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**FEDERAL SENTENCING ENHANCEMENT:
MANDATORY PENALTIES FOR FIREARMS USE
UNDER THE COMPREHENSIVE CRIME
CONTROL ACT OF 1984**

The victims of violence are black and white, rich and poor, young and old, famous and unknown. They are most important of all human beings loved and needed. No one—no matter where he lives or what he does—can be certain who next will suffer from some senseless act of bloodshed. And yet it goes on in this country of ours. Why?

Robert Kennedy, after the
murder of Dr. Martin Luther
King, Jr.*

I. INTRODUCTION

Crime control is a national problem. In an attempt to alleviate some of the tensions in the federal criminal justice system, Congress enacted the Comprehensive Crime Control Act of 1984 (CCCA) on October 12, 1984.¹ The CCCA is an elaborate crime bill which encompasses issues such as bail reform, narcotics enforcement, forfeiture and sentencing. This Comment addresses section 924(c) of the CCCA which requires a mandatory sentence for carrying a firearm during the commission of a "crime of violence."²

Although section 924(c) was originally enacted in 1968,³ Congress

* 129 CONG. REC. E2715 (daily ed. June 6, 1983).

1. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1837. For legislative history and purpose of Pub. L. No. 98-473, see 1984 U.S. CODE CONG. & AD. NEWS 3182.

2. 18 U.S.C.A. § 924(c) (West Supp. 1985). Section 924(c) states:

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

3. 18 U.S.C. § 924(c)(1)-(2) (1982); *infra* note 20. The original § 924(c) was enacted as part of the Gun Control Act of 1968, but it was not included in the original Gun Control bill.

amended the statute in 1984 and included it in the CCCA because it found that the previous section was being misinterpreted by the courts.⁴ Under the current section 924(c), a defendant will be sentenced to an additional mandatory five or ten years in prison for carrying a firearm during a "crime of violence." Once a defendant is sentenced, parole is not permitted.⁵

One of the major problems presented in section 924(c) is that the term "crime of violence" is poorly defined. Title 18 U.S.C.A. § 16(b), which is part of the CCCA, defines a crime of violence as "any . . . offense that is a felony and that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."⁶ This ambiguous terminology has already led to conflicting decisions by several district courts on the same issue.⁷

There are other troublesome issues created by the new section 924(c). The statute applies to any person carrying or using a firearm "in relation to" a crime of violence—a phrase not yet defined by the courts.⁸ Section 924(c) also applies to some misdemeanors and crimes against property. Unfortunately, Congress did not sufficiently specify which misdemeanors or property crimes were meant to be included in section 924(c).⁹ Finally, the ambiguities created by section 924(c) may result in a judicial determination that the statute is unconstitutionally vague.¹⁰

This Comment analyzes the potential impact of section 924(c) and the problems it presents for both judges interpreting the statute and defendants who will be subject to its strict sentencing requirements. In order to put the enactment of section 924(c) into proper perspective, this Comment considers the historical background leading to the enactment of the CCCA, evaluates the purpose of the CCCA to clarify the motivations behind the current section 924(c), and scrutinizes the new statute

Instead, it was offered as an amendment on the House floor by Representative Poff. 114 CONG. REC. 22231 (1968). Because the provision was passed on the same day it was introduced on the House floor, it was not the subject of any legislative hearings or committee reports. 114 CONG. REC. 22248 (1968). See also *Simpson v. United States*, 435 U.S. 6, 13 (1978).

4. Congress wanted to ensure that the mandatory penalties under § 924(c) would be *additional* punishment rather than punishment running currently with other sentencing enhancement statutes. See *infra* notes 20-39 and accompanying text.

5. See *supra* note 2.

6. 18 U.S.C.A. § 16(b) (West Supp. 1985). See *infra* notes 91-92 and accompanying text.

7. See *infra* notes 93-110 and accompanying text.

8. See *infra* notes 120-25 and accompanying text.

9. See *infra* notes 118-19 and accompanying text.

10. See *infra* notes 126-52 and accompanying text.

and its accompanying definition of a crime of violence under current constitutional standards. Finally, a recommendation is included for Congress to redraft section 924(c) to ensure that the statute is applied only to those offenses which it was meant to address.

II. HISTORICAL BACKGROUND OF SECTION 924(C)

A. Escalating Crime

Congress' recognition of the escalating crime rate in the United States led to the enactment of the CCCA, and more specifically, to the creation of the current section 924(c). The Federal Bureau of Investigation's (FBI) annual *Uniform Crime Reports* for 1979¹¹ recorded an overall eleven percent rise in violent crimes over the previous year.¹² The 1980 statistics reported an overall eleven and one-tenth percent increase from the 1979 report.¹³

According to some statistical accounts, when Congress considered the proposed amendment to section 924(c), the nation was facing the highest rate of increase in violent crime since 1968.¹⁴ In fact, the recent amendment to section 924(c) appears to go hand in hand with the national perception in the years preceding the enactment of the CCCA that violent crime in the United States was increasing.¹⁵ The 1979 FBI "crime clock" indicated that there was one violent crime every twenty-seven seconds, one murder every twenty-four minutes, one forcible rape every seven minutes and one robbery every sixty-eight seconds.¹⁶ In 1980, the FBI reported that the number of violent crimes per 100,000 United States residents increased by eight and one-half percent from

11. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS* (1979) [hereinafter cited as 1979 UCR]. These crime reports provide published crime statistics from the nation's police departments.

12. *Id.* at 42.

13. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS* 42 (1980) [hereinafter cited as 1980 UCR].

14. *Accounting for Crime*, Wash. Post, May 5, 1981, at A17, col. 1.

15. The 1980 UCR stated: "Individually, all offenses within the Index rose in 1980. Among the violent crimes, murder increased 7 percent; forcible rape, 8 percent; robbery, 18 percent; and aggravated assault, 7 percent." 1980 UCR, *supra* note 13, at 38.

16. 1979 UCR, *supra* note 12, at 5. The 1979 UCR contained the following disclaimer about the "crime clock":

The crime clock should be viewed with care. Being the most aggregate representation of UCR data, it is designed to convey the annual reported crime experience by showing the relative frequency of occurrence of Index Offenses. This mode of display should not be taken to imply a regularity in the commission of the Part I Offenses; rather it represents the annual ratio of crime to fixed time intervals.

Id.

1979 to 1980.¹⁷ Although statistics based on reported crimes have inherent inaccuracies,¹⁸ these reports have a lasting impact on perception of crime in the community. It is therefore reasonable to infer that the nation's unrest over the increasing crime rate translated into congressional concern and a sense of urgency to make some changes in federal criminal law.¹⁹

B. Problems with the Original Section 924(c)

The original section 924(c) required a conviction for either the use or the *unlawful* carrying of a firearm during any felony.²⁰ The statute stated that in addition to the punishment provided for the felony itself, a defendant would be sentenced for no less than one year or more than ten years.²¹ The United States Supreme Court, however, decided that subsections 924(c)(1) and (2) could not be used to increase a defendant's sentence when the defendant was already receiving enhanced punishment

17. 1980 UCR, *supra* note 13, at 42.

