Exclusion or Deportation of Aliens for the Conviction of Foreign Crimes Involving Moral Turpitude: Grand Problems with the Petty Offense Exception

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EXCLUSION OR DEPORTATION OF ALIENS FOR THE CONVICTION OF FOREIGN CRIMES INVOLVING MORAL TURPITUDE: GRAND PROBLEMS WITH THE PETTY OFFENSE EXCEPTION

Section 212(a)(9) of the Immigration and Nationality Act\(^1\) (INA) excludes all aliens who have committed crimes involving moral turpitude from entry into the United States.\(^2\) The "petty offense" exception, however, limits the applicability of the section by enabling aliens who meet its requirements to avoid the reach of section 212(a)(9) even though they have committed crimes involving moral turpitude.\(^3\)

The requirements of the petty offense exception are not clearly discernable from the wording of the statute. This ambiguity has permitted federal courts and the Board of Immigration Appeals (BIA) to formulate three different interpretations of the section. This Note explains the significance of the petty offense exception as it applies to foreign convictions and evaluates the three different interpretations of the exception in light of the language of the statute, the legislative history, and the purposes of the INA. This Note then suggests an amendment that would both resolve the present conflict over the correct interpretation of the exception and better reflect the substantive policies of the Immigration and Nationality Act.

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2. 8 U.S.C. § 1182(a) (1976) provides: "Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . . (9) Aliens who have been convicted of a crime involving moral turpitude. . . ."
3. The petty offense exception provides:
   Any alien who would be excludable because of a conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of title 18, by reason of the punishment actually imposed, or who would be excludable as one who admits the commission of an offense that is classifiable as a misdemeanor under the provisions of section 1(2) of title 18, by reason of the punishment which might have been imposed upon him, may be granted a visa and admitted to the United States if otherwise admissible: Provided, That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense.

EFFECT OF THE PETTY OFFENSE EXCEPTION

Congress enacted the petty offense exception in 1954, and amended and incorporated the exception into the Immigration and Nationality Act in 1961. The petty offense exception prohibits the Immigration and Naturalization Service from refusing or revoking a visa of any alien who has committed a crime involving moral turpitude if the alien meets the section's requirements. This prohibition operates automatically; it is not left to the discretion of governmental authorities.

The petty offense exception also provides an alien with a defense to a deportation action. 18 U.S.C. § 1251(a) provides that "[a]ny alien in the United States . . . shall . . . be deported who—(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." An alien meeting the requirements of the petty offense exception can thus avoid deportation even though he has committed a crime involving moral turpitude. The defense provided by the exception also enables an alien to petition successfully for voluntary departure from the United States. Voluntary departure, which "offers an alien several advantages over a deportation decree," is not available to those aliens who are "deportable" under section 1251.

In sum, the petty offense exception can enable an alien to prevent exclusion, defend against deportation, and successfully petition for voluntary departure. Because the exception can have such a significant impact on these areas of immigration law, judicial and administrative interpretations of the statute are very important.

6. 8 U.S.C. § 1182(a)(9) (1976). The statute also covers aliens who have admitted committing a crime involving moral turpitude but who have never been convicted. Id.
8. 1 C. Gordon & H. Rosenfield, supra note 7, § 2.43d(4), at 2-320.
10. Comment, 51 N.Y.U. L. Rev. 1021, 1024 (1976). Voluntary departure enables the alien to re-enter the United States without the Attorney General's permission, 8 U.S.C. § 1326 (1976), and to choose his own destination upon leaving the United States, id., § 1253.

To determine whether an alien is deportable under § 1251, see 8 U.S.C. §§ 1254(e), 1101(a)(9), 1182(a)(9) (1976); Khalaf v. Immigration & Naturalization Serv., 361 F.2d 208, 210 (7th Cir. 1966).
II
CONSTRUING THE PETTY OFFENSE EXCEPTION

The petty offense exception provides that an alien who has committed a crime involving moral turpitude in a foreign country may avoid deportation or exclusion if the crime is defined as a misdemeanor and the punishment actually imposed did not exceed six months imprisonment and/or a $500 fine. Problems of interpretation have arisen concerning the proper method of defining misdemeanor. Although it is clear that federal law supplies the definitions of misdemeanor and petty offense, judicial and administrative opinions do not agree on the correct application. The following discussion analyzes three different methods of applying the petty offense exception.

