SIXTH CIRCUIT REVIEW

Outsourcing the Jury: Bartlett v. DuPont\(^1\) and the Role of Alternative Adjudication in Preserving Jury “Fairness” in Complex Scientific Litigation

ELIZABETH V. YOUNG\(^*\)


TABLE OF CONTENTS

I. THE PROBLEM OF COMPLEX SCIENTIFIC QUESTIONS IN LITIGATION .......................................................................................................................... 16

II. THE CREATION OF THE C8 SCIENCE PANEL AND ITS ROLE IN BARTLETT ........................................................................................................ 17

III. A NORMATIVE FRAMEWORK FOR “FAIRNESS” IN ALTERNATIVE ADJUDICATION AND ITS APPLICATION TO THE C8 SCIENCE PANEL ........................................................................................................... 21

IV. THE EFFICACY OF THE C8 SCIENCE PANEL AS SEEN THROUGH A NORMATIVE FRAMEWORK OF JURY “FAIRNESS” ........................................ 24

A. Factors that Advance the C8 Science Panel’s Ability to Preserve Fairness ............................................................................................................. 24

B. Limitations of the C8 Science Panel’s Ability to Preserve Fairness ......................................................................................................................... 27

C. Summary: Determining What Is Most “Fair” for Complex Scientific Litigation ....................................................................................................... 28

V. THE FUTURE OF COMPLEX SCIENTIFIC ADJUDICATION & POLICY PERSPECTIVES IN PRESERVING “FAIRNESS” IN LITIGATION ........ 29

---

\(^*\) J.D. Candidate 2016, The Ohio State University Moritz College of Law; B.A., The Ohio University. Thanks to Professor Cinnamon Carlarne, Chelsea Freeman, Philip Krzeski, Howard Harcha, Kristen Maiorino, and the staff of the Ohio State Law Journal for their incredibly helpful comments, insight, and advice on this piece.

I. THE PROBLEM OF COMPLEX SCIENTIFIC QUESTIONS IN LITIGATION

Complex scientific questions are commonplace in modern litigation. Questions about drug interactions, patent applicability, and environmental consequences are routinely presented to judges and juries who often lack the technical background to untangle the complex legal and factual questions therein. Courts and other quasi-judicial bodies have been exploring alternative methods of adjudicating scientific questions, giving rise to a number of questions about the efficacy and legitimacy of these efforts. One such alternative method of alternative scientific adjudication took place recently in *Bartlett v. DuPont* in the Southern District of Ohio. Mrs. Carla Bartlett brought suit against E. I. du Pont de Nemours and Company (DuPont) for its role in leaking a cancer-causing chemical known as “C8” into Mrs. Bartlett’s drinking water, causing her to develop kidney cancer. On October 7, 2015, a Columbus jury found DuPont liable for causing Mrs. Bartlett’s cancer. The first of 3,500 C8 personal injury suits against DuPont for its role in C8 leakage, the jury awarded Mrs. Bartlett $1.6 million in compensatory damages.

---


4 Sources differ as to “C-8” and “C8.” See, e.g., infra notes 6–8. This Comment uses “C8” except where quoted sources use “C-8.”


7 Jury Verdict Form, *supra* note 6; Rinehart, *supra* note 6. The jury award consisted of $1.1 million for DuPont’s negligence in causing Mrs. Bartlett’s cancer and $500,000 for her emotional distress. Jury Verdict Form, *supra* note 6, at 1–3; see also *Jury Awards Woman...
In *Bartlett*, parties employed a C8 Science Panel in order to conclusively determine whether C8—which was released by DuPont into Southern Ohio and West Virginia drinking water—was capable of causing certain diseases. The C8 Science Panel in *Bartlett* provides an example of efforts to develop effective ways of adjudicating cases that involve complex scientific questions and further provides an excellent vehicle for exploring whether emerging techniques help or hamper a normative understanding of the role juries play in preserving trial “fairness.”

Part II of this Comment will provide a brief overview of the facts of *Bartlett* and the creation and execution of the C8 Science Panel used in the C8 personal injury litigation. Part III will outline a normative framework of the “fairness” embodied by a traditional jury in order to evaluate *Bartlett*’s efficacy in preserving fairness through use of the C8 Science Panel. Part IV will evaluate how the C8 Science Panel performs in light of this normative framework. Part V will look toward the future of alternative scientific adjudication in light of this normative framework, due process, and considerations of public policy.

## II. THE CREATION OF THE C8 SCIENCE PANEL AND ITS ROLE IN BARTLETT

Since the 1950s, DuPont’s Teflon plant near Parkersburg, West Virginia had been releasing perfluorooctanoic acid (PFOA) or ammonium perfluorooctanoate (APFO), also known as “C8,” into the surrounding drinking water. The C8 contaminated area included six water districts on the Ohio and West Virginia border affecting the area known as Tupper’s Plains and parts of fourteen Ohio and West Virginia counties. In 2001, a group of plaintiffs


9*See infra* Parts III–IV.


brought suit in West Virginia against DuPont under a variety of tort actions, all based on a theory of drinking water contamination.\(^{12}\) This group was granted class certification (\textit{Leach Class}) and the suit against DuPont reached a settlement agreement (\textit{Leach Settlement}) in November 2004.\(^{13}\) The \textit{Leach Settlement} created a C8 “Science Panel” to conduct a “Community Study” of the C8 affected area.\(^{14}\) The Panel was created by mutual agreement and its purpose was to conclusively determine whether there was a “Probable Link” or “No Probable Link” between the ingestion of C8 and various human diseases.\(^{15}\) A finding of “Probable Link” by the Panel would indicate that it was “more likely than not” that there was a link between ingestion of C8 at a particular contamination level and a human disease.\(^{16}\) For any linked disease, individual members of the \textit{Leach Class} would be able to pursue claims “for personal injury and wrongful death” as well as “any claims for injunctive relief and special, general and punitive and any other damages.”\(^{17}\) DuPont, however, reserved the right to contest specific causation, damages, and assert any other defense not barred by the \textit{Leach Settlement}.\(^{18}\) Conversely, where the C8 Science Panel found “No Probable Link” between C8 and a particular disease, those persons would be forever barred from suit.\(^{19}\)

The \textit{Leach Settlement} also determined composition of the C8 Science Panel.\(^{20}\) In the \textit{Leach Settlement} parties were required to “mutually agree upon” three “independent, appropriately credentialed epidemiologists” to form the C8 Science Panel.\(^{21}\) In order to confirm a “Probable Link,” at least two panelists had to agree that it was “more likely than not” that C8 consumption could cause


\(^{13}\) Order Approving Final Settlement and Notice Plan and for Entry of Final Judgment at 1–2, \textit{Leach, No. 01-C-698} (Feb. 28, 2005) [hereinafter \textit{Leach Order}] (attached as Exhibit E to MDL Plaintiff’s MSJ, ECF No. 820-9); Class Action Settlement Agreement, Exhibit 1 to \textit{Leach Order} [hereinafter \textit{Leach Settlement}] (attached as Exhibit D to MDL Plaintiff’s MSJ, ECF No. 820-8).

\(^{14}\) \textit{Leach Settlement, supra} note 13, §§ 1.12, 12.2.

\(^{15}\) \textit{id.} §§ 12.2.2, 12.2.3(b) (“The Science Panel shall develop and approve . . . a protocol for a study of Human Disease among residents exposed to C-8 . . . [and] evaluate the available scientific evidence to determine . . . whether such evidence demonstrates a Probable Link between C-8 exposure and any Human Disease.”).

\(^{16}\) \textit{id.} § 1.49 (defining “Probable Link”); \textit{id.} § 12.2.3(b).

\(^{17}\) \textit{id.} §§ 3.2–3.

\(^{18}\) \textit{id.} § 3.3.

\(^{19}\) \textit{id.} § 1.42 (defining “No Probable Link Finding”); \textit{id.} § 3.3.


\(^{21}\) \textit{Leach Settlement, supra} note 13, § 12.2.1.
a particular disease.\textsuperscript{22} Eventually, the parties agreed upon Dr. Fletcher of the London School of Hygiene and Tropical Medicine, Dr. Savits of Brown University, and Dr. Steenland of Emory University.\textsuperscript{23} These scientists were chosen for their “long experience in designing and carrying out environmental health studies” and the parties’ belief that they would be able to “objectively generate and evaluate the evidence.”\textsuperscript{24}

Importantly, DuPont wholly paid for the C8 Science Panel.\textsuperscript{25} In total, DuPont spent over $30 million to fund the Panel’s study.\textsuperscript{26} Despite its funding source, the Panel purported to be a totally neutral investigation team with no predispositions: “We came to this project as independent epidemiologists . . . and remained independent and neutral throughout. . . . We had no belief ahead of time that C8 does or doesn’t affect human health.”\textsuperscript{27} With this promise of neutrality, the community study went forward under the Panel’s direction between 2005 and 2013.\textsuperscript{28}

Procedurally, in order to determine whether a link existed, the Panel conducted a holistic and in-depth study of the C8 affected area.\textsuperscript{29} The panel drew blood, conducted questionnaires, and assessed the medical histories of approximately 69,000 Mid-Ohio Valley residents.\textsuperscript{30} The panel then compiled the results of the study into publicly available reports on a “C8 Science Panel” website.\textsuperscript{31} Ultimately, the panel found a “Probable Link” between the ingestion of C8 via drinking water and six diseases.\textsuperscript{32}

As a part of the Leach Settlement, DuPont and the Leach Class agreed to conclusively accept the C8 Science Panel’s findings as showing general causation for those ailments with a “Probable Link” to C8 ingestion.\textsuperscript{33}
Consequently, plaintiffs with kidney cancer, as well as five other diseases do not have to submit any evidence at trial, in terms of general causation, that C8 was capable of causing their ailments. DuPont cannot refute this causal link between disease and C8 at trial. For the second facet of causation, specific causation, plaintiffs would have to show that it was “more likely than not” that C8 ingestion caused their individual cancer.

