

DEFUSING THE BOMB: THE SCOPE OF THE FEDERAL EXPLOSIVES STATUTE

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Abstract: A federal statute, 18 U.S.C. § 844(h)(2) (2000), imposes a mandatory ten-year term of imprisonment on anyone who “carries an explosive during the commission of any felony which may be prosecuted in a court of the United States.” The United States Courts of Appeals are split over whether the statute must be read to include a relational element such that the crime is carrying explosives *in relation to* another felony. The Third, Fifth, and Sixth Circuits have rejected the notion that the statute contains such an implicit limitation. In contrast, the Ninth Circuit recently held that the application of § 844(h)(2) requires a specific relationship between the explosives and the underlying felony and reversed a conviction where explosives did not “facilitate” the felony. This Comment argues that application of the statute should not be limited to cases in which the explosives facilitate the underlying felony for four reasons: (1) the United States Supreme Court has adopted a broad reading of the terms “carry” and “use” in 18 U.S.C. § 924(c) (2000)—the analogous firearm statute—suggesting that these terms in § 844(h) should also be read expansively; (2) Congress amended § 924(c) to include an explicit relational element but did not amend § 844(h)(2) in the same fashion, suggesting an intentional omission; (3) the Supreme Court’s interpretation of the explicit relational element in § 924(c) is inapplicable to § 844(h)(2) because unlike firearms, explosives are not often carried to facilitate crimes; and (4) the courts may exercise their equitable powers to preclude prosecution under § 844(h)(2) when doing so would produce absurd results.

INTRODUCTION

On December 14, 1999, al-Qaeda operative Ahmed Ressam smuggled explosives into the United States in an attempt to bomb Los Angeles International Airport.¹ United States Customs agents apprehended him in Port Angeles, Washington, and Ressam was subsequently convicted on several counts, including a violation of 18 U.S.C. § 844(h)(2) (2000).² Section 844(h)(2) imposes a mandatory ten-year prison term on one who “carries an explosive during the commission of any felony which may be prosecuted in a court of the United States.”³ On January 16, 2007, the United States Court of Appeals for the Ninth Circuit reversed Ressam’s conviction under § 844(h)(2) on the ground that his possession of the

1. *United States v. Ressam*, 474 F.3d 597, 598, 600 (9th Cir. 2007), *reh’g denied*, 491 F.3d 997 (9th Cir. 2007).

2. *Id.* at 600–01.

3. 18 U.S.C. § 844(h)(2) (2000). Section 844(h)(1) provides the same penalty for one who “uses fire or an explosive” during the commission of a federal felony. *Id.* at § 844(h)(1).

explosives was not related to the underlying felony of making a false customs declaration.⁴ The statute does not explicitly require a relational element,⁵ and courts in other circuits have refused to infer this requirement from the text.⁶ Had Ressay been convicted in Detroit or Philadelphia, for example, his conviction would most likely have been affirmed.⁷

Congress modeled § 844(h) after 18 U.S.C. § 924(c)(1970), a statute that imposed similar penalties for firearm use and possession during the commission of a felony.⁸ The original versions of the two statutes were virtually identical.⁹ Congress amended § 924(c) in 1984 to require explicitly that a firearm be used or carried during “and in relation to” an underlying felony.¹⁰ However, Congress did not similarly amend § 844(h)(2), and the courts are now split over whether the “in relation to” language is implicit in that statute.¹¹

Interpretations of the pre-1984 version of § 924(c) have guided the courts’ interpretations of § 844(h)(2). In *United States v. Stewart*,¹² the Ninth Circuit held that the pre-1984 version of § 924(c) contained an implicit relational element, and that the explicit addition of the relational element in 1984 was simply a reiteration of original intent.¹³ The Ninth Circuit in *United States v. Ressay*¹⁴ noted the similarities between § 844(h)(2) and the pre-1984 version of § 924(c), and concluded that it was bound by *Stewart* to find an implicit relational element in

4. *Ressay*, 474 F.3d at 604.

5. This Comment uses the term “relational element” in the context of § 844(h)(2) to refer to the relationship that some courts require between the act of carrying explosives and the underlying felony. *Id.* at 603; *United States v. Rosenberg*, 806 F.2d 1169, 1177 (3d Cir. 1986); *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1985).

6. *See, e.g., Rosenberg*, 806 F.2d at 1178–79.

7. *See United States v. Jenkins*, 229 F. App’x 362, 365–67 (6th Cir. 2005) (upholding conviction where underlying felony was interstate transportation of a stolen motor vehicle); *Rosenberg*, 806 F.2d at 1177–79 (upholding conviction where the underlying felony was illegal possession of firearms discovered in a storage facility with the explosives).

8. *See H.R. REP. NO. 91-1549*, at 69 (1970), as reprinted in 1970 U.S.C.C.A.N. 4007, 4046 (describing the relationship between the two statutes); *Ressay*, 474 F.3d at 602.

9. *See Ressay*, 474 F.3d at 602–03 (noting the original language of the statutes and subsequent amendments).

10. *See* 18 U.S.C. § 924(c) (1985).

11. *See, e.g., Ressay*, 474 F.3d at 604; *Rosenberg*, 806 F.2d at 1178–79.

12. 779 F.2d 538 (9th Cir. 1985).

13. *Id.* at 539–40.

14. 474 F.3d 597 (9th Cir. 2007).

§ 844(h)(2) as well.¹⁵ In reaching its conclusion, the *Ressam* court employed the doctrine of *in pari materia*, a canon of statutory construction providing that similar statutes should be interpreted similarly.¹⁶ The *Ressam* court held that the relational element was satisfied only if the explosives aided the commission of the underlying felony.¹⁷

In contrast to the Ninth Circuit's approach in *Ressam*, the Third and Sixth Circuits have declined to apply *Stewart* when interpreting § 844(h)(2).¹⁸ In addition, these circuits have held that the text and history of § 844(h)(2) do not warrant the inference of an implicit relational element.¹⁹ The Fifth Circuit has taken the middle ground in this debate, rejecting the relational element but paradoxically holding that "[i]f the weapon was available to facilitate the crime or if it 'emboldened' a defendant in his offense, the jury could conclude the defendant 'carried' the weapon during the offense."²⁰

This Comment argues that courts should not read an implicit relational element into § 844(h)(2), but should rely instead on their equitable powers to prevent prosecutions where the explosives and underlying felony are totally unrelated. The Supreme Court's broad reading of the terms "use" and "carry" in § 924(c) should prompt a broad reading of the term "carry" in § 844(h)(2).²¹ In addition, the *Ressam* court's use of *in pari materia* was erroneous because it did not address the Supreme Court's interpretations of § 924(c) or the divergent amendments to § 924(c) and § 844(h).²² Part I of this Comment explains the doctrine of *in pari materia* and its limitations. Part II compares § 844(h) and § 924(c), focusing on the terms "use" and "carry" in both statutes, as well as the phrase "in relation to" in the current version of

15. *Id.* at 602–04.

16. *Id.* The English translation of *in pari materia* is "in the same matter." BLACK'S LAW DICTIONARY 807 (8th ed. 2004). For a discussion of *in pari materia* generally, see *Linquist v. Bowen*, 813 F.2d 884, 888 (8th Cir. 1987).

17. *Ressam*, 474 F.3d at 604.

18. *United States v. Jenkins*, 229 F. App'x 362, 367 (6th Cir. 2005); *United States v. Rosenberg*, 806 F.2d 1169, 1178–79 (3d Cir. 1986).

19. *Jenkins*, 229 F. App'x at 367; *Rosenberg*, 806 F.2d at 1178–79.

20. *United States v. Ivy*, 929 F.2d 147, 151 (5th Cir. 1991) (upholding conviction where underlying felony was kidnapping and explosives were used to embolden the defendant).

21. See *infra* Part IV.A.

22. See *Ressam*, 474 F.3d at 602–03.

§ 924(c)(1)(A). Part III contrasts the courts' interpretation of "carry" in § 844(h)(2) with the Supreme Court's interpretation of "use" and "carry" in § 924(c). Part IV argues that courts should refrain from reading a relational element into § 844(h) for four reasons: (1) the Supreme Court has interpreted § 924(c) expansively, suggesting § 844(h) should also be read expansively, in accordance with *in pari materia*; (2) Congress amended § 924(c) to include an explicit relational element but did not amend § 844(h) in the same fashion, suggesting an intentional omission; (3) the Supreme Court's interpretation of the explicit relational element in § 924(c)—the facilitation standard, is inapplicable to § 844(h) because criminals do not typically carry explosives to facilitate other crimes; and (4) the courts may exercise their equitable powers to preclude prosecution under § 844(h)(2) when doing so would produce absurd results, such as when the underlying felony is totally unrelated to the carrying of explosives.

