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Misapprising Misprision: Why Misprision Of A Felony Is Not A Crime Involving Moral Turpitude

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MISAPPRISING MISPRISION: WHY MISPRISION OF A FELONY IS NOT A CRIME INVOLVING MORAL TURPITUDE

Introduction

Immigration is an area of American law in which archaic terminology and hyper-technical statutory interpretation collide with human lives. The results can be arbitrary, absurd, or tragic. Noncitizens' behavior is scrutinized, categorized, and judged according to different standards than those that citizens must meet or even consider, and the consequences can be disproportionately devastating. One illustrative example is the immigration law term "crime involving moral turpitude" (CIMT). This antiquated term is not officially defined, nor does any list of crimes definitively involving moral turpitude exist. There are no "crimes involving moral turpitude" outside of immigration law, so citizens never need to evaluate whether their behavior may or may not be legally turpitudinous. Yet a noncitizen convicted of a CIMT can face one of the most profoundly disruptive and traumatic events a person can experience—deportation.

One CIMT that especially highlights the disparity of consequences that citizens and noncitizens can face for the same behavior is misprision of a felony. Misprision of a felony is a federal misdemeanor punishable by a fine or up to three years in prison.[1] The crime consists of having knowledge of a felony committed by someone else, concealing it, and not informing the authorities as soon as possible.[2] Misprision is little known, infrequently charged, and lightly punished—when committed by citizens. But when committed by a noncitizen, the crime suddenly takes on the fearful aspect of a CIMT. This can result in permanent banishment from the United States.

This Comment uses the disparity in the consequences of misprision of a felony for citizens and noncitizens to illuminate the problem with the CIMT category. It begins with a brief summary of the legal structure of immigration law in the United States. It then describes the significance of the CIMT category and tracks the history and current application of the crime of misprision of a felony. There is a current circuit split regarding whether or not misprision of a felony is categori-

1. 18 U.S.C. § 4 (2012).
2. § 4.

cally a CIMT and the various circuits' arguments are explored, focusing especially on the Ninth Circuit's decision in *Robles-Urrea v. Holder*.[3] Next, this Comment analyzes the immigration consequences of a conviction of misprision of a felony, and shows the wide gulf between its impact on citizens and noncitizens. Finally, this Comment goes on to argue that a ruling that misprision of a felony is not a CIMT could function as a way towards a piecemeal dismantling of the crimes involving moral turpitude category.

I. Background

This Part will introduce the legal structure by which immigration is governed and focus on the role that the concept of crimes involving moral turpitude plays in immigration law. This Part will then introduce the definition, history, and current application of the crime of misprision of a felony. Finally, it will turn to the current circuit split regarding whether or not misprision of a felony is a CIMT for immigration purposes.

A. The Legal Structure of Immigration Law

Immigration law in the United States is primarily governed by the Immigration and Nationality Act (INA) and administered by the Department of Homeland Security (DHS).[4] DHS consists of three entities: two enforcement divisions—Customs and Border Patrol (CBP) and Immigration and Customs Enforcement (ICE)—and the division responsible for adjudicating immigration benefits, U.S. Citizenship and Immigration Services (USCIS).[5] Removal proceedings,[6] however, fall within the purview of the Department of Justice (DOJ)[7] and are conducted by an immigration judge appointed by the Attorney General.[8] The approximately 350 immigration judges that make up the immigration court system work under the authority of the DOJ's Executive Office for Immigration Review (EOIR).[9] Their decisions

3. *See generally* 678 F.3d 702 (9th Cir. 2012).

4. Michael A. Scaperlanda, Immigration Law: A Primer 4 (2009).

5. *Id.*

6. The term "removal" replaced "deportation" as official immigration terminology in 1996. T. Alexander Aleinikoff et al., Immigration and Citizenship: Process and Policy 251 (2016).

7. *Id.*

8. 8 U.S.C. § 1229a(a)(1) (2012); 8 U.S.C. § 1101(b)(4) (2012).

9. U.S. Dep't of Justice, Executive Office for Immigration Review: An Agency Guide 1 (2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download [hereinafter EOIR Agency Guide].

can be appealed to the Board of Immigration Appeals (BIA).[10] BIA decisions can, in turn, be appealed (by the respondent only) to the federal circuit court of appeals that has jurisdiction in the area.[11]

Although they can be appealed to the federal circuit courts of appeal,[12] BIA decisions are generally treated with a great deal of deference by reviewing bodies.[13] *Chevron* deference[14] means that very little immigration law has come about as a result of precedential federal court cases. The law overwhelmingly comes from the INA, as interpreted by the entities that make up DHS and the EOIR.[15] Where immigration statutes are ambiguous or leave terms undefined, most federal courts are very reluctant to impose an interpretation contrary to that of the immigration judge or the BIA.[16] However, when the administrative agency's interpretation of a statute is held as impermissible by the reviewing federal circuit court of appeals, the circuit court will state its contrary finding and remand for an opinion consistent with the legal framework or mode of analysis it used to arrive at its contrary judgment. The application of ambiguous terms or phrases in immigration statutes can thus be entirely different depending on what circuit court of appeals district has jurisdiction over a noncitizen's case. These variances in interpretation by district can endure for long periods of time, as the Supreme Court is rarely called upon to resolve these issues and is even more reluctant than the courts of appeal to step in and unilaterally impose its own interpretation on the immigration courts and the BIA.

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10. 8 C.F.R. § 1003.1(b).

11. *See* EOIR AGENCY GUIDE, *supra* note 9, at 7.

12. In 2017, appeals of BIA decisions made up eighty-five percent of administrative agency appeals, for a total of 5,210 cases. United States Courts, *U.S. Courts of Appeals - Judicial Business 2017*, http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2017; United States Courts, *U.S. Courts of Appeals—Sources of Appeals, Original Proceedings, and Miscellaneous Applications Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2013 through 2017*, http://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2017.pdf.

13. *See* SCAPERLANDA, *supra* note 4, at 20 (quoting Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012 (9th Cir. 2006)).

14. "*Chevron* deference," referring to *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), stands for the principal in administrative law that an administrative agency's permissible interpretation of a statute should be deferred to if Congress has not directly spoken on the issue itself. *Id.* at 842–43.

15. *See generally* USCIS, Adjudicator's Field Manual, Ch. 14: Sources of Information / Conducting Research, §§ 14.3–14.6, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2281.html#0-0-0-324 (last visited Oct. 24, 2019).

16. David Hausman, *The Failure of Immigration Appeals*, 164 U. PENN. L. REV. 1177, 1196 (2016).

B. Crimes Involving Moral Turpitude

One notoriously ambiguous term in immigration law is "crime involving moral turpitude." The original legal function of the term "moral turpitude" was to standardize a test for slander allegations.[17] Words would only rise to the level of slander if they implicated moral turpitude, either by resulting in a conviction for a crime or by causing such harm to the reputation of the slandered that the plaintiff would not need to prove damages.[18] The term and concept of "moral turpitude," at various times in American legal history, has been used in evidence law, voting rights law, juror disqualification, and professional licensing; but it is now almost exclusively used in immigration law.[19] Between 2002 and 2012, the term "appeared in nearly 2,500 reported federal cases . . . many involving immigration issues. These numbers do not include administrative-agency decisions. . . . Yet, the term 'moral turpitude' itself is an antique . . . ."[20]

Conviction of a CIMT can result in a number of serious immigration consequences for a noncitizen. These consequences include removal[21] and being rendered ineligible for cancellation of removal.[22] Yet the term, despite its grave implications and having been in use for hundreds of years, has no precise definition—no list of crimes that definitively constitute a CIMT for immigration purposes exists.[23] While the term "moral turpitude" is undefined, courts commonly use the following reference:

> [T]he most common definition of "moral turpitude" cited by the courts is "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."[24]

A CIMT must not just be a crime technically, but also a crime that somehow reads as inherently wrong, across legal systems and cultural norms. USCIS claims that despite the lack of statutory definition, "[e]xtensive case law . . . has provided sufficient guidance on whether

17. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1010 (2012).

