MAY THE BEST CANON WIN: *LOCKHART V. UNITED STATES* AND THE BATTLE OF STATUTORY INTERPRETATION

HASSAN SHAIKH*

INTRODUCTION

Among the Roberts Court's most distinctive features is its consistent reliance on plain language when deciding cases of statutory interpretation.[1] The practice was most recently exemplified in *Lockhart v. United States*,[2] where in a colorful back-and-forth, the majority and dissenting opinions almost exclusively relied on plain language as they sought to resolve a circuit split. And while both opinions did address context and other factors as support, they did so only secondarily.

The Court's decision resolved a long-standing circuit split regarding 18 U.S.C. § 2252(b)(2), which triggers a mandatory minimum sentence for recidivists who have previously been convicted under a federal or state crime relating to "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."[3] It favored the reading of the Second Circuit and four other courts of appeals, holding that the mandatory minimum provision's text and context together revealed a straightforward reading—that the modifying clause "involving a minor or ward" only modified the last crime in the series of predicate crimes.

This "straightforward reading," however, failed to be as obvious to the Court's two dissenters, who used the same plain language approach to reach a wholly opposite result. As such, *Lockhart* indicates that even

*Duke University School of Law, J.D. expected 2018; Baylor University, MPH, BSEd.

1. David Strauss, *The Plain Language Court*, 38 CARDOZO L. REV. 651, 651 (2016).

2. Lockhart v. United States, 136 S. Ct. 958 (2016); *see* Hon. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, And the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 907 (2016).

3. 18 U.S.C. § 2252(b)(2) (2012).

with the consistent use of plain language, there can be inconsistencies in interpretation, and that a straightforward reading may not always be so straightforward. This commentary will explore the background of *Lockhart*, the arguments on both sides, and the Court's holding. It will analyze the use of plain meaning in this case specifically, and attempt to reconcile how the same interpretation strategy can lead to such disparate results. All the while, this commentary will attempt to determine whether the *Lockhart* decision shows clandestine judicial activism, or whether it just indicates the different readings that can arise from the nuances of everyday language.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Avondale Lockhart has two convictions on his record: the first was in 2000, when he was convicted of sexual abuse,[4] and the second was in 2010, when he was arrested for possession of child pornography.[5] Although the convictions would seem unrelated, 18 U.S.C. § 2252(b)(2) made the first conviction relevant to the second because it imposed upon Lockhart a mandatory minimum sentence of ten years. Section 2252(b)(2) reads in full:

> "Whoever violates, or attempts or conspires to violate [18 U.S.C. § 2252(a)(4)] shall be fined under this title or imprisoned not more than 10 years, or both, but . . . if such person has a prior conviction under this chapter, [other federal chapters . . .] or *under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward* . . .such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years."[6]

Based on his 2000 conviction, Lockhart was found to be subject to the mandatory minimum of ten-years imprisonment.[7]

A. Factual Background

Lockhart was arrested for attempted receipt and possession of child pornography following a sting operation conducted by Immigration and Customs Enforcement agents and United States Postal Inspectors.[8]

4. *Lockhart*, 136 S. Ct. at 961.
5. *Id.* at 962.
6. *Id.*
7. *Id.*
8. Brief for Petitioner at 4, Lockhart v. United States, 136 S. Ct. 958 (2016) (No. 14-8358).

In 2010, Lockhart was mailed a letter "inviting him to purchase child pornography through a government-run website or mail order catalog."[9] His past had left him disabled and "addicted to readily available Internet pornography."[10] So he accepted the offer, purchasing six videos "depicting children as young as nine years old engaging in sexually explicit conduct."[11] Agents sought a warrant to search his residence and then conducted a "controlled delivery of a package purported to contain the videos" that Lockhart had ordered.[12] Following Lockhart's acceptance of the package, agents executed the search warrant, where they found "more than 15,000 images and at least nine videos containing child pornography" at his residence.[13]

B. Procedural Background

A federal grand jury in the United States District Court for the Eastern District of New York indicted Lockhart, where he pleaded guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B).[14] His plea was conditioned on an agreement that he "preserved his right to appeal if the district court imposed a ten-year mandatory minimum sentence under Section 2252(b)(2)."[15]