I. *IN PARI MATERIA* REQUIRES COURTS TO INTERPRET IDENTICAL LANGUAGE IN SIMILAR STATUTES SIMILARLY

Statutes that share a common purpose or legislative history often bear strong similarities in spirit and content.²³ Courts interpreting ambiguous terms in a statute will sometimes seek guidance from case law that discusses similar terminology in analogous statutes.²⁴ This approach, called the doctrine of *in pari materia*, recognizes that legislatures generally intend to create a harmonious body of law.²⁵ Where two statutes differ, however, and provisions of each can be read independently without disrupting the harmony of the two, the doctrine of *in pari materia* has limited applicability.²⁶

23. See, e.g., *Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) (noting similarities in wording between § 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, 86 Stat. 369, and § 204(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), 78 Stat. 244, and finding that the two statutes had a "common *raison d'être*") (quoting *Johnson v. Combs*, 471 F.2d 84, 86 (5th Cir. 1972)).

24. *Id.*

25. See 2B NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 51:03 (6th ed. 2006).

26. See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984).

A. *Courts Use In Pari Materia When Statutes Share a Similar Purpose and Similar Language*

The doctrine of *in pari materia* provides that where statutes relate to the same class of persons or things, or where they have the same purpose, they should be interpreted similarly unless legislative history or purpose suggests material differences.²⁷ The Supreme Court emphasized in *Erlenbaugh v. United States*:²⁸

The rule of *in pari materia* . . . is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. Thus, for example, a “later act can . . . be regarded as a legislative interpretation of [an] earlier act . . . in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting,” and “is therefore entitled to great weight in resolving any ambiguities and doubts.”²⁹

Courts typically apply *in pari materia* to a statute only when the text is ambiguous or its significance is doubtful.³⁰ Statutes that share the same general legislative scheme or plan, or are aimed at the accomplishment of similar results are considered *in pari materia*.³¹ The Supreme Court held in *Northcross v. Board of Education of Memphis City Schools*³² that similar language regarding recovery of attorney’s fees in lawsuits under the Emergency School Aid Act of 1972 and the Civil Rights Act of 1964 should be read together, in part because both acts were designed to compensate individuals injured by racial discrimination.³³ The doctrine has been extended to the criminal context,

27. See *Ressam*, 474 F.3d at 602; *Liquist v. Bowen*, 813 F.2d 884, 888 (8th Cir. 1987) (“A primary rule of statutory construction is that when a court interprets multiple statutes dealing with a related subject or object, the statutes are *in pari materia* and must be considered together.”); SINGER, *supra* note 25, at § 51:03 (discussing the general rule); *cf.* *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523–25 (1994) (holding that similar language could not be interpreted similarly when the goals of the statutes were different).

28. 409 U.S. 239 (1972).

29. *Id.* at 243–44 (quoting *United States v. Stewart*, 311 U.S. 60, 64–65 (1940)).

30. See, e.g., *Gen. Elec. Co. v. S. Const. Co.*, 383 F.2d 135, 138–39 (5th Cir. 1967) (declining to apply the doctrine when statutory language was clear).

31. See generally *Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) (noting that two statutes should be read in a complementary fashion when they share the same language and a similar purpose, though not mentioning *in pari materia* specifically).

32. 412 U.S. 427 (1973).

33. *Id.* at 428.

where courts have construed identical terms in analogous statutes identically.³⁴ For example, the Supreme Court stated that the term “property” in a mail fraud statute should be read *in pari materia* with the same term in a wire fraud statute.³⁵

B. *Where Statutes Are Dissimilar, In Pari Materia Has Limited Applicability*

Courts apply *in pari materia* only when the statutes are similar.³⁶ Where similar statutes differ and are capable of coexistence, each should be regarded as independently effective.³⁷ The Supreme Court in *Ruckelshaus v. Monsanto Co.*³⁸ indicated that even when the purposes of two differently worded statutes are intertwined, courts should be reluctant to find that the language of one statute supersedes the other.³⁹ Similarly, the Fifth Circuit in *General Electric Co. v. Southern Construction Co.*⁴⁰ reasoned that where a legislature has inserted a provision in only one of two statutes that deal with closely related subject matter, it is reasonable to infer that the failure to include that provision in the other statute was deliberate rather than inadvertent.⁴¹

Additionally, the application of *in pari materia* may be inappropriate where one statute contains language that limits its scope and a similar statute does not contain such limiting language.⁴² For example, in

34. See *Pasquantino v. United States*, 544 U.S. 349, 355–57 (2005) (using the Court’s previous interpretation of the term “property” in a mail fraud statute to guide its interpretation of the same term in a wire fraud statute); *United States v. Ressam*, 474 F.3d 597, 602 (9th Cir. 2007) (reasoning that a statute penalizing the use of explosives should be read *in pari materia* with the firearm statute after which the explosives statute was modeled).

35. *Pasquantino*, 544 U.S. at 355 n.2 (referencing *Cleveland v. United States*, 531 U.S. 12, 26 (2000)).

36. See SINGER, *supra* note 25, at § 51:03.

37. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (choosing an interpretation that gives force to both statutes in question); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”).

38. 467 U.S. 986 (1984).

39. *Id.* at 1018.

40. 383 F.2d 135 (5th Cir. 1967).

41. *Id.* at 138 n.4.; see also *People v. Valentine*, 169 P.2d 1, 14 (Cal. 1946) (stating the rule); 82 C.J.S. *Statutes* § 352 (2007) (noting that where a statute contains a given provision, the omission of that provision from a similar statute concerning a related subject demonstrates a different intention existed).

42. See *Burlington N. & Santa Fe Ry. Co. v. White*, ___ U.S. ___, 126 S. Ct. 2405, 2411–13 (2006) (reasoning that language in an anti-discrimination statute that limits its scope to employer actions

Burlington Northern & Santa Fe Railway Co. v. White,⁴³ the Supreme Court held that words limiting the scope of a Title VII employment discrimination statute should not be read into a different section of Title VII dealing with anti-retaliation.⁴⁴ The Court noted, “[w]e normally presume that, where words differ as they differ here, ‘Congress acts intentionally and purposely in the disparate inclusion or exclusion.’”⁴⁵ Because courts generally prefer to derive meaning from the text of the specific statute at issue, rather than from comparisons to analogous statutes, textual differences between statutes are likely to affect interpretation of each individual statute.⁴⁶

The fact that statutes contain some differences, however, does not mean courts cannot construe common elements of statutes similarly. Where *in pari materia* is not applicable to all parts of two statutes, courts may still compare common elements to aid interpretation.⁴⁷ Courts can still use *in pari materia* to compare amended statutes with statutes that remain unchanged.⁴⁸ There are no firm rules regarding the applicability of *in pari materia*.⁴⁹ Norman Singer, an eminent scholar of statutory interpretation, stated the guiding principle as a pragmatic test: “[I]f it is natural and reasonable to think that the understanding of members of the legislature or persons to be affected by a statute, be influenced by

affecting employment or the workplace should not be read into an anti-retaliation statute because the words are absent from the latter statute and the purposes of the statutes are different); *Russello v. United States*, 464 U.S. 16, 23 (1983) (noting differences in language are particularly important when comparing sections within the same act).

43. 126 S. Ct. 2405 (2006).

44. *Id.* at 2411–13.

45. *Id.* at 2412 (quoting *Russello*, 464 U.S. at 23).

46. *See, e.g., United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) (reasoning that the starting point for determining legislative intent is the language and structure of the statute itself).

47. *Nat’l Fed’n of Fed. Employees, Local 1309 v. Dep’t of the Interior*, 526 U.S. 86, 105 (O’Connor, J., dissenting) (noting that differences between labor statutes should not preclude their comparison for purposes of interpretation); *see also Overstreet v. N. Shore Corp.*, 318 U.S. 125, 131–32 (1943) (holding that the phrase “engaged in commerce” in two labor statutes should be read similarly, even though the statutes were not strictly analogous).

48. *See, e.g., In re Seiscom Delta, Inc.*, 857 F.2d 279, 285 (5th Cir. 1988) (holding that an amendment to a bankruptcy statute was in fact confirmation that the drafters of the statute had always intended it to be read *in pari materia* with a rule of civil procedure); *cf. SINGER, supra* note 25, at § 51.03 (noting that caution should be used in holding statutes *in pari materia* where an amendment is involved).

