No. 07-608

In the Supreme Court of the United States

UNITED STATES,
Petitioner,
v.
RANDY EDWARD HAYES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

Brief of Professors of Linguistics and Cognitive Science as Amici Curiae in Support of Neither Party

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Interest of Amici Curiae[1]

Amici Georgia M. Green, PhD.; Ray Jackendoff, PhD.; Jeffrey P. Kaplan, PhD.; and Roger W. Shuy, PhD. are professors of linguistics (the study of language), and amicus Edward Gibson, PhD. is a professor of cognitive science who specializes in psycholinguistics (the study of the mental processes involved in understanding, producing, and learning language). Their credentials are summarized in Appendix A.

In cases such as this one that involve the interpretation of language, linguistics can offer insights different from those provided by usual modes of legal argument. We believe that those insights will be useful here, because the seemingly unremarkable issue of statutory interpretation presented in this case raises some quite substantial issues about how language works, how language is used and understood, and how best to go about the process of interpreting language.

We take no position on the *legal* question before the Court. Instead, we focus solely on questions relating to the ordinary meaning of the statutory language, by which we mean the way that an ordinary native speaker of English would be likely to understand the statute. In other words, we are dealing with "the language as we normally speak it."[2]

This Court has often said that statutory interpretation begins with the statute's text and that the

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1. No party's counsel authored this brief in whole or in part. No monetary contribution intended to fund the preparation or submission of this brief was made by any party or any party's counsel. Nobody other than amici or their counsel has made any such contribution. Letters evidencing the parties' consent to the filing of this brief have been lodged with the Clerk.

2. *Watson v. United States*, 128 S. Ct. 579, 583 (2007).

text should ordinarily be interpreted according to its ordinary meaning.[3] The task of figuring out ordinary meaning is important for several reasons. If the court thinks the statute's meaning is plain, analyzing the text may be not just the beginning of the interpretive process but also the end. And even if the statute is unclear or ambiguous, focusing on ordinary meaning before turning to issues of *legal* interpretation—canons of interpretation, statutory context, congressional purpose, legislative history—is important because it bears on the range of meanings that the statute can reasonably support. Attending to ordinary meaning can also help to ground the process in a degree of objectivity, because ordinary meaning is, or at least ought to be, unaffected by individual judges' personal preferences and interpretive philosophy.

Even though interpreting written texts is central to the legal process, legal education typically pays little or no attention to how language works or to methodologies for analyzing disputes about language, the assumption apparently being that by the time people reach law school, they already have the necessary knowledge and skill. Because using and understanding language seems as natural as breathing, we take language for granted, and most of us do not realize that what we were taught in high school merely scratches the surface.

We believe that the interpretive toolkit used by lawyers and judges should be more sophisticated than the one used by high school students. And we believe that the insights and methodologies of linguistics can provide analytical tools, as well as a fresh perspective,

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3. *E.g.*, *BP America Production Co. v. Burton*, 127 S. Ct. 638, 643 (2006).

that can help in resolving interpretive problems like the one presented here.

This case provides a good opportunity to demonstrate this, because although it may at first seem to present only a garden-variety question of statutory interpretation, upon examination it raises a surprising number of language-related issues, ranging from the use and misuse of dictionaries to the structure of concepts and from punctuation and paragraphing to the process by which language is understood.

Introduction and Summary of Argument

The dispute here is about the definition of a misdemeanor crime of domestic violence (MCDV). Under the Fourth Circuit's interpretation, the relative clause *committed by a current or former spouse, parent, or guardian of the victim,* etc. modifies the phrase that immediately precedes it: *the use or attempted use of physical force, or the threatened use of a deadly weapon*, as shown here:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim.

The government, on the other hand, along with most of the other circuits, interprets the *committed by* clause as modifying *an offense*:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim.

Two arguments have been advanced in support of this interpretation. One is that the verb *commit* can't combine with the noun phrase *the use of force* to form a verb phrase such as *commit a use of force* or *the use of force committed by a current or former spouse, parent, or guardian of the victim*. The other relies on the fact that the definition uses the word *element* in the singular. According to this theory, the phrase *the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim* sets out two separate elements rather than just one.

Both of those arguments are at odds with what is known about language and how it works.

The argument that one can't say *a use of force committed by* [*someone*] is apparently based on nothing more than an intuition that that phrase sounds weird. While we understand the intuition and even share it to a degree, it is not a reliable guide here, because it doesn't square with the evidence of how English is actually used. Weird-sounding or not, such constructions are an attested part of the English language.

The singular-element argument, too, is mistaken. As a matter of ordinary language, there is no reason to think that an element of a crime cannot include more than one concept. Indeed, the evidence of actual usage

suggests that an element of a crime is understood as something that *can* be made up of more than one concept. That understanding is reflected in the fact that 18 IC. § 16(a) defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." This definition treats the phrase *the use, attempted use, or threatened use of physical force against the person or property of another* as denoting a single element even though (as the government concedes) the phrase expresses more than one concept. The government argues that in the definition of a crime of violence, the two concepts are necessarily interrelated but that in the definition of an MCDV they are not. But that claim does not stand up to examination. As we will show, the grammatical and conceptual structures of the two definitions are functionally the same, so the degree of relatedness is the same in both cases.

Thus, the Fourth Circuit's interpretation is a reasonable one, which means that the government's interpretation does not represent the statute's plain meaning. The question of which interpretation represents the more natural reading (i.e., which one an ordinary reader would be more likely to arrive at) is an empirical one, and since we have not tried to find out the answer empirically, we do not make any predictions. We do, however, discuss various factors that can be expected to play a role in how the statutory language would be understood.

Argument

A. The grammar of English permits an interpretation in which the *committed-by* clause modifies *the use or attempted use of physical force, or threatened use of a deadly weapon*.

The government challenges the Fourth Circuit's reading of the MCDV statute on the ground that English as it is ordinarily used does not permit the verb *commit* to combine with a noun phrase such as *the use of force* to form a verb phrase such as *the use of force committed by* [*someone*]. This argument originated in the D.C. Circuit's decision in *United States v. Barnes*, which represents perhaps the most detailed attempt to justify the interpretation that the government advances.[4] The court in *Barnes* quoted from the dictionary definition of *commit* and then went on to say, "The use of force is not 'committed,' 'done,' or 'perpetrated.' An '*offense*' is 'committed' or 'perpetrated.'"[5] The government now makes essentially the same argument.

This argument rests on a factual assumption about how the verb *commit* behaves in actual use. And that assumption's validity can be tested: if people really do use phrases such as *the use of force committed by* [*someone*] or [*someone*] *committed a use of force*, the assumption is invalid. As recently as 30 years ago, looking for examples of such phrases in actual use would have been a daunting task. But now, with tools such as Google and Westlaw, it can be done in a matter of minutes.

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4. *United States v. Barnes*, 295 F.3d 1354 (D.C. Cir. 2002).

5. *Barnes*, 295 F.3d at 1360 (emphasis by the court; footnote omitted).

When those tools are brought to bear here, they show that people—including representatives of the Department of Justice and the members of this Court—do use constructions of the kind that the D.C. Circuit described as impossible and government describes as abnormal:

From an FBI publication:

> International terrorism is the unlawful use of force or violence committed by a group or individual, who has some connection to a foreign power or whose activities transcend national boundaries, against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.[6]

From a statute:

> Domestic abuse battery is the intentional use of force or violence committed by one household member upon the person of another household member without the consent of the victim.[7]

From a newspaper article:

> Mitchell claims Schaffer beat and sprayed him because he is black . . . .That constitutes an unnecessary use of force committed with malice and ill will, Mitchell states in the suit.[8]

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6. Federal Bureau of Investigation, *Terrorism in the United States 1996* at 3 (1996) (available at <http://www.fbi.gov/publications.htm> (accessed June 12, 2008)).

7. La. Rev. Stat. Ann. § 14:35.3.A.

8. *Inmate's Lawsuit Alleges Deputies Beat, Stabbed Him*, SARASOTA (FLORIDA) HERALD TRIBUNE (April 9, 1998) (available on Westlaw at 1998 WLNR 1754304).

From a judicial decision:

> Plaintiff Jimenez maintains that Defendant Herrera caused criminal proceedings to be commenced against him without probable cause to believe that he had committed the crime of aggravated assault and that "Herrera had done so to cover up the illegal use of excessive force committed by Herrera."[9]

Additional examples are set out in Appendix B.

