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Zone of Nondeference: Chevron and Deportation for a Crime

Rebecca Sharpless
University of Miami School of Law, rsharpless@law.miami.edu

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Rebecca Sharpless[*]

ABSTRACT

The U.S. Supreme Court lacks a jurisprudence for when courts should defer to immigration agency interpretations of civil removal statutes that involve criminal law terms or otherwise require analysis of criminal law. This Article represents a first step toward such a jurisprudence, arguing for an expansive principle of nondeference in cases involving ambiguity in the scope of crime-based removal statutes. The zone of nondeference includes not only statutes like the aggravated felony provision that have both civil and criminal application, but all removal grounds premised on a crime. The animating principles of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. *as well as the rationales behind both the ban on deference to criminal prosecutors and the criminal and immigration rules of lenity all support the conclusion that courts should not defer to agency interpretations of crime-based removal grounds.*

[*] Clinical Professor, University of Miami School of Law. The author co-authored an amicus brief in support of the petitioner in *Esquivel-Quintana v. Sessions*, a U.S. Supreme Court case discussed in this Article. Many thanks to Michael Froomkin, Mary Holper, and Andrew Stanton for providing valuable feedback on drafts of this Article.

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INTRODUCTION

Our judiciary exists in an age of statutes interpreted by agencies. Today, courts spend more time imbuing statutes with meaning than interpreting the common law, and this statutory interpretation often involves reviewing agency decisions.[1] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* and its progeny, the U.S. Supreme Court has developed a robust, albeit uneven, jurisprudence regarding when, and how, courts should defer to agency interpretations of statutes.[2] While some question the historical pedigree of *Chevron* and have predicted its eventual demise, for now we must contend with it.[3] This Article discusses the relationship between *Chevron*—"the de-

1. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 205 (2006) [hereinafter Chevron *Step Zero*] (*Chevron* is "understood as a natural outgrowth of the twentieth-century shift from judicial to agency lawmaking.").

2. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); *see also* City of Arlington v. FCC, 133 S. Ct. 1863 (2013); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145 (2013); Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. (Brand X), 545 U.S. 967 (2005); United States v Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris Cty., 529 U.S. 576 (2000); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

3. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2016) (arguing that since *Chevron* the Supreme Court and commentators "have misidentified nineteenth-century statutory interpretation cases applying canons of construction 'respecting' contemporaneous and customary interpretation as cases deferring to executive interpretation as such"); Linda Jellum, Chevron's *Demise: A Survey of* Chevron *from Infancy to Senescence*,

cision that dominates modern administrative law" – and administrative adjudicatory decisions to deport noncitizens under the Immigration and Nationality Act ("INA") on account of a criminal conviction.[4]

Under *Chevron*, reviewing courts generally defer to reasonable interpretations of the INA made by the U.S. Attorney General and the Board of Immigration Appeals ("BIA") in precedential, adjudicative decisions.[5] Standing in tension with this rule are Supreme Court decisions holding that ambiguous deportation statutes should be construed in favor of the noncitizen in view of the harsh consequences of deportation.[6] The reality that interpretations of crime-based removal statutes often involve criminal law further complicates this legal landscape. Adjudicators must analyze both the scope of the criminal grounds of removal and the nature of criminal convictions. Immigration and federal criminal law share statutory terms, like "aggravated felony" and "conviction,"[7] and the INA defines both civil violations and criminal offenses.[8] The *Chevron* doctrine thus collides with the Supreme Court's statement that federal agencies have no authority to resolve ambiguities in criminal laws and with the rule of lenity, which holds that ambiguities in criminal law should be construed in favor

59 ADMIN. L. REV. 725, 726–27 (2007) (arguing that "*Chevron*'s importance is fading"); Trevor W. Ezell & Lloyd Marshall, *If Goliath Falls: Judge Gorsuch and the Administrative State*, 69 STAN. L. REV. Online 171, 175–76 (2017) (discussing the anti-*Chevron* views of Justice Gorsuch); Juan Carlos Rodriguez, *GOP Push to 'Repeal' Chevron Deference May Come up Short*, LAW360 (Jan. 5, 2017, 8:11 PM), https://www.law360.com/articles/877708/gop-push-to-repeal-chevron-deference-may-come-up-short (discussing possible legislative repeal of *Chevron* deference); *see also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (2016) (Gorsuch, J., concurring) (arguing that *Chevron* violates separation of powers and is unconstitutional); Michigan v. EPA, 135 S. Ct. 2699, 2712–13 (2015) (Thomas, J., concurring) (arguing that *Chevron* is unconstitutional because deference "is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts").

4. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000) [hereinafter *Nondelegation Canons*]. Crime-based deportation decisions are determinations of whether a particular criminal conviction falls within a criminal ground of deportation or inadmissibility. *See* 8 U.S.C. § 1227(a)(2) (2012) (criminal grounds of deportation); *id.* § 1182(a)(2) (criminal ground of inadmissibility). These decisions are different from other types of removal decisions in which criminal history is relevant as a matter of discretion.

5. The Supreme Court has found that "[i]t is well settled that 'principles of *Chevron* deference are applicable to this statutory scheme.'" Negusie v. Holder, 555 U.S. 511, 516 (2009) (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999)); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (BIA "give[s] concrete meaning [to the INA] through a process of case-by-case adjudication" and has the force of law).

6. *See infra* notes 85–88 and accompanying text; Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (deportation may deprive an individual "of all that makes life worth living").

7. 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i).

8. *Id.* §§ 1326(b)(2), 1253(a)(1), 1327 (defining criminal violations).

of the defendant.[9] When civil deportation is based on a criminal offense, courts must decide whether *Chevron*, the rule of lenity, or something else governs interpretive ambiguities.

Within this broad class of questions, at least two bright line rules have emerged. First, immigration agencies enjoy no deference to their interpretation of the nature of a criminal conviction, be it state or federal.[10] While Congress has delegated to the Attorney General the power to issue precedential decisions interpreting the INA, this general delegation does not encompass the specific power to interpret the elements of an offense and the scope of the criminalized conduct. If the conviction is from state court, the reviewing federal court researches state law to conduct its own analysis, without deferring to the agency's state law assessment.[11] Second, courts do not defer to agency interpretations regarding what has come to be known as the categorical approach.[12] The categorical approach is the usual methodology for determining whether a prior conviction triggers deportation or, in federal criminal cases, sentencing enhancement.[13] Under the categorical approach, adjudicators look at the elements of the con-

9. *See infra* Part II. Commentators have noted the conflict between *Chevron* and the rule of lenity. *See, e.g.*, Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 38–47 (2006); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 128–34 (1998); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2115–16 (1990) [hereinafter *Law and Administration*]. *But see* Patricia G. Chapman, *Has the* Chevron *Doctrine Run out of Gas? Senza Ripieni Use of* Chevron *Deference or The Rule of Lenity*, 19 MISS. C. L. REV. 115, 165–67 (1998) (discussing reconciliation of lenity and *Chevron*).

10. *See* Matter of Carachuri-Rosendo, 24 I. & N. Dec. 382, 385 (B.I.A. 2007) ("Our interpretation of criminal statutes is not entitled to deference; instead we owe deference to the meaning of federal criminal law as determined by the Supreme Court and the Federal circuit courts of appeals.").

11. *See* Efagene v. Holder, 642 F.3d 918, 921 (10th Cir. 2011) ("[T]he BIA is owed no deference to its interpretation of the substance of the state-law offense at issue . . . ."); Marmolejo-Campos v. Holder, 558 F.3d 903, 907 (9th Cir. 2009) (en banc) (refusing to defer to the BIA because it "has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes and, thus, has no special administrative competence to interpret the petitioner's statute of conviction"); Michael v. INS, 206 F.3d 253, 262 (2d Cir. 2000) ("[C]ourts owe no deference to an agency's interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws.").

12. *See* Matter of Chairez-Castrejon, 26 I. & N. Dec. 819, 819–22 (B.I.A. 2016) (recognizing that federal courts do not defer to the BIA's application of the categorical approach, citing to the Court's federal sentencing decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013)). The Supreme Court does not defer to the BIA's view of whether the categorical approach applies in the first place. *See* Nijhawan v. Holder, 557 U.S. 29, 32 (2009) (holding categorical approach did not apply to the phrase "loss to the victim" in the fraud aggravated felony provision without invoking or mentioning *Chevron* or deference).

13. Mathis v. United States, 136 S. Ct. 2243, 2247 (2016); *Descamps*, 133 S. Ct. at 2281–83 (2013).

viction, not the way the crime was committed, and compare the elements with a generic definition contained in immigration law or federal sentencing law.[14] A conviction only leads to removal if each of its elements is contained in the federal definition. In the past, there was confusion about whether courts defer to the agency's interpretation of what the categorical approach entails.[15] The BIA, however, now recognizes that *Chevron* does not apply to its decisions in this area.[16] Interpretations relating to the categorical approach thus represent a second exception to Congress's general delegated power to the agency to interpret the INA.

