A WAR ON DRUGS OR A WAR ON IMMIGRANTS? Expanding The Definition Of 'Drug Trafficking' In Determining Aggravated Felon Status For Non-Citizens

Abstract

In this article we assess competing interpretations of the Immigration and Nationalization Act's 'aggravated felony' provisions, specifically the determination of what state drug offenses properly constitute 'aggravated felonies,' thus subjecting non-citizens to deleterious collateral immigration consequences, including deportation. This issue is considered within the broader political and social context of the nation's 'war on drugs' and wide-ranging trends in American immigration policy. We argue that state drug offenses should be analogous to the traditional federal characterizations of a felony (i.e. yielding more than a year of imprisonment) in order to be appropriately considered aggravated felonies. We conclude that interpretations of the aggravated felony provisions that allow offenses falling below this threshold to be considered aggravated felonies are misguided, lead to unwarranted collateral immigration consequences for non-citizens, and fit within a broader pattern of inordinate burden sharing in the war on drugs by historically disempowered groups.

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INTRODUCTION

While Richard Nixon was the first president to employ the phrase 'war on drugs,'[1] the phrase is most commonly associated with the politics and policies that emanated from the administrations of Presidents Ronald Reagan and George H.W. Bush and continue to dominate U.S. crime policy.[2] Exemplifying this political crusade were the remarks of President Bush at a 1990 anti-drug rally:

> To win the war on drugs, we must have a united effort. This isn't Republican or Democrat or liberal or conservative: it's got to be bipartisan. But now it's time for Congress to act. Our children, our communities, and our cops have waited long enough.[3]

However, the war on drugs campaign was not merely one of rhetoric, as both federal and state enforcement priorities and policies were adjusted to focus on narcotics infractions.[4]

At about this same period of time the nation experienced an escalation in elite and public concern over perceived developments in American immigration, most notably the perception that immigrant criminal involvement was rampant and posed a significant threat to the public's well being.[5] Congress responded to these concerns by taking unprecedented steps toward revising immigration laws to deal with criminal aliens. While this legislation dealt with a myriad of concerns, particularly prominent in these revisions

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[1] ERICH GOODE, BETWEEN POLITICS AND REASON: THE DRUG LEGALIZATION DEBATE (New York: St. Martins Press, 1997).

[2] Andrew Whitford and Jeff Yates, *Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs*, 65:4 JOURNAL OF POLITICS 995, 998 (2003).

[3] *Public Papers of the Presidents of the United States*, at 1038. (United States Government Printing Office: 1991).

[4] Office of National Drug Policy, THE NATIONAL DRUG CONTROL STRATEGY, 1996: PROGRAM RESOURCES AND EVALUATION (1996); Marc Maur, *The Causes and Consequences of Prison Growth in the United States*, 3 PUNISHMENT & SOCIETY 9, 11 (2001).

[5] Peter Schuck and John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARVARD JOURNAL OF LAW & PUBLIC POLICY 367, 422-31 (1999).

of the Immigration and Nationalization Act (hereinafter INA) were provisions designed to combat drug trafficking through the development of a new category of criminal alien, the 'aggravated felon.'[6] Congressional initiatives in 1988 amended the INA to place aliens convicted of certain drug offenses alongside those convicted of murder in the newly created category of 'aggravated felons,' a novel classification which provided an entirely distinctive basis for imposing immigration based disabilities, including deportation, under the INA for non-citizens convicted of drug offenses.[7] Not too long thereafter, the Immigration Act of 1990 greatly expanded the number of crimes that were considered to be aggravated felonies[8] and, with regard to drug trafficking offenses, made clear Congress' position that the aggravated felony provisions applied to those convicted of either federal or state drug offenses.[9]

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[6] *See* Craig H. Feldman, Note, *The Immigration Act of 1990: Congress Continues to Aggravate the Criminal Alien*, 17 SETON HALL LEGISLATIVE JOURNAL 201, 206 (1993).

[7] *Id*. Immigration and Nationality Act § 101(a)(43) (1988) [hereinafter INA], 8 U.S.C. § 1101(a)(43)(1988).

[8] *Id.* The 1990 amendments expanded the definition of aggravated felony to include "crimes of violence" as defined in 18 U.S.C. §16 which "has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or . . . involves substantial risk" of physical force, crimes related to money laundering in 18 U.S.C. § 1956, and any drug trafficking under 18 U.S.C. §924(c)(2).

In 1994 the Act was further amended under the Immigration and Nationality Technical Corrections Act, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22 (codified at 8 U.S.C. § 1101(a)(43)). This Act added illicit trafficking in firearms or explosives, theft or burglary offenses, receipt of stolen property, kidnapping for ransom, child pornography, racketeering crimes, prostitution crimes, espionage, treason, tax fraud or evasion, alien smuggling, certain types of document fraud, and failure of a defendant to appear to serve a sentence. *See* Julie Anne Rah, Note, *The Removal of Aliens Who Drink And Drive: Felony DWI AS A Crime Of Violence under 18 U.S.C. § 16(b)*, 70 FORDHAM LAW REVIEW 2109, 2118 fn. 63 (2002).

In 1996 the Act was amended through the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, div C, 110 Stat. 3009-546 (both codified under various subsections of 8 U.S.C. § 1101(a)(43)). The AEDPA included commercial bribery, counterfeiting, forgery, trafficking in stolen vehicles, obstruction of justice, perjury, briery of a witness, convictions for a second gambling offense, transporting for the purpose of prostitution, failure to appear in court for a felony charge, and illegal re-entry after being previously convicted of an aggravated felony. The IIRIRA expanded aggravated felonies to included rape and sexual abuse of a minor. *See* Rah at 2118 fn. 66.

[9] *See* Feldman, *supra* note 6, at 216-17. INA § 101(a)(43) (1990), 8 U.S.C. § 1101(a)(43)(1990). The term "drug trafficking" in INA § 101(a)(43)(B) is defined through incorporation of the language provided in 18 U.S.C § 924(c)(2) which defines a drug trafficking crime as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et

It is within the political and historical context of the federal government's colossal campaign against drugs and its renewed fervor in immigration regulation that a non-citizen might find himself in a severe amount of trouble for a relatively minor narcotics infraction, depending upon his circumstances. Under the newly enacted aggravated felony provisions, an immigrant might be deported by virtue of being convicted of an offense that would not, in fact, be considered a felony under federal law. While felonies under federal law are traditionally understood as meaning offenses that are punishable for more than a year in prison, some states rather arbitrarily label minor possession offenses as felonies, even though these infractions typically are punishable by a sentence requiring less than a year's imprisonment.

For instance, consider the relative predicaments of two non-citizens under the aggravated felony provisions, each convicted of minor drug possession offenses -- one in North Dakota, and one in Montana.[10] While neither offense would constitute a felony or subject a non-citizen to deportation under federal law, the first non-citizen could be deported because simple possession of thirty grams or less of marijuana is punishable as a felony in North Dakota, whereas the second non-citizen would not face deportation for the same offense in Montana since such a possession charge is only punishable as a misdemeanor.[11] This confusing and disconcerting state of affairs has evolved due to a tenuous reading of the INA's aggravated felony provisions by a number of the United States Circuit Courts of Appeals, in which an expansive definition of the term 'felony' has been adopted. This view holds that for purposes of determining aggravated felony

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seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.). The 1990 clarification amendment to INA §101(a)(43) states that, "[t]he term ["aggravated felony"] applies to an offense described in this paragraph whether in violation of Federal or State law…."

[10] *See Gerbier v. Holmes*, 280 F.3d 297, 312 (3d Cir. 2002).

status under INA § 101(a)(43), 'felony' means all offenses labeled or classified by states as felonies, whether they are analogous to traditional understandings of what constitutes a felony under federal law or not.

In this Article we assess competing interpretations of the INA's aggravated felony provisions pertaining to drug trafficking by the respective United States Circuit Courts of Appeals and the Board of Immigration Appeals. We also consider the placement of this debate within the larger political context of the war on drugs and American immigration policymaking. In Part I we examine the political backdrop to the immediate debate over the proper interpretation of the INA aggravated felony drug trafficking provisions by evaluating the broader policy implications of the government's war on drugs for minorities and immigrants. In Part II we examine the history and development of the laws relating to the current discord over the INA's drug related aggravated felony rules. We then discuss the three primary competing theories concerning what offenses appropriately constitute a drug trafficking felony under the aggravated felony rules and argue that state felony offenses should be analogous to their federal felony counterparts in order to subject non-citizens to the immigration disabilities associated with aggravated felony status. In Part III, we suggest that interpretations of the aggravated felony provisions that allow offenses falling below this threshold to be considered aggravated felonies are misguided and lead to unwarranted collateral immigration consequences for non-citizens. Finally, we conclude that this development fits within a larger pattern of inordinate burden sharing in the war on drugs by historically disempowered groups.

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[11] *Id*.

I. THE WAR ON DRUGS AS A WAR OF POLITICS AND INEQUITIES

The economic costs of the war on drugs are staggering. One estimate of the war's fiscal burden indicates that the effort exacts more than seventy-five billion dollars a year from the public coffers and another seventy billion dollars a year from consumers.[12] This expense is exacerbated by the rising costs of incarcerating those caught in the net of the war on drugs, as imprisonment rates have skyrocketed in recent decades, due in large part to the war on drugs.[13] For example, the percent of the federal prison population incarcerated for drug offenses (as opposed to all other offenses) rose dramatically during the height of the war on drugs, from 24.9% in 1980 to 59.5% in 1992.[14] Another way of considering the impact of the war on drugs on prison populations is to examine the prison population in relation to the number of index crimes (serious, non-drug crimes). In 1980 the rate of state and federal prisoners per 1,000 index crimes was 23. In 1990 it was 49 and in 1998 it was 94.[15] Given the operating costs of holding a prisoner, (estimated at between $20,000 to $30,000 per year), along with the expenditures incurred in building new prison facilities, the war on drugs has proven to be a very costly method for politicians to prove to voters that they are serious about public safety.[16]

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[12] Charles H. Whitebread, *"Us" and "Them" and the Nature of Moral Regulation*, 74 SOUTHERN CALIFORNIA LAW REVIEW 361, 368 (2000)(citing William F. Buckley, Statement to the New York Bar Association, Summer 1995, in NATIONAL REVIEW, *The War is Lost*, Feb. 12, 1996, at 34, 35).

