

SIXTH CIRCUIT REVIEW

***Chevron* Deference or the Rule of Lenity? Dual-Use Statutes and Judge Sutton’s Lonely Lament**

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Commenting on *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016).

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I. INTRODUCTION

As criminal adjudications have become more central to determining an alien’s removability from the United States or his eligibility for discretionary relief from removal, criminal law principles—including application of the categorical approach, recourse to the exclusionary rule, and the fugitive disentitlement doctrine—have all gained prominence in immigration law.¹ The

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¹See, e.g., Patrick J. Glen, *The Fugitive Disentitlement Doctrine and Immigration Proceedings*, 27 GEO. IMMIGR. L.J. 749, 749–51 (2013) (noting the various confluences of criminal law and immigration law).

“rule of lenity” can now be safely added to this mix since the immigration bar has become increasingly aggressive in arguing for application of the rule to immigration cases, particularly before the Supreme Court.² The Supreme Court *has* noted the rule in several immigration cases, but always in passing, never as a central tenet of the holding, and invariably in the context of Board of Immigration Appeals’ (Board) interpretations of provisions of the Immigration and Nationality Act (INA) that expressly incorporate federal criminal statutes.³ It has never been applied to foreclose the Board’s interpretation of a *civil* provision of the INA based only on the fact that the civil determination may entail criminal consequences in a future prosecution.⁴

There is good reason to believe that application of the rule to the Board’s interpretation in this latter circumstance would be inappropriate, given that it is well-established that the principles of *Chevron* deference apply to the Board’s reasonable interpretation of ambiguous provisions of the INA.⁵ In a recent dissent presenting the issue, however, Judge Jeffrey Sutton of the United States Court of Appeals for the Sixth Circuit took the opposite view—that where the INA’s civil provisions have the possibility of entailing criminal consequences, the rule of lenity should displace *Chevron* deference and mandate that any ambiguity in the *civil* statute be construed in the alien’s favor.⁶ This view, although consistent with that advanced by the private

² See, e.g., Brief for Petitioner at 38–47, *Torres v. Lynch*, 136 S. Ct. 1619 (2016) (No. 14-1096), 2015 WL 4967191, at *38–47 (arguing that the rule should apply to displace application of *Chevron* deference to the Board of Immigration Appeals’ construction of subsection (E)(i) of the INA’s aggravated felony provision, 8 U.S.C. § 1101(a)(43)).

³ See, e.g., *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010) (invoking the rule of lenity where the relevant immigration provision cross-referenced the Controlled Substances Act, a federal criminal statute); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (same, regarding INA’s incorporation of the definition of a “crime of violence” contained in a federal criminal statute, 18 U.S.C. § 16).

⁴ Cf. *Kawashima v. Holder*, 132 S. Ct. 1166, 1175–76 (2012) (“Finally, the Kawashimas argue that subparagraph [8 U.S.C. § 1101(a)(43)](M)’s treatment of tax crimes other than tax evasion is ambiguous, and that we should therefore construe the statute in their favor. It is true that we have, in the past, construed ambiguities in deportation statutes in the alien’s favor. We think the application of the present statute clear enough that resort to the rule of lenity is not warranted.” (citation omitted)).

⁵ See, e.g., *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion) (“Principles of *Chevron* deference apply when the BIA interprets the immigration laws.” (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984))); *Immigration & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (“It is clear that principles of *Chevron* deference are applicable to [the INA] statutory scheme.”); see also *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012) (explaining that the Board’s interpretation of the INA “prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best”).

⁶ See *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027–32 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *cert. granted*, No.16-54, 2016 WL 3689050 (Oct. 28, 2016) (mem.).

immigration bar, seems mistaken for several reasons: first, it relies on an outdated notion of lenity that is inconsistent with the rule's current application; second, it minimizes the fairly clear, if implicit, tack of relevant Supreme Court precedent; third, it misunderstands how deference canons, and *Chevron* in particular, may interact with principles of lenity; and fourth, it creates a problem in need of a solution—lenity for criminal aliens charged or sentenced based on arguably innocent conduct—that does not seem to exist as a practical matter.

This Case Comment addresses how deference and lenity should apply in the immigration context, using the Sixth Circuit's decision in *Esquivel-Quintana v. Lynch* as an illustrative example of competing views.⁷ We argue that principles of *Chevron* deference should not be displaced by the rule of lenity when a court is confronted with a so-called “dual-use” statute—a civil provision that may also entail criminal liability—and that both canons can easily coexist given the Supreme Court's consistent holdings regarding when and how the rule of lenity applies. Part II presents the court of appeals' decision in *Esquivel-Quintana*, with specific focus on Judge Sutton's dissent from the panel majority's application of *Chevron* deference. Part III turns to the crux of the issue, the application of the rule of lenity, including the narrow scope of the rule's potential application in immigration proceedings, how the rule has been interpreted as a general matter, and how the Supreme Court has applied deference in cases that would seemingly otherwise call for an application of lenity. Finally, Part IV addresses practical considerations against allowing lenity to displace deference in this context, including the disproportionate (or illusory) gains and the fact that concerns over criminal consequences can be better addressed in the criminal proceeding itself.

