

AALS Panel - *Mexico v. U.S.A. (Avena)* - Crime and Immigration: Domestic, Regional and International Consequences

[Association of American Law Schools Panel on the *Avena* Case (*Mexico v. U.S.A.*), Co-Sponsored by the sections on Immigration Law, International Human Rights and North American Cooperation - AALS Annual Meeting - January 4, 2004, Atlanta, GA]

By Nora V. Demleitner*

The *Avena* case, in which Mexico has sued the United States in the International Court of Justice for a violation of the Vienna Consular Convention in the case of fifty-four Mexican nationals currently on death row in the United States, reflects one scenario where the debates about migration, crime, sentencing and foreign policy converge.¹ Rather than discussing the *Avena* case in more detail, I will put it within a larger framework. Therefore, this article will focus on two issues. First, how could it happen that the United States is being sued by the Mexican government for the treatment of Mexican nationals under sentence of death in the United States? What is the extent of immigrant offending in the United States? What does it mean to be an immigrant offender in the U.S. criminal justice system? Second, the *Avena* case is not the only foreign policy and legal consequence resulting from U.S. sentencing and attendant collateral consequences. Deportations and extraditions in particular have been impacted.

* Professor of Law, Hofstra University School of Law, New York (reachable at lawnvd@hofstra.edu). B.A., Bates College, J.D., Yale Law School, LL.M. (International and Comparative Law), Georgetown University Law Center. My gratitude is to the AALS section on International Human Rights for inviting me to participate in this panel discussion and to the German Law Journal for publishing the panelists' remarks. Many thanks for their thoughts and insights on this piece go to Stephen Legomsky, Michael D. Smith, and Peter Spiro. Jennifer Wiggins and Hofstra's law librarian Patricia Kasting provided excellent research assistance.

¹ Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)* (Int'l Ct. Justice). Materials regarding the case, including the briefs filed, interim decisions and oral arguments are available at www.icj-cij.org.

Often the debates about immigration and crime have become commingled, not only in North America but also in Europe. Non-citizens, and especially undocumented immigrants, are being blamed for a disproportionate number of offenses. High-profile examples seem to prove the point: Lee Malvo, one of the Washington D.C. snipers;² Rafael Resendez-Ramirez, dubbed the railway killer because he killed people along the Texas, Kentucky, Illinois railroad lines;³ the 9/11 suicide terrorists.⁴ However, the actual data are mixed.

A. Crime and Immigration

I. *What Do the Data Tell Us?*

Federal sentencing data indicate that about one third of federal offenders sentenced in fiscal year 2001 were non-citizens (about 19,000).⁵ Almost half of them – about 9,000 – are being sentenced for immigration offenses, especially illegal entry and re-entry after deportation.⁶ Almost a third of all federal drug offenders are non-citizens (about 7,500),⁷ with their highest-level involvement in the heroin trade where they constitute slightly over half of all offenders.⁸ Other than their status as non-citizens, the U.S. Sentencing Commission's statistics do not tell us about the types of connections these offenders have to the United States, whether they have crossed international borders merely to commit crimes or whether they have lived in the United States for a long time, and are being caught up in criminal activity.

The data on the citizenship status of federal prisoners are probably the most reliable. Less reliable are data on federal and state probationers. Despite attempts to target non-citizen inmates in state prisons for deportation prior to the end of their sentences, data on state prisoners remain unreliable as identification efforts are mixed. Numbers frequently used for 2001, for example, indicate that not even five

² See, e.g., Blaine Harden & Tim Golden, *The Hunt for a Sniper: The Suspects*, N.Y. TIMES, Oct. 5, 2002, at A1.

³ Lisa Teachey, *Maturino Resendiz Guilty of Murder*, HOUSTON CHRON., May 19, 2000, at A1.

⁴ Lornet Turnbull, *Boom in Illegal Immigration Apparent in Ohio*, COLUMBUS DISPATCH, Jan. 30, 2002, at 01F.

⁵ U.S. Sentencing Commission, *2001 Sourcebook of Federal Sentencing Statistics* tbl. 9, at 19 (2003), at www.ussc.gov/ANNRPT/2001/table9.pdf (visited last Mar. 15, 2004).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at tbl. 36, at www.ussc.gov/ANNRPT/2001/table36.pdf (visited last Mar. 15, 2004).

percent of state inmates are non-citizens.⁹ However, the figures vary dramatically by state – in California, for example, almost a quarter of all state prison inmates are said not to have citizen status. Undeniably, these numbers are substantially higher than even twenty years ago. The increase can be ascribed in part to the overall rise in immigration, in part to changed enforcement practices and patterns of imprisonment, especially for drug and immigration offenders.