[13] *See e.g.* Nora V. Demleitner, *"Collateral Damage": No Re-Entry for Drug Offenders*, 47 VILLANOVA LAW REVIEW 1027, 1031 (2002).

[14] BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 2000. 526, tbl.6.51 (28th ed. 2001), at http://www.albany.edu/sourcebook/19995/pdf/t652.pdf. Certainly, this increase in incarceration per serious crime might represent more than just drug based imprisonment (e.g. harsher sentences for serious crimes), however coupled with what we know about federal imprisonment rates for drug offenses it provides an interesting insight into the relationship between serious crime and incarceration trends over time.

[15] *Id*. at 523, tbl. 6.46.

[16] MICHAEL TONRY, MALIGN NEGLECT – RACE, CRIME, AND PUNISHMENT IN AMERICA (New York: Oxford University Press, 1995) at 82.

A. DISPARATE ENFORCEMENT FOR IMMIGRANTS AND MINORITIES

The monetary costs of the war on drugs pale in comparison to the non-financial toll of the drug crusade, specifically, the confinement of thousands of people and the detrimental consequences of this government action on affected families and communities.[17] It is these costs that are inequitably borne by minorities and immigrants. For example, while African Americans represent approximately 12.9% of the population, they constituted 35.2% of all persons charged on drug abuse offenses in 1999.[18] Moreover, in 2000 more African American federal prisoners were incarcerated for drug violations than for all other crimes committed by African Americans combined (64.4%).[19] These disparities in enforcement and imprisonment persist despite the fact that studies indicate that, generally, minorities are no more likely to abuse narcotics than non-minorities, and are less apt to abuse certain drugs than whites.[20]

Non-citizens have also emerged as a target in the war on drugs. In 1997 drug offenses were the foremost bases for criminal removal by the INS, leading to more removals than all other category crimes combined.[21] In the broader war on crime, the INS greatly expanded its net of deportation during the Reagan-Bush era, with the number aliens deported for criminal or narcotics violations jumping from 310 in 1981 to 8,183 in

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[17] John Hagan and Juleigh Petty Coleman, *Returning Captives of the American War on Drugs: Issues of Community and Family Reentry*, 47 CRIME AND DELINQUENCY 352 (2001); Clarence Lusane, *In Perpetual Motion: The Continuing Significance of Race and America's Drug Crises*, 1994 UNIVERSITY OF CHICAGO LEGAL FORUM 83, 84-90.

[18] BUREAU OF JUSTICE STATISTICS, supra, note 14, 366, tbl.4.10.

[19] *Id.* at 526, tbl. 6.50.

[20] Tonry, supra, note 16, at 109-110.

[21] Immigration and Naturalization Service, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1997), at 167. Other category crimes listed are: immigration, burglary, assault, weapon offenses, robbery, larceny, stolen vehicle, sexual assault, and forgery.

1990.[22] By 1997, over fifty thousand convicted aliens were removed, with 61% of these removals based on aggravated felonies.[23] In the federal courts, approximately one-third of all drug offenses involve non-citizens, while non-citizens account for only one-tenth of all other types of offenses.[24] There is also reason to believe that immigrants face disparate treatment further along in the criminal justice process. A study of incarceration outcomes in drug offense cases demonstrated that, while statistically controlling for a litany of alternative explanatory factors, a defendant's status as a non-citizen significantly increased his length of imprisonment.[25] Such unequal enforcement and adjudication on drug offenses is especially problematic for immigrants because, unlike violent crimes or white-collar offenses, drug crimes are inordinately associated with numerous and severe collateral sanctions,[26] such as immigration disabilities and occupational restrictions, which can undermine a non-citizen's ability to remain in the country or reintegrate into his community when released.

B. ASSAYING THE COSTS AND BENEFITS OF THE WAR

The economic and social costs of the war on drugs bring to bear the question of what has been gained in the crusade. While proponents of the war might point to statistics evincing a downward trend in the use of some narcotics in the 1980s and early

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[22] Id. at 187, tbl. 68. The INS definition of which aliens count as criminal aliens changed in 1990, making comparisons after that year problematic. Proportionally, aliens deported on criminal or narcotics grounds were approximately 1.8% of all removals in 1981 and 31.1% of all removals in 1990.

[23] Kristen Butcher and Anne Morrison Piehl, *The Role of Deportation in the Incarceration of Immigrants*, 351, 368. In GEORGE BORJAS, ED., ISSUES IN THE ECONOMICS OF IMMIGRATION (Chicago: University of Chicago Press, 2000).

[24] Demleitner, supra, note 13, at 1043 (citing S. Demuth, *The Effect of Citizenship Status on Sentencing Outcomes in Drug Cases*, 14 FED. SENTENCING REP. (2002)).

[25] Butcher and Piehl, supra note 23, at 370-382.

[26] Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 IOWA JOURNAL OF GENDER, RACE & JUSTICE 255, 256 (2002).

1990s, Michael Tonry (1995) makes a persuasive case that such changes in use were part of a long-term downward trend in drug usage that preceded the drug war efforts.[27] His analysis of time series data indicates that reported drug usage reached an all time high in the late seventies and was already on a downward trend when the policies and rhetoric of the war on drugs began several years after Ronald Reagan took office as president.[28] Certainly, public opinion on drug usage changed during this time frame. One national level time series survey indicates that 30% of respondents felt that marijuana should be legalized in 1978, whereas only 16% of respondents favored legalization in 1990.[29] Similar time series studies reveal an increase in respondents' perceptions of the harmfulness of drug use over the same time frame.[30] However, it is not entirely clear if these trends in the public's view towards drug use were a product of cyclical patterns in public attitudes towards vices generally[31] or politicians' entrepreneurial activities.[32] Given the aforementioned downward turn in drug usage during this period of time, it is highly unlikely that this swell in public opinion was an authentic response to reported trends in narcotics use.

Beckett and Sasson (2000) suggest that the war on drugs is largely a product of political manipulation of the policy agenda by conservatives, asserting:

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[27] Tonry, supra, note 16, at 83-91.
[28] *Id.*
[29] SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1993, at 214, tbl 2.71.
[30] *Id.* at 227. The survey of high school students revealed that in 1981 only 19.1% perceived that smoking marijuana occasionally put one at great risk, whereas in 1991 more than 40% of respondents felt that such behavior put one at great risk. Analysis of Gallup Poll results indicates an upward trend in the public's perception of drug usage as the nation's most important problem. In 1985 only 2% of respondents chose it as the nation's most important problem, but by 1989, 27% of respondents identified it as the most important problem facing the nation. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 2000, at 100, tbl 2.1.
[31] Tonry, supra, note 16, at 91-93.
[32] KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (New York: Oxford University Press, 1997), at 55-59. She argues that, "[I]n sum, there is no evidence of an upsurge in concern about drugs prior to Reagan's declaration of war. The erroneous identification of

> Conservative politicians have worked for decades to alter popular perceptions of problems such as crime, delinquency, addiction, and poverty and to promote policies that involve 'getting tough' and 'cracking down.' Their claims-making activities have been part of a larger effort both to realign the electorate and to define social control rather than social welfare as the primary responsibility of the state. [33]

However, the crime and drug control agenda has evolved into a campaign that enjoys the support of both Republicans and Democrats, as backing for the war continued and expanded during the Clinton presidency.[34]

Whether the nation has derived a net benefit or not from the war on drugs will remain a controversial question. However, it is clear that any progress that has been made on this matter, either for political gain or in actual policy impact, has been inordinately paid for by minorities, immigrants, and other traditionally disempowered groups.[35] Hence, any beneficial aspects of this policy have come with a 'tax' burden[36] that has been

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public opinion as the primary impetus for the government's campaigns against crime and drugs obscures the political nature of those efforts." Id. at 55.

[33] KATHERINE BECKETT AND THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA (Thousand Oaks: Pine Forge Press, 2000), at 64-72.

[34] *Id.* at 69-73. *But see* William J. BENNETT, JOHN J. DIIULIO, JR., AND JOHN P. WATERS, BODY COUNT: MORAL POVERTY … AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS (New York: Simon & Schuster, 1996). Bennett, et al. argue "[w]hen President Clinton took office the problem of illegal drugs had undergone a sea change in just a little more than a decade. Instead of directing measured steps to address the residual aspects of the drug problem, the president and members of his administration immediately began undermining anti-drug efforts on a variety of fronts," at 152.

[35] Tonry (1995) argues that "[t]he war on drugs and the set of harsh crime-control policies in which it was enmeshed were launched to achieve political, not policy, objectives, and it is the adoption for political purposes of policies with foreseeable disparate impacts, the use of disadvantaged black Americans as a means to the achievement of politicians' electoral ends, that must in the end be justified, and cannot." Tonry, supra, note 16, at 121.

[36] Randall Kennedy makes a similar argument concerning the special 'tax' minorities pay in the context of racial profiling. He argues that while the benefits of effective policing via frequent (and sometimes unjustified) traffic stops pass to the general population, the personal costs of such stops are inordinately suffered by minorities, who are often unjustifiably accosted due to racial profiling. Randall Kennedy, *Suspect Policy*, THE NEW REPUBLIC, September 13 & 20, pp.30, 34 (1999). *See also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW (New York: Pantheon Books, 1997); Kennedy remarks, "[a] young black man

inequitably levied on those who are the least able to protect their interests through ordinary political channels.

II. 'DRUG TRAFFICKING' AS AN AGGRAVATED FELONY UNDER THE INA

Since its overhaul in 1952, the INA had received only sparse review and revision by Congress until the 1980s.[37] Prior to this time, the Act's primary criminal provisions involved specific drug offenses and crimes involving moral turpitude, with the latter being the dominant grounds for deportation.[38] This relative change in the attention paid by Congress to the issue of non-citizen criminal activity is consistent with general trends in national immigration enforcement policy focus. From 1908 to 1980 approximately 48,000 aliens were deported for criminal violations, but during just the decade of the 1980s over 30,000 alien removals were made on the basis of criminal violations.[39] During this period, a swell of public concern over alien criminal activity developed, with both the media and politicians stressing the importance of the "criminal-alien problem" and arguing that the INS was not satisfactorily handling the situation, in part, due to lack of resources.[40] In the mid-1980s Congress solicited a series of reports on criminal aliens and, based on this information, began to pass legislation to address the issue.[41]

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selected for questioning by police as he alights from an airplane or drives a car is being made to pay a type of racial tax for the war against drugs that whites and other groups escape. That tax is the cost of being subjected to greater scrutiny than others." at 158-59.