This Court used a similar formulation in *Aro Manufacturing Co. v. Convertible Top Replacement Co.*:

> We therefore find it necessary to consider whether payment by Ford to AB constituted full payment for the infringing use committed directly by Ford's purchasers and indirectly by Aro.[10]

Of course, merely finding examples of a construction in the real world doesn't necessarily show that the construction is grammatical; Google finds about 700 web pages with the phrase *he wented* (compared with more than 35 million for *he went*). But the examples above and the others like them can't be brushed aside as mere aberrations. They are written in a more or less formal style and they come from texts that are likely to have been composed and edited carefully. There is no indication that the authors were engaging in wordplay or intentionally using an incorrect form for effect.

Constructions like *commit a use of force* fit into the pattern of words and phrases that can co-occur with *commit*, either as direct objects in active-voice constructions or as subjects in passive constructions. (We

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9. *Jimenez v. Herrera*, 1996 WL 99715 at *3 (N.D. Ill. 1996)

10. 377 U.S. 476, 503 (1964).

will refer to subjects and objects together as "complements."[11]) When *commit* is used with regard to an action, the words that prototypically serve as its complement all denote bad acts: *a crime*, *a murder*, *robbery, perjury*. Phrases such as *the use of physical force* fall into that category. Of course, such a phrase differs from *a crime* and *a murder* in that it is a more complex structure. But that doesn't matter. The phrases *an act of force* and *an act of violence* have the same structure, and constructions like *commit an act of force* or *commit an act of violence* are perfectly fine.[12]

Nothing we have said is inconsistent with the dictionary definitions that the government cites.[13] Those definitions simply do not address the question whether there are limits on the types of noun-phrase structures that will work as complements of *commit*. General-purpose dictionaries—even the monumental *Oxford English Dictionary*—capture only a fraction of the information that bears on the meaning and use of words.[14] They don't try to catalogue the patterns of usage associated with a particular word, such as the grammatical patterns that it can and cannot occur in (referred to variously as valency, colligation, and subcategorization), the other words it can and cannot be associated with (selectional restrictions), the words that it tends to co-occur with (collocations), and the sorts of

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11. *See* Rodney Huddleston & Geoffrey Pullum, THE CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE 215–28 (2002).

12. For examples of usages involving *act of force*, see Appendix C. And a Google search indicates that usages involving *act of violence* appear on more than 160,000 web pages.

13. Gov't Br. 15.

14. *E.g.*, Jean Aitchison, WORDS IN THE MIND 13–14 (1994).

meanings that it is related to (semantic associations).[15] Given the important role that dictionaries often play in the process of interpreting statutes, courts ought not rely on dictionaries to resolve issues that the dictionaries don't deal with.

This is not to deny that *the use of force committed by* [*someone*] sounds a little strange. But that doesn't mean that it is ungrammatical or abnormal. Intuitions of this sort are not always reliable; odd-sounding constructions may nevertheless be grammatical and may be more widely used than we think. Most of us are unaware of the degree to which people can differ in their judgments about grammaticality; what one person sees as an error someone else may see as an acceptable variant.[16] It is therefore all too easy to equate "unfamiliar" with "wrong." And grammaticality judgments don't necessarily involve yes-or-no decisions, but can vary by degrees across a range.[17]

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15. *E.g.*, Michael Hoey, *What's in a Word?*, MED MAGAZINE No. 10, <http://www.macmillandictionary.com/MED-Magazine/August 2003/10-Feature-Whats-in-a-word.htm> (Aug. 2003; accessed June 12, 2008); Beth Levin, *Building a Lexicon: The Contribution of Linguistics*, 4 INT'L J. OF LEXICOGRAPHY 205 (1981).

16. This issue is discussed in a series of blog posts on Language Log, the most recent one (which links to the others) being Arnold Zwicky, *The thin line between error and mere variation 5: better getter*, LANGUAGE LOG, <http://languagelog.ldc.upenn .edu/nll/?p=92> (May 3, 2008; accessed June 12, 2008).

17. *See, e.g.*, Sam Featherston, *Thermometer judgements as linguistic evidence*, *in* Claudia Maria Riehl & Astrid Rothe (eds.), WAS IST LINGUISTISCHE EVIDENZ? KOLLOQUIUM DES ZENTRUMS "SPRACHENVIELFALT UND MEHRSPRACHIGKEIT," (Nov. 2006) (available at <http://www.sfb441.uni-tuebingen.de/~sam/pap ers/Koeln06paper.pdf> (accessed June 12, 2008)).

The risks inherent in relying only on grammatical intuitions are heightened by the fact that when questions of grammar or usage arise in the course of interpreting a statute, they will usually be intertwined with value-laden issues of policy and of justice between the parties. Moreover, the judge will be conscious of how the resolution of the linguistic issue will affect the outcome of the case. This is a decisionmaking environment almost tailor-made to maximize the effects of confirmation bias—the natural tendency to view things in a way that is consistent with one's preexisting attitudes and predispositions.[18]

What all this suggests is that where evidence of actual usage is only a Google search away, it will often make sense to consult it rather than simply assume that one's intuitive judgments about grammaticality are valid. For example, this sort of reality check may be in order when one cannot articulate a reason for one's belief that a particular construction is ungrammatical. As evidenced by the expression that an opinion "won't write," an inability to satisfactorily explain a conclusion may be a warning sign that the conclusion itself needs to be reexamined.[19]

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18. *See generally* Raymond S. Nickerson, *Confirmation Bias: a Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175 (1998).

19. *See, e.g.*, Chad Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1303, 1318 (2008). However, we do not mean to suggest that introspective judgments about linguistic acceptability can never be trusted. Some grammatical judgments are simple, such as the fact that the phrase *an element* is singular.

    Moreover, some qualifications are in order. First, while Google, Westlaw, and Lexis can be powerful tools when one is looking for examples of particular words or phrases, they are less

B. The Fourth Circuit's interpretation is consistent with the MCDV statute's use of the word *element* in the singular.

The government argues, and most courts have held, that the phrase *committed by* [*a current or former spouse, parent, or guardian of the victim*] cannot be interpreted as modifying *the use of physical force* because the definition of an MCDV says "has an element[,]" not "has as elements[.]" According to this argument, a phrase such as *the use of physical force committed by* [*a current or former spouse, parent, or guardian of the victim*] cannot be regarded as a single element because it combines two separate concepts: first, the use of physical force, and second, the relationship between the assailant and the victim. These concepts are variously described by the courts that have ruled for the government as "two conceptually distinct attributes[,]"[20] "two very different things[,]"[21] and "two independent, and unlinked, factors[.]"[22]

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useful in looking for examples of a particular grammatical structure or pattern. Second, the mere fact that a search finds no examples of a particular construction does not mean that the construction is grammatically unacceptable. One of the defining characteristics of language is that it is possible to say things that have never been said before. So although the volume of text that Google can search is staggering, it includes only a small fraction of the number of grammatically acceptable sentences that could possibly be written. It is therefore to be expected that there will be grammatically acceptable constructions of which no prior examples can be found.

20. *E.g.*, *United States v. Meade*, 175 F.3d 215, 218 (1st Cir. 1999).

21. *United States v. Hayes*, 482 F.3d 749, 761 (4th Cir. 2007) (dissenting opinion).

22. *Barnes*, 295 F.3d at 1363.

Although other statutes use *an element* to refer to multi-part concepts—for example, a "crime of violence" is defined by 18 IC. § 16(a) as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"—these statutes are said to be distinguishable. The D.C. Circuit, for instance, described the definition of a crime of violence as involving "a necessarily two-pronged single 'element,' namely (1) use of force (2) against another's person or property," whereas the definition of an MCDV supposedly involves merely a combination of "two independent, and unlinked, factors, the use of force and the perpetrator's relationship to the victim."[23]

This theory holds (1) that an element may include only one concept, (2) except if it is "necessarily two-pronged," but (3) that category does not include *the use of physical force committed by a current or former spouse, parent, or guardian of the victim*. As a matter of ordinary language, this theory has little to recommend it.

1. We start with the assumption that a legal element cannot incorporate more than one concept or "distinct attribute,"[24] which , in turn, assumes that one can easily determine what constitutes a single concept or attribute. Both assumptions, we believe, are unjustified.