18. Local police and sheriff departments have uneven reporting procedures. Additionally, the FBI's *Uniform Crime Reports* are compiled regardless of pertinent political pressures or changes in record-keeping which may result in specific crimes being either under or overreported. *Accounting for Crime, supra* note 14.

19. During his opening statement to the Senate Subcommittee on Criminal Law, Senator Mathais stated:

From 1979 to 1980, robberies increased 20 percent, rapes by 9 percent, aggravated assaults by 8 percent, murders by 7 percent. Serious crime thus has been increasing at a rate much faster than population growth, so you can't account for this just by the fact that there are more people.

The Constitution in its preamble states that one of the principal tasks of government is to "insure domestic tranquility." But as we look at this rate of violent crime, I think we have to assume that this is one area in which if we have not failed, we certainly are far from success.

Attorney General's Task Force on Violent Crime: Hearing Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 97-72, at 1 (1981) (statement of Sen. Mathais) [hereinafter cited as *Senate Hearing*].

20. 18 U.S.C. § 924(c)(1)-(2) (1982). The original § 924(c) stated:

Whoever—

(1) uses a firearm to commit a felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

Id.

21. *Id.*

for carrying a firearm under the state statute for the felony he committed.²²

For example, in *Simpson v. United States*²³ the defendants were prosecuted for committing two bank robberies with handguns.²⁴ A subsection of the bank robbery statute provided for additional punishment when the robbery was committed "by the use of a dangerous weapon or device."²⁵ The prosecutor contended that the court should also apply the original section 924(c) which imposed an enhanced penalty for any person using a firearm during the commission of a felony. The government therefore argued that the defendants in *Simpson* should be penalized under three different statutes: the bank robbery statute which provided up to a twenty year sentence for the commission of a bank robbery; the subsection of the bank robbery statute which enhanced the penalty for a bank robbery committed with a dangerous weapon up to twenty-five years; and the original section 924(c) which directed a court to sentence a defendant from one to twenty-five years for using a firearm during a federal felony.²⁶ The defendants were convicted by the district court for two separate bank robberies and were given consecutive terms of twenty-five years imprisonment on the robbery counts and ten years for the firearms counts.²⁷ During the sentencing proceedings, defense counsel argued that imposing cumulative penalties for the two offenses was impermissible because the charges under the subsection of the bank robbery statute should have been merged with the firearms charges.²⁸ The district court disagreed, holding that "the statutes and the legislative history indicat[e] an intention [by § 924(c)] to impose an additional punishment."²⁹ The court of appeals affirmed without a published opinion.³⁰

22. See, e.g., *Busic v. United States*, 446 U.S. 398 (1980) (defendant's sentence may only be enhanced under enhancement provision in statute defining felony he or she committed); *Simpson v. United States*, 435 U.S. 6 (1978) (defendant could not be sentenced under both enhanced punishment for using firearm during bank robbery and § 924(c)).

23. 435 U.S. 6 (1978).

24. *Id.* at 8-9.

25. *Id.* at 7. Title 18 § 2113(d) states:

Whoever, in committing, or in attempting to commit, any offense defined in . . . this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2113(d) (1982).

26. *Simpson*, 435 U.S. at 9.

27. *Id.*

28. *Id.* This subsection of the bank robbery statute provided an enhanced penalty for carrying a dangerous weapon. *Id.*

29. *Id.*

30. *Id.*

The Supreme Court reversed the district court decision and held that when a defendant was already receiving an enhanced penalty for using a firearm under a bank robbery statute, the original section 924(c) could not impose any additional punishment.³¹ Justice Brennan, writing for the Court, reasoned that the Court's decision was supported by the legislative history behind the original section 924(c) and established rules of statutory construction that require " 'ambiguity concerning the ambit of criminal statutes [to] be resolved in favor of lenity.' "³² Justice Brennan also noted that where a general statute and a specific statute speak to the same concern, precedence should be given to the terms of the more specific statute, even if the general provision was enacted later.³³

In a subsequent case, *Busic v. United States*,³⁴ the Supreme Court followed its decision in *Simpson*. The Court in *Busic* reasoned that prosecution and enhanced sentencing under the original section 924(c) could not be applied where the predicate statute authorized enhanced punishment for the use of a dangerous weapon.³⁵ The Court held that a defendant's sentence could only be enhanced under the enhancement provision in the statute defining the felony he committed.³⁶

Congress responded to these Supreme Court decisions by amending section 924(c) and making it clear that a court must sentence a defendant to an additional five or ten years, regardless of whether any other statutes require additional sentencing for the use of a firearm.³⁷ Furthermore, and in accord with the general sentencing reforms in the CCCA,³⁸ Congress imposed the requirement that a defendant sentenced under the new section 924(c) would not be eligible for either probation or parole.³⁹

31. *Id.* at 16.

32. *Id.* at 14-15 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Bass*, 404 U.S. 336, 347 (1971)). In considering the legislative history behind the original section 924(c), the Court quoted Representative Poff who introduced the amendment by saying that "[f]or the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sectio[n] . . . 2113 . . . concerning armed robberies of . . . banks" *Id.* at 13 (quoting 114 CONG. REC. 22232 (1968)).

33. *Id.* at 15 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973)).

34. 446 U.S. 398 (1980).

35. *Id.* at 404.

36. *Id.* at 399-400.

37. 18 U.S.C.A. § 924(c) (West Supp. 1985).

38. The sentencing provisions of the CCCA do away with parole, limit "good time" credits and establish a commission to set a narrow sentencing range for federal crimes. See, *Comprehensive Crime Control Act Makes Sweeping Changes In Federal Sentencing*, 36 CRIM. L. REP. (BNA) 2238 (Jan. 2, 1985) [hereinafter cited as *Sweeping Changes*].

39. 18 U.S.C.A. § 924(c) (West Supp. 1985); *supra* note 2.

C. *The New Section 924(c)*

1. The Task Force debate

Prior to the enactment of the CCCA, Attorney General Smith appointed a Task Force on Violent Crime to develop new methods for the federal government to combat violent crime.⁴⁰ The Attorney General stated that “[t]he need for a comprehensive crime control program is obvious. The scope of the crime problem is enormous, staggering even hardened observers. Serious crime will touch one-third of American households this year. It has almost become as inevitable as the proverbial death and taxes.”⁴¹ On October 23, 1981, in a hearing before the Subcommittee on Criminal Law of the Senate’s Judiciary Committee, the Attorney General expressed the Reagan Administration’s concern over increased occurrences of violent crime.⁴² He also recognized that the federal government could not usurp the states’ primary authority for combating crime within their own borders.⁴³ Attorney General Smith suggested that the best place to begin a new approach toward the apprehension of violent criminals was through comprehensive reform of the federal criminal codes.⁴⁴

One of the Task Force’s most significant recommendations was a mandatory sentence of imprisonment for the use of a firearm in the commission of a federal felony.⁴⁵ It considered the original section 924(c) and concluded that the language was problematic. The Task Force found that the original section 924(c) was drafted in such a way that a person could still be given a suspended sentence or be placed on proba-

40. *Senate Hearing, supra* note 19, at 1-2.

41. *Report of the Attorney General’s Task Force on Violent Crime: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 90, at 5 (1981)* [hereinafter cited as *House Hearings*].