A. THE "DOMESTIC ANALOGUE" APPROACH

Two United States Circuit Courts of Appeal and the Board of Immigration Appeals have adopted the domestic analogue approach. These courts construe the phrase "by reason of punishment actually imposed" as only modifying "petty offense." Therefore, whether the foreign crime is a misdemeanor or a felony does not depend upon the punishment actually imposed. Rather, the definition depends on the maximum penalty that could be imposed were the same or analogous crime committed in the United States. Since a misdemeanor is defined as any offense not punishable by death or prison term exceeding one year, if a crime comparable to the foreign offense is punishable in the United States by imprisonment for

11. See note 3 supra and note 12 infra.
12. 18 U.S.C. § 1 (1976) provides:
Notwithstanding any Act of Congress to the contrary:
(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
(2) Any other offense is a misdemeanor.
(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

13. See Soetarto v. Immigration & Naturalization Serv., 516 F.2d 778, 780-81 (7th Cir. 1975); Giammario v. Hurney, 311 F.2d 285, 286-87 (3d Cir. 1962); In re Marino, 14 I. & N. Interim Dec. No. 2377 (April 30, 1975); In re Katsanis, 14 I. & N. Dec. 266, 269 (1973); In re Medina-Lopez, 10 I. & N. Dec. 7, 9 (1962); In re M., 8 I. & N. Dec. 453, 454 (1959); In re T., 8 I. & N. Dec. 4, 5 (1956). In In re T., 6 I. & N. Dec. 508, 516 (1955), the BIA at first rejected the domestic analogue approach in favor of the foreign maximum approach. See note 44 infra and accompanying text. That decision was immediately reversed by the Attorney General. 6 I. & N. Dec. at 516-17. Since then, the BIA has consistently followed the domestic analogue approach.
more than one year, that offense is a felony and the alien is outside the scope of the exception.

The domestic analogue approach requires a two-tier analysis. First, a court must “translate” the foreign crime into a comparable violation of Title 18 of the U.S. Code. If the U.S. Code contains no analogous provision, courts look to Title 22 of the District of Columbia Code. The maximum American penalty for the crime determines whether it is a misdemeanor or a felony. Second, if the crime is a misdemeanor, the court looks to the “punishment actually imposed” upon the alien to determine whether the misdemeanor is a petty offense. If the alien was sentenced to less than six months in prison, paid a fine of not more than $500, or both, the petty offense exception applies.

The domestic analogue approach has several advantages. By using the U.S. or D.C. penal code to determine the maximum penalty for a crime committed in a foreign country, this approach avoids “divergent and anomalous results [that] would follow from [the] application of varying systems of foreign law.” The classification of a crime as a misdemeanor or felony will not depend upon which nation’s criminal laws the alien violated.

This alternative also reflects important policies underlying U.S. immigration laws. The primary purpose of exclusion and deportation statutes is to keep out “undesirables.” Arguably, an “undesirable” is any person who has acted contrary to U.S. societal standards.

15. The D.C. Code applies because it is considered to be a manifestation of Congress’s view of non-federal criminal offenses. See Soetarto v. Immigration & Naturalization Serv., 516 F.2d 778, 780-81 (7th Cir. 1975); Giammario v. Hurney, 311 F.2d 285, 287 (3d Cir. 1962).
17. Courts will not examine the D.C. criminal laws, however, unless there are no comparable provisions in the U.S. Code. In re Katsanis, 14 I. & N. Dec. 266, 269 (1973); In re T., 8 I. & N. Dec. 4, 5 (1956); 1 C. GORDON & H. ROSENFIELD, supra note 7, § 2.43d(4), at 2-321. Therefore, while authorizing the use of two Codes, this approach actually applies a single standard, since a conflict between the two will never result.
18. Giammario v. Hurney, 311 F.2d 285, 286 (3d Cir. 1962). Giammario involved a deportation proceeding against an alien who was convicted of larceny in Australia. Since the crime would have been a felony in the United States, the court affirmed a BIA deportation order even though the penalty actually imposed was a fine of less than $500.
19. In Comment, supra note 10, the author states that “[t]he theory of deportation [and exclusion] is that aliens failing to comply with established rules of conduct simply do not qualify for residence in this country . . . [D]eportation . . . is merely a device to protect Americans from undesirable persons.” Id. at 1023. See also Knoetze v. United States, 472 F. Supp. 201, 211 (S.D. Fla. 1979) (“The obvious Congressional purpose of subsection 212(a)(9) of the Immigration and Nationality Act is to keep persons who are likely to be undesirable residents or sojourners from being in our midst.”).
20. This characterization of “undesirable” as defined by U.S. standards draws support from the fact that the term “moral turpitude” in section 212(a)(9) of the Immigration and Nationality Act is defined by the “moral standards generally prevailing in the
rable American crimes to define misdemeanors, courts evaluate the
conduct of aliens, wherever exhibited, by U.S. standards. Therefore,
even if a foreign country considers a particular crime a minor
offense, the petty offense exception would not apply if the compara-
ble U.S. crime was considered sufficiently egregious to be character-
ized as a felony. 21