The overrepresentation of non-citizens in our prisons is not unique to the United States. Most Western European countries replicate the pattern. What seems clear on both sides of the Atlantic is that the crime rate varies by immigrant group, as do the types of offenses in which immigrants are involved.¹⁰ Moreover, the first generation of immigrants has traditionally been less crime-prone than native-born citizens, while the second-generation of immigrants – who are often citizens – are substantially more crime-prone.¹¹ However, this pattern may be changing as some first-generation immigrants increasingly commit offenses that are intricately related to their undocumented immigration status, such as buying and using forged passports, visa documents, and work papers. In addition, some international criminals have begun to pose as first-generation immigrants though their intention is less to immigrate than to commit further offenses.

II. The Use of Crime and Immigration Data

What is the meaning and relevance of data on crime and immigration? First, such data drive anti-immigrant voices to argue for less immigration, stricter border controls and deportation of immigrants who break the law, including immigration laws. To them, deportation of non-citizens, particularly at the end of a prison term, appears most desirable.¹²

Much of the anti-immigrant forces focus on undocumented migrants who, by definition, break the law, and attempt to increase public outrage at the acceptance of the presence of such perpetual law-breakers. This argument has become more pronounced in the wake of the terror attacks of September 11, 2001. To function semi-

⁹ U.S. Department of Justice, Bureau of Justice Statistics, *Criminal Offenders Statistics*, available at www.ojp.usdoj.gov/bjs/ (visited last Mar. 15, 2004).

¹⁰ See, e.g., Daniel P. Mears, *Immigration and Crime: What's the Connection?*, 14 FED. SENT. R. 284, 284-85 (2002); Michael Tonry, *Ethnicity, Crime, and Immigration*, in *ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES* 1, 22-25 (Michael Tonry ed., 1997).

¹¹ Tonry, *supra* note 10, at 20-22 (model “is simplistic and only partly true.”).

¹² For a critique of this view, see Mears, *supra* note 10, at 287-88.

effectively in this country, many undocumented migrants have forged driver's licenses and social security numbers. They are now being equated with the 9/11 attackers who had also procured forged driver's licenses. In some government terrorism databases social security card forgery is counted as a terrorist offense.¹³

Even before 2001, however, anti-immigrant forces had succeeded in changing the legal and enforcement framework against non-citizen offenders. The 1996 immigration legislation substantially expanded the category of "aggravated felon" so that even relatively minor offenses no longer allow relief from deportation even for long-term permanent residents with family in this country.¹⁴ Removal from the United States upon commission of an offense leads also to a long-term re-entry ban: twenty years for those deported upon commission of an "aggravated felony"; ten years for all others deported upon commission of a criminal offense. Deportation has, therefore, become the starkest collateral sanction that can flow from a criminal conviction.

Immigration enforcement has changed first as a consequence of the 1996 legislation and then again in the wake of 9/11. Since 1996 the number of criminal offenders who are being deported because of a criminal conviction has increased substantially even though it is presumably not even close to the number of offenders who could be deported.¹⁵ Removal hearings in prisons lead to deportations straight from the prison cell. Detention assures that the offender is available for deportation. The only group of offenders relatively secure from deportation includes those whose home countries refuse to accept them. However, the State Department has increasingly attempted to and succeeded in negotiating repatriation agreements. In the wake of 9/11, the Justice Department has made the removal of convicted offenders and undocumented migrants from Middle Eastern and other Muslim countries a priority. The so-called Absconder Apprehension Initiative has been designed to locate, apprehend and deport the group of individuals, largely men from such countries, who have outstanding deportation orders, many of them after having committed criminal offenses. In addition, the Department of Homeland

¹³ For an analysis of the data on terrorism prosecutions, see Nora V. Demleitner, *How Many Terrorists Are There? The Escalation in So-Called Terrorism Prosecutions*, 16 FED. SENT. R. 38 (2003).

¹⁴ Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. 104-32, 110 Stat. 1214 (Apr. 24, 1996); Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 2009-546 (codified as amended in sections of 8 U.S.C.).

¹⁵ U.S. Department of Justice, Immigration and Naturalization Service, *2001 Statistical Yearbook of the Immigration and Naturalization Service* 236, tbl. 64, at 249, tbl. 65, at 250-57 (2003).