Therefore, in order for Mrs. Bartlett to demonstrate general and specific causation, Plaintiff’s counsel simply had to prove that Mrs. Bartlett drank Tupper’s Plains water for one year and that the water was contaminated at the “Probable Link” level and this—by differential diagnosis—was the most likely cause of her cancer. Importantly, in order for DuPont to combat causation, they needed to show that something other than C8 caused Mrs. Bartlett’s cancer. For Mrs. Bartlett, general causation was decided in her favor and proving that Mrs. Bartlett ingested water at the requisite level was likely a minor hurdle.

The Leach Settlement was a “unique procedure” to determine whether the 80,000 members of the original Leach Class could file individual personal injury suits against DuPont for the various diseases they claimed C8 caused. Reported to be the first biomonitoring agreement of its kind, the C8 Science

---

34 See supra note 32.
36 See Leach Settlement, supra note 13, § 3.3 (“Defendant will not contest the issue of General Causation between C-8 and any Human Disease(s) as to which a Probable Link Finding has been delivered, but reserves the right to contest Specific Causation and damages.”). DuPont was not permitted to so much as point to the “limitations” of the C8 Findings at trial. Dispositive Motions Order No. 1 at 8, In re DuPont, No. 2:13-MD-2433 (Dec. 17, 2014), ECF No. 1679.
37 MDL ECF No. 3972, supra note 35, at 6–9.
38 Leach Settlement, supra note 13, § 2.1.1 (stating that “contaminated” water for purposes of the Leach Class contained “greater or equal to .05 ppb” of C8).
39 MDL ECF No. 3972, supra note 35, at 6–9.
41 See supra note 36 and accompanying text; see also Kyle Steenland et al., Predictors of PFOA Levels in a Community Surrounding a Chemical Plant, 117 ENVTL. HEALTH PERSP. 1083, 1085–88 (2009) (discussing levels of C8 in residents of affected water districts and concluding that “PFOA levels in this population varied with distance of residence from the plant and employment at the plant”). Mrs. Bartlett lived in the “Tuppers Plains-Chester water district in or about 1980 through the present” where residents had a median PFOA of 37.2 nanograms per milliliter. Bartlett Complaint, supra note 5, at para 8; Steenland et al., supra, at 1084. In 2003–2004, the average U.S. citizen has 4 nanograms per milliliter. Steenland et al., supra, at 1083.
42 MDL ECF No. 3972, supra note 35, at 2.
43 Laura Hall et al., Litigating Toxic Risks Ahead of Regulation: Biomonitoring Science in the Courtroom, 31 STAN. ENVTL. L.J. 3, 20 n.75 (2012); Jury Awards $1.6M, supra note 7 (reporting that the C8 Science Panel is “one of the most extensive examinations ever of
Panel’s exposure and health studies were able to conclusively determine general causation by assessing the links between C8 and any human disease. In Bartlett, however, even with general causation decided, consideration and adjudication of issues of specific causation, negligence, damages and actual malice still lasted three weeks. Now that the first DuPont trial has come to a close, a question of efficacy remains: based on a normative understanding of the role of juries in preserving “fairness” is the C8 Science Panel a more effective way to adjudicate a complicated scientific question, and ultimately does alternative scientific adjudication better preserve or threaten that fairness? This Comment addresses these issues below.

III. A NORMATIVE FRAMEWORK FOR “FAIRNESS” IN ALTERNATIVE ADJUDICATION AND ITS APPLICATION TO THE C8 SCIENCE PANEL

Trial by jury is a critical part of both civil and criminal adjudication. The role of the jury in trial is to be a neutral, objective, and unbiased decision-maker. In essence, the jury’s role is to preserve “fairness.” Principles of due how a toxic chemical affects humans”).

47 See generally GERTNER & MIZNER, supra note 2, at 2–14.
48 See ERIC T. KASPER, IMPARTIAL JUSTICE: THE REAL SUPREME COURT CASES THAT DEFINE THE CONSTITUTIONAL RIGHT TO A NEUTRAL AND DETACHED DECISIONMAKER 12–16 (2013). The jury is tasked with evaluating the evidence before them, applying legal standards, and determining whether plaintiff or defendant has carried their burden on proof such that one party, or the other, should prevail. MARGARET BULL KOVERA & BRIAN L. CUTLER, JURY SELECTION 3 (2013).
49 See KASPER, supra note 48, at 11 (“The best written laws are nothing without a fair and impartial application and procedural fairness.”); see also Molly Armour, Dazed and Confused: The Need for a Legislative Solution to the Constitutional Problem of Juror Incomprehension, 17 TEMP. POL. & C.R. L. REV. 641, 642 (2008) (discussing the need to reform juries in order to preserve fairness and due process); Scott W. Howe, Juror Neutrality
process demand a neutral arbiter, thus it is appropriate to categorize the
“fairness” preserved by a jury to reflect due process concerns.50 Before
evaluating whether the C8 Science Panel is a better method of preserving jury
fairness, it is important to outline what normative factors advance a jury’s ability
to preserve fairness, and what factors limit that ability.

Several factors advance a jury’s ability to preserve fairness. Most
importantly, the jury is objective, unbiased, and neutral because members are
not involved in the case or affected by its outcome.51 The random selection
process for generating jury pools also advances this general neutrality.52
Another important feature of juries is that they reflect community standards of
fairness.53 What is legally appropriate behavior is often determined by standards
of the community,54 and having a cross-section of the community decide cases
ensures community standards are applied. Additionally, jurors make measured,
non-arbitrary decisions because there must be consensus among jurors to render
verdict.55 This non-arbitrariness principle of juries is further preserved through
consensus because it ensures deliberation and thoughtful discussion.56 Finally,
juries as a piece of the adjudicative process are subject to appellate and judicial
redress.57 A judge may set aside a verdict for insufficient evidence or an
appeal court may make other reversible determinations.58

See supra note 48, at 11.

51 “No man is allowed to be a judge in his own cause, because his interest would
certainly bias his judgment, and, not improbably, corrupt his integrity.” THE FEDERALIST NO.

See Jeffrey Abramson, Jury Deliberation: Fair and Foul, in JURY ETHICS 181, 181 (John
Kleinig & James P. Levine eds., 2006) (“Deliberation on a cross-sectional jury ideally serves
the truth by drawing on the diverse experiences and views linked to demography in America,
pushing all to consider how the evidence looks to those with different backgrounds.”).

See Morris B. Hoffman, The Punisher’s Brain: The Evolution of Judge and
Jury 3 (2014) (discussing the fact that a jury’s judgment is a “community judgment”).

See Abramson, supra note 53, at 181–99 (discussing the tactics and issues regarding
different types of jury deliberations in the pursuit of unanimity).

See Fed. R. Civ. P. 50, 52(a)(6); Fed. R. App. P. 4(a); CLAY S. CONRAD, JURY
NULLIFICATION 7 (Cato Inst. 2014) (1998) (“The decisions of civil juries are not final; a
judge may decide to grant a judgment notwithstanding the verdict (non obstante veredicto,
or simply ‘N.O.V.’), or to grant a ‘remittitur,’ effectively reducing the size of the jury’s
award.”); ANN E. WOODLEY, LITIGATING IN FEDERAL COURT: A GUIDE TO THE RULES 103–
05 (2d ed. 2014)

See supra note 57.
redress acts as a safeguard, further ensuring non-arbitrary decisions.\textsuperscript{59} Taken as a whole, the jury is specially poised to advance fairness because it is designed to be unbiased, objective, neutral, reflect community standards of fairness, provide appellate redress, and be non-arbitrary.

Several factors, however, limit a jury’s ability to preserve fairness. First, jurors may not understand the subject of litigation, even those that are highly educated.\textsuperscript{60} Similarly, jurors—as laypeople—are not well versed in the law.\textsuperscript{61} Moreover, there is the possibility that the processes of jury selection and voir dire itself skew the diversity of viewpoints available on the jury.\textsuperscript{62} In particular, attorneys on either side in jury selection are attempting to strike jurors who are overly sympathetic to the opposing side.\textsuperscript{63} This creates a possibility that instead of representing community views through random selection, a jury could actually be skewed by the lawyers themselves.\textsuperscript{64} This risk is slight, however, given that both sides are able to strike jurors.\textsuperscript{65} More problematic than the ability to strike jurors is the pool of people available for jury service.\textsuperscript{66} The pool of people available may be incomplete, and therefore skewed, given the varied and imperfect sources of names from which jury pools are drawn.\textsuperscript{67}

\textsuperscript{59} See supra note 57.

\textsuperscript{60} See Duncan v. Louisiana, 391 U.S. 145, 157 (1968) (“[A]t the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice.”). Highly educated jurors in general are more likely to be excused for inability to sit the length of trial. Further, there is a suggestion that the ability to be fair is correlated with higher education. KOVERA & CUTLER, supra note 48, at 211.

\textsuperscript{61} See Armour, supra note 49, at 641–42 (discussing the problem of juror incomprehension regarding legal standards).

\textsuperscript{62} KOVERA & CUTLER, supra note 48, at 3 (suggesting that the outcome of a trial can depend on the selection of the jury); see also LAURA I APPLEMANN, DEFENDING THE JURY 5 (2015) (discussing the justice system’s “ongoing failure to integrate the community’s voice” in the jury box). Further, states vary in the lists used to generate jury pools. See, e.g., Jury Selection and Pay, GREENVILLE COUNTY CLERK OF COURT, http://www.greenvillecounty.org/Clerk_Of_Court/Jury_Duty/selection_process.asp [https://perma.cc/5L6E-S46W] (“Jurors are selected from a list made up of all registered voters, licensed drivers, and holders of state-issued photo I.D. cards.”); Jury Duty, POLK COUNTY CLERK OF COURTS, http://www.polkcountyclerk.net/jury-duty/ [https://perma.cc/B5XV-A5JC] (“Names are randomly selected from the list of names supplied by the Department of Highway Safety and Motor Vehicles.”).

\textsuperscript{63} KOVERA & CUTLER, supra note 48, at 14.

\textsuperscript{64} In criminal cases, issues with selection bias in regards to race and sex have created requirements that gender and race may not be the impetus for striking a juror. See Batson v. Kentucky, 476 U.S. 79, 87 (1986); Taylor v. Louisiana, 419 U.S. 522, 535–36 (1975).

\textsuperscript{65} KOVERA & CUTLER, supra note 48, at 13–14.

\textsuperscript{66} See supra note 62.

