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"The only consistency that we can see in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses."[1]

Jose Guerrero entered the United States with his parents as a lawful permanent resident when he was two-months-old.[2] Twenty years later, he pled guilty in an Illinois state court to criminal sexual abuse for having sex with his underage girlfriend.[3] Guerrero received a misdemeanor conviction for his actions, and the judge sentenced him to just thirty days work release and two years of sex offender probation.[4] Shortly after his criminal trial, Guerrero was brought before an immigration judge.[5] Even though Guerrero had been convicted of a misdemeanor, and not a felony, the immigration judge concluded that Guerrero had committed the "aggravated felony" of "sexual abuse of a minor."[6] As a result, the government deported Guerrero to Mexico and permanently barred him from returning to the United States.[7]

This note contends that the crime of sexual abuse of a minor should only be considered an "aggravated felony" under the Immigration and Nationality Act ("INA")[8] if the underlying offense satisfies the federal definition of a felony, i.e., it is punishable by more than one year of imprisonment. Because a non-citizen who commits an aggravated felony is deportable and barred from re-entering the country without first receiving special permission from the attorney general, it is likely that Congress did not intend misdemeanor sexual abuse to qualify as an "aggravated felony" under the INA. However, three United States Circuit Courts of Appeals—the Sixth Circuit, the Seventh Circuit, and the Eleventh Circuit—and the Board of Immigration Appeals ("BIA"), have concluded that Congress intended this result. To reach this conclusion, these courts relied on creative arguments to avoid the ordinary meaning of the terms "aggravated" and "felony." In addition, the plain language of the aggravated felony provision, coupled with its legislative history, suggests that misdemeanor sexual abuse cannot constitute the aggravated felony of sexual abuse of a minor. Moreover, in two recent decisions, the Supreme Court has applied an ordinary meaning approach in defining the scope of other parts of the aggravated felony provision. Giving the words "aggravated" and "felony" their ordinary meaning further supports the conclusion that only felony offenses should constitute the aggravated felony of sexual abuse of a minor.

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1. Gonzalez-Gomez v. Achim, 441 F.3d 532, 535 (7th Cir. 2006).

2. Guerrero-Perez v. INS, 242 F.3d 727, 728 (7th Cir. 2001).

3. *Id.* at 730.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 737.

8. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (2000)).

Part I of this note will trace the history of criminal deportation in this country, focusing on the aggravated felony provision and the harsh consequences that follow an aggravated felony conviction. Part II will discuss the line of cases that conclude that misdemeanor offenses involving sexual abuse of a minor qualify as aggravated felonies. Part III will discuss two recent Supreme Court decisions in which the Court applied an ordinary meaning approach in interpreting the scope of the aggravated felony provision. It will further argue that lower courts should apply this approach when interpreting the meaning of the sexual abuse of a minor subparagraph. Part IV will conclude that the aggravated felony of sexual abuse of a minor should include only felony offenses.

I. HISTORY OF CRIMINAL DEPORTATION AND THE AGGRAVATED FELONY PROVISION

Congress did very little to regulate the immigration of aliens convicted of crimes throughout most of the nineteenth century.[9] During the twentieth century, however, Congress steadily increased the crime-related grounds for deportation.[10] Today, one of the largest categories of deportable offenses is crimes known as "aggravated felonies."[11] A conviction for an aggravated felony results in harsh consequences for non-citizens, including deportation and a permanent bar from returning to the country without the attorney general's consent to apply for readmission.[12]

A. The Evolution of Deportation Statutes Based on Criminal Activity

Deportation (now referred to as removal)[13] has traditionally been defined as the removal of a non-citizen who has entered the United States, legally or ille-

9. Melissa Cook, Note, *Banished For Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 296–97 (2003).

10. *Id.* at 298.

11. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 567 (5th ed. 2003).

12. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2000); INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (2000); Cook, *supra* note 9, at 298.

13. Prior to 1996, the INA provided for two different proceedings: deportation proceedings for removing aliens who had entered the country and exclusion proceedings for aliens who were deemed inadmissible (i.e., forbidden entry). Stephen W. Yale-Loehr & Lindsay Schoonmaker, *Overview of U.S. Immigration Law*, 1593 PRAC. L. INST. 9 (2007). In 1996, Congress created "removal proceedings," consolidating deportation and exclusion proceedings. *See* INA § 240, 8 U.S.C. § 1229a (2000). The INA, however, continues to distinguish aliens who are deportable from aliens who are inadmissible. *See* Stephen W. Yale-Loehr & Lindsay Schoonmaker, *Overview of U.S. Immigration Law*, 1593 PRAC. L. INST. 9 (2007); INA § 237(a), 8 U.S.C. § 1227(a) (2007). This note, therefore, continues to use the term "deport" and its derivatives to refer to the removal of aliens who have entered the United States.

gally.[14] The earliest deportation statutes appeared in the colonies.[15] The first federal deportation statute was enacted in 1798.[16] The Alien and Sedition Acts of 1798 gave the president the power to deport: (1) resident aliens who maintained citizenship of a country at war with the United States (enemy aliens), (2) any alien whom he judged to be "dangerous to the peace and safety of the United States," and (3) any alien in prison.[17] Only the power to remove enemy aliens is still on the books today.[18] The other powers granted under the acts were allowed to expire after two years.[19]

For most of the nineteenth century, the federal government did little to regulate immigration.[20] The nation had no general deportation statute, and non-citizens who entered the country were allowed to stay as long as they wished.[21] In the late 1800s, the federal government, through exclusion laws, began to impose restrictions on who could enter the country.[22] Shortly thereafter, Congress recognized the need to remove non-citizens who had entered the country in violation of these restrictions.[23] Thus, deportation statutes were initially viewed as complements to the exclusion laws.[24] Congress expanded the classes of excludable aliens to include felons in 1891.[25] At the same time, Congress provided that any felon who entered the country in violation of the law would be deported within one year of entry.[26]

In 1907, Congress authorized the deportation of any non-citizen who was a prostitute "at any time within three years after she shall have entered the United States."[27] Like the Alien and Sedition Act, this law authorized the deportation of

14. ALEINIKOFF ET AL., *supra* note 11, at 535.

15. Will Maslow, *Recasting Our Deportation Laws,* 56 COLUM. L. REV. 309, 311–12 n.14 (1956). In 1639, Plymouth Colony created a statute providing for the deportation of paupers to Europe. In 1647, Massachusetts denied admission to Catholic priests and called for the deportation of any priests found in the colony. In 1740, Delaware ordered the deportation of criminals and paupers. *Id.*

16. Alien Act of June 25, 1798, ch. 58, 1 Stat. 570 (expired 1801).

17. *Id.*; Alien Enemy Act of July 6, 1798, ch. 66, 1 Stat. 577 (repealed 1881).

18. 50 U.S.C. §§ 21–23 (2000). In the 1940s, the statute was invoked to deport hundreds of Germans. Maslow, *supra* note 15, at 312.

19. ALEINIKOFF ET AL., *supra* note 11, at 535.

20. *Id.*

21. *Id.* However, during this time, the states sought to control the movement of criminals across state lines. Several states passed laws excluding criminals who had been exiled from another country. Others denied entry to any individual—citizen or non-citizen—who had ever been convicted of a crime. Cook, *supra* note 9, at 296–97.

