LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY, OCTOBER 27, 2022

PERSPECTIVE

# In *Bittner v. United States*, the rule of lenity awaits its renaissance

By Joshua M. Robbins

Shutterstock

A law prohibits certain actions, and prescribes a penalty for each violation. But courts across the country, after struggling with the law's text, structure, and legislative history, cannot agree on what exactly a "violation" is. A layperson has no hope of answering that question with certainty. Yet in enforcing the law, the government seeks to impose the most aggressive interpretation of the term, increasing a defendant's liability by a factor of 50. This is the scenario in *Bittner v. United States*, in which the Supreme Court will construe a challenging statute with both civil and criminal implications. *How* it does so bears special importance for federal prosecutors and enforcement attorneys, as well as those confronting increasingly complex regulatory systems with potentially severe penalties.

*Bittner* illustrates the enduring value of a doctrine that Chief Justice John Marshall called "not much less old than [statutory] construction itself": the rule of lenity, under which an ambiguous penal statute is construed against the government and in favor of the defendant. Once broadly and robustly applied to statutory interpretation in this country, it has more recently fallen into relative disuse. But changes in the composition of the Supreme Court and a newfound appetite for constraining regulatory discretion suggest that the canon may be due for a comeback, and *Bittner* could provide a vehicle.

**The Problem: Unclear Laws Hand Excessive Power to the Government**

Under the Bank Secrecy Act, 31 U.S.C. § 5314, the Treasury Secretary must require every U.S. citizen to "keep records, file reports, or keep records and file reports" when that citizen "makes a transaction or maintains a relation for any person with a foreign financial agency." Treasury regulations, in turn, require each citizen with over $10,000 in foreign accounts to file an annual report (called an "FBAR") listing the accounts. The Act, 31 U.S.C. § 5321, provides for a $10,000 maximum penalty for each non-willful violation.

But the law does not say what counts as a single "violation": is it one for each annual report not filed, or one for each account not disclosed? In *Bittner*, a citizen had dozens of foreign accounts, and failed to file annual reports for five years. Bittner argued that each of the five years in which a report was not filed was its own "violation," allowing for a total fine of $50,000. The IRS, on the other hand, said that there was a separate violation for each account not reported and each year it was not reported, adding up to 272 separate violations and a penalty of $2.72 million.

Had the case been prosecuted

criminally under 31 U.S.C. § 5322, the differences would have been even more dramatic: Bittner could have faced a sentence of 5 years in prison and a $250,000 fine per violation, or 1,360 years and $68 million under the IRS interpretation (rather than 25 years and $1.25 million under his). Quite the swing.

With such high stakes, one might expect a clear answer to the statutory interpretation question. But there is none. While the district court sided with Bittner and found the text, structure, and purpose of the statute "unambiguously" supported his reasoning, the Fifth Circuit favored the government's position and reversed. Conversely, in *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021), the district court agreed with the government on this issue, but the Ninth Circuit reversed and sided with the defendant, even finding the government's position "not reasonable." *Id.* 1086. As the Fifth Circuit observed in *Bittner*, district courts across the country, as well as the Fourth Circuit, have taken "diverging views" on the issue.

If various federal courts at both levels, with the luxuries of time, training, staffing, and input from counsel, and after poring over the statute's text, legislative history, and other interpretive devices, cannot agree on the meaning of this language, it is hard to see how an ordinary citizen could be sure what it means, or what the consequences of a violation would be.

The concern is hardly limited to the FBAR reporting requirement. Congress has increasingly passed, and the Department of Justice has increasingly enforced, a range of complex and technical regulatory rules with stiff civil and criminal penalties. The Bank Secrecy Act's anti-money laundering rules require financial institutions and customers alike to wade through a thicket of statutory provisions and Treasury regulations, with serious consequences for violations. Federal health care laws, regulations, and guidance documents from Health and Human Services and Medicare are notoriously complicated, and can generate immense fines and civil fraud liability, along with lengthy jail sentences. More recently, rules relating to export controls, sanctions, customs practices, and other aspects of international trade have been expanded and modified, while the DOJ has increased its pursuit of violations.

Scenarios like Bittner's, with enormous consequences riding on the meaning of a statute on which even federal judges can't agree, may thus only grow more common. In these cases, the government can be expected to favor interpretations that allow for wider liability or greater penalties, thus giving it more leverage in pressuring individuals or companies to cooperate, or to sign more draconian settlements and plea agreements. When few can stomach the cost of being on the wrong side of an interpretive issue, uncertainty benefits the regulator and the prosecutor.

### A Remedy: Reviving the Rule of Lenity

One way to level the scales may involve restoring to prominence the rule of lenity, a canon of statutory construction of unquestioned lineage but limited recent influence. Lenity –"the rule that penal laws are to be construed strictly" – was discussed and applied in English common law at least as early as the time of Blackstone's 18th-century Commentaries. It was then imported into the United States, where one scholar found that for decades it was the "most commonly applied" of all the "substantive" canons of construction.

