
STATE MISDEMEANANT, FEDERAL FELON: ADOLESCENT SEXUAL OFFENDERS AND THE INA

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In 1988, Congress amended the Immigration and Nationality Act (“INA”) to state that any alien who commits an “aggravated felony” is subject to deportation. In 1996, the definition of “aggravated felony” was revised to include “sexual abuse of a minor.” Perhaps uncontroversial at first blush, Congress’ “sexual abuse of a minor” terminology unfortunately encompasses state convictions that may contain both sex and minors, but not necessarily “abuse.” Statutory rape provides a prime example of this class of convictions. Recognizing this potential lack of abuse, most states have enacted Romeo and Juliet exceptions to their statutory rape laws, exempting consensual sexual contact between adolescents close in age from the harsher penalties that flow from other forms of child rape. In most instances, activities falling under such an exception qualify as either a misdemeanor or no crime whatsoever. For immigration purposes, however, it would take the Board of Immigration Appeals (“BIA”) almost twenty years to join these states in recognizing statutory rape as not inherently “abusive.” In its 2015 reinterpretation, the BIA concluded a “meaningful age differential” was required before a statutory rape conviction categorically qualified as an “aggravated felony” under the INA.

This Article is the first to explore the legal historical developments behind and impact of the BIA’s 2015 ruling. In sum, the Board of Immigration Appeals’ most recent interpretation is unreasonable—despite being a step in the right direction—and therefore not entitled to deference by the federal courts. Instead, the only reasonable interpretation of the term “sexual abuse of a minor” is one that is in accord with existing federal statutes defining the actual crime of “sexual abuse of a minor”—an approach that would exempt far more misdemeanor statutory rape convictions than the BIA’s “meaningful age differential” standard currently would allow. Such a conclusion com-

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ports not only with Chevron, but also with principles of statutory construction and also the rule of lenity.

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“[T]hose in authority cannot always be relied upon to take enlightened and comprehending views of what they call the indiscretions of youth.”

–Winston Churchill¹

I. INTRODUCTION

In 1996, a Georgia high-school student, just three weeks shy of his sixteenth birthday, asked a classmate, Wendy Whitaker, to perform oral sex on him in a darkened classroom.² Whitaker, who was seventeen at the time, obliged. The two were caught, and because the male student was not yet sixteen, Ms. Whitaker’s actions ran afoul of the state’s sodomy law.³ As a result, Ms. Whitaker was incarcerated for over a year, sentenced to five years probation, and required to register as a sex offender.⁴ Ten years later, her status as a convicted sex offender required her to va-

1. CHURCHILL BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS 569 (Richard M. Langworth ed., 2011).

2. Second Amended Complaint at 7, *Whitaker v. Perdue*, Civ. Action No. 4:06-cv-140-CC (N.D. Ga. Aug. 3, 2006), 2006 WL 2378226 [hereinafter *Whitaker Second Amended Complaint*]; *Sex Laws: Unjust and Ineffective*, ECONOMIST (Aug. 6, 2009), http://www.economist.com/node/14164614?story_id=14164614&source=hptextfeature.

3. *Whitaker Second Amended Complaint*, *supra* note 2, at 2.

4. *See Sex Laws: Unjust and Ineffective*, *supra* note 2.

cate her home when it was discovered her house was too close to a local day care center.⁵ In fact, Ms. Whitaker “is unable to live in her family’s home or near a school, church day care center, or park as a result of her conviction and registration.”⁶

Many would consider such punishments not only disproportionate to Ms. Whitaker’s crime, but perhaps even a bit draconian. The state of Georgia apparently agreed; today, such cases are treated very differently. Specifically, Georgia, like most states, has enacted what is referred to as “Romeo and Juliet” laws.⁷ Recognizing that sexual experimentation with peers is relatively common during adolescence,⁸ these laws provide for a greatly reduced penalty when, even though one party is below the age of consent, both adolescents are nonetheless close in years.⁹ As Carolyn E. Cocca explains in her book *Jailbait: The Politics of Statutory Rape Laws in the United States*:

[Romeo and Juliet laws] mandate that the perpetrator be a certain number of years older than the victim; some require that the perpetrator be at least of a certain age, such as eighteen. A law that formerly read, “[i]t is a felony for any person to commit an act of sexual penetration with any person under the age of sixteen,” would be changed to, “[i]t is a felony for any person to commit an act of sexual penetration with any person under the age of sixteen, provided that the actor is at least four years older than the victim.” An age-span effectively decriminalizes sexual activity between similar-aged teens at the felony level.¹⁰

Of course, these exceptions do not decriminalize all sexual acts between older adolescents and those below the age of consent. Instead, in most states, the “perpetrator” will merely be guilty of a misdemeanor instead of a felony.¹¹ Furthermore, in most states, a defendant whose actions fall within the Romeo and Juliet exception is not required to register as a convicted sex offender, as is almost always required of those who do not qualify for the exception.¹² Thus, under modern state law, adoles-

5. See Whitaker Second Amended Complaint, *supra* note 2, at 7–8.

6. Michele Goodwin, *Law’s Limits: Regulating Statutory Rape Law*, 2013 WIS. L. REV. 481, 533 (2013).

7. See GA. CODE ANN. § 16-6-3 (2016); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1308 n.250 (2009) (discussing Georgia’s “Romeo and Juliet” law).

8. See MATTHEW ROSS LIPPMAN, *ESSENTIAL CRIMINAL LAW* 182 (2013).

9. See Murray, *supra* note 7 (“In the context of statutory rape, criminal sex between an adult and minor may be subject to ‘Romeo and Juliet’ exemptions that mitigate penalties for the crime where the parties are relatively close in age.”); Shulamit H. Shvartsman, “Romeo and Romeo”: An Examination of *Limon v. Kansas* in Light of *Lawrence v. Texas*, 35 SETON HALL L. REV. 359, 361–62 (2004).

10. CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 29 (2004); *see infra* Part III.

11. COCCA, *supra* note 10.

12. See, e.g., Meredith Cohen, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws*, 16 J.L. & POL’Y 717, 738–39 (2008) (citing state laws that require registration by those not falling under a “Romeo and Juliet” exception).

cents who engage in sexual activity with underage peers are less likely to receive the severe (and in many respects, lifelong) punishments as someone like Ms. Whitaker.

Ironically, just as the states were reducing the penalties that attend adolescent sexual activity, Congress was passing immigration laws that (as currently interpreted and applied) would greatly enhance those penalties.¹³ In fact, for noncitizens who now commit the same crime as Ms. Whitaker, Congress has paved the way for one of the harshest penalties imaginable: banishment. Congress did so, in short, by amending the definition of “aggravated felony” in the Immigration and Nationality Act (“INA”) to include “sexual abuse of a minor.”¹⁴ Under the INA, any noncitizen convicted of an “aggravated felony”—which need not be “aggravated” or even a “felony”¹⁵—faces deportation, a penalty described as “a sanction which in severity surpasses all but the most Draconian criminal penalties.”¹⁶ Conviction of an aggravated felony carries other adverse immigration consequences as well, including mandatory detention,¹⁷ disqualification from any discretionary relief from removal,¹⁸ and permanent inadmissibility.¹⁹

Notably, Congress did not define “sexual abuse of a minor.” Through a series of rulings, however, the Board of Immigration Appeals (“BIA”) would initially define the term in such a way that any conviction for statutory rape, even state misdemeanor convictions, qualified as “sexual abuse of a minor.”²⁰ Consequently, statutory rape fell under the definition of “aggravated felony,” subjecting the offender to severe immigration consequences.²¹ Applying *Chevron* deference, most federal courts followed the BIA’s lead with the result that a noncitizen who committed the same crime as Ms. Whitaker, which today would qualify—at most—as a misdemeanor, would nonetheless be subject to what amounts to mandatory deportation.

Just two years ago, however, the BIA, for the first time, attempted to soften its interpretation. The BIA held statutory-rape convictions might not qualify as “sexual abuse of a minor” unless the state law in

13. See *infra* Part II.A.

14. See *infra* text accompanying note 52.

15. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000); Erica Steinmiller-Perdomo, *Consequences Too Harsh for Noncitizens Convicted of Aggravated Felonies?*, 41 FLA. ST. U. L. REV. 1173, 1176 (2014) (“The phrase ‘aggravated felony’ is a term of art that includes non-felonies ‘when the language of a particular subparagraph specifically includes misdemeanors.’”).

16. *Lok v. Immigration & Naturalization Serv.*, 548 F.2d 37, 39 (2d Cir. 1977).

17. See 8 U.S.C. § 1226(c)(1)(B) (2012).

18. 8 U.S.C. § 1229b(a) (“The Attorney General may cancel removal in the case of an alien who . . . has not been convicted of any aggravated felony.”).

19. 8 U.S.C. § 1182(a)(9)(A) (“Any alien who has been ordered removed . . . and who again seeks admission within 5 years of the date of such removal . . . or at any time in the case of an alien convicted of an aggravated felony is inadmissible.”).

20. See Kate Barth, *Defining “Sexual Abuse of a Minor” in Immigration Law: Finding a Place for Uniformity, Fairness, and Feminism*, 8 SEATTLE J. SOC. JUST. 857 (2010).

21. See *infra* Part IV.A.

question contained, as one of its elements, “a meaningful age differential.”²² As the BIA recognized: “[i]n evaluating whether an offense is categorically one of ‘sexual abuse,’ we must carry out the congressional intent to impose immigration consequences on those who have been convicted of sexual abuse of a minor without including nonabusive consensual sexual intercourse between older adolescent peers.”²³ In other words, a conviction pursuant to a statutory-rape law that does not contain some form of a Romeo and Juliet exception may not qualify as an “aggravated felony.” But what exactly *would* qualify remains far from certain.²⁴

The purpose of this Article is to argue that the BIA’s most recent interpretation, although a move in a right direction, is—just like its earlier interpretation—unreasonable and, thus, not subject to deference by the federal courts. Instead, the only reasonable interpretation of the term “sexual abuse of a minor” is one that is in accord with existing federal statutes defining the actual crime of “sexual abuse of a minor.”²⁵ This approach would exempt far more misdemeanor statutory-rape convictions than the BIA’s “meaningful age differential” standard currently would allow. Such a conclusion comports not only with *Chevron*, but also with principles of statutory construction and the rule of lenity.

Although some scholars have commented generally on the treatment of statutory-rape convictions under the INA,²⁶ this is the first article to analyze the aggravated felony provision through the lens of statutory-rape law in the United States. Specifically, this Article focuses on the history and development of statutory-rape law as a means of better illustrating the mismatch between the BIA’s interpretation and the current understanding of statutory rape.²⁷ This is also the first article to explore the impact of the BIA’s 2015 ruling, which attempted to modify and soften its earlier rulings—rulings the circuit courts had used to classify almost all statutory-rape convictions, even those that were misdemeanors, as aggravated felonies under the INA.²⁸ Finally, this Article is likewise the first to propose a comprehensive solution to the dilemma posed by having to discern which statutory-rape convictions satisfy the requirement of “abuse” under the INA and which do not.²⁹

22. *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 469 (B.I.A. 2015).

23. *Id.* at 476.

24. *See infra* Part IV.C.

25. *See infra* Part V.

26. *See, e.g.,* Barth, *supra* note 20; Adonia R. Simpson, *Judicial Recommendations Against Removal: A Solution to the Problem of Deportation for Statutory Rape*, 35 NEW ENG. J. CRIM. & CIV. CONFINEMENT 489 (2009); Michael S. Vastine, *From Bristol, to Hollywood, to a Land Far, Far Away: Considering the Immigration Consequences of Statutory Rape*, 7 RUTGERS J.L. & PUB. POL’Y 289 (2010).

27. *See infra* Part III.

28. *See infra* Part IV.C.

29. *See infra* Part V.

In developing these arguments, Part II begins with a discussion of the “aggravated felony” under the INA, focusing specifically on Congress’ expansion of that term to increasingly subject more and more criminal behavior to deportation. Part III then discusses statutory-rape law in the United States, with an emphasis on the rise of the “Romeo and Juliet” exception. In Part IV, this Article chronicles both the BIA and the circuit courts’ conflicting rulings that convictions for statutory-rape misdemeanors nonetheless qualify as aggravated felonies for immigration purposes. Finally, Part V argues that federal courts should ignore all the BIA has thus far had to say on this matter and instead hold that, under the appropriate federal definition of “sexual abuse of a minor,” “Romeo and Juliet” convictions must be excluded from the definition of aggravated felony.

II. THE INA’S “AGGRAVATED FELONY”

In 1952, Congress passed the Immigration and Nationality Act, which retained the previous rules relating to deportation on the basis of criminal acts, and provided:

Any alien in the United States . . . shall, upon the order of the Attorney General, be deported . . . who is convicted of a crime involving moral turpitude committed within five years . . . after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for one year or longer . . . [or] who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.³⁰

Since that time, Congress has continually expanded the criminal grounds for deportation, leading one commentator to refer to the provision as “a constantly expanding grab-bag of convictions.”³¹ Currently, that list includes not only the original language referencing crimes of moral turpitude, but also: “high speed flight from an immigration checkpoint; controlled substance convictions, drug abuse, or addiction; firearms offenses; crimes relating to espionage, sabotage, treason or sedition for which a five-year sentence may be imposed; and crimes of domestic violence, stalking, violation of a protection order, and child abuse.”³² Further, the INA provides that “[a]ny alien who is convicted of an aggravat-

30. The Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a)(2)(A) (1994).

31. Lory D. Rosenberg, *Administrative Deportation Proceedings: Accomplishment or Abomination?*, 72 INTERPRETER RELEASES 721, 729 (May 25, 1995); see also Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471 (2007) (“Congress has steadily expanded the list of non-immigration-related crimes that trigger deportation and other adverse immigration consequences, and the sheer numbers of deportations on crime-related grounds have skyrocketed.”).

32. Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 298 (2003).

ed felony at any time after admission is deportable.”³³ As used in the INA, “aggravated felony” is a term of art that itself encompasses “more than fifty classes of crimes imposing numerous penalties and restrictions against convicted noncitizens.”³⁴ Although the phrase, as initially used, had a much more modest reach, Congress’ continual expansion has resulted in the robust provision it is today.

A. An Ever-Expanding Class of Crimes

The INA’s definition of “aggravated felony,” like the criminal grounds for deportation, has grown substantially since the term was first introduced in 1988 as part of the Anti-Drug Abuse Act (“ADAA”).³⁵ Concerned with crimes committed by noncitizens involved in the growing drug trade,³⁶ Congress used the ADAA to mandate that noncitizens were subject to deportation after conviction of an “aggravated felony,” which the Act limited to “murder, any drug trafficking crime . . . or any illicit trafficking in any firearms or destructive devices . . . or any attempt or conspiracy to commit such an act, committed within the United States.”³⁷ Any noncitizen who committed an aggravated felony after entry into the United States was subject to deportation³⁸ and was then barred from seeking readmission for ten years.³⁹ Those convicted of aggravated felonies, however, could petition for discretionary relief in the form of receiving a waiver of deportation.⁴⁰ Such a waiver allowed the attorney general, in his or her discretion, to cancel deportation in light of certain factors, including length of residence in the United States and the impact of deportation on that person’s family.⁴¹

Congress subsequently passed the Immigration Act of 1990, which added considerably more bite to the “aggravated felony” provision. Under the act, which was dubbed “the most sweeping reform of our immi-

33. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

34. Steinmiller-Perdomo, *supra* note 15.

35. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (1988).

36. Cook, *supra* note 32, at 299 (“Debates in the House of Representatives suggest a concern over the growing number of drugs and weapons crimes committed by immigrants, as well as a belief that felonious immigrants were evading deportation.”); Erik S. Siebert, Comment, *The Process is the Problem: Lessons Learned from United States Drug Sentencing Reform*, 44 U. RICH. L. REV. 867, 874 (2010) (“By 1988 drug-related violence was still rising as homicides and gang violence were increasing at record rates in many major urban areas. In an effort to address areas not specified in the 1986 ADAA, Congress considered a series of new mandatory penalties and strengthened some already in place.”).

37. See Anti-Drug Abuse Act § 7342.

38. See The Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a)(2)(A)(iii) (2012).

39. See Anti-Drug Abuse Act § 7349(a).

40. See Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052, (codified at 8 U.S.C. § 1182(2)(B) (2000)) (permitting an aggravated felon imprisoned for less than five years to apply for the § 212(c) waiver of deportation).

41. See *In re Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978) (listing the factors to consider, including “family ties within the United States . . . [and] residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age)”).

gration system since 1952,”⁴² Congress first redefined the term to include drug-trafficking crimes of any amount, money laundering, and crimes of violence for which a term of at least five years imprisonment was imposed.⁴³ Further, the new definition encompassed federal, state, and even foreign offenses for which imprisonment was completed in the last fifteen years.⁴⁴ The act also removed the ability of the attorney general to grant waivers for noncitizens who had been imprisoned for more than five years.⁴⁵ Likewise, it barred those convicted of aggravated felonies from seeking asylum and, effectively, from voluntary departure and adjustment of status.⁴⁶ Finally, the act raised the bar for re-entry from ten to twenty years.⁴⁷ Responding to these changes, one commentator remarked that “[t]he future is bleak for the aggravated felon and will probably only worsen.”⁴⁸

Indeed, just four years later, Congress passed the The Immigration and Nationality Technical Corrections Act of 1994 (“INTCA”), which once again expanded the list of crimes qualifying as an “aggravated felony.”

With the passage of INTCA, the aggravated felon category suddenly included criminal aliens with convictions relating to: explosives and firearms; theft and burglary offenses with sentences of at least five years; kidnapping for ransom; child pornography; racketeer influenced corrupt organization (“RICO”) related offenses in which sentences of five years or more could be imposed; managing a prostitution business; slavery-related offenses; convictions relating to espionage, sabotage, and treason; fraud involving the loss of more than \$200,000 to victims; tax evasion involving the loss of more than \$200,000 to the Government; alien smuggling for gain; document fraud in which the sentence imposed was at least five years; and failure to appear for service of sentence.⁴⁹

Further, “INTCA also gave U.S. district court judges the discretion to enter a judicial order of deportation at the time of sentencing an alien for a criminal conviction that would render the person deportable.”⁵⁰ These

42. Federal Publications Inc., *Congress Approves Major Immigration Reform*, 67 INTERPRETER RELEASES 1209, 1209 (Oct. 29, 1990).

43. See Immigration Act of 1990, §§ 101(a)(43), 501(a)(2).

44. Warren R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, 14 FORDHAM INT'L L.J. 328, 336 (1990).

45. See Immigration Act of 1990, §§ 212(c), 511(a).

46. See Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 595–96 (1998).

47. See Immigration Act of 1990, §§ 212(a)(17), 514(a).

48. Craig H. Feldman, *The Immigration Act of 1990: Congress Continues to Aggravate the Criminal Alien*, 17 SETON HALL LEGIS. J. 201, 233 (1993).

49. Coonan, *supra* note 46, at 598.

50. James F. Smith, *United States Immigration Law as We Know It: El Clandestino, the American Gulag, Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 765–66 n.60 (2005); see also Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 273–74 (1997) (“The statutory authority for these orders provides that the parties to a federal criminal proceeding ‘may stipulate to the entry of a judicial order of deportation from the United

changes were indeed significant, but the most sweeping changes would come in 1996 with the passage of two laws, both of which greatly enhanced the reach of the “aggravated felony” provision of the INA.

First came the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Passed largely in response to the bombing in Oklahoma City, which many initially believed was the act of Middle Eastern terrorists,⁵¹ AEDPA was designed to impose harsher immigration sanctions on noncitizens convicted of criminal offenses. Once again, Congress did so by expanding the definition of “aggravated felony.” Under AEDPA, in addition to those crimes that had previously qualified, the term now encompassed more minor offenses (relatively speaking) like “bribery, counterfeiting or mutilating a passport, certain gambling offenses, obstruction of justice, and transportation for the purpose of prostitution.”⁵² The AEDPA also finished a job that the Immigration Act of 1990 had begun: taking away the ability of a noncitizen convicted of an aggravated felony to petition for a waiver of deportation, regardless of the prison sentence accompanying that conviction.⁵³

Congress was not done. Passed only six months after AEDPA, the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) came about as a result of growing anti-immigrant sentiment among American voters.⁵⁴ This act, like those before it, once again expanded the definition of “aggravated felony,” this time to include rape and “sexual abuse of a minor.”⁵⁵ It also lowered the threshold to \$10,000 in cases where the noncitizen was convicted of a crime causing financial harm to another.⁵⁶ Previously, convictions for crimes involving fraud, deceit, or tax evasion would only qualify as aggravated felonies if the amount of harm exceeded \$200,000.⁵⁷ Additionally, although many crimes had previously qualified as aggravated felonies only when the

States as a condition of the plea agreement or as a condition of probation or supervised release, or both,’ in both felony and misdemeanor cases.”) (quoting 8 U.S.C. § 1228(c)(5) (Supp. 1997) (INA § 238(c)(5))).

51. ANTHONY GREGORY, *THE POWER OF HABEAS CORPUS IN AMERICA: FROM THE KING’S PREROGATIVE TO THE WAR ON TERROR* 177 (2013) (“Only eight days after the horrific Oklahoma City Bombing, . . . [AEDPA] hit the senate floor.”).

52. William J. Johnson, *When Misdemeanors Are Felonies: The Aggravated Felony of Sexual Abuse of a Minor*, 52 N.Y.L. SCH. L. REV. 419, 427 (2007) (citing AEDPA § 440(e), 8 U.S.C. § 1101(a)(43)).

53. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (codified at 8 U.S.C. § 1182(c)).

54. Christine Wheatley & Nestor P. Rodriguez, *With the Stroke of a Bureaucrat’s Pen: U.S. State “Reforms” to Manage Its Undocumented Immigrant Population, 1920–2013*, in 1 HIDDEN LIVES AND HUMAN RIGHTS IN THE UNITED STATES: UNDERSTANDING THE CONTROVERSIES AND TRAGEDIES OF UNDOCUMENTED IMMIGRATION 157, 167 (Lois Ann Lorentzen ed., 2014).

55. See Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1101(a)(43)(A) [hereinafter IIRIRA].

56. *Id.* § 1101(a)(43)(D).

57. See Immigrant and Nationality Act, 8 U.S.C. § 1101(a)(43)(M) (1996) (current at 8 U.S.C. § 1101(a)(43)(M)) [hereinafter INA].

term of imprisonment was at least five years, under IIRIRA they would now qualify, so long as the term of imprisonment was at least one year.⁵⁸

In addition to altering the definition of “aggravated felony,” the IIRIRA also changed the definitions of both “conviction” and “term of imprisonment” to greatly expand those crimes that would now fall under the category of aggravated felony. First, Congress amended the INA to provide that a “conviction” occurred even if a judge deferred adjudication so long as the judge “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 . . . the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.”⁵⁹ This change was in response to some judges’ attempts to save noncitizens from the harsh consequences of an aggravated felony conviction by simply ordering probation in lieu of a formal adjudication.⁶⁰ Second, Congress changed the definition of “term of imprisonment” to make clear that any period of time for which the sentence was suspended—which some judges were likewise granting so as to avoid immigration consequences⁶¹—would still count toward determining whether an offense carried the requisite term of imprisonment to qualify as an aggravated felony.⁶²

Perhaps the most striking change the IIRIRA ushered in, however, was to make all of the INA’s aggravated felony provisions—including those first introduced by the IIRIRA—retroactive.⁶³ Thus, any noncitizen who was previously convicted of a crime was now, nonetheless, subject to deportation if the conviction would qualify as an aggravated felony under the 1996 amendments—even if at the time of the conviction, the crime would not have qualified.⁶⁴ As a result, noncitizens now found themselves subject to deportation for crimes committed many years ago, including crimes for which the noncitizen had pled guilty, thinking—quite correctly at that time—that such a plea would carry no immigration consequences.

58. See IIRIRA, 8 U.S.C. § 1101(a)(43)(F).

59. See *id.* § 101(a)(48); 8 U.S.C. § 1101(a)(48)(A).

60. Cook, *supra* note 32, at 307–08 (“As long as the individual complied with the probationary requirements, no conviction was entered on the record, and the non-citizen was not deportable.”).

61. Johnson, *supra* note 52, at 429.

62. See IIRIRA § 322(a), 8 U.S.C. § 1101(a)(48)(B) (“Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”).

63. See IIRIRA § 321(b), 8 U.S.C. § 1101(a)(43)(U) (“Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.”); see Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 154 (1998) (“Prior to IIRIRA, most changes in the definition of ‘aggravated felony’ had been made on a prospective basis. IIRIRA changed this pattern by making its new definition of aggravated felony fully retroactive to actions taken after IIRIRA’s enactment.”).

64. Wheatley & Rodriguez, *supra* note 54 (“[A]ny immigrant who was found to have been convicted of any of these offenses at any time, even prior to the enactment of the law in 1996, was considered to be deportable under the new legislation.”).

Consider, for instance, the story of Emma Mendez De Hay, a thirty-nine-year-old legal permanent resident who came to the United States in 1970.⁶⁵ Twenty years later, someone called Ms. Mendez De Hay's home to speak with her Spanish-speaking cousin.⁶⁶ At the request of her cousin, who did not speak English very well, Ms. Mendez De Hay answered the phone and carried out her cousin's request, which was to "tell the [the caller] I cannot help him today. I'll help him tomorrow."⁶⁷ In fact, the caller was an undercover narcotics agent, and Ms. Mendez De Hay was subsequently arrested and charged with "using a communication device to facilitate the distribution of cocaine."⁶⁸ In a plea deal that would bring no jail time and no deportation, Ms. Mendez De Hay simply pled guilty.⁶⁹ Six years later, after the passage of the IIRIRA, Ms. Mendez De Hay was detained after attempting to reenter the U.S. after a trip to Europe.⁷⁰ Despite carrying no risk of deportation in 1990, the IIRIRA's retroactive application now provided a basis for deportation.⁷¹

B. *Converting Misdemeanors into Felonies*

As the definition of "aggravated felony" has grown and become more complicated, so too has the difficulty of ascertaining which criminal convictions qualify. After all, any federal or state criminal conviction potentially can fall under the definition of aggravated felony. Thus, a problem arises when one attempts to funnel all the various convictions under the various state laws into the INA's single provision. For example, under the INA, the definition of aggravated felony includes "a theft offense . . . for which the term of imprisonment [is] at least one year."⁷² One convicted of such an offense is, thus, subject to removal. Would, then, a conviction under state law for aiding and abetting another in stealing a car qualify as a "theft offense"?⁷³ This is but one example of numerous situations where a court must attempt to gauge the "fit" of a state conviction with the INA's definition of aggravated felony. Not helping matters is the fact that, in making such determinations, courts are not

65. Cook, *supra* note 32, at 311.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* (pleading guilty "despite her innocence").