More controversial is the question that is the focus of this Article—whether courts give *Chevron* deference to the agency's interpretation of noncriminal terms or criminal terms with no fixed definition that appear in crime-based removal grounds. Examples of noncriminal statutory terms are phrases like "described in" or "relating to." Criminal terms and phrases with no statutorily defined meaning include terms like "theft" or "burglary," and phrases like "sexual abuse of a minor" and crime "involving moral turpitude."[17]

The Court recently declined an opportunity to answer at least some questions about how *Chevron* relates to interpretations of the scope of crime-based removal statutes. The case of Juan Esquivel-Quintana involved the question of whether a California statutory rape conviction falls within the aggravated felony ground of deportation.[18] This provision, like all aggravated felony provisions, is a hybrid statute—a civil statute that has criminal applications both within immigration law and in the federal criminal code.[19] Federal sentencing law enhances sentences for certain immigration-related crimes if the person has been convicted of an aggravated felony.[20]

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14. *See, e.g.*, *Mathis*, 136 S. Ct. 2243; *Descamps*, 133 S. Ct. 2276; Moncrieffe v. Holder, 133 S. Ct. 1678 (2013).

15. *See, e.g.*, Silva-Trevino, 26 I. & N. Dec. 550 (A.G. 2015) (vacating a prior U.S. Attorney General decision that had adopted a novel interpretation of the categorical approach to which some courts had deferred).

16. *Chairez-Castrejon*, 26 I. & N. Dec. at 819–21.

17. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (aggravated felony deportation ground); *id.* § 1101(a)(43)(G) ("theft" and "burglary" aggravated felony provision); *id.* § 1101(a)(43)(A) ("sexual abuse of a minor" aggravated felony provision); *id.* § 1227(a)(2)(A)(i)(I) (crime involving moral turpitude deportation ground).

18. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567 (2017). Justices Scalia and Thomas had been "receptive to granting" review of the question of whether *Chevron* applies to hybrid statutes. *Cf.* Whitman v. United States, 135 S. Ct. 352, 353–54 (2014) (Scalia & Thomas, JJ., statement respecting denial of certiorari).

19. *See supra* note 7-8.

20. *See infra* note 34.

Whether Esquivel-Quintana's California conviction triggered deportation turned on the scope of the "sexual abuse of a minor" provision of the aggravated felony definition.[21] California law criminalizes sexual intercourse with a minor when the age gap is three years or more.[22] In contrast, federal law, the law of 43 states and the District of Columbia, and the Model Penal Code do not criminalize this conduct.[23] The BIA ruled that Esquivel-Quintana's conviction was an aggravated felony because statutory-rape convictions qualify as "sexual abuse of a minor" as long as there is a "meaningful age difference" between the defendant and child.[24] The Sixth Circuit, finding ambiguity in the statutory phrase "sexual abuse of a minor," deferred to the BIA's interpretation.[25] In a separate decision, concurring in part and dissenting in part, one judge stated he would have resolved the ambiguity in the hybrid statute by applying the criminal rule of lenity rather than *Chevron*.[26]

Before the Supreme Court, Esquivel-Quintana argued that it did not matter whether *Chevron* applies because the meaning of "sexual abuse of a minor" is clear.[27] But if the phrase is ambiguous, he contended that the rule of lenity, not *Chevron*, governed the analysis.[28] Following the reasoning of the Sixth Circuit opinion concurring and dissenting, Esquivel-Quintana reasoned that *Chevron* did not apply

21. 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony deportation ground); *id.* § 1101(a)(43)(A) ("sexual abuse of a minor" aggravated felony provision).

22. CAL. PENAL CODE § 261.5(c) (West 2017). Under California law, "[u]nlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a 'minor' is a person under the age of 18 years." *Id.* § 261.5(a). "Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment . . . ." *Id.* § 261.5(c).

23. Only six other states besides California—Arizona, Idaho, North Dakota, Oregon, Virginia, and Wisconsin—criminalize the conduct in question. ARIZ. REV. STAT. ANN. § 13-1405(A) (2015); IDAHO CODE ANN. § 18-6101(2) (West 2016); N.D. CENT. CODE ANN. § 12.1-20-07(1)(f) (West 2017); OR. REV. STAT. §§ 163.345(1), 163.415(1)(a)(B) (2010); VA. CODE ANN. §18.2-63(B) (West 2007); WIS. STAT. § 948.09 (2017).

24. Esquivel-Quintana, 26 I. & N. Dec. 469, 475–76 (B.I.A. 2015). The BIA distinguished between noncitizens "who are sexually abusive toward children" and those who engage in "nonabusive consensual intercourse" with an "older adolescent peer[]." *Id.* at 476. The BIA found California's three-year age difference requirement to be reasonable. *Id.* at 477.

25. Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1021–22 (6th Cir. 2016), *rev'd sub nom*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

26. *Id.* at 1027–31 (Sutton, J., dissenting).

27. Brief for Petitioner at 35–36, Esquivel-Quintana v. Lynch, No. 16-54 (filed Dec. 16, 2016).

28. *Id.* at 41–42.

because the aggravated felony statute "dictates not only civil consequences but criminal liability as well."[29] "[T]he rule of lenity" thus "requires courts to interpret ambiguity in [his] favor."[30]

In a unanimous decision, the Court declined to reach the *Chevron* question but accepted Esquivel-Quintana's argument that the phrase "sexual abuse of a minor" unambiguously excludes convictions under the California statutory rape statute.[31] As discussed below, the Court has traditionally ignored *Chevron* in cases involving the aggravated felony definition, even when the parties have briefed it.[32] But even if the Court had reached the *Chevron* issue in *Esquivel-Quintana*, it would not have answered all questions regarding deference and deportation for a crime.[33] *Esquivel-Quintana* involved a provision of the aggravated felony definition that resides in the INA but is expressly cross-referenced in federal sentencing law.[34] The statute is a classic example of a hybrid statute. Other criminal grounds of removal, however, have no direct application in criminal law, although they involve criminal law terms. As mentioned above, noncitizens can be deported in some circumstances for having been "convicted

29. Petition for Writ of Certiorari at 29–30, Esquivel-Quintana v. Lynch, No. 16-54 (filed July 11, 2016); *see also* Maracich v. Spears, 133 S. Ct. 2191, 2222 (2013) (stating that the rule of lenity applies in a civil case that involves interpretation of a criminal statute (citing Crandon v. United States, 494 U.S. 152, 158 (1990))); Leocal v. Ashcroft, 543 U.S. 1, 11, n.8 (2004) (stating that the rule of lenity applies to ambiguous hybrid statutes); United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 518 (1992) (plurality opinion) (applying rule of lenity to civil statute with criminal application); FCC v. Am. Broad. Co., Inc., 347 U.S. 284, 296 (1954) (same).

30. Petition for Writ of Certiorari, *supra* note 29, at 30. In an amicus brief, the National Association of Criminal Defense Lawyers urged that the "question of whether the rule of lenity or *Chevron* applies when courts confront ambiguous statutory provisions that have both civil and criminal applications and that an agency has interpreted is an important one that warrants this Court's attention." Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 9, Esquivel-Quintana v. Lynch, No. 16-54 (filed Aug. 10, 2016).

31. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567 (2017).

32. *See infra* notes 113–114 and accompanying text.

33. Case law in the area of hybrid statutes is unsettled. *See* Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905, 910 (2007) (noting that some Supreme Court opinions "hint that lenity may well 'trump' deference principles in civil cases . . . that provide for both criminal and civil enforcement mechanisms" while others "hint the opposite").

34. While the phrase "aggravated felony" resides in civil immigration law, it has many criminal applications, both in the INA and in criminal law. Under criminal provisions of the INA, it is a felony to aid or assist in entering the U.S. "any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an *aggravated felony*)." 8 U.S.C. § 1327 (2012) (emphasis added). Having an aggravated felony also raises the maximum prison term for failure to depart from four to ten years. *Id.* § 1253(a)(1). In criminal law, the term appears in federal sentencing enhancement statutes. For example, the maximum penalty authorized by statute for illegal reentry rises from two years to twenty years if the defendant has been convicted of an aggravated felony. *Id.* § 1326(a)(2), (b)(2).

of" a crime "involving moral turpitude."[35] Noncitizens can also be deported for having been convicted of an offense "relating to" the Controlled Substances Act.[36] A more complete jurisprudence on *Chevron* and crime-based deportation would look beyond the aggravated felony definition (and the issue of hybrid statutes) to ask what principles should guide courts in deciding whether *Chevron* applies to the interpretation of crime-based removal statutes.

This Article begins to develop a general jurisprudence of *Chevron* and deportation for a crime, arguing for an expansive principle of nondeference in cases involving ambiguity in the scope of crime-based removal statutes. The zone of nondeference includes not only aggravated felony provisions (hybrid statutes) but all removal grounds premised on a crime. The animating principles of *Chevron* as well as the rationales behind both the ban on deference to criminal prosecutors and the criminal and immigration rules of lenity all point in the same direction: courts should not defer to the BIA or Attorney General's interpretations of terms and phrases in crime-based removal grounds.[37]

The principles discussed below sweep broadly and could justify nondeference to agency adjudicative interpretations of any immigration statute referencing a crime or criminal law,[38] not just crime-based removal grounds—a conclusion that conflicts with longstanding Supreme Court precedent. In *INS v. Aguirre-Aguirre*, the Court considered whether it should defer to the BIA's interpretation of the phrase "serious nonpolitical crime."[39] While this type of crime does not trigger a ground of removal, it bars a form of relief called withholding of

35. *Id.* § 1227(a)(2)(A)(ii).