The district court did impose the mandatory minimum. It agreed with the probation office that the 2000 conviction of first-degree sexual abuse under New York law made Lockhart subject to the statutory minimum.[16] In making its decision, the district court overruled Lockhart's objection that section 2252(b)(2) "did not apply . . . because his prior conviction for first-degree sexual abuse did not involve a minor."[17] It explained that "the plain reading of the statute negates [Lockhart's] position," because the sexual assault offense "fits within th[e] part of [Section 2252(b)(2)] that speaks of a state conviction for aggravated sexual abuse."[18] Thus, in considering the sexual assault conviction as sufficient to impose section 2252(b)(2), the district court ruled that "involving a minor or ward" modifies only "abusive sexual

9. *Id.*
10. *Id.*
11. Brief for Respondent at 10, *Lockhart*, 136 S. Ct. 958.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 11.
17. *Id.*
18. *Id.*

conduct." It does not modify "aggravated sexual abuse" or "sexual abuse," as Lockhart argued.

The Second Circuit affirmed.[19] It held that "a sexual abuse conviction involving an adult victim constitutes a predicate offense" that imposes the ten-year mandatory minimum provided in section 2252(b)(2).[20] The Supreme Court granted certiorari and ultimately affirmed.

II. LEGAL BACKGROUND

Congress first began regulating child pornography in 1978 with the Protection of Children Against Sexual Exploitation Act of 1977, which prohibited visual or print productions of minors engaged in sexually explicit conduct.[21] Following the Supreme Court's holdings in *New York v. Ferber*[22] and *Osborne v. Ohio*,[23] Congress has continued to expand substantive criminal provisions regarding child pornography.[24] These substantive provisions have always included sentencing enhancements.[25] In 1996, the Court expanded sentencing enhancements to include state-law convictions.[26]

The 1996 Act included a new provision within its recidivist enhancement list, stating that prior convictions "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" would also trigger the sentencing enhancements.[27] But at the time, it did not include offenses under section 2252(b)(2). Instead, section (b)(2)'s state-law predicates

19. *Id.*
20. *Id.*
21. Pub. L. No. 95-225, 92 Stat. 7 (1978).
22. *See* 458 U.S. 747 (1982) (holding that the First Amendment permits states to prohibit the use of children in pornographic materials, whether the materials are obscene or not).
23. *See* 495 U.S. 103 (1990) (holding that states can make possession of child pornography that involves actual children illegal).
24. *See e.g.*, Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4816 (1990).
25. *See* Brief for Respondent, *supra* note 11, at 5 ("The 1977 Act . . . increased the maximum sentence from ten to 15 years, if the offender had a prior conviction under 'this section.' . . . As the conduct prohibited by Section 2252(a) expanded to include the receipt of non-obscene child pornography in the [Child Protection Act of 1984], the reference to prior convictions under 'this section' in the recidivist enhancement expanded accordingly.").
26. *Id.* at 6.
27. Pub. L. No. 104-208, 110 Stat. 3009-30 (1996).

were added in 1998.[28] The statutory minimum for recidivists convicted under (b)(2) was increased in 2003, from two to ten years.[29]

Sections 2252(b)(1), 2252A(b)(1), and 2252A(b)(2) include almost identically-worded enhancement provisions. And four circuits in addition to the Second Circuit have held that in these provisions, "involving a minor or ward" only modifies the phrase immediately before it—"abusive sexual conduct."[30] The Eighth Circuit alone has reached a contrary result.[31]

III. ARGUMENTS

A. Petitioner's Arguments

Lockhart presented three arguments to support his contention that the Second Circuit incorrectly decided his case. First, that under the series-qualifier principle, which applies a modifying clause to all integrated series in a list, "involving a minor or ward" modifies all three state-law predicates.[32] Second, that "the statutory context, structure, and history" confirm this reading.[33] Third, that if the Court still doubted the meaning of the statute, then the rule of lenity required that the law be interpreted in his favor.[34]

Lockhart initially argued that the application of the series-qualifier principle was the proper canon to apply when reading the statute. If read with the series-qualifier principle in mind, the modifying clause "involving a minor or ward" would apply to all three state-law predicates. Because his prior conviction did not involve a minor or ward, the mandatory minimum was not triggered. The Supreme Court, he argued, "has long read statutes in light of the series-qualifier principle" when two textual signals are present.[35] First, when the modifying phrase makes sense with all items in the series and second,