70. *Id.*

71. *Id.* at 312. Ultimately, however, she was not deported: "After a grueling two-year fight to stay in the United States, her deportation order was finally lifted when a United States Supreme Court decision invalidated certain deportation orders." *Id.* (citing *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289 (2001)).

72. 8 U.S.C. § 1101(a)(43)(G) (2012).

73. The Supreme Court has held that it would qualify. See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190 (2007) ("[T]he criminal activities of these aiders and abettors of a generic theft must themselves fall within the scope of the term 'theft' in the federal statute.")

merely proceeding on a case-by-case basis, but are attempting to create uniformity in application of the INA.⁷⁴

To deal with this task, courts utilize what is known as the “categorical approach.”⁷⁵ Under this framework, the court is required to “first make a categorical comparison of the elements of the statute of conviction to the generic definition [of the crime], and decide whether the conduct proscribed by [the statute] is broader than, and so does not categorically fall within, this generic definition.”⁷⁶ In other words, the court begins by looking at the “nationally-established generic elements”⁷⁷ of the crime included in the INA. After all, “[w]ithout defined elements, a comparison of the state statute with the federally-defined generic offense is not possible.”⁷⁸ The next step, then, is to compare those elements with the elements of the state statute under which the alien was convicted.⁷⁹ If that comparison reveals that the “minimum conduct that has a realistic probability of being prosecuted under” the state law in question would likewise satisfy all the elements of the generic definition of the crime, then the alien’s conviction will trigger the appropriate immigration consequences under the INA.⁸⁰ For example, the definition of aggravated felony includes “illicit trafficking in a controlled substance,” with the generic definition of a “controlled substance” including only those substances listed on *federal* drug schedules.⁸¹ Suppose that a state drug law includes some additional substances not on the federal list. In that case, courts have held that the state statute is not *categorically* an aggravated felony because the state penalizes drugs not found in the generic definition.⁸²

Under the categorical approach, a court is also permitted “to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior conviction.”

74. Natalie Liem, *Mean What You Say, Say What You Mean: Defining the Aggravated Felony Deportation Grounds to Target More Than Aggravated Felons*, 59 FLA. L. REV. 1071, 1086 (2007) (noting, the “overarching objective of having a national uniform immigration law”); see also Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting the Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1733–34 (2011) (“Uniformity is an important concern in the immigration context, derived not only from policy norms but from the Constitution. Article I of the Constitution provides that Congress must establish a ‘uniform rule of naturalization.’” (quoting U.S. CONST. art. I, § 8, cl. 4)).

75. See generally Pooja R. Dadhania, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313 (2011–2012); Das, *supra* note 74; Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257 (2012).

76. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1067–68 (9th Cir. 2007) (en banc) (quoting *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003)).

77. *Orozco v. Mukasey*, 546 F.3d 1147, 1158 (9th Cir. 2008).

78. *Id.*

79. *Navarro-Lopez*, 503 F.3d at 1070 (“After determining the generic elements of a crime, the next step of the categorical approach is to compare those elements with the state statute in question.”).

80. See *In re Chairez-Castrejon*, 26 I. & N. Dec. 349 (B.I.A. 2014).

81. 8 U.S.C. § 1101(a)(43)(B) (2012); 21 U.S.C. § 802 (2012).

82. See, e.g., *In re Paulus*, 11 I. & N. Dec. 274, 275 (B.I.A. 1965).

tions.”⁸³ As the BIA has explained, the policy behind this approach is as follows: “it eliminates the burden of going into the evidence in a case . . . and it prevents the situation occurring where two people convicted under the same specific law are given different treatment because one indictment may contain a fuller or different description of the same act than the other indictment.”⁸⁴ Additionally, there is the concern that the record may contain facts the defendant did not actively dispute because, at the time of the state criminal proceeding, the facts may not have seemed as crucial. As Professor Rebecca Sharpless elaborates:

A conviction does not exist apart from its elements. To say that a person has been found guilty of a crime is simply to say that he or she has been found guilty of each element of the crime. Another way of expressing this point is to say that a conviction consists of only facts that are necessarily decided by the criminal justice system. All other alleged facts concerning the defendant’s conduct are extraneous and, for both the prosecutor and the defendant, irrelevant to the proceedings. From the prosecutor’s perspective, only facts that are elements need be proven. From the defendant’s perspective, only element facts can result in the deprivation of the defendant’s liberty. Extraneous facts need not be proven at all and therefore certainly are not proven beyond a reasonable doubt. A defendant therefore has no reason to dispute (or to exclude from the record) nonelement facts.⁸⁵

The only exception to all this is when the state statute is divisible, meaning it “comprises multiple, alternative versions of the crime.”⁸⁶ In that case, and if “at least one, but not all of those crimes matches the generic version,” a court may look beyond the elements of the crime to the record of conviction itself to discern of which alternative the defendant was convicted.⁸⁷ For instance, suppose a state law criminalizes discharging a firearm in the direction of another person, with “intent, knowledge, or recklessness” as to the fact that the person could be injured.⁸⁸ Conviction of this crime could qualify as an aggravated felony under the INA (as a “crime of violence”), but only if the defendant acted with intent or knowledge, not if the defendant was merely reckless.⁸⁹ Thus, faced with a conviction under this law, a court would look to whether the statute is divisible and, if so, which mental state the defendant was found to have possessed when firing the gun.⁹⁰ This approach is known as the “modified

83. *Taylor v. United States*, 495 U.S. 575, 600 (1990).

84. *Matter Of R-*, 6 I. & N. Dec. 444, 448 n.2 (B.I.A. 1954).

85. Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 985 (2008).

86. *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013).

87. *Id.* at 2285.

88. *See In re Chairez-Castrejon*, 26 I. & N. Dec. 349, 351–52 (B.I.A. 2014) (interpreting UTAH CODE ANN. §76-10-508.1 (West 2016)).

89. *See id.* at 352.

90. *See id.* When confronted with this issue, the BIA ultimately ruled that the statute was not divisible under the modified categorical approach because “Utah law [does not] require[] jury unanim-

categorical approach.”⁹¹ Although this alternative approach does permit a court to review more details surrounding the defendant’s conviction, the reviewing court is nonetheless limited to only certain documents for the same reasons the categorical approach is limited to only a review of the elements of the underlying crime.⁹² Those documents include “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”⁹³

It is important to keep in mind that, whether a court applies the categorical or the modified categorical approach, the end result is a comparison of the elements of the state conviction with the grounds for immigration-related penalties listed in the INA. As the Supreme Court explained:

[T]he modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach’s central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach’s basic method: comparing those elements with the generic offense’s. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates “several different . . . crimes.”⁹⁴

By focusing almost exclusively on the elements of the crime, it becomes apparent why an aggravated felony under the INA need not be aggravated, or even a felony. Instead, the focus is merely on whether “the minimum conduct that has a realistic probability of being prosecuted”⁹⁵ under the state statute would likewise satisfy the elements of the generic definition of the crime referenced in the INA. Accordingly, it is conceivable that even a state misdemeanor could qualify as an “aggravated felony” under the INA: “[i]n determining whether state convictions are aggravated felonies, courts have consistently favored substance over form, looking beyond the labels attached to the offenses by state law and considering whether the offenses substantively meet the statuto-

ity regarding the mental state with which the accused discharged the firearm.” *See id.* at 354–55 (referencing *Descamps*, 133 S. Ct. at 2276).

91. Steinmiller-Perdomo, *supra* note 15, at 1177–78 (“Using the modified categorical approach, courts may go beyond the statutory language and look into the details of a conviction record to determine whether a state offense constitutes an aggravated felony.”).

92. *See supra* text accompanying notes 75–80.

93. *Shepard v. United States*, 544 U.S. 13, 16, 20 (2005). Further, “[i]n determining the facts that the jury necessarily had to find to convict, courts may look only at the indictment and the jury instructions from the prior trial.” Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1198–99 (2010).

94. *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013) (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)).

95. *In re Sama*, A076 581 488, 2015 WL 4761234, at *1 (B.I.A. July 17, 2015).

ry definition of ‘aggravated felony.’”⁹⁶ Thus, “an offense classified by state law as a misdemeanor can be an ‘aggravated felony’ . . . if the offense otherwise conforms to the federal definition of ‘aggravated felony’ found in 8 U.S.C. § 1101(a)(43).”⁹⁷ For instance, in *Habibi v. Holder*, the Ninth Circuit denied an alien’s request for cancellation of removal, holding that his misdemeanor domestic-violence conviction nonetheless qualified as an aggravated felony under the INA.⁹⁸

One class of aliens who have routinely had their misdemeanor convictions treated as aggravated felonies are those who have been convicted of statutory rape—even those convictions based upon a consensual sexual relationship between an older adolescent and a younger adolescent near the age of consent.⁹⁹ As noted previously, although states have increasingly moved to lower the penalties attendant to such behavior, immigration law has refused to follow suit.¹⁰⁰ Before getting into the INA’s treatment of statutory-rape convictions, however, it is first necessary to explore the nature of statutory-rape law generally and the varying levels of conduct that can fall within those statutes.

III. STATUTORY RAPE AND THE ROMEO AND JULIET EXCEPTION

It should come as no surprise to anyone that sexual activity among adolescents is fairly common. In 2013, for instance, 46.87% of high school students reported having sexual intercourse.¹⁰¹ Furthermore, regardless of whether they are acting upon them, almost all teens experience sexual desires.¹⁰² In light of these adolescent propensities—as well as the understanding that most adolescents lack full emotional, mental, and physical maturity—state legislatures are rightly concerned with protecting teens from “unequal, manipulative, or predatory relationships.”¹⁰³

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

97. *Id.*

98. 673 F.3d 1082, 1085 (9th Cir. 2011) (“[A]ggravated felony’ is defined [by 8 U.S.C. § 1101(a)(43)(F) (2006)] as a ‘crime of violence . . . for which the term of imprisonment [is] at least one year[]’”); see generally Dawn Marie Johnson, Note, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 477 (2001) (“As long as the crime carries a possible sentence of one-year, an alien may be designated as an aggravated felon. Because many crimes carrying a possible sentence of one year are misdemeanors or non-aggravated felonies, for all practical purposes, the AEDPA and the IIRIRA force judges to recharacterize misdemeanors and non-aggravated felonies as aggravated felonies solely for immigration purposes.”).

99. See *infra* Part III.

100. See *supra* Part I.

101. LAURA KANN ET AL., MORBIDITY & MORTALITY WKLY. REP.: YOUTH RISK BEHAVIOR SURVEILLANCE—UNITED STATES, 2013, CTRS. DISEASE CONTROL & PREVENTION (June 13, 2014) 1, 112, <http://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf>.

102. See Linda C. McClain, *Some ABCs of Feminist Sex Education (in Light of the Sexuality Critique of Legal Feminism)*, 15 COLUM. J. GENDER & L. 63, 67 (2006) (describing “sexual desire” as part of adolescents’ “healthy development”); Gretchen Witte, Note, *Internet Indecency and Impressionable Minds*, 44 VILL. L. REV. 745, 767–68 (1999) (“Children, and especially adolescents, are naturally curious about sexual matters and seek information on this subject.”).

103. COCCA, *supra* note 10, at 2; see also Daryl J. Olszewski, Note, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693, 698 (2006) (describing the moti-

One of the primary ways in which legislatures have attempted to do so is through statutory-rape laws.

In essence, statutory-rape laws criminalize sexual activity with a child who is below the statutorily defined age of consent.¹⁰⁴ These laws, which vary by state, lay out the minimum age at which a person can legally consent to engage in a sexual act.¹⁰⁵ As a result, in most instances, sexual behavior with someone below the age of consent is a criminal act regardless of whether the child's participation was voluntary.¹⁰⁶ Indeed, under the law, the child is deemed *legally* incapable of consenting. As one commentator describes: "The law conceives of the younger partner as categorically incompetent to say either yes or no to sex. Because she is by definition powerless both personally and legally to resist or to voluntarily relinquish her 'virtue,' the state, which sees its interest in guarding that virtue, resists for her."¹⁰⁷ In most states, the offense of statutory rape is a felony.

Although statutory-rape laws are seen today as necessary to protect children, the laws were initially designed to protect the property interest that fathers had in their daughter's chastity.¹⁰⁸ As Cocca describes, "[t]he idea behind such laws at the time was less about the ability or lack thereof to consent to such activity on the part of the female, and more about protecting white females and their premarital chastity—a commodity—as property."¹⁰⁹ Indeed, many have pointed to the sexist underpinnings of these early laws and the role they played in society's obsession with regulating female sexuality:

The sheltering of females from sexual experience has been a prominent feature of our male-dominated culture, in which women were

vation behind statutory-rape law as the "desire to protect all juveniles from the sexual predations of adults.").

104. ROBERT L. MADDEX, *ENCYCLOPEDIA OF SEXUAL BEHAVIOR AND THE LAW* 274–75 (Diane Maddex ed., 2006); see also Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 309 (2006) ("At its essence, statutory-rape is unlawful sexual intercourse with a person under a specified age, who, because of that age, is presumed incapable of consenting to the sexual activity.").

105. See Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U.L. REV. 313, 334 (2003) ("At its most basic, statutory rape is the carnal knowledge of a person who is deemed underage as proscribed by statute and who is therefore presumed to be incapable of consenting to sexual activity.").

106. MADDEX, *supra* note 104, at 275.

107. JUDITH LEVINE, *HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX* 71 (2002).

108. See AMY ADELE HASINOFF, *TEXTING PANIC: RETHINKING CRIMINALIZATION, PRIVACY, AND CONSENT* 139–40 (2015) (describing statutory-rape laws as "originally conceived as property crimes in order to protect the commodity value of white girls' premarital chastity").