Security has begun “Operation Predator” last summer which focuses in part on rounding up convicted non-citizen sex offenders for deportation.¹⁶

In some quarters, however, resistance to the deportation of non-citizen offenders has begun to develop at home and abroad.

III. Immigration Offenses

In recent weeks and months the number of news stories about deported offenders has increased substantially in the popular press. A few weeks ago the *New York Times Sunday Magazine* carried the moving story of a young Cambodian man who was returned to Cambodia after a relatively minor offense committed in his youth even though he has a US citizen wife and two US citizen children.¹⁷ The piece highlighted his plight of living in a country to which he has no ties and which he left as a refugee, and his inability to return to the United States because of the re-entry ban.¹⁸

The horrible incident near Houston last summer during which eighteen would-be immigrants suffocated in a truck also illustrated the plight of deported offenders. One of the eighteen was an older man deported for multiple drunk-driving offenses who crossed the border without permission to reunite with his family.

The number of re-entry prosecutions indicates that the latter case is not unique. Resource constraints along the Southern border make it impossible to prosecute the large number of undocumented entry and re-entry cases to the full extent of the law.¹⁹ The Southern District of California’s so-called fast track program, for example, caps re-entry sentences at two years for all but the most serious re-entry offenders. The District of Arizona, on the other hand, has not adopted such a fast-track program but has limited sentence exposure in the past through judicial downward departures in most cases.²⁰ Two recent developments, however, may

¹⁶ For information on “Operation Predator”, see www.dhs.gov.

¹⁷ See Susan Sontag, *In a Homeland Far From Home*, N.Y. TIMES, Nov. 16, 2003, at sec. 6, 48.

¹⁸ *Id.*

¹⁹ For a critique of the insufficient enforcement of immigration law and especially re-entry violations, see Heather MacDonald, *The Illegal-Alien Crime Wave*, CITY JOURNAL (Winter 2004), at www.manhattan-institute.org/cfml/printable.cfm?id=1204 (visited last Jan. 27, 2004).

²⁰ See Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 FED. SENT. R. 260 (2002); Linda Drazga Maxfield, *Fiscal Year 2000 Update on Unlawful Entry Offenses*, 14 FED. SENT. R. 267 (2002); Nora V. Demleitner & Jon M. Sands, *Non-Citizen Offenders and Immigration Crimes: New Challenges in the Federal System*, 14 FED. SENT. R. 247, 249-50 (2002).

change both of these programs. The Sentencing Commission amended the sentencing structure for such crimes so that sentence adjustments now consider the crime of conviction more heavily in determining the applicable sentencing range under the federal sentencing guidelines.²¹ In addition, Congress has sent notice to the federal judiciary (and the Department of Justice) that it is disinclined to tolerate the high number of downward departures.²² As a consequence of the so-called Feeny Amendment, the Department of Justice has issued guidelines for fast-track programs, which limit the extent of sentence discounts.²³

IV. Trial, Sentencing and Deportation of Non-citizens

How do non-citizen offenders fare as compared with citizen offenders? First, a number of state and federal courts have held that lack of citizenship status and/or foreign origin or nationality cannot serve as a sentence enhancement.²⁴ However, it is not clear to what extent juries – either in the guilt phase or during sentencing in capital cases – or judges consider this factor without putting it on the record. On the other hand, a few federal courts have held that adoption of American values on the part of a non-citizen can serve as a reason for a downward departure from a guideline sentence.²⁵

Second, even though lack of citizenship status cannot be considered explicitly at sentencing, it does affect the conditions under which non-citizens will be held. Often they do not qualify for probation, parole or early release because the immigration service has put an immigration detainer on them to be able to remove them from the country straight from prison. They may also not be able to benefit from rehabilitation measures, as those may not seem appropriate for someone who will be removed from the United States.²⁶ In state cases some defense counsel advise

²¹ U.S. Sentencing Commission, *U.S. Sentencing Guidelines*, sec. 2L1.2. See also Maxfield, *supra* note 20, at 270; Robert J. McWhirter, *Aggravated Felon Re-entry Cases Under the 2001 Guideline*, 14 FED. SENT. R. 295 (2002).

²² *Provisions of Feeny Amendment as Enacted into Law as Part of PROTECT Act*, Pub. L. 108-21, 117 Stat. 650, reprinted in 15 FED. SENT. R. 358 (2003). For further information about the Feeny Amendment, see 15 FED. SENT. R. 307-378 (2003).

²³ Attorney General John Ashcroft, *Memo Regarding Policy on Charging of Criminal Defendants* (Sept. 22, 2003), at www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm (visited last Mar. 15, 2004).

