

# THE CONUNDRUM OF CLASSIFYING STATE DRUG OFFENSES UNDER THE IMMIGRATION AND NATIONALITY ACT: GUIDELINES APPROACH OR HYPOTHETICAL FEDERAL FELONY TEST?

## INTRODUCTION

The Immigration and Nationality Act (INA) defines twenty-one types of aggravated felonies.<sup>1</sup> Aggravated felony convictions can have serious consequences for aliens in the United States, including ineligibility for naturalization,<sup>2</sup> asylum,<sup>3</sup> voluntary departure,<sup>4</sup> and cancellation of removal.<sup>5</sup> Aliens convicted of aggravated felonies are also subject to removal (deportation) from the United States<sup>6</sup> and to harsher criminal sentences under the Federal Sentencing Guidelines.<sup>7</sup>

One of the aggravated felonies in the INA is “illicit trafficking in a controlled substance (as defined in . . . the Controlled Substances Act), including a drug trafficking crime (as defined in [18 U.S.C. § 924(c)].”<sup>8</sup> Section 924(c) defines a “drug trafficking crime” as “any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.”<sup>9</sup> This definition of “drug trafficking crime” is ambiguous with respect to state felony drug convictions: it does not indicate whether a state felony drug conviction that would be a misdemeanor under federal drug laws constitutes an aggravated felony. The federal circuits and Board of Immigration Appeals (BIA) have developed two tests for answering this question: the Hypothetical Federal Felony Test (HFFT)<sup>10</sup> and the Guidelines Approach (GA).<sup>11</sup> The HFFT

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1. Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(43) (2000).

2. See 8 U.S.C. § 1427(e) (stating that the Attorney General shall determine the “good moral character” of an applicant for naturalization based on the applicant’s prior conduct).

3. *Id.* § 1158(a)(1), (b)(1), (b)(2)(A)(ii), (b)(2)(B)(i) (outlining the procedure for requesting and granting asylum and listing an exception for aliens convicted of an aggravated felony).

4. *Id.* § 1229c(a)(1), (b)(1)(B).

5. *Id.* § 1229b(a)(3).

6. *Id.* § 1227(a)(2)(A)(iii).

7. FEDERAL SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2000).

8. 8 U.S.C. § 1101(a)(43)(B) (citation omitted).

9. 18 U.S.C. § 924(c)(2) (2000) (citation omitted).

10. See, e.g., *Gerbier v. Holmes*, 280 F.3d 297, 299 (3d Cir. 2002) (defining the HFFT as follows: “[A] state drug conviction, whether it be a felony or a misdemeanor, must either contain a ‘trafficking’ component or be punishable as a felony under federal law in order for it to constitute an ‘aggravated felony.’”).

11. See, e.g., *United States v. Palacios-Suarez*, 418 F.3d 692, 696 (6th Cir. 2005) (defining the GA as follows: “[A] state drug conviction is a ‘drug trafficking crime’ and therefore an ‘aggravated felony’ if (1) the conviction is a felony under either state or federal law and (2) the conduct underlying the conviction is punishable under [federal drug laws].”).

and GA answer the above question differently. In circuits that use the GA, aliens may be subject to harsh immigration consequences as a result of convictions for minor drug offenses.<sup>12</sup>

Part I of this Note outlines the immigration and sentencing consequences of aggravated felonies. Part II then discusses the evolution of the aggravated felony provisions of the INA. Parts III–IX describe the development and adoption of the HFFT and of the GA in the distinct immigration and sentence-enhancement contexts, considering cases from both the circuit courts and from the BIA. Finally, Part X both describes how the GA leads to unfair outcomes and presents reasons why the Supreme Court should mandate use of the HFFT.

## I. IMMIGRATION CONSEQUENCES OF AGGRAVATED FELONIES

### A. Preclusion of Immigration Relief

Naturalization is “the conferring of nationality of a state upon a person after birth, by any means whatsoever.”<sup>13</sup> In order to be naturalized in the United States, an immigrant must show residence and physical presence in this country in addition to “good moral character.”<sup>14</sup> Under the INA, an aggravated felon cannot establish “good moral character.”<sup>15</sup> Accordingly, whether an alien convicted of a drug offense is eligible for naturalization, and therefore citizenship, may depend on how his circuit construes the drug offense.

Asylum is a discretionary form of immigration relief that the United States Citizenship and Immigration Services (USCIS) sometimes grants to “refugee” aliens.<sup>16</sup> Asylum gives its recipients legal status in the United States and allows them to obtain work permits.<sup>17</sup> Under the INA, a refugee is:

any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection

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12. See, e.g., N.D. CENT. CODE §§ 19-03.1-05(5)(t), 19-03.1-23(6) (2004) (making possession of forty-five grams of marijuana a felony); *Palacios-Suarez*, 418 F.3d at 696 (defining the GA).

13. 8 U.S.C. § 1101(a)(23).

14. *Id.* § 1427(a).

15. *Id.* § 1101(f)(8).

16. *Id.* § 1158 (b)(1) (limiting asylum to refugees).

17. 8 C.F.R. §§ 208.7(a), 209.2(a)(1) (2000) (allowing an applicant for asylum to submit an “Application for Employment Authorization” and providing that the director may adjust the status of an asylee to the status of one lawfully admitted for permanent residence).

of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>18</sup>

A “well-founded fear of persecution” is a necessary prerequisite to asylum, but it is not sufficient.<sup>19</sup> The INA makes asylum unavailable to various refugee aliens, including those “convicted of particularly serious crime[s].”<sup>20</sup> With respect to asylum, an aggravated felony is a “particularly serious crime.”<sup>21</sup> A refugee alien convicted of a drug offense may therefore find that her eligibility for asylum depends on whether her circuit construes the offense as an aggravated felony.

Voluntary departure is another form of discretionary immigration relief.<sup>22</sup> It allows a removable alien to leave the United States on his own terms—that is, not handcuffed and under the close supervision of Immigration and Customs Enforcement (ICE) employees.<sup>23</sup> Voluntary departure has four requirements: (1) the alien must “establish[] by clear and convincing evidence that [he] has the means to depart the United States and intends to do so”;<sup>24</sup> (2) “the alien [must be] physically present in the United States for a period of at least one year immediately preceding the date” ICE charged the alien as removable;<sup>25</sup> (3) the alien must not be deportable under the INA;<sup>26</sup> and (4) “the alien [must be] a person of good moral character for at least 5 years immediately preceding the alien’s application for voluntary departure.”<sup>27</sup> However, because aggravated felons are deportable,<sup>28</sup> the third requirement above could make voluntary departure unavailable to an alien convicted of a drug offense. Additionally, the fourth requirement above could also preclude voluntary departure for such an alien, because an aggravated felony conviction bars a finding by the immigration judge of “good moral character.”<sup>29</sup> The final form of immigration relief that aggravated felonies can preclude is cancellation of removal, which has been

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18. 8 U.S.C. § 1101(a)(42).

19. *See id.* § 1158(b)(2)(A) (imposing other requirements).

20. *Id.* § 1158(b)(2)(A)(ii).

21. *Id.* § 1158(b)(2)(B)(i).

22. *Id.* § 1229c(a)(1).

23. In July of 2005, the author observed, in a Boston immigration court, an Irish alien convicted of petty larceny gratefully accept voluntary removal from the immigration judge. The alien was shackled and wearing an orange jumpsuit at the proceeding, and his statements to family members in the courtroom indicated that he looked forward to returning to his homeland as a free(er) man.

24. 8 U.S.C. § 1229c(b)(1)(D).

25. *Id.* § 1229c(b)(1)(A).

26. *Id.* § 1229c(b)(1)(C).

27. *Id.* § 1229c(b)(1)(B).

28. *Id.* § 1227(a)(2)(A)(iii).

29. *Id.* § 1101(f)(8).

defined as “a form of relief from removal [which] provides the [immigration authorities] the limited ability to cancel removal for a narrow class of inadmissible or [removable] aliens.”<sup>30</sup> If the INA authorizes the removal of a particular alien, why would an immigration judge grant this form of relief to the alien? The judge might decide that the alien poses no threat to the United States and that it would be an inefficient use of both the court’s and ICE’s resources to hold removal proceedings and ultimately remove the alien from this country. Because of budget constraints, ICE primarily focuses its INA enforcement efforts on criminal aliens.<sup>31</sup> As with other forms of immigration relief, cancellation of removal is unavailable to aggravated felons.<sup>32</sup> Accordingly, the availability of cancellation of removal to an alien convicted of a drug offense may depend on his circuit’s construal of the drug offense.

Aggravated felons are subject to removal from the United States. The INA commands that “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.”<sup>33</sup> Upon learning of a conviction of an alien that constitutes an aggravated felony, ICE commences removal proceedings against the alien, as in *Gerbier v. Holmes*, a Third Circuit case, discussed later in this Note, which construed the INA’s aggravated felony provisions.<sup>34</sup> Cancellation of removal is unavailable to aggravated felons<sup>35</sup> and, as a result, these proceedings can progress more smoothly in such cases.

### B. Sentence Enhancement for the Crime of Illegal Reentry

Federal judges apply the Federal Sentencing Guidelines when sentencing individuals convicted of federal crimes.<sup>36</sup> First, the judge matches the alien’s offense with an offense guideline section or category in

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30. *Alvarez-Garcia v. INS*, 234 F. Supp. 2d 283, 287 (S.D.N.Y. 2002).

31. Interview with Department of Homeland Security employee (July 2005) (identifying details omitted).

32. 8 U.S.C. § 1229b(a)(3).

33. *Id.* § 1227(a)(2)(A)(iii). “On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the ‘IIRIRA’). The IIRIRA made a number of significant changes to the immigration laws. One of these did away with the previous legal distinction among deportation, removal, and exclusion proceedings.” *United States v. Pantin*, 155 F.3d 91, 92 (2d Cir. 1998). Accordingly, for the purposes of this Note, the terms “removal” and “deportation” will be used interchangeably.

34. *Gerbier v. Holmes*, 280 F.3d 297, 298 (3d Cir. 2002). Prior to the breakup of the INS in 2003, it was the INS, not its successor agency, ICE, that initiated removal proceedings.

35. *See* 8 U.S.C. § 1229b(a)(3) (explaining that the Attorney General may cancel removal for aliens not convicted of an aggravated felony).

