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Defining “Sexual Abuse of a Minor” in Immigration Law: Finding a Place for Uniformity, Fairness, and Feminism

Kate Barth

INTRODUCTION

In June 2001, twenty-year-old Juan Elias Estrada-Espinoza, a lawful permanent resident of the United States, met Sonia Arredondo, who was either fifteen or sixteen at the time.¹ The two started a relationship, lived together for some time with Estrada-Espinoza’s parents before moving to their own residence, and eventually raised a child together.² The relationship was sanctioned by both sets of parents.³ However, in 2004 the California District Attorney filed statutory rape charges against Estrada-Espinoza and he was convicted on four counts under the California Penal Code.⁴ Soon after his conviction for statutory rape, the Department of Homeland Security commenced deportation proceedings, and Estrada-Espinoza was found removable as an “aggravated felon” under 8 U.S.C. § 1227(a)(2)(A)(iii), also known as § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA).⁵

The term “aggravated felony” is defined in 8 U.S.C. § 1101(a)(43)(A) (INA § 101(a)(43)(A)) as “murder, rape, or sexual abuse of a minor.” However, as “sexual abuse of a minor” is not explicitly defined in the INA, both the Board of Immigration Appeals (BIA), which heard Estrada-Espinoza’s appeal, and the initial panel of the Ninth Circuit, which denied Estrada-Espinoza’s petition for review, looked to the BIA’s decision in *In re Rodriguez-Rodriguez*⁶ for a definition.⁷ *Rodriguez-Rodriguez* tied the term “sexual abuse of a minor” to the definition given in 18 U.S.C. § 3509(a)(8), which is a provision that construes “sexual abuse” in the context of the rights of child witnesses.⁸ Under this expansive definition, the BIA

and the initial Ninth Circuit panel concluded that Estrada-Espinoza's state conviction for statutory rape constituted "sexual abuse of a minor."⁹ However, when the case was ordered to be reheard en banc, the Ninth Circuit decided that "sexual abuse of a minor" should be more properly tied to the definition given in 18 U.S.C. §§ 2242–2246, which is a set of provisions in substantive federal criminal law.¹⁰

The Ninth Circuit's recent reversal highlights a circuit split over the proper definition of "sexual abuse of a minor" for the purposes of determining an "aggravated felony" in the INA. Although the Ninth Circuit now determines whether state convictions for statutory rape constitute "sexual abuse of a minor" by comparing the state conviction to the definition given in §§ 2242–2246, the Second, Third, Seventh, and Eleventh Circuits still give deference to the BIA's determination that § 3509(a)(8) is the proper definition.¹¹ The Fifth Circuit also favors the broader scope of the § 3509(a)(8) definition, but in the slightly different context of sentence enhancement for aggravated felons that illegally reenter.¹² Adding to the confusion, the First Circuit refuses to tie "sexual abuse of a minor" to a federal definition and has instead indicated that any state conviction for statutory rape constitutes an aggravated felony as intended by the INA.¹³

The differences between these possible definitions are striking. Section 3509(a)(8), a federal provision construing the rights of child witnesses, reads:

[T]he term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.¹⁴

This definition covers all children—persons up to eighteen years of age—and includes offenses commonly classified as indecent exposure. It does not include an age-span gap provision—permitting, for example, a person to engage in sexual conduct with a minor less than four years

younger than him or her. A court referring to this provision would presumably find that a noncitizen¹⁵ convicted under a state statute that criminalizes consensual sex between an eighteen-year-old and a seventeen-year-old was deportable as an aggravated felon. Likewise, this definition would allow the deportation of a person convicted under a state statute for indecent exposure.

Sections 2242–2246, provisions in substantive federal criminal law, would allow deportation for a much narrower range of persons convicted under state law. The provisions read in part:

§ 2243 Sexual Abuse of a Minor or Ward. (a) Of a Minor. Whoever . . . knowingly engages in a sexual act with another person who (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

§ 2244 Abusive Sexual Contact. . . . (c) Offenses Involving Young Children. If the sexual contact that violates this section . . . is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.¹⁶

While definitively prohibiting sexual relations with anyone under twelve-years-old, these provisions create a separate age-span category for children from twelve to sixteen years of age. When considered in light of the INA, persons who are less than four years older than the child cannot be fined or imprisoned—or deported. Additionally, the provision includes no penalty for consensual sexual relations with children sixteen and older. Furthermore, § 2243 requires a sexual act, which has been defined in § 2246 to mean physical contact.¹⁷ Thus, a court referring to this provision could not deport a noncitizen who was convicted solely of indecent exposure. An eighteen-year-old convicted of statutory rape based on his relationship with a fifteen-year-old would also be safe from deportation, as would a fifty-year-old who had consensual sex with a sixteen-year-old.

Finally, defining an aggravated felony to include any state conviction for statutory rape, as the First Circuit does, perhaps allows the broadest range of convicted noncitizens to be deported. A potential two-step process is collapsed into one, and a noncitizen's state conviction leads to automatic eligibility for deportation.

Because a noncitizen who is convicted of "sexual abuse of a minor" is deportable as a person who has committed an aggravated felony, the breadth of the definition chosen by the courts has far-reaching consequences on the lives of noncitizens convicted of sex crimes. The Supreme Court has acknowledged that deportation is "a drastic measure and at times the equivalent of banishment or exile."¹⁸ As immigration law trends toward reducing the due process safeguards for noncitizens convicted of crimes, it is ever more crucial to choose the definition that best corresponds to our nation's ideal immigration policy.¹⁹ While policymakers may differ on the contours of that ideal policy, ensuring that the law is applied uniformly throughout the states and that the law is fair to those most impacted stand as crucial concerns of any immigration regime.

Moreover, when dealing with laws concerning sexual abuse of minors, it remains imperative to keep in mind what society might hope to achieve through its statutory rape laws: safeguarding a child's chastity, preventing predatory sexual behavior, or preserving a youth's sexual autonomy. Although the term "sexual abuse of a minor" encompasses a broad range of offenses, this article focuses on statutory rape because the two possible definitions that courts wrestle with differ mainly in their approach to statutory rape;²⁰ both § 3509(a)(8) and §§ 2242–2246 would find violent or nonconsensual sexual assault offenders deportable.

This article delves into the rich feminist discourse around the history, aims, advantages, and failings of various statutory rape regimes in order to analyze the objectives of laws that regulate the sexual activity of children. Although feminist theory may not appear to be a natural tool to dissect immigration policy, § 101(a)(43)(A) offers a unique juncture between

immigration policy and gender theory; we must not forget that in defining the scope of "sexual abuse of a minor" the courts will, in part, be crafting laws that shape the sexual lives of minors—a topic more extensively dealt with by feminist scholars than immigration policymakers.²¹ Thus, while rational opinions vary on the goals of immigration and statutory rape laws, this article asserts that the most relevant definition for "sexual abuse of a minor" is one that considers issues of fairness, uniform application of law, and feminist theories on the proper goals of statutory rape laws.

Ultimately, this article suggests that, rather than looking to § 3509(a)(8) or fully relying on a state conviction, courts should compare the state statute of conviction with the definition of "sexual abuse of a minor" encoded in substantive federal criminal law at §§ 2242–2246. Looking at the varied decisions coming out of the BIA and the First, Second, Third, Fifth, Seventh, Ninth, and Eleventh circuits, Part I of this article will analyze the current judicial split and the implications of the different proffered definitions. Part II will explore the legislative history behind the insertion of "sexual abuse of a minor" into the INA with the aim of deciphering how Congress intended the courts to interpret the term. Shifting gears to focus on certain factors that courts should take into account when choosing a definition, Part III will debate what role questions of unity, fairness, and feminist theory ought to play in defining "sexual abuse of a minor." Finally, Part IV will argue that §§ 2242–2246 are the best definitions to adopt because §§ 2242–2246 are construed in favor of the noncitizen, resulting in a more uniform application of the law, and aligns more closely with feminist perceptions of what a statutory rape law should accomplish.

I. CIRCUIT SPLIT OVER THE DEFINITION OF "SEXUAL ABUSE OF A MINOR"²²

In *Rodriguez-Rodriguez*, the BIA published an opinion meant to serve as a guide for courts grappling with the issue of how to interpret "sexual abuse of a minor" in § 101(a)(43)(A).²³ The opinion indicated that courts should

look to § 3509(a)(8), a provision construing “sexual abuse” in the context of the rights of child witnesses.²⁴ The Second, Third, and Seventh Circuits, while not weighing in on whether § 3509(a)(8) is the best possible definition, have agreed to defer to the BIA’s opinion and have adopted the § 3509(a)(8) definition of sexual abuse.²⁵ The Fifth Circuit has also indicated that it adheres to the broad reading of the term “sexual abuse of a minor.”²⁶ The Ninth Circuit, however, has explicitly rejected the § 3509(a)(8) definition, and has decided instead to adopt the “sexual abuse of a minor” definition as given by §§ 2242–2246, which are a set of provisions in federal substantive criminal law.²⁷ Choosing not to look to federal law at all, the First Circuit has indicated that it considers all state convictions for statutory rape to constitute aggravated felonies as they automatically fall within the purview of the § 1101(a)(43)(A) definition of “rape.”²⁸

A. The BIA Defines “Sexual Abuse of a Minor”

In *Rodriguez-Rodriguez*, the noncitizen defendant was convicted of indecency with a child by exposure under § 21.11(a)(2) of the Texas Penal Code.²⁹ He was sentenced to ten years imprisonment, and five years after his initial conviction, charged with removability as an aggravated felon because he had been convicted of “sexual abuse of a minor.”³⁰ A deeply divided Board explicitly published an opinion that was meant to analyze and determine the proper definition of “sexual abuse of minor” in § 101(a)(43)(A) of the INA.

