Kicking Out the Murderers, Rapists, and Tax Offenders: An Analysis of Immigration Consequences for the Act of Committing a Tax Offense

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Kicking Out the Murderers, Rapists, Sexual Abusers and . . . Tax Offenders: An Analysis of Immigration Consequences for the “Base, Vile, and Depraved” Act of Committing a Tax Offense

Eugene J. Choi

Introduction

“With only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’”¹ Given the complexity and evolving nature of both tax law and immigration law, many analysts have studied, criticized and proposed changes to promote fairness and efficiency in these two areas of law. The vast majority of academic tax literature debates the fairness and efficiency of the U.S. tax system; however, most tax scholars give little attention to the consequences of tax offenses, particularly the consequences of tax offenses on aliens. Likewise, U.S. immigration policy has been the subject of heated controversy since the early years of the country;² however, very little literature exists that analyzes the consequences to aliens of being convicted of tax offenses under current immigration law. This particular point, where tax law and immigration law converge, is especially troubling for aliens³ as well as for others who advocate for equal application of “certain unalienable Rights.”⁴

Under the Immigration and Nationality Act (“INA”),⁵ an alien can be deported for tax convictions regardless of whether the conviction was a felony or misdemeanor, whether the alien serves jail time, whether the alien was present legally or illegally, or whether the alien has been here for one year or

⁴ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
over twenty years. On the other hand, a citizen who is convicted of the same minimum tax offense that would subject an alien to deportation could get 10 to 16 months of incarceration, but more likely, no incarceration at all as a result of a plea deal. Of course, an alien is afforded the same opportunity to plead; however, a few months in jail is insignificant compared to the possibility of deportation for pleading guilty to a tax offense. The Supreme Court has said that “deportation is a drastic measure and at times the equivalent to banishment or exile.” The Court has also acknowledged that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” Given the disparity between “banishment” for an alien and a few months in jail at most for a citizen convicted of the same offense, one would expect that this issue had been highly analyzed and criticized by scholars, advocates and the courts. However, as mentioned above, the issue has gotten little attention, and the Supreme Court recently issued a decision that widens the scope of deportability relating to tax offenses, exposing even more aliens to the unfair disparity and “drastic measure” of deportability.

To fully appreciate the fundamental unfairness of the current immigration laws relating to tax convictions, one must understand the basic concepts of tax enforcement, immigration law, aliens as a class, and how the courts have interpreted rights of aliens. If the current laws are fundamentally unfair, the questions that then arise are: How should Congress rectify the issue; and if Congress refuses to act, can the courts declare the laws unconstitutional?

I. Tax Violations

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8 Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).
10 See Kawashima, 132 S. Ct. 1116.
Article I, section 8 of the Constitution states, “Congress shall have Power To lay and collect Taxes . . . .”\(^{11}\) Resident aliens, nonresident aliens, and U.S. citizens are all subject to U.S. taxes.\(^{12}\) All criminal tax statutes are relevant to this issue; however, the most pertinent criminal tax violations are defined in sections 7201 (tax evasion), 7202 (failure to collect tax), 7203 (willful failure to file taxes), and 7206 (tax perjury and aiding and assisting in tax fraud) of the Internal Revenue Code (“IRC”).\(^{13}\) These and other laws proscribed by the IRC are enforced by the Internal Revenue Service Criminal Investigation Division (“CI”).\(^{14}\)

CI conducts criminal investigations into alleged violations of the IRC.\(^{15}\) Criminal investigations are initiated from information obtained internally, such as through audits and collection, or from other law enforcement agencies, the U.S. Attorneys offices, and the general public.\(^{16}\) After obtaining information that a potential violation has occurred, CI special agents start with a “primary investigation.”\(^{17}\) If further information “indicates prosecution potential exits,” a CI supervisor may approve a “subject criminal investigation.”\(^{18}\) Once the investigation is completed, CI may refer the case to the U.S. Department of Justice, Tax Division recommending criminal proceedings or further investigation through a grand jury.\(^{19}\)

CI investigations lead to approximately 3,000 criminal prosecutions per year.\(^{20}\)

Likewise, states have created their own agencies to mirror the Internal Revenue Service (“IRS”), including departments and procedures for enforcement of state tax codes.\(^{21}\) Through programs like the

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\(^{11}\) U.S. Const. art. I, § 8.

\(^{12}\) See De Ganay v. Lederer, 250 U.S. 376 (1919) (holding that a nonresident’s property within the U.S. is subject to U.S. taxes).

\(^{13}\) See I.R.C. §§ 7201-7203, 7206. All references to the “I.R.C.” and the “Code” in this article are to the Internal Revenue Code of 1986, as amended, in effect on March 20, 2012.


\(^{15}\) Id.

\(^{16}\) Id.

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) How Criminal Investigations are Initiated, supra note 14.

Criminal Alien Program, Secure Communities, and INA § 287(g), state officials have deputizing authority to arrest, report or hold non-citizens while Immigration and Custom Enforcement (“ICE”) investigates or conducts cross-references of the detainees.

(a) I.R.C. § 7201

Section 7201 describes the violation of “attempt to evade or defeat tax.” Violation of § 7201 is often referred to as “tax evasion.” In order to prove a violation of tax evasion, the government must show: (i) willfulness; (ii) a tax deficiency; and (iii) “an affirmative act constituting an evasion or attempted evasion of the tax.” There are four defenses to tax evasion charges under § 7201: (i) lack of deficiency; (ii) lack of willfulness; (iii) third party reliance; and (iv) selective prosecution. Tax evasion has been described by the Court as the “gravest of offenses against the revenues,” and the Court “consider[s] this felony as the capstone of a system of sanctions . . . .”

(b) I.R.C. § 7202

Section 7202 describes the violation of “willful failure to collect or pay over taxes.” Section 7202 primarily applies to employers. Under § 7202, it is a crime to either (i) willfully fail to collect any

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23 Secure Communities allows the FBI to automatically send fingerprints of booked aliens received from local jails to ICE to check against its immigration database. See Secure Communities, DEP’T OF HOMELAND SEC., http://www.ice.gov/secure_communities/ (last visited Apr. 21, 2012).
24 See I.N.A. § 287(g) (allowing the Attorney General to enter into a written agreement with States that allow qualified State officers or employees to perform functions of an immigration officer).
25 I.R.C. § 7201.
26 See Kawahima, 132 S. Ct. at 1177.
30 See id. at 497.
31 I.R.C. § 7202.
32 Slachetka, supra note 27, at 1220.
tax required by the IRC; or (ii) willfully fail to truthfully account for and pay over taxes. Each is a separate crime.

In order to prove a violation for willful failure to collect tax under § 7202, the government must show: (i) there is a legal duty to collect a tax; (ii) a failure to collect that tax; and (iii) willfulness. In order to find a violation for willful failure to truthfully account for and pay over a tax under § 7202, the government must show: (i) there is a legal duty to account for and pay over a tax; (ii) a failure to account for and pay over that tax; and (iii) willfulness.

Under § 7202, prosecutions for willful failure to account for and pay over tax are more frequent than willful failure to collect tax because most employers withhold amounts from employees’ wages, but then fail to pay over the withheld amounts to the government. Although two separate crimes, the two violations under § 7202 have similar elements and defenses. Defenses to violations of § 7202 are good faith and lack of knowledge of the illegality of the activity. An inability to pay is not a valid defense.

(c) I.R.C. § 7203

Section 7203 describes the violation of “willful failure to file return, supply information, or pay tax.” Violation of failure to file a tax return is a misdemeanor. In order to prove a violation of § 7203, the government must show beyond a reasonable doubt: (i) a requirement to file a tax return; (ii) failure to file a return; and (iii) willfulness. A defense of § 7203 is “reliance on counsel or an accountant to

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33 Id.
34 Id.
35 Id.
36 Id.
37 Id.
38 Id. at 1224.
39 Id.
40 I.R.C. § 7203.
41 Id.
42 United States v. McKee, 506 F.3d 225, 244 (3d Cir. 2007).
negate willfulness.” However, to prevail on this defense, the defendant must “have made full disclosure of all relevant information to that professional.”