II. HOW TO CONSTRUE AMBIGUITY IN THE PHRASE “SEXUAL ABUSE OF A MINOR”: *ESQUIVEL-QUINTANA V. LYNCH*

The issue presented to the Sixth Circuit in *Esquivel-Quintana* was whether a lawful permanent resident was nonetheless removable from the United States as an alien who was convicted of an aggravated felony offense.⁸ The charge of removability related to *Esquivel-Quintana*'s 2009 conviction for “unlawful sexual intercourse with a minor” under a California state law, providing, in relevant part, that “[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.”⁹ According to the

⁷ *See id.*

⁸ *See id.* at 1020–21; *see also* 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (“Any alien who is convicted of an aggravated felony at any time after admission is deportable.”).

⁹ CAL. PENAL CODE § 261.5(c) (West 2014).

Department of Homeland Security, this conviction constituted an aggravated felony offense, defined under the INA to include “sexual abuse of a minor.”¹⁰

In a precedential decision, the Board agreed that a conviction under this section of the California Penal Code categorically constitutes an aggravated felony offense, sexual abuse of a minor.¹¹ The Board interpreted 8 U.S.C. § 1101(a)(43)(A) to require, vis-à-vis statutory rape offenses, “a meaningful age difference between the victim and the perpetrator,” before the offense could categorically qualify as “sexual abuse of a minor.”¹² The Board based its interpretation on a need to balance effectuating Congressional intent to remove those who sexually abuse minors with the need to *not* punish consensual sexual conduct between older peers.¹³ As California’s statute did contain a meaningful age differential—at least three years—the Board concluded that Esquivel-Quintana’s conviction categorically constituted a removable offense.¹⁴

On review before the court of appeals, a panel of the Sixth Circuit denied the petition, concluding that *Chevron* deference was appropriate given the precedential nature of the Board’s decision and that its construction of the phrase “sexual abuse of a minor” was a reasonable interpretation of ambiguous statutory language.¹⁵ In reaching this conclusion, the panel majority rejected Esquivel-Quintana’s contention that the rule of lenity demanded that any ambiguities in the statute should be resolved in the alien’s favor.¹⁶ It

¹⁰ *Esquivel-Quintana*, 810 F.3d at 1020–21. “Aggravated felony” is a term of art under the INA, and an offense can constitute an aggravated felony under § 1101(a)(43) even if it is punishable only as a misdemeanor. *See* 8 U.S.C. § 1101(a)(43)(A); *United States v. Robles-Rodriguez*, 281 F.3d 900, 902–03 (9th Cir. 2002) (“‘Aggravated felony’ is a term of art created by Congress to describe a class of offenses that subjects aliens convicted of those offenses to certain disabilities. ‘Aggravated felonies’ are not necessarily a subset of felonies; for instance, an offense classified by state law as a misdemeanor can be an ‘aggravated felony’ triggering a sentencing enhancement under § 2L1.2 if the offense otherwise conforms to the federal definition of ‘aggravated felony’ found in 8 U.S.C. § 1101(a)(43). In determining whether state convictions are aggravated felonies, courts have consistently favored substance over form, looking beyond the labels attached to the offenses by state law and considering whether the offenses substantively meet the statutory definition of ‘aggravated felony.’” (citations omitted)); *see also* *United States v. Gonzales-Vela*, 276 F.3d 763, 765–68 (6th Cir. 2001) (holding that misdemeanor sexual abuse of a minor may constitute an “aggravated felony” offense under § 1101(a)(43)(A)).

¹¹ *In re* *Esquivel-Quintana*, 26 I. & N. Dec. 469, 477 (B.I.A. 2015), *petition for review denied sub nom.* *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016), *cert. granted*, No.16-54, 2016 WL 3689050 (Oct. 28, 2016) (mem.).

¹² *Id.*

¹³ *See, e.g., id.* at 476 (“In evaluating whether an offense is categorically one of ‘sexual abuse,’ we must carry out the congressional intent to impose immigration consequences on those who have been convicted of sexual abuse of a minor without including nonabusive consensual sexual intercourse between older adolescent peers.”).

¹⁴ *Id.* at 477.