First, there is no reason to think that indivisibility is an inherent characteristic of a legal element, because there is no reason to think that a legal element *has* any

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23. *Id.* at 1364.

24. Once again, dictionary definitions provide no help. Black's defines *elements of crime* merely as "[t]he constituent parts of a crime . . . that the prosecution must prove to sustain a conviction[.]" BLACK'S LAW DICTIONARY 539 (8th ed. 2004).

inherent characteristics. Unlike a chemical element, a legal element is not something real that exists in the world. It has no physical dimensions or attributes that can be observed, measured, or counted. It is not something real but intangible, such as an emotion. Nor is it even abstraction, such as the principles of mathematics, that might be said to exist independent of human thought. Rather, it is an intellectual construct: a mental framework around which we organize our construal of reality. More particularly, it represents part of another, more complex, mental construct: the definition of a particular crime.

Thus, there is nothing inherent in the concept LEGAL ELEMENT requiring that an element include only one concept. This is confirmed by the fact that there exists the concept SUB-ELEMENT—something that would be impossible if elements are inherently indivisible. The proof that the concept SUB-ELEMENT exists is that the word *sub-element* exists. A Westlaw or Lexis search turns up cases where courts have referred to sub-elements of a crime, tort, or other cause of action,[25] as well as instances of the same usage in various secondary legal authorities.[26] A Google search finds the word on more than 250,000 web pages.

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25. *E.g.*, *Medley v. Runnels*, 506 F.3d 857, 864 (9th Cir. 2007); *Vazquez-Filippetti v. Banco Popular de Puerto Rico*, 504 F.3d 43, 49 (1st Cir. 2007); *United States v. Harris*, 104 F.3d 1465, 1471 n.6 (5th Cir. 1997); *United States v. Pelullo*, 964 F.2d 193, 209 (3d Cir. 1992); *State v. Davis*, 96 Wash. App. 1058, 1999 WL 557294 at *5 (1999); *State v. Nieves*, 1997 WL 89213 at *3 (Ohio App. 1997).

26. *E.g.*, Judicial Committee on Model Jury Instructions for the Eighth Circuit, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 6.18.1622 (2007); Matthew Engle, *Due Process Limitations on Victim Impact Evidence*, 13 CAP. DEF. J. 55, 78 (2000); David

The second problem with the one-concept-per-element theory lies in its assumption that a phrase such as *the use of physical force* denotes something—whether termed a "distinct attribute," a "factor," or a "thing"—that cannot be divided into smaller conceptual parts. As far as we know, nobody has ever tried to justify that assumption. That is surprising, because without this assumption, the theory is self-contradictory. The essence of the theory is that the concept THE USE OF PHYSICAL FORCE can constitute a single element but THE USE OF PHYSICAL FORCE COMMITTED BY A MEMBER OF THE VICTIM'S FAMILY cannot. If THE USE OF PHYSICAL FORCE really represents a combination of other, more basic, concepts, the question would arise whether there is any reasoned basis for making the distinction that the theory draws.

The assumption, in our view, is unjustified. Just as legal elements can have sub-elements, concepts can consist of multiple sub-concepts. This is most obviously true of the concepts expressed by phrases or sentences (e.g., THEORIES OF STATUTORY INTERPRETATION or HOLDING YOUR BREATH UNTIL YOU TURN BLUE); the concepts expressed by individual words are connected into a conceptual structure, with the connections being expressed by the grammatical structure.[27]

This is true of the concept expressed by *the use of physical force*. The grammatical form of the phrase joins the concepts USE and PHYSICAL FORCE in a manner indi-

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Goldstone & Peter Toren, *The Criminalization of Trademark Counterfeiting*, 31 CONN. L. REV. 1, 8 (1998).

27. *See, e.g.*, Ray Jackendoff, FOUNDATIONS OF LANGUAGE ch. 5, 12 (2002); Gregory L. Murphy, THE BIG BOOK OF CONCEPTS ch. 12 (2002); 1 Leonard Talmy, TOWARD A COGNITIVE SEMANTICS 21 (2000).

cating that physical force is the thing being used. And those two concepts can themselves be seen as having a multipart internal structure. A use is an action that has certain prototypical characteristics: the action is performed by an animate entity, the action is purposeful, and the action involves something that serves as an instrument of accomplishing a purpose. This might be expressed more formally in terms something like this: X PERFORMS AN ACTION IN WHICH Y PLAYS AN ESSENTIAL ROLE, SUCH THAT Y ENABLES OR HELPS X TO PERFORM ACTION Z, AN INTENTIONAL ACTION BY X.[28]

The concept PHYSICAL FORCE has a similarly complex structure. To begin with, the general concept FORCE is modified, and therefore narrowed, by the concept PHYSICAL, thereby ruling out nonphysical phenomena that are metaphorically described in terms of force, such as intellectual reasoning (*He was persuaded by the force of her arguments*) or social pressure (*The store was forced to stop selling cigarettes because of community disapproval*). Furthermore, as the phrase *physical force* is used in the statute, it presumably means something more limited than force in the Newtonian sense of energy applied to mass, for otherwise it would encompass acts such as kissing someone or splashing water on them in a swimming pool. Indeed, the Ninth Circuit has held that the physical force to which the

28. Note the similarity between this attempt to decompose the meaning of *use* and the Court's definition of *use* as involving "active employment" of something. *E.g.*, *Watson v. United States*, 128 S. Ct. 579 (2007); *Bailey v. United States*, 516 U.S. 137 (1995).

statute refers does not include merely touching someone impolitely.[29]

Moreover, the sort of physical force that domestic violence entails probably does not include all acts that could in the abstract be considered violent. Performing an emergency tracheotomy on one's spouse presumably would not be regarded as using physical force, even though it involves cutting someone's throat. So, too, if Muhammad Ali had ever sparred with his daughter Laila, who is a professional boxer.[30] What this suggests is that the conception of physical force reflected in the definition of an MCDV incorporates notions of intention, consent, and justification that may be difficult to precisely define but that are nevertheless present. In short, there is more to *physical force* than meets the eye.

Once one starts breaking concepts down into their constituent parts, there is no non-arbitrary stopping place short of disassembling them completely. And if one does that, there will be so many separate pieces, and the pieces will be so abstract, that the process of decisionmaking would become hopelessly complicated. Thus, the idea of searching for indivisible concepts that can be counted as elements is misguided.

2. Faced with what we've said so far, one might argue, as the D.C. Circuit did in *Barnes*, that a single element can include separate concepts as subparts, but only if they are related to each other in such a way that the resulting multi-part element is "*necessarily* two-

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29. *United States v. Belless*, 338 F.3d 1063, 1067–68 (9th Cir. 2003). *See also United States v. Hays*, 2008 WL 2108079 at *4 (10th Cir. May 20, 2008).

30. *Cf. Laila Ali vs Muhammad Ali*, http://www.youtube.com/watch?v=M4J7WHiWRKM (accessed June 12, 2008).

pronged[.]"[31] In laying out this argument, the D.C. Circuit *asserted* that the definitions differed in the extent to which the relevant concepts were related, but did not attempt to explain that conclusion by describing the relationship that it thought was present in one statute but absent in the other. That failure may stem from the fact that ordinary legal analysis provides neither a framework for analyzing conceptual relatedness nor a vocabulary for discussing the issue meaningfully. We believe that this gap can be at least partly filled by building on some of the insights and methodologies of linguistics.

We will start by looking at the similarities and differences in how the two definitions are structured grammatically. (For this purpose, we are interpreting the definition of an MCDV the way the Fourth Circuit did.) The relevant portion of each definition is a noun phrase—a phrase whose grammatical core is a noun and which can function in a sentence as the subject or object. That phrase consists of a smaller noun phrase, which is followed by a relative clause (in the definition of an MCDV) or a prepositional phrase (in the definition of a crime of violence). This phrase-within-a-phrase structure becomes clear when the phrase is represented graphically:

MCDV:

Noun Phrase (*NP*)	
NP the use or attempted use of physical force, or the threatened use of a deadly weapon,	*Relative Clause* (*RC*) committed by a current or former spouse, parent, or guardian of the victim

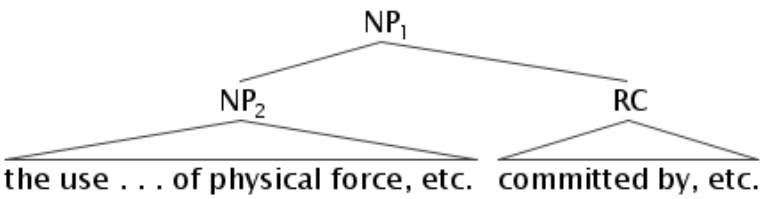
31. 295 F.3d at 1363 (emphasis added).