18. *Id.*

19. *Id.* at 1001.

20. *Id.* at 1002 n.12.

21. 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2018).

22. 8 U.S.C. § 1229b(b)(1)(C) (2012).

23. Cabral v. INS, 15 F.3d 193, 194–95 n.5 (1st Cir. 1994).

24. *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. § 1182Ma)(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 § 3 (1975) [hereinafter 23 A.L.R. FED. 480 § 3].

an offense rises to the level of a CIMT."[25] The agency further notes that a CIMT must involve "conduct that shocks the public conscience,"[26] and that "[w]hether an offense is a CIMT is largely based on whether the offense involves willful conduct that is morally reprehensible and intrinsically wrong, the essence of which is a reckless, evil or malicious intent."[27]

Some obvious examples of CIMTs spring to mind: murder is a clear instance, as is rape. But despite USCIS's assurance that sufficient guidance exists, other CIMTs are not so immediately apparent. Among these is the crime of misprision of a felony.

C. Misprision of a Felony

Misprision of a felony can be defined simply: knowing that a felony was committed and failing to notify the authorities.[28] The crime of misprision of a felony is committed by "[w]hoever, 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 . . . ."[29] Moral turpitude is a concept with a long history in American law, but the crime of misprision of a felony is much older still.

An article on misprision of a felony from 1974 begins: "[M]isprision of felony might be considered an antiquated and nonexistent offense . . . ."[30] Misprision first entered the record in 1500s England,[31] was reported to have largely fallen out of use in 1866,[32] and was officially eliminated from English law in 1967.[33] The American statute was enacted in 1790 and has not functionally changed since that time.[34] Nearly every state has eliminated its misprision statute, if it had one, and the crime has widely been considered a relic.[35]

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25. USCIS, Policy Manual, Vol. 12, Pt. F, Ch. 5(A)(1), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter5.html (last updated Oct. 8, 2019).

26. *Id.*

27. *Id.*

28. 18 U.S.C. § 4 (2012).

29. § 4.

30. Carl Wilson Mullis, III, *Misprision of Felony: A Reappraisal*, 23 EMORY L.J. 1095, 1095 (1974).

31. *Id.*

32. *Id.* at 1096.

33. *Id.* at 1101.

34. *Id.*

35. *See generally* E. Lee Morgan, *Misprision of Felony*, 6 S.C.L.Q. 87 (1953); Michael Kelly, *Misprision of Felony Not a Crime in Florida*, 30 U. MIAMI L. REV. 222 (1975); P. R. Glazebrook, *Misprision of Felony – Shadow or Phantom?*, 8 AM. J. LEGAL HIST. 189 (1964).

Despite this general impression, misprision of a felony continues to be a federal crime, and people are still charged with misprision. In non-immigration cases, one theory is that the charge remains in use as a method of securing a plea deal.[36] From 2002 to 2007, misprision of a felony was the most serious charge against a defendant at the time of the initial filing of the case in approximately 600 cases, but was the most serious charge at the time of the termination of the case in over 2,300 instances.[37] The author responsible for this theory posits that "[t]he almost 1:4 ratio bespeaks the frequent utilization of misprision of a felony as a pleading crime."[38] The author further notes that, of those 600 cases in which misprision of a felony was the most serious crime with which the defendant was initially charged, the defendant pleaded guilty to misprision in "virtually all" of them, "suggesting a pre-filing deal between the prosecution and defense."[39]

The one area of law where the crime of misprision of a felony has serious implications in and of itself, rather than as part of a plea arrangement, is immigration law. According to the BIA, and in almost all of the federal circuits, misprision of a felony constitutes a CIMT.

D. Circuit Split on the Question of Misprision of a Felony as a CIMT

Misprision of a felony has been categorically considered a CIMT for immigration purposes by the BIA, and the circuit courts that have reviewed the question have generally concurred, with the exception of the Ninth Circuit.

1. Itani v. Ashcroft

In *Itani v. Ashcroft*, the Eleventh Circuit affirmed a BIA finding that the defendant's misprision of a felony—in this case, his involvement with a scheme to report rented cars stolen—constituted a CIMT which rendered him deportable.[40] Itani was a Lebanese citizen who entered the United States in 1984 and was arrested in 1987 on charges related to transportation of stolen automobiles.[41] Itani pled guilty to

36. Kyle Graham, *Criminal Codes as Ecosystems: The Curious Case of Misprision of a Felony* (Dec. 13, 2011), https://concurringopinions.com/archives/2011/12/criminal-codes-as-ecosystems-the-curious-case-of-misprision-of-a-felony.html [https://web.archive.org/web/20160605124328/https://concurringopinions.com/archives/2011/12/criminal-codes-as-ecosystems-the-curious-case-of-misprision-of-a-felony.html].

37. *Id.*

38. *Id.*

39. *Id.*

40. 298 F.3d 1213, 1214 (11th Cir. 2002).

41. *Id.*

one count of misprision of a felony, and was sentenced to three years in prison and a $25,000 fine.[42] The trial court, however, suspended his sentence and gave him three years of probation.[43] Despite the leniency shown by the district court, Itani received a notice from USCIS several years later that charged him as deportable, based in part on his having committed a CIMT within five years of entry.[44] At his hearing, the immigration judge ordered Itani deported, and in 2001—seventeen years after Itani's crime took place—the BIA dismissed his appeal.[45] The BIA reasoned that "misprision of a felony is a crime involving moral turpitude because it requires the affirmative, intentional concealment of a known felony and has been condemned at common law."[46]

Itani appealed the BIA's decision to the Eleventh Circuit, which decided to uphold the BIA's decision. In so ruling, the court relied on the misprision statute's long history, noting that "concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium."[47] The court also relied on a Supreme Court decision which acknowledged misprision's "archaic ring," but held nevertheless that reporting a crime is a "deeply rooted social obligation."[48]

2. Robles-Urrea v. Holder

The BIA decision in *Matter of Robles-Urrea* was reversed by the Ninth Circuit in *Robles-Urrea v. Holder*.[49] Robles-Urrea was a Mexican citizen who pled guilty to misprision of a felony—in this case, a conspiracy to distribute drugs that occurred over fifteen years prior to his being charged—and served his nine month sentence, followed by a year of supervised release.[50] Afterwards, he left the United States.[51] Upon his return, the DHS charged him as removable for having been convicted of a CIMT.[52] The immigration judge found him removable, and the BIA dismissed his appeal, finding that the "affirmative steps" taken to either conceal the felony or to prevent authorities from dis-

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 1215.
46. *Itani*, 298 F.3d at 1215.
47. *Id.* at 1216 (quoting Branzburg v. Hayes, 408 U.S. 665, 696–97 (1972)).
48. *Id.* (quoting Roberts v. United States, 445 U.S. 552, 557–58 (1980)).
49. Robles-Urrea v. Holder, 678 F.3d 702, 707 (9th Cir. 2012).
50. Matter of Robles-Urrea, 24 I.&N. Dec. 22, 23 (BIA 2006).
51. *Robles-Urrea*, 678 F.3d at 706.
52. *Id.*

covering it are what make misprision of a felony a CIMT.[53] Robles-Urrea filed a motion to reconsider, which the BIA granted in order to double down.[54] It overruled its previous decision, *Matter of Sloan*, which had held that misprision of a felony was *not* a CIMT.[55]

Robles-Urrea appealed to the Ninth Circuit. The court found that the BIA "entirely fail[ed] to explain why misprision of a felony is 'inherently base, vile, or depraved.'"[56] The Ninth Circuit acknowledged that the BIA and the other circuit courts have found misprision to be inherently turpitudinous because it involves lying and deceit. However, the Ninth Circuit reasoned that lying and deceit may not be fair or just actions, but they are not so vile as to shock the conscience.[57] The court held that it was a "'realistic probability, not [just] a theoretical possibility' that the misprision of a felony statute will encompass conduct that is not morally turpitudinous."[58] For these reasons, the Ninth Circuit declined to follow the other circuits and held that misprision of a felony is not categorically a CIMT.