[37] Feldman, *supra*, note 6, at 203-208.

[38] Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism*, 51 EMORY L.J. 1059, 1064 (2002).

[39] *Id.*

[40] Shuck and Williams, *supra*, note 5, at 425-427.

[41] *See id*. at 427-433 (explaining that the immigration provisions of the 1988 Anti-Drug Abuse Act foreshadowed five years of legislative concern with the criminal-alien problem); see also Feldman, *supra*,

A. DEVELOPMENT OF THE "AGGRAVATED FELON"

In 1986, Congress passed the Immigration Reform and Control Act,[42] which provided for expedited deportation of criminal aliens by the Attorney General, along with the Anti-Drug Abuse Act,[43] which required the INS to begin pilot programs designed to coordinate the efforts of the INS and local enforcement entities on drug offense cases involving non-citizens. However, it was the Anti-Drug Abuse Act of 1988 (hereinafter "the 1988 Act")[44] that introduced the aggravated felony nomenclature to the INA and had the biggest impact on criminal-alien enforcement; affecting the deportation, detention, and readmission of non-citizens convicted of offenses falling into the new classification of aggravated felonies.[45] The 1988 Act stated "the term 'aggravated felony' means murder, any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States."

The 1988 Act incorporated the definition of 'drug trafficking,' set forth in 18 U.S.C. 924(c)(2), which stated, "[f]or purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et

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note 6, at 204-205 (detailing the substance and impact of the report of the Select Commission on Immigration and Refugee Policy).

[42] Pub. L. No. 99-603, 100 Stat. 3359 (1986)(codified as amended in various titles of the U.S.C.).

[43] Pub. L. No. 99-570 (1986)(codified as amended in various titles of the U.S.C.).

[44] Pub. L. No. 100-690, 102 Stat. 4181 (1988)(codified as amended in various titles of the U.S.C.).

[45] *Id. See also Paxton v. U.S. I.N.S.*, 745 F.Supp. 1261, 1265 (E.D.Mich. 1990)("Within the past few years, Congress has mounted a tremendous assault on the prevalence of drugs in today's society. The Anti-Drug Abuse Act of 1988, supra, provides stricter mechanisms for attacking the country's drug problem, including the classification of drug trafficking as an aggravated felony.").

seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."[46] The implementation of the 1988 Act immediately yielded confusion over whether its aggravated felony provisions applied to state drug offenses committed by non-citizens.[47] In 1990, the Board of Immigration Appeals (hereinafter BIA) addressed this issue. In *Matter of Barrett*[48] the BIA held that the definition of "drug trafficking crime" in 924(c)(2), as incorporated into the INA by 101(a)(43), encompasses state as well as federal crimes if the state conviction is analogous to a felony offense under federal law.[49]

In the Immigration Act of 1990 (hereinafter the 1990 Act),[50] Congress attempted to clarify its position by passing legislation intended to codify the BIA's holding in *Barrett*. The House Judiciary Committee Report provides insight on the proposed function of the amendment:

> Current law clearly renders an alien convicted of a *Federal* drug trafficking offense an aggravated felon. It has been less clear whether a *state* drug trafficking conviction brings the same result, although the Board of Immigration Appeals in *Matter of Barrett* (March 6, 1990) has recently ruled that it does. Because the Committee concurs with the recent decision of the Board of Immigration Appeals and wishes to end further litigation on this issue, section 1501 of H.R. 5269 specifies that drug

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[46] The Anti-Drug Abuse Act of 1988 also changed the definition of 'drug trafficking' provided in 18 U.S.C. 924(c)(2). Before the Act, the definition under 924(c)(2) was, "[f]or purposes of this subsection, the term 'drug trafficking crime' means any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." 18 U.S.C. 924(c)(2)(1986).

[47] *See e.g. Leader v. Blackman*, 744 F.Supp 500,504 (S.D.N.Y. 1990)(dealing with one of the first challenges to section 924(c)(2) concerning its applicability to state convictions).

[48] 20 I. & N. 171 (BIA 1990).

[49] *Id.* at 175.

[50] Pub. L. 100-649, 104 Stat. 4978 (1990)(codified as amended in various sections of 8 U.S.C.).

trafficking (and firearms/destructive device trafficking) is an aggravated felony whether or not the conviction occurred in state or Federal Court.[51]

The 1990 Act's addendum to the aggravated felon provisions of 8 U.S.C. 1101(a)(43) explicitly stated that the "term [aggravated felony] applies to offenses described in the previous sentence whether in violation of Federal or State law."[52]

In 1992, the BIA shored up any remaining confusion concerning the applicability of the aggravated felony provisions to state drug offenses, holding in *Matter of Davis* that a state drug conviction is an aggravated felony if it: (1) is a felony under state law and involves illicit trafficking (i.e. unlawful trading or dealing) in any controlled substance, or (2) is a "drug trafficking crime" that is analogous to a felony offense under one of the three statutes enumerated in section 924(c)(2).[53] It is the latter portion of the *Davis* holding, concerning the applicability of aggravated felony treatment to drug trafficking crimes, (which do not actually require an unlawful trading or dealing element - mere possession will suffice), that has proven to be controversial. While the BIA in *Davis* was careful to emphasize its position that analogous felonies (for 924(c)(2) purposes) involved only offenses where the maximum term of imprisonment exceeds one year (citing 18 U.S.C. 3559),[54] not all of the federal courts have agreed with this interpretation.

In creating this new classification scheme of aggravated felonies under INA 101(a)(43), subsequent implementation and interpretation has triggered contention concerning three discrete legal contexts. The first context involves a substantive legal

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[51] H.R. Report No. 101-681 Part 1, 144, 147 (1990)(emphasis in the original).
[52] 104 Stat. at 5048 (1990).
[53] *Matter of Davis*, 20 I. & N. Dec. 536, 540-544 (B.I.A. 1992).
[54] *Id.* at 543.

classification of the types of crimes defined as "aggravated felonies," which grants certain criminal activity special status and creates a distinctive sub-set of offenses. The other two contexts involve sentencing enhancement for non-citizens under the federal sentencing guidelines and immigration consequences for drug trafficking offenses under the INA.

1. *Substantive Context*

In the substantive legal context, INA 101(a)(43) includes twenty-one sub-categories of possible offenses.[55] In a few of these sub-categories the statute lists specific offenses, such as "murder, rape, or sexual abuse of a minor"[56] and "owning, controlling, managing, or supervising of a prostitution business,"[57] without reference to any other statutory authority. However, most of the offenses refer to other statutes in the U.S. Code and require the examination and interpretation of other chapters to find the meaning of 'aggravated felony' in a particular instance. For example, in order to determine if an offense is a crime of violence under §101(a)(43)(F) and thus an aggravated felony for

[55] 8 U.S.C. § 1101(a)(43)(A-U). These offenses include: murder, rape, or sexual abuse of a minor; illicit trafficking in controlled substances, including drug trafficking crimes; trafficking in firearms, destructive devices, or explosive materials; money laundering or unlawful property transactions over $10,000; other explosive material and firearm offenses; crimes of violence punishable by at least one year's imprisonment; theft or burglary punishable by at least one year's imprisonment; offenses relating to demanding or receiving ransom; child pornography; racketeering and gambling offenses punishable by at least one year's imprisonment; offenses relating to prostitution, involuntary servitude, and trafficking in persons; disclosing classified information, sabotage, treason, and disclosing undercover intelligence agent information; offenses involving fraud where loss exceeds $10,000, and tax evasion involving over $10,000; offenses involved in alien smuggling; certain offenses described in 8 USC §1325(a) committed by aliens previously deported by an aggravated felony; document and passport fraud; failure to appear by a defendant for an offense punishable by at least five years' imprisonment; offenses relating to commercial bribery, counterfeiting, forgery or trafficking in vehicles; offenses involving obstruction of justice, perjury, or bribery of a witness punishable by at least one year's imprisonment; failure to appear in court on a criminal felony for which the possible punishment is at least two years; attempt or conspiracies to commit any of the aforementioned crimes.
[56] 8 U.S.C. § 1101(a)(43)(A).
[57] 8 U.S.C. § 1101(a)(43)(K)(i).

immigration purposes, a court must examine 18 U.S.C. §16, which defines a crime of violence as an offense that involves the use, attempted use, or threatened use of physical force against the person or property of another and any other felony offence that involves a substantial risk that physical force may be used.[58] However, §101(a)(43)(F) further confines this category in that to be an aggravated felony, the crime of violence must carry a minimum prison term at least of one year.[59]

In determining whether a criminal act achieves the status of "aggravated felony," in the substantive context, courts have looked at several sources. Some courts have referenced common law meanings, the plain language of the underlying criminal statutes, and the Model Penal Code to define the offense.[60] They may also look to guidance from the state laws when the crime arises from state convictions.[61] At other times, courts have looked to the language of §101 itself, regardless of state law, to determine if an action constitutes an aggravated felony.[62] However, the classification of a conviction as an aggravated felony has created considerable disagreement among the circuit courts, leading to significantly different outcomes regarding some types of crimes. For instance, a split has been developed over whether or not driving while impaired convictions constitute aggravated felonies as crimes of violence under 8 U.S.C. § 1101(a)(43)(F).[63]

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[58] *See e.g.,* 8 U.S.C. § 1101(a)(43)(F)(referencing 18 U.S.C. § 16 defining "a crime of violence").
[59] *Id.*
[60] *See U.S. v. Corona-Sanchez*, 291 F.3d 1201, 1204-1208 (9th Cir. 2002)(citations omitted)(determining whether the theft of a twelve-pack of beer and a pack of cigarettes is an aggravated felony for theft under 8 U.S.C. §1101(a)(43)(G)).
[61] *See id.*
[62] *See U.S. v. Gozalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002)(finding a battery offense to be an aggravated felony under 8 U.S.C. § 1101 (a)(43)(F) because it warranted at least a year of imprisonment, even though the offense was classified as a "gross misdemeanor" under state law).