42. *Senate Hearing, supra* note 19, at 43. Attorney General Smith called violent crime “one of the most serious social problems we face today.” He referred to crime statistics used by President Reagan in the President’s address to the International Association of Chiefs of Police. The Attorney General noted that these crime statistics showed that in 1980 “about one out of every three households in the country was victimized by some form of serious crime.” *Id.* He then projected that if the trend continued, within a few years “every family in America will personally experience the outrage of violent crime.” *Id.*

43. *Id.* at 45. The Attorney General noted that “states have primary authority for dealing with most crimes committed within their borders. . . . The federal government should not and cannot usurp the primary criminal justice authority of the states. But that does not mean each must go its separate way, paying no heed to how it might assist the other in such a matter of common concern.” *Id.*

44. *Id.* at 46. The Attorney General emphasized that the federal criminal laws are “a disorderly array of statutes that have been enacted haphazardly over the past two hundred years. Many are confusing, out-of-date, or unenforceable.” *Id.*

45. *Id.* at 61.

tion for his first violation of the section. Additionally, it concluded that the section was ambiguous as to whether a sentence for a first violation could run concurrently with the sentence for the underlying offense.⁴⁶ The Task Force on Violent Crime had a great influence on the creation of the section 924(c) which is now a part of the CCCA. Most of the recommendations made by the Task Force were adopted verbatim in the current section 924(c).⁴⁷

In November of 1981, the Task Force presented a Report on Violent Crime to the Subcommittee on Crime of the House Committee on the Judiciary.⁴⁸ The Task Force's report included the recommendation previously made to the Senate of a mandatory sentence for carrying a firearm during the commission of a federal felony.⁴⁹ In the commentary following the recommendation, the Task Force included statistics which stated that in 1978 firearms were used in 307,000 offenses of murder, robbery and aggravated assault reported to the police.⁵⁰ The report added that every year approximately 10,000 Americans are murdered by criminals using handguns.⁵¹

As might be expected, the Task Force's recommendation of a mandatory penalty for criminals carrying firearms was met with substantial opposition in the legal community. The National Council on Crime and Delinquency (NCCD) opposed many of the Task Force's recommen-

46. *Id.*

47. In the Hearing before the Senate Committee on the Judiciary, the Task Force report stated:

[W]e will strongly support mandatory minimum sentences for the use, display, or possession of a firearm during and in relation to the commission of a federal crime of violence as part of the Criminal Code Reform bill. Such a sentence will be required to run consecutively to any other term of imprisonment and the defendant will not be eligible for probation. Parole will be eliminated as it is for all offenses under the new Code.

Id. at 62.

48. See *House Hearings, supra* note 41, at 316-414.

49. One notable difference is that in the House Hearing recommendation the term "crime of violence" was not used. Instead, the Task Force recommended that "[t]he Attorney General should support or propose legislation to require a mandatory sentence for the use of a firearm in the commission of a *federal felony*." *Id.* at 350 (emphasis added). No explanation is offered for the change in wording between the Senate and the House Hearings. However, the Task Force recommendation to the House Committee appeared to be paraphrasing the recommendation given to the Senate Committee where the term "crime of violence" was used. Failure to use the words "crime of violence" in the recommendation to the House Committee could therefore have been due to word economy or oversight. *Id.* See *supra* note 47.

50. *House Hearings, supra* note 41, at 351 (citing FED. BUREAU OF INVESTIGATION, U.S. DEPT' OF JUSTICE, CRIME IN THE UNITED STATES 1978 (1979) [hereinafter cited as CRIME IN THE UNITED STATES]).

51. *Id.* (citing CRIME IN THE UNITED STATES, *supra* note 50, at 12).

dations.⁵² Although the NCCD did not address the particular proposed changes in section 924(c), it did make general comments on the Task Force's sentencing provisions, which were to be a part of the proposed criminal code reform.⁵³

The NCCD agreed that numerous federal laws needed reform, but it did not support many of the specific solutions advocated by the Attorney General's Task Force.⁵⁴ The NCCD expressed concern with mandatory sentences which would increase the number of inmates in an already overcrowded prison system.⁵⁵ The report emphasized that where mandatory sentences for serious crime had gone into effect, both time served and incarceration rates increased.⁵⁶ The NCCD added that the Task Force's intentions to keep violent criminals in jail could backfire because "[t]he more severe the penalty, the more unlikely that it will be imposed."⁵⁷

Finally, the NCCD criticized the Task Force's failure to consider the sources of criminal violence. It quoted a *New York Times* article which stated:

If every person who has already committed a violent crime could be identified and convicted today, sent to prison tomorrow, and kept there for life, and nothing else was done, a new group of violence-prone persons soon would rise from the same economic, social, legal, psychological, and class conditions that produced their predecessors.⁵⁸

In a letter to the Attorney General, the Task Force itself conceded that "[w]e have not addressed the many social and economic factors that . . . may tend to increase or decrease crime rates."⁵⁹

The American Bar Association (ABA) presented the House Subcommittee on Crime with the ABA policy regarding the various Task Force recommendations.⁶⁰ The ABA opposed the Task Force's sentencing proposal for the use of a firearm in the commission of a federal felony, commenting that it opposed mandatory sentences, but urged

52. D. GORDON, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, DOING VIOLENCE TO THE CRIME PROBLEM: A RESPONSE TO THE ATTORNEY GENERAL'S TASK FORCE (1981).

53. *Id.* at 5-11.

54. *Id.* at 1-2.

55. *Id.* at 6.

56. *Id.* at 8.

57. *Id.* at 9 (citing J. WILSON, THINKING ABOUT CRIME 201 (1977)).

58. *Id.* at 14 (quoting Wicker, *How to Revulse the Public*, N.Y. Times, Aug. 21, 1981, at A31, col. 6).

59. D. GORDON, *supra* note 52, at 14.

60. *House Hearings, supra* note 41, at 73.

"severe penalties" for use of a firearm in the commission of a crime.⁶¹ Other legal groups criticized the Task Force's recommendation to impose a mandatory sentence for the use of a firearm during a federal felony.⁶² Criticisms included the effect it would have on the sentencing discretion usually employed by federal judges,⁶³ the inability to consider each individual defendant on a case by case basis⁶⁴ and the aggravation of prison overcrowding.⁶⁵

2. The Comprehensive Crime Control Act and its effect on the enactment of the new section 924(c)

Although a detailed analysis of the history behind the CCCA is beyond the scope of this Comment,⁶⁶ some background on the Act is necessary to understand the motivations behind the amended section 924(c). The first significant effort toward updating the federal criminal codes began in 1975.⁶⁷ Between 1975 and 1984, Congress was reluctant to make any radical changes in the federal criminal codes and chose instead to maintain the status quo. One of the major problems, and the one most pertinent to this discussion, was Congress' reluctance to create drastic sentencing reforms.⁶⁸ However, many of the concepts disfavored in the 1970's appear in the new act.⁶⁹ The CCCA eventually passed because it received persistent bipartisan support.⁷⁰ Both parties in Congress became increasingly concerned with the growing unrest over the nation's rising crime rate.⁷¹ As a result, the sentencing reforms which once were major obstacles to criminal code reform gained increasing support from

61. *Id.*

62. In the Appendix to the Senate Hearings with the Attorney General's Task Force, there were various letters from law firms and criminal law groups expressing either their support or their criticisms of the Task Force's recommendations. *Senate Hearing, supra* note 19, at 79-88 app.