Finally, the legislative history of the exception seems to support
this interpretation. Fortunately, because Congress adopted the
section as a "floor" amendment, the available legislative history is
minimal. 22 After the House of Representatives passed the amend-
ment, Representative Walter, the sponsor of the bill in the House,
sent a letter to Senator McCarran, the Senate sponsor. Senator
McCarran read the letter into the Congressional Record before the
Senate vote on the amendment. The correspondence stated:

I want to say for the record and as part of the legislative history of the bill,
that my amendment... adopted by the House today, is intended to require
the meeting of two standards, namely, the offense must be an offense which if
committed in the United States would be a misdemeanor (not punishable by
imprisonment for 1 year or more), and, second, the offense must be one for
which the actual penalty imposed in the particular case was imprisonment
not to exceed 6 months or a fine not to exceed $500, or both. 23

A contemporaneous administrative interpretation of the petty
offense exception provides further support for the domestic analogue
approach. Soon after the enactment of the petty offense exception,
the State Department promulgated regulations construing it to
require the application of the domestic analogue approach. 24

rel. McKenzie v. Savoretti, 200 F.2d 546, 548 (5th Cir. 1952); In re Katsanis, 14 I. & N.
Dec. 266, 268 (1973); 39 Op. Att'y Gen. 95, 96 (1937). For a general discussion of the
interpretation of "moral turpitude" in deportation hearings, see Annot., 23 A.L.R. Fed.
480 (1975).

21. For example, even if the theft of $110 in a foreign nation carries a maximum
penalty in that country that meets the federal definition of misdemeanor (imprisonment
for less than one year), the convicted alien could not use the petty offense exception
because the District of Columbia Code imposes a maximum penalty that meets the fed-
eral definition of a felony (more than one year). See 22 D.C. CODE ANN. § 22-2201

22. The House of Representatives' brief comments on the exception are recorded at
100 CONG. REC. 15,490-92 (1954). The amendment's legislative history in the Senate can
be found at 100 CONG. REC. 15,388 (1954).

23. Id. at 15,388 (emphasis added). Further, when introducing the amendment to
the Senate, the Senate sponsor stated that "the construction placed on the amendment by
... Representative Walter, is in complete accord with my own construction." Id.

24. 22 C.F.R. § 42.42(c)(1) (1955) provided:

An alien shall not be ineligible to receive a visa under the provisions of section
212(a)(9) of the act (i) solely by reason of the conviction of a single offense
which, if committed in the United States, would be a misdemeanor punishable by
imprisonment not to exceed one year, and for which the penalty actually
imposed was imprisonment not to exceed six months or a fine not to exceed $500,
or both; or (ii) solely by reason of the admission of the commission of a single
Although these regulations no longer appear in the Code of Federal Regulations, the Immigration and Naturalization Service has consistently applied the domestic analogue approach in an adjudicatory context since 1955. Where a statutory provision is ambiguous and an administrative agency charged with applying and enforcing the statute adopts a certain interpretation contemporaneously with the statute's enactment, it is a rule of statutory construction that courts should give substantial weight to that interpretation. This is particularly true where this administrative construction occurs in an adjudicatory context, and has been followed for a long period of time. The State Department's contemporaneous construction and the Immigration and Naturalization Service's continued application of the domestic analogue approach strongly suggest that courts should defer to this interpretation.

Although practical considerations, policy arguments, legislative history, and rules of statutory construction support the adoption of the domestic analogue approach, there are a number of flaws. First, the two appellate courts that have adopted it and the Board of Immigration Appeals apply a different construction to crimes committed by aliens within the United States than they do to crimes committed abroad. Where aliens are convicted under state laws, the state offense which, if committed in the United States, would be a misdemeanor punishable by imprisonment not to exceed one year. (emphasis added).

This interpretation last appeared at 22 C.F.R. § 42.42(a)(9) (1958). In 1959, the State Department re-numbered and amended the visa regulations. Reference to the petty offense exception was omitted. The present "moral turpitude" regulations are now codified in 22 C.F.R. § 41.91(a)(9) (1980).

See note 13 supra and accompanying text.

In construing this statute we feel it is proper to show great deference to the interpretation given the statute by the officers or agency charged with its administration... Deference is particularly appropriate where the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new... The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. See also Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). This deference is particularly warranted if Congress subsequently re-enacts the provision at issue without substantial change. See Walker v. United States, 83 F.2d 103, 107 (8th Cir. 1936). See generally E. Crawford, THE CONSTRUCTION OF STATUTES 388-98 (1940).