(d) I.R.C. § 7206

Section 7206 describes the violation of “fraud and false statements.” There are two principal provisions in § 7206: (1) the “tax perjury” violation; and (2) the “aiding and assisting” violation. Under § 7206(1), it is a felony to file a tax return willfully knowing that the information on the return is false. The elements to convict a defendant under § 7206(1) are: (i) a return, statement, or other document was made or subscribed with false information as to a material matter; (ii) the return, statement, or other document contained a written declaration made under the penalties of perjury; (iii) the defendant did not believe that every material matter on the return, statement, or other document was true and correct; and (iv) the defendant acted with a willful specific intent to violate the law. As with most alleged tax violations, the defense of lack of willfulness is the most effective defense under § 7206(1). Reliance on a third party for preparation or advice is also a defense; however, the taxpayer must show that complete, truthful information was supplied to the third party, and the taxpayer acted in good-faith by relying on the advice. Generally under § 7206, if the information provided by the defendant is the “literal truth” the taxpayer will not be found guilty, even though the information is misleading.

43 Slachetka, supra note 27, at 1228.
44 United States v. Bishop, 291 F.3d 1100, 1107 (9th Cir. 2002).
45 I.R.C. § 7206.
46 Id.
47 United States v. Clayton, 506 F.3d 405, 413 (5th Cir. 2007) (citing I.R.C. § 7206).
48 United States v. Bok, 156 F.3d 157, 164 (2d Cir. 1998).
49 Slachetka, supra note 27, at 1232.
50 Id. at 1233.
51 See United States v. Reynolds, 919 F.2d 435, 437 (7th Cir. 1990) (“Section 7206(1) is a perjury statute, and literal truth is a defense to perjury, even if the answer is highly misleading.”).
defense often arises because the defendant used the wrong form. However, willfully providing incomplete information on the correct form or the wrong form may constitute a violation.

Under § 7206(2), it is a felony to “aid or assist” a taxpayer to file a false tax return. The elements to convict a defendant under § 7206(2) are: (i) an act of aiding and assisting in the preparation of a false return; (ii) material falsity; and (iii) willfulness. Any person, whether directly or indirectly responsible for preparing a fraudulent tax return, may be liable for aiding and assisting in the preparation of a false return by simply taking affirmative action that encourages the taxpayer to mislead the IRS. Hence, under § 7206(2), tax preparers, accountants, lawyers, clerical workers, and even spouses can be held liable for aiding and assisting in the preparation of a false tax return. Just as in § 7206(1), the most effective defense for § 7206(2) is to refute the willfulness element.

(e) Sanctions for violations of I.R.C. §§ 7201, 7202, 7203, and 7206

A person convicted of violating § 7201 is guilty of a felony punishable by a fine of not more than $100,000 or imprisonment of not more than five years, or both. A person convicted of violating § 7202 is guilty of a felony punishable by a fine not more than $10,000 or imprisonment of not more than five years, or both. A person convicted of violating § 7203 is guilty of a misdemeanor punishable by a fine not more than $25,000 or imprisonment of not more than one year, or both. Finally, a person convicted of violating § 7206 is guilty of a felony punishable by a fine not more than $100,000 or imprisonment of not more than three years, or both.

52 Slachetka, supra note 27, at 1235.
53 See United States v. Gollapudi, 130 F.3d 66, 72 (3d Cir. 1997) (holding defendant liable for violating § 7206(1) because although his W-2 form was numerically accurate, he never actually submitted withholdings to the IRS).
54 I.R.C. § 7206(2).
55 Id.
57 See Kawashima, 132 S. Ct. at 1176; Slachetka, supra note 27, at 1234.
58 Slachetka, supra note 27, at 1235.
59 Id. § 7201.
60 Id. § 7202.
61 Id. § 7203.
62 Id. § 7206.
The sentence imposed for tax violations generally corresponds with the Federal Sentencing Guidelines. However, the Federal Sentencing Guidelines are not mandatory but serve as “effectively advisory.” U.S. Sentencing Guidelines § 2T1.1 provides sentencing guidance for convictions of “tax evasion” (§ 7201), “willful failure to file return, supply information, or pay tax” (§ 7203), and “fraudulent or false returns, statements, or other documents” (§ 7206(1)). Under § 2T1.1, the base offense level is to be determined by § 2T4.1 (“Tax Table”), which corresponds to the tax loss or, if there is no tax loss, the base offense level is 6. Furthermore, if the tax loss exceeds $10,000 in any year, or if the criminal activity involved sophisticated means, the offense level increases by 2 levels, with a minimum level of 12.

The tax loss for offenses that involve tax evasion or a fraudulent or false return is “the loss that would have resulted had the offense been successfully completed.” For offenses that involve failure to file a tax return, the tax loss is “the amount of tax that the taxpayer owed and did not pay.” The government must prove the amount of tax loss by the preponderance of the evidence. A six-year statute of limitations applies to the offenses discussed. When the amount of actual tax loss is uncertain, “the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.”

For example, Bob, who is convicted for the first-time of tax evasion, where over a six year period, the amount of tax loss was more than $5,000, but less than $12,501, would normally have a base

65 U.S. Sentencing Guidelines Manual § 2T1.1
67 Id. § 2T1.1. A base offense level is the minimum basis in which a sentencing court will begin to calculate an appropriate sentence.
68 Id. § 2T1.1(b)(1)-(2).
69 Id. § 2T1.1(c)(1).
70 Id. § 2T1.1(c)(2).
71 Id.
73 U.S. Sentencing Guidelines Manual § 2T1.1(c) cmt. 1.
level of 10 according to the Tax Table. However, if the tax loss exceeded $10,000 in any year, the base offense level would be 12. After ascertaining the appropriate base level, the sentencing court will match the offense level with the Federal Sentencing Table (“Sentencing Table”). Hence, assuming that Bob has no criminal history, his base level of 10 would correspond to 6-12 months of imprisonment. A base level of 12 would correspond to 10-16 months of imprisonment.

Defendants convicted under § 7202 (“failure to collect or account for tax”) are sentenced according to U.S. Sentencing Guidelines § 2T1.6. The base offense level is also calculated from the Tax Table and determined by “the amount of tax not collected or accounted for and paid over.” Defendants convicted under § 7206(2) (“aiding and assisting”) are sentenced according to U.S. Sentencing Guidelines § 2T1.4, corresponding also to the Tax Table. Under § 2T1.4, if the convicted defendant (A) “committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income; or (B) [w]as in the business of preparing or assisting in the preparation of tax returns,” the level increases by 2.

Before the sentencing guidelines, roughly half of all tax offenders received probation without jail time, while the other half received an average sentence of twelve months confinement. The Guidelines were implemented to reduce disparity in sentencing and somewhat increase average sentence lengths. As the amount of tax loss increases, the seriousness of the offense should increase, and the

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74 See U.S. SENTENCING GUIDELINES MANUAL § 2T4.1.
75 Id. Ch. 5, Pt. A (2010).
76 See id.
77 Id.
78 Id. app. A.
79 Id. § 2T4.1.
80 Slachetka, supra note 27, at 1239 (citing U.S. SENTENCING GUIDELINES MANUAL § 2T1.6(a)).
81 U.S. SENTENCING GUIDELINES MANUAL app. A.
82 Id. § 2T4.1.
83 Id. § 2T1.4(1).
84 U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(c) cmt 7.
85 Id.
necessity to deter should increase.86 Hence, the IRS is more likely to focus on sophisticated criminal schemes, high-dollar transactions, and prominent taxpayers.87

In 2011, CI initiated 4,720 investigations and recommended 3,410 cases for prosecution.88 These recommendations led to 2,350 total convictions in which 2,206 violators were sentenced.89 "Sentence includes confinement to federal prison, halfway house, home detention, or some combination thereof."90 CI boasts, “Criminal Investigation’s conviction rate is one of the highest in federal law enforcement. Not only do the courts hand down substantial prison sentences, but those convicted must also pay fines, civil taxes and penalties."91 However, another potential consequence of tax offense not listed in CI’s mission statement, and perhaps not worth boasting about, is the strict deportation of aliens convicted of a first-time tax offense; aliens who may have resided legally in the U.S. for decades, who may have to leave behind children raised in the U.S., and who may lose everything and have to start over in another country with nothing.

