CRIMINAL LAW — FIREARMS REGULATION — FIRST CIRCUIT HOLDS THAT TRADING DRUGS FOR GUNS CONSTITUTES "USE" OF A GUN FOR PURPOSES OF 18 U.S.C. § 924(C). — *United States v. Cotto*, 456 F.3d 25 (1st Cir. 2006).

Drug dealers are villains of the first order in America. They contribute, directly and indirectly, to the breakdown of schools, workplaces, and neighborhoods. Beginning in the 1970s, Congress responded to these social threats by criminalizing nearly all conduct with an apparent link to drug possession or distribution.[1] As part of this effort, Congress enacted 18 U.S.C. § 924(c), which enhances sentences for drug offenses that involve firearms.[2] The section imposes liability upon any person who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm."[3] Courts have found the statute's use requirement satisfied in a variety of instances, some of which may appear counterintuitive.[4] Recently, in *United States v. Cotto*,[5] the First Circuit employed an expansive conception of "use" in interpreting the statute: a unanimous panel held that bartering drugs in exchange for firearms constitutes "use" of a firearm within the statute's meaning.[6] In its decision, the court relied heavily on an inapplicable precedent, rejecting a more natural interpretation of the statute in favor of an interpretation promoting a perceived punitive policy underlying the legislation. *Cotto* thus illustrates a judicial failure to interpret criminal drug laws in a principled and rigorous manner and a preference instead to follow the harsh dictates of societal attitudes toward drug offenders.

From the summer of 1999 until the spring of 2000, Jose Cotto, Jr., a drug dealer, provided Amanda Tew, a teenager living with her grandparents, with heroin on over twenty separate occasions.[7] Instead of

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[1] *See, e.g.*, Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. II, § 401, 84 Stat. 1236, 1260–62 (codified as amended at 21 U.S.C § 841 (2000 & Supp. III 2003), *amended by* Pub. L. No. 109-248, tit. II, § 201, 120 Stat. 587, 611 (2006), *and by* Pub. L. No. 109-177, tit. VII, §§ 711(f)(1)(B), 732, 120 Stat. 192, 262 (2006)) (making unlawful the manufacture, distribution, dispensation, and possession of certain controlled substances); *id.* § 404, 84 Stat. at 1264–65 (codified as amended at 21 U.S.C. § 844 (2000), *amended by* Pub. L. No. 109-177, tit. VII, § 711(e)(1), 120 Stat. at 262) (imposing mandatory minimum penalties for simple possession of controlled substances).

[2] *See* 18 U.S.C.A. § 924(c) (West 2000 & Supp. 2006).

[3] *Id.* § 924(c)(1)(A).

[4] *See, e.g.*, United States v. Sanders, 421 F.3d 1044, 1049–50 (9th Cir. 2005) (finding a co-conspirator's use of a firearm during a bank robbery sufficient to constitute use by the defendant); United States v. Taylor, 54 F.3d 967, 975 (1st Cir. 1995) (explaining that, to qualify as being used, a gun need not be loaded or operable as long as it is real).

[5] 456 F.3d 25 (1st Cir. 2006).

[6] *Id.* at 26.

[7] *Id.*

paying for the drugs with cash, Tew provided Cotto with guns stolen from her grandparents' basement.[8] When Tew was eventually arrested for possession of heroin, she agreed to participate in an undercover sting operation with the Bureau of Alcohol, Tobacco, and Firearms (ATF).[9] On July 10 and July 11 of 2000, in two recorded conversations, Tew told Cotto that she had one MAC-11 and two .380-caliber handguns to trade for drugs.[10] They then met in a parking lot where ATF agents had established a surveillance operation.[11] After inspecting the three guns in Tew's trunk, Cotto transferred them to the trunk of his car. He was arrested by ATF agents shortly thereafter.[12]

The government charged Cotto with one count of being a felon in possession of a firearm, pursuant to 18 U.S.C. § 922(g)(1), and one count of using a firearm during and in relation to a drug trafficking crime, pursuant to 18 U.S.C. § 924(c)(1).[13] He pled guilty to the felon-in-possession count and went to trial solely on the use-of-a-firearm count. At trial, Cotto argued that the heroin in his possession was for personal use, that he did not intend to trade the drugs for the guns, and that there was thus no predicate "drug trafficking crime" on which to hang the § 924(c)(1) count.[14] Following the trial, the jury returned a guilty verdict.[15]

The First Circuit affirmed the conviction, holding that a defendant who barters drugs for firearms is guilty of using a firearm under § 924(c)(1). Writing for the court, Judge Lynch[16] first pointed to two Supreme Court cases that addressed the question of what constituted use under the statute. In *Smith v. United States*,[17] the Court held that "a criminal who trades his firearm for drugs" — the inverse scenario from the one presented in *Cotto* — "'uses' [the firearm] during and in relation to a drug trafficking offense."[18] The *Smith* Court reasoned that the defendant had "derived service" from the gun as an item of barter and hence used it in an effort to obtain drugs.[19] Two years later, in *Bailey v. United States*,[20] the Court refined its definition of use to require "evidence sufficient to show an *active employment* of the

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[8] *Id.*

[9] *Id.*

[10] *Id.* at 26–27. The ATF, not Tew, supplied these three guns. *Id.* at 27.