²⁴ See, e.g., *United States v. Onwuemene*, 933 F.2d 650 (8th Cir. 1991); *United States v. Borrero-Isaza*, 887 F.2d 1349 (9th Cir. 1989).

²⁵ See, e.g., *United States v. Rodriguez-Montelongo*, 263 F.3d 429, 432-34 (5th Cir. 2001).

²⁶ See also Demleitner & Sands, *supra* note 20, at 250 (some courts have held that “the different treatment of incarcerated non-citizens justifies a downward departure.” *Id.*).

non-citizen clients who face a probationary sentence to plead guilty quickly so that no investigation into their immigration status is possible – thereby also preventing an investigation into possible innocence or police malfeasance claims.

Third, language barriers often make an effective defense difficult, if not impossible. Cultural issues also arise frequently.²⁷ In some cultures, for example, plea-bargaining is anathema, leading, however, to higher sentence exposure.

Fourth, deportation has become a more severe sanction for many non-citizens than the sentence they may face, particularly when that sentence is probation or consists of a suspended sentence.²⁸ Some immigrants fight the charges; some prosecutors agree to bargains that allow the immigrant to avoid deportation while other prosecutors file charges with precisely that goal in mind. Most importantly, as deportation has become a viable threat, increasingly higher courts have demanded that trial courts inform defendants of the possibility of removal. In other states statutory mandates to that effect exist. Nevertheless poor counseling on the part of criminal defense lawyers still accounts for guilty pleas of defendants who are subsequently surprised by deportation orders.

B. Diplomatic Problems for the United States on Account of Sentencing and Collateral Consequences

Not only the treatment of non-citizens in the U.S. criminal justice system but also their deportation has caused diplomatic problems for the United States. Sentences perceived as inappropriately harsh have made other countries more reluctant to extradite offenders. Large scale deportations, on the other hand, have created serious foreign policy issues.

I. Extradition

Increasingly, offenders have come to challenge their extradition based on procedural shortcomings in the U.S. criminal justice system. Western European countries,

²⁷ Numerous foreign governments, including Mexico and Saudi Arabia, provide extensive assistance -- legal and financial -- to their citizens who are being charged with criminal offenses in the United States. See, e.g., Michael Fleishman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. L. 359 (2003) (detailing assistance Mexican government provides to its nationals charged with capital offenses in the United States).

²⁸ For a discussion of the harshness and inflexibility of U.S. immigration law with regard to the deportation of non-citizen offenders as compared to many Western European countries, see Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOUSTON L. REV. 273 (forthcoming spring 2004).

for example, have indicated that they will not extradite individuals who might face one of the military commissions for alleged terrorists. Much more frequent, however, are objections based on possible sentence exposure.

1. *The Death Penalty*

As the *Avena* case indicates, the death penalty has presented a perpetual, and growing problem for the United States. The first time it came up as an issue in a regional tribunal was in *Soering v. UK* (1989), decided by the European Court of Human Rights (ECHR). The ECHR found that the death row phenomenon – conditions on Virginia’s death row, combined with the long wait for an execution – would lead to a violation of Soering’s rights under the European Convention on Human Rights if the United Kingdom were to extradite him.²⁹ Ultimately, Soering was extradited but only once Virginia promised not to seek to execute him, a promise that was kept.

The *Soering* decision now governs extradition from all member states of the Council of Europe.³⁰ In the terrorism context, issues of cooperation and assistance have arisen when a foreign national, such as Zacharias Moussaoui, has been charged with a capital crime in the United States. Many of these matters remain unresolved.

Revelations that innocent persons spent decades on death row have also not helped the reputation of the United States’ criminal justice system in Europe. A case covered extensively in Europe involved a Spanish national convicted and sentenced to death in South Florida. Ultimately, a team of high-priced lawyers, financed by donations of Spanish citizens, got him a new trial that ended in a not guilty verdict.³¹

2. *Long-term Prison Sentences*

Even though European objections to the death penalty receive the most publicity in the United States, some European and most South American countries do not extradite even non-nationals to the United States who are threatened with long-term

²⁹ *Soering v. United Kingdom*, 11 Eur. Ct. H.R. at 439 (1989).

³⁰ Courts in other countries that no longer allow for the death penalty have similarly denied requests for extradition in death cases. See, e.g., Guy Taylor, *Home a Safe Haven for Mexican Suspects*, WASH. TIMES, Jan. 9, 2004. For a discussion of how the jurisprudence of foreign courts may shape U.S. law, see Paolo G. Carozza, *“My Friend Is a Stranger”: The Death Penalty and the Global Ius Commune of Human Rights*, 81 TEX. L. REV. 1031 (2003).