63. *Id.* at 80.

64. *Id.*

65. *Id.* at 86.

66. In a recent synopsis of the CCCA, one author wrote that "[t]he sheer bulk of the CCCA makes it an unlikely candidate for browsing. Its intricacies and scope suggest that it will be the subject of elucidation and litigation for years to come." Cohen, *Special Feature: An Introduction to the New Federal Crime Control Act*, 21 CRIM. L. BULL. 330 (1985).

67. See Sears, *A Synopsis of the Comprehensive Crime Control Act of 1984*, 14 COLO. LAW 183 (1985).

68. *Id.* at 183.

69. *Id.*

70. *Id.* See also 129 CONG. REC. S11366 (daily ed. Aug. 2, 1983); 22 AM. CRIM. L. REV. 707, x (1985).

71. A special Task Force was assigned to inform Congress on violent crime. Hearings were held with the Attorney General's Task Force on Violent Crime, where facts and statistics

previously reluctant members of Congress.⁷²

The sentencing reform provisions in the CCCA have been called "the most dramatic and important reforms in the entire crime package."⁷³ Senator Kennedy, in a foreword to a recent symposium on the CCCA, stated that "[t]he existing federal sentencing structure [was] a non-system and a national disgrace."⁷⁴ The Senator emphasized that a primary focus of the sentencing reform was to end gross disparities in sentencing by developing uniform sentencing for federal crimes, while not jeopardizing any citizen's constitutional rights and liberties.⁷⁵

The passage of the CCCA was said to be "as much a victory for the Republicans as for the Democrats, for Congresses all the way back to 1967, for Attorneys General from Robert Kennedy and Ramsey Clark to Griffin Bell and William French Smith, and for Presidents from Lyndon Johnson to Ronald Reagan."⁷⁶ It would, however, be inaccurate to label the CCCA an across-the-board victory to every constituency. While it will be several years before the CCCA's effect will be realized, various legal groups opposed numerous provisions from their inception.⁷⁷

The Reagan Administration strongly supported the enactment of a new and tougher federal criminal code.⁷⁸ On March 16, 1983, President Reagan presented Congress with a legislative proposal entitled the Comprehensive Crime Control Act of 1983.⁷⁹ President Reagan emphasized that his administration was interested in "improv[ing] the efficiency and coordination of Federal law enforcement, with special emphasis on violent and drug-related crime."⁸⁰ The President then added that "[i]f the forces of law are to regain the upper hand over the forces of crime, ensuring that criminals are convicted and put and kept behind bars, basic legislative changes are needed."⁸¹ It is in this political temperament that the

were cited. Apparently, Congress felt the need to react by creating the CCCA, and more specifically, § 924(c). See *Senate Hearing, supra* note 19; *House Hearings, supra* note 41.

President Reagan also addressed his concerns to Congress about escalating crime. He stressed the need for a comprehensive crime act. 129 CONG. REC. S3160 (daily ed. Mar. 17, 1983).

72. See *Sears, supra* note 67.

73. Kennedy, *Foreword*, 22 AM. CRIM. L. REV. 707, vii (1985). See, e.g., *Criminal Code Hearings on S. 1630: Hearings Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess.*, pt. XVI at 11760, 11765 (1981).

74. Kennedy, *supra* note 73, at ix.

75. *Id.* at ix-x.

76. *Id.* at x.

77. See *supra* notes 52-65 and accompanying text.

78. See *supra* note 71.

79. See 129 CONG. REC. S3161 (daily ed. Mar. 17, 1983).

80. *Id.* at S3160.

81. *Id.*

Comprehensive Crime Control Act of 1984 was eventually passed; moreover, its intended severity permeates the entire Act.

Much of the commentary and recent writings on the CCCA address the sentencing reforms in Title II of the Act. Even though section 924(c) is included in Title X of the CCCA, which deals with miscellaneous violent crimes, the considerations and motivations behind the sentencing provisions apply to section 924(c) as well. In Title II of the CCCA Congress sought to achieve various sentencing reforms which are consistent with the creation of the current section 924(c). Congress established an independent sentencing commission to promulgate detailed sentencing guidelines.⁸² These sentencing guidelines are not just advisory; the federal courts are required to follow them.⁸³ The mandatory five to ten year sentence requirement in section 924(c) is consistent with Congress' goal of limiting a judge's discretion in imposing sentences.

Title II also abolishes the parole commission⁸⁴ and curtails "good-time release," by making its accrual more definite and less discretionary. These changes are meant to result in more predictable prison terms. Congress' strict approach toward parole provisions in Title II is apparent in section 924(c) which forbids parole. Finally, the mandatory penalties in section 924(c) are consistent with the many mandatory sentencing guidelines in Title II.

3. The amendments

The changes in section 924(c) were not solely due to congressional disapproval of its interpretation by the courts. A major difference between the old and the new statute is in its severity. Section 924(c) now imposes a mandatory five year sentence for a first offense and ten years for a second offense.⁸⁵ Once a defendant is sentenced, parole is no longer permitted.⁸⁶ Unlike the original statute, the current section 924(c) does not require the *carrying* of a firearm during an offense be unlawful. The previous section 924(c) also gave federal judges more discretion by allowing them to choose sentences between one and ten years for first offenders and two to twenty-five years for second offenders.⁸⁷ Additionally, the original statute did not forbid parole.⁸⁸

82. 28 U.S.C.A. § 991 (West Supp. 1985).

83. *Id.* See also, 28 U.S.C.A. § 994(a) (West Supp. 1985).

84. 18 U.S.C.A. § 3583 (West Supp. 1985) (does not take effect until 1991).

85. 18 U.S.C.A. § 924(c) (West Supp. 1985); *supra* note 2.

86. 18 U.S.C.A. § 924(c) (West Supp. 1985); *supra* note 2.

87. 18 U.S.C. § 924(c)(1)-(2) (1982); *supra* note 20.

88. 18 U.S.C. § 924(c)(1)-(2) (1982); *supra* note 20.

An important substantive change in section 924(c) is that a defendant can no longer be sentenced for carrying a firearm during any felony,⁸⁹ instead, he can be sentenced only if he carried a firearm during a crime of violence.⁹⁰ On its face, this appears to be more lenient than the previous section. However, it will become apparent through further analysis that the current section 924(c) encompasses a broader number of crimes and is therefore more strict than the original section.

III. CRITICISM OF THE AMENDED SECTION 924(C)

A. *Conflicting Court Decisions Concerning Narcotics Crimes*

A major problem with the current section 924(c) is not in its intended severity, but with its imprecision. Title 18 U.S.C.A. § 16, which was enacted as part of the CCCA, defines the term "crime of violence" as:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.⁹¹

Section 16(b) exposes the definition of a violent crime to many varied interpretations. It was created to apply specifically to the various statutes in the CCCA which require a finding of a crime of violence prior to imposing a sentence.⁹² Because of the recent origin of the CCCA, there are very few published opinions dealing with the current section 924(c).

89. 18 U.S.C. § 924(c)(1)-(2) (1982); *supra* note 20.

