



WHY THE AVERAGE TRAVELER CAN'T BE EXPECTED TO RECOGNIZE A CRIME INVOLVING MORAL TURPITUDE

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By [Myriam Jaidi](#)

In a fascinating [recent decision](#) (courtesy of attorney [Stephen Heller](#)), the Office of Administrative Appeals determined that a visa waiver applicant is not expected to know the meaning of a “crime involving moral turpitude” (“CIMT”), with the welcome recognition that “the term ‘moral turpitude’ is not in common usage and it is unlikely that the average person is aware of its meaning and application in U.S. immigration law.” Amen to that. The case involved an individual who had initially been denied a waiver of inadmissibility for “willfully misrepresenting” on his Form I-94W (the Nonimmigrant Visa Waiver Arrival/Departure Record, which requested biographic information and answers to a series of unfortunate questions) that he had not been convicted of a CIMT. Although the AAO determined that the individual had in fact been convicted of a CIMT, it also found that he could not be expected to know that and should therefore not be found inadmissible for not stating it on the form.

Since 2008, instead of having to complete a Form I-94W, travelers from [Visa Waiver countries](#) to the United States must answer the same set of bizarre questions to obtain permission to travel to the United States via the Electronic System for Travel Authorization (“ESTA”). In his New York Times Op-Ed piece “[How Not to Attract Tourists](#)”, writer and airline pilot Mark Vanhoenacker perfectly captures the absurdity of many of the questions on the form quipping, “Naturally, no one with anything to hide will answer honestly.” I would add that with regard to the question “have you ever been arrested or convicted for an offense or crime involving moral turpitude . . .” it is nearly impossible for the average person to answer at all.

Courts have long recognized that a CIMT is a “nebulous concept” and the

determination of whether a crime is a CIMT depends on the judge, the wording of the particular statute at issue, and whether the judge applies the “categorical approach” (which requires consideration of the minimal conduct implicated by a penal law) or “modified categorical approach” (where the categorical approach does not yield an answer because a criminal statute includes offenses that fall outside the generic criminal category, this approach allows consideration of the record of conviction for clarification), among other things.

Take drug possession for example (though note that an arrest or conviction involving drugs will cause you a whole host of problems with trying to gain permission to enter or to remain in the United States outside the CIMT context, see [here](#) for an explanation). In its response to the question “[How do I correct a mistake on my ESTA application](#)”, ESTA includes “possession of narcotics” in its parenthetical summarizing CIMTs: “If you discover that you are not eligible to come to the U.S. under the visa waiver program because of a CIMT (such as fraud, or possession of narcotics) . . .” As an aside it is funny that the sentence starts with “if you discover” — how one is supposed to make such a discovery is not clear, especially given the extraordinary complexity of CIMTs and the disagreement among Circuit Courts with regard to how to determine whether something is a CIMT. Anyway, back to drug possession. The Board of Immigration Appeals has found that simple drug possession is not a CIMT, see, e.g., *Matter of Abreu-Semino*, 12 I & N Dec 775 (BIA 1968) – so tossing that general “possession of narcotics” in the parenthetical is inaccurate. On the other hand, drug possession with intent to sell or trafficking in narcotics has been found to be a CIMT. Another example of a CIMT given on the ESTA website is theft – but as [noted in a previous blog by Cyrus Mehta](#), theft is not always a CIMT either!

Mr. Vanhoenacker’s assessment of the “uninviting” nature of the ESTA website rings true, especially with respect to individuals trying to get a sense of what a CIMT might be so that they can try to answer the question if they have been arrested or convicted of something (two other kettles of fish there on those two legal terms – “arrested” and “convicted”). To be fair, ESTA’s website offers a [help page](#) providing guidance on various topics. Given there are 773 results accessible from the page, anyone trying to understand what a crime involving moral turpitude might be should search “CIMT” in the search box at the top of the page. This yields a much more manageable 4 results (though misses a fifth

result and perhaps other questions where addressing CIMTs), but each result provides a slightly different summary of a CIMT, as noted above, and directs the reader to two different sections of the Foreign Affairs Manual (“FAM”) – the 8 pages of [related statutory provisions](#) in 9 FAM 40.21(a), rather than the apparently promised [“list of crimes of moral turpitude”](#), and the other the 26 pages of 9 FAM 40.21(a) Notes providing further legal background on CIMTs, but researcher beware – the FAM is not precise with regard to CIMTs either, though it does provide a lot of information. It is unreasonable to expect the average person in a foreign country to analyze that information under the applicable United States law (9 FAM 40.21(a) N2.1 states “The presence of moral turpitude in a statutory offense is determined according to United States law”) and formulate an answer.

Obviously, the questions are there for various reasons including security, but including unanswerable questions like the one regarding CIMTs (not to mention the other absurd questions) in an automated questionnaire does not promote the security goal, as Mr. Vanhoenacker so aptly demonstrates. Any error could result in an unfair denial and significant inconvenience to a would-be traveler. If someone answers incorrectly by mistake and gets denied, his or her options are to [email Customs and Border Protection](#), seek redress from the Department of Homeland Security’s Travel Redress Inquiry Program ([DHS/TRIP](#)), or to apply for a visa at a U.S. consulate. None of these options are likely to allow a traveler with ticket in hand to take her trip as planned.

If inquiries regarding criminal background must be included in the ESTA system, a better model might be to include a more simple question like this one from the Form N-400, Application for Naturalization: “Have you ever been convicted of a crime or offense,” include a drop down box to allow an explanation, and have applications ticked “yes” automatically sent to CBP for quick review without requiring the person to email or seek redress. This may make the system a touch more inviting and comprehensible.