

SQUARING THE CIRCLE: RECONCILING CLEAR
STATUTORY TEXT WITH CONTRADICTIONARY
STATUTORY PURPOSE IN *United States v. Whitley*,
529 F.3d 150 (2d Cir. 2008)

Since the Supreme Court struck down the New Jersey Hate Crime Statute in *Apprendi v. New Jersey*,¹ federal courts have increasingly resisted mandatory sentencing regimes. From *Apprendi* to *Booker*² to *Kimbrough*³ and *Gall*,⁴ the courts have progressively increased their own discretion at the expense of uniform systems established by Congress. In *United States v. Whitley*,⁵ the Second Circuit continued this trend by depending on judges to ensure equity and uniformity in sentencing enhancements for using firearms under 18 U.S.C. § 924(c). Although prior cases focused on constitutional claims, the *Whitley* court tackled a challenge of statutory interpretation. Confronting a statute containing plain text that starkly departed from Congress's apparent intent, the Second Circuit rejected the intentionalism of other circuits, choosing instead fidelity to the words that Congress chose, however improvidently. Unfortunately, the opinion failed to acknowledge the resulting "absurdity" that will result from straightforward application of the statute because of its confident reliance on judges to implement congressional intent on a discretionary basis. Instead of pretending that Congress did not err in drafting the statute, the Second Circuit should have attacked the legal chimera head-on, remaining loyal to the text as much as possible but alerting Congress that it had created a dilemma and should amend the statute. Rather than assuming that Congress and the courts are walled-off from one another, the *Whitley* court should have encouraged a dialogue between the two.

In November 2004, Latie Whitley robbed a Bronx delicatessen, threatening employees with a firearm and emptying the cash reg-

1. 530 U.S. 466 (2000).

2. *United States v. Booker*, 543 U.S. 220 (2005).

3. *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

4. *Gall v. United States*, 128 S. Ct. 586 (2007).

5. 529 F.3d 150 (2d Cir. 2008).

ister. During the robbery, the gun accidentally fired, wounding Whitley in the face.⁶ He was subsequently indicted on three counts. Count One charged Whitley with the robbery in violation of the Hobbs Act, which criminalizes “obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery or extortion.”⁷ Count Two charged Whitley with using, carrying, or possessing a firearm “during and in relation to any crime of violence or drug trafficking crime” under § 924(c)(1)(A).⁸ Count Three charged Whitley as an armed career criminal for illegally possessing a firearm after three convictions for violent felonies or serious narcotics offenses under § 924(e)(1).⁹ Whitley was convicted of all counts at trial.¹⁰

The district court sentenced Whitley to imprisonment for 282 months on both the robbery and armed career criminal counts, followed by a mandatory consecutive term of 120 months for discharging a firearm.¹¹ The district court believed § 924(c)(1)(A)¹²

6. *Id.* at 151.

7. Hobbs Act, 18 U.S.C. § 1951 (2006).

8. 18 U.S.C. § 924(c)(1)(A) (2006).

9. 18 U.S.C. § 924(e)(1) (2006).

10. *Whitley*, 529 F.3d at 152.

11. *Id.*

12. The statute states:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A). After outlining additional penalties for certain types of weapons, such as assault rifles, machineguns, and silenced weapons, the section concludes by stating:

Notwithstanding any other provision of law . . . no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

18 U.S.C. § 924(c)(1)(D)(ii).

required this sentence.¹³ The Second Circuit reversed, holding that the statute did not require the mandatory ten-year consecutive sentence, and remanded for resentencing.¹⁴

Writing for the panel, Judge Jon O. Newman found that the consecutive mandatory sentence violated the opening clause of 18 U.S.C. § 924(c).¹⁵ The court of appeals held that because Count Three—the armed career criminal violation—subjected Whitley to a fifteen-year mandatory minimum sentence, “a greater minimum sentence [was] otherwise provided by this subsection or by any other provision of law,” thereby invoking the “except” clause and exempting Whitley from the requirement of a consecutive sentence.¹⁶ Rather than discuss the affirmative merits of its very literal reading of the statute, the court instead addressed the four specific objections raised by the government.