90. 18 U.S.C.A. § 924(c) (West Supp. 1985); *supra* note 2.

91. 18 U.S.C.A. § 16(b) (West Supp. 1985).

92. The following are examples of other statutes within the CCCA (codified in various Titles of U.S.C.A.) which also use the term "crime of violence."

Section 3142(f) pertains to the release or detention of a defendant pending trial. Subsection (f)(1) states that a detention hearing must be held in a case: "upon motion of the attorney for the Government, that involves—(A) a crime of violence . . ." 18 U.S.C.A. § 3142(f) (West Supp. 1985).

Section 994(h), which deals with the duties of the sentencing commission, states: "The Commission shall assure that the guidelines will specify a sentence to a term of imprisonment at or near the maximum . . . [where] the defendant . . . —(1) has been convicted of a felony that is—(A) a crime of violence . . ." 28 U.S.C.A. § 994(h) (West Supp. 1985).

Section 5038(d), which describes the use of juvenile records, states: "Whenever a juvenile is found guilty of committing an act which if committed by an adult would be a felony that is a crime of violence . . . such juvenile shall be fingerprinted and photographed." 18 U.S.C.A. § 5038(d) (West Supp. 1985).

The fact that the term "crime of violence" is used elsewhere in the CCCA only strength-

In *United States v. Rivera*,⁹³ a New York district court found that carrying a firearm during a narcotics transaction constituted a crime of violence under the current section 924(c).⁹⁴ The court recognized that the amended section 924(c) excluded nonviolent felonies from its sentencing requirements.⁹⁵ The court nevertheless concluded that "Congress intended that the new § 924(c) should apply to offenses where physical force is likely to be involved, whether or not it is an element of the crime, as opposed to the old statute where any felony triggered the statute."⁹⁶ The *Rivera* court further reasoned that "firearms are the tools of the narcotics trade" and that narcotics felonies, by their nature, involve substantial risk that force will be used within the meaning of section 924(c).⁹⁷ In *United States v. Rosado*,⁹⁸ the same district court confirmed its holding in *Rivera* by reemphasizing that narcotics transactions are crimes of violence. The court, in a one page opinion, held that the defendant in *Rosado* "offer[ed] no compelling reasons for [it] to reconsider its position and conclusion in *Rivera*."⁹⁹

In *United States v. Jernigan*,¹⁰⁰ a district court held that possession with intent to distribute cocaine was *not* a crime of violence within the meaning of section 924(c).¹⁰¹ The court considered section 16(b)'s language, which includes in its definition of a crime of violence, any felony which by its nature involves a substantial risk that physical force against

ens the argument that the definition of a crime of violence provided in 18 U.S.C.A. § 16 must be clarified.

93. No. SS 85 Cr. 33 (S.D.N.Y. May 7, 1985), *rev'd sub nom.* *United States v. Diaz*, 778 F.2d 86 (2d Cir. 1985).

94. *Id.* at 4.

95. *Id.*

96. *Id.*

97. *Id.* at 3. The *Rivera* court's conclusion that firearms are the "tools of trade" is not unfounded. A synopsis of narcotics related violent incidents was recently compiled by the Bureau of Alcohol, Tobacco, and Firearms (ATF). Internal Memoranda, Intelligence Branch, Bureau of Alcohol, Tobacco, and Firearms, Dep't of Treasury, Assessment Report on Drugs/Narcotics-Related Violence (May 16, 1985) (Special Agent in Charge, Joseph J. Vince, Jr.). The ATF memoranda indicated the following: (1) there is a close relationship between narcotics trafficking and violence of all kinds; (2) almost all the violence committed by narcotics dealers is committed with firearms; (3) the most commonly used firearm in narcotics is the handgun; (4) the use of firearms in drug/narcotic related murders is 22.7% higher than the national average use of firearms during the commission of murder; (5) the use of handguns in narcotics related murders increased over the last few years; (6) while fewer law enforcement officers were killed nationwide in 1983 in the line of duty, there is an increased likelihood that a law enforcement officer would be killed in connection with the apprehension of persons or seizure of evidence for narcotic/drug offenses. *Id.*

98. No. S 85 Cr. 340 (S.D.N.Y. Sept. 17, 1985).

99. *Id.*

100. 612 F. Supp. 382 (E.D.N.C. 1985).

101. *Id.* at 384.

the person or property of another may be used in the course of the offense. The *Jernigan* court reasoned that Congress did not intend to include possession with intent to distribute cocaine under the definition provided in section 16(b).¹⁰²

The most comprehensive discussion by a court of section 924(c) and section 16(b) is found in *United States v. Bushey*.¹⁰³ Like *Jernigan*, the court in *Bushey* found that narcotics distribution was not a crime of violence. The court also recognized that section 16(b)'s language is "far from clear."¹⁰⁴ In *Bushey*, the court reasoned that "even assuming that firearms and narcotics distribution are a common combination, that does not mean that narcotics distribution *by its nature* involves such a risk."¹⁰⁵

The court added that it must consider the underlying offense of narcotics distribution rather than the "totality of the circumstances which might incidently include the use or carrying of a firearm."¹⁰⁶ The *Bushey* court conducted a detailed examination of section 924(c)'s legislative history and found that narcotics distribution was not among the crimes Congress intended to designate as a crime of violence.¹⁰⁷ The court also followed the rule of strict construction of penal statutes and held that ambiguities must be resolved in favor of a defendant.¹⁰⁸ After *Bushey*, the Second Circuit Court of Appeals reversed the *Rivera* opinion.¹⁰⁹ The court of appeals followed the *Bushey* decision and held that narcotics transactions could not be considered a crime of violence.¹¹⁰

The *Rivera* court came to the opposite conclusion of the *Jernigan* and *Bushey* courts on the same exact issue. These incompatible results in the district courts demonstrate that section 924(c), and its accompanying definition of a crime of violence, are unclear about the crimes they encompass and therefore create conflicting decisions regarding the same offenses.

B. Problems in Applying the Definition of a Crime of Violence to Section 924(c)

1. Creation of circular arguments

Because of the broad definition of a crime of violence in section

102. *Id.* at 383-84.

103. 617 F. Supp. 292 (D. Vt. 1985).

104. *Id.* at 294.

105. *Id.* (emphasis in original).

106. *Id.* at 296.

107. *Id.* at 295-96.

108. *Id.* at 298.

109. *United States v. Diaz*, 778 F.2d 86 (2d Cir. 1985).

110. *Id.* at 88.

16(b), courts are free to apply section 924(c) to crimes which perhaps were not meant to fall under the section's stiff sentencing requirements. The court in *United States v. Rivera*¹¹¹ cannot be faulted for its interpretation of a crime of violence. The reasoning it employed was consistent with the language in section 924(c) and the definition of a crime of violence in section 16(b).¹¹² Congress may approve of the result in *Rivera*,¹¹³ because one of Congress' major concerns when enacting the CCCA was the escalating dangers associated with narcotics traffickers.¹¹⁴

The *Rivera* court found that because narcotics dealers used firearms as "tools of trade," they created a substantial risk that force would be used. The court therefore reasoned that the defendant could be sentenced under section 924(c).¹¹⁵ However, many crimes involve firearms as "tools of trade." Courts could decide that *any* crime where a defendant carries a firearm creates a substantial risk that force will be used, and hold that section 924(c)'s mandatory penalties apply. Virtually every felony during which a firearm is used or carried creates a substantial risk of

111. No. SS 85 Cr. 33, slip op. (S.D.N.Y. May 7, 1985), *rev'd sub nom.* *United States v. Diaz*, 778 F.2d 86 (2d Cir. 1985).

