSENBERG *supra* note 50, at § 6-1.

[53] *See De George*, 341 U.S. at 233, 235 (Jackson, J., dissenting) ("Congress did not see fit to state what meaning it attributes to the phrase 'crime involving moral turpitude.'").

[54] Cabral v. Immigr. Naturalization Serv., 15 F.3d 193, 195 (1st Cir. 1994). The Court ruled in *De George* that the term of "crime involving moral turpitude" is not void for vagueness. *See De George*, 341 U.S. at 232; *but see id.* at 242 (Jackson, J., dissenting) ("Congress expected the courts to determine the various crimes includable in this vague phrase. We think that not a judicial function."); Derrick Moore, Note, *"Crimes Involving Moral Turpitude": Why the Void-for-Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813, 814–15 (2008) (asserting that the term crime involving moral turpitude should be void for vagueness).

[55] *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1696–97 (2011); Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 315 (2011).

[56] *See, e.g.*, Esparza-Rodriguez v. Holder, 699 F.3d 821, 823–24 (5th Cir. 2012) (citing Smalley v. Ashcroft, 354 F.3d 332, 335–36 (5th Cir. 2003)) (noting that courts give *Chevron* deference to the BIA's interpretation of moral turpitude). *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* stands for the proposition that when Congress' intent is ambiguous, a court may not substitute its own statutory construction for the reasonable interpretation of an agency. *See* Chevron, U.S.A., Inc. v. N.R.D.C., Inc., 467 U.S. 837, 844 (1984). In a CIMT analysis, the determination that the elements of a crime constitute moral turpitude is a question of law reserved for the courts. *See* Hamdan v. Immigr. Naturalization Serv., 98 F.3d 183, 185 (5th Cir. 1996) (citing Immigr. Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 447–48 (1987); *Cabral*, 15 F.3d at 196 n.5 (1st Cir. 1994)).

[57] *In re* Franklin, 20 I. & N. Dec. 867, 868 (B.I.A. 1994). *See also In re* D-, 1 I. & N. Dec. 190, 193 (B.I.A. 1942) ("An act of baseness, vileness, or depravity, in the private and social duties which a man owes to his fellow man or to society.").

[58] *In re* Franklin, 20 I. & N. Dec. at 868 (citing *In re* P-, 6 I. & N. Dec. 795, 798 (B.I.A. 1955)).

depravity' such as murder, rape, and incest"[59] or acts involving "evil intent."[60]

In addition to "base, vile, or depraved" conduct, the crime must also be "committed . . . with some form of scienter" or intent.[61] For a crime to be a CIMT, the act must be committed with some level of "consciousness or deliberation."[62] This requirement is meant to separate conduct that is morally turpitudinous from conduct that the State has an interest in punishing generally.[63] Culpable states of mind that meet the scienter requirement include "specific intent, deliberateness, willfulness, [and] recklessness."[64] While the BIA has held that recklessness is sufficient, not all circuits agree.[65]

The U.S. Department of State separates crimes involving moral turpitude into three categories: (1) crimes against property, (2) crimes against the government, and (3) crimes committed against a person, family relationship, or sexual morality.[66] Crimes involving moral turpitude generally involve an element of fraud, larceny, or intent to harm persons or property.[67] Nearly all circuits agree that the following crimes are CIMTs: murder and attempted murder,[68] robbery,[69] burglary,[70] rape,[71] and larceny (including petty theft).[72] However, there is disagreement among the circuits that the following crimes are CIMTs: manslaughter,[73] child abandonment,[74] and

[59] Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1074 (9th Cir. 2007) (citing Rodriguez-Herrera v. Immigr. Naturalization Serv., 52 F.3d 238, 240 (9th Cir. 1995)).

[60] Marmolejo-Campos v. Holder, 558 F.3d 903, 923 (9th Cir. 2009) (Berzon, J., dissenting) (citing *In re* Khourn, 31 I. & N. Dec. 1041, 1046 (B.I.A. 1997)).

[61] *In re* Silva-Trevino, 24 I. & N. Dec. 687, 706 (Op. Att'y Gen. 2008).

[62] *Id.* (quoting Partyka v. Att'y Gen. of the U.S., 417 F.3d 408, 414 (3d Cir. 2005)).

[63] *See Silva-Trevino*, 24 I. & N. Dec. at 689 n.1.

[64] *Id.*

[65] *See* KESSELBRENNER & ROSENBERG, *supra* note 50, § 6.2.

[66] *See* U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL AND HANDBOOK § 302.3-2(B)(2)(c) (July 9, 2018), https://fam.state.gov/FAM/09FAM/09FAM030203.html.

[67] *See id.* at § 302.3-2(B)(2)(b).

[68] *See* Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. § 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. Fed. 480 § 10(a).

[69] *See id.* at § 10(c).

[70] *See id.* at § 11(b) (noting however that breaking and entering without intent to commit a major crime, such as murder, burglary, or rape is not morally turpitudinous conduct).

[71] *See id.* at § 12(h).

[72] *See id.* at § 11(g).

[73] *See, e.g.*, Sotnikau v. Lynch, 846 F.3d 731, 738 (4th Cir. 2017) (holding that involuntary manslaughter under Virginia law is not a CIMT because merely criminal negligence is required for a conviction); Franklin v. Immigr. Naturalization Serv., 72 F.3d 571, 573 (8th Cir. 1995) (finding involuntary manslaughter to be a CIMT).