¹⁵ *Esquivel-Quintana*, 810 F.3d at 1024–26.

¹⁶ *Id.* at 1023–24.

determined that to the extent the Supreme Court has addressed that question, it applied deference to the exclusion of lenity when reviewing relevant agency action.¹⁷ Moreover, interpretation of the INA was not otherwise an “extraordinary” case that would mandate ignoring the applicability of *Chevron* deference.¹⁸

Judge Jeffrey Sutton dissented from this holding and would have applied the rule of lenity to resolve the statutory ambiguity, not *Chevron* deference.¹⁹ He concurred with the conclusion that the relevant statutory phrase, “sexual abuse of a minor,” is ambiguous.²⁰ But because the determination of whether an alien has been convicted of an aggravated felony under the INA has civil *and* potential criminal consequences, Judge Sutton would have applied the rule of lenity resulting in a conclusion that Esquivel-Quintana was not removable.²¹ Judge Sutton based this application on the Supreme Court’s prior directive that a statute must have the same interpretation in both civil and criminal contexts, thus concluding that deference should not be given to the Board’s interpretation of a term where a court in a criminal proceeding would have to resolve the ambiguity against the harsher, but possibly reasonable, interpretation of the statute.²² He also disagreed with the panel majority’s reliance on *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, as the Supreme Court’s observation in that case on the non-applicability of the rule of lenity was made only in passing and no other Supreme Court decision has explicitly opined that *Chevron* retains its full force when confronting agency interpretations of dual-use statutes.²³ Finally, Judge Sutton believed that a categorical exception to *Chevron* deference for dual-use statutes fit comfortably with other areas where the Supreme Court had crafted exceptions to the application of deference.²⁴

III. DEFERENCE VERSUS LENITY, OR DEFERENCE THEN LENITY?

Although Judge Sutton’s approach to the issue has some intuitive appeal, the panel majority’s decision is the preferable legal harmonization of principles of deference and lenity, as well as the better interpretation of existing Supreme Court precedent. To understand why this is the case, and why deference precedes lenity in interpreting dual-use statutes, it is important to apprehend three points: (1) what exactly is at issue in interpreting dual-use

¹⁷ *Id.* at 1024 (citing *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703–04 (1995)).

¹⁸ *Id.* at 1024 (quoting *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015)).

¹⁹ *Id.* at 1029–30 (Sutton, J., concurring in part and dissenting in part).

²⁰ *Id.* at 1027–28.

²¹ *Esquivel-Quintana*, 810 F.3d at 1030–31 (Sutton, J., concurring in part and dissenting in part).

²² *Id.* at 1031 (citing, inter alia, *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)).

²³ *Id.* at 1030–31.

²⁴ *Id.* at 1031–32 (collecting cases).

statutes in immigration cases; (2) how the Supreme Court generally applies the rule of lenity; and (3) how the Supreme Court has thus far applied deference canons in cases that might otherwise call for application of the rule of lenity. Exploring these points, the subject of the instant part, leads one away from Judge Sutton's conclusion that lenity, to the exclusion of deference, is the correct rule for immigration cases.

A. *Disentangling What Is at Issue*

It is important to understand how and why there is a potential conflict between deference principles and the rule of lenity when interpreting a dual-use immigration statute. Cases such as *Esquivel-Quintana*'s are *not* about interpretation of federal or state criminal statutes, where the rule of lenity is most directly applicable, as the agency receives *no* deference in interpreting such provisions.²⁵ These cases are also not about interpreting a civil provision that explicitly incorporates a federal criminal statute or standard, as no deference is warranted in that case either, at least to the extent interpretation of the criminal statute is relevant.²⁶ Rather, what is at issue is the Board's interpretation of a *purely* civil provision contained *wholly* within the INA and relevant *only* to immigration law.

It is well-established that the Board is entitled to receive deference for its reasonable interpretation of ambiguous provisions in the INA.²⁷ However, the argument from lenity contends that deference is not warranted for the Board's interpretation of the civil INA in civil removal proceedings, to the extent that it is interpreting provisions that might form the basis for subsequent criminal sanctions in a different proceeding.

