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# The Intertwined Problems of Immigration and Sentencing

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## EDITORS' OBSERVATIONS

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## THE INTERTWINED PROBLEMS OF IMMIGRATION AND SENTENCING

Nora Demleitner  
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 Daniel J. Freed

Since California's voters passed the anti-immigration provisions of proposition 187 in November 1994, immigration has been a hot political issue in a number of states as well as the federal arena. While some legislation targets all recent immigrants—legal and illegal, law-abiding and criminal—much of the federal effort seems to be directed at aliens who commit crimes, whether they be in this country legally or illegally.

In recent years, Congress and the states have responded to public concern about immigrant crime with a series of legislative programs and enforcement projects. The Anti-Terrorism and Effective Death Penalty Act (AEDPA), which became law on April 24, 1996, and the immigration bills currently pending before Congress, are only the latest examples of these undertakings. Given the complexity of the issues, and the passions stirred by them, one may reasonably question the Congress's ability to address them in a coherent and rational manner in an election year.

This special Issue of FSR seeks to shine some light on this rapidly changing field of law—a field that has too long been neglected by most mainstream federal practitioners. The observations of the Issue's participants—prosecutors, academics, and defense attorneys—suggest that this shadowy area of the law deserves, at minimum, detailed attention and considerable reform.

### 1. Enforcement Context

Immigration crime makes up a large and growing portion of the federal caseload. According to the impressive statistical overview prepared by Susan Katzenelson and her staff colleagues at the Sentencing Commission, nearly a quarter of all guideline convictions in 1995 involved non-U.S. citizens. And that number masks significant regional variations. In California, where immigration crime is a major political issue, non-U.S. citizens make up an astounding 44% of cases convicted and sentenced in federal court.

The article by Alan Bersin, U.S. Attorney for the Southern District of California, represents a major statement of enforcement policy by arguably the most important immigration prosecutor in the nation. Bersin describes a new enforcement effort in the Southern District which has led to a near doubling of felony prosecutions in the past year (from 1,200 in 1994 to 2,250 in 1995). Bersin observes that prior to

1994 the Southern District essentially divided immigration offenses into two broad groups: (1) aliens who illegally *reenter* the country after having been earlier convicted of an "aggravated felony" in the United States; and (2) lesser offenders charged simply with misdemeanor illegal entry. Bersin notes how this division failed to account for "anomalies" in the statutory scheme that sweep many minor offenders within its scope and ignore other more serious crimes. In a fascinating discussion, he shows how the Southern District's new prosecutorial policy seeks to discriminate with care among defendants of varying culpability. His account represents a useful illustration of how prosecutorial policies might be crafted to remedy perceived defects in a statutory scheme.

### 2. Aggravated Felonies

Three articles examine the "aggravated felony" provision in greater detail. James Fleissner and James Shapiro, both former AUSAs in the Northern District of Illinois, review the tortuous legislative history behind the current statutory definition of an aggravated felony. They describe the interplay between that definition and the Sentencing Commission's efforts to enact reasonable guidelines, and they offer several bold proposals to rectify current defects in the immigration law. Fleissner and Shapiro conclude by suggesting that Congress rewrite the statutory definition of aggravated felony to coincide with the current guideline definition and to make it retroactive.

Next, Lee Teran, of the Immigration and Human Rights Clinic at St. Marys University School of Law in San Antonio, describes how Congress's various attempts to define aggravated felonies have created a patchwork statute with differing and confusing effective date provisions. Teran directs much of her attention to the circuit courts' attempts to make sense of this stew, and faults some for failing to undertake reasonable statutory construction.

Assistant Federal Defenders Robert McWhirter and Jon Sands from Arizona then analyze the aggravated felony provisions, and a number of other immigrant sentencing provisions, from a public defender's perspective. They are especially critical of the extent to which many of the enhancements for "aggravated" crimes turn out to be both unprecendented and unjust, and seem to have been enacted without any study or research, and after little discussion.

### 3. Criminal Trial and Immigrant Status

A pair of articles focuses on a separate theme—the relationship between the criminal trial and the immigrant status of the defendant. Professor Susan Pilcher of the University of Arkansas School of Law shows how the findings and decisions in a criminal trial can have important collateral effects not only on

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subsequent deportation proceedings, but also by prohibitions against re-entry into the United States. This is an especially harsh sanction for permanent residents who have lived in this country for many years and whose families are settled here. Pilcher describes how the criminal justice system often acts without considering the immigration consequences of its decisions, and displays "an extraordinary lack of compassion."

Daniel Kowalski, a private immigration lawyer, examines a slightly different aspect of the interplay between trials and immigration status. He looks at three different provisions that might be used by federal courts to influence or carry out deportation proceedings. While deportation is often unpreventable, Kowalski suggests ways in which it can be used to benefit the defendant as well as the prosecution and the court.

#### 4. The Pending Immigration Bill

The concluding article by Jonathan Wroblewski, Legislative Counsel for the Sentencing Commission, examines the House and Senate immigration bills now pending in Congress. Although significant

changes in immigration policy have already been enacted under AEDPA in April, the pending bills offer a useful illustration of the complex interaction between the Commission and the Congress.

As Wroblewski observes, the House and Senate immigration bills differ in significant ways. The House version provides new mandatory minimum sentences for immigration offenses and directs the Commission to make detailed changes in its guidelines. Wroblewski says these provisions were "crafted with little debate, with little, if any research into their effectiveness or efficiency, and with virtually no consultation with the Commission." The Senate version, on the other hand, is vastly different and was written after considering the analyses and views of the Commission.

Wroblewski's article draws important lessons for the Commission and Congress on the choice between legislative micromanagement of the sentencing process which the Sentencing Reform Act of 1984 was enacted to avoid—and "a strong crime and sentencing policy analysis" i.e. one that is both nonpartisan and trustworthy, that a practical Commission can reliably offer to Congress in order to meet the goals of the SRA.