Stanley Co. of America v. Tobriner, 298 F.2d 318, 320-21 (D.C. Cir. 1961); E. Crawford, supra note 27, at 393-94. The Immigration and Naturalization Service's long-standing application of the domestic analogue approach in adversarial proceedings meets this test, even though the original administrative interpretation occurred in a legislative context, and no longer appears in the C.F.R. See note 25 supra and accompanying text.
viction is not "translated" into a comparable federal or D.C. crime. Instead, the maximum penalty that the state statute imposes determines whether the crime is a misdemeanor or felony. This inconsistent application of the exception leads to "divergent and anomalous results" because different states will impose different penalties for the same crime. Thus, the domestic analogue approach, which translates foreign crimes into federal or D.C. crimes to avoid divergent results, produces inconsistencies when applied to state convictions.

Second, the policy consideration of keeping out "undesirables" suggests that courts should use the maximum foreign penalty to determine whether the crime is a misdemeanor or a felony. If an "undesirable" is one who is "bad" by U.S. standards, then the domestic analogue approach is appropriate. If, however, Congress enacted the immigration barriers to prevent the admission of persons who manifest antisocial behavior, then foreign penalties are better indicators of such behavior. Foreign laws reflect the social mores of the country in which the alien committed the crime; a grave violation of a country's custom that is sanctioned by a severe penalty might not be considered so offensive by U.S. standards. It is possible that the foreign penalty could greatly exceed one year's imprisonment while the comparable U.S. statute would simply impose a nominal fine.
Although the maximum foreign penalty is a better indicator of antisocial behavior than is the maximum U.S. penalty, the domestic analogue approach does consider the foreign nation's societal standards. It monitors antisocial behavior by using the "punishment actually imposed" by the foreign country to define "petty offense." In cases where the alien's behavior so offended the mores of the convicting country as to require imprisonment for more than six months or a fine of more than $500,35 the exception will not be available to the alien, even though the comparable federal statute classifies the crime as a misdemeanor.36

Third, although representative Walter's letter37 corroborates the domestic analogue approach, this evidence may not be a strong indicator of legislative intent.38 Because the House sponsor did not outline his interpretation of the exception until after the House passed the legislation,39 the letter is clearly not a valid indication of the intent of the House of Representatives.40

35. See notes 3 & 12 supra and accompanying text.
36. 1 C. GORDON & H. ROSENFIELD, supra note 7, § 2.43d(4), at 2-322 ("If the sentence actually imposed exceeded six months, the [petty offense] exemption is unavailable, even though a lesser sentence might have been imposed upon a comparable conviction in American courts."). See In re Scarpulla, I. & N. Interim Dec. No. 2332 (Nov. 21, 1974); In re M., 8 I. & N. Dec. 453, 454-55 (1959).

37. See notes 22-23 supra and accompanying text.
38. "[T]he weight of authority apparently refuses to regard the opinions, the motives, and the reasons expressed by the individual members of the legislature, even in debate, as a proper source from which to ascertain the meaning of an enactment." E. CRAWFORD, supra note 27, at 375-76.

On the other hand, an opposing view suggests that the statements of a bill's sponsor should be accorded at least some weight.

In the course of deliberations on a bill, legislators look to its sponsor as well as to the representative of the committee having charge of it, as one who is expected to be particularly well informed about its purpose, meaning, and intended effect. In recognition of this reality of legislative practice, courts give consideration to statements made by a bill's sponsor on grounds similar to those relied on to support the use of statements by the committeeman in charge of the bill.


39. When Representative Walter introduced the "floor" amendment in the House, he made no reference to the interpretation later expressed in his letter to Senator McCarran. Rather, his statements indicate that his main concern was that the federal definitions of misdemeanor, felony, and petty offense be applied to the exception. See 100 CONG. REC. 15,491 (1954) ("The purpose of my amendment is to ... clarify ... so as to bring it in conformity with section 1 of title 18, United States Code.").

40. In N.C. Freed Co., Inc. v. Board of Governors of the Fed. Reserve Sys., 473 F.2d 1210 (2d Cir. 1973), the court held that a letter written by a sponsor of a bill one year after the enactment of the legislation "does not constitute part of legislative history and is entitled to no weight ... ." Id. at 1217 n.23.
PETTY OFFENSE EXCEPTION

A final problem with the domestic analogue approach is that many foreign crimes do not have comparable American counterparts. Thus, courts sometimes have difficulty translating a foreign crime into the proper federal or District of Columbia statute. For example, in Knoetze v. United States, a South African court had convicted the petitioner of "obstruction of justice." The court noted that the comparable federal statute, "Chapter 73 on obstruction of justice in U.S.C., Title 18 has eleven sections, five of which are misdemeanors . . . and the rest are felonies." Indeed, numerous experts on South African law could not agree on whether the crime, if committed in the United States, would have been a misdemeanor or a felony. To the extent that foreign convictions do not easily translate into federal or District of Columbia crimes, the initial fact-finder has great discretion in deciding whether the crime is a misdemeanor or a felony.