22. ALEINIKOFF ET AL., *supra* note 11, at 535.

23. *Id.*

24. *Id.*

25. Immigration Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084.

26. *Id.*

27. Alien Immigration Act of February 20, 1907, ch. 1134, § 3, 34 Stat. 898, 899–900.

a non-citizen based on conduct within the United States after he or she made a lawful entry.[28] Congress has continued to expand the list of post-entry crimes that render a lawfully admitted alien deportable,[29] all of which can now be found in INA Section 237(2).[30] This list currently includes: a single conviction of a crime of moral turpitude committed within five years of admission, two or more convictions of crimes of moral turpitude regardless of the length of the sentence, aggravated felonies, high-speed flight from an immigration checkpoint, controlled substance convictions, drug abuse or addiction, certain firearm offenses, espionage, treason and sedition, crimes of domestic violence, stalking, violation of a protection order, and child abuse.[31]

B. The Rule of Lenity

Commentators have long noted the harsh consequences of deportation. Arguing against the Alien and Sedition Acts, James Madison forcefully stated that:

> If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessing of personal security, and personal liberty, than he can elsewhere hope for. . . . [I]f 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.[32]

The Supreme Court has also recognized the severe consequences associated with deportation.[33] As a result, the Court has a long history of interpreting deportation statutes narrowly.[34] Justice Douglas wrote the classic statement of what is often referred to as the "rule of lenity":

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

28. ALEINIKOFF ET AL., *supra* note 11, at 536.

29. *Id.*

30. INA § 237(2), 8 U.S.C. § 1227 (2000).

31. *Id*.

32. ALEINIKOFF ET AL., *supra* note 11, at 539 (citing JONATHAN ELLIOT, 4 ELLIOT'S DEBATES 555 (1881)).

33. *Id.* at 550.

34. *Id.*

> that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.[35]

The Court has consistently maintained that deportation statutes must be narrowly interpreted.[36] In 1987, the Court referred to "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[37] In 2001, the Court once again reaffirmed the validity of this canon of interpretation.[38] Indeed, the rule of lenity has been described as the "most important rule of statutory interpretation peculiar to immigration."[39]

C. The Aggravated Felony Provision

The concept of an aggravated felony has been of increasing importance in the deportation context.[40] Since Congress added the phrase to the INA in 1988,[41] the definition of what constitutes an aggravated felony has steadily grown and now includes conduct that is neither "aggravated" nor "felonious," as those words are commonly understood.[42] In fact, several misdemeanors, including shoplifting and simple battery, are now considered aggravated felonies for purposes of the INA.[43] As the definition of what constitutes an aggravated felony has grown increasingly inclusive, the consequences of an aggravated felony conviction have

35. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (citation omitted).

36. *See* Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 519 (2003).

37. INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).

38. *See* INS v. St. Cyr, 533 U.S. 289, 320 (2001).

39. STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 156 (1987).

40. ALEINIKOFF ET AL., *supra* note 11, at 567. The Department of Homeland Security ("DHS") decides whether to seek to remove an alien. The removal proceeding must be conducted by an immigration judge in the Immigration Court (under the umbrella organization of the Executive Office for Immigration Review ("EOIR") of the Department of Justice ("DOJ")). The DHS's Immigration and Customs Enforcement ("ICE") division's trial attorneys represent the government. Non-citizens found removable by immigration judges have a right to appeal to the Board of Immigration Appeals ("BIA"), which is composed of board members appointed by the attorney general. Under limited circumstances, aliens may seek judicial review of an adverse decision of the BIA. For example, Section 242 of the INA eliminates judicial review of a removal order based on most crime-related deportation grounds, including aggravated felony convictions. However, the Supreme Court has interpreted Section 242 narrowly to leave open the possibility of judicial review of pure questions of law raised by the alien. *St. Cyr*, 533 U.S. at 305; *see* ALEINIKOFF ET AL., *supra* note 11, at 238–62 (providing a broader discussion of the agencies and courts involved in the adjudication of a removal case).

41. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 [hereinafter ADAA] (codified as amended at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2000)). The ADAA defined the term as "murder, any drug trafficking crime . . . or any illicit trafficking in firearms or destructive devices . . . or any attempt or conspiracy to commit such an act." *Id.*

42. Cook, *supra* note 9, at 298.

43. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000).

grown increasingly harsh. Aggravated felons are subject to mandatory detention and expedited removal, are ineligible for most forms of discretionary relief, have limited access to judicial review, and face a lifetime ban from reentering the country.[44] In 1996, Congress made these harsh consequences all the more potent by applying the aggravated felony provisions retroactively.[45]

1. The Advent of the Aggravated Felony Provision: The Anti-Drug Abuse Act

Congress added the term "aggravated felony" to the INA in 1988 as part of the Anti-Drug Abuse Act ("ADAA")[46] in order to target crimes committed by non-citizens involved in the drug trade,[47] including murder, drug-trafficking, and trafficking in firearms.[48] The ADAA called for the deportation of any non-citizen convicted of an aggravated felony any time after entry.[49] The ADAA also barred aggravated felons from re-entering the country for ten years.[50] Furthermore, the ADAA created special deportation proceedings for aggravated felons[51] and ordered the Immigration and Naturalization Service ("INS")[52] to complete deportation proceedings before the alien finished his term of imprisonment.[53] If the INS is unable to timely complete the deportation proceedings, the ADAA instructs the attorney general to hold the aggravated felon in custody until deportation.[54]

2. The Expansion Begins: The Immigration Act of 1990

The George H.W. Bush administration's war on drugs and violent crime led to an amendment of the aggravated felony provision in 1990.[55] The Immigra-

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44. *See* discussion *infra* subsections 1–6.

45. Cook, *supra* note 9, at 309 (citing Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 321(b), 110 Stat. 3009-628 (1996) [hereinafter IIRIRA] (codified in scattered sections of 8 and 18 U.S.C. (2000))).

46. *Id.* (citing ADAA § 7342, 8 U.S.C. § 1101(a)(43)).

47. *Id.* at 299. Debates in the House of Representatives showed a concern over the number of drug-related crimes committed by non-citizens. *See generally* 133 Cong. Rec. H8961 (daily ed. Oct. 22, 1987) (statement of Rep. Smith). The debates also illustrated Congress's concern that non-citizen felons were escaping deportation. *Id.*

48. ADAA § 7342, 8 U.S.C. § 1101(a)(43).

49. ADDA § 7344(a)(2), 8 U.S.C. § 1251(a)(4).

50. ADDA § 7349, 8 U.S.C. § 1182(a)(17).

51. ADDA §§ 7343(a), 7347, 8 U.S.C. §§ 1252(a), 1228.

52. The INS now forms part of the Department of Homeland Security. For a broader discussion of the federal agencies and courts involved in the administration of the country's immigration policy, see ALEINIKOFF ET AL., *supra* note 11, at 238–62.