49. SINGER, *supra* note 25, at § 51:03.

another statute, then a court called upon to construe the act in question should also allow its understanding to be similarly influenced.”⁵⁰

C. *Courts Must Apply In Pari Materia in Light of Other Canons of Statutory Construction, Including the Rule that Statutes Should Be Construed to Avoid Absurd Results*

It is a well-established rule that a court must construe statutes to avoid unreasonable or absurd results,⁵¹ and that if possible, unclear provisions should be given a reasonable and intelligent construction.⁵² Where there are two reasonable interpretations of a statute, and one yields absurd results while the other does not, the latter interpretation is favored.⁵³ *United States v. Brown*⁵⁴ generally defined absurd results as those that nullify Congressional intent.⁵⁵ Specifically, the *Brown* Court rejected as absurd a reading of the Federal Escape Act⁵⁶ that would restrict a judge from imposing additional prison sentences for prison escapes, “the one type of offense which Congress unmistakably intended to be subject to separate and added punishment”⁵⁷ However, courts should be cautious in employing the absurd results doctrine⁵⁸ because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it said.⁵⁹

In sum, courts employ *in pari materia* primarily to create a harmonious body of law. Where statutes can be read independently, without contradicting prior interpretations of one another, *in pari materia* is less useful. Although differences between statutes do not necessarily preclude the application of *in pari materia*, courts should

50. *Id.*

51. *United States v. Brown*, 333 U.S. 18, 27 (1948) (“No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences.”).

52. 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45:12 (6th ed. 2006).

53. *See, e.g.*, *Rosado v. Wyman*, 397 U.S. 397, 414–15 (1970) (rejecting a statutory reading that would render legislative purpose futile).

54. 333 U.S. 18 (1948).

55. *Id.* at 26.

56. 18 U.S.C. § 753(h) (1935).

57. *Brown*, 333 U.S. at 27.

58. 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:7 (6th ed. 2006).

59. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, ___ U.S. ___, 126 S.Ct. 2455, 2459 (2006) (noting the general rule that courts must presume that legislatures mean what they say in statutes); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005) (holding that where there is a plausible explanation for an omission from a statute, the omission is not absurd).

apply the doctrine with caution in such circumstances to assure that the intent of the legislature is respected and absurd results are avoided.

II. SECTIONS 844(h) AND 924(c) CONTAIN IDENTICAL TERMS AND WERE INTENDED TO FULFILL SIMILAR PURPOSES

The federal statute 18 U.S.C. § 844(h) imposes a ten-year mandatory prison term on anyone convicted of using or carrying explosives during the commission of a federal felony.⁶⁰ Congress modeled § 844(h) after § 924(c), a pre-existing statute that imposed similar penalties on persons who use or carry firearms during the commission of a federal felony.⁶¹ The original versions of the statutes were virtually identical, and they still share some identical language, including the terms “use” and “carry.”⁶² In their current, amended form, the two statutes contain meaningful differences as well.⁶³

A. *Section 844(h) Imposes a Ten-Year Prison Sentence on Anyone Who Uses or Carries an Explosive During the Commission of a Federal Felony*

The federal statute 18 U.S.C. § 844(h) adds ten years to the prison sentence of anyone convicted of using or carrying explosives during the commission of a federal felony.⁶⁴ Congress originally enacted § 844(h) in 1970⁶⁵ and subsequently amended it multiple times to strengthen penalties.⁶⁶ Congress last amended this statute in 1996.⁶⁷

The focus of this Comment is the definition of the word “carries,” the first word in § 844(h)(2). The current text of § 844(h) reads in part:

(h) Whoever—

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

60. 18 U.S.C. § 844(h) (2000).

61. H.R. REP. No. 91-1549, at 69 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4007, 4046.

62. *See infra* Part I.C.

63. *Id.*

64. 18 U.S.C. § 844(h) (2000).

65. Pub. L. No. 91-452, § 1102(a), 84 Stat. 922, 956 (1970).

66. Pub. L. No. 104-132, § 708(a)(3), 110 Stat. 1214, 1296 (1996); Pub. L. No. 100-690, § 6474(b), 102 Stat. 4181, 4379–80 (1988).

67. Pub. L. No. 104-132, § 708(a)(3), 110 Stat. 1214, 1296 (1996).

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years.⁶⁸

This statute was drafted primarily to deter bombings,⁶⁹ and Congress has not indicated any change in the purpose of the statute.⁷⁰

B. Congress Passed Section 844(h) to Prevent Bombings Generally

The legislative history of § 844(h), although sparse, indicates that Congress passed the original statute in 1970 to combat the rash of bombings related to social and political protests in the late 1960s.⁷¹ United States Representatives advocating for passage repeatedly emphasized the goal of curbing politically-related bombings.⁷² Nonetheless, there are very few statements or documents relating to the original bill, and it remains unclear whether the statute was designed to have other effects.

C. Congress Modeled Section 844(h) After Section 924(c), and the Statutes Retain Several Key Similarities

Congress drew much of the spirit and language for § 844(h) from the Gun Control Act of 1968, 18 U.S.C. § 924(c), a pre-existing statute that imposed similar prison sentences on persons who use or carry firearms during the commission of a federal felony.⁷³ Section § 844(h) was enacted in 1970,⁷⁴ two years after the enactment of § 924(c).⁷⁵ The U.S. House of Representatives Judiciary Committee Report on the bill stated that “[s]ection 844(h) carries over to the explosives area the stringent

68. 18 U.S.C. § 844(h)(2) (2000).

69. *United States v. Gelb*, 700 F.2d 875, 878 (2d Cir. 1983); H.R. REP. NO. 91-1549, at 37 (1970), as reprinted in 1970 U.S.C.C.A.N. 4007, 4013 (“Bombings and the threat of bombings have become an ugly, recurrent incident of life in cities and on campuses throughout our Nation.”).

70. See Pub. L. No. 104-132, § 708(a)(3), 110 Stat. 1214, 1296 (1996); Pub. L. No. 100-690, § 6474(b), 102 Stat. 4181, 4379–80 (1988).

71. See *Gelb*, 700 F.2d at 878 (citing legislative history).

72. *Id.*

73. See H.R. REP. NO. 91-1549, at 69 (1970), as reprinted in 1970 U.S.C.C.A.N. 4007, 4046.

74. Pub. L. No. 91-452, § 1102(a), 84 Stat. 922, 956 (1970).

75. Pub. L. No. 90-351, § 902, 82 Stat. 197, 233 (1968).

provisions of the Gun Control Act of 1968 [now § 924(c)] relating to the use of firearms and the unlawful carrying of firearms to commit, or during the commission of a Federal felony.”⁷⁶

Congress used nearly identical language in drafting the original versions of § 924(c) and § 844(h).⁷⁷ The only textual difference between the original versions of these two statutes was that § 924(c) contained the word “firearm” whereas § 844(h) contained the word “explosive.”⁷⁸ The original version of § 924(c) provided: “Whoever—(1) uses a *firearm* to commit any felony which may be prosecuted in a court of the United States, or (2) carries a *firearm* unlawfully during the commission of any felony which may be prosecuted in a court of the United States” (emphasis added).⁷⁹

Similarly, the original version of § 844(h) provided: “Whoever—(1) uses an *explosive* to commit any felony which may be prosecuted in a court of the United States, or (2) carries an *explosive* unlawfully during the commission of any felony which may be prosecuted in a court of the United States” (emphasis added).⁸⁰ The original versions of § 924(c) and § 844(h) were substantially identical in language, and Congress patterned § 844(h) directly after § 924(c).⁸¹

Despite the original parallels between the statutes, Congress has separately amended both § 844(h) and § 924(c) so that portions of the statutes are no longer identical.⁸² In 1984, Congress struck the word “unlawfully” from § 924(c)(2), and replaced the word “during” with the phrase “during and in relation to.”⁸³ In 1988, Congress similarly struck the word “unlawfully” from § 844(h)(2).⁸⁴ However, Congress did not replace the word “during” in § 844(h) with the phrase “during and in relation to,” as it had done with § 924(c), thereby creating a notable difference between the statutes.⁸⁵ The legislative history of the 1988

76. H.R. REP. No. 91-1549, at 69 (1970), as reprinted in 1970 U.S.C.C.A.N. 4007, 4046.

77. Pub. L. No. 90-351, § 902, 82 Stat. 197, 233 (1968); Pub. L. No. 91-452, § 1102(a), 84 Stat. 922, 956 (1970).

78. *Id.*

79. Pub. L. No. 90-351, § 902, 82 Stat. 197, 233 (1968).

80. Pub. L. No. 91-452, § 1102(a), 84 Stat. 922, 956 (1970).

81. H.R. REP. No. 91-1549, at 69 (1970), as reprinted in 1970 U.S.C.C.A.N. 4007, 4046.

82. See Pub. L. No. 104-132, § 708(a)(3), 110 Stat. 1214, 1296 (1996); Pub. L. No. 100-690, § 6474(b), 102 Stat. 4181, 4379–80 (1988).