\textsuperscript{67} See KOVERA & CUTLER, supra note 48, at 6 (“They may use lists of voter registrants, driver’s license holders, taxpayers, utilities customers, and recipients of unemployment benefits . . . ”); supra note 62.
is made remain unknown. The secrecy factor makes it difficult for judges and parties to evaluate and monitor the actual methods of decision-making a jury uses in deliberation. Finally, the length and procedure of trial itself can cause wavering attention spans and perhaps even inattentiveness to all facts—a fallibility of human nature. In sum, juries are limited in their ability to preserve fairness because they lack technical knowledge, have an imperfect attention span, lack familiarity with legal standards, are somewhat viewpoint selected, and render verdicts in a secret decision making process.

As examined in Part IV below, when evaluated against this framework for jury fairness, the C8 Science Panel used in Bartlett is relatively effective at preserving fairness and may improve upon the jury process by compensating for some of the jury’s limitations in dealing with complex scientific questions.

IV. THE EFFICACY OF THE C8 SCIENCE PANEL AS SEEN THROUGH A NORMATIVE FRAMEWORK OF JURY “FAIRNESS”

A. Factors that Advance the C8 Science Panel’s Ability to Preserve Fairness

Evaluated within the normative framework described in Part III, the C8 Science Panel as used in Bartlett was generally able to preserve traditional jury fairness and improve upon some jury limitations when evaluating complex scientific questions. First, the selection of the C8 Science Panel replicated the traditional process for selecting a neutral, objective, and unbiased jury. The Panel was fairly chosen because the scientists were “mutually” agreed upon. This mutual agreement emulates voir dire where attorneys try to strike jurors most aligned with the other side. Further, the mutual agreement provision for

---

68 See Clark v. United States, 289 U.S. 1, 13 (1933) (Cardozo, J.) (“Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.”).


70 The many guides to attracting and keeping a juror’s attention illustrate this point. See, e.g., Trey Cox, Winning the Jury’s Attention 3–4 (2011). Additionally, one study of civil trials by the Federal Judicial Center found that the ability to understand evidence presented was decreased in a long trial as compared to a short trial. Joe S. Cecil et al., Federal Judicial Ctr., Jury Service in Lengthy Civil Trials 27–28 (1987), http://www.fjc.gov/public/pdf.nsf/lookup/jurylnth.pdf/$file/jurylnth.pdf [https://perma.cc/XAA2-8QES]. Further, when participants were asked “How often did you find your attention wandering during the presentation of the evidence?”, 40% of jurors in long trials responded “occasionally” compared to only 24% of jurors in short trials. Id. at 28.

71 Leach Settlement, supra note 13, § 12.2.1.

72 See supra Part II.
selecting the C8 Science Panel may help to combat the viewpoint selection issues of a jury because unlike voir dire the attorneys were required to agree—meaning the most neutral scientists likely comprised the panel. Additionally, unlike persons who comprise jury pools, the pool of scientists available was arguably limitless. Finally, the C8 Science Panel was paid for by the Leach Settlement independent of the results of the community health study. While the fact that DuPont paid for the C8 Science Panel in its entirety may seem to cut against the Panel’s “fairness”—because DuPont paid the Panel regardless of the Panel’s decision helps to combat any fear that DuPont was “buying” a favorable result.

In addition to the member selection process, there are some unique features of the C8 Science Panel that may advance fairness even more so than a traditional jury. Most obviously, during trial, the Panel simplified the Jury’s technical role by providing an undisputed fact that C8 is generally capable of causing kidney cancer. The Panel’s technical knowledge analyzed the causation element using accepted scientific methods that would otherwise have posed potentially impenetrable questions for a jury (or even a judge) to understand. In particular, the C8 Science Panel studied C8 and its effects on humans, over a period of years—as opposed to weeks. This subject-matter

---

73 See Leach Settlement, supra note 13, §12.2.1 (“Appropriate candidates for appointment to the Science Panel shall be recognized, independent, appropriately credentialed epidemiologists who have not testified as expert witnesses designated by the Settling Parties, and who have not been consulted by counsel for the Settling Parties prior to September 4, 2004, unless waived by mutual agreement of the Settling Parties.”).
74 See supra note 62.
75 So long as they met the minimum requirements of qualification as set by the Leach Settlement. See supra note 73.
76 See Leach Settlement, supra note 13, §12.2.1. The Leach Settlement required, regardless of result, that at least $20 million be spent on the C8 Science Panel and the Community Health Study. Id. § 9.1.
77 See supra note 76.
78 See supra Part II.
79 See Bruce J. Berger, The Trouble with PFOA: Testing, Regulation and Science Concerning Perfluorooctanoic Acid and Implications for Future Litigation, 76 DEF. COUNS. J. 460, 469 (2009) (discussing the difficulties of proving PFOA personal injury suits unless deleterious health effects in humans is directly linked to levels of PFOA in the environment); supra Part II.
81 In another adjudicative setting, the World Trade Organization (WTO), the WTO’s international dispute resolution body is able to effectuate quicker scientific “turn-around” than the C8 Science Panel in this case. The quick turn around is likely due to the fact that instead of a ground-up study, the WTO Panel relied, more like a court, on preliminary information provided by the parties. See generally Dale E. McNiel, The First Case Under the WTO’s Sanitary and Phytosanitary Agreement: The European Union’s Hormone Ban, 39 V.A. INT’L L. 89, 111–12 (1998). This accelerated timing is a consideration for actions that may require a quicker turn around. See generally id.
simplification combats a jury’s lack of technical knowledge—a crucial factor in advancing fairness in complex scientific litigation.\textsuperscript{82}

Additionally, the Panel’s determination of general causation shortened the time frame of trial, combating the imperfect attention spans of jurors.\textsuperscript{83} Mrs. Bartlett’s three-week trial\textsuperscript{84} would have lasted significantly longer if the crux of her suit, general causation, were still up for debate.\textsuperscript{85} The Panel’s ability to shorten the trial time frame advances fairness because it keeps a jury engaged as opposed to wavering in attention after weeks of trial.\textsuperscript{86}

The non-arbitrariness principle of a traditional jury is advanced because a science panel will create more consistent outcomes for litigants. Juries are not necessarily consistent when faced with similar facts, even with the consensus requirement.\textsuperscript{87} The scientific results reached by the Panel, however, ensure that general causation is determined consistently among litigants in the C8 personal injury litigation.\textsuperscript{88} This also provides objective fairness to Defendant DuPont because juries may be swayed in their view of science because of a particularly sympathetic plaintiff,\textsuperscript{89} whereas a science panel evaluates only the science.\textsuperscript{90}

Uniquely, unlike the “secrecy” of jury deliberations,\textsuperscript{91} the Panel’s process for determining causation was incredibly transparent. The information was

\textsuperscript{82} See supra Part III.
\textsuperscript{83} See supra note 70 and accompanying text.
\textsuperscript{84} Dye & Gray, supra note 45.
\textsuperscript{85} Furthermore, the use of the C8 Science Panel circumvented the complicated issues and limitations of class certification of toxic tort litigants. Berger, supra note 79, at 468.
\textsuperscript{86} See supra Part II and note 70.
\textsuperscript{87} See supra note 62.
\textsuperscript{88} There are 3500 individual suits stemming from the Leach Settlement. Multidistrict Litigation 2433: Introduction, U.S. DISTRICT CT. SOUTHERN DISTRICT OHIO, http://www.ohsd.uscourts.gov/MDLINTRO [https://perma.cc/8LH-KNNH]. While the Leach Settlement was a class action settlement, the C8 Personal Injury litigation consists of individual suits of persons formerly in the Leach Class. See supra Part II.
\textsuperscript{89} See Neal R. Feigenson, Sympathy and Legal Judgment: A Psychological Analysis, 65 TENN. L. REV. 1, 19–26 (1997) (discussing the extent and process of sympathetic decision making by juries). Courts do not allow attorneys to ask jurors to rely on sympathy by theoretically placing themselves in the plaintiff’s shoes. See, e.g., Marcoux v. Farm Serv. & Supplies, Inc., 290 F. Supp. 2d 457, 463 (S.D.N.Y. 2003) (“The well established ‘Golden Rule,’ also known as the ‘bag of gold’ rule, prohibits counsel from telling the jurors, either directly or by implication, that they should put themselves in plaintiff’s place and render such a verdict as they would wish to receive were they in plaintiff’s position.”) (alteration in original)).
\textsuperscript{90} The panel’s findings were able to provide objective fairness in West Virginia, considered a plaintiff friendly state with unique litigation choices, including a controversial “medical monitoring” tort. See Patrick J. Borchers, Punitive Damages, Forum Shopping, and the Conflict of Laws, 70 LA. L. REV. 529, 537 (2010) (“According to the 2007 Chamber of Commerce study, the five ‘worst’—i.e., presumably most plaintiff-friendly—states are West Virginia, Mississippi, Louisiana, Alabama, and Illinois.”); Adam P. Joffe, The Medical Monitoring Remedy: Ongoing Controversy and a Proposed Solution, 84 CHI.-KENT L. REV. 663, 674 (2009).
\textsuperscript{91} See supra Part III.
made publicly available on a special “C8 Science Panel” website.” 92 This transparency enforces the “community standards” of scientific accuracy and even more importantly ensures the non-arbitrariness principle.

Overall, the C8 Science Panel is able to better preserve fairness in evaluating technical science, combating human attention spans, creating a consistent result among litigants, and providing a transparent decision making process. Additionally, the C8 Science Panel is at least as good, if not better, than a traditional jury in preserving an objective, neutral, and detached arbiter.

B. Limitations of the C8 Science Panel’s Ability to Preserve Fairness

The C8 Science Panel’s ability to preserve fairness is limited in a few ways. First, the novel nature of the Panel’s findings could be criticized for lacking the type of scientific peer review that typically accompanies scientific research. 93 Therefore, the formulation of results is not necessarily reflective of accepted scientific community standards. 94 Similarly, there is a risk that current limitations in scientific methodology limit the efficacy of the Panel in its ability to render a scientific decision regarding any particular disease. While hard science may sometimes be inconclusive, a jury reflects a more malleable community standard of reasonability—thus juries may be able to make inferential leaps where a properly grounded science panel cannot. 95 This limitation in inference, however, is balanced by the non-arbitrariness principle discussed above. 96 A scientific determination—which arguably should have only one correct answer 97—that is consistent for purposes of large scale scientific litigation is more reflective of the “consensus” a jury must reach. Any inferential step a jury may make is likely not worth the loss of credibility the judicial system would suffer as a result of inconsistent causation outcomes.