[74] *See, e.g.*, Hernandez-Cruz v. Att'y Gen. of the U.S., 764 F.3d 281, 287 (3d Cir. 2014) (holding that Pennsylvania's child endangerment statute did not constitute a CIMT under the

indecent exposure,[75] and fraud.[76]

2. Approaches to Determining Whether a Crime Is CIMT

To determine whether a crime is a CIMT, adjudicators must examine the statutory elements of the crime.[77] This type of review focuses on the inherent nature of the conviction rather than the particular circumstances of an individual's actions.[78] There are two types of review to determine whether a crime is a CIMT: the categorical approach and the modified categorical approach.[79]

The categorical approach considers only the elements of the crime to determine whether all convictions under the statute involve morally turpitudinous conduct.[80] "If every conviction under the criminal statute involves [morally] turpitudinous conduct, then" the crime is considered to be a CIMT.[81] Circuit courts use predominantly two tests to determine if moral turpitude inheres in a criminal statute: the least culpable conduct test or the realistic probability test.[82]

Under the least culpable conduct test, the criminal statute is "read at the minimum criminal conduct necessary to sustain a conviction under the [criminal] statute."[83] Courts use this test to determine if all conduct criminalized by a statute is categorically morally turpitudinous.[84] If the least culpable conduct that can sustain a

least culpable conduct test); Jean-Louis v. Att'y Gen. of the U.S., 582 F.3d 462, 464 (3d Cir. 2009) (holding that simple assault against a child under the age of 12 is not a CIMT); Rodriguez-Castro v. Gonzales, 427 F.3d 316, 318 (5th Cir. 2005) (holding that child abandonment with intent to return is not a CIMT); Garcia v. Att'y Gen. of the U.S., 329 F.3d 1217, 1222 (11th Cir. 2003) (holding aggravated child abuse to be a CIMT); Guerrero de Nodahl v. Immigr. Naturalization Serv., 407 F.2d 1405, 1406-07 (9th Cir. 1969) (holding that inflicting corporal punishment is a CIMT).

[75] *See, e.g.*, Cisneros-Guerrerro v. Holder, 774 F.3d 1056, 1061 (5th Cir. 2014) (finding that a Texas public lewdness statute is a divisible statute that encompasses both turpitidinous acts and non-turpitudinous acts); Nunez v. Holder, 594 F.3d 1124, 1138 (9th Cir. 2010) (holding that California's indecent exposure statute is not categorically a crime involving moral turpitude).

[76] *See* Matter of Mendez, 27 I. & N. Dec. 219, 223 (B.I.A 2018).

[77] *See In re* Torres-Varela, 23 I. & N. Dec. 78, 84 (B.I.A. 2001).

[78] *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 688 (B.I.A. 2008) (noting that this is a proposition that the BIA and the federal courts agree on).

[79] *See* Jean-Louis v. Att'y Gen. of U.S., 582 F.3d 462, 465 (3d Cir. 2009) (citing Knapik v. Ashcroft, 384 F.3d 84, 88 (3d Cir. 2004)). The categorical approach is used in other contexts aside from determining whether a crime is a CIMT. *See, e.g.*, Shepard v. United States, 544 U.S. 13, 17 (2005); Taylor v. United States, 495 U.S. 575, 588 (1990)).

[80] *See Jean-Louis*, 582 F.3d at 465–66.

[81] Dadhania, *supra* note 55, at 325–26.

[82] *See Silva-Trevino*, 24 I. & N. Dec. at 696–97.

[83] Rodriguez-Castro v. Gonzales, 427 F.3d 316, 320 (5th Cir. 2005) (quoting Hamden v. Immigr. Naturalization Serv., 98 F.3d 183, 189 (5th Cir. 1996)).

[84] *See Rodriguez-Castro*, 427 F.3d at 320.

conviction is not morally turpitudinous, the offense is not considered a CIMT.[85] Courts generally do not require, under this test, actual proof of the application of the statute to non-turpitudinous conduct.[86] Rather, it is the possibility of conviction for non-turpitudinous conduct that is sufficient to avoid removal.[87] The Second, Third, Fifth, and Eleventh Circuits use this test in applying the categorical approach to criminal statutes.[88]

The realistic probability test considers if moral turpitude inheres in those acts that would realistically be prosecuted under the statute.[89] Unlike the least culpable conduct approach, the realistic probability test focuses on the actual application of the criminal statute to conduct that was non-turpitudinous.[90] In a removal case, the noncitizen must provide evidence of an actual case where the statute was used to prosecute non-turpitudinous conduct.[91] This evidence could include published decisions, unpublished decisions, and plea transcripts, even those from a noncitizen's own criminal case.[92] The BIA and the Seventh, Eighth, Ninth, and Tenth Circuits use the realistic probability test.[93]

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[85] The Fifth Circuit in *Rodriquez-Castro* found that Texas Penal Code misdemeanor child abandonment with intent to return to the child is not a CIMT because the least culpable conduct of "a mother's quick trip next door to borrow some sugar while carelessly leaving a toddler alone in a kitchen with a pot boiling, electric sockets uncovered, and ordinary utensils accessible . . . is not per se morally reprehensible or intrinsically wrong." *Id.* at 322–24.

[86] *See* Jean-Louis v. Att'y Gen. of U.S., 582 F.3d 462, 471 (3d Cir. 2009).

[87] *See id.*

[88] *See, e.g.*, Gelin v. Att'y Gen., 837 F.3d 1236, 1242 (11th Cir. 2016) (finding that the least culpable conduct under a Florida elder abuse statute constituted a CIMT); Efstathiadis v. Holder, 752 F.3d 591, 595 (2d Cir. 2014) (quoting Moncrieffe v. Holder, 569 U.S. 184, 191 (2013)) ("our focus is on the question of whether or not 'the minimum conduct criminalized by the . . . statute would support classification of a crime as a CIMT'"); *Jean-Louis*, 582 F.3d at 465 ("[we] read[] the applicable statute to ascertain the least culpable conduct necessary to sustain conviction under the statute"); Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006) ("Under the categorical approach, we read the statute at its minimum, taking into account 'the minimum criminal conduct necessary to sustain a conviction under the statute'").