The BIA began its analysis by looking to the congressional decision “to provide a comprehensive statutory scheme to cover crimes against children.”³¹ This congressional decision broadened the category of “aggravated felony” in the INA to include “rape and sexual abuse of a minor” through the 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).³² This legislative history persuaded the BIA to choose a definition that reflected this broad intent. The BIA concluded that they would tie the term to a federal definition because

removal proceedings are federal law, even though Congress did not specifically cross-reference "sexual abuse of a minor" with a federal provision.³³ Left with the two possible federal definitions of "sexual abuse," the BIA found that "18 U.S.C. § 3509(a) better captures [the] broad spectrum of sexually abusive behavior. The definition set forth in 18 U.S.C. §§ 2242, 2243, and 2246 are, in our view, too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse."³⁴

The BIA also justified its choice of definition by pointing out that § 3509(a)(8) comports with the generally understood meaning of "sexual abuse of a minor." Looking to the definition of "sexual abuse" as commonly defined in Black's Law Dictionary,³⁵ the BIA noted that "the common usage of the term includes a broad range of maltreatment of a sexual nature, and it does not indicate that contact is a limiting factor."³⁶

Board Member Guendelsberger, however, argued forcibly against § 3509(a)(8) as the correct definition.³⁷ He pointed out that § 3509(a)(8) is a social welfare provision and was never intended to define a criminal offense.³⁸ Moreover, while Guendelsberger agreed with the majority's finding that Congress included the term "sexual abuse of a minor" to broaden the category of aggravated felonies, he noted that both § 3509(a)(8) and §§ 2242–2246 expand upon this category.³⁹ Guendelsberger also opined that Congress was aware that federal criminal law and many state laws do not include indecent exposure offenses under "sexual abuse of a minor." Therefore, "had Congress intended to include indecent exposure and other noncontact offenses under the term 'sexual abuse of a minor,' it would have explicitly so stated in the terms of the Act."⁴⁰ Finally, Guendelsberger observed that, given the uncertainty inherent in statutory interpretation, the majority "completely ignores the principle that ambiguities in statutory interpretation must be resolved through reasonable interpretations in favor of the alien."⁴¹ For all of these reasons, Guendelsberger concluded that §§ 2242–2246 would be the preferred definition.

B. The Second, Third, Seventh, Eleventh, and Fifth Circuits Adopt § 3509(a)(8)

The Second, Third, Seventh and Eleventh Circuits have decided to defer to the BIA's § 3509(a)(8) definition since, under the well-established *Chevron* rule,⁴² when Congress's intent is uncertain and the statutory language is unclear, reviewing courts should defer to the interpretation of the agency that oversees the statute.⁴³ The Second Circuit noted that "[t]he Supreme Court has held 'that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication.'"⁴⁴ Thus, because the language of § 101(a)(43)(A) "yields no clear evidence of congressional intent as to the scope of the phrase,"⁴⁵ the Second, Third, Seventh, and Eleventh Circuits found deference to *Rodriguez-Rodriguez* appropriate.⁴⁶

Although choosing to defer to the BIA-endorsed § 3509(a)(8) definition,⁴⁷ the Second, Third, and Eleventh Circuits have by and large withheld judgment as to whether they believe § 3509(a)(8) is the best possible definition. Indeed, although the Third Circuit repeatedly defined "sexual abuse of a minor" based on § 3509(a)(8), this circuit has not yet produced an opinion analyzing the merits of such a definition. In fact, in *Stubbs v. Attorney Gen.*, the Third Circuit, though using § 3509(a)(8) as the touchstone for its analysis, specifically refused to pass judgment on the BIA interpretation.⁴⁸

However, in deciding *Mugalli v. Ashcroft*, the Second Circuit indicated that it believed § 3509(a)(8) to be an "appropriate" definition:

[N]ot simply because it appears somewhere in the United States Code, but because it is consonant with the generally understood broad meaning of the term "sexual abuse" as reflected in *Black's*. . . . It is also supported by the BIA's reading of Congressional intent to 'provide . . . a comprehensive scheme to cover crimes against children.'⁴⁹

The *Mugalli* court applauded the BIA for providing uniformity by using a federal definition that applies nationwide, while simultaneously recognizing that achieving true uniformity would probably thwart the congressional intent to broaden the category of aggravated felony.⁵⁰ The *Mugalli* court noted that to ensure strict uniformity “the age of consent for purposes of deciding whether the conviction for the crime constitutes ‘sexual abuse of a minor’ would have to be the lowest age provided by the law of any state,” thus resulting in an undesired “lowest common denominator” effect.⁵¹ While uniform application of federal law is important, the Second Circuit decided that Congress acknowledged that criminal law varied by region “by providing that the term ‘aggravated felony’ ‘applies to an offense . . . whether in violation of Federal or State law’” and thus understood that there would be some disunity in the application of this provision.⁵²

The Seventh Circuit has also concluded that “the BIA’s resort to section 3509(a)(8) and its broad definition of sexual abuse is reasonable” and has shown some preference for this definition over §§ 2242–2243, though that court has refrained from an in-depth analysis of the merits of the two definitions.⁵³ In deciding *Lara-Ruiz v. INS*, a case involving the physical molestation of a four-year-old, the court rejected the petitioner’s argument that his conviction did not constitute “sexual abuse of a minor” because that term should be defined only by § 2243, which requires the minor to be between the ages of twelve and sixteen.⁵⁴ Although the BIA had actually concluded that the petitioner’s crime constituted sexual abuse even when analyzed under §§ 2242–2246, the Seventh Circuit’s opinion indicated that it favored an even wider definition of the term.⁵⁵ In later cases, the Seventh Circuit specifically reaffirmed this preference for § 3509(a)(8) over §§ 2242–2243, emphasizing what they saw as the broad congressional intent behind “sexual abuse of a minor.”⁵⁶

While the Fifth Circuit has not explicitly deferred to the BIA interpretation of “sexual abuse of a minor,” it has decided that the term has an expansive meaning which covers indecent exposure offenses.⁵⁷ In *United*

States v. Zavala-Sustaita,⁵⁸ the court considered the meaning of “sexual abuse of a minor” in the context of the aggravated felony sentencing enhancement in the Sentencing Guidelines § 2L1.2.⁵⁹ The facts of the case revolved around a noncitizen convicted under Texas Penal Code § 21.11(a)(2) for masturbating in front of two young children.⁶⁰ Because the Sentencing Guidelines indicated that the term “aggravated felony” was to be defined by reference to § 101(a)(43)(A), the Fifth Circuit took the opportunity to discuss what they saw as the scope of “sexual abuse of a minor.”

In attempting to define the ordinary and common meaning of the phrase, the Fifth Circuit looked to the American Heritage Dictionary entries for “sexual” and “abuse” and determined that these definitions did not preclude indecent exposure.⁶¹ Moreover, the court concluded that “[a] distinction that treats a stranger’s brief groping of a child in a public shower as qualitatively more serious than the conduct of an adult who verbally forces a child to watch him repeatedly engage in sex acts is unjustifiable.”⁶² Discussing congressional intent, the Fifth Circuit decided that, in not tying “sexual abuse of a minor” to a federal provision or requiring a minimum sentence length, Congress explicitly did not limit its meaning of the phrase.⁶³

Although not expressly adopting the § 3509(a)(8) definition, the Fifth Circuit discarded § 2243 as a possible definition. It concluded that Congress might have had good reason to look outside of § 2243 for a definition since § 2243 “creates a substantive federal offense, while [§ 101(a)(43)(A)] attaches consequences, in the immigration context, to offenses already committed.”⁶⁴ The court observed that under § 3509(a)(8) a noncitizen’s offense would be considered an aggravated felony,⁶⁵ and the “BIA addressed the exact same issue” in *Rodriguez-Rodriguez*, holding that “sexual abuse of a minor” encompasses indecent exposure.⁶⁶ Thus, while the Fifth Circuit never officially deferred to the BIA’s definition, nor adopted § 3509(a)(8) on its own merits, the *Zavala-Sustaita* opinion

indicated that the Court considered "sexual abuse of a minor" to be defined in roughly the same terms as § 3509(a)(8).

C. The Ninth Circuit Defines "Sexual Abuse of a Minor"

Estrada-Espinoza v. Mukasey presented the Ninth Circuit with its second pass at the § 101(a)(43)(A) definition.⁶⁷ The year before *Estrada-Espinoza* made its way to the circuit court, the Ninth Circuit decided *Afridi v. Gonzales*, a case which required the court to define "sexual abuse of a minor" in the context of a thirty-something-year-old man who had sexual intercourse with a seventeen-year-old prostitute.⁶⁸ In *Afridi*, the Ninth Circuit deferred to the *Rodriguez-Rodriguez* § 3509(a)(8) definition,⁶⁹ thus, when *Estrada-Espinoza* first presented itself to the Ninth Circuit in 2007, the court held that *Afridi* was the binding precedent and denied the petition for review.⁷⁰ However, just a year later, the court decided to accept the *Estrada-Espinoza* petition for review, declared §§ 2242–2246 to be the correct definition,⁷¹ and overturned *Afridi*.⁷²

The opinion justifying the swap in definitions led its readers through a reclassification of the aggravated felonies listed in INA § 101(a)(43). The Ninth Circuit explained that the INA actually defined two kinds of aggravated felonies. The first kind of aggravated felonies "refer to a broad category of offenses, using a potentially ambiguous phrasing, [and references] other statutory provisions for clarification."⁷³ The second kind of aggravated felonies are "those that refer to a specific crime which is already clearly defined in criminal law [and] have no need for a cross-reference."⁷⁴ Because "sexual abuse of a minor" refers to the specific federal crime enumerated in §§ 2242–2246, it falls into the latter category.⁷⁵ The court thus reasoned that

[If] Congress had intended the aggravated felony "sexual abuse of a minor" to be defined differently than the criminal offense "sexual abuse of a minor" it could have provided a definition, cross-referenced a different federal code provision, or even

specified that the definition was not limited to the criminal definition.⁷⁶

Since Congress did not give any particular indication as to what the definition should be, “the logical inference is that Congress intended ‘sexual abuse of a minor’ to carry its standard criminal definition, on par with ‘murder’ or ‘rape.’”⁷⁷ Therefore, the Ninth Circuit decided that courts should not look to § 3509(a)(8)—the federal provision which construes the rights of child witnesses—but rather to §§ 2242–2246, which encodes the substantive federal crime.