Additionally, the C8 Science Panel does not improve upon a traditional jury’s unfamiliarity with substantive law. 98 Scientists, while highly educated,

92 The Science Panel Website Home, supra note 10. Piggybacking from transparency, the panel’s findings could be transferred to governmental agencies, like the EPA. This helps expand the marketplace of knowledge for regulation of companies and preservation and cleanup of environments.

93 Berger, supra note 79, at 465–66.

94 See id.; supra Part III (discussing that community standards ensure fairness).

95 Hall et al., supra note 43, at 4–7.

96 See supra Part III.

97 For example, general causation is theoretically always the same regarding consumption of C8 and kidney cancer, but, without independent evaluation of this face a two separate juries may not find general causation in two C8 personal injury cases regarding kidney cancer. See supra note 62.

98 Additionally, there is an issue with charging a science panel to come to a legal conclusion where the legal standard for causation (or another element) may not be consistent among states. See MDL ECF No. 3972, supra note 35, at 14–15. For example, in Bartlett, Defendant attempted to attack the binding nature of the C8 Science Panel findings because
cannot be said to be generally familiar with legal standards of adjudication. This unfamiliarity, however, may not be a bad attribute. While a jury is limited by its lack of legal knowledge, that may be by design. A wealth of legal knowledge may limit the ability of a jury to listen to the facts before it and render an objective verdict. Similarly, a science panel that is well versed in legal standards of causation may not be able to put that out of their minds while assessing the scientific evidence before it.\footnote{99}{See supra Part III. There is always the chance that a legally educated science panel would research and conclude results with legal, as opposed to scientific, standards in mind. See supra Part III.}

Another possible limitation of the C8 Science Panel is the lack of appellate redress. Whether the “No Probable Link” plaintiffs were given sufficient process is indeterminate. By terms of the Leach Settlement, those litigants with “No Probable Link” diseases are forever barred from suit.\footnote{100}{See supra note 19.} While, taking the decision away from the jury is certainly more efficient for parties to the actual lawsuit, for the “No Probable Link” plaintiffs, there is no appellate structure for redress.\footnote{101}{See supra note 19.} While DuPont reserved the right to contest specific causation and damages, there is no ability preserved by the parties to appeal the C8 Science Panel’s factual findings regarding general causation.\footnote{102}{See supra note 19.} The C8 Science Panel only found six out of many illnesses studied to have a probable link to C8 exposure.\footnote{103}{See supra note 32. See generally C8 Study Publications, supra note 44 (listing numerous links to human disease studies and the design of the C8 community health study).} The inability of the “No Probable Link” plaintiffs to appeal the C8 Science Panel findings is a serious limitation of the C8 Science Panel’s ability to advance fairness in adjudication. Importantly, though, the class of plaintiffs agreed to this result—plaintiffs knew that if the C8 Science Panel did not find a “Probable Link” there would be no ability to file suit.

Therefore a jury is limited by its potential lack of accepted community standards in achieving scientific results, possible limitations in the current ability of science determine a result, the Panel’s unfamiliarity with legal standards, and lack of appellate redress for certain plaintiffs.

C. Summary: Determining What Is Most “Fair” for Complex Scientific Litigation

Ultimately, what is most “fair” in determining causation for complex scientific litigation remains to be seen. The C8 Science Panel in Bartlett, though, is a good example of preserving traditional jury fairness.\footnote{104}{See supra Part IV.A.} Within the normative framework,\footnote{105}{See supra Part III.} the most significant limitation of the C8 Science Panel
is the lack of appellate redress for “No Probable Link” plaintiffs. This bar on appealing the Panel’s factual findings, however, may be worth the many positive and unique fairness advantages the C8 Science Panel achieved. Unlike a jury, the Panel was able to use scientific expertise to parse through the impenetrable science involved in the C8 litigation and deliver an objective, neutral, and non-arbitrary result to an entire class of personal injury plaintiffs.

V. THE FUTURE OF COMPLEX SCIENTIFIC ADJUDICATION & POLICY
PERSPECTIVES IN PRESERVING “FAIRNESS” IN LITIGATION

The courtroom is no stranger to complicated toxic tort litigation.106 By its nature, however, a jury does not have sophisticated scientific knowledge, which in complicated scientific litigation threatens a jury’s normative role in preserving fairness. In Bartlett, the C8 Science Panel’s general causation findings allowed the jury to get past the complex science and decide the factual questions that ascribed legal responsibility to DuPont. Moving beyond Bartlett, though, it is important to also consider whether use of a science panel properly preserves due process.

The “fairness” embodied by a jury itself reflects due process107, therefore it is important to consider the theoretical issues with to taking a necessary element of a given claim—here, general causation—away from the jury. The constitutional right to due process has been interpreted by the Supreme Court to protect the right to an impartial jury in criminal and civil cases.108 What it means to have an impartial jury, however, is not so easily defined. There are plenty of avenues where legal questions are decided that do not involve a jury.109 For instance, it is established practice for parties to segment litigation,110 or stipulate to a variety of facts before trial.111 Many trials are only on damages after parties have stipulated to generally liability.112 Further, when it comes to complex

107 See supra Part II.
108 KASPER, supra note 48, at 6. In the Leach Settlement, parties waived a right to a jury trial on the issue of general causation by agreeing to a bar on suits regarding “No Probable Link” plaintiffs as well as an agreement by Defendant DuPont not to “contest the issue of General Causation.” Leach Settlement, supra note 13, § 3.3; Bartlett Complaint, supra note 5, at paras. 142–43.
109 WOODLEY, supra note 57, at 77–79; see also Alternative Dispute Resolution, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining alternative dispute resolution as “[a]ny procedure for settling a dispute by means other than litigation, as by arbitration or mediation”).
110 See Derek A. Shoemake, Bifurcation: A Powerful but Underutilized Tool in South Carolina Civil Litigation, 59 S.C. L. REV. 433 (2008); ELI’s Gulf Team, supra note 2 (discussing the segmented Deepwater Horizon litigation).
112 See id.
scientific questions, a jury may even be more impartial where excessively complicated scientific questions are decided by those with technical training and traditional legal issues remain with the jury.\textsuperscript{113}

Moving beyond due process concerns with taking legal questions away from a jury, there is a question of whether it is appropriate—as a matter of public policy—to contract around a jury decision. Here, DuPont arguably traded its “burden” of defending the general causation element for each C8 lawsuit in exchange for defending fewer lawsuits.\textsuperscript{114} Here, one of the biggest hurdles in toxic tort litigation—general causation—was already decided in favor of any “Probable Link” plaintiff.\textsuperscript{115} The C8 Science Panel’s findings, in effect, created an irrebuttable presumption of causation in favor of any defendant who suffered from one of the six “Probable Link” diseases.\textsuperscript{116} Those plaintiffs have a reduced litigation burden by virtue of having general causation pre-determined, but as the Leach Settlement mandates Plaintiffs whose disease did not have a probable link are forever barred from suit against DuPont.\textsuperscript{117} Thus, DuPont is certain that it will only have to defend suits regarding those six “Probable Link” diseases and no more. In a sense of fairness and policy, this factor is unclear. But, it is certainly a method of adjudication worth considering for Defendants. At a minimum, DuPont may plan its litigation strategy more concretely and “Probable Link” plaintiffs may file suit knowing they have a higher likelihood of success.\textsuperscript{118}

Despite any theoretical or policy issues with segmenting toxic tort litigation, the C8 Science Panel in Bartlett, was able to replicate traditional fairness-preserving attributes normally employed by a jury. In order to improve upon the Bartlett C8 Science Panel, future panels of this sort may consider a method of “scientific review” in order to combat any fairness issues with the C8 Science Panel’s lack of appellate review.

Litigation over the consequences of chemical risks is not going to abate. Global chemical production is predicted to grow and keep growing.\textsuperscript{119} Use of alternative methods of adjudicating scientific questions is one way to manage this trend and retain the fairness of traditional jury resolution. The C8 Science Panel is one such method of alternative adjudication litigants should consider.

\textsuperscript{113}See supra Part IV.
\textsuperscript{114}See supra Part II.
\textsuperscript{115}See Ellis, supra note 106, at 4; supra Part II.
\textsuperscript{116}See Leach Settlement, supra note 13, § 3.3; supra Part II.
\textsuperscript{117}Leach Settlement, supra note 13, §§ 3.2–3.
\textsuperscript{118}Id. § 4.1 (“Defendant states that it is entering into this Settlement to avoid the time, expense and distraction of embroilment in the current Lawsuit and potential future litigation and disputes relating to present, past or future C-8 exposure claimed to be attributable to the operations of Washington Works.”).
SIXTH CIRCUIT REVIEW

The Sixth Circuit Forges a Path for Equal Protection Challenges to Ohio’s Judicial Campaign Finance Regulations

BEN F.C. WALLACE*

Commenting on O’Toole v. O’Connor, 802 F.3d 783 (6th Cir. 2015).

TABLE OF CONTENTS

I. INTRODUCTION ..........................................................41
II. EQUAL PROTECTION: INCUMBENTS AND CHALLENGERS..............42
III. CHALLENGING RULE 4.4: THE OUTSIDER AND THE LADDER
    A. The Outsider ..........................................................44
    B. The Ladder Climber .................................................45
    C. Evaluating the Challengers .........................................45
IV. CONCLUSION ..................................................................46

I. INTRODUCTION

The Supreme Court’s decision in Williams-Yulee v. Florida Bar rests on an intuitive, yet increasingly contested principle in our money-saturated electoral landscape: “Judges are not politicians . . . .”1 The Court held that state restrictions on direct solicitation of contributions by judicial candidates do not violate the First Amendment because they are narrowly tailored to states’ compelling interest in maintaining the integrity of their judiciary.2 The decision appears to, for the time being, mitigate the inconsistencies between the High Court’s campaign finance decisions, most notably Citizens United v. FEC3 and McCutcheon v. FEC,4 and states’ interests in an unbiased and minimally politicized judiciary.