First, the government argued that the “except” clause should suspend an otherwise applicable § 924(c)(1)(A) sentence only when a greater minimum *consecutive* sentence applies for using a firearm in furtherance of an underlying crime. For example, 18 U.S.C. § 924(c)(1)(A)(iii) subjected Whitley to a ten-year consecutive sentence for discharging a firearm.¹⁷ The “except” clause exempted him from the five-year consecutive sentence he would also be subject to under 18 U.S.C. § 924(c)(1)(A)(i) for possessing the gun, a logically precedent requirement for discharging it.¹⁸ Similarly, had Whitley discharged a machinegun instead of a handgun—which results in a thirty-year consecutive sentence under § 924(c)(1)(B)(ii)—he would be exempt from the lesser ten-year sentence.¹⁹ But because Whitley’s twenty-three-year sentence arose from § 1951 and § 924(e), under which punishments do *not* run consecutively, the “except” clause should have no effect, and the district court correctly tacked on the ten-year sentence for discharging the gun. In short, the government’s interpretation implied that a sentence under § 924(c)(1)(A) is “excepted” only when the longer sen-

13. *Whitley*, 529 F.3d at 151.

14. *Id.* at 158.

15. *Id.* at 153 (quoting 18 U.S.C. § 924(c)(1)(A)).

16. *Id.*

17. *Id.*

18. *Id.*

19. 18 U.S.C. § 924(c)(1)(B)(ii).

tence triggering the “except” language also runs consecutively because the statute provides for consecutive sentences. Rejecting this argument with a single paragraph, the court accurately observed that “[t]he flaw in the Government’s argument, of course, is that the word ‘consecutive’ does not appear in the text of the ‘except’ clause.”²⁰

Second, the government pointed to the statute’s design.²¹ The 1998 amendment to § 924(c)(1)(A) separated an undivided subsection into individual numbered segments.²² Congress added the “except” clause, the government argued, solely to ensure that the newly-divided segments functioned in harmony: defendants would not be exposed to liability under multiple sections of § 924(c)(1)(A) for the same offense.²³ The court noted—tersely but correctly—that “if linking the various provisions of subsection (c)(1) together was the sole purpose of the ‘except’ clause, the clause would have ended with the phrase ‘provided by this subsection,’ and the phrase ‘or by any other provision of law’ would have been unnecessary.”²⁴

Third, the government argued that relieving Whitley of the ten-year sentence would be contrary to congressional intent.²⁵ Noting that the argument was “[o]f arguably greater force” than the two previously advanced,²⁶ the court briefly reviewed the history of amendments to § 924(c). Conceding that the most obvious purpose of the amendment was to reverse the Supreme Court’s very narrow interpretation of the statute’s previous version in *United States v. Bailey*,²⁷ the court nevertheless stated, “we do not regard it as inconsistent with that purpose for Congress . . . also to have made a reasoned judgment that where a defendant is exposed to two minimum sentences . . . only the higher minimum should apply.”²⁸

20. *Whitley*, 529 F.3d at 153.

21. *Id.*

22. *Id.* at 154.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. 516 U.S. 137, 144 (1995) (holding that the language in the previous version of § 924(c)(1)(A), prohibiting “use” of a firearm during a crime of violence, did not legalize possession but only “active employment” of a gun).

28. *Whitley*, 529 F.3d at 155.

Finally, the government argued that the court's interpretation of the "except" clause would give rise to illogical results.²⁹ Specifically, felons who committed lesser underlying crimes would face ultimately higher sentences than those whose base crimes carried a minimum sentence high enough to subsume the § 924(c) penalty through the "except clause." For example, a defendant who brandished a firearm while possessing 500 grams of cocaine would be subject to consecutive mandatory minimum sentences of seven years for the firearm and five years for the narcotics, whereas a defendant who brandished a firearm while possessing five kilograms would face only the mandatory ten-year minimum for the drugs.³⁰ The Second Circuit responded that courts would not be obliged to effect this absurdity, but could, in the aftermath of *Booker* and consistent with the sentencing factors of 18 U.S.C. § 3553(a), sentence above the minimum when necessary to avoid this inconsistency and to ensure justice.³¹ Notably, the court never denied that its interpretation would occasionally produce odd results.³²