112. The *Rivera* court simply applied the language of section 16(b) and concluded that narcotics transactions create a substantial risk that force will be used. *Id.* at 4. Congress gave the court the freedom to so interpret the statute by drafting it so broadly.

There is however some indication in § 924(c)'s legislative history that narcotics crimes were not intended to fall under the amended § 924(c). In a senate report, the drafters stated that § 924(c) would no longer apply to nonviolent felonies. The drafters maintained that this change would have little practical effect since the former version was "not frequently utilized in situations in which the associated offense is not a 'crime of violence' as defined herein." S. REP. NO. 307, 97th Cong., 1st Sess. 888-89 (1981).

In a footnote, the senate report cited two examples where the previous § 924(c) was used when the offense was not clearly a crime of violence. The two examples cited in the footnote were both cases where a defendant was sentenced under the original § 924(c) for possession of narcotics with intent to distribute. *Id.* at n.43 (citing *United States v. Bower*, 575 F.2d 499 (5th Cir.), *cert. denied*, 439 U.S. 983 (1978), and *United States v. Dixon*, 558 F.2d 919 (9th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978)).

113. In the hearings before the House Subcommittee on Crime, the Attorney General's Task Force claimed that "[o]f all crimes committed today narcotics trafficking is without a doubt the most harmful to our society. . . . Narcotics trafficking frequently involves violence; it invariably breeds violence; it unquestionably causes acute misery, and in many instances death." *House Hearings*, *supra* note 41, at 12.

The Task Force's influence on the enactment of the CCCA is evident from the numerous recommendations which Congress adopted in the CCCA. The Task Force discussed crimes such as narcotics transactions which did not have violence as an element in its description of violent crimes. This could have been the reason that § 16(b) defined a crime of violence in such broad terms. Additionally, much of the CCCA addresses narcotics crimes. *See Comprehensive Crime Control Act of 1984*, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1837.

114. *Id.* at Titles III & V.

115. *Rivera*, No. SS 85 Cr. 33, slip op. at 3-4. *See supra* note 97 and accompanying text.

injury. Congress' apparent intent that section 924(c) apply to only certain types of crimes, or "crimes of violence," would be meaningless under such an interpretation. If Congress intended to create a mandatory penalty for *any* crime where a firearm was used, then it should have expressly stated so in the language of the statute.

The varied number of interpretations of section 924(c) may result in repeated ad hoc decisions in which one court construes one crime as violent, while another court does not. The CCCA intended to create uniform sentencing provisions to avoid the imposition of different jail terms for the same crime.¹¹⁶ Yet, if one judge determines that narcotics crimes are crimes of violence while other judges do not, then Congress' intent for a uniform sentencing statute fails.

Close scrutiny of section 16(b) reveals a dangerously broad leeway afforded to the courts in interpreting the term crime of violence. First, section 16(b) states that a crime of violence can be "any . . . offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used"¹¹⁷ The wording of this part of the statute can result in the creation of circular arguments. The definition does not specify whether the crime itself must be violent or if by simply carrying a weapon during the course of an offense a defendant creates a substantial risk of violence. This becomes an important distinction when one considers the gravity of the penalty. Additionally, by changing the statute to include a mandatory penalty for carrying a firearm during a crime of violence, instead of during any federal felony, Congress allows courts to determine what constitutes a crime of violence for offenses ranging from misdemeanors to felonies.

2. Crimes against property

Another troubling part of section 16 is that it not only covers offenses which involve physical force against people, but it includes crimes against property. Both subsections 16(a) and 16(b) state that a crime of violence can be found when there is a threat of force against "the person or *property* of another."¹¹⁸ Under this definition, a person carrying a gun while stealing a car stereo from an unoccupied car could be sentenced to five or ten years in prison without the possibility of parole.

Carrying a firearm on Capitol grounds is a federal felony.¹¹⁹ Therefore, a security guard carrying a firearm on Capitol grounds without au-

116. See *Sweeping Changes*, *supra* note 38, at 2238.

117. 18 U.S.C.A. § 16(b) (West Supp. 1985).

118. 18 U.S.C.A. § 16(a) & (b) (West Supp. 1985) (emphasis added).

119. 40 U.S.C. §§ 193f(a), 193h(a) (1982).

thorization could theoretically be sentenced under section 924(c). Admittedly, it is unlikely that a judge would find either the intentional or the accidental carrying of a firearm on federal grounds a crime of violence. However, if a judge determines that the carrying of a gun in and of itself creates a substantial risk that force will be used, then a person could be sentenced under section 924(c).

3. "[A]nd in relation to"

The language in section 924(c) also creates ambiguities because of its declaration that a defendant who "during and in relation to any crime of violence . . . uses or carries a firearm"¹²⁰ will receive enhanced sentencing. The Justice Department's Handbook on the CCCA¹²¹ analyzed the above wording. In a footnote, the Handbook explains that the phrase "and in relation to" was originally incorporated in antecedent legislation which was not limited to violent offenses.¹²² The phrase was prompted by the concern that, without such a limitation, a person committing tax fraud in his home while in possession of a weapon might be found subject to a mandatory penalty.¹²³

The Handbook emphasizes that the phrase—"and in relation to"—"should be understood as meaning only that the carrying of a weapon must have some relation to the commission of the offense."¹²⁴ However, if a judge found that carrying a gun *during* an Internal Revenue Service investigation for tax fraud created a "substantial risk" that force may be used, and the defendant carried the gun "in relation to" the investigation, the defendant could conceivably be sentenced to a mandatory penalty under section 924(c). Congress would most likely disapprove of this result. As the court in *United States v. Bushey*¹²⁵ emphasized, it is important to consider the underlying offense to determine if that offense is likely to involve violence, rather than finding that the carrying of a firearm during the crime creates the risk of injury.

As is evident from the above discussion, the definition of a crime of violence can simply be a matter of interpretation. Supporters of section 924(c) may argue that most statutes require some degree of interpretation by courts. Their criticism would not be unfounded. However, if

120. 18 U.S.C.A. § 924(c) (West Supp. 1985); *supra* note 2.

121. U.S. DEP'T OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND OTHER CRIMINAL STATUTES ENACTED BY THE 98TH CONGRESS (1984) [hereinafter cited as HANDBOOK]. See also *United States v. Stewart*, 779 F.2d 538 (9th Cir. 1985).

122. HANDBOOK, *supra* note 121, at 106 n.1.

123. *Id.*

124. *Id.*

125. 617 F. Supp. 292, 300 (D. Vt. 1985).

Congress seeks to impose mandatory penalties without the possibility of parole, precision in drafting is critical.