The *Estrada-Espinoza* Court also dealt with the issue of whether deference was due to the BIA’s choice of definition. While recognizing that, under *Chevron*, deference was due to the BIA’s published decisions that dealt with interpretation of the INA, the Court held that such deference was inappropriate in the instant matter because “the BIA did not construe the statute and provide a uniform definition in the decision. Rather it developed an advisory guideline for future case-by-case interpretation.”⁷⁸ According to the Supreme Court, such interpretation lacks the force of law and does not enjoy *Chevron* deference.⁷⁹ Although the Ninth Circuit admitted that *Rodriguez-Rodriguez* does have “the force of decisional law,” it concluded that the opinion still served as a “guide” for defining “sexual abuse of a minor” because it “suffers from the same imprecision that internal agency guidelines possess.”⁸⁰ Drawing from a Seventh Circuit opinion, the Ninth Circuit agreed that “when the BIA hasn’t done anything to particularize the meaning of a term, giving *Chevron* deference to its determination of that meaning has no practical significance.”⁸¹

In addition to believing §§ 2242–2246 are the correct definition merely because they provide the federal criminal offense and not a federal law defining sexual abuse in another context, the Ninth Circuit argued that §§ 2242–2246 were the best substantive definitions. Primarily, the Court contended that the younger age of sexual consent given in § 2243 comports well with the commonly understood meaning of “sexual abuse of a

minor."⁸² The court came to this conclusion after surveying state statutes and the Model Penal Code's provision on statutory rape, and finding that the majority of state statutes and the Model Penal Code set the age of sexual consent at sixteen, just like § 2243.⁸³ The court also pointed to prior case law which determined that consensual underage sex is not necessarily harmful to older adolescents.⁸⁴

D. The First Circuit Considers "Sexual Abuse of a Minor"

Although the First Circuit has yet to produce an opinion that fully grapples with defining "sexual abuse of a minor," it has decided two cases which required it to touch upon the issue.⁸⁵ In 2001, when determining whether a stepfather's conviction for touching his 13-year-old stepdaughter's chest and groin area constituted "sexual abuse of a minor,"⁸⁶ the First Circuit concluded that "unlawful sexual contact with a minor approximating the federal definition [in §§ 2242–2246] is presumptively within the amended INA's scope."⁸⁷ While the opinion seemed to lean toward applying the definition in §§ 2242–2246, the court recognized that the broader § 3509(a)(8) definition was also available; although, citing Guendelsberger's dissent in *Rodriguez-Rodriguez*, it expressed concerns over its relevance.⁸⁸ However, by assuming that the noncitizen's conduct would be a deportable offense under either definition, the First Circuit did not need to strongly justify its penchant for §§ 2242–2246 and left an open question as to what definition applies.⁸⁹

Five years later, in 2006, the First Circuit tackled the issue again. In *Silva v. Gonzales*, the resident noncitizen pleaded guilty under Mass. Gen. Laws Ch. 265, § 23 to a charge of statutory rape involving a fourteen-year-old girl; the offender was probably in his early twenties at the time.⁹⁰ The First Circuit pointed out that

[B]y its plain terms, the INA provides that 'rape' is an aggravated felony. . . . Here the statute of conviction, Mass. Gen. Laws Ch. 265 §23, specifically terms the crime of conviction

‘[r]ape.’ Under the explicit language of the INA, all rape—including statutory rape—comes within the aggravated felony taxonomy.⁹¹

According to this logic, any state conviction that could be classified as some form of rape automatically qualifies as an aggravated felony under the INA. Interestingly, such reasoning would conclude that a statutory rapist qualifies as an aggravated felon under the “rape” prong of § 101(a)(42)(A) and not under the “sexual abuse of a minor” prong. Thus, this opinion actually sidesteps the difficult question of defining “sexual abuse of a minor.”

In short, the First Circuit seems to be advocating an automatic deportation process for noncitizens convicted under state laws of statutory rape. Instead of determining whether the state law conviction qualifies as “sexual abuse of a minor,” the First Circuit would automatically shunt statutory rapists into the category of “rape” and place them on the fast track to deportation. The advantage of such a process is the clear and efficient standard for dealing with noncitizen statutory rapists. The downside is the resulting fragmentation of federal law, should each noncitizen’s removal process be tied to his or her state’s statutory rape laws. It is also probable that tying state provisions to automatic removal would lead to vastly overinclusive results; for example, a state could have a disjunctive statute which covers child sexual abuse, statutory rape, and nonsexual child abuse.⁹² A noncitizen convicted under such a statute for his nonsexual child abuse might be automatically pushed into deportation proceedings under the “rape” category. Thus, simplicity proves to be both the benefit and weakness of this approach.

II. CONGRESSIONAL INTENT AND LEGISLATIVE HISTORY

One reason that courts have had such a difficult time settling on a definition for “sexual abuse of a minor” is that Congress gave very little direction as to the intended scope of the phrase when it passed IIRIRA—the

act that inserted "sexual abuse of a minor" into the INA. There was no actual discussion about how the phrase should be defined; Congress seemingly inserted the language into the INA without conscious acknowledgment that the ambiguous provision would produce divisive results. In looking to Congress for guidance in this statutory interpretation, we look not to any stated intent, but rather to the subtext in the passage of the bill, the placement of the words, and the existence of related provisions.

On the one hand, the *Rodriguez-Rodriguez* court's contention that the purpose of the IIRIRA was to broaden the grounds for deportability seems accurate when looking at the context of the overall act.⁹³ The IIRIRA is not friendly to convicted noncitizens:⁹⁴ it prohibits a deported aggravated felon from ever returning to the United States,⁹⁵ removes judicial discretion in cases where deportation would automatically follow conviction,⁹⁶ requires that all convicted noncitizens be detained while awaiting deportation,⁹⁷ provides for expedited removal of aggravated felons,⁹⁸ eliminates a waiver of deportation previously available to convicted noncitizens,⁹⁹ greatly reduces opportunities for appeals,¹⁰⁰ and applies the aggravated felony provision retroactively.¹⁰¹ When viewed against this sprawling background of ever-stricter measures, it seems likely that Congress intended that the phrase "sexual abuse of a minor" be viewed expansively.

On the other hand, word placement and the existence of related provisions suggest that Congress did not intend for the phrase to be read as broadly as the *Rodriguez-Rodriguez* court interpreted it. As noted by BIA dissenter Guendelsberger, the placement of "sexual abuse of a minor" in the same provision of "murder" and "rape" and at the head of a litany of possible aggravated felonies may have indicated that Congress intended the term to cover only the most egregious of offenses.¹⁰² Moreover, other sexual offenses relating to children, such as pornography, are later enumerated as aggravated felonies by § 101(a)(43)(I), making it more probable that Congress only intended "sexual abuse of a minor" to cover contact offenses, thus excluding indecent exposure from the definition.¹⁰³

The language of sections ultimately discarded also point to a narrower construction of the term. When the IIRIRA was discussed in the House, House members proposed the addition of a section entitled “Crimes of Sexual Violence” which stated that any noncitizen convicted of “aggravated sexual abuse, sexual abuse, or abusive sexual contact or other crime of sexual violence is deportable.”¹⁰⁴ This provision was not ultimately included in the IIRIRA because House members deferred to the Senate version of the bill, possibly because they recognized the Senate version already covered such serious offenses. As argued by Guendelsberger, this history shows that Congress envisioned “sexual abuse” as a crime of violence, ruling out such non-aggressive offenses.¹⁰⁵

Of course, this same reading of the legislative history preceding the passage of the IIRIRA could also be taken as evidence that Congress intended “sexual abuse of a minor” to encompass noncontact offenses. After all, if Congress truly intended “sexual abuse of a minor” to cover only crimes of violence, then why not include that key language? Also, why would Congress enumerate a separate provision for “sexual abuse of a minor” when “crimes of violence” already constitute grounds for deportation under § 101(a)(43)(F)? Under this view, “sexual abuse of a minor” must include something more than simply violent acts. As Guendelsberger claimed in his dissent from the *Rodriguez-Rodriguez* decision, “Congress was aware of the wide range of offenses constituting child abuse and child sexual abuse.”¹⁰⁶ If true, then why would Congress choose not to limit the definition to a more precise meaning if they did not actually intend for “sexual abuse of a minor” to cover this wide range of offenses?¹⁰⁷ Clearly, the legislative history behind IIRIRA does not give evidence of a congressional preference for any one definition.

III. IMPORTANT ISSUES SURROUNDING THE SEARCH FOR A DEFINITION

As exemplified by the three-way circuit split and the murky legislative history behind the IIRIRA, there is neither agreement on what Congress intended by "sexual abuse of a minor" nor agreement on the best substantive definition for the term. Thus, the search for a preferred definition must look beyond pure congressional intent. In particular, concerns about uniformity, fairness, and the feminist goals of statutory rape laws may flesh out the definition best suited to § 101(a)(43)(A).

A. Uniformity

As a federal body of law, immigration law is intended to be uniformly applied across the nation. It is possible that the Constitution even mandates such uniformity through Article I, Section 8, Clause 4, which requires Congress "[t]o establish a uniform Rule of Naturalization."¹⁰⁸ Because deportation is the harshest penal measure that our immigration law provides, it is even more crucial that noncitizens in one state not be deported for actions that noncitizens just across a state border are able to commit without the same penalty. The difficulty, of course, arises when federal immigration law is dependent on a traditional arena of state sovereignty, such as standards of public morality.¹⁰⁹ By depending on state standards of criminal conduct to define deportability, the government is allowing individual states to determine which noncitizens stay and which are expelled.¹¹⁰ However, to disregard these state standards of public morality may be seen as an encroachment on state sovereignty.

To further complicate matters, immigration law is considered civil law, not criminal law. In the landmark decision *Bugajewitz v. Adams*, Justice Holmes held that, for constitutional purposes, deportation is not "a punishment; it is simply a refusal by the government to harbor persons whom it does not want."¹¹¹ However, "[i]t is doubtful that Holmes could have really meant that deportation is not punishment, if by 'punishment'

one means the imposition of harm or sanctions for misconduct or violation of the law.”¹¹² It seems more likely that “Holmes was making a technical distinction in order to protect congressional exercise of the immigration power from the substantive and procedural limits the Constitution places on criminal proceedings.”¹¹³ In practice, this means that noncitizens do not enjoy the basic rights and procedural protections that they might in the criminal context. This includes the right to counsel, protection from double jeopardy, protection against cruel and unusual punishment, and limitations on *ex post facto* laws.¹¹⁴ Although deportation is an extremely severe mechanism,¹¹⁵ noncitizens who are charged with criminal acts are often not well represented or protected by the Constitution.¹¹⁶ Thus, it is critical to ensure that deportation is meted with a just and uniform hand.

One article discussing the lack of uniformity in deportation matters points out that, currently, two forms of disunity exist in federal immigration law:

First, sometimes the same conduct undertaken in different states will lead to conflicting decisions on deportation. By defeating normative uniformity in federal immigration law, this results in unfairness to immigrants and may violate the Constitution’s requirement of a uniform rule of naturalization. Second, federal deportations based on violations of state criminal laws may not reflect, and may directly undermine, the state policies embodied in those laws. Although the federal government defers to state legislatures on matters of criminal law, state legislatures do not necessarily consider immigration law consequences when passing legislation. This kind of nonuniformity is particularly troublesome because it could mean that deportation decisions are grounded in neither federal nor state policy.¹¹⁷

In addition to these two disunities, another kind of disunity may enter the discourse on statutory rape laws. In the landmark case *Michael M. v. Superior Court of Sonoma County*, the U.S. Supreme Court ruled that it was permissible for state statutory rape laws to discriminate based on gender.¹¹⁸ Although only one state currently discriminates based on gender,¹¹⁹ this

ruling opens up the possibility that a male would be deported for engaging in the same action of a female in the same state without risking deportation.

