ZONE OF NONDEFERENCE: CHEVRON AND DEPORTATION FOR A CRIME

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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.

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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. 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. While some question the historical pedigree of *Chevron* and have predicted its eventual demise, for now we must contend with it. This Article discusses the relationship between *Chevron*—“the de-
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 of the noncitizen.9

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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 “gives[a] 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”).


8. Id. §§ 1326(b)(2), 1253(a)(1), 1327 (defining criminal violations).
of the defendant. 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. 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. Second, courts do not defer to agency interpretations regarding what has come to be known as the categorical approach. The categorical approach is the usual methodology for determining whether a prior conviction triggers deportation or, in federal criminal cases, sentencing enhancement. Under the categorical approach, adjudicators look at the elements of the conviction, not the way the crime was committed, and compare the ele-

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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).

ments with a generic definition contained in immigration law or federal sentencing law. The 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. The BIA, however, now recognizes that *Chevron* does not apply to its decisions in this area. 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.”

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. 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. Federal sentencing law enhances sentences for certain immigration-related crimes if the person has been convicted of an aggravated felony.

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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. California law criminalizes sexual intercourse with a minor when the age gap is three years or more. In contrast, federal law, the law of 43 states and the District of Columbia, and the Model Penal Code do not criminalize this conduct. 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. The Sixth Circuit, finding ambiguity in the statutory phrase “sexual abuse of a minor,” deferred to the BIA’s interpretation. 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.

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. But if the phrase is ambiguous, he contended that the rule of lenity, not Chevron, governed the analysis. Following the reasoning of the Sixth Circuit opinion concurring and dissenting, Esquivel-Quintana reasoned that Chevron did not apply


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).


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.


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


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.”

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 of” a crime “involving moral turpitude.”35 Noncitizens can also be


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).


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).

35. Id. § 1227(a)(2)(A)(ii).
deported for having been convicted of an offense “relating to” the Controlled Substances Act.\(^36\)\(^{36}\) 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,\(^38\)\(^38\) 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.”\(^39\)\(^39\)\(^39\) While this type of crime does not trigger a ground of removal, it bars a form of relief called withholding of removal, a protection for noncitizens who face deportation to countries where they will likely be persecuted.\(^40\)\(^40\) In holding that *Chevron*

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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.”).


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 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

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

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

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51. *Id.* at 843.

52. *Id.*


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

55. *Id.*; see also Kenneth Bamberger, *Normative Canons in the Review of Administrative Policy-Making*, 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).

56. *Chevron*, 467 U.S. at 840.
to each constitutive part generating pollution.\textsuperscript{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.\textsuperscript{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 \textit{Chevron} over twenty years ago, courts and scholars have analyzed its jurisprudential underpinnings, including concerns about expertise, political accountability, and delegation.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.

More recently, cases and commentary have focused on the idea that \textit{Chevron} deference is concerned with delegation.\textsuperscript{62} Courts should defer to agencies when Congress has instructed them to do so. When it

\begin{itemize}
  \item \textsuperscript{57} Id.
  \item \textsuperscript{58} Id. at 866.
  \item \textsuperscript{59} See, e.g., Lisa Schultz Bressman, \textit{Chevron’s Mistake}, 58 DUKE L.J. 549, 566–71 (2009); William N. Eskridge, Jr. & Lauren E. Baer, \textit{The Continuum of Defe
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} See Gonzales v. Oregon, 546 U.S. 243, 258 (2006) (“\textit{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) (“\textit{A}dministrative implementation of a particular statutory provision qualifies for \textit{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.”);
leaves ambiguity in a statute, Congress delegates interpretive authority to agencies. 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.” In subsequent decisions, the Court interpreted Mead’s delegation inquiry in ways that reflected a historical debate between Justice Breyer and Justice Scalia. 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. 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).

II. CRIMINAL LAW AND LENIETY

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 prosecutions. 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.”

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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.


67. See infra notes 146–51 and accompanying discussion.

68. Merrill & Hickman, supra note 53 (explaining the scope of the Chevron doctrine); see Cran- don 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.”]).

stein 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 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

70. Sunstein, Chevron Step Zero, supra note 1, at 210.
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).
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).
76. Greenfield, supra note 9, at 57–58.
rule of lenity, particularly with respect to civil statutes with criminal application (hybrid statutes).  

Criminal statutes “are for courts, not for the Government, to construe.” 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.” For example, Congress has delegated to the Department of Justice the authority to modify the federal drug schedule. 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.” Congress has granted the authority to interpret the INA to the Attorney General, who has in turn delegated adjudicative authority to the BIA by regulation. 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.

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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).


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.


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 is[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
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.” 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. The rule stems from the Court’s longstanding recognition that “deportation is a drastic measure and at times the equivalent of banishment or exile.” The Court has not directly addressed the relationship between Chevron and the presumption in favor of lenity.