3. Lugo v. Holder

Given this range of opinions, in *Lugo v. Holder,* the Second Circuit decided to abstain from throwing its hat in the ring. In a case involving an appeal of a judgment holding misprision of a felony to be a CIMT, the Second Circuit stated, "We believe it is desirable for the Board to clarify this matter in a published opinion."[59] The court noted the existence of a split amongst the circuits on the question of whether misprision of a felony is a CIMT.[60] The Second Circuit also pointed out that the BIA itself originally held that misprision of a felony was not a

53. *Id.* The statute under which Robles-Urrea was charged, 8 U.S.C. § 1182(a)(2)(A)(i)(I), provides that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude . . . or an attempt or conspiracy to commit such crime, is inadmissible." 8 U.S.C. § 1227(a)(1)(A) states that "[a]ny alien who at the time of entry . . . was within one or more of the classes of aliens inadmissible . . . is deportable." Since Robles-Urrea left the United States and re-entered, the statutory provision regarding deportability on the basis of inadmissibility applied. However, 8 U.S.C. § 1227(a)(2)(A)(i) makes any alien deportable who is convicted of a crime involving moral turpitude within five years of admission to the United States, where a sentence of at least one year may be imposed, so Robles-Urrea's leaving and re-entering the country was not a necessary condition of finding him removable.

54. *Robles-Urrea*, 678 F.3d at 706.

55. *Id.* at 706–07.

56. *Id.* at 708.

57. *Id.*

58. *Id.* at 711–12.

59. Lugo v. Holder, 783 F.3d 119, 121 (2d Cir. 2015).

60. *Id.* at 120.

CIMT in *Matter of Sloan*.[61] In *Matter of Sloan*, the BIA categorically held that misprision is not a CIMT, relying on the fact that worse crimes than "the mere failure to furnish information" do not involve moral turpitude for the purposes of immigration law.[62] However, in *Matter of Robles-Urrea*, the BIA had changed its position to align with the Eleventh Circuit's ruling in *Itani*.[63]

4. Villegas-Sarabia v. Sessions

The BIA-*Itani* line of thought was echoed in the Fifth Circuit case *Villegas-Sarabia v. Sessions*.[64] Villegas-Sarabia was a Mexican citizen who was brought to the United States by his mother and his U.S.-citizen father when he was a few months old, and remained in the United States continuously ever since.[65] Unrelated complications in immigration law caused Villegas-Sarabia's citizenship to be unclear for many years, but he became a lawful permanent resident when he was eleven years old.[66] Villegas-Sarabia was charged with possession of a firearm by a felon in 2011, and he applied for citizenship in between his guilty plea and his sentencing.[67] USCIS denied his application and subsequently initiated deportation proceedings against him, on the grounds that a 1997 conviction for misprision of a felony constituted a CIMT making him removable.[68] The BIA affirmed the immigration judge's ruling.[69]

On appeal, the Fifth Circuit stated that it uses the categorical approach to analyze whether or not crimes fit the BIA definition of a CIMT.[70] The court explained that the categorical approach requires the court to ignore the individual circumstances of the particular crime at issue, instead determining whether the minimum criminal conduct necessary to sustain a conviction under the statute is present.[71] In *Villegas-Sarabia*, the court upheld the conclusion it had reached in past cases—that misprision of a felony constitutes a CIMT because it involves an element of intentional deception, and that intentional deception inherently implicates moral turpitude.[72]

61. Matter of Sloan, 12 I.&N. Dec. 840, 848 (A.G. 1968, BIA 1966).
62. *Id.* at 842.
63. Matter of Robles-Urrea, 24 I.&N. Dec. 22, 26–27 (BIA 2006).
64. Villegas-Sarabia v. Sessions, 874 F.3d 871, 880–81 (5th Cir. 2017).
65. *Id.* at 874.
66. *Id.*
67. *Id.*
68. *Id.* at 875.
69. *Id.* at 875–76.
70. *Villegas-Sarabia*, 874 F.3d at 877.
71. *Id.*
72. *Id.* at 878.

The Fifth Circuit acknowledged the circuit split, with *Itani* on one side, the Ninth Circuit on the other, and the Second Circuit deciding not to weigh in.[73] The Fifth Circuit noted that it "has not expressly adopted *Itani*, but some of our panels have cited it favorably," ultimately deciding that its history of favorable treatment of *Itani* was strong enough to allow it to support the BIA's interpretation.[74]

In a recent opinion issued by the BIA, *Matter of Mendez*, the BIA reaffirmed its holding from *Matter of Robles-Urrea*, declaring its position that misprision of a felony is categorically a CIMT.[75]

II. Analysis

This Part will analyze misprision of a felony as a CIMT. This Part will also examine the Ninth Circuit's decision in *Robles-Urrea*, its reasoning and treatment of BIA and other circuit cases on the question. It will also discuss its use of the categorical and modified categorical approach. Next, this Part will examine other arguments in favor of deciding that misprision of a felony is not a CIMT. Finally, this Part argues against the crimes involving moral turpitude category as a whole.

A. Misprision of a Felony Should Not be Categorized as a CIMT

Misprision of a felony should not be categorized as a CIMT, because it does not satisfy the generally agreed-upon elements of a crime involving moral turpitude. It does not necessarily shock the conscience, or indicate a level of "baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men."[76] Crimes that demonstrate a much greater rupture of our social norms, such as assault and incest, are not categorized as crimes involving moral turpitude.[77] In *Robles-Urrea v. Holder*, the Ninth Circuit acknowledged this and held that misprision of a felony is not categorically a CIMT.[78] For the reasons given in the Ninth Circuit's opinion, the crime's relative obscurity, and the disproportionate severity of the consequences to noncitizens, the existing circuit split should be resolved and misprision of a felony declared categorically not a CIMT.

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73. *Id.* at 879–80.

74. *Id.* at 880–81.

75. Matter of Mendez, 27 I.&N. Dec. 219 (BIA 2018).

76. 23 A.L.R. Fed. 480 § 3, *supra* note 24.

77. U.S. Dep't of State, Foreign Affairs Manual & Handbook, 9 FAM 302.3-2(B)(2)(U)(c)(3)(b)(i), (iii), https://fam.state.gov/searchapps/viewer?format=html&query=moral%20turpitude&links=MORAL,TURPITUD&url=/FAM/09FAM/09FAM030203.html#M302_3_2_B_2.

78. 678 F.3d 702, 707 (9th Cir. 2012).

B. The Ninth Circuit Court's Reasoning in Robles-Urrea

1. The Categorical Approach and the Modified Categorical Approach

The Ninth Circuit's opinion in *Robles-Urrea* used both the categorical approach and the modified categorical approach to analyze whether misprision of a felony is categorically a CIMT.[79] The categorical approach is when a court considers only the elements of the offense, rather than the facts and circumstances surrounding the crime.[80] It is designed to analyze whether the bare minimum of criminal conduct necessary to maintain a conviction under the statute would necessarily make the accused removable, while ensuring that the statute is not so broad that it encompasses conduct that the accused did not necessarily perform.[81] The categorical approach means that the facts of the underlying criminal conviction do not need to be, and in fact cannot be, re-litigated.[82] The modified categorical approach allows immigration judges to examine the record below, and the noncitizen's actual conduct, to determine whether or not the noncitizen is removable on the basis of their conviction for a crime.[83]

In its categorical analysis, the Ninth Circuit set out to compare the elements of Robles-Urrea's crime with the generic definition of moral turpitude.[84] The categorical approach requires a reviewing court to find a "realistic probability"[85] that the statute is so broad that it will sweep in conduct beyond the scope of the generic federal offense before it can overturn an administrative decision.[86] The court began by stating that CIMTs are nowhere defined or listed, but are generally considered by interpreting courts and the BIA to mean "crimes that

79. *Id.*

80. Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1674 (2011).

