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Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm"

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LINGUISTIC ANALYSES OF JUDICIAL DECISIONMAKING

USING COMMON SENSE: A LINGUISTIC PERSPECTIVE ON JUDICIAL INTERPRETATIONS OF "USE A FIREARM"

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This Article will show how analytical methods of legal and linguistic scholarship can interact to examine a legal text, in particular a provision of

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the federal criminal code, the interpretation of which has been hotly contested within the legal system. We will first analyze one interpretive problem that was the subject of the divided Supreme Court decision of *United States v. Smith*[1] in 1993, and then turn to another interpretive problem that divided the nine judges of the federal court of appeals from the District of Columbia and will be argued before the Supreme Court during the fall of 1995 in the consolidated cases of *United States v. Bailey*[2] and *United States v. Robinson*[3] ("the *Bailey* case").

Are there linguistic features of the statutory text itself that generate such demonstrably "hard" cases? Our analysis does identify such features, but also derives from "common sense" understanding of the text linguistic principles for distinguishing between competing interpretations. By including in our analysis an interpretive problem yet to be definitively resolved by the Supreme Court we continue the experimental approach of combining law and linguistics reported in the 1994 article, *Plain Meaning and Hard Cases*[4] that brings the two disciplines together not merely to critique past judicial decisionmaking but to imagine ways such interdisciplinary collaboration could actually be of practical use to judges faced with the challenge of deciding hard cases.

The two interpretive problems focus on the meaning of "uses" in the phrase "uses or carries a firearm" in section 924(c) of Title 18.[5] Because

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1. 113 S. Ct. 2050 (1993).

2. 995 F.2d 1113 (D.C. Cir. 1993), *aff'd on different grounds*, 36 F.3d 106 (D.C. Cir. 1994) (en banc), *and cert. granted*, 63 U.S.L.W. 3780 (1995).

3. 997 F.2d 884 (D.C. Cir. 1993), *rev'd sub nom.*, United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994) (en banc), *and cert. granted*, 63 U.S.L.W. 3780 (1995). This text first came to our attention when Kent Greenawalt brought up the *Smith* decision and Justice Scalia's criticism of the decision, during the Law and Linguistics Conference. *Law and Linguistics Conference*, 73 WASH. U. L.Q. 857-58 (1995). After the conference Cunningham continued to review cases for which the Court was granting review for the 1995-96 term looking for issues that might be amenable to linguistic analysis, a project he had started for the conference. When review was granted in the *Bailey* and *Robinson* cases, he asked Fillmore to do a preliminary semantic analysis. The results of that analysis seemed sufficiently interesting that we agreed to write this article for this symposium issue. None of the parties nor their attorneys in the *Bailey* or *Robinson* cases asked us to work on this topic. Our contact with the attorneys has been largely limited to obtaining information about the status of the case and copies of the briefs. Although in response to their requests, we sent a draft copy to attorneys for both petitioners and the government a month before the reply brief was due.

4. Clark D. Cunningham et al., 103 YALE L.J. 1561 (1994); *see also* Jeffrey P. Kaplan et al., *Bringing Linguistics into Judicial Decisionmaking: Semantic Analysis Submitted to the U.S. Supreme Court*, 1 Forensic Linguistics (forthcoming 1995). Both articles have the same four co-authors: a law professor, Cunningham, and three linguistics professors: Judith N. Levi, Georgia M. Green, and Jeffrey P. Kaplan.

5. 18 U.S.C. § 924(c) (1995).

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in both the *Smith* and *Bailey* cases the majority *and* dissenting opinions made much of "common parlance" and "the ordinary use of the English language"[6] we begin our analysis by using standard linguistic methods. This analysis indicates that in everyday English the meaning of the verb *use*[7] is very general and thus highly dependent on context, in particular its direct object and any other accompanying phrases.

We identify two distinctly different ways in which context can affect interpretation of the phrase *use a firearm.* The first relates to the nature of firearms as artifacts, raising the interpretive question whether the firearm is to be understood as being used according to its manufactured function, "the default interpretation." The disagreement among the justices in *Smith v. United States*[8] over the "plain meaning" of the phrase can be explained as a debate as to whether the statutory context pointed only to the default interpretation.

The second distinction is between "eventive" and "designative" interpretations of *use a firearm.* In the eventive interpretation, *use a firearm* indicates that a specific event took place in which the firearm played an instrumental role. In the designative interpretation, *use a firearm* may only designate a particular intended function for the firearm without any event having yet taken place. As we read the *Bailey* decision, the majority opted for a designative interpretation while the dissenters read the statute as limited to an eventive interpretation.

Thus far in our analysis, the methods of linguistics serve to bring to conscious awareness the "common sense" that judges share with all native speakers about everyday language. Our expectation is that these semantic distinctions would enable judges to articulate what they already "know" about possible interpretations of *use a firearm*, in much the same way that rules of syntax can explain how a speaker "knows" that one utterance is well-formed while another utterance is not (even though that speaker might not be able to state the syntactical rule).[9] In relation to the *Bailey* case, we continue this focus on "common sense" understanding of the text as everyday language by looking at the way the combination of "or carries"

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6. *See infra* notes 14-20 and 50-75 and accompanying text.

7. We follow the standard convention in linguistics of using italics rather than quote marks when referring to a word or phrase as a linguistic term.

8. 113 S. Ct. 2050 (1993).

9. More than a century ago the Supreme Court indicated its willingness to use dictionaries in the same way we urge that linguistics be used now: "in regards to all words in our own tongue . . . not as evidence, but only as aids to the memory and understanding of the court." Nix v. Hedden, 149 U.S. 304, 307 (1893) (citations omitted).

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with "uses" invites the eventive interpretation. However, we go beyond the conventional methods of linguistics to test the distinction between designative and eventive interpretation for the specific legal context of the statute.

The first legal context we examine is synchronic: the entire text of Title 18 of the United States Code in its current form. Review of every provision in which *use* appears together with some variant of *weapon* reveals patterns consistently explicated by the designative/eventive distinction, patterns that once again point toward an eventive interpretation of section 924(c). In particular we note that elsewhere in Title 18 Congress relies on variations of the verb *possess*, not *use*, where it imposed criminal penalties in situations that could have been described as *using a firearm* in the designative sense. Title 18 does contain provisions that invite a designative interpretation of *use* but only in provisions that share two features: (1) they are exceptions to criminal liability, and (2) the designative interpretation is marked by a *for* phrase (not found in section 924(c)).

The second legal context is diachronic: the history of how the text of section 924(c) has evolved in Congress to its current form. Again the designative/eventive distinction proves to be a useful heuristic. The text as originally enacted clearly limited *use a firearm* to an eventive interpretation. No single subsequent amendment marked an expansion to a designative interpretation; rather, the intersection of textual features in the current statute that is now used to support arguments for a designative interpretation appears to be an unintended result of three unrelated amendments by three separate Congresses. Our review of Title 18 also led us to discover a series of unsuccessful legislative amendments from 1989 to the present, all of which appeared to have the purpose of extending section 924(c) to fact patterns like the *Bailey* case, but by adding *possess* to the text rather than by clarifying or defining *use* to point to a designative interpretation.

Our experience in this project has been that the approaches of our respective disciplines of law (Cunningham) and linguistics (Fillmore) have been mutually edifying. Cunningham's idea to extend the data base from conventional everyday discourse to the text of Title 18 produced a set of examples that led us to elaborate and sharpen Fillmore's initial semantic analysis of *use*. In turn, Fillmore's semantic analysis enabled Cunningham to put legislative history in a new perspective. Instead of using legislative history in the conventional legal way as evidence for underlying goals and purposes of Congress (an approach increasingly disfavored by the current Supreme Court), we examine what we call "legislation history" in two ways more consistent with attention to textual meaning. First, having found a

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semantic anomaly in the current text, that apparently led the *Bailey* majority to select a designative interpretation, we looked to see at what point in the legislation history that anomaly might have been introduced.[10] Second, we examined the textual history of section 924(c) as if it were a coherent discourse over time, an approach that may make unsuccessful amendments more relevant than they are treated under current principles of statutory interpretation.

In Part I we review the *Smith* decision and in Part II we summarize the facts, procedural history and conflicting judicial opinions in the *Bailey* case. Part III contains our linguistic analysis of *use a firearm* based on study of both everyday discourse and the text of Title 18, and applies that analysis to both the *Smith* and *Bailey* cases. In Part IV we examine the legislation history of section 924(c) in light of our linguistic analysis.

I. PLAIN MEANING AND THE FIREARMS PENALTY STATUTE

Section 924(c) of Title 18 imposes a mandatory minimum five year sentence on "[w]hoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm"[11] ("the firearms penalty"). This term of imprisonment must be added to whatever sentence is imposed for the underlying crime of violence or drug trafficking offense, and cannot be reduced by probation or parole. In *Smith v. United States*,[12] the Court held by a 6-3 majority that "uses a firearm in relation to drug trafficking" included bartering a MAC-10 machine gun in exchange for two ounces of cocaine.[13]

It is notable what the majority and dissenting opinions had in common. Both Justice O'Connor, writing for the majority, and Justice Scalia, dissenting for himself, Justices Souter and Stevens, agreed that *uses* in the firearms penalty should be interpreted according to "ordinary," "natural" and "everyday" meaning and not as a technical word or "artfully defined" legal term.[14] Neither relied at all on extra-textual evidence of legislative

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10. Linguistic analysis of the statute at issue in United States v. Granderson, 114 S. Ct. 1259 (1994), by the authors of *Plain Meaning* also showed a peculiar variance from conventional usage, leading them to an examination of legislative history that strongly suggested congressional error. Cunningham et al., *supra* note 4, at 1579-82, *cited in Granderson*, 114 S. Ct. at 1267.

11. 18 U.S.C. § 924(c)(1) (1988).

12. 113 S. Ct. 2050 (1993).

13. *Id.* at 2054.

14. *Id.* at 2054, 2061.

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intent such as committee reports or floor debates.[15] There was only cursory argument based on the presumed purpose of the statute or public policy.[16] The ground of disagreement between the two factions appeared to be entirely a matter of differing opinions about the meaning of everyday language.[17]

Justice O'Connor wrote:

> When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning . . . . Surely petitioner's treatment of his MAC-10 can be described as "use" within the everyday meaning of that term. Petitioner "used" his MAC-10 in an attempt to obtain drugs by offering to trade it for cocaine.[18]
>
> We have observed that the rule of lenity "cannot dictate an implausible interpretation of a statute nor one at odds with the generally accepted contemporary meaning of a term." That observation controls this case. Both a firearm's use as a weapon and its use as an item of barter fall within the plain language of § 924(c)(1).[19]

Justice Scalia relied on his intuitions about everyday language to exactly the same extent as Justice O'Connor:

> In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. . . . To use an instrumentality ordinarily means to use

15. Justice O'Connor mentions that Smith relied "on the legislative record" to argue that bartering was not the kind of firearm use Congress contemplated in drafting the statute, without explication of what specifically in the legislative record was argued by Smith. *Id.* at 2058. She dismisses any possible evidence in the legislative history by reference to the language of the text: "It may well be that Congress . . . had in mind a more obvious use of guns . . . but the language [of the statute] is not so limited." *Id.* (quoting United States v. Harris, 959 F.2d 256, 262) (brackets in original). *See also id.* at 2058 ("Even if we assume that Congress had intended the term "use" to have a more limited scope when it passed the original version of § 924(c) in 1968 . . . we believe it clear *from the face of the statute* that the Congress that amended § 924(c) in 1986 did not.") (emphasis added).

16. In the penultimate paragraph of her opinion, Justice O'Connor states that the dissent's more restrictive reading would do "violence not only to the structure and language of the statute, but to its purpose as well." *Id.* at 2060. She goes on to say that Congress "was no doubt aware that drugs and guns are a dangerous combination," quoting statistics about the correlation between homicide and drug dealing in New York City and Washington, and pointing out that the gun offered for barter could have been "converted instantaneously from currency to cannon." *Id.* Justice Scalia responds in his last footnote: "The Court contends that giving the language its ordinary meaning would frustrate the purpose of the statute . . . . Stretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in." *Id.* at 2063 n.4 (Scalia, J., dissenting).

17. Both Justice O'Connor and Justice Scalia argue that their interpretations of "use a firearm" are consistent with the meaning of that phrase in other provisions of federal criminal law, but these arguments serve only to buttress their primary analysis based on everyday meaning.

18. *Id.* at 2054 (citations omitted).

19. *Id.* at 2060 (citations omitted).

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> it for its intended purpose. . . . The Court does not appear to grasp the distinction between how a word can be used and how it ordinarily is used. . . . It is unquestionably not reasonable and normal, I think, to say simply "do not use firearms" when one means to prohibit selling . . . them.[20]

Given this reliance on everyday meaning, used by all members of the Court in interpreting the firearms penalty in *Smith*, this statute actualizes the hypothetical posed during the Law and Linguistics Conference:[21] If two justices disagree about the everyday meaning of a text, how can that disagreement be resolved? And, in cases of such potential disagreement, can a linguist provide useful information about the everyday meaning of a text beyond what is available to a judge from her own intuitions as a native speaker of English?

Fortuitously for us, the Supreme Court has decided to revisit the problem of what "use a firearm" means in the firearms penalty statute by granting review, almost exactly two years after *Smith* was decided, to a pair of consolidated cases from the District of Columbia Circuit: *United States v. Robinson*[22] and *United States v. Bailey*.[23] Both cases, to be argued before the Court sometime in the fall of 1995, present an issue that has plagued the courts of appeal in every federal circuit:[24] Where the evidence shows that a drug trafficker has kept a firearm in an accessible location while engaged in her drug operations, is that evidence by itself sufficient to convict a defendant of "using a firearm" during and in relation to a drug trafficking crime?

II. THE ROBINSON AND BAILEY CASES

Candisha Robinson should not have answered the door when Larry Hale knocked on July 15, 1991, but she did and she got him what he asked for, a "rock" of crack cocaine.[25] Unfortunately for her, Hale was an undercover officer. The next night a search warrant was executed at her apart-

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20. *Id.* at 2060 (Scalia, J. dissenting).

21. *Law and Linguistics Conference*, *supra* note 3, at 852-53.