[89] *See* Linares-Gonzalez v. Lynch, 823 F.3d 508, 514 (9th Cir. 2016) (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).

[90] *See In re* Silva-Trevino, 24 I. & N. Dec. 697, 697 (B.I.A. 2008).

[91] *See id.*

[92] *See* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 187, 193 (2007) ("[T]o find that a state statute creates a crime outside the generic definition of a listed crime . . . requires more than an application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show a realistic probability, an offender, of course, may show that the statute was so applied in his case."); Nicanor-Romero v. Mukasey, 523 F.3d 992, 1005 (9th Cir. 2008), *overruled on other grounds by* Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009).

[93] *See, e.g.*, Arias v. Lynch, 834 F.3d 823, 829 (7th Cir. 2016) (noting that it approved the *Silva-Trevino I* approach, which includes the application of the realistic probability test); Linares-Gonzalez v. Lynch, 823 F.3d 508, 514 (9th Cir. 2016) ("[T]he defendant or alien must

If a criminal statute encompasses multiple crimes, the offense is divisible, and thus the modified categorical approach is applied.[94] An example of such an offense is burglary, defined in the statute as breaking into a dwelling *or* an automobile.[95] As this statute encompasses two different crimes: breaking into a house or breaking into a car, the statute is divisible.[96] When a statute is divisible, it may encompass both morally turpitidinous and non-turpitidinous conduct.[97] To determine whether a conviction is a CIMT under a divisible statute, the court examines other documents outside of the criminal statute such as the indictment, jury instructions, plea agreement, or colloquy to determine what crime a defendant was convicted of.[98] The court then compares the elements of that crime with the generic definition of a CIMT.[99] As the statute criminalizing misprision is not divisible because it does not contain elements in the alternative, like the burglary example above (dwelling or automobile), the modified categorical is not explored any further in this note.[100]

II. CIRCUIT SPLIT

The circuits are split on whether misprision of a felony is a crime involving moral turpitude (CIMT). In 1966, the BIA in *Matter of Sloan*[101] held that misprision of a felony is not a CIMT because "evil intent nor a depraved act" was required in the statute for a conviction.[102] In 2002, the Eleventh Circuit in *Itani v. Ashcroft* held that misprision was a CIMT.[103] The BIA adopted the Eleventh Circuit's view that misprision was a CIMT in *Robles-Urrea v.*

show that there is a 'realistic probability' that the statute would be applied to acts not covered by the generic federal statute."); Villatoro v. Holder, 760 F.3d 872, 877 (8th Cir. 2014) (citing *Duenas–Alvarez*, 549 U.S. at 193); Rodriguez-Heredia v. Holder, 639 F.3d 1264, 1267 (10th Cir. 2011) (using realistic probability test) (quoting *Duenas-Alvarez*, 549 U.S. at 193); *In re* Silva-Trevino, 26 I. & N. Dec. 826, 831 (B.I.A. 2016) (applying realistic probability test).

94 *See* Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). While *Mathis* concerns sentencing enhancements under the Armed Career Criminal Act, its holding regarding the modified categorical approach applies in immigration law. KESSELBRENNER & ROSENBERG, *supra* note 50, § 6.4.

95 Descamps v. United States, 570 U.S. 254, 257 (2013).

96 *See Mathis*, 136 S. Ct. at 2249; *Descamps*, 570 U.S. at 257.

97 *See Silva-Trevino*, 26 I. & N. Dec. at 833.

98 *Mathis*, 136 S. Ct. at 2249 (citing Taylor v. United States, 495 U.S. 575, 602 (1990)).

99 *Mathis*, 136 S. Ct. at 2249.

100 *See* 18 U.S.C. § 4 (2018).

101 *In re* Sloan, 12 I. & N. Dec. 840 (B.I.A. 1966).

102 *Id.* at 843 (noting in its opinion that affirmative concealment was required for a conviction).

103 Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002).

Holder,[104] but this decision was reversed by the Ninth Circuit.[105] The Second Circuit declined to rule on the issue.[106] Instead in *Lugo v. Holder*, the Court asked the BIA to address the issue in a precedential decision.[107] In 2017, the Fifth Circuit, the last circuit to address the issue before the BIA released another opinion on the matter, held that misprision is a CIMT in *Villegas-Sarabia v. Duke*.[108] The BIA in *Matter of Mendez*, ruled that misprision is a CIMT.[109] However, this may not be the final word on the issue. To understand the underlying cause of these splits, it is critical to go through the analysis in each decision.

A. BIA's Decision in Matter of Sloan (1966)

Sloan was convicted for concealing a person from arrest (harboring an escaped convict) and misprision of a felony ("failing to inform authorities that a convicted person had traveled interstate to avoid confinement").[110] The BIA held that both offenses were not CIMTs,[111] but the Attorney General overturned its ruling with regards to concealing a person from arrest, but not with respect to misprision.[112] The BIA applied a categorical approach to analyzing the statutes, citing *U.S. ex rel Mylius v. Uhl*,[113] but focused most of its opinion on the harboring charge.

B. Eleventh Circuit's Decision in Itani v. Ashcroft (2002)

The Eleventh Circuit in *Itani v. Ashcroft* was the next set of adjudicators to address the issue of whether misprision is a CIMT.[114] Itani was convicted of misprision of a felony where the underlying offense was transporting stolen automobiles interstate.[115] The Eleventh Circuit did not reference *Sloan* in its opinion perhaps due to the BIA's lack of analysis regarding Sloan's misprision conviction.

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[104] *See In re* Robles-Urrea, 24 I. & N. Dec. 22, 26 (B.I.A. 2006).