II. Immigration law: deportation as a result of tax offenses

In 1952, the INA was enacted into law.92 Under the INA, there are two ways that an alien can be deported for tax offenses. First, an alien’s tax offense can be deemed a “crime of moral turpitude” under INA § 237(a)(2)(A)(i).93 Second, a tax offense can be considered an “aggravated felony” under INA § 237(a)(2)(A)(iii).94 “Aggravated felony” is defined by INA § 101(a)(43).95 Specifically, INA § 101(a)(43)(M) states that an offense that (i) “involves a fraud or deceit in which the loss to the victim or

86 Id.
87 Slachetka, supra note 27, at 1203.
89 Id.
90 Id.
94 Id. § 237(a)(2)(A)(iii).
95 Id. § 101(a)(43).
victims exceeds $10,000; or (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the loss to the Government exceeds $10,000” constitutes as an aggravated felony.96

(a) I.N.A. § 237(a)(2)(A)(i)—“Crime of Moral Turpitude”

INA § 237(a)(2)(A)(i) states, “Any alien who (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission; and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.”97 Hence, an alien’s deportation due to a crime of moral turpitude (“CMT”) may be precluded depending upon the alien’s status, date of admission, date of the crime, and potential sentence. Furthermore, aliens convicted of a CMT may be eligible for cancellation of removal at the discretion of the Attorney General,98 or eligible for voluntary departure.99 A reading of § 237(a)(2)(A)(i) begs the questions: What is the definition of a CMT, how does one determine if a conviction constitutes as a CMT, and can tax offenses lead to deportation under the CMT definition?

Although the term “moral turpitude” is deeply rooted in the law,100 Congress has never seen fit to give the term a meaning.101 The Department of Justice, decisions by the Board of Immigration Appeals (“BIA”), and the Attorney General have provided their own definition of CMT.102 CMT is generally defined as a crime involving conduct “which is inherently base, vile, or depraved, contrary to accepted rules of morality.”103 There is no set list of crimes that constitute CMT, but the consensus of common law holds that “offenses that have an element of fraud, larceny, or intent to harm persons or property

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96 Id. § 101(a)(43)(M).
97 Id. § 237(a)(2)(A)(i).
98 Id. § 240A(a)(3).
99 Id. § 240B(a)(1).
101 Id. at 234 (Jackson, J., dissenting).
103 Tseung Chu v. Cornell, 247 F.2d 929, 934 (9th Cir. 1957).
generally involve moral turpitude.”

The Supreme Court has held that the CMT definition is not unconstitutionally vague. Furthermore, based on the decision in *Chevron v. N.R.D.C.*, the courts will defer to an agency’s interpretation of what counts as a CMT. Hence, an alien found to have committed a CMT has very limited options to dispute the definition itself.

Rather than attacking the term CMT itself for unconstitutional vagueness or challenging the agency’s definition of a CMT, an alien facing deportation under a CMT conviction may have better luck disputing that his or her crime does not fit the agency’s definition of “inherently base, vile, or depraved.” In reviewing whether an alien’s crime constitutes a CMT, the courts use a form of analysis known as the categorical approach. Generally, the categorical approach contains two steps: the traditional categorical approach (“categorical approach”) and the modified categorical approach (“modified approach”).

**(i) The categorical approach**

Under the categorical approach, the reviewing court looks to the statute in which the alien was convicted to see if moral turpitude is inherent in the elements. The courts do not look at the facts underlying the conviction, but rather, the courts look solely to the generic definition of the elements in the statute under which the alien was convicted. If every conceivable conviction under the convicting statute would necessarily involve moral turpitude, then any conviction under the statute would also be

104 Dadhania, *supra* note 102, at 319.
105 *Jordan*, 341 U.S. at 332.
106 *See* *Chevron v. N.R.D.C.*, 467 U.S. 837, 844 (1984) (holding that agency interpretations are given great deference unless they are arbitrary and capricious, also known as “Chevron deference”); *Knapik v. Ashcroft*, 384 F.3d 84, 88 (3d Cir. 2004) (concluding that the Board of Immigration Appeals’ interpretation that reckless endangerment may involve moral turpitude is entitled to *Chevron* deference). *But see Kawashima*, 132 S. Ct. at 1176 (pointing out that in the past, the Court has construed ambiguities in deportation statutes in favor of the alien); *St. Cyr*, 533 U.S. at 320.
107 *See* *Knapik*, 384 F.3d at 88.
108 *See* *Tseung Chu*, 247 F.2d at 934.
109 *See* *Cuevas-Gasper v. Gonzales*, 430 F.3d 1013, 1017 (9th Cir. 2005); *see also* *Taylor v. United States*, 495 U.S. 575 (1993).
110 *See* Dadhania, *supra* note 102, at 314.
111 *Id.* at 324.
112 *Cuevas-Gasper*, 430 F.3d at 1017.
considered a CMT for immigration purposes.\textsuperscript{113} For example, based on the necessary elements of theft, every circuit, in which the question has been litigated, has held that theft is a CMT, even petty theft.\textsuperscript{114} On the other hand, burglary is not necessarily a CMT because a state statute may only require proof of breaking and entering with intent to commit any crime, rather than a specific crime.\textsuperscript{115} Under such a burglary statute, the court in \textit{Cuevas-Gasper} explained that “a group of boys opening the unlocked door of an abandoned barn with the intention of playing cards . . . could all be convicted of third degree burglary. Yet, we do not think that such persons should be deemed to be base, vile or depraved.”\textsuperscript{116}

However, when a statute is unclear, such that an alien may or may not have committed a CMT based strictly on the convicting statute, reviewing courts then take a modified approach.\textsuperscript{117}

\textbf{(ii) The modified approach}

The modified approach is applied only when the convicting statute is broader than the generic definition of the crime.\textsuperscript{118} Under the modified approach, the court “may look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction.”\textsuperscript{119} Such documents include, “the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript of the plea proceedings.”\textsuperscript{120} However, the reviewing court may not look at extrinsic evidence beyond the record of conviction to particular facts underlying the conviction.\textsuperscript{121} If the record of conviction shows that the alien’s particular offense constitutes a CMT, then the alien is deemed to have

\textsuperscript{113} See Dadhania, \textit{supra} note 102, at 325-26.
\textsuperscript{114} See United States v. Esparaza-Ponce, 193 F.3d 1133, 1136 (9th Cir. 1999) (“[E]very other circuit that has addressed the question in the context of the immigration laws has concluded that petty theft is a crime involving moral turpitude for purposes of those laws.”).
\textsuperscript{115} See \textit{Cuevas-Gasper}, 430 F.3d at 1019.
\textsuperscript{116} See id. (quoting \textit{In re M}, 2 I. & N. Dec. 721, 723(BIA 1946)).
\textsuperscript{117} See \textit{Cuevas-Gasper}, 430 F.3d at 1020.
\textsuperscript{118} Id.
\textsuperscript{119} Tokatly v. Ashcroft, 371 F.3d 613, 620 (9th Cir. 2004).
\textsuperscript{120} United States v. Rivera-Sanchez, 247 F.3d 905, 908 (9th Cir. 2001) (quoting United States v. Casarez-Bravo, 181 F.3d 1074, 1077 (9th Cir. 1999)).
committed a CMT.\textsuperscript{122} However, if even after reviewing the record of conviction, the court cannot determine whether the offense constitutes a CMT, the alien will not be found to have committed a CMT.\textsuperscript{123}

As mentioned above, the court in \textit{Cuevas-Gasper} could not find that burglary constituted a CMT under the categorical approach because the convicting statute was too broad; however, when the court reviewed the defendant’s guilty plea, the court found that he admitted to entering the residence with the intention of stealing property; hence, his conviction was a CMT under the modified approach.\textsuperscript{124}

(iii) Tax offenses: Crime of moral turpitude?