109. COCCA, *supra* note 10, at 11. The early law was, likewise, concerned almost exclusively with protecting the chastity of young, white women. Accord CLAIRE ELAINE RASMUSSEN, *THE AUTONOMOUS ANIMAL: SELF-GOVERNANCE AND THE MODERN SUBJECT* 54 (2011) ("Few African American girls were affected by age of consent laws because their bodies were seen as less than pure or of less importance for the maintenance of social order."); see also JOANNE BELKNAP, *THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE* 170 (2014) (describing the early laws as being far more far "with protecting White girls than girls of color, particularly African American girls, from lecherous men").

once considered the exclusive property of the men to whom they were married (and before marriage the property of their fathers, acting in trust for their future husbands). Many of our sexual norms are rooted in such beliefs. Rape, for example, was until recently seen in terms of one man violating the property rights of another. Prohibitions of premarital sex and emphasis on virginity likewise can be seen as efforts to preserve the market value of females.¹¹⁰

Not surprisingly, then, early statutory-rape laws were drafted to protect only underage females. In other words, the crime was gender specific, defined as “sexual penetration of an underage female by a male.”¹¹¹ The law continued in this fashion for some time, and the Supreme Court even upheld the constitutionality of this form of gender discrimination, ruling in 1981 that “[b]ecause virtually all of the significant harmful and identifiable consequences of teenage pregnancy fall on the female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct.”¹¹² Nonetheless, feminists began to see these discriminatory laws “less as empowering and more as infantilizing.”¹¹³ Specifically, they viewed these early forms of statutory-rape laws as mechanisms “to codify patriarchal notions of female sexuality and mental incapacity into law and to reinforce stereotypes of gender by prohibiting sex with an underage female only.”¹¹⁴ Thus, feminists began advocating for reform, and their efforts were quite successful. By the year 2000, all states had modified their statutory-rape laws to be gender neutral.¹¹⁵

Early statutory-rape laws also criminalized, at the felony level, all sexual activity with a person under the age of consent regardless of the age of the “perpetrator.” Thus, “if the male were the same age as the female, or even younger than the female, he would still be prosecuted for the crime.”¹¹⁶ Many states, however, recognized that sexual experimentation with peers is relatively common during adolescence and that in such circumstances, there is less danger of abuse.¹¹⁷ These states enacted what are referred to as “Romeo and Juliet” exceptions, which provide for either a mitigated penalty or complete exculpation when both actors are

110. ALBERT D. KLASSEN ET AL., *SEX AND MORALITY IN THE U.S.* 272 (Hubert J. O’Gorman ed., 1989).

111. Carolyn Cocca, *16 Will Get You 20: Adolescent Sexuality and Statutory Rape Laws*, in *ADOLESCENT SEXUALITY: A HISTORICAL HANDBOOK AND GUIDE* 15, 16 (Carolyn Cocca ed., 2006).

112. *Michael M. v. Sonoma Cty. Super. Ct.*, 450 U.S. 464, 473 (1981) (“It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly ‘equalize’ the deterrents on the sexes.”).

113. Cocca, *supra* note 111, at 19.

114. *Id.*

115. *Id.* at 21; *see also* Carpenter, *supra* note 105, at 338 (“[N]early all states have chosen to recast the crime as gender-neutral, both in who may be the perpetrator and in who may be the victim.”).

116. COCCA, *supra* note 10.

117. *See* Shvartsman, *supra* note 9.

close in years, yet one party is below the age of consent.¹¹⁸ As one text describes:

[M]ost states have age-gap exceptions, sometimes called “Romeo and Juliet” clauses, which overlook consensual sex between same-age peers. These exceptions prohibit prosecution for statutory rape in cases where the parties’ ages are within a specified range, usually 2–5 years, as specified in statute. These exceptions prohibit, for example, the prosecution of an 18-year-old male for engaging in sexual activity with his 16-year-old girlfriend.¹¹⁹

Of course, this is not to suggest that all states freely permit sexual acts between older adolescents and those below the age of consent. Instead, in most states, such acts are still criminalized; at most, however, the perpetrator will merely be guilty of a misdemeanor and not a felony.¹²⁰ Furthermore, in most states, a defendant who falls under the ambit of the Romeo and Juliet exception is not required to register as a convicted sex offender, as is required of those who commit statutory rape and do not qualify for the exception.¹²¹

To illustrate how a Romeo and Juliet exception operates and just how beneficial it can be, consider the case of Matthew Limon. In February of 2000, Matthew Limon was one week past eighteen years old when he engaged in consensual oral sex with M.A.R., who was one month shy of his fifteenth birthday.¹²² In Kansas, the Romeo and Juliet statute allowed for a greatly reduced penalty for violating the statutory rape laws provided that: 1) the victim was fourteen or fifteen years of age; 2) the defendant was both less than nineteen years of age and less than four years older than the victim; 3) the victim and the defendant are the only ones involved in the sexual act; and 4) the victim and the defendant are of the opposite sex.¹²³ Had Matthew Limon received the benefit of this exception, his sentence would have been no greater than fifteen months and he would not have been required to register as a convicted sex offender.¹²⁴ Limon, however, did not qualify under the Romeo and Juliet statute for the sole reason that he and M.A.R. were both male.¹²⁵ Accordingly, Limon was convicted and sentenced to over seventeen years in

118. *Id.*

119. STACY L. MALLICOAT & CONNIE ESTRADA IRELAND, *WOMEN AND CRIME: THE ESSENTIALS* 84 (2014).

120. COCCA, *supra* note 10, at 34; *see also* Steve James, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*, 78 UMKC L. REV. 241, 256 (2009) (“[W]hen addressing consensual sex between young people close in age, the provisions ensure that states either do not punish the conduct at all or punish it to a much lesser degree . . .”).

121. *See generally* Cohen, *supra* note 12 (citing state laws that require registration by those not falling under “Romeo and Juliet” exception).

122. *State v. Limon*, 122 P.3d 22, 24 (Kan. 2005).

123. *Id.* For an extended discussion of the case, *see* Shvartsman, *supra* note 9.

124. *Limon*, 122 P.3d at 25.

125. *Id.* at 24.

prison, five years of post-release supervision, and registration as a persistent sexual offender.¹²⁶

In the end, however, *Limon* prevailed in getting the Kansas Supreme Court to strike down the law's requirement that only opposite-sex couples could avail themselves to the protections of the Romeo and Juliet exception.¹²⁷ Specifically, the court found no rational basis to distinguish between a class of those eighteen years old and younger who engage in voluntary, heterosexual activity with minors aged fourteen or fifteen, and a class of those eighteen years old and younger who engage in voluntary, homosexual activity with such minors.¹²⁸

Similarly, in 2003, Genarlow Wilson, at the age of seventeen, had oral sex with a fifteen-year old girl.¹²⁹ Because she was below the age of consent, Wilson was charged with statutory rape.¹³⁰ The case arose out of Georgia, which by this time had in place a Romeo and Juliet exception.¹³¹ Nonetheless, at the time the exception was adopted, the legislature neglected to extend it to cases involving oral sex, with the result that the exception merely protected sexual intercourse between adolescents close in age.¹³² Accordingly, Wilson's conduct was not covered by the exception and, in 2005, he was sentenced to ten years in prison for aggravated child molestation.¹³³ A public backlash quickly ensued, and as a result, the following year the Georgia legislature amended its statutory-rape laws to make the Romeo and Juliet exception apply to cases involving oral sex.¹³⁴ Although the amendment was not made retroactive, Wilson was released in 2007 after the Georgia Supreme Court declared his punishment to be both cruel and unusual.¹³⁵

As these two cases demonstrate, Romeo and Juliet exceptions not only offer enormous protections to those adolescents facing charges of statutory rape, but also show a clear trend on the part of the states to be more inclusive as to which adolescents can avail themselves of this protection. In both cases, when it was revealed that state law was denying certain adolescents the benefits of the Romeo and Juliet exception, courts and legislatures quickly corrected the omission and remedied the

126. *Id.* at 25.

127. *Id.* at 40.

128. *Id.* at 36.

129. *Wilson v. State*, 631 S.E.2d 391, 392 (Ga. Ct. App. 2006).

130. *Id.* For a more detailed recounting of the Wilson story, see Wendy S. Cash, *A Search for "Wisdom, Justice, and Moderation" in Wilson v. State*, 42 NEW ENG. L. REV. 225 (2007).

131. Cash, *supra* note 130, at 233–34.

132. *Wilson*, 631 S.E.2d at 392–93 (“[I]f a seventeen-year-old male who engages in an act of sodomy with a female under the age of sixteen years is convicted of aggravated child molestation, he is subject to a mandatory sentence of ten years imprisonment without possibility of parole. If, however, that same teenage male engages in an act of sexual intercourse with the same female child and is convicted of statutory rape, he is guilty of only a misdemeanor.”).

133. *Id.* at 392.

134. *Humphrey v. Wilson*, 652 S.E.2d 501, 503 (Ga. 2007) (“Georgia Governor Sonny Perdue signed House Bill 1059, which amended OCGA § 16–6–4 effective July 1, 2006, by adding a new subsection (d)(2) to make conduct such as Wilson’s a misdemeanor . . .”).

135. *Id.* at 503–04.

resulting harms. As the next Part details, however, when it comes to federal immigration law, that trend has sadly moved in exactly the opposite direction.

IV. ROMEO AND JULIET EXCEPTIONS UNDER THE INA

As noted earlier, Congress did not add the language “sexual abuse of a minor” to the INA’s definition of aggravated felony until 1996 under the IIRIRA.¹³⁶ At the same time, Congress chose to not define “sexual abuse of a minor.”¹³⁷ Accordingly, it would be up to the courts to determine the scope of this new form of “aggravated felony.” Particularly important would be the BIA’s interpretation, given that, under *Chevron*,¹³⁸ “the BIA is entitled to deference in interpreting ambiguous provisions of the INA.”¹³⁹

A survey of both the BIA and the circuit courts’ rulings on this issue reveals three classes of cases: 1) the initial cases interpreting “sexual abuse of a minor,” all of which essentially held that those convicted of statutory rape—even if the underlying conviction was a misdemeanor—had likewise been convicted of an aggravated felony under the INA; 2) a subsequent round of circuit-court cases in which the courts started to express disagreement as to whether all statutory-rape convictions should categorically qualify as “sexual abuse of a minor”; and 3) the BIA’s most recent attempt to both offer a compromise and to soften its earlier interpretation by proposing a standard whereby not all convictions for statutory rape constitute aggravated felonies.

A. *First-Generation Cases: A Broad Interpretation*

Three years after the passage of the IIRIRA, in *In re Rodriguez-Rodriguez*, the BIA weighed in for first time on the meaning of “sexual abuse of a minor.”¹⁴⁰ In that case, Rodriguez-Rodriguez was convicted under Texas state law of exposing himself to a child.¹⁴¹ Because Rodriguez-Rodriguez was a legal permanent resident, the Immigration and Naturalization Service (“INS”) attempted to use his conviction as a basis for removal.¹⁴² The BIA, thus, had to determine whether Rodriguez-Rodriguez’s crime qualified as “sexual abuse of a minor.”¹⁴³ The Board began by noting that, among the crimes found in the definition of aggra-

136. See Johnson, *supra* note 52, at 428.

137. *Id.* at 435.

138. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

139. *Negusie v. Holder*, 555 U.S. 511, 516 (2009); see also Paul Chaffin, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?*, 69 N.Y.U. ANN. SURV. AM. L. 503, 506 (2013) (“As a general matter, Chevron undoubtedly applies to the BIA’s interpretation of the INA.”) (footnote omitted).

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

141. *Id.* at 992 (citing TEX. PENAL CODE ANN. § 21.11(a)(2) (West 1993)).

142. *Id.*

143. *Id.*

vated felony, Congress chose to define several of them by cross-referencing federal criminal statutes.¹⁴⁴ In this instance, however, Congress provided no such cross-reference. In light of that omission, the BIA concluded that “[w]here Congress includes particular language in one section but omits it from another, it is presumed that Congress acted intentionally and purposefully.”¹⁴⁵ Accordingly, the BIA ruled that it was not bound by any particular definition and instead would employ principles of statutory construction to best discern the congressional intent behind the phrase “sexual abuse of a minor.”¹⁴⁶

Ultimately, the BIA settled on 18 U.S.C. § 3509(a), a federal statute that delineates the rights of child witnesses, wherein the term “sexual abuse” is defined to include “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.”¹⁴⁷ Given the breadth of that definition, the high degree of mental culpability required by the underlying Texas statute, and the fact that Rodriguez-Rodriguez was sentenced to ten years in prison, the BIA concluded that his crime did indeed qualify.¹⁴⁸ As to its use of 18 U.S.C. § 3509(a), however, the BIA did note that: “[w]e are not adopting this statute as a definitive standard or definition but invoke it as a guide in identifying the types of crimes we would consider to be sexual abuse of a minor.”¹⁴⁹

Although the issue in *Rodriguez-Rodriguez* involved indecent exposure, the BIA’s ruling would nonetheless prove instructive to those courts soon confronted with classifying statutory-rape offenses under the INA. In 2001, the Seventh Circuit encountered just such a case with *Guerrero-Perez v. INS*.¹⁵⁰ In that case, Guerrero-Perez, when he was nineteen, had sex with his girlfriend, who was fifteen at the time.¹⁵¹ As a result, he was convicted of “criminal sexual abuse,” which is defined as “an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was less

144. *Id.* at 994–95 (“In amending the aggravated felony definition to include sexual abuse of a minor, Congress did not use the phrase ‘an offense described in section’ and then designate a definition found in the federal statute, as it did elsewhere in section 101(a)(43) of the Act . . .”).