[105] *See* Robles-Urrea v. Holder, 678 F.3d 702, 705 (9th Cir. 2012).

[106] *See* Lugo v. Holder, 783 F.3d 119, 120 (2d Cir. 2015).

[107] *See id.* at 120–21 ("We are thus left to wonder whether, going forward, the [BIA] wishes to adopt the Ninth Circuit's rule or the Eleventh Circuit's. We believe it is desirable for the Board to clarify this matter in a published opinion.").

[108] *See* Villegas-Sarabia v. Duke, 874 F.3d 871, 884 (5th Cir. 2017).

[109] *In re* Mendez, 27 I. & N. Dec. 219, 220 (B.I.A. 2018).

[110] *See In re* Sloan, 12 I. & N. Dec. 840, 843 (B.I.A. 1968).

[111] *See id.* at 848.

[112] *See id.* at 854.

[113] *See id.* at 847 (citing United States *ex rel.* Mylius v. Uhl, 210 F. 860 (2d Cir. 1914)).

[114] *See* Itani v. Ashcroft, 298 F.3d 1213, 1214 (11th Cir. 2002).

[115] *See id.*

At the start of the analysis, the Eleventh Circuit defined the term moral turpitude using the BIA's standard definition:

> An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. Generally, a crime involving dishonesty or false statement is considered to be one involving moral turpitude.[116]

To determine whether misprision of a felony matches this generic definition of a CIMT, the court used a categorical approach, but did not specify whether it was applying the least culpable conduct test or the realistic probability test.[117] The court took into account the history of misprision in the U.S, noting that the concealing of a crime is behavior that is "not looked upon with favor [in society]."[118] While the court did not specifically say that it was analyzing the intent element of misprision, it noted that the crime requires knowledge of underlying offense and "some affirmative act of concealment or participation [in the crime]."[119] From this elucidation of the offense, the court read into the statute the involvement of dishonest or fraudulent activity.[120] As misprision involves dishonest or fraudulent activity, and affirmative concealment of a felony runs contrary to acceptable societal duties, the court concluded that the crime is a CIMT.[121]

C. BIA's Decision in the Matter of Robles-Urrea (2006)

After the Eleventh Circuit's decision, the BIA addressed the question of whether misprision is a CIMT in the *Matter of Robles-Urrea*. Robles-Urea was a lawful permanent resident who pleaded guilty to misprision for concealing a conspiracy to distribute marijuana and cocaine.[122] In 2005, after serving his sentence for misprision, he was stopped at the Arizona border on his return to the

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[116] *Id.* at 1215 (quoting United States v. Gloria, 494 F.2d 477, 481 (5th Cir. 1974)).

[117] *See Itani*, 298 F.3d at 1216 ("Whether a crime involves . . . moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct.").

[118] *Id.* (quoting Branzburg v. Hayes, 408 U.S. 665, 696—97 (1972)).

[119] *Itani*, 298 F.3d at 1216 (quoting *Branzburg*, 408 U.S. at 696 n.36).

[120] *See Itani*, 298 F.3d at 1216.

[121] *See id.*

[122] *See In re* Robles-Urrea, 24 I. & N. Dec. 22, 22–23 (B.I.A. 2006).

U.S. from Mexico.[123] He was charged with removability as a drug trafficker and for having been convicted of a crime involving moral turpitude within the last five years.[124] He contested his removal.[125] The BIA ultimately ruled that misprision of a felony is a crime involving moral turpitude due to the affirmative concealment element of the offense.[126]

The BIA defined moral turpitude as "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[127] The BIA applied a categorical approach to analyzing whether misprision is a CIMT.[128] The approach at the time of this decision encompassed examining the statutory definition of the offense and looking to court decisions to clarify the meaning of any confusing language in the statute.[129]

The BIA found the holding in *Itani* persuasive and agreed with the Eleventh Circuit that statutory elements of misprision matches the generic definition of moral turpitude, noting that evil intent is implicit in the act of concealing a felony from law enforcement and such concealment runs contrary to the duties owed by man to society in general.[130] With this decision, the BIA overturned *Sloan* with little hesitation.[131]

D. The Ninth Circuit's Decision in Robles-Urrea v. Holder

The Ninth Circuit reversed the BIA's decision in *Robles-Urrea v. Holder*.[132] The court applied the categorical and modified categorical approaches to determining whether an offense constitutes a crime involving moral turpitude.[133] In the Ninth Circuit, the categorical approach constitutes "compar[ing] the elements of the crime to the

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[123] *See* Robles-Urrea v. Holder, 678 F.3d 702, 706 (9th Cir. 2012).

[124] *See id.*

[125] *See id.*

[126] *See In re Robles-Urrea*, 24 I. & N. Dec. at 25–26, 28.

[127] *Id.* at 25 (quoting *In re* Olquin-Rufino, 23 I. & N. Dec. 896, 896 (B.I.A. 2006); *In re* Torres-Varela, 23 I. & N. Dec. 78, 83 (B.I.A. 2001)).

[128] *See In re Robles-Urrea*, 24 I. & N. Dec. at 26.

[129] *See id.* at 25 (citing *In re* Olquin-Rufino, 23 I. & N. Dec. at 897, n.1).

[130] *See In re Robles-Urrea*, 24 I. & N. Dec. at 26. However, it should be noted that misprision does not require active concealment from law enforcement. *Supra* Part II(a).

[131] *See id.* at 26 ("We have little hesitation in so finding, having had the benefit of some 40 years of intervening decisions of the Federal courts and the Board interpreting the standard for crimes involving moral turpitude since *Matter of Sloan* was decided.").

[132] *See* Robles-Urrea v. Holder, 678 F.3d 702, 705, 712–13 (9th Cir. 2012).