81. *Id.*

82. Brief for American Immigration Lawyers Ass'n et al. as Amici Curiae Supporting Reconsideration at 4, Silva-Trevino, 24 I.&N. Dec. 687 (A.G. 2008) (No. A013 014 303).

83. Das, *supra* note 80, at 1674.

84. Robles-Urrea v. Holder, 678 F.3d 702, 707 (9th Cir. 2012).

85. Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 282–84 (2012) (There are two standards for analyzing the elements of a noncitizen's conviction versus the generic federal offense: the "realistic probability" approach and the "least culpable conduct" approach. The realistic probability standard is more difficult for noncitizens to meet, but it is the approach recommended for use in cases involving crimes of moral turpitude. Under the least culpable conduct analysis, the court would simply ask whether the least culpable conduct that could possibly have resulted in the noncitizen's conviction necessarily involved morally turpitudinous behavior.). For an explanation and analysis of the two approaches and the categorical approach as a whole, see *id.*

86. *Robles-Urrea*, 678 F.3d at 707 (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007)).

are 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'"[87] The court noted that CIMTs tend to fall into two categories—crimes involving "grave acts of baseness or depravity," and crimes involving fraud.[88] These categories necessarily leave many crimes out. Not every crime, not even every serious crime, is a CIMT just because it involves conduct contrary to society's rules and norms. The court pointed out that many crimes, including burglary and assault with a deadly weapon, are not CIMTs—a crime involving moral turpitude must go even further and "shock . . . the public conscience."[89] The problem with the BIA's categorical analysis, the Ninth Circuit found, was that it simply concluded that misprision of a felony met the criteria for a CIMT, without explaining how and why it came to that conclusion.[90]

The BIA relied on the Eleventh Circuit's opinion in *Itani* to conclude that misprision of a felony is a CIMT, because it consists of behavior that "runs contrary to accepted social duties."[91] The Ninth Circuit, however, pointed out the flaw of this line of reasoning by quoting its opinion in *Navarro-Lopez v. Gonzales,* where it found that the *Itani* rationale would mean that *every* crime is necessarily a CIMT.[92] All crimes involve some element of behavior that runs contrary to an accepted social duty, but not all of these behaviors have the requisite elements of baseness or depravity that raise them to the level of a CIMT.[93] If Congress intended for any conviction for any crime to render a noncitizen removable and ineligible for cancellation of removal, there would be no need for the moral turpitude distinction. The Ninth Circuit analysis distinguished misprision of a felony from similar crimes that have been held to be CIMTs, such as obstruction of justice and accessory after the fact, because misprision, unlike those other crimes, does not require any particular intent but only knowledge of the felony.[94]

Finally, the Ninth Circuit pointed out the absurdity of holding misprision of a felony to be categorically a CIMT, when the felony concealed by the defendant could carry less serious consequences than

87. *Id.* at 708 (quoting Matter of Robles-Urrea, 24 I.&N. Dec. 22, 25 (BIA 2006)).
88. *Id.*
89. *Id.* (quoting Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1075–76 (9th Cir. 2007)).
90. *Id.*
91. Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002).
92. *Navarro-Lopez*, 503 F.3d at 1070–71.
93. *Id.*
94. Robles-Urrea v. Holder, 678 F.3d 702, 710 (9th Cir. 2012).

the defendant's concealment of it.[95] Because nothing in the misprision of a felony statute as it is written necessarily implicates moral turpitude in all cases, the court held that it is not categorically a CIMT.[96]

The Ninth Circuit remanded the case to the BIA with instructions to conduct an analysis using the modified categorical approach.[97] Since the modified categorical approach requires an evaluation of the defendant's actual conduct, rather than an evaluation of the statutory elements of the offense, a modified categorical analysis is more properly conducted by a lower tribunal with access to more of the specific facts.[98] Nevertheless, the court maintained that it had "severe doubts" as to whether the government could prevail under such analysis—if misprision of a felony is not categorically a CIMT, the court found it extremely unlikely that Robles-Urrea's behavior in committing misprision involved moral turpitude.

2. Misprision of a Felony as an Offense Involving Fraud

In a footnote to the *Robles-Urrea* opinion, the Ninth Circuit noted that it did not touch upon the question of whether or not misprision of a felony is an offense involving fraud, because the BIA had not advanced that theory in its opinion.[99] Misprision of a felony is often understood to fall under the category of fraud, and it is this understanding that justifies its categorization as a CIMT—at least, that is what the Eleventh Circuit held in *Itani.*[100] The rationale relied on by the court in *Itani*—that misprision of a felony is a CIMT because it involves fraudulent conduct—is unpersuasive, because misprision does not necessarily require fraud as it is generally understood. For instance, the FBI's definition of fraud offenses does not capture misprision of a felony. The FBI's Uniform Crime Reporting Program lists the following fraud offenses: false pretenses/swindle/confidence game, credit card/automatic teller machine fraud, impersonation, welfare fraud, wire fraud, identity theft, and hacking /computer invasion.[101] Misprision of a felony does not appear on this list. The

95. *Id.* at 710–11.
96. *Id.* at 711.
97. *Id.* at 712–13.
98. *Id.* at 712.
99. *Id.* at 711 n.8.
100. Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002).
101. U.S. Dep't of Justice—Federal Bureau of Investigation: Uniform Crime Reporting Program, National Incident-Based Reporting System, (NIBRS), 2017, *Crimes Against Persons, Property, and Society*, https://ucr.fbi.gov/nibrs/2017/resource-pages/crimes_against_persons_property_and_society-2017.pdf (Released Fall 2018) [hereinafter *Crimes Against Persons, Property, and Society*].

database defines fraud offenses as the "intentional perversion of the truth for the purpose of inducing another person, or other entity, in reliance upon it to part with something of value or to surrender a legal right."[102] Misprision does not contemplate that the misprisor has failed to inform law enforcement of a felony for the purpose of inducing reliance, or to cause someone to part with something of value or to surrender any legal right. In fact, the purpose for the misprision is not contemplated in the crime's definition.[103] So the fraudulent conduct justification for misprision's classification as a CIMT is unconvincing.

C. Possible Justifications for Misprision of a Felony

It is not difficult to imagine various reasons why someone may choose to not reveal to law enforcement that they have knowledge of a felony—fear of reprisal from known felons, fear of candor to officials due to immigration status, mistrust of law enforcement due to experience with official corruption in the immigrant's home country, unwillingness to bring criminal or immigration consequences on a friend or family member, unwillingness to incriminate (or seem to incriminate) oneself, and many more.

In 2000, Congress enacted the Victims of Trafficking and Violence Prevention Act, which provides a method for undocumented crime victims to obtain legal status in the United States if they cooperate with law enforcement.[104] The legislation acknowledges that "because victims are often illegal immigrants . . . they are repeatedly punished more harshly" than offenders.[105] The law goes on to note that because noncitizen crime victims are:

> [F]requently unfamiliar with the laws, cultures, and languages . . . subjected to coercion and intimidation . . . and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.[106]

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102. U.S. DEP'T OF JUSTICE—FEDERAL BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTING PROGRAM, NATIONAL INCIDENT-BASED REPORTING SYSTEM, (NIBRS), 2017, *NIBRS Offense Definitions*, 2017, 3, https://ucr.fbi.gov/nibrs/2017/resource-pages/nibrs_offense_definitions-2017.pdf (Released Fall 2018) [hereinafter *NIBRS Offense Definitions*].