36. Sentencing Reform Act of 1984 § 217(a), 28 U.S.C. § 994(a) (2000); FEDERAL SENTENCING GUIDELINES MANUAL § 1A1.1(1) (2004).

the Sentencing Guidelines Manual.<sup>37</sup> From this, the judge determines the “base offense level,” a point value that varies depending on the section.<sup>38</sup> The judge then adjusts the base offense level using factors enumerated in the Manual.<sup>39</sup> Next, the judge adjusts the base offense level considering factors of “victim, role, and obstruction of justice.”<sup>40</sup> For each additional count, the judge repeats the preceding three steps.<sup>41</sup> The judge then adjusts the number downward if the defendant has accepted responsibility.<sup>42</sup> Next, the judge “determines the defendant’s criminal history category.”<sup>43</sup> Using the base offense level and the criminal history category, the judge then determines the corresponding “guideline range.”<sup>44</sup> With the guideline range in hand, the judge consults the Manual to determine “sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.”<sup>45</sup> Finally, the judge applies certain adjustments to the punishment suggested by the Manual.<sup>46</sup> As an example of the adjustments, the judge might impose a sentence of home confinement, rather than incarceration, if the defendant is “elderly and infirm,” on the basis that “home confinement might be equally efficient as and less costly than incarceration.”<sup>47</sup>

One offense category is “Unlawfully Entering or Remaining in the United States.”<sup>48</sup> Another is “Robbery.”<sup>49</sup> In the former category, the base offense level is eight.<sup>50</sup> In the latter category, the base offense level is twenty.<sup>51</sup> This disparity may reflect the relatively greater seriousness of robbery in the eyes of the Guidelines’ drafters. Robbery has many special offense characteristics, including: use of a firearm; severity and duration of injury to the victim, if any; and value of property stolen.<sup>52</sup> The unlawful entry category has several special offense characteristics, one of which is a prior aggravated felony conviction.<sup>53</sup> When an alien has entered the United

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37. FEDERAL SENTENCING GUIDELINES MANUAL § 1B1.1(a).

38. *Id.* § 1B1.1(b).

39. *Id.*

40. *Id.* § 1B1.1(c).

41. *Id.* § 1B1.1(d).

42. *Id.* § 1B1.1(e).

43. *Id.* § 1B1.1(f).

44. *Id.* § 1B1.1(g).

45. *Id.* § 1B1.1(h).

46. *Id.* § 1B1.1(i).

47. *Id.* § 5H1.1.

48. *Id.* § 2L1.2.

49. *Id.* § 2B3.1.

50. *Id.* § 2L1.2(a).

51. *Id.* § 2B3.1(a).

52. *Id.* § 2B3.1(b)(2)–(6).

53. *Id.* § 2L1.2(b)(1)(C).

States unlawfully and is charged with illegal reentry, a judge could lengthen the imposed sentence if the alien is an aggravated felon. Under *United States v. Booker*, however, federal judges are no longer obliged to follow the Guidelines.<sup>54</sup>

## II. STATUTORY EVOLUTION OF THE AGGRAVATED FELONY

Congress passed the Anti-Drug Abuse Act of 1988 (ADAA) “[t]o prevent the manufacturing, distribution, and use of illegal drugs, and for other purposes.”<sup>55</sup> The ADAA has several provisions relevant to this Note. First, it added the definition of an “aggravated felony” to the INA:

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.<sup>56</sup>

Next, the ADAA defines “drug trafficking crime” as “any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.”<sup>57</sup> Finally, the ADAA imposes severe immigration consequences for aliens convicted of aggravated felonies, including deportability<sup>58</sup> and unavailability of voluntary departure.<sup>59</sup>

The “any felony punishable under [federal drug statutes]” language of the ADAA is ambiguous with respect to state drug convictions.<sup>60</sup> That is, does it mean “any felony conviction obtained under federal drug statutes” or “any felony offense which could be convicted and punished under federal drug statutes”? In other words, could a state—as opposed to a federal—drug conviction make an alien an aggravated felon? In 1990, the

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54. See *United States v. Booker*, 543 U.S. 220, 245 (2005) (“[T]he provision of the federal sentencing statute that makes the Guidelines mandatory [is] incompatible with today’s constitutional holding. We conclude that this provision must be severed and excised.”) (citation omitted).

55. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, pmb., 102 Stat. 4181, 4181. (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and other titles).

56. *Id.* § 7342, 102 Stat. at 4469-70 (codified as amended at 8 U.S.C. § 1101(a) (2000)).

57. *Id.* § 6212, 102 Stat. at 4360 (codified as amended at 18 U.S.C. § 924(a), (c)(2) (2000)) (citation omitted).

58. *Id.* § 7344, 102 Stat. at 4470-71 (codified as amended at 8 U.S.C. § 1227).

59. *Id.* § 7343(b), (c), 102 Stat. at 4470 (codified as amended at 8 U.S.C. § 1251 (repealed 1996)).

60. *Id.* § 6212, 102 Stat. at 4360 (codified as amended at 18 U.S.C. § 924(a), (c)(2) (2000)).

BIA, which hears appeals of findings by both immigration judges and USCIS adjudication officers, answered this latter question affirmatively in the case *In re Barrett*.<sup>61</sup> As support for its position, the BIA cited a plain language reading of the ADAA, Supreme Court precedent, and legislative intent.<sup>62</sup> Two Board Members in *Barrett* dissented,<sup>63</sup> but the majority view that a state drug conviction can make an alien an aggravated felon prevailed.<sup>64</sup>

Congress agreed with the BIA's interpretation and, in the Immigration Act of 1990 (IMMACT), codified *Barrett* by changing the INA's drug-related aggravated felony provision to the following: "any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act), including any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code."<sup>65</sup> IMMACT also clarified that the term "aggravated felony" "applies to offenses . . . whether in violation of Federal or State law."<sup>66</sup> IMMACT's House Report made clear the change's intent: "Because the Committee concurs with the recent decision of the Board of Immigration Appeals [in *Barrett*] and wishes to end further litigation on the issue, section 1501 of H.R. 5269 specifies that drug trafficking . . . is an aggravated felony whether or not the conviction occurred in state or Federal court."<sup>67</sup>

### III. ADVENT OF THE HYPOTHETICAL FEDERAL FELONY TEST

*In re Davis*, decided in 1992, presented an opportunity for the BIA to clarify which state drug offenses could constitute aggravated felonies under the INA.<sup>68</sup> In *Davis*, Maryland prosecutors obtained a conviction of a Dominican alien for conspiracy to distribute a controlled substance, cocaine, which is a misdemeanor under Maryland's laws.<sup>69</sup> The Immigration and Naturalization Service (INS), predecessor to ICE and USCIS, initiated deportation proceedings in immigration court against the

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61. *In re Barrett*, 20 I. & N. Dec. 171, 177–78 (B.I.A. 1990).

62. *Id.* at 174–77.

63. *Id.* at 178, 184 (Vacca and Heilman, Board Members, dissenting).

64. *See, e.g.*, *Gerbier v. Holmes*, 280 F.3d 297, 299 (3d Cir. 2002) (describing circumstances under which a state drug conviction makes an alien an aggravated felon); *United States v. Palacios-Suarez*, 418 F.3d 692, 695–96 (6th Cir. 2005) (same).

65. Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990) (codified at 8 U.S.C. § 1101(a) (2000)).

66. *Id.* (emphasis added).

67. H.R. REP. NO. 101-681, pt. 1, at 147 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6472, 6553.

68. *In re Davis*, 20 I. & N. Dec. 536, 540–44 (B.I.A. 1992).

69. *Id.* at 537.

alien, alleging deportability on two grounds.<sup>70</sup>

First, the INS relied on a provision of the INA that “[a]ny alien who at any time after admission has been convicted of . . . a conspiracy . . . to violate . . . any law or regulation of a State . . . relating to a controlled substance . . . is deportable.”<sup>71</sup> The immigration judge hearing the case agreed with the INS that the alien was deportable under this provision.<sup>72</sup> The alien appealed this finding to the BIA.<sup>73</sup>

Second, the INS contended that the alien was guilty of a drug trafficking crime and therefore an aggravated felon, deportable under the INA.<sup>74</sup> In addressing the INS’s claims, the trial judge considered the INA’s drug offense, aggravated felony category—“illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in [18 U.S.C. § 924(c)])”<sup>75</sup>—and § 924(c)’s definition of “drug trafficking crime”—“any felony punishable under the Controlled Substances Act . . . [or other federal drug laws].”<sup>76</sup> The judge found that because the elements of drug-distribution conspiracy under the CSA differed from those of Maryland common law, the alien’s state conspiracy crime was “not sufficiently analogous” to a federal conspiracy crime for his crime to be characterized as “drug trafficking” under the catchall provision.<sup>77</sup> Since the alien’s crime was neither “illicit trafficking” in the general sense nor drug trafficking under the CSA, he was not an aggravated felon.<sup>78</sup> The INS appealed this finding to the BIA, contending that the judge should have analogized the underlying offense of cocaine distribution to federal law and not the offense of conspiracy.<sup>79</sup>

On appeal to the BIA, the alien made the following “argument” against aggravated felon deportability: “My very resistance Appeal on the Case Mostly is Because, I do have a Wife in the U.S. and I also do have a 3 1/2 months old baby. Those my reasons why to Appeal the Case thank you.”<sup>80</sup> The BIA rejected this reasoning for failure “to meaningfully identify the specific aspects of the immigration judge’s order that the respondent

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70. *Id.*

71. *Id.* (citing Immigration Act of 1990 § 241(a)(2)(B)(i), 104 Stat. at 5080 (1990) (current version at 8 U.S.C. § 1227(a)(2)(B)(i) (2000))).

72. *Id.* at 536–37.

73. *Id.* at 537.

74. *Id.* (citing Immigration Act of 1990 § 241(a)(4)(B), 104 Stat. at 5080 (1990) (current version at 8 U.S.C. § 1227 (a)(2)(A)(iii) (2000))).

75. 8 U.S.C. § 1101(a)(43)(B) (2000).

76. 18 U.S.C. § 924(c)(2) (2000).

77. *Davis*, 20 I. & N. Dec. at 539.