[133] *See id.* at 707 (citing Taylor v. United States, 495 U.S. 575 (1990); Marmolejo-Campos v. Holder, 558 F.3d 903, 912 (9th Cir. 2009)).

generic definition of moral turpitude and decid[ing] whether the conduct proscribed in the statute is broader than, and so does not categorically fall within, this generic definition."[134] The court applied the realistic probability test to determine if the statute applies to conduct that falls beyond the scope of the generic offense.[135]

The court defined a "crime involving moral turpitude" as a crime that 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."[136] When examining this definition, the court noted that not all offenses that break the accepted rules of social conduct constitute crimes involving moral turpitude.[137] To the court, "[o]nly truly unconscionable conduct surpasses the threshold of moral turpitude. [Instead it] must determine whether misprision of a felony is so *categorically* base, vile or depraved as to be morally turpitudinous."[138]

The court noted that the BIA failed to explain why misprision of a felony is so "inherently, base, vile, or depraved" as to be a CIMT.[139] The court found the explanation that misprision is a CIMT because it involves the knowledge and affirmative concealment of a crime, and is therefore contrary to accepted social duties to be problematic.[140] "[T]he crime [must] involve some level of depravity or baseness 'so far contrary to the moral law' that it gives rise to moral outrage" in order to be a CIMT according to the Ninth Circuit.[141] If the sole benchmark of the crime was that it ran contrary to accepted social duties, every crime would be a CIMT.[142] The court noted that finding misprision to be a CIMT because it violates the social contract would be contrary to Congress' intent.[143] "'[I]f Congress had intended any conviction to make an alien ineligible for cancellation of removal,' then it would not have 'designate[d] specific categories of crimes' to have this effect."[144]

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[134] *Robles-Urrea*, 678 F.3d at 707 (quoting Nunez v. Holder, 594 F.3d 1124, 1129 (9th Cir. 2010)).

[135] *See Robles-Urrea*, 678 F.3d at 707 (citing Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).

[136] *Robles-Urrea*, 678 F.3d at 708.

[137] *See id.*

[138] *Id.* (emphasis in original).

[139] *See id.*

[140] *See id.* at 709 (quoting Branzburg v. Hayes, 408 U.S. 665, 669 (1972); Itani v. Ashcroft, 298 F.3d 1213, 1214 (11th Cir. 2002)).

[141] *Robles-Urrea*, 678 F.3d at 709 (quoting Navarro-Lopez v. Gonzales, 455 F.3d 1055, 1071 (9th Cir. 2006)).

[142] *See Robles-Urrea*, 678 F.3d at 709 (quoting *Navarro-Lopez*, 455 F.3d at 1070–71).

[143] *See Robles-Urrea*, 678 F.3d at 709.

[144] *Robles-Urrea*, 678 F.3d at 709 (quoting *Navarro-Lopez*, 455 F.3d at 1071).

The court disagreed with the BIA and the Eleventh Circuit that misprision of a felony must be a CIMT because "evil intent" is implicit in the element of affirmative concealment.[145] There was nothing to support the notion that affirmative concealment involves "evil intent" because misprision does not require specific intent to conceal, but only knowledge of a felony.[146]

The court noted that the BIA's holding would have an "absurd result" in which misprision is CIMT, but the underlying felony is not.[147] Further, the BIA held that accessory after the fact is not a CIMT unless the principal offender's actions are morally turpitudinous.[148] To the court, this holding supports its conclusions that misprision of a felony would "encompass conduct that is not morally turpitudinous."[149]

The Ninth Circuit also determined that the application of the modified categorical approach to misprision is appropriate because the offense is "categorically broader than the generic definition."[150] The court noted that "the modified categorical approach [requires] ask[ing] what facts the conviction 'necessarily rested' on in light of the [prosecutorial] theory of the case as revealed in the relevant [judicially noticeable] documents, and whether these facts satisfy the elements of the generic offense."[151] Under this approach, Robles-Urrea could be found to be a convicted of a CIMT even though the misprision statute lacked "baseness or depravity as an element [of the offense], so long as the particular facts of his conviction . . . were base or depraved."[152] The court remanded this case to the BIA to conduct the modified categorical approach in the first instance.[153]

E. Fifth Circuit's Decision in Villegas-Sarabia v. Duke (2012)

Villegas-Sarabia was convicted of misprision of a felony and illegal possession of a firearm.[154] In applying the minimum conduct test, the court held that misprision of a felony is CIMT.[155]

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[145] *See Robles-Urrea*, 678 F.3d at 709–10.
[146] *See id.* at 710.
[147] *See id.* at 710–11.
[148] *See id.* at 710 (citing *In re* Rivens, 25 I. & N. Dec. 623, 628 (B.I.A. 2011).
[149] *Robles-Urrea*, 678 F.3d at 711.
[150] *Id.* (quoting Navarro-Lopez v. Gonzales, 455 F.3d 1055, 1071 (9th Cir. 2006)).
[151] *Robles-Urrea*, 678 F.3d at 712 (alteration in original) (quoting United States v. Aguila-Montes de Oca, 655 F.3d 915, 937 (9th Cir. 2011)).
[152] *Robles-Urrea*, 678 F.3d at 712.
[153] *See id.* at 712–13.
[154] *See* Villegas-Sarabia v. Duke, 874 F.3d 871, 874, 875, 884 (5th Cir. 2017).
[155] *See id.* at 877, 881.