83. Pub. L. No. 98-473, § 1005, 98 Stat. 1837, 2138 (1984).

84. Pub. L. No. 100-690, § 6474(b), 102 Stat. 4181, 4379–80 (1988).

85. *Id.*

amendment fails to explain whether the difference was intentional.⁸⁶ The Senate Report simply indicated that the amendment strengthened the penalty provisions of § 844(h) for “using or carrying an explosive during the commission of a federal felony, so as to bring it in line with similar amendments adopted in the Comprehensive Crime Control Act of 1984”⁸⁷

As a result of the amendments, the current versions of § 844(h) and § 924(c) are similar in part, and dissimilar in part.⁸⁸ Section 924(c), reflecting its several amendments, currently provides, in relevant part:

. . . any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—(i) be sentenced to a term of imprisonment of not less than 5 years⁸⁹

In sum, § 844(h) and § 924(c) share a common legislative pedigree, and the history of the two statutes indicates they were passed for the common purpose of discouraging criminals from carrying dangerous weapons. Both statutes still use the key terms “use” and “carry.” However, the firearm statute, unlike the explosives statute, was amended in 1984 to require the government to prove a defendant has carried a firearm in relation to an underlying felony. Congress did not similarly amend § 844(h), although Congress has amended § 844(h) in other ways since 1984.

III. THE SUPREME COURT’S INTERPRETATION OF SECTION 924(c) SUGGESTS SECTION 844(h)(2) SHOULD BE READ BROADLY

The United States Courts of Appeals have split over whether prosecution under § 844(h)(2) implicitly requires that a defendant carry an explosive in relation to the commission of an underlying felony.⁹⁰ The courts have made frequent references to § 924(c) in determining

86. 134 CONG. REC. S17,360–62, 17,367 (daily ed. Nov. 10, 1988).

87. *Id.*

88. 18 U.S.C. § 844(h)(2) (2000); *id.* § 924(c).

89. *Id.* § 924(c).

90. *See infra* Part III.A.

whether an implicit relational element exists in § 844(h)(2), exploring in particular the common legislative histories of the statutes.⁹¹ Curiously, the courts, when interpreting the term “carry” in § 844(h)(2), have not turned to Supreme Court decisions regarding § 924(c) for guidance.⁹²

A. *The United States Courts of Appeals Have Split Regarding the Interpretation of the Phrase “Carries an Explosive During the Commission of Any Felony” in Section 844(h)(2)*

The United States Courts of Appeals have disagreed over whether the government needs to show that a defendant carried an explosive in relation to an underlying felony to obtain a conviction under § 844(h)(2).⁹³ The two main competing theories are represented by *United States v. Rosenberg*,⁹⁴ which held that the statute did not demand such a relationship,⁹⁵ and *Ressam*, which held that such a relationship was required.⁹⁶ *Ressam* suggested that the phrase “carries an explosive during the commission of any felony” should be read to mean “carries an explosive during and in relation to the commission of any felony,”⁹⁷ whereas *Rosenberg* held that reading “in relation to” into the statute was inappropriate.⁹⁸ *United States v. Ivy*⁹⁹ represents the middle ground, holding that § 844(h)(2) does not contain an implicit relational element, but the term “carry” itself implies that the explosive must bear a certain relationship to the underlying felony.¹⁰⁰

The Ninth Circuit in *Ressam* concluded that § 844(h)(2) required the government to prove that the defendant carried explosives in relation to the underlying felony, and the court held that such a relationship existed only when the explosives facilitated the crime.¹⁰¹ Applying the doctrine of *in pari materia*, the *Ressam* court relied heavily on its interpretation

91. *Id.*

92. *See infra* Part III.C.

93. *See* *United States v. Ressam*, 474 F.3d 597, 603–04 (9th Cir. 2007); *United States v. Ivy*, 929 F.2d 147, 151 (5th Cir. 1991); *United States v. Rosenberg*, 806 F.2d 1169, 1177–79 (3d Cir. 1986).

94. 806 F.2d 1169 (3d Cir. 1986).

95. *Id.* at 1179.

96. *Ressam*, 474 F.3d at 603–04.

97. *See id.*

98. *Rosenberg*, 806 F.2d at 1177–79.

99. 929 F.2d 147 (5th Cir. 1991).

100. *Id.* at 151.

101. *Ressam*, 474 F.3d at 603–04.

of the pre-1984 § 924(c)(2) in *United States v. Stewart*.¹⁰² In *Stewart*, the Ninth Circuit analyzed the analogous phrase in the firearm statute before it was amended to include the “in relation to” language.¹⁰³ *Stewart* held that one could be convicted for carrying a firearm under § 924(c) only if “the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge in fact occurred”¹⁰⁴ In so holding, the *Stewart* Court relied on an earlier case in which the Ninth Circuit had applied the “facilitation standard” in the context of § 924(c)(1).¹⁰⁵ In that case, *United States v. Moore*,¹⁰⁶ the Ninth Circuit noted that the defendant used his gun to rob a bank much in the same way he used his gloves and ski mask: “[t]hese items increased the likelihood of success; without them he probably would not have sallied forth.”¹⁰⁷ The *Ressam* court inferred an identical facilitation requirement in § 844(h)(2) and reversed a conviction where this particular relationship between the carrying of the explosive and the underlying felony was not found.¹⁰⁸ The Ninth Circuit stated, “[i]t is not enough for the government to prove that *Ressam* lied *because* he was smuggling explosives in the trunk of his car.”¹⁰⁹ The Ninth Circuit required that the explosives themselves aid the commission of the crime.¹¹⁰

In contrast, the Third Circuit in *Rosenberg* and the Sixth Circuit in *United States v. Jenkins*¹¹¹ declined to require the government to show that the defendant carried explosives in relation to the underlying felony.¹¹² In *Rosenberg*, two defendants appealed multiple convictions for stockpiling firearms, explosives, and false identification documents in a storage facility; their intent in stockpiling these items was

102. *Id.* at 602–04 (relying on *United States v. Stewart*, 779 F.2d 538, 539–40 (9th Cir. 1985)).

103. *Stewart*, 779 F.2d at 539–40.

104. *Id.* at 540.

105. *Id.*

106. 580 F.2d 360 (9th Cir. 1978).

107. *Id.* at 362.

108. *Ressam*, 474 F.3d at 604.

109. *Id.*

110. *See id.*

111. 229 F. App’x 362 (6th Cir. 2005).

112. *Jenkins*, 229 F. App’x at 367; *United States v. Rosenberg*, 806 F.2d 1169, 1177–79 (3d Cir. 1986).

unknown.¹¹³ The court in *Rosenberg* explicitly rejected the Ninth Circuit's interpretation of the legislative history of § 924(c) in *Stewart*.¹¹⁴ The court noted that there was no indication § 924(c) ever contained an implicit relational element, and that the decision to attach an explicit relational element to § 924(c) but not to § 844(h) was open to multiple interpretations.¹¹⁵ Finding the legislative histories of § 924(c) and § 844(h) inconclusive, *Rosenberg* reverted to the plain language of the statute, upholding a conviction where the underlying felony involved illegal possession of firearms.¹¹⁶ Similarly, *Jenkins* adopted the *Rosenberg* rationale to uphold a conviction where the underlying felony was interstate transportation of a stolen motor vehicle.¹¹⁷ In *Jenkins*, the defendant had stolen explosives with the intent to bomb multiple government buildings.¹¹⁸

Finally, the Fifth Circuit in *Ivy* seemed to share elements of both the Third and Ninth Circuits' interpretations. In *Ivy*, a defendant was convicted of carrying a pipe bomb in his car while he kidnapped his estranged wife.¹¹⁹ *Ivy* held that § 844(h)(2) did not specifically require that explosives be carried in relation to another crime.¹²⁰ Despite rejecting the relational requirement, the Court noted that if the pipe bomb was available to facilitate the kidnapping, or if it emboldened the defendant in his offense, a jury could find that the defendant "carried" the explosive under § 844(h)(2).¹²¹ It is unclear if the Fifth Circuit would have upheld the conviction in *Ivy* had the government not met the facilitation standard.¹²²

B. The Debate Between the Circuits Has Exposed the Extent to Which the Word "Carry" Differs from "Possess"

The circuit split regarding the existence of an implicit relational element in § 844(h)(2) is a manifestation of a more fundamental

113. *Rosenberg*, 806 F.2d at 1172.