78. *Id.*

79. *Id.*

80. *Id.* at 537.



considers to be incorrect”<sup>81</sup> and summarily dismissed the alien’s appeal pursuant to an INA regulation permitting the summary dismissal of appeals based on insufficient reasoning.<sup>82</sup>

The BIA found the alien deportable under § 1251(a)(2)(B)(i), which mooted the INS’s appeal of the immigration judge’s aggravated felony finding.<sup>83</sup> However, the BIA decided to address the merits of the INS’s appeal “because of the significant legal questions presented” regarding the classification of the alien’s offense and also because of the immigration consequences for the alien of an aggravated felony conviction.<sup>84</sup> According to the BIA, for aggravated felony purposes, the immigration judge should have analyzed the underlying crime of cocaine distribution, not the conspiracy to distribute cocaine.<sup>85</sup> By analyzing the plain language meanings of “illicit” and “trafficking,” the BIA found that the alien’s actions made him an aggravated felon under the “illicit trafficking in a controlled substance” portion of 8 U.S.C. § 1101(a)(43).<sup>86</sup> The BIA then found that because the underlying crime of cocaine distribution was a felony under the CSA, his actions also fit the catchall provision of § 1101(a)(43).<sup>87</sup> The BIA therefore sustained the INS’s appeal.<sup>88</sup>

The *Davis* court’s analysis suggested what came to be called the Hypothetical Federal Felony Test (HFFT)<sup>89</sup> for whether a state drug offense constitutes an aggravated felony. Under this test, if the offense constitutes “illicit trafficking” under the plain language meaning of those words, the offense is an aggravated felony.<sup>90</sup> If not, the offense is an aggravated felony only if its elements make it analogous to a felony enumerated in the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.<sup>91</sup> The practical effect of

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81. *Id.* In the author’s experience, many pro se appellants to the BIA rely on this sort of appeal to the board members’ sympathies, with similarly little success.

82. *Id.* at 538 (citing 8 C.F.R. § 3.1(d)(1-a)(i)(A) (1992), amended by 68 Fed. Reg. 9830 (Feb. 28, 2003) (current version at 8 C.F.R. § 1003.1 (d)(2)(i)(D) (2006)) (“[The BIA] may summarily dismiss any appeal . . . in which . . . [t]he Board is satisfied, from a review of the record, that the appeal . . . lacks an arguable basis in fact or in law . . .”).

83. *Id.*

84. *Id.*

85. *See id.* at 541 n.5 (emphasizing that the elements of the underlying offense determine whether a conviction is for “‘illicit trafficking’ for purposes of determining a drug-related ‘aggravated felony’”).

86. *Id.* at 541, 545–46.

87. *Id.* at 545–46.

88. *Id.* at 546.

89. *See, e.g.,* United States v. Graham, 169 F.3d 787, 789 (3d Cir. 1999) (using this term in the Third Circuit).

90. *Davis*, 20 I. & N. Dec. at 545.

91. *Id.*

this test is that a misdemeanor offense under federal law that does not contain a trafficking element is not an aggravated felony, regardless of its classification under state law.

#### IV. ADVENT OF THE GUIDELINES APPROACH IN THE IMMIGRATION CONTEXT

The Second Circuit considered the aggravated felony consequences of a state drug conviction in *Jenkins v. INS*.<sup>92</sup> In that case, an immigrant entered New York illegally in 1982 but received temporary status in 1989.<sup>93</sup> In 1990, he pled

guilty in New York state court [to] attempted criminal possession of a controlled substance in the third degree, in violation of §§ 110.00 and 220.16 of the New York Penal Law. A lab report prepared in connection with the prosecution indicate[d] that [the alien] had in his possession a total of 20 grams of powder cocaine.<sup>94</sup>

The alien's crime constituted a felony under New York law but a misdemeanor under the CSA.<sup>95</sup> The INS initiated deportation proceedings against him because of the conviction, alleging that he was deportable on three grounds: (1) that he was an "immigrant not in possession of a valid entry document"; (2) that he was "an alien convicted of an offense involving a controlled substance"; and (3) that he was "an alien convicted of an aggravated felony."<sup>96</sup> For reasons that are unclear, "the INS [later] withdrew the aggravated felony [allegation]."<sup>97</sup> In 1993, "an Immigration Judge ordered [the alien] deported," and in 1994 the BIA upheld the order of deportation, dismissing the alien's appeal.<sup>98</sup> The BIA sustained the INS's first two allegations, finding that the alien's admissions established their truth.<sup>99</sup> The BIA further found the alien inadmissible (unable to enter the United States legally in the future) because of his illegal entry into the United States and his controlled-substance conviction.<sup>100</sup>

The alien appealed the BIA's findings to the Second Circuit and moved

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92. *Jenkins v. INS*, 32 F.3d 11, 14 (2d Cir. 1994).

93. *Id.* at 12.

94. *Id.*

95. *Id.* at 14.

96. *Id.* at 13.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

for a stay of deportation pending that court's decision on the merits of his appeal.<sup>101</sup> In doing so, he relied on a provision of the INA that mandated a stay of deportation pending the resolution of the appeal process where the alien has not been convicted of an aggravated felony.<sup>102</sup> At a hearing on the motion to stay deportation, the court granted a temporary stay pending its decision on the merits of the appeal.<sup>103</sup>

Whether the court could extend the temporary stay turned on whether the alien was an aggravated felon.<sup>104</sup> Analysis of this question constituted the bulk of the court's published opinion on the motion. The court considered three statutory provisions:

- 8 U.S.C. § 1101(a)(43): One type of aggravated felony is “illicit trafficking in a controlled substance (as defined in [the Controlled Substances Act]), including a drug trafficking crime as defined in [the CSA].”<sup>105</sup>
- 18 U.S.C. § 924(c): A drug trafficking crime is “any felony punishable under the [CSA or other federal drug laws].”<sup>106</sup>
- 21 U.S.C. § 802(13): The CSA defines a felony as “any Federal or State offense classified by applicable Federal or State Law as a felony.”<sup>107</sup>

The court then made three conclusions. First, because the alien's crime was a felony under New York law, § 802(13) made the crime a felony with respect to the CSA; that the amount of cocaine did not independently make him a felon under the CSA was immaterial.<sup>108</sup> Second, because the crime was a felony under the CSA (in the court's reasoning), it constituted a drug trafficking crime.<sup>109</sup> Third and finally, because the alien had committed a drug trafficking crime, he was an aggravated felon under the INA and therefore ineligible for a stay under 8 U.S.C. § 1105a(a)(3).<sup>110</sup>

The Second Circuit relied on the “any felony” language of the INA and on the felonious nature, in New York, of the alien's crime.<sup>111</sup> In doing so,

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101. *Id.* at 12.

102. *Id.* at 13 (citing 8 U.S.C. § 1105a(a)(3) (2000) (repealed 1996)).

103. *Id.*

104. *Id.* (citing 8 U.S.C. § 1105a(a)(3) (repealed 1996)).

105. *Id.*

106. *Id.* at 13–14.

107. *Id.* at 14.

108. *Id.* at 12, 14.

109. *See id.* at 13–14 (relying on the broad definition of “drug trafficking crime” as “any felony punishable under the Controlled Substances Act”).

110. *Id.*

111. *Id.* at 14.

the court established a new test, different from the HFFT, for whether state drug convictions constitute aggravated felonies. This test later came to be known as the Guidelines Approach (GA).<sup>112</sup> Under the GA, as originally set forth in *Jenkins*, an alien's state drug conviction makes him an aggravated felon if "(1) the conviction is a felony under *either state or federal law* and (2) the conduct underlying the conviction is punishable under [federal drug laws]."<sup>113</sup>

The Second Circuit's published opinion only addressed the merits of the alien's motion to stay deportation, not the merits of the immigration judge's finding that he was removable.<sup>114</sup> However, by describing the alien's petition as "meritless," the court intimated that that the alien would not prevail in his appeal.<sup>115</sup> There is no subsequent history in *Jenkins*, so the alien apparently let the appeal drop and accepted deportation by the INS.

In 1995, the BIA reaffirmed its choice of the HFFT in the immigration context.<sup>116</sup> The BIA disparaged *Jenkins* for its choice of the GA, but stated that the BIA would prospectively apply the GA in cases arising in the Second Circuit, citing the BIA's deference to the Second Circuit's clear choice of the GA.<sup>117</sup> This BIA case, *In re L- G-*, later caused the Second Circuit to drop the GA in favor of the HFFT in the immigration context.<sup>118</sup>

#### V. ADVENT OF THE GUIDELINES APPROACH IN THE SENTENCE- ENHANCEMENT CONTEXT

As described in Part I of this Note, the status of aggravated felon subjects aliens to enhanced sentences under the Federal Sentencing Guidelines for the crime of illegal reentry.<sup>119</sup> Because the Guideline at issue refers explicitly to the aggravated felon definition in the INA,<sup>120</sup> federal courts have had to construe aggravated felonies in the context of sentence enhancement. With respect to whether state drug convictions constitute aggravated felonies, those circuits that have considered the issue

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112. See, e.g., *Gerbier v. Holmes*, 280 F.3d 297, 304 (3d Cir. 2002) (using the phrase "Guidelines approach" within the Third Circuit).

113. *United States v. Palacios-Suarez*, 418 F.3d 692, 696 (6th Cir. 2005).

114. *Jenkins*, 32 F.3d at 14.

115. *Id.* at 15.

116. *In re L- G-*, 21 I. & N. Dec. 89, 101-02 (B.I.A. 1995), *modified by In re Yanez-Garcia*, 23 I. & N. Dec. 390, 396, 400 (B.I.A. 2002).

117. *Id.*

118. See *Aguirre v. INS*, 79 F.3d 315, 316 (2d Cir. 1996) (overruling *Jenkins* in light of the BIA's stated preference for the HFFT in *L- G-*).