The Court has said that “crimes in which fraud was an ingredient have always been regarded as involving moral turpitude.”\textsuperscript{125} Due to the required “willful intent to evade taxes” element, convictions under IRC § 7201 (“tax evasion”) are generally considered to involve a CMT.\textsuperscript{126} Furthermore, willful intent to evade taxes is not limited to federal convictions. State tax evasion also can be considered a CMT and a deportable offense.\textsuperscript{127} Interestingly, § 7201 does not contain an element of fraud; however, courts have pointed to the fact that § 7201 does require willful evasion of tax,\textsuperscript{128} and that “[t]here can be no ‘willful’ evasion without a specific intent to defraud.”\textsuperscript{129}

However, a few courts have suggested that a “fraud” element in a crime does not make the crime a CMT per se.\textsuperscript{130} The court in \textit{Navarro-Lopez} stated:

\begin{quote}
There may be crimes involving fraud that do involve moral turpitude. For example, someone perpetrating a vast fraud to deprive widows of pension benefits or employees
\end{quote}

\begin{itemize}
\item \textsuperscript{122} \textit{See} Dadhania, \textit{supra} note 102, at 329.
\item \textsuperscript{123} \textit{Id}.
\item \textsuperscript{124} \textit{See} \textit{Cuevas-Gasper}, 430 F.3d at 1020.
\item \textsuperscript{125} \textit{Jordan}, 341 U.S. at 232.
\item \textsuperscript{126} \textit{See e.g.}, \textit{id.}; Chhabra v. Holder, 444 F. App’x 493, 496 (2d Cir. 2011); Serafino v. Attorney Gen., 186 F. App’x 302, 305 (3d Cir. 2006); Carty v. Ashcroft, 395 F.3d 1081, 1085 (9th Cir. 2005).
\item \textsuperscript{127} \textit{See e.g.}, Wittgenstein v. INS, 124 F.3d 1244, 1246 (10th Cir. 1997) (holding that conviction under a New Mexico state tax evasion statute is a CMT).
\item \textsuperscript{128} \textit{See I.R.C. § 7201; Chhabra}, 444 F. App’x at 495.
\item \textsuperscript{129} Costello v. INS, 311 F.2d 343, 348 (2d Cir. 1962).
\item \textsuperscript{130} Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1069 (9th Cir. 2007) (holding that an accessory after the fact conviction under California law is not a CMT).
\end{itemize}
of ERISA benefits would qualify as base, vile, depraved, and shocking society's conscience. On the other hand, some actions involving fraud may not qualify as base, vile, and depraved. Take the example of a welfare mother who falsely endorses and then cashes a social security check mistakenly issued to her deceased father. The woman knows that she does not have the right to the money. She forges her father's signature. But, she needs money to feed her hungry children. Although such conduct is illegal, it is not base, vile, or depraved. Both of these crimes involve fraud, but they present very different circumstances. Because such a large swath of crimes involve fraud, we should conduct an individualized analysis for offenses involving fraud—not immediately label them as involving moral turpitude.131

Generally, however, tax offenses are considered CMTs due to the required element of willful “fraud.”132 Based on this implicit element in the IRC, courts generally can make a determination that a tax offense is a CMT simply by using the categorical approach. In other words, any conviction under the specified IRC provisions necessarily will involve a CMT.

However, as stated above, an alien convicted under INA § 237(a)(2)(A)(i) for a CMT, may qualify for certain deportation relief.133 In addition, an alien may be precluded from deportation for a CMT due to the alien’s status, time spent in the U.S., date of the offense, or sentence imposed.134 Thus, depending upon the circumstance, the government may be precluded from deporting an alien on the basis that the tax offense was a CMT. However, if the tax loss exceeds $10,000, the government may get around these hurdles and deport an alien by, instead of labeling the tax offense as a CMT, labeling the offense as an “aggravated felony.”135

(b) I.N.A. § 237(a)(2)(A)(iii)—“Aggravated Felony”

INA § 237(a)(2)(A)(iii) states, “Any alien convicted of an aggravated felony at any time after admission is deportable.”136 Unlike an alien convicted of a CMT, an alien convicted of an “aggravated

131 Id.
132 See Jordan, 341 U.S. at 232; Franklin v. INS, 72 F.3d 571, 587 (8th Cir. 1995) (stating that convictions with an element of fraud “can be decided with relative ease” that the crime was a CMT).
133 See supra text accompanying notes 98-99.
135 See Id. § 237(a)(2)(A)(iii).
136 Id.
“felony” is precluded from deportation relief. The definitions statute, INA § 101(a)(43), describes multiple crimes that are considered “aggravated felonies.” A tax offense could be deemed an “aggravated felony” under § 101(a)(43)(M) if it is “an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000 [hereinafter “Clause (i)”; or (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000 [hereinafter “Clause (ii)”). Thus, section 101(a)(43)(M) describes two provisions potentially related to tax offenses. Under § 101(a)(43)(M), the two most glaring questions are: (1) does Clause (i) apply to tax offenses; and (2) how does one calculate the “amount of loss” requirement in both Clause (i) and Clause (ii)?

(i) Kawashima v. Holder: Clause (i) applies to tax offenses.

This past February, the Supreme Court decided a landmark case in Kawashima v. Holder. In a 6-3 decision, the Court held that violations of IRC § 7206(1) (“tax perjury”) and § 7206(2) (“aiding and assisting”) involve “fraud or deceit” and are therefore “aggravated felonies.” Before the Kawashima decision, the circuits were split on whether Clause (i) included tax offenses or whether Clause (ii)’s specific mention of “tax evasion” (§ 7201) was the only deportable tax offense, thereby excluding tax offenses in Clause (i).

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137 See I.N.A. § 240A (“The Attorney General may cancel removal . . . if the alien . . . has not been convicted of any aggravated felony.”); I.N.A. § 240B (“The Attorney General may permit an alien voluntarily to depart the United States . . . if the alien is not deportable under section 237(a)(2)(A)(ii).”).
138 I.N.A. § 101(a)(43).
139 Id. § 101(a)(43)(M).
140 I.N.A. § 101(a)(43)(M).
141 Kawashima, 132 S. Ct. 1166.
142 Id. at 1170.
143 Compare Lee v. Ashcroft, 368 F.3d 218 (3d Cir. 2004) (holding that a violation of IRC § 7206(1) was not an aggravated felony and not a deportable offense), with Arguelles-Olivares v. Mukasey, 526 F.3d 171 (5th Cir. 2008) (holding that a conviction under IRC §7206(1) is an aggravated felony if the offense involves a loss of $10,000 or more).
In *Kawashima*, Mr. Kawashima pleaded guilty to one count of willfully filing a false tax return in violation of IRC § 7206(1). Mr. Kawashima pleaded guilty to one count of adding and assisting in the preparation of the false return. Both Mr. and Mrs. Kawashima were natives and citizens of Japan as well as lawful permanent residents in the U.S. since June 21, 1984. Following their convictions, they were charged with being deportable for committing aggravated felonies under INA § 237(a)(2)(A)(iii). The Ninth Circuit held that violations of § 7206 in which the loss to the Government exceeds $10,000 constitute aggravated felonies under Clause (i), and the Supreme Court affirmed.

The Court first began with the categorical approach. The Court reasoned, “If the elements of the offenses establish that the Kawashimas committed crimes involving fraud or deceit, then the first requirement of Clause (i) is satisfied.” In deciding that Mr. Kawashima’s crime involved fraud or deceit, the Court used a similar analysis as previously described. The Court stated:

> Although the words “fraud” and “deceit” are absent from the text of § 7206(1) and are not themselves formal elements of the crime, it does not follow that his offense falls outside of Clause (i). [ ] Rather, Clause (i) refers more broadly to offenses that “involv[e]” fraud or deceit-meaning offenses with elements that necessarily entail fraudulent or deceitful conduct.

Likewise, by establishing that Mrs. Kawashima knowingly and willfully assisted her husband in filing a false return in violation of § 7206(2), she also committed an aggravated felony that involved deceit.