36. *Id.* § 1227(a)(2)(B)(i).

37. *See* Greenfield, *supra* note 9, at 5 ("Reconciliation of the rule of lenity and *Chevron* deference requires consideration of a number of underlying issues, including: methodologies of statutory interpretation, the respective roles of courts and agencies, limitations on delegation, and the proper balance between law enforcement and civil liberties.").

38. Scholars have argued that *Chevron* deference should not apply to other areas of immigration law. *See* Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Law*, 90 N.Y.U. L. Rev. 143 (2014) (arguing against *Chevron* deference to interpretations of law related to immigration detention); Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 DUKE L.J. 1059 (2011) (arguing against *Chevron* deference in the area of asylum and refugee law); Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK L. REV. 1241 (2011) (arguing against deference to an Attorney General's decision about how to decide whether a crime involves moral turpitude); Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313 (2012) (arguing against deference to the BIA because it fails to deliver persuasive opinions or use procedures aimed at ensuring sound decision making).

39. INS v. Aguirre-Aguirre, 526 U.S. 415, 430 (1999).

removal, a protection for noncitizens who face deportation to countries where they will likely be persecuted.[40] In holding that *Chevron* applied, the Court cited the Attorney General's authority to interpret the INA.[41] But the Court also emphasized two unique characteristics of the withholding statute. First, it pointed to statute's language stating that the Attorney General determines whether an applicant qualifies for withholding, a specification that does not exist in all INA provisions.[42] Second, the Court found the "serious nonpolitical crime" determination to be "political," stating that a "decision by the Attorney General to deem certain violent offenses committed in another country as political in nature . . . may affect our relations with that country or its neighbors."[43] The Court refused to "shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions."[44] While *Aguirre-Aguirre*'s *Chevron* holding is arguably limited to its unique facts, the principles discussed below suggest that it was wrongly decided because the statute at issue involved an analysis of criminal law.[45] This Article, however, saves for another day this analysis of *Aguirre-Aguirre* as well as the more general question of what limiting principles might adhere to the argument put forth below.

Part I provides a brief overview of *Chevron*. Part II discusses the criminal rule of lenity and the established view that reviewing courts should not give *Chevron* deference to the criminal law interpretations of the Attorney General in individual prosecutions. Part III analyzes *Chevron* deference in the area of immigration law and the "rule of immigration lenity."[46] Part IV makes the case for an expansive principle of nondeference when courts settle interpretive ambiguity in crime-based removal statutes.

I. *CHEVRON* DEFERENCE

Chevron is the "undisputed starting point for any assessment of the allocation of authority between federal courts and administrative

40. 8 U.S.C. § 1253(h) (2012).

41. *Aguirre-Aguirre*, 526 U.S. at 424.

42. *Id.* at 424–25 (citing 8 U.S.C. § 1253(h)(1), (2)) (emphasis added).

43. *Id.* at 425.

44. *Id.*

45. *See infra* Part IV.

46. Irene Scharf, *Un-Torturing the Definition of Torture and Employing the Rule of Immigration Lenity*, 66 RUTGERS L. REV. 1, 30 (2013) (discussing the "rule of immigration lenity"); *see also* Kawashima v. Holder, 565 U.S. 478, 489 (2012) (referring to a "rule of lenity" in the deportation context).

agencies."[47] The case has been aptly described as a modern limitation on the *Marbury v. Madison* principle that the law is for the courts to decide.[48] By shifting interpretative authority from the courts to the executive branch, *Chevron* reallocates the division of powers in our tripartite government.[49]

The *Chevron* framework involves a familiar two-step inquiry for courts reviewing agency interpretations of the statutes they are charged with administering.[50] Courts first ask whether Congress has "directly spoken to the precise question at issue," such that the intent of Congress is unambiguous.[51] If, after application of norms of statutory interpretation, the meaning of the statute is ambiguous, courts proceed to the second part of the inquiry. This step asks whether the agency's interpretation is reasonable.[52] An important threshold question is whether the *Chevron* framework even applies in the first place. Scholars have dubbed this inquiry "*Chevron* step zero."[53] Cass Sunstein argues that "well-established background principles operate to 'trump' *Chevron*."[54] These rules include the canon to construe statutes to avoid serious constitutional issues and the presumption against the retroactive application of law.[55]

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47. Sunstein, Chevron *Step Zero*, *supra* note 1, at 188.

48. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803). *See generally* Aditya Bamzai, Marbury v. Madison *and the Concept of Judicial Deference*, 81 MO. L. REV. 1057 (2016) (discussing the tension bertween *Marbury* and *Chevron*); Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) (describing *Chevron* as "a kind of counter-*Marbury* for the administrative state").

49. *See generally* Sunstein, *Nondelegation Canons*, *supra* note 4; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Sunstein, *Law and Administration*, *supra* note 9; Cynthia R. Farina, *Statutory Interpretation and the Balance of Power In the Administrative State*, 89 COLUM. L. REV. 452 (1989).

50. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

51. *Id.* at 843.

52. *Id.*

53. Sunstein, Chevron *Step Zero*, *supra* note 1, at 244. *But see* Matthew C. Stephenson & Adrian Verneule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009). Sunstein credits Thomas W. Merrill and Kristin E. Hickman for the "step zero" phrase. Sunstein, Chevron *Step Zero*, *supra* note 1, at 191 n.19 (citing Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001)).

54. Sunstein, Chevron *Step Zero*, *supra* note 1, at 244.

55. *Id.*; *see also* Kenneth Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 75–78 (2008) (discussing statutory construction canons in the context of *Chevron*). Commentators disagree about whether the rule of lenity operates at step zero or at a later point in the *Chevron* analysis. *See* Greenfield, *supra* note 9, at 10–14 (discussing the disagreement).

At issue in *Chevron* was the proper method for reviewing the Environmental Protection Agency's ("EPA") definition of the term "stationary source" under the Clean Air Act.[56] The agency opted to interpret the term as encompassing an entire plant or factory, as opposed to each constitutive part generating pollution.[57] Because the statute was ambiguous, the Court held that the EPA could define "stationary source" as it thought best, as long as it was reasonable.[58] By ruling in favor of the EPA, the Court permitted the agency to enforce an expansive reading of the Clean Air Act's anti-pollution provisions.

Since the Supreme Court decided *Chevron* over twenty years ago, courts and scholars have analyzed its jurisprudential underpinnings, including concerns about expertise, political accountability, and delegation.[59] The Court recognized that agencies might have more expertise with the statute they were entrusted to implement, such that Congress could have intended "that those with great expertise and charged with responsibility for administering the provision would be in a better position [than Congress itself] to do so."[60] The Court also suggested that agencies are more politically accountable than the judiciary, noting that although "agencies are not directly accountable to the people, the Chief Executive is."[61] Settling statutory ambiguity, in this view, is akin to making policy, and the separation of powers requires that policy decisions fall within the democratically elected executive branch, not the judiciary.

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56. *Chevron*, 467 U.S. at 840.

57. *Id.*

58. *Id.* at 866.

59. *See, e.g.*, Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 566–71 (2009); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 553 (2006); Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 206-07 (2004); Ronald J. Krotoszynski, Jr., *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735 (2002); Merrill & Hickman, *supra* note 53; Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Sunstein, *Nondelegation Canons*, *supra* note 4; John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Paulsen, *supra* note 49; Merrill, *supra* note 49; Sunstein, *Law and Administration*, *supra* note 9; Farina, *supra* note 49; Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985).

60. *Chevron*, 467 U.S. at 865.

61. *Id.*

More recently, cases and commentary have focused on the idea that *Chevron* deference is concerned with delegation.[62] Courts should defer to agencies when Congress has instructed them to do so. When it leaves ambiguity in a statute, Congress delegates interpretive authority to agencies.[63] In *United States v. Mead*, when determining whether deference was appropriate, the Supreme Court asked whether the agency had issued the particular rule or adjudication "with the force of law."[64] In subsequent decisions, the Court interpreted *Mead*'s delegation inquiry in ways that reflected a historical debate between Justice Breyer and Justice Scalia.[65] Justice Scalia favored a bright line test for determining whether the *Chevron* framework applies, whereas Justice Breyer has espoused a multi-factor approach that is reminiscent of the pre-*Chevron* approach taken in *Skidmore v. Swift & Co.*[66] Post-*Mead*, a key question is whether assessing delegation involves looking only at the source of the agency interpretation (e.g., a regulation or adjudication as opposed to policies set out in memoranda) or also at the nature of the interpretive question (e.g., whether it involves a major question or an everyday adjudication within the agency's expertise).[67]

II. CRIMINAL LAW AND LENITY

Whatever the precise contours of *Chevron*'s "domain," one established rule is that courts never defer to the Attorney General's interpretation of ambiguous criminal law statutes in individual criminal

62. *See* Gonzales v. Oregon, 546 U.S. 243, 258 (2006) ("*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official."); United States v. Mead, 533 U.S. 218, 226-27 (2001) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."); *see generally* David J. Barron and Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212-225; Evan J. Criddle, Chevron's *Consensus*, 88 B.U. L. REV. 1271 (2008); Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989 (1999); Linda D. Jellum, *The Impact of The Rise and Fall of* Chevron *on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141 (2012); Merrill & Hickman, *supra* note 53.