Further complicating the Chevron/immigration law relationship is the reality that immigration law intertwines with criminal law. As mentioned above, the controversy centers on whether courts defer to agency interpretations of terms defining the scope of a crime-based removal ground. 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

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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).


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

As to the first category, cross-referenced terms, courts agree that Chevron has no bearing. 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.” “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.

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. The BIA and courts have imported this definition of burglary into immigration law.

91. 8 U.S.C. § 1227 (2012); Deng, supra note 89, at 283–85.
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).
Terms and phrases that describe a group of offenses or that have no settled meaning in criminal law are more controversial. 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. 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. The phrase “sexual abuse of a minor,” in the Court’s view, is a generic term like “burglary” in Taylor. 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.

Esquivel-Quintana involved the aggravated felony definition, a hybrid statute. 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). In Mellouli v. Lynch, the Court interpreted the phrase “relating to” in the controlled substance criminal deportation ground. 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]).” The Court held that the Kansas paraphernalia conviction was not a deportable offense because the Kansas drug schedule was broader than the one described


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.


105. Id. at 1989–90.

in the Controlled Substances Act. 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. 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*.” The Court thus appeared to engage in a step two *Chevron* inquiry, rejecting the BIA’s interpretation of an ambiguous statute as unreasonable. The Court’s brief reasoning did not reveal why it believed *Chevron* was relevant.

Apart from *Mellouli*, the Court has ignored *Chevron* when interpreting crime-based removal statutes. 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. Lower courts, in contrast, have often deferred to the agency’s interpretations of aggravated felony provisions without first questioning whether deference is appropriate.

The Court has not yet developed a jurisprudence addressing when, if ever, *Chevron* applies to interpretations of crime-based removal

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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.
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).
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).
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.

#### 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

115. *See supra* Part I.


117. Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (analogizing immigration law to “King Minos’s labyrinth in ancient Crete”).
phrases, like “theft,” “burglary,” and “sexual abuse of a minor.” The phrase “moral turpitude,” for example, stems from early American defamation law, first appearing in immigration law in 1891. The term still appears in criminal law.

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. 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. Because the phrase “sexual abuse of a minor” is not defined 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.” 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. Under the latter, the offense would be an aggravated felony. 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.

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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).


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


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.
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 “relating 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

128. Id. at 841; Crimes and Criminal Procedure, 18 U.S.C. § 3 (2012).
130. Id. at 120.
132. Id.
133. Id. at 1984.
134. See supra note 12 and accompanying discussion.
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. 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. In the last ten years, the Attorney General has issued only 12 decisions, whereas the BIA issued 319 precedential decisions over the same period. BIA members, unlike the Attorney General, are not political appointees. Department of Justice regulations require that the BIA use “independent judgment and discretion,” and the Supreme Court has held that the Attorney General must abide by this regulation. 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

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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.


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.” 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. This delegation can be either express or implicit, but it must be focused on the “particular statutory provision” at issue. Because Congress gave the Attorney General (and, 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.

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.” 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. These specific refusals to defer co-exist with Congress’s general grant

142. Id. at 269–70 (Jackson, J., dissenting).
144. Id. at 226.
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.
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 *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


149. *Barnhart*, 535 U.S. at 222 (citing United States v. Mead Corp., 533 U.S. 218 (2001); 1 KEN-NETH 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.

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 William 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. 1052, 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.
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.\(^{153}\)

### 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 infor-
mation through common databases, and officials in leadership positions within both agencies meet frequently and have easy access to one another. 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 of society’s moral center.” 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.”

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. Under the Controlled Substances Act, after complying with specified procedures, the Attorney General can

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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.”).
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).
add new drugs to any of the five schedules of controlled substances. 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.”

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” illustrate the connection between removal statutes and morality. 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.” 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.”

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.” Although courts have rejected the proposition that deportation constitutes punishment, recent cases have

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).
164. Simon-Kerr, supra note 119, at 1039.
165. Touby, 500 U.S. at 170 (Marshall, J., concurring).
166. Id.
called this distinction into question. The severity of deportation supports a broad principle of nondeference.

Further reinforcement resides in another foundation of the rule of lenity—the principle of fair warning. 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.” 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,


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).
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.\(^\text{172}\) With the post-New Deal rise of agencies as the “fourth branch” of government, it is only natural that the Supreme Court should consider how the judiciary relates to agency interpretation of statutes that in some way relate to criminal law.\(^\text{173}\) To date, the Court has left largely unaddressed whether *Chevron* applies to interpretations of crime-based deportation provisions.\(^\text{174}\) 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.\(^\text{175}\) Rather, the Court has usually decided this type of case without mentioning *Chevron*, even if the parties briefed it.\(^\text{176}\) 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.\(^\text{177}\)

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

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

176. *See id.*

177. *See supra* note 119 and accompanying text.
defer to immigration agency interpretations of deportation statutes triggered by a conviction for a crime.