*J.D. Candidate 2016, The Ohio State University Moritz College of Law. The author wishes to thank Professor Daniel P. Tokaji for invaluable advice and feedback.
2 Id.
3 Citizens United v. FEC, 558 U.S. 310 (2010) (holding that the First Amendment prohibits the government from placing restrictions on corporate independent campaign expenditures).
4 McCutcheon v. FEC, 134 S. Ct. 1434 (2014) (holding unconstitutional limits on aggregate campaign contributions as impermissible restrictions on the First Amendment right to participate in democracy through political contributions).
The Sixth Circuit is the first appeals court to directly apply the *Williams-Yulee* standard. In *O’Toole v. O’Connor*, a unanimous panel rejected a facial challenge under the First Amendment and Equal Protection Clause to Rule 4.4(E) of Ohio’s Code of Judicial Conduct, which prohibits judicial candidates from soliciting contributions more than ten months in advance of the election in most years and more than twelve months before the election during presidential election years. The court relied almost exclusively on *Williams-Yulee* in resolving the First Amendment claim and holding that Ohio’s interest in maintaining the integrity of its judiciary was a compelling interest and that the restriction was sufficiently tailored to this interest.

In contrast to this straightforward application of the *Williams-Yulee* standard, the court’s resolution of the *O’Toole* plaintiff’s Equal Protection claim raises as many questions as it answers. Part II of this Comment analyzes the plaintiff’s Equal Protection argument and the Sixth Circuit’s ruling on that claim in *O’Toole*. Based on that ruling, I argue that this may provide an early signal of problems to come in judicial campaign finance regulation in the wake of *Williams-Yulee*. Finally, in Part III of this Comment, I identify and analyze certain classes of plaintiffs that may bring cognizable Equal Protection challenges to Ohio’s judicial campaign finance restrictions under the *O’Toole* ruling.

II. EQUAL PROTECTION: INCUMBENTS AND CHALLENGERS

The plaintiff, Colleen O’Toole, holds a seat on Ohio’s intermediate court of appeals and is seeking nomination for election to the Ohio Supreme Court. She claimed that Rule 4.4(E) violated the Equal Protection Clause by discriminating in favor of candidates with significant retained funds, who may spend this money in support of their campaigns during the same period their challengers are prohibited from soliciting contributions.

O’Toole argued that prohibiting fundraising results in a disparity of funds that, in the context of an election, results in a disparity of speech. Each of the identified Supreme Court candidates is a sitting judge who had previously run for election and retained funds in their campaign accounts. The plaintiff held $93 in her account, while the three other announced candidates held funds

---

5 *O’Toole v. O’Connor*, 802 F.3d 783, 789 (6th Cir. 2015).
7 *O’Toole*, 802 F.3d at 789–91.
8 *Id.* at 791.
9 Principal Brief of Appellant Friends to Elect Colleen M. O’Toole at 48, *O’Toole*, 802 F.3d 783 (No. 15-3614).
10 *Id.* at 3, 6 (identifying Maureen O’Connor, the current Chief Justice on the Ohio Supreme Court, Patrick DeWine, a judge on Ohio’s First District Court of Appeals, and Patrick Fischer, also a judge on Ohio’s First District Court of Appeals).
ranging into five and six figures. O’Toole argued that she was effectively muted until she was permitted to raise more money, while her opponents were free to spend (and therefore speak) voluminously. The Sixth Circuit rejected this David and Goliath portrayal. The disparity in speech, the court found, was “not from any lack of equality in the rule itself,” but simply from difference in the amounts that previous campaigns had raised and spent. Since it was O’Toole’s own shortcomings in fundraising or frugality that was the true “cause of the disparity,” her Equal Protection argument failed. The court apparently did not believe that O’Toole had demonstrated that Rule 4.4(E) created two classes of candidates.

However, the Sixth Circuit panel, speaking through Judge Clay, indicated how a future plaintiff could demonstrate that Rule 4.4(E) discriminates against certain classes of candidates. In dicta, the court noted that the fundraising restriction “may have a differential effect on [some] candidates.” The court identified plaintiffs “who have not previously sought judicial office” as potentially being disfavored under Rule 4.4(E), since those candidates “could not have retained any funds in a prior election cycle to spend in a subsequent cycle.” And the court did not stop there. In dismissing O’Toole’s Equal Protection claim, the court noted that she had not properly delineated between a favored class of candidates and those disfavored by Rule 4.4(E). Essentially, O’Toole had only demonstrated that she had limited money, not that Rule 4.4(E) was discriminatory. The court’s discussion of Rule 4.4(I)(1), which reaches beyond what was necessary for the court to resolve the issue before it, indicates that the court sensed an Equal Protection issue lurking within Canon 4 (or Rule 4.4) but that O’Toole had failed to properly frame the argument. The court’s dicta on this point conspicuously leaves the door open for future plaintiffs to bring a successful Equal Protection challenge to Rule 4.4.

The court seems to reject O’Toole’s Equal Protection challenge because she had not properly delineated between a favored class of candidates and those disfavored by Rule 4.4(E). Essentially, O’Toole had only demonstrated that she had limited money, not that Rule 4.4(E) was discriminatory. The court’s discussion of Rule 4.4(I)(1), which reaches beyond what was necessary for the court to resolve the issue before it, indicates that the court sensed an Equal Protection issue lurking within Canon 4 (or Rule 4.4) but that O’Toole had failed to properly frame the argument. The court’s dicta on this point conspicuously leaves the door open for future plaintiffs to bring a successful Equal Protection challenge to Rule 4.4.

The court’s discussion of O’Toole’s Equal Protection claim is brief, but it provides a sufficient window for future litigants to challenge Ohio’s judicial campaign finance rules. While the Williams-Yulee decision seems to present a solid obstacle to First Amendment challenges to these laws, O’Toole may provide an avenue for litigants to challenge these restrictions on Equal

11 Id. at 6 (stating that the identified candidates reported that, as of December 31, 2014, their campaign committees held between $21,674.37 and $245,493.50).
12 Id. at 49.
13 O’Toole, 802 F.3d at 791.
14 Id.
15 Id.
16 Id.
17 Id. at 791 n.1.
Protection grounds. Some potential classes of litigants who might bring such challenges are discussed in the next section.

III. CHALLENGING RULE 4.4: THE OUTSIDER AND THE LADDER CLIMBER

The language discussed in the previous section may serve as a stepping-stone for further challenges to Ohio’s system of regulating judicial campaign finances by way of the Equal Protection Clause. The challenges outlined in this Comment may hold special appeal to legal critics of campaign finance regulation, as they reinforce the notion that such regulations have the effect, possibly even the design, of protecting incumbents.\textsuperscript{19} Two classes of potential plaintiffs are profiled below.

A. The Outsider

The ideal Outsider has never before sought judicial office. The Outsider, however, is not a true outsider: she is a successful attorney with a large firm who maintains a stellar professional reputation and is well-qualified for the Ohio bench. Standing in her way is Judge Incumbent. He has held a seat on the court of common pleas for decades, and has rarely faced a serious challenge due to his exceptional fundraising ability.

The odds are against the Outsider in her challenge against Judge Incumbent. He has retained significant funds from previous races. Meanwhile, the Outsider is hobbled in her effort to begin laying the groundwork of her campaign. Because the race takes place during a presidential election year, Rule 4.4(E) prohibits her from raising funds until January.\textsuperscript{20} She is forced to maintain her practice full time until she is able to raise enough funds to support her candidacy.

In her as-applied challenge to Rule 4.4(E), the Outsider will argue that the fundraising restriction creates two classes of candidates: incumbents and challengers. She will seek to demonstrate that the restriction on fundraising operates as a restriction on speech for challengers, while permitting incumbent judges to speak through their retained funds. She will argue that Ohio has no


\textsuperscript{20} \textit{OHIO CODE OF JUDICIAL CONDUCT} r. 4.4(E).
legitimate interest in preventing the speech of nonjudge candidates while simultaneously allowing sitting judges to speak.

B. The Ladder Climber

The Ladder Climber has served two terms on the Ohio Court of Appeals and now is seeking a seat on the Supreme Court. Although he has been a prodigious fundraiser, he has only retained a modest amount because he serves in an expensive media market and Rule 4.4(I) has prevented him from raising more than $1,200 from any individual, $3,600 from any organization, and $72,700 from his political party.\(^{21}\)

The Ladder Climber is challenging a two-term incumbent on the Supreme Court. The incumbent has served previously as a state senator and has always been a stellar fundraiser. She has retained a staggering amount of money because, as a previous Supreme Court candidate, Rule 4.4(I) has allowed her to receive contributions of up to $3,600 from individuals, $6,700 from organizations, and $363,000 from her party in previous cycles.\(^{22}\) Rule 4.4(E) prevents the Ladder Climber from raising funds before November in the year prior to the election,\(^{23}\) meaning he will almost certainly be disadvantaged in campaign expenditures. Meanwhile, the incumbent justice began using her retained funds a year before the general election to travel around the state and meet with potential supporters.

The Ladder Climber’s Equal Protection challenge will focus on the cumulative effect of subsections (E) and (I) of Rule 4.4. He will argue that these provisions operate to discriminate against nonincumbents and function to protect sitting Supreme Court justices. The Ladder Climber will need to make a factual demonstration that subsection (E) prevents him from mounting an effective campaign by prohibiting him from raising the necessary funds.

C. Evaluating the Challengers

Both challengers will seek to characterize the rules as unfair and discriminatory, and as functioning to protect incumbents, but the two claims will have some analytical distinctions. The Outsider can claim that she is being silenced because she is prohibited from raising contributions, but the Ladder Climber can make no such claim because he is permitted to spend his retained funds from previous elections. The Ladder Climber will also have to overcome the heightened state interest in restricting the fundraising activities of sitting

\(^{21}\) Id. at r. 4.4(I).
\(^{22}\) Id.
\(^{23}\) Id. at r. 4.4(E).
judges. The state has a reduced interest in restricting the fundraising of nonjudges who are seeking judicial office.24

These distinctions give the Outsider the more compelling claim. She is being entirely silenced, and regulating the speech of a person who is not a sitting judge is, arguably, not narrowly tailored to the state’s interest in preserving judicial integrity. To increase his chances of success, the Ladder Climber should attempt to make a factual demonstration that the fundraising restriction severely burdens his ability to effectively make his case to the voters.