2. *Sentencing Context*

In the sentencing context, the federal sentencing guidelines incorporate the INA 101(a)(43) definition of aggravated felony (which, in turn, incorporates the 924(c)(2) definition of drug trafficking), in the determination of offense level enhancement for non-citizens convicted of unlawfully entering or remaining in the United States.[64] In instances in which the offense at issue is a felony under both state and federal law, it is clear that the offense constitutes a drug trafficking crime under section 924(c)(2), and hence, an aggravated felony under INA 101(a)(43), for sentence enhancement purposes.[65] There is support from at least two Circuit Courts of Appeals for the proposition that a state drug misdemeanor can qualify as an aggravated felony if it would also be a federal felony.[66] There is also support, from a majority of U.S. Circuit Courts that have ruled on the issue, for the proposition that state *felony* drug offenses that would be only *misdemeanors* under federal law qualify as drug trafficking offenses and, thus, are aggravated felonies for sentencing purposes. [67]

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[63] *See* Rah, *supra* note 8, at 2109, 2126-2135 (2002).

[64] U.S.S.G § 2L1.2(b)(1)(C), Application Note 2.

[65] THOMAS W. HUTCHISON, DAVID YELLEN, PETER B. HOFFMAN, AND DEBORAH YOUNG, FEDERAL SENTENCING LAW AND PRACTICE 795 (2002).

[66] *Id.*(citing *United States v. Ramos-Garcia*, 95 F.3d 369 (5th Cir. 1996), *United States v. Vasquez-Balandran*, 76 F.3d 648 (5th Cir. 1996), and *United States v. Diaz-Bonilla*, 65 F.3d 875 (10th Cir. 1995)). See also United States v. Simpson, 319 F.3d 81 (2nd Cir. 2002)(holding that state misdemeanor could be hypothetical federal felony for sentence enhancement). *But cf. United States v. Gomez-Oritz*, 62 F.Supp.2d 508 (D.R.I. 1999)(holding that state misdemeanor can not be aggravated felony although it would have been a felony under federal law).

[67] *Id.* (citing *United States v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996), *United States v. Cuevas*, 75 F.3d 778 (1st Cir. 1996), *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997), *United States v. Briones-Mata*, 116 F.3d 308 (8th Cir. 1997), *United States v. Olvera-Cervantes*, 960 F.2d 101 (9th Cir. 1992), *United States v. Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000), and *United States v. Simon*, 168 F.3d 1271 (11th Cir. 1999)). *See also United States v. Pornes-Garcia*, 171 F.3d 142 (2nd Cir. 1999)(holding that state felony that would only be a federal misdemeanor is an aggravated felony); and *United States v. Cabrera-Sosa*, 81 F.3d 998 (10th Cir. 1996)(adopting state classification rule, although classification at issue defined felonies as being punishable for more than a year). *But cf. United States v. Robles-Rodriguez*,

3. *Immigration Context*

In the immigration context, a determination of aggravated felon status under INA 101(a)(43) can trigger a litany of adverse collateral consequences, including mandatory deportation,[68] detention without bond,[69] and ineligibility for discretionary relief from deportation,[70] among others. As in the sentencing context, there is consensus favoring aggravated felony status in situations in which the offense at hand is a felony under both state and federal law. The BIA suggested early on, in *Matter of Davis*, that a state misdemeanor that is analogous to a federal felony could constitute an aggravated felony in the immigration context,[71] and there is some U.S. Circuit Court authority supporting this position.[72] The primary point of contention, however, is whether drug offenses that are classified by the state as felonies, but would not be felonies under federal law, are appropriately considered as felonies for purposes of determining aggravated felon status under the INA. In the immigration context, a majority position has not been reached on this issue and most of the U.S. Circuit Courts of Appeals have not yet established authoritative precedent adopting any rule or interpretation on what constitutes a felony for determining aggravated felony status.[73] As we discuss in more detail, infra, the BIA

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281 F.3d 900 (9th Cir. 2002)(changing 9th Circuits position from using state offense labels to looking at substantive nature of state treatment in determining whether an offense is a felony).

[68] 8 U.S.C. §1227(a)(2)(A)(iii).

[69] 8 U.S.C. §1226(c).

[70] 8 U.S.C. §1229(a)(iii).

[71] *See Matter of Davis*, I. & N. Dec. 536 (B.I.A. 1992).

[72] *See Steel v. Blackman*, 236 F.3d 130, 137 (3rd Cir. 2001); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3rd Cir. 2002)(cautioning that appropriate formalities and procedural protections must be followed before misdemeanors can stand as hypothetical federal felonies). See also *United States v. Graham*, 927 F.Supp. 619 (W.D.N.Y. 1996); *Copeland v. Ashcroft*, 246 F.Supp.2d 183 (W.D.N.Y. 2003)(holding that state misdemeanors could stand as hypothetical federal felonies and yield aggravated felony finding). *But see In Re Santos-Lopez*, 23 I. & N. Dec. 419 (B.I.A. 2002); *In Re Elgendi*, 23 I. & N. Dec. 515 (B.I.A. 2002)(finding that state misdemeanors are not felonies for determining aggravated felony status).

[73] By "authoritative precedent" we mean a published decision by a U.S. Circuit Court of Appeals deciding a case dealing with immigration consequences under the INA (as opposed to dealing with interpretations INA 101(a)(43) for sentencing enhancement purposes) in which an interpretation of the aggravated felony

has recently changed its position on this issue, now holding that state drug offenses classified by the state as felonies can qualify as aggravated felonies under the INA, even when the offense is not analogous to a federal felony.[74]

B. COMPETING PERSPECTIVES ON THE MEANING OF 'FELONY' IN STATE DRUG OFFENSE CASES UNDER §924(C)(2)

Three primary competing perspectives, or views, on the application of the aggravated felony provisions, by way of §924(C)(2), to state drug offenses have emerged in the federal courts: the hypothetical federal felony approach, the state labeling or classification approach, and the state substantive felony approach. In evaluating these three approaches, we are careful to identify the context (sentencing vs. immigration) of cases' holdings. However, we have observed a certain degree of confluence between the sentencing and immigration contexts in courts' analyses of competing interpretations of the aggravated felony provisions. It is likely that courts assessing the competing perspectives will continue to intersperse both lines of precedent in formulating a doctrinal matrix and deciding cases, regardless of the legal context (sentencing vs. immigration) of the case at bar.

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provisions of INA 101(a)(43) as applied to state felonies that would not be federal felonies is offered. While a number of Circuits have published U.S. District Court decisions and unpublished Court of Appeals decisions dealing with this matter, our review of the case law indicates that only the Second , Third, Fifth, and Ninth Circuits have established authoritative precedent on this matter. Some Circuit Courts have effectively dodged answering the question by deciding cases on alternative or multiple bases. *See e.g. U.S. v. Haggarty*, 85 F.3d 403, 406 (8th Cir. 1996)(finding that defendant's offense was a an aggravated felony because it was a felony under both state and federal law).

[74] *Matter of Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002); *In Re Santos-Lopez*, 23 I. & N. Dec. 419 (B.I.A. 2002); *In Re Elgendi*, 23 I. & N. Dec. 515 (B.I.A. 2002).

1. *Hypothetical Federal Felony Perspective*

The first view follows the lead of the BIA's *Davis/Barrett* rule and holds that state drug offenses that are delineated as felonies under state law must be analogous to a federal felony offense under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act, to qualify as an aggravated felony.[75] The Second[76], Third[77], and Ninth[78] Circuit Courts of Appeals have adopted this interpretation for the immigration context, however no circuit has yet chosen this path for sentencing enhancement. This view emphasizes the need for national uniformity in the application of immigration laws[79] and argues that, in light of its legislative history and statutory context, section 924(c)(2)'s use of the term "felony" is properly understood as meaning an offense that is punishable as a felony under federal law.[80]

2. *State Classification or Label Perspective*

The second perspective contends that state drug offenses that are classified or labeled as felonies by the relevant state properly qualify as drug trafficking crimes under

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[75] *See Matter of Barrett*, 20 I. & N. Dec. 170 (B.I.A. 1990); *Matter of Davis*, 20 I. & N. Dec. 536 (B.I.A. 1992).

[76] *Aguirre v. INS*, 79 F.3d 315 (2nd Cir. 1996). The Second Circuit overruled its prior decision in *Jenkins v. INS*, 32 F.3d 11 (2nd Cir. 1994), which had used the state classification rule, in deference to the B.I.A.'s decision *in In re L-G*, 21 I. & N. Dec. 89 (BIA 1995), citing the need for nationwide uniformity on such cases. *Id.* at 317.

[77] *Gerbier v. Holmes*, 280 F.3d 297 (3rd Cir. 2002). The Third Circuit has not yet addressed the aggravated felony issue in the sentencing context. *See also United States v. Ibarra-Galindo*, 206 F.3d 1337, 1342 (9th Cir. 2000)(Canby, J., dissenting)(arguing that the hypothetical federal felony rule should be applied in the sentencing context).

[78] *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004). The Ninth Circuit followed the reasoning of the Second and Third Circuits with regard to aggravated felonies in the immigration context, based largely on the need for uniformity of immigration law. *See also, U.S. v. Ortiz-Lopez* 385 F.3d 1202 (9th Cir. 2004). The Sixth Circuit has also utilized this analysis in at least one case, although it was clear not to establish the hypothetical felony rational as the binding scheme for analysis. Without specifically deciding which rational to use, In *Garcia-Echaverria v. U.S.*, 376 F.3d 507 (6th Cir. 2004) the Circuit Court found that, in the immigration context, the defendant failed to meet his burdens under the more lenient standard established in *Gerbier* and upheld the denial of the defendant's petition for writ if habeas corpus.

[79] *Gerbier,* 280 F.3d at 313.

section 924(c)(2) and, therefore, aggravated felonies under INA 101(a)(43). In the sentencing context, this view arguably commands a majority of the U.S. Circuit Courts of Appeals that have ruled on the issue.[81] However, few Circuit Courts of Appeals have ruled on the issue in the immigration context in published opinions, and our review of the cases indicates that of those circuits that have ruled on the issue, only the Fifth Circuit has unequivocally chosen the state classification perspective.[82]

3. *State Substantive Felony Perspective*

The third perspective on the treatment of state drug offenses under the aggravated felony provisions holds that an offense qualifies as a felony, and consequently as a drug trafficking offense under section 924(c)(2), if the relevant state deems the offense as punishable by more than a year's imprisonment. Thus, this perspective focuses on the

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[80] *Id.* at 308-311.