C. *Constitutional Implications*

1. Does section 924(c) provide a defendant sufficient notice?

Because section 924(c) and its accompanying definition of a crime of violence are poorly drafted, the statute could be found to be unconstitutionally vague. The vagueness issue arises because a defendant may not be aware that the offense committed can also result in an enhanced penalty. For example, although a person carrying a firearm during a narcotics transaction knows that selling drugs is illegal, he or she may not be "on notice" that a narcotics transaction may also be considered a crime of violence which imposes section 924(c)'s mandatory penalties. A court which scrutinizes the language in sections 924(c) and 16(b) will have to decide whether a statute which is vague because of the penalties it creates for certain crimes is unconstitutionally vague; even though the defendant knows that the underlying offense is illegal.

The fourteenth amendment's due process doctrine concerning vague statutes incorporates notions of fair notice or warning and requires legislatures to set reasonably clear guidelines for triers of fact in order to avoid " 'arbitrary and discriminatory enforcement.' " ¹²⁶ Before an accused is punished, the crime of which he is accused must clearly appear within the statute, ¹²⁷ otherwise a defendant's due process rights may be violated. ¹²⁸ If a court is allowed to disregard the statutory elements of

126. *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (wearing cloth patch of American flag sewn to seat pocket of pants did not clearly fall within flag misuse statute) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

127. *United States v. Resnick*, 299 U.S. 207, 210 (1936) (defendant could not be sentenced under agricultural criminal statute which did not specifically prohibit the offense).

128. The fourteenth amendment provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

The United States Supreme Court has reasoned that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). In another opinion the Supreme Court recognized:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Conally v. General Constr. Co., 269 U.S. 385, 391 (1926) (citations omitted).

The conflicting decisions by several district court judges under the current § 924(c)

the crime and decide that any given offense is a crime of violence, a defendant will not know whether the crime of which he is accused falls within the meaning of the statute.

The United States Supreme Court has held that "[s]tatutes will not be read to create crimes . . . unless the purpose so to do is plain."¹²⁹ Traditionally, a defendant "is not to be subjected to a penalty unless the words of a statute plainly impose it."¹³⁰ Section 924(c) appropriately applies to felonies which have violence as an element of the offense.¹³¹ However, the statute also includes misdemeanors which have physical violence as an element and felonies which create a substantial risk that force will be used.¹³² Because section 924(c) may not give enough notice to defendants, and because it allows the courts too much discretion in the determination of a crime of violence,¹³³ it may be found to be unconstitutionally vague.

For example, in *Kolender v. Lawson*,¹³⁴ the United States Supreme Court held that a California loitering statute requiring "'credible and reliable'" identification at police request was unconstitutionally vague.¹³⁵ The Court reasoned that police officers were afforded too much discretion in determining whether identification was credible and reliable. Writing for the Court, Justice O'Connor stressed that "where a statute imposes criminal penalties, the standard of certainty is higher."¹³⁶ She also noted that public concern with curbing criminal activity does not justify failure to meet constitutional standards for definiteness and clarity.¹³⁷ The facts of the *Lawson* case may not directly correspond to a section 924(c) analysis, but the Court's reasoning on the vagueness doctrine is analogous. Congress has the right to address public concern over the use of firearms during certain crimes, but not at the expense of clarity.

The Supreme Court has also reasoned that "[t]he vice of vagueness in criminal statutes is the treachery they conceal either in determining

demonstrate that even persons who are legally trained and experienced may differ in the application and interpretation of the term "crime of violence." See *supra* notes 93-110 and accompanying text.

129. *United States v. Noveck*, 271 U.S. 201, 204 (1926).

130. *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971) (quoting *Keppel v. Tiffin Sav. Bank*, 197 U.S. 356, 362 (1905)).

131. 18 U.S.C.A. § 16(a) (West Supp. 1985).

132. 18 U.S.C.A. § 16(a)-(b) (West Supp. 1985).

133. See *supra* notes 91-92 and accompanying text.

134. 461 U.S. 352 (1983).

135. *Id.* at 353 (citing CAL. PENAL CODE § 647(e) (West 1970)).

136. *Id.* at 358-59 n.8 (citing *Winters v. New York*, 333 U.S. 507, 515 (1948)).

137. *Id.* at 361 (citing *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)).

what persons are included or what acts are prohibited.”¹³⁸ The Court is nevertheless reluctant to find federal statutes void for vagueness. In *Parker v. Levy*,¹³⁹ the Court reasoned that in view of the presumptive validity of an act of Congress, statutes are not automatically void as vague simply because it is difficult to determine whether certain marginal offenses fall within their language.¹⁴⁰ It would, however, be difficult to support an argument that narcotics transactions are merely marginal offenses and that the uncertainty of whether they fall under section 924(c) is insubstantial. The regulation of narcotics transactions is a fundamental area of concern for both state and federal governments that deserves specific attention.

The Supreme Court further demonstrated its distaste for finding federal statutes unconstitutionally vague in *United States v. Powell*.¹⁴¹ In *Powell*, the Court upheld as constitutional a statute prohibiting the mailing of pistols, revolvers and “other firearms capable of being concealed on the person.”¹⁴² Justice Rehnquist, writing for the Court, emphasized that just because Congress could have chosen more precise language does not mean that the statute is vague.¹⁴³

A state supreme court considering language similar to that used in section 924(c) concluded that the comparable terms were not vague. In *People v. Lloyd*,¹⁴⁴ the Illinois Supreme Court held that there was sufficient certainty in the terms “violence or any other unlawful means,” “crime and violence” and “force or violence or physical injury to person or property.”¹⁴⁵ The Illinois statute declared it unlawful for any person to advocate by “crime and violence” the overthrow of the United States government. The court reasoned that “[i]t must be clear to any one examining this statute that the General Assembly could not enumerate all the unlawful means . . . for overthrowing a government, and so it used the general terms . . . to make punishable the advocacy of the overthrow of the existing government.”¹⁴⁶

The vagueness problems presented in *Lloyd* are distinguishable from the ambiguities in sections 924(c) and 16(b). The difference is that in

138. *United States v. Cardiff*, 344 U.S. 174, 176 (1952) (statute failed to give factory owner fair warning of criminal nature of his failure to give consent and was therefore too vague for judicial enforcement).

139. 417 U.S. 733 (1974).

140. *Id.* at 757 (citations omitted).

141. 423 U.S. 87 (1975).

142. *Id.* at 90, 93-94.

143. *Id.* at 94.

144. 304 Ill. 23, 136 N.E. 505 (1922).

145. *Id.* at 34, 136 N.E. at 512.

146. *Id.*

drafting sections 924(c) and 16(b), Congress *provided* a definition for a crime of violence. Because the definition given under section 16(b) is poorly drafted, it may be found unconstitutionally vague as applied to section 924(c). Section 16 was enacted to define a crime of violence; yet section 16(b) encompasses crimes which do not have violence as an element. The overly broad definition of a crime of violence provided in section 16(b) permits courts to sentence a defendant under section 924(c) for any felony which they find involves a substantial risk of force. The broad discretion afforded federal judges to interpret the definition of a crime of violence under section 16(b) creates an avenue for defendants to attack section 924(c) as unconstitutionally vague. Additionally, unlike the circumstances in *Lloyd*, it would not be as burdensome for Congress to list the felonies without physical force as an element which could be considered crimes of violence, as it would be for Congress to enumerate all the unlawful ways to overthrow a government.

