Immigration Consequences of Louisiana Criminal Offenses

Harvard Law School
Crimmigration Clinic

An overview of the crime-based grounds of removal and a quick reference chart concerning the immigration consequences of select Louisiana and New Orleans criminal offenses

IMMIGRATION CONSEQUENCES OF LOUISIANA CRIMINAL OFFENSES[1]

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INTRODUCTION

This preamble and the accompanying chart is an introductory tool for criminal defense attorneys at Orleans Public Defenders who are advising their clients on the potential immigration consequences of criminal dispositions.

The preamble outlines various grounds of crime-based removal, and the accompanying chart analyzes the specific immigration consequences of certain frequently prosecuted Louisiana and New Orleans criminal offenses. The chart is divided into Louisiana state code sections and New Orleans municipal code sections. The chart addresses the likelihood that convictions for the specified offenses will give rise to grounds of removal. It takes a conservative approach and highlights where each offense could give rise to a potential ground of removability.

Because the chart is intended as a tool for defense attorneys, it does not address possible arguments to be used in immigration proceedings or forms of immigration relief and is not intended for use by immigration attorneys representing clients in immigration-related proceedings.

I. Disclaimer

Determining the immigration consequences of a particular conviction is a complex and fluid process. It involves analyzing the statute of conviction, the federal ground of removal, the record of conviction, the client's criminal history, and the client's immigration history. Therefore, identifying the potential grounds of removability triggered by an offense is never alone sufficient. Defense attorneys must have a complete understanding of their client's entire immigration and criminal histories in order to provide accurate advice concerning the immigration consequences of a conviction.

This preamble and the accompanying chart should serve as only an initial step in determining the potential immigration consequences of criminal activity. These materials should thus be relied upon only as a guide for further individualized legal research and fact investigation. Case law concerning the immigration consequences of criminal convictions changes rapidly. Therefore, the analysis in the preamble and chart must be checked for accuracy to ensure that no intervening law has been established. Only after an individualized case analysis can an accurate prediction of immigration consequences be provided.

II. Overview of Immigration Law

The primary immigration statute is the Immigration and Nationality Act of 1952, as amended ("INA"), codified at 8 U.S.C. § 1101 et seq. Most immigration regulations are located at Title 8 of the Code of Federal Regulations.

The Department of Homeland Security ("DHS") is the agency responsible for both immigration enforcement and immigration services. Within DHS, the U.S. Citizenship and Immigration Services ("USCIS") administers immigrant benefits such as asylum and work authorization. U.S. Immigration and Customs Enforcement ("ICE") is DHS's immigration

enforcement agency (including detention and removal). U.S. Customs and Border Protection ("CBP") polices U.S. borders and ports of entry. Immigration Courts fall within the Executive Office for Immigration Review ("EOIR"), which is within the Department of Justice ("DOJ"). It is the administrative court in which removal proceedings are conducted.

Removal proceedings are similar to trials. An Immigration Judge ("IJ") presides over the proceedings and he or she decides issues of removability and relief. Precedential immigration case law is developed by the Board of Immigration Appeals ("BIA"), the U.S. Circuit Courts of Appeals, and the U.S. Supreme Court. The BIA issues appellate administrative decisions that are binding on all Immigration Judges unless modified or overruled by the Attorney General, the federal appellate court in which the immigration judge presides, or the U.S. Supreme Court.

DETERMINING IMMIGRATION STATUS

Noncitizen criminal defendants may be removable from the United States on the basis of criminal activity. There are two distinct crime-based grounds of removal: (1) the grounds of deportability (8 U.S.C. § 1227(a)(2)(A)–(F)); and (2) the grounds of inadmissibility (8 U.S.C. § 1182(a)(2)(A)–(I)). Your client's immigration status will largely determine whether they will be subject to the grounds of inadmissibility or deportability.

The grounds of deportability generally apply to noncitizens who have previously made a lawful admission into the United States. Generally, a lawful admission occurs when a noncitizen enters the United States after inspection and approval by an immigration officer. For example, entering the United States on a valid visa is a lawful admission. Individuals who have made a lawful admission and either have let that status lapse or are convicted of a certain type of crime may be deportable.

The grounds of inadmissibility apply to those seeking to make a lawful admission. Whether a noncitizen is returning after travel abroad, applying for their green card (permanent residency), or is present in the U.S. without a previous lawful admission (e.g. crossing the border without authorization) he or she may need to overcome the grounds of inadmissibility to avoid removal.

Even if a noncitizen made a lawful admission and is currently subject to the grounds of deportability, they may later be subject to the grounds of inadmissibility. For example, a lawfully present noncitizen may become subject to the grounds of inadmissibility if they travel abroad and seek to re-enter to the United States.

While many crime-based grounds of deportability and inadmissibility overlap, there are important distinctions between the two (see chart below).

Crime Category (as defined by the INA)	Ground of Inadmissibility	Ground of Deportability
"crime involving moral turpitude" (CIMT)	X	X
Controlled Substance Offense (CSO)	X	X
Money Laundering	X	
Crime Category (as defined by the INA)	Ground of Inadmissibility	Ground of Deportability
Firearms Offense		X
Domestic Violence Offense		X
Aggravated Felony (AF)		X

I. Types of Immigration Status

- U.S. Citizens: With very rare exceptions, a U.S. Citizen ("USC") is not subject to immigration law. A person is a USC if they are born on U.S. soil or are a child born to U.S. citizen parents. A person can become a USC through naturalizing (the process of applying for and becoming a USC after birth) or deriving citizenship from a naturalized parent. Children who are minors when their parents naturalize may automatically derive U.S. citizenship, even if naturalization took place many years ago.

  Rules regarding citizenship are complex and have changed throughout the years. For example, if a noncitizen has a USC parent or grandparent, or was adopted by a USC, they may actually be a USC without their knowledge. Accordingly, it is important to thoroughly research the immigration history of all immediate family members when determining a client's immigration status.

- Lawful Permanent Residents ("LPRs"): LPRs, or green-card-holders, are subject to immigration laws, and criminal activity may affect their right to stay in the United States. Many people who have been LPRs for years are unaware that they are still subject to immigration laws and possible removal for even minor crimes.

Because gaining LPR status usually constitutes a legal "admission," a subsequent arrest may trigger a ground of deportability. In addition, LPRs may be subject to the grounds of inadmissibility if they leave the country and then attempt to reenter. For instance, a client who has a conviction (as defined by federal immigration law rather than state or federal criminal law) for a crime that is not a ground of deportability but is a ground of inadmissibility may be permitted to live in the United States but may be denied re-entry after travel abroad and could be arrested at an airport or border and subject to detention.

- Visa-Holders: "Visa-holders" are noncitizens who are legally in the country while their visa remains valid but do not have permanent immigration status. Some visa-holders have an intent to remain in the United States while others do not have permanent immigration intent. The most common visa categories for non-immigrants include: business visitors (B-1 visa-holders), tourists (B-2 visa-holders), students (F or M visa-holders), exchange visitors (J visa-holders), and temporary workers (H visa-holders). Visa-holders must comply with the requirements of their visas and are subject to removal if they violate those requirements. To remain compliant with their visas, non-immigrant visa-holders may not be convicted of a crime of violence (see below) for which a sentence of one year or longer may be imposed. Such a conviction is considered a failure to maintain proper visa status and renders the visa-holder removable.

  Like LPRs, visa-holders are typically considered to have made a legal admission and are therefore subject to the grounds of deportability. They are also subject to the grounds of inadmissibility if they leave the country and attempt to reenter in the future, or attempt to adjust to another status such as LPR status. Because travel and reentry under the same or a different visa is common for non-immigrants, consideration of the grounds of inadmissibility is important.

- Refugees and Asylees: Certain criminal convictions render a noncitizen ineligible for asylum or for withholding of removal (an asylum-like status that carries fewer protections and rights sometimes given to immigrants who are ineligible for asylum). If there is any possibility that your client has applied for or may ever apply for asylum or withholding of removal because he or she is afraid to return to his or her home country, it is important to determine whether a criminal conviction would make that client ineligible for such protection.

  A noncitizen convicted of a "particularly serious crime" ("PSC") is ineligible for asylum. Asylum status may also be revoked as a result of a PSC conviction. Similarly, withholding of removal may be denied to those convicted of a PSC or an aggravated felony for which the term of imprisonment is 5 years or greater. Refugees and asylees are eligible to apply for LPR status one year after receiving refugee or asylee status, and will be subject to the grounds of inadmissibility if and when they become an LPR. Consequently, it is important to know whether any criminal conviction is a ground of inadmissibility that would render a refugee or asylee client ineligible to become an LPR.

- U and T Visas: An individual who has been the victim of a certain type of crime in the United States and who cooperates in the investigation and/or prosecution of that offense

may be eligible for a U visa. Individuals who have been subject to human-trafficking may be eligible for a T visa. Once granted a U or T visa, the individual is subject to the grounds of deportability.

- Temporary Protected Status ("TPS"): TPS is a program that provides temporary status to immigrants in the United States from specific countries. The DHS Secretary designates countries for TPS based upon ongoing armed conflict, environmental disaster, or other extraordinary and temporary condition in the country. Noncitizens whose home country has been designated for TPS and who are present in the United States without documentation at the time that TPS status is announced may apply to remain in the country legally, but only for the duration of the TPS designation. Currently, the nations designated for TPS include El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen.[2] Applicants for TPS are subject to specific criminal grounds for ineligibility. A noncitizen who is granted TPS must periodically re-register for TPS, and must meet the eligibility requirements at each renewal.

- Undocumented and Out-of-Status Persons: Noncitizens who enter the United States without inspection (or with false documentation), overstay their visa, or violate the terms of admission are subject to removal by DHS simply for their immigration violation. This does not mean, however, that criminal proceedings are irrelevant. An undocumented or out-of-status noncitizen may seek to obtain lawful status and will at such time be subject to the grounds of inadmissibility. A noncitizen who entered lawfully and subsequently overstayed his or her visa or violated the terms of the visa will be subject to the grounds of deportability. Moreover, certain criminal convictions bar certain defenses to removal (e.g. asylum) or waivers for which they may otherwise be eligible.

II. Gathering Proof of Immigration Status

It is important to ask your client for documentation of his or her immigration status if available and to be aware of what possible documentation exists. Obtaining proof of a client's immigration status may help prove the client's status (even if the client does not know his or her status) and may help the attorney determine whether a criminal conviction will make that client subject to a ground of inadmissibility or deportability. For example, certain criminal convictions may render an LPR client deportable if committed within the five years after they became an LPR. Proof of immigration status will likely clarify that relevant five-year time period. Some documents that serve as proof of immigration status include:

- Certificate: This is issued to evidence naturalization. Naturalization records are kept with the clerk of the U.S. District Court where the swearing-in ceremony took place.

- Permanent Resident Card (a "green card"): This is issued to an immigrant when he or she becomes an LPR.

[2] Temporary Protected Status, *USCIS, Department of Homeland Security*, https://www.uscis.gov/humanitarian/temporary-protected-status (last visited on 08/22/2019).

- Employment Authorization Document ("EAD" or "work permit"): This demonstrates the individual's authorization to work in the United States. EADs are issued based on the individual's immigration status pursuant to specified sections of federal regulations. A reference to the specific regulation through which the individual obtained the EAD is on the card itself.

- Most lawful immigrants or non-immigrants will have a visa or visa stamp in their passports as well as an I-94 card (often stapled into the passport). This card shows their lawful admittance, the place of admittance, and under which category they were admitted. Some countries have a visa-waiver program, and non-immigrants from those countries will not have a visa, but will have an I-94 card.

IMMIGRATION ADJUDICATION

I. Conviction and Admission

A criminal "conviction" is typically—but not always—required for removal. A conviction for immigration purposes is not necessarily coterminous with a conviction under state or local criminal law.

Immigration law defines a conviction as "a formal judgment of guilt . . . 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 a 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." 8 U.S.C. § 1101(a)(48)(A).

Because a finding of guilt or an imposition of punishment by the judge is required, many dismissals, nolle prosequi dispositions, and adjudications of juvenile delinquencies are typically not considered convictions. Many diversion programs, however, do meet the definition of a conviction under immigration law. For instance, programs requiring an upfront guilty plea such as misdemeanor pleas under section 894 of the Louisiana Code of Criminal Procedure meet the definition of a "conviction."

Sometimes a conviction is not required to satisfy a ground of removal. For example, a noncitizen's admission to the elements of certain offenses, such as controlled substances offenses or "crimes involving moral turpitude" ("CIMT") can render him or her inadmissible or deportable.

II. The Categorical Approach

Immigration adjudicators employ the "categorical approach" when determining whether a conviction or admission qualifies as a ground for removability. This approach requires the analysis of the statutory elements of an offense and not the specific factual allegations.

Minimum Conduct: For most grounds of inadmissibility or deportability, a criminal conviction satisfies that ground only if the minimum possible conduct criminalized/prosecuted

under the statute of conviction would trigger removal. The immigration adjudicator must not look to what the individual defendant allegedly did, but the minimum culpable conduct criminalized by the statute. If that conduct would not trigger removability, the noncitizen is also not removable. However, the categorical approach is complex and not consistently applied.

Divisible Statutes: Some criminal statutes are "divisible" in that they set out multiple distinct offenses (one or more of which may meet a ground of deportability or inadmissibility) separated by distinct elements. A statute is divisible if the fact-finder must choose between two or more offenses composed of distinct elements when convicting, or sentencing. If a statute is divisible, an immigration adjudicator is permitted to review certain documents from the record of conviction to determine which offense the person was convicted (i.e. which part of the divisible statute). Then the judge will apply the minimum conduct rule to that part of the statute of conviction. If a statute is not divisible, the minimum conduct test applies to the entire statute.

Record of Conviction: If a statute is truly divisible, an immigration adjudicator may review a limited set of documents, called the record of conviction ("ROC"), to discern of which offense the person was convicted. These are the documents used to create a "good" or "bad" record for immigration purposes. They determine what the immigration judge knows or does not know about the prior criminal proceeding. In a plea, assume that the ROC includes:

- The charge pleaded to, as amended (not dropped charges);
- The plea colloquy transcript;
- Plea agreement;
- The judgment; and
- Any factual basis for the plea agreed to by the defendant during the plea colloquy.

Note that the police report is not part of the ROC, unless it is stipulated to during the plea colloquy.

III. Sentence

Pursuant to immigration law, a sentence includes any period of incarceration ordered by a court, whether imposed or suspended in whole or in part. 8 U.S.C. § 1101(a)(48)(B). There is no distinction between a suspended sentence and a period of incarceration for immigration purposes.

The sentence—in some situations actually imposed and in other cases the possible sentence—is often relevant to grounds of removal. For example, certain offenses may be considered aggravated felonies only if a sentence of a year or more is imposed. Also, a first Louisiana misdemeanor CIMT (see below) conviction can fall within the "petty offense exception" to the CIMT inadmissibility ground only if a sentence of six months or less is imposed.

For immigration purposes, a "sentence imposed" includes any sentence to custody, even if suspended. It does not refer to the amount of time actually served. It does not include pre-hearing custody if the defendant waives credit for time served, and it does not include custody ordered in delinquency proceedings.

I. Aggravated Felony

Aggravated felonies are listed in 8 U.S.C. § 1101(a)(43). A conviction for an "aggravated felony" ("AF") triggers a ground of deportability (though not necessarily a ground of inadmissibility) and is typically a bar to most forms of immigration relief. Aggravated felonies generally carry the most severe immigration consequences:

- Deportation is virtually automatic
- Ineligible for nearly all forms of immigration relief
- Ineligible for naturalization
- Permanent banishment
- Greater criminal punishment for illegal reentry.

There are twenty-one types of aggravated felonies listed in 8 U.S.C. § 1101(a)(43). AFs need not be aggravated or felonies.

A. Crime of Violence

One type of aggravated felony is a "crime of violence" ("COV"), as defined in 18 U.S.C. § 16. *See* 8 U.S.C. § 1101(a)(43)(F). 18 U.S.C. § 16 has defined "crime of violence" in two different ways. § 16(a) defines a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 16(b) defines a crime of violence as "any other offense that is a felony and that, by its nature, involves substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The COV term is defined to include "violent, active crimes," *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), where "'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010); *see also Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010) (noting that *Johnson* controls the BIA's interpretation of "crime of violence" because the Armed Career Criminal Act ("ACCA") definition of "violent felony" is identical to that in 18 U.S.C. § 16(a)).

Sessions v. Dimaya (2018)

In *Sessions v. Dimaya*, the Supreme Court held that § 16(b) was unconstitutionally vague. 138 S.Ct. 1204 (2018). The holding in *Dimaya* relied on a previous case, *Johnson v. United States*, where the Court struck down a similar provision in the ACCA as unconstitutionally vague. 135 S.Ct. 2551 (2015).