B. THE "FOREIGN MAXIMUM" APPROACH

A second interpretation of the petty offense exception also requires a two-tier analysis. Like the domestic analogue approach, the foreign maximum approach assumes that the phrase "by reason of punishment actually imposed" modifies only the term "petty offense." Unlike the previous interpretation, however, this construction looks to the maximum penalty that the convicting foreign country imposes on the violation to determine if the crime is a misdemeanor. The second tier, like that of the domestic analogue approach, examines the punishment actually imposed to determine whether the misdemeanor is a petty offense.

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41. 472 F. Supp. 201 (S.D. Fla. 1979). For an outline of the facts involved in the Knoetze case, see note 60 infra.
42. Id. at 211.
43. Id. at 207-08.
44. The Board of Immigration Appeals developed and adopted the foreign maximum approach in a case that was subsequently reversed by the Attorney General. See In re T., 6 I. & N. Dec. 508 (May 6, 1955), reversed by the Attorney General, id. at 516-17 (July 19, 1955). See note 13 supra. There, a Canadian court convicted the alien of stealing $32.60. Although the crime would have been a misdemeanor if committed in the District of Columbia, the maximum Canadian penalty was seven years' imprisonment. The BIA therefore characterized the crime as a felony.

[We] hold that the determination of whether a foreign crime is a felony or misdemeanor must be made by looking to the punishment prescribed by the law of that country for the particular crime and using the standard set forth in 18 U.S.C. 1. In other words, if a foreign offense is punishable by death or imprisonment for a term exceeding one year, it is a felony and otherwise it is a misdemeanor. If the offense is a misdemeanor and the punishment actually imposed does not exceed 6 months imprisonment and/or $500 fine, the crime is a petty offense.

Id. at 516. The BIA has since consistently adopted the domestic analogue approach. See decisions cited in note 13 supra.
This interpretation eliminates a number of problems inherent in the domestic analogue approach. First, the treatment of foreign crimes under the foreign maximum approach is consistent with the treatment of crimes committed by aliens in the United States. In the case of both foreign and domestic convictions, the maximum penalty imposed by the offended sovereign is "plugged into" the federal one-year misdemeanor limit.

Second, the foreign maximum approach eliminates the problem of "translating" foreign crimes into American statutes. Third, as previously discussed, this interpretation of the exception better reflects the policy of preventing the immigration of aliens who exhibit antisocial behavior in their own country.

Although the amendment's legislative history supports the domestic analogue approach, that interpretation does not inevitably follow from the language of the statute. The subsequently vacated BIA decision that originally adopted this interpretation concluded that the wording of the statute clearly indicated that the foreign maximum approach was the only correct interpretation and that resort to the exception's legislative history was improper. The Board stated "that the language of the statute is plain and that there can be no justification for an attempt to add to its words importing the fiction that a crime committed in a foreign country was actually committed in the United States."

Like the domestic analogue approach, the foreign maximum approach has several flaws. Although the foreign maximum approach may guard against the admission of aliens who have exhibited antisocial behavior (as defined by the convicting country), it does not measure the alien's conduct by American stand-

45. See note 30 supra and accompanying text.
46. The BIA recognized this flaw in the domestic analogue approach, stating that such an interpretation of the exception "could not be rationalized, under any circumstances, unless the foreign crime and the United States crime were identical." In re T., 6 I. & N. Dec. 508, 514-15 (1955). See also notes 41-43 supra and accompanying text.
47. See note 34 supra and accompanying text. For example, under the foreign maximum approach, the Iranian who hoarded food, disregarding the customs and laws of his nation, would not be able to use the petty offense exception since the crime is now characterized as a felony. Of course, this argument assumes that "antisocial behavior" is accurately measured by the customs and traditions of the alien's country. What constitutes antisocial behavior by U.S. standards plays no role. See notes 51-52 infra and accompanying text.
48. See notes 22-23 supra and accompanying text. But see notes 37-40 supra and accompanying text.
50. Id.
51. See note 47 supra and accompanying text.
ards. Under this approach, an alien convicted of a crime that would be a felony if committed in the United States might still be granted entry into this country if the convicting country considered the crime to be relatively trivial. Conversely, the conviction of a minor offense by U.S. standards would bar entry if the convicting country punished the crime by more than one year's imprisonment. Also, because the foreign maximum approach uses a foreign standard, it runs contrary to the judicially adopted position that refuses to recognize the effect of foreign pardons in deportation proceedings.

