

September 30, 2009

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

Kate S. Barth, *University of Pennsylvania*

DEFINING “SEXUAL ABUSE OF A MINOR” IN IMMIGRATION LAW: FINDING  
A PLACE FOR UNIFORMITY, FAIRNESS AND FEMINISM.

Kate Barth

TABLE OF CONTENTS

Introduction.....	1
I. Circuit Split Over the Definition of “Sexual Abuse of a Minor” .....	7
A. <i>The BIA Defines “Sexual Abuse of a Minor”</i> .....	8
B. <i>The Second, Third, Seventh, Eleventh and Fifth Circuits Adopt § 3509(a)(8)</i> .....	10
C. <i>The Ninth Circuit Defines “Sexual Abuse of a Minor”</i> .....	15
D. <i>The First Circuit Considers “Sexual Abuse of a Minor”</i> .....	18
II. Congressional Intent and Legislative History .....	20
III. Important Issues Surrounding the Search for a Definition .....	23
A. <i>Uniformity</i> .....	24
B. <i>Fairness</i> .....	27
C. <i>The Feminist Goals of Statutory Rape Laws</i> .....	33
IV. Sections 2242-2246 Are The Proper Definition For “Sexual Abuse Of A Minor” ....	36
Conclusion .....	40

INTRODUCTION

In June, 2001, 20 year old Juan Elias Estrada-Espinoza, a lawful permanent resident of the United States, met Sonia Arredondo, who was either 15 or 16 at the time.<sup>1</sup> The two started a relationship, lived for some time with Estrada-Espinoza’s parents before moving to their own residence, and eventually raised a child together.<sup>2</sup> The relationship was sanctioned by both sets of parents.<sup>3</sup> However, in 2004, the California District Attorney filed statutory rape charges against Estrada-Espinoza and he was convicted on four counts under California Penal Code.<sup>4</sup> Soon after his conviction for statutory rape, the Department of Homeland Security commenced deportation proceedings and Estrada-Espinoza was found removable as an “aggravated felon” under

---

<sup>1</sup> See *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1150 (9th Cir. 2008).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.* at 1150-1151. Estrada-Espinoza was convicted under Cal. Penal Code §§ 261.5(c), 286(b)(1), 288a(b)(1) and 289(h).

8 U.S.C.A. § 1227(a)(2)(A)(iii), § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (“INA”).<sup>5</sup>

The term “aggravated felon” is defined in 8 U.S.C. § 1101(a)(43)(A), INA § 101(a)(43)(A) (“§ 101(a)(43)(A)”) as “murder, rape, or sexual abuse of the minor.” However, as “sexual abuse of a minor” is not explicitly defined in the INA, the Board of Immigration Appeals (“BIA”) which heard Estrada-Espinoza’s appeal and an initial panel of the Ninth Circuit which denied Estrada-Espinoza’s petition for review looked to the BIA’s decision *In Re Rodriguez-Rodriguez*<sup>6</sup> for a definition.<sup>7</sup> *Rodriguez-Rodriguez* tied the term “sexual abuse of a minor” to the definition given in 18 U.S.C § 3509(a)(8) (“§ 3509(a)(8)”), a provision construing “sexual abuse” in the context of the rights of children witnesses.<sup>8</sup> Under this expansive definition, the BIA and the initial Ninth Circuit panel concluded that Estrada-Espinoza’s state conviction for statutory rape did constitute “sexual abuse of a minor.”<sup>9</sup> However, when the case was ordered to be reheard en banc, the Ninth Circuit decided that “sexual abuse of a minor” should more properly be tied to the definition given in 18 U.S.C.A. §§ 2242-2246 (“§§ 2242-2246”), provisions in substantive federal criminal law.<sup>10</sup>

---

<sup>5</sup> See *id.* at 1151.

<sup>6</sup> 22 I. & N. Dec. 991 (B.I.A 1999).

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

<sup>8</sup> See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996 (“We find the definition of sexual abuse in 18 U.S.C. § 3509(a)(8) to be a useful identification of the forms of sexual abuse.”).

<sup>9</sup> *Estrada-Espinoza*, 498 F.3d at 936 (holding that under the BIA’s definition of “minor” as anyone under the age of 16, the alien offender was properly considered removable by the Immigration Judge and BIA).

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

The Ninth Circuit's recent reversal highlights a circuit split over the proper definition of "sexual abuse of a minor" for the purposes of determining an "aggravated felony" in the INA. Although the Ninth Circuit now determines whether state convictions for statutory rape constitute "sexual abuse of a minor" by comparing the state conviction to the definition given in §§2242-2246, the Second, Third, Seventh, and Eleventh Circuits still give deference to the BIA's determination that § 3509(a)(8) is the proper definition.<sup>11</sup> In the slightly different context of sentence enhancement for illegally-reentering aggravated felons, as the term is defined by § 101(a)(42)(A), the Fifth Circuit has also favored the broader scope of § 3509(a)(8) definition.<sup>12</sup> In addition, the First Circuit has refused to tie "sexual abuse of a minor" to a federal definition and instead indicated that any state conviction for statutory rape constitutes an aggravated felony as intended by the INA.<sup>13</sup>

The differences between these possible definitions are striking. Section 3509(a)(8), a federal provision construing the rights of child witnesses, reads: the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children."<sup>14</sup>

This definition covers all children (persons up to 18 years of age), would include offenses commonly classified as indecent exposure, and does not include an age-span gap

---

<sup>11</sup> See *James v. Mukasey*, 522 F.3d 250 (2d Cir. 2008); *Mercado v. Att'y Gen.*, 250 F. App'x 515 (3d Cir. 2007); *Chuno v. Att'y Gen.*, 250 F. App'x 484 (3d Cir. 2007); *Stubbs v. Att'y Gen.*, 452 F.3d 251 (3d Cir. 2006); *Gattem v. Gonzalez*, 412 F.3d 758 (7th Cir. 2005); *Mugalli v. Ashcroft*, 259 F.3d 52 (2d Cir. 2001); *Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001).

<sup>12</sup> See *US v. Zavala-Sustaita*, 214 F.3d 601 (5th Cir. 2000).

<sup>13</sup> See *Silva v. Gonzales*, 455 F.3d 26, 29 (1st Cir. 2006) ("Under the explicit language of the INA, all rape including statutory rape comes within the aggravated felony taxonomy.").

<sup>14</sup> 18 U.S.C § 3509(a)(8).

provision (permitting, for example, a person to engage in such conduct with a child less than 4 years younger than him or her). A court referring to this provision would presumably find that an alien convicted under a state statute that criminalizes consensual sex between an 18 year-old and a 17 year-old was deportable as an aggravated felon. Likewise, this definition would allow the deportation of a person convicted under a state statute for indecent exposure.

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

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

§ 2244 Abusive Sexual Contact. . . . (c) Offenses Involving Young Children. If  
the sexual contact that violates this section (other than subsection (a)(5)) is with  
an individual who has not attained the age of 12 years, the maximum term of  
imprisonment that may be imposed for the offense shall be twice that otherwise  
provided in this section.<sup>15</sup>

While definitively prohibiting sexual relations with anyone under 12 years old, these provisions create a separate age-span category for children from 12 to 16 years of age, whereby persons who are less than four years older than the child cannot be fined or imprisoned (or, when considered in light of the INA, deported). Additionally, the

---

<sup>15</sup> 18 U.S.C. § 2244.

provision includes no penalty for consensual sexual relations had with children 16 and older. Section 2243 requires a sexual act, which has been defined in § 2246 to mean physical contact.<sup>16</sup> Thus, a court referring to this provision could not deport an alien who was convicted solely of indecent exposure under a state statute. The 18 year-old convicted of statutory rape based on his relationship with a 15 year-old would also be safe from deportation, as would a 50 year-old who had consensual sex with a 16 year-old.

Finally, defining an aggravated felony to include any state conviction for statutory rape allows the broadest range of convicted aliens to be deported. A potentially two-step process is collapsed into one; an alien's state conviction leads to automatic eligibility for deportation.

Because an alien who is concluded to have been convicted of "sexual abuse of a minor" is deportable as a person who has committed an aggravated felony, the breadth of the definition chosen by the courts has far-reaching consequences on the lives of the aliens it impacts. Even the Supreme Court has referred to deportation as "a drastic measure and at times the equivalent of banishment or exile."<sup>17</sup> As immigration law

---

<sup>16</sup> The relevant section of § 2246 reads, "(2) the term 'sexual act' means-- (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; (3) the term 'sexual contact' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246.

<sup>17</sup> *Fong Haw Tan. v. Phelan*, 333 U.S. 6, 10 (1948). A Founding Father, James Madison, also recognized the deportation was an extremely harsh action:

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness . . . if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied. Jonathan Elliot, 4 Elliot's Debates 555 (1881).

trends towards reducing the due process safeguards for aliens convicted of crimes, it is ever more crucial to choose the definition that best corresponds to our ideal immigration policy.<sup>18</sup> Moreover, when dealing with laws concerning sexual abuse of minors, it remains imperative to keep in mind what society hopes to achieve through its statutory rape laws. Thus, in coming to the correct definition, we must consider issues of fairness, uniform application of law and feminist theories on the proper goals of statutory rape laws.

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

---

<sup>18</sup> See Brent K. Newcomb, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 687, 698-701 (1998) (describing the recent legislation passed by Congress which restrict immigrant’s rights); *see also* William J. Johnson, Note, *When Misdemeanors are Felonies: The Aggravated Felony of Sexual Abuse of a Minor* 52 N.Y.L. SCH. L. REV. 419, 425-423 (2007) (detailing the recent history of immigration reform).

aligns more closely with feminist perceptions of what a statutory rape law should accomplish.