Many of the offenses contained in the Reference Chart would have arguably, if not definitely, qualified as crimes of violence under § 16(b). Since § 16(b) has been held unconstitutionally vague, the Reference Chart has been edited to reflect that § 16(b) can no longer be relied upon to characterize an offense as a crime of violence. This change should be

taken with some caution, as it is not yet clear what Congress, courts, or the BIA will do in response to *Dimaya*.

United States v. Reyes-Contreras (2019)

Courts might seek to expand the scope of § 16(a) to encompass conduct that previously fell within § 16(b). In *Stokeling v. United States*, the Supreme Court appeared to broaden the ACCA's analog to § 16(a) by including state robbery statutes that cover even slight physical force. 139 S.Ct. 544 (2019). Similarly, in *United States v. Reyes-Contreras*, the Fifth Circuit recently held that prior distinctions between direct and indirect force under the U.S. Sentencing Guideline's 16(a) analog's definition were no longer valid in light of *United States v. Castleman*, 572 U.S. 157 (2014), expressly overruling a number of Fifth Circuit cases in the process. 910 F.3d 169 (5th Cir. 2018). The list of overruled cases is included below. Subsequent Fifth Circuit decisions have imported the holding of *Reyes-Contreras* into the aggravated felony context. *See United States v. Gomez Gomez*, 2019 WL 989427 (5th Cir. 2019) ("We now instead recognize . . . that the 'use of force' under 18 U.S.C. § 16(a) incorporates the common-law definition of force—and thus includes indirect as well as direct applications of force."). Given the holdings in *Stokeling* and *Reyes-Contreras*, the precise scope of § 16(a) going forward is uncertain. Recently, the Fifth Circuit held that the definition of physical force under the ACCA includes the "force necessary to overcome a victim's resistance. . . [and that] the degree of force entails more force than the "slightest offensive touching," but does not require "any particular degree of likelihood or probability that the force used will cause pain or injury; only potentiality."" *United States v. Burris*, 920 F.3d 942, 955 (5th Cir. 2019) (citations omitted).

The following cases were expressly overruled by the Fifth Circuit in *Reyes-Contreras*: *United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) (en banc); *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) (en banc); *United States v. Bonilla*, 524 F.3d 647 (5th Cir. 2008); *United States v. Neri-Hernandes*, 504 F.3d 587 (5th Cir. 2007); *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006); *United States v. Turner*, 349 F.3d 833 (5th Cir. 2003); *United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017); *United States v. Johnson*, 286 F. App'x 155 (5th Cir. 2008); *United States v. De La Rosa-Hernandez*, 264 F. App'x 446 (5th Cir. 2008); *United States v. Hernandez-Rodriguez*, 788 F.3d 193 (5th Cir. 2015); *United States v. Garcia-Perez*, 779 F.3d 278 (5th Cir. 2015); *United States v. Herrera-Alvarez*, 753 F.3d 132 (5th Cir. 2014); *United States v. Resendiz-Moreno*, 705 F.3d 203 (5th Cir. 2013); *United States v. Andino-Ortega*, 608 F.3d 305 (5th Cir. 2010); *United States v. Garcia*, 470 F.3d 1143 (5th Cir. 2006); *United States v. Valenzuela*, 389 F.3d 1305 (5th Cir. 2004); *United States v. Garcia-Cantu*, 302 F.3d 308 (5th Cir. 2002); *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001).

Despite the seemingly large change in the law that *Reyes-Contreras* caused, there are reasons to argue that *Reyes-Contreras* should be treated narrowly:

First, *Reyes-Contreras* was based on *United States v. Castleman*, 572 U.S. 157 (2014), which was itself a narrow opinion. In *Castleman*, the Supreme Court interpreted a statute that banned possession of firearms by anyone who was convicted of "a misdemeanor crime of violence." *Id.* at 159. In particular, the Court interpreted one phrase in the definition of a

misdemeanor crime of violence: "the use . . . of physical force." *Id.* at 161. The Court applied the common-law concept of "force," which included both direct and indirect force, to define the phrase in question. *Id.* at 170. In doing so, the Court noted that the common-law concept of force was applicable in the context of domestic violence, but not necessarily in any other context. The Court reasoned that "domestic violence" is a "term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context," particularly because most physical assaults committed by intimates are "relatively minor." *Id.* at 165. The Court relied on other distinguishing factors to justify applying the common-law concept of force. For example, perpetrators of domestic violence are regularly prosecuted under "generally applicable" battery laws, so a "misdemeanor crime of violence" was likely defined to include such a general statute. *Id.* at 164. In sum, the Court's opinion in *Castleman* made clear that its ruling was narrow and based on considerations that are unique to the domestic violence context.

Second, the Supreme Court itself has neither applied *Castleman* in other contexts nor broadened it. Even in *Castleman* itself, the Court distinguished the statute before it from a different statute that contained similar phrasing (i.e. "has an element the use . . . of physical force"), which was interpreted in *Johnson v. United States*, 559 U.S. 133 (2010), with no mention of indirect force. Far from overruling *Johnson*, the *Castleman* court was careful to note that the two cases were entirely consistent with each other, despite the common-law concept of force only being applied in *Castleman*. In large part, this consistency came from the different contexts in each case: *Castleman* interpreted a statute related to domestic violence and *Johnson* interpreted a sentencing provision in the Armed Career Criminal Act. The BIA has noted that § 16(a)'s definition of crime of violence tracks the ACCA's definition. *See Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010). Even in *Stokeling*, the Court noted that the *Castleman* Court did not hold that a "de minimis" touching falls within the definition of physical force. 139 S.Ct. at 553. The Court has yet to apply the *Castleman* definition in the context of § 16(a).

Third, although the Fifth Circuit has applied *Reyes-Contreras* in the context of § 16(a), it has acknowledged that § 16(a) still does not encompass minor injuries that are too minimal to constitute a crime of violence. *See, e.g.*, *United States v. Garcia-Cantu*, 2019 WL 1450475 (5th Cir. 2019); *United States v. Burris*, 920 F.3d 942, 955 (5th Cir. 2019) (The 5th Circuit held that the definition of physical force under the ACCA includes the "force necessary to overcome a victim's resistance. . . [and that] the degree of force entails more force than the "slightest offensive touching," but does not require "any particular degree of likelihood or probability that the force used will cause pain or injury; only potentiality.""") To win such an argument, a litigant must show a realistic probability of prosecution, and "interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability.'" *Id.* at 1. Thus, if a statute criminalizes de minimis touching or no touching at all, there is arguably a way to distinguish that statute from *Reyes-Contreras* and its progeny. To successfully distinguish a statute, case law showing that this conduct is prosecuted might be required. The statutes where *Reyes-Contreras* has been applied in the § 16(a) context include: a Texas "Assault-Family Violence" statute, *United States v. Gracia-Cantu*, 920 F.3d 252 (5th Cir. 2019); a Texas aggravated assault statute, *United States v. Gomez Gomez*, 2019 WL 989427 (5th Cir. 2019); a Texas assaulting a peace officer statute, *United States v. De La Rosa*, 2019 WL 177958 (5th Cir. 2019); and an Oregon third-degree assault statute, *United States v. Castaneda-Morales*, 2019 WL 1097215 (5th Cir. 2019). All of these cases involve some form of assault, and in no case did the Fifth Circuit hold

that a statute criminalizing de minimis touching (with a realistic probability of prosecution) or no touching at all falls under the scope of *Reyes-Contreras*.

All three of the above arguments are ways to argue *Reyes-Contreras* should be treated narrowly, as its exact scope is still being determined. The analysis of Louisiana laws below incorporates these arguments, while acknowledging the uncertainty going forward.

II. Crime Involving Moral Turpitude

A "crime involving moral turpitude" ("CIMT") is not a statutorily defined term, in contrast to an AF. Determining when a criminal offense is considered a CIMT is notoriously difficult. The BIA's test for determining when a crime qualifies as a CIMT remains in flux, although the BIA has recently adopted the categorical approach in the CIMT context. Typically, CIMTs include crimes involving theft, fraud, or violence. CIMTs also include some offenses involving lewdness, recklessness, or malice. One common, if somewhat unhelpful, definition of a CIMT is "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." Bouvier's Law Dictionary (3d ed. 1914). In most cases, a CIMT is only triggered if the underlying offense required a degree of scienter greater than recklessness. *See Gomez-Perez v. Lynch*, 829 F.3d 323, 328 (5th Cir. 2016) ("Texas's assault statute can be committed by mere reckless conduct and thus does not qualify as a crime involving moral turpitude, which requires a more culpable mental state.")

CIMTs can (1) trigger either the grounds of inadmissibility or deportability, (2) prompt mandatory detention, (3) prevent a finding of "good moral character" (a requirement for some forms of immigration relief), and (4) negatively impact an exercise of discretion.

A noncitizen is deportable when he or she (a) "is convicted of a crime involving moral turpitude committed within five years after the date of admission, and is convicted of a crime for which a sentence of one year or longer may be imposed," or (b) "at any time after admission is convicted of two or more [CIMTs], not arising out of a single scheme of criminal misconduct" regardless of the sentence. 8 U.S.C. § 1227(a)(2)(A). It is important to note that a conviction is required to trigger these specific grounds of deportability.

A noncitizen is inadmissible if he or she is convicted of, or admits committing, one CIMT, unless one of two exceptions apply: the "petty offense" exception or the "youthful offender" exception. To qualify for the "petty offense" exception, a noncitizen must have (1) committed only one CIMT, (2) which carries a potential sentence of not more than a year, and (3) a sentence of not more than six months was imposed. 8 U.S.C. § 1182(a)(2)(A)(ii)(II). To qualify for the youthful offender exception, a noncitizen must have (1) committed only one CIMT, (2) while under age 18, and (3) the conviction or release from imprisonment occurred at least five years ago. 8 U.S.C. § 1182(a)(2)(A)(ii)(I).

III. Controlled Substance Offense

Controlled substances related offenses may trigger either the grounds of deportability or the grounds of inadmissibility. There is an exception to deportation and a possible waiver of

inadmissibility if the conviction is for "a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. § 1227 (a)(2)(B)(i); 8 U.S.C. § 1182(h). "Controlled substance" is defined according to federal law, and some state codes or schedules include substances not on the federal list. Due to this disparity, in some instances, the noncitizen may not be subject to removal if he or she has a controlled substance related offense involving a controlled substance listed on a state schedule but not on the federal schedule. See above, Categorical Approach (p. 7). For example, the Louisiana state schedules are broader than the federal schedules (i.e. phenazepam and etizolam are Schedule I controlled substances in Louisiana, but are not controlled substances under federal law).

Controlled substance offenses that involve sale or distribution may satisfy the "illicit trafficking in a controlled substance" AF definition. *See* 8 U.S.C. § 1101(a)(43)(B).

Moreover, if DHS has reason to believe that a noncitizen is a drug-trafficker or directly benefits from drug-trafficking, he or she is inadmissible. 8 U.S.C. § 1182(a)(C).

A noncitizen can also be deportable and inadmissible if DHS has reason to believe the noncitizens is a drug addict or drug abuser. 8 U.S.C. §§ 1182(a)(1), 1227(a)(2)(B)(ii).

IV. Firearms Offense

A conviction for most offenses in which the use, attempted use, or threatened use of a firearm may render a noncitizen deportable. *See* 8 U.S.C. § 1227(a)(2)(C). Firearms are statutorily defined at 18 U.S.C. § 921. A firearms related offense that involves the sale or distribution of firearms may also satisfy the firearms trafficking aggravated felony definition. *See* 8 U.S.C. § 1101(a)(43)(C).

V. Domestic Violence, Child Abuse, or Stalking; Violation of a Protective Order

The above referenced offenses all trigger a ground of deportability. A crime of "domestic violence" is defined under 18 U.S.C. § 16 as a "crime of violence" against a person protected under state domestic violence laws. The violation of a protective order ground of deportability does not require a conviction, but technically requires violating the part of the protective order that is meant to protect against threats or repeated harassment.

NOTE: Other grounds of deportability and inadmissibility exist that are not covered in this manual, but they are referenced in the table below.

VI. "Realistic Probability" Test in the Fifth Circuit

When the categorical analysis is being used, the Fifth Circuit applies the "realistic probability" test. *Vazquez v. Sessions*, 885 F.3d 862 (5th Cir. 2018). Under the "realistic probability" test, a defendant must point to specific state case law applying a state statute in a non-generic manner, even where the state statute is facially overbroad. *Vazquez*, 885 F.3d at 874 (citing *United States v. Castillo-Rivera,* 853 F.3d 218) ("without supporting state case law, interpreting a state statute's text alone is simply not enough to establish the necessary "realistic probability."").

GROUNDS OF INADMISSIBILITY AND DEPORTABILITY QUICK REFERENCE TABLE

GROUNDS OF INADMISSIBILITY (8 U.S.C. §1182(a)(2))	GROUNDS OF DEPORTABILITY (8 U.S.C. §1227(a)(2))
CRIME INVOLVING MORAL TURPITUDE Conviction or admission of sufficient facts for one CIMT Exceptions: ● 1 CIMT committed under 18 and at least 5 years before admission, OR ● Maximum possible penalty is 1 year or less AND sentence imposed is 6 months or less	**CRIME INVOLVING MORAL TURPITUDE** Conviction for one CIMT if ● Conviction is within 5 years of admission where a sentence of one year or longer may be imposed Conviction for 2 CIMTs at any time if: ● Not arising out of a "single scheme of criminal conduct"
CONTROLLED SUBSTANCE OFFENSE Conviction or admission to sufficient facts of any crime/acts relating to a controlled substance as defined at 21 U.S.C. §802 Reason to believe person is a drug trafficker Currently a drug abuser or addict	**CONTROLLED SUBSTANCE OFFENSE** Conviction of any drug offense, except 1 offense of 30 grams or less of marijuana Conspiracy or attempt to commit any drug offense, except 1 offense of 30 grams or less of marijuana If found to be a drug abuser or addict at ANY time after admission.
MULTIPLE OFFENSES Conviction for 2 or more crimes (of any type—even if in a common scheme) in which the aggregate sentence is 5 years or more	**MULTIPLE OFFENSES** N/A
PROSTITUTION See 8 U.S.C. 1182(a)(2)(D)	**PROSTITUTION** N/A
FIREARMS OFFENSE N/A	**FIREARMS OFFENSE** Conviction for any crime of buying, selling, using, owning, possessing or carrying any firearm or destructive device Conspiracy or attempt to do the same May include crimes for which possession or use of a firearm is an element
DOMESTIC VIOLENCE N/A	**DOMESTIC VIOLENCE** Conviction for: ● Domestic Violence ● Stalking ● Child abuse ● Child neglect ● Child abandonment

	Violation of: ● criminal or civil protective orders (conviction is not necessary) Applies to spouses, household members, children, and others defined by state domestic violence laws.
AGGRAVATED FELONY N/A	**AGGRAVATED FELONY** Conviction for (including but not limited to): ● murder ● rape ● sexual abuse of a minor ● drug trafficking ● firearms trafficking ● fraud or tax evasion where the loss is at least $10,000. Conviction (with a sentence of 1 year or more) for: ● crime of violence (as defined by 18 USC §16) ● theft offense ● obstruction of justice ● document (passport) fraud
MISCELLANEOUS OFFENSES ● Noncitizens involved in serious criminal activity who have asserted immunity from prosecution ● Committing or conspiring to commit human trafficking ● There is reason to believe the noncitizen has engaged, is engaging, or will engage in money laundering (including conspiracy, aiding and abetting, etc.) ● There is reason to believe the noncitizen seeks to enter the US to violate certain security related laws of the United States ● Has engaged in or there is reason to believe they have engaged in terrorist activity ● Aliens previously removed ● Others not defined here	**MISCELLANEOUS OFFENSES** ● Knowingly smuggling of aliens either prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry (including encouraging, inducing, assisting, aiding, abetting) ● Marriage fraud ● Conviction for espionage, sabotage, treason, sedition (including conspiracy and attempt) ● Terrorist activities ● Selective service violations ● Failure to register change of address ● Conviction of falsification of documents ● Others not defined here

IMMIGRATION CONSEQUENCES OF LOUISIANA CRIMINAL OFFENSES REFERENCE CHART

Disclaimer: The immigration consequences of criminal conduct turns on how an adjudicator interprets the statute of conviction, relevant case law, and the record of conviction. Jurisprudence changes rapidly in this area of law. For these reasons, the following chart should only be used as a starting point and not relied upon without individualized research and analysis.

Reading the chart: As noted above, it is difficult to predict how an immigration adjudicator will classify a specific criminal offense. Unless there is precedential case law interpreting the specific section of the municipal or Louisiana code, there is always the possibility that an adjudicator will disagree with the below chart. In order to convey our level of certainty as to whether any of the offenses listed below will trigger a ground of removal, we have developed the below key. Also, please consult relevant endnotes for further analysis and relevant case law.