145. *Id.* at 995.

146. *Id.* at 993 (“Where Congress’ intent is not plainly expressed, we then need to determine a reasonable interpretation of the language and fill any gap left, either implicitly or explicitly, by Congress.”).

147. *Id.* at 995 (internal quotation marks omitted).

148. *Id.* (“Sexually explicit conduct includes lascivious exhibition of the genitals or pubic area of a person or animal. The Texas statute can be fairly construed to fall within this definition.”) (internal citation omitted). In the previous year, the Fifth Circuit reached the same result on a case of very similar facts. *United States v. Zavala-Sustaita*, 214 F.3d 601, 607 (5th Cir. 2000).

149. *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996.

150. 242 F.3d 727 (7th Cir. 2001).

151. *Id.* at 730. Guerrero-Perez entered the United States when he was just over two months old. *Id.* at 728.

than 5 years older than the victim.”¹⁵² Under Illinois law, the crime in question was a misdemeanor, and Guerrero-Perez was sentenced to thirty days work release and two years of sex-offender probation.¹⁵³

The issue confronting the Seventh Circuit was whether Guerrero-Perez’s conviction qualified as “sexual abuse of a minor” and thus an “aggravated felony” under the INA.¹⁵⁴ Recognizing that this was an issue of first impression for the Circuit,¹⁵⁵ the court first held that an “aggravated felony” under the INA need not be a felony:

[R]ather than leave the question of what constitutes an aggravated felony open-ended, Congress said, “The term ‘aggravated felony’ means— . . .” and proceeded to list what crimes would be considered aggravated felonies. It is important to note that the term aggravated felony is placed within quotation marks and Congress then used the word “means” after this term. What is evident from the setting aside of aggravated felony with quotation marks and the use of the term “means” is that 8 U.S.C. § 1101(a)(43) serves as a definition section.¹⁵⁶

Further, noting that “[w]hen a statute includes an explicit definition, we must follow that definition, even if it varies from that term’s ordinary meaning,”¹⁵⁷ the court held that misdemeanors, as well as felonies, can fall within the INA’s definition of aggravated felony: “Congress, since it did not specifically articulate that aggravated felonies cannot be misdemeanors, intended to have the term aggravated felony apply to the broad range of crimes listed in the statute, even if these include misdemeanors.”¹⁵⁸

Therefore, applying the broad definition of “sexual abuse of a minor” used by the BIA earlier in *Rodriguez-Rodriguez*, the court upheld the BIA’s ruling in Guerrero-Perez’s case that his misdemeanor statutory-rape conviction qualified as an aggravated felony.¹⁵⁹ In applying this standard to Guerrero-Perez, who had moved to the U.S. when he was just over two months old, the court concluded that “[w]hile we are mindful of the harsh realities that Guerrero will face if he is deemed to be an aggravated felon, we are constrained by the structure of the statute as well as Congress’ intent when it defined certain crimes as aggravated felonies to reject Guerrero’s position.”¹⁶⁰

152. *Id.* at 730 (citing 720 ILL. COMP. STAT. 5/12–15(c)) (internal quotation marks omitted).

153. *Id.*

154. *Id.* at 731.

155. *Id.* at 735 (“Whether an Illinois Class A Misdemeanor for criminal sexual abuse can constitute an aggravated felony under the rubric of sexual abuse of a minor is a question of first impression for this Circuit.”).

156. *Id.* at 736.

157. *Id.* (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)).

158. *Id.* at 737.

159. *Id.* at 727.

160. *Id.* at 732.

Shortly thereafter, the BIA would disagree with the Seventh Circuit's conclusion and hold that misdemeanor statutory-rape convictions cannot qualify as aggravated felonies under the INA. In *In re Crammond*, the BIA was confronted with the issue of whether a misdemeanor conviction under California's statutory-rape law qualified as an aggravated felony.¹⁶¹ Citing *Chevron*, the BIA found that the term "aggravated felony" was ambiguous:¹⁶² "[t]he choice of the term 'aggravated felony,' as opposed to more generic terms such as 'aggravated offense' or 'aggravated crime,' suggest[s] that Congress intended to restrict the listed offenses to felonies. On the other hand, there is no explicit reference . . . requiring that the crimes included there be felonies."¹⁶³ In light of this ambiguity, the court relied upon the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"¹⁶⁴ and held that "if an alien has been convicted of an offense of 'murder, rape, or sexual abuse of a minor,' that conviction must be for a 'felony' in order for the crime to be considered an "aggravated felony" under" the INA.¹⁶⁵ In so ruling, the BIA expressed its disagreement with the Seventh Circuit's holding in *Guerrero-Perez*.¹⁶⁶

That same year, both the Sixth and the Eleventh Circuits sided with the Seventh, holding that even misdemeanor convictions qualified as "sexual abuse of a minor," as used in the definition for aggravated felony.¹⁶⁷ As the Sixth Circuit put it, "as long as a defendant's former conviction leading to deportation can legitimately be termed 'sexual abuse of a minor,' that act must be considered an 'aggravated felony' for immigration law purposes, regardless of a state designation as either a felony or misdemeanor."¹⁶⁸ Neither case, however, concerned statutory rape, but instead involved adult defendants convicted of molesting young children.

In 2002, in another case involving misdemeanor child molestation—this time between a forty-seven-year-old man and an eleven-year-old child—the BIA reversed course and held that even a misdemeanor conviction can qualify as an aggravated felony under the INA's "sexual abuse of a minor" provision.¹⁶⁹ Relying upon the Sixth, Seventh, and Eleventh Circuit courts' opinions, the BIA held that "the prevailing ap-

161. 23 I. & N. Dec. 9 (B.I.A. 2001).

162. *Id.* at 3 ("We do not find a clear expression of congressional intent in the plain language of section 101(a)(43) of the Act.").

163. *Id.*

164. *Id.* at 5.

165. *Id.*

166. *Id.* at 6 ("The Seventh Circuit does not address our decision and analysis in *Matter of Davis*, 20 I. & N. Dec. 536, 542-43 (B.I.A. 1992), which emphasizes the importance, for purposes of uniformity, of a felony offense in order to have an aggravated felony under section 101(a)(43)(B) of the Act. Finally, the Seventh Circuit does not fully address the interpretive principle that we resolve doubts in favor of the more narrow construction of deportation statutes.").

167. See *United States v. Gonzalez-Vela*, 276 F.3d 763, 768 (6th Cir. 2001); *United States v. Marin-Navarette*, 244 F.3d 1284, 1287 (11th Cir. 2001).

168. *Gonzalez-Vela*, 276 F.3d at 768 (emphasis in original).

169. *In re Small*, 23 I. & N. Dec. 448 (B.I.A. 2002).

pellate court view should be adopted for the reasons set forth in the above-cited opinions [of those circuit courts]. We consider it appropriate at this juncture to accede to the weight of appellate court authority in the interest of uniform application of the immigration laws.”¹⁷⁰

Thus, by this point, the interpretation of the BIA and the appellate courts appeared to be in accord that misdemeanor convictions did indeed qualify as “sexual abuse of a minor.” The problem, however, was that precious few of those cases concerned a statutory-rape conviction involving adolescents close in age.¹⁷¹ As discussed earlier, state law had increasingly come to view this form of sexual activity as less worthy of punishment, if worthy of any punishment at all.¹⁷² Thus, the question remained as to whether, regardless of the fact it could not be excluded by virtue of its misdemeanor label, this form of statutory rape should reasonably fall within the INA’s “sexual abuse of a minor” provision.

B. *Second-Generation Cases: Discord*

In 2008, the Ninth Circuit parted ways with those earlier cases when the court, sitting *en banc*, unanimously ruled that a conviction under California’s statutory-rape law did not qualify as an aggravated felony.¹⁷³ In that case, Juan Elias Estrada-Espinoza was a legal permanent resident who entered the United States when he was only twelve years old.¹⁷⁴ At the age of twenty, he became involved with Sonia Arredondo, who was “fifteen or sixteen” at the time.¹⁷⁵ With the blessing of both their parents, the two lived together and eventually had a child together.¹⁷⁶ Nonetheless, because his girlfriend was below the age of consent, Estrada-Espinoza was ultimately charged and convicted of statutory rape.¹⁷⁷ The law in question criminalized “sexual intercourse with someone under eighteen and three years younger than the defendant, who is not the defendant’s spouse.”¹⁷⁸ He was sentenced to a year in county jail.¹⁷⁹ Soon thereafter, the INS initiated deportation proceedings on the basis that

170. *Id.* at 2–3 (“At the time we initially considered *Crammond*, the question it presented was essentially one of first impression, as only one federal circuit court had decided the issue.”).

171. In truth, the Seventh Circuit decided two cases involving statutory rape during this period. The second case, however, followed the same reasoning as that of *Guerrero-Perez*. See *Lara-Ruiz v. INS*, 241 F.3d 934, 942 (2001) (“Because we find that the BIA’s interpretation of § 101(a)(43)(A) as applied to Lara-Ruiz’ conduct is reasonable and comports with the ordinary meaning of the language that Congress used in that section, we agree with the BIA that Lara-Ruiz committed the aggravated felony of ‘sexual abuse of a minor.’”).

172. See *supra* Part III.

173. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 (9th Cir. 2008).

174. *Id.* at 1150.

175. *Id.* (“Estrada-Espinoza claims that Arredondo and her friends told him she was 18 at the time of their meeting, and that he did not learn of her true age until December 2001.”).

176. *Id.* (“During this time, Estrada-Espinoza worked in various grocery stores to support himself, his girlfriend, and, eventually, the child they raised together.”).

177. *Id.* at 1151.

178. *Id.* (citing CAL. PENAL CODE § 261.5(c) (2011)).

179. *Id.*

Estrada-Espinoza's conviction qualified as "sexual abuse of a minor" and, thus, an aggravated felony under the INA.¹⁸⁰ Estrada-Espinoza challenged that theory, and the case was subsequently taken up by the Ninth Circuit, sitting.

To decide the issue, the court employed the categorical approach, discussed above,¹⁸¹ and began by looking to the generic elements of the crime "sexual abuse of a minor."¹⁸² Because the INA, however, does not define the term, the Ninth Circuit had to look elsewhere—just as the BIA had been required to do in *Rodriguez-Rodriguez*—to try and ascertain those elements. Unlike the BIA, however, which relied on 18 U.S.C. § 3509(a) as its guide,¹⁸³ the Ninth Circuit turned its attention to a completely different statute.¹⁸⁴ As an initial matter, the Ninth Circuit refused to defer to the BIA's earlier use of § 3509(a) because, first, per the BIA's own opinion, its use of that statute was intended merely as a guide and not a uniform definition.¹⁸⁵ Second, the Ninth Circuit noted that the statute relied upon by the BIA "does not define a crime, but merely addresses the rights of child victims and witnesses."¹⁸⁶

Instead, the Ninth Circuit looked to 18 U.S.C. § 2243(a), which, in contrast to § 3509(a), "is a criminal statute outlining the elements of the offense."¹⁸⁷ In fact, § 2243(a) is titled "Sexual abuse of a minor or ward," and defines that crime as requiring the following:

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.¹⁸⁸

In essence, then, the Ninth Circuit found that "sexual abuse of a minor" has four generic elements: "(1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor."¹⁸⁹

In determining that § 2243(a) was the better source of the crime's generic elements, the Ninth Circuit was persuaded by the fact that the elements listed in § 2243(a) would better fulfill the court's duty "to give ef-

180. Both the Immigration Judge and the BIA, relying on *Rodriguez-Rodriguez*, found that Estrada-Espinoza's conviction qualified as "sexual abuse of a minor." *Id.* (citing *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (B.I.A. 1999)).

181. *See supra* Part II.B.

182. *Estrada-Espinoza*, 546 F.3d at 1152.

183. *See supra* text accompanying notes 142–49.

184. *Estrada-Espinoza*, 546 F.3d at 1152.

185. *Id.* at 1157 ("[T]he 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.").

186. *Id.* at 1152 n.2.

187. *Id.*

188. 18 U.S.C. § 2243(a) (2012).

189. *Estrada-Espinoza*, 546 F.3d at 1152.

fect, if possible, to every clause and word of the statute.”¹⁹⁰ Specifically, as the court explained, “a conviction which constitutes ‘sexual *abuse* of a minor’ must necessarily contain an element of abuse.”¹⁹¹ With that principle in mind, the court considered the current state of statutory-rape law—which, as noted earlier, has evolved drastically from its earliest forms¹⁹²—and found that “under national contemporary standards, although sexual activity with a younger child is certainly abusive, sexual activity with an older adolescent is not necessarily abusive.”¹⁹³ After all, according to the court, to assume “that a minor’s legal incapacity implies that . . . sexual intercourse is non-consensual . . . may be valid where the minor is a younger child [but] does not hold true where the victim is an older adolescent, who is able to engage in sexual intercourse voluntarily, despite being legally incapable of consent.”¹⁹⁴

Having identified the generic elements of “sexual abuse of a minor,” the Ninth Circuit then compared those elements to those required by the California statute under which Estrada-Espinoza was convicted.¹⁹⁵ In so doing, the court held that the statute was broader than the generic offense, meaning that Estrada-Espinoza’s conviction categorically could not qualify as “sexual abuse of a minor” or, by extension, an aggravated felony.¹⁹⁶ Specifically, unlike the generic elements, the California statute also applied to “victims” as old as sixteen and seventeen.¹⁹⁷ In addition, whereas the federal statute required an age difference of at least four years, the California statute only required a difference of “three years and one day.”¹⁹⁸ Although it was the first, the Ninth Circuit is not the only court that has refused to defer to the BIA’s ruling in *Rodriguez-Rodriguez*. In 2015, the Fourth Circuit likewise refused to defer to the Board’s earlier definition of “sexual abuse of a minor” for similar reasons:

Although the BIA recognized that the broad definition in Section 3509(a)(8) is consistent with the common understanding of “sexual abuse,” the BIA expressly stated that it was “not adopting [that] statute as a definitive standard or definition.” . . . Instead, the BIA “invoke[d] [the definition in Section 3509(a)(8)] as a guide in identifying the types of crimes [it] would consider to be sexual abuse of a minor.” . . . We therefore conclude that the BIA did not adopt in

190. *Id.* at 1153 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

191. *Id.*

192. *See supra* Part III.