114. *Id.* at 1178.

115. *Id.*

116. *Id.* at 1178–79.

117. *Jenkins*, 229 F. App'x at 367.

118. *Id.* at 363–64.

119. *United States v. Ivy*, 929 F.2d 147, 151 (5th Cir. 1991).

120. *Id.* (citing *Rosenberg*, 806 F.2d at 1177).

121. *Id.* (citing *United States v. Stewart*, 779 F.2d 538 (9th Cir. 1985)).

122. *See id.*

question: to what extent does “carrying” differ from coincidental possession?¹²³ Whether the word “carry” is distinct from the word “possess” is important because equating the two terms greatly expands the applicability of § 844(h)(2).¹²⁴ No circuit has addressed this issue explicitly, but the opinions suggest that this question is implicit in the courts’ analysis of § 844(h)(2).¹²⁵ *Ressam* in particular included a detailed discussion of the analogous firearm statute, § 924(c), and noted that “in relation to” was added to that statute to prevent the government from prosecuting individuals who merely possess a firearm during the commission of an unrelated crime.¹²⁶

Adhering to the plain language of the statute, the Third Circuit in *Rosenberg* did not appear to draw any distinction between the words “carry” and “possess” and upheld a conviction where there was little more than a coincidental relationship between the explosives and the underlying offense.¹²⁷ The Fifth Circuit in *Ivy* appeared to struggle with this style of construction.¹²⁸ On one hand, *Ivy* found that § 844(h)(2) did not include a relational element.¹²⁹ On the other hand, *Ivy* held that a defendant could be found to “carry” the explosives if the explosives facilitated the underlying crime, suggesting that “carry” connotes something beyond possession.¹³⁰ *Ivy* did not address whether the conviction would have stood had there been no facilitation. Like *Ivy*, *Ressam* seemed to reject the idea that “carry” equals “possess,” but contrary to *Ivy*, *Ressam* read a relational element into § 844(h)(2) to distinguish the two terms.¹³¹

Section 844(h)(2) lacks the explicit “in relation to” language found in § 924(c), and there seems to be little in the language of § 844(h) that distinguishes “carry” from “possess.”¹³² The *Rosenberg* court’s apparent finding that “carry” equals “possess” is supported by the general canon

123. See, e.g., *Rosenberg*, 806 F.2d at 1176–77 (discussing “carrying” and “possession” charges in the same section and failing to distinguish between the two).

124. Compare *id.* at 1176–79, with *United States v. Ressim*, 474 F.3d 597, 604 (9th Cir. 2007).

125. See *Ressim*, 474 F.3d at 602; *Rosenberg*, 806 F.2d at 1176–77.

126. *Ressim*, 474 F.3d at 602.

127. See *Rosenberg*, 806 F.2d at 1179.

128. *United States v. Ivy*, 929 F.2d 147, 151 (5th Cir. 1991).

129. *Id.* (noting that conviction under the statute did not require a finding that the defendant carried the explosives “during and in relation to” the kidnapping).

130. *Id.*

131. See *Ressim*, 474 F.3d at 604.

132. See 18 U.S.C. § 844(h)(2) (2000).

that the plain text of a statute controls where the language is clear.¹³³ On the other hand, the courts that distinguish “carry” from “possess” are generally supported by *United States v. Bailey*,¹³⁴ which noted the difference between the two words in an analysis of the firearm statute,¹³⁵ and by courts holding that statutory context is important in determining the meaning of a word.¹³⁶

C. *Although the Supreme Court Has Interpreted the Terms “Uses” and “Carries” Within Section 924(c), No United States Court of Appeals Has Discussed These Supreme Court Interpretations While Analyzing Section 844(h)(2)*

The Supreme Court has never analyzed § 844(h)(2), but has interpreted the term “uses” in § 924(c) broadly to include nonviolent use of a firearm.¹³⁷ The Courts of Appeals can acknowledge such interpretations when applying § 844(h)(2) because it is well settled that a Court of Appeals can depart from circuit precedent based on an intervening opinion of the Supreme Court that undermines the prior precedent.¹³⁸ In *Smith v. United States*,¹³⁹ a defendant was convicted of bartering guns for narcotics under § 924(c), and the Court upheld the conviction on the ground that bartering constituted use.¹⁴⁰ *Smith* relied on the BLACK’S LAW DICTIONARY definition of the term “use”: “[t]o make use of; to convert to one’s service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of.”¹⁴¹ *Smith* rejected the argument that “uses” means “uses as a weapon,” holding that “[i]mposing a more restrictive reading of the phrase ‘uses . . . a firearm’ does violence not only to the structure and language of the

133. See, e.g., *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (holding plain language controls unless it leads to results that are “absurd or glaringly unjust”).

134. 516 U.S. 137 (1995).

135. *Id.* at 144–45.

136. See, e.g., *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (holding that the meaning of statutory language, plain or not, depends on context); *Deal v. United States*, 508 U.S. 129, 132 (1993) (“[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”).

137. See, e.g., *Smith v. United States*, 508 U.S. 223, 236–37 (1993).

138. *Nelson v. Shuffman*, 476 F.3d 635, 637 (8th Cir. 2007) (Colloton, J., dissenting) (stating the rule).

139. 508 U.S. 223 (1993).

140. *Id.* at 229.

141. *Id.* (quoting BLACK’S LAW DICTIONARY 1541 (6th ed. 1990)).

statute, but to its purpose as well.”¹⁴² *Smith* noted that there was no indication Congress intended for courts to draw a distinction between use of a gun as a weapon and as an item of barter because “[the gun] creates a grave possibility of violence and death in either capacity.”¹⁴³

The Supreme Court sharpened the definition of “use” in *Bailey*, equating “use” with active employment, and holding that storage of a gun in the defendant’s car did not constitute “use” in the context of § 924(c).¹⁴⁴ *Bailey* did not overrule *Smith* but simply clarified that “use” must be active, at least in part to distinguish “use” from “carry.”¹⁴⁵

The Supreme Court in *Muscarello v. United States*¹⁴⁶ did not assign a formal definition to the term “carries” in § 924(c), but held that “carry” must be read more broadly than “use,” and can include instances where a defendant possesses a firearm in his immediate vicinity but does not actively employ it.¹⁴⁷ Thus, *Muscarello* provided that “use” and “carrying” are distinct concepts within § 924(c).¹⁴⁸ Firearms can be used without being carried, such as when an offender trades a firearm for something without handling it.¹⁴⁹ Likewise, a firearm can be carried without being used, such as when an offender keeps a gun hidden in his clothing throughout a drug transaction.¹⁵⁰

Despite the Supreme Court’s broad reading of “carry” in *Muscarello*, the Court has stopped short of equating “carry” with mere possession.¹⁵¹ *Bailey* stated that if Congress had intended to equate “use” with “possession,” it could have simply used the word “possession.”¹⁵² This reasoning from *Bailey* suggests that the Court would also distinguish

142. *Id.* at 240.

143. *Id.*

144. *United States v. Bailey*, 516 U.S. 137, 150 (1995).

145. *See id.* at 145–46.

146. 524 U.S. 125 (1998).

147. *Id.* at 136–37 (declining to limit the statute to instances where the firearms were immediately accessible and upholding conviction of drug traffickers who carried guns in a locked glove compartment and in a trunk).

148. *Id.* at 145–46.

149. *Smith v. United States*, 508 U.S. 223, 229 (1993).

150. *Bailey*, 516 U.S. at 146; *see also Muscarello*, 524 U.S. at 136–37.

151. *Bailey*, 516 U.S. at 145 (quoting *United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting) (“[T]he ordinary meanings of the words ‘use’ and ‘carry’ . . . connote activity beyond simple possession.”)).

152. *Id.* at 148.