22. 997 F.2d 884 (D.C. Cir. 1993), *rev'd sub nom.* United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994) (en banc), *cert. granted*, 63 U.S.L.W. 3780 (1995).

23. 995 F.2d 1113 (D.C. Cir. 1993), *aff'd on different grounds*, 36 F.3d 106 (D.C. Cir. 1994) (en banc), *and cert. granted*, 63 U.S.L.W. 3780 (1995).

24. See the summary of circuit court decisions interpreting "use or carry" in the en banc *Bailey* opinion, 36 F.3d at 113, and in then-Chief Judge Breyer's dissent in United States v. McFadden, 13 F.3d 463, 468-70 (1st Cir. 1994).

25. *Robinson*, 997 F.2d at 885.

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ment.[26] Inside a locked trunk in her bedroom closet the police found a twenty-two caliber derringer and holster, two rocks of crack cocaine weighing a little over ten grams, and twenty dollars in marked money.[27] No ammunition for the derringer was found in the apartment.[28]

After a jury trial, Robinson was convicted of (1) distributing cocaine base,[29] (2) possession with intent to distribute cocaine base in excess of five grams,[30] (3) maintenance of a crack house,[31] and (4) use or carrying of a firearm during and in relation to a drug trafficking offense.[32] She was sentenced to thirteen years of imprisonment;[33] five of those years were attributable solely to the firearms penalty.[34]

On appeal, a panel of three circuit judges voted two to one to reverse the firearms penalty conviction.[35] Then-Chief Judge Abner Mikva wrote for the majority that "[g]iven the way section 924(c) is drafted, even if an individual intends to use a firearm in connection with a drug trafficking offense, the conduct of that individual is not reached by the statute unless the individual *actually uses* the firearm for that purpose."[36] He concluded that "[t]he only reasonable view of the evidence in this case is that the gun [merely] was intended for use at some future date."[37]

The government successfully sought review by the entire District of Columbia Circuit bench, which consolidated en banc consideration of *Robinson* with the case of *United States v. Bailey*.[38]

Unfortunately for Roland Bailey, in May 1988, two officers of the District of Columbia police department noticed his car was missing its front license plate and had no inspection sticker.[39] It was also unfortunate that he was not carrying his driver's license. When he was ordered out of his

26. *Id.*
27. *Id.*
28. *Id.* at 888.
29. 21 U.S.C. § 841(a)(1) & (b)(1)(C) (1988).
30. 21 U.S.C. § 841(a)(1) & (b)(1)(B)(iii) (1988).
31. 21 U.S.C. § 856(a) (1988).
32. 18 U.S.C. § 924(c)(1) (1988). She was also convicted of committing these drug offenses within 1000 feet of a school, in violation of 21 U.S.C. § 860(a). 997 F.2d at 886.
33. 997 F.2d at 886.
34. 36 F.3d at 109.
35. 997 F.2d at 891.
36. *Id.* at 887 (emphasis added).
37. *Id.* at 890.
38. 36 F.3d 106 (D.C. Cir. 1994).
39. *Id.*

car, he produced only a District of Columbia identification card.[40] While exiting the car, Bailey pushed something between the seat and front console of the car.[41] One of the officers observed this action and searched the passenger compartment, finding a round of ammunition and twenty-seven plastic bags containing a total of thirty grams of cocaine.[42] The police arrested Bailey and then searched the trunk of the car, finding a loaded pistol and $3,216 in small bills.[43]

Following a jury trial Bailey was convicted of (1) possession with intent to distribute five grams or more of cocaine[44] and (2) using or carrying a firearm during or in relation to that drug trafficking offense.[45] He was sentenced to fifty-one months imprisonment on the possession charge and an additional five years on the firearms penalty.[46] The conviction was affirmed in a peculiar panel opinion. The opinion's purported author, Judge Douglas Ginsburg, actually dissented from the major portion of the opinion—on the issue of "using a firearm"—which was filed *per curiam*.[47] Judge Ginsburg explained that he could not reconcile Bailey's conviction with existing precedent in the District of Columbia Circuit interpreting the firearms penalty.[48] But he also made clear his opinion that the existing precedent ought to be overruled, charitably referring to the work of his predecessors with the well-known quote from Charles Dickens: "Sometimes the law *is* 'a ass, a idiot.'"[49]

Judge Ginsburg's dissent made its point. The District of Columbia Circuit granted en banc review of the *Bailey* case, consolidated it with the *Robinson* case, and then issued a five to four decision[50] that rewrote the

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40. 995 F.2d 1113, 1114 (D.C. Cir. 1993).

41. *Id.*

42. *Id.*

43. 995 F.2d at 1113, 1114. According to Bailey's brief on the merits before the Supreme Court, the police found the gun "beneath 'a whole lot of items' including 'clothing and bags and other things'." Brief for Petitioners at 2, United States v. Bailey, 63 U.S.L.W. 3780 (1995) Nos. 94-7448, 94-7492. "The police could not see the gun when they opened the trunk; indeed, the trunk was so full that it took roughly one minute to find the bag containing the gun." Brief for Petitioners at 2, 63 U.S.L.W. 3780

44. 995 F.2d at 1114-15 (conviction for violation of 21 U.S.C. § 841(a) (1988)).

45. *Id.* (conviction for violation of 18 U.S.C. § 924(c) (1988)).

46. *Id.* at 1115.

47. *Id.* at 1114 n.*.

48. *Id.* at 1119 (Ginsburg, J., dissenting).

49. *Id.*

50. United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994) (en banc). Judge Mikva, author of the *Robinson* panel opinion that was reversed, participated in oral argument en banc but did not vote on the decision, presumably because he had departed the bench by then to become special counsel to the

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law of the circuit as to the meaning of "use a firearm."[51] Judge Ginsburg wrote the en banc opinion for the majority.[52]

According to the en banc opinion, the District of Columbia Circuit had developed, through a series of panel decisions, "an open-ended test that [took] account of numerous factors arguably relevant to whether a gun was used in relation to a drug trafficking offense."[53] Among the numerous factors that might determine whether a gun was "used" under the open-ended test were "whether a gun is accessible to the defendant, whether it is located in proximity to the drugs (which may cut either way depending on the facts of a particular case), whether it is loaded, what type of weapon it is, and finally, whether there is expert testimony to bolster the government's particular theory of 'use'."[54] Criticizing this approach as producing "widely divergent results"[55] and as intruding "into the province of the jury," the en banc opinion sought to replace it with "a test that looks to two factors only: the proximity of the gun to the drugs involved in the underlying offense, and the accessibility of the gun to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds are located."[56]

The en banc opinion explains the basis for its new test in the space of a single page—five paragraphs—that relies almost entirely on what Judge Ginsburg argues is the ordinary meaning of "use a firearm."

The analysis begins:

> In the context of § 924(c)(1), 'use' could be defined either narrowly, so as to encompass only the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense, or more broadly, so as to include the other ways in which a gun can be used to facilitate drug trafficking. The narrow definition has the virtue of simplicity . . . however; it is too narrow to capture all of the various uses of a firearm that the Congress apparently intended to reach via § 924(c)(1).[57]

President. Had he remained on the bench until the decision, the District of Columbia Circuit might have been stuck with a five to five split on these cases.

51. *Id.*

52. *Id.*

53. *Id.* at 108 (citations omitted).

54. *Id.* at 110 (quoting United States v. Derr, 990 F.2d 1330, 1338 (D.C. Cir. 1993)).

55. *Id.* at 112. *Compare* United States v. Jefferson, 974 F.2d 201 (D.C. Cir. 1992); United States v. Morris, 977 F.2d 617 (D.C. Cir. 1992) (holding firearm used); *with* United States v. Derr, 990 F.2d 1330 (D.C. Cir. 1993); United States v. Bruce, 939 F.2d 1053 (D.C. Cir. 1991) (holding firearm not used).

56. 36 F.3d at 108.

57. *Id.* at 114.

The second paragraph simply cites the *Smith* decision as authority for the proposition that "Congress employed the term 'use' expansively" in the firearms penalty.[58]

The heart of the en banc opinion appears in the third paragraph:

> A gun can surely be used even when it is not being handled, however. For example, a gun placed in a drawer beside one's bed for fear of an intruder would, *in common parlance*, be a gun 'used' for domestic protection.[59]

Later in the opinion, Judge Ginsburg repeatedly transfers the "used for domestic protection"[60] example to describe the facts of the two cases as "uses of a gun,"[61] because the guns were "used to protect the drug trafficking operation."[62]

In the fourth paragraph, the en banc opinion cites as authority for "this more inclusive understanding of 'use'" a 19th century Supreme Court opinion holding that a customs exemption for "wearing apparel in actual use" applied to clothing purchased by the petitioner abroad and "intended for his own use" even if it had not yet "been actually put on or applied to its proper personal use."[63] Judge Ginsburg also quotes in this paragraph the following definition of "use" from *Black's Law Dictionary*: "[t]o make use of; to convert to one's service; to avail oneself of; to utilize; to carry out a purpose or action by means of."[64]

In the fifth and final paragraph, Judge Ginsburg announces the following new definition of "use a firearm" to replace the "open-ended" approach:

> [W]e hold that one uses a gun, i.e., avails oneself of a gun, and therefore violates the statute, whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime.[65]

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58. 36 F.3d at 114 (quoting Smith v. United States, 113 S. Ct. 2050, 2058 (1993)).
59. *Id.* (emphasis added).
60. *Id.*
61. *Id.* at 117.
62. *Id.* at 116.
63. *Id.* at 114-15 (quoting Astor v. Merritt, 111 U.S. 202, 213 (1884)).
64. *Id.* at 117. The quote comes from within the *Smith* opinion, thus giving it particular authority. Smith v. United States, 113 S. Ct. 2050, 2054 (1994) (quoting BLACK'S LAW DICTIONARY 1541 (6th ed. 1990)). The Court in *Smith* also quoted WEBSTER'S DICTIONARY, defining "to use" as "[t]o convert to one's service" or "to employ." 113 S. Ct. at 2054 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2806 (2d ed. 1949)). Judge Ginsburg apparently found the *Webster's* definition less helpful. It is peculiar for a court to quote only a law dictionary when making an assertion about the ordinary meaning of a word.
65. *Bailey*, 36 F.3d at 115.

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It is important to be clear that Judge Ginsburg is not assuming that the proximity of a gun to drugs or drug money is circumstantial evidence that the defendant actually *did* "gain access to it" to facilitate a drug crime. According to Judge Ginsburg, even if Bailey's gun never moved from the trunk of the car or Robinson's derringer stayed, unloaded, in the locked trunk in her closet, it is still a good use of everyday English to say that these guns were *used* during the drug crimes—if only because knowledge of their availability "emboldened" the defendants to commit the crimes:

> [T]here is little reason to doubt that [Bailey] was using the gun in relation to the possessory offense *regardless of whether the gun actually furthered the possessory offense* or emboldened him to commit that offense.[66]

In equating "being emboldened [by a firearm]" with "using a firearm," Judge Ginsburg relies upon what he describes as the "seminal" opinion interpreting the firearms penalty, *United States v. Stewart*,[67] a 1985 Ninth Circuit decision authored by now-Justice Kennedy.[68]

Like both the majority and dissenting Supreme Court opinions in *Smith*, the en banc opinion in *Bailey* does not rely significantly on either interpretive approaches based on Congressional purpose inferred from legislative history[69] or policy arguments.[70]

The en banc opinion made short work of applying its new definition to the facts before it. Bailey's conviction was affirmed because "the jury was entitled to conclude that Bailey had put the gun into the car not for some unrelated purpose but because he was keeping drugs there; that alone establishes that the gun was used in relation to Bailey's drug trafficking offense."[71] Robinson's conviction was reinstated because the jury could

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66. *Id.* at 117 (emphasis added).

67. 779 F.2d 538 (9th Cir. 1985).

68. *Id.* at 540.

69. There is a one paragraph reference to legislative history invoked to support the court's interpretation, not of "use or carry," but of "in relation to a drug trafficking crime" in the firearms penalty. 36 F.3d at 116.

70. The only real policy argument advanced was that the en banc approach was superior to the prior open-ended test in the District of Columbia Circuit because it would provide a "bright line" standard that would decrease inconsistent results and excessive second-guessing of jury decisions. *Id.* at 117. Presumably, any equally simple test would have the same virtues, including the interpretation proposed by Judge Williams' dissent. *Id.* at 120 (Williams, J., dissenting).

71. 36 F.3d at 117-118. Neither the panel decision nor the en banc majority opinion discuss whether Bailey was also "carrying" the gun during and in relation to his drug crime, although he was convicted of "using *or* carrying" a firearm. In his dissent from the en banc opinion, Judge Williams argues that Bailey's transportation of the gun in his car trunk cannot be termed "carrying" the gun,

infer "that Robinson placed or kept the gun in the same location as the drugs in order to protect her possession of the drugs . . . [and thus] used the gun in relation to the drug trafficking offense."[72]

Two differing dissents were filed opposing the en banc opinion. Judge Williams wrote a lengthy dissent, joined by Judges Silberman and Buckley, arguing that *use* must be "understood to require real activity"[73] and not "simply possession with a floating intent to use."[74] He would have reversed both convictions. Judge Wald wrote a shorter dissent, essentially supporting a continued "open-ended approach" that would have reversed only Robinson's conviction.[75]

Three of the justices who will decide the *Bailey* and *Robinson* cases have already written opinions as circuit court judges about the meaning of "use or carry" in the firearm penalty: Kennedy, Thomas and Breyer. Although Justice Kennedy's opinion in the *Stewart* case[76] is cited in the en banc *Bailey* opinion as an important source for its reasoning, as we discuss below,[77] then-Judge Kennedy was not only interpreting an earlier version of the statute, he was also clearly interpreting the meaning of *carry*, not *use*.

Then-Judge Thomas ruled in *United States v. Long*[78] that the evidence against the defendant was insufficient to support his conviction for "using" a firearm where the government failed to prove that Long even possessed the firearm found at the scene of the drug trafficking crime.[79] The *Long* decision thus does not clearly indicate how Justice Thomas would apply *use a firearm* to the *Bailey* and *Robinson* facts where possession is proven.