IV. CONCLUSION

Chief Justice Roberts’ maxim that “[j]udges are not politicians”25 remains aspirational. As political dysfunction and policy stagnation continues to be the rule and not the exception in Washington, states will continue to be the primary arena for important policy decisions on labor, reproductive rights, and education. It is only natural that state courts, as the ultimate arbiters and interpreters of these laws, will receive increasing political pressure and political spending. The Sixth Circuit’s decision in O’Toole is likely to inspire future candidates to challenge restrictions on judicial fundraising.26 Whether that litigation will weaken the fragile peace ushered in by Williams-Yulee remains to be seen.

24See Wolfson v. Concannon, 750 F.3d 1145, 1157–58 (9th Cir. 2014) (holding that a state law restricting judicial candidates from personally soliciting campaign funds was not narrowly tailored as applied to judicial candidates who were not sitting judges).
26In addition to Ohio, other states within the Sixth Circuit similarly restrict judicial campaign contributions monetarily and temporally. See KY. CODE OF JUDICIAL CONDUCT Canon 5(B)(2) (2005); MICH. CODE OF JUDICIAL CONDUCT Canon 7(B)(2)(d) (2013); TENN. CODE OF JUD. CONDUCT r. 4.4(B) (2012).
CHEVRON DEERENCE OR THE RULE OF LENITY?
DUAL-USE STATUTES AND JUDGE SUTTON’S LONELY LAMENT

PATRICK J. GLEN* & KATE E. STILLMAN†

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

TABLE OF CONTENTS

I. INTRODUCTION ......................................................................................129
II. HOW TO CONSTRUE AMBIGUITY IN THE PHRASE “SEXUAL ABUSE OF A MINOR”: ESQUIVEL-QUINTANA V. LYNCH ...........................................131
III. DEERENCE VERSUS LENITY, OR DEERENCE THEN LENITY? …..133
   A. Disentangling What Is at Issue .........................................................134
   B. The Last-Resort Role of Lenity .........................................................135
   C. Lenity As Adjunct to Deference ......................................................137
IV. PRACTICAL CONSIDERATIONS AGAINST FORECLOSING
   DEERENCE ...........................................................................................140
   A. Disproportionate Curtailment of Board Authority to Interpret
      the INA .............................................................................................140
   B. Prosecutorial Discretion in Cases of Potential
      Ambiguity ..........................................................................................142
V. CONCLUSION .........................................................................................142

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

---

* Senior Litigation Counsel, Office of Immigration Litigation, Civil Division, United
States Department of Justice.
† J.D., Harvard Law School (2016); B.A., Bates College. Ms. Stillman was an intern
in the Office of Immigration Litigation from May 2014 through August 2014. The views
and opinions expressed in this Case Comment are the authors’ own, and do not represent
those of the Department of Justice or the United States Government.
1 See, 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. 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. 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.

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. 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.

---

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)).


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)).


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. 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. 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.”

---

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.”

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. 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.” The Board based its interpretation on a need to balance effectuating Congressional intent to remove those who sexually abuse minors with the need not to punish consensual sexual conduct between older peers. 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.

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. 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.

---

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)).


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.\textsuperscript{17} Moreover, interpretation of the INA was not otherwise an “extraordinary” case that would mandate ignoring the applicability of \textit{Chevron} deference.\textsuperscript{18}

Judge Jeffrey Sutton dissented from this holding and would have applied the rule of lenity to resolve the statutory ambiguity, not \textit{Chevron} deference.\textsuperscript{19} He concurred with the conclusion that the relevant statutory phrase, “sexual abuse of a minor,” is ambiguous.\textsuperscript{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.\textsuperscript{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.\textsuperscript{22} He also disagreed with the panel majority’s reliance on \textit{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 \textit{Chevron} retains its full force when confronting agency interpretations of dual-use statutes.\textsuperscript{23} Finally, Judge Sutton believed that a categorical exception to \textit{Chevron} deference for dual-use statutes fit comfortably with other areas where the Supreme Court had crafted exceptions to the application of deference.\textsuperscript{24}

\textbf{III. \textit{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

\textsuperscript{17} \textit{Id.} at 1024 (citing Babbitt v. Sweet Home Chapter of Cntys. for a Great Or., 515 U.S. 687, 703–04 (1995)).
\textsuperscript{18} \textit{Id.} at 1024 (quoting King v. Burwell, 135 S. Ct. 2480, 2488 (2015)).
\textsuperscript{19} \textit{Id.} at 1029–30 (Sutton, J., concurring in part and dissenting in part).
\textsuperscript{20} \textit{Id.} at 1027–28.
\textsuperscript{21} \textit{Esquivel-Quintana}, 810 F.3d at 1030–31 (Sutton, J., concurring in part and dissenting in part).
\textsuperscript{22} \textit{Id.} at 1031 (citing, inter alia, Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004)).
\textsuperscript{23} \textit{Id.} at 1030–31.
\textsuperscript{24} \textit{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.
prison sentence of “not more than four years.” 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).

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.” The general statutory sentence for a violation of this provision is “not more than 2 years.” 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, 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. Finally, § 1327 relates to “[a]iding or assisting certain aliens to enter.” 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.”

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.” Whatever the historical reach of the rule, 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).
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. 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.”

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. 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.” 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.” 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

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)).

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). 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.”

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.”

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,” must be accorded “controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.” 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. Importantly, the Supreme Court

---

45 *Id.* at 703.
46 *Id.* at 704 n.18.
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.”\textsuperscript{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. \textit{Sweet Home, O’Hagan,} and \textit{Kasten} all, to an extent, assume the answer for purposes of deciding the case at hand.\textsuperscript{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 \textit{Leocal v. Ashcroft} in support of his application of lenity,\textsuperscript{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.\textsuperscript{53} This circumstance is different from the purely civil statute at issue in \textit{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.\textsuperscript{54} Judge Sutton also cited Justice Scalia’s statement respecting the denial of certiorari in \textit{Whitman v. United States,} joined by Justice Thomas,\textsuperscript{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.\textsuperscript{56} Second, no contrary Supreme Court precedent is cited in \textit{Whitman} for the proposition advanced by Justice Scalia, with reliance being placed solely on cases such as \textit{Leocal,} which are distinguishable given the wholly criminal nature of the statute at issue.\textsuperscript{57} Finally, Justice Scalia’s opinion did no more than echo his prior dissent in \textit{O’Hagan,} where he had earlier alleged a

\textsuperscript{50} Id.
at 16.
\textsuperscript{51} See supra notes 44–50 and accompanying text.
\textsuperscript{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.).
\textsuperscript{53} See Leocal, 543 U.S. at 11 n.8.
\textsuperscript{54} See supra notes 3–5, 25 and accompanying text.
\textsuperscript{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.)).
\textsuperscript{56} See Whitman, 135 S. Ct. at 353 (Scalia, J., statement respecting the denial of certiorari) (collecting cases).
\textsuperscript{57} See id. at 353–54.
violation of principles of lenity in the application of deference to the SEC’s construction of criminal prohibitions.\textsuperscript{58} The Supreme Court did not adopt his views in that case, and their subsequent expression in \textit{Whitman}, in the context of a denial by the full court to grant plenary review to consider the question,\textsuperscript{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.\textsuperscript{60}

On a fair assessment of the current state of the law, far from being a “view... increasing in prominence,”\textsuperscript{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,\textsuperscript{62} while Judge Sutton cites Justice Scalia.\textsuperscript{63} There is no doubting either of their intellects, but there is also no doubt that at present their view has not been


\textsuperscript{59} See generally \textit{Whitman}, 135 S. Ct. 352.

\textsuperscript{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 \textit{Caron} v. United States, 524 U.S. 308, 314–15 (1998)) (explaining that in \textit{Caron}, the Court rejected “a narrow construction that [was] grammatically possible but ‘contrary to a likely, and rational, congressional policy’” (quoting \textit{Caron}, 524 U.S. at 315)).

\textsuperscript{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.).

\textsuperscript{62} See \textit{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)).

\textsuperscript{63} See \textit{Esquivel-Quintana}, 810 F.3d at 1031 (Sutton, J., concurring in part and dissenting in part) (citing \textit{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. 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. 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. Finally, no deference would extend to any interpretation of the purely civil aggravated felony provision, § 1101(a)(43), given the inclusion of those grounds as a basis for sentence enhancement under the

---

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).


\(^{70}\) Id. at W1 fig.34.

\(^{71}\) Id. at Q1 fig.27.

\(^{72}\) Id. at W3 fig.35.


\(^{75}\) 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. 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.” 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.”

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

---

79 Id. (quoting 8 U.S.C. § 1251(a)(4) (1970)).
rather than later.\textsuperscript{80} Or perhaps not. It has, in point of fact, largely managed to avoid doing so in the three decades since \textit{Chevron}, despite numerous cases where the issue would have been ripe for decision.\textsuperscript{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, \textit{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.

\textsuperscript{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.).
\textsuperscript{81} See supra Part III.C.
SIXTH CIRCUIT REVIEW

“Sticker Shock”: Driving Around Chevron and the Rule of Lenity in Immigration Removal

BRYAN B. BECKER*

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

TABLE OF CONTENTS

I. INTRODUCTION ...........................................................................................................73
II. ESQUIVEL-QUINTANA AT THE AGENCY AND THE COURTS ..........................75
   A. Board of Immigration Appeal ..............................................................................75
   B. The Sixth Circuit and the Chevron Doctrine ......................................................76
   C. A Tale of Two Footnotes .......................................................................................77
III. DISSENTING ARGUMENTS ....................................................................................78
IV. OTHER CIRCUITS, OTHER REASONING .........................................................80
V. THE PATH(S) AHEAD ...............................................................................................81
VI. CONCLUSION ...........................................................................................................82

I. INTRODUCTION

In Esquivel-Quintana v. Lynch, the Sixth Circuit upheld the removal of a resident based on a violation of a vague immigration statute.\(^1\) The Sixth Circuit’s decision does not give a definition to the statute, however, but brings into question statutory construction as the court based its decision on Chevron deference.\(^2\) Both the majority and spirited dissent by Judge Sutton express a doctrinal argument over the proper relationship between the rule of lenity and Chevron deference when a statute has criminal and civil liability. In this case, Juan Esquivel-Quintana, a permanent resident, violated a California statute for “unlawful sexual intercourse with a minor.”\(^3\) For that violation, the Board of Immigration Appeals (BIA) found him removable from the United States under federal law.\(^4\) This decision, when appealed to the Sixth Circuit, led to the entanglement of two important values—between reading laws with

\(^*\) J.D. Candidate 2016, The Ohio State University Moritz College of Law. The author would like to thank his family and friends for their years of support, and the staff of the Ohio State Law Journal for their indispensable commentary and advice.