53. ADAA § 7347, 8 U.S.C. § 1228.

54. ADDA § 7343, 8 U.S.C. § 1228.

55. Cook, *supra* note 9, at 300. At that time, Congress and the Bush administration continued to view the aggravated felony provision as an important weapon in the war on drugs. Between 1980 and 1990, the

tion Act of 1990 significantly expanded the coverage of the aggravated felony provision by adding lesser drug crimes and crimes of violence, for which the term of imprisonment was five years, to the list of qualifying offenses.[56] In addition, it raised the bar for re-admission for aggravated felons from ten to twenty years.[57] Congress also made certain aggravated felons ineligible for discretionary relief. Prior to 1990, lawful permanent residents convicted of aggravated felonies were eligible for an INA Section 212(c) waiver of deportation.[58] The waiver enabled the attorney general to cancel deportation after considering several mitigating factors, including permanent residence status, length of residence in the United States and the possible effect of deportation on the non-citizen's family.[59] The Immigration Act of 1990, however, made aggravated felons imprisoned for more than five years ineligible for this form of relief, eliminating the attorney general's ability to consider mitigating factors in the cases of many aggravated felons.[60] In 1991, Congress further restricted the availability of Section 212(c) waivers by denying such relief to aliens convicted of multiple aggravated felonies, regardless of the length of sentence.[61]

The unforgiving consequences of these changes are not difficult to imagine. Take, for example, the case of Al Correa, who left Columbia with his family at the age of two.[62] He attended grade school and high school in Brooklyn, New York and had begun attending college in Manhattan.[63] Mr. Correa did not speak Spanish, was employed, and had no prior police record.[64] He was "totally American" although "technically Columbian" because he had never applied to become an American citizen.[65] Nevertheless, Mr. Correa faced deportation as an

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number of undocumented prisoners grew by 600 percent. *Id.* More than 80 percent of undocumented prisoners had been convicted of narcotics violations. *Id.* at 300–01. In his signing statement, President Bush wrote, "[the aggravated felony expansion] meets several objectives of my Administration's war on drugs and violent crimes . . . [by providing] for the expeditious deportation of aliens who, by their violent criminal acts, forfeit their right to remain in this country. These offenders, comprising nearly a quarter of our federal prison population, jeopardize the safety and well-being of every American resident." Statement on Signing the Immigration Act of 1990, PUB. PAPERS 1717–18 (Nov. 29, 1990).

56. Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (codified at 8 U.S.C. § 1101(a) (2000)).

57. Immigration Act of 1990 § 514(a), 8 U.S.C. § 1182(a)(17).

58. INA § 212(c), 8 U.S.C. § 1182(c) (1988).

59. Cook, *supra* note 9, at 301 (describing Section 212(c) discretionary waiver).

60. *See id.* at 303 (discussing section 511 of the Immigration Act of 1990).

61. Miscellaneous and Technical Immigration and Nationality Amendments of 1991, Pub. L. No. 102–232, § 306(a)(10), 105 Stat. 1733, 1751 (1991).

62. Andrew Blake, *Strict Deportation Laws Imperil an American Dream,* BOSTON GLOBE, Jan. 28, 1990, at 18.

63. *Id*.

64. *Id.*

65. *Id.*

aggravated felon after pleading guilty to a federal charge of cocaine possession with intent to distribute.[66] The prosecutor in the case actually requested a minimum sentence, acknowledging that Mr. Correa was the "smallest of small fry offenders," and "simply in the wrong place at the wrong time."[67] The arresting detective in the case also stated that he did not believe Mr. Correa should be deported.[68] Unfortunately, the aforementioned changes to the aggravated felony provision left the government "virtually no option even in cases like Mr. Correa's" because Congress had made aggravated felons ineligible for virtually every form of discretionary relief.[69] The new and inflexible consequences of the aggravated felony provision meant that Mr. Correa faced deportation to a land he never knew.[70]

3. The Antiterrorism and Effective Death Penalty Act

In 1995, the Oklahoma City bombing resulted in the death of 168 people.[71] The vast majority of Americans initially believed that Middle-Eastern terrorists were responsible for the tragic event, which led to a public outcry for stricter immigration legislation preventing the admission of foreign terrorists.[72] This outcry, coupled with the fact that 1996 was an election year, resulted in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[73] President Clinton signed the bill into law, even though he recognized that the reactionary legislation made "major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism."[74]

The AEDPA added to the aggravated felony provision's list of offenses several less serious crimes, including: bribery, counterfeiting or mutilating a passport, certain gambling offenses, obstruction of justice, and transportation for the purpose of prostitution.[75] The act also made aggravated felons ineligible for certain forms of discretionary relief.[76] Under the Immigration Act of 1990, aggra-

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* (quoting Timothy Whelan, the district deputy director of the INS in Boston, Mass.).

70. *Id.*

71. Cook, *supra* note 9, at 303.

72. *Id.* at 303–04. American terrorists actually carried out the attack. *See, e.g.,* William F. Woo, *A Nation No Longer Quite So Indivisible*, ST. LOUIS POST DISPATCH, May 7, 1995, at 1B.

73. Cook, *supra* note 9, at 304–05; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat 1214, 1214 [hereinafter AEDPA] (codified as amended in scattered sections of 8, 18, 22, 28, 42 U.S.C. (2000)).

74. Cook, *supra* note 9, at 305 (citing Editorial, *A Terror of Law Series*, ST. PETERSBURG TIMES, July 18, 1996, at 14A).

75. AEDPA § 440(e), 8 U.S.C. § 1101(a)(43).

76. AEDPA § 440(d), 8 U.S.C. § 1182(c).

vated felons imprisoned for less than five years could apply for the section 212(c) waiver of deportation.[77] The AEDPA, on the other hand, categorically denied such relief to all aggravated felons.[78]

4. Retroactive Application: The Illegal Immigration Reform and Immigrant Responsibility Act

Six months after the enactment of the AEDPA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which further expanded the scope of the aggravated felony provision.[79] The IIRIRA included rape and sexual abuse of a minor as aggravated felonies.[80] The IIRIRA also significantly reduced monetary requirements for certain offenses included in the aggravated felony provision.[81] For example, prior to 1996, offenses involving fraud, deceit, or tax evasion qualified as aggravated felonies only when the loss to the victim exceeded two hundred thousand dollars.[82] The IIRIRA lowered the requisite amount to ten thousand dollars.[83] Congress made similar changes to the sentencing requirements of certain crimes.[84] Prior to 1996, crimes of violence, passport falsification, theft offenses, and alien smuggling offenses, all required a term of imprisonment of at least five years in order to qualify as aggravated felonies.[85] The IIRIRA reduced the requisite imprisonment to one year.[86] These reductions in monetary and sentencing requirements greatly expanded the breadth of the aggravated felony provision.[87] At the same time, the IIRIRA prohibited an aggravated felon from ever returning to the country.[88]

Further, the IIRIRA removed a judge's discretion in cases where criminal conviction would result in deportation by redefining the terms "conviction" and

77. Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052, (codified at 8 U.S.C. § 1182(2)(B) (2000)).