The literal application of the "except" clause is unsatisfying in two main respects. First, it contorts a commonsense understanding of congressional intent through an overly simplistic textualism. Second, it pays tribute to textualism with one hand while taking back with the other, relying on unmoored future judicial discretion to remedy the potentially illogical results that its narrow interpretation produces. *Whitley* is only one of several recent circuit court decisions straining to reconcile the irreconcilable text and intent of the latest amendment to § 924(c).³³ The resulting circuit split neatly illustrates the tension between literalism and intentionalism, and the futility of the enterprise recommends a third way. Courts should employ a "dialogic" approach that increases explicit communication

29. *Id.*

30. *Id.*

31. *Id.*

32. See *United States v. Williams*, No. 07-2436-cr, slip op. at 16 (2d Cir. Mar. 5, 2009) (reaffirming the holding of *Whitley* where a defendant's mandatory sentence for crack cocaine trafficking exceeded the additional mandatory sentence for firearms possession, and holding that "this purported anomaly results from what, in our view, is a plain reading of the statutory text").

33. See, e.g., *United States v. Studifin*, 240 F.3d 415 (4th Cir. 2001); *United States v. Jolivette*, 257 F.3d 581 (6th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386 (8th Cir. 2000).

from the judiciary to Congress, imitating practices commonly used to deal with constitutional issues.

It is well established that the first resort of statutory interpretation is to the plain language of the law,³⁴ and the plain text of the statute does seem to support the court's holding. In general, "[i]t is beyond [the] province [of the courts] to rescue Congress from its drafting errors, and to provide for what [the court] might think, perhaps along with some Members of Congress, is the preferred result."³⁵ The government's arguments in *Whitley* required either ignoring words in the statute—specifically, the language "or any other provision of law"—or adding words that are not there by narrowing the sweeping language of the "except" clause to "consecutive" sentences only. The Second Circuit, however, relied too heavily on the aphorism that Congress "says in a statute what it means and means in a statute what it says"³⁶ when it concluded that Congress intended to exclude from the application of § 924(c) those facing heavier sentences for underlying crimes.³⁷ The court conceded that the 1998 amendments to § 924(c) were obviously enacted to reverse the *Bailey* decision.³⁸ Although divining congressional intent after the fact can be an alchemic and uncertain process, there is myriad evidence in the legislative history that the only purposes of the amendment were to reverse *Bailey* and to treat criminals who use guns while committing their crimes more harshly than those who do not.³⁹ There is no mention in the his-

34. *Caminetti v. United States*, 242 U.S. 470 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.").

35. *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring).

36. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

37. *United States v. Whitley*, 529 F.3d 150, 155 (2d Cir. 2008).

38. *Id.*

39. Enacted in 1968 as part of the 90th Congress's Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 924 was originally written very narrowly, providing that whoever "ships, transports, or receives a firearm in interstate or foreign commerce" with an intent to commit certain crimes was subject to enhanced punishment. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 233 (1968). The statute was subsequently amended in 1971, 1984, 1986, 1990, 1993, and 1994.

tory of the intent to exempt a huge class of offenders from the strictures of § 924(c). Indeed, such a purpose undermines the entire point of stacking firearms enhancements. That Congress would radically undermine § 924(c) in the same moment it was working specifically to reverse a Supreme Court decision that weakened the provision is unlikely.

Perhaps more disconcerting is the court's conclusion that discretionary sentencing by judges pursuant to the factors of § 3553(a) would suffice to implement the purpose of Congress. Far from being comforting, this remedy amounts to a tacit admission of the potential inadequacy of the court's interpretation of the statute and, in the name of achieving congressional aims, contrives a solution that Congress sought to preclude. First, it is empirically unclear that the proposed solution will oc-

Following that last amendment, § 924(c) was an undivided subsection providing for mandatory consecutive sentences for anyone who "uses or carries a firearm" during a crime of violence or drug trafficking crime. 18 U.S.C. § 924(c)(1) (1994), amended by Pub.L. No. 105-386. In 1995 the Supreme Court construed that version of the statute narrowly, holding that "'use' of a firearm under § 924(c)(1) requires more than a showing of mere possession." *United States v. Bailey*, 516 U.S. 137, 144 (1995). Congress immediately attempted to redraft the statute. Though it ultimately took a year and several proposals to amend § 924(c), the language in each and every proposal was virtually identical to that ultimately adopted, including the "except" clause. S. 1612, 104th Cong. (1996); S. 191, 105th Cong. (1998) (enacted).