“carry” from “possession.”¹⁵³ *Muscarello* explained that the explicit relational element in § 924(c) served to distinguish “carry” from “possess,” and that the relational element prevented criminalization of gun possession wholly unrelated to the underlying offense.¹⁵⁴

The *Muscarello* Court noted that one justification for its broad reading of the term “carry” is that the term is limited within § 924(c) by the phrase “in relation to.”¹⁵⁵ The Court stated, “[o]nce one takes account of the words ‘during’ and ‘in relation to’ it no longer seems beyond Congress’ likely intent, or otherwise unfair, to interpret the statute as we have done.”¹⁵⁶ This language suggests that the Court may not have read “carry” so broadly had this limiting language not been included in the statute.¹⁵⁷ The Court made this point again in *Smith*, where the court justified its broad reading of the term “use” by noting that the “in relation to” language serves to contain the scope of the statute, thereby preventing absurd prosecutions, such as where a defendant “‘uses’ a firearm to scratch his head”¹⁵⁸

D. The Supreme Court Has Held that the “In Relation To” Element in Section 924(c) Is Satisfied When the Firearm Is Used to Facilitate the Underlying Offense

The Supreme Court has defined the meaning and purpose of “in relation to” in the context of § 924(c), holding the element is satisfied if the firearm facilitated the underlying felony.¹⁵⁹ *Muscarello* noted that by adding “in relation to” to § 924(c), Congress intended to avoid prosecutions where possession was totally unrelated to the underlying felony.¹⁶⁰ *Smith* held that “in relation to” means, at a minimum, that the firearm have some purpose or effect regarding the underlying felony,

153. *Id.*

154. *Muscarello v. United States*, 524 U.S. 125, 137 (1998).

155. *Id.*

156. *Id.* (declining to limit the statute’s applicability to instances where the firearms were immediately accessible).

157. *Id.*

158. *Smith v. United States*, 508 U.S. 223, 232 (1993).

159. *See, e.g., id.* at 238 (holding that the relational element was satisfied when the underlying felony was drug trafficking).

160. *Muscarello*, 524 U.S. at 137; *see also* *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985) (observing that “in relation to” was “added to allay explicitly the concern that a person could be prosecuted . . . for committing an entirely unrelated crime while in possession of a firearm”).

and that its presence cannot be the result of coincidence or accident.¹⁶¹ Applying the language of the statute to the facts in *Smith*, the Court held that “in relation to” meant the gun must at least “facilitat[e], or ha[ve] the potential of facilitating” the drug trafficking offense, adopting the facilitation standard from *Stewart*.¹⁶²

Ressam, which found “in relation to” implicit in § 844(h)(2), held that this language is satisfied only when the explosives facilitate the underlying felony.¹⁶³ Specifically, *Ressam* overturned a conviction where the explosives did not facilitate the underlying felony.¹⁶⁴ In this sense, the holding in *Ressam* was doubly unusual: the Ninth Circuit became the first Court of Appeals to read “in relation to” into § 844(h)(2), and the first to hold that the implicit relational element was satisfied by the facilitation standard, which was developed in firearm-related case law.¹⁶⁵

In sum, the United States Courts of Appeals have disagreed over whether § 844(h)(2) applies to defendants who coincidentally possess explosives during the commission of another federal felony. Multiple courts have held that § 844(h)(2) is applicable to these defendants, generally relying on a plain language reading of the statute. The *Ressam* court has held that the statute does not apply to such defendants, citing the Ninth Circuit’s interpretation of § 924(c) in *Stewart* to support a similar interpretation of § 844(h)(2). None of the courts have referenced Supreme Court decisions regarding § 924(c) to guide their reading of the term “carry.”

IV. COURTS SHOULD REFRAIN FROM READING A RIGID RELATIONAL ELEMENT INTO SECTION 844(h)(2)

Courts should refrain from restricting the meaning of the term “carry” in § 844(h)(2).¹⁶⁶ The Supreme Court has read the identical term broadly in § 924(c).¹⁶⁷ The fact that Congress amended § 924(c) to include an explicit relational element but did not make the same amendment to § 844(h)(2) further supports the conclusion that Congress did not intend

161. *Smith*, 508 U.S. at 238.

162. *Id.* (quoting *Stewart*, 779 F.2d at 540).

163. *United States v. Ressam*, 474 F.3d 597, 603–04 (9th Cir. 2007).

164. *Id.*

165. *Id.*

166. *See infra* Part IV.A.

167. *Muscarello v. United States*, 524 U.S. 125, 136–37 (1998).

to include additional restrictive elements in § 844(h)(2).¹⁶⁸ A broad reading of § 844(h)(2) satisfies public policy concerns and reflects the varied ways in which criminals use explosives.¹⁶⁹ Furthermore, courts may rely on equitable powers to prevent application of the statute when doing so would produce absurd results.¹⁷⁰

A. *In Accordance with the Doctrine of In Pari Materia, Lower Courts Should Follow the Supreme Court's Broad Reading of "Carry" in Muscarello When Interpreting the Same Term in Section 844(h)*

The doctrine of *in pari materia* provides that courts should interpret § 844(h) and § 924(c) similarly because the statutes are similar in form and share the common purpose of preventing the use of dangerous weapons.¹⁷¹ The legislative history of § 844(h) made reference to the parallel aims of § 924(c),¹⁷² and the nearly identical language of the two original statutes strongly suggests they were part of the same legislative scheme.¹⁷³ Under *Northcross v. Board of Education of Memphis City Schools*,¹⁷⁴ courts should read such statutes *in pari materia* to the extent the statutes share common language.¹⁷⁵

The Ninth Circuit used *in pari materia* in *Ressam*, holding that the court's previous interpretation of the original § 924(c) should control its interpretation of the current § 844(h),¹⁷⁶ but the court erred in limiting its application of *in pari materia* to its own statutory interpretations. This decision was erroneous in part because the Ninth Circuit ignored numerous Supreme Court decisions construing similar terms in § 924(c),¹⁷⁷ most notably the *Muscarello* decision.¹⁷⁸ Although *Muscarello* did not explicitly denounce the Ninth Circuit's restrictive

168. See *infra* Part IV.B.

169. See *infra* Part IV.C.

170. See *infra* Part IV.D.

171. See H.R. REP. No. 91-1549, at 69 (1970), as reprinted in 1970 U.S.C.C.A.N. 4007, 4046.

172. *Id.*

173. See Pub. L. No. 90-351, § 902, 82 Stat. 197, 233 (1968); Pub. L. No. 91-452, § 1102(a), 84 Stat. 922, 956 (1970).

174. 412 U.S. 427 (1973).

175. *Id.* at 428 (noting that statutes should be read together when they share the same language, especially where they have a similar purpose).

176. See *United States v. Ressam*, 474 F.3d 597, 602 (9th Cir. 2007).

177. See *Muscarello v. United States*, 524 U.S. 125, 136–37 (1998); cf. *Smith v. United States*, 508 U.S. 223, 236–37 (1993); *United States v. Bailey*, 516 U.S. 137, 150 (1995).

178. See *Muscarello*, 524 U.S. at 136–37.

reading of § 924(c) in *Stewart*, the court did hold that a broad reading of that statute was appropriate, thereby undermining the *Stewart* decision.¹⁷⁹ Like the other circuits interpreting § 844(h), the Ninth Circuit failed to take notice of *Muscarello* and the other Supreme Court cases interpreting analogous terms in § 924(c).

The common terms in § 844(h)(2) and § 924(c) should be read *in pari materia*. The term “carries” appears in both current statutes, and although the statutes now contain different language, the two statutes have a common purpose and a common legislative genesis.¹⁸⁰ *Overstreet v. North Shore Corp.*,¹⁸¹ while not citing the doctrine of *in pari materia* specifically, supported parallel readings of a common phrase where two statutes bore some substantive differences but fulfilled a similar purpose.¹⁸² Indeed, courts are inclined to apply *in pari materia* when they find statutes share common legislative purposes and histories.¹⁸³ Sections 844(h)(2) and 924(c) share these features.

The Supreme Court’s broad interpretation of the term “carry” under § 924(c) in *Muscarello* should be applied *in pari materia* to § 844(h)(2). In *Muscarello*, the Court held that one may “carry” firearms even when the firearms are not readily available as weapons.¹⁸⁴ The *Muscarello* court generally declined to restrict the meaning of “carry.”¹⁸⁵ The Court’s decisions in *Smith* and *Bailey* confirm that a broad reading of § 924(c) is appropriate.¹⁸⁶ *Smith* held that “use” incorporates nonviolent use of a weapon, and *Bailey* noted that the definition of “carry” must be even broader.¹⁸⁷ Given the similar aims of § 924(c) and § 844(h), it follows that a broad reading of § 844(h)(2) is required. A relational element could severely restrict application of § 844(h)(2), especially considering that the Supreme Court has interpreted the relational element in § 924(c) narrowly to require that the weapon be used to

179. *Id.* at 137–38 (1998) (holding that a narrow interpretation of “carry” was inappropriate).