The court defined moral turpitude as "conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[156] The court noted that the moral turpitude has been defined as an act that is "morally reprehensible" (malum in se), and so that "the nature of the act itself and not the statutory prohibition [is one that] renders the crime one of moral turpitude."[157] "[I]f a crime's essential element 'involves fraud or deception,' or 'include[s] dishonesty or lying,' it is a CIMT."[158]

The court examined the scienter of misprision, concluding that affirmative concealment requires an intentional act of deceit based on its holding in *Patel v. Mukasey*.[159] The court also found *Itani* persuasive.[160] In *Patel*, the court held that affirmative concealment constitutes fraud or deceit because it requires "the act of intentionally giving a false impression."[161] The court defined fraud in *Patel* as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment" and deceit is defined as "the act of intentionally giving a false impression."[162] The court concluded that misprision is a CIMT based on reading intent to deceive into the statute and its past holding that "crimes including an element of intentional deception are crimes involving moral turpitude."[163]

F. BIA's Decision in Matter of Mendez (2018)

The BIA issued another precedential opinion on whether misprision is a CIMT. In *Matter of Mendez*, issued in February 2018, the BIA held that misprision is a CIMT and outright rejected the Ninth Circuit's reasoning in *Robles-Urrea*.[164]

The BIA applied the framework articulated in *Silva-Trevino III* for determining whether misprision is a CIMT, noting that in general, it will apply the realistic probability test unless circuit court decisions

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[156] *Id.* at 877 (quoting Hyder v. Keisler, 506 F.3d 338, 391 (5th Cir. 2007)).

[157] *Villegas-Sarabia*, 874 F.3d at 877–78 (quoting Hyder v. Keisler, 506 F.3d 338, 391 (5th Cir. 2007)).

[158] *Villegas-Sarabia*, 874 F.3d at 878.

[159] *See id.* at 878–79 (citing Patel v. Mukasey, 526 F.3d 800, 803 (5th Cir. 2008)).

[160] *See Villegas-Sarabia*, 874 F.3d at 881.

[161] *Id.* at 878–79 (citing *Patel*, 526 F.3d at 803).

[162] *Patel*, 526 F.3d at 802.

[163] *Villegas-Sarabia*, 874 F.3d at 879 (quoting Fuentes-Cruz v. Gonzales, 487 F.3d 724, 726 (5th Cir. 2007)).

[164] *See In re* Mendez, 27 I. & N. 219, 225 (B.I.A. 2018).

dictate otherwise.[165] To the BIA, "[m]oral turpitude refers generally to conduct that 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.'"[166] Moral turpitude also requires a culpable state of mind.[167]

The BIA agreed with the Fifth and Eleventh Circuits that affirmative concealment involves dishonest and deceitful behavior and is thus morally turpitudinous conduct.[168] It was not persuaded by the argument that finding misprision to be a CIMT when the underlying offense is an "absurd result."[169] The Ninth Circuit compared misprision with accessory after the fact in its analysis.[170] To the BIA and the Ninth Circuit, accessory after the fact is a CIMT only if the underlying felony is a CIMT.[171] In this decision, the BIA referenced *Matter of Espinoza-Gonzales*,[172] which compared misprision and accessory after the fact and concluded that misprision is not an aggravated felony because "[i]t is a lesser offense to conceal a crime where there is no investigation or proceeding, or even an intent to hinder the process of justice."[173] The Board also noted that accessory after the fact carries a higher sentence.[174] Yet, the BIA deemed such comparisons between misprision and accessory after the fact to be irrelevant to its CIMT analysis.[175]

In examining the language of the misprision statute, the BIA concluded that affirmative concealment constitutes deceitful and dishonest conduct and is therefore morally turpitidinous, regardless

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[165] *See id.* at 221 (citing *In re* Silva-Trevino, 26 I. & N. Dec. 826, 827, 831 (B.I.A. 2016)).

[166] *In re Mendez*, 27 I. & N. Dec. at 221 (quoting Mendez v. Mukasey, 547 F.3d 345, 347 (2d Cir. 2008)).

[167] *Matter of Mendez*, 27 I. & N. Dec. at 221.

[168] *Id.* at 222.

[169] *See id.*

[170] *See id.* at 222–23. The BIA states in its opinion that the Ninth Circuit was commenting on the federal accessory-after-the-fact statute in Robles-Urrea. *Id.* at 222. This is erroneous; the Ninth Circuit was referencing its decision regarding California's accessory-after-the-fact statute. Robles-Urrea v. Holder, 678 F.3d 702, 711 (9th Cir. 2012) (citing Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1071 (9th Cir. 2007)).

[171] *In re Mendez*, 27 I. & N. Dec. at 222–23 (citing *In re* Rivens, 25 I. & N. Dec. 623, 627 (B.I.A. 2011)).

[172] *In re* Espinoza-Gonzalez, 22 I. & N. Dec. 889 (B.I.A. 1999).

[173] *In re Mendez*, 27 I. & N. Dec. at 223 (quoting *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 895 (B.I.A. 1999)).

[174] *See In re Mendez*, 27 I. & N. Dec. at 223.

[175] *Id.* The BIA continued to make comparisons between misprision and accessory after the fact to bolster its conclusion that misprision is a CIMT despite stating that "[such] comparative distinctions between misprision of a felony and accessory after the fact do not inform or dictate our moral turpitude analysis." *Id.* (citing *In re* Solon, 24 I. & N. Dec. 239, 240 (B.I.A. 2007)).

of whether the underlying felony is a CIMT.[176] The BIA also noted in this portion of its analysis that both misprision and accessory after the fact involve concealment of the underlying offense, but that "the range of punishment for misprision is fixed without regard to the underlying felony, while the range for accessory after the fact is directly tied to the potential punishment of a principal."[177] To the BIA, this sentencing structure support its conclusion that the nature of the underlying felony is irrelevant to determining whether misprision is a CIMT.[178]

In its scienter analysis, the BIA read into the statute intentional concealment, finding such intent to be implicit because a conviction requires that the "defendant took steps to conceal the [underlying] crime."[179] The BIA also noted that "charging documents for misprision have included allegations that the act of concealment [is] intentional."[180] The BIA was unpersuaded by the respondent's argument that misprision lacks the requisite scienter based on its holding in *Matter of Espinoza-Gonzales* that misprision "lacks the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice" unlike accessory after the fact.[181]

III. ANALYSIS AND CRITIQUE

At first glance, it may seem that the crux of the split between the circuits and the BIA is that they each use different tests when applying the categorical approach: the BIA and the Ninth Circuit use the realistic probability test and the Fifth and Eleventh Circuits use the least culpable or minimum conduct test. However, that is a red herring. The main points of contention between the two camps are: (1) whether fraud can be read into the statute; (2) whether misprision has the requisite degree of scienter to be a CIMT; and (3) whether an "absurd result" exists, which should not be tolerated, when misprision of a felony is a considered to be CIMT even though the underlying felony is not.