28. Brief for Respondent, *supra* note 11, at 7.
29. *Id.* at 8.
30. *See* United States v. Mateen, 764 F.3d 627, 633 (6th Cir. 2014) (en banc) (per curiam); United States v. Spence, 661 F.3d 194, 197–98 (4th Cir. 2011); United States v. Hubbard, 480 F.3d 341, 350 (5th Cir. 2006); United States v. Rezin, 322 F.3d 443, 448 (7th Cir. 2003).
31. *See* United States v. Linngren, 652 F.3d 868, 870 (8th Cir. 2011) (assuming that to trigger a prior state-law conviction, the "sexual abuse" predicate must require "the victim [to] be a minor").
32. Brief for Petitioner, *supra* note 9, at 11.
33. *Id.* at 22.
34. *Id.* at 39.
35. *Id.* at 12.

when the "modifying clause appears . . . at the end of a single, integrated list."[36] As applied to the relevant series in section 2252(b)(2), Lockhart argued that the modifier "involving a minor or ward . . . makes sense with *all* the terms in the series"[37] and that the series "constitutes a 'single, integrated list' of related elements" because "[s]ubstantively, all three items describe iterations of the same basic conduct, unlawful or wrongful sexual behavior."[38] He contended that both textual signals were present, and that the series-qualifier rule produced a "natural reading" that the modifier applied to the entire series.[39]

Lockhart buttressed his initial argument with the "fundamental canon of statutory interpretation that the words of a statute must be read in their context with a view to their place in the overall statutory scheme."[40] He argued that Congress had drafted the list of state-law predicates to be narrower than the list of federal-law predicates.[41] In supporting this argument, Lockhart suggested that the development of the list of predicate offenses shows Congress's intent to not treat federal and state offense with parity.[42] He contrasted the "generic" reach of the federal statutes, which "do not require the obscene matter to involve children" with specific language in the list of state-predicate crimes, which specifically criminalize "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of *child* pornography."[43]

Lockhart continued his argument by evaluating the legislative history of the statute. He argued that "[n]ot only has Congress always distinguished between prior federal and state convictions, it has done so by requiring the latter to involve children." His argument noted that state-predicates were absent from the initial enactment of child pornography regulation in 1978.[44] And he explained that when section 2252(b)(2)'s state-predicates were added in 1996, so were section (b)(1)'s. The contemporaneous enactment of these provisions,

36. *Id.* at 12 (quoting Jama v. Immigration & Customs Enf't, 543 U.S. 335, 344 n.4 (2005)).
37. *Id.* at 13 (emphasis in original).
38. *Id.* at 15–16.
39. *Id.* at 12.
40. *Id.* at 22 (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 309 (1989)).
41. *See id.* at 23 ("It is true today, and has been true at all times since these provisions were enacted, that the qualifying federal convictions encompass more conduct than their state-law counterparts.").
42. *Id.*
43. *Id.*
44. *Id.* at 26.

Lockhart argued, makes it reasonable to consider that the limiting factors of one section would apply to the other. So, because the state-predicates in section (b)(1) are limited to state convictions "relating to the possession of child pornography," Lockhart contended that the "more logical inference is that Congress limited all state-law predicates [including those in section (b)(2)] to offenses involving minors."[45]

As a Hail Mary, Lockhart's last argument asserted that if the Court remained doubtful about the plain meaning of the statute, the ensuing ambiguity would require the Court to invoke the lenity doctrine.[46] The doctrine "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them"[47] and should be deployed "once other legitimate tools of interpretation have been exhausted."[48] Lockhart argued that the United States failed to "show[] that the statute's recidivist enhancement unambiguously applies to him,"[49] and that this failure mandated the application of the lenity doctrine.[50] "[A]pplying the enhanced penalties of § 2252(b)(2) . . . will have a serious and negative impact both on individual defendants and on our system of just and proportionate sentencing," Lockhart argued.[51] But, "[t]he rule of lenity [would] eliminate[] that risk."[52]

B. Respondent's Arguments

The United States used three arguments to support its contention that the Second Circuit's decision should be affirmed. First, it employed the last-antecedent rule, which provides that "a limiting clause or phrase should ordinarily be read as modifying only the noun or the phrase it immediately follows,"[53] in interpreting section 2252(b)(2)'s state-law predicates, and argued that the rule results in a straightforward reading of the statute.[54] Second, it examined the

45. *Id.* at 27.
46. *Id.* at 39.
47. *Id.* (quoting United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion)). For a greater exploration of the rule of lenity's application in the Court's jurisprudence, see Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AM. J. CRIM. L. 1, 8 (2008).
48. *Id.* at 40.
49. *Id.* at 41.
50. *Id.* at 43.
51. *Id.*
52. *Id.*
53. Brief for Respondent, *supra* note 11, at 14 (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).
54. *Id.* at 18.