The criminal consequences related to interpretation of the civil provisions of the INA are confined to three statutory sections within Title 8 of the United States Code. First, § 1253 entails certain penalties when an alien, "being a member of any of the classes described in [§] 1227(a) of" the INA, which relates to those aliens who are deportable, and either fail to depart or otherwise attempt to defeat removal after removability has been finally established.²⁸ As a general matter, an alien convicted of a violation of this section will receive a

²⁵ See, e.g., *Omargharib v. Holder*, 775 F.3d 192, 196 (4th Cir. 2014) ("Although we generally defer to the BIA's interpretations of the INA, where, as here, the BIA construes statutes [and state law] over which it has no particular expertise, its interpretations are not entitled to deference." (alteration in original) (quoting *Karimi v. Holder*, 715 F.3d 561, 566 (4th Cir. 2013))); *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1069 n.2 (11th Cir. 2013) ("We owe no *Chevron* deference to the Board's interpretation of the Georgia [criminal] statute, which the Board has no power to administer."); *Denis v. Att'y Gen.*, 633 F.3d 201, 208 (3d Cir. 2011) ("[I]f the issue turns on the meaning of a federal statute other than the INA, we possess the requisite expertise to interpret a federal criminal statute such that no deference is due.").

²⁶ See *supra* note 3 and accompanying text.

²⁷ See *supra* note 5 and accompanying text.

²⁸ 8 U.S.C. § 1253 (2012).

prison sentence of “not more than four years.”²⁹ But a higher sentence of not more than ten years may be assessed “if the alien is a member of any of the classes described in paragraph[s]” § 1227(a)(1)(E) (alien smuggling), § 1227(a)(2) (criminal offenses), § 1227(a)(3) (document fraud), or § 1227(a)(4) (security, terrorism, and related grounds).³⁰

Second, § 1326 pertains to the illegal reentry or attempted illegal reentry of an alien who has previously been “denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding.”³¹ The general statutory sentence for a violation of this provision is “not more than 2 years.”³² Nonetheless, the statute also provides two relevant enhancements. If an alien’s removal “was subsequent to a conviction for commission of an aggravated felony” under § 1101(a)(43), the statutory maximum is twenty years,³³ while if an alien has previously been excluded on expedited grounds because of inadmissibility under § 1182(a)(3)(B), relating to terrorist activities, the statutory maximum is ten years.³⁴ Finally, § 1327 relates to “[a]iding or assisting certain aliens to enter.”³⁵ It provides that “[a]ny person who knowingly aids or assists any alien inadmissible under [§] 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) or [§] 1182(a)(3) . . . of this title to enter the United States . . . shall be fined under [T]itle 18, or imprisoned not more than 10 years, or both.”³⁶

Because the Board’s determination of removability or inadmissibility under the sections referenced in these three criminal provisions—including aggravated felony determinations under § 1101(a)(43) and potentially *all* removability determinations under § 1227(a)—could impose criminal liability or increase an alien’s sentence in a hypothetical criminal prosecution, the lenity argument contends that any ambiguities in these civil provisions should be resolved in favor of the alien.

B. *The Last-Resort Role of Lenity*

The rule of lenity is “[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.”³⁷ Whatever the historical reach of the rule,³⁸ the modern

²⁹ *See id.* § 1253(a)(1).

³⁰ *Id.*; *see also id.* § 1227(a)(1)–(4).

³¹ *Id.* § 1326(a)(1).

³² *Id.* § 1326(a).

³³ *Id.* § 1326(b)(2).

³⁴ 8 U.S.C. § 1326(b)(3).

³⁵ *Id.* § 1327.

³⁶ *Id.*

³⁷ *Rule of Lenity*, BLACK’S LAW DICTIONARY 1532 (10th ed. 2014); *see also* DAVID MELLINKOFF, MELLINKOFF’S DICTIONARY OF AMERICAN LEGAL USAGE 577 (1992)

conception of lenity is not mechanistic in its application. Answering the question of whether lenity applies is not simply considering whether the statute is not clear or whether the statute may permit a narrower construction, thus effectively *mandating* adoption of the narrower or mitigating interpretation.³⁹ Rather, “the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.”⁴⁰

Thus, the courts must bring traditional interpretive tools to bear on an ambiguous statutory phrase in order to ascertain its meaning and can proceed to a “lenient” construction only when these tools are incapable of resolving the ambiguity.⁴¹ Accordingly, the rule of lenity “comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.”⁴² Moreover, despite the rule’s rationale of narrowing the construction of an ambiguous criminal provision, it is not “a directive to [courts] to invent distinctions neither reflective of the policy behind congressional enactments nor intimated by the words used to implement the legislative goal.”⁴³ In this sense, the rule of lenity is applied at the end of a court’s interpretive process and does not provide a backdrop for the court’s initial inquiry into the meaning of a

(“[G]enerally, ambiguity in a criminal statute should be resolved in favor of the defendant, e.g., a less harsh penalty.”).

³⁸ See, e.g., Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421–23 (2006) (describing a more robust rule of lenity that courts were quicker to apply in the face of statutory language that could bear multiple reasonable interpretations).