#### I. CIRCUIT SPLIT OVER THE DEFINITION OF “SEXUAL ABUSE OF A MINOR”<sup>19</sup>

In *Rodriguez-Rodriguez*, the BIA published an opinion meant to serve as a guide for courts grappling with the issue of how to interpret “sexual abuse of a minor” in § 101(a)(43)(A).<sup>20</sup> The opinion indicated that courts should look to § 3509(a)(8), a provision construing “sexual abuse” in the context of the rights of children witnesses.<sup>21</sup> The Second, Third, and Seventh Circuits, while not weighing in on whether § 3509(a)(8) is the best possible definition, have agreed to grant deference to the BIA’s opinion and have adopted the § 3509(a)(8) definition of sexual abuse.<sup>22</sup> The Fifth Circuit has also indicated that it adheres to the broad reading of the term “sexual abuse of a minor.”<sup>23</sup> The Ninth Circuit however, has explicitly rejected the § 3509(a)(8) definition, deciding instead to adopt the “sexual abuse of a minor” definition as given by §§ 2242-2246, a provision in federal substantive criminal law.<sup>24</sup> Choosing not to look to federal law at all,

---

<sup>19</sup> In addition to the circuit split over what definition to use, circuits may also differ on whether to use the categorical or modified categorical approach when applying a certain definition. For suggestions on how courts should handle the categorical v. modified categorical question as relates to 8 USC § 1101(a)(43)(f) “crimes of violence,” see Shani Fregia, *Statutory Rape: A Crime of Violence for Purposes of Immigration Deportation?*, 2007 U. CHI. LEGAL F. 539. Courts have also split as to whether state misdemeanor convictions for “sexual abuse of a minor” can constitute an aggravated felony. For a fuller discussion of this circuit split, see Johnson, *supra* n. 18.

<sup>20</sup> 22 I. & N. Dec. 991 (B.I.A 1999).

<sup>21</sup> See *id.* at 995-996 (finding the definition set forth in § 3509(a)(8) to better captures the wide array of sexually abusive behavior against children).

<sup>22</sup> See *James v. Mukasey*, 522 F. 3d 250 (2d Cir. 2008); *Mercado v. Att’y Gen.*, 250 F. App’x. 515 (3d Cir. 2007); *Chuno v. Att’y Gen.*, 250 F. App’x 484 (3d Cir. 2007); *Stubbs v. Att’y Gen.*, 452 F.3d 251 (3rd Cir. 2006); *Gatterm v. Gonzalez*, 412 F.3d 758 (7th Cir. 2005); *Mugalli v. Ashcroft*, 259 F.3d 52 (2d Cir. 2001); *Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001).

<sup>23</sup> See *US v. Zavala-Sustaita*, 214 F.3d 601 (2000).

<sup>24</sup> See *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1150 (9th Cir. 2008).



the First Circuit has indicated that it considers all state convictions for statutory rape to constitute aggravated felonies as they automatically fall within the purview of §101(a)(43)(A)’s “rape.”<sup>25</sup>

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

In *Rodriguez-Rodriguez*, the defendant alien was convicted of indecency with a child by exposure under section 21.11(a)(2) of the Texas Penal Code Annotated.<sup>26</sup> He was sentenced to 10 years imprisonment and, five years after his initial conviction, charged with removability as an aggravated felon, having been convicted of “sexual abuse of a minor.”<sup>27</sup> A deeply-divided Board explicitly published an opinion in this case meant to analyze and determine the proper definition of “sexual abuse of minor” in § 101(a)(43)(A) of the INA.

The BIA began its analysis by looking to the congressional decision “to provide a comprehensive statutory scheme to cover crimes against children”<sup>28</sup> by broadening the category of “aggravated felony” in the INA to include “rape and sexual abuse of a minor” through the 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).<sup>29</sup> This legislative history persuaded the BIA of the importance of choosing a definition that reflected this broad intent through its extensive coverage of sexual abuses. Next, the BIA concluded that they would tie the term to a federal definition because removal proceedings are federal law, even though Congress

---

<sup>25</sup> See *Silva v. Gonzales*, 455 F.3d 26 (1st Cir. 2006).

<sup>26</sup> See *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 992 (B.I.A. 1999).

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* at 994.

<sup>29</sup> See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in 9 U.S.C.).

did not specifically cross-reference “sexual abuse of a minor” with a federal provision.<sup>30</sup>

Left with the two possible federal provisions which define “sexual abuse,” the BIA found that “18 U.S.C. § 3509(a) better captures [the] broad spectrum of sexually abusive behavior. The definition set forth in 18 U.S.C. §§ 2242, 2243, and 2246 is, in our view, too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse.”<sup>31</sup>

The BIA also justified its choice of definition by pointing out that § 3509(a)(8) comports with the generally-understood meaning of “sexual abuse of a minor.” Looking to the definition of “sexual abuse” as commonly-defined in Blacks Law Dictionary,<sup>32</sup> the BIA noted that “the common usage of the term includes a broad range of maltreatment of a sexual nature, and it does not indicate that contact is a limiting factor.”<sup>33</sup>

Board Member Guendelsberger, however, argued forcibly against § 3509(a)(8) as the correct definition.<sup>34</sup> He pointed out that § 3509(a)(8) is a social welfare provision, never intended to define a criminal offense.<sup>35</sup> Moreover, while Guendelsberger agreed

---

<sup>30</sup> *Id.* at 995. Even the *Rodriguez-Rodriguez* dissent, written by Board Member Guendelsberger, agreed that looking to a federal definition “achieves uniform results in situations where reliance upon fundamentally different state law definitions would lead to a patchwork immigration law.” *Id.* at 1000.

<sup>31</sup> *Id.* at 996.

<sup>32</sup> BLACKS LAW DICTIONARY 1375 (6th ed. 1990) (defining the term sexual abuse as “(i)llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance.”).

<sup>33</sup> *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996. However, it is worth noting that the later Ninth Circuit opinion in *Estrada-Espinoza* questioned whether the § 3509(a)(8) definition was consonant with common understandings of “sexual abuse of a minor” as it raises the age of consent to 18. The *Estrada-Espinoza* court discussed the various ages of sexual consent among the states and concluded that “[t]he fact that the vast majority of states do not forbid consensual sexual intercourse with a 17-year-old male or female indicates that such conduct is not necessarily abusive under the ordinary, contemporary, and common meaning of ‘abuse.’ *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1153 (9th Cir. 2008).

<sup>34</sup> Board Member Filppu also wrote a dissent, arguing that “[t]he absence of a specific cross-reference to a federal statute . . . suggests that Congress may also have wanted us to take into account the various approaches the states have adopted in dealing with sexual crimes committed against minors.” *Id.* at 998. Uncomfortable with both the broadness of § 3509(a)(8) and the narrowness of §§ 2242-2246, Filppu did not provide a firm definition for “sexual abuse of the minor” but remained “ill at ease providing a comprehensive answer in our first effort to grapple with the question.” *Id.*

<sup>35</sup> *Id.* at 1000 (Guendelsberger, dissenting) (“We are not here construing a law affording rights, but are determining the extent to which a conviction will be treated as an aggravated felony for purposes of

with the majority’s finding that Congress included the term “sexual abuse of a minor” to broaden the category of aggravated felonies, noted that both § 3509(a)(8) and §§ 2242-2246 expand upon this category.<sup>36</sup> Guendelsberger also opined that Congress was aware that federal criminal law and many state laws do not include indecent exposure offenses under “sexual abuse of a minor,” and therefore “had Congress intended to include indecent exposure and other noncontact offenses under the term “sexual abuse of a minor,” it would have explicitly so stated in the terms of the Act.”<sup>37</sup> Finally, Guendelsberger observed that, given uncertainty in statutory language, the majority “completely ignores the principle that ambiguities in statutory interpretation must be resolved through reasonable interpretations in favor of the alien.”<sup>38</sup> For all of these reasons, Guendelsberger concluded that §§ 2242-2246 would be the preferred definition.

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

The Second, Third, Seventh and Eleventh Circuits have decided to give deference to the BIA’s § 3509(a)(8) definition since, under the well-established *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>39</sup> when Congress’s intent is uncertain and the statutory language is unclear, reviewing courts should defer to the interpretation of the

---

immigration law. Such a classification renders an alien removable, eliminates nearly all forms of relief from removal, and perpetually bars reentry. Given the grave consequences of such a determination, including separation from family and other ties to this country, the more appropriate reference point is the federal criminal law definition of ‘sexual abuse of a minor.’”).

<sup>36</sup> *See id.* at 1001 (Guendelsberger, dissenting) (“Both definitions expand the categories of aggravated felonies.”).

<sup>37</sup> *Id.* at 1004 (Guendelsberger, dissenting).

<sup>38</sup> *Id.* For a more in depth discussion of this rule of lenity, see *infra* Part III.B.

<sup>39</sup> 467 U.S. 837, 842-43 (1984) (“If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”).

agency which oversees the statute.<sup>40</sup> The Second Circuit noted that “[t]he Supreme Court has held ‘that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication.’”<sup>41</sup> Thus, because the language of § 101(a)(43)(A) “yields no clear evidence of congressional intent as to the scope of the phrase”<sup>42</sup> the Second, Third, Seventh, and Eleventh Circuits found deference to *Rodriguez-Rodriguez* appropriate.<sup>43</sup>

Although choosing to defer to the BIA-endorsed § 3509(a)(8) definition,<sup>44</sup> the Second, Third, and Eleventh Circuits have by and large withheld judgment as to whether they believe § 3509(a)(8) to be the best possible definition. Indeed, although the Third Circuit repeatedly defines “sexual abuse of a minor” based on § 3509(a)(8), this Circuit has yet to produce an opinion analyzing the merits of such definition. In fact, in *Stubbs v. Attorney Gen.*, the Third Circuit, though using § 3509(a)(8) as the touchstone for their analysis, specifically refused to pass judgment on the BIA interpretation.<sup>45</sup>

---

<sup>40</sup> See *Mugalli v. Ashcroft*, 259 F.3d 52, 55 (2nd Cir. 2001) (noting that *Chevron* required the Court to defer to the BIA’s interpretation of § 101(a)(43)(A)).

<sup>41</sup> *Mugalli*, 359 F.3d at 55 (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

<sup>42</sup> *Id.* at 56.