The Kawashimas argued, however, that when Clause (i) and (ii) are read together, Clause (i) should be interpreted to preclude tax offenses. They argued that when read together, Clause (i)’s

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144 *Kawashima*, 132 S. Ct. at 1170.
145 *Id.*
146 *Id.*
147 *Id.* at 1170-71.
148 *Kawashima*, 615 F.3d 1043, 1053 (9th Cir. 2007).
149 *Kawashima*, 132 S. Ct. at 1171.
150 *Id.* at 1172.
151 *Id.*
152 See supra text accompanying notes 125-32.
153 *Kawashima*, 132 S. Ct. at 1172.
154 *Id.* at 1173.
general language was intended to include only non-tax crimes involving fraud or deceit in which the actual loss applies to “loss to [a real] victim or victims,” not the Government. Furthermore, they argued that if Clause (i) was meant to include tax offenses, Clause (ii) is “mere surplusage.” Finally, the Kawashimas pointed to the U.S. Sentencing Guidelines and argued that separate treatment of tax crimes and crimes involving fraud and deceit support the contention that Congress did not intend Clause (i) to include tax offenses.

The Court rejected all of the Kawashimas’ arguments. First, the Court reasoned that Clause (i)’s language covers a broad class of fraud and deceit offenses; thus, it refers “to [a] wide range of potential losses and victims.” The fact that Clause (ii)’s language refers solely to tax evasion “does not demonstrate that Congress also intended to implicitly circumscribe the broad scope of Clause (i)’s plain language.” Second, the Court thought it “more likely that Congress specifically included tax evasion offenses under [ ] § 7201 in Clause (ii) to remove any doubt that tax evasion qualifies as an aggravated felony.” Thus, Clause (ii) is not “mere surplusage.” Finally, the Court noted that Clause (ii) does not refer to all offenses involving taxation but is expressly limited to offenses under § 7201, and “[t]hat textual difference undercuts any inferences that Congress was considering, much less incorporating, the distinction drawn by the Guidelines.”

The Court’s decision is problematic for several reasons. First, as the dissent in Kawashima points out, it is “[f]ar more likely, Congress did not intend to include tax offenses in [Clause (i)], but instead

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155 Id.
156 See I.N.A. § 101(a)(43)(M)(i) (“An aggravated felony is an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.”).
157 Kawashima, 132 S. Ct. at 1173.
158 Id. at 1174.
159 Id. at 1175.
160 Id. at 1176.
161 Id. at 1173.
162 Id. at 1174.
163 Id.
164 Id.
165 Id. at 1175.
drafted that provision to address fraudulent schemes against private victims, then added [Clause (ii)] so that the “capstone” tax offense against the Government also qualifies as an aggravated felony.166 Hence, under the majority’s reading, Clause (ii) is “surplusage.”

Second, a reading of the majority’s decision “sweeps a wide variety of federal, state, and local tax offenses-including misdemeanors-into the ‘aggravated felony’ category.”167 On the federal level, misdemeanors such as failure to file a return (IRC § 7203), furnishing a false W2 form to an employee (IRC § 7204), supplying false information to an employer (IRC § 7205), or filing a return known to be false as to any material matter (IRC § 7207), would be deemed aggravated felonies under the majority’s reading and subject an alien to deportation.168 On the state and local level, an alien may be deportable because of a state or local misdemeanor conviction for willfully stating false information to reduce his or her tax.169 Furthermore, because the Government can look back as far as six years to calculate the amount of loss,170 the $10,000 threshold can be met for tax crimes far less serious than tax evasion.171

Finally, the majority’s decision would discourage aliens from pleading guilty to less serious tax offenses than tax evasion because it is more difficult to prosecute under tax evasion than less serious tax offenses.172 For example, it is often more difficult to prosecute under § 7201 (“tax evasion”) than § 7206 (“tax perjury”).173 If the consequences of a conviction are going to be deportation either way, an alien might as well face charges of tax evasion, which is harder to prosecute, than tax perjury. This effect will have adverse consequences on the efficiency and handling of tax prosecutions.174

166 Id. 1179 (Ginsburg, J., dissenting) (citing Spies, 317 U.S. at 497).
167 Kawashima, 132 S. Ct. at 1176 (Ginsburg, J., dissenting).
168 See id. at 1180.
169 See id. (citing CAL. REV. & TAX CODE ANN. § 1610.4 (West 1998); N.D. CENT. CODE ANN. § 5737.116 (Lexis 2011); COLUMBUS, OHIO CITY CODE §§ 361.31(a)(4), (b), (d) (2009)).
171 Kawashima, 132 S. Ct. at 1180 (Ginsberg, J., dissenting).
172 Id. at 1176.
173 See States v. Olgin, 745 F.2d 263, 272 (3d Cir. 1984) (stating that § 7206 does not require proof of a tax deficiency as § 7201 does); Considine v. United States, 683 F.2d 1285, 1287 (9th Cir. 1982) (stating § 7206 does not require proof of an attempt to escape a tax as § 7201 does).
174 Kawashima, 132 S. Ct. at 1180 (Ginsberg, J., dissenting).
(ii) Determining the amount of loss

After determining that the alien has committed a tax offense that satisfies the “fraud and deceit” element in Clause (i), or conviction under § 7201 under Clause (ii), the next inquiry must be whether the tax offence led to a loss “exceeding $10,000” in order to find the alien deportable for committing an aggravated felony.\(^{175}\) Because sentencing for tax offenses is generally based on the amount of tax loss to the government, the tax loss will normally be reflected in the district court’s record.\(^{176}\) For example, a tax offense that led to less than a $5,001 loss to the government carries a sentence of zero to six months of imprisonment;\(^{177}\) whereas an offense that led to more than a $5,000 loss, but less than $12,001, carries a sentence of six to twelve months of imprisonment.\(^{178}\) The amount of loss is usually a key negotiating point during plea bargaining, especially for aliens who may be subject to deportation.\(^{179}\) For citizen defendants, it usually does not make a difference whether the tax loss is $10,000 or $10,001 because the sentencing will be six to twelve months regardless.\(^{180}\) However, for an alien, the break point is $10,000, where any amount over will cause the crime to be considered an aggravated felony and will lead to deportation.\(^{181}\) This $10,000 threshold is somewhere between offense level 10 (more than $5,000) and 12 (more than $12,500), and whether the tax loss was over $10,000 may not be reflected in the sentencing court’s documents.\(^{182}\)

The Supreme Court determined how to calculate the amount of loss in *Nijhawan v. Holder*.\(^{183}\) Prior to the holding in *Nijhawan*, circuits were split on how to calculate the amount of loss.\(^{184}\) The

\(^{175}\) See I.N.A. § 101(a)(43)(M).
\(^{177}\) See U.S. SENTENCING GUIDELINES MANUAL §§ 2T4.1, ch. 5, pt. A.
\(^{178}\) See id.
\(^{180}\) See *id.* at 15.
\(^{181}\) See I.N.A. § 101(a)(43)(M).
\(^{182}\) See Brackney, *supra* note 176, at 15.
\(^{184}\) See Arguelles-Olivares, 526 F.3d at 178 (“We recognize that there is disagreement among the circuit courts as how the amount of loss involved in a prior criminal conviction may be ascertained in civil removal proceedings.”).
Second and Ninth Circuits had held that the determination of amount of loss must be restricted to the record of conviction under the modified approach. On the other hand, the Third and Fifth Circuits had held that when the amount of loss is not an element of the convicting statute, such that it is only determined for collateral purposes like sentencing, the categorical and modified approach are inapplicable, and the court can look beyond the record of conviction to the underlying facts of the case to determine the amount of loss. In *Nijhawan*, the Supreme Court agreed with the latter approach.

The defendant in *Nijhawan*, was convicted of “conspiring to commit mail fraud, wire fraud, bank fraud, and money laundering.” None of the statutes under which the defendant was convicted requires proof of an amount of loss to the victim; hence, the jury made no finding of fact as to the amount of loss to the victim. At sentencing, the defendant stipulated that the loss exceeded $100 million. The defendant was sentenced to 41 months in prison and fined $683 million in restitution. Three years later, the Government claimed that the defendant had been convicted of an aggravated felony under INA § 237(a)(2)(A)(iii) and sought to deport him. The ultimate question that the Supreme Court had to address was whether “the $10,000 threshold in [Clause (i)] refers to an element of a fraud statute or to the factual circumstances surrounding commission of the crime on a specific occasion.” If the $10,000 threshold language refers to a generic crime, the Court must look to the convicting statute to determine whether the defendant breached this monetary threshold, i.e., the categorical

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185 See *id.* (citing *Whiteway v. U.S. Dep’t of Homeland Sec.*, 501 F.3d 116, 133 (2d Cir. 2007)); *Li v. Ashcroft*, 389 F.3d 892, 897 (9th Cir. 2004)).