YES:	There is precedential case law interpreting the exact statute as satisfying the designated immigration crime classification.
LIKELY YES:	Case law interpreting a similar statute or in a non-precedential opinion *strongly* indicates that the criminal statute likely satisfies the designated immigration crime classification.
PROBABLY YES:	Case law interpreting a similar statute or in a non-precedential opinion suggests that the criminal statute may satisfy the designated immigration crime classification.
MAYBE:	The case law is unclear or it greatly depends on the specific circumstances of the case as to whether the offense satisfies the designated immigration crime classification.
PROBABLY NO:	Case law interpreting a similar statute or in a non-precedential opinion suggests that the criminal statute probably does not satisfy the designated immigration crime classification.
LIKELY NO:	Case law interpreting a similar statute or in a non-precedential opinion *strongly* indicates that the criminal statute likely does not satisfy the designated immigration crime classification.
NO:	There is precedential case law interpreting the exact statute as not satisfying the designated immigration crime classification.

Louisiana Code Section	Offense	Aggravated Felony	CIMT	Other Ground Removability	Advice and Comments
14:103	Disturbing the Peace	Probably No	Probably No[1]	None	If possible, clarify that plea is for non-offensive disturbing behavior.
14:31	Manslaughter	Likely Yes[2]	Probably Yes[3]	Crime of Domestic Violence - Maybe[4]	
14:34	Aggravated Battery	Likely Yes[5]	Likely Yes[6]	Firearms Offense	Keep sentence to less than one year Try to obtain a sentence of less than one year (active or suspended). If the weapon in question was poison, make this clear in record of conviction. If weapon was not poison, try to leave nature of weapon vague.
14:34.1	Second Degree Battery	Probably Yes	Likely Yes[7]		
14:35	Simple Battery	Probably No[8]	Maybe[9]	None	Try to sanitize record of conviction to exclude anything other than *de minimis* touching. Also, sanitize record to exclude identity of victim if the person falls within a protected class.
14:35.3	Domestic abuse battery	Maybe[10]	Likely Yes[11]	Domestic Violence Offense	Subsequent offenses that qualify as federal felonies must not be coupled with a one-year sentence to avoid AF. Try to sanitize record of conviction to exclude whether defendant intended to cause physical harm, or plead to *de minimis* touching if possible.

Louisiana Code Section	Offense	Aggravated Felony	CIMT	Other Ground Removability	Advice and Comments
14:37	Aggravated Assault	If sentenced to less than one year, No If sentenced to more than one year, Probably Yes	Likely Yes[12]	Firearms Offense	
14:43.1.1	Misdemeanor Sexual Battery	Likely No[13]	Probably Yes[14]	Crime of Domestic Violence - Maybe[15]	
14:55	Aggravated Criminal Damage to Property	Maybe[16]	Probably Yes[17]		
14:56	Simple Criminal Damage to Property	Likely Yes if sentenced to at least one year of imprisonment[18]	Maybe		
14:60	Aggravated Burglary	Likely Yes if sentenced to at least one year of imprisonment [19]	Probably Yes[20]	Firearms Offense[21]	
14:62	Simple Burglary	Likely Yes if sentenced to at least one year of imprisonment[22]	Probably Yes[23]		If divisible plead "to commit a felony" rather than "theft" for CIMT purposes.
14:62.2	Simple Burglary of an Inhabited Dwelling	Yes if sentenced to at least one year[24]	Probably Yes[25]		If divisible plead "to commit a felony" rather than "theft" for CIMT purposes.
14:62.3	Unauthorized Entry of an Inhabited Dwelling	Probably No[26]	Maybe[27]		

Louisiana Code Section	Offense	Aggravated Felony	CIMT	Other Ground Removability	Advice and Comments
14:64	Armed Robbery	Likely Yes[28]	Likely Yes[29]	Firearms Offense[30]	To avoid a Firearms Offense, make clear in the record if dangerous weapon was not a firearm. If dangerous weapon was a firearm, try to keep nature of the weapon vague or try not to plead to RS 14:64.3.
14:65	Simple Robbery	If sentence exceeds one year, Likely Yes[31]	Likely Yes[32]		Try to obtain a sentence of less than one year (active or suspended).
14:67	Theft	Likely No, if sentenced to less than one year Likely Yes, if sentenced to one year or more[33]	Likely Yes[34]	None	
14:67.B.4	Theft of less than $750	No, if sentenced to less than one year Likely Yes, if sentenced to one year or more	Likely Yes	None	
14:68	Unauthorized Use of a Movable	Theft or Fraud: If convicted under "less than $1000" prong, Probably No If convicted under "over $1000" prong, Likely Yes[35]	Likely Yes[36]		Try to keep the record of conviction and other relevant documents from demonstrating that that the value of the stolen property is more than $10,000. Also, if convicted pursuant to the "over $1,000" prong, keep sentence to less than one year.

Louisiana Code Section	Offense	Aggravated Felony	CIMT	Other Ground Removability	Advice and Comments
14:69.B.3	Illegal possession of stolen things of less than $500	No, if sentenced to less than one year Likely Yes, if sentenced to one year or more[37]	Likely Yes[38]	None	
14:80	Felony Carnal Knowledge of a Juvenile	Maybe[39]	Maybe[40]	Crime of Child Abuse – Probably Yes[41] Crime of Domestic Violence - Maybe[42]	
14:81	Indecent Behavior with Juveniles	Likely No[43]	Maybe[44]	Crime of Child Abuse – Likely Yes[45] Crime of Domestic Violence – Maybe[46]	
14:93	Cruelty to Juveniles	Maybe[47]	Maybe[48]	Crime of Child Abuse: Likely Yes[49] Crime of Domestic Violence: Maybe[50]	
14:95	Illegal carrying of weapons	Probably No[51]	Probably No[52]	Firearms Offense	If statute is divisible then plead to section 14:95.A(4)(a) to avoid Firearms Offense.

Louisiana Code Section	Offense	Aggravated Felony	CIMT	Other Ground Removability	Advice and Comments
40:966(A)	(A) Manufacture; distribution narcotic drugs in Schedule I	Likely Yes[53]	Maybe[54]	Controlled Substance Offense [55]	
40:966(C)	(C) Possession of narcotic drugs in Schedule I	Likely No[56]	Maybe[57]	Controlled Substance Offense[58]	
40:966(D)(1)	Possession of marijuana	Likely No	Maybe[59]	Controlled Substance Offense[60]	To avoid a Controlled Substance Offense, make clear in the record of conviction that offense involved 30 grams or less and was for personal use.
40:971.1	False Represent-ation	Maybe[61]	Maybe[62]	Controlled Substance Offense [63]	
40:1023	Paraphernalia	Maybe[64]	Maybe[65]	Controlled Substance Offense [66]	
40:1060.13	Sale, distribution, possession of legend drugs	Maybe[67]	Maybe[68]	Controlled Substance Offense [69]	

New Orleans Municipal Code Section	Offense	Aggravated Felony	Crime Involving Moral Turpitude	Other Grounds of Deportability or Inadmissibility	Advice and Comments
54-96	Battery	No, if sentenced to less than one year	Maybe[70]		
54-153	Criminal Trespass	Probably No, but if third offense keep term of imprisonment to less than one year[71]	Likely No[72]		
54-186	Theft	Likely No, unless 1 year sentence imposed or loss to victim is at least $10,000.[73]	Likely Yes		
54-188	Illegal possession of stolen things	No, if sentenced to less than one year Likely Yes, if sentenced to one year or more	Likely Yes		
54-401	Obstructing Public Passages	Likely No	Likely No		
54-505	Simple Possession of Marijuana and/or Synthetic Cannabinoids	Likely No	Probably No	Controlled Substance Offense	If conviction is for less than 30g of marijuana for defendant's own use, include this information in the record of conviction or other relevant documents.
54-403	Disturbing the peace	No, if sentenced to less than one year Maybe, if sentenced to at least one year[74]	Maybe[75]		
54-405	Public Drunkenness	Likely No	Likely No	Controlled Substance Offense[76]	Avoid any reference to a controlled substance

[1] Disturbing the Peace: A conviction under La. Stat. Ann. § 14:103 is probably not a crime involving moral turpitude. There is no relevant Fifth Circuit case law regarding whether La. Stat. Ann. § 14-103 is a CIMT. The BIA has held that similar statutes are not CIMTs. If possible, plea to the non-offensive disturbing section of La. Stat. Ann. § 14-103.

[2] Manslaughter: § 14:31 includes both voluntary and involuntary manslaughter. In *United States v. Dominguez-Ochoa*, 386 F.3d 639 (5th Cir. 2004), the court held that a Texas conviction for criminally negligent homicide included *mens rea* below recklessness, which is necessary for generic manslaughter, and therefore is not a crime of violence. *Id.* at 646. § 14:31 also includes involuntary manslaughter which does not rise to the *mens rea* of recklessness, and therefore may not be considered a crime of violence. A search of Louisiana case law did not reveal whether § 14:31 is divisible. However, the Fifth Circuit previously assumed this statute was divisible without conducting a divisibility analysis and conducted the modified categorical approach, so it would be beneficial to make sure that the record of conviction shows the involuntary nature of the conduct. *See United States v. Hanner*, 549 Fed. Appx. 289 (5th Cir. 2013) (conducting modified categorical approach but upholding lower court's decision because the record of conviction was unclear).

[3] Manslaughter: Older BIA case law supports a determination that while voluntary manslaughter is a CIMT, involuntary manslaughter is not because it does not have the requisite *mens rea*. *See Matter of Lopez*, 13 I.&N. Dec. 725, 726-27 (BIA 1971) (determining that a statute that does not distinguish between voluntary and involuntary manslaughter cannot be a CIMT because it is overbroad regarding intent); *Matter of Sanchez-Marin*, 11 I.&N. Dec. 264, 266 (BIA 1965) ("Voluntary manslaughter has generally been held to involve moral turpitude while involuntary manslaughter has not"). However, in more recent cases courts have held that some acts, such as murder, rape, voluntary manslaughter, and some involuntary manslaughter offenses, may be deemed a CIMT even without a *mens rea* that rises to the level of recklessness if the act in itself is morally reprehensible. *See Orosco v. Holder*, 396 Fed. Appx. 50, 54 (5th Cir. 2010) (quoting *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006); *see Matter of Lopez-Meza*, 22 I.&N. Dec. 1188, 1193 (BIA 1999); *see also Nunez v. Holder*, 594 F.3d 1124, 1131-32 (9th Cir. 2010) (identifying that "crimes of moral turpitude *almost always* involve an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victim") (emphasis added). A search of Louisiana case law did not reveal whether § 14:31 is divisible. However, the Fifth Circuit previously assumed this statute was divisible without conducting a divisibility analysis and conducted the modified categorical approach. *See United States v. Hanner*, 549 Fed. Appx. 289 (5th Cir. 2013) (conducting modified categorical approach but upholding lower court's decision because the record of conviction was unclear).

[4] Manslaughter: For a conviction under the statute to be considered a crime of domestic violence, it must first be considered a crime of violence. *See Matter of Velasquez*, 25 I.&N. Dec. 278 (BIA 2010). *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) involved a case of voluntary manslaughter, in which the court ruled that even if the defendant were convicted under the assisted suicide prong of the manslaughter statute, it would still be considered a crime of violence. *See supra* "Categories of Immigration Offenses," Section I. In *Reyes-Contreras*, the court ruled that "a person uses physical force when he knowingly or intentionally applies or employs a force capable of causing physical pain or injury." 910 F.3d at 185. Therefore, defenders could argue that involuntary manslaughter does not rise to the requisite level of *mens rea* and make sure that the record of conviction does not evince intent.

If it is a crime of violence, the crime of domestic violence applies to any conviction in which a domestic relationship is present. An immigration adjudicator may look at the record of conviction to establish the domestic relationship, so defenders should try to make sure that the record is free of any information evincing a domestic relationship. *See Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016). A search of Louisiana case law did not reveal whether § 14:31 is divisible. However, the Fifth Circuit previously assumed this statute was divisible without conducting a divisibility analysis and conducted the modified categorical approach. *See United States v. Hanner*, 549 Fed. Appx. 289 (5th Cir. 2013) (conducting modified categorical approach but upholding lower court's decision because the record of conviction was unclear).

[5] Aggravated Battery: There is a Fifth Circuit case directly on point for this statute. *See United States v. Herrera-Alvarez*, 753 F.3d 132, 141 (5th Cir. 2014) (finding the statute divisible, and stating, "Louisiana crime of aggravated battery . . . as narrowed under the modified categorical approach to exclude poisoning, is a "crime of violence" because it necessarily contains, as an element, the use, attempted use, or threatened use of force.").

In *United States v. Hernandez-Rodriguez*, 788 F.3d 193 (5th Cir. 2015), the Fifth Circuit first found that since there were no *Shepard* documents to identify the subpart of the statute that formed the basis of Hernandez–Rodriguez's conviction, it could not exclude the possibility that Hernandez-Rodriguez's conviction was based on the administration-of-poison alternative within § 14:34— "the least culpable act" to violate the statute. *Id.* at 197. Therefore, Hernandez–Rodriguez's conviction did not satisfy the force offense prong of the sentencing guidelines, which is substantially similar to 18 U.S.C. §16(a). *Id.*

However, *United States v. Reyes-Contreras*, 910 F.3d 169, 187 (5th Cir. 2018) explicitly overruled *Herrera-Alvarez* and *Hernandez-Rodriguez*. The court in *Reyes-Contreras* explained that poisoning, or the intentional act of employing poison as a

means to cause harm, qualifies as use of force. *Id*. at 185. Therefore, arguably, it is likely that aggravated battery, regardless of whether the record of conviction shows possibility of poison, now qualifies as a crime of violence under 16(a). *See supra* "Categories of Immigration Offenses," Section I. Section I describes arguments why *Reyes-Contreras* should be applied narrowly and not applied to other statutes.

[6] Aggravated Battery: "Assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude by both the BIA and Federal courts, because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the 'simple assault and battery' category." *Matter of Sanudo*, 23 I. & N. Dec. 968, 971. In *Pichardo v. INS*, 104 F.3d 756, 760 (5th Cir. 1997), the Fifth Circuit recognized no distinction between an attempt offense and the commission of the offense itself regarding its moral turpitude. *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976), *aff'd sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977) (relying on BIA and Seventh Circuit cases finding that assault or assault and battery with a dangerous weapon is a CIMT to hold that an Illinois conviction for aggravated assault is a CIMT).

"[A]ssault and battery offenses may appropriately be classified as crimes [involving] moral turpitude if they necessarily involved aggravating factors [or attendant circumstances] that significantly increased their culpability" over mere simple assault. *Matter of Sanudo*, 23 I&N at 971 (BIA 2006). A search of Louisiana case law did not reveal whether the statute is divisible.

[7] Second Degree Battery: The BIA has held that an assault offense which requires (1) specific intent and (2) a meaningful level of harm that is more than an offensive touching qualifies as a crime involving moral turpitude. *Matter of Solon*, 24 I&N Dec. 239, 241-42 (BIA 1996) (describing a sliding-scale approach in which the level of harm required increases as the level of conscious behavior decreases; also holding that if no conscious behavior is required, there can be no finding of moral turpitude regardless of harm); *see also Matter of Esparza-Rodriguez v. Holder*, 699 F.3d 821 (5th Cir. 2012) (granting *Chevron* deference to BIA determination that a Texas conviction for assault is a CIMT); b*ut see Gomez-Perez v. Lynch*, 829 F.3d 323, 328 n.5 (5th Cir. 2016) (noting how *Mathis v. United States*, 136 S. Ct. 2243 (2016), overruled *Esparza-Rodriguez* to the extent that it found the Texas assault statute to be divisible and thus subject to the modified categorical approach). A search of Louisiana case law did not reveal whether the statute is divisible.

[8] Simple Battery: Under *Johnson*, battery statutes requiring "proof of only the slightest unwanted physical touch" do not have as an element "the use, attempted use, or threatened use of physical force against the person or property of another," as required by the federal "crime of violence" statute at 18 U.S.C. § 16(a). *See Johnson v. United States*, 559 U.S. 133, 137–38 (2010). In *State v. Schenck*, the Supreme Court of Louisiana defined battery to include "offensive touchings." 513 So.2d 1159, 1165 (La. 1987). Louisiana courts have since convicted defendants of simple battery for pushing another onto a sofa, *State v. Cooks*, 81 So.3d 932, 940 (La. App. 4 Cir. 2011); grabbing another's face and squeezing her cheeks, *State ex rel. L.T.*, 747 SO. 2d 148, 152 (La. App. 3 Cir. 1999); and throwing urine on another. *State in Interest of J.J.*, 125 So.3d 1248, 1251 (La. App. 4 Cir. 2013). Arguably, the minimum conduct criminalized under the statute is thus far more like the "slightest unwanted physical touch" than "force capable of causing physical pain or injury to another person," *Johnson*, 559 U.S. at 137-40.