[11] *Id.* at 27.

[12] *Id.* At the time of his arrest, Cotto had two bundles of heroin and a small amount of cash with him, but had not given any drugs to Tew. *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Judge Lynch was joined by Judges Selya and Lipez in the panel's decision.

[17] 508 U.S. 223 (1993).

[18] *Id.* at 241.

[19] *Id.* at 229 (internal quotation marks omitted).

[20] 516 U.S. 137 (1995).

firearm by the defendant" such that the firearm was an "operative factor" in the predicate crime.[21] The requirement of active employment, the Court held, necessitated a showing of implementation to distinguish the defendant's activity from mere possession.[22]

Judge Lynch then turned to the scenario in the instant case, in which a defendant bartered drugs to obtain guns — a "drugs-for-guns" trade. Judge Lynch divided the circuit courts into three camps since the decision in *Smith*[23]: four circuits have concluded that a drugs-for-guns trade qualifies as use,[24] two circuits could "be viewed as leaning that way,"[25] and four circuits have taken the position that such a trade does not constitute use.[26] In holding that "bartering drugs in order to obtain firearms constitutes 'use' of the firearms,"[27] the First Circuit adopted what is now the predominant view.

Cotto argued that bartering drugs for guns could never amount to use — an argument Judge Lynch acknowledged was "not without merit."[28] She allowed that the "common understanding" of the term "use" aligned with Cotto's interpretation, whereas the government's position called for a "somewhat less natural" construction of the term.[29] Judge Lynch wrote that the court "might well be inclined to say, based on the most natural reading of the statute, that Cotto did not 'use' the guns by bartering for them."[30]

But, Judge Lynch noted, "we do not write on a blank slate."[31] Instead, the court explained that the outcome was dictated by *Smith*, which held that "a firearm's . . . use as an item of barter fall[s] within

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[21] *Id.* at 143.

[22] *Id.* at 149.

[23] *Cotto*, 456 F.3d at 28.

[24] *See* United States v. Sumler, 294 F.3d 579, 583 (3d Cir. 2002) ("[W]e cannot evade the brute fact that . . . both *Bailey* and *Smith* explained that the word 'use' means 'barter.'"); United States v. Ramirez-Rangel, 103 F.3d 1501, 1506, 1509 (9th Cir. 1997) (concluding that, under *Smith*, § 924(c)(1) applied to a drugs-for-guns trade); United States v. Ulloa, 94 F.3d 949, 955–56 (5th Cir. 1996) (reasoning that a drugs-for-guns trade was not cause to distinguish *Smith*); United States v. Cannon, 88 F.3d 1495, 1508–09 (8th Cir. 1996) (finding that "the *Smith* holding appl[ied] with equal force" when the defendant traded drugs for guns).

[25] *Cotto*, 456 F.3d at 28. In *United States v. Cox*, 324 F.3d 77 (2d Cir. 2003), the Second Circuit held that a defendant used a gun when he "took the gun *as collateral* for the cash price of drugs, not in barter of one commodity for another." *Id.* at 84. The Fourth Circuit concluded in *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994), that a defendant used a gun when he gave drugs as consideration for another individual's efforts to obtain a gun on his behalf. *Id.* at 1269.

[26] *See* United States v. Montano, 398 F.3d 1276, 1282–84 (11th Cir. 2005) (per curiam); United States v. Stewart, 246 F.3d 728, 731–33 (D.C. Cir. 2001); United States v. Warwick, 1167 F.3d 965, 975–76 (6th Cir. 1999); United States v. Westmoreland, 122 F.3d 431, 434–36 (7th Cir. 1997).

[27] *Cotto*, 456 F.3d at 26.

[28] *Id.* at 28.