Justice Breyer's dissenting opinion in *United States v. McFadden*[80] can be read as a good indication of how he will approach the *Bailey* and *Robinson* cases. The facts in *McFadden* were very similar to the *Robinson*

because there was no evidence that he had immediate access to it while committing a drug offense. *Id.* at 125. The government, in its Supreme Court brief, asks the Court to remand the cases to the court of appeals for consideration of the "carry" issue if the Court decides for petitioners on the "use" issue. Brief for the United States at 44 n.19, 63 U.S.L.W. 3780 (1995) (Nos. 94-7448, 94-7492).

72. *Id.* at 118.

73. *Id.* at 126.

74. *Id.* at 121.

75. *Id.* at 120. Apparently she differentiated between the two cases on the basis that Bailey had more "ready access" to his gun than did Robinson.

76. 779 F.2d 538.

77. *See infra* notes 158-65 and accompanying text.

78. 905 F.2d 1572 (D.C. Cir.), *cert. denied*, 498 U.S. 948 (1990).

79. *Id.* at 1578.

80. 13 F.3d 463, 466-71 (1st Cir. 1994).

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case. McFadden was charged with using a firearm during and in relation to the crime of possessing cocaine with intent to distribute.[81] The only evidence that he "used" a firearm was that marked money from sales to undercover officers was found under McFadden's mattress along with an unloaded shotgun; no ammunition was found in the apartment.[82] Then-Chief Judge Breyer dissented from the majority opinion that applied the following test: "[M]ere presence of arms for protection of drugs for sale is present use," a "use" the majority described as the "maintenance of a fortress."[83]

Breyer's long and thoughtful dissent is particularly noteworthy because it draws upon his unusual expertise in the area of criminal sentencing: first as chief counsel to the Senate Judiciary Committee,[84] and then, after becoming a federal appellate judge, as a member of the United States Sentencing Commission that drafted the Sentencing Guidelines.[85] His dissent provides a strong policy argument against the type of interpretation represented by both the *McFadden* and *Bailey* majority opinions, that this very broad interpretation of *use* results in a very rigid sentencing system which is inconsistent with the Sentencing Guidelines. The Guidelines provide a lower sentence enhancement if a convicted defendant *possessed* a firearm during a drug trafficking offense than if the firearm was *used*,[86] defining *firearm use* in a way that clearly requires that the firearm was either discharged or employed as a weapon beyond mere brandishment or display.[87] It is not entirely clear from his dissent, though, how exactly he would interpret *use a firearm*, a problem he frankly admits: "I confess that it is easier to see the need to distinguish (drug-crime-related) 'use' from 'possession' than it is to explain just how to make the distinction."[88] He appears to end up with a position close to Judge Wald's dissent in *Bailey*, an open-ended approach where a finding of firearms use might turn on such factors as whether the gun was loaded, the amount of drugs possessed, and

81. *Id.* at 464.
82. *Id.* at 465.
83. *Id.*
84. *See* David Margolick, *Man in the News: The Supreme Court; Scholarly Consensus Builder: Stephen Gerald Breyer*, N.Y. TIMES, May 14, 1994, at A1.
85. *Id.*
86. U.S.S.G. § 2D1.1 (drug trafficking).
87. U.S.S.G. § 1B1.1, cmt. 1(g) (1995) (defining "otherwise used" with reference to a firearm).
88. 13 F.3d at 468.

the presence of other guns.[89]

If the division of the Justices in the *Smith* case were taken as a basis for predicting votes in the *Bailey* and *Robinson* cases, then one might assume that the three dissenting Justices who favored a "narrow" interpretation in *Smith* (Scalia, Souter and Stevens) would be likely to opt for a narrow interpretation in these cases. Of the six Justices in the *Smith* majority, only four remain on the bench: Chief Justice Rehnquist, and Justices Kennedy, O'Connor and Thomas. If Justice Breyer's vote is predicted, based on *McFadden*, to be on the side of a narrow interpretation, the Court would be split four to four with Justice Ginsburg the key vote. However, as we discuss below,[90] the interpretive issue in *Smith* is linguistically quite different from that presented in *Bailey* and *Robinson,* which provides one of many salient reasons for not attempting to predict the outcome of these two apparently very difficult cases.

III. Linguistic Analysis

A. Methodology

The linguistic question before us is whether a statute which imposes a mandatory prison sentence on any person who "uses or carries a firearm" "during and in relation to" a "drug-trafficking crime" should be understood as applying to cases where a firearm was stored in a place which also contained "drugs, drug paraphernalia or drug proceeds," even though the defendants (as in *Bailey* and *Robinson*) were not observed to handle or manipulate the firearm or even to have the firearm on their person. Because the holdings in both *Bailey* and *Robinson* are based on the "use" branch of the "uses or carries" provision in section 924(c)(1), the emphasis in this discussion is on the word "use."

Because *Bailey*, *Robinson*, and related decisions make much of "common parlance" and the "ordinary use of the English language," the approach we take here is to seek information about how the everyday principles of interpreting these words, in these contexts, on the part of ordinary users of the English language, can shed light on the question

89. *Id.* If the issue were whether there was sufficient circumstantial evidence to infer that a firearm was "actually used" at some point in relation to drug trafficking, reliance on such factors as "the amount of drugs present" would make more sense. It is more difficult to understand how the combination of all these varying factors determines whether the firearm was "used" in some sense other than conventional "active use."

90. *See infra* Section III (C).

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before us. The methods we employ are those of standard linguistic analysis. These include, in part, an examination of the occurrence of particular linguistic forms (in our case the word "use") in different contexts, by, for example, exploring electronic data bases containing a large number of texts, sorting the examples according to features of context, and considering native speaker judgments on the interpretation of those instances; performing changes in expressions using the word and seeking native speaker judgments on the results of those changes; and (in the case of so-called "negative evidence") seeking native-speaker agreement on the unacceptability of invented uses of the word.

An example of negative evidence might be this: From the results of our examination of "use a firearm" in various contexts we may acquire the belief that in its central meaning it is equivalent to 'discharge the firearm.' To counter this, we would point out that an appropriately situated utterance of "I accidentally discharged the gun (when I was showing it to my nephew)" could not be paraphrased as "I accidentally used the gun." Such negative evidence obviously does not appear in the form of direct observations that we can make about the language in use: We need to notice that native speakers of the language agree that this would not be an appropriate utterance for such a situation.

In many cases the judgments we depend on are obvious enough not to need support from speaker surveys or the like. However, in some cases linguists choose to survey users to verify assertions about the issues of meaning or usage in question.[91] In this analysis, though, we are restricting ourselves to conclusions that can be supported by reference to positive evidence from our textual searches and negative evidence that we believe is self-evident to native speakers. We have searched three sets of texts: (1) British newspaper articles (a very large data set) (2) selected American newspaper articles (a much smaller set used primarily as a control against possible, but unlikely, dialect differences between British and American practices about expressions involving "use"; and (3) the entire text of Title 18 of the United States Code, which includes most federal criminal law.[92]

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91. *See, e.g.*, Cunningham et al., *supra* note 4, at 1599-1613 (analyzing the meaning of "enterprise").

92. The first data set we used was the British National Corpus, a sample of contemporary British English of approximately one hundred million words, created by a consortium of publishers and research institutions in Britain. Fillmore had ready access to this unusually large data base because of his current participation in major research projects in computational lexicography centered in Europe. *See, e.g.*, Charles J. Fillmore & B.T.S. Atkins, *Starting Where the Dictionaries Stop: The Challenge for Computational Lexicography*, *in* COMPUTATIONAL APPROACHES TO THE LEXICON 349 (B.T.S. Atkins

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The kinds of expressions we will concern ourselves with here are those in which the verb "use" has as its direct object a word or phrase designating a firearm.[93] The occurrence of "use" with an expression designating a firearm will be referred to in what follows as "use [a firearm]" where the bracketed phrase "[a firearm]" will refer to any noun phrase designating a type of firearm, *e.g.*, "his rifle", "a shotgun".

B. The Generality of the Verb "Use"

Many verbs stand for types of events or activities that can be characterized in fairly precise and complete ways. If an English sentence attributes to some person an action such as chewing, groveling, alphabetizing, exhaling, or the like, we could hire an actor to carry out such activities, and we could decide without any difficulty whether that actor's activities were of the sort represented by the sentence's main verb. There are other simple verbs that identify activities that cannot be acted out, such as appreciating, grieving, doubting, etc., but we know from our own experiences what sorts of activities these are.

But in addition to these, there are also verbs that provide no specifics on the nature of an activity, offering instead an evaluation or interpretation of an activity. If we read that Jones "failed" or "succeeded," or that he "risked his inheritance," we find that the words "fail," "succeed," and "risk" tell us

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& A. Zampoli eds., 1994). Through colleagues at the Oxford University Press, Fillmore received by electronic mail a collection of sentences from the corpus that contained the word *use* and one or more of the words *gun*, *weapon*, *firearm*, *rifle*, *pistol*, or *shotgun*. This collection was pared down by eliminating those sentences in which the word *use* had no grammatical connection with the firearm name.

The second data set was created by Cunningham in consultation with Fillmore using the NEXIS data base of American newspapers maintained by Mead Data Central. Restricting the search to the *New York Times*, *Chicago Tribune* and *Los Angeles Times* for the period of June 2 - June 9, 1995, he searched for segments containing any variation of *use* within seven words of either *gun* or *firearm*. This search generated twenty-eight examples.

The third data set was created by Timothy Willoughby under Cunningham's supervision from the full text of Title 18 contained in the LEXIS data base maintained by Mead Data Central. After a number of pre-test searches, the final set was generated by searching for segments containing variations of *use* either (a) within fifteen words of variations of *carry* or *possess* or (b) within fifteen words of *firearm*, *weapon*, *explosive*, *knife* or *gun*. This search yielded 149 examples which were then reviewed by Cunningham individually, who reduced the examples to the smaller final set which he then forwarded to Fillmore.

93. The relation we speak of here as holding between "use" and its direct object will stand as an abbreviation for phrases that are properly so described (*e.g.*, "he used his gun"), as well as passive sentences with the firearm expressed as the subject (*e.g.*, "a gun was used in the crime") and phrases in which the noun "use" is followed by a prepositional phrase beginning with "of" (*e.g.*, "his crime involved the use of a gun.").

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nothing about what Jones actually did; they merely tell us that, whatever it was, it did or did not count as achieving Jones' goal, in the case of "succeeded" and "failed," or, in the case of "risked his inheritance," it created a probability that Jones's inheritance might be endangered. In order for sentences containing such verbs to be fully intelligible, further information must be provided: Jones failed to win my vote; Jones succeeded in getting the audience's attention; Jones risked his inheritance by insulting his grandfather. The verb "use" is similar to the verbs in this latter group, in demanding some sort of completion to be more fully informative, but unlike them, it points to an enabling circumstance rather than an evaluation or interpretation of an event. The phrase "enabling circumstance" is deliberately vague, since what is intended includes a vast range of relations between actors and their activities: One can use the side roads to avoid the rush hour traffic; one can use Latin in one's research; one can use a coat hanger to break into a car, and so on. If we hear about some event only that "Jones used a rock," we know nothing about what Jones did, only that, in doing what he did, a rock was put to some unspecified instrumental service. The sentence "I used a rock" is not informative enough to be taken as a cooperative response to the simple request, "Tell me something you did today." The interviewer would have to ask another question to get any idea what kind of activity the other was engaged in.

Expressions of the form "W used X" express an idea more fully stated in the form "W used X as Y to do Z." X served an instrumental function, Y, in some purposeful activity, Z, in which X was engaged. The nature of that primary activity (Z) needs to be known before we can understand the full message of a "W uses X" utterance.[94] Suppose we hear that the sentence "They used a rock" has been uttered in connection with what some boys did. This sentence is uninformative if it has no contextual support: We learn from it nothing about the kind of activity the rock played a part in. Such a sentence can only be understood if it is a part of a larger context which identifies Z, or which, by identifying Y, invites reasonable inferences about the nature of Z. One such context could be a conversation

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94. The two phrases "as Y to do Z" in combination would provide the kind of "purpose parameter" referenced in Michael Geis' analysis of the firearms statute. Michael Geis, *The Meaning of "Meaning" in the Law*, 73 WASH. U. L.Q. 1125 (1995). We consider Geis' analysis essentially consistent with our own, although it differs somewhat in terminology and focus. *See also* Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court*, 73 WASH. U. L.Q. 1069 (1995) (discussing *Smith* in terms of semantic prototype theory).

partner's question about how the boys managed to put the wounded animal out of its misery (they used a rock); a second context might be a concern about how they kept the cabin door from blowing shut (they used a rock); a third might be a question about how they dealt with the fact that there were not any picnic tables in that part of the park (they used a rock). The expression is broad enough to include a case in which the rock was directly manipulated in an event which immediately brought about a result (killing the animal); a case in which the rock was put in place against the possibility that something would happen (a gust of wind blowing against the door); and a case in which the rock simply afforded certain features (flatness or stability) which the boys could take advantage of.

Information about the primary activity, Z, can be provided outside of the actual sentence in which "use" occurs, or it can be provided as a part of that same sentence. For example, direct or indirect information about Z can appear in a phrase that is grammatically subordinated to the "use" phrase, as in the following examples where phrases beginning with "to", "as" and "for" modify "used a rock."

"We used a rock to kill the porcupine."
"We used a rock as a doorstop."
"We used a rock for a picnic table."

Alternatively, information about the use of the instrument can be subordinated to a clause that identifies the primary activity.

"We killed the animal using a rock."
"We propped the door open by using a large rock."

In many cases, the same instrumental role can be signalled by a *with*-phrase: The phrase "with a rock" would communicate the same information in the above two sentences.

Even these expanded sentences do not tell us directly what was actually done with the rock; much is still left to inference. For the three situations we have just posited, we are likely to imagine that the animal was killed by striking it with the rock, that the door was propped open by placing the rock on the floor next to the (partially) open door to prevent it from moving into the jamb, or that a large and probably flat rock provided a surface for laying out a picnic lunch. Our visualization of each such scene is aided by our experience with rocks and our knowledge of their properties and potentials, and by our familiarity with the activities and intentions of human beings.