119. FEDERAL SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2004).

120. *Id.* at cmt. 3(A).

have largely chosen the GA.<sup>121</sup> *United States v. Restrepo-Aguilar*,<sup>122</sup> although not the first case to adopt the GA in the sentence-enhancement context,<sup>123</sup> contains “the most thorough analysis” of the GA in this context.<sup>124</sup>

In *Restrepo-Aguilar*, the alien had pled nolo contendere to simple cocaine possession, a felony under the convicting Rhode Island law but a misdemeanor under the CSA.<sup>125</sup> The INS deported him but later apprehended him in Rhode Island after his illegal reentry into the United States.<sup>126</sup> He then pled “guilty to a charge of unlawful reentry into the United States after deportation. At sentencing, the district court added 16 offense levels under [the Federal Sentencing Guidelines] to [the alien’s] Guidelines sentence, based on a finding that he had been previously ‘deported after a conviction for an aggravated felony.’”<sup>127</sup> The alien appealed his sentence to the First Circuit, arguing that his earlier conviction did not constitute a felony under the CSA and that he was therefore not an aggravated felon.<sup>128</sup>

The First Circuit rejected this argument, noting that the alien’s view of § 924(c)(2) saw the provision as “defin[ing] ‘drug trafficking crime’ as any offense punishable *as a felony under the CSA.*”<sup>129</sup> But, as the court noted, “that is not how § 924(c)(2) is written. The statutory definition plainly does not require that an offense, in order to be a drug trafficking crime, be subject to a particular magnitude of punishment if prosecuted under the CSA . . . .”<sup>130</sup> As the First Circuit saw it, § 924(c)(2) required “only that the offense be a ‘felony punishable’” under the CSA.<sup>131</sup> Further, the First Circuit noted that the CSA defines a felony as “any Federal or State offense classified by applicable Federal or State law as a felony.”<sup>132</sup> Therefore, the First Circuit held that, at least in the sentence-enhancement context, a state drug conviction constitutes an aggravated felony conviction if: (1) the

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121. See *Gerbier v. Holmes*, 280 F.3d 297, 307 n.6 (3d Cir. 2002) (listing cases adopting the Guidelines Approach).

122. *United States v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996).

123. See *United States v. Forbes*, 16 F.3d 1294, 1301 (1st Cir. 1994) (applying the GA in the sentence-enhancement context).

124. *Gerbier*, 280 F.3d at 306. The summary of *Restrepo-Aguilar* that follows is indebted to the *Gerbier* majority opinion.

125. *Restrepo-Aguilar*, 74 F.3d at 363.

126. *Id.*

127. *Id.* at 362.

128. *Id.* at 363.

129. *Id.* at 364.

130. *Id.*

131. *Id.*

132. *Id.* at 364 (citing Controlled Substances Act § 102, 21 U.S.C. § 802(13) (2000)).

offense is punishable under the CSA; and (2) the offense is a felony under either the law of the convicting state or the CSA.<sup>133</sup> That the BIA had construed the INA differently in *L- G-* was immaterial because the context in that case was immigration rather than sentence enhancement, and in any case, the First Circuit was not bound by BIA precedent.<sup>134</sup>

The test elaborated in *Restrepo-Aguilar* became known as the Guidelines Approach because its primary application has been in sentence-enhancement cases such as *Restrepo-Aguilar*.<sup>135</sup> Contrary to the HFFT, a state felony drug conviction, punishable under the CSA as a misdemeanor, would constitute an aggravated felony.<sup>136</sup> In the sentence-enhancement context, the First, Second, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the GA.<sup>137</sup> The Sixth Circuit recently adopted the HFFT in the sentence-enhancement context and is the only circuit to have done so.<sup>138</sup>

#### VI. FIFTH CIRCUIT AND BIA ADOPT THE GA IN THE IMMIGRATION CONTEXT

In 1999, the BIA noted that the circuits' use of the GA in the sentence-enhancement context was in conflict with its use of the HFFT in the immigration context.<sup>139</sup> In response, the court reaffirmed its preference for the HFFT in the immigration context, emphasizing that the distinct sentence-enhancement and immigration contexts merited the use of different tests.<sup>140</sup> Two years later, the Fifth Circuit, which had previously adopted the GA in the sentence-enhancement context,<sup>141</sup> rejected this

133. *Id.*

134. *Id.* at 367 n.10.

135. *See, e.g.,* *Gerbier v. Holmes*, 280 F.3d 297, 304 (3d Cir. 2002) (calling the test the "Guidelines approach").

136. *See id.* at 299 (discussing the differences between the HFFT and the GA).

137. *See, e.g.,* *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000); *United States v. Pomes-Garcia*, 171 F.3d 142, 143, 148 (2d Cir. 1999); *United States v. Simon*, 168 F.3d 1271, 1272 (11th Cir. 1999); *United States v. Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997); *United States v. Briones-Mata*, 116 F.3d 308, 309 (8th Cir. 1997); *United States v. Garcia-Olmedo*, 112 F.3d 399, 400–01 (9th Cir. 1997); *United States v. Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996); *United States v. Polanco*, 29 F.3d 35, 38 (2d Cir. 1994) (adopting the GA in the sentence-enhancement context).

138. *United States v. Palacios-Suarez*, 418 F.3d 692, 700 (6th Cir. 2005).

139. *In re K- V- D-*, 22 I. & N. Dec. 1163, 1172 (B.I.A. 1999), *overruled by In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002).

140. *See In re K- V- D-*, 22 I. & N. Dec. at 1175 (noting that a uniform approach is needed in the immigration context and incorporating reasoning from *In re L- G-*, 21 I. & N. Dec. 89, 102 (B.I.A. 1995), to support its use of the HFFT).

141. *See Hinojosa-Lopez*, 130 F.3d at 694 (adopting reasoning from *United States v. Restrepo Aguilar*, 74 F.3d 361, 364–66 (1st Cir.1996), an earlier case that applied the GA).

“dichotomy” in *United States v. Hernandez-Avalos*, adopting the GA in the immigration context.<sup>142</sup>

In *Hernandez-Avalos*, the alien pled guilty in Colorado to possession of heroin, a felony under Colorado law, but a misdemeanor under the CSA.<sup>143</sup> The INS, refusing to apply BIA precedent adopting the HFFT in the immigration context,<sup>144</sup> deported the alien as an aggravated felon.<sup>145</sup> Shortly afterwards, border patrol agents in El Paso, Texas arrested the alien, and the INS charged him with illegal reentry into the United States.<sup>146</sup> Because of the alien’s aggravated felon status, the INS sought an enhanced penalty under the Federal Sentencing Guidelines.<sup>147</sup> The alien filed a motion to dismiss the indictment on the theory that the INS had incorrectly found him to be an aggravated felon and deportable alien, violating his Due Process rights.<sup>148</sup> The district court denied this motion, relying on an earlier Fifth Circuit case adopting the GA in the sentence-enhancement context.<sup>149</sup> In his appeal to the Fifth Circuit, the alien made two arguments; both were ultimately rejected by the court.<sup>150</sup>

First, he argued that the deportation was unfair because the INS had improperly failed to apply BIA precedent from *Davis* and other cases mandating the HFFT in the immigration context.<sup>151</sup> In other words, because the amount of heroin in his possession was not felonious under the CSA, he was not an aggravated felon, and the INS should not have found him deportable.<sup>152</sup> The Fifth Circuit conceded that the INS had failed to follow *Davis* but found this failure harmless because the BIA’s holding in *Davis* was “plainly incorrect.”<sup>153</sup> Under Fifth Circuit sentence-enhancement precedent, the alien was an aggravated felon.<sup>154</sup>

Second, the alien argued that *Hinojosa-Lopez*, the case in which the Fifth Circuit had chosen the GA, was inapposite because its context was different, sentence enhancement rather than immigration.<sup>155</sup> Rather, he

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142. *United States v. Hernandez-Avalos*, 251 F.3d 505, 509–10 (5th Cir. 2001).

143. *Id.* at 506, 508.

144. *See In re Davis*, 20 I. & N. Dec. 536, 540–46 (B.I.A. 1992) (applying the HFFT in the immigration context).

145. *Hernandez-Avalos*, 251 F.3d at 506.

146. *Id.*

147. *Id.*

148. *Id.* at 507.

149. *Id.*

150. *Id.* at 510.

151. *Id.* at 508.

152. *Id.*

153. *Id.* at 508–09.

154. *Id.* at 509.

155. *Id.*

argued, the court should apply the HFFT in the distinct immigration context, as the BIA had done in *In re K- V- D-*.<sup>156</sup> The court rejected this approach, stating that it would create a “dichotomy” between sentence-enhancement and immigration cases and that it was contrary to the plain language of the statutes involved.<sup>157</sup> Addressing the alien’s implicit argument that the lack of a uniform, substantive test for which state drug offenses constituted aggravated felonies (at least under the GA) was unfair, the court noted that such absence was “the consequence of a deliberate policy choice by Congress” that neither the Fifth Circuit nor the BIA could disregard.<sup>158</sup>

#### VII. THE THIRD CIRCUIT ADOPTS THE HFFT IN THE IMMIGRATION CONTEXT

*Hernandez-Avalos* represented a clear choice of the GA in the immigration context. But one year after *Hernandez-Avalos*, in *Gerbier v. Holmes*, the Third Circuit adopted the HFFT in the immigration context.<sup>159</sup> In 1997, authorities arrested the *Gerbier* alien, a Haitian national and lawful permanent resident of the United States, in possession of between five and fifty grams of crack cocaine.<sup>160</sup> The alien pled guilty to a drug crime defined as a felony under a Delaware statute.<sup>161</sup> Later that year, the INS issued the alien a notice to appear (a charging document), alleging that he was deportable as an aggravated felon.<sup>162</sup> The INS also alleged that he was deportable under 8 U.S.C. § 1227(a)(2)(B)(i), which makes deportable those aliens who are convicted of certain controlled substance crimes.<sup>163</sup> The immigration judge agreed with the INS that he was deportable under § 1227(a)(2)(B)(i) but found him not to be an aggravated felon.<sup>164</sup> The judge granted the alien’s application for cancellation of removal because the alien was not an aggravated felon.<sup>165</sup> The INS appealed this finding to the BIA, which reversed the grant, noting that the alien had a prior marijuana conviction, making him an aggravated felon ineligible for cancellation of

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156. *Id.* (citing *In re K- V- D-*, 22 I. & N. Dec. 1163, 1173 (B.I.A. 1999), *overruled by In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002)).

157. *Id.* at 509–10.

158. *Id.* at 510 (quoting *United States v. Restrepo-Aguilar*, 74 F.3d 361, 366 (1st Cir. 1996)).

159. *Gerbier v. Holmes*, 280 F.3d 297, 299 (3d Cir. 2002).

160. *Id.* at 300–01.