Crime of violence:

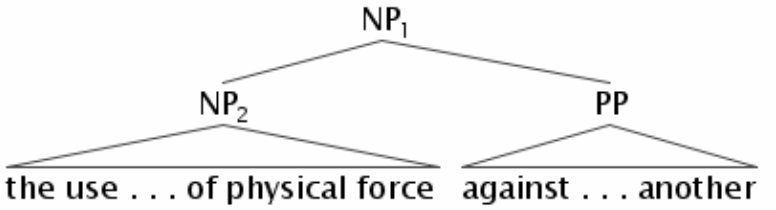
NP	
NP the use, attempted use, or threatened use of physical force	*Prep. Phrase* (*PP*) against the person or property of another

The structure can also be shown using a tree diagram (actually an upside-down-tree diagram):

MCDV:



Crime of violence:



The grammatical difference—relative clause versus prepositional phrase—is insignificant, because the relative clause and the prepositional phrase both have the same function in the overall noun phrase (NP_1 in the tree diagrams): they modify the smaller noun phrase that they immediately follow (NP_2).[32] This means

32. *See generally* CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE, *supra* note 11, at 445–46 (discussing post-head modifiers).

that they limit the set of entities that are otherwise designated by NP_2.[33] What we mean by this is that in both definitions, if NP_2 were unmodified, it would encompass all uses of physical force, but when it is combined with the modifier, the resulting phrase (NP_1) encompasses only some uses of physical force. In the definition of an MCDV, the subset consists of those uses of force that are committed by a current or former spouse, parent, or guardian of the victim; in the definition of a crime of violence, it consists of those that are committed against the person or property of someone other than the person using the force.

It might seem odd to say that uses of force against someone else or someone else's property are only a subset of all uses of physical force; after all, when we think about the illegal use of force, we generally think of force that the perpetrator directs against someone else. But while that may be the prototypical example of illegal force, it is not the only kind that exists. Depending on the circumstances and the jurisdiction, it can be illegal to use physical force against oneself (suicide;[34] self-injury by a member of the military, when done to avoid duty[35]), against one's own property (arson[36]), or against

33. *See* Alan Cruse, MEANING IN LANGUAGE: AN INTRODUCTION TO SEMANTICS AND PRAGMATICS 301 (2d ed. 2004); CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE, *supra* note 11, at 1064; Paul Portner, WHAT IS MEANING: FUNDAMENTALS OF FORMAL SEMANTICS 61–69 (2005).

34. *E.g.*, *Wackwitz v. Roy*, 418 S.E.2d 861 (Va. 1992).

35. 10 U.S.C. § 915 Art. 115.

36. 3 Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW § 21.3(d) (2d ed. 2003).

something that is not private property at all (illegally harming a wild animal[37]).

There is a further indication that the relative clause in the definition of an MCDV is functionally equivalent to the prepositional phrase in the definition of a crime of violence: one provision's grammatical form can be switched for the other's, without any change in meaning. Thus, the definition of an MCDV could be rewritten as *the use or attempted use of physical force, or the threatened use of a deadly weapon, by a current or former spouse, parent, or guardian of the victim* and the definition of a crime of violence could be rewritten as *the use, attempted use, or threatened use of physical force committed against the person or property of another*.

What we have said suggests that the relationship between the sub-elements in the definition of an MCDV is analogous to the relationship between the sub-elements in the definition of a crime of violence. That conclusion is reinforced when one looks beyond the definitions' grammatical structure to their underlying conceptual structure.

The notion of conceptual structure that we are referring to is based on the idea that words stand for concepts and that when words are arranged according to the rules of grammar, a structure is imposed not only on the words but on the concepts they represent. Verbs and nouns, the basic building blocks of a sentence, correspond to basic conceptual building blocks: events and entities that play a role in events.[38]

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37. *E.g.*, 16 U.S.C. § 1538(1)(B), (C).

38. *E.g.*, William Frawley, LINGUISTIC SEMANTICS ch. 3–5 (1992); Michael Gasser, HOW LANGUAGE WORKS § 6.2, <www.indiana.edu/~hlw/Sentences/schemas.html> (ed. 3.0 2006) (accessed June 12, 2008)). The correspondence between events and verbs isn't perfect. Events can be expressed as nouns (*the use of*

With only a few possible exceptions, events involve entities that play roles in the event. The event SLEEP assigns the role of SLEEPER; the event THROW assigns the roles of THROWER and THROWN OBJECT. And (to get back to the MCDV and crime-of-violence statutes), the event USE OF FORCE assigns the roles we will call FORCE-USER and TARGET.

In the definition of an MCDV, both the force-user and the target are mentioned expressly (*the use of physical force committed by a relative* [FORCE-USER] *of the victim* [TARGET]), but no information is provided about the target except for his or her status as a current or former spouse, parent, or guardian of the force-user. In the definition of a crime of violence, only the target is mentioned expressly: *the use of physical force against the person or property of another* [TARGET]. But the word *another* implicitly points to the force-user, because it is understood to mean *a person other than the person using physical force*.

The category labels we have given for the type of event and the type of role-players (use of force, force-user, and target) are tied closely to the specific type of event that the statutes are concerned with. But the action of using force (in the legal, not Newtonian, sense) isn't *sui generis*. It can be considered as belonging to a category of actions that are similar in terms of the minimum number of role-players involved, the defining characteristics of the role-players, and the relationship of the role-players to the action and to one another. For example, it could be described as part of a category of

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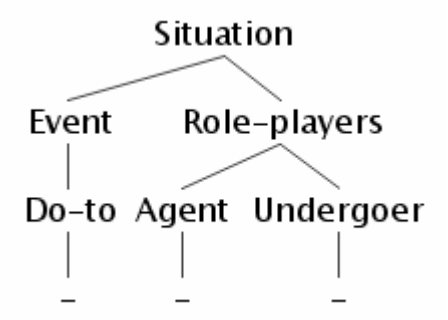
force), and even in that form they are associated with role-players. Thus, *Jim's use of force against Bob* is conceptually equivalent to *Jim used force against Bob*. *See, e.g.*, Ray Jackendoff, FOUNDATIONS OF LANGUAGE 137 (2002).

actions, which we will call DO-TO type actions, that includes throwing, breaking, cutting, folding, hammering, washing, painting, and consuming.[39] These actions have several distinguishing characteristics. They all involve volitional action, so at least one of the role-players must be an entity capable of such action. And they all involve one role-player doing something that affects the other in some way. Rather than using different labels for the role-players corresponding to each action (THROWER and THROWN OBJECT, BREAKER and BROKEN OBJECT, etc.), one pair of labels can be used for all the DO-TO actions. We will call the doer the AGENT and the entity to which the action is done the UNDERGOER.[40]

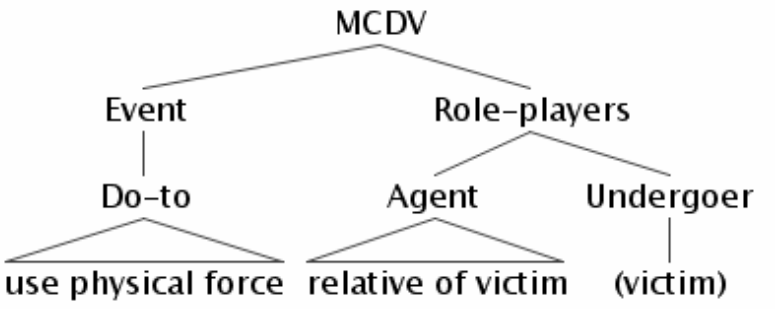
Considered together, the relevant event type and the role-player categories associated with it make up a sort of conceptual template, which can be represented using a variation on the tree-diagrams we used above:

39. The DO-TO label is borrowed from HOW LANGUAGE WORKS, *supra* note 38, § 6.2. We should note that the categories we have sketched out here are simplifications and are not what a linguist would regard as a theoretically-adequate taxonomy of event types. For more detailed discussion of the structure and categorization of events, see, e.g., Steven Pinker, THE STUFF OF THOUGHT ch. 2–3 (2007); Beth Levin & Malka Rappaport Hovav, ARGUMENT REALIZATION (2005); Beth Levin, ENGLISH VERB CLASSES AND ALTERNATIONS: A PRELIMINARY INVESTIGATION (1993).