However, in light of the recent case, *United States v. Reyes Contreras*, 910 F.3d 169 (5th Cir. 2018), even such minimal touching may potentially fall under "force" depending on how "indirect force" is defined. *See supra* "Categories of Immigration Offenses," Section I. As of yet, there is no BIA or Fifth Circuit case law regarding the statute's divisibility.

[9] Simple Battery: Simple battery is probably not a crime involving moral turpitude. Statutes criminalizing offensive or provocative contact are not categorically crimes involving moral turpitude. *See Esparza-Rodriguez v. Holder*, 699 F.3d 821, 825 (5th Cir. 2012); *State v. Schenck*, 513 So.2d 1159, 1165 (La. 1987); *Matter of Solon*, 24 I. & N. Dec. 239, 242 (BIA 2007). However, if the record of conviction reveals assault intended to cause more than *de minimis* physical harm, then the Board may designate the offense as a crime involving moral turpitude. *See Esparza-Rodriguez*, 699 F.3d at 825–26. Status as a crime involving moral turpitude may potentially be derived from the identity of the victim. *See Revolorio v. Holder*, 554 F. App'x 344, 345 (5th Cir. 2014) ("Simple assault or battery does not generally involve moral turpitude unless there is some aggravating factor indicative of moral depravity . . . 'such as the infliction of serious injury upon a person deserving special protection, such as a family member or a peace officer.").

[10] Domestic Abuse Battery: In light of the recent decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018), domestic abuse battery may be a crime of violence under § 16(a) if domestic abuse battery is seen to include "indirect force." *See supra* "Categories of Immigration Offenses," Section I. Section I describes arguments why *Reyes-Contreras* should be applied narrowly and not applied to other statutes.

The state code's definition of "crime of violence," is almost identical to § 16. *Compare* La. Stat. Ann. § 14:2 ("an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon") and 18 U.S.C. § 16 ("(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"). In addition to incorporating the § 16 definition of crimes of violence, § 2 enumerates forty-six specific offenses that

qualify as crimes of violence. These include six different types of battery: aggravated battery, § 2(B)(5), second degree battery, § 2(B)(6), sexual battery, § 2(B)(12), second degree sexual battery, § 2(B)(13), aggravated second degree battery, § 2(B)(31), and battery of a police officer, § 2(B)(41).

The exclusion of La. Stat. Ann. § 35.3 battery from the § 2 list of enumerated offenses indicates that the minimum conduct criminalized by § 35.3 likely does not rise to the level of use, attempted use, or threatened use of physical force against the person or property of another necessary to meet § 16(a) of the crime of violence statute. Indeed, Louisiana's definition of crime of violence is even broader than the Fifth Circuit's definition, including crimes such as burglary and robbery, which "involve[] a substantial risk that physical force against the person or property of another may be used," § 2, while such offenses are excluded under the Fifth Circuit's definition, *see Gonzalez-Longoria*, 2016 WL 537612 at *8. In light of the inclusion of six different Louisiana battery statutes in § 2, the fact that § 35.3 does not fall within this broader definition of crime of violence is persuasive that it also should fall outside of the Fifth Circuit's narrower definition. A search of Louisiana case law did not reveal whether the statute is divisible.

[11] Domestic Abuse Battery: Defenders should continue to treat domestic abuse battery as a crime involving moral turpitude, even though the BIA's analysis of CIMTs has changed. In *Matter of Sanudo*, the Board held that, "[i]n the absence of admissible evidence reflecting that the respondent's offense occasioned actual or intended physical harm to the victim, . . . the existence of a current or former "domestic" relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime. 23 I & N Dec. 968, 973 (BIA 2006). *Accord Lazaro v. Holder*, 390 F. App'x 319 (5th Cir. 2010) (holding noncitizen committed crime involving moral turpitude because convicted of "intentionally inflicting bodily injury upon his wife").

[12] Aggravated Assault: The BIA has recognized that crimes involving the injurious touching of another person can reflect moral depravity on the part of the offender where there is either an aggravating factor, such as assault and battery with a deadly weapon, or bodily harm upon individuals deserving of special protection, such as a child or a domestic partner. *Matter of Sanudo*, 23 I&N Dec. 968, 971-72 (BIA 2006). Adjudicators have considered use of a dangerous weapon to be an aggravating factor. *See, e.g., Matter of Wu*, 27 I&N Dec. 8, 11 (BIA 2017) (citing *Matter of Sanudo* and reasoning that an assault and battery coupled with an aggravated factor such as the "use of a deadly or dangerous weapon" can satisfy the CIMT definition). Thus, § 14:37 likely qualifies as a CIMT regardless of the victim's identity. A search through Louisiana case law did not reveal whether the statute is divisible.

[13] Misdemeanor Sexual Battery: Since a conviction under § 14:43.1.1 results in imprisonment of maximum six months, even if it is considered a crime of violence it is not an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(F).

[14] Misdemeanor Sexual Battery: While there is no relevant 5th Circuit or Louisiana case law, other courts have held that similar misdemeanor sexual battery statutes constitute crimes of moral turpitude. *See People v. Chavez*, 84 Cal. App. 4th 25, 30 (Cal. Ct. App. 2000) (upholding lower court's decision that defendant's conviction for misdemeanor sexual battery, which entails punishment by imprisonment up to six months or a fine similar to § 14:43.1.1, is a crime of moral turpitude and finding that sexual battery is a crime of specific intent); *See also Gonzalez-Cervantes v. Holder*, 709 F.3d 1265, 1267 (9th Cir. 2013) (Court held that defendant's California conviction for misdemeanor sexual battery involved moral turpitude. Sexual conduct where victims were harmed through the non-consensual touching of their intimate parts, falls within the generic federal definition of moral turpitude as applied in the context of sex-related offenses.) In *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007), the BIA held that a third-degree assault conviction under New York law – a class A misdemeanor which has a maximum punishment of twelve months of imprisonment - was a crime of moral turpitude because it involved both specific intent and physical injury. Since both elements are also present in this statute, it is probable that a conviction under §14:43.1.1 may be considered a crime of moral turpitude. A search of Louisiana case law did not reveal whether the statute is divisible.

[15] Misdemeanor Sexual Battery: For a conviction under the statute to be considered a crime of domestic violence, it must first be considered a crime of violence. *See Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010). Therefore, if it is not deemed a crime of violence, *see* endnote 28, then it is not a crime of domestic violence. If it is deemed a crime of violence, then the crime of domestic violence applies to any conviction in which a domestic relationship is present. An immigration adjudicator may look at the record of conviction to establish the domestic relationship, so defenders should try to make sure that the record is free of any information evincing a domestic relationship. *See Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016). A search of Louisiana case law did not reveal whether the statute is divisible.

[16] Aggravated Criminal Damage to Property: Under current law, a conviction under § 14:55 might be a crime of violence, even though § 16(b) was declared unconstitutionally vague, because of the Fifth Circuit's recent decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018). *See supra* "Categories of Immigration Offenses," Section I. Section I describes arguments why *Reyes-Contreras* should be applied narrowly and not applied to other statutes. § 14:55 encompasses intentional damaging "by any means other than fire or explosion." Because *Reyes-Contreras* held that there is no distinction between direct and indirect force, this language may be held not to be overbroad for the purposes of 16(a) in a future case. However, § 14:55 is

different from the assault statutes that *Reyes-Contreras* has been extended to, as § 14:55 does not require that force is applied against any individual. There are cases where individuals have been charged under § 14:55 when no injury to any person resulted from the underlying conduct. See, e.g., *State v. Dawson*, 2018 WL 4520104 (La. App. Ct. 1st Cir. 2018) (noting that no individuals suffered any injuries from a car collision and the only damage was to the car). The difference between § 14:55 and the assault statutes provides another reason for *Reyes-Contreras* not to be applied.

[17] Aggravated Criminal Damage to Property: A conviction under § 14:55 is probably a CIMT because it requires specific intent. However, the requisite level of conduct may not satisfy the CIMT definition. The BIA has found that property damage alone is not necessarily reprehensible conduct. *See Matter of B–*, 2 I. & N. Dec. 867, 867 (BIA 1947) (holding that "willfully damaging mail boxes and damaging other property" under Canadian property damage statute is not a CIMT because statute does not require "base or depraved conduct" nor did the records of conviction allege such conduct). However, other decisions suggest that a conviction under § 14:55 is still a CIMT. S*ee Matter of M–*, 3 I. & N. Dec. 272, 272 (BIA 1948) (Oregon statute is CIMT which involves "[m]aliciously and wantonly injuring and destroying personal property of another"); *Da Silva Neto v. Holder*, 680 F.3d 25, 27, 31 (1st Cir. 2012) (holding that "malicious destruction of property under Massachusetts law qualifies as a crime involving moral turpitude," but found "wanton destruction of property is not categorically a crime involving moral turpitude because it may be done with indifference or recklessly."); *Matter of M–*, 2 I. & N. Dec. 686, 687–88 (BIA 1946) (finding property destruction conviction for willfully breaking railway insulators to be a CIMT as "it indicates a disconcern with the safety and security of others, although no life or person was actually in danger thereby. Such disregard of safety indicates a degree of depravity from which a finding of evil intent is justified.").

[18] Simple Criminal Damage to Property: Under current law, a conviction under § 14:56 might be a crime of violence, even though § 16(b) was declared unconstitutionally vague, because of the Fifth Circuit's recent decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) and its application to § 16(a). *See supra* "Categories of Immigration Offenses," Section I. Section I describes arguments as to why *Reyes-Contreras* should be applied narrowly and not applied to other statutes. Further, § 14:56 is different from the assault statutes *that Reyes-Contreras* has been extended to, as § 14:56 does not require that force is applied against any individual. For example, conduct such as causing damage to two tires, with no injury at all to any person, has been charged under § 14:56. *State v. Earl*, 259 So.3d 1105 (La. App. 4 Cir. 2018). The difference between § 14:56 and the assault statutes provides another reason for *Reyes-Contreras* not to be applied.

[19] Aggravated Burglary: Depending on the divisibility of the statute, this statute may qualify as an aggravated felony based on the "burglary," "theft," or "crime of violence" aggravated felony definitions. A conviction under § 14:60 is arguably a crime of violence under § 16(a), especially in light of the Fifth Circuit's recent decision in in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018). *See supra* "Categories of Immigration Offenses," Section I. Section I describes arguments as to why *Reyes-Contreras* should be applied narrowly and not applied to other statutes. *See also United States v. Fuentes-Canales*, 902 F.3d 468 (5th Cir. 2018).

Whether a conviction under § 14:60 qualifies as a "burglary offense" pursuant to the aggravated felony definition depends on the statute's divisibility. This is because the location element of § 14:60 reaches any "inhabited dwelling, or of any structure, water craft, or movable" while the generic burglary location element is "building or structure." *See Descamps v. United States*, If § 14:60 is not divisible, it is likely broader than the generic definition of burglary *See id.* at 2283 (U.S. 2013) (defining generic offense of burglary as "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime"); s*ee also U.S. v. Reyes-Ochoa*, No. 15-41270, 2017 WL 2820932, at *4 (5th Cir. 2017) (noting the Virginia burglary statute was indivisible and broader than federal crime of generic burglary). However, simple burglary under § 14:62 has been considered to be divisible. *See infra* endnote 22–23. That statute's language is substantially similar to the location element of § 14:60. If the statute is divisible, then any convictions specifying burglary of a "building or structure" in the record of conviction could be found to qualify as a burglary offense and therefore a crime of violence.

Depending on whether the statute is divisible, a conviction under § 14:60 could also qualify as a "theft offense." *See Lopez-Elias v. Reno*, 209 F.3d 788, 793, n. 7 (5th Cir. 2000) (noting that deportation for burglary offense could have been "based alternatively on the theory that burglary of a vehicle with *intent to commit theft* is tantamount to an offense of *attempted theft*") (italics in original). Louisiana law is not clear on whether the statute is divisible. *Compare State v. Smith*, 677 So.2d 589, 592 (La. App. 2 Cir. 1996) ("To satisfy the intent element in this case, the prosecution must prove the defendant had the specific intent to commit a theft at the time of his unauthorized entry.") *State v. Netter*, 79 So.3d 478, 483 (La. App. 5 Cir. 2011) (finding that state "proved beyond a reasonable doubt that defendant still had the requisite specific intent to commit a theft") with *State v. Delagardelle*, 957 So.2d 825, 831 (La. App. 5 Cir. 2007 ("The defendant must have the specific intent to commit either a felony or a theft at the time of his unauthorized entry."). A search of Louisiana case law did not reveal whether § 14:60 is divisible, and the relevant jury instructions were not available.

[20] Aggravated Burglary: If the statute is not divisible, then there is an argument that a conviction under § 14:60 may not be a CIMT, as the intent to commit a felony element may be for a felony that does not implicate moral turpitude. *See Matter of M–*, 2 I&N Dec. 721, 723–25 (BIA 1946) (finding New York burglary statute not to be CIMT because it did not specify intended crime

and "pushing ajar the unlocked door of an unused structure and putting one's foot across the threshold would constitute a breaking and entering. Certainly such an act, in and of itself, should not be stigmatized as base, vile or depraved."); *Matter of G–*, 1 I. & N. Dec. 403, 405 (BIA 1943) (stating that burglary offense is not a CIMT "unless the record of conviction shows that the particular crime that the alien intended to commit upon his unlawful entry into a building involved moral turpitude"); *Matter of Brieva-Perez*, 23 I&N Dec. 766, 772 (BIA 2005) (stating that "offenses such as burglary . . . would not generally be considered a crime of moral turpitude unless accompanied by the intent to commit a morally turpitudinous crime, such as larceny, after entering the building"); *Matter of Luise Alfredo Davila-Barrera*, 2016 WL 8468346 at *3 (BIA Nov. 23, 2016) (finding Texas burglary statute requiring "intent to commit any felony or theft" not to be divisible and thus not to be a CIMT because the underlying felony many not be one that implicates moral turpitude). However, recent case law in the burglary context suggests that it there is intent to commit any crime in the commission of a burglary, then such conduct is inherently base, vile, or depraved, and is therefore a CIMT. *See Uribe v. Sessions*, 855 F.3d 622 (4th Cir. 2017) ("The act of breaking and entering a dwelling, with the intent to commit any crime, necessarily involves conduct that violates an individual's reasonable expectation that her personal living and sleeping space will remain private and secure."); *See also Matter of Jimenez*, 2017 WL 2376445 (BIA 2017) (distinguishing the relevant statute from that in *Matter of M-* based on the statute requiring intent to commit a felony as opposed to a crime more generally and finding that it was a CIMT).

[21] Aggravated Burglary: The statute appears to be divisible regarding its three aggravating factors. *See State v. Richard*, 115 So.3d 86, 91 (La. App. 5 Cir. 2013) (stating that for conviction under § 14:60, "the State must prove beyond a reasonable doubt the existence of one of the three aggravating factors"); *see also Johnson v. Louisiana*, 559 F. Supp. 2d 694, 697 (E.D. La. 2008) (affirming delivery of jury instructions that exclusively spoke about dangerous weapon element, when battery could also have been a ground). If the statute is divisible and the record of conviction involves a dangerous weapon, it is possible that it could qualify as a firearms offense under § 237(a)(2)(C). However, "dangerous weapon" is defined broadly under Louisiana law. *See* La. Stat. § 14:2 (defining "dangerous weapon" as including "any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm"). Thus, the Louisiana definition of "dangerous weapon" might be broader than the federal definition of "firearm," *see* 18 U.S.C. § 921(a)(3), and not a categorical match.

[22] Simple Burglary: *See also supra* endnote 19. A conviction under § 14:62 likely also qualifies as an aggravated felony burglary offense if the conviction is for burglary of any building or structure, as courts have considered § 14:62 to be divisible. *See U.S. v. Bailentia*, 717 F.3d 448, 449-50 (5th Cir. 2013) (finding that a conviction under § 14:62 "meets the generic definition of burglary" when "[t]he charging document and minutes of court, which the district court properly considered to narrow the offense of conviction, reveal that Bailentia pleaded guilty to simple burglary of a building with the intent of committing a theft therein"); *United States v. Melancon*, 2016 WL 5661769 at *1 (M.D. La. Sept. 29, 2016) (similarly finding that § 14:62 conviction met the definition of generic burglary and constituted a violent felony when charging document "established that the Defendant was convicted of entering a building or structure").

[23] Simple Burglary: *See supra* endnotes 19–21; *see also Matter of Nolan*, 19 I. & N. Dec. 539, 545 (BIA 1988) (denying motion to reopen for petitioner who had been found deportable for CIMT for Louisiana crime of attempted simple burglary, without further analysis of CIMT finding); *Matter of Pulido-Alatorre*, 2010 WL 2465083, 381 F. App'x 355, 358 (5th Cir. 2010) (finding Texas conviction for misdemeanor burglary of a motor vehicle was a crime involving moral turpitude). If underlying felony does not implicate moral turpitude, then simply burglary may not categorically match the CIMT definition.