161. *Id.* at 301.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 301–02.



removal.<sup>166</sup> The alien then filed a habeas petition in a Pennsylvania federal district court, arguing that the BIA had “erred in determining that he was not eligible for cancellation of removal.”<sup>167</sup> Finding the BIA’s ruling proper, the federal court denied the petition.<sup>168</sup> The alien then appealed to the Third Circuit.<sup>169</sup>

The question facing the Third Circuit was whether the alien’s crack cocaine conviction, a felony under Delaware law but a misdemeanor under the CSA, made him an aggravated felon.<sup>170</sup> The court began its discussion with lengthy exegeses on the INA’s aggravated felony provisions,<sup>171</sup> on the HFFT,<sup>172</sup> and on the GA.<sup>173</sup> The court noted that because the statutory language at issue was ambiguous, legislative history merited consideration, and the court agreed with the dissent in an earlier sentence-enhancement case that legislative history supported the BIA’s HFFT.<sup>174</sup> The court also noted that inconsistent results caused by application of the GA in the immigration context would impinge on the federal government’s authority over immigration law.<sup>175</sup> Finally, the court noted that applying the GA in immigration cases would lead to the bizarre result that an alien might or might not be eligible for cancellation of removal depending on whether his state considered his drug crime a felony.<sup>176</sup> The Third Circuit therefore adopted the HFFT in the immigration context.<sup>177</sup> In light of this construal of the INA, the court “reverse[d] the judgment of the District Court and remand[ed] with instructions that it grant the [alien’s] writ” of habeas corpus.<sup>178</sup> This reversal of the district court allowed the alien to submit an application for cancellation of removal.<sup>179</sup>

Judge Reavley, visiting the Third Circuit from the Fifth, sat on the *Gerbier* panel.<sup>180</sup> Though he acknowledged the eloquence of Judge Becker’s majority opinion, he dissented because “too many circuit courts

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166. *Id.* at 302.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 298.

171. *Id.* at 303.

172. *Id.* at 304–06.

173. *Id.* at 306–08. Puzzlingly, Chief Judge Becker’s otherwise well-crafted opinion cited *Hernandez-Avalos* as espousing the GA in the sentence-enhancement context. *Id.* at 307 n.6.

174. *Id.* at 308–09.

175. *Id.* at 311–12.

176. *Id.* at 312.

177. *Id.* at 310–11.

178. *Id.* at 318.

179. *Id.*

180. *Id.* at 298.

[had] chosen the other way”—that is, the GA.<sup>181</sup> Many other circuit courts *had* chosen the GA, but in the context of sentence enhancement, not of immigration.<sup>182</sup> Judge Reavley left unstated his premise that the differing contexts of sentence enhancement and of immigration did not merit separate tests.

#### VIII. BIA ADOPTS THE GA IN THE IMMIGRATION CONTEXT

*Hernandez-Avalos* caused the BIA to retreat from the HFFT. In *In re Salazar*, the BIA switched to the GA in cases arising in the Fifth Circuit, deferring to the Fifth Circuit’s construal of the INA in *Hernandez-Avalos*.<sup>183</sup> *Salazar* did not address the question of whether the HFFT still applied to BIA decisions in cases arising in other circuits.<sup>184</sup> However, *In re Yanez-Garcia*, decided later in 2002, extended *Salazar*’s choice of the GA in the immigration context to all other circuits save those that had explicitly chosen the HFFT.<sup>185</sup> This change for “silent circuits” had four bases:

- The GA was the majority rule among circuits that construed the relevant section of the INA.<sup>186</sup> The BIA implicitly found insignificant the fact that in all but one case, *Hernandez-Avalos*, the circuits were construing the INA in the sentence-enhancement context, not the immigration context.<sup>187</sup>
- The BIA found that the GA interpretation of the INA bore “considerable logical force and [that it flowed] coherently and intuitively from the relevant statutory language.”<sup>188</sup>
- The HFFT had only been independently adopted by a divided panel of the Third Circuit, and it “require[d] adjudicators to engage in an often-convoluted hypothetical analysis that can be difficult to apply in practice.”<sup>189</sup>

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181. *Id.* at 318 (Reavley, J., dissenting).

182. *See id.* at 307 n.6 (majority opinion) (giving examples of circuit courts adopting the GA in the sentence-enhancement context).

183. *In re Salazar*, 23 I. & N. Dec. 223, 235 (B.I.A. 2002) (citing *In re K- S-*, 20 I. & N. Dec. 715, 719–20 (B.I.A. 1993) (requiring federal agencies to apply a circuit’s precedents in cases arising in that circuit)).

184. *Id.* at 235 n.5.

185. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 396–98 (B.I.A. 2002).

186. *Id.* at 397–98.

187. *See Gerbier*, 280 F.3d at 307 n.6 (giving examples of circuit courts adopting the GA in the sentence-enhancement context).

188. *Yanez-Garcia*, 23 I. & N. Dec. at 397.

189. *Id.* at 397–98.

- Finally, the Attorney General had not espoused a view contrary to that of the circuits adopting the GA.<sup>190</sup>

A lengthy concurrence and dissent accompanied the majority opinion in *Yanez-Garcia*. Board Members Rosenberg and Espenoza, although agreeing that the alien in the case was removable,<sup>191</sup> found that the change was impermissibly retroactive,<sup>192</sup> and they criticized the majority's choice of the GA on policy grounds.<sup>193</sup> *Yanez-Garcia* remains good law,<sup>194</sup> however, and in light of the fact that Rosenberg and Espenoza are no longer Board Members,<sup>195</sup> its prospects for reversal in the absence of guidance from the Supreme Court appear slim.

#### IX. OTHER COURTS ADOPT THE HFFT

One basis for *Yanez-Garcia* was that, at the time of its decision, only one circuit, the Third, had adopted the HFFT in the immigration context.<sup>196</sup> But in subsequent years, the Ninth Circuit<sup>197</sup> and a Seventh Circuit district court also did so.<sup>198</sup> The Sixth Circuit adopted the HFFT in both the sentence-enhancement and immigration contexts.<sup>199</sup> Use of the HFFT, at least in the immigration context, is therefore the majority rule among circuits that have considered the matter.

#### X. ANALYSIS OF ARGUMENTS

This Note has alluded to some arguments for applying the HFFT rather than the GA. The section that follows elaborates upon these arguments and proposes several more.

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190. *Id.* at 398.

191. *Id.* at 412 (Rosenberg and Espenoza, Board Members, concurring and dissenting).

192. *Id.* at 415–17.

193. *Id.* at 402–03, 411–13.

194. *See* *United States v. Palacios-Suarez*, 418 F.3d 692, 695 n.1 (6th Cir. 2005) (implying that the BIA still follows *Yanez-Garcia*).

195. *See* Fact Sheet, U.S. Dept. of Justice, Executive Office for Immigration Review, Board of Immigration Appeals (June 2005), <http://www.usdoj.gov/eoir/fs/biabios.htm> (listing biographical information of current board members and failing to include Rosenberg and Espenoza).

196. *Yanez-Garcia*, 23 I. & N. Dec. at 397.

197. *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004). The Ninth Circuit's choice of the HFFT in the immigration context had three bases. First, the court cited its desire for uniform application of the immigration laws. *Id.* at 912. Second, the court raised legislative intent arguments, citing also those of *Gerbier*. *Id.* at 914–17. Third and finally, the court noted the potential inequity that application of the GA in the immigration context could create. *Id.* at 917–18.

198. *Gonzales-Gomez v. Achim*, 372 F. Supp. 2d 1062, 1069 (N.D. Ill. 2005).

199. *United States v. Palacios-Suarez*, 418 F.3d 692, 700 (6th Cir. 2005).

### A. Plain Language Is Ambiguous

The INA defines the drug trafficking aggravated felony as “illicit trafficking in a controlled substance (as defined in [the Controlled Substances Act]), including a drug trafficking crime (as defined in [18 U.S.C. § 924(c)].”<sup>200</sup> The CSA defines a “drug trafficking crime” as “any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.”<sup>201</sup> The ambiguity of these provisions lies in the phrase “any felony punishable under.” If the phrase said “any crime punishable as a felony under,” plain language would clearly favor the HFFT.<sup>202</sup> If the phrase said “any felony, state or federal, that is punishable under,” plain language would clearly favor the GA.<sup>203</sup> This ambiguity did not prevent the Fifth Circuit from asserting “that the statutory language is clear” in favor of the GA.<sup>204</sup> The Second Circuit, however, found “[t]he statutory point [to be] fairly debatable.”<sup>205</sup> The concurring and dissenting Board Members in *Yanez-Garcia*, though they favored the HFFT, conceded that an interpretation favoring the GA was neither “unsupported [n]or unsupported.”<sup>206</sup> In light of the ambiguity of these provisions, as evidenced by disagreement among the circuits and the BIA, plain language analysis is not dispositive.

Although this Note favors the HFFT, it should be noted, in fairness to the GA, that the “trafficking component” subtest of the HFFT does not spring directly from the statutory language cited above.<sup>207</sup> The INA does mention “drug trafficking” and “illicit trafficking,” but, unlike the HFFT, the INA does not state that any drug crime with a trafficking component is an aggravated felony.<sup>208</sup> Rather, when the BIA developed the HFFT in *Davis*, this subtest sprang from the BIA’s reading of the words “trafficking”

200. 8 U.S.C. § 1101(a)(43)(B) (2000).

201. 18 U.S.C. § 924(c)(2) (2000) (citation omitted).

202. *See, e.g., Gerbier v. Holmes*, 280 F.3d 297, 299 (3d Cir. 2002) (defining the HFFT as follows: “[A] state drug conviction, whether it be a felony or a misdemeanor, must either contain a ‘trafficking’ component or be punishable as a felony under federal law in order for it to constitute an ‘aggravated felony.’”).

203. *See, e.g., Palacios-Suarez*, 418 F.3d at 696 (defining the GA as follows: “[A] state drug conviction is a ‘drug trafficking crime’ and therefore an ‘aggravated felony’ if (1) the conviction is a felony under either state or federal law and (2) the conduct underlying the conviction is punishable under [federal drug laws].”).

204. *United States v. Hernandez-Avalos*, 251 F.3d 505, 510 (5th Cir. 2001).

205. *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996).

206. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 402 (B.I.A. 2002) (Rosenberg and Espenozza, Board Members, concurring and dissenting).

207. *See Gerbier*, 280 F.3d at 299 (defining the HFFT).