63. *See United States v. Mead*, 533 U.S. at 227 (citing *Chevron*, 467 U.S. at 843-844) (holding that when Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation").

64. *Id.* at 229.

65. City of Arlington v. FCC, 133 S. Ct. 1863 (2013); Barnhart v. Walton, 535 U.S. 212 (2002).

66. 65 S. Ct. 161 (1944). *See infra* notes 146-51 and accompanying discussion.

67. *See infra* notes 146-51 and accompanying discussion.

prosecutions.[68] Underlying this prohibition is the constitutional concern that "the Due Process Clause limits the extent to which prosecutorial and other functions may be combined in a single actor."[69] Sunstein calls "preposterous" the suggestion that courts defer to prosecutorial interpretations.[70] "Such deference," he warns, "would ensure the combination of prosecutorial power and adjudicatory power in a way that would violate established traditions and threaten liberty itself."[71] Even those who favor *Chevron* deference to agencies tasked with administering civil statutes that have criminal application might agree that the judiciary should not defer to the Attorney General in his role as the country's prosecutor-in-chief.[72]

The rule of lenity, not *Chevron* deference, governs the resolution of ambiguities in criminal law.[73] Under the rule of lenity, ambiguities are construed in favor of the defendant.[74] Justice Scalia famously argued that giving executive officials the power to "create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain[,]" would convert the rule of lenity to a rule of "severity."[75] The concern is that prosecutors, in an effort to secure

68. Merrill & Hickman, *supra* note 53 (explaining the scope of the *Chevron* doctrine); *see* Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (emphasizing that a criminal statute is not administered by an agency or the Attorney General, but by the courts); Gonzales v. Oregon, 546 U.S. 243, 264 (2006) ("[I]t [] require[s] the Attorney General to decide '[c]ompliance' with the [criminal] law, it does not suggest that he may decide what the law says.").

69. Touby v. United States, 500 U.S. 160, 170–71 (1991) (Marshall, J., concurring) (citing Morrissey v. Brewer, 408 U.S. 471, 485–87 (1972)).

70. Sunstein, Chevron *Step Zero*, *supra* note 1, at 210.

71. *Id.* (citing *Crandon*, 494 U.S. at 177–78 (Scalia, J., concurring)). *But see* Dan M. Kahan, *Is* Chevron *Relevant To Federal Criminal Law?* 110 HARV. L. REV. 469 (1996) (arguing in favor of consolidating the law-interpreting and law-enforcement functions).

72. *See, e.g.*, Richard E. Myers II, *Complex Times Don't Call For Complex Crimes*, 89 N.C. L. REV. 1849, 1858 (2011) (contrasting the statutory interpretations of prosecutors with agency interpretations of hybrid statutes whose administration was specifically delegated by Congress).

73. Abramski v. United States, 134 S. Ct. 2259, 2274 (2014); United States v. Santos, 553 U.S. 507, 519 (2008); United States v. Bass, 404 U.S. 336, 347–48 (1971); Bell v. United States, 349 U.S. 81, 83–84 (1955); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820); *see also* Reno v. Koray, 515 U.S. 50, 64–65 (1995) (explaining when the rule of lenity applies); United States v. Bass, 404 U.S. 337–48 (1971) (discussing policies underlying the rule of lenity); Livingston Hall, *Strict or Liberal Construction of Criminal Statutes*, 48 HARV. L. REV. 748, 749–51 (1935) (discussing the origins of the rule of lenity). In some of its decisions, the Court refers to the criminal rule of lenity as applying only in cases of "grievous" ambiguity. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 463 (1991); Barber v. Thomas, 560 U.S. 474, 488 (2010); Muscarello v. United States, 524 U.S. 125, 138 (1998).

74. *Crandon*, 494 U.S. at 158.

75. Whitman v. United States, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting denial of certiorari); *see also Crandon*, 494 U.S. at 178 (Scalia, J., concurring).

convictions, have incentive to adopt expansive interpretations of statutes.[76] Further grounding the rule of lenity is the due process requirement that people have "fair warning" of what qualifies as a crime and the idea that the government cannot strip away a person's liberty unless there is no doubt about what the law requires.[77] Legal scholars have commented on the tension between *Chevron* deference and the rule of lenity, particularly with respect to civil statutes with criminal application (hybrid statutes).[78]

Criminal statutes "are for courts, not for the Government, to construe."[79] But whether Congress can delegate its authority to define crimes to executive branch officials is a different question. Congress has empowered agencies to administer statutes that include criminal provisions. As one commentator notes, "the broad authority given to administrative agencies to define the scope of criminal behavior belies any claim that Congress cannot delegate the power to define crimes."[80] For example, Congress has delegated to the Department of Justice the authority to modify the federal drug schedule.[81] Thus, while there is broad agreement that courts do not defer to the interpretations of criminal prosecutors, the relationship between *Chevron* and delegated agency authority to define criminal offenses is less clear.

III. IMMIGRATION LAW AND LENITY

With respect to immigration law, the general rule is that the "principles of *Chevron* deference are applicable."[82] Congress has granted the authority to interpret the INA to the Attorney General, who has

76. Greenfield, *supra* note 9, at 57–58.

77. *Bass*, 404 U.S. at 338; *see* NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §59:3, 125 (6th ed. 2000); *see also Crandon*, 494 U.S. at 158; Liparota v. United States, 471 U.S. 419, 427 (1985); McBoyle v. United States, 283 U.S. 25, 27 (1931).

78. *See, e.g.*, Hickman, *supra* note 33, at 910; *see also* Note, *Justifying the* Chevron *Doctrine: Insights From the Rule of Lenity*, 123 HARV. L. REV. 2043, 2061 n.98 (2010) (citing commentaries).

79. Abramski v. United States, 134 S. Ct. 2259, 2274 (2014); *see also* Gonzales v. Oregon, 546 U.S. 243, 264 (2006); Muscarello v. United States, 524 U.S. 125, 150 (1998); *Crandon*, 494 U.S. at 158; *Bass*, 404 U.S. at 348.

80. Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2426 (2006). For example, "the Attorney General is empowered to designate drugs as Schedule I controlled substances; the SEC promulgates rules governing securities trading; and various statutes establish criminal penalties for violations of regulations promulgated by the IRS, the EPA, and other agencies." *Id.*

81. 21 U.S.C. § 811 (2012).

82. Negusie v. Holder, 555 U.S. 511, 516 (2009) (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999)); *see* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 58, 465–83 (2009) (discussing history of deference principles in immigration law).

in turn delegated adjudicative authority to the BIA by regulation.[83] Indeed, the Supreme Court has historically applied a form of super-deference to immigration questions in light of the plenary power doctrine, which empowered Congress and the executive branch to act with unfettered authority in the area of immigration.[84]

The story, however, is not so simple. Just as criminal law jurisprudence includes an interpretive rule of lenity, immigration law has a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[85] With origins in early deportation cases, this "rule of immigration lenity" aims to protect noncitizens from deportation in cases where the meaning of a statutory provision is not clear.[86] The rule stems from the Court's longstanding recognition that "deportation is a drastic measure and at times the equivalent of banishment or exile."[87] The Court has not directly addressed the relationship between *Chevron* and the presumption in favor of lenity.[88]

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83. 8 C.F.R. § 1003.1 (2016); 8 U.S.C. § 1103(a)(1) (2012); *see also* United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("A very good indicator of delegation meriting *Chevron* treatment i[s] express congressional authorization to engage in the process of rulemaking or adjudication that produces regulations . . . ."). The BIA issues both precedential and non-precedential decisions. *See* 8 C.F.R. § 1003.1(g).

84. For a discussion of the plenary power doctrine and how it has eroded over the last few decades, see Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

85. INS v. Elias-Zacarias, 502 U.S. 478, 487 (1992) (citing INS v. Errico, 385 U.S. 214, 225 (1966); Costello v. INS, 376 U.S. 120, 128 (1964); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)); *see also* Kawashima v. Holder, 565 U.S. 478, 489–90 (2012) ("[W]e think the application of the present statute clear enough that resort to the rule of lenity is not warranted."); INS v. St. Cyr, 533 U.S. 289, 320 (2001) (applying the canon of construing ambiguities in deportation statutes in favor of the noncitizen); INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (same); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("[W]e will not assume that Congress meant to trench on [the alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used."); Matter of Andrade, 14 I. & N. Dec. 651, 655 (B.I.A. 1974) (citing *Fong Haw Tan*, 333 U.S. at 9); 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.01[4][b] (Matthew Bender, rev. ed. 2016) (stating that deportation statutes must be "strictly construed").

86. *See* Scharf, *supra* note 46, at 30; *Kawashima*, 565 U.S. at 489.

87. *Fong Haw Tan*, 333 U.S. at 10; Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (stating that deportation may deprive an individual "of all that makes life worth living").

88. Like the criminal rule of lenity, the presumption against deportation in immigration cases arguably kicks in at *Chevron* step zero—when courts are deciding whether *Chevron* even applies in the first place. *See* Sunstein, Chevron *Step Zero*, *supra* note 1, at 205–20 (discussing the criminal rule of lenity as a Step Zero inquiry). *But see* Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 543, 574–81 (2003) (arguing that the immigration rule of lenity should apply at *Chevron* step two).