Having deportability depend on the location of a noncitizen's act will also lead to massively overinclusive or underinclusive immigration laws.¹²⁰ After all, if deportation aims to remove dangerous noncitizens, a law that allows for the deportation of only one individual when two individuals have committed the same act will either result in ridding the nation of only one dangerous offender—if the offense is, in fact, a danger to the public—or ridding the nation of one harmless person if the offense is not actually dangerous. Commentators have noted, "Either way, the current process does not provide a reliable method for determining which aliens should be deported because they are injurious to the public welfare."¹²¹

In order to unify immigration law with respect to sexual acts, the courts would have to interpret "sexual abuse of a minor" to include only those acts which are criminalized in every state. This "lowest common denominator" approach, while having the benefit of providing a predictable and uniform standard, probably does not accurately reflect the roughly established congressional intent to provide for expansive coverage of sexual abuse crimes.¹²² Unfortunately, since immigration law does depend on the state conviction for the initial qualification of noncitizens for deportation, it is unlikely that any definition short of the "lowest common denominator" would provide uniform application. However, while it may be undesirable to choose the one approach that provides total uniformity, courts should still strive to cut down on the extensive uneven application of immigration law that currently exists.¹²³

Disunity in immigration law may have serious consequences, resulting in unfairness to the noncitizen, the inadvertent undermining of state policy, deportations that do not reflect the intent of either federal or state policymakers, an unwittingly gendered immigration policy, overinclusive or underinclusive deportations, and constitutional violations. Although perhaps impracticable to seek total uniformity, when looking for the best substantive

definition of “sexual abuse of a minor” it is important to choose the definition that will allow for a more even-handed application of the law.

B. Fairness

Attempting to achieve justice and fairness is an important policy when drafting any law. As noted above, disunity in immigration law remains a source of unfairness for the noncitizens whose lives are affected. When deportation is determined by the state of residency, it results in inconsistent treatment of noncitizens and basic unfairness: one noncitizen is deported while another residing just across the state border is not deported, despite the fact that both are engaged in the same behavior. At the same time, this approach also leads to a distortion of federal and state policymakers’ intent. Federal policymakers enact immigration laws to achieve certain immigration results; unfortunately, the intended result can vary widely if the implementation of federal law depends on individual state laws. On the other hand, state policymakers might not consider the interaction of immigration and state law.¹²⁴ This interaction can have unseen and undesired consequences. For example, a state legislature may choose to expand its use of suspended sentences in order to promote criminal rehabilitation outside of prisons. However, the state legislature may not explicitly factor into its reasoning the fact that noncitizens who receive suspended sentences, though serving no prison time, are still deportable. In such a case, the increased deportability of noncitizens who otherwise might not have received any sentence actually contradicts the state’s original policy goals.¹²⁵ The end result is that a noncitizen may be removed when his or her deportation is desired by neither federal nor state policy.

Immigration law’s reliance on state criminal statutes also results in noncitizens being disproportionately punished for their crimes. When convicted of a crime, a noncitizen faces the same sentence, the same fine, and the same prison time as a citizen. However, in addition to the criminal punishment, the noncitizen also suffers the additional penalty of

deportation, though neither the state legislature nor the state court may have factored that into their sentencing recommendations.¹²⁶

It is perhaps also important to note that the vast majority of noncitizens who are charged as aggravated felons are permanent residents, with an average length of residency of fifteen years in the United States.¹²⁷ Twenty-five percent of those charged saw twenty years pass between their arrival in the United States and their deportation proceedings.¹²⁸ In a sense, these legal noncitizens lead their lives in an America with two sets of rules; noncitizens are expected to obey the same laws as citizens, but are also subject to an overlay of harsher penalties for their illegal actions.

This extra burden placed on noncitizens seems potentially problematic in light of the U.S. Supreme Court's determination that, because noncitizens are a discrete and insular minority without the ability to vote, laws affecting them should be subject to heightened scrutiny.¹²⁹ Of course, these equal protection decisions were made in the context of state laws that denied noncitizens welfare benefits or employment options.¹³⁰ However, the general principle that noncitizens are a vulnerable class of persons due to their lack of political power and insular nature holds true in any context and should make noncitizens particularly worthy of judicial and legislative protection.

These protections are even more necessary today in light of the recent trends toward harsher immigration laws.¹³¹ The Anti-Drug Abuse Act of 1988,¹³² the Immigration Act of 1990,¹³³ the Violent Crime Control and Law Enforcement Act of 1994,¹³⁴ the Immigration and Nationality Technical Corrections Act of 1994,¹³⁵ the Antiterrorism and Effective Death Penalty Act of 1996,¹³⁶ the IIRIRA of 1996,¹³⁷ and the REAL ID Act of 2005¹³⁸ have broadened the category of "aggravated felony," have increased penalty for the reentry to aggravated felons, have heightened entry standards for asylum seekers, and have decreased procedural remedies available to noncitizens. Through these acts, Congress (1) sought to introduce summary deportation procedures and greatly narrowed judicial

discretion and review of deportation, exclusion, and removal; (2) prohibited aggravated felons from returning to the country; (3) increased the use of detainment; (4) applied the aggravated felony provision retroactively; and (5) “[took] great steps towards ‘dismissing all criminal aliens’ appeals as a matter of law.”¹³⁹

While Congress broadened the grounds for deportation, the executive departments that handle immigration matters have somewhat floundered in maintaining a consistent policy¹⁴⁰ and appear to have adopted harsher punishments for noncitizens.¹⁴¹ It is possible that the executive branch’s contradictory policies “forced the INS, the BIA, and the Attorney General into using even more heavy-handed tactics with criminal aliens than perhaps Congress intended.”¹⁴² All in all, the current climate is one where criminal noncitizens face harsher penalties and do not enjoy widespread procedural remedies. Some legal commentators have decried these increasingly restrictive immigration laws as a product of anti-immigrant sentiment or xenophobia.¹⁴³ However, whether one believes that the current immigration laws are unfair in and of themselves, it is important to recognize that criminal noncitizens operate in a sphere with few procedural protections.

It is in this atmosphere of disproportionate punishments, increasingly harsh laws, and fewer procedural protections that the classic “rule of lenity” should be applied in favor of noncitizens. This rule, which states that ambiguities in the law should be interpreted in favor of defendants, was succinctly enunciated by Justice Douglas in an early opinion dealing with the potential deportation of a noncitizen convicted of murder:

We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment of exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on

his freedom beyond that which is required by the narrowest of several possible meanings of the words used.¹⁴⁴

This principle of statutory construction perhaps sprung from the notion that courts should avoid constitutional questions when there are other grounds to resolve the case, thus resulting in the Supreme Court "frequently [stretching] language in favor of aliens when contrary interpretations would have raised troublesome constitutional issues."¹⁴⁵

A long line of Supreme Court cases reaffirmed the principle that ambiguities be construed in favor of the noncitizen. In the 1964 case of *Costello v. INS*, the Court ruled that a provision in the INA allowing deportation of any noncitizen who was convicted of two crimes of moral turpitude "at any time after entry" did not apply to a noncitizen who was a citizen at the time of the offenses—even though that citizenship had been falsely acquired by willful misrepresentation.¹⁴⁶ The Court justified its ruling by explaining that the Court was "constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the petitioner."¹⁴⁷ Two years later, the Court interpreted a statute designed to save from deportation noncitizens who had gained entrance to the United States through misrepresentation; the Court held that "[e]ven if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."¹⁴⁸ The rule of lenity has also emerged in landmark decisions relating to refugee law¹⁴⁹ and, more recently, in the Supreme Court's interpretation of provisions in the Antiterrorism and Effective Death Penalty Act and the IIRIRA.¹⁵⁰ The rule of lenity "has been described as the 'most important rule of statutory interpretation peculiar to immigration.'"¹⁵¹

Achieving uniform application, heightening scrutiny for an insular class without political power or many procedural protections, and interpreting statutes in favor of noncitizens all stand as important concerns of justice. When determining the scope of "sexual abuse of a minor" with an eye to fairness, we are pointed in the direction of a definition that construes this

term to the benefit of criminal noncitizens by encompassing a narrower class of offenses.

C. The Feminist Goals of Statutory Rape Laws

In contemplating the scope of “sexual abuse of a minor” it is appropriate to consider the goals that these statutory rape laws ideally hope to achieve, and to pick the definition that best encompasses these goals. In general, philosophers, feminists, and legal commentators agree that contemporary statutory rape laws are aimed at protecting the young—particularly young women—from predatory sexual behavior while preserving a youth’s sexual autonomy; the trick is finding the proper balance between these two goals.¹⁵² Historically, however, statutory rape laws developed to preserve a young woman’s chastity.¹⁵³ For this reason, early statutory rape laws were often gender specific—protecting only minor females—and offered a “promiscuity” defense to the offender.¹⁵⁴ Although only one state continues to have a gender-specific statutory rape statute on the books,¹⁵⁵ the Supreme Court has ruled that gender-based discrimination is constitutional with regard to statutory rape laws.¹⁵⁶ Because statutory rape springs from this gendered font, many of the theories justifying different statutory rape schemes are grounded in feminist thought.

Due to the historical background of paternalism and the contemporary license for gender discrimination, some feminists harbor fears that statutory rape laws may still unfairly deny young females their sexual autonomy.¹⁵⁷ Other feminists, however, believe that increasingly more lenient statutory rape laws “serve primarily to grant men sexual access to minor females.”¹⁵⁸ This debate can be split down the lines of feminists who endorse formal equality versus feminists who endorse substantive equality.¹⁵⁹ Those who advocate formal equality assert that the two genders should be treated alike, and “[fear] that the legal establishment will confuse [biological differences] with socially constructed differences and use them to justify discriminatory treatment.”¹⁶⁰ This group particularly worries about the implications of

gendered statutory rape laws and focuses on the importance of a woman's right to sexual freedom, implicitly endorsing less restrictive statutory rape laws.

On the other hand, feminists advocating substantive equality recognize deeply entrenched gender inequalities that would distort facially neutral treatment into a perpetuation of such inequalities.¹⁶¹ These feminists support "different treatment of the sexes as long as such treatment [does] not perpetuate or exacerbate gender inequalities."¹⁶² Feminists endorsing substantive equality exhibit a greater comfort with restrictive statutory rape laws, which are more protective of a young female's right to security from sexual aggression.¹⁶³

Identifying the proper balance between these two concerns is crucial to achieving an acceptable statutory rape regime. Although carving out the scope of "sexual abuse of a minor" does not actually call upon courts to create a statutory rape regime from scratch, it does give courts the chance to balance these competing goals. Courts must define the line between preventing predatory behavior and protecting youths' sexual autonomy. This is particularly true when the consequences of such a conviction could include deportation.

One solution may be to look to a definition that includes an age-span provision that allows a window of permissible sexual activity between age-appropriate peers. Such activity is arguably less harmful to the adolescent and achieves a proper balance between protection from predators and sexual autonomy.¹⁶⁴ Another alternative is to permit older adolescents greater sexual autonomy while still providing strong protection for younger children through an age-graded regime. Although age does not necessarily indicate maturity in sexual decisionmaking, it may serve as a useful proxy.¹⁶⁵ Of course, if the aim of statutory rape laws is to preserve a youth's chastity, then allowing greater sexual autonomy for older adolescents would be nonsensical. However, because the goals of statutory rape laws have shifted toward protecting the youth's freedom from sexual coercion,

allowing older adolescents more autonomy—and less protection—would seem appropriate.