³⁹ See, e.g., *Abramski v. United States*, 134 S. Ct. 2259, 2272 n.10 (2014) (“The dissent would apply the rule of lenity here because the statute’s text, taken alone, permits a narrower construction, but we have repeatedly emphasized that is not the appropriate test.”).

⁴⁰ *United States v. Castleman*, 134 S. Ct. 1405, 1416 (2014) (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)); see also *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013) (“Only where ‘the language or history of [the statute] is uncertain’ after looking to ‘the particular statutory language, . . . the design of the statute as a whole and to its object and policy,’ does the rule of lenity serve to give further guidance.” (alterations in original) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990))).

⁴¹ See *Abramski*, 134 S. Ct. at 2272 n.10 (“Although the text creates some ambiguity, the context, structure, history, and purpose resolve it.”); *Barber*, 560 U.S. at 488 (“Having so considered the statute, we do not believe that there remains a ‘grievous ambiguity or uncertainty’ in the statutory provision before us. Nor need we now simply ‘guess’ what the statute means.”); cf. *Kawashima v. Holder*, 132 S. Ct. 1166, 1175–76 (2012) (“Finally, the Kawashimas argue that subparagraph [8 U.S.C. § 1101(a)(43)](M)’s treatment of tax crimes other than tax evasion is ambiguous, and that we should therefore construe the statute in their favor. It is true that we have, in the past, construed ambiguities in deportation statutes in the alien’s favor. We think the application of the present statute clear enough that resort to the rule of lenity is not warranted.” (citation omitted)).

⁴² *Maracich*, 133 S. Ct. at 2209 (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)).

⁴³ *United States v. Healy*, 376 U.S. 75, 82 (1964).

statutory phrase. It is only once the court has exhausted other forms of statutory interpretation and is still unable to reach a definitive construction that the rule of lenity may be applied.

C. *Lenity As Adjunct to Deference*

The Supreme Court has not squarely resolved the question of whether deference is or is not applicable where agency constructions of dual-use statutes are presented for review. Indications are, however, that such deference *is* appropriate, as this is in line with a conception of the relationship between deference and lenity whereby the deference canons are part of the traditional tools of statutory construction and lenity is applicable only in the last resort if a “grievous” ambiguity remains.

The point of contention in *Esquivel-Quintana* is related to the Supreme Court’s opinion in *Sweet Home*, where the Supreme Court offered deference to the Secretary of the Interior’s regulatory definition of the statutory term “take” in the Endangered Species Act (ESA).⁴⁴ The majority in *Sweet Home* opined that “[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary’s reasonable interpretation.”⁴⁵ It rejected the idea of applying the rule of lenity to the case simply because the ESA also provides for criminal penalties: “We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement.”⁴⁶

The rationale of *Sweet Home* is consistent with the Court’s subsequent decisions. In *United States v. O’Hagan*, the Supreme Court applied deference to a legislative rule implemented by the Securities and Exchange Commission and concluded that the Commission’s assessment of the rule, and whether it “is reasonably designed to prevent fraudulent acts,”⁴⁷ must be accorded “controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.”⁴⁸ Likewise, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Supreme Court applied *Skidmore* deference to the Secretary of Labor’s consistent “views about the meaning of . . . enforcement language” within the scope of the agency’s expertise.⁴⁹ Importantly, the Supreme Court

⁴⁴ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 696–704 (1995).

⁴⁵ *Id.* at 703.

⁴⁶ *Id.* at 704 n.18.

⁴⁷ *United States v. O’Hagan*, 521 U.S. 642, 673 (1997).

⁴⁸ *Id.* (alteration in original) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

⁴⁹ *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14–15 (2011); *see also id.* at 15–16 (“These agency views are reasonable. They are consistent with the Act. The length of time the agencies have held them suggests that they reflect careful

rejected recourse to the rule of lenity only *after* its application of deference principles: “[A]fter engaging in traditional methods of statutory interpretation, we cannot find that the statute remains sufficiently ambiguous to warrant application of the rule of lenity here.”⁵⁰ This indicates that the Supreme Court views the rule of lenity as a tool of last resort and is leery of using it as a means to overturn established agency positions.

It is true that the Supreme Court has never comprehensively and explicitly addressed how deference and lenity interact. *Sweet Home*, *O’Hagan*, and *Kasten* all, to an extent, assume the answer for purposes of deciding the case at hand.⁵¹ Nonetheless, the Court’s extant precedent points in one direction only—deference applies where it otherwise applies, and lenity acts only as an interpretive tool of absolute last resort, just as it does in the purely criminal context.