In opening Judiciary Committee hearings on the proposals, Senator Mike DeWine was clear that the offenders targeted by the statute "need to have very, very severe sentences, [and] that those sentences need to be enhanced if they do, in fact, commit the crime with a gun." *Violent and Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under Section 924(c): Hearing Before the S. Comm. on the Judiciary*, 104 Cong. 2 (1998) (statement of Sen. Mike DeWine, Member, S. Comm. on the Judiciary). In explaining the purpose of the legislation, Senator Jesse Helms was explicit: "[v]iolent felons who possess firearms are more dangerous than those who don't." *Id.* at 3 (statement of Sen. Jesse Helms, Member, S. Comm. on the Judiciary). Senator Joseph Biden was equally clear: "We don't want people committing crimes, but if we have a choice, we want to penalize the person who thinks they may or may not need a gun, but nonetheless has it in their possession when they commit a crime—we want to punish that person more than the person that doesn't." *Id.* at 10 (statement of Sen. Joseph Biden, Member, S. Comm. on the Judiciary).

Even those who opposed the legislation recognized its clear intent to tack an additional sentence for the firearm onto that for the underlying crime. For example, David Zlotnick, a law professor and former Assistant U.S. Attorney, expressed reservations that "rural defendants who commit exactly the same crime as their counterparts in the city, but have a gun in their house, will likely receive additional mandatory time for the exact same crime." *Id.* at 32 (statement of David Zlotnick, Assoc. Professor, Roger Williams Univ. Sch. of Law).

cur. According to a 1991 study of mandatory minimum sentencing, the Second Circuit is among the most lenient in the nation, with judges sentencing above statutorily required minimums in only 49% of cases.⁴⁰ Further, that study was conducted in an era of even less judicial discretion before *United States v. Booker* rendered the Sentencing Guidelines advisory.⁴¹ There is little reason to believe that a result of the current, less-regimented system is to increase the willingness of judges to sentence defendants to long terms of incarceration.

Second, the entire purpose of mandatory minimums is to reduce judicial discretion. As the U.S. Sentencing Commission put it, “[m]andatory minimums employ a structure that allows a shifting of discretion and control over the implementation of sentencing policies from courts to prosecutors.”⁴² The Second Circuit’s interpretation of § 924(c) reverses Congress’s decision, arrogating to district judges the responsibility of deciding when to apply the stacking effect Congress intended with § 924(c). If the test for absurdity is whether an interpretation of a statute is “plainly at variance with the policy of the legislation as a whole,”⁴³ as the Supreme Court has urged, then *Whitley*’s solution of relying on judges to adjust sentences on an ad hoc, case-by-case basis is itself “absurd.”⁴⁴

Whitley applies the most uncompromisingly textual analysis of any circuit to consider the new § 924(c). Before *Whitley*, the Fourth, Sixth, and Eighth Circuits expressly rejected so literal a reading of the “except” clause.⁴⁵ Instead, they focused on the design of the provision, emphasizing its conversion from an undivided section into several subparts and attributing the existence of the “except” clause to its simplest explanation. It was

40. U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 31 (1991) [hereinafter SENTENCING COMMISSION SPECIAL REPORT].

41. 543 U.S. 220 (2005).

42. SENTENCING COMMISSION SPECIAL REPORT, *supra* note 40, at 48.

43. *Ozawa v. United States*, 260 U.S. 178, 194 (1922).

44. The descriptive claim that judges can, in fact, avoid illogical sentences by imposing a higher sentence equivalent to that which would be required absent the “except” clause is certainly true. The absurdity is in the normative conclusion that ad hoc judicial evaluation is consistent with congressional intent in passing a statute designed to preclude that kind of discretion.