78. AEDPA § 440(d), 8 U.S.C. § 1182(c).

79. IIRIRA, Pub. L. No. 104-208, § 321(a), 110 Stat. 3009–546 (1996) (codified at 8 U.S.C. § 1101(a)(43) (2000)).

80. IIRIRA § 321(a)(1), 8 U.S.C. § 1101(a)(43).

81. IIRIRA § 321(a), 8 U.S.C. § 1101(a)(43); Cook, *supra* note 9, at 307.

82. INA § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M) (1988), *amended by* IIRIRA § 321(a)(7) (1996).

83. IIRIRA § 321(a)(7), 8 U.S.C. § 1101(a)(43).

84. Cook, *supra* note 9, at 307.

85. INA § 101(a)(43)(F)–(G), (N) & (P), 8 U.S.C. § 1101(a)(43) (1988), *amended by* IIRIRA § 321(a)(3) (1996).

86. IIRIRA § 321(a)(3), 8 U.S.C. § 1101(a)(43).

87. Cook, *supra* note 9, at 307.

88. IIRIRA § 301(b), 8 U.S.C. § 1182. The prohibition of re-admission had harsh consequences on the immigrant community. For example, a lawful permanent resident who had lived in the country for twenty years could suddenly be deported for shoplifting and banned from ever returning to the country. Cook, *supra* note 9, at 307 (citing Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 605 (1998)).

"term of imprisonment." Prior to the IIRIRA, the INA did not statutorily define conviction.[89] Instead, courts relied on the definition of conviction created by the BIA in *In re Ozkok*.[90] This definition allowed judges to defer adjudication, issuing some form of probation instead.[91] As long as the alien complied with the terms of the probation, the conviction was never entered on the record and, consequently, the alien was not deportable.[92] Congress sought to eliminate this practice.[93] To that end, the IIRIRA created INA section 101(a)(48), which provides that a conviction still occurs even when a judge defers adjudication as long as there are sufficient facts to establish guilt, and the judge has imposed some form of punishment.[94]

The IIRIRA further restricted a sentencing judge's discretion and ability to avoid deportation of aggravated felons by redefining the phrase "term of imprisonment." Prior to the IIRIRA, certain offenses required the imposition of a jail term in order to qualify as aggravated felonies.[95] Thus, judges could suspend sentences in order to avoid deportation consequences.[96] The IIRIRA ended this practice by providing that "term of imprisonment" includes any period of time that a sentence is suspended.[97]

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89. *See In re* Ozkok, 19 I. & N. Dec. 546, 551–52 (B.I.A. 1988) (judicially creating a definition for conviction).

90. Cook, *supra* note 9, at 307; *see In re* Ozkok, 19 I. & N. Dec. at 551–52 ("As a general rule, a conviction will be found for immigration purposes where all of the following elements are present: (1) a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty; (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service); and (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.").

91. Cook, *supra* note 9, at 308.

92. Bruce Robert Marley, Comment, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 SAN DIEGO L. REV. 855, 867 (1998).

93. Cook, *supra* note 9, at 304.

94. 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 statutory definition creates inconsistencies between state and federal law. Certain adjudications not treated as convictions by state law qualify as convictions for the purposes of the INA. For a more in-depth discussion of these inconsistencies see generally Morawetz, *supra* note 43, at 1942.

95. Marley, *supra* note 92, at 868.

96. *Id.* at 869.

97. IIRIRA § 322(a) (1996), 8 U.S.C. § 1101(a) (2000). While the IIRIRA certainly achieved its goal—removing discretion from the hands of sentencing judges—it also created odd results. An alien who is

The IIRIRA also instituted harsh procedural changes with regard to the aggravated felony provision. The IIRIRA mandated that all aggravated felons be detained until deported.[98] This meant that aggravated felons could remain detained for years while awaiting the results of uncertain appeals.[99] More importantly, the aggravated felony provision, including the newly added offenses, now applied retroactively.[100] Thus, a conviction of one of the provision's underlying offenses was now considered an aggravated felony even if the conviction occurred before the enactment of the IIRIRA in 1996.[101] As a result, the INS began deporting lawful permanent residents because of minor crimes they had committed long before the government defined these offenses as aggravated felonies.[102] For example, at age twenty-one, Alejandro Bontia was convicted of sexual contact with a minor for having sex with his fifteen-year-old girlfriend.[103] The girl's mother became angry about the relationship and reported Mr. Bontia's conduct to the police.[104] Nearly fifteen years later, Mr. Bontia faced separation from his family, including his wife and child, for this "youthful dalliance."[105]

Applying the aggravated felony provision retroactively also meant that aliens who entered into plea bargains for lesser crimes to avoid deportation suddenly found themselves deportable as aggravated felons. The case of Emma Mendez De Hay, a twenty-year resident of the United States, illustrates this point and also exemplifies the harsh effects of the IIRIRA's detention provisions. In 1990, someone called Ms. Mendez de Hay's home looking for her Spanish-speaking cousin.[106] Her cousin told her to "tell [the caller] I can't help him today. I'll help him tomorrow." The caller turned out to be an undercover narcotics officer, and Ms. Mendez de Hay was charged with using a communication device

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sentenced to eleven months imprisonment is not deportable as an aggravated felon. In contrast, an alien who enters a plea bargain for a one-year suspended sentence for the same offense is deportable. Cook, *supra* note 9, at 309.

98. IIRIRA § 305, 8 U.S.C. § 1231.

99. Cook, *supra* note 9 at 311–12.

100. IIRIRA § 321(b), 8 U.S.C. § 1101(a)(43). The Supreme Court has long held that deportation is a civil action; therefore, it does not qualify as criminal punishment. Thus, the ex post facto clause found in Article I of the Constitution, which applies only to criminal punishment, does not apply to deportation statutes. *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).

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

102. Cook, *supra* note 9, at 310.

103. *Id.* at 310 (citing Chris Hedges, *Enforcement of Immigration Law Stirring Backlash, Call for Change: Defenders Cite Drop In Drug-Related Crime*, DALLAS MORNING NEWS, Sept. 2, 2000, at A39).

104. *Id*.

105. *Id*.

106. Cook, *supra* note 9, at 311 (citing Peggy Anderson, *Immigrant Faces Deportation Under Tough INS Laws*, OREGONIAN, Feb. 14, 2000, at E7).

to facilitate the distribution of cocaine.[107] She agreed to plead guilty in exchange for a promise that the government would not incarcerate or deport her.[108] In 1996, as she returned from a trip with her fiancé to Italy, the INS detained her on the basis of the guilty plea.[109] Shortly thereafter, the government shipped her to a detention facility in Louisiana, far away from the home she shared with her four children in Washington State.[110] She was held in detention for five months.[111] After an arduous two-year struggle, the government finally lifted her deportation order.[112]

In addition, the IIRIRA eliminated aggravated felons' opportunity to seek relief from deportation by eliminating the section 212(c) waiver of deportation.[113] In its place, the IIRIRA created a form of relief called "cancellation of removal."[114] This provision allows the attorney general to cancel deportation for certain non-citizens,[115] but it is not available to aggravated felons.[116]

The case of Antonio Cesar Chamorro exemplifies the harsh effects of repealing the waiver provisions.[117] Mr. Chamorro was convicted of money laundering.[118] In 1993, he completed his three-and-one-half-year prison sentence.[119] Because Mr. Chamorro had been a legal permanent resident since 1972, had married a United States citizen, and had two sons, both born in the United States, an immigration judge approved Mr. Chamorro's request for a section 212(c) waiver of deportation.[120] However, in 1997, an immigration judge struck down the waiver pursuant to the 1996 laws, and Mr. Chamorro was

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107. *Id*.

108. *Id*.

109. *Id*.

110. *Id*.

111. *Id*.