³¹ *The World’s View of Executions*, N.Y. TIMES, June 13, 2001, at A32.

prison sentences. Especially life-without-parole and multiple life prison terms have created objections. Portugal's constitution, for example, forbids extraditions in such cases. The Mexican Constitutional Court held not long ago that under the Mexican Constitution, Mexico could not extradite individuals threatened with sanctions that do not hold out hope for release, at least at some point.³² This decision has caused some district attorneys, especially in Houston and Los Angeles, not to request extradition any longer in those cases because they were unwilling to engage in any bargains that would have led to shorter sentences.³³

Unless the rest of the world were willing to change its position on the acceptable length of prison sentences, the United States should continue to expect to run into difficulties with extradition requests based on terms that would not ever allow an offender to leave prison alive.

II. The Consequence of Deportations

Extradition is not the only area in which the United States has run into diplomatic and legal problems. Deportation of non-national law-breakers is another. The large bulk of offenders deported from the United States hail from a relatively small number of foreign countries, most of which are poor, many of which are in Central America and the Caribbean. Many of these countries are not being informed or are being only insufficiently informed about the return of these deportees, their criminal convictions and their potential for future criminal conduct. Moreover, even if provided with adequate information, most of these countries do not have any means to cope with the influx.³⁴ For example, because of resource constraints, most countries do not have any means to offer treatment to a large number of sex offenders who are being returned from the United States.

³² See, e.g., *Testimony of Deputy Assistant Attorney General Mary Lee Warren on U.S./Mexico Counternarcotics Efforts Before the Criminal Justice, Drug Policy, and Human Resources Subcomm. of the House Comm. on Government Reform*, Feb. 29, 2002, at www.house.gov/reform/cj/hearings/00.02.29/Warren.htm (visited last June 10, 2002) (discussing decision by Mexican Supreme Court and its impact on extradition from Mexico); Terence Jeffrey, *Shut Down Mexico's Sanctuary for Murderers*, Nov. 13, 2003, at www.townhall.com/columnists/terence_jeffrey/printj20031113.shtml (visited last Nov. 26, 2003); Tim Weiner, *Extraditions Are Limited By Ruling In Mexico*, N.Y. TIMES, Jan. 20, 2002, at 9. See also K. Larry Storrs, *CRS Report for Congress: Mexico's Counter-Narcotics Efforts under Zedillo and Fox, December 1994-March 2001 CRS-6* (March 30, 2001) (extradition of Mexican citizens for drug violations only if they are being sentenced in U.S. courts under Mexican law).

³³ See, e.g., Maria Alicia Gaura, *How Killers in State Stay Untouchable: Mexican Court Scraps Extradition Treaty -- Frustrated California D.A.s Won't Cut Deals*, S.F. CHRONICLE, Aug. 10, 2003.

³⁴ See, e.g., Margaret H. Taylor & T. Alexander Aleinikoff, *Deportation of Criminal Aliens: A Geopolitical Perspective* (1998), at www.thedialogue.org/publications/taylor_criminal.htm.

In some Central American countries the crime rate has increased dramatically, in part because deportees have reconstituted themselves in gangs. In others, vigilante groups have arisen to “deal with,” i.e., kill, anybody with U.S. gang tattoos. Many foreign countries object, therefore, to the large number of deportees, especially when they consider them a problem created in and by the United States.³⁵ This holds particularly true when the deportees left their home countries at a very young age and were socialized in the United States.

In recent months the U.S. government has promised foreign governments to inform them better and in a more timely fashion of the arrival of deportees.³⁶ However, more, such as financial assistance for the reintegration of such offenders, might be needed. That is unlikely, though. Legal challenges are also unlikely since international law generally mandates that countries permit their nationals entry.

C. Conclusion

Crime and immigration will remain with us for years, and cases similar to *Avena* can be expected to multiply in different fora. As long as the United States allows for sentences and collateral sanctions that are perceived as unfair and inequitable abroad, legal and diplomatic resistance to deportation and extradition on the part of sending countries will become a part of our future.

³⁵ See, e.g., Randall Richard, *500,000 Deportees from U.S. Wreaking Havoc*, ASSOCIATED PRESS, Oct. 26, 2003.

³⁶ See, e.g., Anna Gorman, *Mexico Seeks Warning on Deportations*, L.A. TIMES, Oct. 8, 2003.