Further complicating the *Chevron*/immigration law relationship is the reality that immigration law intertwines with criminal law.[89] As mentioned above, the controversy centers on whether courts defer to agency interpretations of terms defining the scope of a crime-based removal ground.[90] The terms and phrases divide into four basic categories: (1) those involving interpretation of a term or phrase expressly defined in a federal criminal statute, like "crime of violence;" (2) those employing a general criminal law term, like "conviction," "burglary," or "theft;" (3) those describing a category of offenses, like "sexual abuse of a minor" or "crime involving moral turpitude;" and (4) those relating to statutory terms that have no distinct criminal law meaning, like "described in," or "relating to," or "involving."[91] While some of these statutory terms are part of the aggravated felony definition – the designation that carries the most serious immigration consequences and also appears in federal criminal law – others are not.[92]

As to the first category, cross-referenced terms, courts agree that *Chevron* has no bearing.[93] The U.S. Attorney General has recognized that "courts do not afford *Chevron* deference to the Board's interpretation of a criminal provision incorporated by reference into the INA."[94] "Incorporated," in this view, means expressly cross-referenced by statute number. The Supreme Court routinely reviews this type of case with no mention of *Chevron* deference.[95]

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89. Yafang Deng, *When Procedure Equals Justice: Facing the Pressing Constitutional Needs of a Criminalized Immigration System*, 42 COLUM. J.L. & SOC. PROBS. 261, 261, 284–85 (2008).

90. *See supra* notes 6–17 and accompanying discussion.

91. 8 U.S.C. § 1227 (2012); Deng, *supra* note 89, at 283–85.

92. Angela M. Banks, *Deporting Families: Legal Matter or Political Question?*, 27 GA. ST. U. L. REV. 489, 506 n.68 (2011).

93. *See* Zivkovic v. Holder, 724 F.3d 894, 897–98 (7th Cir. 2013) ("No one thinks that the Board of Immigration Appeals has the authority to set the boundaries of the term 'crime of violence' for every criminal prosecution in the United States; the great majority of these cases are entirely unrelated to immigration law."); Dalton v. Ashcroft, 257 F.3d 200, 203–04 (2d Cir. 2001) (reviewing without *Chevron* deference the meaning of "crime of violence" as defined in federal criminal law).

94. Brief for the Petitioner at 24, Lynch v. Dimaya, No. 15-1498 (filed Nov. 14, 2016), 2016 WL 6768940, at *24; *see also* Matter of Carachuri-Rosendo, 24 I. & N. Dec. 382, 385 (B.I.A. 2007) (recognizing that no deference is due the BIA's interpretation of criminal statutes).

95. Leocal v. Ashcroft, 543 U.S. 1, 5 (2004) (considering whether a Florida conviction for driving while intoxicated qualified as a "crime of violence" as defined in 18 U.S.C. § 16, and, therefore, an aggravated felony); Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) (considering whether a Georgia statute penalizing possession of marijuana with intent to distribute qualified as an aggravated felony as "illicit trafficking in a controlled substance" as defined in 18 U.S.C. § 924(c)); Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) (considering whether two misdemeanor Texas drug offenses constituted a "drug trafficking" aggravated felony as defined by the Controlled Substances Act, 21 U.S.C. § 801).

The same reasoning holds true for the second category—criminal terms for which there is no cross-referenced federal criminal definition. When faced with interpreting the term "burglary," for example, the Court in *Taylor v. United States* defined the term "generically" by surveying the laws of the states, federal law, and the Model Penal Code.[96] The BIA and courts have imported this definition of burglary into immigration law.[97]

Terms and phrases that describe a group of offenses or that have no settled meaning in criminal law are more controversial.[98] *Esquivel-Quintana* illustrates the controversy of this type of interpretive question, addressing the meaning of "sexual abuse of a minor" in the aggravated felony definition.[99] Esquivel-Quintana argued, and the Court agreed, that the unambiguous meaning of "sexual abuse of a minor" emerges from the interpretive approach employed in *Taylor*—surveying federal law, state law, and the Model Penal Code.[100] The phrase "sexual abuse of a minor," in the Court's view, is a generic term like "burglary" in *Taylor*.[101] The Court rejected the government's contention that the phrase does not describe a generic crime but a category of offenses appropriate for *Chevron* deference.[102]

Esquivel-Quintana involved the aggravated felony definition, a hybrid statute.[103] But interpretive questions relating to non-aggravated felonies present an even closer question, as these grounds have no criminal law application. The Supreme Court has suggested—albeit briefly—that *Chevron* is relevant in such cases, at least with respect to statutory terms that have no distinct criminal law meaning (the fourth category above).[104] In *Mellouli v. Lynch*, the Court interpreted the phrase "relating to" in the controlled substance criminal deportation

96. 495 U.S. 575, 580, 598 (1990).

97. Sareang Ye v. INS, 214 F.3d 1128, 1131–32 (9th Cir. 2000); Lopez-Elias v. Reno, 209 F.3d 788, 792 (5th Cir. 2000); Solorzano-Patlan v. INS, 207 F.3d 869, 873 (7th Cir. 2000); Matter of Perez, 22 I. & N. Dec. 1325, 1326–27 (B.I.A. 2000).

98. *Compare* Jean-Louis v. Att'y Gen., 582 F.3d 462, 477 (3d Cir. 2009) (choosing not to defer to the U.S. Attorney General's definition of "crime involving moral turpitude"), *with* Smalley v. Ashcroft, 354 F.3d 332, 335–36 (5th Cir. 2003) (granting deference to the BIA's definition of "crime involving moral turpitude").

99. *See* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

100. *Id.* at 1568; *see also* Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1151 (9th Cir. 2008) (en banc) (declining to defer to the BIA's interpretation of "sexual abuse of a minor").

101. *Esquivel-Quintana*, 137 S. Ct. at 1571.

102. *Id.* at 1572; *see also* Brief for Respondent, Esquivel-Quintana v. Lynch, No. 16-54 (filed Jan. 18, 2017), 2017 WL 345128, at *9–12.

103. Esquivel-Quintana v. Lynch, 810 F.3d at 1019, 1020 (6th Cir. 2016), *rev'd sub nom* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

104. Mellouli v. Lynch, 135 S. Ct. 1980, 1989 (2015).

ground.[105] At issue was whether a Kansas misdemeanor for possession of drug paraphernalia constituted a deportable drug offense under a provision that authorizes the removal of a noncitizen "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country *relating to* a controlled substance (as defined in [the federal Controlled Substances Act])."[106] The Court held that the Kansas paraphernalia conviction was not a deportable offense because the Kansas drug schedule was broader than the one described in the Controlled Substances Act.[107] The Court reasoned that the paraphernalia conviction did not necessarily "relate to" a federal controlled substance because it could have related to a substance criminalized by Kansas, but not federal, law.[108] Characterizing the BIA's contrary interpretation as "ma[king] scant sense," the Court found the agency was "owed no deference under the doctrine described in *Chevron*."[109] The Court thus appeared to engage in a step two *Chevron* inquiry, rejecting the BIA's interpretation of an ambiguous statute as unreasonable.[110] The Court's brief reasoning did not reveal why it believed *Chevron* was relevant.[111]

Apart from *Mellouli*, the Court has ignored *Chevron* when interpreting crime-based removal statutes.[112] In cases involving aggravated felony provisions, the Court has neither referred to *Chevron* nor deferred to the agency, even when *Chevron* was briefed by the parties.[113]

105. *Id.* at 1989–90.

106. *Mellouli*, 135 S. Ct. at 1984 (quoting 8 U.S.C. § 1227(a)(2)(B)(i) (2012)) (emphasis added).

107. *Id.* at 1990–91 (citing 21 U.S.C. § 802(6)).

108. *Id.* at 1991.

109. *Id.* at 1989.

110. *Id.* at 1990–91.

111. *Id.* at 1989–91.

112. Michael Kagan, Chevron's *Immigration Exception, Revisited*, YALE J. ON REG.: NOTICE & COMMENT (June 10, 2016), http://yalejreg.com/nc/chevron-s-immigration-exception-revisited-by-michael-kagan/. Empirical studies of how often the Supreme Court and U.S. courts of appeals invoke *Chevron* show that the Supreme Court is much less likely to defer under *Chevron* than lower courts; *see* Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017) (manuscript at 6) (Ohio St. Pub. L., Working Paper No. 359).

113. *See* Torres v. Lynch, 136 S. Ct. 1619 (2016) (interpreting the words "described in" in an aggravated felony provision without reference to *Chevron* or deference principles); *see also* Kawashima v. Holder, 565 U.S. 478, 489 (2012) (deciding the case without reference to *Chevron* and implying that the rule of lenity, not *Chevron*, was relevant); Lopez v. Gonzalez, 549 U.S. 50, 60 (2006) (interpreting the term "felony punishable" in the phrase "felony punishable under the Controlled Substances Act" without mentioning *Chevron*, despite it having been briefed).