context and drafting history of the statute to come to the conclusion that "Congress intended for the term . . . to modify only the last category of state sexual-abuse offenses."[55] Third, it rebuffed Lockhart's use of the series-qualifier principle and lenity doctrine, arguing that after applying the last-antecedent rule and "considering the text, context, history, and purpose of Section 2252(b)(2), the meaning of the statute was clear, and that no grievous ambiguity justified the application of the rule of lenity."[56]

In arguing for the application of the last-antecedent rule, the United States urged that the principle be employed because "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows."[57] Thus, reading the phrase as it should ordinarily be read would "make especially good sense," according to the United States.[58] It argued that under common syntax rules, using a comma "indicates that qualifying language is applicable to all of the preceding clauses" but that section 2252(b)(2) used no comma to separate the modifying clause from the last antecedent.[59] The United States contended that the absence of the comma "signal[ed] the contrary conclusion," so the qualifying language only applies to "abusive sexual conduct."[60]

The United States then delved into the statutory context and drafting history of section 2252(b)(2) to buttress its argument. It argued that section (b)(2)'s federal-law predicates covered crimes "that may have either minor or adult victims,"[61] and as such, its state-law predicates predictably also would cover a range of crimes including minor and adult victims.[62] The United States then supplied additional evidence that, of section (b)(2)'s federal-law predicates, three crimes similar to the state-law predicates were included. "Section 2241 prohibits 'aggravated sexual abuse,' Section 2242 prohibits 'sexual abuse,' and Section 2243 prohibits 'sexual abuse of a minor or ward.'"[63] Thus, it argued that "[t]he strong similarity between those three federal

55. *Id.* at 15.
56. *Id.* at 16.
57. *Id.* at 18 (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).
58. *Id.* at 19–20.
59. *Id.* at 20.
60. *Id.* at 19–20.
61. *Id.* at 21.
62. *Id.*
63. *Id.* at 22.

statutes and the three categories of state sexual-abuse crimes listed in Section 2252(b)(2) . . . is persuasive evidence that Congress intended to capture prior state law convictions for 'aggravated sexual abuse' and 'sexual abuse' involving adult victims."[64] If Congress had intended to limit state-law predicates, the United States argued, its drafting history and use of similar federal-law predicates would have made that clear.[65] Thus, under application of the last-antecedent rule, and with context and drafting history in mind, the United States argued that section 2252(b)(2) was unambiguous and that the modifying clause "of a minor or ward" was only a limiting factor for abusive sexual conduct.

After concluding that there was no ambiguity with the statute, the United States concluded its argument with some parting shots at Lockhart's positions. It argued that Lockhart's series-qualifier principle would render the second state-predicate superfluous[66] and was inappropriate because section (b)(2) "does not contain an integrated list."[67] According to the United States, the list could not be seen as integrated when the second and third state-predicates were *identical*.[68] It argued that the "difference between a list containing distinct words that are similar or 'overlapping' in meaning and one containing two phrases that bear the identical is substantial."[69] This is especially true in a case where the "textual signal" of an integrated, but not identical, list is required in order to apply the series-qualifier principle.[70]

The United States then addressed the other indicia presented by Lockhart to support application of the series-qualifier principle.[71] It argued that Lockhart was unable to show that the series-qualifier principle was more reasonable to use than the last-antecedent rule.[72] It supported this contention by arguing that neither the drafting history

64. *Id.*
65. *Id.* at 24–25.
66. *Id.* at 32–33 ("Petitioner *concedes* that [under the series-qualifier principle] the second and third categories are identical. . . . [A]nd his interpretation therefore runs up against the presumption against surplusage.").
67. *Id.* at 34.
68. *Id.* at 35.
69. *Id.*
70. *See id.* at 40–48 (arguing that "Petitioner's view of drafting history is misconceived," and that the "scant history of the recidivist enhancement . . . provides no basis" for Petitioner's legislative history argument).
71. *Id.* at 37.
72. *Id.*

nor the legislative history provided any support for the belief that the series-qualifier principle led to a more reasonable reading of the statute.[73] Finally, the United States argued that Lockhart's request to apply the rule of lenity should be rejected.[74] As it stated, "[t]he rule of lenity is a tie-breaking rule of statutory construction" – but in the United States' eyes, there was no tie.[75]

IV. HOLDING

In a 7–2 decision, the Supreme Court affirmed the Second Circuit and held in favor of the United States' reading of section 2252(b)(2).[76] It found that the modifying phrase "involving a minor or ward" only applied to the last state-law predicate in the series, "sexual abusive conduct."[77] And its decision confirmed that Lockhart's 2000 sexual assault conviction was a qualifying state-law predicate that triggered the ten-year mandatory minimum sentence. Both the majority and dissenting opinions, in expected fashion, stuck closely to the statutory text and interpreted it according to its plain meaning. Nevertheless, they came to conflicting conclusions.