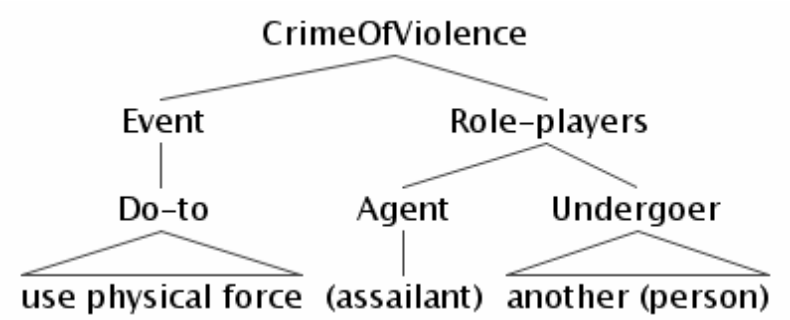
40. The term more commonly used in linguistics is "patient."



This template can then be completed by filling in the slots with the appropriate words or phrases from the sentence at issue. The completed templates for the definition of an MCDV and the definition of a crime of violence are as follows (with the words in parentheses representing words that are not expressly stated in the statute but are implicitly understood):[41]

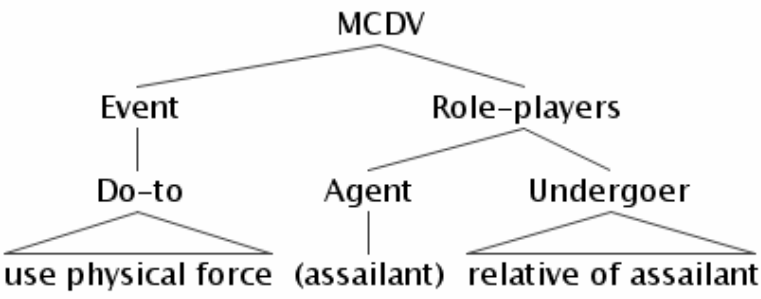


41. To keep things simple, we are treating *the use of force* as a fixed expression that functions similarly to a single word rather than as a phrase.

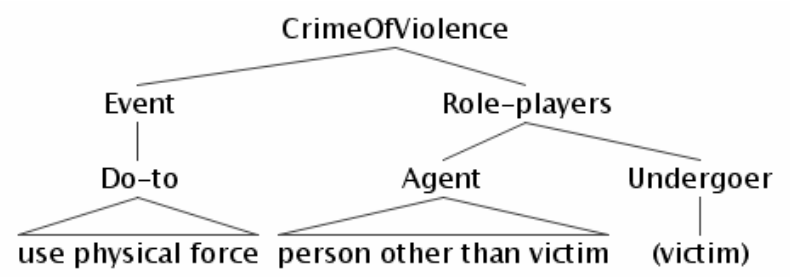


These diagrams represent the conceptual structure underlying the two statutory definitions. And what is immediately apparent is that the two structures are virtually identical. They differ only in terms of where the relationship between the agent and the target is expressed. In the definition of an MCDV it is part of the description of the agent, while in the definition of a crime of violence it is part of the description of the target. But this difference is inconsequential, because it would be possible to rewrite each definition using the other one's conceptual and grammatical structure, without changing either definition's meaning:

> *MCDV*: the use of physical force against [a relative of the assailant].



> *Crime of violence*: the use of physical force committed by a person other than the person against whom the force was directed.



C. The question of how ordinary readers would most likely understand the statute is an empirical one.

We have focused so far on showing that as a matter of ordinary meaning the Fourth Circuit's interpretation of § 921(a)(33)(A) is a reasonable one. We turn now to the question whether one or the other of the interpretations better reflects the "natural" reading of the statutory language; i.e., what an ordinary reader would understand the statute to mean.

That question is ultimately an empirical one, and it would be possible to try to answer it empirically by conducting an experiment that would elicit test subjects' understanding of the statute.[42] We have not conducted such an experiment, and we are reluctant to speculate about what the outcome would be. We can, however, offer some observations about what one would expect, given what is known about how people understand and interpret language.

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42. The experiment would have to involve something more complicated than just asking people which interpretation they agreed with. The understanding to be elicited is what people would arrive at automatically as a matter of ordinary reading comprehension, not what they would conclude after focusing consciously on the interpretive issue.

The most obvious point is that the Fourth Circuit's interpretation is consistent with the statute's paragraph structure, while the government's is not. Paragraph breaks don't typically occur within a sentence, but when they do, readers are likely to treat them as providing cues as to how the sentence is organized. And it is quite appropriate for them to do so, because that is the reason why legislative drafters break statutes up into sections, subsections, paragraphs, and so on.[43] Paragraph breaks that occur within a single sentence serve in effect as a form of punctuation, if punctuation is defined broadly as any typographical device used to indicate the grammatical structure of a particular string of words.[44] It is well established that readers rely on punctuation as an indicator of grammatical structure, much as they often rely on a speaker's rhythm and intonation as an indicator of grammatical structure in spoken language. While we recognize that the Court has sometimes minimized the significance of punctuation, the fact remains that punctuation often plays an important role in language as we normally read it.[45]

This structure-signaling function is reinforced here by the fact that subparagraphs (i) and (ii) each correspond to units of grammatical structure (verb phrases), as shown in this tree diagram:

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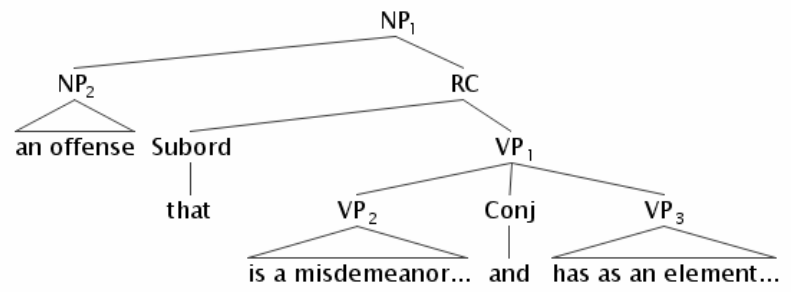
43. *E.g.*, Tobias A. Dorsey, LEGISLATIVE DRAFTER'S DESKBOOK: A PRACTICAL GUIDE 209 (2006).

44. *See* CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE, *supra* note 11, at 1724–25; Geoffrey Nunberg, THE LINGUISTICS OF PUNCTUATION 17, 73–75 (1990).

45. *See, e.g.*, Robin Hill & Wayne Murray, *Commas and Spaces: Effects of Punctuation on Eye Movements and Sentence Parsing*, in Alan Kennedy et al., eds., READING AS A PERCEPTUAL PROCESS ch. 22 (2000).

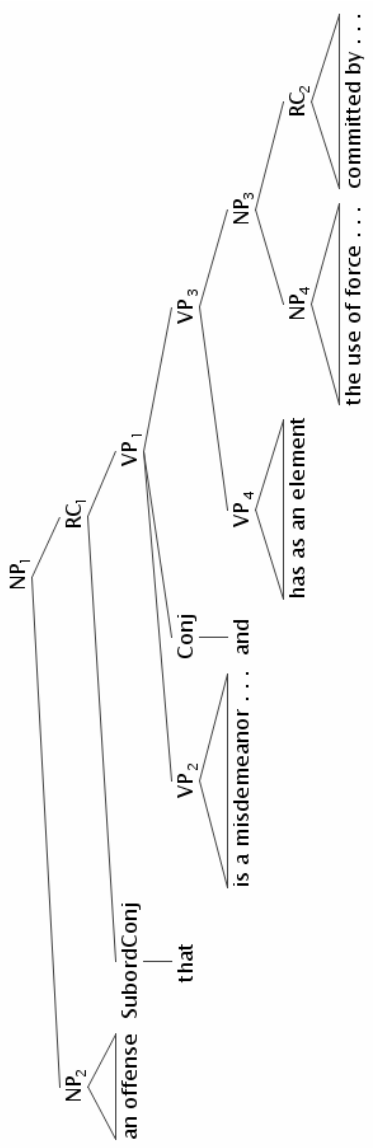


Because there is no paragraph break before the *committed by* clause, the reader is given no visual cue suggesting that that clause is not part of subparagraph (ii).