[24] Simple Burglary of an Inhabited Dwelling: A conviction under § 14:62.2 qualifies as a "burglary offense" under INA § 101(a)(43) as it meets the generic definition of burglary. *See United States v. Melancon*, 2016 WL 5661769 at *1-2 (M.D. La. 2016) ("It is clear upon application of the 'categorical approach' to La. R.S. 14:62.2, that the elements of the Louisiana crime of simple burglary of inhabited dwelling match those for generic burglary"). Under current law, a conviction under § 14:62.2 probably is not a crime of violence under 16(a), but because of the Fifth Circuit's recent decision in in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018), the answer is not certain. *See supra* "Categories of Immigration Offenses," Section I. Section I describes arguments as to why Reyes-Contreras should be applied narrowly and not applied to other statutes. Further, § 14:62.2 is different from the assault statutes that *Reyes-Contreras* has been extended to, as § 14:62.2 does not require that force is applied against any individual. *See, e.g., State v. Allen*, 2018 WL 4561498 (La. App. 1 Cir. 2018) (noting that a house was broken into and not mentioning anyone being touched). The difference between § 14:62.2 and the assault statutes provides another reason for *Reyes-Contreras* not to be applied; *see also United States v. Perdomo*, 914 F.3d 356, 357 (5th Cir. 2019).

[25] Simple Burglary of an Inhabited Dwelling: If § 14:62.2 is indivisible, then there is an argument that it does not qualify as a CIMT because the nature of the underlying felony may not involve moral turpitude. *Cf. United States v. Melancon*, 2016 WL 5661769 at *2 (M.D.La., 2016) (stating in the aggravated felony context that "the Louisiana statute proscribing burglary of an inhabited dwelling sets forth a single ('indivisible') set of elements defining that crime"). However, whether "felony" is broad enough to avoid being a categorical match with the CIMT ground is not an entirely closed question. *See, e.g., Uribe v. Sessions*, 855 F.3d 622 (4th Cir. 2017) ("The act of breaking and entering a dwelling, with the intent to commit any crime, necessarily

involves conduct that violates an individual's reasonable expectation that her personal living and sleeping space will remain private and secure.").

While the BIA has found that burglary of an occupied dwelling is a CIMT, its application of the "realistic probability" analysis in the CIMT context was rejected by the Fifth Circuit. *See Matter of Louissaint*, 24 I. & N. Dec. 754, 758 (BIA 2009) (finding that "the conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent to commit a crime is inherently 'reprehensible conduct' committed 'with some form of scienter'" after examining a Florida statute); declined to follow by *Mercado v. Lynch*, 823 F.3d 276, 278–79 (5th Cir. 2016) (finding that the Fifth Circuit applies a "minimum reading" approach in the CIMT context and that "[a]n offense is a crime involving moral turpitude if the minimum reading of the statute [of conviction] necessarily reaches only offenses involving moral turpitude"). However, the Fifth Circuit has recently determined that whenever the categorical analysis is employed, the "realistic probability" test applies. *Vazquez v. Sessions*, 885 F.3d 862 (5th Cir.2018); *United States v. Castillo-Rivera*, 853 F.3d 218, (5th Cir.2017); s*ee also supra* "Realistic Probability Test in the Fifth Circuit." A search through Louisiana case law did not reveal whether the statute is divisible.

[26] Unauthorized Entry of an Inhabited Dwelling: A conviction under § 14:62.3 is probably not a crime of violence under 16(a). *See United States v. O'Connor*, 632 F.3d 894 (5th Cir. 2011) (holding that under § 4B1.2(a)(1), the Sentencing Guidelines equivalency of 16(a), the offense of unauthorized entry of an inhabited dwelling does not qualify as a crime of violence because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another).

However, because of the Fifth Circuit's recent decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018), the answer is not certain. *See supra* "Categories of Immigration Offenses," Section I. Section I describes arguments as to why *Reyes-Contreras* should be applied narrowly and not applied to other statutes. Further, § 14:62.3 is different from other assault statutes to which *Reyes-Contreras* has been extended, as § 14:62.3 does not require that force is applied against any individual. *See, e.g.*, *State v. Henry*, 256 So.3d 1080 (La. App. 3 Cir. 2018) (noting that the defendant was charged with entering a trailer without authorization). The difference between § 14:62.3 and the assault statutes provides another reason for *Reyes-Contreras* not to be applied.

[27] Unauthorized Entry of an Inhabited Dwelling: It is unclear whether this offense would qualify as a crime involving moral turpitude. It is arguably less morally culpable than a trespassing offense that explicitly requires malicious intent. *See, e.g.*, *Matter of Esfandiary*, 16 I. & N. Dec. 659, 661 (BIA 1979) (finding a Florida malicious trespass offense to be a CIMT because it "involves a malicious and mischievous intent").

[28] Armed Robbery: Although a Ninth Circuit case has found that a similar Massachusetts armed robbery statute was not categorically a "violent felony" under the Armed Career Criminal Act's force prong, which is substantially similar to 18 U.S.C. § 16(a), *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016), Armed Robbery may be a crime of violence under § 16(a) in the Fifth Circuit in light of the recent decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2015). *See supra* "Categories of Immigration Offenses," Section I. Section I describes arguments why *Reyes-Contreras* should be applied narrowly and not applied to other statutes; s*ee also United States v. Tzacir-Garcia*, 928 F.3d 448, 450 (5th Cir. 2019) (Texas conviction for robbery is a crime of violence under § 16(a) and thus potentially an aggravated felony for purposes of § 1326(b)(2), illegal reentry). The statute contains as an element the use of "force or intimidation," which may qualify as use of force under the broad definition set out by *Reyes-Contreras*. La. Rev. Stat. Ann. § 14:64, but may be distinguished by citing cases with no use of force but intimidation that are prosecuted under the statute. A search of Louisiana case law did not reveal whether the statute is divisible.

[29] Armed Robbery: *See infra* Simple Robbery notes 31–32. The aggravating element of a weapon may make the Armed Robbery statute likely to be deemed a crime of moral turpitude. *See Matter of Sanudo*, 23 I. & N. Dec. 968 (BIA 2006) (holding that an assault offense which requires a state of mind falling between specific intent and criminal negligence (e.g., general intent, recklessness, etc.) nonetheless qualifies as a crime involving moral turpitude if it requires proof of some aggravating element or attendant circumstance which significantly increases its culpability over mere simple assault); *Matter of O-*, 3 I&N Dec. 193, 196 (BIA 1948); *see also Matter of J-*, 4 I&N Dec. 512, 515-16 (BIA 1951) (holding that a Massachusetts conviction for armed robbery is a crime of moral turpitude, as specific intent is essential to the crime of robbery). A search of Louisiana case law did not reveal whether the statute is divisible.

[30] Armed Robbery: While there is no Fifth Circuit or BIA case law on the statute's divisibility, it is unclear whether the statute is divisible with respect to the firearm element. While the statute specifically imposes an additional sentence if a firearm is involved, sample jury instructions do not specifically require the jury to determine whether a firearm was involved, but rather to determine whether the defendant led the victim reasonably to believe that the defendant was armed with "a dangerous weapon." *See* La. Stat. Ann. § 14:64.3(A) (imposing an additional sentence of five years without benefit of parole, probation, or suspension of sentence, and to be served consecutively, when the dangerous weapon used is a firearm); Louisiana Criminal Jury Instructions, § 10.67 First Degree Robbery (R.S. 14:64).

[31] Simple Robbery: Case law interpreting the simple robbery statute suggests that a conviction is permissible even where force, attempted force, or threatened force is not used, as required to be considered a crime of violence pursuant to 18 U.S.C. § 16(a). *See, e.g., State v. Robinson,* 713 So.2d 828, 830 (La. App. 5 Cir. 1998) (finding that the "force or intimidation" element was met despite no use, attempted use, or threatened use of force, when "defendant's demeanor caused [victim] concern, and defendant used slang of "street" words that are not used in Causey's neighborhood."); *see also id.* at 830 (where the Court treated "force or intimidation" as indivisible).

However, in light of the recent decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018), even such minimum touching may potentially fall under "force" depending on how "indirect force" is defined. *See supra* "Categories of Immigration Offenses," Section I. Section I describes arguments why *Reyes-Contreras* should be applied narrowly and not applied to other statutes. Defenders may distinguish a conviction under simple robbery from the kind of conduct defined as force under *Reyes-Contreras* by pointing to cases such as *State v. Robinson,* 713 So.2d, in which the defendant was prosecuted under the statute despite having displayed no use, attempted use, or threatened use of force. *See also United States v. Tzacir-Garcia*, 928 F.3d 448, 450 (5th Cir. 2019) (Texas conviction for robbery is a crime of violence under § 16(a) and thus an aggravated felony for purposes of § 1326(b)(2), illegal reentry).

[32] Simple Robbery: It is likely that § 14:65 will be found a CIMT. *See Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016) (finding that a theft offense is a CIMT if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded, but also that it is appropriate to presume—absent evidence to the contrary—that retail theft and theft of cash involve an intent to permanently deprive the owner of the merchandise or cash, without the necessity of affirmative proof); *Matter of Jurado*, 24 I. & N. Dec. 29, 33-34 (BIA 2006). Robbery has long been considered a crime involving moral turpitude. See also Matter of Martin, 18 I&N Dec. 226, 227 (BIA 1982) ("It is clear . . . that robbery is universally recognized as a crime involving moral turpitude.").

[33] Theft: § 14:67 is likely a theft offense aggravated felony under 8 U.S.C. § 1101(a)(43)(G), which includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year." The Fifth Circuit has adopted the generic definition of theft for the purposes of the categorical analysis: "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Burke v. Mukasey*, 509 F.3d 695 (5th Cir. 2007), *see also United States v. Rodriguez-Salazar*, 768 F.3d 437, 438 (5th Cir. 2014) (Holding that the definition of theft followed does not limit the crime to consent withheld when a guilty person takes possession of the property from the owner. The withholding of consent is expressly extended to the time the thief or embezzler exercises control of the property. The owner's consent is comparable whether measured before or after the moment the property is transferred.). Under § 14:67 "Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential." Thus, as long as a sentence under § 14:67 is at least one year, there is likely a categorical match. A search of Louisiana case law did not reveal whether the statute is divisible, and the relevant jury instructions did not provide useful guidance.

[34] Theft: There is a general presumption that theft offenses are CIMTs. *See, e.g., Soetarto v. INS*, 516 F.2d 778 (7th Cir. 1975) ("Theft has always been held to involve moral turpitude, regardless of the sentence imposed or the amount stolen."); *see also Okoro v. I.N.S.*, 125 F.3d 920, 926 (5th Cir. 1997)(Although we are aware of no Fifth Circuit cases so holding, we accord due deference to the BIA's and other Circuits' interpretation of the INA and find that the crime of theft is one involving moral turpitude within the meaning of INA §§ 241(a)(2)(A)(i) and (ii).");
Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847, 853 (BIA 2016) (Holding that theft is a CIMT "if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded."). However, courts have recognized a narrow exception to the general presumption, where a statute covers *de minimis* takings, such as joyriding. *Martinez v. Sessions*, 892 F.3d 655 (4th Cir. 2018); *Chacon v. Sessions*, 704 Fed. Appx. 360 (5th Cir. 2017) ("In other words, a theft or larceny statute is not a CIMT in circumstances where it criminalizes a de minimis taking, such as joyriding."). It is not clear from a search of Louisiana case law whether § 14:67 includes *de minimis* takings. Even if § 14:67 does include *de minimis* takings, the extent to which the exception applies to conduct criminalized under § 14:67 depends on whether the statute is divisible—in particular, the element relating to the value of the item taken. Louisiana jury instructions suggest that the statute is divisible, since a jury must find a particular threshold of value. Louisiana Criminal Jury Instructions, § 10.71 Theft (R.S. 14:67). However, there is no BIA or Louisiana case law directly addressing the statute's divisibility. Thus, the exception would likely only apply to cases involving the lowest value threshold.

[35] Unauthorized Use of a Movable: *See United States v. Rodriguez-Salazar,* 768 F.3d 437, 438 (5th Cir. 2014) (finding that a Texas theft statute that was broad enough to include theft by fraudulently obtained consent fit the generic definition of theft pursuant to the aggravated felony statute).

[36] Unauthorized Use of a Movable: The BIA has held that a theft offense is a CIMT if it involves a taking or the exercise of control over another's property without consent and with an intent to deprive the owner of his property either *permanently* or under circumstances where the owner's property rights are substantially eroded. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 852-53 (BIA 2016); *see also Chacon v. Sessions*, 704 Fed. Appx. 360 (5th Cir. 2017) (finding that an Oklahoma theft statute that did not require permanent deprivation was a CIMT). La. Stat. Ann. § 14:68 specifies that the unauthorized use of a movable is the intentional taking or use of a movable which belongs to another, either without the other's consent, or by means of fraudulent conduct, practices, or representations "without any intention to deprive the other of the movable permanently." La. Stat. Ann. § 14:68.

[37] Illegal possession of stolen things of less than $500: The Immigration and Nationality Act (the "Act") defines aggravated felony to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C § 1101(a)(43)(G). To determine if a state offense qualifies as this type of aggravated felony, IJs will compare the state statute to the generic definition of a theft offense. *See Nolos v. Holder*, 611 F.3d 279, 285 (5th Cir. 2010). The federal generic definition of theft is "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Burke v. Mukasey*, 509 F.3d 695, 697 (5th Cir. 2007).

La. Stat. Ann. § 14.69 requires the state to prove four elements: (1) the property was stolen; (2) the property was worth less than $500; (3) the defendant knew or should have known that the vehicle was stolen; and (4) the defendant intentionally received the property. *See State v. Riley*, 744 So.2d 664, 667 (La. App. 4th Cir. 1999). Because either a "knew" or "should have known" *mens rea* would categorically match the federal generic offense of receipt of stolen property, § 14.69.B.3 would likely qualify as an aggravated felony if the conviction was coupled with a sentence of at least one year, as required by 8 U.S.C § 1101(a)(43)(G). *See Matter of Jose Guillermo Rios-Ventura*, 2015 WL 1208208, *2 (BIA 2015).

[38] Illegal possession of stolen things of less than $500: The Fifth Circuit has not considered whether receipt of stolen property is a crime involving moral turpitude. However, the BIA has held that such offenses—even where the offender only had "good reason to believe," or, "objective knowledge," that the thing received was stolen—do qualify as crimes involving moral turpitude. *See, e.g., Matter of Bahta*, 22 I. &N. Dec. 1381, 1391 (BIA 2000) (finding that Nevada statute requiring either knowledge of the stolen nature of property or circumstances that "should have caused a reasonable person to know that it is stolen property" is categorically a crime of moral turpitude). A search of Louisiana case law did not reveal whether the statute is divisible, and the relevant jury instructions were not available.

[39] Felony Carnal Knowledge of a Juvenile: The determination of whether a conviction under §14:80 is an aggravated felony will depend on the divisibility of this statute. "Murder, rape or sexual abuse of a minor" is an aggravated felony. 8 USC § 1101 (a)(43)(A). In assessing an earlier version of the statute, the Fifth Circuit in a 2012 unpublished decision upheld the district court's determination that a conviction under §14:80 is sexual abuse of a minor in the context of a sentencing enhancement under the United States Sentencing Guidelines §2L1.2. *United States v. Martinez-Munoz*, 496 Fed.Appx. 474, 476 (5th Cir. 2012). However, in *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017), the Supreme Court held that "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants," the statute must require the age of the victim to be less than sixteen for it to be a match with the generic federal definition of "sexual abuse of a minor." *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562, 1565 (2017). The age requirement in *Esquivel-Quintana* was adopted by the Fifth Circuit in *Shroff v. Sessions*, 890 F.3d 542 (5th Cir. 2018) in the aggravated felony context and applied to an online solicitation case. *Id.* at 545 (Despite arguments that the holding in *Esquivel-Quintana v. Sessions* is limited to convictions involving statutory rape, the 5th Circuit found that the Supreme Court's holding in fact applies to any conviction criminalizing conduct based solely on the age of the participants. Therefore, if the Supreme Court found that sexual intercourse with a 17-year-old was not "especially egregious," than neither would online solicitation of a 17-year-old.). Section 14:80 requires the victim to be thirteen years of age or older but less than seventeen years of age. Sample jury instructions suggest that the statute is not divisible by age because the jury does not need to decide on the age of the victim, as such the statute is likely overbroad and not a categorical match in light of *Esquivel-Quintana* and *Shroff*.