193. *Estrada-Espinoza*, 546 F.3d at 1153.

194. *Id.* at 1154 (quoting *Valencia v. Gonzales*, 439 F.3d 1046, 1151 (9th Cir. 2006)).

195. *Id.* at 1158.

196. *Id.* at 1159 (“[T]he conduct proscribed by each of the four statutes is broader than the generic offense, and so none of the [California statutory-rape provisions] fall, categorically, within the generic definition.”).

197. *Id.* (“[B]ecause each statute applies to persons under 18 years of age, all four statutes are broader than the generic offense with respect to the third element—the age of the minor.”).

198. *Id.*

Rodriguez-Rodriguez a particular definition of the generic federal crime of “sexual abuse of a minor.”¹⁹⁹

In 2014, however, the Seventh Circuit reached the opposite conclusion, holding fast to its earlier ruling on the subject. In *Velasco-Giron v. Holder*, the court was confronted with a legal permanent resident who, at eighteen, had sex with his fifteen-year-old girlfriend.²⁰⁰ Such behavior ran afoul of California’s statutory-rape law, which Velasco-Giron was subsequently charged and convicted.²⁰¹ The crime was considered a misdemeanor, and he was sentenced to unsupervised probation.²⁰² The issue for the Seventh Circuit then, just as it had been for the Ninth Circuit in *Estrada-Espinoza*, was whether this conviction qualified as sexual abuse of a minor and, thus, an aggravated felony under the INA. The court, deferring to the BIA’s ruling in *Rodriguez-Rodriguez* thirteen years earlier, ruled against Velasco-Giron.²⁰³ In justifying its reliance on the board’s earlier determination, the court found that it was bound by *Chevron* to defer to the agency’s prior interpretation: “[w]hen resolving ambiguities in the Immigration and Nationality Act—and ‘sexual abuse of a minor’ deserves the label ‘ambiguous’—the Board has the benefit of *Chevron* . . . , under which the judiciary must respect an agency’s reasonable resolution.”²⁰⁴ Thus, the court rejected the Ninth Circuit’s determination that *Chevron* deference was not warranted simply because *Rodriguez-Rodriguez* “adopted a standard rather than a rule.”²⁰⁵

When an agency chooses to address topics through adjudication, it may proceed incrementally; it need not resolve every variant (or even several variants) in order to resolve one variant. . . . Like the NLRB, the FTC, the SEC, and many another agency [sic], the BIA is a policy-making institution as well as a judicial one. It may choose standards as the best achievable policies. Just as judges do every day, the Board is entitled to muddle through.²⁰⁶

Further, the court was critical of the Ninth Circuit’s reliance on 18 U.S.C. § 2243(a) to define sexual abuse of a minor.²⁰⁷ Beyond finding the BIA’s earlier reliance on § 3509(a) was entitled to *Chevron* deference,²⁰⁸

199. *Amos v. Lynch*, 790 F.3d 512, 519–20 (4th Cir. 2015) (internal citations omitted).

200. 773 F.3d 774, 775 (7th Cir. 2014).

201. *Id.* (citing CAL. PENAL CODE § 261.5(c) (2011)).

202. *Id.* at 780 (Posner, J., dissenting) (“The crime was reported by the girl’s father and the defendant pleaded guilty on his nineteenth birthday; the sexual relationship had been brief and consensual . . .”).

203. *Id.* at 776 (majority opinion) (“We have considered the Board’s approach to ‘sexual abuse of a minor’ five times, and each time we have held that *Rodriguez-Rodriguez* takes a reasonable approach to the issue.”).

204. *Id.*

205. *Id.* at 777.

206. *Id.* at 779–80. The court described this as “one of the earliest principles developed in American administrative law.” *Id.* at 779 (quoting *Almy v. Sebelius*, 679 F.3d 297, 303 (4th Cir. 2012)).

207. *Id.* at 776–77.

208. Although acknowledging “§ 3509(a)(8) itself is open-ended,” the court noted that “the Board needs to classify one state statute at a time, and the statutory language leaves room for debate about whether a particular state crime is in or out. Yet, many statutes and regulations adopt criteria

the court noted that, if Congress had intended to define the term using § 2243(a), it would have provided a textual cross-reference as it had done for other crimes listed in the definition of “aggravated felony.”²⁰⁹ Additionally, adopting § 2243(a) as the sole standard for the term would likely thwart congressional intent: “to adopt § 2243(a) as the only definition would be to eliminate the possibility that crimes against persons aged eleven and under, or sixteen or seventeen, could be ‘sexual abuse of a minor.’”²¹⁰ After all, the plain language of § 2243(a) applies only to victims aged twelve to fifteen.²¹¹

In a lengthy dissent, Judge Posner took issue with the majority and instead agreed with the Ninth Circuit that *Rodriguez-Rodriguez* was not entitled to *Chevron* deference.²¹² Specifically, “the Board found the definition [in § 3509(a)] useful given the facts of the *Rodriguez-Rodriguez* case (which are very different from the facts of the present case), but did not adopt it as the canonical definition of ‘sexual abuse of a minor.’”²¹³ In other words, the BIA used that statute as a guide in *Rodriguez-Rodriguez* only because it was helpful in determining whether the particular form of criminal sexual activity in that case qualified as an aggravated felony. And, in that case, the alien had been charged with “indecent with a child by exposure”²¹⁴ and sentenced to ten years in prison—thus, in the words of the BIA, “demonstrat[ing] that Texas considers the crime to be serious.”²¹⁵ But the facts of *Velasco-Giron* were quite different—the conviction was for a different form of criminal sexual abuse, the conviction was a misdemeanor, and his sentence consisted merely of unsupervised probation. As Posner explained:

So *Rodriguez-Rodriguez* did not define “sexual abuse of a minor” in the immigration statute to encompass every criminal sexual activity involving a minor, as section 3509(a)(8) of the federal criminal code seems to do. Instead it gave reasons pertinent to the case before it, in particular the severity of the punishment meted out by the state court, for concluding that the petitioner’s particular criminal

that leave lots of cases uncertain. If § 3509(a)(8) is good enough to be part of the United States Code, why would an agency be forbidden to adopt its approach?” *Id.* at 777.

209. *Id.* (“[T]he Board was entitled to find that Congress omitted a statutory reference from § 1101(a)(43)(A) precisely in order to leave discretion for the agency.”). The Ninth Circuit had addressed this argument, ultimately rejecting it on the basis that, as a specifically defined crime, the term “sexual abuse of a minor” needed no cross-reference. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1155 (9th Cir. 2008) (“[T]here is a clear distinguishing characteristic between the aggravated felonies that are linked to other statutory provisions and those that are not. Those that refer to a broad category of offenses, using a potentially ambiguous phrase, reference other statutory provisions for clarification. On the other hand, those that refer to a specific crime which is already clearly defined in criminal law have no need for a cross-reference.”).

210. *Id.* at 776.

211. 18 U.S.C. § 2243(a)(1) (2012) (requiring that the victim “has attained the age of 12 years but has not attained the age of 16 years”).

212. *Velasco-Giron*, 773 F.3d at 782–83 (Posner, J., dissenting).

213. *Id.* at 781 (Posner, J., dissenting).

214. *Id.* (citing *Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (B.I.A. 1999)).

215. *Id.*

offense had been serious enough to merit designation as sexual abuse of a minor for purposes of immigration law. In the present case the Board gave no reason for its similar, but less plausible, conclusion.²¹⁶

Continuing, Posner noted that “inadequacy of the Board’s analysis would not be fatal if the correctness of the conclusion could not be questioned.”²¹⁷ According to Posner, however, this was not the case. Instead, he questioned the conclusion that one who perpetrates such a trivial crime is “unfit to be allowed to live in the United States.”²¹⁸ As Posner pointed out, the majority’s reasoning means that “voluntary sexual intercourse between a just-turned twenty-one year old and an about-to-turn eighteen year old”—a crime that is illegal in only eight states—would qualify as “sexual abuse of a minor,” thus subjecting the just-turned twenty-one year old to deportation.²¹⁹ “It’s difficult to imagine a more trivial offense,” stated Posner while pointing to Velasco-Giron’s sentence of unsupervised probation—“California thinks it trivial. Why does the Board think it serious?”²²⁰ Overall, Posner’s point seemed to be that the BIA, in order to enjoy *Chevron* deference, must provide a definition that satisfies not only Congress’ requirements that there be a “sexual” offense against a “minor,” but also that the offense rise to the level of “abuse.”²²¹ This, according to Posner, is something the board had simply failed to do.²²²

C. *The BIA Offers a Compromise*

Although Posner’s reasoning did not carry the day in *Velasco-Giron*, the very next year the BIA would do exactly what Posner thought was required—it clarified the standard that applies when determining whether convictions for statutory rape are categorically included in the definition of “sexual abuse of a minor.”²²³ Again, it was the *Rodriguez-Rodriguez* case that had produced the existing standard, but that case involved a very different form of criminal sexual activity. Thus, in *In re Esquivel-Quintana*,²²⁴ the BIA announced a new standard for statutory-rape

216. *Id.* at 781 (“Treating the federal statute as merely a guide obliged the Board in this case to go beyond the definition of sexual abuse in the federal criminal code, and it failed to do that, the critical omission being a failure to consider the gravity of the petitioner’s crime and punishment in relation to the crime and punishment in *Rodriguez-Rodriguez*.”).

217. *Id.* at 782.

218. *Id.* Posner further noted that the conduct criminalized by the California statute “is illegal in only eight states.” *Id.*

219. *Id.* (“How can the Board believe that for a 21-year-old man to have consensual sex with a girl one day shy of her 18th birthday renders the 21-year-old unfit to remain in the United States?”).

220. *Id.* (“Could we not at least ask the Board to explain why it thinks a minor misdemeanor sex offense is grounds for deportation?”).

221. *See id.* at 781 (“*Rodriguez-Rodriguez* did not define ‘sexual abuse of a minor’ in the immigration statute to encompass every criminal sexual activity involving a minor.”).

222. *See id.*

223. *See* Esquivel-Quintana, 26 I. & N. Dec. 469, 477 (B.I.A. 2015).

224. *See generally id.*

convictions, seemingly in response to the fact that, as Judge Posner pointed out, most states consider such crimes to be relatively trivial.²²⁵

The case centered around Esquivel-Quintana, who was convicted under the same California statutory-rape law that was at issue in both *Velasco-Giron* and *Estrada-Espinoza*.²²⁶ The BIA began by first reaffirming the definition of “sexual abuse of a minor” it had relied upon in *Rodriguez-Rodriguez*, noting the many circuit courts that have deferred to both that definition and the BIA’s subsequent definition of “minor.”²²⁷ The board then noted, however, that it must now “expand upon these decisions and consider whether a violation of a statute that involves unlawful sexual intercourse and presumes a lack of consent based on the age of the victim is ‘sexual abuse of a minor.’”²²⁸ In other words, the BIA would look more specifically at the application of these standards to cases where the underlying criminal conviction involves statutory rape.

Although Esquivel-Quintana advocated in favor of an approach identical to that taken by the Ninth Circuit in *Estrada-Espinoza*, the BIA declined that invitation.²²⁹ Specifically, the BIA disagreed with the definition of “sexual abuse of a minor” used by the Ninth Circuit because the statute the court relied upon failed to protect victims who were sixteen and seventeen years old:

Specifically, we are not prepared to hold that a sixteen or seventeen-year-old categorically cannot be the victim of sexual abuse. We believe that sexual abuse of such a minor by an older person may occur in certain circumstances, and there is a realistic probability of prosecution for such abuse. . . . It is significant to our consideration of congressional intent, however, that a number of States defined sixteen and seventeen-year-olds to be victims at the time Congress enacted this provision, as they continue to do.²³⁰

At the same time, however, the BIA did “recognize that there should be a distinction between sexual offenses involving older adolescents and those involving younger children when assessing whether consensual intercourse between peers is ‘abusive,’ and thus whether it would constitute ‘sexual abuse of a minor.’”²³¹ More specifically, the BIA appeared, for the first time, to be giving more weight to the word “abuse,” suggesting that statutory-rape convictions involving older adolescents may not qualify as abusive: “[i]n evaluating whether an offense is categorically one of ‘sexual abuse,’ we must carry out the congressional intent to impose immigration consequences on those who have been convicted of

225. See *Velasco-Giron*, 773 F.3d at 782 (Posner, J., dissenting).

226. *Esquivel-Quintana*, 26 I. & N. Dec. at 470 (citing CAL. PENAL CODE § 261.5(c)).

227. *Id.* at 470–71.

228. *Id.* at 471.

229. *Id.* at 472–73 (“We are not bound by the Ninth Circuit’s decision in these proceedings because the respondent’s case arises in the Sixth Circuit, which, to our knowledge, has not opined on the definition of ‘sexual abuse of a minor’ in this context.”).