IV. SECTIONS 2242–2246 CONTAIN THE PROPER DEFINITION FOR “SEXUAL ABUSE OF A MINOR”

When construing the ambiguous congressional intent behind the term “sexual abuse of a minor,” courts must balance considerations of uniformity, fairness, and the feminist goals of statutory rape laws. First and foremost, it is crucial that courts tie “sexual abuse of a minor” to a federal definition to achieve uniform and fair application. Relying on state statutory rape convictions as a total proxy for aggravated felonies, as the First Circuit espouses, would lead to extensive and damaging disunity. Without a single definition, immigration law will fragment into a state-by-state determination of “who stays” and “who goes.” Considering that state legislatures do not usually take immigration consequences into account when passing legislation, this would produce immigration laws unbound by federal or state policy.

Obviously, some disunity will still occur even if “sexual abuse of a minor” is tied to a federal definition since a noncitizen’s qualification for consideration of deportation depends initially on the state law that convicted the noncitizen. If the federal definition chosen is more expansive than a state’s statutory rape law, a noncitizen could go unpunished for an act that would cause him or her to be both convicted under another state’s law and deported under the INA. The only way to fully avoid disunity and still depend on state statutes of conviction is to define “sexual abuse of a minor” as encompassing only behavior which is criminalized by all states, leading to an undesirable lowest common denominator effect.¹⁶⁶ Some disunity, while regrettable, is therefore inevitable as long as federal law defers to state standards of criminality and refuses to accept the lowest standards of criminal conduct. Fortunately, Congress arguably indicated that some disunity is acceptable via its statutory language.¹⁶⁷ The crucial goal,

therefore, is simply to reduce disunity as much as possible with the adoption of a single unifying federal definition.

Of course, using a federal definition still leaves courts with two viable options: § 3509(a) and §§ 2242–2246. Of these two definitions, §§ 2242–2246 better comports with considerations of unity, fairness, and the feminist goals behind statutory rape laws. Sections 2242–2246 are also a narrower set of provisions, providing a lower age of sexual consent, an age-span provision of four years for minors between the ages of 12 and 16, and a requirement of sexual contact. Because they are narrower, §§ 2242–2246 will decrease the range of offenses for which criminal noncitizens can be deported, resulting in a greater unity in the kinds of actions that result in deportation. Noncitizens who commit acts that are criminalized in states with broad statutory rape laws will receive similar treatment to those who commit offenses in states with less expansive laws.

A narrow definition also better upholds the principle that ambiguities in immigration law should be construed in favor of the noncitizen.¹⁶⁸ A narrow definition reduces the number of noncitizens who are disproportionately punished for their crimes. Some may argue that a rule ridding the nation of the greater number of noncitizens convicted of statutory rape is desirable due to the grave nature of the offense. Although statutory rape *is* a serious crime, “[i]f criminal punishment is to automatically follow the crime of statutory rape we should remember that immigrants face the possibility of overpaying by additionally losing their legal status in the United States. Because of this heightened penalty, perhaps their cases deserve cautious analysis.”¹⁶⁹ Indeed, as suggested by the Supreme Court’s equal protection decisions, this “cautious analysis” may be particularly appropriate for noncitizens, a discrete and insular minority without the power to vote. Sections 2242–2246 include a lower age of consent and an age-span provision that seems to better match the goals of protecting youths’ security from sexual predators while simultaneously allowing them sexual autonomy. A survey of the states’ statutory rape statutes, a majority of

which set the age of sexual consent at sixteen, show that it is commonly accepted that older adolescents are mature enough to make sexual decisions.¹⁷⁰ Statutory rape laws also trend toward incorporating age-span provisions, perhaps reflecting the belief that peer-on-peer sexual activity—even when one peer is over eighteen—falls within the realm of youths’ permissible sexual decision-making.¹⁷¹ Even apart from feminist theory, the fact that a majority of states set the age of consent at sixteen and incorporate age-span provisions indicates that common perceptions over the proper scope of statutory rape laws comport more with the definition given in §§ 2242–2246.

Finally, defining “sexual abuse of a minor” through §§ 2242–2246 does not impede congressional intent. Both sides of the debate agree that in enacting IIRIRA, Congress was attempting to broaden the category of aggravated felonies, and both § 3509(a)(8) and §§ 2242–2246 do expand upon the previous categories. By not specifically cross-referencing “sexual abuse of a minor” with a noncriminal section of the federal code, it seems reasonable that Congress assumed the definition would be tied to federal substantive criminal law. Moreover, as suggested by Guendelsberger, by placing “sexual abuse of a minor” in the same provision as “murder” and “rape,” at the head of a long list of offenses—some of which incorporate other child-related sex crimes—Congress intended the term to cover the gravest of offenses, offenses that fall within the purview of §§ 2242–2246.

In short, the narrower definition of §§ 2242–2246 will result in a greater unity of crimes for which criminal noncitizens are eligible to be deported and a reduction of criminal noncitizens who suffer a disproportionate punishment of deportation. Also, §§ 2242–2246 better achieve the feminist goal of securing youths’ sexual autonomy while not exposing youths to sexual predators, better reflecting contemporary notions of the scope of statutory rape laws, and more closely following the lines of congressional intent.

CONCLUSION

Under the plain language of § 101(a)(42)(A), either § 3509(a), §§ 2242–2246, or full reliance on a state statute of conviction appear to be permissible interpretations of “sexual abuse of a minor.” However, because immigration law is rooted in federal law, it would be impermissible to allow various definitions to attach to the same provision. The issue, therefore, is not which definition is permissible, but which definition is most appropriate.

The First Circuit’s total dependence on a state’s statute of conviction would lead to an undesirable disunity of application of immigration law. The BIA’s chosen definition, § 3509(a)(8), provides an overly broad definition that does not comport with modern-day notions of the proper scope for statutory rape laws. This expansive definition would also heighten disunity by increasing the range of actions for which a noncitizen in one state could be deported, while a noncitizen in a second state with less restrictive laws would remain outside of the state penal law system and ineligible for removal. Because more noncitizens would be deportable under § 3509(a)(8), this broader definition may also heighten unfairness by having criminal noncitizens, already presumably punished by state courts, face a disproportionate penalty for their crimes.

The narrower scope of §§ 2242–2246 better achieves the feminist goal of balancing the protection of youths’ security from sexual predators and the safeguarding of youths’ sexual autonomy. Sections 2242–2246 also align more closely with the majority of current state statutes, thus better complying with contemporary notions of statutory rape laws. These provisions construe the ambiguities in “sexual abuse of a minor” in favor of the noncitizen, an even more crucial principle to uphold in this era of harsher laws and fewer procedural protections for criminal noncitizens. Courts should thus follow the Ninth Circuit’s approach in tying “sexual abuse of a minor” to the definition found in §§ 2242–2246.

¹ Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1150 (9th Cir. 2008).

² *Id.*

³ *Id.*

⁴ *Id.* at 1150–51. Estrada-Espinoza was convicted under Cal. Penal Code §§ 261.5(c), 286(b)(1), 288a(b)(1), and 289(h).

⁵ *Id.* at 1151.

⁶ *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (B.I.A. 1999).

⁷ See Estrada-Espinoza v. Gonzales, 498 F.3d 933, 936 (2007) (noting that the Ninth Circuit’s earlier decision in *Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006), a case that deferred to the BIA’s interpretation of “sexual abuse of a minor,” was controlling).

⁸ See *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995–96 (“We find the definition of sexual abuse in 18 U.S.C. § 3509(a)(8) to be a useful identification of the forms of sexual abuse.”).

⁹ *Estrada-Espinoza*, 498 F.3d at 936 (holding that under the BIA’s definition of “minor” as anyone under the age of sixteen, the noncitizen offender was properly considered removable by the Immigration Judge and BIA).

¹⁰ Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1152 n.2 (9th Cir. 2008) (“Since 8 U.S.C. § 1101(a)(43)(A) defines a category of *crime* (aggravated felony), it is more plausible that Congress intended the ‘aggravated felony’ of ‘sexual abuse of a minor’ to incorporate the definition of ‘sexual abuse of a minor’ in 18 U.S.C. § 2243, which is a criminal statute outlining the elements of the offense, rather than the definition of ‘sexual abuse’ found in 18 U.S.C. § 3509.”).

¹¹ See James v. Mukasey, 522 F.3d 250 (2d Cir. 2008); Mercado v. Att’y Gen., 250 F. App’x 515 (3d Cir. 2007); Chuno v. Att’y Gen., 250 F. App’x 484 (3d Cir. 2007); Stubbs v. Att’y Gen., 452 F.3d 251 (3d Cir. 2006); Gattem v. Gonzalez, 412 F.3d 758 (7th Cir. 2005); Mugalli v. Ashcroft, 258 F.3d 52 (2d Cir. 2001); Bahar v. Ashcroft, 264 F.3d 1309 (11th Cir. 2001).

¹² See United States v. Zavala-Sustaita, 214 F.3d 601 (5th Cir. 2000).

¹³ See Silva v. Gonzales, 455 F.3d 26, 29 (1st Cir. 2006) (“Under the explicit language of the INA, all rape—including statutory rape—comes within the aggravated felony taxonomy.”).

¹⁴ 18 U.S.C. § 3509(a)(8) (2006).

¹⁵ As a term of art in immigration law, “alien” is defined as a foreign-born person who is not a national or citizen of the United States. 8 U.S.C. § 1101(a)(3) (2006). However, due to the negative overtones created by this term, such as implications of outsider status and lessened civil rights, this article will use the word “noncitizen” as a synonym to “alien” as it is used within immigration matters. See Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 264 (1997).

¹⁶ 18 U.S.C. § 2244 (2006).

¹⁷ The relevant section of § 2246 reads,

(2) the term “sexual act” means— (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight; (B) contact

between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; (3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

18 U.S.C. § 2246 (2006).

¹⁸ *Fong Haw Tan. v. Phelan*, 333 U.S. 6, 10 (1948). James Madison, a Founding Father, also recognized the deportation was an extremely harsh action:

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness . . . if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

JONATHAN ELLIOT, 4 ELLIOT'S DEBATES 555 (2nd ed., Philadelphia, Lippincott 1896).

¹⁹ See Brent K. Newcomb, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 687, 698–701 (1998) (describing the recent legislation passed by Congress which restrict immigrants' rights); see also William J. Johnson, Note, *When Misdemeanors are Felonies: The Aggravated Felony of Sexual Abuse of a Minor*, 52 N.Y.L. SCH. L. REV. 419, 423–25 (2007) (detailing the recent history of immigration reform).