112. Cook, *supra* note 9, at 312 (citing Susan Gilmore, *Mother Won't Be Deported After All: '92 Conviction Had Left Her in Limbo*, SEATTLE TIMES, Aug. 7, 2002, at A1). The government lifted her order after the Supreme Court decided that certain aliens could not be deported retroactively. *Id.*; *see* INS v. St. Cyr, 533 U.S 289, 320–26 (2001).

113. Cook, *supra* note 9, at 312 (citing IIRIRA § 304(a) (1996), 8 U.S.C. § 1228 (2000)).

114. *Id.*

115. *Id.*

116. *Id.*

117. Cook, *supra* note 9, at 312 (citing Jo Ann Zuniga, *Deportation Rules Break Up Families, INS Critics Charge*, HOUSTON CHRON., May 31, 1998, at 28).

118. *Id.*

119. *Id.*

120. *Id.* at 312–13.

promptly deported to his native Chile.[121] Shortly thereafter, his wife, who still lived in the United States, filed for bankruptcy.[122]

The IIRIRA also created a provision for "expedited removal" of aggravated felons.[123] This provision allowed the attorney general to complete deportation proceedings and any administrative appeals before the release of the aggravated felon from prison.[124] Finally, the IIRIRA stripped the courts of jurisdiction to review orders of removal against aggravated felons.[125]

5. Other Immigration and Criminal Consequences of an Aggravated Felony Conviction

Aggravated felons are also ineligible for several other forms of discretionary relief. They may not seek voluntary departure, which is a discretionary procedure that enables an alien to depart the United States at the alien's own expense within a preset time frame, giving them time to tend to personal or financial issues before departing the country.[126] Congress has also made aggravated felons ineligible for asylum.[127] Lastly, lawful permanent residents convicted of an aggravated felony are precluded from naturalizing—that is, becoming a U.S. citizen.[128]

In addition to the harsh immigration consequences mentioned above, an aggravated felony conviction may also have criminal consequences for the non-citizen. In pursuit of the American dream, or simply to rejoin his or her family, some aliens attempt to surreptitiously re-enter the United States after being deported.[129] This is a crime and exposes the alien to serious criminal penalties

121. *Id.* at 313 (citing Jo Ann Zuniga, *Deportation Rules Break Up Families, INS Critics Charge*, HOUSTON CHRON., May 31, 1998, at 28).

122. *Id.*

123. IIRIRA § 304 (1996), 8 U.S.C. § 1228 (2000).

124. *Id.*

125. IIRIRA § 306(a)(2), 8 U.S.C. § 1252. The Supreme Court addressed the constitutionality of this bar to judicial review in INS v. St. Cyr, 533 U.S. 289 (2001). The Court held that the IIRIRA did not deprive federal courts of jurisdiction to review habeas petitions challenging deportation resulting from criminal convictions. *Id.* at 313–14. Congress subsequently passed the Real ID Act, which provides that a petition for review (not a habeas petition) is a non-citizen's only way into federal courts. Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 460 (2006).

126. *See* INA § 240B(a)(1) (1998), 8 U.S.C. § 1229(c)(1) (2000); Marley, *supra* note 92, at 881.

127. INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i).

128. INA § 101(f)(8), 8 U.S.C. § 1101(f)(8). Naturalization candidates must be of "good moral character" for a period of five years before naturalizing. INA § 316(a), 8 U.S.C. § 1427(a). An aggravated felony conviction establishes a lack of "good moral character." INA § 101(f)(8), 8 U.S.C. § 1101(f)(8).

129. Robert James McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and the Immigration Consequences to Aliens Convicted of Crimes Revisited,* 11 GEO. IMMIGR. L.J. 507, 519 (1997).

which are particularly harsh for aggravated felons, who could be sentenced to up to twenty years in prison.[130]

In summary, the aggravated felony provision has undergone quite a transformation since Congress added the term to the INA in 1988. Congress has significantly expanded the scope of the provision, principally by defining less serious crimes as aggravated felonies.[131] By changing the statutory definition of "conviction" and "term of imprisonment," Congress further broadened the scope of the provision.[132] At the same time, the consequences of an aggravated felony conviction have become increasingly harsh. They now include mandatory detention, expedited removal, limited judicial review, ineligibility for most forms of discretionary relief, and a lifetime ban from re-entering the country.[133] Congress made these harsh consequences even more potent by making the aggravated felony provision apply retroactively.[134]

6. The Severity of the Consequences for the Typical Aggravated Felon Call for Lenity

The harsh consequences of an aggravated felony conviction seem especially severe when one considers the characteristics of the typical alien charged as an aggravated felon. In 2006, the government charged over 11,300 aliens as aggravated felons.[135] Since 1997, the government has charged more than 156,700 aliens as aggravated felons.[136] The majority of these aliens were long-time permanent residents of the United States, with an average length of residence of fifteen years.[137] These figures include aliens who, like Jose Guerrero, arrived at a very young age and spent the better part of their lives in this country. As Judge Learned Hand noted, deportation of these individuals is the equivalent of perpetual exile:

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130. 8 U.S.C. § 1326(b)(2); McWhirter, *supra* note 129, at 519. An alien apprehended attempting to reenter the United States after being deported faces up to two years in prison. 8 U.S.C. § 1326(a). Deported aggravated felons who attempt to reenter, on the other hand, face up to twenty years in prison. § 1326(b).

131. *See supra* Part I.C.

132. *See supra* notes 89–97 and accompanying text.

133. *See supra* Part I.C.

134. *See supra* notes 100–12 and accompanying text.

135. TRAC Immigration: How Often is the Aggravated Felony Statute Used?, http://trac.syr.edu/immigration/reports/158/ (last visited Oct. 16, 2007). The actual number of aliens charged as aggravated felons is most likely higher. The government publishes no statistical data on the number of aliens who have been charged, or actually deported, as aggravated felons. Using data received under the Freedom of Information Act, TRAC Immigration calculated the number of aliens charged as aggravated felons in immigration court. These figures, however, reveal only a partial picture of the government's use of the aggravated felony provision. Statistical data on the administrative use of the provision to bypass the immigration court is currently unavailable. *Id.*

136. *Id.*

137. *Id.*

> [W]e think it is not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as anyone borne of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all people.[138]

Given the extraordinarily harsh consequences of the aggravated felony provision, one might expect that courts would apply the rule of lenity to interpret any ambiguities in the provision in the alien's favor. However, this has not been the case and, indeed, quite the opposite has happened. A number of courts have interpreted at least one arguably ambiguous section of the aggravated felony provision against the alien.[139]

II. WHEN MISDEMEANORS ARE FELONIES: CASES HOLDING THAT MISDEMEANOR CONVICTIONS INVOLVING SEXUAL ABUSE OF A MINOR MAY QUALIFY AS AN AGGRAVATED FELONY

The INA defines the term "aggravated felony" by listing qualifying offenses in twenty-one sub-paragraphs, each of which contains one or more of these qualifying offenses.[140] Several of these sub-paragraphs refer to a specific provision of the federal code—e.g., paragraph (I) refers to "an offense described in section 2251, 2252A, or 2252 of Title 18 (relating to child pornography)."[141] Others merely refer to a term of imprisonment—e.g., paragraph (G) refers to a theft or burglary offense for which the "term of imprisonment is at least one year."[142] Other paragraphs are even more general. Paragraph (M)(i) includes an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."[143] Congress undoubtedly chose this broad language to encompass a wide range of federal and state offenses.[144]

However, the broad language used to define qualifying offenses led to interpretative problems for courts.[145] For example, paragraph (A) includes as an ag-

138. United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926).

139. *See* discussion *infra* Part II.