<sup>43</sup> See *James v. Mukasey*, 522 F. 3d 250, 254 (2d Cir. 2008) (deferring to the BIA’s interpretation of §101(a)(43)(A) in determining whether the petitioner’s New York conviction for rape in the third degree constituted “sexual abuse of a minor”); *Mercado v. Att’y Gen.*, 250 F. App’x. 515, 518 (3d Cir. 2007) (looking to the BIA definition of “sexual abuse of a minor” to determine whether the New Jersey statute of conviction qualified); *Chuno v. Att’y Gen.*, 250 F. App’x 484, 486 (3d Cir. 2007) (deferring to the BIA’s §3509(a)(8) definition of “sexual abuse of a minor”); *Stubbs v. Att’y Gen.*, 452 F.3d 251, 265 (3d Cir. 2006) (holding that the petitioner’s conviction fails to fit the BIA’s definition of “sexual abuse of a minor”); *Gatterm v. Gonzalez*, 412 F.3d 758, 763 (7th Cir. 2005) (“[I]nsofar as the Board’s holding as to Gatterm turns on an interpretation of the INA, we must defer to that construction . . . .”); *Mugalli*, 359 F.3d at 55 (“[W]e defer to the BIA’s interpretation of § 1101(a)(43)9A) in determining the meaning of ‘sexual abuse of a minor.’”); *Bahar v. Ashcroft*, 264 F.3d 1309, 1311 (11th Cir. 2001) (“[w]e will defer to the Board’s interpretation if it is reasonable.”).

<sup>44</sup> The Eleventh Circuit has not specifically adopted the § 3509(a)(8) definition. However, in the short *Bahar v. Ashcroft* opinion, the Eleventh Circuit favored an expansive meaning of “sexual abuse of a minor” that did not require physical contact and agreed to defer to the BIA’s interpretation of § 101(a)(43)(A). *Bahar*, 264 F.3d at 1311-1312.

<sup>45</sup> See *Stubbs*, 452 F.3d at 265 (“Even if we assume, without deciding, that the BIA’s interpretation is permissible, [the defendant alien’s] offense still does not qualify.”).

However, in deciding *Mugalli v. Ashcroft*, the Second Circuit indicated that it believed § 3509(a)(8) to be an “appropriate” definition “not simply because it appears somewhere in the United States Code, but because it is consonant with the generally understood broad meaning of the term ‘sexual abuse’ as reflected in *Blacks* . . . . It is also supported by the BIA’s reading of Congressional intent to ‘provide . . . a comprehensive scheme to cover crimes against children.’”<sup>46</sup>

The *Mugalli* court also applauded the BIA for looking to a federal definition which applies nationwide for its unifying effect, while simultaneously recognizing that achieving true uniformity would probably thwart congressional intent in broadening the category of aggravated felony.<sup>47</sup> As noted by the *Mugalli* court, to ensure strict uniformity “the age of consent for purposes of deciding whether the conviction for the crime constitutes ‘sexual abuse of a minor’ would have to be the lowest age provided by the law of any state” which would result in an undesired lowest common denominator effect.<sup>48</sup> While uniform application of federal law is important, the Second Circuit decided that Congress acknowledged that criminal law varied by region “by providing that the term ‘aggravated felony’ ‘applies to an offense . . . *whether in violation of Federal or State law*’” and thus understood that there would be some disunity in the application of this provision.<sup>49</sup>

The Seventh Circuit has also “concluded that the BIA’s resort to section 3509(a)(8) and its broad definition of sexual abuse is reasonable” and has shown some preference for this definition over §§ 2242-2243, though the court has refrained from an

---

<sup>46</sup> *Mugalli*, 359 F.3d at 58-59.

<sup>47</sup> *See id.* at 59 (noting that the BIA’s nationwide definition is consistent with the general rule that federal laws not be construed as to have their meaning depend on state law).

<sup>48</sup> *Id.* at 60.

<sup>49</sup> *Id.* (citing INA §101(a)(43)).

in depth analysis of the merits of the two definitions.<sup>50</sup> In deciding *Lara-Ruiz v. INS*, a case involving the physical molestation of a four year-old, the court rejected the petitioner’s argument that his conviction did not constitute “sexual abuse of a minor” because that term should be defined only by § 2243, which requires the minor to be between the ages of 12 and 16.<sup>51</sup> Although, in that case, the BIA had actually concluded that the petitioner’s crime constituted sexual abuse even when analyzed under §§ 2242-2246, the Seventh Circuit’s opinion indicated that it favored an even wider definition of the term.<sup>52</sup> In the later cases, the Seventh Circuit specifically reaffirmed this preference for § 3509(a)(8) over §§ 2242-2243, emphasizing what they saw as the broad congressional intent behind “sexual abuse of a minor.”<sup>53</sup>

While the Fifth Circuit has not explicitly deferred to the BIA interpretation of “sexual abuse of a minor” it has decided that the term has an expansive meaning which covers indecent exposure offenses.<sup>54</sup> In *United States v. Zavala-Sustaita*, the Court considered the meaning of “sexual abuse of a minor” in the context of the aggravated felony sentencing enhancement in the Sentencing Guidelines § 2L1.2.<sup>55</sup> The facts of the case revolved around an alien convicted under Texas Penal Code § 21.11(a)(2) for masturbating in front of two young children.<sup>56</sup> Because the Sentencing Guidelines

---

<sup>50</sup> *Gattem v. Gonzalez*, 412 F.3d 758, 764 (7th Cir. 2005).

<sup>51</sup> *See Lara-Ruiz v. INS*, 241 F.3d 934, 941-942 (7th Cir. 2001) (discussing why congressional intent behind “sexual abuse of a minor” did not support such a narrow reading).

<sup>52</sup> *See id.* at 942 (“*Lara-Ruiz* offers no good reason why we must refer to § 2243 rather than to § 3509.”).

<sup>53</sup> *See Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 464-465 (noting that “Congress intended the phrase ‘sexual abuse of a minor’ to broadly incorporate all acts” as a justification for rejecting the petitioner’s argument that sexual abuse be defined by §§ 2241-48 instead of § 3509); *Gattem*, 412 F.3d at 764-765 (observing that prior case law “put to rest our dissenting colleague’s contention that the Board has gone astray in choosing section 3509(a) as a reference point in assessing the nature of an alien’s conviction.”).

<sup>54</sup> *See United States v. Zavala-Sustaita*, 214 F.3d 601, 602 (5th Cir. 2000) (holding that “sexual indecency with a child by exposure constitutes ‘sexual abuse of a minor’ for purposes of the aggravated felony sentencing enhancement on Sentencing Guidelines S 2L12).

<sup>55</sup> U.S. SENTENCING GUIDELINES § 2L1.1.

<sup>56</sup> *See Zavala-Sustaita*, 214 F.3d at 602 (describing the defendant alien’s offense).

indicate that “aggravated felony” is to be defined by reference to § 101(a)(43)(A), the Fifth Circuit took the opportunity to discuss what they saw as the scope of “sexual abuse of a minor.”

In attempting to divine the ordinary and common meaning of the phrase, the court looked to the American Heritage Dictionary entries for “sexual” and “abuse” and determined that these definitions did not preclude indecent exposure.<sup>57</sup> Moreover, the Fifth Circuit concluded that “[a] distinction that treats a stranger’s brief groping of a child in a public shower as qualitatively more serious than the conduct of an adult who verbally forces a child to watch him repeatedly engage in sex acts is unjustifiable.”<sup>58</sup> Discussing congressional intent, the Fifth Circuit decided that in not tying “sexual abuse of a minor” to a federal provision or requiring a minimum sentence length, Congress explicitly did not limit its meaning of the phrase.<sup>59</sup>

Although not expressly adopting the § 3509(a)(8) definition, the Fifth Circuit does discard § 2243 as a possible definition, concluding that Congress might have had good reason to look outside of § 2243 for a definition since § 2243 “creates a substantive federal offense, while [§ 1101(a)(43)(A)] attaches consequences, in the immigration context, to offenses already committed.”<sup>60</sup> The court observes that under § 3509(a)(8) the alien’s offense would be considered an aggravated felony<sup>61</sup> and notes the “BIA addressed the exact same issue” in *Rodriguez-Rodriguez*, and held that “sexual abuse of a minor”

---

<sup>57</sup> ‘Sexual’ is defined as “[o]f, pertaining to, affecting, or characteristic of sex, the sexes or the sex organs and their functions.” THE AMERICAN HERITAGE DICTIONARY 70 (2d ed. 1982). ‘Abuse’ is defined as “[t]o use wrongly or improperly” or “[t]o hurt or injure by maltreatment.” *Id.* at 1124.

<sup>58</sup> Zavala-Sustaita, 214 F.3d at 605.

<sup>59</sup> *See id.* at 606-607 (“Specifically, Congress did not define ‘sexual abuse of a minor’ by expressly referencing other provisions of the United States Code, as it did in several other parts of § 1101(a)(43)(A). . . Nor did Congress narrow the definition of ‘sexual abuse of a minor’ by requiring a minimum sentence length, thereby ensuring the offense was of a sufficient severity.”).

<sup>60</sup> *Id.* at 607 n. 8.

<sup>61</sup> *See id.* (“This definition would seemingly cover an offense under Texas Penal Code §21.11(a)(2) . . .”).

does encompass indecent exposure.<sup>62</sup> Thus, while the Fifth Circuit never officially defers to the BIA's definition, nor adopts § 3509(a)(8) on its own merits, the *Zavala-Sustaita* opinion indicates that the Court considers "sexual abuse of a minor" to be defined in roughly the same terms as § 3509(a)(8).

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

*Estrada-Espinoza v. Mukasey* presented the Ninth Circuit with their second bite at the § 101(a)(43)(A) definition apple.<sup>63</sup> The year before *Estrada-Espinoza* made its way to the Circuit court, the Ninth Circuit decided *Afridi v. Gonzales*, a case which required the court to define "sexual abuse of a minor" in the context of a thirty-something year-old man who had sexual intercourse with a seventeen-year-old prostitute.<sup>64</sup> In *Afridi*, the Ninth Circuit deferred to the *Rodriguez-Rodriguez* § 3509(a)(8) definition;<sup>65</sup> thus, when *Estrada-Espinoza* first presented itself to the Ninth Circuit in 2007, the court held that *Afridi* was the binding precedent and denied the petition for review.<sup>66</sup> However, just a year later, the court decided to accept the *Estrada-Espinoza* petition for review, declared §§ 2242-2246 to be the correct definition,<sup>67</sup> and overturned *Afridi*.<sup>68</sup>

---

<sup>62</sup> *Id.* at 608.