103. 18 U.S.C. § 4 (2012) ("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.").

104. *See generally* 22 U.S.C. § 7101 (2012).

105. § 7101(b)(17).

106. § 7101(b)(20).

Even direct victims of crimes find it difficult to cooperate with law enforcement—noncitizens with mere knowledge of a felony have all the disincentives to cooperation listed by Congress, with no hope of an immigration benefit. Indeed, as U.S. lawmakers themselves pointed out, a noncitizen who chooses to come forward will likely face a harsher penalty than the felon.[107]

The Ninth Circuit's reasoning in *Robles-Urrea* is persuasive—misprision of a felony is categorically not a CIMT, because the elements of misprision of a felony do not necessarily implicate conduct that is especially base, depraved, or shocking to the public conscience. Instead, the elements of misprision of a felony implicate conduct that is not at all difficult to justify.

D. The Relative Obscurity of Misprision of a Felony

Citizens are very rarely charged with misprision of a felony. It is an archaic crime that is not widely known. When misprision is mentioned in scholarly works or articles, it is often described as little-known or obscure.[108] The elements of the crime have to be outlined in media for both the general public and for legal professionals. Many articles written for the general public that discuss misprision of a felony approach the subject from the angle of a novelty or a warning—*You yourself may have committed this obscure crime you've never heard of! Here's how!*[109] Considering how rarely misprision of a felony is charged or convicted, how unknown it is to the general public and even to legal professionals, and how it is often described as a crime that anyone may have committed without even knowing it, it is disingenuous to claim that misprision of a felony suddenly implicates moral turpitude when perpetrated by immigrants.

Charges of misprision of felony are rare, both because conduct encompassed in the definition of misprision of a felony can usually be otherwise charged, and because misprision of a felony simply does not

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107. *See generally* § 7101.

108. *See, e.g.*, Mullis, III, *supra* note 30 ("While misprision of felony might be considered an antiquated and nonexistent offense, a close examination of the crime and its history indicates that this is not the case, for the crime still exists today."); Royal G. Shannonhouse III, *Misprision of a Federal Felony: Dangerous Relic or Scourge of Malfeasance?*, 4 U. BALT. L. REV. 59, 60 (1974) (noting the crime's "obsolescence" and that "it may shock many United States citizens to learn that there is a law-imposed duty to inform the government of misconduct of one's fellows . . . .").

109. *See, e.g.*, Arlene Jones, *Are you guilty of misprision of a felony?*, AUSTIN WEEKLY NEWS, https://www.austinweeklynews.com/News/Articles/4-6-2017/Are-you-guilty-of-misprision-of-a-felony%3F-/ (Apr. 6, 2017); Van Smith, *Obscure charge "misprision of a felony" adds to feds' arsenal to fight "Stop Snitching,"* BALTIMORE CITY PAPER, https://www.citypaper.com/bcp-cms-1-1057900-migrated-story-cp-20101103-mobs-20101103-story.html (Nov. 3, 2010).

shock the conscience, except in the most egregious cases. Arguments have been made for modifying the statute to apply only to public officials.[110]

Others have characterized misprision of a felony as a "pleading crime."[111] Kyle Graham has characterized a "pleading crime" as a tool that prosecutors use when they do not wish to, or are unable to, charge a more substantive crime.[112] This conception of misprision is backed up by data indicating that misprision is rarely the most serious crime with which a defendant is charged at the initial time of filing, but is much more frequently the most serious charge by the end of the case.[113] In keeping with other media mentions of misprision, the article refers to it as a "humble crime" that "doesn't get much attention."[114]

Statistics on misprision of a felony are not available on most databases maintained by the United States government or by state governments. The lack of statistics speaks for itself, demonstrating how rarely this crime is charged and how little importance is placed on it. The FBI's Uniform Crime Reporting Program—National Incident-Based Reporting System does not catalog misprision of felony.[115]

Given the obscurity of the crime of misprision of a felony, the rarity with which it is charged, the perception of misprision as a "pleading crime," and the lack of statistics the government keeps relating to it, it is counter-intuitive to claim that this crime somehow shocks the public conscience with its base depravity when it is committed by noncitizens. Misprision of a felony, as it pertains to citizens, is discussed by scholars as an archaic crime whose continued existence is a surprise. Misprision of a felony, as it pertains to noncitizens, is categorized as a crime involving "inherently base, vile, and depraved" behavior. This gulf between interpretations is so wide that it is the disparity itself that shocks the conscience.

E. The Disproportionate Consequences of Misprision of a Felony for Noncitizens

The consequences of being charged with or convicted of a CIMT are very severe for a noncitizen. These consequences can mean being

110. *See* Mullis, III, *supra* note 30, at 1114–15.
111. Graham, *supra* note 36.
112. *Id.*
113. *Id.*
114. *Id.*
115. *See Crimes Against Persons, Property, and Society*, *supra* note 101; *see also NIBRS Offense Definitions supra* note 102.

deported.[116] They could also mean that a lawful permanent resident who attempts to adjust status and become a citizen faces a denial of their application for naturalization.[117] Additionally, the current administration has ramped up the consequences of the denial of an N-400 application.[118] If an application to naturalize is denied on the grounds of good moral character, USCIS has stated that it will issue a Notice to Appear (NTA), which is a charging document issued by the government to a citizen it intends to deport.[119] CIMTs will implicate the good moral character of a noncitizen.

If a noncitizen with a conviction, charge, or even uncharged history of misprision of a felony visits an immigration attorney to discuss naturalization, a competent attorney must advise that their attempt to become a citizen could lead to the issuance of a NTA, and thus could lead to their deportation. In *Padilla v. Kentucky*, the Supreme Court recognized that an attorney's failure to adequately apprise his client of the immigration consequences of a guilty plea amounted to ineffective assistance of counsel—a violation of his noncitizen client's Sixth Amendment rights.[120] In the wake of that decision, all attorneys who work with noncitizens are even more assiduous in warning clients of the potential immigration consequences of any decision they might make. With this knowledge, the noncitizen may elect not to take the risk of applying to naturalize, despite fulfilling the requirements of residency and having maintained legal status. In this way, the categorization of misprision of a felony as a CIMT could lead to people—who are otherwise entirely eligible for United States citizenship—not becoming citizens. These people are forced instead to live in a permanent limbo that could end in deportation at any time.

Deportation is a very serious consequence. Despite the fact that it is not a criminal punishment, but a civil procedure, many judges and legal scholars have pointed out that the American legal system's insistence that it is not a punishment is disingenuous as well. In several Supreme Court cases, Justices have declared in both majority and dissenting opinions that deportation is an extremely serious consequence and that to be casual about deportation is a grave mistake. Indeed, the

116. 8 U.S.C. § 1227(a)(2)(A)(i) (2018).

117. *Instructions for Application for Naturalization*, USCIS Form N-400, 1 (2016).

118. *Id.*

119. U.S. Dep't of Homeland Security, USCIS Policy Manual, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens,* PM-602-0050.1, 7 (June 28, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf.

120. Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010).

President of the National Association of Immigration Judges has acknowledged that immigration cases are "complex and high stakes matters . . . which can be tantamount to death penalty cases . . . adjudicated in a setting which most closely resembles traffic court."[121]

F. Supreme Court Arguments for Fairness to Noncitizens

In the recent Supreme Court decision *Padilla v. Kentucky*, Justice John Paul Stevens wrote that "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[122] The Court found that the increase in crimes that can lead to deportation and the decrease in discretion that immigration judges can exercise during or after sentencing, have "dramatically raised the stakes of a noncitizen's criminal conviction."[123] Justice Stevens noted that deportation has long been recognized as a "particularly severe 'penalty,'" citing the landmark immigration case *Fong Yue Ting v. United States.*[124] In *Padilla*, the Court held that lawyers must inform their clients when their pleas carry a risk of deportation or violate the Sixth Amendment.[125] This holding acknowledges the severity of deportation as a criminal consequence for a noncitizen. It makes it clear that in the Court's opinion, nothing that could potentially lead to deportation should be taken lightly.