However, § 14:80 may be an aggravated felony under the crime of violence definition, particularly in light of *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018), where the Fifth Circuit deemed that indirect force may be sufficient to classify an act as a crime of violence. *See supra* "Categories of Immigration Offenses," Section I. (outlining potential ways to distinguish a case from *Reyes-Contreras*); *see also Ramos-Garcia v. Holder*, 483 F. App'x 926, 928 (5th Cir. 2012) ("A sexual act does not require physical contact with a minor to be abusive, since psychological harm may occur even without such contact. . . . [it is an] established [. . .] per se rule that gratifying or arousing one's sexual desires in the presence of a child is abusive because it involves taking undue or unfair advantage of the minor. . . .therefore [. . .] sexually suggestive contact with or in the presence of a minor is sexual abuse."). *But cf. United States v. Hernandez-Avila*, 892 F.3d 771, 773 (5th Cir. 2018) (holding that though the Texas conviction was a crime of violence under the Sentencing Guidelines, which includes "sexual abuse of a minor" as a conviction that satisfied the crime of violence definition, the relevant statute was categorically overbroad under *Esquivel-Quintana* because it criminalized intercourse with a victim under 17, rather than 16 and did so solely based on the age of the participants.).

A search of Louisiana case law did not reveal whether the statute is divisible.

[40] Felony Carnal Knowledge of a Juvenile: The determination of whether a conviction under §14:80 is a crime involving moral turpitude will depend on the divisibility of this statute. In *Matter of Silva-Trevino*, 26 I.&N. Dec. 826, 834 (BIA 2016), on remand, the Board reaffirmed the holding in *Silva-Trevino*, 24 I.&N. Dec. 687 (2008), finding no reason to deviate from the rule that a crime involving intentional sexual conduct by an adult with a child involves moral turpitude as long as the perpetrator knew or should have known that the victim was a minor. According to the Fifth Circuit, in the aggravated felony context, "[a]n act is sexual if it is "[o]f, pertaining to, affecting, or characteristic of sex, the sexes, or the sex organs and their functions," and includes any act whose purpose is "sexual arousal or gratification." *Ramos-Garcia v. Holder*, 483 F. App'x 926, 930 (5th Cir. 2012). Arguably, the acts described in the statute could fall under such a definition. However, depending on the divisibility, §14:80 may possibly be found overbroad based on the age of the victim and whether the defendant had knowledge that the victim was a minor. S*ee Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 835 (BIA 2016) ("As noted, an offense will be classified as a crime involving moral turpitude in the Fifth Circuit if the minimum reading of a statute only encompasses offenses involving moral turpitude. . . Because section 21.11(a)(1) is broad enough to punish behavior that is not accompanied by the defendant's knowledge that the victim was a minor, the offense does not necessarily involve moral turpitude.") (citation omitted). The Fifth Circuit has yet to address *Matter of Silva-Trevino*, 26 I.&N. Dec. 826 (BIA 2016); *see also Matter of Guevara-Alfaro*, 25 I&N Dec. 417 (BIA 2011) (any intentional sexual conduct by an adult with a child involves moral turpitude, as long as the perpetrator knew or should have known that the victim was under the age of sixteen.). Unfortunately, a search of Louisiana law did not reveal whether the statute is divisible.

[41] Felony Carnal Knowledge of a Juvenile: It is likely that Section 14:80 would be considered a crime of child abuse, as almost any offense that has a minor victim as an element, or where the record of conviction shows that the victim was under eighteen years of age, may be a crime of child abuse. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512-13 (BIA 2008) (interpreting the term "crime of child abuse" broadly to mean "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being"). Further, the BIA has held that exposing a child to the risk of harm, such as child endangerment, is sufficient to constitute crime of child abuse, and that no actual injury is required. *Matter of Soram*, 25 I&N Dec. 378, 383 (BIA 2010).

[42] Felony Carnal Knowledge of a Juvenile: For a conviction under the statute to be considered a crime of domestic violence, it must first be considered a crime of violence. *See Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010). Therefore, if it is not deemed a crime of violence, *see* endnote 28, then it is not a crime of domestic violence. If it is, then the crime of domestic violence applies to any conviction in which a domestic relationship is present. An immigration adjudicator may look at the record of conviction to establish the domestic relationship, so defense attorneys should try to make sure that the record is free of any information evincing a domestic relationship. *See Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016).

[43] Indecent Behavior with Juveniles: The determination of whether a conviction under §14:81 is an aggravated felony will depend on the divisibility of this statute. "Murder, rape or sexual abuse of a minor" is an aggravated felony. 8 USC § 1101 (a)(43)(A). In *Ramos-Garcia v. Holder*, 483 F. App'x 926, 928 (5th Cir. 2012), the Fifth Circuit held that the defendant's conviction under the 2002 version of §14:81 constituted sexual abuse of a minor under the generic, contemporary meaning of the term, affirming the BIA's prior determination (in 2006 the relevant portion of the statute under which the defendant was convicted was moved to Subsection (A)(1) of the statute). *See* La.Rev.Stat. 14:81(A)(1) (2007). The court stated that sexual abuse of a minor under § 1101(a)(43) contains three elements: "(1) the conduct must involve a 'child'; (2) the conduct must be 'sexual' in nature; and (3) the sexual conduct must be 'abusive.'" *Id.* at 930 (citing *United States v. Esparza–Andrade*, 418 Fed.Appx. 356, 358 (5th Cir.2011) (per curiam) (unpublished) (citing *Najera–Najera*, 519 F.3d at 511)); *see also United States v. Duron-Rosales*, 584 F. App'x 218 (5th Cir. 2014) (finding §14:81(A)(1) to fall within the generic meaning of "sexual abuse of a minor").

Despite the holding in *Ramos-Garcia*, *Shroff v. Sessions*, 890 F.3d 542 (5th Cir. 2018) suggests that §14:81 will likely be found to be overbroad and therefore not a categorical match, particularly regarding the age of the victim. Despite arguments that the holding in *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017) is limited to convictions involving statutory rape, the 5th Circuit in *Shroff* held that the Supreme Court's holding in fact applies to any conviction criminalizing conduct based solely on the age of the participants. *Id.* at 545. Therefore, if the Supreme Court held that sexual intercourse with a 17-year-old was not "especially egregious," then online solicitation of a 17-year-old would likely be regarded as not "especially egregious" as well. *Id.* Like the statute in *Shroff*, Section 14:81 criminalizes conduct based solely on the age of the participants and requires the victim to be less than seventeen years of age, which is broader than the "under 16-year-old" requirement found in *Esquivel-Quintana*. Moreover, according to the Reporter's Comments for §14:81, the statute was meant to cover conduct that falls short of sexual intercourse. Arguably, the statute may be overbroad regarding the age and conduct, and not a categorical match in light of *Esquivel-Quintana* and *Shroff*. *See, e.g., United States v. Hernandez-Avila*, 892 F.3d 771, 773 (5th Cir. 2018) (Finding that in the context of the Sentencing Guidelines, under *Esquivel–Quintana*, a prior conviction under Texas Penal Code § 22.011(a)(2) is not a "crime of violence" [because it] proscribes sexual conduct with a "child"—defined as "a person younger than 17 years of age"—"regardless of whether the person knows the age of the child at the time of the offense." . . . . [b]ecause [the statute] criminalizes sexual intercourse with a victim under 17, rather than a victim under 16, and does so "based solely on the age of the

participants," it is categorically overbroad under *Esquivel–Quintana*.") The 5th Circuit also rejected any proposition that the conviction did not meet the generic definition of sexual abuse of a minor because no minor was involved in the sting operation and "found that the relevant question for removal purposes is whether the alien acted with the intention of sexually exploiting a minor." *Shroff*, 890 F.3d at 544.

However, Section 14:81 may be an aggravated felony under the crime of violence definition, particularly in light of *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018), where the 5th Circuit deemed that indirect force may be sufficient to classify an act as a crime of violence. *See supra* "Categories of Immigration Offenses," Section I (outlining potential ways to distinguish a case from *Reyes-Contreras*); *see also Ramos-Garcia v. Holder*, 483 F. App'x 926, 928 (5th Cir. 2012) ("A sexual act does not require physical contact with a minor to be abusive, since psychological harm may occur even without such contact. . . . [it is an] established [. . .] per se rule that gratifying or arousing one's sexual desires in the presence of a child is abusive because it involves taking undue or unfair advantage of the minor. . . .therefore [. . .] sexually suggestive contact with or in the presence of a minor is sexual abuse."). *But cf. United States v. Hernandez-Avila*, 892 F.3d 771, 773 (5th Cir. 2018) (holding that though the Texas conviction was a crime of violence under the Sentencing Guidelines, which includes "sexual abuse of a minor" as a conviction that satisfied the crime of violence definition, the relevant statute was categorically overbroad under *Esquivel-Quintana* because it criminalized intercourse with a victim under 17, rather than 16 and did so solely based on the age of the participants)

[44] Indecent Behavior with Juveniles: The determination of whether a conviction under §14:81 is a crime involving moral turpitude will depend on the divisibility of this statute. In *Matter of Silva-Trevino*, 26 I.&N. Dec. 826, 834 (BIA 2016), on remand, the Board reaffirmed the holding in *Silva-Trevino*, 24 I.&N. Dec. 687 (2008), finding no reason to deviate from the rule that a crime involving intentional sexual conduct by an adult with a child involves moral turpitude as long as the perpetrator knew or should have known that the victim was a minor. According to the Fifth Circuit, in the aggravated felony context, "[a]n act is sexual if it is "[o]f, pertaining to, affecting, or characteristic of sex, the sexes, or the sex organs and their functions," and includes any act whose purpose is "sexual arousal or gratification." *Ramos-Garcia v. Holder*, 483 F. App'x 926, 930 (5th Cir. 2012). Arguably, the acts described in both (A)(1) and (A)(2) could fall under such a definition. However, depending on the divisibility, §14:81 may possibly be found to be overbroad based on the subsection, age of the victim, and whether the defendant had knowledge that the victim was a minor. S*ee Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 835 (BIA 2016) ("As noted, an offense will be classified as a crime involving moral turpitude in the Fifth Circuit if the minimum reading of a statute only encompasses offenses involving moral turpitude. . . Because section 21.11(a)(1) is broad enough to punish behavior that is not accompanied by the defendant's knowledge that the victim was a minor, the offense does not necessarily involve moral turpitude.") (citation omitted). The Fifth Circuit has yet to address *Matter of Silva-Trevino*, 26 I.&N. Dec. 826 (BIA 2016). Unfortunately, a search of Louisiana law did not reveal whether the statute is divisible.

[45] Indecent Behavior with Juveniles: It is likely that §14:81 will be considered a crime of child abuse as almost any offense that has a minor victim as an element, or where the record of conviction shows that the victim was under eighteen years of age, may be a crime of child abuse. *See Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 513 (BIA 2008).

[46] Indecent Behavior with Juveniles: For a conviction under the statute to be considered a crime of domestic violence, it must first be considered a crime of violence. *See Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010). Therefore, if it is not deemed a crime of violence, *see* endnote 26, then it is not a crime of domestic violence. If it is deemed a crime of violence, then the crime of domestic violence applies to any conviction in which a domestic relationship is present. An immigration adjudicator may look at the record of conviction to establish the domestic relationship, so defenders should try to make sure that the record is free of any information evincing a domestic relationship. *See Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016).

[47] Cruelty to Juveniles: The determination of whether a conviction under §14:93 is an aggravated felony under the crime of violence definition will depend on the divisibility of this statute. While neither the Fifth Circuit nor Louisiana case law revealed much regarding the divisibility of the statute, the statute could plausibly be indivisible with regard to the different types of cruelty to juveniles, as the statute does not prescribe different punishments for each type, only for when the crime committed is under (A)(1) and the victim is eight years old or younger. La. Rev. Stat. § 14:93 (D)(2). The sample jury instructions however did provide evidence in favor of divisibility, as it requires the jury to fill in a blank describing the act of cruelty from the indictment. Louisiana Criminal Jury Instructions, § 10.99 Cruelty to Juveniles (R.S. 14:93). Additionally, the jury instructions seem to suggest that the statute is divisible regarding the mens rea. The subsections also appear to be divisible, in that there are separate jury instructions for all three subsections. § 10:141. Cruelty to juveniles (R.S. 14:93), Louisiana Criminal Jury Instructions and Procedures § 10:141; § 10:142. Cruelty to juveniles—Exposure to a juvenile to a clandestine laboratory operation where it is foreseeable that the child may be physically harmed (R.S. 14:93(A)(2)), Louisiana Criminal Jury Instructions and Procedures § 10:142; § 10:143. Cruelty to juveniles (R.S. 14:93), Louisiana Criminal Jury Instructions and Procedures § 10:143. A search of Louisiana case law did not provide any guidance as to the statute's divisibility. Cruelty to Juveniles may not be deemed a crime of violence as it encompasses actions that lack any force. For example, the "intentional or criminally negligent allowing" of a child under the age of seventeen "to be present during the manufacturing, distribution, or purchasing or attempted manufacturing, distribution or purchasing of a controlled dangerous substance" is criminalized under the statute. La. Rev. Stat. § 14:93 (A)(3). However, if the statute is deemed divisible, then exposing a child to "unjustifiable pain or suffering" may be deemed indirect

force, which under *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) may be sufficient to classify it as a crime of violence. *See supra* "Categories of Immigration Offenses," Section I. Section I outlines potential ways to distinguish a case from *Reyes-Contreras*.

[48] Cruelty to Juveniles: The determination of whether a conviction under §14:93 is a crime involving moral turpitude under definition will depend on the divisibility of this statute, particularly regarding the mens rea and conduct. To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state. *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 834 (BIA 2016) (citing *Nino v. Holder*, 690 F.3d 691, 695 (5th Cir. 2012)). The BIA has held that "moral turpitude inheres in crimes involving serious misconduct committed with at least a culpable mental state of recklessness— that is, a *conscious disregard* of a substantial and unjustifiable risk. *Matter of Tavdidishvili*, 27 I. & N. Dec. 142, 143-44 (BIA 2017) (quotations omitted). Therefore, since the defendant can be convicted of §14:93 with the mental state of criminal negligence, it is possible that the statute may be found overbroad because of the requisite mens rea. Additionally, regarding the conduct, defenders could argue that the statute is indivisible and that it includes conduct that is not morally turpitudinous, such as allowing a child under the age of seventeen to be present during the manufacturing, distribution or purchasing of a controlled substance. La. Rev. Stat. § 14:93 (A)(3). A search through Louisiana case law did not reveal whether the statute is divisible.

[49] Cruelty to Juveniles: §14:93 requires that the age of the victim be under seventeen, and therefore likely qualifies as a crime of child abuse because the ground is extremely broad. Almost any offense that has a minor victim as an element, or where the record of conviction shows that the victim was under eighteen years of age, may be a crime of child abuse. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512-13 (BIA 2008) (interpreting the term "crime of child abuse" broadly to mean "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being"). Further, the BIA has held that exposing a child to the risk of harm, such as child endangerment, is sufficient to constitute crime of child abuse, and that no actual injury is required. *Matter of Soram*, 25 I&N Dec. 378, 383 (BIA 2010). However, the BIA also acknowledged that a state-by-state analysis is required. *Id.* at 383.

[50] Cruelty to Juveniles: For a conviction under the statute to be considered a crime of domestic violence, it must first be considered a crime of violence. *See Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010). Therefore, if it is not deemed a crime of violence, then it is not a crime of domestic violence. If it is, then the crime of domestic violence applies to any conviction in which a domestic relationship is present. An immigration adjudicator may look at the record of conviction to establish the domestic relationship, so defenders should try to make sure that the record is free of any information evincing a domestic relationship. *See Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016). A search of Louisiana case law did not reveal whether the statute is divisible.

[51] Illegal carrying of weapons: There is one possible ground on which a violation of La. Stat. Ann. § 14:95 could qualify as an aggravated felony: illicit trafficking in firearms. § 14:95 is probably not a crime of violence (COV). The remaining definition of a COV is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See* 18 U.S.C. § 16(a). The Fifth Circuit has declined to find that concealed weapons offenses are crimes of violence under § 16(a). See *United States v. Medina-Anicacio*, 325 F.3d 638, 644 (5th Cir. 2006) ("[T]he California concealed dagger offense is not a crime of violence under § 16(a), because it does not have as an element the 'use, attempted use, or threatened use of physical force against the person or property of another.'"). It is unlikely that *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) currently changes the outcome. The *Reyes-Contreras* court did not overrule *United States v. Medina-Anicacio* and has not revisited *Medina-Anicacio* since *Reyes-Contreras* was decided. Additionally, *Reyes-Contreras* itself should be applied narrowly are described above. *See supra* "Categories of Immigration Offenses," Section I. *Reyes-Contreras* has only been applied so far in the context of various assault statutes—statutes that criminalize some use of force, whether direct or indirect. In contrast, § 14:95 criminalizes possession alone, and encompasses conduct that involves no use of force at all. *See, e.g.*, *State v. Lattin*, 256 So.3d 484 (La. App. 2 Cir. 2018) (finding sufficient evidence for a § 14:95 conviction where a gun was found in a shoe box on top of a dresser).