<sup>63</sup> See *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1150 (9th Cir. 2008). For the facts of *Estrada-Espinoza*, see *supra* Introduction.

<sup>64</sup> See *Afridi v. Gonzales*, 442 F.3d 1212, 1214-1215 (9th Cir. 2006).

<sup>65</sup> *Id.* at 1216 ("The BIA's definition was based on a permissible construction of the statute.")

<sup>66</sup> See *Estrada-Espinoza v. Gonzales*, 498 F.3d 933, 936 (2007) ("*Afridi* is binding precedent and controls this case. . . . Therefore the BIA and IJ did not err in denying relief and we must deny the petition for review.").

<sup>67</sup> See *Estrada-Espinoza*, 546 F. 3d at 1152 n. 2 ("[I]t is more plausible that Congress intended the 'aggravated felony' of 'sexual abuse of a minor' to incorporate the definition of 'sexual abuse of a minor' in 18 U.S.C. § 2243, which is a criminal statute outlining the elements of the offense, rather than the definition of 'sexual abuse' found in 18 U.S.C. § 3509.").

<sup>68</sup> *Estrada-Espinoza*, 546 F. 3d at 1160 n. 15 ("In so holding, we necessarily overrule *Afridi v. Gonzales* . . . .").



The opinion justifying the swap in definitions leads its readers through a reclassification of the aggravated felonies listed in INA § 101(a)(43). The Ninth Circuit explains that the INA actually defines two kinds of aggravated felonies: the first kind of aggravated felonies “refer to a broad category of offenses, using a potentially ambiguous phrasing, [and references] other statutory provisions for clarification.”<sup>69</sup> The second kind of aggravated felonies are “those that refer to a specific crime which is already clearly defined in criminal law [and] have no need for a cross-reference.”<sup>70</sup> Because “sexual abuse of a minor” refers to the specific federal crime enumerated in §§ 2242-2246, it falls into the latter category.<sup>71</sup> The court thus reasons that “[if] Congress had intended the aggravated felony ‘sexual abuse of a minor’ to be defined differently than the criminal offense ‘sexual abuse of a minor’ it could have provided a definition, cross-referenced a different federal code provision, or even specified that the definition was not limited to the criminal definition.”<sup>72</sup> Since Congress did not give any particular indication as to what the definition should be “the logical inference is that Congress intended ‘sexual abuse of a minor’ to carry its standard criminal definition, on par with ‘murder’ or ‘rape.’”<sup>73</sup> Therefore, the Ninth Circuit decided that courts should not look to § 3509(a)(8), the federal provision which construes the rights of child witnesses, but rather to §§ 2242-2246 which encodes the substantive federal crime.

---

<sup>69</sup> Estrada-Espinoza, 546 F. 3d at 1155. For example, INA § 101(a)(43)(B), “illicit trafficking in a controlled substance,” and INA § 101(a)(43)(F) “crime of violence” are cross-referenced with other federal provisions. *Id.*

<sup>70</sup> *Id.* For example, INA §101(a)(43)(A) “murder, rape,” INA §101(a)(43)(G) “a theft offense . . . or burglary offense” are not cross-referenced. *Id.* at 1156.

<sup>71</sup> *See id.* at 1156.

<sup>72</sup> *Id.* But see United States v. Zavala-Sustaita, 214 F.3d 601, 607 n.8 (5th Cir. 2000) (arguing that as federal substantive law and the INA serve very different purposes Congress may have had good reasons for adopting different definitions).

<sup>73</sup> Estrada-Espinoza, 546 F. 3d at 1156.

The *Estrada-Espinoza* Court also dealt with the issue of whether deference was due to the BIA's choice of definition, whether incorrect or not. While recognizing that under *Chevron* deference was due to the BIA's published decisions that dealt with interpretation of the INA, the Court held that such deference was inappropriate in the instant matter because "the BIA did not construe the statute and provide a uniform definition in the decision. Rather it developed an advisory guideline for future case-by-case interpretation."<sup>74</sup> According to the Supreme Court, such interpretation lacks the force of law and does not enjoy *Chevron* deference.<sup>75</sup> Although the Ninth Circuit admitted that *Rodriguez-Rodriguez* does have "the force of decisional law" it concluded that the opinion still merely served as a "guide" for defining "sexual abuse of a minor" because it "suffers from the same imprecision that internal agency guidelines possess."<sup>76</sup> Drawing from a Seventh Circuit opinion, the Ninth Circuit agreed that "when the BIA 'hasn't done anything to particularize the meaning' of a term, 'giving *Chevron* deference to its determination of that meaning has no practical significance.'"<sup>77</sup>

In addition to believing §§ 2242-2246 to be the correct definition merely because it is the federal criminal offense and not a federal law defining sexual abuse in another context, the Ninth Circuit argued that §§ 2242-2246 was the best substantive definition. Primarily, the court contended that the younger age of sexual consent given in § 2243 comports well with the commonly-understood meaning of "sexual abuse of a minor."<sup>78</sup>

---

<sup>74</sup> *Id.* at 1157.

<sup>75</sup> *See id.* ("The Supreme Court has instructed that '[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.") (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

<sup>76</sup> *Estrada-Espinoza*, 546 F. 3d at 1157.

<sup>77</sup> *Id.* (citing *Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004)).

<sup>78</sup> *Estrada-Espinoza*, 546 F. 3d at 1153 ("[U]nder national contemporary standards, although sexual activity

The court comes to this conclusion after surveying state statutes and the Model Penal Code's provision on statutory rape and finding that the majority of state statutes and the Model Penal Code set the age of sexual consent at 16, just like § 2243.<sup>79</sup> The court also pointed to prior case law which determined that consensual underage sex is not as necessarily harmful to older adolescents.<sup>80</sup>

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

Although the First Circuit has yet to produce an opinion which fully grapples with the issue of how to define "sexual abuse of a minor" they have decided two cases which required them to touch upon the issue.<sup>81</sup> In 2001, when determining whether a stepfather's conviction for touching his 13-year old step-daughter's chest and groin area constituted "sexual abuse of a minor,"<sup>82</sup> the First Circuit concluded that "unlawful sexual contact with a minor approximating the federal definition [ §§ 2242-2246 ] is presumptively within the amended INA's scope."<sup>83</sup> While the opinion seemed to lean towards applying the definition in §§ 2242-2246, the Court recognized that the broader § 3509(a)(8) definition was also available (although it expressed concerns over its

---

with a younger child is certainly abusive, sexual activity with an older adolescent is not necessarily abusive.").

<sup>79</sup> See *id.* (analyzing trends in state statutory rape laws).

<sup>80</sup> See *id.* at 1153-1154 ("[O]ur prior case law-as well as common sense-suggest that, while consensual underage sex may be psychologically harmful to a young teen, it may not be harmful to an older one.") (citing *United States v. Lopez Solis*, 447 F.3d 1201, 1208 (9th Cir. 2006); see also *United States v. Pallares-Galan*, 359 F.3d 1088, 1101 (9th Cir. 2004) (pointing out that under California statutory rape laws a person can "annoy" or "molest" a minor without injuring him or her); *United States v. Melton*, 344 F.3d 1021, 1028 (9th Cir. 2003) (noting that "some courts have hesitated in categorically equating the physical risks of sexual acts to minors of different age groups."); *United States v. Thomas*, 159 F.3d 296, 299 (7th Cir. 1998) ("[I]t is difficult to maintain on a priori grounds that sex is physically dangerous to 16 year old girls."); *United States v. Kirk*, 111 F.3d 390, 396 n.8 (5th Cir. 1997) (concluding that a serious potential for physical injury does not necessarily exists with sexual contact between a nineteen year-old and a sixteen year-old)).

<sup>81</sup> See *Emile v. INS*, 244 F.3d 183 (1st Cir. 2001); *Silva v. Gonzales*, 455 F.3d 26 (1st Cir. 2006).

<sup>82</sup> See *Emile*, 244 F.3d at 185 (describing the facts of the offense).

<sup>83</sup> *Id.* at 188.

relevance).<sup>84</sup> The First Circuit, however, did not throw its weight fully behind §§ 2242-2246 and very much left an open question as to what definition applies.<sup>85</sup>

Five years later in 2006, the First Circuit tackled the issue again. In *Silva v. Gonzales*, the resident alien pleaded guilty under Mass. Gen. Laws. Ch 265, § 23 to a charge of statutory rape involving a 14-year old girl (the alien offender was probably in his early twenties at the time).<sup>86</sup> The First Circuit pointed out that “[B]y its plain terms, the INA provides that “rape” is an aggravated felony. . . . Here the statute of conviction, Mass. Gen. Laws. Ch. 265 §23, specifically terms the crime of conviction ‘[r]ape.’ Under the explicit language of the INA, all rape--including statutory rape--comes within the aggravated felony taxonomy.”<sup>87</sup> According to this logic, any state conviction that could be classified as some form of rape, automatically qualifies as an aggravated felony under the INA. Interestingly enough, such reasoning indicates that a statutory rapist qualifies as an aggravated felon under the “rape” prong of § 101(a)(42)(A) and not under the “sexual abuse of a minor” prong. Thus, this opinion actually sidesteps the difficult question of defining “sexual abuse of a minor.”

In short, the First Circuit seems to be advocating an automatic deportation process for aliens convicted under state laws of statutory rape. Instead of determining whether the

---

<sup>84</sup> See *id.* at 165 n.2 (“Elsewhere in the federal criminal code, see 18 U.S.C. § 3509(a)(8)(1994), the term “sexual abuse” is used broadly enough that it indubitably covers [the petitioner’s] conduct, but it is debatable how relevant this provision may be.”).

<sup>85</sup> See *id.* at 165 n.1 (“We do not want to be understood as endorsing the view that every possible violation of the federal sexual abuse chapter would automatically translate into a deportable offense.”).