230. *Id.* at 473–74.

231. *Id.* at 475.

sexual abuse of a minor without including nonabusive consensual sexual intercourse between older adolescent peers.”²³²

In order to strike that balance, the BIA, first noting that the categorical approach prohibits an inquiry into the actual age differential between the two parties,²³³ held that a statute under which an alien had been convicted of statutory rape would not categorically fall under “sexual abuse of a minor” unless the statute contains “a meaningful age differential.”²³⁴ Thus, any statute that criminalized sexual activity involving victims aged sixteen or seventeen would only categorically qualify as “sexual abuse of a minor” if the statute also required that there exist a “meaningful” age difference between the victim and the perpetrator.²³⁵ Because the California statute at issue required that the minor victim be “more than three years younger” than the perpetrator, the BIA held that the statute was categorically included in the definition of “sexual abuse of a minor.”²³⁶

In short, the BIA attempted to do what Posner said was required if it hoped its decision would be entitled to *Chevron* deference. Specifically, it revisited the broad, seemingly all-encompassing definition it adopted in *Rodriguez-Rodriguez*, noting that application of that definition in the context of statutory rape may end up subsuming some convictions not generally seen as “abusive.”²³⁷ The BIA then adopted the “meaningful age differential” requirement as a means of striking that balance.²³⁸ The BIA did note, however, that its revised definition was not as generous as that used by the Ninth Circuit, which would categorically exclude any statutory-rape statute that criminalized activity involving 1) sixteen and seventeen year old victims or 2) even victims aged twelve to fifteen, if there was less than four years age difference between the victim and the defendant.²³⁹

On review, the Sixth Circuit ruled that the BIA’s ruling in *Esquivel-Quintana* was entitled to *Chevron* deference.²⁴⁰ Importantly, it refused to follow the decisions of either the Ninth or the Fourth Circuits, noting that even if those courts were correct that the BIA’s earlier decision in *Rodriguez-Rodriguez* was not entitled to deference, the BIA’s latest determination presented an entirely different story. “Neither *Amos* nor *Es-*

232. *Id.* at 476.

233. *Id.* at 472 (“Because we are therefore limited to applying the categorical approach, we may not look to any of the facts that form the basis of the conviction, including the ages of the victim and the offender.”).

234. *Id.* at 475.

235. *See id.*

236. *Id.* at 477.

237. *See id.* at 476.

238. *Id.*

239. *See id.* at 472–73 (“According to the court, for a statute criminalizing statutory rape to define a ‘sexual abuse of a minor’ offense, it may never include 16- or 17-year-olds as victims and it must require at least a 4-year age difference between the victim and perpetrator.”).

240. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1021 (6th Cir. 2016), *cert. granted*, No. 16-54, 2016 WL 3689050 (U.S. Oct. 28, 2016).

trada-Espinoza involved a published, precedential BIA opinion *interpreting the relevant state statute*. . . . Here, conversely, we owe the BIA's precedential decision *Chevron* deference.²⁴¹ Therefore, the Sixth Circuit found little guidance in the Fourth and Ninth Circuits' opinions.

V. "SEXUAL ABUSE OF A MINOR" AND STATUTORY RAPE: THE BIA'S UNREASONABLE INTERPRETATIONS

The BIA's recent opinion in *Esquivel-Quintana* is a positive development in at least one respect. Namely, the board—for the first time—has recognized that its previous interpretation of "sexual abuse of a minor" is, by itself, unreasonable when applied to cases involving statutory rape. After all, many instances of statutory rape involve older adolescent "victims" or, even when the "victim" is a younger adolescent, the perpetrator is himself another adolescent close in age.²⁴² In either case, state law overwhelmingly, as demonstrated by the proliferation of Romeo and Juliet exceptions, treats such forms of statutory rape as far less serious given that, in those instances, it is unlikely that the sexual relationship was abusive in nature.²⁴³ Thus, the BIA's ruling that a statutory-rape conviction cannot *categorically* qualify as "sexual abuse of a minor," unless the state law under which the defendant was charged contained a "meaningful age differential," is at least an attempt by the BIA to bring its interpretation into accord with the contemporary understanding of statutory rape.²⁴⁴

Nonetheless, the interpretation offered by the BIA in *Esquivel-Quintana*—like its earlier interpretation in *Rodriguez-Rodriguez*—remains unreasonable when applied to statutory-rape convictions and, as such, fails to qualify for *Chevron* deference. This Article reaches that conclusion for three reasons. First, when it comes to whether, and in what circumstances, statutory-rape convictions qualify as "sexual abuse of a minor," Congress has already spoken. Second, even if the congressional intent behind the meaning of "sexual abuse of a minor" were ambiguous, the BIA's interpretation is unreasonable. In contrast, the definition provided by Congress in 18 U.S.C. § 2243(a) offers a much more reasonable definition as it gives greater effect to Congress' use of the word "abuse." Finally, the BIA's alternative proposal violates the rule of lenity.

241. *Id.* at 1022 (emphasis added).

242. *See supra* Part III.

243. *Id.*

244. *See supra* text accompanying notes 223–39.

A. The Words of Congress

The first step in any *Chevron* analysis is to ascertain whether Congress has already spoken on the precise issue at hand.²⁴⁵ If so, “that is the end of the matter,” and the agency must abide by congressional intent.²⁴⁶ Only in the face of ambiguity is the agency allowed to interpret the relevant law and, if that interpretation proves reasonable, enjoy *Chevron* deference.²⁴⁷ Applying those principles here, the BIA is correct that Congress neither defined “sexual abuse of a minor” in the INA nor did it provide a cross-reference to another federal statute to indicate the scope of what Congress had in mind when it introduced that phrase into the definition of aggravated felony.

Such an omission on the part of Congress is hardly surprising. After all, there are many crimes that potentially fall under the general heading “sexual abuse of a minor,” including indecent exposure, child pornography, child rape, child molestation, *etc.* Thus, attempting to define the term within the INA would have likely proved quite difficult. Furthermore, Congress had no other federal statute that it could point to that would exhaustively list the various crimes that might fall under this general heading. For those reasons, the BIA’s early decision in *Rodriguez-Rodriguez* looked to 18 U.S.C. § 3509(a), which, as noted earlier, is quite expansive, defining “sexual abuse” as “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.”²⁴⁸ In its own words, however, the BIA used this definition merely as a guide and not “as a definitive standard or definition.”²⁴⁹ Based on the facts of *Rodriguez-Rodriguez*, the Board’s reliance on 18 U.S.C. § 3509(a) in that specific context was likely reasonable.

In contrast, in cases dealing with statutory rape, this same statute proved inapposite for a variety of reasons. Most notably, § 3509(a) is so broad that it encompasses almost any conviction involving sexual activity with a minor, whereas statutory-rape convictions can arise out of conduct that is not generally regarded as abusive.²⁵⁰ Eventually recognizing this problem, the BIA used *Esquivel-Quintana* as an opportunity to reexamine its definition of “sexual abuse of a minor” or, more specifically, to

245. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

246. *Id.*

247. *See United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) (“It can be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute When circumstances implying such an expectation exist, a reviewing court must accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable.”).

248. *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 995 (B.I.A. 1999); *see supra* text accompanying notes 140–49.

249. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996.

250. *See supra* Part IV.

“expand upon [prior] decisions and consider whether a violation of a statute that involves unlawful sexual intercourse and presumes a lack of consent based on the age of the victim is ‘sexual abuse of a minor.’”²⁵¹ As noted earlier, the BIA would ultimately rule that only those statutory-rape convictions that contain a “meaningful age differential” would categorically qualify.²⁵² Where did this “meaningful age differential” language come from? It was invented by the BIA, and for that reason, the standard is not entitled to *Chevron* deference.

When the BIA decided that a new standard was warranted in order to determine when statutory rape qualifies as “sexual abuse of a minor,” the Board was required to go back to step one of *Chevron* and examine whether Congress had already spoken on that precise issue. Had it done so, it would have found that Congress has indeed delineated which statutory-rape convictions qualify as “sexual abuse of a minor.” Congress did so in 18 U.S.C. § 2243(a)—a statute that is even labeled “Sexual abuse of a minor or ward.”²⁵³ The text of the statute then explicitly provides that “sexual abuse of a minor” is defined as sex with a victim between the ages of twelve and fifteen with an age difference between the two parties of at least four years.²⁵⁴ This is the same statute relied upon by the Ninth Circuit in *Estrada-Espinoza v. Mukasey*, where a unanimous *en banc* panel held that the defendant’s misdemeanor conviction for statutory rape failed to categorically qualify as “sexual abuse of a minor.”²⁵⁵ The court’s justification was that the state statute in question criminalized consensual sexual conduct where the parties had an age difference of less than four years instead of the requirement of § 2243(a) that the age difference be at least four years.²⁵⁶

It is true that Congress has not explicitly said (via a cross-reference, for example) that, when applying “sexual abuse of a minor” to a state conviction for statutory rape, it intended for the courts to look to 18 U.S.C. § 2243(a). First off, however, as noted earlier, “sexual abuse of a minor” is a broad term, encompassing a variety of crimes.²⁵⁷ For that reason alone, a single cross-reference was likely unrealistic. In fact, other broad categories of offenses in the INA, like “rape” and “murder,” likewise do not have cross-references.²⁵⁸ Second, even putting that possible explanation to the side, Congress has *explicitly spoken* on the issue of what varieties of statutory rape qualify as “sexual abuse of a minor.” Accordingly, to the extent that the BIA rules—as it did in *Esquivel-Quintana*—that such crimes warrant a different standard when determin-

251. *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 471 (B.I.A. 2015).

252. *Id.* at 475.

253. 18 U.S.C. § 2243(a) (2012).

254. *Id.*

255. *See supra* text accompanying notes 173–98.

256. *Id.*

257. *See supra* Part IV.

258. *See* 8 U.S.C. § 1101(a)(43)(A).

ing whether they qualify as “sexual abuse of a minor” under the INA,²⁵⁹ the existing standard provided by Congress on that precise issue should carry the day. At the very least, it should prevail over a new standard created out of whole cloth by the BIA. This is particularly true when the standard offered by the BIA and the standard *already* supplied by Congress are attempting to balance the exact same concerns—namely, which forms of statutory rape qualify as “abusive.”

B. The “Abuse” Requirement

In *Esquivel-Quintana*, the BIA explicitly noted that some forms of statutory rape would not qualify as “abusive.”²⁶⁰ According to the board: “[i]n evaluating whether an offense is categorically one of ‘sexual abuse,’ we must carry out the congressional intent to impose immigration consequences on those who have been convicted of sexual abuse of a minor without including nonabusive consensual sexual intercourse between older adolescent peers.”²⁶¹ The BIA then adopted the “meaningful age differential” standard as a means of striking that balance.²⁶² The problem, however, is that even if Congress had not already spoken on the issue of when statutory rape constitutes a crime of “abuse,” the BIA’s new interpretation is unreasonable given that it fails to achieve its very objective of requiring that any qualifying conviction satisfy the “abuse” requirement.

As noted earlier, the law of statutory rape has evolved quite drastically since its beginnings, such that the law is now not only gender neutral, but also more tolerant of adolescent sexual activity.²⁶³ The standard announced by the BIA in *Esquivel-Quintana* attempts to mirror this understanding,²⁶⁴ but instead falls short. First, by not elaborating on what exactly constitutes a “meaningful age differential,” the BIA has introduced a new standard, the meaning of which—specifically concerning how to distinguish between abusive and nonabusive sexual crimes—is very much in doubt. Based on the board’s ruling in that case, an age differential of over three years qualifies as “meaningful.”²⁶⁵ Would a mere age differential of more than one year qualify? If so, a nineteen-year-old alien convicted of having sex with a partner who is one day shy of her eighteenth birthday would qualify as an aggravated felon. It is highly doubtful, however, that such a relationship qualifies as “abusive” merely by virtue of the sexual act.

Beyond creating this troubling question, the BIA’s new interpretation also errs on the side of casting many more statutory-rape convictions

259. *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 466–67 (B.I.A. 2015).

260. *Id.* at 475–76.

261. *Id.* at 476.

262. *See supra* text accompanying note 234.

263. *See supra* Part III.

264. *Esquivel-Quintana*, 26 I. & N. Dec. at 475.

265. *Id.* at 477.

as aggravated felonies, even though those convictions are rarely considered abusive. For instance, because it has a requirement that the two parties be more than three years apart in age, the California statutory-rape law at issue in *Esquivel-Quintana* was found to be categorically included in the definition of “sexual abuse of a minor,” and, thus, one convicted of that law would qualify as an aggravated felon.²⁶⁶ This same law, it should be noted, would criminalize sex between a twenty-one year old and someone one day shy of her eighteenth birthday. As Judge Posner noted, “[i]t’s difficult to imagine a more trivial offense.”²⁶⁷

Furthermore, this law is hardly representative of statutory-rape law nationally. Indeed, California is only one of seven states that criminalizes sex between people of that age.²⁶⁸ A look at what the other states do reveals just how big of an outlier states like California are. Specifically, thirty-five states allow sex between a twenty-two-year-old and a sixteen-year-old.²⁶⁹ An additional seven states allow consensual sex between a twenty-one-year old and a seventeen-year old.²⁷⁰

Even the Model Penal Code defines statutory rape as “any person who engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse, . . . if: (a) the other person is less than sixteen years old and the actor is at least [four] years older than the other person.”²⁷¹ Thus, as the Ninth Circuit summarized, “[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.’”²⁷² Yet, the BIA, in ruling that the rare state statute that does criminalize such conduct can nonetheless *categorically* qualify as an aggravated felony, fails to offer an interpretation that gives appropriate deference to Congress’ use of the word “abuse.”