\(^1\) Esquivel-Quintana v. Lynch, 810 F.3d 1019 (6th Cir. 2016).

\(^2\) Id. at 1021.

\(^3\) Id.

\(^4\) Id.
criminal ramifications strictly, and deferring to agencies entitled to enforce the law.

The rule of lenity, which requires ambiguous criminal statutes to be read in favor of the accused, has a rich history in the United States, but also a difficult one as courts have wrestled with the proper scope of the doctrine.\(^5\) *Chevron* deference, while lacking the older rule’s pedigree, makes up for it by being one of the most cited opinions ever, with a vast quantity of judicial and academic commentary.\(^6\) The distinct values each hold necessarily creates pressure when they are brought into dispute.\(^7\)

The decision in *Esquivel-Quintana* aggravates a Circuit split not only in what “sexual abuse of a minor” means for the purposes of 8 U.S.C. § 1227, but also over the proper level of deference given to the BIA interpretation of statutes.\(^8\) Past the practical problem of whether Esquivel-Quintana violated § 1227 and the doctrinal problem of deciding between the rule of lenity and *Chevron* deference, it raises the theoretical dilemma of how a lower court receives direction from the Supreme Court in interpreting statutes. The majority in *Esquivel-Quintana* found it difficult to derive a standard from the secondhand manner in which the Supreme Court has used *Chevron* deference in decisions involving statutes with both criminal and civil applications.\(^9\) Even with this difficulty, however, the court was still willing to give a strong reading from its understanding of the precedent. The conflict between these two rules has already been noted by academic commentators in immigration law and other fields.\(^10\) The murky nature of *Chevron*’s relationship with the

---


7 Cf. Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 61 (2006) (“*Chevron* deference respects a valid delegation of authority by Congress and empowers agencies to achieve their policy goals more easily. The rule of lenity, however, protects core constitutional rights—the due process requirement of fair warning and the primacy of Congress in defining criminal behavior.”).

8 This circuit split has appeared in other BIA readings of criminal statutes. See David A. Luigs, Note, *The Single-Scheme Exception to Criminal Deportations and the Case for Chevron’s Step Two*, 93 MICH. L. REV. 1105, 1108 (1995).


rule of lenity, however, is not limited just to immigration. Agencies often interpret civil statutes with criminal ramifications that would require courts to ask whether to defer or apply the rule of lenity. Unfortunately, the level of abstraction the majority and dissent reaches in Esquivel-Quintana, treating the conflict as a purely doctrinal question, made it more difficult to solve as there is no good comprehensive rule on when lenity should overrule Chevron. Instead of giving a simple reading of the statute, the Supreme Court could use this or a similar case to give lower courts direction on the use of Chevron deference when the agency goes against the traditional tools of statutory construction.

This Case Comment will show how a simple statutory construction problem created a myriad of solutions. Part II will describe how the case arrived at the Sixth Circuit and how the majority handled it in a doctrinal manner that opens up this debate. Part III will look at the passionate dissent by Judge Sutton challenging the underlying values found in the opinion and how his argument relates to the current academic commentary on the subject. Part IV will look at how other circuits have dealt with this specific issue, showing the divergent ways courts could decide cases where an agency interprets a statute with criminal and civil elements and how distinct the court’s reasoning in Esquivel-Quintana appears compared to its peers. Part V will explain how this multitude of options makes it difficult to predict how a future Supreme Court would handle all the issues raised in the case—such as how to interpret § 1227 and § 1101—using the level of deference given to the BIA in interpreting those statutes, and whether the rule of lenity applies to situations where a statute has both criminal and civil outcomes.

II. ESQUIVEL-QUINTANA AT THE AGENCY AND THE COURTS

The path taken by the BIA and the Sixth Circuit’s review of that order shows different approaches. The agency interprets the statute on the basis of the Board’s precedent. The majority, instead of parroting the Board or de novo reviewing the statute, sees itself constrained by the Chevron doctrine.

A. Board of Immigration Appeal

Juan Esquivel-Quintana was arrested and convicted of violating section 261.5(c) of the California Penal Code in 2009 for having sexual relations with a minor who is more than three years younger than the perpetrator. Esquivel-Quintana was sentenced to six years in prison and was then deported to Mexico.

11 Greenfield, supra note 7, at 5 (pointing out the dilemma can be found in EPA, OSHA, SEC, BOP, and NLRB cases).
12 Greenfield, supra note at 7, at 61 (“It is important, therefore, to approach the problem not simply as an abstract debate over methods of statutory interpretation, but as a conflict between two policies that serve distinct sets of values.”).
13 “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 . . . .” CAL. PENAL CODE § 261.5(c) (West 2014).
with a girl at least 3 years younger than himself. In 2013, after he moved to Michigan, an Immigration Judge held that this conviction made Esquivel-Quintana removable because it constituted an “aggravated felony,” which, under federal law, is cause for civil deportation. The statute’s definition section for “aggravated felony” includes the dispositive phrase “sexual abuse of a minor” without further explanation.

Lacking a statutory definition of “sexual abuse of a minor,” the Board turned to its own precedent. In an earlier decision, In re Rodriguez-Rodriguez, the BIA concluded that it did not necessarily need to give a definite meaning to “sexual abuse of a minor” on the basis of any prior federal statute. The BIA instead decided to be merely “guided” by a federal statutory definition for sexual abuse dealing with the proper treatment of child victims testifying at their abusers’ trials.

The Board in Esquivel-Quintana on the basis of this earlier decision, concluded that while sixteen- or seventeen-year-olds might not always be included in the definition of “minor” for the purposes of § 1227, they would be if the state includes a reasonable age difference in its statute. The Californian statute stated a victim had to be more than “three years younger than the perpetrator,” so the statute passed the Board’s test—Esquivel-Quintana’s victim was a minor. As such, the BIA upheld the Immigration Judge’s decision.

B. The Sixth Circuit and the Chevron Doctrine

The Sixth Circuit, in an opinion by Judge Boggs, upheld the BIA’s decision, structuring its analysis on Chevron deference. As laid out by the Supreme Court, the Chevron doctrine requires courts to follow a two-step process: first, ask if the law specifically speaks on an issue and then, if it does not, ask whether the agency’s interpretation is a permissible reading of that ambiguity. The Supreme Court already held that the BIA is allowed to make basic asylum decisions, partially on the basis of Chevron. The Sixth Circuit

---

17 In re Esquivel-Quintana, 26 I & N Dec. at 470.
19 Id. at 995–96. The term “sexual abuse” includes “the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.” Id. (citing 18 U.S.C. § 3509(a)(8) (1994)).
20 In re Esquivel-Quintana, 26 I & N Dec. at 475.
21 Id. at 477.
22 Esquivel-Quintana, 810 F.3d at 1021–22.
also noted that three other circuits have already applied *Chevron* analysis to the BIA’s definition of sexual abuse.\textsuperscript{26} However, there is a circuit split on whether nonprecedential BIA opinions deserve deference.\textsuperscript{27} The Sixth Circuit directly disagreed with the Fourth and Ninth Circuit decisions by holding that unpublished BIA precedent deserves *Chevron* deference. “There is not ‘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.’”\textsuperscript{28} Applying this framework, the Court moved on to analyze the petitioner’s argument. The Sixth Circuit quickly ruled out creating a definitive “generic-definition” for sexual abuse of a minor because the Petitioner had built this argument around a case dealing with an easily distinguishable statute.\textsuperscript{29} The Court also rejected Esquivel-Quintana’s preferred interpretation of “minor”—relying on 18 U.S.C. § 2243\textsuperscript{30}—as unreasonable, pointing out that using it would limit the definition of “minor” to children over the age of twelve.\textsuperscript{31}

**C. A Tale of Two Footnotes**

The Court outlined the benefits of applying the rule of lenity to statutes with criminal and civil applications,\textsuperscript{32} which includes stopping agencies from creating new crimes through enforcement, ensures the legislature creates

\begin{quote}
\textsuperscript{26} *Esquivel-Quintana*, 810 F.3d at 1022 (citing Velasco-Giron v. Holder, 773 F.3d 774, 776 (7th Cir. 2014); Restrepo v. Attorney Gen. of the U.S., 617 F.3d 787, 796 (3d Cir. 2010); Mugalli v. Ashcroft, 258 F.3d 52, 60 (2d Cir. 2001)).
\end{quote}

\begin{quote}
\textsuperscript{27} Id.
\end{quote}

\begin{quote}
\textsuperscript{28} Id. (quoting City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013)).
\end{quote}

\begin{quote}
\textsuperscript{29} Id. at 1022–23 (deciding a “generic” meaning was created for robbery in *Taylor v. U.S.*, 495 U.S. 575 (1990), on the basis of legislative history of the particular law in question).
\end{quote}

\begin{quote}
\textsuperscript{30} The statute states:

(a) Of a Minor.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

\end{quote}

\begin{quote}
\textsuperscript{31} Id. at 1025–26.
\end{quote}

\begin{quote}
\textsuperscript{32} Oddly, neither the majority nor dissent considered the statutory canon presumption against deportation (the immigration rule of lenity) as being distinguishable from the criminal rule of lenity. *See* Rubenstein, *supra* note 10, at 491 (arguing the immigration rule of lenity is weaker than the criminal one) *cf.* Slocum, *supra* note 9, at 519–22 (tracing the history of the immigration rule of lenity through Supreme Court precedent).
\end{quote}
criminal statutes, and leaves courts as the final arbitrator of what criminal statutes mean. Despite commending the rule of lenity, the Court considered itself constrained by a footnote in the Supreme Court decision Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, which seemed to limit the application of the rule of lenity. Meanwhile, a later footnote that appeared in Leocal v. Ashcroft, while a strong statement in support of rule of lenity, was dismissed by the Sixth Circuit as dicta. That Court did not consider the Leocal footnote to have any effect on their reading of Babbit or at least not enough to overturn what it claimed to be an explicit directive from the Supreme Court.