[29] *Id.*

[30] *Id.*

[31] *Id.*

the plain language of § 924(c)(1)."[32] The court adopted *Smith*'s broad understanding of use and determined that it was "not free to disregard" this reading.[33] *Bailey*'s refinement of *Smith* to require active employment of a firearm as an operative factor in the predicate crime did not alter the First Circuit's result. The fact that Cotto merely received guns, the court determined, did "not mean he was passive with respect to them."[34] Judge Lynch engaged in a causation analysis, reasoning that because receipt of the guns was a condition of the transaction, the guns were an operative factor in the offense.[35]

The court further reasoned that a broad interpretation of use was consistent with other portions of the statute and promoted the statute's underlying purposes.[36] Following the methodology of *Smith* and *Bailey*, the court identified separate provisions of the statute under which a defendant's receipt of a firearm constituted use.[37] Moreover, the First Circuit explained that drawing a "fine metaphysical distinction" between bartering *with* a gun and bartering *for* a gun was contrary to Congress's intent to provide enhanced sentences for drug offenders who employed firearms.[38] Borrowing language from *Smith*, the court reasoned that a gun's status as an item of barter "does not render it inert or deprive it of destructive capacity. . . . [I]t can be converted instantaneously from currency to cannon."[39]

In *Cotto*, the First Circuit chose to follow the reasoning of *Smith* rather than a reading of the statute that the court conceded was a more natural interpretation. The First Circuit thus joined the Third,[40]

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[32] *Id.* (quoting Smith v. United States, 508 U.S. 223, 240 (1993)).

[33] *Id.* at 29.

[34] *Id.*

[35] *Id.*

[36] *See id.* at 29–30.

[37] *Id.* at 29. For example, an individual who receives a stolen firearm is criminally liable under 18 U.S.C. § 922(j), and an unlicensed individual who receives a firearm from outside the state is liable under § 922(a)(3). *See id.* at 29 n.4. Section 924 subjects any firearm "intended to be used" in these and other contexts to seizure and forfeiture. *See* 18 U.S.C.A. § 924(d)(1) (West 2000 & Supp. 2006).

[38] *Cotto*, 456 F.3d at 29–30 (quoting Smith v. United States, 508 U.S. 223, 240 (1993)). The *Smith* Court used this language in reference to § 924(c)(1), stating that Congress did not intend to distinguish metaphysically "between a gun's role in a drug offense as a weapon and its role as an item of barter." *Smith*, 508 U.S. at 240.

[39] *Cotto*, 456 F.3d at 29 (quoting *Smith*, 508 U.S. at 240) (internal quotation mark omitted). The First Circuit rejected Cotto's argument that the heroin was for his personal use, and held that "[t]here was ample evidence that Cotto possessed heroin with the intent to distribute it, which is a drug trafficking crime" under 21 U.S.C. § 841(a)(1). *Id.* at 30. Finally, the court briefly considered and rejected Cotto's claim of sentencing error under *United States v. Booker*, 125 S. Ct. 738 (2005). *See Cotto*, 456 F.3d at 30–31.

[40] *See* United States v. Sumler, 294 F.3d 579, 583 (3d Cir. 2002).

Fifth,[41] Eighth,[42] and Ninth Circuits,[43] each of which found itself bound by *Smith* in cases involving drugs-for-guns trades. In relying on this precedent, however, the *Cotto* court overstated the breadth of the Supreme Court's interpretation of the statute, particularly in light of the Court's confinement of the *Smith* holding in *Bailey*. By opting to decide the case under the rule of *Smith*, the court masked the driving force of its decision — its willingness to align with harsh societal attitudes.

The rule announced by the Supreme Court in *Smith* should not apply to the facts in *Cotto*. The rule of *Smith* is limited to a "criminal who trades his firearm for drugs,"[44] and, under *Bailey*, any use must involve an "active employment" of the firearm.[45] Although in *Bailey* the Court did identify "bartering" as an activity that could constitute use, this mention came in a list of activities that all require possession or ownership of the gun.[46] The proper inference is that the Court's conception of use included bartering *with*, but not necessarily bartering *for*, a gun. Implicit in *Bailey*, then, is a requirement that the gun be employed with a certain agency by the defendant, and the mere presence of a gun in a given transaction is not sufficient to constitute use. The *Cotto* court, however, ignored this agency requirement. According to the court's logic, both Tew, who bartered with the guns that she possessed, and Cotto, who bartered for them, used the guns in question. Yet this approach contemplates the use of the same guns at the same time by two different individuals — an anomalous, logically confounding situation in a barter exchange.[47] It is here that *Bailey*'s active employment requirement becomes critical: only Tew actively employed the guns — by possessing them, bringing them to the site of the trade, and offering them to Cotto — to bring about a desired re-

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41 *See* United States v. Ulloa, 94 F.3d 949, 955 (5th Cir. 1996).