[81] *See e.g. U.S. v. Ibarra-Galindo*, 206 F.3d 1337, 1339,1341 (9th Cir. 2000), cert. Denied, 531 U.S. 1102 (2001)(reviewing other circuits that have reviewed the issue in the sentencing context and concluding that they all adopted the state classification perspective). However, this observation may not be as straightforward as *Ibarra-Galindo* and the other courts that have decreed this to be the majority position would suggest. For instance, *Ibarra-Galindo* asserts that the First, Second, Fifth, Eighth, Tenth, and Eleventh Circuit Courts have adopted the state classification rule. However, in a number of the cases cited by *Ibarra-Galindo* the Circuit Courts had actually decided that a state felony that was punishable for more than a year qualified as an aggravated felony. See *U.S. v. Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996)(finding that drug offense was aggravated felony because under New York law any criminal offense punishable by more than one year is a felony); *U.S. v. Restrepo-Aguilar*, 74 F.3d 361, 365 (1st Cir. 1996)(finding that Rhode Island felony that was punishable up to three years imprisonment was an aggravated felony); *U.S. v. Hinojoso-Lopez*, 130 F.3d 691 (5th Cir. 1997)(holding that state drug offense yielding five year prison sentence was an aggravated felony under 924(c)(2)).

These courts were not required to directly rule on the definition of felony, since the offenses at issue were both classified as felonies and also were punishable for more than a year. *See U.S. v. Caicedo-Cuero*, 312 F.3d 697, 703 fn. 32 (5th Cir. 2002)(stating that the definition of 'felony' in determining aggravated felony status was a case of first impression in the circuit, having not been directly decided by *Hinojosa-Lopez*). The state drug offenses in these cases would also qualify as aggravated felonies under the state substantive felony perspective, discussed in more detail infra, since they involve a sentence of over a year of incarceration. Even the hypothetical federal felony perspective typically invokes the 18 U.S.C. 3559(a) definition of felony, which requires that an offense be punishable by more than a year of imprisonment. One is left to wonder if these courts would have reached the same conclusions if the offenses at issue had involved punishments more commonly associated with misdemeanors (i.e. a year or less of imprisonment). On balance, the proposition that such courts have unequivocally adopted the state classification rule appears tenuous at best.

[82] *United States v. Hernandez-Avelos*, 251 F.3d 505 (5th Cir. 2001).

substantive nature of the offense and the punishment designated for it.[83] To date, this perspective has only been adopted by the Ninth Circuit Court of Appeals, and then only for sentencing enhancement purposes. The Ninth Circuit has reasoned that the statutory context of section 924(c)(2) and Congress' long-standing tradition of equating a felony to more than a year's imprisonment strongly suggest that state labels or classifications of drug offenses should yield to the level of punishment associated with an offense in determining whether the offense constitutes an aggravated felony.[84] While none of the other Circuit Courts of Appeals have formally adopted this perspective in a published opinion, there is some evidence that support for the substantive state felony approach exists in some of the circuits that have not yet authoritatively addressed the issue.[85]

4. *The BIA's Position*

In 2002, the BIA in *Matter of Yanez-Garcia*,[86] abandoned its longstanding *Davis/Barrett* rule which had held that state drug felonies (or misdemeanors) must be analogous to federal felonies in order to qualify as aggravated felonies under section 924(c)(2) and INA 101(a)(43)(i.e. the hypothetical federal felony). The position set forth by the BIA in *Yanez* is that it will follow the rule adopted by the relevant Circuit Court of Appeals in deciding whether a state felony constitutes an aggravated felony for collateral immigration consequences and in those circuits that have not ruled on the issue, it will

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[83] *United States v. Robles-Rodriguez*, 281 F.3d 900, 903-904 (9th Cir. 2002).

[84] *Unites States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002); *United States v. Arellano-Torres*, 303 F.3d 1173 (9th Cir. 2002); *United States v. Ballesteros-Ruiz*, 319 F.3d 1101 (9th Cir. 2003); *but see Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004), noting, at least in *dicta*, that the power of sentencing is a state power and that uniformity is not required across states as it is with the immigration context.

[85] See *Navarro-Macias v. I.N.S.*, 16 Fed. Appx. 468; 2001 U.S. App. LEXIS 14015 (7th Cir. 2001)(unpublished opinion emphasizing that the defendant's drug offense was punishable by more than a year of imprisonment); *Shurney v. I.N.S.*, 201 F.Supp.2d 783 (N.D. Ohio 2001)(Sixth Circuit district court deportation case holding that a felony under 924(c)(2) means an offense punishable by imprisonment for more than one year);

[86] *Matter of Yanez-Garcia*, 23 I. & N. Dec. 390 (BIA 2002).

follow the position taken by the majority of the circuit courts in sentencing enhancement cases - the state classification perspective.[87]

However, this procedure has proven to be less than straightforward in practice. In a case arising in the jurisdiction of the Second Circuit decided just months after *Yanez*, the BIA abandoned the Second Circuit Court of Appeals' decision in *Aguire v. I.N.S.*, in which the circuit had adopted the hypothetical federal felony rule for immigration cases,[88] and instead applied the Second Circuit's approach for sentencing enhancement cases, the state classification perspective rule.[89] The BIA reasoned that the Second Circuit's rationale for adopting different rules for the immigration and sentencing contexts - deferring to the BIA's former rule in order to attain a nationwide uniformity in the application of immigration laws – was no longer feasible, therefore the circuit majority sentencing approach was essentially the "favored construction" in the Second Circuit.[90] It remains to be seen if the BIA will apply similar logic in cases arising under the jurisdiction of the Third and Ninth Circuit Courts of Appeals, the only remaining circuits that have explicitly rejected the state classification perspective rule for immigration cases.

III. WHEN 'FELONY' MEANS AN AGGRAVATED FELONY

The previously outlined escalation in federal legislative and enforcement attention to narcotics and alien criminals in recent decades essentially extends the policy-making

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[87] *Id*. at 396-397.
[88] *Aguirre v. I.N.S.*, 79 F.3d 315 (2nd Cir. 1996).
[89] *Matter of Elgendi*, 23 I. & N. Dec. 515 (BIA 2002). The Second Circuit had previously adopted the majority approach in a sentencing context case, *United States v. Pornes-Garcia*, 171 F.3d 142 (2nd Cir. 1999).
[90] *Id.* at 518-519.

onus to the federal judiciary.[91] The manner in which the federal courts interpret and apply the law in the cases that are brought before them can significantly influence the direction and character of national criminal justice and immigration policy. In short, federal courts are important institutional actors in the politics of shaping national public policy and, more generally, the direction of American life. However, in shaping national immigration policy in the context of the war on drugs, the U.S. Courts of Appeals have reached an impasse. A parting of ways has arisen concerning an important statutory interpretation under the INA. In deciding what drug offenses are appropriately considered drug trafficking offenses, and hence, aggravated felonies under the INA, the Courts of Appeals define both the future of national immigration policy as well as the fortunes of thousands of immigrants. We argue below that the state classification perspective embraced by a number of the Circuit Courts and recently adopted by the BIA in *Yanez*, fails to properly interpret the INA's aggravated felony provisions and has detrimental implications for American immigration policy.

A. PLAIN MEANING AND THE STATUTORY CONTEXT OF 'FELONY'

In examining any statute, one must always look to the plain or established meaning of the words used.[92] If the words themselves are unambiguous, the reviewing court merely applies that plain meaning without the need for further interpretation. Although there has been conflict over the *legal* meaning of "aggravated felony," its *plain*

[91] There is evidence to suggest that the escalation of the war on drugs extended to judicial policy decision-making. During the height of the war on drugs, average sentences for drug offenses in the U.S. District Courts increased from 54.6 months in 1982 to 82.2 months in 1992. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, supra, note 29, at 495 – table 5.23. Of course, this increase, in part, may reflect the impact of federal legislation on sentencing, especially congressional inroads on narcotics offenses. Still, the 50% increase in sentencing length over the time frame leads us to believe that there was some change in judicial policy-making in drug cases.

meaning appears unambiguous from the common usage of the two words themselves. This plain meaning also contradicts the inclusion of misdemeanors or other offenses that are not commonly deemed felonies under the law. As one Court of Appeals judge noted:

> [I]t is quite clear that "aggravated felony" defines a subset of the broader category "felony." Common sense and standard English grammar dictate that when an adjective—such as "aggravated"—modifies a noun—such as "felony"—the combination of the terms delineates a subset of the noun. One would never suggest, for example, that by adding the adjective "blue" to the term "car," one could be attempting to define items that are not, in the first instance, cars. . . [W]e certainly should not presume that those specifics (aggravated felonies) would include offenses that are not felonies *at all.*[93]

In interpreting the meaning of the aggravated felony provisions, it is also appropriate to consider the use of the term 'felony' within the relevant statutory context. Section 1101(a)(43)(B) of Title 8 defines 'aggravated felonies' to include "illicit trafficking of a controlled substance (as defined in section 802 of Title 21), including drug trafficking crimes (as defined in section 924(c)(2) of Title 18)," and adds that the term "applies to an offense described in this paragraph, whether in violation of Federal or State law." In turn, "drug trafficking crime" is defined in section 924(c)(2) of Title 18 as "any felony punishable under" the three referenced federal statutes. Hence, the point of contention lies in determining exactly what offenses qualify as a 'felony' under section 924(c)(2) and, more specifically, whether 'felony' includes state simple possession

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[92] *See, e.g., NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

offenses that are classified as state felonies, but do not require more than a year of incarceration and would only constitute misdemeanors under federal law.

Courts adopting the state classification or label perspective have charged that the hypothetical federal felony rule essentially endeavors to rewrite section 924(c)(2) as "any *crime* punishable *as a felony* under" the referenced federal statutes.[94] However, the hypothetical federal felony approach does not require an implicit rewriting of the statute, but merely a sensible understanding of how the term 'felony' is used within section 924(c)(2). In interpreting a statute, the plain meaning of a word or phrase cannot simply be considered in isolation, but rather, meaning must be drawn from the statutory context in which it was used.[95] Analysis of the entire text of section 924 reveals that where it adopts state definitions or explanations to expand the scope of the statute, it does so explicitly.[96] In sub-paragraphs 924(e)(2)(A)(ii) and 924(g)(3) the statute deliberately incorporates state law drug offense definitions to expand the scope of penalties for drug crimes and firearm offenses.[97] However, it specifically declines to provide any such provisions in 924(c)(2) for state felonies that could not be punishable *as felonies* under federal law.[98] Thus, the premise that a 'felony' under 924(c)(2) denotes an offense that is

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[93] See *United States v. Pacheco*, 225 F.3d 148, 157 (2nd Cir. 2002)(Straub. J., dissenting)(arguing that 'felony' is commonly understood to include crimes punishable by prison terms of more than a year).