Lower courts, in contrast, have often deferred to the agency's interpretations of aggravated felony provisions without first questioning whether deference is appropriate.[114]

The Court has not yet developed a jurisprudence addressing when, if ever, *Chevron* applies to interpretations of crime-based removal grounds. While there is general agreement that some ambiguity in the criminal grounds of deportation is for courts alone to settle, there is persistent confusion about which questions fall into this category. The different types of terms and phrases needing interpretation—and the cross-cutting issue of whether *Chevron* applies to deportation statutes that have criminal application (e.g., the aggravated felony definition)—complicate the question of whether *Chevron* applies in any given scenario. The Court is in sore need of guidance in the area of *Chevron* and deportation for a crime.

IV. TOWARD A *CHEVRON* JURISPRUDENCE FOR CRIME-BASED DEPORTATION

The grounding for a jurisprudence of agency deference and deportation lies in the rationales undergirding *Chevron* as well as concerns about institutional overreach, morality, lenity, and fair notice—concerns underlying the ban on deference to prosecutors and the criminal and immigration rules of lenity. These tenets support an expansive zone of nondeference that extends beyond hybrid statutes like the aggravated felony definition. As discussed earlier, *Chevron* rests on ideas of agency expertise, political accountability, and delegation.[115] Each of these concerns supports nondeference to agency statutory interpretations in the area of deportation for a crime.

114. *See* Spacek v. Holder, 688 F.3d 536, 538 (8th Cir. 2012) (according "substantial deference" to the BIA's statutory interpretation of "described in," and not addressing the criminal rule of lenity); Nieto Hernandez v. Holder, 592 F.3d 681, 684–85 (5th Cir. 2009) (finding that *Chevron* applies but withholding determination of "the precise degree of deference to be afforded the BIA's interpretation" and not mentioning the criminal rule of lenity); James v. Mukasey, 522 F.3d 250, 254 (2d Cir. 2008) (deferring to the BIA's definition of the "sexual abuse of a minor" aggravated felony provision); Gattem v. Gonzales, 412 F.3d 758, 764 (7th Cir. 2005) ("We previously have concluded that the BIA's . . . broad definition of sexual abuse for guidance is reasonable."); Alwan v. Ashcroft, 388 F.3d 507, 515 (5th Cir. 2004) (deferring to the BIA's interpretation of "relating to obstruction of justice" in the aggravated felony definition).

115. *See supra* Part I.

A. *Expertise*

The idea that agencies have more expertise than the judiciary animates *Chevron*. Congress often delegates to agencies when it is "struggling to figure out . . . [h]ow . . . [to] regulate things we don't understand."[116] Where some agencies possess scientific or other technical expertise, the BIA's expertise lies in its experience interpreting the INA, a statute described as a "labyrinth."[117] But settling interpretive ambiguity in crime-based removal grounds requires expertise in criminal law and general statutory construction, not the INA.

Deciding whether a conviction triggers deportation involves both an interpretation of the nature of the criminal conviction and the scope of the deportation ground. Both inquiries straightforwardly involve criminal law. Deportation grounds contain criminal terms and phrases, like "theft," "burglary," and "sexual abuse of a minor."[118] The phrase "moral turpitude," for example, stems from early American defamation law, first appearing in immigration law in 1891.[119] The term still appears in criminal law.[120]

When determining the scope of a criminal removal ground, the BIA often looks to the corpus of criminal law or to general definitions, such as those in Black's Law Dictionary.[121] The BIA's precedential decision interpreting the scope of the "sexual abuse of a minor" aggravated felony definition—at issue in *Esquivel-Quintana*—illustrates how assessments of criminal law pervade interpretations of crime-based deportation provisions. In *Matter of Rodriguez-Rodriguez*, the BIA analyzed a Texas conviction for indecency with a child by exposure.[122] Because the phrase "sexual abuse of a minor" is not defined

116. *See* Richard E. Myers II, *Adaptation and Resiliency in Legal Systems: Complex Times Don't Call for Complex Crimes*, 89 N.C. L. REV. 1849, 1858 (2011).

117. Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (analogizing immigration law to "King Minos's labyrinth in ancient Crete").

118. *See* Sunstein, *Nondelegation Canons*, *supra* note 4.

119. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1039 (2012); Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 118 (1929); Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.S. § 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. FED. 480, 487 (1975).

120. Simon-Kerr, *supra* note 119 at 1001.

121. As discussed above, the petitioner in *Esquivel-Quintana* argued that the categorical approach applies to this inquiry. *See supra* notes 100–102 and accompanying text; Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567–68 (2017). The categorical approach falls outside the scope of *Chevron; see* Matter of Chairez-Castrejon, 26 I. & N. Dec. 819 (B.I.A. 2016); *see also* Nijhawan v. Holder, 557 U.S. 29 (2009).

122. Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 991–92 (B.I.A. 1999).

by statute, the BIA turned to federal law, stating "[i]n determining whether a specific offense falls within a classification described in deportation or removal provisions in the [INA], we have looked to a federal definition."[123] The BIA reviewed both federal criminal law and a federal statute defining the rights of child victims and child witnesses. Under the former, the Texas conviction would not qualify, as it did not involve contact.[124] Under the latter, the offense would be an aggravated felony.[125] In choosing the latter, the BIA said that the victim protection "statute encompasses those crimes that can reasonably be considered sexual abuse of a minor" and cited to Black's Law Dictionary.[126]

Even the interpretation of seemingly neutral terms or phrases in crime-based deportation grounds—like "described in" or "relating to"— often require criminal law interpretations. While these terms are not criminal in and of themselves, their meaning depends on an assessment of how they relate to criminal terms in the statutory deportation ground. In *Matter of Valenzuela Gallardo*, for example, the BIA considered whether a California conviction for being an accessory to a crime qualified as an aggravated felony as "an offense *relating to* obstruction of justice."[127] In holding that it did, the BIA looked to the federal criminal code defining the offense of accessory after the fact and found that the California statute was "closely analogous, if not functionally identical, to [the federal offense]."[128]

The BIA often relies on Black's Law Dictionary when interpreting statutory terms. In *Matter of Martinez Espinoza*, for example, the BIA found that drug paraphernalia qualified as "a violation of . . . any law or regulation of a State, the United States, or a foreign country *relating to* a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))[.]"[129] In holding that the phrase "re-

123. *Id.* at 995; *see also* Drug Law Enforcement Act, 18 U.S.C. § 924(c)(2) (1994).

124. *Rodriguez-Rodriguez*, 22 I. & N. at 995.

125. *Id.*

126. *Id.* at 996. In *Esquivel-Quintana*, the Solicitor General did not defend the BIA's reliance on the federal witness protection statute to define "sexual abuse of a minor." It did, however, defend the BIA's citation to Black's Law Dictionary. Brief for Respondent, *supra* note 102, at *16–20.

127. Matter of Agustin Valenzuela Gallardo, 25 I. & N. Dec. 838, 839–44 (B.I.A. 2012) (emphasis added).

128. *Id.* at 841; Crimes and Criminal Procedure, 18 U.S.C. § 3 (2012).

129. Matter of Martinez Espinoza, 25 I. & N. Dec. 118, 119 (B.I.A. 2009) (emphasis added).

lating to" must be broadly construed to encompass drug paraphernalia convictions, the BIA primarily relied on the definition of "relating to" in Black's Law Dictionary—a source outside of the INA.[130]

The BIA's cramped reasoning stands in contrast to that of the Supreme Court, which overruled *Matter of Martinez Espinoza* in *Mellouli v. Lynch*.[131] In *Mellouli*, the Court interpreted the meaning of "relating to" by looking not to the inherent meaning of the phrase, which was "'broad' and 'indeterminate,'" but to what it meant in "context."[132] The Court emphasized the mixed immigration/criminal nature of the case, introducing it as involving "the interplay between several federal and state statutes."[133] Much of the Court's decision applied the categorical approach, a methodology that the BIA now agrees lies within the province of federal courts, not the agency, to define.[134] As discussed above, although the Court assumed the relevancy of *Chevron*, it quickly dismissed the BIA's interpretation as unreasonable.[135] The Court did not consider whether there were reasons to find the *Chevron* framework wholly inapplicable at step zero, as argued in this Article. *Mellouli* illustrates how the interpretation of crime-based deportation statutes, even when the interpretation is of noncriminal terms, is inextricably intertwined with criminal law and thus outside the agency's expertise.

B. Political Accountability

The second pillar of *Chevron* is the notion that settling interpretive ambiguity amounts to the promulgation of policy, something within the province of the politically accountable executive branch.[136] But immigration agencies, when exercising their adjudicative function, may not be as politically accountable as other agencies. The two main immigration adjudicatory bodies are the BIA and the U.S. Attorney General. While the Attorney General has authority to overrule the BIA, he has historically invoked this power only occasionally.[137] In

130. *Id.* at 120.

131. Mellouli v. Lynch, 135 S. Ct. 1980, 1990 (2015).

132. *Id.*

133. *Id.* at 1984.

134. *See supra* note 12 and accompanying discussion.

135. *Mellouli*, 135 S. Ct. at 1989.