In short, we are able to understand a sentence that contains the verb

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"use" only if we have further information, directly or indirectly, about what is going on. It is for this reason that we believe that dictionary definitions of "use" are particularly unhelpful. As Michael Geis points out in his essay, definitions of the sort quoted by the *Smith* court are circular: simply substituting less familiar terms like "employ" or "avail oneself of" for "use" when these less familiar words are then themselves defined in terms of "use."[95]

C. *Interpreting the Instrumental Role of the Direct Object*

In *Smith v. United States*, Justice O'Connor relies on the generality of the verb *use* in concluding that *use a firearm* can be interpreted to include using a gun as an item of barter to acquire cocaine: "[O]ne can use a firearm in a number of ways."[96] However, the nature of *firearm* as an artifact with a specific function (to discharge a projectile with sufficient force to wound or kill), combined with the absence in the statute of an accompanying "as" phrase invites the interpretation offered by Justice Scalia in dissent,[97] despite the generality of *use* out of context.

The noun "rock" used in the earlier examples does not designate an object that was manufactured for any specific purpose. Therefore, a "use" sentence with a rock named as the instrument needs contextual support for clarifying the function the rock has in the activity in which it is being used. But some nouns designate artifacts that are produced specifically for certain purposes ("typewriter," "flashlight," "gun," etc.), and when these nouns appear as direct objects of "use," even without the sorts of contextual support mentioned above, strong inferences are invited about the agent's (i.e., W's) relation to the artifact (X) in carrying out activity Z.

"Do you use a typewriter in your work?"
"We may need to use a flashlight."
"I have never used this gun."

The natural inferences we derive from these sentences have to do with the way in which the agent W takes advantages of those properties which have to do with the purpose of the artifact X; we still need more information to know exactly what activity Z is. Perhaps we need a flashlight to find our way out of a cave. Again, to understand a "use" sentence fully, we have to have some idea of the way in which X served an enabling function

95. Geis, *supra* note 94, at 1133-43.
96. 113 S. Ct. 2050, 2055 (1993).
97. *Id.* at 2061 (Scalia, J., dissenting).

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in W's carrying out activity Z.

When the object of "use" (X) is an artifact manufactured for a specific purpose, we can say that the "default" interpretation of "use X" will be to engage X in the function for which it was created. By "default interpretation" we mean the interpretation a speaker will "fall back on" in the absence of additional information either within the utterance itself or inferable from the circumstances of the utterance. (If W used X [a gun] as a X [gun] to do Z, the "as a . . . " specification can drop out, yielding the default interpretation.) Thus, if we hear somebody say, "I hope I never have to use this gun," we are most likely to assume that the person is speaking about using it for its manufactured purpose, which is to propel a projectile with a force that would allow it to do bodily injury to a living being. This "default interpretation" then will be to fire or discharge the gun with such an intention. If the phrase "used a gun" was to be used to describe an occasion when a gun was placed on papers to prevent them from blowing away, a speaker would reasonably assume that the utterance would have been something like, "He used a gun as a paperweight" to signal that the default interpretation was not applicable.

The disagreement between Justices O'Connor and Scalia in *Smith v. United States* thus can be analyzed as a dispute over whether the interpretation of the instrumental role element of *use a firearm* should be limited to the default interpretation (Justice Scalia's position),[98] or whether the absence of an explicit role element instead should indicate a relatively unbounded interpretation of possible instrumental functions, including the rather unusual function of firearm as unit of exchange in barter.[99]

In our newspaper data set we found one example of a firearm being used other than as a firearm:

> "used his shotgun as a club to try to put an injured porcupine out of its misery."[100]

The "as a club" phrase serves to notify the reader that the default interpretation of instrumental function is not applicable. The Title 18 corpus also shows that "as a Y" appears in an expression in order to negate the inference of the inherent function:

> "The term "destructive device" shall not include any device which is neither

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98. *Id.* at 2062-2063.

99. *Id.* at 2054-2055 (Justice O'Connor's position).

100. *See infra* Appendix One.

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designed nor redesigned for use *as a weapon*; any device, although originally designed for use as a weapon, which is redesigned for use *as a signaling, pyrotechnic, line throwing, safety, or similar device . . .* "[101]

We also found several examples where accompanying phrases appear in order to indicate that "use a firearm" includes activities other than discharge, although still related to the inherent weapon function:

Example One: " . . . if a firearm was brandished, discharged, or otherwise used as a weapon . . . ."[102] The critical surrounding language here includes the preceding word "otherwise" and the following phrase "as a weapon": The expression covers ways of using a firearm "as a weapon" other than firing it off - pistol whipping someone, for example, or striking someone with the butt of a rifle. Because the phrase beginning with "otherwise" follows the word "discharged", the interpretation is that discharging a firearm is one way of using a firearm as a weapon.[103]

Example Two: "[T]he defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person."[104] Here the purpose phrase beginning with "to threaten . . . " shows a fuller range of uses to which a firearm can be put in order to guarantee that a victim's resistance will be unavailing.

Thus the surrounding language, and whatever purposes, ongoing activities, or contrasts it introduces, help to tune the interpretation we can give to a phrase like "use [a firearm]." It may, for example, indicate the instrumental role, Y, even if it is not explicitly stated. The absence of such surrounding language, in particular the conventional signal "as a . . . ," invites the interpretation favored by Justice Scalia that *use a firearm* refers only to use as a weapon.[105]

101. 18 U.S.C. 921(a)(4) (1988) (emphasis added).

102. 18 U.S.C. § 3559(c)(2)(D) (1988 & Supp. 1995) (defining "firearms use" for purposes of sentencing classification).

103. *Cf.* 18 U.S.C. 3559(c)(2)(A) (1988 & Supp. 1995) (defining "assault with intent to commit rape" as "engaging in physical contact with another person or using or brandishing a weapon against another person. . . .") Here "using" is distinguished from "brandishing."

104. 18 U.S.C. § 3592(d)(4) (1988 & Supp. 1995) (aggravating factors to be considered in determining whether sentence of death is justified).

105. 113 S. Ct. at 2062 (Scalia, J., dissenting). Justice Scalia says that "[t]o use an instrumentality ordinarily means to use it for its intended purpose" and gives as his example his opinion on the most natural interpretation one could give to the question, "Do you use a cane?", suggesting that everybody would understand the speaker as asking if the addressee walks with the help of a walking stick. *Id.* at 2061. Justice O'Connor, writing for the majority, responds to this argument by claiming that "to use Y" is not so limited: She refers to expressions about "using a cane" in administering punishment. She

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D. *The Difference Between Eventive and Designative Interpretations*

The en banc opinion in *Bailey* invokes the "expansive" interpretation of *use a firearm* in *Smith* as authority for creating its own "expansive" interpretation.[106] However, our analysis indicates that the *Smith* and *Bailey* cases present interpretive issues quite different in kind. The clue to identifying how very different the en banc *Bailey* interpretation is in "expansiveness" from the *Smith* decision is the following "ordinary language" example that is the keystone of the *Bailey* opinion:

> "[A] gun placed in a drawer beside one's bed for fear of an intruder would, in common parlance, be a gun 'used' for domestic protection."[107]

If this piece of "common parlance" is paraphrased from the passive to active form, it would appear as: "Ron used a gun for domestic protection." We notice how different this expression is than any of the *use a firearm* examples discussed above when we try to restate it in the form: W used X as Y to do Z. It seems simple enough to say that Ron used the gun as a gun [for domestic protection], but it becomes difficult to identify an activity Z for which the gun served an instrumental role. As long as the gun rests in the bedside drawer, Ron has not *done* anything with the gun; no specific event has occurred for which the gun was an instrumentality. (Even if the initial act of placing the gun in the drawer is viewed as an event, that is an act done *to* the gun, not *by means of* the gun.)

We looked through our newspaper and legal sets for other examples of *use a firearm* similar to the en banc example in lacking an activity Z and found such expressions in both sets. In the newspaper corpus, the expressions were all marked by an accompanying "for" phrase:

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points out that, far from being an unusual usage, this usage is so salient that it has led to the word "caning" to refer to just such a punishment. She implies that the question "Do you use a cane?" can suggest very different uses for the same "instrumentality." *Id.* at 2055. The flaw in the majority's example is that it assumes that these two expressions about "canes" speak of different uses of the same kind of object. The "cane" that is used in punishment is not the same sort of object as the "cane" that is used for support in walking. The COLLINS ENGLISH DICTIONARY, gives as one of the separately numbered senses of "cane" the following: "5. a flexible rod with which to administer a beating as a punishment, as to schoolboys." COLLINS ENGLISH DICTIONARY 235 (3d ed. 1991). A "cane" of this type could not easily keep an unsteady person from toppling. Also, a British schoolmaster authorized to "use the cane" for punishing misbehaving schoolboys would undoubtedly be in for severe punishment himself if he chose to use a walking stick on the hands or backsides of his charges. The two instruments have different properties because they are created for different purposes.

106. United States v. Bailey, 36 F.3d at 114 (D.C. Cir. 1994).

107. *Id.*

use a gun for personal protection;
use guns for law enforcement or crime prevention;
use guns for protection.[108]

In Title 18 we found that the expressions were also marked by the preposition "for," although *use* was most often part of a *for* phrase, in which case there was another accompanying *for*, *of*, or *in*:[109]

intends to use solely *for* sporting, recreational or cultural purposes[110]
loan . . . *for* temporary use *for* lawful sporting purposes[111]
intended *for* the personal use *of* such member[112]
imported . . . *for* the use *of* the United States[113]
for use *in* connection with his official duty[114]
for use *in* a program approved by a school[115]
is *for* use *in* connection with competition or training[116]

Like the example posed by the en banc *Bailey* opinion, all of the above expressions could refer to situations where no event has yet taken place in which the firearm played an instrumental role.[117]

If *use a firearm* does not indicate in such expressions a relationship between an agent (W), instrument (X) and an activity (Z), what kind of interpretation is invited? What all these expressions seem to have in common is that they designate the firearm to a particular purpose (personal protection, law enforcement, sporting, official duty, school program, competition or training purposes) or, in the Title 18 set, to a particular agent (the United States, personal use of such member). However, the expressions do not seem to convey much information beyond that

108. *See infra* Appendix One.
109. For the full statutory context of each phrase, see *infra* Appendix One.
110. 18 U.S.C. § 921(a)(4) (1988) (emphasis added).
111. 18 U.S.C. § 922(a)(5)(B) (1988) (emphasis added).
112. 18 U.S.C. § 925(a)(4)(B) (1988) (emphasis added).
113. 18 U.S.C. § 925(a)(1) (1988 & Supp. 1995) (emphasis added).
114. 18 U.S.C. § 922(a)(2)(B) (1988) (emphasis added).
115. 18 U.S.C. § 922(q)(2)(B)(iv) (1988 & Supp. 1995) (emphasis added).
116. 18 U.S.C. § 925(d)(1) (1988) (emphasis added).
117. In looking at expressions from the newspaper corpus using *for*, we distinguish "use a gun for personal protection" from expressions like "use guns for hunting," because the latter does indicate a particular activity (hunting), although possibly in a generalized iterative way rather than a specific event. *See infra* Appendix One. Evidence for this distinction is the peculiarity of the following expression:

John used that gun for hunting although he never took it out of the drawer.

as compared with

John used that gun for domestic protection although he never took it out of the drawer.

designation.

The en banc *Bailey* opinion thus prompts us to recognize two very different interpretations of a phrase like *use a firearm*. For the first type of interpretation, a sentence like "Jones used a gun in self-defense," a reader would understand that a specific event took place in which the gun played an instrumental role. We refer to this as an "eventive" interpretation of the sentence: Using the gun was a specific time-bound act. In contrast, a sentence like "John used a gun for domestic protection" easily leads to an interpretation that does not bring to mind a specific event, but rather covers a situation in which Jones was merely prepared to protect his home by keeping a gun available.[118] We term this second type of interpretation as "designative": The gun was designated as having a particular function in Jones' household.[119]

Application of this distinction reveals several interesting patterns in the legal discourse of Title 18. First, all of the appearances of *use a firearm* that invite a designative interpretation are exceptions to legal liability, and in particular, exceptions to liability based on possession of a firearm. Apart from the dubious example of § 924(c) itself, we could find no provision in Title 18 where a designative interpretation of *use* is the basis for imposing criminal liability.

Second, several situations that could perhaps be described by designative *use* are described instead with the verb *possess*. Subsection 922(x) generally prohibits sale or transfer of a handgun or ammunition to a juvenile, and lists a number of exceptions. One exception could easily have been stated with designative *use*, excepting handguns "used for ranching or farming,"

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118. Of course, it is also possible to give this sentence an eventive interpretation, as referring to a specific occasion in which John used the gun to wound a burglar.

119. Readers familiar with the literature on aspect in semantics may wonder whether we are classifying the verb *use* as having two distinct senses, marked by different aspect: + eventive and - eventive (or stative). Although we considered this possibility briefly during our analysis, comments by Jeffrey Kaplan, Georgia Green and Judith Levi and consultation with aspect specialists Mari Olsen and Hana Filip confirmed our doubts about such a classification. Consistent with our conclusions about the generality of *use* out of context, we do not suggest that the verb itself is marked for aspect, in contrast to such well known examples as *learn* (eventive) versus *know* (stative). We have borrowed the basic concept, *eventive*, as a convenient description for interpretations of certain types of sentences in which *use* appears. However, the contrasting interpretation of sentences of the *use for domestic protection* type is not so readily described as the opposite of eventive (*i.e.*, stative). Therefore, we have coined the term "designative," which does not have a corresponding term of art in aspectual semantics. In the discussion that follows, when we sometimes for the sake of brevity refer to *eventive use* or *designative use*, we do not mean to indicate that the verb itself has these two distinct senses. Rather we are referring to two different types of interpretations that can be given to expressions containing *use*.

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but note the actual wording of the exception:

> [W]ith respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent . . .[120]

In this provision Congress apparently wanted to reserve *use* for an eventive meaning, to indicate that the juvenile could even discharge the handgun (and not just have "available for use," *i.e*, "possess . . . for ranching or farming activities.").