45. *See, e.g., United States v. Studifin*, 240 F.3d 415 (4th Cir. 2001); *United States v. Jolivet*, 257 F.3d 581 (6th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386 (8th Cir. 2000).

necessary “to link the remaining prefatory language in (c)(1)(A) to each sentence length set forth in subdivisions (c)(1)(B) and (c)(1)(C).”⁴⁶ Each decision reached essentially the same conclusion that the government proposed in *Whitley*. The Eighth Circuit in *United States v. Alaniz* described it thus: “Subdivision (c)(1)(A)’s ‘greater minimum sentence’ clause refers only to the firearm-related conduct proscribed either by § 924(c)(1) or ‘by any other provision of law.’”⁴⁷ In adopting the reasoning of *Alaniz* a year later, the Fourth Circuit in *United States v. Studifin*⁴⁸ went further, focusing not merely on the crime but also on the way in which the drafting of the “except” clause was intended to affect sentences. The court read “the language as simply reserving the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation, and not as negating the possibility of consecutive sentencing.”⁴⁹ When the Sixth Circuit confronted the issue in *United States v. Jolivette*, it extensively cited both *Studifin* and *Alaniz*, concluding that where a statute does not provide a mandatory minimum, “the sentences in those subsections do not fall within § 924(c)(1)(A)’s reference to ‘any other provision of law.’”⁵⁰ In short, the Second Circuit stands alone in reading the “except” clause so literally.

The reasoning of these circuits is subject to valid criticism. As the *Whitley* court noted, fixing the “design” problem requires only the first portion of the “except” clause:⁵¹ “[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection.”⁵² The words that follow, “provided by this subsection or any other provision of law,”⁵³ are not only unnecessary to fix the design problem but also compel a broader exception than every circuit—other than the Second—attributes to the provision. Although it is troubling to think that fidelity to Congress’s intent requires inserting words into a facially clear statute (to echo the *Whitley* court’s criticisms of the govern-

46. *Alaniz*, 235 F.3d at 389; see also *Jolivette*, 257 F.3d at 587; *Studifin*, 240 F.3d at 423.

47. *Alaniz*, 235 F.3d at 389.

48. 240 F.3d at 423.

49. *Id.*

50. 257 F.3d at 587.

51. *United States v. Whitley*, 529 F.3d 150, 154 (2d Cir. 2008).

52. 18 U.S.C. § 924(c)(1)(A) (2006).

53. 18 U.S.C. § 924(c)(1)(A) (emphasis added).

ment's argument that the exception applies to consecutive sentences alone), it is no less disturbing to reach the same conclusion by ignoring terms that are actually present, as other circuits addressing the question have done.⁵⁴

These competing approaches to the interpretation of the "except" clause illustrate the two major styles of statutory interpretation: intentionalism in the majority view and textualism in *Whitley*. Both interpretations have their shortcomings. To bring the statute into accord with congressional intent, the majority view essentially cherry-picks those aspects of the "except" clause that it wishes to follow, virtually omitting its application to "any other provision of law." This analysis creates problems of granting the judiciary authority to ignore what Congress has set down. The textualist approach in *Whitley*, however, leaves untouched a problematic statute that, although clear on its face, no one thinks is quite so clear in its application. So although the Fourth, Sixth, and Eighth Circuits were indeed distorting the text of the statute, at least they were doing so to bend it to the contours that Congress intended. In many respects, the two problems are opposite sides of the same coin. Professor John Manning described one of the chief problems of intentionalism, especially as reflected in the absurdity doctrine, that it "is triggered by the conclusion that Congress could not conceivably have intended the results otherwise compelled by a clear statutory text."⁵⁵ In *Whitley*, the court came to the equally problematic and implausible conclusion that Congress could not conceivably have intended any result other than that compelled by the statutory text.⁵⁶

There is a third way. It is possible to divine a reasonably accurate impression of congressional intent, looking at the legislative history according to a model such as that adopted by Justice Samuel Alito and Chief Judge Frank Easterbrook: "as a persuasive source of information . . . rather than as an authoritative source of law."⁵⁷ But this still leaves the court in the un-

54. *Cf. Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004) ("Where there are two ways to read the text—either attorney is surplusage, in which case the text is plain; or attorney is nonsurplusage . . . in which case the text is ambiguous—applying the rule against surplusage is, absent other indications, inappropriate. We should prefer the plain meaning since that approach respects the words of Congress.").

55. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2431 (2003).

56. *United States v. Whitley*, 529 F.3d 150, 154 (2d Cir. 2008).

57. Elliott M. Davis, Note, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983, 1002 (2007).

satisfactory position of having to choose “persuasive . . . information” over clear law.⁵⁸ In a case of irreconcilable conflict between text and intent, like *Whitney*, legislative history should serve a much better purpose than a justification for the court to edit the statute as it sees fit. It can provide a means for judges “not [only to] apply the law, but [to] participate in a law-making conversation.”⁵⁹

When striking down statutes on constitutional grounds, courts frequently “suggest repairs that would make the statute constitutional.”⁶⁰ There is no reason to limit this dialogic approach to cases in which a statute has been struck down entirely; it can apply to cases of interpretation as well. Indeed, one might view a flat refusal to enforce a law as less offensive than continuing to enforce a law out of accordance with Congress’s intention. Professor Amanda Frost has suggested allowing the Supreme Court to have essentially an interlocutory appeal to Congress in cases requiring interpretation of ambiguous statutes.⁶¹ Although that formal an approach raises its own set of issues, especially in regard to a criminal statute like § 924(c), there is no reason that Congress’s involvement with its statutes should end the day a bill is passed. In a case like *Whitley*, and in all cases involving criminal sentences, the court ultimately has limited powers to cure the ills of a poorly written statute. There is no middle ground between a strict application of the legislative history, which ties judges’ hands to the mandatory consecutive minimums, and strict application of the text, which, in cases of those serious offenders Congress most wished to punish, leaves the severity of sentences in the dubious control of the § 3553(a) factors. Congress, by contrast, has a much more expansive toolbox, ranging from the mere deletion of a few words to bring the statute in accord with the current majority view, to wholesale redrafting after hearings and learned commentary—a technique the legislature has not hesitated to employ with § 924(c) in the past.

Consistent with *Whitley*’s commendable restraint in adhering to the text of the statute, it would therefore be far better for a

58. *Id.*

59. Katherine R. Tromble, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation*, 52 VAND. L. REV. 521, 547 (1999).

60. *Id.* at 548.

61. Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 6 (2007).

court to be equally deferential to Congress in selecting a remedy for the error. In 1930, Justice George Sutherland expressed this idea for a unanimous Court:

It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts.⁶²

There are examples of the Supreme Court calling for Congress to remedy unintended consequences through legislation. In addressing a question of sovereign immunity, Justice Thurgood Marshall wrote in 1988 that “Congress is in the best position to provide guidance for the . . . inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal employees involved in state-law tort actions would be useful.”⁶³ In this case, because sentences should, at least in part, reflect a community sense of the evil of a particular crime, it is particularly important that courts defer to the democratic judgment of Congress. Similarly, in interpreting the Armed Career Criminal Act in January 2009, Justice Samuel Alito wrote a concurrence in which he described that although he was “sympathetic to the majority’s efforts to provide a workable interpretation,” he wrote separately “to emphasize that only Congress can rescue the federal courts from the mire into which ACCA’s draftsmanship and [prior cases] have pushed us.”⁶⁴

Lower courts dealing with § 924(c) should be similarly outspoken. The Second, Fourth, Sixth, and Eighth Circuits all reached unsatisfactory results without explicitly announcing that there was anything unsatisfactory about the statute itself. Why? Before her elevation to the Supreme Court, Justice Ruth Bader Ginsburg wrote that lower courts “are not shy about identifying the deficiencies in legislation. The problem has been that, too often,

62. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

63. *Westfall v. Erwin*, 484 U.S. 292, 300 (1988).