136. *See supra* notes 59-61 and accompanying text. For a critique of the political accountability rationale for the administrative state, see Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

137. *See Executive Office for Immigration Review: Fact Sheet*, U.S. DEP'T JUST. (Sept. 9, 2010), https://www.justice.gov/eoir/eoir-at-a-glance.

the last ten years, the Attorney General has issued only 12 decisions, whereas the BIA issued 319 precedential decisions over the same period.[138] BIA members, unlike the Attorney General, are not political appointees.[139] Department of Justice regulations require that the BIA use "independent judgment and discretion,"[140] and the Supreme Court has held that the Attorney General must abide by this regulation.[141] Thus, while the BIA, as the main source of immigration adjudicatory authority, is part of the executive branch, it is not as politically accountable as other agencies that operate more directly through the leadership of political appointees.

At the same time, the BIA is not as well-positioned as courts to carry out the duties of a neutral arbiter. The fact that the BIA is subject to being overruled by the Attorney General means that it lacks true independence. The BIA exists in an awkward "middle position," functioning as "neither a judicial body nor an independent agency."[142] The political accountability rationale for deferring to agencies does not apply to the BIA with the force it might to other agencies.

C. Congressional Intent

Congress intended the judiciary, not immigration agencies, to interpret ambiguity in crime-based removal statutes. Focusing on delegation as the touchstone for deference, the Supreme Court in *Mead* framed the question as whether "the agency interpretation claiming deference was promulgated in the exercise of [the] authority" to make rules carrying the force of law.[143] This delegation can be either express or implicit, but it must be focused on the "particular statutory provision" at issue.[144] Because Congress gave the Attorney General (and,

138. *See Attorney General and BIA Precedent Decisions*, U.S. DEP'T JUST., https://www.justice.gov/eoir/ag-bia-decisions (last updated Mar. 2, 2017).

139. However, the BIA is not insulated from politics. In 2001, a group of BIA board members were removed in a process that was widely criticized as political. *See* Jason Dzubow, *Former BIA Chairman Paul W. Schmidt on His Career, the Board, and the Purge (part 2)*, ILW.COM: DISCUSSION BOARD (Oct. 5, 2016, 10:53 AM), http://blogs.ilw.com/entry.php?9484-Former-BIA-Chairman-Paul-W-Schmidt-on-His-Career-the-Board-and-the-Purge-(part-2); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1666 (2010). For a discussion of how federal courts have criticized the quality of BIA decisions, see Rana, *supra* note 38, at 326 & n.64.

140 8 C.F.R. § 1003.1(d)(1)(ii) (2016).

141. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266–67 (1954).

142. *Id.* at 269–70 (Jackson, J., dissenting).

143. United States v. Mead Corp., 533 U.S. 218, 227 (2001).

144. *Id.* at 226.

by extension, the BIA) the authority to issue binding precedential adjudications, these decisions—whatever their content—arguably satisfy *Mead*'s general force of law requirement.[145]

But satisfaction of *Mead*'s general "force of law" requirement does not end the delegation inquiry. *Mead* further requires "inquiry into whether Congress intended the *particular* provision at issue to fall within delegated interpretive authority."[146] This particularized approach to the delegation inquiry is consistent with Supreme Court practice in the area of crime-based removal. As discussed above, when confronted by certain types of statutory ambiguity—for example, ambiguity that relates to the categorical approach or the aggravated felony definition—the Court has opted not to apply *Chevron*.[147] These specific refusals to defer co-exist with Congress's general grant of authority to the Attorney General to interpret the INA through adjudications.

In *Barnhart v. Walton*, a Justice Breyer opinion, the Court fashioned a controversial test for the *Mead* delegation inquiry.[148] The Court instructed judges to evaluate "the interstitial nature of the legal question, the related expertise of the [a]gency, the importance of the question to administration of the statute, the complexity of that administration," and whether the agency has given the question "careful consideration . . . over a long period of time."[149] This multi-factor test contrasts with the bright line rule favored by Justice Scalia, who read

145. *See supra* note 83 and accompanying text; John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 620 (2004). *But see* Mary Holper, *Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1242–43 (2011) (arguing that an agency decision about the crime involving moral turpitude ground of removal fails to meet the force of law requirement).

146. Guendelsberger, *supra* note 145, at 620 (emphasis added); *see also* Sunstein, Chevron *Step Zero*, *supra note* 1, at 218 ("The grant of authority to act with the force of law is a sufficient but not necessary condition for a court to find that Congress has granted an agency the power to interpret ambiguous statutory terms.").

147. *See supra* notes 12, 112–13 and accompanying text.

148. Barnhart v. Walton, 535 U.S. 212, 222 (2002); *see also* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005) (discussing the controversy surrounding *Mead*).

149. *Barnhart*, 535 U.S. at 222 (citing United States v. Mead Corp., 533 U.S. 218 (2001); 1 KENNETH C. DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE §§ 1.7, 3.3 (3d ed. 1994)). As a federal circuit judge, Justice Breyer had suggested that the judiciary take a "stricter review of matters of law, where courts are more expert, but more lenient review" where agencies have more "expertise." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 397 (1986). Justice Breyer's individualized determination of delegation asks whether the interpretive question is "closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise." Mayburg v. Sec'y of Health & Human Servs., 740 F.2d 100, 106 (1st Cir. 1984). For a discussion of the multi-factor test of *Barnhart*, see Sunstein, Chevron *Step Zero*, *supra* note 1, at 231–47.

Chevron as establishing an "across-the-board" presumption of deference to agency action.[150] But even Justice Scalia appears to have acknowledged that *Chevron* might not apply to questions outside of the agency's "substantive field," even if *Mead*'s general "force of law" requirement were satisfied.[151]

While hardly a model of clarity, the Court's *Chevron* jurisprudence—as well as its practice—permits factors like institutional expertise to inform the delegation inquiry.[152] If an ambiguous provision in the INA does not implicate agency expertise, courts should not assume that Congress intended to delegate interpretive authority. As applied to interpretations of crime-based removal statutes, *Mead*'s "force of law" requirement, as elaborated by *Barnhart*, suggests that courts should not defer to agency interpretations of the scope of a removal statute when it involves the "substantive field" of criminal law.[153]

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150. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515–17 (1989) (explaining how *Chevron* creates an "across-the-board" presumption where there used to be a case-by-case determination); *see Mead*, 533 U.S. at 241, 246 (Scalia, J., dissenting) ("The principle effect [of the majority's decision] will be protracted confusion."); *see also* Willaim N. Eskridge, Jr., Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations*, 96 GEO. L.J. 1080, 1168 (2008) (discussing the debate between Justice Breyer and Justice Scalia); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1047 (2011) (same); Sunstein, Chevron *Step Zero*, *supra* note 1 at 192 (same). For a discussion of how Justice Scalia may have had "buyer's remorse" regarding *Chevron* such that he was re-thinking his position, see Ezell & Marshall, *supra* note 3, at 175–76.

151. City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013) (Breyer, J., dissenting) (majority opinion authored by Justice Scalia noting that Justice Breyer in his dissent did not cite to "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority *within the agency's substantive field*") (emphasis added). Post-*City of Arlington*, the Court has failed to apply *Chevron* when reviewing duly passed regulations on the grounds that the issue was too important. *See* King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (refusing to defer to tax regulations regarding the Patient Protection and Affordable Healthcare Act because the case was "extraordinary"). *King* illustrates that the delegation inquiry is not a bright line test focused only on *Mead*'s general "force of law" inquiry.

152. *See* Paul Chaffin, Note, *Expertise and Immigration Administration: When Does* Chevron *Apply to BIA Interpretations*, 69 N.Y.U. ANN. SURV. AM. L. 503, 530 (2013) (discussing post-*Mead* cases like *Barnhart v. Walton*, 535 U.S. 212 (2002) to suggest that expertise remains a central justification).

153. Even if this reading of *Mead* is overly broad, a zone of nondeference to crime-based deportation grounds undeniably exists. Because the Supreme Court has declined to defer to at least some precedential agency interpretations of the INA that incorporate a criminal provision, we know that satisfaction of *Mead*'s general "force of law" requirement does not end the delegation inquiry. *See* Guendelsberger, *supra* note 145, at 620–22. The question is not whether a zone of nondeference exists but what its contours are.

D. Institutional Overreach and Morality

Other rationales further support the conclusion that the judiciary should not defer to agency interpretation of ambiguity in criminal removal grounds, including the reasons for not deferring to prosecutors and for applying the rule of lenity. Courts do not defer to the prosecutors in criminal cases because they have institutional incentives to read statutes expansively.[154] The same concern about institutional overreach exists with the BIA and the Attorney General.[155] Although Congress in 2002 removed immigration enforcement officials—including immigration court prosecutors—from the Department of Justice and placed them in the newly created Department of Homeland Security, the two agencies remain closely linked.[156] Lawyers from the Department of Justice represent the Department of Homeland Security before the U.S. courts of appeal.[157] The two agencies share information through common databases, and officials in leadership positions within both agencies meet frequently and have easy access to one another.[158] The Attorney General oversees both the BIA and the prosecution of federal criminal law. To defer to the BIA and Attorney General's interpretation of crime-based deportation grounds would be to defer to institutional actors that have incentive to read deportation grounds expansively in aid of immigration enforcement.