Once again, the solution to this problem (and, thus, the more reasonable interpretation of the term “sexual abuse of a minor”) is found in 18 U.S.C. § 2243(a). There, the crime of “sexual abuse of a minor” requires an age differential of at least four years.²⁷³ As a result, this standard is more appropriate for two reasons. First, it is a definite age differential of at least four years, not the uncertain, vague “meaningful age differential” offered by the BIA. Second, and more importantly, such an

266. *Id.*

267. *In re Velasco-Giron*, 773 F.3d 774, 782 (7th Cir. 2014) (Posner, J., dissenting).

268. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1153 (9th Cir. 2008) (en banc) (citing ASAPH GLOSSER ET AL., U.S. DEP’T HEALTH & HUM. SERV., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 6 (2004); Sandra Norman-Eady et al., *Statutory Rape Laws by State*, CONN. OFF. LEGIS. RES. (Apr. 14, 2003), <https://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-r-0376.htm>).

269. *Id.*

270. *Id.*

271. MODEL PENAL CODE § 213.3(1)(a).

272. *Estrada-Espinoza*, 546 F.3d at 1153.

273. 18 U.S.C. § 2243(a)(2) (2012) (requiring that the victim “is at least four years younger than the” defendant).

age differential is much more in line with the current state of statutory-rape law in the United States—specifically, it would mirror the level of conduct that an overwhelming majority of the country views as actually “abusive.”²⁷⁴

One of the main criticisms of using 18 U.S.C. § 2243(a) is that it would fail to cover all state statutes that might qualify as “sexual abuse of a minor.”²⁷⁵ Specifically, because the statute in question only applies to sexual acts between victims aged twelve to fifteen and defendants who are at least four years older, the objection is that minors who are either sixteen, seventeen, or below the age of twelve would be left unprotected.²⁷⁶ The fallacy of this argument is revealed, however, by a quick look at the BIA’s various rulings interpreting “sexual abuse of a minor.” In *Rodriguez-Rodriguez*, the BIA employed 18 U.S.C. § 3509(a) to interpret that provision.²⁷⁷ Subsequently, in *Esquivel-Quintana*, the BIA, reaffirming its reliance on § 3509(a), nonetheless held that a supplemental rule was needed when the conviction involved statutory rape, and the supplemental rule it created was the “meaningful age differential” standard.²⁷⁸ Thus, the BIA has already acknowledged that more than one rule may be used to interpret “sexual abuse of a minor,” depending on the variety of sexual crime at issue. Following that logic, there is no reason the BIA cannot look to other rules to determine the standards for sexual convictions involving children of other ages. In fact, if the BIA were to use 18 U.S.C. § 2243(a) for statutory rape involving adolescents, it would not have to look very far to find a complementary provision for children under twelve. Specifically, 18 U.S.C. § 2241(c) defines “aggravated sexual abuse” as:

[w]hoever . . . knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so shall be fined under this title and imprisoned for not less than 30 years or for life.²⁷⁹

From this provision it is clear that Congress never intended to exempt crimes against children under twelve from qualifying as “sexual abuse of a minor.” Instead, it merely defined such acts as “*aggravated* sexual abuse.” Further, by repeating the main elements from 18 U.S.C. § 2243(a) in the same provision, it reveals that Congress intended crimes

274. See *supra* text accompanying notes 268–71.

275. See *supra* text accompanying notes 226–29.

276. *In re Esquivel-Quintana*, 26 I. & N. Dec. 467, 473 (B.I.A. 2015).

277. See *supra* text accompanying notes 140–48.

278. *Esquivel-Quintana*, 26 I. & N. Dec. at 475.

279. 18 U.S.C. § 2241(c).

against children aged zero to fifteen to qualify as “sexual abuse of a minor,” merely under different labels depending on the age of the victim.

Regarding § 2243(a) and its seeming lack of protection for victims aged sixteen and seventeen, such an omission comports with Congress’ use of the term “abuse.” In the context of statutory rape, we are talking about sexual activities that were entered into without force: “[b]y definition, statutory rape penalizes sexual encounters that do not constitute forcible rape, and that one might therefore presume to be wholly consensual.”²⁸⁰ In other words, both parties voluntarily participated; however, statutory-rape laws nonetheless exist to protect minors, who, due to their young age, are subject to “unequal, manipulative, or predatory relationships.”²⁸¹ In that realm of activity, as noted earlier, few states punish sexual activity involving those above the age of fifteen.²⁸² Thus, 18 U.S.C. § 2243(a) nicely mirrors state law and the determination that consensual sex with those aged sixteen and seventeen is simply not seen as “abusive.” It is, of course, true that people that age—like people of any age—are subject to sexual abuse.²⁸³ But in those instances, the defendant would likely be charged and prosecuted with a crime other than statutory rape. After all, “sexual abuse of a minor” is only one category of aggravated felony under the INA—“rape” and even “a crime of violence” represent independent categories of “aggravated felony” within which sexually abusive situations involving those aged sixteen and seventeen are more likely to fall.²⁸⁴

C. *The Rule of Lenity*

In *Fong Haw Tan v. Phelan*, the Supreme Court stated that “because deportation is a drastic measure and at times the equivalent of banishment or exile,” ambiguities in the laws governing deportation should be resolved in favor of the noncitizen.²⁸⁵ In that case, the Court wrestled with whether an alien convicted of more than one count in a single proceeding had satisfied the INA’s requirement that he was “sentenced more than once” for a qualifying crime and was, thus, subject to deportation.²⁸⁶ The Court ultimately resolved the ambiguity in favor of Fong Haw Tan, holding that “since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom

280. Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 707 (2000); see also ROBIN SAX, PREDATORS AND CHILD MOLESTERS: WHAT EVERY PARENT NEEDS TO KNOW TO KEEP KIDS SAFE 29 (2009) (“These acts are consensual and generally lack the perversity and grotesqueness of the traditional sexual assault acts.”).

281. COCCA, *supra* note 10, at 2.

282. See *supra* text accompanying notes 268–71.

283. Oberman, *supra* note 280, at 704.

284. See 8 U.S.C. § 1101(a)(43)(A), (F) (2012).

285. 333 U.S. 6, 10 (1948).

286. *Id.* at 9–10.

beyond that which is required by the narrowest of several possible meanings of the words used.”²⁸⁷

Known as the immigration rule of lenity, this canon of statutory construction expresses the Court’s reluctance to “construe a deportation statute against a noncitizen absent an unambiguous indication from Congress that it should do so.”²⁸⁸ As Professor Brian Slocum points out, “[i]t has been applied to a wide variety of statutory provisions, including provisions that provide relief from deportation, asylum provisions, provisions closing deportation hearings to the public, in determinations of whether statutes are retroactive, and in construing exclusion provisions when those provisions are applied to noncitizens in deportation cases.”²⁸⁹ Even the BIA, in one of its decisions discussed earlier,²⁹⁰ made note of the rule of lenity when it initially held that a misdemeanor could not qualify as an aggravated felony under the “sexual abuse of a minor” category:

The consequences of a finding that a crime is an “aggravated felony” are severe. Congress has specifically noted its intention that aliens convicted of such crimes should be subjected to various disabilities under the immigration laws and precluded from nearly all forms of relief. In light of these harsh consequences, we resolve the ambiguity presented by this case in favor of the respondent.²⁹¹

As noted earlier, the difference in interpreting “sexual abuse of a minor” using the BIA’s interpretation in *Esquivel-Quintana* versus the elements Congress listed in 18 U.S.C. § 2243(a) is that, under the former, more statutory-rape convictions will qualify as aggravated felonies and, thus, more noncitizens will be subject to deportation on that basis.²⁹² More specifically, if the term “sexual abuse of a minor” is defined such that only statutory rape convictions pursuant to a statute containing an age differential of at least four years (*i.e.*, the standard provided by § 2243(a) and consistent with the majority of the states) will categorically qualify, then the class of aliens subject to deportation on that basis is much less than if the age differential were merely more than three years (*i.e.*, the statutory requirement found in *Esquivel-Quintana*). The reason being that a standard of at least four years would disqualify those statutory-rape convictions arising out of the small minority of states that criminalize sexual activity involving an age difference of less than four

287. *Id.* at 10; *see also* *Jobson v. Ashcroft*, 326 F.3d 367, 376 (2d Cir. 2003) (holding that the rule of lenity requires the “narrowest of several possible meanings” to be adopted).

288. Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 521–22 (2003); *see also* Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 198 (2015) (“[W]hile the rule of lenity is used in multiple contexts, its application in the immigration context is primarily centered on the underlying liberty interest at stake.”).

289. Slocum, *supra* note 288, at 523.

290. *See supra* text accompanying notes 161–66.

291. *In re Crummond*, 23 I. & N. Dec. 9, 14 (B.I.A. 2001).

292. *See supra* Part V.B.

years—an age difference, again, that most states and the Model Penal Code do not consider sexual abuse.²⁹³

For that reason—and because § 2243(a) not only embodies Congress’ stated views on this issue, but is also a reasonable interpretation of the INA’s “abuse” requirement—the rule of lenity likewise renders the standard adopted by the BIA in *Esquivel-Quintana* unreasonable and, thus, not subject to *Chevron* deference.²⁹⁴

VI. CONCLUSION

It has taken the BIA almost twenty years to finally recognize that, when it comes to the crime of statutory rape, those convicted of such a crime should only qualify as an aggravated felon under the INA if the law in question somehow took into account the age differential between the defendant and the “victim.” That it took the BIA so long is somewhat surprising given that most states, for some time now, have had Romeo and Juliet exceptions in place, which offer reduced (if any) penalties to those who engage in consensual sex with an adolescent below the age of consent, yet, nonetheless close in age to the defendant.²⁹⁵ Many states, therefore, recognize that relationships of this variety do not qualify as sexual abuse.

In 2015, the BIA finally took note of its lag and issued an opinion revisiting its earlier decision—a decision which had defined the term “sexual abuse of a minor” so expansively that a number of circuits, following the BIA’s lead under *Chevron*, had over the years ordered the deportation of a number of statutory-rape defendants.²⁹⁶ In its new decision, however, the BIA offered a new interpretation to be applied in cases involving statutory-rape convictions. Despite its good intentions, however, the BIA’s new ruling suffers from the same flaws as its earlier interpretation. Namely, as applied to statutory rape, the standard violates the plain language of the statute by failing to give adequate effect to the

293. See *supra* text accompanying notes 268–71. And, indeed, even those courts who take this minority approach have not necessarily done so out of some belief that sexual unions between people within four years of age are abusive. For instance, California courts have recognized that “a minor over the age of 14 who voluntarily engages in sexual intercourse is not necessarily a victim of sexual abuse.” *In re Kyle F.*, 112 Cal. App. 4th 538, 543 (Cal. Ct. App. 2003).

294. It is true that there exists a conflict in the law between the rule of lenity and *Chevron*. See Slocum, *supra* note 288, at 517 (“*Chevron*, which directs reviewing courts to defer to reasonable agency interpretations of ambiguous statutes, is in direct conflict with the immigration rule of lenity (as well as other strict construction canons), which directs that such ambiguities be resolved in favor of the noncitizen.”). However, as Judge Sutton noted in his dissent to the Sixth Circuit’s decision in *Esquivel-Quintana*, see *supra* text and accompanying notes 240–41:

What matters for present purposes is that *Chevron* has no role to play in construing hybrid statutes. Whether the rule of lenity necessarily will provide the answer in all of these cases is another matter, one for the Court ultimately to decide. In some settings, it may turn out, the Court simply will apply the normal rules of construction unaided by a zero-sum default rule, and will look to the rule of lenity only in the kinds of interpretive disputes that require it.

Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1031 (6th Cir. 2016) (Sutton, J., dissenting).

295. See *supra* Part III.

296. See *supra* Part IV.

word “abuse,” ignores what Congress has already said regarding age differentials *vis á vis* sexual abuse, and runs afoul of the immigration rule of lenity.

The solution, however, is simple. When confronted with statutory-rape convictions, define “sexual abuse of a minor” in the INA using the federal criminal statute likewise entitled “sexual abuse of a minor.” In that law, Congress already considered and explicitly spelled out what it considers to be the difference in age required in order for a consensual sexual act between adolescents close in age to constitute “abuse.”²⁹⁷ Using this statute as a guide not only better effectuates congressional intent, but—in contrast to the BIA’s standard—it also adopts a much more reasonable interpretation of the phrase “sexual abuse of a minor.” In fact, this approach offers an interpretation in accord not only with federal law, but also with the law of a vast majority of the states.²⁹⁸ Most importantly, however, this alternative approach prevents the seemingly absurd result of an adolescent immigrant being permanently deported from this country—perhaps the only country he has every really known—simply because he engaged in sexual activities with another teenager. In short, given the sometimes trivial acts that can result in a statutory-rape conviction, much more should be required under the INA before such a conviction is deemed to categorically qualify as an “aggravated felony.” After all, when it comes to sexual activity between adolescents close in age, as one commentator aptly put it, “although to some this might seem deeply appalling or unappealing, these activities are certainly not the abuse or mistreatment of young children.”²⁹⁹ And, for that reason, they are most certainly no justification for automatic banishment.

297. See *supra* text accompanying notes 253–56.

298. See *supra* text accompanying notes 268–71.

299. Michael R. Parker, *Kids These Days: Teenage Sexting and How the Law Should Deal with It* 13 (Sept. 2, 2009) (unpublished manuscript), http://works.bepress.com/michael_parker/1.