[94] *See Gerbier v. Holmes*, 280 F.3d 297, 307 (3rd Cir. 2002)(summarizing the competing arguments on the interpretation of section 924(c)(2)).

[95] *See e.g. Deal v. United States*, 508 U.S. 129, 132 (1993)(suggesting that meaning of words be derived by their use in statute as a whole).

[96] *U.S. v. Ibarra-Galindo,* Brief for Defendant (1999 WL 22604797), at 14-15.

[97] Sub-paragraph (e)(2)(A)(ii) of 924 states that "As used in this subsection . . . the term 'serious drug offense' means . . . (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." For 924 (g)(3), the statute states, "Whoever, with the intent to engage in conduct which . . . (3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))."

[98] *Id.* Unlike 924(e)(2)(A)(ii) and 924(g)(3), 924 (c)(2) merely states "For purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C.

punishable as a felony under federal law reflects a well-reasoned and informed reading of the term 'felony' that appropriately considers the overall structure of the statute and the relevant context of the term.

B. LEGISLATIVE HISTORY

The basic premise of the hypothetical federal felony perspective that a 'felony' denotes an offense that would constitute what is commonly considered to be a felony under federal law is supported by the legislative history and purpose of the aggravated felony provisions. Section 924(c)(2) of Title 18 provides sentencing enhancements for defendants in federal prosecutions who use or carry a firearm in relation to a drug trafficking crime. Prior to 1988, this section defined 'drug trafficking' as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance."[99] In the Anti-Drug Abuse Act of 1988, Congress amended this section to incorporate specific federal provisions concerning narcotics offenses, with the definition of 'drug trafficking' being changed to "any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act."[100] The amendment was labeled a 'clarification' and certainly does not reflect the intention of Congress to expand the definition of 'drug trafficking crimes'.[101]

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801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)" without any reference to state laws.

[99] 18 U.S.C. § 924(c)(2) (1982 & Supp. V 1987).

[100] Public Law No. 100-690, § 6212, 102 Stat 4181, 4360 (1988).

[101] *See United States v. Contreras*, 895 F.2d 1241, 1244 (9th Cir. 1990)(arguing that Congress had labeled the amendment a clarification and that its intent was not to broaden the definition of drug trafficking crime). *See also In Re L-G*, 21 I. & N. Dec. 89, 94-95 (B.I.A. 1995)(explaining that while the amended definition no longer required a clear nexus to 'trafficking,' it did not signify a wholesale adoption of state felony definitions). The title of section 6212 is "Clarification of Definition of Drug Trafficking Crimes in

Further insight on the meaning of the term 'felony' can be found in the legislative history of INA 101(a)(43). Following the enactment of the aggravated felony provisions in 1988, the BIA's decision in *Matter of Barrett* extended the parameters of the aggravated felony provisions to state drug offenses, holding:

> If Congress had wanted only convictions under the cited federal statutes to serve as aggravated felonies with respect to drug offenses, it could have said so quite simply. Instead Congress referred to felonies "punishable under" not "convictions obtained under" those statutes. As such, we find that the definition of 'drug trafficking crime' at 18 U.S.C. § 924(c)(2), as incorporated into the Immigration and Nationality Act by section 101(a)(43) of the Act, includes a state conviction *sufficiently analogous to a felony offense* under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.[102]

Congress followed up the BIA's decision later that year by providing an addendum to INA 101(a)(43) which specified that a drug trafficking offense is an aggravated felony whether or not the conviction occurred in state or federal court.

As noted previously in this article, the House Judiciary Committee Report on the proposed amendment stated that the Committee concurred with the BIA's decision in *Barrett*.[103] In 1992 the BIA elaborated on its interpretation in *Matter of Davis*, holding

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Which Use or Carrying of Firearms and Armor Piercing Ammunition is Prohibited." *Id. See also Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004).

[102] *Matter of Barrett*, 20 I. & N. Dec. 171, 175 (B.I.A. 1990)(emphasis supplied).

[103] *See* H.R. Report No. 101-681 Part 1, 144, 147 (1990); *see also Gerbier v. Holmes*, 280 F.3d 297, 305 (3rd Cir. 2002)(asserting that the legislative history of the amendment indicates that it essentially codified the BIA's decision in *Barrett*).

that "[w]e therefore clarify our holding in *Matter of Barrett* to specify that for a finding of 'drug trafficking crime' the alien's offense must be a felony offense under one of the three statutes listed in 18 U.S.C. § 924(c)(2), or it must be analogous to a felony offense under one of the three statutes in section 924(c)(2)."[104] This statement of the BIA's position on the interpretation of 'felony' under section 924(c)(2) endured for more than a decade, and while Congress continued to amend the aggravated felony provisions on more than a few occasions during that time frame, it conspicuously declined to demonstrate its disapproval by revising the statute to specify that the aggravated felony provisions encompassed state felonies that were not punishable as federal felonies.

In determining the meaning of 'felony' under 18 U.S.C. § 924(c)(2), the appropriate definition is found within the same title. Section 3559(a) of Title 18 sets forth the general classification of offenses (as felonies or misdemeanors) for federal crimes and defines felony as an offense that is punishable by more than one year in prison. Under this definition, state drug offenses would not constitute aggravated felonies unless they were punishable under the relevant federal law and would yield a term of imprisonment in excess of one year. However, courts espousing the state classification or label perspective do not use the definition provided by Title 18, but rather, make a strained reference to a definition provided within the Controlled Substances Act of Title 21.[105] Section 802(13) of the Controlled Substances Act states "As used in this subchapter: The term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony."[106]

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[104] *Matter of Davis*, 20 I. & N. Dec. 536, 543 (B.I.A. 1992).
[105] 21 U.S.C. § 802(13)
[106] *Id*.

The U.S. Circuit Courts of Appeals may embrace this definition in order to provide a viable rationalization for using state classifications to determine federal aggravated felon status, however, by its own terms, section 802(13) limits the application of its definition of felony to that which is "used in this subchapter." Hence, it is important to assess the use of this definition within its own statutory parameters. Section 802(13)'s definition of felony is primarily used to activate sentence enhancements for repeat offenders under Title 21 rather than to define substantive crimes – the pertinent inquiry with regard to section 924(c)(2).[107]

C. PROPER INTERPRETATION OF STATUTORY DEFINITIONS

If subsection 802(13) is indeed the proper authority for defining aggravated felonies in the drug offense context, as the state classification perspective contends, using that statute in this manner conflicts with standard rules of statutory construction concerning intra-statutory conflict and inconstancy. First, utilizing this meaning conflicts with a later part of the same section, 802(44), which defines 'felony drug offense' as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country."[108] Thus, under the state classification perspective, a drug offense could be a felony even if it was punishable by less than a year's incarceration; a result that is plainly at odds with section 802's own definition of

[107] *See Gerbier v. Holmes*, 280 F.3d 297, 309 (3rd Cir. 2002)(citing *In re L-G*, 21 I. & N. Dec. 89, 99 (B.I.A. 1995)). The *Gerbier* court goes on to explain that, "[i]ndeed, there is only one instance under the Controlled Substances Act where the term 'felony' is used to describe a punishable offense, see 21 U.S.C. § 843(b) (1999)(making it unlawful to use a communication facility 'in committing or causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter'), and case law makes clear that only a felony under federal law satisfies the felony element of this offense." *Id*. at 310.

[108] *See* 21 U.S.C. § 802(44).

'felony drug offense'.[109] This conflict violates the well-established interpretive canon favoring statutory consistency:

> A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.[110]

To apply subsection 802(13) and define state felony drug offenses punishable by a year or less as aggravated felonies would make superfluous subsection 802(44) which includes the more than one year imprisonment requisite. Proper interpretation of the entire section involves the reasonable inference that Congress intended to separate drug offenses from other felonious criminal actions.[111] A reading of 802(13) to include drug crimes as felonies merely by way of a state's delineation and without regard to minimum punishments would ignore the Congressional language unambiguously written in the statute. At least one U.S. Circuit Court of Appeals has arrived at a similar conclusion concerning the interpretation of section 802.[112] In *United States v. Robles-Rodriguez*, the Ninth Circuit rejected the state classification perspective within the context of sentencing enhancement.[113] The Court held:

> [i]f the [state classification] position were correct, a drug offense could be a felony (and therefore a 'felony drug offense') even if punishable by less

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[109] *United States v. Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002).
[110] NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 46:06, 181-190 (West Publishing, 2000)(citations omitted). Singer cites over 150 cases in support of this statutory cannon, including cases at both federal and state levels.
[111] *See id.* at 194 ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.")(citing *Carver v. Bond/Fayette/Effingham Regional Bd. Of School Trustees*, 146 Ill. 2d 347, 586 N.E.2d 1273 (1992)).
[112] *Robles-Rodriguez*, 281 F.3d at 904. *See also United States v. Rios-Beltran*, 361 F.3d 1204 (9th Cir. 2004).

> than one year's imprisonment – a result clearly inconsistent with the statute's definition of 'felony drug offense' . . . Reading both definitions together, we conclude that Congress intended the word 'felony' to describe offenses punishable by more than one year's imprisonment under applicable state or federal law.[114]

As the Ninth Circuit found in the sentencing enhancement context and as proper statutory interpretation dictates, the provisions in subsection 802 should be understood within the framework of the entire section, requiring subsection 802 (13) to be read in conjunction with subsection 802 (44). This requires the prerequisite of a more than one-year as the minimum punishment for drug crimes to be defined as "aggravated felonies" as used in the Immigration and Naturalization Act and as interpreted through the Controlled Substances Act.