The foreign maximum approach is probably overbroad in guaranteeing the exclusion of "antisocial" aliens. If an alien has lived in the nation where he was convicted of a criminal offense, the foreign maximum approach effectively monitors conduct violating that country's social norms. When an alien commits a crime in a country other than his own, however, that country's criminal laws may not be an accurate indicator of antisocial behavior if the offender was not in the country long enough to appreciate its societal norms. Finally, the foreign maximum approach will lead to divergent and anomalous results.

52. For example, a foreign country might not consider violations of its drug laws to be serious crimes. If, for example, the crime of selling heroin in Pakistan was punishable by imprisonment for less than one year and the convicted alien received a three month prison sentence, he would be eligible for entry into the United States under the foreign maximum approach to the petty offense exception, even though the same offense would be a felony if committed in the United States.

53. See note 47 supra and accompanying text. In Knoetze v. United States, 472 F. Supp. 201 (S.D. Fla. 1979), the court recognized the problem of completely ignoring what is "bad" by U.S. standards.

[I]t is most disturbing to consider that the harsh penalties of revocation and deportation, even under a non-immigrant visa, can be visited upon someone for a proceeding against that person in a country that (1) makes no distinctions between felonies and misdemeanors, as in American law; (2) considered it a lenient matter and thereby equivalent to a misdemeanor under American law; and (3) the facts as testified to . . . left the court convinced it is unlikely that a United States Attorney would take the matter to a grand jury or prosecute on a felony basis in America . . . .

Id. at 209-10 n.11.


The "pardon exception" provides that an alien who has been convicted of a crime involving moral turpitude shall not be deported if he has "subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States. . . ." 8 U.S.C. § 1251(b) (1976) (emphasis added).

In addition to the treatment of foreign pardons, the application of American standards to define "moral turpitude" cuts against the adoption of the foreign maximum approach. See note 20 supra.

55. In the case of food hoarding in Iran, for example, an individual from Italy convicted of hoarding food during a short visit to Iran would not fall within the petty offense exception under the foreign maximum approach because the crime would still be considered a felony.
lous results because different nations may have different maximum penalties for the same crime.\textsuperscript{56}

C. The "Actual Punishment" Approach

The final interpretation of the petty offense exception maintains that the statutory phrase "by reason of the punishment actually imposed" modifies both "petty offense" and "misdemeanor." Under this interpretation, "the only significant element for the purposes of applying the exception is the duration or term of punishment actually imposed."\textsuperscript{57} Under the actual punishment approach, the exception is available to an alien if the penalty imposed is a sentence of six months or less and/or a fine of $500 or less, regardless of the maximum authorized penalty.\textsuperscript{58} This approach has been adopted by the Ninth Circuit\textsuperscript{59} and in dicta by the Southern District of Florida.\textsuperscript{60}

The actual punishment approach has several advantages over the first two interpretations. By using a single standard, this construction of section 212(a)(9) eliminates the possibility of "divergent and anomalous results" when applying the exception to both foreign\textsuperscript{61} and domestic\textsuperscript{62} criminal convictions. In \textit{Patel v. Immigration

\textsuperscript{56} This is the main criticism of the foreign maximum approach espoused by the proponents of the domestic analogue approach. \textit{See} notes 17-18 & 52 supra and accompanying text.

\textsuperscript{57} \textit{Patel v. Immigration & Naturalization Serv.}, 542 F.2d 796, 798 (9th Cir. 1976) (emphasis in original).

\textsuperscript{58} This penalty meets the requirements of the federal definition of a petty offense. 18 U.S.C. § 1(3) (1976). \textit{See} note 12 supra and accompanying text. If the punishment imposed meets the definition of a petty offense, it will a fortiori meet the requirements of a misdemeanor, since all petty offenses are misdemeanors. \textit{Id}.

\textsuperscript{59} \textit{Patel v. Immigration & Naturalization Serv.}, 542 F.2d 796 (9th Cir. 1976). \textit{Patel} involved an appeal from a U.S. Immigration and Naturalization Service order refusing plaintiff's petition for voluntary departure. The plaintiff, an Indian native, had been convicted of receiving stolen property under a California statute. Although the case dealt with a domestic conviction, the court implied that its interpretation of the petty offense exception should be applied to foreign convictions as well. \textit{Id} at 798.

Even though \textit{Patel} specifically rejected the domestic analogue approach as applied in Giammario v. Hurney, 311 F.2d 285 (3d Cir. 1962), and Soetarto v. Immigration & Naturalization Serv., 516 F.2d 778 (7th Cir. 1975), it did not fully comprehend the interpretation formulated by those cases. In a footnote, the court stated that "[w]e do not accept the rule first applied in \textit{Giammario v. Hurney} . . . and adopted in \textit{Soetarto v. United States}, [sic] . . . that 'actual punishment' is determined by looking to the maximum possible penalty which could be imposed under an equivalent federal statute." 542 F.2d at 798 n.5.