186 See *Nijhawan v. Attorney Gen.*, 523 F.3d 387, 396 (3d Cir. 2008) (finding that the loss exceeded $10,000 based on a sentence stipulation); *Arguelles-Olivares*, 526 F.3d at 178 (finding that the loss exceeded $10,000 based on a presentence report).

187 See *Nijhawan*, 129 S. Ct. at 2304.

188 *Id.* at 2298.

189 See 18 U.S.C §§ 371, 1341, 1343, 1344, 1956(h).

190 *Nijhawan*, 129 S. Ct. at 2298.

191 *Id.*.

192 *Id.*

193 *Id.*

194 *Id.*
approach. If, however, the $10,000 threshold refers to the “specific way in which an offender committed the crime on a specific occasion,” the Court must look to “the facts and circumstances underlying an offender’s conviction.”

The Court concluded that the INA § 101(a)(43)(M) calls for a “circumstance-specific,” not a “categorical,” interpretation. The Court first reasoned that the “aggravated felony” statute refers to both generic crimes as well as to the specific circumstances in which a crime was committed. The Court stated that there is no “widely applicable federal fraud statute that contains a relevant monetary loss threshold.” The Court concluded that “the monetary threshold [in INA § 101(a)(43)(M)] applies to the specific circumstances surrounding an offender’s commission of a fraud or deceit crime on a specific occasion.”

The Court then explained that deportation proceedings are civil proceedings, and the Government does not have to prove the monetary threshold beyond a reasonable doubt. According to the Court, the standard the Government must meet is a “clear and convincing” standard. The defendant stipulated that losses underlying the conviction involved amounts greater than $10,000, and “this evidence is clear and convincing.”

Hence, the amount of loss determination is not subject to the limitations of the categorical or modified categorical approaches; rather, the loss may be determined by evidence outside the record so long as the loss is related to the crime of which the alien was convicted and is proven by clear and convincing evidence.

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195 Id. at 2298-99.
196 Id.
197 Id. at 2300.
198 Id. at 2301 (reasoning that there is no criminal statute that contains some of the exceptions in INA § 101(a)(43), and “if the [immigration] provisions are to have any meaning at all, the exception must refer to the particular circumstances in which an offender committed the crime on a particular occasion”).
199 Id.
200 Id. at 2302.
201 Id. at 2303.
202 Id.
203 Id.
Before analyzing the fairness or constitutionality of the laws described above, an illustration of possible scenarios may be helpful to highlight the disparity of treatment between an alien and a citizen, in which both were convicted of tax offenses. Although fictitious, the following illustration is based on current tax and immigration law:

John Thomsen is a 52-year-old citizen of Denmark. He came to the United States at the age of 17 and has lived in the U.S. as a legal permanent resident since then. Mr. Thomsen owns a small business which has grown to considerable success, in which Mr. Thomsen now requires the help of a full-time employee and eight part-time employees. Through Mr. Thomsen’s hard work, he is able to send both his children to college and provide a decent life for his family. Mr. Thomsen has never broken the law and has always fulfilled his duties as a legal permanent resident, including paying taxes.

Mr. Thomsen is a good employer. He cares very much for his employees and does whatever he can to improve their lives both at work and in their personal lives. Economic times are tough, and although his business is weathering the tough times, his full-time employee has hit a run of bad luck, and she is barely surviving financially. She approaches Mr. Thomsen to explain her situation and ask for a raise. Mr. Thomsen feels for his employee but explains that he is doing whatever he can to keep from laying off other employees, and a raise would be impossible given the current situation. Weeks go by, and Mr. Thomsen sees that the financial toll on his full-time employee is severely affecting her both emotionally and physically. Not only does he recognize that she is struggling, but he sees that several of his part-time employees are barely meeting their expenses day-to-day.

At the end of the month, Mr. Thomsen begins calculating the paychecks that he will disperse to his employees. He toils over his books to see if there is anything that can be done to give his employees more, but he finds it impossible based on his already paper-thin budget. Feeling as though he must do something for his employees, he decides that this one time, he will not withhold the required federal tax
from his employees’ paychecks. He reasons that when it is time to pay the government, he will pay out of his own pocket to ensure the government gets its money.

Months later, the economy takes a turn for the worse. Mr. Thomsen’s retirement investments are worth next to nothing and his business is crumbling. When it is time to pay his employment taxes, Mr. Thomsen cannot afford to make up for the amounts that he did not withhold from his employees. By this time, he has not been withholding for several months.

Based on a tip from one of Mr. Thomsen’s competitors, and mounting pressure to stop a trend of tax fraud from small businesses, CI begins an investigation of Mr. Thomsen. After significant costs for the investigation, including forensic accounting and clandestine operations, CI discovers that he has violated IRC § 7202, willful failure to collect tax. CI refers the case to the DOJ, who then decide to prosecute Mr. Thomsen for the violation of § 7202. Mr. Thomsen pleads guilty, stipulating that the total amount not withheld was $10,100. He is sentenced to 2 years probation and fines.

The prosecutor realizes that Mr. Thomsen is not a citizen; and thus deportable for his offense, and the prosecutor starts proceedings for Mr. Thomsen’s deportation. The prosecutor knows that this is Mr. Thomsen’s first offense and that Mr. Thomsen has been a legal permanent resident for well over 10 years; thus, he decides to forgo classifying Mr. Thomsen’s offense as a “crime of moral turpitude,” and instead, classifies his offense as an “aggravated felony.”

During Mr. Thomsen’s deportation hearing, the prosecutor argues that although Mr. Thomsen was not convicted under IRC § 7201 (“tax evasion”), Mr. Thomsen has still been convicted of an offense involving “fraud or deceit” and therefore qualifies under Clause (i). The prosecutor goes on to

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204 See I.R.C. § 7202.
207 See id. § 101(a)(43)(M)(ii).
208 See id. § 101(a)(43)(M)(i); Kawashima, 132 S. Ct. at 1172 (“Clause (i) refers more broadly to offenses that ‘involve’ fraud or deceit-meaning offenses with elements that necessarily entail fraudulent or deceitful conduct.”).
argue that Mr. Thomse stipulated to the fact that the amount of loss was $10,100; hence, the amount of loss threshold has been met, and Mr. Thomse is deportable. Based on statute and case law, the judge has no choice but to deport Mr. Thomse. Because Mr. Thomse was convicted of an aggravated felony under INA § 237(a)(2)(A)(iii), he is not entitled to deportation relief.

Without the owner, Mr. Thomse’s business eventually closes down, and his employees lose their jobs. Mr. Thomse’s children now must finish college without the presence or support of their father. Mrs. Thomse must decide to stay in the U.S. to look after her children or join her husband in Demark, where he has not been since he was 17 years old, to help start a life from scratch.

Now considering the case of Mr. Thompson, which is virtually the same as Mr. Thomse’s except that Mr. Thompson is a U.S. citizen. Mr. Thompson gets the 2 years of probation and must also pay fines; however, Mr. Thompson continues on with his life in the U.S. with his children, his wife, and his business.

It is clear to see that there is a disparity in treatment between Mr. Thomse and Mr. Thompson. Both committed the same tax offense; however, one man has his life taken away while the other receives a “mere slap on the wrist.”