180. See H.R. REP. No. 91-1549, at 69 (1970), as reprinted in 1970 U.S.C.C.A.N. 4007, 4046 (describing the relationship between the two statutes); *Ressam*, 474 F.3d at 602.

181. 318 U.S. 125 (1943).

182. *Id.* at 131–32.

183. SINGER, *supra* note 25, at § 51:3.

184. *Muscarello*, 524 U.S. at 138.

185. *Id.* at 137–39.

186. *United States v. Bailey*, 516 U.S. 137, 145–46 (1995); *Smith v. United States*, 508 U.S. 223, 240 (1993).

187. *Bailey*, 516 U.S. at 145–46; *Smith*, 508 U.S. at 240.

facilitate the underlying felony.¹⁸⁸ Such an effect is directly contrary to the expansive scope the Supreme Court has afforded § 924(c), and by implication, § 844(h)(2).¹⁸⁹

Even if “carry” cannot be read identically in both § 844(h)(2) and § 924(c), the general spirit of interpretation in *Muscarello* should guide the courts in interpreting § 844(h)(2).¹⁹⁰ The *Muscarello* Court noted that its broad reading of “carry” was justified at least in part by the “in relation to” language included in the statute.¹⁹¹ The *Smith* Court also noted the importance of the language as a bulwark against absurd prosecutions.¹⁹² Courts must consider these explanations when determining the applicability of *Muscarello* to interpretations of § 844(h)(2), because the “in relation to” language is in fact absent from § 844(h)(2). Notwithstanding this potential problem, the fact remains that *Muscarello* explicitly rejected other limitations on the term “carry,” including the suggestion that the scope of the term be limited to instances where a gun is immediately accessible.¹⁹³ Thus, the general spirit of *Muscarello* demands a broad reading of the term “carry” and should discourage courts from confining the meaning of “carry” in § 844(h)(2) with restrictive elements that are absent from the statutory language.

B. Congress Amended Section 924(c) to Include an Explicit Relational Element but Did Not So Modify Section 844(h)(2), Suggesting that It Did Not Intend to Restrict Application of Section 844(h) in a Similar Manner

In light of the divergent amendments to § 844(h) and § 924(c), courts should apply the doctrine of *in pari materia* only to identical terms in the two statutes, and should read the dissimilar language in the statutes independently. The general purpose of *in pari materia* is to allow harmonious interpretation of an entire body of law.¹⁹⁴ For example, *Overstreet* held that statutes with some differences may be read similarly where language is comparable and a common legislative purpose is

188. *Smith*, 508 U.S. at 238.

189. *See supra* Part III.C.

190. *See Muscarello*, 524 U.S. at 136–37.

191. *Id.*

192. *Smith*, 508 U.S. at 232.

193. *Muscarello*, 524 U.S. at 136–37.

194. *See SINGER, supra* note 25, at § 51:03.

shared.¹⁹⁵ *In pari materia* may not be applicable to all portions of analogous statutes, however.¹⁹⁶ *Ruckelshaus* held that where statutes differ in material terminology, and courts can give independent and consistent effect to each, *in pari materia* no longer applies.¹⁹⁷ Though § 844(h)(2) and § 924(c) contain similarities, the “in relation to” language is explicit in only the latter statute.¹⁹⁸ *Ruckelshaus* demands that courts respect the difference in the statutes.¹⁹⁹

Whether or not the *Stewart* court was correct in finding that the original § 924(c) contained an implicit relational element, *Stewart* did not bind the *Ressam* court to hold that the current § 844(h)(2) also contains this element. The *Ressam* court improperly dismissed the fact that Congress explicitly amended § 924(c) to include an “in relation to” element but did not similarly amend § 844(h).²⁰⁰ Given that subsequent amendments to § 844(h) reflected a general awareness of § 924(c),²⁰¹ it seems unlikely that the omission of “in relation to” language from § 844(h) was accidental. *General Electric Co.* and generally accepted canons of statutory construction provide that when a statute contains a given provision, omission of that provision from related statutes is presumed to be intentional.²⁰² Had the Ninth Circuit heard *Ressam* in 1985, when the two statutes were nearly identical, a sweeping use of *in pari materia* might have been justified, overlooking for a moment the practical differences between explosives and firearms. The current statutes, however, show meaningful differences regarding the appropriate scope of each. Under *General Electric*, it is reasonable to infer that “in relation to” was left out of § 844(h) deliberately, and courts should be cognizant of that likelihood.²⁰³ *Burlington Northern & Santa Fe Ry. Co.* clearly stated the presumption that where statutes use different words, those differences are intentional, and *in pari materia* does not apply.²⁰⁴ Indeed, the use of *in pari materia* where statutes differ

195. *Overstreet v. N. Space Shore Corp.*, 318 U.S. 125, 131–32 (1943).

196. *See Ruckelshaus v. Monsanto*, 467 U.S. 986, 1018 (1984).

197. *Id.* at 1018.

198. *Compare* 18 U.S.C. § 844(h)(2) (2000) *with id.* § 924(c).

199. *Ruckelshaus*, 467 U.S. at 1018.

200. *See United States v. Ressim*, 474 F.3d 597, 603 (9th Cir. 2007).

201. *See, e.g.*, 134 CONG. REC. S17,360–62, 17,367 (daily ed. Nov. 10, 1988).

202. *See Gen. Elec. Co. v. S. Constr. Co.*, 383 F.2d 135, 137–38 (5th Cir. 1967); *see also* 82 C.J.S. *Statutes* § 352 (2007); SINGER, *supra* note 25, at §51:2.

203. *See Gen. Elec. Co.*, 383 F.2d at 137–38.

204. *Burlington N. & Santa Fe Ry. Co. v. White*, ___ U.S. ___, 126 S. Ct. 2405, 2411–12 (2006).

in terms and where legislatures are aware of both statutes at the time of drafting is generally discouraged.²⁰⁵ Especially in light of the precise connotations that “in relation to” carries after *Smith*—the requirement that the weapon facilitate the underlying offense²⁰⁶—courts should refrain from reading this element into § 844(h)(2).

C. Caselaw Discussing the Relational Element in Section 924(c) Is Not Applicable to the Explosives Context

Courts should not read § 844(h) to include “in relation to,” because *Smith* equates “in relation to” with “for the purpose of facilitating.”²⁰⁷ Explosives seldom facilitate felonies in the same way firearms do, and reading “in relation to” into § 844(h) would preclude appropriate prosecutions under the statute.²⁰⁸ Congress clearly intended § 844(h) to prevent bombings,²⁰⁹ and the statute must be read accordingly.

Smith held that the relational element in § 924(c) is satisfied when a gun is used to facilitate the underlying felony or embolden the defendant.²¹⁰ This facilitation standard makes sense in relation to guns. Criminals commonly carry guns to facilitate crime: nearly fifteen percent of all federal prisoners carried a gun during the crime for which they were currently incarcerated, and thirty-five percent of federal inmates in prison for homicide, sexual assault, assault, robbery, or other violent crime admitted to carrying a gun when committing the crime.²¹¹ Of those federal inmates who carried a gun during their current offense, more than one-half actively brandished or discharged the firearm.²¹²

By adding the “in relation to” language to § 924(c), Congress attempted to retain the strength of the law as it related to gun crime while allaying fears that a person could be prosecuted for possessing a

205. See, e.g., *United States v. Poff*, 926 F.2d 588, 594 (7th Cir. 1991) (Easterbrook, J., dissenting) (noting that different language in different statutes should convey different meanings when the two statutes have linked legislative histories).

206. *Smith v. United States*, 508 U.S. 223, 238 (1993).

207. *Id.*

208. See *infra* notes 216–221 and accompanying text.

209. *United States v. Gelb*, 700 F.2d 875, 878 (2d Cir. 1983); H.R. REP. NO. 91-1549, at 37 (1970), as reprinted in 1970 U.S.C.C.A.N. 4007, 4013.

210. *Smith*, 508 U.S. at 238.

211. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: FIREARM USE BY OFFENDERS 1 (2001).