²⁰ Note, however, that one court has discussed the difference in how the two provisions deal with indecent exposure offenses. See *United States v. Zavala-Sustaita*, 214 F.3d 601, 602 (5th Cir. 2000). Although the inclusion of indecent exposure as a deportable offense stands as an important difference between the two provisions, this difference has not generated the same amount of controversy as the difference in the statutory rape coverage.

²¹ Heidi Kitrosser, *Meaningful Consent: Towards a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287, 311 (1997) (noting that the statutory rape laws were developed to protect young women's chastity).

²² In addition to the circuit split over what definition to use, circuits may also differ on whether to use the categorical or modified categorical approach when applying a certain definition. For suggestions on how courts should handle the categorical versus modified categorical question as it relates to 8 U.S.C. § 1101(a)(43)(f) "crimes of violence," see Shani Fregia, Comment, *Statutory Rape: A Crime of Violence for Purposes of Immigration Deportation?*, 2007 U. CHI. LEGAL F. 539 (2007). Courts are also split as to whether state misdemeanor convictions for "sexual abuse of a minor" constitute an aggravated felony. For a fuller discussion of this circuit split, see Johnson, *supra* note 19.

²³ *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (B.I.A 1999).

²⁴ *See id.* at 995–96 (finding the definition set forth in § 3509(a)(8) better captures the wide array of sexually abusive behavior against children).

²⁵ *See James v. Mukasey*, 522 F. 3d 250 (2d Cir. 2008); *Mercado v. Att’y Gen.*, 250 F. App’x. 515 (3d Cir. 2007); *Chuno v. Att’y Gen.*, 250 F. App’x 484 (3d Cir. 2007); *Stubbs v. Att’y Gen.*, 452 F.3d 251 (3rd Cir. 2006); *Gattem v. Gonzalez*, 412 F.3d 758 (7th Cir. 2005); *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001); *Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001).

²⁶ *See United States v. Zavala-Sustaita*, 214 F.3d 601 (5th Cir. 2000).

²⁷ *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008).

²⁸ *Silva v. Gonzales*, 455 F.3d 26, 29 (1st Cir. 2006).

²⁹ *See In re Rodriguez-Rodriguez*, 22 I. & N. Dec. at 992.

³⁰ *See id.*

³¹ *See id.* at 994.

³² *See* Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990) (codified as amended in 9 U.S.C.); The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (1996) (codified as amended in 8 U.S.C.).

³³ *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995. Even the *Rodriguez-Rodriguez* dissent, written by Board Member Guendelsberger, agreed that looking to a federal definition “achieves uniform results in situations where reliance upon fundamentally different state law definitions would lead to a patchwork immigration law.” *Id.* at 1000.

³⁴ *Id.* at 996.

³⁵ BLACK’S LAW DICTIONARY 1375 (6th ed. 1990) (defining the term sexual abuse as “[i]llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance”).

³⁶ *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996. However, it is worth noting that the later Ninth Circuit opinion in *Estrada-Espinoza* questioned whether the § 3509(a)(8) definition was consonant with common understandings of “sexual abuse of a minor” as it raises the age of consent to eighteen. The *Estrada-Espinoza* court discussed the various ages of sexual consent among the states and concluded that “[t]he fact that the vast majority of states do not forbid consensual sexual intercourse with a seventeen-year-old male or female indicates that such conduct is not necessarily abusive under the ordinary, contemporary, and common meaning of ‘abuse.’” 546 F.3d 1147, 1153 (9th Cir. 2008).

³⁷ Board Member Filppu also wrote a dissent, arguing that “[t]he absence of a specific cross-reference to a federal statute . . . suggests that Congress may also have wanted us to take into account the various approaches the states have adopted in dealing with sexual crimes committed against minors.” *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 998. Uncomfortable with both the broadness of § 3509(a)(8) and the narrowness of §§ 2242–2246, Filppu did not provide a firm definition for “sexual abuse of the minor” but remained “ill at ease providing a comprehensive answer in our first effort to grapple with the question.” *Id.*

³⁸ *Id.* at 1000 (Guendelsberger, dissenting) (“We are not here construing a law affording rights, but are determining the extent to which a conviction will be treated as an aggravated felony for purposes of immigration law. Such a classification renders an alien removable, eliminates nearly all forms of relief from removal, and perpetually bars

reentry. Given the grave consequences of such a determination, including separation from family and other ties to this country, the more appropriate reference point is the federal criminal law definition of 'sexual abuse of a minor.'").

³⁹ See *id.* at 1001 (Guendelsberger, dissenting) ("Both definitions expand the categories of aggravated felonies.").

⁴⁰ *Id.* at 1004 (Guendelsberger, dissenting).

⁴¹ *Id.* For a more in-depth discussion of this rule of lenity, see *infra* Part III.B.

⁴² *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

⁴³ See *Mugalli v. Ashcroft*, 258 F.3d 52, 55 (2nd Cir. 2001) (noting that *Chevron* required the court to defer to the BIA's interpretation of § 101(a)(43)(A)).

⁴⁴ *Id.* at 55 (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

⁴⁵ *Id.*

⁴⁶ See *James v. Mukasey*, 522 F.3d 250, 254 (2d Cir. 2008) (deferring to the BIA's interpretation of § 101(a)(43)(A) in determining whether the petitioner's New York conviction for rape in the third degree constituted "sexual abuse of a minor"); *Mercado v. Att'y Gen.*, 250 F. App'x 515, 518 (3d Cir. 2007) (looking to the BIA definition of "sexual abuse of a minor" to determine whether the New Jersey statute of conviction qualified); *Chuno v. Att'y Gen.*, 250 F. App'x 484, 486 (3d Cir. 2007) (deferring to the BIA's § 3509(a)(8) definition of "sexual abuse of a minor"); *Stubbs v. Att'y Gen.*, 452 F.3d 251, 265 (3d Cir. 2006) (holding that the petitioner's conviction fails to fit the BIA's definition of "sexual abuse of a minor"); *Gattem v. Gonzalez*, 412 F.3d 758, 763 (7th Cir. 2005) ("[I]nsofar as the Board's holding as to Gattem turns on an interpretation of the INA, we must defer to that construction. . . ."); *Mugalli*, 258 F.3d at 55 ("[W]e defer to the BIA's interpretation of § 1101(a)(43)(A) in determining the meaning of 'sexual abuse of a minor.'"); *Bahar v. Ashcroft*, 264 F.3d 1309, 1311 (11th Cir. 2001) ("[w]e will defer to the Board's interpretation if it is reasonable.").

⁴⁷ The Eleventh Circuit has not specifically adopted the § 3509(a)(8) definition. However, in the short *Bahar v. Ashcroft* opinion, the Eleventh Circuit favored an expansive meaning of "sexual abuse of a minor" that did not require physical contact and agreed to defer to the BIA's interpretation of § 101(a)(43)(A). 264 F.3d at 1311–12.

⁴⁸ See *Stubbs*, 452 F.3d at 265 ("Even if we assume, without deciding, that the BIA's interpretation is permissible, [the defendant alien's] offense still does not qualify.").

⁴⁹ *Mugalli*, 258 F.3d at 58–59.

⁵⁰ See *id.* at 59 (noting that the BIA's nationwide definition is consistent with the general rule that federal laws not be construed to have their meaning depend on state law).

⁵¹ *Id.* at 60.

⁵² *Id.* (citing INA §101(a)(43)).

⁵³ *Gattem v. Gonzalez*, 412 F.3d 758, 764 (7th Cir. 2005).

⁵⁴ See *Lara-Ruiz v. INS*, 241 F.3d 934, 941–42 (7th Cir. 2001) (discussing why congressional intent behind “sexual abuse of a minor” did not support such a narrow reading).

⁵⁵ See *id.* at 942 (“Lara-Ruiz offers no good reason why we must refer to § 2243 rather than to § 3509.”).

⁵⁶ See *Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 464–65 (noting that “Congress intended the phrase ‘sexual abuse of a minor’ to broadly incorporate all acts” as a justification for rejecting the petitioner’s argument that sexual abuse be defined by §§ 2241–48 instead of § 3509); *Gattem*, 412 F.3d at 764–65 (observing that prior case law “put to rest our dissenting colleague’s contention that the Board has gone astray in choosing section 3509(a) as a reference point in assessing the nature of an alien’s conviction.”).

⁵⁷ See *United States v. Zavala-Sustaita*, 214 F.3d 601, 602 (5th Cir. 2000) (holding that “sexual indecency with a child by exposure constitutes ‘sexual abuse of a minor’ for purposes of the aggravated felony sentencing enhancement on Sentencing Guidelines § 2L1.2).

⁵⁸ *Id.* at 602.

⁵⁹ U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2009).

⁶⁰ See *Zavala-Sustaita*, 214 F.3d at 602 (describing the defendant noncitizen’s offense).

⁶¹ *Zavala-Sustaita*, 214 F.3d at 604. “Sexual” is defined as “[o]f, pertaining to, affecting, or characteristic of sex, the sexes or the sex organs and their functions.” THE AMERICAN HERITAGE DICTIONARY 1124 (2d ed. 1982). “Abuse” is defined as “[t]o use wrongly or improperly” or “[t]o hurt or injure by maltreatment.” *Id.* at 70.

⁶² *Zavala-Sustaita*, 214 F.3d at 605.

⁶³ See *id.* at 606–07 (“Specifically, Congress did not define ‘sexual abuse of a minor’ by expressly referencing other provisions of the United States Code, as it did in several other parts of § 1101(a)(43)(A). . . . Nor did Congress narrow the definition of ‘sexual abuse of a minor’ by requiring a minimum sentence length, thereby ensuring the offense was of a sufficient severity.”).

⁶⁴ *Id.* at 607 n.8.

⁶⁵ See *id.* (“This definition would seemingly cover an offense under Texas Penal Code § 21.11(a)(2). . . .”).

⁶⁶ *Id.* at 608.

⁶⁷ See *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1150 (9th Cir. 2008). For the facts of *Estrada-Espinoza*, see *supra* Introduction.

⁶⁸ *Afridi v. Gonzales*, 442 F.3d 1212, 1214–15 (9th Cir. 2006).

⁶⁹ *Id.* at 1216 (“The BIA’s definition was based on a permissible construction of the statute.”).

⁷⁰ See *Estrada-Espinoza v. Gonzales*, 498 F.3d 933, 936 (2007) (“*Afridi* is binding precedent and controls this case. . . . Therefore the BIA and IJ did not err in denying relief and we must deny the petition for review.”).