208. 8 U.S.C. § 1101(a)(43)(B) (2000); *Gerbier*, 280 F.3d at 299 (defining the HFFT).

and “illicit” and what Congress must have intended by using them.<sup>209</sup> If the HFFT prevails and if Congress agrees with the BIA’s reasoning in *Davis*, Congress should amend the INA to clarify that drug crimes with trafficking components are aggravated felonies, regardless of their status as felonies or misdemeanors. This would reify the trafficking component subset of the HFFT.

### B. Negative Legislative History Supports the HFFT

The Third Circuit in *Gerbier v. Holmes*<sup>210</sup> and the Sixth Circuit in *Palacios-Suarez*<sup>211</sup> offered legislative history in support of the HFFT. The concurrence in *Palacios-Suarez* did not find these arguments to be compelling despite agreeing with the majority’s result.<sup>212</sup> The positive legislative history of the INA—that is, what Congress did and said with respect to the INA—therefore appears ambiguous. But the *negative* legislative history of the INA, that is, what Congress did not do or say with respect to the INA, favors the HFFT.

Courts presume that Congress is aware of judicial interpretations of the laws it passes.<sup>213</sup> Indeed, the House Report to the Crime Control Act of 1990 noted that the Act was incorporating the BIA’s holding in *Barrett*.<sup>214</sup> But from 1992, the year the BIA stated its preference for the HFFT in the immigration context,<sup>215</sup> until 2002, when the BIA abandoned it in this context,<sup>216</sup> Congress passed no legislation imposing the GA in the immigration context. Congress did, however, amend 8 U.S.C. § 1101, which contains the definitions of “aggravated felony” and other immigration concepts, twenty-two times from 1992 to 2002.<sup>217</sup> Congress

209. *In re Davis*, 20 I. & N. Dec. 536, 540–42 (B.I.A. 1992).

210. *Gerbier*, 280 F.3d at 308–09.

211. *United States v. Palacios-Suarez*, 418 F.3d 692, 698–700 (6th Cir. 2005).

212. *Id.* at 701–02 (Nelson, J., concurring) (arguing that the rule of lenity, not legislative history, should have weighed most heavily in determining the case).

213. *Scheidemann v. INS*, 83 F.3d 1517, 1525 (3d Cir. 1996).

214. H.R. REP. NO. 101-681, pt. 1, at 147 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6553.

215. *In re Davis*, 20 I. & N. Dec. 536, 544 (B.I.A. 1992).

216. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 390–91 (B.I.A. 2002).

217. *See* Act of Apr. 30, 1994, Pub. L. No. 103-236, tit. I, § 162(h)(1), 108 Stat. 407; Act of Sept. 13, 1994, Pub. L. No. 103-322, tit. XIII, § 130003(a), 108 Stat. 2024; Act of Oct. 5, 1994, Pub. L. No. 103-337, div. C, tit. XXXVI, § 3605, 108 Stat. 3113; Act of Oct. 25, 1994, Pub. L. No. 103-416, tit. II, §§ 201, 202, 214, 219(a), 222(a), 108 Stat. 4310, 4311, 4314, 4316, 4320; Act of Nov. 15, 1995, Pub. L. No. 104-51, § 1, 109 Stat. 467; Act of Apr. 24, 1996, Pub. L. No. 104-132, tit. IV, § 440(b), (c), 110 Stat. 1277; Act of Sept. 30, 1996, Pub. L. No. 104-208, div. C, tit. I, § 104(a), tit. III, §§ 301(a), 308(d)(3)(A), (4)(A), (e)(3), (f)(1)(A), (B), 321(a), (b), 322(a)(1), (2)(A), 361(a), 371(a), tit. VI, §§ 601(a)(1), 625(a)(2), 671(a)(3)(B), (b)(5), (e)(2), 110 Stat. 3009-555, 3009-575, 3009-617, 3009-620, 3009-621, 3009-627 to 3009-629, 3009-644, 3009-645, 3009-689, 3009-700, 3009-721 to 3009-723;

also amended 18 U.S.C. § 924, which defines “drug trafficking crime” and other concepts, five times from 1992 to 2002.<sup>218</sup> This suggests that, even if Congress did not “intend” that courts adopt the HFFT in the immigration context, Congress accepted the courts’ use of the HFFT.<sup>219</sup> Of course, as 2002, the year the BIA adopted the GA in the immigration context, recedes into history without congressional reaction, this negative legislative history increasingly favors the GA.

### C. Majority Rule Is Ambiguous

A simple resolution to the GA versus HFFT debate would be for the Supreme Court to pick the majority rule, reversing rogue, minority circuits. But the question arises: what majority? All circuits that have considered the question, with the exception of the Sixth Circuit, favor the GA in the sentence-enhancement context.<sup>220</sup> But in the immigration context, the circuits are four to one in favor of the HFFT.<sup>221</sup> There are, therefore, two

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Act of Oct. 6, 1997, Pub. L. No. 105-54, § 1(a), 111 Stat. 1175; Act of Nov. 26, 1997, Pub. L. No. 105-119, tit. I, § 113, 111 Stat. 2460; Act of Oct. 21, 1998, Pub. L. No. 105-277, div. C, tit. IV, § 421, div. G, tit. XXII, § 2222(e), 112 Stat. 2681-657, 2681-819; Act of Oct. 30, 1998, Pub. L. No. 105-319, § 2(b)(1), (e)(2), formerly (d)(2), 112 Stat. 3014, 3015, renumbered § 2(e)(2); Act of Nov. 12, 1999, Pub. L. No. 106-95, § 2(a), (c), 113 Stat. 1312, 1316; Act of Dec. 7, 1999, Pub. L. No. 106-139, § 1(a), (b)(1), 113 Stat. 1696; Act of Oct. 6, 2000, Pub. L. No. 106-279, tit. III, § 302(a), (c), 114 Stat. 838, 839; Act of Oct. 28, 2000, Pub. L. No. 106-386, div. A, § 107(e)(1), (4), div. B, tit. V, §§ 1503(a), 1513(b), 114 Stat. 1477, 1479, 1518, 1534; Act of Oct. 30, 2000, Pub. L. No. 106-395, tit. II, § 201(a)(1), 114 Stat. 1633; Act of Nov. 1, 2000, Pub. L. No. 106-409, § 2(a), 114 Stat. 1787; Act of Nov. 22, 2000, Pub. L. No. 106-536, § 1(a) 114 Stat. 2560; Act of Dec. 21, 2000, Pub. L. No. 106-553, § 1(a)(2) [tit. XI, §§ 1102(a), 1103(a)], 114 Stat. 2762, 2762A-142, 2762A-144; Act of Jan. 16, 2002, Pub. L. No. 107-125, § 2(b), 115 Stat. 2403; Act of Nov. 2, 2002, Pub. L. No. 107-274, § 2(a), (b) 116 Stat. 1923 (amending 8 U.S.C. § 1101 but not resolving the ambiguity).

218. Act of Nov. 30, 1993, Pub. L. No. 103-159, tit. I, § 102(c), tit. III, § 302(d), 107 Stat. 1541, 1545; Act of Sept. 13, 1994, Pub. L. No. 103-322, tit. VI, § 60013, tit. XI, §§ 110102(c), 110103(c), 110201(b), 110401(e), 110503, 110504(a), 110507, 110510, 110515(a), 110517, 110518(a), tit. XXXIII, §§ 330002(h), 330002(f)(2), 3330011(i), (j), 330016(1)(H), (K), (L), 108 Stat. 1973, 1998, 1999, 2011, 2015, 2016, 2018–2020, 2140, 2141, 2145, 2147; Act of Oct. 11, 1996, Pub. L. No. 104-294, tit. VI, § 603(m)(1), (n)–(p)(1), (q)–(s), 110 Stat. 3505; Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469; Act of Nov. 2, 2002, Pub. L. No. 107-273, div. B, tit. IV, § 4002(d)(1)(E), div. C, tit. I, § 1109(e)(3), 116 Stat. 1809, 1821 (amending 18 U.S.C. § 924 but not resolving the ambiguity).

219. See also *Gonzales-Gomez v. Achim*, 372 F. Supp. 2d 1062, 1072–73 (N.D. Ill. 2005) (espousing this negative-history argument).

220. See *Gerbier v. Holmes*, 280 F.3d 297, 307 n.6 (3rd Cir. 2002) (giving examples of circuit courts adopting the GA in the sentence-enhancement context).

221. See, e.g., *United States v. Palacios-Suarez*, 418 F.3d 692, 700–01 (6th Cir. 2005) (favoring the HFFT in both contexts); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912, 919 (9th Cir. 2004) (favoring the HFFT in the immigration context); *Gerbier*, 280 F.3d at 299 (3d Cir. 2002) (favoring the HFFT in the immigration context); *United States v. Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir. 2001) (favoring the GA in the immigration context); *Aguirre v. INS*, 79 F.3d 315, 317–18 (2d Cir. 1996) (favoring the HFFT in the immigration context).

majority rules, each one favoring a different test. The rule the Supreme Court might someday consider as the majority rule depends on whether the Court accepts the validity of the context distinction central to the Second and Ninth Circuits' dichotomous approach. If the Court rejects this distinction, the dichotomous circuits could be viewed as inconsistently applying their own precedent.

*D. HFFT Comports with Consistent Application of Immigration Laws*

The Constitution states that immigration is a federal, specifically a congressional, prerogative: "The Congress shall have power . . . [t]o establish an [sic] uniform rule of naturalization . . . throughout the United States . . ." <sup>222</sup> Alexander Hamilton, arguing that New York should adopt the Constitution, wrote that the power of naturalization "must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE."<sup>223</sup> But the GA, at least in the immigration context, takes this power away from Congress, in that it may make an alien ineligible for citizenship because of the vagaries of state law.

For example, in North Dakota, an alien could be found guilty of a felony if caught with forty-five grams of marijuana,<sup>224</sup> but that same alien, caught with the same quantity of the same controlled substance in Montana, could only be found guilty of a misdemeanor.<sup>225</sup> Because the INA can preclude citizenship for aggravated felons,<sup>226</sup> the alien would, under the GA, be eligible for citizenship if caught in Montana but not North Dakota. As another example, in Delaware, an alien could be found guilty only of a misdemeanor if caught in possession of a small amount of cocaine,<sup>227</sup> but in Texas, that same alien could be found guilty of a felony if caught in possession of *any* quantity of cocaine.<sup>228</sup> As in the previous example, under the GA, the alien would be eligible for citizenship if caught in one state but

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222. U.S. CONST. art. I, § 8, cls. 1, 4.