<sup>86</sup> See *Silva*, 455 F.3d at 27 (describing the facts and procedural history of the case). The Immigration Judge presiding over the removal proceedings determined that the alien’s state-conviction was for both the crime of rape and the crime of abuse of a child so that the alien qualified doubly as an aggravated felon. See *id.* On appeal, the alien argued that statutory rape did not constitute “sexual abuse of a minor” but he did not specifically challenge the Immigration Judge’s determination that he had also been convicted of the crime of rape. See *id.* at 28. Although the First Circuit thus concluded that “[b]y not setting out any developed argumentation to contradict the Immigration Judge’s classification of his conviction as rape, the petitioner has waived any challenge to that determination,” the court still proceeded to answer this imputed claim, as if it had been preserved. *Id.* at 29.

<sup>87</sup> *Id.* at 29.

state law conviction qualifies as “sexual abuse of a minor” the First Circuit would automatically shunt statutory rapists into the category of “rape” and on the fast track for deportation. The advantage of such a process is the clear and efficient standard for dealing with alien statutory rapists. The downside would be the resulting fragmentation of federal law, should each alien’s deportation process be entirely tied to his state’s statutory rape laws. It is also probable that tying state provisions which encompass statutory rape to automatic eligibility for removal would lead to vastly overinclusive results; for example, a state could have a disjunctive statute which covers child sexual abuse, statutory rape, and non-sexual child abuse.<sup>88</sup> An alien convicted under such a statute for his non-sexual child abuse might be automatically pushed into deportation proceedings under the “rape” category. Thus, simplicity proves to be both the benefit and weakness of this approach.

## II. CONGRESSIONAL INTENT AND LEGISLATIVE HISTORY

One reason that courts have had such a difficult time settling on a definition for “sexual abuse of a minor” is that Congress gave very little direction as to the intended scope of the term when they passed IIRIRA (the act that inserted “sexual abuse of a minor” into the INA). There was no actual discussion about how the phrase should be defined; Congress seemingly inserted the language into the INA without conscious acknowledgment that the ambiguous provision could produce a divisive results. In looking to Congress for guidance in this statutory interpretation, then, we look not to any stated intent, but rather the clues hidden in passage of the bill, the placement of the words, or the existence of related provisions.

---

<sup>88</sup> See, e.g. N.J. STAT. ANN. § 2C:24-4(a) (West 2001).

On one hand, the *Rodriguez-Rodriguez* court's contention that the purpose of the IIRIRA was to broaden the grounds for deportability seems accurate when looked at in context of the overall Act.<sup>89</sup> The IIRIRA is not friendly to convicted aliens;<sup>90</sup> it prohibits a deported aggravated felon from ever returning to the United States,<sup>91</sup> removes judicial discretion in cases where deportation would automatically follow conviction,<sup>92</sup> requires that all convicted aliens be detained while awaiting deportation,<sup>93</sup> provides for expedited removal of aggravated felons,<sup>94</sup> eliminates a waiver of deportation previously available to convicted aliens,<sup>95</sup> greatly reduces opportunities for appeals<sup>96</sup> and applies the aggravated felony provision retroactively.<sup>97</sup> When viewed against this sprawling background of ever-stricter measures, it seems likely that Congress did intend the phrase "sexual abuse of a minor" to be viewed expansively.

On the other hand, word placement and the existence of related provisions do give some suggestion that that Congress perhaps did not intend the term to be read as broadly as the *Rodriguez-Rodriguez* court interpreted it. For example, as noted by BIA dissenter Guendelsberger, the placement of "sexual abuse of a minor" in the same provision of

---

<sup>89</sup> See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994 ("The terms rape and sexual abuse of a minor were added in an expansion of the definition of what constitutes an aggravated felony and an overall increase in the severity of the consequences for aliens convicted of crimes.").

<sup>90</sup> See Johnson, *supra* note 18, at 228-433 (giving an in depth analysis of IIRIRA).

<sup>91</sup> See IIRIRA § 301(b), 8 U.S.C. § 1182.

<sup>92</sup> See INA § 101(a)(48)(A) (1998), 8 U.S.C. § 1101(a)(48)(2000) ("The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."). This definition of "conviction" prevents judges from deferring adjudication in favor of some form of probation so that the conviction would not be entered on the record, making the alien eligible for deportation. See Johnson, *supra* note 18, at 429 (explaining how IIRIRA eliminated judicial discretion).

<sup>93</sup> See IIRIRA § 305, 8 U.S.C. § 1231.

<sup>94</sup> See IIRIRA § 203 (1996), 8 U.S.C. § 1228 (2000).

<sup>95</sup> See IIRIRA § 304(a) (1996), 8 U.S.C. § 1228 (2000).

<sup>96</sup> See IIRIRA § 306(a)(2), 8 U.S.C. § 1252.

<sup>97</sup> See IIRIRA § 321(b), 8 U.S.C. § 1101(a)(43).

“murder” and “rape” and at the head of a whole litany of possible aggravated felonies may have indicated that Congress intended the term to cover only the most egregious of offenses.<sup>98</sup> Moreover, other sexual offenses relating to children, such as pornography, are later enumerated as aggravated felonies by § 101(a)(43)(I), making it more probable that Congress only intended “sexual abuse of a minor” to cover contact offenses, thus excluding indecent exposure from the definition.<sup>99</sup>

The language of sections ultimately discarded could also point to a narrower construction of the term. When the IIRIRA was being discussed in the House, House members proposed the addition of a section entitled “Crimes of Sexual Violence” which stated that any alien convicted of “aggravated sexual abuse, sexual abuse, or abusive sexual contact or other crime of sexual violence is deportable.”<sup>100</sup> This provision was not ultimately included in the IIRIRA because the House members deferred to the Senate version of the bill, possibly because they recognized the Senate version already covered such serious offenses. As argued by Guendelsberger, this history could show that the Congress thus envisioned “sexual abuse” as a crime of violence, ruling out such noncontact offenses.<sup>101</sup>

---

<sup>98</sup> See *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 1002 (B.I.A. 1999) (Guendelsberger, dissenting) (“The decision by Congress to place ‘sexual abuse of a minor’ in section 101(a)(43)(A), alongside murder and rape, suggests that it was focusing on the most egregious offenses.”). But see *US v. Zavala-Sustaita*, 214 F.3d 601, 606 n.7 (2000) (“This argument would find no support in the rest of the statute, which includes numerous offenses within the definition of an ‘aggravated felony’ which, while serious, are less severe than murder or rape.”).

<sup>99</sup> See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 1002. (concluding that the scope “sexual abuse of a minor” should be considered “in light of the overage of the other aggravated felony categories.”).

<sup>100</sup> IIRIRA proposed section H.R. 2202, 104th Cong. §218 (1996).

<sup>101</sup> See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 1003. (“Notably, proposed section 241(a)(2)(F) categorized ‘sexual abuse’ as an offense involving violence or the threat of violence.”); see also *Emile v. INS*, 244 F.3d 183, 186-187 (1st Cir. 2001) (observing that the legislative history of IIRIRA in the House makes it likely that Congress intended “sexual abuse of a minor” to encompass conduct that would be criminal under §§ 2241, 2242, and 2244). Gruendelsberger further argued that “[i]n choosing its terms, Congress also was aware that the federal criminal law and a number of state laws employing the ‘sexual abuse of a minor’ definition limit the range of offenses covered to those involving sexual acts or sexual

Of course, this same reading of the legislative history proceeding the passage of the IIRIRA could also be taken as evidence that Congress did intend “sexual abuse of a minor” to encompass non-contact offenses. After all, if Congress did truly intend for “sexual abuse of a minor” to cover only crimes of violence, then why not leave in that key language? Also, why would Congress enumerate a separate provision for “sexual abuse of a minor” when “crimes of violence” already constitute grounds for deportation in § 101(a)(43)(F)? Under this view, “sexual abuse of a minor” must include something more than simply violent acts. Moreover, if, as Guendelsberger claims, “Congress was aware of the wide range of offenses constituting child abuse and child sexual abuse”<sup>102</sup> why would not Congress choose to limit the definition to a more precise meaning if they did not actually intend for “sexual abuse of a minor” to cover this wide range of offenses?<sup>103</sup> Clearly, legislative history alone does not give foolproof evidence of congressional preference for any one definition.

### III. IMPORTANT ISSUES SURROUNDING THE SEARCH FOR A DEFINITION

As clearly exemplified by the circuit split there is neither agreement on exactly what Congress intended by “sexual abuse of a minor” nor the best substantive definition for the term. Thus, the search for a preferred definition must look to other issues which stretch beyond pure Congressional intent. In particular, concerns about uniformity,

---

contact, and do not include within their scope indecent exposure.” Rodriguez-Rodriguez, 22 I. & N. Dec. at 1003. However, the legislative history does not indicate that Congress specifically considered either the definitions given by federal or state law, or the Model Penal Code, which classifies indecent exposure as a misdemeanor. *See* MODEL PENAL CODE § 213.5. (“A person commits a misdemeanor if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.”).

<sup>102</sup> Rodriguez-Rodriguez, 22 I. & N. Dec. at 1003.

<sup>103</sup> *See* United States v. Zavala-Sustaita, 214 F.3d at 606-607 (arguing that in not “expressly limiting the meaning of ‘sexual abuse of a minor’ in ways it employed in other parts of § 1101(a)(42)(A)” Congress did, in fact, intend a broad definition).



fairness, and the feminist goals of statutory rape laws may color the definition best suited to § 101(a)(43)(A).

### A. Uniformity

As federal law, immigration law is intended to be uniformly applied across the nation. It is possible that the Constitution even mandates such uniformity through Article I, Section 8, Clause 4, which requires Congress “[t]o establish a uniform Rule of Naturalization.”<sup>104</sup> Because deportation is the harshest measure that our immigration law provides, it even more crucial that aliens in one state not be deported for actions that aliens just across a state border are able to safely undertake. The difficulty, of course, arises when federal immigration law is dependent on a traditional area of state sovereignty, here standards of public morality.<sup>105</sup> To depend on state standards of criminal conduct to define deportability, the government would be allowing individual states determine which aliens stay, and which aliens go;<sup>106</sup> to not depend on state standards of public morality could be seen as an encroachment on state sovereignty.