If one assumes that the grammatical structure of § 921(a)(33)(A) parallels its paragraph structure, as the Fourth Circuit's interpretation does, the grammatical structure is as shown on the next page. As that diagram shows—

- The subsection as a whole is a noun phrase (NP_1).
- That noun phrase consists of a smaller noun phrase (NP_2) modified by a relative clause (RC_1).
- The relative clause consists of the subordinator *that* followed by a verb phrase (VP_1).
- VP_1, in turn, consists of two conjoined verb phrases (VP_2 and VP_3).
- We are concerned here with VP_3, which consists of a verb phrase (VP_4) and a noun phrase (NP_3).
- Finally, NP_3 consists of yet another noun phrase (NP_4), which is modified by a relative clause (RC_2).

Note that RC_2 is in fact a relative clause even though it is not introduced by *that* or *which* and therefore may look like an ordinary verb phrase. Specifically, it is a "reduced relative" and is understood to mean the same


NP1
RC1
VP1
VP3
NP3
RC2
NP2
SubordConj
VP2
Conj
VP4
NP4
an offense
that
is a misdemeanor . . . and
has as an element
the use of force . . .
committed by . . .

thing as *that is committed by a current or former spouse, parent, or guardian of the victim*.[46]

There are also two possible alternative structures. One (which is not what the government argues for, but which would not support the Fourth Circuit's interpretation) would in effect make the *committed-by* clause a new subparagraph (iii), as if the statute had looked like this:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,
>
> (iii) committed by a current or former spouse, parent, or guardian of the victim

This paragraph structure corresponds to the phrase structure shown in the tree on the next page.

This structure is problematic, however. The presence of the conjunction *and* before subparagraph (i) and its absence before the new subparagraph (iii) suggests that there are two subparagraphs, not three. Whenever *and* is used in any series of three or more items, it must appear before the last item (*Tom, Dick, and Harry* is OK, as is *Tom and Dick and Harry*, but *Tom and Dick, Harry* is unacceptable).

Even without that problem, the reconfigured text would be an ungrammatical mess: *an offense that . . . committed by a current or former spouse, parent, or guardian of the victim*. This could be fixed only by

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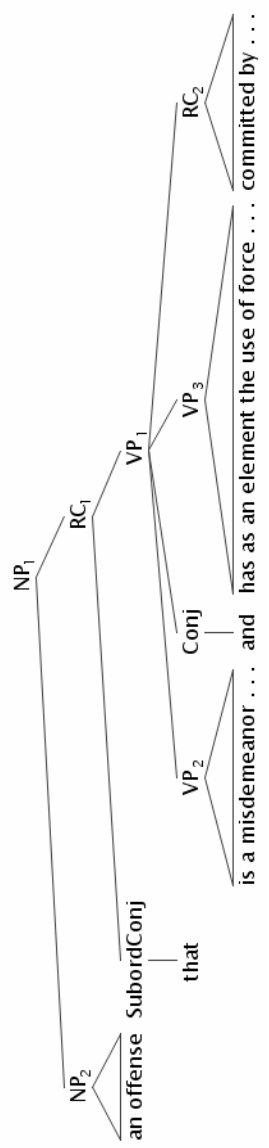
46. *See, e.g.*, Robert Lawrence Trask, A DICTIONARY OF GRAMMATICAL TERMS IN LINGUISTICS 231 (1992).


NP1
RC1
VP1
RC2
VP3
NP2
SubordConj
Conj
VP2
an offense
that
is a misdemeanor . . .
and
has as an element the use of force . . .
committed by . . .

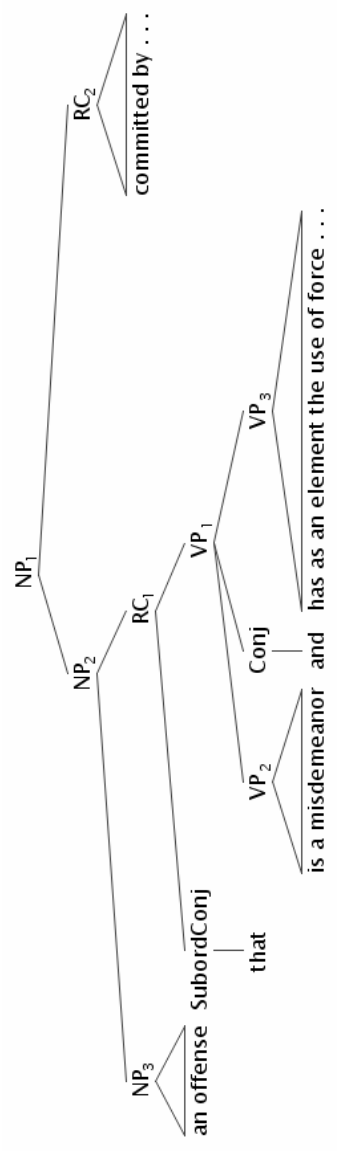
adding a word to the statute (*an offense . . . that* <u>*is*</u> *committed by a current or former spouse, parent, or guardian of the victim*) or by deleting one (*an offense . . . committed by a current or former spouse, parent, or guardian of the victim*).

In order to avoid this problem, the *committed by* clause (RC_2) would have to be removed from RC_1 altogether. The phrase structure necessary to accomplish this is shown on the next page; it corresponds to the following paragraph structure:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal or State law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,
>
> committed by a current or former spouse, parent, or guardian of the victim

This is essentially the structure that the government argues in favor of, except that the government ignores the indentation of subparagraphs (i) and (ii).

By detaching *committed by a current or former spouse, parent, or guardian of the victim* from subparagraph (ii), this structure would make it clear that the *committed by* clause should not be read as part of that subparagraph. And because that phrase would be at the same level of indentation as *an offense*, it would be clear that it is at a higher level in the hierarchical structure of the statutory text. Both of these factors are reflected in the corresponding phrase-structure tree, which is shown on the next page.


NP1
NP2
RC2
committed by . . .
RC1
VP1
VP3
has as an element the use of force . . .
Conj
and
VP2
is a misdemeanor
NP3
an offense
SubordConj
that

In addition to the paragraph structure, there is at least one more factor that would tend to incline readers toward the Fourth Circuit's interpretation. The issue here—the way that structurally ambiguous sentences are understood—has been studied by researchers in psycholinguistics. For the most part they agree that all other things being equal, there is a tendency for the ambiguous word or phrase to be linked with the most recently processed part of the sentence.[47] This translates into a phrase structure in which the word or phrase in question is attached to the phrase-structure tree at a point close to those that it immediately follows. The phrase structure associated with the Fourth Circuit's interpretation is consistent with this "recency" preference: the *committed by* clause is part of the *use of force* phrase. The phrase structure associated with the government's interpretation, on the other hand, is very clearly inconsistent with that preference.[48] (The same

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47. *E.g.*, Daniel Grodner & Edward Gibson, *Consequences of the Serial Nature of Linguistic Input for Sentential Complexity*, 29 COGNITIVE SCIENCE 261, 262–63 (2005).

48. It has been suggested that the recency preference does not play a role in interpreting relative clauses. *See* Lyn Frazier & Charles Clifton, Jr., CONSTRUAL 28–32, 69–92 (1996). This does not represent the dominant view within the field, but even under this theory, the Fourth Circuit's interpretation would be the more likely one. The theory predicts that relative clauses are interpreted within a "processing domain" that is defined by the most recent word that assigns semantic roles of the sort that we discussed above—most typically verbs but some times nouns. With respect to the *committed by* clause, that domain would be limited to the *use of force* phrase, in which *use* functions as a role-assigner. The possibility of the clause being associated with *an offense* would be blocked by the intervention of other role-assigning words: *is a misdemeanor* and *has as an element*.

thing is true, albeit to a lesser extent, with respect to the interpretation discussed on page 30, above.)