42 *See* United States v. Cannon, 88 F.3d 1495, 1509 (8th Cir. 1996).

43 *See* United States v. Ramirez-Rangel, 103 F.3d 1501, 1506 (9th Cir. 1997).

44 *Smith*, 508 U.S. at 241.

45 Bailey v. United States, 516 U.S. 137, 143 (1995).

46 *See id.* at 148 ("The active-employment understanding of 'use' certainly includes brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm."); *see also Cannon*, 88 F.3d at 1510 (Gibson, J., concurring in part and dissenting in part) (describing the passage in *Bailey* as denoting "that the object bartered, and thus used, was the firearm").

47 In *United States v. Westmoreland*, 122 F.3d 431 (7th Cir. 1997), the Seventh Circuit objected to this kind of reasoning:

> [W]e note that there is no grammatically correct way to express that a person receiving a payment is thereby 'using' the payment. . . . No matter how we phrase the events in this transaction, the defendant is on the passive side of the bargain. He received the gun. He was paid with the gun. He accepted the gun. But in no sense did he actively 'use' the gun.

Id. at 435.

sult. To rule that Cotto did so is to stretch the meaning of "use" to encompass Cotto's request that Tew transfer the guns to him in exchange for drugs.

The *Smith* Court termed the distinction between a gun's use as a weapon and its use as an item of barter "metaphysical"[48] without addressing the instant question of whether a similar distinction exists between trading with and trading for a gun. Although the Eighth Circuit found it to be "a distinction without a difference,"[49] there are good reasons to distinguish the two types of transactions. First, Cotto took the guns off the market, rather than bringing them to the market. Until the guns were returned to the market, Cotto removed them from potential harmful use by *other* parties. If Cotto himself chose to resell or otherwise to employ the guns, he could have been subject to prosecution under a separate statute.[50] In contrast, bartering with a gun allows downstream purchasers the opportunity to commit violent crime, an opportunity they would not have absent the defendant's sale. Second, the criminal law draws sharp distinctions between buyers and sellers in related contexts — most notably in drug distribution statutes. A defendant who possesses a controlled substance "with intent to manufacture, distribute, or dispense" it is subjected to significantly greater punishment than a defendant guilty of simple possession.[51] This willingness to punish sellers more harshly than buyers[52] may stem from the assumption that sellers are more likely to engage in repeat unlawful transactions.

The First Circuit also reasoned that "the rationale of § 924(c) support[ed] [its] interpretation."[53] However, rather than citing actual evidence of Congress's intent in implementing the statute, the court merely relied on *Smith*'s expansive conception of § 924(c)'s purposes. The court's focus thus was not on Congress's goals in enacting this particular provision, but on the *Smith* Court's more general recogni-

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[48] *Smith*, 508 U.S. at 240.

[49] *Cannon*, 88 F.3d at 1509.

[50] The *Bailey* Court recognized that a prospective use could not be punished prior to its actual occurrence. Because another provision, § 924(d)(1), imposed liability for intending to use a firearm, but § 924(c)(1) does not use that language, the Court concluded that § 924(c)(1) applied "only [to] those defendants who *actually* 'use' the firearm." *Bailey*, 516 U.S. at 150 (emphasis added).

[51] *Compare* 21 U.S.C. § 841(b) (2000 & Supp. III 2003) (imposing a minimum penalty of five years' incarceration for possession with intent to manufacture, distribute, or dispense), *amended by* Pub. L. No. 109-248, tit. II, § 201, 120 Stat. 587, 611 (2006), *and by* Pub. L. No. 109-177, tit. VII, §§ 711(f)(1)(B), 732, 120 Stat. 192, 262 (2006); *with* § 21 U.S.C. 844(a) (2000) (limiting the penalty for first-time simple possession to a minimum fine of $1000 and imprisonment for not more than one year), *amended by* Pub. L. No. 109-177, tit. VII, § 711(e)(1), 120 Stat. at 262.

[52] *See* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1817 (1998) ("[T]he legal system has . . . consistently punished sale of illegal goods and services more harshly than the purchase of those same goods and services.").

[53] *Cotto*, 456 F.3d at 29.

tion of the "destructive capacity" of a firearm.[54] Although it is true that a gun retains its potential for destruction even as an item of barter, this fact should not give a court the freedom to impose punishments beyond the limitations specified by Congress.[55] Indeed, Congress continues to decline to regulate firearms in other contexts, including simple possession, despite the same ever-lurking potential for destructive violence inherent in the weapons. The invocation of statutory "rationale" was therefore premised on nothing more than a prior precedent's conception of congressional purpose, and should not have been deployed in an effort to supplant the more natural reading of the provision's ordinary meaning.