\textsuperscript{60} \textit{Knoetze v. United States}, 472 F. Supp. 201 (S.D. Fla. 1979). In \textit{Knoetze}, a professional boxer and a citizen of South Africa sought to enjoin the U.S. Secretary of State from revoking his visa. The crime at issue was a South African conviction for obstruction of justice. Although the court approved the approach taken in \textit{Patel} instead of the domestic analogue approach, it decided the case on other grounds.

\textsuperscript{61} This is a criticism of the foreign maximum approach. \textit{See} note 56 supra and accompanying text.

\textsuperscript{62} This is a problem inherent in the domestic analogue approach. \textit{See} notes 30-31 supra and accompanying text.
& Naturalization Service, the Ninth Circuit stressed the advantages of looking to the punishment actually imposed instead of the statutory maximum penalty in defining misdemeanor. The court stated that "[n]o other basis would be equitable or reasonable. States vary considerably in their classification of crimes, as do foreign nations." Moreover, this interpretation, like the foreign maximum approach, eliminates the problem of translating the foreign conviction into a comparable violation of the U.S. or D.C. criminal code.

Compared to the first two interpretations, the actual punishment approach is arguably more concerned with the alien's culpability. Since courts will take mitigating factors into consideration when determining the length of the sentence, the punishment actually imposed better reflects the egregiousness of the defendant's actions than does the maximum penalty established for an entire class of crimes. In addition, the actual punishment approach is probably more effective in measuring antisocial behavior. One of the mitigating factors that a court will probably consider is the extent to which the defendant perceived and acted in contravention of societal mores. Through his discretion in imposing a sentence, the judge might hold a foreigner to a more lenient standard than he would a native who is presumably fully aware of the consequences of his actions.

The actual punishment approach does not follow from the language of the exception; it is a judicial attempt to construe the statute to achieve equitable results. The district court in Knoetze v. United States acknowledged that the actual punishment approach was a strained interpretation of the exception, but supported the approach by stressing fairness considerations. The court stated that

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63. 542 F.2d 796 (9th Cir. 1976).
64. Id. at 798.
65. See notes 41-43 supra and accompanying text.
66. Returning to the food hoarding situation, an Iranian judge would probably impose only a nominal fine on the Italian who, not realizing the seriousness of his actions, hoarded food during his short stay in Iran. Under the foreign maximum approach, the alien would not be able to use the petty offense exception even though he exhibited minimal antisocial behavior. The maximum Iranian penalty imposable for the conviction makes the crime a felony. Therefore, the foreign maximum approach's first level of analysis would prevent the alien from using the exception. Since the actual punishment approach looks solely to the penalty imposed, the alien would fall within the exception if the sentence was less than six months in prison.

On the other hand, neither the domestic analogue nor the foreign maximum approach totally disregards the effect of mitigating circumstances. Both interpretations examine the actual punishment in their second-tier of analysis. Mitigating factors thereby become relevant, but both approaches subordinate the trial court's discretion to the inflexible mandate of the legislature.

67. See notes 72-74 infra and accompanying text.
although Congress has plenary power in the area of deportation\textsuperscript{69} Congress must be presumed to expect courts to consider equitable matters rather than reflexively applying rigid tests . . . and it is settled doctrine\textsuperscript{70} that deportation statutes must be construed in favor of the alien.\textsuperscript{71}

The biggest problem with this third interpretation is its inconsistency with the language of the statute. Under basic rules of grammatical construction, the phrase "by reason of the punishment actually imposed" only modifies "petty offense" and not the word "misdemeanor." It is a rule of statutory construction that the legislature is presumed to know the rules of grammar and to have drafted according to such rules.\textsuperscript{72} A second rule of statutory construction (which echoes the rules of grammar) maintains that qualifying clauses in statutes modify the next preceding antecedent.\textsuperscript{73} Under this rule, the phrase "by reason of the punishment actually imposed" modifies only the term "petty offense" and not "misdemeanor."\textsuperscript{74}

Further, since all petty offenses are misdemeanors,\textsuperscript{75} if Congress had intended the "punishment actually imposed" standard to define both terms, it would not have included the word "misdemeanor" in the exception. If the punishment actually imposed indicates that the conviction is a petty offense, it will also indicate that the conviction was a misdemeanor. By rendering the term "misdemeanor" super-
fluorous, the actual punishment approach violates another rule of statutory construction reddendo singula singulis.\textsuperscript{76} Further, although courts may interpret ambiguous immigration legislation to the benefit of the alien,\textsuperscript{77} they may not judicially legislate where Congress has plenary power.\textsuperscript{78}

Finally, it is not clear that the actual punishment approach is more equitable than the other interpretations of the exception. Just as treatment of the same crime differs from country to country, different courts will treat convicted criminals differently when sentencing. Invariably, some judges will be more lenient or severe than others. The actual punishment approach determines when to revoke or refuse a visa and when to deport solely by the discretionary actions of a particular court. Thus, this interpretation ignores the legislative characterization of the crime. By subjecting deportation or revocation determinations to the sometimes fair, sometimes vindictive discretion of the trial court, and by removing from consideration the legislative judgment of the seriousness of the crime (as reflected in the maximum sentence), the actual punishment approach suffers from claims of unfairness as well.