This is not necessarily decisive, though, because the recency preference is only one of the factors that can affect how sentences are understood. Others include the context in which the sentence appears, the relative real-world plausibility of the two possible interpretations, the relative frequencies of the different senses in which a word might be construed and of the alternative possible grammatical structures, and the speaker's rhythm and intonation (or, in the case of written text, the punctuation).[49]

Two of these factors that weigh in on the government's side of the scale. One is the relative rarity of constructions such as *the use of force committed by someone* compared to *an offense committed by someone*. There might be some people for whom the former sounds sufficiently odd that they would be pushed toward the government's interpretation. The second is the comma that appears before the *committed-by* clause, which might have a similar effect.

However, it is not clear that the comma would have this effect. On the contrary, the comma could also be interpreted in a way that would have the opposite effect: Rather than being interpreted as simply separating the *committed by* clause from what comes before it, it can be understood as the second of a pair of commas appearing on either side of *or the threatened use of a deadly weapon*:

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49. *See, e.g.*, Martin Pickering & Roger Van Gompel, *Syntactic parsing,* in Matthew Traxler & Morton Ann Gernsbacher, eds., THE HANDBOOK OF PSYCHOLINGUISTICS , ch. 12 (2d ed. 2006) (available in manuscript form at <http://www.dundee.ac.uk/psychology/rpgvanGompel/papers/Traxler.pdf> (accessed June 12, 2008)); C*ommas and Spaces*, *supra* note 45.

> has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by . . .

Under this reading, the commas would act as "delimiting" commas, meaning that they set the phrase between them off from the surrounding text, rather than simply separating two elements. They would signal that the *committed by* clause modifies both *the threatened use of a deadly weapon* and the phrase before it—*the use or attempted use of physical force.* (Compare *Jane lost, and Bill found, the key to the storeroom*.) [50]

There is another factor that might or might not be relevant. Under the government's interpretation, the word *offense*, which appears only once, has to be understood as being used in two different ways. As modified by *is a misdemeanor* and *has as an element*, it is used to denote a particular *type* of event. But as modified *an offense . . . committed by a relative of the victim*) it denotes an *instance* of such an event, namely the commission of a criminal act by a particular person against a particular person. Whether this would affect a reader's understanding of the statute is unclear.

As the Court may have noticed, the recency preference that we have referred to looks strikingly similar to the rule of the last antecedent, which the Fourth Circuit relied on.[51] That rule is therefore an example of a principle of legal interpretation that has a solid linguistic basis. And considering that the rule dates

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50. *See* Geoffrey Nunberg, THE LINGUISTICS OF PUNCTUATION 38 (1990); CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE, *supra* note 11, at 1343–54, 1746.

51. This was first noted in Lawrence Solan, THE LANGUAGE OF JUDGES 31–34 (1993).

back more than a hundred years,[52] this is an instance in which the law anticipated later developments in linguistics.

However, there can be a tendency for the rule of the last antecedent to be applied too woodenly. To begin with, it is important when looking for the "last antecedent" to keep in mind that sentences are not just strings of words one after the other. As our tree diagrams have shown sentences have a structure, and that structure affects the way in which a phrase at or near the end of the sentence is interpreted. And one should be especially careful with respect to the punctuation-based exception the government relies on.[53] Although punctuation can indeed influence understanding, its effect cannot be reduced to a rigid formula. As shown by our discussion of the comma before the *committed by* clause, it is necessary to attend to the punctuation's function in the sentence, not just to where in the sentence it appears.

We close with a caveat. Taking account of the way that readers process and understand what they read is not necessarily appropriate when one's goal is to determine what the author of a text subjectively intended. The processes involved in understanding language are not necessarily the same as those involved in speaking or writing. Authors often fail to recognize ambiguities lurking in what they write and therefore don't realize that the text can be interpreted in a way they did not intend. This is illustrated by headlines such as *British Left Waffles on Falkland Islands* and *Squad Helps Dog Bite Victim*. It is therefore possible that the staffer who

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52. Jabez Sutherland, STATUTES AND STATUTORY CONSTRUCTION 349 (1891).

53. Gov't Br. 20.

composed § 922(a)(33)(A)—presumably at Senator Lautenberg's direction—intended it to mean what the government contends it does.

But to the extent that it is appropriate to consider legislative intent (as opposed to purely textual meaning), the focus is on what *Congress* intended, not on what was intended by the person who actually put pen to paper or fingers to keyboard. In enacting legislation, senators and representatives approve a preexisting text that was drafted by someone else. If ordinary meaning is regarded as indicating what the legislators understood the statute to mean and therefore what they intended, considering how language is understood is indeed appropriate.

Conclusion

We have attempted in this brief to show how linguistics can shed new light on the sorts of interpretive issues that courts regularly face. We would urge the Court to draw on the analysis we have presented when it decides this case.

Respectfully submitted,

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Appendix A
Amici Curiae

Edward Gibson, PhD. is Professor of Cognitive Sciences at the Massachusetts Institute of Technology. He specializes in psycholinguistics—the study of the mental proceses involved in understanding, producing, and learning language. Information about his work can be found at <http://tedlab.mit.edu/People.html#Ted Gibson>.

Georgia M. Green, PhD. is Professor, emerita, of linguistics at the University of Illinois at Urbana-Champaign and Professor, emerita, Beckman Institute. Her research interests include pragmatics, syntactic theory, and language and the law. A partial list of her publications can be found at <http://www.linguistics .uiuc.edu/g-green/>.

Ray Jackendoff, PhD. is Seth Merrin Professor of Philosophy and Co-Director of the Center for Cognitive Studies at Tufts University. (Although he holds a chair in the Philosophy Department, he is a linguist.) His research interests include natural language semantics and conceptual structure, syntax and the interface between syntax and semantics, the lexicon, the architecture of the language faculty and other cognitive capacities, music cognition, social cognition, and consciousness. His cv is available at <http://ase.tufts.edu/cogstud/incbios/RayJackendoff/index.htm>.

Jeffrey P. Kaplan, PhD., J.D. is Professor of linguistics and Chair of the Department of Linguistics and Oriental Languages at San Diego State University. His research interests include discourse-functional syntax; pragmatics; and language and law, in particular, applying principles of grammar, semantics, pragmatics,

and discourse structure to legal discourses such as contracts, legislation, wills, and other operative texts. His cv is available at <http://www-rohan.sdsu.edu/~jeff315/JK_CV_2007.html>.

Roger W. Shuy, PhD. is Distinguished Research Professor of Linguistics, Emeritus, Georgetown University. His areas of specialization are forensic linguistics, sociolinguistics, and discourse analysis. His cv is available at <http://www.rogershuy.com/ae_curriculum.html>.

Appendix B
Examples of *use of force*
as a complement of *commit*
(Emphasis added in all cases)

Statutes

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

. . .

"Terrorism." The unlawful *use of force or violence committed by* a group or individual against persons or property to intimidate or coerce a government, the civilian population or any segment thereof in furtherance of political or social objectives.

- Pa. Cons. Stat., tit. 35, § 2140.102

(2) The Nebraska State Patrol shall not issue a permit to store or use explosive materials to any person who:

. . .

(h) Has been convicted in any court of a misdemeanor crime of domestic violence. This includes any misdemeanor conviction involving *the use or attempted use of physical force committed by* a current or former spouse, parent, or guardian of the victim or by a person with a similar relationship with the victim;

- Neb. Rev. Stat. § 28-1229

To use or to attempt to offer to use force or violence upon or toward the person of another is not unlawful in the following cases:

1. *When necessarily committed by* a public officer in the performance of any legal duty, or by any other person assisting such officer or acting by such officer's direction;

2. *When necessarily committed by* any person in arresting one who has committed any felony, and delivering such person to a public officer competent to receive such person in custody;

3. *When committed either by* the person about to be injured, or by any other person in such person's aid or defense, in preventing or attempting to prevent an offense against such person, or any trespass or other unlawful interference with real or personal property in such person's lawful possession; provided the force or violence used is not more than sufficient to prevent such offense;

4. *When committed by* a parent or the authorized agent of any parent, or by any guardian, master or teacher, in the exercise of a lawful authority to restrain or correct such person's child, ward, apprentice or scholar, . . .;

5. *When committed by* a carrier of passengers, or the authorized agents or servants of such carrier, or by any person assisting them at their request, in expelling from any carriage, railroad car, vessel or other vehicle, any passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, . . .; and

6. *When committed by* any person in preventing a person who is impaired by reason of mental retardation or developmental disability as defined by Section 1430.2 of Title 10 of the Oklahoma Statutes, a mentally ill person, insane person or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to such per-

son's self or to another, or enforcing such restraint as is necessary for the protection of the person or for restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of the person.