III. DISSENTING ARGUMENTS

In his opinion, Judge Sutton limits how much he really disagrees with the majority, going so far as to concur in part instead of directly dissenting. However, his criticism of the court’s use of Chevron is harsh, writing that its use challenges the separation of powers principle by allowing an agency to enforce and interpret a law. Sutton starts his disagreement by arguing that a statute with criminal and civil application must be given only one

33 Esquivel-Quintana, 810 F.3d at 1023–24.
34 Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 n.18 (1995). The footnote, after listing the value of rule of lenity concluded:

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. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the “harm” regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them.

Id.

35 Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004). There, the court stated:

Even if § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner’s favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

Id.

36 Esquivel-Quintana, 810 F.3d at 1024 (“While the Court has begun to distance itself from Babbitt, we do not read dicta in Leocal and subsequent cases as overruling Babbitt, or requiring that we apply the rule of lenity here in Esquivel-Quintana’s civil removal proceeding. As an ‘inferior’ court, our job is to adhere faithfully to the Supreme Court’s precedents.”).
37 Id. at 1027 (Sutton, J., concurring in part and dissenting in part).
38 Id.
interpretation—the criminal law construction. On whether or not California’s definition of statutory rape is included under federal law, Sutton notes that the circuit split must mean the federal law is, at least, ambiguous on this point.

Sutton goes on to point out the definition of “minor” in other federal statute involving sexual abuse has contradictory meanings—in one case where the victim must be under sixteen-years-old, but eighteen in another. Further, Sutton contends that “sexual abuse” might qualify the meaning of minor in a way that would otherwise mean persons under the age of eighteen. Having shown that there must be ambiguity in the interpretation, Sutton goes on to explain that lenity, not Chevron deference to the BIA’s conclusion, should be the controlling decider for that ambiguity. For him, the Court deciding otherwise reads too much into one footnote.

Judge Sutton tries to quell fears about “the potential sticker shock of transforming a government-always-wins canon (Chevron) into a government-always-loses canon (rule of lenity).” He gives a highly nuanced approach where “ambiguity” might mean one thing for Chevron analysis, and another for the rule of lenity. This approach would allow for some agency interpretations of statutes to not necessarily require rule of lenity analysis if those statutes are not ambiguous for the specific purposes of the rule of lenity. Judge Sutton’s difficulty in choosing one definition for “ambiguity” might underscore an innate problem with the statutory canons. Scholars challenge whether the canons are by themselves comprehensive enough to create clear results. Canons are often too generalized to help without precedent to establish the meaning of statutory language as they “ignore crucial differences in structure that characterize modern legislation.”

—

39 Id. at 1028. Sutton’s argument closely tracks the statement made by Justice Scalia in Whitman v. United States, 135 S. Ct. 352 (2014) (statement respecting the denial of certiorari). In that statement, Scalia expressed that he agreed with the denial because he thought Whitman would serve as “a poor setting in which to reac...th the question.” Id. at 354. But he concluded that the Court should accept a case with the proper question. Id. Judge Sutton likely thinks Esquivel-Quintana serves as that case. See also Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 729–36 (6th Cir. 2013) (Sutton, J., concurring).

40 Esquivel-Quintana, 810 F.3d at 1029 (Sutton, J., dissenting).

41 Id.

42 Id.

43 Id.

44 Id. at 1030.

45 Id. at 1031.

46 Esquivel-Quintana, 810 F.3d at 1031 (“If American Inuits have more than one way to describe snow, American lawyers may have more than one way to describe ambiguity.”).

47 Id.; see also Greenfield, supra note 7, at 14–15 (outlining the different levels of ambiguity the rule of lenity had been applied to before).


lack of precedent that so bothered the majority opinion that it felt constrained to find against Esquivel-Quintana, might be the same reason Sutton tries to supply a formless guidance on how to direct lower courts to use the rule of lenity situations. Yet, his thesis taps into the ongoing academic debate.

Commentators dealing with the *Chevron* and lenity contradiction have suggested that lenity should be applied either at “step one” on whether the statute is ambiguous or at “step two” where the question is whether the construction offered by the agency is permissible. 50 If a step one approach was adopted, a court would interpret a statute to have the clear congressional intent of having lenity read into it, removing the ambiguity for the agency to have interpreted. 51 Under a step two approach, it would serve as a factor to take into account as to whether the agency’s reading was acceptable. 52 Finally, there has been one suggestion that the rule of lenity only serves a role after a court concludes that an agency, by giving an unreasonable interpretation, failed *Chevron* at step two. At that point, the court would independently interpret the statute and therefore would use the rule of lenity. 53 While Judge Sutton does not adopt any of these approaches in his dissent, they do follow his idea that lenity has a role to play even when an agency is meant to be the main interpreter of a statute.

IV. OTHER CIRCUITS, OTHER REASONING

The approach adopted by the majority and the dissent in *Esquivel-Quintana* is just a small sliver on how to handle the Board’s interpretation of “sexual abuse of a minor.” While academic commentators have been quick to notice the divergence between rule of lenity and *Chevron* deference, the other Circuits have expressed multiple methods on how to interpret the statutes at issue in *Esquivel-Quintana*. What might be surprising is how none of them expressly deal with the rule of lenity.

The Ninth Circuit in its reading of §1101(a) refused to give *Chevron* deference to “unpublished, non-precedential” BIA orders. 54 The court considered *Rodriguez-Rodriguez* to be a guide to read “sexual abuse of a minor” instead of a definite interpretation that could be given *Chevron* deference. 55 Instead, it created its own generic definition of the term “sexual abuse of a minor” to be followed by the agency. 56 Like the Ninth Circuit, the

50 Rubenstein, *supra* note 10, at 482; Slocum, *supra* note 9, at 577 (“This proposal would modify lenity somewhat from a dispositive tiebreaker canon to a canon that acts as a factor.”); see also Greenfield, *supra* note 7, at 47–51.
51 Luigs, *supra* note 8, at 1131 n.110.
54 Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1156 (9th Cir. 2008) (en banc).
55 Id. at 1157.
56 Id. at 1158. The court lists the elements of “sexual abuse of a minor” to be met to reach the statutory definition: “(1) a mens rea level of knowingly; (2) a sexual act; (3) with
Fourth Circuit “conclude[d] that the BIA did not adopt in Rodriguez-Rodriguez a particular definition of the generic federal crime of ‘sexual abuse of a minor’ for application of Subsection A.” Holding that the BIA’s interpretation was only entitled to Skidmore deference, the Court went on to reverse the BIA’s decision for removal. The Fifth Circuit decided that a plain reading of the statute included the petitioner’s actions. It also concluded that while Chevron step one might be met by the BIA’s reading of the statute, step two failed because BIA’s construction went against the Circuit’s precedent for statutory construction. For its part, the Seventh Circuit rejected these approaches, believing that the Supreme Court precedent dictated that agencies can choose between rulemaking and adjudication to apply Chevron deference to agency adjudication like the guidance found in Rodriguez-Rodriguez. Sexual abuse of a minor would have to be determined by a common law approach best left to the BIA, not the courts. None of these cases expressly considered the rule of lenity.

V. THE PATH(S) AHEAD

The Sixth Circuit staking its analysis completely on Chevron instead of a de novo reading of the statute could provide a unique challenge to the Supreme Court on the meaning of the doctrine if it was to review the case. The Supreme Court might otherwise give an equivocal answer where they upheld the removal on the basis of the plain meaning of the statute, without expressly saying if Chevron deference was necessary. It might also adopt the Ninth Circuit approach where courts do not adopt an agency’s “guidance” on what a statute means, but only a bright-line rule with specific boundaries to categorize behavior. It could adopt the Seventh Circuit’s reasoning that the BIA can take a common law approach in enforcing the statute. However, the Court has recently made a strong statement that an agency interpretation of criminal statutes does not deserve deference. It might consider including civil—criminal statutes within that category. There is reason to suspect that even a favorable decision against the use of Chevron deference would not overturn the ruling, as happened in the Fifth Circuit. The Supreme Court recently

---

57 Amos v. Lynch, 790 F.3d 512, 520 (4th Cir. 2015).
58 Id. at 521.
59 Contreras v. Holder, 754 F.3d 286, 296 (5th Cir. 2014).
60 Id. at 293.
61 Velasco-Giron v. Holder, 773 F.3d 774, 779 (7th Cir. 2014).
62 Id.
63 Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1157 (9th Cir. 2008) (en banc).
64 Velasco-Giron, 773 F.3d at 779.
65 Abramski v. United States, 134 S. Ct. 2259, 2274 (2014). (“Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly . . . a court has an obligation to correct its error.”).
restated a very narrow standard for applying the rule of lenity—it is only to be used where, “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.” 66 The Supreme Court could conclude that even under a lenity approach, Esquivel-Quintana was removable because of his prior conviction. The recent passing of Justice Scalia casts even more uncertainty on how the Supreme Court would handle this case, as he was one of the strongest voices on the Supreme Court supporting the use of the rule of lenity in *Chevron* situations.67 However, a pure review of *Esquivel-Quintana* will likely require the Court to settle the “debate” between the footnotes in *Babbit* and *Leocal*.

VI. CONCLUSION

No matter the Supreme Court’s stance, the Sixth Circuit has opened a Pandora’s Box about the nature of statutory construction and the canons of interpretation. While wrestling with mixed messages from the Supreme Court, the Sixth Circuit ironically felt constrained into making an expansive statement on the powers agencies hold over immigrants facing deportation. This strong statement will likely make it more difficult for lenity to overrule *Chevron* in future Sixth Circuit cases involving other agencies—showing that the tools of statutory construction, as forged and shaped by the Supreme Court, are often as malleable or rigid as the lower courts choose to see them.

66 Id. at 2272 n.10 (quoting Maracich v. Spears, 133 S. Ct. 2191 (2013)).