140. INA § 101(a)(43) (1998); 8 U.S.C. § 1101(a)(43) (2000). The section provides: "The term 'aggravated felony' means—(A) murder, rape, or sexual abuse of a minor; (B) illicit trafficking in a controlled substance. . . ." *Id.*

141. INA § 101(a)(43)(I); 8 U.S.C. § 1101(a)(43)(I).

142. INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

143. INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).

144. ALEINIKOFF ET AL., *supra* note 11, at 567.

145. *Id.* at 568.

gravated felony "sexual abuse of a minor."[146] Congress, however, provides no definition for the term "sexual abuse of a minor" in the statute.[147] Unlike other paragraphs, there is no accompanying reference to another provision of the federal code or to a requisite term of imprisonment.[148] As the BIA and the federal courts have struggled to interpret the term, they have addressed the question of whether the aggravated felony definition encompasses misdemeanor convictions involving sexual abuse of a minor.

The Seventh Circuit confronted the issue in *Guerrero-Perez v. INS*.[149] Guerrero, a Mexican national, entered the United States in 1979 when he was just over two months old.[150] Twenty years later, in 1999, Guerrero pled guilty in an Illinois state court to "criminal abuse of a minor."[151] The criminal complaint indicated that the nineteen-year-old Guerrero had engaged in sexual intercourse with his fifteen-year-old girlfriend.[152] The offense constituted a class A misdemeanor under Illinois law, and Guerrero was sentenced to thirty days work release and two years of sex-offender probation.[153] He was then brought before an immigration judge ("IJ").[154] The government took the position that Guerrero had committed the aggravated felony of sexual abuse of a minor.[155] Guerrero argued that, because his conviction was for a class A misdemeanor and not a felony, it should not be considered an aggravated felony.[156] The IJ agreed with the government.[157] Guerrero appealed, and the Seventh Circuit affirmed the IJ's decision, concluding that "Congress, since it did not specifically articulate that aggravated felonies cannot be misdemeanors, intended to have the term aggravated felony apply to a broad range of crimes listed in the statute, even if these include misdemeanors."[158]

Two weeks later, the BIA reached a contrary conclusion in *In re Crammond*.[159] Crammond had been convicted of unlawful sexual intercourse in a California court, for which he was sentenced to ninety days in jail and three

146. INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).

147. *See id.*

148. *Id.*

149. 242 F.3d 727 (7th Cir. 2001).

150. *Id.* at 728.

151. *Id.* at 730.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 729.

156. *Id.* at 731.

157. *Id.* at 728.

158. *Id.* at 737.

159. *In re* Crammond, 23 I. & N. Dec. 9 (B.I.A. 2001).

years of probation.[160] Under the California Penal Code, the conviction was considered a misdemeanor.[161] Recognizing that the Seventh Circuit had recently determined that the aggravated felony provision encompassed misdemeanor offenses, the majority of the board members (eleven out of twenty) came to the exact opposite conclusion.[162] The BIA held that for an alien to be deportable, an aggravated felony of sexual abuse of a minor must be a felony offense, not a misdemeanor.[163] To determine whether an alien has committed a felony offense, the BIA held that courts should look to the federal definition of felony, i.e., an offense for which the maximum term of imprisonment is at least one year.[164] The maximum term of imprisonment for unlawful sexual intercourse in California did not exceed one year and thus did not satisfy the federal definition of a felony and, therefore, did not qualify as an aggravated felony.[165]

Based on *Crammond*, Guerrero asked the Seventh Circuit to reconsider its decision.[166] The court refused, stating that "[w]e cannot adopt the approach that a splintered majority of the Board in *Crammond* supports." The court found that it had previously considered and rejected the positions articulated by the majority in *Crammond*[167] and therefore concluded that this case did not warrant vacating its decision in *Guerrero-Perez*.[168]

Shortly thereafter, the Sixth and Eleventh Circuits both had occasion to address the issue.[169] Employing similar reasoning as the Seventh Circuit, both courts concluded that the aggravated felony of sexual abuse of a minor included misdemeanor convictions involving sexual abuse of a minor.[170] The BIA, then, in *In re Small*, deferred to the Seventh Circuit's view, stating "[w]e consider it

160. *Id.* at 10.

161. *Id.* at 16–17. The California statute under which Crammond was convicted stated "[a]ny 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 in a county jail not exceeding one year, or by imprisonment in the state prison." *Id*. at 16 (citing CA. PENAL CODE § 261.5(c) (West 1998)). The state court reduced his conviction from a felony to a misdemeanor. *Id.* at 16–17.

162. *Crammond*, 23 I. & N. Dec. at 14–15.

163. *Id.* at 15.

164. *Id.* at 15–16.

165. *Id.* at 16–17. The BIA eventually vacated the decision for lack of jurisdiction after learning that Crammond departed the country while the decision was pending. *Crammond*, 23 I. & N. Dec. at 180.

166. Guerrero-Perez v. INS, 256 F.3d 546, 546 (7th Cir. 2001).

167. *Id.* at 547.

168. *Id.*

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

170. *Gonzales-Vela*, 276 F.3d at 768; *Marin-Navarette*, 244 F.3d at 1287.

appropriate at this juncture to accede to the weight of the appellate court authority in the interest of uniform application of the immigration laws."[171]

III. WHY MISDEMEANOR CONVICTIONS INVOLVING SEXUAL ABUSE OF A MINOR SHOULD NOT BE CONSIDERED AGGRAVATED FELONIES

In *Guerrero-Perez*, the Seventh Circuit Court of Appeals made three points to support its conclusion that misdemeanor convictions may constitute the aggravated felony of sexual abuse of a minor for purposes of the INA.[172] First, the court noted that sexual abuse of a minor is grouped with rape and murder, indicating that Congress considered sexual abuse of a minor a very serious offense.[173] Given the gravity of the offense, the court asserted, Congress must have intended the aggravated felony of sexual abuse of a minor to include a broad range of crimes, including misdemeanors.[174] Second, the court found that the structure of the aggravated felony provision created a definition section that emptied the term "aggravated felony" of its plain meaning.[175] Third, the court held that, because the aggravated felony provision failed to expressly exclude misdemeanor convictions, Congress must have intended to include them.[176]

The plain meaning of the terms "aggravated" and "felony," however, as well as the legislative history of the aggravated felony provision clearly indicate that Congress intended the aggravated felony of sexual abuse of a minor to include only felony convictions. Moreover, in two recent decisions, the Supreme Court has used an ordinary meaning approach in interpreting the scope of the aggravated felony provision.[177] Applying this approach to the sub-paragraph that addresses sexual abuse of a minor in the IIRIRA leads to one conclusion: misdemeanor convictions of sexual abuse of a minor do not qualify as aggravated felonies.

A. A Critique of the Seventh Circuit's Arguments for Including Misdemeanors as Aggravated Felonies

1. Structural Arguments

The *Guererro* court held that by grouping sexual abuse of a minor with rape and murder, Congress intended the definition of sexual abuse of a minor to include misdemeanor convictions.[178] The court noted that, prior to 1996, para-

171. *In re* Small, 23 I. & N. Dec. 448, 450 (B.I.A. 2002).