III. Alien rights

Aliens have similar rights as citizens. Their rights differ only in that they cannot vote or hold public office. “To hold that they are subject to any different law, or are less protected in any particular, than other persons, is . . . to ignore the teachings of our history, the practice of our government, and the language of our [C]onstitution.” The alien population in the U.S. makes up a

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209 See Nijhawan v. Holder, 129 S. Ct. 2294 (holding that a defendant’s stipulation outside the record of conviction can be used to determine the amount of loss).
210 See I.N.A. §§ 240A, 240B.
211 See United States v. Ruff, 535 F.3d 999, 1006 (9th Cir. 2008) (Gould, J., dissenting) (describing probation “as a mere slap on the wrist for those convicted of serious economic crimes”).
212 Ting v. United States, 149 U.S. 698, 754 (1893) (Field, J., dissenting).
213 Id.
large portion of our society and continues to grow; yet, the judiciary has been inconsistent as to what rights and obligations aliens possess with regards to the government and the Constitution.214 “Specifically, the judiciary should revisit the question of whether and to what extent the Constitution permits the government to discriminate on the basis of alienage.”215

(a) The Constitution

The Constitution is explicit that the rights to vote and hold public office are reserved for citizens.216 However, all the other constitutional provisions do not specifically identify the beneficiary of other rights and privileges, or they identify the beneficiaries only as “persons.”217 In some places in the Constitution, “persons” clearly refers to citizens,218 while in other places, “persons” clearly refers only to human beings.219 An examination of history reveals that the Framers themselves lacked consensus on whether the Constitution was really about citizens; or whether it was primarily about persons, where citizens are only mentioned in a particular situation or special case.220

In 1856, the Supreme Court resolved the citizen/person distinction in Dred Scott v. Sandford by stating, “The words ‘people of the United States’ and ‘citizens’ are synonymous terms, and mean the same thing.”221 The Court held that Scott was neither a citizen nor a person for purposes of asserting any constitutional rights.222 By finding that “citizen” and “person” “mean the same thing,” the Court avoided having to address what constitutional rights Scott might have if he were deemed a “person.”223

214 Boyd, supra note 2, at 320.
215 Id.
216 See U.S. Const. amends. XV, XIX, XXIV, XXVI (describing right to vote); U.S. Const. art. I, § 2, cl. 2; art. I, § 3, cl. 3; art. II, § 1, cl. 5; amend. XII (describing right to public office).
217 Boyd, supra note 2, at 325.
218 See id. (citing U.S. CONST. art. I, § 3, cl. 6; art. I, § 6, cl. 2; art. I, § 7, cl. 2 (referring to Members of Congress and the President as “persons”)).
219 See Boyd, supra note 2, at 325. (citing U.S. CONST. art. I, § 2, cl. 3 (referring to slaves as “three fifths of all other Persons”); id. art. I, § 9, cl. 1 (referring to aliens in “the Migration or Importation of such Persons”)).
220 See Boyd, supra note 2, at 325.
221 Dred Scott v. Sandford, 60 U.S. 393, 404 (1856) (superseded by constitutional amendment).
222 Id.
223 See Boyd, supra note 2, at 327.
Congress implemented the Fourteenth Amendment with the intention of reversing *Dred Scott*. Section 1, Clause 1 of the Fourteenth Amendment defines those who qualify for citizenship, however, Clause 2 goes on to say, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.” “This indicates that the drafters not only understood the Amendment to reach aliens, but that they viewed anti-alien legislation as ‘class’ or ‘caste’ legislation that would be eradicated by the Amendment.” Although the references to “person” in the Fourteenth Amendment do not literally apply to the federal government, the Fifth Amendment’s Due Process Clause contains an equal protection element that prohibits the federal government from discriminating against aliens.

(b) The Plenary Power Doctrine

Despite the clear indications to the contrary from the Founders, the Constitution, and the Court’s precedents, many modern courts assume that federal alienage discrimination is justified under the Plenary Power Doctrine. The Doctrine purports to give unqualified power to a political branch to act, or not act, on a particular subject matter or area. Citing the Plenary Power Doctrine, the Supreme Court has, in most cases, refused to apply constitutional analysis to acts by Congress and the Executive branch as they relate to the rights of aliens in immigration law. For example, in *Chae Chan Ping v.*

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224 See U.S. CONST. amend. XIV; Sugerman v. Dougall, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting) (“The paramount reason [for the 14th Amendment] was to . . . overrule explicitly the *Dred Scott* decision.”).
225 See U.S. CONST. amend. XIV, § 1, cl. 1.
226 See id. § 1 (emphasis added).
227 Boyd, supra note 2, at 328.
228 See Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that D.C.’s segregation in schools violates the Fifth Amendment’s Due Process clause).
229 See Boyd, supra note 2, at 329.
230 See e.g., U.S. Const. art. I, § 8, cl. 3 (describing the Commerce Clause that gives Congress absolute power over interstate commerce); id. § II, § 2 (granting the President plenary power to grant pardons).
231 See e.g., Fiallo v. Bell, 430 U.S. 787 (1977) (upholding federal immigration law that gives immigration priority to illegitimate children of female citizens or permanent residents, but not to illegitimate children of male citizens or permanent residents); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding federal immigration law that called for deportation of aliens who had been associated with the Communist Party); Ting, 149 U.S. 698 (upholding
United States, the Court upheld an immigration law that barred the immigration of Chinese laborers to the U.S.\textsuperscript{232} The Court reasoned, “Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.”\textsuperscript{233}

In *Wong Wing v. United States*, however, the Court acknowledged that strictly applying the Plenary Power Doctrine, without constitutional considerations, is inappropriate in the domestic sphere.\textsuperscript{234} The Court stated:

The term “person,” used in the [F]ifth [A]mendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.\textsuperscript{235}

In *Yamatay v. Fisher*, the Court extended this principle to consequences that may lead to deportation.\textsuperscript{236} The Court stated, “An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears.”\textsuperscript{237} Hence, these cases demonstrate that the Plenary Power Doctrine must yield to constitutional limitations in regards to the federal government’s immigration powers within the domestic sphere.\textsuperscript{238} Although these cases make it clear that an alien has the same right to due process as a citizen in criminal proceedings, in deportation proceedings, aliens are not afforded certain constitutional rights.\textsuperscript{239} One such precluded right is the Eighth Amendment right not to be subjected to cruel and unusual punishment.\textsuperscript{240}

\textsuperscript{232} Chae Chan Ping v. United States, 130 U.S. 581 (1889) (commonly known as the “Chinese Exclusion Case”).
\textsuperscript{233} Id. at 603.
\textsuperscript{234} Wong Wing v. United States, 163 U.S. 228 (1896).
\textsuperscript{235} Id. at 242.
\textsuperscript{236} See *Yamataya v. Fisher*, 189 U.S. 86 (1903).
\textsuperscript{237} Id. at 101.
\textsuperscript{238} See *Boyd*, *supra* note 2, at 333.
\textsuperscript{239} See *Carlson v. Landon*, 342 U.S. 524, 537 (1952).
\textsuperscript{240} See U.S. CONST. amend. XIII.
The Eighth Amendment of the Constitution states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment.”241 “To determine whether a punishment is cruel and unusual, courts must look beyond historical concepts to ‘the evolving standards of decency that mark the progress of a maturing society.’”242 The proportionality of the punishment to the crime is covered under the Eighth Amendment, and the determination of a punishment’s constitutionality should be judged by: (1) the inherent gravity of the offense; (2) the sentence imposed for similar offenses in other jurisdictions; and (3) sentences imposed for the same crime in the same jurisdiction.243 However, courts have consistently refused to apply this analysis for seemingly disproportional deportation statutes; rather, finding that deportation is not subject to constitutional review primarily for two reasons, (a) deportation is not a punishment; and (b) deportation is a civil, rather than a criminal, proceeding.244

The Court has recognized that the Eighth Amendment applies to not only criminal cases but also civil proceedings.245 However, the Court has stopped short of extending certain constitutional rights in civil deportation hearings.246 Generally, civil deportation hearings are not afforded Eighth Amendment review. The Supreme Court has stated, “Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the constitution.”247 The Court did recognize, however, that deportation “is a particularly drastic remedy where aliens have become

241 Id.
244 See Mensah v. Att’y Gen., 405 F. App’x 631, 634 (3d Cir. 2010) (rejecting an Eighth Amendment violation because removal was not criminal punishment); Santelises v. INS, 491 F.2d 1254, 1255-56 (2d. Cir. 1974) (“It is settled that deportation, being a civil procedure is not punishment and . . . the Eighth Amendment accordingly is not applicable.”); Cortez v. INS, 395 F.2d 965, 967 (5th Cir. 1968) (“[D]eportation is not punishment. It therefore cannot constitute cruel and unusual punishment.”).
245 Austin v. United States, 509 U.S. 602, 607 (1993) (rejecting the Government’s argument that “the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal”).
247 Carlson, 342 U.S. at 537.
absorbed into our community life.”