The BIA and Attorney General should not be empowered to resolve statutory ambiguity regarding crime-based deportation for the further reason that they, like criminal prosecutors, are not moral agents of our nation. Because criminal law reflects the morality of our community, the power to define criminal terms should not lie with agency administrators. As one commentator has observed, "[a]gencies may be experts in their spheres, but they are not the appropriate arbiters

154. *See supra* notes 68–72 and accompanying discussion.

155. For a discussion of whether courts should defer to agency decisions involving their own self-interest, see Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203 (2004).

156. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 stat. 2135, 2192 (establishing the Department of Homeland Security).

157. The Office of Immigration Litigation of the Civil Division of the U.S. Department of Justice represents the Department of Homeland Security before the U.S. courts of appeal. *Office of Immigration Litigation: Appellate Section*, U.S. DEP'T JUST., https://www.justice.gov/civil/appellate-section (last updated Jan. 12, 2017).

158. *See Law Enforcement Information Sharing Initiative*, U.S. DEP'T HOMELAND SECURITY, https://www.ice.gov/le-information-sharing (last visited May 2, 2017).

of society's moral center."[159] Agencies should not interpret the scope of an offense "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community."[160]

Although Congress has delegated to the Attorney General the authority to designate new drugs on the federal drug schedules, this delegation is narrow and contingent on approval by the Secretary of Health and Human Services.[161] Under the Controlled Substances Act, after complying with specified procedures, the Attorney General can add new drugs to any of the five schedules of controlled substances.[162] Amendments to the drug schedule require scientific expertise in detecting and defining new types of controlled substances, not a sense of our nation's moral compass. The Court has thus held that "allowing the Attorney General both to schedule a particular drug and to prosecute those who manufacture that drug" does not "violate[] the principle of separation of powers."[163]

The lack of general delegation to the Department of Justice to define crimes supports the view that Congress has not delegated to the agency the administration of deportation statutes that incorporate, implicate, or otherwise involve criminal law. Crime-based removal statutes—like the crimes each provision references—express the morals of the community. Terms like "crime involving moral turpitude"

159. Myers II, *supra* note 72, at 1864; *See also* Hickman, note 33, at 923 ("As designated representatives of the people, members of Congress are both more in touch with communal perceptions of 'right' and 'wrong' and more accountable to the public for the moral judgments they make than agencies are. While the Supreme Court has not explicitly made this link, other courts and scholars have highlighted the moral element of criminalization as a further reason for not extending judicial deference to Justice Department interpretations of the criminal code.").

160. United States v. Bass, 404 U.S. 336, 348 (1971).

161. 21 U.S.C. § 811 (2012) (authorizing the Attorney General to add or remove drugs from the schedule or to move them from one schedule to another). To modify the schedule, the Attorney General must comply with detailed statutory provisions, including requesting a scientific and medical assessment from the Secretary of Health and Human Services. *Id.* § 811(b). If the Secretary recommends against scheduling a substance, the Attorney General cannot schedule it. *Id.* The Attorney General must consider eight specified factors and comply with the notice and hearing provisions of the Administrative Procedure Act. *Id.* § 811(c). Further, the scheduling of a drug is subject to challenge by any person in the courts of appeals. *Id.* § 877. *But see id.* § 811(h)(6) (allowing the Attorney General to schedule a substance in schedule I on a "temporary basis" to "avoid an imminent hazard to the public safety," which is not subject to judicial review).

162. Controlled Substances Act, 21 U.S.C. § 811 (1970).

163. Touby v. United States, 500 U.S. 160, 167 (1991) (rejecting the argument that giving the Attorney General the power to temporarily schedule a particular drug and prosecute those who manufacture the drug concentrates too much power in one branch of government).

illustrate the connection between removal statutes and morality.[164] Like criminal law, crime-based deportation law is grounded in morality—something best not left to agencies to define.

E. Lenity and Fair Warning

The presumption in favor of lenity to ameliorate harsh consequences and fair notice concerns also weigh in favor of nondeference. In both criminal and immigration cases, the federal government acts directly on individuals to restrain their liberty. As Justice Marshall observed, deference is inappropriate when decisions implicate individual liberty "[b]ecause of the severe impact."[165] As a result, "an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity when administrative standards are enforced by criminal law."[166]

The criminal and immigration rules of lenity reflect the harshness of criminal incarceration and civil deportation. Both incarceration and deportation remove people from their families and communities. Deportation often amounts to "banishment or exile" from "all that make life worth living."[167] Although courts have rejected the proposition that deportation constitutes punishment, recent cases have called this distinction into question.[168] The severity of deportation supports a broad principle of nondeference.[169]

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164. Simon-Kerr, *supra* note 119, at 1039.

165. *Touby*, 500 U.S. at 170 (Marshall, J., concurring).

166. *Id.*

167. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (citing Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

168. *See Padilla*, 559 U.S. at 357 ("Although removal proceedings are civil, deportation is intimately related to the criminal process"); *see also* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1307 (2011) (arguing that *Padilla v. Kentucky* "represents the first step . . . toward a full repudiation of" the view that deportation is not punishment); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1893 (2000) ("[T]he dramatic increase in deportation of long-term permanent residents . . . for increasingly minor post-entry criminal conduct raises profound humanitarian and constitutional concerns."); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 332–36 (2000); *see also* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010) (arguing that "excessive immigration detention practices have evolved into a quasi-punitive system of *immcarceration*") (emphasis in original).

169. *See* United States v. Bass, 404 U.S. 336, 347–48 (1971) (the "seriousness of criminal penalties" supports the rule of lenity).

Further reinforcement resides in another foundation of the rule of lenity—the principle of fair warning.[170] Unless people are given notice that an action constitutes a crime or is the basis of deportation, it is unfair to prosecute or deport them. Both lenity and notice concerns thus weigh in favor of resolving ambiguity in a criminal deportation statute in favor of the noncitizen.

In sum, the underlying purposes of *Chevron*, the ban on deference to the prosecution, and the criminal and immigration rules of lenity all support a jurisprudence that eliminates deference in the area of crime-based removal. The above principles sweep well beyond the issue of hybrid statutes presented in *Esquivel-Quintana*, as they do not depend on an immigration statute having a criminal law application. Rather, the test is whether the deportation statute incorporates or relies upon criminal law in any way. My intention is not to diminish the importance of the narrower question about hybrid statutes briefed, but not decided, in *Esquivel-Quintana*, given that "[a]n increasing number of administrative regulations . . . contain criminal as well as civil penalties."[171] The suggestion is simply that hybrid statutes are a subset of a larger group of statutes to which courts should not defer to agency interpretation. Not only should the Court remain concerned about deferring to agency interpretations of hybrid statutes, but it should expand its scope of concern to include, at a minimum, all crime-based removal grounds.

CONCLUSION

Crime-based deportation has existed since the earliest general expulsion statutes.[172] With the post-New Deal rise of agencies as the "fourth branch" of government, it is only natural that the Supreme

170. *Id.* ("[f]air warning . . . of what the law intends to do if a certain line is passed" justifies the rule of lenity) (citing McBoyle v. United States, 283 U.S. 25, 27 (1931)). Commentators have noted that the rule of lenity is grounded in part in the criminal due process concerns of the Constitution. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992).

171. Greenfield, *supra* note 9, at 5 (discussing the Environmental Protection Agency, the Occupational Safety and Health Administration, the Securities and Exchange Commission, and the National Labor Relations Board).

172. *See* Immigration Act of 1891, ch. 551, §§ 1, 10, 26 Stat. 1084, 1086; Immigration Act of 1917, Pub. L. No. 301, ch. 29, § 19, 39 Stat. 874, 889. For a discussion of the evolution of deportation law, see DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007).

Court should consider how the judiciary relates to agency interpretation of statutes that in some way relate to criminal law.[173] To date, the Court has left largely unaddressed whether *Chevron* applies to interpretations of crime-based deportation provisions.[174] Unlike lower courts, the Supreme Court has never deferred to the Attorney General or BIA's interpretations of the scope of a criminal ground of deportation.[175] Rather, the Court has usually decided this type of case without mentioning *Chevron*, even if the parties briefed it.[176] In these cases, it is often unclear whether the Court regarded *Chevron* as irrelevant (a step zero decision) or regarded *Chevron* relevant but the statutory meaning clear (a step one decision). Lower courts, in contrast, have routinely invoked *Chevron* when reviewing the same type of statutory interpretation questions.[177]

The Court needs a jurisprudence of how *Chevron* relates to interpretive questions arising out of crime-based removal adjudications. Even if the Court had reached the *Chevron* question in *Esquivel-Quintana*, an aggravated felony case, its holding would not have resolved the general question of what interpretive rules govern non-aggravated felony crime-based adjudications, especially when the interpretative question does not involve a criminal term with a settled meaning. This Article begins to develop a jurisprudence of *Chevron* and crime-based deportation. The animating concerns of *Chevron*, the ban on deference to the Attorney General as a prosecutor, and the criminal and immigration rules of lenity all suggest that courts should not defer to immigration agency interpretations of deportation statutes triggered by a conviction for a crime.

173. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); City of Arlington v. FCC, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting).

174. *See supra* notes 117-119 and accompanying text.

175. *See supra* note 118 and accompanying text.

176. *See id.*

177. *See supra* note 119 and accompanying text.