Following its precedent, the Court applied the last antecedent rule to the statute's text and held that in conjunction with the statute's context, there was only one "straightforward reading."[78] In applying the rule, the Court noted that last antecedent rule is a "timeworn" method, applied "from [the Court's] earliest decisions to [its] more recent," and that its application is most appropriate when "it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all."[79] As an illustration of its reasoning, the majority provided this quip:

> [I]magine you are the general manager of the Yankees and you are rounding out your 2016 roster. You tell your scouts to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year's World Champion Kansas City Royals. It would be natural for your scouts to confine their search for a pitcher to last year's

73. *See generally id.* at 37–49 (arguing that Petitioner had failed to provide persuasive evidence to rebut the presumption of applying the last-antecedent rule).
74. *Id.* at 49.
75. *Id.*
76. Lockhart v. United States, 136 S. Ct. 958 (2016).
77. *Id.* at 961.
78. *Id.* at 962.
79. *Id.* at 962–63.

> championship team, but to look more broadly for catchers and shortstops.[80]

To carry the modifier "World Champion Kansas City Royals" across the entire series would be a "heavy lift."[81] And it is better read with the basic intuition that the modifier only affects the last antecedent in the series—the pitcher. As such, the Court held that when interpreting section 2252(b)(2), a similar reading should apply.[82]

The Court then examined the context of the statute and the series-qualifier rule proposed by Lockhart.[83] But through the rest of its analysis, it remained committed to the plain meaning of the words. For example, even when considering the context of the provision, the Court compared section (b)(2)'s language to other similarly drafted provisions.[84] And although it technically examined the *context* of the statute, it merely looked at how the other "sections mirror precisely the order, precisely the divisions, and nearly precisely *the words*. . . ."[85]

The Court did, in fairness, also address some other indicia in making its decision, including a Senate report and a letter from the Department of Justice.[86] But again, it closely analyzed the language of the report and letter, inevitably determining that neither indicia was enough to overcome the application of the last antecedent rule. Finally, the Court addressed Lockhart's lenity doctrine argument, stating that it was inapplicable in this case because the lenity doctrine only applies "when the ordinary canons of statutory construction have revealed no satisfactory construction."[87] Here, the Court found the last antecedent rule to be satisfactory, so the lenity doctrine did not apply.[88]

The dissent similarly engaged in plain-meaning interpretation, but argued on behalf of Lockhart that the series-qualifier rule was better applied to the statute. It began its opinion with three equally colorful examples:

---

80. *Id.*
81. *Id.*
82. *Id.*
83. *See id.* at 963–66.
84. *Id.* at 966.
85. *Id.* at 964 (emphasis added).
86. *Id.* at 967.
87. *Id.* at 968.
88. *Id.*

> Imagine a friend told you that she hoped to meet "an actor, director, or producer involved with the new Star Wars movie." You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest Zoolander. Suppose a real estate agent promised to find a client "a house, condo, or apartment in New York." Wouldn't the potential buyer be annoyed if the agent sent him information about condos in Maryland or California? And consider a law imposing a penalty for the "violation of any statute, rule, or regulation relating to insider trading." Surely a person would have cause to protest if punished under that provision for violating a traffic statute. The reason in all three cases is the same: Everyone understands that the modifying phrase—"involved with the new Star Wars movie," "in New York," "relating to insider trading"—applies to each term in the preceding list, not just the last.[89]

The dissent then made its point clear that the series-qualifier principle was better suited for deciding this case than the last antecedent rule. The dissent continued making this point through a painstakingly close analysis of previous cases where the last antecedent rule had applied, and then distinguished them from *Lockhart*.[90] It finally concluded its scrutiny with the opinion that the statute, when applying the series-qualifier principle, "reflects the completely ordinary way that people speak and listen, write and read."[91]

The dissent then addressed other indicia that supported application of the series-qualifier principle to the statute. It reviewed the legislative history and examined the structural similarities between the state predicates and the federal ones. It then made its most salient point—that the rule of lenity should undoubtedly apply here. In its final argument, the dissent proffered an assumption—that maybe neither the series-qualifier principle, nor the last antecedent rule actually resolves the case as clearly as either side has argued.[92] "What to do?" the dissent asked. Its answer was simple: "This Court has a rule for how to resolve genuine ambiguity in criminal statutes: *in favor of the criminal defendant*."[93]

89. *Id.* at 969.
90. *See id.* at 969–73.
91. *Id.* at 970.
92. *Id.* at 977.
93. *Id.* (emphasis added).