⁷¹ See *id.* at 1152 n.2 (“[I]t is more plausible that Congress intended the ‘aggravated felony’ of ‘sexual abuse of a minor’ to incorporate the definition of ‘sexual abuse of a minor’ in 18 U.S.C. § 2243, which is a criminal statute outlining the elements of the offense, rather than the definition of ‘sexual abuse’ found in 18 U.S.C. § 3509.”).

⁷² *Estrada-Espinoza*, 546 F.3d at 1160 n.15 (“In so holding, we necessarily overrule *Afridi v. Gonzales*.”).

⁷³ *Id.* at 1155. For example, INA § 101(a)(43)(B), “illicit trafficking in a controlled substance,” and INA § 101(a)(43)(F) “crime of violence” are cross-referenced with other federal provisions. *Id.*

⁷⁴ *Id.* For example, INA § 101(a)(43)(A) “murder, rape,” INA § 101(a)(43)(G) “a theft offense . . . or burglary offense” are not cross-referenced. *Id.* at 1156.

⁷⁵ *See id.* at 1156.

⁷⁶ *Id.* *But see* *United States v. Zavala-Sustaita*, 214 F.3d 601, 607 n.8 (5th Cir. 2000) (arguing that as federal substantive law and the INA serve very different purposes Congress may have had good reasons for adopting different definitions).

⁷⁷ *Estrada-Espinoza*, 546 F.3d at 1156.

⁷⁸ *Id.* at 1157.

⁷⁹ *See id.* (“The Supreme Court has instructed that “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”) (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

⁸⁰ *Estrada-Espinoza*, 546 F.3d at 1157.

⁸¹ *Id.* (citing *Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004)) (internal quotations removed).

⁸² *Estrada-Espinoza*, 546 F.3d at 1153 (“[U]nder national contemporary standards, although sexual activity with a younger child is certainly abusive, sexual activity with an older adolescent is not necessarily abusive.”).

⁸³ *See id.* (analyzing trends in state statutory rape laws).

⁸⁴ *See id.* at 1153–54 (“[O]ur prior case law—as well as common sense—suggest that, while consensual underage sex may be psychologically harmful to a young teen, it may not be harmful to an older one.”) (citing *United States v. Lopez Solis*, 447 F.3d 1201, 1208 (9th Cir. 2006). *See also* *United States v. Pallares-Galan*, 359 F.3d 1088, 1101 (9th Cir. 2004) (pointing out that under California statutory rape laws a person can “annoy” or “molest” a minor without injuring him or her); *United States v. Melton*, 344 F.3d 1021, 1028 (9th Cir. 2003) (noting that “some courts have hesitated in categorically equating the physical risks of sexual acts to minors of different age groups.”); *United States v. Thomas*, 159 F.3d 296, 299 (7th Cir. 1998) (“[I]t is difficult to maintain on a priori grounds that sex is physically dangerous to 16 year old girls.”); *United States v. Kirk*, 111 F.3d 390, 396 n.8 (5th Cir. 1997) (concluding that a serious potential for physical injury does not necessarily exists with sexual contact between a nineteen-year-old and a sixteen-year-old).

⁸⁵ *See Emile v. INS*, 244 F.3d 183 (1st Cir. 2001); *Silva v. Gonzales*, 455 F.3d 26 (1st Cir. 2006).

⁸⁶ *See Emile*, 244 F.3d at 185 (describing the facts of the offense).

⁸⁷ *Id.* at 188.

⁸⁸ *See id.* at 165 n.2 (“Elsewhere in the federal criminal code, *see* 18 U.S.C. § 3509(a)(8)(1994), the term “sexual abuse” is used broadly enough that it indubitably covers [the petitioner’s] conduct, but it is debatable how relevant this provision may be.”).

⁸⁹ See *id.* at 165 n.1 (“We do not want to be understood as endorsing the view that every possible violation of the federal sexual abuse chapter would automatically translate into a deportable offense.”).

⁹⁰ See *Silva*, 455 F.3d at 27 (describing the facts and procedural history of the case). The immigration judge presiding over the removal proceedings determined that the noncitizen’s state conviction was for both the crime of rape and the crime of abuse of a child, so that the noncitizen qualified doubly as an aggravated felon. See *id.* On appeal, the noncitizen argued that statutory rape did not constitute “sexual abuse of a minor” but he did not specifically challenge the immigration judge’s determination that he had also been convicted of the crime of rape. See *id.* at 28. Although the First Circuit thus concluded that “[b]y not setting out any developed argumentation to contradict the immigration judge’s classification of his conviction as rape, the petitioner has waived any challenge to that determination,” the court still proceeded to answer this imputed claim, as if it had been preserved. *Id.* at 29.

⁹¹ *Id.*

⁹² See, e.g., N.J. STAT. ANN. § 2C:24–4(a) (West 2001).

⁹³ See *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 994 (B.I.A. 1999) (“The terms rape and sexual abuse of a minor were added in an expansion of the definition of what constitutes an aggravated felony and an overall increase in the severity of the consequences for aliens convicted of crimes.”).

⁹⁴ See Johnson, *supra* note 19, at 428–33 (providing an in depth analysis of IIRIRA).

⁹⁵ See IIRIRA § 301(b) (1996), 8 U.S.C. § 1182(a)(9).

⁹⁶ See INA § 101(a)(48)(A) (1998), 8 U.S.C. § 1101(a)(48) (2000) (“The term ‘conviction’ means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.”). This definition of “conviction” prevents judges from deferring adjudication in favor of some form of probation so that the conviction would not be entered on the record, making the alien eligible for deportation. See also Johnson, *supra* note 19, at 428–29 (explaining how IIRIRA eliminated judicial discretion).

⁹⁷ See The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 § 305 (1996) (codified as amended in 8 U.S.C.), 8 U.S.C. § 1231 (2006).

⁹⁸ See IIRIRA § 203, 8 U.S.C. § 1228 (2000).

⁹⁹ See IIRIRA § 304(a), 8 U.S.C. § 1228 (2000).

¹⁰⁰ See IIRIRA § 306(a)(2), 8 U.S.C. § 1252 (2006).

¹⁰¹ See IIRIRA § 321(b), 8 U.S.C. § 1101(a)(43) (2006).

¹⁰² See *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 1002 (B.I.A. 1999) (Guendelsberger, dissenting) (“The decision by Congress to place ‘sexual abuse of a minor’ in section 101(a)(43)(A), alongside murder and rape, suggests that it was focusing on the most egregious offenses.”). *But see* *United States v. Zavala-Sustaita*, 214 F.3d 601, 606 n.7 (5th Cir. 2000) (“This argument would find no support in the rest of the statute,

which includes numerous offenses within the definition of an "aggravated felony" which, while serious, are less severe than murder or rape.").

¹⁰³ See In re *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 1002 (concluding that the scope "sexual abuse of a minor" should be considered "in light of the overage of the other aggravated felony categories.").

¹⁰⁴ IIRIRA proposed section H.R. 2202, 104th Cong. § 218 (1996).

¹⁰⁵ See In re *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 1003 ("Notably, proposed section 241(a)(2)(F) categorized 'sexual abuse' as an offense involving violence or the threat of violence."); see also *Emile v. INS*, 244 F.3d 183, 186–87 (1st Cir. 2001) (observing that the legislative history of IIRIRA in the House makes it likely that Congress intended "sexual abuse of a minor" to encompass conduct that would be criminal under §§ 2241, 2242, and 2244). Guendelsberger further argued that "[i]n choosing its terms, Congress also was aware that the federal criminal law and a number of state laws employing the 'sexual abuse of a minor' definition limit the range of offenses covered to those involving sexual acts or sexual contact, and do not include within their scope indecent exposure." In re *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 1003. However, the legislative history does not indicate that Congress specifically considered either the definitions given by federal or state law, or the Model Penal Code, which classifies indecent exposure as a misdemeanor. See MODEL PENAL CODE § 213.5 ("A person commits a misdemeanor if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.").

¹⁰⁶ In re *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 1003.

¹⁰⁷ See *Zavala-Sustaita*, 214 F.3d at 606–07 (arguing that in not "expressly limiting the meaning of 'sexual abuse of a minor' in ways it employed in other parts of § 1101(a)(42)(A)," Congress did, in fact, intend a broad definition).

¹⁰⁸ U.S. CONST. Art. I, § 8, cl. 4. Although naturalization and immigration are not synonymous, one can argue that immigration falls under the congressional power to set up a uniform rule of naturalization. "However, it is not clear from the Constitution what is meant by 'uniform' and whether such a standard applies to the application of naturalization rules." Christina LaBrie, *Lack of Uniformity in the Deportation of Criminal Aliens*, 25 N.Y.U. REV. L. & SOC. CHANGE 357, 363–64 (1999).

¹⁰⁹ See LaBrie, *supra* note 108, at 365 ("Congress traditionally defers to state standards of public morality.").

¹¹⁰ See *id.* ("[B]y using state standards to define criminal conduct for the purposes of immigration and naturalization laws, the federal government in effect allows itself to deny citizenship to (or deport) an immigrant for an act that is a crime in one state but not another."). See also THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 567–68 (5th ed. 2003) (describing the problems with uniformity and the aggravated felony provision).

¹¹¹ 228 U.S. 585, 592 (1913).

¹¹² ALEINIKOFF, *supra* note 110, at 538.

¹¹³ *Id.*

¹¹⁴ See LaBrie, *supra* note 108 at 361 (noting that because deportation is a civil penalty noncitizens are denied basic constitutional rights).

¹¹⁵ See discussion, *supra* note 18.

¹¹⁶ See, e.g., Kevin Costello, *Without a Country: Indefinite Detention as Constitutional Purgatory*, 3 U. PA. J. CONST. L. 503, 508–09 (noting that the majority of courts have found that excludable noncitizens are not protected by the Fifth Amendment); Tracey Topper Gonzalez, *Individual Rights Versus Collective Security*, 11 U. MIAMI INT’L COMP. L. REV. 75, 86–87 (discussing that constitutional protections of the Fifth, Sixth, and Fourteenth Amendments afforded to noncitizens are not as complete as those afforded to American citizens); LaBrie, *supra* note 108 at 362–63 (“Criminals who are citizens can rely on the Constitution to provide them with procedural fairness, but criminal aliens cannot.”).

¹¹⁷ *Id.* at 363. For examples of how the unintended consequences of the interaction between state and immigration law can undermine state policies, see *supra* Part III.B.

¹¹⁸ 450 U.S. 464, 464 (1981) (holding that a California statutory rape statute which only criminalized having sexual relations with minor females did not violate the Equal Protection Clause of the Fourteenth Amendment).

¹¹⁹ See IDAHO CODE ANN. § 18–6101 (2009).

¹²⁰ See LaBrie, *supra* note 108, at 367 (discussing the dangers in having the location of the offense determine deportability).

¹²¹ *Id.*

¹²² For a fuller discussion on the “lowest common denominator” effect, see *supra* Part I.B.