212. *Id.*

firearm during the commission of a crime.²¹³ The Ninth Circuit in *Stewart* produced the facilitation standard to reflect this intent, a standard later endorsed in *Smith*.²¹⁴ In so holding, *Stewart* implied that § 924(c) does not criminalize gun possession if such possession does not facilitate an underlying offense.²¹⁵

Unlike firearms, explosives are not commonly carried, and their use for intimidation or protection during the commission of other crimes appears to be relatively rare.²¹⁶ A 1996 Bureau of Alcohol, Tobacco and Firearms Selected Explosives Incidents Report noted that the vast majority of explosives incidents are related to vandalism and revenge, and fewer than two percent of incidents were motivated by a desire to commit a homicide, suicide, or robbery.²¹⁷ Common sense and experience suggest that *Ivy*, in which the defendant carried a bomb to aid in kidnapping,²¹⁸ is a rare case.

The facilitation standard is impractical in the explosives context primarily because it fails to adequately punish those who carry explosives with obvious, yet unrealized, plans of harming people and property. Carrying explosives often involves the commission of other felonies, even if it does not “facilitate” them.²¹⁹ Bombing, unlike shooting, is usually not an incidental act. It is usually the culmination of a series of unlawful acts, each of which contributes to the execution of a bomb plot.²²⁰ *Ressam* demonstrates that the relationship between bomb

213. *Muscarello v. United States*, 524 U.S. 125, 137 (1998) (citing *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985) and S. REP. No. 98-225, at 314 n.10 (1983), as reprinted in 1984 U.S.C.A.N. 3182, 3492).

214. *Smith*, 508 U.S. at 238; *Stewart*, 779 F.2d at 540.

215. *Stewart*, 779 F.2d at 540.

216. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: WEAPON USE AND VIOLENT CRIME 2 (2003) (noting of all violent crimes committed with weapons, approximately thirty-eight percent were committed with a firearm, twenty-five percent with a sharp object, sixteen percent with a blunt object, and eighteen percent with an unspecified weapon, an unknown portion of which may be explosives).

217. 1996 ATF Selected Explosives Incidents Report (Mar. 19, 1999), http://www.atf.gov/pub/fire-explo_pub/eir/motive.htm.

218. *United States v. Ivy*, 929 F.2d 147, 149 (5th Cir. 1991).

219. *See, e.g., United States v. Nettles*, 476 F.3d 508, 512–13 (7th Cir. 2007) (noting that bomb plot included counterfeit activity to purchase bomb-making materials); *United States v. Salameh*, 261 F.3d 271, 274–75 (2d Cir. 2001) (listing the counts on which defendants were convicted for their role in the 1993 World Trade Center bombing, including interstate transport of the bomb, traveling in foreign commerce with intent to commit a crime of violence, making false statements to the INS, and conspiracy charges related to the bombing).

220. *See Nettles*, 476 F.3d at 512; *Salameh*, 261 F.3d at 274–75.

possession and its associated felonies is often difficult to predict, and the relationship is seldom analogous to that of gun possession and its associated felonies.²²¹ The explosives Ressam had stored in the trunk of his car did, in fact, bear some relationship to the false information he provided on his customs form, and Ressam lied precisely because the explosives were there.²²² Moreover, Ressam's carrying of the explosives was not an innocent act, and it cannot reasonably be said that Congress intended to excuse such acts because their relationship to an underlying charge does not conform to the facilitation standard.²²³ The dangerousness of the bomb was not diminished because "facilitation" was lacking. A statute must not be read to restrict sentencing for criminal activity that Congress clearly intended to punish.²²⁴ The purpose of § 844(h) is to prevent bombings,²²⁵ and such a purpose requires application of § 844(h) beyond instances in which the explosives were found to facilitate the underlying offense.

D. The Term "Carry" in Section 844(h)(2) Should Not Be Read So Broadly that It Produces Absurd Results

The definition of the term "carry" in § 844(h) is unclear. *Muscarello* failed to draw a bright line between the terms "carry" and "possess" and instead relied on the explicit relational element in § 924(c) to serve as the dividing line between the two terms.²²⁶ The fact that § 844(h) lacks such an element has prompted fears that if similar language is not read into § 844(h), prosecutions under the statute may run rampant.²²⁷ Defense briefs in *Ressam* cite examples, including prosecution of the unwitting farmer who carries dynamite to his farm to blow up tree stumps and commits an unrelated environmental felony during his trip.²²⁸ Another example cited in the defense briefs is the police officer prosecuted for carrying gunpowder in his licensed, loaded handgun

221. See *United States v. Ressam*, 474 F.3d 597, 600–01 (9th Cir. 2007).

222. *Id.*

223. See *supra* Part II.B.

224. See *United States v. Brown*, 333 U.S. 18, 26–27 (1948).

225. See *supra* Part II.B.

226. *Muscarello v. United States*, 524 U.S. 125, 137 (1998).

227. See Brief for the Defendant, *United States v. Ressam*, 474 F.3d 597 (9th Cir. 2007) (No. 05-30422), at 34.

228. *Id.*

while taking an unrelated bribe.²²⁹ These concerns are reminiscent of the recognition by the *Smith* court that the “in relation to” limitation in § 924(c) served to prevent prosecutions where the defendant used the firearm to scratch his head.²³⁰

The term “carry” should be limited so it does not encompass totally unrelated, non-malicious possession that Congress did not intend to criminalize.²³¹ The *Ressam* court, apparently recognizing this need, incorporated the “in relation to” language from § 924(c) to define the term “carry.”²³² The *Ivy* court similarly attempted to confine the term by holding that a defendant could be found to “carry” a bomb if it facilitated his crime.²³³ By contrast, *Jenkins* and *Rosenberg* chose not to draw discernible boundaries around the term “carry,” allowing it to become indistinguishable from mere possession.²³⁴

Whether the circuits’ approaches reflect Congress’s general intent in drafting § 844(h)—the prevention of bombings—is unclear.²³⁵ The facilitation standard imposed by *Ressam* and *Ivy* is too rigid to prosecute many cases in which a defendant carries explosives maliciously. The rationale in *Rosenberg* fails to discuss any boundaries on the term “carry” at all, thereby leaving open the possibility that mere possession will be criminalized.²³⁶

The term “carry” in § 844(h)(2) should be limited only by the absurd results doctrine. Courts retain the power to avoid plain language application of penal statutes when doing so would produce absurd results.²³⁷ This power is discretionary, and it does not provide defendants with an up-front assurance that they will never be charged with a violation of § 844(h)(2) when the underlying felony is totally unrelated.²³⁸ Prosecutors and courts must be able to apply § 844(h)(2) with some flexibility, however, and reliance on the absurd results

229. *Id.*

230. *Smith v. United States*, 508 U.S. 223, 232 (1993).

231. *See supra* Part II.B.

232. *United States v. Ressam*, 474 F.3d 597, 602–04 (9th Cir. 2007).

233. *United States v. Ivy*, 929 F.2d 147, 151 (5th Cir. 1991).

234. *United States v. Jenkins*, 229 F. App’x 362, 367 (6th Cir. 2005); *United States v. Rosenberg*, 806 F.2d 1169, 1177–79 (3d Cir. 1986).

235. *See supra* Part II.B.

236. *See Rosenberg*, 806 F.2d at 1177–79.

237. *See supra* Part I.C.

238. *Id.*

doctrine provides such flexibility.²³⁹ It is not always obvious or predictable how the possession of explosives will relate to felonious behavior, or when application of the statute will be appropriate to deter malicious possession.

Ultimately, we must rely on the sensibility of our judicial system, and trust that courts will refrain from statutory constructions that result in ten-year prison terms for people who blow up tree stumps with dynamite or who scratch their heads with guns. Given the fact that the Supreme Court has not interpreted the key terms of § 844(h)(2), and that the only existing definition of “in relation to” is the facilitation standard, the courts should not read “in relation to” into § 844(h)(2). Instead, courts should use the absurd results doctrine to prevent applications of the statute when the underlying felony is totally unrelated.

V. CONCLUSION

Courts should refrain from reading a rigid relational element into § 844(h)(2). The Supreme Court has read the analogous firearm statute broadly, and Congress has not amended § 844(h)(2) to include a relational element, though it has had the opportunity to do so. Congress is likely aware of the legal baggage associated with the words “in relation to” in the context of the firearm statute—specifically, the requirement that the weapon facilitate the underlying felony. By adding the “in relation to” element to § 844(h)(2), courts unnecessarily restrict the scope of the statute and leave unpunished those who commit felonies in furtherance of a bombing plot. The absurd results doctrine, although imperfect, is adequate to prevent the prosecution of defendants whose possession of explosives is totally unrelated to the underlying felony.

239. *Id.*