Illicit Trafficking in Firearms

The Immigration and Nationality Act defines "aggravated felony" to include "illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title)." 8 U.S.C. § 1101(a)(43)(C). 18 U.S.C. 18 U.S.C. § 921, in turn, defines firearm to mean:

- (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
- (B) the frame or receiver of any such weapon;
- (C) any firearm muffler or firearm silencer; or
- (D) any destructive device," but not an antique firearm.

18 U.S.C. § 921(a)(3) defines "destructive device" to mean:

- (A) an explosive, incendiary or poison gas, including a bomb, grenade, rocket, missile, mine, or a similar device,
- (B) any type of weapon," other than a "shotgun or shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter," and
- (C) "any combination of parts either designed or intended for use in converting any device into a destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled."

§ 921(a)(4) excludes from the definition of destructive devices:

- any device which is neither designed nor redesigned for use as a weapon;
- any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device;
- surplus ordnance sold, loaned, or given by Secretary of Army pursuant to certain federal statutes; or
- any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use for sporting, recreational or cultural purposes.

The firearms aggravated felony is limited to the commonsense definition of trafficking. *See* IMMIGR. LAW & CRIMES § 7:28 (2015). Indeed, the BIA has determined that, "[e]ssential to ["trafficking"] . . . is its business or merchant nature, the trading or dealing of goods, although only a *minimal degree of involvement* may be sufficient under the precedents of this Board to characterize an activity as 'trafficking' or a participant as a 'trafficker'." *Matter of Ata Kwadwo Kwateng A.K.A. Francis Bimpong*, 2006 WL 2391228, at *2 (BIA 2006); *see also Matter of Victor Indalecio Saravia-Guerrero*, WL 880331, at *2 (BIA 2004) ("Section 101(a)(43)(C) does not define 'illicit trafficking,' but we have held in the controlled substance context that this term means any unlawful trading or dealing."). The Fifth Circuit's only case on point comports with that definition, holding that buying, receiving, concealing, and facilitating transportation, concealment, and sale of semi-automatic pistols, knowing that they were intended for export to Guatemala, is an aggravated felony firearms offense. *Franco-Casasola v. Holder*, 773 F.3d 33, 35–42 (5th Cir. 2014); *see also Soto-Hernandez v. Holder*, 729 F.3d 1, 4 (1st Cir. 2013) (affirming BIA's definition of "trafficking" to include "any activity involving the commercial exchange of a firearm, including a single past transaction").

Section 14:95 likely does not qualify as an illicit trafficking in firearms offense because no subdivision of 14:95 relating to firearms, as defined by 18 U.S.C § 921, criminalizes activity that qualifies as trafficking. "Concealment," "ownership, possession, custody or use," § 14:95(1)–(3), (5), sweep more broadly than activities that are "business or merchant in nature," such as "trading or dealing," *Matter of Ata Kwadwo Kwateng A.K.A. Francis Bimpong*, 2006 WL 2391228, at *2. Thus, § 14:95 violations should not qualify as aggravated illicit trafficking in firearms offenses.

[52] Illegal carrying of weapons: La. Stat. Ann. § 14:95 probably does not qualify as a CIMT. Crimes involving moral turpitude have been defined by courts and the BIA to include "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." *Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir. 1996). Covered conduct should be "per se morally reprehensible and intrinsically wrong, or malum in se," and involve "a vicious motive or a corrupt mind." *Id.*

Although the Fifth Circuit has not yet had occasion to address whether this particular offense qualifies as a crime of moral turpitude, the BIA has held that "possession of burglary tools is not a crime involving moral turpitude unless accompanied by an intent to commit a turpitudinous offense such as larceny," *Matter of Serna*, 20 I. & N. Dec. 579, 584 (BIA 1992) (citing *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir. 1939); *Matter of S-*, 6 I & N Dec. 769 (BIA 1955)), and, with a few exceptions, "carrying or possessing a concealed weapon . . . involve[s] moral turpitude only when the intent to use it against another person has been established," *Matter of Serna*, 20 I. & N. Dec, 579, 584 (BIA 1992); *see Matter of Eduardo Zuniga-Gallardo*, WL 263114 at *2 (BIA 2009) ("Typically, convictions for unlawfully possessing a concealed firearm have not been held to constitute crimes involving moral turpitude absent evidence that the alien unlawfully possessed the firearm with the intent of harming someone."); *accord Matter of S-*, 8 I. & N. Dec. 344, 346 (BIA 1959) (holding carrying a concealed weapon with intent to use against another is crime involving moral turpitude). However, an unpublished BIA opinion noted that such offenses *are* crimes involving moral turpitude when the defendant is convicted of trafficking firearms or commits a fraudulent act in connection with possessing a weapon. *Matter of Ibrahaim Abed Hussein Hasan Ali*, 2007 WL 1196271 at *2 (BIA 2007). In *Matter of Ibrahim Abed Hussein Hasan Ali*, the Board reasoned that trafficking had occurred because the noncitizen had been convicted of violating 18 U.S.C. § 922(a)(1)(A)–(B) by "engag[ing] in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm [or ammunition]." *Id*.

Ultimately, a violation of La. Stat. Ann. § 14:95 would likely not constitute a crime of moral turpitude. The statute requires no intent to harm someone or to commit a turpitudinous offense, such as larceny, as required by *Matter of Serna*.

[53] Manufacture; Distribution: § 40:966(A) likely falls under the "illicit trafficking in a controlled substance" aggravated felony ground. Under 8 U.S.C. § 1101(a)(43)(B), illicit trafficking in a controlled substance (as defined in section 802 of title 21)

includes a drug trafficking crime (as defined in § 924(c) of title 18). § 924(c) defines "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act." *Moncrieffe v. Holder*, 569 U.S. 184 (2013). § 40:966(A) similarly criminalizes the listed conduct of the federal statute. Though, Louisiana state schedules are broader than the federal schedules (i.e. phenazepam and etizolam are Schedule I controlled substances in Louisiana, but are not controlled substances under federal law), sample jury instructions suggest that jurors must name the particular controlled substance. If that is the case, then the statute is likely divisible and a conviction under §40:966(A) will likely render an individual removable, depending on the particular controlled substance.

[54] Manufacture; Distribution: It is likely that a conviction under § 40:966(A) would be a crime involving moral turpitude, depending of the divisibility of statute. The BIA and other courts have determined that distribution of a controlled substance is a crime involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041, 1046-47 (BIA 1997); *Atlantic Richfield Co. v. Guerami*, 820 F.2d 280 (9th Cir. 1987) (holding that possession with intent to distribute is a crime involving moral turpitude); *Matter of Gorman*, 379 N.E.2d 970, 971-72 (Ind. 1978) (holding that conviction under 21 U.S.C. § 841 (a)(1) for possession with intent to distribute, conspiracy, and distribution of cocaine is a crime involving moral turpitude). In *Matter of Khourn*, we found that "an evil intent is inherent in the crime of distribution of a controlled substance under 21 U.S.C. § 841(a)(1)." *Id.*, at 1047; *In Re: Marciano Chavez-Rodriguez*, No. : AXX XX5 971 - AURO, 2008 WL 762650, at *2 (DCBABR Mar. 7, 2008); *See also Matter of Acosta*, 27 I. & N. Dec. 420, 422 (BIA 2018).

[55] Manufacture; Distribution: Considering that §40:966(A) criminalizes possession of a controlled substance, it is very likely that a conviction under the statute will trigger either the grounds of deportability or inadmissibility, depending on the divisibility of the statute. "Controlled substance" is defined according to federal law, and some state codes or schedules include substances not on the federal list. Though, Louisiana state schedules are broader than the federal schedules (i.e. phenazepam and etizolam are Schedule I controlled substances in Louisiana, but are not controlled substances under federal law), sample jury instructions suggest that jurors must name the particular controlled substance. If that is the case, then the statute is likely divisible and a conviction under §40:966(A) will likely render an individual deportable or inadmissible, depending on the particular controlled substance. *See also Matter of Navarro Guadarrama,* 27 I. & N. Dec. 560, 568 (BIA 2019).

[56] Possession: As part of the aggravated felony definition, the INA lists "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [CSA]), including a drug trafficking crime (as defined in section 924(c) of title 18), United States Code)." However, 8 U.S.C. § 1101(a)(43)(B), does not define "illicit trafficking." Title 18 U.S.C. § 924(c)(2) defines "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act" (CSA).

In light of *Lopez v. Gonzales*, 549 U.S. 47 (2006), it is unlikely that possession will be considered an aggravated felony since possession is not a felony under the federal CSA. *Id.* at 53, 60 (holding that since mere possession is not a felony under the federal CSA, a state offense constitutes a felony punishable under the CSA only if it proscribes conduct punishable under the federal law.); *but see id.* at 54, n.4 (2006) (citing "21 U.S.C. § 844(a) (providing for "a term of imprisonment of not more than 1 year" for possession offenses except for repeat offenders, persons who possess more than five grams of cocaine base, and persons who possess flunitrazepam), and trafficking offenses as felonies, see § 841 (2000 ed. and Supp. III)).

[57] Possession: It is unclear whether mere possession would be seen as a crime involving moral turpitude. Because a possession conviction would likely be a controlled substance offense, there hasn't been much analysis on possession alone regarding moral turpitude, but rather more on possession with intent to distribute. *See Matter of Acosta*, 27 I. & N. Dec. 420, 423 (BIA 2018) ("We have held that the Federal offense of possession of a controlled substance with the intent to distribute is a crime involving moral turpitude because 21 U.S.C. § 841(a)(1) (1988) requires a mental state of knowledge or intent, and the unlawful distribution of drugs is inherently reprehensible conduct."); *Matter of Khourn*, 21 I&N Dec. 1041, 1046-47 (BIA 1997); *Atlantic Richfield Co. v. Guerami*, 820 F.2d 280 (9th Cir. 1987) (holding that possession with intent to distribute is a crime involving moral turpitude); *Matter of Gorman*, 379 N.E.2d 970, 971-72 (Ind. 1978) (holding that conviction under 21 U.S.C. § 841 (a)(1) for possession with intent to distribute, conspiracy, and distribution of cocaine is a crime involving moral turpitude). In *Matter of Khourn*, we found that "an evil intent is inherent in the crime of distribution of a controlled substance under 21 U.S.C. § 841(a)(1)." *Id.*, at 1047; *In Re: Marciano Chavez-Rodriguez*, No. : AXX XX5 971 - AURO, 2008 WL 762650, at *2 (DCBABR Mar. 7, 2008).

[58] Possession: Considering that §40:966(C) criminalizes possession of a controlled substance, it is very likely that a conviction under the statute will trigger either the grounds of deportability or the grounds of inadmissibility, depending on the divisibility of the statute. There is an exception to deportation and a possible waiver of inadmissibility if the conviction is for "a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. § 1227 (a)(2)(B)(i); 8 U.S.C. § 1182(h). "Controlled substance" is defined according to federal law, and some state codes or schedules include substances not on the federal list. Though Louisiana state schedules are broader than the federal schedules (i.e. phenazepam and etizolam are Schedule I controlled substances in Louisiana, but are not controlled substances under federal law), sample jury instructions suggest that jurors must name the particular controlled substance. If that is the case, then the statute is likely divisible and a conviction under §40:966(C) will likely render an individual deportable or inadmissible, depending on the particular controlled substance. *See also Matter of Navarro Guadarrama*, 27 I. & N. Dec. 560, 568 (BIA 2019); *Lopez Ventura v. Sessions*, 907 F.3d 306 (5th Cir. 2018).

[59] Possession of Marijuana: Neither the Fifth Circuit nor the BIA has ruled definitively on whether possession of marijuana qualifies as a crime of moral turpitude. While the BIA has held in non-precedential decisions that solicitation and distribution of marijuana are crimes of moral turpitude, *see, e.g., Matter of Leonel Poblete-Mendoza*, 2007 WL 2588546 (BIA 2007) (holding that violation of an Arizona statute for solicitation to possess marijuana for sale is a crime of moral turpitude); *Matter of Marciano Chavez-Rodriguez*, 2008 WL 762650 (BIA 2008) (holding that distribution of marijuana in violation of a New Mexico statute qualifies as a crime of moral turpitude), it has acknowledged that "courts disagree whether mere possession of controlled substances is a crime involving moral turpitude," *Chavez-Rodriguez*, 2008 WL 762650, *2 (BIA 2008), and has not yet resolved that question. *Accord Mei v. Ashcroft*, 393 F.3d 737, 741 (7th Cir. 2004) (highlighting difficulties of defining crimes of moral turpitude, noting that simple possession of cocaine classified as crime involving moral turpitude in one jurisdiction, but simple possession of marijuana is not).

The Ninth Circuit has stated in dictum that drug trafficking offenses "including possession of unlawful substances for sale, generally involve moral turpitude." *Barragan-Lopez v. Mukasey*, 508 F.3d 899, 903–04 (9th Cir. 2007). However, in *Barragan-Lopez*, the Court applied a narrower rule, finding that marijuana possession for sale qualified as a crime of moral turpitude because the amount of marijuana at issue—four pounds—necessarily indicated an "intent to promote or facilitate the commission of a [crime of moral turpitude]." *See id.* at 904. Later cases confirmed the narrowness of the *Barragan-Lopez* holding, treating the "'for sale' element" as dispositive. *See Sanchez-Resendez v. Lynch*, 608 Fed. App'x 537, 538 (9th Cir. 2015). A search of Louisiana case law did not reveal whether § 40:966 is divisible, and the relevant jury instructions were not available.

[60] Possession of Marijuana: Marijuana is a "controlled substance" within the meaning of 21 U.S.C. 802. *See, e.g., Flores-Larrazola v. Lynch*, 840 F.3d 234, 240 (5th Cir. 2016) ("[M]arijuana is a controlled substance as defined by federal law.") . However, under the personal use exception, a single offense involving possession for one's own use of 30 grams or less of marijuana does qualify as a controlled substance offense. *See Moncreiffe v. Holder*, 133 S.Ct 1678, 1686 n.7 (2013); *Esquivel v. Lynch*, 803 F.3d 699, 702 (5th Cir. 2015). To determine whether an offense meets this exception, IJs will apply a circumstance-specific approach. *See Esquivel*, 803 F.3d at 702 n.2); *Matter of Navarro Guadarrama*, 27 I. & N. Dec. 560, 568 (BIA 2019).

[61] False Representation: Whether § 40:971.1 falls under the "illicit trafficking in a controlled substance" aggravated felony ground depends on the statute's divisibility, particularly regarding the conduct and controlled substance. A search of Louisiana case law did not reveal whether § 40:971.1 is divisible, and the relevant jury instructions were not available. Under 8 U.S.C. § 1101(a)(43)(B), illicit trafficking in a controlled substance (as defined in section 802 of title 21) includes a drug trafficking crime (as defined in section 924(c) of title 18). 924(c) defines "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act" and two other acts that are not relevant here. *Moncrieffe v. Holder*, 569 U.S. 184 (2013). § 40:971.1 appears to criminalize a broader range of conduct relating to false representation than the federal statute. The federal statute includes "create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." 21 U.S.C. § 841(a)(2). § 40:971.1 appears to be broader, as it includes the verbs "transport" and "deliver." If these words are interpreted to cover conduct not covered by the federal statute, then whether 40:971.1 is divisible can be dispositive.

Regarding the divisibility by controlled substance, if § 40:971.1 requires a jury to determine the specific controlled substance that is being represented by the counterfeit or imitation substance, and is thus divisible by the controlled substance, there would be a risk of a conviction qualifying as an aggravated felony if in the record of conviction, the controlled substance that is being represented fell within the federal schedules. *See Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (Court held that to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§ 802]."); *see also Singh v. Attorney Gen.*, 839 F.3d 273, 284–85 (3d Cir. 2016) (The record of conviction showed that the defendant pled guilty to "possession with intent to deliver a counterfeit substance under Pennsylvania law but not under federal law" and "criminal conspiracy to commit possession with the intent to deliver, a counterfeit substance, which is designated a counterfeit substance, under Pennsylvania law but not under federal law." Third Circuit held that because the drug identity was not within the federal CSA list, it was not an aggravated felony.) Currently, the Louisiana state schedules are broader than the federal schedules. For example, Louisiana classifies phenazepam and etizolam as Schedule I controlled substances, *see* La. R.S. 40:964, but neither is a controlled substance under federal law.

Additionally, say a jury does not need to name the specific drug but can either pick between a counterfeit or imitation controlled substance, than the statute may be overbroad in that it also criminalizes the false representation of imitation controlled dangerous substance, which is not defined in the CSA.