Another exception in subsection 922(x) is even more intriguing because it is the only provision we found in Title 18 that invites the phrase "gun used for domestic protection," yet here Congress avoided *use* altogether, speaking only of "possession":

> This subsection does not apply to— . . . (D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.[121]

The distinction between eventive and designative interpretations of *use* accurately, and more precisely, describes the linguistic intuitions a number of judges have tried to articulate in their opinions. For example, Judge Williams, in his dissent to the en banc *Bailey* opinion, asserts that "'use' in ordinary language normally implies activity" (*i.e.*, eventive) in contrast to the majority's definition as "possession with a contingent intent to use" (*i.e.*, designative).[122] However, Judge Williams treats the en banc interpretation as if it were a distortion of the ordinary meaning of *use*, saying that the majority "diluted"[123] its meaning. Thus, his dissent fails to meet squarely the majority's most plausible point, that *use* in ordinary language does sometimes indicate possession without activity, as in "used for domestic protection."[124] The issue is not whether the *Bailey* majority "diluted" the meaning of *use*, but rather, whether the interpretation it selected, appropriate in some contexts, is plausible in the particular

120. 18 U.S.C. § 922(x)(3)(ii)(II) (1988 & Supp. 1995).

121. 18 U.S.C. § 922(x)(3)(D) (1988 & Supp. 1995).

122. 36 F.3d 106, 121 (D.C. Cir. 1994) (Williams, J., dissenting).

123. *Id.*

124. Justice Breyer, in his thoughtful *McFadden* dissent, did seem to recognize that *use* could be given an interpretation that is very close to merely *possess*, and also recognized that the distinction, although recognizable, was difficult to articulate. United States v. McFadden, 13 F.3d 463, 467 (Breyer, C.J., dissenting). *See supra* notes 80-89 and accompanying text.

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statutory context within which *use* appears.

Likewise, *Astor v. Merritt*,[125] the century old Supreme Court decision about the clothing import duty cited in the en banc *Bailey* opinion, clearly indicates that the Court was selecting a designative interpretation of *use clothing*:

> If a person residing in the United States should purchase wearing apparel here, in a condition ready for immediate wear without further manufacture, *intended for his own use or wear*, . . . no one would hesitate to say that such wearing apparel was 'in actual use' by such person, even though some of it might not have been actually put on or applied to its proper personal use. . . . An article of wearing apparel, *bought for use*, and *appropriated and set apart to be used*, by being placed in with, and as a part of, what is called a person's wardrobe, is, in common parlance, in use, in actual use, in present use, in real use, as well before it is worn as while it is being worn or afterwards.[126]

The *Astor* court was interpreting the following statutory provision:

> The importation of the following articles shall be exempt from duty: . . . Wearing apparel *in actual use*, and other personal effects, (not merchandise,) . . . of persons arriving in the United States. But this exemption shall not be construed to include machinery, or other articles imported *for use* in any manufacturing establishment, or *for sale*.[127]

The interpretation given by the Court would fit easily if the statutory language was "wearing apparel *for personal use*," a formulation that clearly invites a designative interpretation as does the language of the last sentence in the provision excluding from the exemption articles imported "for sale."[128]

Unfortunately, the *Astor* opinion seems to conflate designative and eventive interpretations of *use* with its problematic assertion about everyday language: "bought for [personal] use . . . is, in common parlance . . . [synonymous with] in actual use."[129] This assertion is inconsistent with normal linguistic intuition that the combination of "actual" with "use" functions precisely to clarify that more than designative use is involved, as

125. 111 U.S. 202 (1884).

126. *Id.* at 213 (emphasis added), *quoted in Bailey*, 36 F.3d at 114-15.

127. 18 Stat. 482, 489 (1878) (emphasis added), *quoted in Astor*, 111 U.S. at 203.

128. The Court was thus interpreting *use* in the import duty statute as, for example, *use* functions in 18 U.S.C. § 925(s)(1) to create an exception to the firearms importation prohibition for "any firearm . . . imported . . . for the use of the United States." *See supra* note 113 and accompanying text.

129. 111 U.S. at 213.

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the following examples illustrate:

> Take a look at this fine fur coat I bought in England.
> Have you actually used it?
> No, I'm waiting until the first snowfall.
>
> This is the gun I use for domestic protection.
> Have you actually used it?
> No, thank God, I've never had to use it.

Despite its asserted reliance on "common parlance," the *Astor* court was apparently trumping the textual language with the inferred purpose of the provision, to allow clothing purchased abroad for personal use to be imported free of duty,[130] but the Court's failure to acknowledge it was rejecting ordinary meaning[131] in favor of some other principle of interpretation undermines the credibility of its opinion and creates a mischievous precedent that obscures the distinction between eventive and designative interpretations of *use* depending on context.

The question then becomes whether the particular textual context of *use a firearm* in the firearms penalty makes it plausible to interpret *use* as designative, thus, not necessarily implying a time-bound event for which the firearm played an instrumental role.

Use a firearm within the first sentence of the firearms penalty invites an eventive, not a designative interpretation. The accompanying prepositional phrase in the firearms penalty is not a *for* phrase but rather "during and in relation to . . . ."[132] *In relation to* is so deliberately[133] vague as to offer

130. The Court said that it was seeking an interpretation that, "while it comports with the ordinary habits of passengers and travellers, will not open the door for fraud." 111 U.S. at 214. One might suspect, though, that the intent of Congress in selecting the phrase "in actual use" was precisely to address the problem Mr. Astor presented to the customs inspector. If the test was whether the owner of the clothing intended them for personal use, a difficult burden would be placed on the inspector to disprove the owner's stated intent. On the other hand, if the test was whether the clothing had actually been worn by the owner, the inspector could look for objective evidence, and if the clothing had obviously been "actually used," its potential value for resale in the United States would be greatly diminished. (This, of course, is precisely what is meant by "used clothing." Had Mr. Astor died before the onset of winter, his widow might offer his imported fur coat for sale as "never actually used.")

131. Perhaps "common parlance" on this point was different in 1884, but we doubt it.

132. As originally enacted, *use a firearm* was modified by *to commit any felony*. See *infra* note 154 and accompanying text. Such a *to do something* phrase is the standard marker of the eventive interpretation.

133. As discussed in the en banc *Bailey* opinion, in 1985 the Reagan administration successfully opposed a provision in a bill passed by the Senate that would have replaced "carries . . . in relation to" with "carries in furtherance of" by arguing that the change would have indicated a more direct connection between the gun and the predicate offense. United States v. Bailey, 36 F.3d 106, 116 (D.C.

little interpretive guidance, but *during* certainly invites an eventive interpretation, particularly as combined with "crime of violence." It is only the fact that the current broad definition of "drug trafficking crime" in the statute allows the statutory text to be "translated" into an indictment for "using a firearm . . . during and in relation to the crime of possessing cocaine with intent to distribute" that raises even the possibility of a designative interpretation.[134] As pointed out in the en banc *Bailey* opinion, "[s]ince possession with intent subsequently to distribute is in a sense a passive crime, it becomes somewhat difficult analytically to determine how one goes about using a gun in relation to that crime."[135] Because mere possession is not an event or an activity, it *is* difficult to construct a sentence with *use* in an eventive interpretation that applies readily to fact situations like *Bailey* and *Robinson*.[136] Thus, when the government attempts to apply the firearms penalty to one particular type of drug trafficking crime, possession, many judges are apparently tempted to project the "non-eventive" character of that precursor offense back on to the meaning of *use a firearm*, motivating them to give *use* a designative interpretation.

However that motivation to give *use* a designative interpretation must still contend with another contextual feature, one that strongly indicates that only an eventive interpretation is appropriate: the combination of "uses" with "carries" connected by "or." The contrast between carrying a firearm and using a firearm is a familiar and established one and indicates that "using a gun" is a specific act, one more dangerous than the act of "carrying a gun." As a matter of ordinary language, "whoever uses or carries a firearm . . . shall be punished," is understood as "whoever uses *or even* carries a firearm . . . shall be punished."

Cir 1994).

134. The legislative history of the firearms penalty raises great doubt as to whether any particular Congress intended that *use a firearm* be given a designative interpretation, including the 1988 Congress that amended the definition of "drug trafficking crime" to include possession. *See infra* notes 153-85 and accompanying text.

135. 36 F.3d at 116-17 (quoting United States v. Bruce, 939 F.2d at 1055).

136. Unlike Bailey, Robinson was charged with distribution (to the undercover officer) as well as possession of cocaine (found in the closet). United States v. Robinson, 997 F.2d 884, 886 (D.C. Cir. 1993). However, the en banc opinion only refers to her crime of possession in applying its new rule to her facts. 36 F.3d at 118. According to Robinson's brief, the firearms penalty charge (Count V of the indictment) was based only on the precursor crime of possession (Count III) and not the crime of distributing cocaine to the undercover officer the previous day (Count I). Brief for Petitioner, *supra* note 43, at 5.

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Our review of newspaper examples[137] and Title 18[138] confirms this common sense impression. The clearest example is the following:

Muggers here carry guns and use them![139]

The meaning of this phrase changes, and becomes puzzling or comical if the order of "carry" and "use" are reversed.

Muggers here use guns and carry them!

If we transfer this example into the terms of the *Bailey* case, one can readily see from the peculiarity of the last of the three following sentences, A(3), why the en banc "definition" defies semantic common sense when "use" appears as "use or carry."

A(1) Roland Bailey uses a gun to protect his drug trafficking, putting it in his car trunk whenever he leaves to make a sale.
A(2) Jack Bailey tucks a pistol under his belt whenever he leaves to make a drug sale.
A(3) Unlike his brother Roland, Jack does not just use his gun; he carries it!

It seems clear as a matter of ordinary language that adding "or carries" expands criminal liability from the obvious hazards caused by using a gun (as a weapon) to the more subtle dangers created by carrying a gun.

Section 924 itself contains textual evidence that "use or carry" is interpreted as fitting into a hierarchy of danger with "discharge" at one end and "possess" at the other. Subsection 924(a)(5)(B)(ii) provides criminal penalties for any adult who transfers a handgun to a juvenile with knowledge that the juvenile "intended to carry or otherwise possess or discharge or otherwise use the handgun" in the commission of a crime of violence.[140] This subsection clearly indicates the following hierarchy of dangers associated with transferring a gun to a juvenile:

(1) discharge
(2) or otherwise use

137. *See infra* Appendix Two. Appendix Two contains examples from current British news sources, mainly because the British corpus materials were easily available to us, but the ease with which American readers understand these recurring contrasts between "use a gun" and "carry a gun" indicates that there is little reason to believe that American English and British English differ in respect to these uses.

138. *See infra* Appendix Three.

139. For similar examples, see *infra* Appendix Two.

140. 18 U.S.C. § 924(a)(5)(B)(ii) (1994).

(3) carry
(4) or otherwise possess[141]

The federal sentencing guidelines,[142] promulgated pursuant to Congressional authorization,[143] both reflect a similar hierarchy and treat "carried" as a type of possession in contrast to "used." Take, for example, the sentencing enhancement for robbery:

-If a firearm was discharged, increase by 7 levels
-If a firearm was otherwise used,[144] increase by 6 levels
-If a firearm was brandished, displayed or possessed increase by 5 levels[145]

We now turn to the history of the firearms penalty legislation, both for additional evidence of whether our linguistic analysis is consistent with the discourse of the federal firearms law, and for a possible explanation of how a statute whose text seems to indicate only one interpretation of *use a firearm* (the eventive: using a firearm to do something) also permits application to a situation (using a firearm during and in relation to drug possession) that invites a different interpretation (the designative: using a firearm for protection of possessed drugs).

IV. LEGISLATION HISTORY

William Eskridge describes the "new textualism" advocated most prominently by Justice Scalia as replacing reference to legislative history with "dictionaries and grammar books . . . and the common sense God gave us."[146] However, our experience on this project indicates that close attention to the textual language may sometimes make the history of the

141. 18 U.S.C. § 924(a)(5)(B)(ii).

142. 18 U.S.C. app. (1988 & Supp. 1995) (Federal Sentencing Guidelines).

143. 58 U.S.C. § 991 (1988).

144. "Otherwise used, with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm." Application Instructions, Sentencing Guidelines, U.S.S.G. § 1B1.1 cmt. 1(g) (1995).

145. U.S.S.G. § 2B3.1(b)(2)(A) (1995). Both the legislative history and case law interpreting the firearms penalty clearly indicate that *use a firearm* includes brandishing and displaying, so that it is interesting that the Sentencing Guidelines exclude the latter from the definition of "used," apparently in order to indicate a judgment that mere brandishment of a firearm is no more deserving of severe punishment than possession. ("Possessed" is not specifically defined in the Guidelines but surely is intended to include "carried.") Recent legislative attempts to amend section 924(c) seem to reflect a similar judgment that discharging a firearm should be separated out for greater punishment than mere carrying of a firearm. *See infra* note 216 and accompanying text.

146. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 669 (1990).

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legislation more, not less relevant. Because the term "legislative history" is associated with inattention to text in favor of inferred Congressional purpose, we use the phrase "legislat*ion* history" to highlight our focus on the prior history of the text itself: original language, subsequent amendments, and even failed proposals to amend. This linguistically guided approach explicates the text by interpreting it as part of a specialized Congressional discourse taking place over time, not by replacing the text with committee reports and sponsor speeches as "better evidence" of what Congress wants the courts to do when applying the law.

Our review of the history of the firearms penalty in Congress from 1968 up to the present confirms our conclusion that *use a firearm* in that context should only be given an eventive interpretation. An eventive interpretation for *use a firearm* was clearly indicated by the text of the original version enacted in 1968.[147] It took three amendments by three different Congresses (1984,[148] 1986,[149] and 1988[150]) to produce the current text, and we can find no indication that any of those Congresses intended to add a designative interpretation. However, beginning as early as 1989, Congress has been very aware that the current text does not readily apply to fact situations like *Bailey* and *Robinson,*[151] but despite numerous proposed amendments to address this problem,[152] Congress has failed so far to amend section 924(c) to resolve this concern.

The legislation history also confirms that the patterns of usage we found in ordinary language (the newspaper examples) and the text of Title 18 are consistent with the way Congress "talks" about the firearms penalty in the form of bills, committee reports and floor debates. Perhaps the most striking evidence that Congressional discourse does not naturally apply *use* to fact patterns like *Bailey* and *Robinson* is found in the attempted amendments of the past six years. All of these proposed amendments are based on adding "possess a firearm" in some form to the firearms penalty; none of the legislative proposals take the form of defining or "clarifying" the meaning of *use a firearm* to include the designative interpretation.

147. Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1223. *See infra* notes 153-66 and accompanying text.

148. Pub. L. No. 98-473, § 1005, 98 Stat. 2138 (1984). *See infra* notes 167-78 and accompanying text.

149. Pub. L. No. 99-308, 100 Stat. 456 (1986). *See infra* notes 179-82 and accompanying text.

150. Pub. L. No. 100-690, § 6272, 102 Stat. 4181, 4360 (1988). *See infra* notes 183-85 and accompanying text.

151. *See infra* notes 186-89 and accompanying text.

152. *See infra* notes 186-216 and accompanying text.

http://openscholarship.wustl.edu/law_lawreview/vol73/iss3/24

A. *Original Version*

The firearms penalty was first enacted as section 924 of the Gun Control Act of 1968.[153] The original provision read as follows:

> "(c) Whoever-
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence."[154]

The accompanying phrase "to commit any felony" in (c)(1) (which no longer appears in the firearms penalty) clearly indicates the eventive interpretation of *use*. This original subsection 924(c)(1) explicitly states the form of the eventive interpretation: "W (whoever) uses X (a firearm) to do Z (commit a felony)."[155] The "to commit" phrase thus indicates the enabling relationship between the use of a firearm and an event.[156]

In this original version, "carrying a firearm" gives rise to criminal liability only if it was carried "unlawfully," e.g., without a gun permit. Thus, as originally enacted, the firearms penalty did not apply even if the firearm was carried during a felony if the felon had a permit to carry the gun and did not "use[] [the] firearm to commit [the] felony." Thus, reading the original subsections (c)(1) and (c)(2) together provides further evidence that "use a firearm" could not be given the designative interpretation as

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153. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1223 (codified as amended at 18 U.S.C. § 924(c) (1988)). A useful, though incomplete, summary of the legislative history appears in Note, Thomas A. Clare, Smith v. United States *and the Modern Interpretation of 18 U.S.C. § 924(c): A Proposal to Amend the Federal Armed Offender Statute*, 69 NOTRE DAME L. REV. 815, 823-28 (1994).

154. Pub. L. 90-618, 82 Stat. 1223.

155. The absence of Y indicates to the reader that the default instrumental role applies, i.e., that X is used "as a firearm." *See supra* notes 96-105 and accompanying text.

156. For other examples in Title 18 where *use* is closely related to an event by an accompanying "to" phrase, see Appendix Three, *infra*. Appendix Three also contains provisions indicating a less direct relationship—"involving the use of a firearm," "acts [which] include the use of weapon," and "used during the offense"—all of which nonetheless indicate the eventive interpretation of *use*. *Id.*

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originally enacted. If a person who obtained a concealed weapon permit and then carried that weapon hidden under his belt while selling cocaine on the street corner, said, "I used this gun for drug dealing," one could have plausibly given *use* in his utterance a designative interpretation. (His statement could have been true even if there was never an event in which he took some action with the gun.) But if *use a firearm* in the original (c)(1) was given this designative interpretation, then this street corner dealer could have been convicted under (c)(1) even though his conduct fell clearly within the explicit exception written into (c)(2).

It is interesting to note that during the congressional debates leading to enactment of the original version, one senator spoke in support of the firearms penalty proposal by paraphrasing the relationship between *use* and *carry* as we did above: "[This law] will make every criminal and would-be criminal think twice before using *or even* carrying a firearm."[157]

Ironically, one of the clearest illustrations that the original statute did not support a designative interpretation of *uses a firearm* is found in Justice Kennedy's *Stewart* decision that the en banc *Bailey* opinion identifies as the "seminal" interpretation of the firearms penalty.[158] The fact pattern in *Stewart* is strikingly similar to *Bailey.* Stewart operated a methamphetamine laboratory on his business premises and kept various precursor chemicals and laboratory equipment at his residence.[159] Federal officers arrived at his residence to execute a search warrant and found Stewart sitting in his car in front of the house.[160] They arrested him and searched the car, finding an illegal sawed-off "UZI" rifle in the trunk.[161] Then-Judge Kennedy concluded that the jury could infer from this evidence "that Stewart's possession of the UZI outside his residence was intended to facilitate the drug operations or secure the premises where contraband and other evidence were located."[162] This inference led him to express the

157. 114 CONG. REC. S27,144 (1968) (statement of Sen. Murphy) (emphasis added). We learned of this remark by reading the defendants' Supreme Court brief after we had already formulated the paraphrase stated earlier. *See* Brief for Petitioners, at 18 n.7, United States v. Bailey, 63 U.S.L.W. 3780 (1995) (Nos. 94-7448, 94-7492). We mention this statement made on the Senate floor not as typical legislative history argumentation—as evidence of congressional intent or underlying statutory purpose—but simply as showing that our intuitions about the ordinary meaning of "use or carry a firearm" are consistent with the naturally occurring speech of at least one relevant speaker at the time of original enactment.

158. *Bailey*, 36 F.3d at 109 (discussing United States v. Stewart, 779 F.2d 538 (9th Cir. 1985)).

159. *Stewart*, 779 F.2d at 539.

160. *Id.*

161. *Id.*

162. 779 F.2d at 539.

widely-cited "emboldening" rationale for giving the firearms penalty a broad application:

> If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge in fact occurred, then there is a violation of the statute.[163]

In quoting this statement from *Stewart,* however, the en banc *Bailey* opinion did not point out that "the statute" referenced in the last line was the original version.[164] The only "violation of the statute" with which Stewart was charged was the original section 924(c)(2), carrying a firearm unlawfully during the commission of a felony. Apparently (and understandably) it never occurred to the prosecutors to charge Stewart with violating the original section 924(c)(1)—that he had used the UZI to commit a felony—even though under the court's view of the evidence Stewart was "using the UZI," in the designative sense, to protect his drug operations.[165]

The fact that so many circuit court opinions[166] have relied freely on the *Stewart* case as a guide to interpreting *use a firearm,* even though then-Judge Kennedy was clearly interpreting *carry,* not *use,* suggests that those courts are failing to attend closely to the actual statutory language even though claiming their decisions are dictated by the text.

B. 1984 Amendment

Section 1005 of the Comprehensive Crime Control Act of 1984 completely rewrote the firearms penalty, merging the separate "uses" and "carries" subsections (c)(1) and (c)(2) into single complex section (c)[167] that read as follows:

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163. *Id.* at 540 (citations omitted).

164. Although the Ninth Circuit decision was filed in 1985, Stewart's crime was committed before the 1984 amendments.

165. *Id.* at 539.

166. *See, e.g.,* United States v. Bailey, 36 F.3d 106, 113 (D.C. Cir. 1994); United States v. Torres-Medina, 935 F.2d 1047, 1050 (9th Cir. 1991); United States v. Vasquez, 909 F.2d 235, 240 (7th Cir. 1990), *cert. denied,* 501 U.S. 1217 (1991).

167. Pub. L. 98-473, § 1005, 98 Stat. at 2138-2139 (1984). The current subsections (c)(2) and (c)(3) were later added to 18 U.S.C. § 924 by the 1986 amendment.

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> (c) Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.[168]

According to the Senate report (there was no reference to the firearms penalty in the House Report)[169] this rewrite was primarily motivated by two goals. First, Congress wanted to make clear, through insertion of the long parenthetical phrase that begins "including a crime of violence which provides for an enhanced punishment,"[170] that the firearms penalty applies even when the underlying felony has, as an element, the use of a firearm. This insertion responded to two Supreme Court decisions holding that a defendant could not be charged with both the firearms penalty and such a felony.[171] Second, Congress, by deleting the modifier "unlawfully" after "carries a firearm," eliminated the "registered gun" exception to the crime of carrying a firearm during commission of a felony.[172] However, at the same time Congress expanded criminal liability to cover felons who were carrying a firearm "lawfully" during a crime, it balanced that expansion by also narrowing liability through changing the precursor crime from "any felony" to "any crime of violence."[173]

The replacement in the 1984 text of the accompanying phrase "[uses] to commit any felony" with the phrase "[uses] during and in relation to a crime of violence" did move the text away from the most explicit form of

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168. Pub. L. 98-473, § 1005, 98 Stat. at 2138-2139 (1984).

169. *See* Clare, *supra* note 153, at 826, n.76.

170. Pub. L. 98-473, § 1005, 98 Stat. at 2138 (1984).

171. S. REP. No. 225, 98th Cong., 1st Sess., 1, 312-13 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490-91. The two Supreme Court cases were Busic v. United States, 446 U.S. 398 (1980), and Simpson v. United States, 435 U.S. 6 (1978).

172. Pub. L. 98-473, § 1005, 98 Stat. 2138 (1984).

173. Pub. L. 98-473, § 1005, 98 Stat. 2138 (1984).

the eventive interpretation: W uses X [as Y] to do Z. The new form of the text—W uses X [as Y] during Z—still refers to an event (a violent crime) but does not make the causal link between the event and gun use explicit. Nonetheless, a statement that "John used the gun during the assault\rape\murder [other violent crime]" does not invite an interpretation that John only designated the gun for potential action during the crime; rather, the plausible interpretation is that the gun served as an instrumentality that caused some element of that violent event to take place.[174]

We have not found any legislative history that indicates why the 1984 Congress decided to merge what had been separately numbered subsections—(c)(1) "uses," (c)(2) "carries"—into a single phrase, "uses or carries." Because, as discussed above, the "use or carry a firearm" phrase strongly indicates an eventive interpretation of *use*,[175] and because the change from "any felony" to "crime of violence" also points to a link between firearm use and a specific event, it seems very unlikely that this drafting change was intended to signal that *use a firearm* could now be given a designative interpretation. The most plausible explanation is that no change in the relation between *use a firearm* and the precursor crime was intended:[176] Congress merged the two subsections to avoid having to

174. The en banc *Bailey* opinion appears to acknowledge this point when it distinguishes violent crimes like aggravated bank robbery—where "[o]f course one must somehow threaten another with a dangerous weapon"—from "furtive" crimes like drug possession, where "one should expect the firearm" to be "secreted." United States v. Bailey, 36 F.3d 106, 115 n.1 (D.C. Cir. 1994).

175. The Senate Report contrasted "use" with "carry" in a way that is consistent with our analysis. It stated: "Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant *intended to use* the gun if a contingency arose . . . ." S. REP. NO. 225, 98th Cong., 1st Sess., 314, n.10, *reprinted in* 1984 U.S.C.C.A.N. 3492 n.10 (emphasis added). In his dissent from the en banc *Bailey* opinion, Judge Williams interpreted this passage from the Senate Report as showing that,

> [T]he Senate evidently saw "use" as a comparatively narrow term, with "carry" picking up cases of an alternative type of activity, where the defendant did not actively "use" the weapon. The majority has turned this relation around, giving "use" such a broad meaning as to leave no apparent role for "carry".

36 F.3d at 122-23 (Williams, J., dissenting).

176. Indeed there is evidence that the "to commit" phrase was still understood to implicitly modify "uses a firearm," as illustrated by this quote from the Senate Report: "For example, a person convicted of armed bank robbery . . . and of using a gun *in its commission* (for example, by pointing it at a teller or otherwise displaying it whether or not it is fired) would have to serve five years . . . ." S. REP. NO. 225, 98th Cong., 1st Sess., 314 (citation omitted). If the shift from "use to commit" to "use during and in relation to" was intended to expand the meaning of *use a firearm* to include the designative interpretation, one would have expected the Senate Committee to carefully avoid the old terminology and to use instead the new phrase in its example (*e.g.*, "a person convicted . . . of using a gun during and in relation to the robbery").

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repeat the cumbersome new parenthetical ("including a crime of violence which provides for an enhanced punishment . . . ") and added "in relation" only with "carries during" in mind to establish a stronger link between firearm carrying (even lawfully) and the precursor crime for liability.[177] "Use a firearm to commit a crime of violence" and "use a firearm during and in relation to a crime of violence" might have been considered so close in meaning that it would have been unnecessary to retain the separate subsections just to retain the "to commit" language.[178]

C. *The 1986 Amendment*

Section 104 of the Firearms Owners' Protection Act of 1986[179] enacted the following scattered amendments to the firearms penalty:

> [Amend 924] subsection (c)—
> (A) by inserting "(1)" before "Whoever,";
> (B) by striking out "violence" each place it appears and inserting in lieu thereof "violence or drug trafficking crime,";
> (C) by inserting "or drug trafficking crime" before "in which the firearm was used or carried.";
> (D) in the first sentence, by striking out the period at the end and inserting in lieu thereof ", and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for ten years.";
> (E) in the second sentence, by striking out the period at the end and inserting in lieu thereof ", and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for twenty years."; and
> (F) by adding at the end the following:
> (2) For purposes of this subsection, the term 'drug trafficking crime' means any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).
> (3) For purposes of this subsection the term 'crime of violence' means an

177. According to the Senate Report,

> [T]he requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

Id. at 314 n.10.

178. Redrafting to retain "to commit" would have produced a very awkward phrase: "uses or carries a firearm to commit a crime of violence."

179. Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449, 456-57 (1986) (codified as amended at 18 U.S.C. § 924(c) (1988)).