An additional interpretive cannon is violated by ignoring subsection 802(44). When specific definitions apply to specific terms within a statute, the specific, rather than the general definitions apply in those particular situations.[115] As has been noted, "where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail."[116] Thus, in dealing with aggravated felonies concerning *drug*

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[113] *Robles-Rodriguez*, 281 F.3d at 904.
[114] *Id.* at 904 (citing *United States v. Fiorillo*, 186 F.3d 1136, 1153 (9th Cir. 1999)("[O]ne provision of a statute should not be interpreted in a manner that renders other sections of the same statute inconsistent, meaningless, or superfluous")).
[115] *See e.g., D. Ginsberg & Sons v. Popkin,* 285 U.S. 204, 208 (1932).
[116] Singer, supra note 1100, at 177 (citing *Equal Employment Opp. Comm. v. Gilbarco, Inc.,* 615 F.2d 985 (4th Cir. 1980); *Aeron Marine Shipping Co. v. U.S.,* 695 F.2d 567 (D.C. Cir. 1982); *In re Gledhill*, 76 F.3d 1070, 34 Fed. R. Serv. 3d (LCP) 1267 (10th Cir. 1996); *U.S. v. Cross*, 121 F.3d 234, 1997 FED App. 229P (6th Cir. 1997); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1997 FED App. 25P (6th Cir. 1997), cert denied, 520 U.S. 1224 (1997) and (implied overruling on other grounds recognized by, *Arrendondo v. U.S.,* 120 F.3d 639, 1997 FED App. 239P (6th Cir. 1997)); *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996); *Hill v. Morgan Power Apparatus Corp.*, 259 F. Supp 609 (E.D. Ark. 1966), judgment aff'd, 368 F.2d 230 (8th Cir. 1966); *Russell v. Dep. of Air Force*, 915 F. Supp. 1108 (D. Colo. 1996); *In re Thomas*, 85

crimes, such as INA section 101(a)(43)(B), the proper interpretation of "felony" would be the more specific definition regarding "felony *drug* offense" found in 802(44) rather than the more general definition of felony written in 802(13). Therefore, even if section 802 is the proper section to refer to for INA definitions, the state classification perspective remains at odds with the proper interpretation of the statute. In order to comply with the presumption that a more specific statute usually controls a statute that is more general,[117] the later, and more specific definition found in subsection 802(44) applies when defining aggravated drug felonies.

D. ADDITIONAL CONSIDERATIONS

The appropriate interpretation and implementation of the aggravated felony provisions of the INA involves not only the standard statutory construction concerns outlined above, but also entails consideration of broader matters of importance in immigration policy and legal rights.

1. *Lenity in the Interpretation of Laws Affecting Deportation*

The state classification perspective also conflicts with the traditional Supreme Court precedent of finding ambiguities in deportation statutes in favor of the alien.[118] The Court has held that:

> [D]eportation is a drastic measure and at times the equivalent of banishment or exile [citations omitted]. It is a forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this

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B.R. 608 (Bankr. N.D. Ala 1988), order rev'd on other grounds, 91 B.R. 117 (N.D. Ala. 1988), opinion aff'd, 883 F.2d 991 (11th Cir. 1989); *In re MR. Gatti's Inc.*, 164 B.R. 929 (Bankr. W.D. Tex 1994)).

[117] *See* Singer, supra note 110, at 179 (citing *Russell v. Dep. of Air Force*, 915 F. Supp. 1108 (D. Colo. 1996)).

> statutory provision less generously to the alien might find support in logic. But, since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.[119]

This principle has been followed in recent contexts, although some contemporary cases may limit this approach.[120] Favoring aliens in ambiguous statutes also follows the long-standing rule of lenity toward criminal defendants under which the Court decides uncertainty in criminal statutes in favor of the defendant.[121] Several of the Circuit Courts of Appeals have applied this rule of lenity in the immigration context.[122] Given the harsh collateral immigration consequences that non-citizens face in such situations, the rule of lenity is especially appropriate in these cases. The state classification perspective, however, fails to fulfill the spirit of this principle, allowing non-citizens to be deported

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[118] *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449-450 (1987).

[119] *Fong Haw Tan v Phelan*, 330 U.S. 6, 10 (1948). This case dealt with the ability to deport an alien convicted of two murders. Deportation procedures were initiated under the premise that the defendant-alien was convicted and sentenced to two crimes of moral turpitude. Although the statute was not specific as to the timeframe of when the two convictions or sentences had to occur, the Court held that these two convictions could not occur within the same trial, thus allowing the defendant-alien to avoid deportation.

[120] *See e.g., Costello v. I.N.S.*, 376 U.S. 120, 128 (1964); *I.N.S. v. Errico* 385 U.S. 214, 225 (1966); *but see I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26 (1996)(distinguishing *Errico* and finding a different result based on a subsequent statutory change by Congress); *Cardoza-Fonseca*, 480 U.S. at 449 (citing *Costello* and noting the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); *but see I.N.S. v. Elias- Zacarias*, 502 U.S. 478 (1992)(finding a different result allowing deportation of the alien on a similar issue as raised in *Cardoza-Fonseca*).

[121] *See Unites States v. Bass*, 404 U.S. 336 (1971). *See also Unites States v. Kozminiski*, 487 U.S. 931, 952 (1988)("The purpose[s] of the rule of lenity [are] to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts . . ."); *but see Chapman v. United States,* 500 U.S. 453, 463-464 (1991)(holding the rule of lenity not applicable when the statute is clear).

[122] *See United States v. Simpson*, 319 F.3d 81, 86-87 (2nd Cir. 2002). In *Simpson,* the Second Circuit held that the rule of lenity applies when interpreting the Sentencing Guidelines for sentencing enhancements, even though in the particular case the court held that the specific provision in questions was not ambigous and thus did not require the rule of lenity. The Second Circuit Court also noted that the Ninth, Eighth, and Fourth Circuits have also held that the rule of lenity applies, although the Seventh and Fourth Circuits have found the rule of lenity inapplicable to sentencing enhancements cases.

under state criminal statutes for crimes that they could not be deported under if living in other states or if prosecuted under federal authority. As the U.S. Supreme Court has previously noted, a statute that trenches on this freedom should be construed narrowly,[123] as opposed to the more expansive interpretation dictated by the state classification position. Following this historic principle leads to the conclusion that a narrow interpretation of "aggravated felony," that favors the non-citizen, should apply.

2. *Favoring Substance Over Form in Defining Felonies*

The state classification perspective further ignores the importance of the potential punishment of the crime rather than the mere labeling of the offense. In numerous recent circuit cases, even in those circuits adopting the state classification perspective, courts have recognized the traditional Congressional definition of a 'felony' being a crime punishable by more than one year.[124] Examining a crime's punishment, rather than its classification, conforms to the principle that the crime's seriousness is defined by its sanctions, rather than its name alone.[125] As one judge noted:

> While Congress clearly intended to broaden the aggravated felony category to include more criminal offenses, there is no evidence to suggest that in doing so, Congress intended to 'break the time-honored line

[123] *Fong Haw Tan,* 330 U.S. at 10.
[124] *See United States v. Robles-Rodriguez*, 281 F.3d 900, 904-905 (9th Cir. 2002)("Congress has a long-standing practice of equating the term 'felony' with offenses punishable by more than one year's imprisonment."); *United States v. Urias-Escobar*, 281 F.3d 165, 167-168 (5th Cir. 2002)("[F]ederal law traditionally defines a felony as a crime punishable by over one year's imprisonment"); *United States v. Graham,* 169 F.3d 787, 792 (3rd Cir. 1999)("The one-year mark was used by Congress as early as 1865."); *United States v. Page*, 84 F.3d 38,41 (1st Cir. 1996)(incorporating from Congressional history a minimum one-year definition for felony crimes when 'felonious' is left undefined).
[125] *See United States v. Jones*, 235 F. 3d 342, 346 (7th Cir. 2000)(citing *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968)).

between felonies and misdemeanors' by including offenses punishable by one year's imprisonment within the definition.[126]

An analogous instance demonstrating the importance of the punishment rather that the statutory label can be found in the Supreme Court's decisions concerning the right to a trial by jury.[127] In *Duncan v. Louisiana*, the state of Louisiana denied the defendant a jury trial based on the fact that the crimes alleged were only classified as misdemeanors.[128] At the time, federal "petty crimes," where no jury trial was required, were classified as crimes with punishments of less than six months imprisonment.[129] In determining whether Louisiana was required to grant the defendant a jury trial, the Supreme Court looked not at the label or classification of the crime committed, but the possible punishment, in Duncan's case two years imprisonment.[130] Justice White, writing for the majority, asserted "[t]he penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment."[131]

The current debate over aggravated felonies for drug convictions does not involve civil liberties as granted to citizens under the Bill of Rights. However, the results of classifying a crime as an aggravated felony may involve consequences for immigrants that are just as serious to them as violations of those rights granted in the Bill of Rights.[132] The Court's traditional emphasis on punishment, rather than labels, coupled with the Supreme Court's principle of deciding ambiguities in favor of aliens, discussed

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[126] *Pacheco,* 225 F.3d at 158-159 (Straub J., dissenting)(citations omitted).
[127] U.S. Const. Amend. VI.
[128] 391 U.S. 145, 146 (1968).
[129] *Id.* at 161
[130] *Id.* at 162
[131] *Id.* at 159 (citing *Dist. of Columbia v. Clawen*, 300 U.S. 617 (1937)).
[132] *See Fong Haw Tan v Phelan*, 330 U.S. 6, 10 (1948)

supra, demonstrates that the state classification perspective is inconsistent with historical jurisprudence.

3. *Need For Uniformity*

Beyond the factors outlined above, the state classification perspective further negates the longstanding goal of uniformity within national immigration policy.[133] The need for uniformity was stressed by Alexander Hamilton in *The Federalist*, when he argued that "[t]he power over naturalization must 'necessarily be exclusive; because if each State had power to prescribe a Distinct Rule there could be no Uniform Rule.'"[134] As demonstrated in the example between the laws of North Dakota and Montana provided at the beginning of this Article, the current state classification regime over aggravated felonies brings Hamilton's prophetic statement to life.[135] The goal of uniformity serves as an important factor in those circuits that adopt the hypothetical felony rule in the deportation context.[136] In *Aguirre*, the Second Circuit Court of Appeals explicitly expressed its "concern to avoid disparate treatment of similarly situated aliens

[133] *See Gerbier v. Holmes*, 280 F.3d 297, 311 (3rd Cir. 2002); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 913 (9th Cir. 2004).
[134] *Gerbie,* 280 F.3d at 311, quoting THE FEDERALIST NO. 32.
[135] *See also*, Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions,* 74 NEW YORK UNIVERSITY LAW REVIEW 1696, 1720-1726 (1999). Discussing a number of inconsistencies in state criminal laws, Bennett proposes a hypothetical case, based on actual facts, of a nineteen-year-old male who has consensual sex with his fifteen-year-old girlfriend. Noting the various state laws determining the age of consent, in New York the nineteen-year-old could be convicted of "sexual misconduct," which would constitute an aggravated felony. However, in other states with lower age of consent, such as Maryland, the nineteen-year-old would not face state prosecution and thus could not be deported as an aggravated felony.
[136] *See eg., Gerbier,* 280 F.3d at 311-312; *Aguirre v. I.N.S.* 79 F.3d 315, 317 (2nd Cir. 1996)(overruling the 2nd Circuits prior precedent applying the state classification perspective and applying the hypothetical felony perspective; "[The] interests of nationwide uniformity outweigh our adherence to Circuit precedent"); *but see United States v. Pornes-Garcia*, 171 F.3d 142 (1999) (distinguishing *Aguirre* and limiting its holding to deportation cases while sentence enhancement will still be decided under the state classification approach).