223. THE FEDERALIST NO. 32, at 195 (Alexander Hamilton) (Sherman F. Mittell ed.).

224. N.D. CENT. CODE §§ 19-03.1-05(5)(t), 19-03.1-23(6) (2004).

225. MONT. CODE ANN. § 45-9-102(2) (2005). This example is from *Gerbier v. Holmes*, 280 F.3d 297, 312 (3d Cir. 2002), which cites to MONT. CODE ANN. § 45-102(2) (2001).

226. See 8 U.S.C. § 1427(a)(3), (e) (2000) (stating that conduct is a determinative factor in the Attorney General's decision to naturalize an applicant and requiring that an applicant for naturalization be "a person of good moral character"); 8 U.S.C. § 1101(f)(8) (stating that a person convicted of an aggravated felony cannot be found to have "good moral character").

227. DEL. CODE ANN. tit. 16, § 4753 (2006).

228. See TEX. HEALTH & SAFETY CODE ANN. § 481.102(3)(D) (Vernon 2001) (placing cocaine in "Penalty Group 1"); TEX. HEALTH & SAFETY CODE ANN. § 481.115(b)-(f) (Vernon 2001) (making all Penalty Group 1 offenses felonies).

not the other.<sup>229</sup> Assuming that immigration law is a congressional prerogative, the fact that the HFFT avoids this inconsistency makes it preferable to the GA. Under the HFFT, a state drug conviction that does not contain a trafficking element constitutes an aggravated felony only if it is punishable as a felony under a single body of law: the United States Code.<sup>230</sup>

#### *E. Rule of Lenity Supports the HFFT in the Immigration Context*

Black's Law Dictionary defines the rule of lenity as follows: "The judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment."<sup>231</sup> As Judge Nelson noted in *Palacios-Suarez*, this rule favors the HFFT in the sentence-enhancement context because the United States Code provisions at issue are ambiguous, and the context is criminal punishment—more precisely, enhancement thereto.<sup>232</sup> Because immigration litigation is civil in nature, not criminal,<sup>233</sup> the rule of lenity's relevance to the immigration context is not immediately apparent. But the Supreme Court stated in *Fong Haw Tan v. Phelan* that because "the stakes are considerable [in deportation proceedings] for the individual, we will not assume that Congress meant to trench on [the alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used."<sup>234</sup> "This [rule recognizes] the very harsh consequences of deportation, characterized by Supreme Court Justice Brandeis as 'depriving an alien of life or of all that makes life worth living.'"<sup>235</sup> *Fong Haw Tan* suggests that the rule of lenity, which favors the HFFT,<sup>236</sup> should apply in the immigration context. The HFFT is less "harsh" than the GA in the case of drug crimes that are not felonies under the CSA and that do not contain a trafficking component.<sup>237</sup>

229. See 8 U.S.C. § 1427(e) (stating that the Attorney General shall determine the "good moral character" of an applicant for naturalization based on the applicant's prior conduct).

230. See *Gerbier v. Holmes*, 280 F.3d 297, 299 (3d Cir. 2002) (defining the HFFT).

231. BLACK'S LAW DICTIONARY 1359 (8th ed. 2004). See also *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221–22 (1952) (stating the rule of lenity without naming it).

232. *United States v. Palacios-Suarez*, 418 F.3d 692, 702 (6th Cir. 2005) (Nelson, J., concurring).

233. See *Chavez-Raya v. INS*, 519 F.2d 397, 400 (7th Cir. 1975) (stating that deportation proceedings are civil, not criminal, in nature).

234. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

235. Gerald Seipp, *The Aggravated Felony Concept in Immigration Law: Traps for the Unwary and Opportunities for the Knowledgeable*, IMMIGRATION BRIEFINGS, Jan. 2002, at 4 (paraphrasing *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

236. *Palacios-Suarez*, 418 F.3d at 702 (Nelson, J., concurring).

237. See *Gerbier v. Holmes*, 280 F.3d 297, 299 (3d Cir. 2002) (defining the HFFT); *Palacios-*



But under both tests, drug crimes that are felonies under the CSA receive the same aggravated felony treatment.<sup>238</sup>

#### F. Retributivism and Utilitarianism

Another method of comparing the HFFT and GA is through the lens of punishment theory. Because immigration proceedings are civil in nature, not criminal,<sup>239</sup> arguably theories of punishment are not relevant to the immigration context. But the immigration consequences of aggravated felonies under the INA<sup>240</sup> do fit at least one commentator's definition of punishment: "Punishment in all its forms is a loss of rights or advantages consequent on a breach of law."<sup>241</sup> In the immigration context, a "breach" of federal or state drug laws causes an alien to lose the "rights" to naturalize,<sup>242</sup> to leave the United States under voluntary departure,<sup>243</sup> to be granted asylum,<sup>244</sup> or to have removal cancelled by an immigration judge.<sup>245</sup> Therefore, theories of punishment should influence the resolution of which test, the HFFT or the GA, courts use in the immigration context. Discussions of two such theories, both of which favor the HFFT, follow.

The retributivist theory of punishment holds that "punishment is justified when it is deserved. It is deserved when the wrongdoer freely chooses to violate society's rules."<sup>246</sup> This theory is not new—the Bible states that "he that killeth a beast shall make it good; beast for beast."<sup>247</sup> The ADAA, which created the category of aggravated felony, may have reflected a desire on the part of Congress to implement the retributivist theory of punishment.<sup>248</sup> That is, the drafters may have believed that aliens who commit certain crimes deserve the negative immigration consequences

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*Suarez*, 418 F.3d at 696 (6th Cir. 2005) (defining the GA).

238. *Id.*

239. *See Chavez-Raya v. INS*, 519 F.2d 397, 400 (7th Cir. 1975) (stating that deportation proceedings are civil, not criminal, in nature).

240. *See supra* Part I.A (describing the forms of immigration relief precluded by aggravated felonies).

241. GLANVILLE WILLIAMS, *CRIMINAL LAW* 575 (2d ed. 1961).

242. *See* 8 U.S.C. § 1427(e) (2000) (stating that conduct is a determinative factor in the Attorney General's decision to naturalize an applicant).

243. *Id.* § 1229c(a)(1), (b)(1)(B).

244. *Id.* § 1158(b)(2)(A)(ii), (b)(2)(B)(i).

245. *Id.* § 1229b(a).

246. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 16 (3d ed. 2001).

247. *Leviticus* 24:18 (King James).

248. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, pmb1., 102 Stat. 4181 (stating that Congress enacted the ADAA "[t]o prevent the manufacturing, distribution, and use of illegal drugs, and for other purposes" (emphasis added)) (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and other titles).

added to the INA by the ADAA.<sup>249</sup> If so, the GA is at odds with consistent application of retributivism. How can alien A, found guilty of simple marijuana possession in a state that makes such a crime a felony, “deserve” to be ineligible for citizenship more than alien B, found guilty of simple marijuana possession in a state where such a crime is a misdemeanor?<sup>250</sup> The Bible does *not* say “he that killeth a beast shall make it good; beast—or perhaps ten beasts, depending on the state in which he hath killed a beast—for beast.”<sup>251</sup> Use of the HFFT in the immigration context avoids this “ten beasts” absurdity because the classification of a conviction is dependant only on whether the offense has a trafficking element or is punishable as a felony under federal drug laws.<sup>252</sup>

Proponents of the utilitarian theory of punishment “believe that the pain inflicted by punishment is justifiable if, but only if, it is expected to result in a reduction in the pain of crime that would otherwise occur.”<sup>253</sup> Applying this theory to the context of aggravated felonies and immigration, utilitarianism suggests that the pain of negative immigration consequences inflicted on aliens who commit drug crimes is expected to result in a reduction of the pain of drug crime American society would otherwise experience. This proposition is at least colorable in the case of an alien convicted of state felony simple possession, where the results of the HFFT and GA differ.<sup>254</sup> That is, by suffering the “pain” of removability<sup>255</sup> and ineligibility for citizenship,<sup>256</sup> an alien is removed from the United States and can no longer support the illegal drug industry by continuing to buy illegal drugs (assuming she was buying them), and the illegal drug trade, at least in the United States, is weakened.<sup>257</sup> An awareness of the draconian consequences for drug use might also discourage drug use among aliens, benefiting society.

However, the GA faces the following utilitarian criticism: in certain

249. See *supra* Part I.A (describing the forms of immigration relief precluded by aggravated felonies).

250. See *United States v. Palacios-Suarez*, 418 F.3d 692, 696 (6th Cir. 2005) (defining the GA).

251. *Leviticus* 24:18 (King James) (disjunctive clause added). For further critique of draconian punishments from a Biblical perspective, see Paul M. Bischke, *An Eye for an Eye: Get Tough Laws Under Biblical Scrutiny*, NOV. COALITION, Oct.–Nov. 1997, <http://www.november.org/razorwire/rzold/04/0407.html>.

252. See *Gerbier v. Holmes*, 280 F.3d 297, 299 (3d Cir. 2002) (defining the HFFT).

253. DRESSLER, *supra* note 246, at 14.

254. See *Gerbier*, 280 F.3d at 299; *Palacios-Suarez*, 418 F.3d at 696 (defining the HFFT and GA—note that under the HFFT, unlike the GA, the status of a crime as a state felony is not sufficient to make a crime an aggravated felony).

255. 8 U.S.C. § 1227(a)(2)(A)(iii) (2000).

256. See *id.* § 1427 (outlining the requirements for citizenship).

257. The footnoted sentence and the three that follow adopt, *arguendo*, the unstated premise of the ADAA that illegal drug use is inherently harmful to society and to individuals.

circumstances, it leads to an infliction of pain on aliens removed from the United States that is disproportionate to the benefit derived by society from the infliction of pain. In the case of serious drug crimes, such as trafficking, this pain is justifiable because the benefit to society at large is apparent. But the GA and HFFT do not differ in outcome with respect to serious drug crimes—the former makes such crimes aggravated felonies because they are punishable as felonies under state or federal law and are punishable under federal drug law. The latter makes them aggravated felonies because they contain a trafficking element or are punishable as felonies under federal drug law.<sup>258</sup> But how does society benefit where the tests differ, where an alien's friend gives him a joint, and the alien is caught, convicted, and removed? As described in the preceding paragraph, there may be a deterrent benefit to society, but this benefit is speculative. The cost to the alien is clear: the destruction of the life he has built in the United States. As the alien in *Davis* noted, this cost falls on not just the alien, but on his entire family.<sup>259</sup> The reality of this cost relative to the speculative benefit of punishment suggests that the GA is incompatible with the net benefit goal of utilitarianism, at least where the outcomes of the two tests differ.