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offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[180]

There is no evidence from the legislative history that any of these amendments, including the addition of "drug trafficking crime," were intended to indicate a designative interpretation of *use a firearm*.[181] As discussed above, the best textual argument for a designative interpretation (implausible though we believe it to be) is that the addition of "drug trafficking crime" complicated the concept of "using a firearm during a crime" because one drug trafficking crime is the non-eventive crime of possession with intent to distribute, the precursor crime in the *Bailey* and *Robinson* cases. However, "drug trafficking crime" when first added in

180. Pub. L. No. 99-308, 100 Stat. 456-57 (1986).

181. Indeed, there is once again evidence from a committee report that the "use or carry" phrase was understood as limiting *use* to an eventive interpretation. The Firearms Owner's Protection Act of 1986 originated in the Senate as Senate Bill 49. S. 49, 99th Cong., 1st Sess. (1985). This Senate Bill contained a controversial new provision that would have created a self-defense exception to the firearms penalty. S. 49, 99th Cong., 1st Sess. § 104(2) (1985). The House rejected the self-defense proposal with this explanation in the Report of the House Judiciary Committee:

> Proponents of the self-defense amendment point out that the defense is not available to one protecting himself 'from the danger which was the direct result of the commission of or attempt to commit a felony.' They argue that a felon who *uses* a gun in the commission of a felony or in a shoot out with police while fleeing cannot therefore claim self-defense, since he is protecting himself from a danger that was the direct result of the felony. While this reasoning may rule out a successful self-defense claim in most situations in which the *use* branch of the offense forms the basis of the mandatory penalty prosecution, it would not have the same weight in the case of prosecution for carrying a firearm during the commission of a felony. Indeed, the 'carrying' branch of the offense might be decimated, in that the felon could claim that he was only carrying the weapon for defense against other felons, and cite the fact that he did not *actually use* the weapon as proof of his claim. For example, a drug trafficker, if charged with carrying a firearm under 18 U.S.C. 924(c) in connection with drug trafficking, might be able to reasonably sustain a claim that it was carried *for protection* against rival traffickers.

H R. Rep No. 495, 99th Cong. 2d Sess. 10, *reprinted in* 1986 U.S.C.C.A.N. 1327, 1336 (emphasis added).

The narcotics experts whose testimony was offered against both Bailey and Robinson based their conclusions that the guns were "used in relation" to drug crimes on their knowledge that drug dealers "generally use guns to protect themselves from other drug dealers." United States v. Bailey, 36 F.3d 106, 108-09 (D.C. Cir. 1994). Thus the hypothetical posed in the House Report seems descriptive of *Bailey* and *Robinson* facts. Yet the House Report assumes that such a drug dealer who "uses a gun 'for protection against rival traffickers'" could successfully defend himself from a charge under 924(c)(1) as it would be amended by the pending bill because he "did not actually use the weapon." 1986 U.S C.C.A.N. 1336.

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1986, was defined as "distribution, manufacture, or importation" of drugs (all crimes involving time-bound events), not mere possession.[182] We must therefore look to the 1988 amendment that redefined "drug trafficking crime" to include "possession with intent to distribute."

D. The 1988 Amendment

The current definition of "drug trafficking crime" in the firearms penalty is the result of a 1988 amendment.[183] Reporting to the Senate as chair of the judiciary committee, Senator Biden provided the following explanation of the amendment: "The present definition of 'drug trafficking crime', however, covers offenses involving the distribution, manufacture, and importation of controlled substances, but does not cover either possession with intent to distribute, or attempt and conspiracy violations."[184] The amendment "adds" possession with intent to distribute in a rather obscure way: "For purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. app. § 1901 et seq.)."[185] One must read section 801 and the subsequent sections of Title 21 to discover that possession with intent to distribute is now a "drug trafficking crime" for purposes of the firearms penalty.

The amendment was uncontroversial. Nothing in its legislative history indicates that Congress was aware that changing the definition of "drug trafficking crime" might have any effect on the meaning of *use a firearm*.

E. Unsuccessful Attempts to Add "Possess"

Beginning as early as 1989 and continuing up to the date of writing, members of Congress have been attempting to amend the firearms penalty with the stated goal, "to broaden the prohibitions in 18 U.S.C. § 924(c) . . . to reach persons who have a firearm or explosive available during the commission of certain crimes, even if the firearm is not carried or used . . . [for example,] a situation in which a loaded firearm was found in the dresser drawer of an apartment which the defendant utilized in connection

182. *See supra* note 180 and accompanying text..

183. Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988).

184. 134 CONG. REC. S17,360-02 (November 10, 1988).

185. PUB L. NO. 100-690, § 6212, 102 Stat. 4181, 4360 (1988).

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with his drug dealings."[186] We begin with the 1989 proposal, originating with the Bush administration[187] and introduced by Republicans in both houses as part of larger crime bills, which was simply to add "or otherwise possesses" after "uses or carries" ("1989 Republican Proposal").[188] The legislative history contains several explicit statements that this proposal was a response to a recent Second Circuit decision with facts almost identical to those in the *Robinson* case, that reversed a conviction because the defendant had not "used or carried" the gun found in his apartment.[189] This proposal was referred to the democratically controlled House and Senate Judiciary Committees in 1989[190] and never re-emerged. However, the following year Senator Gramm succeeded in adding a somewhat different proposal by way of floor amendment to the Democrats' crime bill.[191] The Gramm proposal would have *replaced* "uses or carries" with "possesses" and defined "possession of a firearm" as: "(i) in the case of a crime of violence, the person touches the firearm . . . at any time during the commission of the crime; and (ii) in the case of a drug trafficking crime, the person has a firearm readily available at the scene of the crime during the commission of the crime" ("1990 Gramm Proposal").[192] Gramm's proposal also would have imposed a minimum sentence for such possession of ten years (as compared to five for using or carrying under the current statute), added a twenty year mandatory sentence applicable to "[w]hoever . . . discharges a firearm with intent to injure another person," and imposed the death penalty if the death of a person results from the discharge of the firearm.[193] The 1990 Gramm Proposal did not appear in

186. 135 CONG. REC. S13079 (daily ed. June 22, 1989) (section-by-section analysis of § 113, S.1225).

187. *See Hearings on H.R. 2709 Before the Subcomm. on Crime of the Committee on the Judiciary*, 101st Cong., 20 Sess. 69 (statement of Edward S.G. Dennis, Jr., Assistant Attorney General).

188. *See* S. 1225, 101st Cong., 1st Sess. § 113 (1989); H.R. 2709, 101st Cong., 1st Sess. § 113 (1989) (Comprehensive Violent Crime Control Act of 1989).

189. United States v. Feliz-Cordero, 859 F.2d 250 (2d Cir. 1988). This case is discussed in the section-by-section analysis appended to Senator Thurmond's bill. 135 CONG. REC. S13079 (daily ed. June 22, 1989). Assistant Attorney General Robert S. Mueller III also mentioned *Feliz-Cordero* in his statement to the House Subcommittee on Crime and Criminal Justice. *Hearings on H.R. 1400 Before the Subcomm. on Crime and Criminal Justice of the Committee on the Judiciary*, 102d Cong., 1st Sess. 11-12 (statement of Robert S. Mueller III, Assistant Attorney General).

190. 1 Cong. Index (CCH) 21,028 (status of S. 1225); 2 Cong. Index (CCH) 35, 045 (status of H.R. 2709).

191. S. 1970, 101st Cong., 1st Sess. (1990).

192. 136 CONG. REC. S8994 (daily ed. June 28, 1990) (Gramm Amendment 2084 to S. 1970).

193. *Id.*

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the final bill as enacted.[194]

In 1991, Senator Biden, chair of the Judiciary Committee, introduced a crime bill that would have replaced "uses or carries" with "discharges, uses, carries or otherwise possesses," and created a scale of enhanced punishment depending on the type of firearm involved ("1991 Biden Proposal").[195] Unlike the 1990 Gramm Proposal, it did not contain a definition of "possession." The proposal passed the Senate but did not survive the conference.[196]

In 1992, Senator Thurmond introduced a crime bill that would have replaced "uses or carries" with "knowingly uses, carries or otherwise possesses" and defined "possession" as "the person has a firearm readily available at the scene of the crime during the commission of the crime" ("1992 Republican Proposal").[197] Like the 1990 Gramm Proposal, it imposed a ten year sentence for "possession" and a twenty year sentence if the firearm was discharged with intent to injure.[198] This bill was referred to committee,[199] and when it was not reported out, several

194. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990). The Conference Committee did not issue a report. Instead a much shortened compromise bill was introduced and passed in each house. *See* 136 CONG. REC. S17600 (daily ed. October 27, 1990) (statement of Sen. Biden). We could find nothing in the legislative history that explicitly explained why the Gramm amendment was dropped, although the debate in the Senate included remarks by Senator Kennedy criticizing the excessive use of mandatory sentencing. 136 CONG. REC. S8998 (daily ed. June 28, 1990) (statement of Sen. Kennedy). There was also considerable opposition to the death penalty provision. 136 CONG. REC. S9021 (daily ed. June 28, 1990) (statements of Sen. Kennedy and Sen. Kerry).

195. S. 1241, 102d Cong., 1st Sess., § 1212 (1991).

196. Complicating the history of S. 1241 was the amendment introduced by Senator D'Amato to create a new firearms penalty provision aimed at a person who "knowingly possesses" a firearm during and in relation to a *state crime*. 137 CONG. REC. S8846 (daily ed. June 27, 1991) (statement of Sen. D'Amato). Floor debate on the D'Amato amendment focused on the considerable expansion of federal criminal jurisdiction it would create. *Id.* at S8848-9 (comment of Sen Biden); *id.* at 8850 (comment of Sen. Bingaman). Nonetheless, the amendment passed, *id.* at S. 8851. The amended S1241 then passed the Senate. 137 CONG. REC. S9832 (daily ed. July 11, 1991).

We could find nothing in the legislative history about opposition in the House or the Conference Committee to the Biden proposal to amendment 924(c)(1). However, a motion in the House to instruct their conferees to accept the D'Amato amendment failed. 137 CONG. REC. H10747 (daily ed. Nov. 21, 1991). Neither proposed Senate amendments to section 924(c) survived conference in the face of a House bill that contained no such provision. Unlike the previous year, there was a conference report to the enacted bill, but once again we could find no explanation there or anywhere else in the legislative history for the disappearance of the 1991 Biden Proposal. *See* H.R. REP. NO. 102-405, 102d Cong., 1st Sess. 200 (1991) (Conference Report on H.R. 3371, The Violent Crime Control and Law Enforcement Act of 1991).

197. S. 2305, 102d Cong., 2d Sess. § 401 (1992).

198. S. 2305, 102d Cong., 2d Sess. § 401 (1992).

199. 138 CONG. REC. S2680 (daily ed. Mar. 3, 1992).

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republican senators attempted unsuccessfully to add the proposal as an amendment to various bills on the floor.[200]

In 1993, then-minority leader Senator Dole introduced a comprehensive crime bill[201] that included the same language amending the firearms penalty as was contained in the 1992 Republican Proposal ("1993 Republican Proposal").[202] The bill was reported to committee and did not re-emerge.[203]

At the date of writing, there is a bill pending, introduced by Representative Barr (R-Ga) on April 7, 1995 that contains yet another proposal to amend the firearms penalty. ("1995 Barr Proposal").[204] This bill would replace "uses or carries" with three different provisions: (1) if a person "possesses a firearm," the sentence is five years, (2) if a person "brandishes a firearm," the sentence is ten years, and (3) if a person "discharges a firearm with intent to injure another person" the sentence is twenty years.[205] The 1995 Barr Proposal contains identical firearms penalties for federal and state precursor crimes.[206] The bill was referred to the House

200. *See* 138 CONG. REC. S6116, 6130 (daily ed. May 6, 1992) (proposal by Sen. Gramm to amend Telephone Privacy Act); 138 CONG. REC. S16360, S16374 (daily ed. Oct. 2, 1992) (proposal by Sen. Smith to amend Public Service Health Act); 138 CONG. REC. S7812, S7827 (daily ed. June 10, 1992) (proposal by Sen. Gramm to amend Workplace Fairness Act); 138 CONG. REC. S6745, S6760 (daily ed., May 14, 1992) (proposal by Sen. Gramm to amend National Voter Registration Act).

201. 136 CONG. REC. S10384, S10422 (daily ed. Aug. 4, 1993) (statements of Sen. Dole).

202. S. 1356, 103d cong., 1st Sess. § 1007 (1993).

203. 136 CONG. REC. at S10384. However, on November 9, 1993, Senator D'Amato successfully repeated his strategy of 1991. Once again he amended the crime bill that was reported from committee, S 1607, to insert language similar to the 1991 D'Amato Proposal. 139 CONG. REC. S15386-87 (daily ed Nov. 9, 1993) ("The 1993 D'Amato Proposal"). The 1993 D'Amato Proposal did not include the final phrase "during the commission of the crime" at the end of the definition of "possession" as did the 1991 D'Amato amendment. The amendment was passed by a vote of 58-42. *Id.* at S15409. Even after the D'Amato amendment added a new firearms penalty related to state crimes, S. 1607 did *not* contain an amendment to the existing federal crimes provision in 924(c)(1) as appeared in the 1992 or 1993 Republican Proposals. The House voted to instruct its conferees to retain the D'Amato amendment. 140 CONG. REC. H5930 (daily ed. July 20, 1994) (motion by Rep. McCollum, passed 291-128) The Senate did the same. 140 CONG. REC. S6078-88 (daily ed. June 19, 1994) (motion by Sen. Gramm). *See also id.* at S6092-98. Despite these instructions, the version reported out of the Conference Committee and subsequently enacted into law did not contain the D'Amato amendment.

204 H.R. 1488, 104th Cong., 1st Sess. § 3 (1995), 141 CONG. REC. H4430 (daily ed. Apr. 7, 1995) (introduced by Rep. Barr).

205. If the firearm discharged is a short barreled rifle or a short-barreled shotgun, the provision would also add another five years to the sentence enhancement, and if the firearm is a machine gun, destructive device, or is equipped with a silencer or muffler, the mandatory sentence would be thirty years. *Id.*

206. *Id.*

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Judiciary Committee[207] and has not yet been reported out of committee.

Under the conventional canons of statutory interpretation, these various unsuccessful proposals to amend the firearms penalty would be given relatively little weight. First, the views of a later Congress about the meaning of a statute enacted by an earlier Congress are considered uninformative about the intent and goals of the enacting Congress.[208] Second, the failure of a later Congress to pass proposed changes to a statute cannot be taken as evidence that the later Congress was satisfied with that statute.[209] Given the enormous complexity of the legislative process, there are many reasons a piece of legislation may fail to pass that have nothing to do with the merits of any particular component of that legislation.[210]

We find the legislation history of the past six years relevant for different reasons. We look to this history as evidence of a coherent discourse within Congress, spanning from session to session, that is consistent with the discourse we find in everyday English and in the text of Title 18. This evidence counters concern that the way Congress talks about the firearms penalty may be based on a specialized discourse that differs in important ways from the more generalized discourse found in the newspaper and in the Title 18 materials.