A crime involving fraud is almost always found to be a CIMT.[182]

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[176] *In re Mendez*, 27 I. & N. Dec. at 223.

[177] *Id.*

[178] *Id.*

[179] *Id.* (quoting United States v. Cefalu, 85 F.3d 964, 969 (2d Cir. 1996)).

[180] *In re Mendez*, 27 I. & N. Dec. at 224.

[181] *Id.* (quoting *In re* Espinoza-Gonzalez, 22 I. & N. Dec. 889, 896 (B.I.A. 1999)).

[182] *See e.g.*, Jordan v. De George, 341 U.S. 223, 227 (1951); Matter of Adetiba, 20 I. & N. Dec. 506, 508 (B.I.A. 1992).

Even when intent to defraud is not an element of the offense, fraud may be found to be implicit in the crime, and thus be deemed a deportable offense.[183] The BIA, Fifth, and Eleventh Circuits read intent to defraud or to deceive into the misprision statute,[184] but not the Ninth Circuit.[185] Even though misprision may involve making false statements or otherwise concealing criminal activity, it may not be proper to read intent to defraud into the misprision statute. The language of the misprision statute does not make intent to defraud the government or a private individual an essential element of the offense. All that the statute requires is that a person had knowledge of a felony and concealed it; it does not specify who the felony must be concealed from.[186]

In addition, there is some doubt as to whether affirmative concealment is an essential element of the offense. In *United States v. Caraballo-Rodriguez*,[187] the First Circuit declined to read into the misprision statute the element of affirmative concealment.[188] Under this reading, a partial disclosure of the one's knowledge of the crime would be enough for a conviction.[189] Without the element of affirmative concealment, the reading of intent to defraud in the statute would certainly be called into doubt because inadvertent acts of concealment would be enough for a conviction. Take for example, a woman whose boyfriend uses her kitchen to parcel out cocaine for sale. He leaves traces of cocaine accidently in some containers she wants to use to pack her child's lunch. She washes out the container thereby destroying evidence of a crime. Did she mean to affirmatively conceal her boyfriend's drug crimes and thus defraud law enforcement? No, she wanted to pack her child's lunch. Under the *Caraballo* reading of the misprision statute this inadvertent act of concealment would be enough to secure a conviction. Such an inadvertent act is not meant to deceive anyone into thinking a drug crime did not happen. As there is a possibility that inadvertent concealment could be punishable under the misprision statute, it is

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[183] *See* Carty v. Ashcroft, 395 F.3d 1081, 1084 (9th Cir. 2005) (citing Goldeshtein v. Immigr. Naturalization Serv., 8 F.3d 645, 648 (9th Cir. 1993)).

[184] *See* United States v. Gayle, 967 F.2d 483, 486 (11th Cir. 1992).

[185] *See Goldeshtein*, 8 F.3d at 648.

[186] *See generally* 18 U.S.C. § 4 (2018) ("Whoever, having knowledge of the actual commission of a felony . . . , conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.").

[187] United States v. Caraballo-Rodriguez, 480 F.3d 62 (1st Cir. 2007).

[188] *See id.* at 70.

[189] *See id.*

not appropriate to read intent to defraud into the offense.

Even if fraud is read into misprision, such conduct is not "inherently base, vile, or depraved." Fraud offenses criminalize a wide variety of conduct, and thus it may not be proper to label all such crimes CIMTs.[190] The Ninth Circuit offered the following example to explain why not all fraud offenses may be crimes involving moral turpitude:

> Take the example of a welfare mother who falsely endorses and then cashes a social security check mistakenly issued to her deceased father. The woman knows that she does not have the right to the money. She forges her father's signature. But, she needs money to feed her hungry children. Although such conduct is illegal, it is not base, vile, or depraved.[191]

In this example, the offense does not match the generic definition of a crime involving moral turpitude even though fraud is inherent in the offense, because it is not "base, vile, or depraved" to obtain money to feed your family even if it is through illegal means. This social security fraud example is analogous to misprision; even though an individual may be affirmatively concealing a felony through misrepresentation or hiding evidence, the conduct is not necessarily "base, vile, or depraved." Making misrepresentations to the police, so your husband is not sent to prison or paying your mortgage with illegal drug proceeds to keep your home are not instances of depraved conduct marked with evil intent.[192] As such, conduct that is punishable under the federal misprision statute does not fit the definition of a CIMT.

In addition, the Eight Circuit found that making a false statement to a police officer is not a CIMT, noting that individuals may not be cooperative with law enforcement officers for a variety of reasons that are not always motivated by evil intent.[193] This holding calls into doubt the proposition, in the misprision context, that a person's reasons for concealment are always motivated by evil intent.

The Ninth Circuit found misprision to be different from other crimes of concealment because it does not require a specific intent to

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[190] Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1069 (9th Cir. 2007).

[191] *Id.*

[192] *See supra* text accompanying notes 41–48.