64. *Chambers v. United States*, 129 S. Ct. 687, 694 (2009) (Alito, J., concurring in the judgment).

no one in Congress hears the plea.”⁶⁵ Although judicial pleas falling on deaf congressional ears certainly may be a problem, to mangle statutes in interpretation or apply them unblinkingly and literally to produce absurd results is a double evil. When a court, as in *Whitley*, implausibly holds that Congress meant what the statute says, even the most attentive Members of Congress remain uninformed of the problem and the courts lose credibility. Either approach—contorting the statute to accord with intent or strictly applying the text and concluding that intent and text must be aligned—carries the same problem: It “relieves Congress of accountability.”⁶⁶

The Supreme Court may step in and address § 924(c) soon. If it takes the case, it is by no means clear that the Court will reach the same conclusion as *Whitley*. Since that case was decided, the Court has been kinder than the Second Circuit to the looser interpretation of § 924(c) urged by the government in *Whitley*. In dictum in *Greenlaw v. United States*, decided one week after *Whitley*, Justice Ginsburg noted that “any sentence for violating § 924(c), moreover, must run consecutively to ‘any other term of imprisonment,’ including any other conviction under § 924(c).”⁶⁷ This “reading into the statute” of a requirement that a sentence run consecutively if it is to invoke the “except” clause of § 924(c)(A)(1) is precisely what the government urged in *Whitley* and reaches the same result that all circuits have reached except the Second Circuit. As the Second Circuit noted in *Whitley*, however, the Supreme Court has also encouraged the courts to give literal reading to § 924.⁶⁸ The Court’s past pronouncements, then, illustrate the same divided loyalty to text and intent that created the circuit split. Ultimately, the Supreme Court may employ another canon to break the stalemate: the rule of lenity. In *Whitley*, the court did not explicitly invoke the

65. Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1429 (1987).

66. Manning, *supra* note 55, at 2472.

67. *Greenlaw v. United States*, 128 S. Ct. 2559 (2008) (reversing a court of appeals for finding error sua sponte in a sentence that did not include enhanced penalties for multiple convictions entered in the same judgment when the government had not cross-appealed the issue).

68. See *United States v. Whitley*, 529 F.3d 150, 156 (2d Cir. 2008) (citing *United States v. Rodriguez*, 128 S. Ct. 1783, 1788 (2008) (holding that interpreting the statute to add qualifying language not actually written is “not faithful to the statutory text”)).

rule of lenity but hinted that it might be tipping the scales.⁶⁹ For example, the court noted that it was “aware of no decision rejecting the literal meaning of statutory language *to the detriment of a criminal defendant.*”⁷⁰ This is one of three instances when the Second Circuit obliquely hinted at the rule of lenity.⁷¹ Caught, like the Second Circuit, between the literal text of § 924(c) and the obvious intention behind it, the Supreme Court might be more willing than the Second Circuit to invoke the rule of lenity explicitly.

Whitley demonstrates why congressional statutes should not be read with such rigidity. Courts of course can and should apply the text of the statute as written whenever possible. Any other approach leads courts into a maze of mirrors in which “congressional intent” ends up merely reflecting the views of jurists. Textualism need not, however, require treating legislative history as if it does not exist or positing a non-existent correlation between text and intent. Applying the text with no regard for what Congress intended that text to do creates an interstitial legal space in problematic cases described by Judge Henry Friendly in the title of a 1963 article as *The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t*.⁷² Judge Friendly is right; judges cannot legislate. They can, however, speak up. Judges should be textualist whenever possible and vocal when textualism compels results discordant with likely statutory aims. Few are better situated to alert Congress of its failure to craft laws that achieve their goals than judges who strive to be faithful to text.

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69. See, e.g., *id.* at 151.

70. *Id.* at 156 (emphasis added).

71. See *id.*; *id.* at 151 (“This criminal appeal presents the unusual situation in which the literal meaning of a sentencing statute has been disregarded *to the detriment of a defendant.*” (emphasis added)); *id.* at 154 (“Passing the objection that *even a grammatical imperfection would be a dubious basis for adding a ten-year consecutive sentence contrary to the plain wording of a statute,* we fail to see any grammatical problem at all” (emphasis added)).

72. Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t*, 63 COLUM. L. REV. 787 (1963).