\section*{III}
\textbf{RECOMMENDATION}

Because each interpretation of the petty offense exception has serious flaws, Congress should enact new legislation to amend the exception. The amendment proposed below outlines precisely the steps that a court or the BIA should follow, thereby eliminating the need to construe the exception.

This proposed amendment to the petty offense exception requires a three-tier analysis. An alien convicted of a crime in a foreign country may use the exception if: (1) the maximum penalty for the crime imposed by the foreign country is three years imprisonment or less;\textsuperscript{79} (2) the comparable federal or District of Columbia criminal statute imposes a maximum penalty of one year or less; and

\begin{footnotes}
\footnote{76. Under this principle, "words in different parts of a statute must be referred to their appropriate connection, giving to each in its place, its proper force and effect, and, if possible, rendering none of them useless or superfluous . . . ." E. CRAWFORD, supra note 27, at 332 (footnote omitted, emphasis added).}
\footnote{77. See cases cited in note 70 supra.}
\footnote{78. See note 69 supra and accompanying text.}
\footnote{79. The amendment uses the foreign maximum penalty of three years' imprisonment, instead of one year, in order to broaden the scope of the proposed amendment. Since it will probably be more difficult for aliens to use the proposal's three-tier analysis than any of the present interpretations, a one year foreign "cut-off" point seems excessively restrictive.}
\end{footnotes}
(3) the punishment actually imposed does not exceed six months imprisonment and/or a $500 fine.

Although all three tiers of the proposed amendment would apply in most circumstances, Congress should also provide an avenue for a convicted alien to bypass one or two of the above listed criteria if certain facts are present. Therefore, the recommended legislation authorizes a court or the BIA to ignore the second requirement, the translation of the foreign crime into a U.S. statute, if it determines that no federal or D.C. criminal offense closely parallels the foreign conviction. Such flexibility alleviates the problem of translating foreign crimes into American statutes when crimes cannot be effectively translated.81

The proposal would also permit a court or the BIA to disregard the first requirement, the use of the maximum foreign penalty, if it determines that the alien did not know or have reason to know that his action was a serious violation of the country's laws and mores. If the alien was present in the foreign country for at least six months within the five-year period immediately preceding his commission of the crime, the court or BIA may conclusively presume that the violator appreciated that country's social mores and had reason to know that his conduct was a serious violation. This exception to the three-tier analysis prevents the foreign maximum penalty from operating as an inaccurate indicator of antisocial behavior.82

By considering the maximum penalties imposed by both the foreign country and the United States, the three-tier approach eliminates other flaws inherent in the three present interpretations of the petty offense exception. Because the proposal uses the maximum penalties imposed by comparable offenses in the United States, it measures the seriousness of the alien's acts by U.S. standards.83 By considering the maximum foreign penalty, the amendment also measures the degree of the alien's antisocial behavior, as defined by the convicting country.84 Finally, the proposal rejects exclusive reliance upon the decisions of particular judges, avoiding the flaws of the actual punishment approach. The amendment also subjects state convictions to the second and third requirements, thereby eliminat-

80. See generally notes 41-43 supra and accompanying text.
81. Where no American counterpart exists for a foreign crime, the act proscribed by the foreign criminal law is probably not repugnant by U.S. standards. Therefore, a court should only examine the degree of a defendant's antisocial behavior, as reflected by the maximum foreign penalty and the punishment actually imposed.
82. See note 55 supra and accompanying text.
83. This flaw is inherent in the foreign maximum approach. See note 52 supra and accompanying text.
84. See note 34 supra and accompanying text.
ing inconsistent applications of the exception to foreign and domestic convictions.85

IV
CONCLUSION

The petty offense exception can prohibit the rejection or revocation of a visa, provide an affirmative defense to a deportation action, or facilitate a voluntary departure. Courts and the Board of Immigration Appeals have formulated various interpretations of the statute, each having benefits as well as inherent defects. Because the exception significantly affects various areas of immigration law, Congress should amend the petty offense exception along the lines suggested by this Note to eliminate the flaws in the various interpretations and provide a uniform system of application.

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85. See note 30 supra and accompanying text.