#### G. Distortion of and Interference with Criminal Sentencing

The BIA criticized the HFFT for “requir[ing] adjudicators to engage in an often-convoluted hypothetical analysis that can be difficult to apply in practice.”<sup>260</sup> This criticism suggests that the BIA favors doctrines that simplify the work of trial and immigration judges. But the GA actually complicates their work, as illustrated in *In re Cota-Vargas*.<sup>261</sup> In *Cota-Vargas*, the alien, a lawful permanent resident of the United States, was convicted of receiving stolen property in California and “sentenced to 3 years of formal probation and a 365-day term of probationary detention in county jail.”<sup>262</sup> This conviction made the alien an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii), and the INS instituted removal proceedings against him in immigration court.<sup>263</sup> The alien then petitioned the trial judge to reduce his jail sentence *nunc pro tunc* to less than one year so that he could seek a waiver of deportation from the INS.<sup>264</sup> The trial judge

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258. See *Gerber*, 280 F.3d at 299; *Palacios-Suarez*, 418 F.3d at 696 (defining the HFFT and GA).

259. *In re Davis*, 20 I. & N. Dec. 536, 537 (B.I.A. 1992).

260. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 397–98 (B.I.A. 2002).

261. *In re Cota-Vargas*, 23 I. & N. Dec. 849 (B.I.A. 2005).

262. *Id.* at 849–50.

263. *Id.* at 850.

264. *Id.*

granted this petition without comment, reducing the jail sentence to 240 days.<sup>265</sup> The alien then moved in immigration court to terminate removal proceedings, arguing that he was no longer an aggravated felon.<sup>266</sup> The immigration judge denied this motion, noting that the sentence change was purely for immigration purposes.<sup>267</sup> The alien appealed to the BIA,<sup>268</sup> which reversed, noting that because the alien was no longer a felon under California law, he was no longer an aggravated felon.<sup>269</sup>

*Cota-Vargas* illustrates a problem with the GA: it gives excessive weight to state convictions and puts pressure on trial judges to reduce sentences or at least entertain motions to do so. Knowing the immigration consequences of state felony convictions, trial judges might even preemptively endeavor to keep sentences under one year, thereby distorting criminal sentencing. Some judges, as in *Cota-Vargas*, will reduce sentences;<sup>270</sup> other judges will not. The importance of state sentences under the GA will therefore increase the workloads of trial judges, a circumstance the BIA appeared not to favor in *Yanez-Garcia*.<sup>271</sup> Under the HFFT, the actual sentence imposed by the trial judge is irrelevant with respect to immigration. A conviction constitutes an aggravated felony only if it contains a trafficking element or if it would constitute a felony under federal drug laws.<sup>272</sup>

#### CONCLUSION

The rule of lenity, Congress's ownership of immigration law, the negative legislative history of the INA, the retributivist and utilitarian theories of punishment, and potential interference with and distortion of criminal sentencing all favor the application of the HFFT in the immigration context. The Supreme Court should therefore resolve the GA versus HFFT circuit split in favor of the HFFT.

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265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 851.

269. *Id.* at 852.

270. *Id.* at 850.

271. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 397-98 (B.I.A. 2002).

272. *Gerbier v. Holmes*, 280 F.3d 297, 299 (3d Cir. 2002) (defining the HFFT).

## POSTSCRIPT

On April 3, 2006, the United States Supreme Court granted certiorari on and consolidated two cases: *United States v. Toledo-Flores*<sup>273</sup> and *Lopez v. Gonzales*.<sup>274</sup> Both aliens were convicted of drug crimes that were felonies under state law but not under federal law.<sup>275</sup> Toledo-Flores appealed unsuccessfully to the Fifth Circuit Court of Appeals, arguing that his sentence enhancement for illegal reentry had been improperly increased because of an aggravated felony conviction.<sup>276</sup> Lopez unsuccessfully appealed to the Eighth Circuit Court of Appeals, arguing that he had been improperly barred from seeking cancellation of removal because of an aggravated felony conviction.<sup>277</sup> The Supreme Court heard oral argument on October 3, 2006 and will apparently resolve the GA/HFFT circuit split during the 2006 Term.<sup>278</sup>

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## APPENDIX I. TIMELINE

**1988:** Congress passes the Anti-Drug Abuse Act (ADAA) of 1988. The ADAA adds the term “aggravated felony” to the Immigration and Nationality Act (INA).<sup>279</sup> The changes to the INA do not indicate whether state drug convictions can constitute aggravated felonies or, if they can, which state drug offenses can do so.

**1990:** The Board of Immigration Appeals holds in *In re Barrett* that state

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273. *United States v. Toledo-Flores*, 149 Fed. Appx. 241 (5th Cir. 2005), cert. granted, 74 U.S.L.W. 3559 (U.S. Apr. 3, 2006) (No. 05-7664).

274. *Lopez v. Gonzales*, 417 F.3d 934 (8th Cir. 2005), cert. granted, 74 U.S.L.W. 3559 (U.S. Apr. 3, 2006) (No. 05-547).

275. *Toledo-Flores*, 149 Fed. Appx. at 242; *Lopez*, 417 F.3d at 935.

276. *Toledo-Flores*, 149 Fed. Appx. at 242.

277. *Lopez*, 417 F.3d at 935.

278. Legal Information Institute, Supreme Court Oral Argument Previews: *Lopez v. Gonzales*; *United States v. Toledo-Flores*, <http://www.law.cornell.edu/supct/cert/05-547.html> (last visited Nov. 17, 2006).

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279. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and other titles).

drug convictions can be aggravated felonies.<sup>280</sup>

**1990:** In the Immigration Act of 1990, Congress codifies *Barrett* by changing the INA to include state drug convictions in the aggravated felony category.<sup>281</sup> The ambiguity regarding which state drug convictions constitute aggravated felonies remains.

**1992:** The BIA creates the Hypothetical Federal Felony Test (HFFT) for whether state drug convictions constitute aggravated felonies.<sup>282</sup>

**1994:** In a deportation case, *Jenkins v. INS*, the Second Circuit chooses the Guidelines Approach (GA) for deciding whether state drug convictions constitute aggravated felonies.<sup>283</sup>

**1995:** The BIA recommends use of the HFFT in the immigration context and disparages *Jenkins* for its use of the GA.<sup>284</sup>

**1996:** The BIA's preference for the HFFT causes the Second Circuit to switch to this test in the immigration context.<sup>285</sup>

**1996:** The First<sup>286</sup> and Tenth<sup>287</sup> Circuits choose the GA in the sentence-enhancement context.

**1997:** The Fifth,<sup>288</sup> Eighth,<sup>289</sup> and Ninth<sup>290</sup> Circuits choose the GA in the sentence-enhancement context.

**1999:** The Second<sup>291</sup> and Eleventh<sup>292</sup> Circuits choose the GA in the sentence-enhancement context.

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280. *In re Barrett*, 20 I. & N. Dec. 171, 177–78 (B.I.A. 1990).

281. Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048.

282. *In re Davis*, 20 I. & N. Dec. 536, 545 (B.I.A. 1992).

283. *Jenkins v. INS*, 32 F.3d 11, 14 (2d Cir. 1994).

284. *In re L- G-*, 21 I. & N. Dec. 89, 102 (B.I.A. 1995), *modified by In re Yanez-Garcia*, 23 I. & N. Dec. 390, 396, 400 (B.I.A. 2002).

285. *Aguirre v. INS*, 79 F.3d 315, 316 (2d Cir. 1996).

286. *United States v. Restrepo-Aguilar*, 74 F.3d 361, 362–63 (1st Cir. 1996).

287. *United States v. Cabrera-Sosa*, 81 F.3d 998, 999–1000 (10th Cir. 1996).

288. *United States v. Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997).

289. *United States v. Briones-Mata*, 116 F.3d 308, 310 (8th Cir. 1997).

290. *United States v. Garcia-Olmedo*, 112 F.3d 399, 401 (9th Cir. 1997).

291. *United States v. Pornes-Garcia*, 171 F.3d 142, 148 (2d Cir. 1999).

292. *United States v. Simon*, 168 F.3d 1271, 1272 (11th Cir. 1999).

**2001:** The Fifth Circuit chooses the GA in the immigration context, rejecting the application of different tests in the sentence-enhancement and immigration contexts.<sup>293</sup>

**2002:** The Third Circuit chooses the HFFT in the immigration context.<sup>294</sup>

**2002:** In reaction to the Fifth Circuit's 2001 ruling, the BIA adopts the GA in the immigration context for cases arising in the Fifth Circuit.<sup>295</sup>

**2002:** The BIA adopts the GA in the immigration context for circuits that have not chosen the HFFT in the immigration context.<sup>296</sup>

**2004:** The Ninth Circuit chooses the HFFT in the immigration context.<sup>297</sup>

**2004:** For jurisdictional reasons, the Seventh Circuit states that it is unable to rule on whether federal courts in its circuit should use the GA or HFFT in the immigration context.<sup>298</sup>

**2005:** A district court in the Seventh Circuit chooses the HFFT in the immigration context.<sup>299</sup>

**2005:** The Sixth Circuit chooses the HFFT in both the immigration and sentence-enhancement contexts.<sup>300</sup>

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293. *United States v. Hernandez-Avalos*, 251 F.3d 505, 509–10 (5th Cir. 2001).

294. *Gerbier v. Holmes*, 280 F.3d 297, 299 (3d Cir. 2002).

295. *In re Salazar*, 23 I. & N. Dec. 223, 235 (B.I.A. 2002).

296. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 391, 397 (B.I.A. 2002).

297. *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 919 (9th Cir. 2004).

298. *Yanez-Garcia v. Ashcroft*, 388 F.3d 280, 283–84 (7th Cir. 2004).

299. *Gonzales-Gomez v. Achim*, 372 F. Supp. 2d 1062, 1069 (N.D. Ill. 2005).

300. *United States v. Palacios-Suarez*, 418 F.3d 692, 700 (6th Cir. 2005).