The Court has also stated that “although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling.” Deportation can lead to the loss “of all that makes life worth living.” Considering that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man, [and] [w]hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards,” an alien should be afforded proportional review of certain deportable tax offenses. Subjecting an alien to “exile,” for a tax offense that would normally lead to probation, fines, or a few months imprisonment, is nothing short of disproportionate “punishment.”

IV. Congress and the courts should act

If courts continue to assert that virtually all tax offenses are deportable, that deportation is not a “punishment,” and that aliens are not afforded certain constitutional rights in a civil deportation hearing, they should at least acknowledge that not all tax offenses are necessarily deportable offenses, regardless of whether the courts maintain that all tax offenses carry some form of fraud. Congress also has the incentive to change the unfair immigration law that imposes a punishment of deportation on a person for a first-time tax offense, potentially even a misdemeanor offense.

(i) I.N.A § 237(a)(2)(A)(i)—Not every tax offense should be considered a “Crime of Moral Turpitude”

Courts should take a hard look to determine whether all tax offenses really are “base, vile, or depraved.” Although, as the courts have said, tax offenses contain an element of fraud, certain

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248 Id.
250 Ng Fung Ho v. White 259 U.S. 276, 284 (1922).
252 Fong Haw Tan, 333 U.S. at 10 (describing deportation as “the equivalent to banishment or exile”).
253 See Kawashima, 132 S. Ct. at 1176.
254 See Carlson, 342 U.S. at 537.
255 See Lopez-Mendoza, 468 U.S. at 1049.
257 See Tseung Chu v. Cornell, 247 F.2d 929, 934 (9th Cir. 1957) (defining a “crime of moral turpitude”).
fraud offenses are worse than others, and a tax offense should not be considered a CMT per se. Rather than categorically defining all tax offenses as CMTs, the courts should use the modified approach to find that in some cases, certain tax offenses are not inherently “vile.” Although not related to tax, this common sense approach was used in *Manzella v. Zimmerman*. In *Manzella*, the court held that breaking out of prison with force and arms did not constitute as a CMT. The court stated:

In considering whether a prison breach accomplished by force involves moral turpitude we must remind ourselves again that it is the inherent nature of the offense under any and all circumstances which we are considering . . . [the defendant’s] action, while mistaken and wrong under these circumstances, does undoubtedly spring from the basic desire of the human being for liberty of action and freedom from restraint . . . I agree with those who regard it as most unfortunate that Congress has chosen to base the right of a resident alien to remain in this country upon the application of a phrase so lacking in legal precision and, therefore, so likely to result in a judge applying to the case before him his own personal views as to the mores of the community.

Likewise, not all tax offenses are necessarily motivated by greed or an intent to harm. In some circumstances, although “mistaken and wrong,” a person’s “basic desire” to provide financially for oneself or one’s family will not always involve reprehensible behavior contrary to the “mores of the community” and worthy of deportation. Defining all “fraud” offenses as CMTs, thereby making all tax offenses deportable offenses, holds on to an antiquated, unjust rule.

(ii) I.N.A. § 101(a)(43)(i)—Not all tax offenses which exceed $10,000 in losses should be considered an “Aggravated Felony”

Furthermore, Congress should clarify that Clause (i) of INA § 101(a)(43)(M) does not encompass all tax offenses as the Court has interpreted. In looking to the entirety of § 101(a)(43), it seems obvious that certain tax offenses do not belong in the “aggravated felonies” category. For example,
“filling a false return” is not the same as “murder, rape and sexual abuse of a child.”266 Yet, all are considered aggravated felonies and deportable offenses.267 Instead, Congress should state that Clause (ii) is the only provision that makes a tax offense a deportable offense as an aggravated felony. In the alternative, Congress should clarify that “aggravated felonies” only apply to those offenses that are actual felonies, where only aliens who actually served a sentence of at least one year are considered to have committed an “aggravated felony.”

The first steps toward such a solution have been taken. On June 22, 2011, the Comprehensive Immigration Reform Act of 2011 ("CIRA") was introduced in the Senate.268 CIRA would amend § 101(a)(43) so that “[n]otwithstanding any other provision of law, the term ‘aggravated felony’ applies to any offense which is a felony described in this paragraph, whether in violation of Federal or State law, for which the individual served at least 1 year of imprisonment.”269 This would create a significant change on how aliens convicted of tax offenses would be treated. If CIRA were to pass, an alien convicted of a misdemeanor tax offense, a tax offense that imposes a sentence of less than one year, or a tax offense that imposes no jail time, will not automatically be subject to deportation under § 101(a)(43)(M).270 However, the chances that CIRA will be passed into law are very slim.271

V. Conclusion

Although aliens and citizens are not afforded the same rights, aliens do have “certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.”272 The U.S. is

266 See id. § 101(a)(43)(A).
269 Id. § 254.
270 See I.N.A. § 101(a)(43) (M) (lacking any sentencing requirement for tax offenses).
272 See DECLARATION OF INDEPENDENCE para. 2.
described as “a land of immigrants,” where immigrants play a vital role in furthering America’s society. To impose a law that virtually leads to automatic deportation of aliens convicted of the slightest tax offenses is not only unfair, but it belittles the morality and priorities of this great country.

Tax offenses are crimes and should be deterred and punished; however, the punishment should fit the crime. Aliens and prosecutors should have the opportunity to form a plea bargain that imposes just punishment but forgoes any unjust punishment, such as deportation in certain cases. Currently, an alien who pleads or is found guilty of a tax offense, whether under federal or state law and regardless of the “criminal” punishment, is subject to deportation. In most cases involving tax offenses, the Government simply needs to bring the offense to the attention of the immigration judge, and the alien will be found deportable. Furthermore, if the offense, regardless of its severity, leads to a tax loss exceeding $10,000, the deportable alien is afforded no relief or mitigating defenses to deportation.

Generally, the U.S. government relies on its citizens to fulfill their moral obligations to pay taxes, rather than relying on the relatively common penalties of civil fines, liens, public embarrassment, potential probation, or a few months imprisonment. Likewise, the vast majority of aliens fulfill their moral obligations to pay taxes; however, for aliens, the deterrent effect is much greater: Aliens are subject to “exile” for not fully complying.

Another key difference between citizen and alien tax offenders is the political power to change policy. For example, former U.S. Senator Tom Daschle, government consultant and former Chief Performance Officer nominee Nancy Killefer, and Treasury Secretary Timothy Geithner, all made the news for violating the IRC; yet, two key differences exist between these political figures and aliens:

275 See id. §§ 240A(a)(3), 240B(a)(1).
276 See Fong Haw Tan, 333 U.S. at 10 (describing deportation as “the equivalent to banishment or exile”).
First, even if these political figures had been subject to a criminal investigation, they would not have to face the fear of being deported. Second, because these figures are U.S. citizens, they have the power to challenge and change the system.278

This issue has gone unnoticed by most law practitioners despite the fact that the Supreme Court has ruled that an alien’s counsel must be aware of criminal conviction consequences for immigration purposes.279 Instead of shrugging this unfair law off or being completely oblivious to the situation, criminal law, immigration law, and tax law practitioners and educators should be aware of this dilemma. Furthermore legislators, the courts, practicing attorneys, and other advocates of fair policy should call for better clarity and equity in the immigration consequences of tax offenses. To treat an alien convicted of a first time, misdemeanor tax offense the same as an alien who commits murder is fundamentally unfair.280

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278 See U.S. Const. amends. XV, XIX, XXIV, XXVI (providing that only citizens have the right to vote); U.S. Const. art. I, § 2, cl. 2; art. I, § 3, cl. 3; art. II, § 1, cl. 5; amend. XII (providing that only citizens have the right to hold public office).