The First Circuit's appeal to the rationale of § 924(c) as an additional basis for its decision reveals an uneasiness with resting entirely on *Smith*. On the one hand, the court proclaimed that it was "not free to disregard *Smith*" and that *Bailey* gave no cause "to distinguish *Smith*."[56] The court confidently stated that the rule of *Smith* applied, thus requiring an affirmance of Cotto's conviction. On the other hand, the court conceded that the statute on its face was susceptible to a more natural reading than the one dictated by *Smith*. Furthermore, the court felt the need to articulate alternative reasoning for its conclusion, based on a contextual reading of the statute and on the statutory rationale described above, just in case the "Supreme Court precedent did not require the interpretation" that the court had adopted.[57] In light of these concessions, the court's reliance on *Smith* loses much of its rhetorical force.

The outcome of *Cotto* will likely not offend most people's intuitive principles of punishment; indeed, public attitudes toward drug and gun offenders are some of the most entrenched.[58] While there may be scattered opposition to particular aspects of drug and gun laws, there is no widespread effort to reverse course and diminish the laws' punitive severity.[59] Thus, the First Circuit's decision cannot be viewed as

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[54] *Id.* (quoting Smith v. United States, 508 U.S. 223, 240 (1993)) (internal quotation marks omitted).

[55] If Congress were legislating on the basis that firearms are potentially destructive in all circumstances, it might not have limited liability to defendants who use or carry guns, but might have simply imposed punishment whenever a gun was present during the commission of the offense. As the Court in *Bailey* stated, however, "the inert presence of a firearm, without more, is not enough to trigger § 924(c)(1)." *Bailey*, 516 U.S. at 149.

[56] *Cotto*, 456 F.3d at 29.

[57] *Id.*

[58] *See* PEW RESEARCH CTR., INTERDICTION AND INCARCERATION STILL TOP REMEDIES (2001), http://people-press.org/reports/display.php3?ReportID=16 ("[T]he public continues to rank drugs among the major problems facing both the nation and local communities . . . .").

[59] In the aftermath of *Bailey*, members of Congress sought to clarify the language of the statute and "revers[e] the restrictive effect of the *Bailey* decision." H.R. REP. NO. 105-344, at 6 (1997). A bill originating in the House would have done away with the "uses or carries" language

undermining some kind of national consensus on drug criminals. Instead, the case can be viewed in the opposite light, as the court's decision coincides with the conventional societal wisdom on the issue.

Over the past three and a half decades, the web of federal drug legislation has grown considerably as legislators have realized the political bounties to be reaped from being tough on drug crime.[60] As the laws take hold, it becomes less clear whether the legislation reflects a societal impulse or rather dictates that impulse to society through the fabric of the law.[61] *Cotto*, then, is an illustration of a court's falling in line with a general legislative policy — severe punishment for armed drug offenders — under cover of an inapplicable precedent, rather than rigorously applying a criminal statute to the facts before it. The implementation of this policy has been facilitated not only by the broad swath of drug laws available to federal prosecutors, but also by the willingness of federal courts to achieve the politically expedient ends desired by Congress.[62] *Cotto* thus reflects both the societal impulse to deliver harsher punishment to those who mix guns and drugs, and the way in which courts can distort restrictive congressional language to satisfy that impulse.

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and replaced it "with increased penalties for escalating egregious conduct," including clearly articulated categories such as possessing, brandishing, and discharging a firearm. *Id.* Ultimately, however, the "uses or carries" language was retained, and a "possession in furtherance" provision was added as an alternative basis for liability. *See* 18 U.S.C.A. § 924(c)(1)(A) (West 2000 & Supp. 2006). This is the version of the statute under which Cotto was indicted and substantially the version in use today.

60 *See* EVA BERTRAM ET AL., DRUG WAR POLITICS 134–38 (1996) (criticizing Congress for its opportunistic and fragmentary approach in expanding the war on drugs).

61 *See* Steven Wisotsky, *Not Thinking Like a Lawyer: The Case of Drugs in the Courts*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 651, 682–83 (1991) (arguing that the government's dogged pursuit of a war on drugs has "deprived the public of its power of critical thinking on this subject").

62 *See id.* at 689 (asserting that in deciding issues of drug policy, judges "have followed political rather than judicial standards of knowledge"); *see also* California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting) ("[T]his Court has become a loyal foot soldier in the Executive's fight against crime."). But judges' tendencies to acquiesce in the prosecution of the war on drugs have not occurred with uniformity. *See* BERTRAM ET AL., *supra* note 60, at 229–31 (describing various judges' objections to the drug laws and, in some instances, public advocacy of legalization).