Immigration law also stands as civil, not criminal law. In practice, this means that aliens do not enjoy the basic rights that they might in the criminal context: right to counsel, protection from double jeopardy, cruel and unusual punishment, and ex post

---

<sup>104</sup> U.S. CONST. art I, § 8, cl. 4. Although naturalization and immigration are not synonymous, one can argue that immigration falls under the congressional power to set up a uniform rule of naturalization. “However, it is not clear from the Constitution what is meant by ‘uniform’ and whether such a standard applies to the application of naturalization rules.” Christina LaBrie, *Lack of Uniformity in the Deportation of Criminal Aliens*, 25 N.Y.U. REV. L. & SOC. CHANGE 357, 363-364 (1999).

<sup>105</sup> See LaBrie, *supra* note 104, at 365 (“Congress traditionally defers to state standards of public morality.”).

<sup>106</sup> See *id.* (“[B]y using state standards to define criminal conduct for the purposes of immigration and naturalization laws, the federal government in effect allows itself to deny citizenship to (or deport) an immigrant for an act that is a crime in one state but not another.”); see also THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 567 (5th ed. 2003) (describing the problems with uniformity and the aggravated felony provision).

facto laws.<sup>107</sup> Although deportation is an extremely severe mechanism,<sup>108</sup> criminal aliens tend not to be well represented or protected by the Constitution.<sup>109</sup> It is thus critical to ensure that deportation is meted out with a just and uniform hand.

In her article discussing the current lack of uniformity in deportation matters, Christina LaBrie points out that currently, two forms of disunity exist in federal immigration law:

First, sometimes the same conduct undertaken in different states will lead to conflicting decisions on deportation. By defeating normative uniformity in federal immigration law, this results in unfairness to immigrants and may violate the Constitution's requirement of a uniform rule of naturalization. Second, federal deportations based on violations of state criminal laws may not reflect, and may directly undermine, the state policies embodied in those laws. Although the federal government defers to state legislatures on matters of criminal law, state legislatures do not necessarily consider immigration law consequences when passing legislation. This kind of nonuniformity is particularly troublesome because it could mean that deportation decisions are grounded in neither federal nor state policy.<sup>110</sup>

In addition to the two disunities identified by La Brie, when dealing with statutory rape laws yet another kind of disunity may enter the mix. In the landmark case *Michael M. v. Superior Court of Sonoma County*, the Supreme Court ruled that it was permissible

---

<sup>107</sup> See LaBrie, *supra* note 104, at 361 (noting that because deportation is a civil penalty aliens are denied basic constitutional rights).

<sup>108</sup> From the Founding Fathers to the Supreme Court, deportation has been recognized as a harsh penalty. See discussion, *supra* note 17.

<sup>109</sup> See LaBrie, *supra* note 104, at 362-363 ("Criminals who are citizens can rely on the Constitution to provide them with procedural fairness, but criminal aliens cannot.").

<sup>110</sup> *Id.* at 363. For examples of how the unintended consequences of the interaction between state and immigration law can undermine state policies, see *infra* Part III.B.

for state statutory rape laws to discriminate based on gender.<sup>111</sup> Although only one state does currently discriminate based on gender,<sup>112</sup> this opens up the possibility that a male would be deported for engaging in the same action that a female in his same state undertook without consequence.

Having deportability depend on the location of an alien's act will also lead to massively over or underinclusive immigration laws.<sup>113</sup> After all, if deportation aims to remove dangerous aliens, a law which allows for the deportation of only one individual, when two have committed the same act will either result in ridding the nation of only one dangerous offender (if the offense is, in fact, a danger to the public) or ridding the nation of one harmless person (if the offense is not actually dangerous). As LaBrie points out, "[e]ither way, the current process does not provide a reliable method for determining which aliens should be deported because they are injurious to the public welfare."<sup>114</sup>

In order to completely unify immigration law, the courts would have to interpret "sexual abuse of a minor" to only include acts which are criminalized in every state. This "lowest common denominator" approach, while having the benefit of providing an easy and uniform standard, probably does not well reflect congressional intent to provide for an expansive coverage of sexual abuse crimes.<sup>115</sup> Unfortunately, since immigration law does depend on the state conviction for the initial qualification of aliens for deportation, it is unlikely that any definition short of the "lowest common denominator" would provide uniform application. However, while it may thus be undesirable to choose the one

---

<sup>111</sup> 450 U.S. 464, 464 (1981) (holding that a California statutory rape statute which only criminalized having sexual relations with minor females did not violate the Equal Protection Clause of the Fourteenth Amendment).

<sup>112</sup> See Idaho Code Ann. § 18-6101 (1996?).

<sup>113</sup> See LaBrie, *supra* note 104, at 367 (discussing the dangers in having the location of the offense determine deportability).

<sup>114</sup> *Id.*

<sup>115</sup> For a fuller discussion on the "lowest common denominator" effect see *supra* Part I.B.

approach that does provide total uniformity, courts should still strive to cut down the extensive nonuniform application of immigration law which currently exists.<sup>116</sup>

Disunity in immigration law could have serious consequences, resulting in a possible constitutional violation, unfairness to the alien, the inadvertent undermining of state policy, deportations which do not reflect the intent of either federal or state policy-makers, an unwittingly-gendered immigration policy or over or underinclusive deportations. Although perhaps impracticable to seek total uniformity, when looking for the best substantive definition of “sexual abuse of a minor” it is important to choose the definition that will allow a more even-handed application of the law.

### B. *Fairness*

Attempting to achieve justice and fairness stands as an important goal of any law-making policy. As noted above, disunity in immigration law remains a source of unfairness for the aliens whose lives are affected. When deportation is determined by the state of residency, this not only results in the basic unfairness that one alien is deported for the same unchastised behavior as an alien residing across the state border, but also leads to a distortion in federal and state-policy makers’ intent. Federal policy makers enact immigration laws to achieve certain immigration results; unfortunately, the intended result can vary widely if the implementation of federal law depends on individual state laws. On the other hand, state policy-makers might not consider the interaction of immigration and state law when enacting laws.<sup>117</sup> This interaction can have

---

<sup>116</sup> See ALENIKOFF, *supra* note 106, at 568 (“Assuming that uniformity ought to be a goal, is it achievable? Or should the goal be stated more modestly as reducing non-uniformity?”).

<sup>117</sup> See LaBrie, *supra* note 104, at 363 (“State legislatures do not necessarily consider immigration law consequences when passing legislation.”).

unseen and undesired consequences. For example, a state legislature may choose to expand their use of suspended sentences in order to promote criminal rehabilitation outside of prisons. However, the state legislature may not explicitly factor into their reasoning the fact that aliens who receive suspended sentences, though serving no prison time, are still deportable. In such a case, the increased deportability of aliens who otherwise might not have received any sentence actually contradicts the state's original policy goals.<sup>118</sup> The end result is that an alien may be unfairly made removable when his deportation is desired neither by federal nor state policy.

Immigration law's reliance on state criminal statutes also results in aliens being disproportionately punished for their crimes. When convicted of a crime, an alien faces the same sentence, the same fine, the same prison time as a citizen. However, in addition to the criminal punishment, the alien also suffers the extra penalty of deportation, though neither the state legislature nor the state court may have factored that into their sentencing recommendations.<sup>119</sup> It is perhaps also important to note that the vast majority of the aliens who are charged as aggravated felons are long-term permanent residents with an average length of residency of fifteen years in the United States.<sup>120</sup> Twenty-five percent of those charged saw twenty years pass between their arrival in the United States and their deportation proceedings.<sup>121</sup> In a sense, these legal aliens lead their lives in an

---

<sup>118</sup> See *id.* at 368 (discussing how immigration law can undermine the a state's policy goals in implementing a greater use of suspended sentences).

<sup>119</sup> See *id.* at 367 (“[A]n alien’s deportability may be determined by [the] state conviction, even though the state court did not consider deportability in convicting or sentencing.”).

<sup>120</sup> See TRAC Immigration: How Often is the Aggravated Felony Statute Used?, <http://trac.syr.edu/immigration/reports/158/> (last visited Feb. 25, 2009) (analyzing the characteristics of those being charged as aggravated felons).

<sup>121</sup> See *id.*

America with two sets of rules; aliens are expected to obey the same laws as citizens, but are also subject to an overlay of harsher penalties for their illegal actions.<sup>122</sup>

This extra burden placed on aliens seems potentially problematic in light of the Supreme Court's determination that, because aliens are a discrete and insular minority without the ability to vote, laws affecting them should be subject to heightened scrutiny.<sup>123</sup> Of course, these Supreme Court equal protection decisions were made in the different context of state laws which denied aliens welfare benefits or employment options.<sup>124</sup> However, the general principle that aliens are a vulnerable class of persons due to their lack of political power and insular nature holds true in any context and should make aliens particularly worthy of judicial and legislative protection.

Despite this argument for particular protection, in recent decades the immigration laws in the United States have been trending towards harsher and harsher measures.<sup>125</sup>

---

<sup>122</sup> In the landmark decision *Bugajewitz v. Adams*, Justice Holmes held that for constitutional purposes, deportation is not "a punishment; it is simply a refusal by the government to harbor persons whom it does not want." 228 U.S. 585, 592 (1913). However, "[i]t is doubtful that Holmes could have really meant that deportation is not punishment, if by 'punishment' one means the imposition of harm or sanctions for misconduct or violation of the law." ALEINIKOFF, *supra* note 106, at 538. It seems more likely that "Holmes was making a technical distinction in order to protect congressional exercise of the immigration power from the substantive and procedural limits the Constitution places on criminal proceedings." *Id.*

<sup>123</sup> See *Sugarman v. Dougall*, 413 U.S. 634, 642 (1982) (noting that "classifications based on alienage are 'subject to close judicial scrutiny.'" (citation omitted); *In re Griffiths*, 413 U.S. 717, 721, 729 (1973) (holding that laws preventing resident aliens from practicing law violated the equal protection clause as aliens warranted heightened scrutiny); *Graham v. Richardson*, 403 U.S. 365, (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate.") (citation omitted). However, despite the Court's heightened scrutiny of state laws which potentially violate the Equal Protection Clause, "the Supreme Court has established essentially no limits on Congress's authority to define classes of deportable citizens." ALEINIKOFF, *supra* note 106, at 536.

<sup>124</sup> See *Sugarman*, 413 U.S. at 636 (discussing a discriminatory law requiring citizenship for public employment in positions subject to competitive examination); *Griffiths*, 413 U.S. at 718 (dealing with laws restricting aliens from the practice of law); *Graham*, 403 U.S. at 357 (invalidating welfare laws with residency requirements).