There is no case that points in the opposite direction. Judge Sutton seemed to cite *Leocal v. Ashcroft* in support of his application of lenity,⁵² but that case addressed only the interpretation of a purely criminal statute, 18 U.S.C. § 16, which the Supreme Court unexceptionally opined must be interpreted the same in both criminal and administrative contexts.⁵³ This circumstance is different from the purely civil statute at issue in *Esquivel-Quintana*, and deference should apply to the Board’s interpretation of these civil provisions even where it does not extend to criminal statutes or provisions of the INA that explicitly incorporate criminal statutes.⁵⁴ Judge Sutton also cited Justice Scalia’s statement respecting the denial of certiorari in *Whitman v. United States*, joined by Justice Thomas,⁵⁵ but that opinion offers scant support for the rule Judge Sutton would adopt. First, that decision quite explicitly noted the unanimity in the courts of appeals *contra* the position advocated by Justice Scalia, thus coloring Judge Sutton’s own view as the clear minority position that it is.⁵⁶ Second, no contrary Supreme Court precedent is cited in *Whitman* for the proposition advanced by Justice Scalia, with reliance being placed solely on cases such as *Leocal*, which are distinguishable given the wholly criminal nature of the statute at issue.⁵⁷ Finally, Justice Scalia’s opinion did no more than echo his prior dissent in *O’Hagan*, where he had earlier alleged a

consideration, not ‘*post hoc* rationalization[n].’” (alteration in original) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983))).

⁵⁰ *Id.* at 16.

⁵¹ See *supra* notes 44–50 and accompanying text.

⁵² *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1031 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)), *cert. granted*, No.16-54, 2016 WL 3689050 (Oct. 28, 2016) (mem.).

⁵³ See *Leocal*, 543 U.S. at 11 n.8.

⁵⁴ See *supra* notes 3–5, 25 and accompanying text.

⁵⁵ *Esquivel-Quintana*, 810 F.3d at 1031 (citing *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J., statement respecting the denial of certiorari) (mem.)).

⁵⁶ See *Whitman*, 135 S. Ct. at 353 (Scalia, J., statement respecting the denial of certiorari) (collecting cases).

⁵⁷ See *id.* at 353–54.

violation of principles of lenity in the application of deference to the SEC's construction of criminal prohibitions.⁵⁸ The Supreme Court did not adopt his views in that case, and their subsequent expression in *Whitman*, in the context of a denial by the full court to grant plenary review to consider the question,⁵⁹ provides weak support for the proposition that there is a majority on the Supreme Court who believe that lenity should trump deference in the context of dual-use statutes.

Further, the Supreme Court's leanings on this issue, even if implicit, make sense in light of the modern conception of lenity as a last resort, applied only after reviewing the text, structure, history, and policy behind the statute. Agency expertise fits comfortably within the ambit of these interpretive tools, and thus if an agency has permissibly interpreted ambiguity that should be considered in the context of determining whether traditional tools of statutory construction point to a permissible reading of the statute, while also counseling against the need to apply lenity. This also squares with the fact that courts are themselves generally engaging in some level of interpretation of criminal laws when determining the meaning of a criminal provision, not simply dictating a strict construction of the statute. There is little reason to disallow the same interpretive authority when it is an agency engaging in this exercise.⁶⁰

On a fair assessment of the current state of the law, far from being a "view . . . increasing in prominence,"⁶¹ the belief that lenity should trump deference has been on a largely circular track between the Sixth Circuit and the Supreme Court, or, more specifically, between Judge Sutton and his former boss, the late Justice Scalia: Justice Scalia cites Judge Sutton for support,⁶² while Judge Sutton cites Justice Scalia.⁶³ There is no doubting either of their intellects, but there is also no doubt that at present their view has not been

⁵⁸ See *United States v. O'Hagan*, 521 U.S. 642, 679 (1996) (Scalia, J., concurring in part and dissenting in part).

⁵⁹ See generally *Whitman*, 135 S. Ct. 352.

⁶⁰ Note, *supra* note 38, at 2426 ("[J]udicial application of the rule undermines any claim that it operates as a nondelegation doctrine. . . . [C]ourts apply the rule of lenity only after trying to cure ambiguity by examining the policies behind the law—that is, after exercising some delegated legislative power."); see also *id.* at 2426 n.45 (citing *Caron v. United States*, 524 U.S. 308, 314–15 (1998)) (explaining that in *Caron*, the Court rejected "a narrow construction that [was] grammatically possible but 'contrary to a likely, and rational, congressional policy'" (quoting *Caron*, 524 U.S. at 315)).

⁶¹ *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1024 (6th Cir. 2016) ("Nonetheless, while this view is increasing in prominence, the Supreme Court has not made it the law. To the contrary, the Court has reached the opposite conclusion."), *cert. granted*, No.16-54, 2016 WL 3689050 (Oct. 28, 2016) (mem.).