V. ANALYSIS

Although the Court ultimately made a clear decision that has already been favored by a majority of the courts of appeals, its method in reaching it may not be as straightforward as the majority contended it was. If a plain reading of the statute were all that was required of the Court, it would not have led to the passionate debate between the majority and dissent. Nor would it have led to the initial circuit split. Further, if the reading of the language were as "straightforward" as the majority held, then questions about the appropriate reading of the statute and the application of the lenity doctrine would not have remained. The Court did however apply the most reasonable reading of section 2252(b)(2).

However, *Lockhart* revealed two important points about the Court: first, that it will likely continue to steadfastly apply statutory interpretation to determine the plain meaning whenever possible; and second, that it has the skilled ability to cloak judicial activism behind the veil of statutory interpretation. The *Lockhart* decision puts a new burden on legal academics and practitioners who read statutory interpretation cases to make sure that the interpretation is not just the product of an active bench.

The Roberts' Court's consistent use of the plain language approach is well documented.[94] And its shift to the close reading of words can be largely attributed to the late Justice Scalia.[95] But in the context of *Lockhart*'s inquiry, both the majority and dissent bent over backwards to ensure that they remain steadfast on their quests for the plain meaning of section 2252(b)(2). Although both opinions did address other indicia, such as the lenity doctrine, the bulk of both opinions revolved around an inquiry into the language and timely examples of how the statute should be read.

However, even as the opinions explored the meaning of the statute and continued to resort to common statutory principles, a reader cannot help but recognize that a majority of the arguments were self-serving. Under the façade of reading the statute for its plain meaning, the opinions developed their own proof (in the form of examples) to back their assertions.

94. Strauss, *supra* note 1, at 651–52.
95. *Id.*

One possible explanation for the circular reasoning of both opinions lies behind the veil of judicial activism—the "notoriously slippery term" that has "become increasingly unclear" for students, practitioners, and academics over the last few decades.[96] But despite the inability of most scholars and judges to define the amorphous term, judicial activism can certainly be seen when it is used on the bench. This is the case in *Lockhart*, where both opinions seemed to have selected their method of interpretation based on beliefs made prior to hearing the arguments. And then, the opinions applied statutory interpretation principles to section 2252(b)(2) that best conformed to their belief of what the statute means.

This is most clearly seen in the majority's dismissal of the application of the lenity doctrine in preference of the last-antecedent rule. Although it attempted to make the interpretation a clear-cut case, that two Justices read the statute differently is a clear indication that the language may not be as clear as the majority contended. In cases like this, as the dissent noted, criminal law precedent has established a rule for murky statute interpretation—side with the defendant. But even with this timeworn doctrine in hand, the Court refused to apply it because it preferred the outcome of the last-antecedent rule.

Judicial activism is certainly a possibility when one is reminded of the serious nature of the crimes Lockhart committed. Although both opinions used humorous and timely examples about Star Wars and the World Championship, at the heart of the case is a man who has committed one of society's most shameful crimes—the exploitation of young children. Thus, had the Court held differently, Lockhart would have been a free man within just a few years. So, even if the plain meaning was crystal clear in applying to all three of the state-law predicates, it would not be unreasonable to believe that the Court would dispense its own sense of justice to ensure that society's morals were protected.

Activism could also be suspected in the case of the dissenters, who likely recognized that the series-qualifier principle would help them eliminate a troubling and uniquely American criminal punishment—mandatory minimums. By reading the statute in favor of Lockhart, the dissenters were able to make both a political statement and remain

96. Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1442 (2004).

consistent in their plain language approach. However, behind that veil, it is likely that there were some political ambitions driving the decision.

CONCLUSION

The Court in *Lockhart* remained a steadfast adherent of plain meaning statutory interpretation, but its decision suggests that more than just the language of the statute played into its decision. Cases such as *Lockhart* demonstrate that not even the Supreme Court is immune from judicial activism, but they open discussion on whether judicial activism is as dangerous of a threat as past academics have crafted it to be. An active bench can certainly use their political preferences to drive their decisions, and continue to cage those decisions within well-developed legal principles. In the case of *Lockhart*, the question will remain: what happened behind the closed doors of One First Street?