172. Guerrero-Perez v. INS, 242 F.3d 727, 727 (7th Cir. 2001).

173. *Id.* at 736.

174. *Id.*

175. *Id.*

176. *Id.* at 737.

177. Leocal v. Ashcroft, 543 U.S. 1 (2004); Lopez v. Gonzales, 127 S. Ct. 625 (2006).

178. Guerrero-Perez v. INS, 242 F.3d 727, 736 (7th Cir. 2001).

graph (A) of the aggravated felony provision covered only one offense, murder.[179] With the enactment of the IIRIRA, Congress broadened paragraph (A) to also include rape and sexual abuse of a minor.[180] The court held that grouping rape and sexual abuse of a minor with murder suggests that Congress considered these offenses to be of similar severity and import.[181] Thus, the argument goes, "grouping sexual abuse of a minor with these two acts, without explicitly limiting sexual abuse of a minor to the status of a misdemeanor, is a fairly strong indication . . . that Congress intended both misdemeanor and felony convictions for sexual abuse of a minor to be considered aggravated felonies."[182]

The grouping of sexual abuse of a minor with murder and rape, however, seems to cut the other way. Murder and rape are almost universally recognized as felonies.[183] Thus, the inclusion of sexual abuse of a minor alongside these terms suggests that Congress intended to encompass only felony offenses involving sexual abuse of a minor.[184]

The *Guerrero* court also held that by placing the term aggravated felony within quotation marks, Congress stripped the term of its ordinary meaning. As stated above, Congress chose not to explicitly define the term "aggravated felony."[185] Instead, the statute reads: "The term 'aggravated felony' means" and then lists offenses to be considered aggravated felonies.[186] By placing the term "aggravated felony" in quotation marks followed by the word "means," the court contended, Congress created a definition section.[187] In other words, Congress stripped the term "aggravated felony" of its ordinary meaning, and supplied a new definition, which consisted of the offenses listed in paragraphs A through U.[188] The court held that Congress could have used a number of terms to define the offenses covered in the aggravated felony provision.[189] As the court stated, "[Congress] could have substituted the term 'aggravated felony' for a myriad of phrases, including: (1) aggravated offense; (2) bad acts, and (3) aggravated crimes." The court held that, "although this list is hypothetical, it exemplifies that Congress had the discretion to use whatever term it pleased and define the term as it deemed appropriate."[190]

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179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *See In re* Small, 23 I. & N. Dec. 448, 455 (B.I.A. 2002) (Rosenberg, Bd. Member, dissenting).

184. *See id.*

185. *See supra* text accompanying notes 140–49.

186. Guerrero-Perez v. INS, 242 F.3d 727, 736–37 (7th Cir. 2001).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

But, of course, Congress did not use the term "aggravated offense," "bad act," or "aggravated crimes." It chose the term "aggravated felony."[191] And, as the Supreme Court has stated, "[t]he legislative purpose is presumed to be expressed by the ordinary meaning of the words used."[192] The fact that Congress chose the term "aggravated felony," as opposed to a more generic term, suggests that Congress intended the term to encompass only felony offenses.[193]

2. Congress's Failure to Exclude Misdemeanors Means Congress Intended to Include Them

The *Guerrero* court also noted that the aggravated felony provision does not state that only felony offenses qualify as aggravated felonies.[194] Thus, the court held, because Congress did not specifically articulate that misdemeanors cannot be aggravated felonies, Congress intended the term aggravated felony to apply to a broad range of crimes, including misdemeanors.[195] The Eleventh Circuit Court of Appeals made a similar argument in *Marin-Navarette*, holding that because Congress failed to include a reference to a term of imprisonment for sexual abuse of a minor offenses, Congress intended the term to apply to a broad range of offenses, including misdemeanors.[196]

This approach, however, overlooks the principle of statutory interpretation that a definition of a term should be read to exclude any meaning that is not stated.[197] Accordingly, because Congress failed to provide that aggravated felonies include misdemeanors, courts should not read "including misdemeanors" into the aggravated felony provision.[198] When Congress wished to expand other paragraphs of the aggravated felony provision to include misdemeanors, it did so expressly—for example, paragraphs (F), (G), and (H) impose a sentence requirement of "at least one year," thus encompassing misdemeanor offenses for which a term of imprisonment of one year may be imposed.[199] To state that Congress intended to include misdemeanor offenses by not including a term of imprisonment is to mistake the exception for the rule, and overlooks the longstanding rule of statutory interpretation that a definition of a term should be read to exclude any meaning that is not stated.

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191. INA § 101(a)(43) (1998), 8 U.S.C. § 1101(a)(43) (2000).

192. *See* INS v. Phinpathya, 464 U.S. 183, 189 (1984).

193. *See In re* Crammond, 23 I. & N. Dec. 9, 15 (B.I.A. 2001).

194. Guerrero-Perez v. INS, 242 F.3d 727, 737 (7th Cir. 2001).

195. *Id.*

196. United States v. Marin-Navarette, 244 F.3d 1284, 1286 (2001).

197. *See Crammond*, 23 I. & N. Dec. at 22 (Rosenberg, Bd. Member, concurring) (citing Stenberg v. Carhart, 530 U.S. 914, 942 (2000).

198. *See id*.

199. *See id.* at 25.

B. Arguments in Favor of Excluding Misdemeanor Offenses

1. Plain Language and Legislative History

Any attempt to include misdemeanor offenses as aggravated felonies requires a complete circumvention of the well-established meaning of the terms "aggravated" and "felony." A felony refers to a serious crime and is distinguishable from a misdemeanor.[200] Felonies have traditionally been defined as offenses punishable by imprisonment of more than one year.[201] The term "aggravated" typically modifies other words, and suggests a situation that is "worse, enhanced or more severe in some manner."[202] The two terms together suggest a very serious offense punishable by more than one year in prison. As Judge Straub stated:

> [I]t is quite clear that an "aggravated felony" defines a subset of the broader category "felony." Common sense and standard English grammar dictate that when an adjective—such as "aggravated"—modifies a noun—such as felony—the combination of the terms delineates a subset of a noun. One would never suggest, for example, that by adding the adjective "blue" to the noun "car," one could be attempting to define items that are not, in the first instance, cars. In other words, based on the plain meaning of the terms "aggravated" and "felony," we should presume that the specifics that follow in the definition of "aggravated felony" under INA § 101(a)(43) serve to elucidate what makes these particular felonies "aggravated"; we certainly should not presume that those specifics would include offenses that are not felonies at all.[203]

The history of the aggravated felony provision further buttresses the argument that Congress intended the term to encompass only felony offenses. When Congress created the term "aggravated felony," in 1988, as part of the ADAA, it also made other changes to the INA.[204] For example, Congress revised former Section 242(a) to require the attorney general to take custody of "any alien convicted of an aggravated felony" and ordered that "the Attorney General shall not release *such felon* from custody."[205] Further, Congress added a new Section 242A to the INA aimed at expediting the deportation of aliens convicted of ag-

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200. *See id.* at 23–24 (citing BLACK'S LAW DICTIONARY 633 (7th ed. 1999)).