⁶² See *Whitman*, 135 S. Ct. at 353 (Scalia, J., statement respecting the denial of certiorari) (citing *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring)).

⁶³ See *Esquivel-Quintana*, 810 F.3d at 1031 (Sutton, J., concurring in part and dissenting in part) (citing *Whitman*, 135 S. Ct. 352 (Scalia, J., statement respecting the denial of certiorari)).

taken up by the Supreme Court itself, while being contrary to binding precedent in every federal court of appeals.

IV. PRACTICAL CONSIDERATIONS AGAINST FORECLOSING DEFERENCE

Based on the contemporary conception of the rule of lenity and the Supreme Court's consideration of that rule in agency cases, the better *legal* argument is that deference and lenity can coexist, and that this coexistence entails lenity applying only as a last resort where traditional tools of statutory construction, including deference canons, fail to reasonably resolve ambiguity. Practical considerations also militate against displacing deference with a default rule of lenity. This Part addresses two such considerations: (1) the disproportionate civil immigration caseload as compared to the criminal prosecutions potentially affected by agency interpretation; and (2) the ability of prosecutorial discretion to mitigate any notice and fairness concerns in the criminal proceeding itself.

A. Disproportionate Curtailment of Board Authority to Interpret the INA

A default rule of lenity would displace agency deference over fairly significant portions of the INA. There would be an argument that all removability grounds in 8 U.S.C. § 1227(a) would be undeserving of deference, given the criminal penalties assigned to a failure to depart after being ordered removed.⁶⁴ Regardless of the fate of § 1227(a) as a whole, at the very least lenity would seemingly attach to interpretations of the alien smuggling provision, all criminal grounds, all grounds associated with document fraud and misuse, and the security and terrorism related grounds, given the heightened sentence imposed if an alien fails to depart after being removed under one of these more specific provisions.⁶⁵ These are significant provisions pertaining to matters peculiarly within the expertise of the agency. The Board would also be deprived of deference over all security and terrorism related *inadmissibility* grounds, as those sections relate to either an element of criminal liability or a basis for a sentence enhancement under Title 8's criminal provisions.⁶⁶ Finally, no deference would extend to any interpretation of the purely civil aggravated felony provision, § 1101(a)(43),⁶⁷ given the inclusion of those grounds as a basis for sentence enhancement under the

⁶⁴ See 8 U.S.C. § 1253(a) (2012).

⁶⁵ *Id.* (referencing aliens ordered removed under § 1227(a)(1)(E), (2), (3), or (4)).

⁶⁶ See *id.* § 1326(b)(3) (sentence enhancement imposed if alien is excludable under terrorism-related provision); *id.* § 1327 (criminal liability if assisting an alien, who is inadmissible under this section, to illegally enter the United States).

⁶⁷ See *id.* § 1101(a)(43) (defining the term "aggravated felony" as used in Title 8).

illegal reentry provision and criminal liability under the smuggling provision.⁶⁸

But stripping the Board of deference over these *civil* provisions, when they are potentially implicated in tens of thousands of cases each year, is out of proportion to any concerns over unfairness or lack of notice to criminal defendants if lenity is not applied. In 2013, for instance, immigration judges completed a total of 253,942 matters,⁶⁹ while 350,330 remained pending at the close of the year.⁷⁰ The Board completed a total of 36,690 cases,⁷¹ while 22,940 remained pending.⁷²

In contrast to these numbers, in 2012 sixteen total convictions were entered under § 1253, and eight convictions were entered under § 1327.⁷³ Moreover, although there are well over ten thousand convictions each year under § 1326, these convictions never seem to result in a sentence range anywhere near the twenty-year aggravated felony enhancement contemplated by § 1326(b)(2), and rarely broach even the ten-year enhancement contemplated by the terrorism-related basis of § 1326(b)(3).⁷⁴ The average sentence for illegal reentry in 2013 was eighteen months, under the twenty-four month statutory maximum under § 1326(a), while the median sentence was just one year.⁷⁵ And as the Commission notes, “Only two of the 18,498 illegal reentry offenders sentenced in fiscal year 2013 received a sentence above ten years,” and this statistic includes the approximately “40.4 percent [of offenders] with the most serious criminal histories” that would otherwise trigger the twenty-year maximum in § 1326(b)(2).⁷⁶

It makes little practical sense to strip the Board of deference to its interpretations of the civil statute it is charged with administering in potentially tens of thousands of cases each year, simply because

⁶⁸ *See id.* § 1326(b)(2) (sentence enhancement imposed if alien reenters after having been found removable under the aggravated felony provision); *id.* § 1327 (criminal liability if assisting an alien who is inadmissible under the criminal inadmissibility grounds, so long as the offense of conviction would constitute an aggravated felony offense).