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121. Memorandum from Dana Leigh Marks, President, Nat'l Ass'n of Immigration Judges 2 (Oct. 2009), https://pennstatelaw.psu.edu/_file/NAIJ%20Priorities%20Short%20List%20-%20October%202009.pdf.

122. *Padilla*, 559 U.S. at 364.

123. *Id.* at 356, 364.

124. *Id.* at 365 (citing Fong Yue Ting v. United States, 149 U.S. 698, 741 (1893)). In *Fong Yue Ting*, the Supreme Court upheld a law requiring Chinese laborers who could not produce a certificate of residence to provide two white—not Chinese—witnesses who could attest to their residence. 149 U.S. at 729. The majority opinion in that case stated clearly that "deportation is not punishment for crime. It is not a banishment . . . ." *Id.* at 730. Justice Stevens' reference to *Fong Yue Ting* in *Padilla* seems to function as a repudiation of the Court's history of upholding laws that disadvantage noncitizens, as well as a reference to Justice Murphy's apt and modern-sounding dissent:

> It needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel.

Id. at 740. Justice Field's dissent likewise acknowledges deportation as punishment "beyond all reason in its severity. It is all out of proportion to the alleged offence." *Id.* at 759. These dissents are mirrored Justice Steven's opinion, which reflects on deportation's status as a punishment for crime that is not, technically, criminal punishment.

125. *Padilla*, 559 U.S. at 374; Robles-Urrea v. Holder, 678 F.3d 702, 705 (9th Cir. 2012) (quoting Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1074–75 (9th Cir. 2007)).

Supreme Court cases have long acknowledged the severity of deportation. In Justice Robert H. Jackson's dissent in *Shaughnessy v. United States ex rel. Mezei*, he defended affording due process to noncitizens by acknowledging that, while the law may place more restrictions on noncitizens, "basic fairness" should still apply and treatment of the noncitizen and the citizen should be essentially comparable in terms of fairness.[126] In discussing due process violations as they pertained to a noncitizen, he wrote:

> If the procedures used to judge this alien are fair and just, no good reason can be given why they should not be extended to . . . citizens. If they would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien.[127]

Justice Jackson's argument for affording procedural due process to noncitizens who have been admitted to the United States, especially to lawful permanent residents, is a compelling argument for fairness in immigration law in general. He advocates for treatment of noncitizens that is not precisely equal to that of citizens, but equitable. This argument is not an exact parallel for the differences in consequences of misprision of a felony between citizens and noncitizens—the consequences cannot be compared, because citizens cannot be deported. And while it is rarely charged, and rarely has grievous consequences on its own, misprision of a felony is still a federal crime regardless of who commits it. But the principles Justice Jackson advocated for still apply. If misprision of a felony is not regarded as morally turpitudinous when committed by a citizen, it is fundamentally unfair to categorize it as a CIMT when applied to noncitizens.

However, in Justice William Douglas's dissenting opinion in *Harisiades v. Shaughnessy*, he challenged the failure to characterize deportation as a punishment. He described it as "punishment through banishment from the country,"[128] and wrote that

> Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair.[129]

Given the severity of these consequences, Justice Douglas argued that none of the civil rights that noncitizens enjoy in the United States can

126. 345 U.S. 206, 225 (1953).
127. *Id.*
128. Harisiades v. Shaughnessy, 342 U.S. 580, 598 (1952).
129. *Id.* at 600.

be properly enjoyed if the threat of being deported arbitrarily hangs over their heads. "Unless they are free from arbitrary banishment the 'liberty' they enjoy while they live here is indeed illusory."[130] That misprision of a felony should carry such a heavy punishment for noncitizens, to the extent that Supreme Court Justices have found it to impede their enjoyment of their civil rights, is out of proportion to the crime.

G. The Likelihood of Deportation

Additionally, an immigrant cannot rely on the hope that an immigration judge will simply recognize that their conduct was not, in fact, shocking to the conscience and decline to order them deported. Most proceedings before immigration judges result in deportation.[131] In 2017, almost 75% of cases in immigration courts resulted in removal or "voluntary departure," with relief being granted in only 13% of cases.[132] Furthermore, an immigration judge's hands are tied in many respects. Judicial Review of Administrative Decisions (JRAD) was formerly a method by which immigration judges could exercise discretion in deciding whether or not to uphold a noncitizen's order of removal.[133] Now, however, JRAD no longer exists.[134] Thus, deportation is an almost foregone conclusion.

A noncitizen with a charge or conviction of misprision of a felony is very likely to face deportation, or live with the threat of deportation, because of its categorization as a CIMT. This categorization also makes noncitizens ineligible to apply for cancellation of removal.[135]

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130. *Id.*

131. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: STATISTICS YEARBOOK FISCAL YEAR 2017, 14, https://www.justice.gov/eoir/page/file/1107056/download.

132. *Id.*

133. *See* former Immigration and Nationality Act § 244, 8 U.S.C. § 1254 (1994) (repealed Sept. 30, 1996) (The INA formerly allowed for Immigration Judges to balance the positive and negative equities and come to an independent conclusion regarding the deportation of a noncitizen.).

134. *Id.* The Supreme Court provided a concise history in *Padilla v. Kentucky*:

> [T]he JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA), and in 1990 Congress entirely eliminated it. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996.

559 U.S. 356, 363 (2010) (citations omitted); Robles-Urrea v. Holder, 678 F.3d 702, 705 (9th Cir. 2012) (quoting Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1074–75 (9th Cir. 2007)).

135. 8 U.S.C. § 1229b(d)(1) (2008) provides that a noncitizen's continuous residence in the United States—a condition of eligibility to apply for cancellation of removal under 8 U.S.C. § 1229b(a)—is terminated when a noncitizen has committed an offense that renders him inad-

The severity of these consequences is grossly disproportionate to the crime of misprision of a felony, and grossly disproportionate to the obscurity and unimportance of the crime in American law. To eliminate its designation as a CIMT would bring the consequences of a noncitizen's conviction of misprision of a felony into proportion with public perception of the crime and with the insignificant place it holds in American law generally.

H. Ultimately the CIMT Category Should be Taken Out of the Analysis of Immigration Decisions

The classification "crimes involving moral turpitude" should be made less important in immigration law, because it is vague, archaic, and not useful. It sweeps crimes such as petty shoplifting and turnstile jumping[136] into the same category, with the same consequences, as crimes such as murder and rape. A wholesale disavowing of the category is unlikely. However, certain crimes that do not at all satisfy the generally accepted parameters of moral turpitude, such as misprision of a felony, could be categorically ruled *not* to be CIMTs. Enough of these rulings, taken together, could function as a piecemeal dismantling of the category.

Given the lack of clarity in the CIMT category, many have questioned whether it is unconstitutionally vague.[137] The category survived a "void for vagueness" challenge before the Supreme Court in 1951.[138] In *Jordan v. De George*, the Supreme Court held that the defendant, who had been convicted of tax fraud, should have been on notice that his crime would constitute a CIMT because the case law on fraud had been unambiguous—"[t]he phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct."[139] The test, the Court held, is not whether a statute meets "impossible standards of specificity . . . ,"[140] but "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[141] Since

missible or deportable. A conviction of a crime involving moral turpitude makes a noncitizen inadmissible under 8 U.S.C. § 1182(a)(2) and deportable under 8 U.S.C. § 1227(a)(2).

136. Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 674 (2015).

137. *See, e.g.*, Mary Holper, *Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NEBRASKA L. REV. 647, 648 (2012); Sara Salem, *Should They Stay or Should They Go: Rethinking the Use of Crimes Involving Moral Turpitude in Immigration Law*, 70 FLA. L. REV. 225, 250 (2018).

138. Jordan v. De George, 341 U.S. 222, 231 (1951).

139. *Id.* at 232.

140. *Id.* at 231 (citing Connally v. Gen. Constr. Co., 269 U.S. 385 (1926)).

141. *Id.* at 231–32 (citing United States v. Petrillo, 332 U.S. 1 (1947)).

tax fraud was consistently categorized as a CIMT, the Court declined to pursue the matter further—holding that the implications of the defendant's conduct should have been clear in this instance, "[w]hatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases[.]"[142]

Justices Jackson, joined by Justices Hugo Black and Felix Frankfurter, dissented, reasoning that deportation is so grave a punishment that imposing it on the basis of so vague a phrase as "crime involving moral turpitude" cannot be constitutional.[143] The absolute lack of any settled definition of moral turpitude clearly frustrated the dissenters. They agreed with the defendant that the legislative history indicated that Congress only had crimes of violence in mind when originally enacting the statute.[144] The dissent continued that any attempt to discern the "common understanding and practices" of the entire United States would be impossible, and that deportation of a longtime lawful permanent resident on the basis of such a flimsy construction would be "a savage penalty" and that "due process of law requires standards for imposing it as definite and certain as those for conviction of crime."[145]

Despite this persuasive reasoning, the Supreme Court has not revisited the issue and the CIMT category survives today, just as vague as ever.[146] If it cannot be defeated, perhaps it could be worked around. The category of CIMTs could be dismantled bit by bit, in piecemeal challenges to its various provisions. This could be done until the trend is obvious and Congress takes action to dismantle the category of its own accord, or until it has lain dormant so long that no one seriously thinks of charging or prosecuting someone using it as a rationale.

III. Impact

This Part examines the potential impact of declaring misprision of a felony not to be a CIMT. It also discusses how that step might play a larger role in United States immigration law in general by functioning as a step towards dismantling the crimes involving moral turpitude category. The Comment concludes by examining the impact this action would have on noncitizens' lives.

142. *Id.* at 232; 18 U.S.C. § 4 (2012).

143. *Id.* at 232–33.

144. *Jordan*, 341 U.S. at 235.

145. *Id.* at 243.

146. *But cf.* Derrick Moore, *Crimes Involving Moral Turpitude: Why the Void-for-Vagueness Argument is Still Available and Meritorious*, 41 Cornell Intl. L. J. 813 (2008) (arguing that the *Jordan* decision has not foreclosed a void-for-vagueness argument and that the Supreme Court should revisit its decision).

A. A Step Towards Dismantling CIMTs

If the circuit split was resolved in favor of the Ninth Circuit's interpretation of misprision of a felony as categorically not a CIMT, it could function as the first step in dismantling the outdated, unclear, unfair, oft-derided CIMT designation altogether. If the BIA were to reverse its opinion and issue a precedential ruling that misprision of a felony is categorically not a CIMT, or if the Supreme Court were to take the (unlikely) step of resolving the circuit split, it would not only be the correct analysis of misprision of a felony for the reasons outlined above, but it would further weaken the outdated CIMT category.

While Congress could pass legislation amending the INA to remove the CIMT designation from the statute, this seems wildly unlikely. Immigration law reform has always had difficulty gaining support or passing in Congress. The last comprehensive reform to the INA was the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[147] and that Act seriously increased deportations and other punishments for noncitizens.[148] Furthermore, the Trump administration is committed to increasing deportations.[149] The chances that any Congress, much less a legislature acting during the Trump administration, will take the initiative to propose rewriting and revising a section of the INA seems incredibly unlikely, especially in order to do away with a large portion of criminal penalties for immigrants.[150] Congress would be dismantling one of the oldest and broadest categories of behavior that renders an immigrant inadmissible or deportable, and essentially agreeing to legitimize large swathes of noncitizen conduct. In 2019 President Donald Trump declared a national emergency in order to build a wall between the United States and Mexico. It was designed to both curb immigration and send a message of exclusion to nonci-

147. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

148. *See generally* Illegal Immigration Reform and Immigrant Responsibility Act, tit. II.

149. *See e.g.*, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (announcing expanded immigration enforcement priorities).

150. *See* Cade, *supra* note 136, at 719 ("Year after year—for over a decade now—multiple bipartisan efforts to engineer comprehensive immigration reform have failed."); *see also* 8 U.S.C. §§ 1229b(a), 1229b(d)(1) (2012); 8 U.S.C. § 1182(a)(2)(2012); 8 U.S.C. § 1227(a)(2) (2018). *See generally* Ryan Lizza, *Getting to Maybe: Inside the Gang of Eight's Immigration Deal*, NEW YORKER (June 24, 2013), https://www.newyorker.com/magazine/2013/06/24/getting-to-maybe; Marc R. Rosenblum, U.S. IMMIGRATION POLICY SINCE 9/11: UNDERSTANDING THE STALEMATE OVER COMPREHENSIVE IMMIGRATION REFORM, MIGRATION POLICY INST., Aug. 2011, at 12.

tizens,[151] and so it is difficult to imagine legislative action softening or eliminating the crimes against moral turpitude category.

B. Allowing CIMTs to Fade Away

If crimes were regularly adjudicated not to be CIMTs and the legitimacy of the category was continually called into question, it is possible that in time, a pattern could emerge. CIMTs could cease to carry such serious weight in immigration practice, even if they remained on the books in immigration law as a part of the INA. Since the INA does not define crimes involving moral turpitude, no crimes are statutorily CIMTs. Should enough crimes be declared categorically *not* CIMTs, the phrase could remain part of the INA as a sort of relic, without the serious consequences it carries today.

There are other crimes that were formerly deemed CIMTs that are no longer regularly prosecuted as such.[152] One such example is homosexuality and the crimes that were used to prosecute it.[153] In 1990, Congress revised the INA to remove "affliction with a psychopathic personality . . . or sexual deviation" as a ground of exclusion or deportation.[154] Former criminal consequences of homosexuality, and how the prosecution and designation of that "crime" has changed along with society, could provide a template for how to gradually take the teeth out of crimes involving moral turpitude.

In 1956, a lawful permanent resident who had been convicted of "gross indecency" with another man in Toronto was ordered deported for having committed a CIMT.[155] The BIA noted that, like CIMTs, the Canadian statute under which he was convicted did not anywhere define "gross indecency," so it initially overturned the immigration judge's deportation order.[156] However, on reconsideration, the BIA came to agree with the government's conclusion that any set of facts involving gross indecency between two men would necessarily *have* to have involved moral turpitude, stating that they failed to find any cases in which a conviction under that statute did not implicate facts that necessarily involved moral turpitude.[157] In 1959, the BIA stated

151. *See* Peter Baker, *Trump Calls Emergency, Defying Congress*, N.Y. TIMES, Feb. 15, 2019, at A1.

152. *See e.g.*, Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 771 (1993) (citing Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990)).

153. *Id.*

154. *Id.*

155. Matter of H., 7 I.&N. Dec. 359, 359–60 (BIA 1956).

156. *Id.* at 360.