201. *See id.* (citing United States v. Graham, 169 F.3d 787, 792–93 (3d Cir. 1999)); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2005).

202. *See Crammond*, 23 I. & N. Dec. at 22 (Rosenberg, Bd. Member, concurring) (citing BLACK'S LAW DICTIONARY 65 (7th ed. 1999)).

203. United States v. Pacheco, 225 F.3d 148, 157 (2000) (Straub, J., dissenting). This case involved subparagraphs (F) and (G), which relate to a crime of violence and a theft or burglary offense, respectively. The issue in the case was whether a misdemeanor conviction of either type of crime qualified as an aggravated felony. *Id*.

204. *See Crammond*, 23 I. & N. Dec. 9, 23 (B.I.A. 2001) (Filppu, Bd. Member, concurring).

205. *Id.* at 18 (citing ADAA § 7342 (1988), 8 U.S.C. § 1101(a)(43) (2000)).

gravated felonies.[206] The new section provided that "[w]ith respect to an alien convicted of an aggravated felony who is taken into custody by the Attorney General . . . the Attorney General shall, to the maximum extent practicable, detain *any such felon* at a facility at which other such aliens are detained."[207] Despite the frequent changes to the aggravated felony provision, the reference to "such felon" has never been changed.[208] In addition, former Section 212(c) prohibited an alien who was "convicted of one or more aggravated felonies and has served for such *felony or felonies* a term of imprisonment of at least 5 years" from receiving a waiver of deportation.[209] These references suggest that Congress intended the aggravated felony provision to apply only to felony offenses.[210]

2. Recent Supreme Court Decisions Support Excluding Misdemeanor Offenses

In two decisions decided after *Guerrero*, the Supreme Court took an ordinary meaning approach in defining two other subparagraphs of the aggravated felony provision.[211] This approach is hard to square with the *Guerrero* court's creative parsing of the aggravated felony provision. In *Leocal v. Ashcroft*, the Court, in a unanimous opinion, held that the aggravated felony of "crime of violence" does not include the offense of driving under the influence.[212] The INA defines "crime of violence" as "an offense that has as an element the use . . . of physical force."[213] In analyzing whether driving under the influence involved the use of physical force, the Court stated that the ordinary, natural meaning of the word "use" involves more than negligent or accidental conduct, such as injuring someone while driving under the influence.[214] The Court stated that "when interpreting a statute, we must give the words their 'ordinary and natural' meaning."[215]

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206. *Id.* (citing ADAA § 7347(a), 8 U.S.C. § 1228).

207. *Id.*

208. *See id.*

209. *See Crammond*, 23 I. & N. Dec. at 13 (citing INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996)) (alteration in original).

210. *See id.* To further buttress the argument for excluding misdemeanors, others have cited Section 237(a)(2)(e) of the INA, which provides that "any alien who at any time after admission is convicted of a crime of . . . child abuse, child neglect, or child abandonment is deportable." INA § 237(a)(2)(E) (2000), 8 U.S.C. § 1227(a)(2)(E) (2000). This section would appear to cover minor sexual abuse offenses, suggesting that Congress intended "sexual abuse of a minor" under section 101(a)(43)(A) to be limited to more serious felony offenses. *Crammond*, 23 I. & N. Dec. at 13.

211. *See* Leocal v. Ashcroft, 543 U.S. 1 (2004); Lopez v. Gonzales, 127 S. Ct. 625 (2006).

212. *Leocal*, 534 U.S. at 12.

213. 18 U.S.C. § 16(a) (2000).

214. *Leocal*, 534 U.S. at 9.

215. *Id.*

The Court applied a similar approach in its eight-to-one decision in *Lopez v. Gonzales*.[216] In *Lopez,* the Court held that the aggravated felony of "drug trafficking" does not include state felony convictions for simple possession of a controlled substance.[217] The Court noted that the ordinary, natural meaning of the term "trafficking" involves commercial dealing, which is not an element of a garden-variety possession conviction.[218] The Court expressed a preference for using the ordinary meaning of statutory language in the absence of a clear indication from Congress to do otherwise.[219] Justice Souter stated that "Humpty Dumpty used a word to mean 'just what [he chose] it to mean—neither more nor less,' and legislatures, too, are free to be unorthodox. Congress can define an aggravated felony of illicit trafficking in an unexpected way. But Congress would need to tell us so."[220]

Leocal and *Lopez* clearly illustrate the Supreme Court's preference for giving the language of the aggravated felony provision its ordinary, plain meaning. Such an approach certainly suggests that only a felony may qualify as an aggravated felony, unless Congress clearly states otherwise. The Seventh Circuit's creative arguments in *Guerrero* for reading the "aggravated felony" provision to include misdemeanor offenses—e.g., that the use of quotation marks drains the terms of their natural meaning—do not constitute a clear indication on the part of Congress to strip the term of its ordinary meaning.

3. The Rule of Lenity Supports a Narrow Reading of the Provision

In light of the tenuous arguments for including misdemeanors as aggravated felonies, it is difficult to imagine how a court could conclude that including misdemeanors is not only a possible interpretation of the statute, but the narrowest possible interpretation. If anything, the aggravated felony provision is ambiguous as to whether misdemeanors qualify as aggravated felonies. In that case, the courts should have applied the rule of lenity, and interpreted section 101(a)(43)(A) in the manner least prejudicial to the alien—i.e., as excluding misdemeanors involving sexual abuse of a minor.[221]

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216. 127 S. Ct. 625 (2006).

217. *Id.* at 633.

218. *Id.* at 630.

219. *Id.*

220. *Id.*

221. The majority in *In re Crammond* believed the statute was ambiguous and applied the rule of lenity. 23 I. & N. Dec. 9, 15 (B.I.A. 2001). Other members found that there was no need to resort to the rule of lenity as the plain language of the statute made it perfectly clear that misdemeanors could not qualify as aggravated felonies. *Id.* at 17 (Filppu, Bd. Member, concurring).

IV. CONCLUSION

Under the INA, a non-citizen who commits an aggravated felony is deportable and barred from ever re-entering the country.[222] Often, the aliens who have been deported as aggravated felons, like Jose Guerrero, have spent the better part of their lives in the United States and have strong ties to the United States.[223] Given the harsh consequences of the aggravated felony provision, it is unlikely that Congress intended to include misdemeanor convictions involving sexual abuse of a minor as aggravated felonies. Although three circuit courts and a reluctant BIA have held the opposite, they have done so by relying on arguments that are tenuous at best. In addition, the plain language of the aggravated felony provision, coupled with the provision's legislative history, supports the contrary position—namely, that the aggravated felony of sexual abuse of a minor does not include misdemeanors. Moreover, the Supreme Court has applied an ordinary meaning approach in defining the scope of the aggravated felony provision in two recent decisions, which precludes the creative parsing of the statute by the circuit courts. Finally, the rule of lenity, which calls for the reading of deportation statutes in the light most favorable to the alien, further buttresses the narrower interpretation of the provision. For these reasons, courts addressing this issue in the future should find that the aggravated felony of sexual abuse of a minor does not include misdemeanor offenses.

222. INA § 212(a)(9)(A)(ii) (1998), 8 U.S.C. § 1182(a)(9)(A)(ii) (2000).

223. *See supra* Part I.C.6.