The history of unsuccessful amendment proposals displays several features of semantic interest:

1. Among all the variety of creative ways of rewriting the firearms penalty proposed at different times, in different houses, and by legislators of different parties—all proposals that seem designed to bring cases like *Bailey* and *Robinson* within the statute—none can be found that define or clarify *use* to indicate it should be given a designative interpretation of the sort given in the en banc *Bailey* opinion.[211] All the proposals seem based on a natural linguistic intuition that cases like *Bailey* and *Robinson* should be described in terms of the non-eventive verb *possess*.

2. The 1990 Gramm Proposal[212] seems to recognize the semantic difference between an "eventive" crime of violence and a potentially "non-

207. 141 CONG. REC. H4430 (daily ed. Apr. 7, 1995).

208. Central Bank of Denver v. First Interstate Bank of Denver, 114 S. Ct. 1439, 1452-53 (1994).

209. *Id.*

210. Indeed, our suspicion is that the various proposals to amend "uses or carries," particularly the Gramm and D'Amato amendments that passed the Senate, failed to be enacted because they were tied to more controversial changes such as adding a death penalty provision or expanding the statute to cover firearms possession during state crimes.

211. *See supra* notes 107-19 and accompanying text.

212. *See supra* notes 191-94 and accompanying text.

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eventive" drug trafficking crime (like possession with intent to distribute) by defining *possess* differently for each crime. In the case of a crime of violence, firearm possession is defined almost as an eventive use: "the person touches the firearm."[213] In the case of a drug trafficking crime, the firearm possession is similar to designative *use*: "The person has a firearm readily available."[214]

3. The hierarchy of danger we identified above[215]—ranging from discharge to possession—is explicitly recognized in the 1995 Barr Proposal: twenty years for discharge, ten years for brandishing, and five years for possession.[216]

Our linguistic analysis indicates that to give a designative interpretation to *use a firearm* in its current statutory context is contrary to linguistic "common sense" and also imperils "common sense" in a different way—by undermining the goal of maintaining a coherent legal discourse in which words retain their meaning as much as possible in different provisions of the criminal code. The recent history of congressional efforts to "improve" the firearms penalty strongly suggests that even if a court elected to "rewrite" the statute by giving it a different interpretation than ordinary meaning provides, a court would make "more sense" by reformulating the statute with new terminology rather than straining to accomplish its purpose by trying to employ *use* with a designative meaning.

V. CONCLUSION

We have used the analytical methods and terminology of linguistics not only to explore and explicate patterns of everyday usage, but also as heuristic devices for examining legislation history and judicial decisions relating to the firearms penalty. We do not claim that this approach should dictate the "right" or even the wisest outcome to the Supreme Court's impending decision of the *Bailey* and *Robinson* cases. Judicial decisionmaking can and often should take into account factors other than the ordinary meaning of legislative text. But we hope that this analysis has shown what a rich and subtle resource is provided by ordinary language, a resource that should not be lightly disregarded by either legislatures or courts.

213. *See supra* note 192 and accompanying text.

214. *Id.*

215. *See supra* notes 140-45 and accompanying text.

216. The hierarchy is less fully developed but still present in the 1990 Gramm Proposal and the 1992 and 1993 Republican Proposals, all of which single out "discharge" for additional punishment. *See supra* notes 192, 198 and 202 and accompanying text.

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APPENDIX ONE

Here are some contexts taken from a collection of British and American newspaper usages. Columns 2 and 3 identify the phrase that stands for "[a firearm]" in the phrase "use [a firearm]" and a modifying phrase that influences its interpretation.

In examples where the modifier is a prepositional phrase with "against" or "on", "use [a firearm]" in the sense of "fire a firearm" actually stands for the main activity, and the phrases with "against" or "on" represent the targets or victims of a weapon-discharging act.

Column 1	Column 2	Column 3
use	firearms	against a moving vehicle
use	guns	against brother Palestinians
use	live weapons	against demonstrators
use	his weapon	against the defenseless citizenry
use	firearms	against the police
use	weapons	against their own people
use	machine guns and tanks	against unarmed civilians
use	weapons	on them

The next example has two accompanying phrases: "as a club" and "to try to put an injured porcupine out of its misery." In this case, the shotgun is used because of physical properties unrelated to the fact that is a firearm. (That property is not unrelated to the sentence as a whole, however; the man killed himself while doing this.)

use	his shotgun	as a club to try to put an injured porcupine out of its misery

The phrases using the preposition "for" in the following examples present quite general purposes, suggesting just having the weapon available in the "protection" cases and shooting when the occasion arises in the "hunting" cases.

use	a gun	for his personal protection
use	guns	for hunting
use	guns	for hunting and target practice
use	guns	for hunting or sport shooting
use	guns	for law enforcement or crime prevention
use	guns	for protection
use	the Armstrong gun	for just this purpose

A phrase with "in" followed by phrases designating specific military actions invites the interpretation that the weapons were fired, since these modifying phrases refer to specific events.

use	a heavy calibre machine gun	in an attack
use	a gun	in IRA attacks
use	Kalashnikov AK-47 assault rifles	in recent Continental attacks
use	the rifle	in the shootings
use	weapons	in the invasion

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"Marked infinitive" phrases as modifiers invite an interpretation that depends on the nature of the act introduced by the phrase following the word "to." Consider the following examples:

use	rifles	to break up the crowd
use	firearms	to frighten
use	a gun	to get away
use	the gun	to kill Lee Harvey Oswald
use	guns	to kill or maim thousands of citizens each year
use	guns	to kill people
use	virtually every gauge of shotgun	to kill rabbits
use	a gun	to kill someone in self-defense
use	weapons	to quell public demonstrations or riots
use	guns, teargas, and helicopters	to regain control
use	these weapons	to regain the Holy Sepulchre
use	a Luger pistol	to shoot Brian Hayward

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APPENDIX TWO: "USE OR CARRY"

This appendix lists a variety of sentences which a British associate of Fillmore's found by looking in the British National Corpus for combinations of *use* and *carry* in relation to *gun, firearm, rifle, pistol, shotgun* or *weapon*. *See supra* note 92. Since we were not provided with exact citations, we do not offer this list as proof that these variations of *carry and use* have actually occurred in everyday discourse, like newspaper articles. Believing the usages in question to be noncontroversial, we simply rely on the reader's linguistic intuitions to recognize each example as an acceptable and readily interpretable expression. For ordinary purposes of linguistic analysis, the native speaker's acceptability judgments and interpretative abilities are central, and so the examples would be equally relevant if they had been the product of Fillmore's linguistic introspection. Nevertheless, we provide the data Fillmore used in order to illustrate one technique of linguistic analysis: searching data bases of naturally occurring texts to support and augment the linguist's capacity to imagine and generate data for analysis and examples for illustrating particular types of linguistic phenomena.

What if there's a scrap and I do have to fire at them and they return it; for after all, as I've said, we don't really know whether they *carry* guns; all we know is they haven't *used* them yet.

The defendant pleaded guilty to robbery and possession of a firearm with intent to commit an indictable offence on the basis that he knew that a gun was being *carried*, that he did not know it was loaded, and he did not incite or order or suggest that the gun should be *used*.

"We were taught to *carry and use* guns," boasted Chivite, who does not know his age but looks about 10.

"British tourists do not realize that most muggers here *carry* guns and do not hesitate to *use* them," says Barry Jolly, chairman of the British Chamber of Commerce in Orlando.

Zack *carried* a gun, and knew he would *use* it to get away.

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Mr. Nagdi had been *carrying* a gun when he left for work yesterday but he did not get a chance to *use* it.

You *carry* any weapon, whether it be a knife, baseball bat or gun, and in the end you'll *use* it.

"MUGGERS HERE *CARRY* GUNS—AND *USE* THEM"

They have to be taken seriously, because so many *carry* weapons which they are prepared to *use*, as the next story shows.

People who *carry* weapons into bank premises and threaten to *use* them must receive a severe sentence.

APPENDIX THREE

EXAMPLES OF "USE A GUN\FIREARM\WEAPON\EXPLOSIVE" IN TITLE 18

A. *EVENTIVE USE*

BY THE USE OF

§ 844. Penalties (h) [i]ncluding a felony which provides for an enhanced punishment if committed by the USE of a deadly or dangerous WEAPON or device.

§ 2113. Bank robbery and incidental crimes

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the USE of a dangerous WEAPON or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

§ 2114. Mail, money, or other property of United States

(a) [I]f in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the USE of a dangerous WEAPON, or for a subsequent offense, shall be imprisoned not more than twenty-five years.

§ 3665. FIREARMs POSSESSed by convicted felons

A judgment of conviction for transporting a stolen motor vehicle in interstate or foreign commerce or for committing or attempting to commit a felony in violation of any law of the United States involving the USE of threats, force, or violence or perpetrated in whole or in part by the USE of FIREARMs, may, in addition to the penalty provided by law for such offense, order the confiscation and disposal of FIREARMs and ammunition found in the POSSESSion or under the immediate control of the defendant at the time of his arrest.

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CAUSE THROUGH THE USE OF

§ 924 (i). A person who, in the course of a violation of subsection (c), causes the death of a person through the USE of a FIREARM, shall—(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

INVOLVING THE USE OF

§ 930. Possession of firearms and dangerous weapons in federal facilities

(c) A person who kills or attempts to kill any person in the course of a violation of subsection (a) or (b), or in the course of an attack on a Federal facility involving the USE of a FIREARM or other dangerous WEAPON, shall be punished as provided in sections 1111, 1112, and 1113.

§ 1751. Presidential and Presidential staff assassination, kidnapping, and assault; penalties

(e) Whoever assaults any person designated in subsection (a)(2) shall be fined under this title, or imprisoned not more than one year, or both; and if the assault involved the USE of a dangerous WEAPON, or personal injury results, shall be fined under this title, or imprisoned not more than ten years, or both.

§ 5032. Delinquency proceedings in district courts; transfer for criminal prosecution

In considering the nature of the offense, as required by this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the USE or distribution of controlled substances or FIREARMs.

THE USE OF

§ 242. Deprivation of rights under color of law

[O]r if such acts include the USE, attempted USE, or threatened USE of a dangerous WEAPON, EXPLOSIVEs, or fire, shall be fined under this title or imprisoned not more than ten years, or both.

§ 245. Federally protected activities

[O]r if such acts include the USE, attempted USE, or threatened USE of a dangerous WEAPON, EXPLOSIVEs, or fire shall be fined under this title, or imprisoned not more than ten years, or both.

USED AGAINST

§ 3559. Sentencing classification of offenses

(c)(2)(A) [T]he term "assault with intent to commit rape" means an offense that has as its elements engaging in physical contact with another person or USING or brandishing a WEAPON against another person with intent to commit aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242).

§ 3592. Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified

(c)(2) Previous conviction of violent felony involving FIREARM. For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the USE or attempted or threatened USE of a FIREARM (as defined in section 921) against another person.

USED AS

§ 3559. Sentencing classification of offenses

(c)(2)(D) [T]he term "firearms USE" means an offense that has as its elements those described in section 924(c) or 929(a), if the FIREARM was brandished, discharged, or otherwise USEd as a WEAPON and the crime of violence or drug trafficking crime during and relation to which the FIREARM was USEd was subject to prosecution in a court of the United States or a court of a State, or both.

USED DURING

§ 2261 Interstate domestic violence

(b)(3) [F]or not more than 10 years, if serious bodily injury to the offender's spouse or intimate partner results or if the offender USEs a dangerous WEAPON during the offense.

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§ 2262. Interstate violation of protection order
(b)(3) [F]or not more than 10 years, if serious bodily injury to the offender's spouse or intimate partner results or if the offender USEs a dangerous WEAPON during the offense.

USED FOR

§ 930. Possession of firearms and dangerous weapons in Federal facilities
(g)(2) The term "dangerous WEAPON" means a WEAPON, device, instrument, material, or substance, animate or inanimate, that is USEd for, or is readily capable of, causing death or serious bodily injury."

USED IN

§ 930. Possession of firearms and dangerous weapons in Federal facilites
(b) Whoever, with intent that a FIREARM or other dangerous WEAPON be USEd in the commission of a crime, knowingly POSSESSes or causes to be present such FIREARM or dangerous WEAPON in a Federal facility, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.

USED TO

§ 844. Penalties (d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any EXPLOSIVE with the knowledge or intent that it will be USEd to kill, injure, or intimidate any individual.

§ 844. Penalties (h) Whoever—(1) USEs fire or an EXPLOSIVE to commit any felony.

§ 924. Penalties (h) Whoever knowingly transfers a FIREARM, knowing that such firearm will be USED to commit a crime of violence."

§ 3592. Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified
(d)(4) USE of FIREARM. In committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant USEd a FIREARM or knowingly directed, advised, authorized, or assisted another to USE a FIREARM to threaten, intimidate, assault, or

injure a person.

USED WITH RESPECT TO

§ 922. *Unlawful acts* (x)(3)(A)(ii) [W]ith respect to ranching or farming activities as described in clause (i), a juvenile may POSSESS and USE a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian

B. *DESIGNATIVE USE*

FOR (THE) USE

§ 925. Exceptions: Relief from disabilities
(a)(1) The provisions of this chapter, except for provisions relating to FIREARMs subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, POSSESSion, or importation of any FIREARM or ammunition imported for, sold or shipped to, or issued for the USE of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

§ 925. Exceptions: Relief from disabilities
(a)(4) [A]ny FIREARM or ammunition which is (A) determined by the Secretary to be generally recognized as particularly suitable for sporting purposes, or determined by the Department of Defense to be a type of FIREARM normally classified as a war souvenir, and (B) intended for the personal USE of such member.

USED FOR

§ 921. Definitions (a)(4)(A) [O]r is a rifle which the owner intends to USE solely for sporting, recreational or cultural purposes.

§ 922. Unlawful acts (b)(3)(B) [T]he loan or rental of a FIREARM to any person for temporary USE for lawful sporting purposes.

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USED IN

§ 922. Unlawful acts (a)(2)(B) [A]nd other FIREARMs capable of being concealed on the person, for USE in connection with his official duty.

§ 925. Exceptions: Relief from disabilities (d)(1) [I]s being imported or brought in for scientific or research purposes, or is for USE in connection with competition or training pursuant to chapter 401 of title 10.