⁶⁹ EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2013 STATISTICS YEARBOOK, at A2 fig.1 (Apr. 2014), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf> [<https://perma.cc/2XV8-NSAM>].

⁷⁰ *Id.* at W1 fig.34.

⁷¹ *Id.* at Q1 fig.27.

⁷² *Id.* at W3 fig.35.

⁷³ *Federal Criminal Case Processing Statistics*, BUREAU JUST. STATS., <http://www.bjs.gov/fjsrc/tsec.cfm> [<https://perma.cc/5WCJ-NMBT>] (compiling criminal data from the Administrative Office of the United States Courts regarding the outcomes for defendants in cases closed in the year 2012).

⁷⁴ *See* U.S. SENTENCING COMM’N, ILLEGAL REENTRY OFFENSES 9 (Apr. 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf [<https://perma.cc/7BHJ-FBVG>].

⁷⁵ *Id.*

⁷⁶ *Id.* at 10.

determinations made in some of those cases might have slight (though more likely no) relevance to a vanishingly small number of criminal proceedings.

B. *Prosecutorial Discretion in Cases of Potential Ambiguity*

Concerns over any ambiguity, or the Board's resolution of ambiguous terms or phrases, could also be taken into account by prosecutors at the charging and sentencing stages of criminal proceedings under the affected provisions of Title 8. Given the foregoing criminal prosecution statistics, it seems that this already happens to a degree, although the reason is not clear.

One hint might be in an old, since-repealed provision, which created a "judicial deportation" procedure whereby a federal district judge could order the removal of a criminal alien following trial if the conviction constituted a removable offense.⁷⁷ In a memorandum from the Attorney General to Department of Justice litigators, they were told *not* to seek judicial deportation in cases where doing so would require the district courts to enter into the realm of immigration policy: "[I]n view of the Department's responsibility to administer and enforce immigration laws, and considering the ambiguities in the judicial deportation statute, prosecutors should not seek judicial deportation if the district courts necessarily will become involved in contentious immigration issues."⁷⁸ This forbearance was especially important in areas where contested criminal concepts were at issue, such as the limits of what constitutes a "crime involving moral turpitude."⁷⁹

If a potential conviction under Title 8 would turn on a contested interpretation of the civil INA, or on interpretation of a provision the Board had not yet addressed in a precedential decision, then the better approach is that reflected in the Attorney General's memorandum—do not charge a violation of the statute or do not seek a sentence enhancement. In other words, confine lenity to the interpretation of the criminal statute by settling on a less-significant punishment, and thereby avoid displacing deference in the civil immigration proceedings. Such a straight-forward approach to the handful of cases implicating application of the INA's relevant criminal provisions is surely preferable to a wholesale declination to accord deference where it otherwise would be unquestionably warranted.

V. CONCLUSION

Given the frequency with which the lenity argument is being raised in immigration cases, the Supreme Court will have to confront its merits sooner

⁷⁷ See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, tit. II, § 224, 108 Stat. 4305.

⁷⁸ Memorandum from U.S. Att'y Gen. to All Fed. Prosecutors, Deportation of Criminal Aliens (Apr. 28, 1995), <http://www.justice.gov/ag/attorney-general-april-28-1995-memorandum-deportation-criminal-aliens> [<https://perma.cc/GBG5-625C>].

⁷⁹ *Id.* (quoting 8 U.S.C. § 1251(a)(4) (1970)).

rather than later.⁸⁰ Or perhaps not. It has, in point of fact, largely managed to avoid doing so in the three decades since *Chevron*, despite numerous cases where the issue would have been ripe for decision.⁸¹

When—or if—the Court does decide to wade into the issue, it would do well to simply make explicit what it has thus far assumed: that when reviewing agency interpretations of civil statutes that have potential criminal application, *Chevron* deference applies with full force and the rule of lenity acts only as an interpretive aid of last-resort. This holding would be consistent with the rule of lenity’s application in the criminal context while safeguarding a basic tenet of the administrative state—deference to reasonable agency interpretations of the statutes Congress has charged it with administering.

Judge Sutton’s views are well-reasoned and must be taken into account when confronting application of lenity in agency cases. But they should ultimately be rejected in favor of the application of deference presented here.

⁸⁰ It may do so in this very case, where certiorari was granted on October 28, 2016. *See* *Esquivel-Quintana v. Lynch*, No.16-54, 2016 WL 3689050 (Oct. 28, 2016) (mem.).

⁸¹ *See supra* Part III.C.