[193] *See* Bobadilla v. Holder, 679 F.3d 1052, 1058 (8th Cir. 2012) ("We reject the notion, all too prevalent in government circles, that every person who intentionally makes a government official's task more difficult is guilty of 'inherently base, vile, or depraved' conduct.").

conceal, but only knowledge of the felony.[194] Specific intent fulfills *Silva-Trevino*'s scienter requirement.[195] In its discussion of scienter in *Matter of Mendez*, the BIA found its holding in *Matter of Espinoza-Gonzales* to be inapplicable in its CIMT analysis because this decision only addressed whether misprision has the requisite intent to obstruct justice, not the level of mens rea attached to affirmative concealment.[196] But the BIA chose not reference in *Mendez* its finding in *Espinoza-Gonzales* that the statutory elements of misprision did not require "the defendant [to] act[] with any motive toward the participants in the underlying crime."[197] If the Government need not prove a defendant's motive in relation to the underlying participants in the crime, such as they were motivated to conceal the principal offender's crime, the intent requirement does not meet the level of specificity required by *Silva-Trevino*.

In addition to the scienter issue, there is the "absurd result" of misprision being a CIMT when the underlying offense is not. The Ninth Circuit found this type of situation to be intolerable, the BIA disagreed, and the other circuits did not comment upon it.[198] Both the BIA and the Ninth Circuit reference the crime of accessory after the fact in their opinions.[199] Accessory after the fact is not a CIMT unless the underlying felony is also a CIMT.[200] Accessory after the fact has similar elements to misprision. Accessory after the fact requires (1) the commission of a felony, (2) the defendant had knowledge of that offense; and (3) the defendant assisted the offender to prevent his apprehension, trial, or punishment.[201] Both accessory after the fact and misprision require knowledge of the felony.[202] Concealment of a felony may encompass conduct that the federal accessory statute also punishes, such as hiding evidence or providing misinformation to the authorities.[203] One of the few differences between these two crimes is that there must be an investigation or a judicial proceeding for an individual to be convicted of accessory after

[194] Robles-Urrea v. Holder, 678 F.3d 702, 710 (9th Cir. 2012).

[195] *See supra* text accompanying notes 63–64.

[196] *See supra* text accompany notes 170–75.

[197] *In re* Espinoza-Gonzalez, 22 I. & N. Dec. 889, 893 (B.I.A. 1999).

[198] *See supra* Part II.

[199] *See* Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1071 (9th Cir. 2007); *In re* Rivens, 25 I. & N. Dec. 623, 627 (B.I.A. 2011).

[200] *In re Rivens*, 25 I. & N. Dec. at 627.

[201] United States v. Osborn, 120 F.3d 59, 63 (7th Cir. 1997).

[202] *Id.*; Robles-Urrea v. Holder, 678 F.3d 702, 710 (9th Cir. 2012).

[203] *See* Craig Ehrlich, *When Minding Your Own Business Means Speaking Up: Criminally Punishing A Corporate Executive for Failing to Blow the Whistle on the Illegal Misconduct of a Colleague*, 32 J.L. & COM. 255, 270 (2014).

the fact.[204]

Yet the BIA still deemed misprision to be a CIMT regardless of the underlying felony even when it pointed out conduct that constitutes accessory after the fact that is also punishable by the federal misprision statute such as "receiv[ing], reliev[ing], comfort[ing], or assist[ing] the principal."[205] Hiding bank robbers from detection by the authorities, providing misinformation to the police to prevent your spouse from going to prison, and hiding a financial scheme by having another pay off outstanding loans are all actions that would provide relief, comfort, or assistance to a principal.[206] Instead, the BIA simply concludes that concealing *any* felony from *any* person whether it be law enforcement or private individual is somehow more dishonest and deceitful than providing relief, comfort, or assistance to a principal as an accessory after the fact.

In addition, the BIA also noted that accessory after the fact carries a higher sentence.[207] Yet the BIA deemed such comparisons between misprision and accessory to be irrelevant to its CIMT analysis despite comparing the two crimes throughout its analysis.[208]

IV. RECOMMENDATIONS AND CONCLUSION

Circuit courts should not give too much credence to the BIA's analysis in *Matter of Mendez*. Due to the many issues in this opinion, it should not be viewed as the final word on whether misprision is a CIMT. Rather, it may be time to thoroughly reexamine the scienter requirements of misprision through textual analysis of the statute. Such an analysis would make clear the intent required to be convicted of misprision.

Circuit courts should also consider whether it is tolerable in immigration jurisprudence to have misprision be a CIMT when the underlying felony is not. Justice Jackson noted that deportation is an extension of criminal sentencing because the noncitizen faces the additional punishment of deportation, which "is equivalent to banishment or exile."[209] When viewed in the context of Justice

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[204] *In re* Espinoza-Gonzalez, 22 I. & N. Dec. 889, 891, 893 (B.I.A. 1999). Meaning that there needs to be an investigation or judicial proceeding to evade. *Id.*

[205] *In re* Mendez, 27 I. & N. Dec. 219, 223 (B.I.A. 2018).

[206] *See supra* text accompanying notes 27–28, 42–43.

[207] *Mendez*, 27 I. & N. Dec. at 223.

[208] *Id.* The BIA continued to make comparisons between misprision and accessory after the fact to bolster its conclusion that misprision is a CIMT despite stating that "[such] comparative distinctions between misprision of felony and accessory after the fact do not inform or dictate our moral turpitude analysis." *Id.* (citing *In re* Solon, 24 I. & N. Dec. 239, 240 (B.I.A. 2007)).

[209] Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting).

Jackson's words, it does not seem fair that a noncitizen should face the additional punishment of deportation when the principal offender would not face the same. As such, misprision should not be a CIMT when the underlying crime is not.