¹²³ See ALEINIKOFF, *supra* note 110, at 568 (“Assuming that uniformity ought to be a goal, is it achievable? Or should the goal be stated more modestly as reducing non-uniformity?”).

¹²⁴ See LaBrie, *supra* note 108, at 363 (“State legislatures do not necessarily consider immigration law consequences when passing legislation.”).

¹²⁵ See *id.* at 368 (discussing how immigration law can undermine the a state’s policy goals in implementing a greater use of suspended sentences).

¹²⁶ See *id.* at 367 (“[A]n alien’s deportability may be determined by [the] state conviction, even though the state court did not consider deportability in convicting or sentencing.”).

¹²⁷ See TRAC Immigration, *How Often is the Aggravated Felony Statute Used?*, <http://trac.syr.edu/immigration/reports/158/> (last visited Feb. 25, 2010) (analyzing the characteristics of those being charged as aggravated felons).

¹²⁸ See *id.*

¹²⁹ See *Sugarman v. Dougall*, 413 U.S. 634, 642 (1982) (noting that “classifications based on alienage are ‘subject to close judicial scrutiny.’”) (citation omitted); *In re Griffiths*, 413 U.S. 717, 721, 729 (1973) (holding that laws preventing resident noncitizens from practicing law violated the equal protection clause as noncitizens warranted heightened scrutiny); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”) (citation omitted). However, despite the Court’s heightened scrutiny of state laws which potentially violate the equal protection clause, “the Supreme Court has established essentially no limits on Congress’s authority to define classes of deportable citizens.” ALEINIKOFF, *supra* note 110, at 536.

¹³⁰ See *Sugarman*, 413 U.S. at 636 (discussing a discriminatory law requiring citizenship for public employment in positions subject to competitive examination); *In re Griffiths*, 413 U.S. at 718 (dealing with laws restricting noncitizens from the practice of law); *Graham*, 403 U.S. at 357 (invalidating welfare laws with residency requirements).

¹³¹ See Newcomb, *supra* note 19, at 698–701 (describing the recent wave of strict immigration legislation).

¹³² See Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of 42 U.S.C.).

¹³³ See Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990) (codified as amended in 8 U.S.C.).

¹³⁴ See Violent Crime Control and Law Enforcement Act of 1994, Title XIII, Pub. L. No. 103–322, 108 Stat. 1796 (1994) (codified as amended at 18 U.S.C., 42 U.S.C.).

¹³⁵ See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103–416, § 222, 108 Stat. 4305 (1994) (codified at 8 U.S.C. § 1101).

¹³⁶ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–131, § 550(e), 110 Stat. 1214 (1996).

¹³⁷ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 101 Stat. 3009–546 (1996) (codified as amended at 8 U.S.C.).

¹³⁸ See REAL ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 302 (2005).

¹³⁹ Newcomb, *supra* note 19, at 703 (citing Peter Hill, *Did Congress Eliminate All Judicial Review of Orders of Deportation, Exclusion, and Removal for Criminal Aliens?*, 44 FED. LAW. 43, 44 (1997)); see also ALEINIKOFF, *supra* note 110, at 566 (“The category of ‘aggravated felony’ has significant (some would say, overly harsh) consequences for other aspects of immigration law.”); Johnson, *supra* note 19, at 425–33 (tracking the development of the aggravated felony provision).

¹⁴⁰ These executive departments are the Department of Justice and the Immigration and Naturalization Service (INS)—now the Department of Homeland Security. See, e.g., The United States Department of Justice, Department of Justice Agencies, <http://www.justice.gov/agencies/> (last visited Apr. 12, 2010); The United States Department of Homeland Security, Department Subcomponents and Agencies, <http://www.dhs.gov/xabout/structure/> (last visited Apr. 12, 2010).

¹⁴¹ See Newcomb, *supra* note 19, at 705–06 (discussing the INS, the BIA and the Attorney General’s conflicting policies towards the 212(c) discretionary waiver for relief).

¹⁴² *Id.* at 718.

¹⁴³ See, e.g., *id.* (“Strictness towards criminality does not seem to constitute fairness towards the alien. Congress has gone too far in reacting to public opinion, denying legitimate members of the community access to basic rights, such as due process and equal protection of the laws. Part of the reason for congressional and administrative ill-will towards aliens stems from a general anti-immigrant sentiment prevalent in the United States. . . . Throughout this century, America as a whole can be characterized as xenophobic.”); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 709 (1996) (“An anti-immigrant tide currently rages against this country’s shores.”).

¹⁴⁴ *Fong Haw Tan. v. Phelan*, 333 U.S. 6, 10 (1948).

¹⁴⁵ *Contra* STEPHAN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 156 (1987).

¹⁴⁶ *Costello v. INS*, 376 U.S. 120, 131 (1964).

¹⁴⁷ *Id.* at 121, 128.

¹⁴⁸ *INS v. Errico*, 385 U.S. 214, 225 (1966).

¹⁴⁹ *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (“We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.”).

¹⁵⁰ *See INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (noting that the principle of construing any lingering ambiguities in favor of the noncitizen supported the conclusion that Congress had not affirmatively considered the unfairness of the contemplated provision).

¹⁵¹ Johnson, *supra* note 19, at 423–24 (citing LEGOMSKY, *supra* note 145, at 156).

¹⁵² *See, e.g.,* Keith Burgess-Jackson, *Statutory Rape: A Philosophical Analysis*, 8 CAN. J.L. & JURIS. 139, 145 (1995) (“The feminist, qua feminist, wishes to protect women from male aggression, whether sexual or otherwise; but the feminist also wishes to empower women to make decisions of their own on matters of sexuality.”); Kitrosser, *supra* note 21, at 187–288 (analyzing the debates around whether a new generation of statutory rape laws serve to increase female autonomy or merely grant men sexual access to minor females); Francis Olsen, *Statutory Rape: A Feminists Critique of Rights Analysis*, 63 TEX. L. REV. 367, 404–07 (1984) (noting that while statutory rape laws may be oppressive to underage females, their total abolition could undermine the right of young women to be free of unwanted sexual contact.); Note, *Feminist Legal Analysis and Sexual Autonomy: Using Statutory Rape Laws as an Illustration*, 112 HARV. L. REV. 1065, 1076 (1999) (discussing the balancing act statutory laws must perform “between women’s right to freedom and their right to security in the area of sexual autonomy.”).

¹⁵³ *See* Kitrosser, *supra* note 21, at 311 (“Historically, it was well accepted that statutory rape laws existed to protect the chastity of virtuous young women.”); *see also* Fregia, *supra* note 22, at 555–56 (“[T]he primary motivation for criminalizing the behavior was to promote female chastity and prevent teenage out-of-wedlock pregnancies.”).

¹⁵⁴ *See* Fregia, *supra* note 22, at 555 (“Originally the laws were gender specific, only criminalizing sexual acts with female victims.”). For a discussion of a “typical” promiscuity defense, *see* Burgess-Jackson, *supra* note 152, at 152.

¹⁵⁵ IDAHO CODE ANN. § 18–6101(1) (2009).

¹⁵⁶ *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 464 (1981) (holding that a California statutory rape statute which only criminalized having sexual relations with minor females did not violate the Equal Protection Clause of the Fourteenth Amendment). For a discussion of the disunity that could arise from such gender-specific statutes, *see supra* Part III.A.

¹⁵⁷ *See* Kitrosser, *supra* note 21, at 288 (pointing out that some feminists believe statutory rape laws should be reformed or abolished “based largely on the notion that statutory rape laws violate female autonomy and thus deny young women the right to choose when and with whom they will engage in sexual activity.”).

¹⁵⁸ *Id.*

¹⁵⁹ See Olsen, *supra* note 152, at 397 (“A few feminists have recognized that formal equality can perpetuate inequality in actual practice and have begun to search for ways in which women can achieve substantive equality. This effort has produced sharp disagreements among feminists. . . .”); Note, *supra* note 152, at 1065 (detailing the split between the formal and substantive equality schools of thought). For a discussion of a similar split termed “liberal” versus “radical” feminist theories on statutory rape, see Burgess-Jackson, *supra* note 152, at 147–51.

¹⁶⁰ See Note, *supra* note 152, at 1065. This fear of confusing biological and social differences was particularly strong in the wake of *Michael M.* Feminists from both schools criticized the opinion because “First, in holding that pregnancy constituted a real difference for women engaged in sexual intercourse, the Court confused biology with social arrangement. . . . Second, the Court’s opinion was based on outmoded stereotypes of male aggressiveness and female passivity.” *Id.* at 1077; see also Olsen, *supra* note 152, at 395–96 (describing feminists concerns with the “real differences” doctrine).

¹⁶¹ See Olsen, *supra* note 152, at 391 (analyzing theories springing from the recognition that formal equality can perpetuate inequality); Note, *supra* note 152, at 1066 (noting that “the formal equality approach ignores the current reality of gender inequality” and thus does not help to solve societal problems).

¹⁶² Note, *supra* note 152, at 1065.

¹⁶³ See *id.* at 1067 (“[T]he substantive equality school stresses women’s lack of security, pointing out women’s need to be protected from unwanted sexual activities.”).

¹⁶⁴ See MODEL PENAL CODE § 213.3 cmt. 2 at 385 (1980) (noting that the Model Penal Code statutory rape provision incorporates a four year age span provision because “[i]t will be rare that the comparably aged actor who obtains the consent of an underage person to sexual conduct . . . will be an experience exploiter of immaturity.”). But see Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 769 (2000) (arguing that it is very common for peer-on-peer sexual relations to include violence, coercion, and harassment).

¹⁶⁵ See Burgess-Jackson, *supra* note 152, at 154 (discussing age-based statutes as a surrogate for maturity-based statutes).

¹⁶⁶ For a fuller discussion of the “lowest common denominator” effect, see *supra* Part I.B.

¹⁶⁷ See *Mugalli v. Ashcroft*, 258 F.3d 52, 60 (2d Cir. 2001) (noting that Congress acknowledged such variability in the providing that an aggravated felony “applies to an offense . . . whether in violation of Federal or State law.”) (citation omitted).

¹⁶⁸ See discussion *supra* Part III.B.

¹⁶⁹ Fregia, *supra* note 22, at 560.

¹⁷⁰ See THE LEWIN GROUP, STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 6–7 (Dec. 2004) available at <http://www.lewin.com/content/publications/3068.pdf> (summarizing the states’ age of consent laws); see also *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1153 (9th Cir. 2008) (“The majority of states set the age of sexual consent at age 16 and forty-five states permit marriage at age 16 if the parents consent.”).

¹⁷¹ See THE LEWIN GROUP, *supra* note 170, at 6–7 (summarizing states’ use of age-span provisions); see also Kitrosser, *supra* note 21, at 287 (noting that a vast majority of modern-day statutes incorporate age-span provisions).