157. *Id.* at 361.

even more clearly that a noncitizen was deportable on the basis of homosexuality alone.[158] The lawful permanent resident defendant in that case had been convicted of gross indecency and sodomy after having made a homosexual overture to an undercover police officer.[159] The Board found that "[t]here is no question that crimes of gross indecency between male persons and sodomy are crimes involving moral turpitude by the language of the Michigan statutes, and the decisions of this Board, and under such court decisions as are available."[160] The man was found deportable.[161]

There has never been a list of crimes or behaviors fitting the crimes involving moral turpitude standard, so theoretically, the BIA could issue similar rulings today. As Shannon Minter pointed out in 1993:

> The 1990 Act did not . . . explicitly provide new guidelines or standards about how to interpret or apply the crimes involving moral turpitude exclusion . . . . As before the 1990 Act, the INS [Immigration and Nationality Service] and the courts retain nearly unfettered discretion as to how to interpret these provisions. As a result, although U.S. immigration law no longer explicitly discriminates on the basis of lesbian or gay identity alone, the INS and the courts have not reevaluated their old policy of interpreting these provisions in a manner that singles out lesbians and gay men for disparate treatment.[162]

However, while immigration judges *could* continue to interpret the CIMT category to include charges based solely on homosexuality, society has changed. Sodomy laws have been struck down by the Supreme Court as unconstitutional.[163] Some other countries still have sodomy laws; some American laws that were used in the past to prosecute homosexual conduct, such as public lewdness and solicitation statutes, remain on the books.[164] But today, noncitizens are rarely found deportable for having committed CIMTs when those crimes merely implicate homosexual behavior.

Thus, the courts could still categorize certain crimes, such as a conviction of sodomy in a foreign country, or a conviction for public lewdness or solicitation based on homosexual conduct, as implicating moral turpitude. But because homosexuality does not, generally speaking, shock the public conscience anymore, deportations are rarely now sought on that basis. Because the American public does

158. Matter of S., 8 I.&N. Dec. 409 (BIA 1959).
159. *Id.* at 410.
160. *Id.* at 415.
161. *Id.* at 418.
162. Minter, *supra* note 152, at 782–83.
163. Lawrence v. Texas, 539 U.S. 558, 587 (2003).
164. *See* Minter, *supra* note 152, at 803–06.

not generally think of homosexuality as inherently base, vile, or depraved, American courts do not seek to make it fit into the category of CIMTs, subjecting noncitizens to deportation or inadmissibility on those grounds alone.

This evolution could provide a template for other CIMTs. As crimes cease to shock the public conscience, they should cease to be prosecuted as CIMTs. If a noncitizen's crime fits into some other category that would render him deportable or excludable, such as the broad immigration category called "aggravated felony," then there is no issue. And if the only basis for deportation or exclusion is a crime that does not imply inherently base, vile, or depraved behavior, then the solution should not be to somehow seek to make it fit into the category of crimes involving moral turpitude, but to simply not deport or exclude that person. As fewer and fewer deportations are sought based on the CIMT category, the category will necessarily lose its power and importance in immigration law, even if it remains part of the INA.

C. Impact on Noncitizens' Lives

Aside from the possible large-scale impact of helping to eliminate the CIMT category, resolving the current circuit split in favor of the Ninth Circuit's interpretation of misprision would be an improvement in the lives of individual immigrants. A resolution of the circuit split will bring clarity, fairness, and equality of treatment regardless of where the immigrant lives.

The impact of the current circuit split is that noncitizens are treated differently depending on where they are located in the United States. It is not a minor difference, but the difference between the same conduct being designated a CIMT and designated an archaic crime that is rarely ever charged anymore. It can be the difference between being adjudged inadmissible or deportable or being able to remain in the United States. It can mean the difference between successfully petitioning to cancel an order of deportation or having no recourse. It can also mean the difference between applying to become a United States citizen or having to choose to remain a permanent noncitizen, forever out of reach of the full privileges, benefits, and responsibilities of citizenship in a country that some may have lived in for decades.

In *In re Espinoza-Gonzalez*, the BIA held that a conviction for misprision of a felony does not constitute a conviction for an aggravated felony as an "offense relating to obstruction of justice."[165] The defen-

165. Matter of Espinoza-Gonzalez, 22 I.&N. Dec. 889 (BIA 1999).

dant in *Espinoza-Gonzalez* was convicted of misprision of a felony based on a conspiracy to possess marijuana with intent to distribute.[166] He was afterwards placed in removal proceedings with that conviction as the basis—the Immigration and Nationality Service charged him with removability as an "alien convicted of an aggravated felony" based on § 237(a)(2)(A)(iii) of the INA.[167] The INA's definition of an aggravated felony is a long list of offenses ranging from murder to mutilation of a passport, as long as the term of imprisonment is at least one year.[168] With the BIA's decision in *Espinoza-Gonzalez*, misprision of a felony can no longer be classified as an aggravated felony and make a noncitizen removable and ineligible for cancellation of removal on that ground. Thus, classifying misprision as a CIMT is the only remaining method by which misprision of a felony can make a noncitizen removable and ineligible for cancellation of removal, in the absence of any other removable offenses. If misprision of a felony is held to categorically not be a CIMT, then noncitizens with convictions for misprision will no longer be subject to deportation on the basis of that conduct alone.

A publication by a division of the American Psychological Association reported on the deportation's effects.[169] This report noted that "[m]ost people who are deported have lived in the country for over a decade and many are parents or caregivers of United States citizens."[170] The report details the hardships that families in family detention centers are fleeing and the conditions to which they are forced to return, noting that "deportations have resulted in kidnapping, torture, rape, and murder."[171] In addition to violence, deportation separates families, leading to fractured relationships and childhood trauma.[172] The report also shows the wide-ranging effects that deportations can have. "Nearly ten percent of United States families with children have at least one member without citizenship, and 5.9 million United States citizen children have at least one caregiver who does not have authorization to remain in the United States."[173] Given the effects of deportation of a family member on children—which include economic,

166. *Id.*

167. *Id.* at 890.

168. 8 U.S.C. § 1101(a)(43)(A)–(U) (2012).

169. *See generally* Regina Day Langhout et al., *Statement on the Effects of Deportation and Forced Separation on Immigrants, Their Families, and Communities*, 62 AM. J. COMM. PSYCH. 3 (2018).

170. *Id.*

171. *Id.* at 3–4.

172. *Id.* at 4.

173. *Id.*

psychological, emotional, cognitive, and behavioral issues—this enormous number of potentially affected children means that deportation is an issue that affects the future of the United States generally.[174] This is especially true considering that studies have shown that the effects on children remain for some time even if a family is reunited.[175] With such serious consequences, deportations must not occur as a result of arbitrary, unfair, or unnecessary laws.

Conclusion

The more that American laws and standards for noncitizens reflect the standards that we expect of citizens, the greater the integrity of the American immigration system, and the more reasonable it is to expect noncitizens to comply with American immigration laws. When what is required and expected of noncitizens is not arbitrary, but instead reflects clear and legitimate expectations, with clear and legitimate consequences of violations, both citizens and noncitizens alike can place greater faith in immigration laws and find more value in upholding and enforcing them.

Misprision of a felony should categorically not be a CIMT. Whether this happens by a BIA ruling overturning its decision, by a majority of the other circuit courts following the decision made by the Ninth Circuit, or by a Supreme Court decision, a declaration that misprision of a felony is not a CIMT will greatly impact the fairness and equity of United States immigration law. Misprision of a felony's treatment in non-immigration law makes clear that it is not a CIMT and it should not be arbitrarily a CIMT when committed by a noncitizen, when the disparity of consequences is so great. Additionally, a ruling that misprision of a felony is not a CIMT will help take the teeth out of the CIMT category, which should be done away with because it is vague, archaic[176], unnecessary, and perpetuates unfairness. A decision that misprision of a felony is not a crime involving moral turpitude will be a step towards improving American immigration law's logic and application.

Alexandra Carl

174. *Id.*

175. Langhout et al., *supra* note 169.

176. One measure of the term's antiquity: Microsoft Word does not recognize "turpitudinous" as correctly spelled. Microsoft Word for Mac 2017, Version 15.37.