under the immigration laws."[137] In *Gerbier*, the Third Circuit Court of Appeals emphasized the need for uniformity in immigration law, noting:

> [A]liens convicted of drug offenses in different states would be treated differently with respect to deportation and cancellation of removal . . . This cannot be what Congress intended in establishing a "uniform" immigration law. . . In sum, a state drug conviction, for deportation purposes, constitutes an "aggravated felony" if it is either a felony under state law and contains a trafficking element, or would be punishable as a felony under the federal Controlled Substances Act.[138]

The U.S. Supreme Court has been inclined to favor uniformity in instances in which varying state criminal law definitions may have federal sentencing consequences.[139] In *Taylor v. United States*, the Court had to determine the impact of prior state burglary convictions for federal sentencing enhancements under the Anti-Drug Abuse Act of 1986, 18 U.S.C.S. 924(e).[140] In *Taylor*, the Eighth Circuit Court of Appeals determined that burglary, for sentencing enhancement purposes, is defined "however a state chooses to define it."[141] In rejecting the Circuit Court's approach, the Supreme Court noted the difficulties that occur when federal sentencing statutes must rely on dissimilar state statutes, including the possibility of unequal punishments for identical criminal conduct.[142] Instead of allowing lower courts to merely rely on state-law labeling

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[137] *Aguirre*, 79 F.3d at 317.
[138] *Gerbier*, 280 F.3d at 312 (citations omitted). The *Gerbier* Court further determined that punishable under the CSA required the state conviction to be punishable by more than one year's imprisonment.
[139] *See* Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions,* 74 NEW YORK UNIVERSITY LAW REVIEW 1696, 1731-1732 (1999).
[140] 495 U.S. 575 (1990).
[141] 495 U.S. at 579 (quoting Taylor v. U.S., 864 F.2d 625, 627 (8th Cir. 1989)).
[142] *Id.* at 590-591. The Supreme Court noted one example of the problem between the Michigan and California burglary statutes. The California law includes such things as "shoplifting" and taking items out

of prior convictions as 'burglaries,' the Supreme Court provided a "generic definition" of burglary[143] and held that lower courts must look not only at the fact of a prior conviction but also the statutory definition of the prior conviction.[144] If the definition of the state offense did not include the elements of the generic definition of burglary as provide by the Supreme Court, the sentencing court may need to examine other facts of the conviction, such as the charging papers and jury instructions, to make sure the necessary elements of generic burglary were proven.[145] These measures appear necessary to avoid the consequences of unequal sentencing outcomes "based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'"[146]

Thus, it is evident that a reading of the aggravated felony provisions within the state classification context adds significant sanctions to some immigrants for merely committing the wrong crime in the wrong state.[147] While the violation of any criminal law may be deplorable and indeed deserving of punishment, the immigration ramifications should be uniform and comply with a national policy that treats all immigrants similarly in like situations. The hypothetical federal felony perspective,

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of an automobile as "burglary" while the Michigan statute does not include these activities. This led the Court to note, "a person imprudent enough to shoplift or steal from an automobile in California would be found, under the Ninth Circuit's view, to have committed a burglary constituting a "violent felony" for enhancement purposes -- yet a person who did so in Michigan might not. Without a clear indication that with the 1986 amendment Congress intended to abandon its general approach of using uniform categorical definitions to identify predicate offenses, we do not interpret Congress' omission of a definition of 'burglary' in a way that leads to odd results of this kind." (citations omitted).

[143] *Id.* at 599.

[144] *Id.* at 602.

[145] *Id.*

[146] *Id.* at 591.

[147] Similar arguments have been made concerning the current Justice Department's policy of encouraging local law enforcement agencies to enforce federal immigration laws. This policy could lead to similar disparate treatment of similarly situated immigrants depending on the level of aggressiveness of local authorities. Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U.L. REV 965 (2004).

whereby state criminal convictions must meet uniform standards to be considered aggravated felonies, is the best method for assuring that immigrants are treated equally under national immigration policy.

CONCLUSION

The War on Drugs stands as one of the most ambitious government policy campaigns in recent American history. Government efforts to curtail the use and sale of illegal narcotics have been manifested through public rhetoric by elite political actors,[148] legislation,[149] and law enforcement and prosecutorial priorities.[150] The courts have also played an important role in the War on Drugs. Both trial[151] and appellate[152] courts have an important influence on the direction of American public policy through their interpretation and application of statutes and case precedent. In this Article we outline how government policy-making in the War on Drugs has negatively and inordinately impacted immigrants and, more specifically, how judicial policy-making via statutory interpretation of the aggravated felony provisions of the INA can have unwarranted and onerous collateral consequences for non-citizen defendants in relatively minor narcotics cases. The policy decisions of a number of the U.S. Circuit Courts of Appeals and the BIA have lead to an injudicious interpretation and implementation of the aggravated

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[148] *See generally* WILLIAM N. ELWOOD, RHETORIC IN THE WAR ON DRUGS: THE TRIUMPHS AND TRAGEDIES OF PUBLIC RELATIONS (Westport, CT: Praeger Publishers, 1994).
[149] *See generally* STEVEN R. BELENKO, DRUGS AND DRUG POLICY IN AMERICA: A DOCUMENTARY HISTORY (Westport, CT: Praeger Publishers, 2000).
[150] Whitford and Yates, *supra*, note 2 at 998.
[151] *See* Lynn Mather, *The Fired Football Coach (Or, How Trial Courts Make Policy)*, in LEE EPSTEIN, ED., CONTEMPLATING COURTS (Washington, DC: CQ Press, 1995), at 173-74.
[152] *See* JEFFREY A. SEGAL AND HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (New York: Cambridge University Press, 2002), at 6-12.

felony provisions of the INA and which will continue to yield unfair and inconsistent treatment of non-citizens in such cases.

If we consider the government's policy crusade against the illegal use and sale of narcotics as a "war," then we may gain some valuable policy insight by assessing the role of immigrants, minorities, and lower socio-economic classes in American wars more broadly. On the home-front, wars typically have both benefits and costs, and such benefits and costs are not often distributed equally. For example, during the Civil War, the Union's conscription policies, which allowed those with enough money to "buy out" of the draft by paying a fee, unduly favored the wealthy and disproportionately targeted immigrants.[153] Discontent with the patent unfairness of these discriminatory draft laws led members of New York City's working poor and immigrant populations to engage in one of the most violent riots in American history.[154] By the final year of the Civil War, one out of every three Union soldiers was foreign born.[155]

Such inequitable burden-sharing by immigrants, ethnic minorities, and the poor, have been evident throughout American involvement in wars.[156] In the American War on

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[153] *See* HERBERT ASBURY, THE GANGS OF NEW YORK: AN INFORMAL HISTORY OF THE UNDERWORLD (New York: Alfred A. Knopf, 1998), at 108-157; *see also* WILLIAM L. BURTON, MELTING POT SOLDIERS: THE UNION'S ETHNIC REGIMENTS (New York: Fordham University Press, 1998)(chronicling Union attempts to recruit new immigrants). Burton provides a contemporary sketch of a scene in New York in which Union officials attempt to enlist immigrants who have just arrived from the other side of the Atlantic. His caption for the picture notes, "ENLISTING IRISH AND GERMAN IMMIGRANTS. Union recruiters enticed immigrants literally right off the docks at New York's Castle Garden, a practice that led to confederate charges that the Union employed foreign mercenaries." *Id.* at 198.

[154] *Id.*

[155] Peter Blanck and Chen Song, *With Malice Toward None; With Charity Toward All: Civil War Pensions for Native and Foreign-Born Union Army Veterans*, 11 TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 1, 32 (2001).

[156] *See e.g.* Jeanette Keith, *The Politics of Southern Draft Resistance, 1917-1918: Class, Race, and Conscription in the Rural South*, 87 THE JOURNAL OF AMERICAN HISTORY 1335 (2001)(chronicling elitist draft policies in World War I and the concomitant resistance to such conscription practices by southern minorities and poor whites); *see also* Kennedy, *supra*, note 36, at 138-39 (recounting the mistreatment of Asians during World War II in the name of national security); David Card and Thomas Lemieux, *Going to College to Avoid the Draft: The Unintended Legacy of the Vietnam War*, 91 THE AMERICAN ECONOMIC REVIEW 97 (2001)(describing the strategy of middle and upper class citizens to avoid the draft by gaining

Drugs, the general population may have derived a benefit from governmental actions to reduce the consumption and sale of illegal narcotics, however, it is clear that traditionally disempowered groups (i.e. immigrants, ethnic minorities, and the poor) have paid the "fee".[157] Within the specific context of the INA's aggravated felony provisions, the current position of some U.S. Courts of Appeals, imposing aggravated felon status on non-citizens whose offenses are not equivalent to traditional federal standards for felonies, distorts the underlying purpose and meaning of INA section 1101(a) and stands to continue to cause unfair collateral immigration consequences for non-citizens who have been convicted of relatively minor drug offenses.

college deferment; a tactic unavailable to most poor immigrants and minorities). The recent War in Iraq has led to charges that the present 'all volunteer' military system has disproportionately drawn from historically disempowered groups. *See* Kevin Horrigan, *Hired Guns*, St.Louis Dispatch, May 11, 2003, at B3. (noting that only one in fourteen military recruits has a college degree); *see also* Richard Cohen*, Spread the Threat*, Washington Post, October 7, 2004, at A39 (outlining controversy surrounding proposed bill to reinstate the draft and arguing that African Americans' representation in the military is nearly twice that of their representation in the general population).

[157] See Tonry, *supra*, note 16 at 123; *see also* Kennedy, *supra*, note 36, Kennedy posits that one compelling theory of inordinate burden-sharing in the drug war suggests that, "the war on drugs, although truly aimed against illicit narcotics, is conducted in a fashion that is negligently indifferent to the war's collateral damage to blacks. According to this theory, if the war on drugs did to white communities what it is doing black communities, white policymakers would long ago have called a truce in order to pursue some other, less destructive course." at 351-52.