<sup>125</sup> See *Newcomb*, *supra* note 18, at 698-701 (describing the recent wave of strict immigration legislation).

The Anti-Drug Abuse Act of 1988,<sup>126</sup> the Immigration Act of 1990,<sup>127</sup> the Violence Crime Control and Law Enforcement Act of 1994,<sup>128</sup> the Immigration and Nationality Technical Corrections Act of 1994,<sup>129</sup> the Antiterrorism and Effective Death Penalty Act of 1996,<sup>130</sup> the IIRIRA of 1996,<sup>131</sup> and the REAL ID Act of 2005<sup>132</sup> all broadened the category of “aggravated felony,” increased penalty for the reentry to aggravated felons, heightened entry standards for asylum seekers or decreased procedural remedies available to aliens. Through these acts, Congress sought to introduce summary deportation procedures, greatly narrowed judicial discretion and review of deportation, exclusion and removal, prohibited aggravated felons from returning to the country, increased the use of detainment, applied the aggravated felony provision retroactively, and “[took] great steps towards ‘dismissing all criminal aliens’ appeals as a matter of law.’”<sup>133</sup>

While Congress broadened the grounds for deportation, the executive departments which handle immigration matters (the Attorney General, the Immigration and Naturalization Service (“INS”)—now the Department of Homeland Security, the BIA and the immigration courts) have somewhat floundered in maintaining a consistent

---

<sup>126</sup> See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of 42 U.S.C.).

<sup>127</sup> See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in 9 U.S.C.).

<sup>128</sup> See Violent Crime Control and Law Enforcement Act of 1994, Title XIII, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended at 18 U.S.C., 42 U.S.C.).

<sup>129</sup> See Immigration and Nationality Technical Corrections Act of 1994, § 222, Pub. L. No. 103-416, 108 Stat. 4305 (1994) (codified at 8 U.S.C. § 1101).

<sup>130</sup> See Antiterrorism and Effective Death Penalty Act of 1996, § 550(e), Pub. L. No. 104-131, 110 Stat. 1214 (1996).

<sup>131</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 101 Stat. 3009-546 (1996) (codified as amended at 8 U.S.C.).

<sup>132</sup> See REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005).

<sup>133</sup> Newcomb, *supra* note 18, at 703 (citing Peter Hill, *Did Congress Eliminate All Judicial Review of Orders of Deportation, Exclusion, and Removal for Criminal Aliens?*, 44 FED. LAW. 43, 44 (1997)); see also ALEINIKOFF, *supra* note 106, at 566 (“The category of ‘aggravated felony’ has significant (some would say, overly harsh) consequences for other aspects of immigration law.”); Johnson, *supra* note 18, at 425-433 (tracking the development of the aggravated felony provision).

policy.<sup>134</sup> It is possible that the executive branch's contradictory policies "forced the INS, the BIA, and the Attorney General into using even more heavy handed tactics with criminal aliens than perhaps Congress intended."<sup>135</sup> All in all, the current climate is one where criminal aliens face harsher penalties and do not enjoy widespread procedural remedies. Some legal commentators have decried these increasingly restrictive immigration laws as a product of anti-immigrant sentiment or xenophobia.<sup>136</sup> However, whether one believes that the current immigration laws are unfair in and of themselves, it is important to recognize criminal aliens operate in a sphere with few procedural protections.

It is in this atmosphere of possibly disproportionate punishments, increasingly restrictive laws and fewer procedural protections that the well-established principle that ambiguities should be interpreted in favor of the alien becomes so critical. This "rule of lenity" was succinctly enunciated by Justice Douglas in an early opinion dealing with the potential deportation of an alien convicted of murder:

We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment of exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we

---

<sup>134</sup> See Newcomb, *supra* note 18, at 705-706 (discussing the INS, the BIA and the Attorney General's conflicting policies towards the 212(c) discretionary waiver for relief).

<sup>135</sup> *Id.* at 718.

<sup>136</sup> See, e.g., *id.* ("Strictness towards criminality does not seem to constitute fairness towards the alien. Congress has gone too far in reacting to public opinion, denying legitimate members of the community access to basic rights, such as due process and equal protection of the laws. Part of the reason for congressional and administrative ill-will towards aliens stems from a general anti-immigrant sentiment prevalent in the United States. . . . Throughout this century, America as a whole can be characterized as xenophobic."); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 709 (1996) ("An anti-immigrant tide currently rages against this country's shores.").



will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.<sup>137</sup> This principle of statutory construction perhaps sprung from the notion that courts should avoid constitutional questions when there are other grounds to resolve the case, thus resulting in the Supreme Court “frequently [stretching] language in favour of aliens when contrary interpretations would have raised troublesome constitutional issues.”<sup>138</sup>

A long line of Supreme Court cases has reaffirmed the principle that ambiguities be construed in favor of the alien. In 1964, for example, the Court justified their ruling that a provision in the INA allowing deportation of any alien who was convicted of two crimes of moral turpitude “at any time after entry” did not apply to an alien who was a citizen at the time of the offenses (even though that citizenship had been falsely acquired by willful misrepresentation) by explaining that the Court was “constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the petitioner.”<sup>139</sup> Two years later, the Court again buttressed a decision which construed a statute to save from deportation aliens who had gained entrance to the United States through misrepresentation by holding that “[e]ven if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien.”<sup>140</sup> This principle has popped up in landmark decisions relating to refugee law<sup>141</sup> and, more recently, in the Supreme Court’s interpretation of provisions in the Antiterrorism and

---

<sup>137</sup> *Fong Haw Tan. v. Phelan*, 333 U.S. 6, 10 (1948).

<sup>138</sup> STEPHAN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 156 (1987).

<sup>139</sup> *Costello v. INS*, 376 U.S. 120, 121, 128 (1964).

<sup>140</sup> *INS v. Errico*, 385 U.S. 214, 225 (1966).

<sup>141</sup> *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (“We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.”).

Effective Death Penalty Act and the IIRIRA.<sup>142</sup> “Indeed, the rule of lenity has been described as the ‘most important rule of statutory interpretation peculiar to immigration.’”<sup>143</sup>

Achieving uniform application, a more proportionate punishment vis-à-vis citizens who have committed the same crime, heightened scrutiny for an insular class without political power or many procedural protections, and statutory construction in favor of the alien all stand as important concerns of justice. When determining the scope of “sexual abuse of a minor” with an eye to fairness, we are thus pointed in the direction of a definition that construes the term to the benefit of the criminal aliens by encompassing a narrower class of offenses.

### *C. The Feminist Goals of Statutory Rape Laws*

In contemplating the scope of “sexual abuse of a minor” it is appropriate to consider what statutory rape laws ideally hope to achieve and to pick the definition that best encompasses these goals. In general, philosophers, feminists and legal commentators agree that contemporary statutory rape laws are aimed at protecting the young (particularly young women) from predatory sexual behavior while preserving a youth’s sexual autonomy; the trick is finding the proper balance between these two goals.<sup>144</sup>

---

<sup>142</sup> See *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (noting that the principle of construing any lingering ambiguities in favor of the alien supported the conclusion that Congress had not affirmatively considered the unfairness of the contemplated provision).

<sup>143</sup> Johnson, *supra* note 18, at 423-424 (citing LEGOMSKY, *supra* note 133, at 156).

<sup>144</sup> See e.g., Keith Burgess-Jackson, *Statutory Rape: A Philosophical Analysis*, 8 CAN. J.L. & JURIS. 139, 145 (1995) (“The feminist, qua feminist, wishes to protect women from male aggression, whether sexual or otherwise; but the feminist also wishes to empower women to make decisions of their own on matters of sexuality.”); Heidi Kitrosser, *Meaningful Consent: Towards a New Generation of Statutory Rape Laws* 4 VA. J. SOC. POL’Y & L. 287, 187-288 (1997) (analyzing the debates around whether a new generation of statutory rape laws serve to increase female autonomy or merely grant men sexual access to minor females); Francis Olsen, *Statutory Rape: A Feminists Critique of Rights Analysis*, 63 TEX. L. REV. 367,

Historically, however, statutory rape laws developed to preserve a young women's chastity;<sup>145</sup> for this reason early statutory rape laws were often gender specific (protecting only minor females) and offered a "promiscuity" defense to the offender.<sup>146</sup> Although only one state continues to have a gender-specific statutory rape statute on the books,<sup>147</sup> the Supreme Court has ruled that it is constitutional for statutory rape laws to discriminate via gender.<sup>148</sup> Because statutory rape springs from this gendered font, many of the theories justifying different statutory rape schemes are grounded in feminist thought.

Due to the historical background of paternalism and contemporary license for gender discrimination, some feminists harbor fears that statutory rape laws may still unfairly deny young females their sexual autonomy.<sup>149</sup> Other feminists, however, believe that increasingly more lenient statutory rape laws "serve primarily to grant men sexual access to minor females."<sup>150</sup> This debate can be split down the lines of feminists who

---

404-407 (1984) (noting that while statutory rape laws may be oppressive to underage females, their total abolition could undermine the right of young women to be free of unwanted sexual contact.); Note, *Feminist Legal Analysis and Sexual Autonomy: Using Statutory Rape Laws as an Illustration*, 112 HARV. L. REV. 1065, 1076 (1999) (discussing the balancing act statutory laws must perform "between women's right to freedom and their right to security in the area of sexual autonomy . . .").

<sup>145</sup> See Kitrosser, *supra* note 144, at 311 ("Historically, it was well accepted that statutory rape laws existed to protect the chastity of virtuous young women."); see also Fregia, *supra* note 19, at 555-556 ("[T]he primary motivation for criminalizing the behavior was to promote female chastity and prevent teenage out-of-wedlock pregnancies.").

<sup>146</sup> See Fregia, *supra* note 19, at 555 ("Originally the laws were gender specific, only criminalizing sexual acts with female victims."). For a discussion of a "typical" promiscuity defense, see Burgess-Jackson, *supra* note 141, at 152.

<sup>147</sup> Idaho Code s 18-6101(1) (Supp. 1996).