Lenity is based on two constitutional principles: due process and separation of powers. As to the former, a basic and intuitive rule – embraced from the time of ancient Greece – is that citizens should have "fair notice" of both what the law permits and prohibits, and what the consequences are of breaking it. To respect separation of powers, courts refrain from invading Congress's legislative role by expanding criminal rules and penalties to cover conduct not plainly addressed in a statute. Approving the government's harshest reading of ambiguous penal statutes undermines both goals.

Over time, however, courts began to restrict application of lenity. In some cases, the Supreme Court and others have directed that the rule is not triggered unless there is a "grievous" ambiguity in the statute; ordinary ambiguity will not suffice. In others, courts have chosen to resort to analysis of legislative history and statutory purpose in attempting to resolve interpretive issues and avoid applying lenity. Some have restricted lenity to purely criminal cases, rather than those involving civil enforcement by regulators such as the IRS or SEC. As a result, lenity has sometimes been relegated to an afterthought at best.

In *Bittner*, for example, the Fifth Circuit dismissed lenity in a paragraph, finding that it did not apply because, the court said, the specific FBAR penalty provision was not ambiguous enough (despite broad judicial disagreement) and did not involve a criminal penalty (even though the criminal penalty language is substantively identical). In *Yates v. United States*, 354 U.S. 298 (2015), the Supreme Court, while considering whether a criminal statute designed to bar destruction of documents also applied to disposing of fish (yes, fish), briefly referred to lenity only after using other tools of statutory interpretation, such as legislative history, to decide in the negative

But there is some reason to expect the doctrine's revival. In *Wooden v. United States*, 142 S.Ct. 1063 (2022), decided earlier this year, the Supreme Court confronted a provision of the Armed Career Criminal Act that had divided lower courts for years. Justice Neil Gorsuch's concurring opinion, joined by Justice Sonia Sotomayor, argued that the issue should be resolved by applying the rule of lenity to resolve the question "in favor of liberty." Reviewing the rule's storied history and later decline, he argued for eliminating the "grievous ambiguity" requirement and elevating the rule over other interpretive devices like legislative history and purpose.

There are hints among other justices as well. Justice Elena Kagan, in a dissent in *Lockhard v. United States*, 577 U.S. ____ (2016), criticized the majority for failing to apply the rule of lenity to "tip the scales" of an ambiguous statute in a defendant's favor. Justice Amy Coney Barrett, meanwhile, is the author of a 2010 law review article on statutory construction that paid particular attention to the rule of lenity. As she explained, application of the rule to resolve ambiguity in penal statutes is a proper textualist approach that allows courts to act as "faithful agents" of Congress. Justice Ketanji Brown Jackson has little track record on the issue, but during her confirmation hearing, she identified lenity as one of the rules of construction she would apply, and her background as a public defender may suggest sympathy for the principle.

Meanwhile, the Court's conservative majority has shown an appetite for revisiting precedent affecting regulators' discretion to interpret statutes in ways that increase their power. For example, in *Kisor v. Wilkie*, 588 U.S. ___ (2019) the Court imposed restrictions on the *Auer* doctrine that had required courts to defer to agencies' interpretation of ambiguous regulatory language. Four of the justices voted to overrule *Auer* entirely, and it is possible that the later replacement of Justice Ruth Bader Ginsburg with Justice Barrett could make the difference if the issue were to arise again. Justice Gorsuch, who led the charge to end *Auer*, is famously hostile to the related Chevron doctrine giving deference to agencies' interpretation of ambiguous statutes.

### Back to the Interpretive Future?

The canon's history, of course, may not repeat itself. The majority in Wooden earlier this year declined Justice Gorsuch's invitation to invoke lenity, while Justice Brett Kavanaugh wrote separately to specifically reject the idea and to argue that "properly applied, the rule of lenity … rarely if ever plays a role." In his view, the due

process/fair notice concerns behind lenity are adequately served by emphasizing the mens rea element of federal crimes – for example, the requirement in some regulatory statutes that the government prove the defendants knew their conduct was unlawful. Intriguingly, he suggested that courts could insert such a requirement even into statutes that do not expressly require it, at least when they contain some ambiguity. The Bank Secrecy Act provision in Bittner seems to fit that bill, so it will be interesting to see how Justice Kavanaugh approaches it.

But whether the current Court chooses to take up the issue directly this time, it is bound to recur. With Congress and federal agencies churning out reams of new regulatory prohibitions and empowering DOJ, civil enforcement agencies, and sometimes civil litigants to enforce them, courts will continue to confront tricky and unexpected questions of interpretation. To strengthen its hand, the government will likely continue to press for the harshest possible reading. And both businesses and individuals will struggle to guess at what they may and may not do, and what may happen to them if they are wrong. In *Bittner*, the Court has a chance to nip this trend in the bud by returning to its doctrinal roots.

**Joshua M. Robbins** *is a shareholder and co-chair of the White Collar and Investigations Practice at Buchalter.*