[62] False Representation: A search of 5th Circuit, other circuits, and Louisiana case law did not reveal whether § 40:971.1 is a crime involving moral turpitude. In an unpublished 2007 decision, the BIA held in *In Re: Umang Desai* that the "respondent's conduct - distributing chocolate that he falsely purported to be laced with the hallucinogen psilocybin - is not the type of inherently base, vile, or depraved action that rises to the level of a turpitudinous crime." Therefore the court found that the respondent's look-alike offense did not make him inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. No. : AXX XX8 446 - CHIC, 2007 WL 1180517, at *2 (DCBABR Mar. 20, 2007)

[63] False Representation: Whether § 40:971.1 is a controlled substance offense will depend on the divisibility of the statute. If § 40:971.1 requires a jury to determine the specific controlled substance that is being represented by the counterfeit or imitation substance, and is thus divisible by the controlled substance, there would be a risk of a conviction qualifying as a controlled substance offense if in the record of conviction the controlled substance that is being represented fell within the federal schedules. *See Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (Court held that to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§ 802]."). Currently, the Louisiana state schedules are broader than the federal schedules. For example, Louisiana classifies phenazepam and etizolam as Schedule I controlled substances, *see* La. R.S. 40:964, but neither is a controlled substance under federal law.

[64] Paraphernalia: Whether §40:1023 falls under the "illicit trafficking in a controlled substance" aggravated felony ground depends on the statute's divisibility. A search of Louisiana case law did not reveal whether § 40:1023 is divisible, and the relevant jury instructions were not available. Under 8 U.S.C. § 1101(a)(43)(B), illicit trafficking in a controlled substance (as defined in section 802 of title 21) includes a drug trafficking crime (as defined in section 924(c) of title 18). Section 924(c) defines a "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act" and two other acts that are not relevant here. *Moncrieffe v. Holder*, 569 U.S. 184 (2013). The federal statute criminalizes selling or offering to sell drug paraphernalia, transport drug paraphernalia through the mail or any other facility of interstate commerce, and importing or exporting drug paraphernalia. *See* 21 U.S.C. § 863(a).

§40:1023 appears to be overbroad because each subsection contains conduct that arguably does not fall within the federal definition. The first relevant level of potential divisibility is the three subsections in §40:1023. For example, subsection (c), criminalizes use, as well as possession with intent to use, drug paraphernalia, which appears to fall outside of the scope of the federal statute. Even if the three subparts are divisible, there are further questions of divisibility *within* the subsections. Subsections (a) and (b) likely encompass some conduct that is criminalized under the Controlled Substances Act and some that is not. For example, subsection (a) criminalizes lending, renting, and leasing drug paraphernalia. This appears broader than the federal statute, but whether the subsection is truly broader would depend on how these words are interpreted. Therefore, if § 40:1023 is divisible within subsections, then lending, renting, and leasing drug paraphernalia would likely not be an aggravated felony. The statute may also be overbroad regarding what constitutes drug paraphernalia, in that Louisiana's definition of what constitutes "drug paraphernalia' is arguably broader than the federal definition. La. Stat. Ann. § 40:1022.

[65] Paraphernalia: Whether § 40:1023 is a CIMT depends on its divisibility. A search of Louisiana case law did not reveal whether § 40:1023 is divisible, and the relevant jury instructions were not available. Drug trafficking offenses, including possessing drugs for sale, are generally regarded as crimes involving moral turpitude. *See Barragan-Lopez v. Mukasey*, 508 F.3d 899 (9th Cir. 2007) (citing *Atl. Richfield Co. v. Guerami*, 820 F.2d 280, 282 (9th Cir.1987) (noting that possession of heroin for sale is a "crime of moral turpitude") (citing *United States ex rel. DeLuca v. O'Rourke*, 213 F.2d 759, 762 (8th Cir.1954) ("[T]here can be nothing more depraved or morally indefensible than conscious participation in the illicit drug traffic.")). The BIA has held that "participation in illicit drug trafficking is a crime involving moral turpitude." *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that such drug trafficking offences can be CIMTs, even if they are not completed offenses (such as solicitation). *Matter of Gonzalez Romo*, 26 I&N Dec. 1041 (BIA 2016). However, subsections (a) and (b) of § 40:1023 criminalize not only knowing conduct, but also conduct under "circumstances where one reasonably should know" that items might be drug paraphernalia. This language suggests that subsections (a) and (b) encompass negligent conduct, which would make those sections overbroad for CIMT purposes. *See Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1986) (reasoning that a conviction for distribution of cocaine was not a CIMT because the relevant statute was primarily regulatory and did not require intent). The case law leaves no indication one way or another as to whether § 40:1023 is divisible. If § 40:1023 is indivisible, arguably subsections (a) and (b) are likely not CIMTs.

Subsection (c) does not contain the same language about negligence. However, subsection (c) only encompasses use, or possession with intent to use, drug paraphernalia. Mere possession might not be enough to qualify as a CIMT. *See Hampton v. Wong Ging*, 299 F. 289 (9th Cir. 1924) (noting that the record of conviction only mentioned opium possession, and from this, there was not enough information to conclude that the offense was aggravated enough to be a crime involving moral turpitude). However, the case law addressing this question is limited, and at least some courts have suggested that possession can constitute a CIMT. *See United States v. Cisneros*, 191 F.Supp. 924, 927-28 (N.D. Cal. 1961) (noting in dicta that possession of narcotics involves moral turpitude because it is "a violation of a rule which is accepted by all decent people as involving public policy and morals in the United States").

[66] Paraphernalia: Whether § 40:1023 is a controlled substance offense will depend on the divisibility of the statute, particularly regarding what drug is associated with the paraphernalia and what the actual paraphernalia is itself. Louisiana classifies phenazepam and etizolam as Schedule I controlled substances, *see* La. R.S. 40:964, but neither is a controlled substance under federal law. If § 40:1023 requires a jury to find a specific controlled substance, and is thus divisible by drug, there would be a risk of a conviction qualifying as a controlled substance offense if the particular drug in the record of conviction fell within the federal schedules. Section 40:1023 criminalizes paraphernalia possession with intent to use, similar to the relevant statute in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015). In *Mellouli*, the Supreme Court determined that while the Federal law criminalizes the

sale of or commerce in drug paraphernalia, it does not criminalize possession alone. *Id.* at 1985. According to *Mellouli*, to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§ 802]." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1990-91 (2015) ("In sum, construction of § 1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of "controlled substance," for removal purposes, to the substances controlled under § 802. We therefore reject the argument that *any* drug offense renders an alien removable, without regard to the appearance of the drug on a § 802 schedule."). Section 40:1023 may also be overbroad regarding what constitutes drug paraphernalia, in that Louisiana's definition of what constitutes "drug paraphernalia' is arguably broader than the federal definition. La. Stat. Ann. § 40:1022. *See also Lopez Ventura v. Sessions*, 907 F.3d 306 (5th Cir. 2018).

[67] Sale, Distribution, Possession of Legend Drugs: The determination of whether La. Rev. Stat. § 40:1060.13 is an aggravated felony will likely come down to whether the statute requires the prosecution to prove that the defendant sold, delivered, or possessed a specifically-named drug such that the statute is divisible. Additionally, § 40:1238.1 criminalizes a broader set of conduct than the set of felonies under the Controlled Substances Act. Particularly regarding the specifically-named drug, §40:1060.13 includes possession of substances that are not federally controlled substances, such as Viagra. *State v. Williams*, 101 So.3d 533 (La. 2012). A search of Louisiana case law did not reveal whether § 40:1238.1 is divisible, and the relevant jury instructions were not available. However, cases like *State v. Wilcox*, 2009-1073 (La. App. 1 Cir. 12/23/09) seem to suggest divisibility. Therefore, keeping any reference to a specific drug out of the record of conviction, unless it's something not listed within the federal statute is advisable. The Fifth Circuit applies the least culpable conduct test to determine whether there is a categorical match between state and federal offenses. *See, e.g., United States v. Amaya*, 576 Fed. Appx. 416 (5th Cir. 2014); *see also Vazquez v. Sessions*, 885 F.3d 862 (5th Cir. 2018) (applying the "realistic probability" test.). Thus, it is important to find out whether the state actually prosecutes individuals for possessing Viagra. It seems that the state does. *See State v. Ioveniti*, 238 So.3d 496 (La. App. 4 Cir. 2018).

La. Rev. Stat. § 40:1060.13 criminalizes the "sale, distribution, or possession of legend drug without prescription or order prohibited . . . ." "Legend drug" is further defined as "any drug or drug product on the label of the manufacturer or distributor, as required by the Federal Food and Drug Administration [FDA], the statement "Caution: Federal law prohibits dispensing without a prescription." La. Rev. Stat. § 1060.11(3). Legend drugs regulated by the FDA are also largely listed within the five schedules of the CSA. But there are some legend drugs that are not listed in the CSA. For example, Sildenafil (the active chemical name for Viagra), is a legend drug for purposes of § 40:1060.13, but it does not appear to be listed in one of the five CSA schedules. *See State v. Ioveniti*, 238 So.3d 496 (La. App. 4 Cir. 2018) (concerning the prosecution of an individual for unlawful possession of Viagra); *State v. Williams*, 101 So.3d 533 (La. 2012) (same). There is, therefore, a categorical mismatch between legend drugs regulated by La. Rev. Stat. § 40:1060.13 and controlled substances that may trigger removal under the INA.

Most cases examining § 40:1060.13, or its prior designation as § 40:1238.1, have focused on the affirmative defense available to defendants charged with violating § 40:1238.1 if they have been lawfully prescribed the legend drug. *See, e.g., State v. Wilcox*, 2009 WL 5647218, *4 (La. App. 1 Cir. Dec. 23, 2009) (holding that the defendant has the burden of showing that he had a valid prescription to possess the legend drug, Zoloft). A thorough search of relevant case law did not reveal whether the legend drug list relevant to § 40:1238.1 is divisible, and the relevant jury instructions were not available. Thus, it is unclear whether a jury would have to agree on the legend drug allegedly used in commission of the offense.

[68] Sale, Distribution, Possession of Legend Drugs: The determination of whether La. Rev. Stat. § 40:1060.13 is a CIMT will depend on whether the statute requires the prosecution to prove that the defendant sold, distributed, or possessed a specifically-named drug such that the statute is divisible. "Legend drug" is defined as "any drug or drug product on the label of the manufacturer or distributor, as required by the Federal Food and Drug Administration [FDA], the statement "Caution: Federal law prohibits dispensing without a prescription." La. Rev. Stat. § 1060.11(3). Legend drugs regulated by the FDA are also largely listed within the five schedules of the CSA. But there are some legend drugs that are not listed in the CSA. Arguably, because § 40:1060.13 criminalizes mere possession, and it includes substances such as Viagra, *see State v. Williams*, 101 So.3d 533 (La. 2012), it is unlikely that it will be considered is a CIMT. A search of Louisiana case law did not reveal whether § 40:1238.1 is divisible, and the relevant jury instructions were not available. The Fifth Circuit applies the least culpable conduct test to determine whether there is a categorical match between state and federal offenses. *See, e.g., United States v. Amaya*, 576 Fed. Appx. 416 (5th Cir. 2014). Thus, the question would be to determine whether Louisiana actually prosecutes individuals for possessing Viagra. It seems that it does. *See State v. Ioveniti*, 238 So.3d 496 (La. App. 4 Cir. 2018).

Therefore, if the statute is divisible by the drug and the drug falls within the federal schedules, then it will likely be considered a CIMT. There is also potentially one additional layer of divisibility. If the statute is divisible, and the drug falls within the federal schedule, the next step would be to determine whether the jury needs to decide on the conduct because possession of a controlled substance can potentially not be a CIMT, such as the sale of Viagra, which is not a controlled substance. *See endnote 16*; *see also In Re: Umang Desai*, No. : AXX XX8 446 - CHIC, 2007 WL 1180517, at *2 (DCBABR Mar. 20, 2007) (in an unpublished 2007 decision, the BIA held that the "respondent's conduct - distributing chocolate that he falsely purported to be laced with the hallucinogen psilocybin - is not the type of inherently base, vile, or depraved action that rises to the level of a turpitudinous

crime.") As a result, the respondent's look-alike offense did not make him inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

[69] Sale, Distribution, Possession of Legend Drugs: Whether § 40:1238.1 is a controlled substance offense will depend on the divisibility of the statute. "Legend drug" is defined as "any drug or drug product on the label of the manufacturer or distributor, as required by the Federal Food and Drug Administration [FDA], the statement "Caution: Federal law prohibits dispensing without a prescription." La. Rev. Stat. § 1060.11(3). Legend drugs regulated by the FDA are also largely listed within the five schedules of the CSA. But there are some legend drugs that are not listed in the CSA. For example, Sildenafil (the active chemical name for Viagra), is a legend drug for purposes of § 40:1060.13, but it does not appear to be listed in one of the five CSA schedules. *See State v. Ioveniti*, 238 So.3d 496 (La. App. 4 Cir. 2018) (concerning the prosecution of an individual for unlawful possession of Viagra); *State v. Williams*, 101 So.3d 533 (La. 2012) (same). There is, therefore, a categorical mismatch between legend drugs regulated by La. Rev. Stat. § 40:1060.13 and controlled substances that may trigger removal under the INA. A search of relevant case law did not reveal whether the legend drug list relevant to § 40:1238.1 is divisible, and the relevant jury instructions were not available, so it's unclear whether a jury would have to agree on the legend drug allegedly used in commission of the offense.

[70] Battery: The BIA has held that simple assault (i.e., the offensive touching or threatened offensive touching of another person, committed with general intent and not resulting in serious bodily harm) does not involve moral turpitude. *See, e.g.*, *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 466 (BIA 2011); *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of E-*, 1 I&N Dec. 505, 507 (BIA 1943) (*citing United States ex rel. Morlacci v. Smith*, 8 F.2d 663 (D.C.N.Y. 1925)). But, an assault offense which requires: (1) specific intent and (2) a meaningful level of harm that is more than an offensive touching qualifies as a crime involving moral turpitude. *Matter of Solon*, 24 I&N Dec. 239, 241-42 (BIA 1996); *see also Matter of Esparza-Rodriguez v. Holder*, 699 F.3d 821 (2012). The language of § 54-96 includes "force or violence." If "force" includes *de minimis* touching, then the offense may not be considered a CIMT. But it is unclear how courts have interpreted this particular provision.

[71] Criminal Trespass: Under current law, a conviction under § 14:63 probably is not a crime of violence under § 16(a), but because of the Fifth Circuit's recent decision in in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018), the answer is not certain. *See supra* "Categories of Immigration Offenses," Section I. Section I describes arguments why *Reyes-Contreras* should be applied narrowly and not applied to other statutes. Further, § 14:63 is different from the assault statutes that *Reyes-Contreras* has been extend to, as § 14:63 does not require that force is applied against any individual. *See, e.g.*, *State v. Zeno*, 2018 WL 2054865 (La. App. 3 Cir. 2018) (noting that the defendant was charged with criminal trespass after he allegedly stole two weed-eaters out of the back of a truck in a Wal-Mart parking lot). Further, the fact that § 14:63 and assault statutes are different provides another argument for not applying *Reyes-Contreras*.

[72] Criminal Trespass: This is likely not a CIMT. A criminal trespass statute might qualify as a CIMT if an individual intends to commit a particular CIMT while trespassing, *see Jimenez v. Sessions*, 893 F.3d 704 (10th Cir. 2018), or when the required intent for a criminal trespass charge is sufficiently malicious, *see Matter of Esfandiary*, 16 I. & N. Dec. 659, 661 (BIA 1979) (finding Florida malicious trespass to be CIMT because it "involves a malicious and mischievous intent"). § 14:63 does not specify that an individual must have the intent to commit a particular crime, or any crime at all, making § 14:63 broader than the statute analyzed in *Jimenez v. Sessions*, which did require intent to commit a crime and still was not found to be a CIMT.

[73] Theft: A conviction under § 54-186 may be an aggravated felony, depending on the term of imprisonment. For now, because the maximum sentence under the statute is six months, this offense cannot be a theft offense aggravated felony. Under INA § 101(a)(43)(G), "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year" is an aggravated felony and a deportable offense. § 54-186 includes as an element the permanent deprivation of property. While there are a few outlying arguments that theft by deceit or fraud does not match the generic definition of theft and thus should not be an aggravated felony "theft" offense, these arguments are not well accepted and it is not advisable to rely on them. Keep the sentence below one year. It appears that a six-month term of imprisonment is the max sentence under the statute.

[74] Disturbing the Peace: In many jurisdictions this is a "safe plea." However, the language of 54-403 appears to require threatened use of force which may satisfy the crime of violence statute. For that reason, keep the sentence to less than a year to safely avoid an aggravated felony conviction. Ultimately, it will come down to whether the statute is divisible, as the statute is arguably broad, and whether a sentence of 1 year or more is given.

[75] Disturbing the Peace: A conviction under § 54-403 may be a crime of moral turpitude. There is no relevant Fifth Circuit case law regarding whether § 54-403 is a CIMT. The BIA has held that other similar disturbing the peace statutes are not CIMTs, but § 54-403 includes threatened use of force which may push an immigration judge to hold that it is a CIMT. Ultimately, it will come down to whether the statute is divisible, as the statute is arguably broad.

[76] Public Drunkenness: If possible, ensure that the record of conviction specifies that the defendant was under the influence of alcohol to avoid this possible outcome.