<sup>148</sup> Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 464 (1981) (holding that a California statutory rape statute which only criminalized having sexual relations with minor females did not violate the Equal Protection Clause of the Fourteenth Amendment). For a discussion the disunity that could arise from such gender-specific statutes, see *supra* Part III.A.

<sup>149</sup> See Kitrosser, *supra* note 144, at 288 (pointing out that some feminists believe statutory rape laws should be reformed or abolished "based largely on the notion that statutory rape laws violate female autonomy and thus deny young women the right to choose when and with whom they will engage in sexual activity.").

<sup>150</sup> *Id.*

endorse formal equality versus feminists who endorse substantive equality.<sup>151</sup> Those who advocate formal equality assert that the two genders should be treated alike and “[fear] that the legal establishment will confuse [biological differences] with socially constructed differences and use them to justify discriminatory treatment.”<sup>152</sup> This group particularly worries about the implications of gendered statutory rape laws and focuses on the importance of a woman’s right to sexual freedom, thus implicitly endorsing less restrictive statutory rape laws. On the other hand, feminists advocating substantive equality recognize deeply-entrenched gender inequalities which would distort facially-neutral treatment into a perpetuation of such inequalities.<sup>153</sup> These feminists support “different treatment of the sexes as long as such treatment did not perpetuate or exacerbate gender inequalities.”<sup>154</sup> Feminists endorsing this substantive equality view exhibit a greater comfort with restrictive statutory rape laws that are more protective of a young female’s right to security from sexual aggression.<sup>155</sup>

Clearly, identifying the proper balance between these two concerns is crucial to achieving an acceptable statutory rape regime. Although carving out the scope of “sexual

---

<sup>151</sup> See Olsen, *supra* note 144, at 397 (“A few feminists have recognized that formal equality can perpetuate inequality in actual practice and have begun to search for ways in which women can achieve substantive equality. This effort has produced sharp disagreements among feminists.”); Note, *supra* at 141, at 1065 (detailing the split between the formal and substantive equality schools of thought). For a discussion of a similar split termed “liberal” versus “radical” feminist theories on statutory rape, see Burgess-Jackson, *supra* note 144 at 147-151.

<sup>152</sup> See Note, *supra* at 112, at 1065. This fear of confusing biological and social differences was particularly strong in the wake of *Michael M.* Feminists from both schools criticized the opinion because “First, in holding that pregnancy constituted a real difference for women engaged in sexual intercourse, the Court confused biology with social arrangement. . . . Second, the Court’s opinion was based on outmoded stereotypes of male aggressiveness and female passivity.” *Id.* at 1077; see also Olsen, *supra* note 144, at 395-396 (describing feminists concerns with the “real differences” doctrine).

<sup>153</sup> See Olsen, *supra* note 144, at 391 (analyzing theories springing from the recognition that formal equality can perpetuate inequality); Note, *supra* at 112, at 1066 (noting that “the formal equality approach ignores the current reality of gender inequality” and thus does not help to solve societal problems).

<sup>154</sup> Note, *supra* note 144, at 1065.

<sup>155</sup> See *id.* at 1067 (“[T]he substantive equality school stresses women’s lack of security, pointing out women’s need to be protected from unwanted sexual activities.”).

abuse of a minor” does not actually call upon courts to create a statutory rape regime from scratch, it does give courts the chance to balance these competing goals. Courts must define the line between preventing predatory behavior and protecting youth sexual autonomy.

One solution might be to look to a definition that includes an age-span provision that allows a window of permissible peer-on-peer sexual activity. Such activity is arguably less harmful to the adolescent and achieves a proper balance between protection from predators and allowing for autonomy.<sup>156</sup> An additional alternative could be to permit older adolescents greater sexual autonomy while still providing strong protection for younger children through an age-graded regime. Although age does not necessarily indicate maturity in sexual decision-making, it may serve as a useful proxy.<sup>157</sup> Of course, if the aim of statutory rape laws were still to preserve a youth’s chastity then allowing greater sexual autonomy for older adolescents would be nonsensical. However, because the goals of statutory rape laws have shifted towards protecting the youth’s freedom to not be coerced into sex, allowing older adolescents more autonomy (and less protection) would seem appropriate.

#### IV. SECTIONS 2242-2246 ARE THE PROPER DEFINITION FOR “SEXUAL ABUSE OF A MINOR”

---

<sup>156</sup> See MODEL PENAL CODE § 213.3 cmt 2 at 385 (noting that the Model Penal Code statutory rape provision incorporates a four year age span provision because “[i]t will be rare that the comparably aged actor who obtains the consent of an underage person to sexual conduct . . . will be an experience exploiter of immaturity.”). *But see* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 769 (2000) (arguing that it is very common for peer-on-peer sexual relations to include violence, coercion, and harassment).

<sup>157</sup> See Burgess-Jackson, *supra* note 144, at 154 (discussing age-based statutes as a surrogate for maturity-based statutes).

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

Obviously, some disunity will still occur even if “sexual abuse of a minor” is tied to a federal definition since an alien’s qualification for consideration of deportation depends initially on the state law that convicted him. If the federal definition chosen is more expansive than a state’s statutory rape law an alien could get away under one state’s laws scot-free with an act that would cause him to be both convicted under another state’s law and deported under the INA. The only way to fully avoid disunity and still depend on state statutes of conviction would be to define “sexual abuse of a minor” as encompassing only behavior which is criminalized by all states, leading to an undesirable lowest common denominator effect.<sup>158</sup> Some disunity, while regrettable, is thus inevitable as long as federal law defers to state standards of criminality and refuses to accept the lowest standards of criminality. Fortunately, there is a good argument that Congress indicated that some disunity is acceptable via their statutory language.<sup>159</sup> The crucial

---

<sup>158</sup> For a fuller discussion of the “lowest common denominator” effect see *supra* Part I.B.

<sup>159</sup> See *Mugalli v. Ashcroft*, 259 F.3d 52, 60 (2d Cir. 2001) (noting that congress acknowledged such

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

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

A narrower definition also better upholds the principle that ambiguities in immigration law be construed in favor of the alien.<sup>160</sup> This narrower definition reduces the number of aliens who are disproportionately punished for their crime. Some may argue that a rule ridding the nation of the greater amount of aliens convicted of statutory rape is desirable due to the grave nature of the offense. Although statutory rape *is* a serious crime, “[i]f criminal punishment is to automatically follow the crime of statutory rape we should remember that immigrants face the possibility of overpaying by additionally losing their legal status in the United States. Because of this heightened penalty, perhaps their cases deserve cautious analysis.”<sup>161</sup> Indeed, as suggested by the

---

variability in the providing that an aggravated felony “applies to an offense ... *whether in violation of Federal or State law.*”) (citation omitted).

<sup>160</sup> See discussion *supra* Part III.B.

<sup>161</sup> Fregia, *supra* note 19, at 560.

Supreme Court's equal protection decisions, this "cautious analysis" may be particularly appropriate for aliens, a discrete and insular minority without the power to vote. Sections 2242-2246 include a lower age of consent and an age-span provision which seems to better match the goals of protecting youth's security from sexual predators while simultaneously allowing them sexual autonomy. A survey of the state's statutory rape statutes, a majority of which set the age of sexual consent at 16, show that it is commonly accepted that older adolescents are mature enough to make sexual decisions.<sup>162</sup> Statutory rape laws are also trending towards incorporating age-span provisions, perhaps reflecting the belief that peer-on-peer sexual activity (even when one peer is over 18) falls within the realm of youth autonomous sexual decision-making.<sup>163</sup> Even apart from feminist theory about the proper purpose of statutory rape laws, the fact that majority of states set the age of consent at 16 and incorporate age-span provisions indicates that common perceptions over the proper scope of statutory rape laws comports more with the definition given in §§ 2242-2246.

Finally, it is clear that defining "sexual abuse of a minor" through §§ 2242-2246 does not retard Congressional intent. Both sides of the debate agree that in enacting IIRIRA Congress was attempting to broaden the category of aggravated felonies; both § 3509(a)(8) and §§ 2242-2246 do expand upon the previous categories. In not specifically cross-referencing "sexual abuse of a minor" with a non-criminal section of the federal code it seems reasonable that Congress assumed the definition would be tied to federal

---

<sup>162</sup> See THE LEWIN GROUP, STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 6-7 (Dec., 2004) *available at* <http://www.lewin.com/content/publications/3068.pdf> (summarizing the states' age of consent laws); *see also* Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1153 (9th Cir. 2008) ("The majority of states set the age of sexual consent at age 16 and forty-five states permit marriage at age 16 if the parents consent.").

<sup>163</sup> See THE LEWIN GROUP, *supra* note 159, at 6-7 (summarizing states' use of age-span provisions); *see also* Kitrosser, *supra* note 144, at 287 (noting that a vast majority of modern-day statutes incorporate age-span provisions).



substantive criminal law. Moreover, as pointed out by Guendelsberger, in placing “sexual abuse of a minor” in the same provision as “murder” and “rape,” at the head of a long list of offenses (some of which incorporate other child-related sex crimes), it is not inconceivable that Congress intended the term to cover the gravest of offenses—offenses that fall within the purview of §§ 2242-2246.

In short, the narrower definition of §§ 2242-2246 will result in a greater unity of the crimes for which criminal aliens are eligible to be deported and a reduction of criminal aliens who suffer the disproportionate (in comparison with criminal citizens) punishment of deportation. Sections 2242-2246 better achieve feminist goals of securing youth sexual autonomy (while not exposing youths to sexual predators), better reflect contemporary notions of the scope of statutory rape laws and follow the lines of Congressional intent.

#### CONCLUSION

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

The First Circuit’s total dependence on the state statute of conviction would lead to an undesirable disunity of application of immigration law. The BIA’s chosen definition, § 3509(a)(8), provides an overly-broad definition that does not comport with

modern day notions of the proper scope for statutory rape laws. This expansive definition would also heighten disunity by increasing the range of actions for which an alien in one state could be deported while an alien in a second state with less restrictive laws remains outside of the state penal law system and ineligible for removability. Because more aliens would be deportable under § 3509(a)(8), this broader definition may also heighten the unfairness in having criminal aliens, already presumably punished by state courts, face a disproportionate penalty for their crime.

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