- 21 Okla. Stat., tit. 21, § 643

For purposes of determining whether a defendant has a prior conviction for violation of this Section, a conviction under this Section or a conviction under the laws of any state or an ordinance of a municipality, town, or similar political subdivision of another state which prohibits *the intentional use of force or violence committed by* one household member upon another household member of the opposite sex presently or formerly living in the same residence with the defendant as a spouse, whether married or not, shall constitute a prior conviction.

- La. Rev. Stat. Ann. § 14:35.3.A.G(1)

Cases

Consequently, although defendant Jensen need not have actually made contact with plaintiff to defeat her qualified immunity claim, the undisputed facts on record indicate that defendant Jensen did not have the opportunity or the means to prevent *the alleged use of excessive force committed by* defendant Whitehead.

- *Owens v. Chrisman*, 2008 WL 217118 at *7 (M.D. Tenn. 2008)

Plaintiffs here assert that *the alleged use of excessive force, although committed by* subordinate-level police

officers, is chargeable to the Town because of Chief McCue's presence at the demonstrations.

- *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 127 (2d Cir. 2004)

In his first count, Plaintiff claims that the DCHA, along with Officer Greene and several unnamed, never identified, never served Doe Defendants, violated his Fifth Amendment rights: (1) by "collud[ing] with each other [ ] in order to avoid liability for the injuries Plaintiff sustained because the building was left unguarded" and "*the use of excessive force committed by* [Officer] Greene". . . .

- *Steele v. District of Columbia Housing Authority*, 2006 WL 335770 at *4 (D.D.C. 2006)

Lastly, plaintiff claims defendant BELL's failure to curb the abusive conduct of the other defendants constituted deliberate indifference and contributed to and caused *the excessive use of force committed by* the other defendants.

- *Fry v. Dretke*, 2005 WL 578447 at *1 (N.D. Tex. 2005)

Plaintiff states that the death of decedent TyRon Lewis was the result of *the alleged negligent use of excessive force committed by* Officers Knight and Minor. . . . The affidavit submitted in opposition to summary judgment does not address the investigatory or disciplinary policies of Defendant, but instead merely addresses the alleged negligent use of excessive force committed by Officers Knight and Minor.

- *Lewis v. City of St. Petersburg*, 98 F.Supp.2d 1344, 1349, 1356 (M.D. Fla. 2000)

A deputy public defender filed in the municipal court a declaration to obtain a subpoena duces tecum directed to the chief of police to compel production of:

. . .

"(5) Verbatim copies of all records, reports, reports of investigations and all other writings pertaining to the use of aggressive conduct, *excessive force and/or violence committed by* said officers in the possession of the Bureau of Internal Affairs."

- *Caldwell v. Municipal Court*, 129 Cal. Rptr. 834, 835(Cal. App. 1976)

However, in the prior charges to which we have adverted the instructions to the jury were clearly erroneous, and therein the court overlooked the express provisions of subdivision 1 of section 246 of the Penal Law, that *the use of force is not unlawful "when necessarily committed by* a public officer in the performance of a legal duty."

- *People v. Denker*, 225 App. Div. 517, 520 (N.Y. Sup. Ct. 1929)

Books

To put the question in another way, does participation by an individual in every act of aggression or unlawful *use of force committed by* a State constitute a crime against peace by that individual?

- Elizabeth Wilmshurst, *Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?* in Mauro Politi & Giuseppe Nesi, eds., THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 93, 94 (2004)

The extent of the obligation imposed upon the members of a total or partial community to come to the assistance of the victim of *an illegal use of force committed* within this community may differ.

- Hans Kelsen, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 24 (Naval War College, International Securities Studies (1957; Lawbook Exchange, Ltd. ed. 2001)

Law review articles

The imputability to a state of *the use of force committed by* its agents is also established in the Definition of Aggression. If the injury amounts to use of force, that use of force is considered to have been committed by the responsible state.

- Davis Brown, *Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 8, 17 (2003)

A survey of law enforcement agencies conducted by the Police Foundation and funded by the National Institute of Justice, attempted to compile the number of incidents of *excessive use of force committed by* police during 1991.

- Alexa P. Freeman, *Unscheduled Departures: the Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 688 (1996)

As such, the rules of engagement will not amount to "penal provisions" within the meaning of art 65 of Geneva Convention IV unless the term "penal pro-

visions" includes all defences to *the use of force committed by* soldiers.

- Pete Rowe, *The Rules of Engagement in Occupied Territory: Should They Be Published?*, 8 MELBOURNE J. INT'L LAW ___, ___ (2007) (available at <http://www.mjil.law.unimelb.edu.au/issues/archive/2007(2)/09Rowe.pdf>; see page 7 of PDF document)

Miscellaneous

Fears have been raised in the media that the commission, established on October 19, 2000 with the mandate to gather and compile information on *"the disproportionate and indiscriminate use of force" committed "by* the Israeli occupying power against innocent and unarmed Palestinian citizens," may recommend that Israel be indicted for war crimes.

- Jonathan Krashinksy, *UN Commission acknowledges need for security closures*, JERUSALEM POST, 2001 WLNR 197202 (Feb. 15, 2001)

Appendix C
Examples of *act of force*
as a complement of *commit*
(Emphasis added in all cases)

Statute

Every person who with the intent to cause a riot does an act or engages in conduct that urges a riot, or urges others to *commit acts of force* or violence, or the burning or destroying of property, and at a time and place and under circumstances that produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of incitement to riot.

- Cal. Penal Code § 404.6(a)

Cases

"The evidence clearly demonstrates and this court finds that both Bryan Lankford and Mark Lankford *committed acts of force* and violence directly upon the persons of Mr. and Mrs. Bravence which acts directly and proximately caused the deaths of Mr. and Mrs. Bravence."

- *Lankford v. Idaho*, 500 U.S. 110, 117 n.11 (1991) (quoting trial judge)

It is important to understand that *acts of violence or force committed* against members of a hated class of people with the intent to exact retribution for and create dissuasion against their use of public facilities have a long and intimate historical association with slavery and its cognate institutions.

- *United States. v. Nelson*, 277 F.3d 164, 189 (2d Cir. 2002)

Clause (b) permanently enjoined physical restraining or obstructing or *committing acts of force* or violence against persons entering, leaving, or working at or seeking services from any such facility.

- *Planned Parenthood League of Massachusetts, Inc. v. Blake*, 631 N.E.2d 985, 993 n.16 (Mass. 1994)

Reasonable minds could certainly conclude, as apparently the jury did in this case, that the appellant here *committed his acts of force* "in fleeing immediately after" the theft.

- *State v. Lynch*, 1993 WL 155664 at *3 (Ohio App. 1993)

Books and articles

The court emphasized that under the concept of "breach of the peace" the secured creditor, in exercising the privilege to enter upon the premises of another to repossess collateral, may not *commit any act of force* or violence, or naturally calculated to provoke a breach of the peace.

- 1 Raymond T. Nimmer, COMMERCIAL ASSET-BASED FINANCING § 5:20

That bill, in Section 1, makes criminal the commission, or attempt or threat to *commit any act of force* against any person or any property with intent to cause the change of the Government of the United States or any of the laws thereof, or to oppose or hinder the execution

of any law of the United States; such an offense is "sedition," and punishable by fine and imprisonment up to twenty years.

- K.N.L., *Free Speech in Time of Peace*, 29 YALE L.J. 337, 341 (1920)

The DeMetris were involved in fixing only one race while the other defendants were charged with *committing acts of force* and violence that did not involve the DeMetris.

- Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 422 (1983)

In the first place, Nicaragua charges that officials and employees of the United States government acting under color of office and in the line of duty, have themselves *committed acts of force* against Nicaragua in violation of article 2(4).

- Abram Chayes, *United States, Nicaragura and the World Court*, 85 Colum. L. Rev. 1445, 1464 (1985)