Even though the Supreme Court seems to give special consideration to criminal statutes challenged for vagueness,¹⁴⁷ the Court does not require perfect clarity. In *Boyce Motor Lines, Inc. v. United States*,¹⁴⁸ the Court noted that "no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."¹⁴⁹ A challenge for vagueness under sections 924(c) and 16(b) creates the following analytical problem. Under section 924(c) a person will be sentenced for carrying a firearm during a crime of violence. Generally, the defendant will know that the *underlying* offense violates the law. A court must now decide if a defendant is entitled to have notice of the unexpected consequences of a known illegal act. In other words, a court must determine if a narcotics dealer, who knows that dealing drugs violates narcotics laws, is entitled to know that narcotics trafficking may also carry mandatory penalties reserved for crimes of violence.

The Supreme Court has held that because congressional intent was unclear, the original section 924(c) could not be used to enhance a defendant's sentence where he or she already received an additional sen-

147. Although the Court in *Winters v. New York* dealt with a statute limiting freedom of expression, it noted that "[t]he standards of certainty in statutes punishing for offenses is higher than those depending primarily upon civil sanction for enforcement." 333 U.S. 507, 515 (1948).

148. 342 U.S. 337 (1952).

149. *Id.* at 340 (citations omitted). In *Boyce*, the Court held a regulation *not* unconstitutionally vague when it required drivers of trucks carrying explosives to avoid "so far as practicable, and where feasible," driving through congested thoroughfares. *Id.* at 338-39, 343.

tence for carrying a firearm in the underlying offense.¹⁵⁰ The current section clearly states that section 924(c) will be used to add five or ten years to a sentence even if a defendant is already receiving an enhanced sentence for the underlying offense. Also, section 924(c) forbids parole.¹⁵¹ Perhaps due to the severity of the new section 924(c), the Supreme Court will look more closely at the shortcomings of the statute, and find that it is unconstitutionally vague and violative of a defendant's due process rights. However, due to the current composition of the Supreme Court and its disdain for overturning criminal statutes,¹⁵² it seems unlikely that section 924(c) will be found unconstitutionally vague.

2. Double jeopardy?

The fifth amendment's double jeopardy clause applies to multiple prosecutions for the same offense.¹⁵³ It could be argued that sentencing a defendant under an armed robbery statute which provides enhanced punishment for the use of a firearm and punishing the same defendant under section 924(c) penalizes the accused twice for the same offense. However, recent case law does not support this conclusion.

In *Missouri v. Hunter*,¹⁵⁴ a Missouri state statute provided that a person committing any felony through the use of a dangerous or deadly weapon was also guilty of the crime of armed criminal action punishable by imprisonment for not less than three years. Another Missouri statute provided that any person convicted of first-degree robbery by means of a dangerous and deadly weapon would be punished by imprisonment for not less than five years. The defendant was convicted in a Missouri state court of both first degree robbery and armed criminal action. Pursuant to the statutes, he was sentenced to concurrent prison terms of ten years for robbery and fifteen years for armed criminal action. The Missouri Court of Appeals reversed the armed criminal action conviction on the ground that the sentence for both robbery and armed criminal action violated the double jeopardy clause of the fifth amendment. The Missouri Supreme Court denied review, and the United States Supreme Court granted certiorari.¹⁵⁵

The Supreme Court reversed the court of appeals and held that a conviction under both statutes did not violate the double jeopardy

150. See *supra* notes 22-36 and accompanying text.

151. 18 U.S.C.A. § 924(c) (West Supp. 1985); *supra* note 2.

152. See *supra* notes 139, 147-49 and accompanying text.

153. C. WHITEBREAD, CRIMINAL PROCEDURE, AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 501 (1980).

154. 459 U.S. 359 (1983).

155. *Id.* at 362-63.

clause.¹⁵⁶ The Court reasoned that “[w]here . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct . . . a court’s task of statutory construction is at an end and the . . . court . . . may impose cumulative punishment under such statutes in a single trial.”¹⁵⁷

Given the holding in *Hunter*, it is unlikely that section 924(c), when combined with another statute which provides enhanced punishment for carrying a firearm will be held to violate the double jeopardy clause of the fifth amendment. The *Hunter* decision stressed that if the legislative intent clearly authorized cumulative punishments, then such punishments will not violate the double jeopardy clause.¹⁵⁸ Congress expressly stated, within the language of section 924(c), that the statute was meant to apply in conjunction with any other statute which already punished the use of firearms.¹⁵⁹

IV. PROPOSAL

The major problem with section 924(c) is that it creates the potential for overly broad or inconsistent interpretations of a crime of violence. This could result in mandatory penalties being imposed by courts for crimes which are not intended to be within the scope of section 924(c). The United States Supreme Court has recognized that “[w]hile courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional lawmaking.”¹⁶⁰ The Court added that the definition of a criminal offense is peculiarly the business of the legislatures and not of the courts.¹⁶¹

In creating a separate mandatory penalty for carrying a firearm, Congress should have specified which underlying crimes it meant to address. It is Congress’ prerogative to combat violent crime, however the legislature should not ignore its constitutional obligation to draft precise criminal statutes.

156. *Id.* at 368-69.

157. *Id.*

158. *Id.*

159. *See supra* note 2.

160. *United States v. Bass*, 404 U.S. 336, 344 (1971) (defendant could not be sentenced for possessing firearm under Omnibus Crime Control and Safe Streets Act because of ambiguous terminology in statute).

161. *Id.* at 348. The Court in *Bass* reasoned that “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies ‘the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.’” *Id.* (citations omitted).

The definition of a crime of violence in the CCCA is poorly drafted. Section 16(b) defines as a crime of violence any felony which creates a substantial risk that force will be used. Several district courts have already had difficulties interpreting this language.¹⁶² Section 16(a) encompasses misdemeanors with violence as an element. Congress should decide whether a person has committed a *felony* under section 924(c) whenever he or she carries a firearm during and in relation to a misdemeanor which includes physical force as an element.¹⁶³ Under the current section 924(c), a court can sentence the accused to five or ten years of mandatory imprisonment as long as it finds that the accused was carrying the firearm in relation to the crime, regardless of whether he or she was authorized to carry a weapon, or whether the weapon was actually used.

Additionally, under section 16, crimes against property can be found to be crimes of violence. A person could be sentenced to five or ten years without parole under section 924(c) for insubstantial, or no harm to another's property. As long as a court finds that the crime created a substantial risk that force would be used against the property of another, section 16 applies. Supporters of harsh sentencing may find that crimes such as felony arson deserve to fall under section 924(c)'s severe penalties. However, because section 16 also applies to lesser crimes against property,¹⁶⁴ Congress should specify which crimes against property are included under section 924(c). If Congress designates which crimes against property it intends to include in section 924(c), a court could determine whether applying that section creates disproportionate sentences which are unconstitutional as cruel and unusual punishment.

There are alternative ways of defining a crime of violence. Title 28 U.S.C. § 2901(c) defines the term "crime of violence" as it applies to civil commitment and rehabilitation of narcotics addicts. Section 2901(c) states:

"Crime of Violence" includes voluntary manslaughter, murder, rape, mayhem, kidnapping, robbery, burglary or housebreaking in the nighttime, extortion accompanied by threats of violence, assault with a dangerous weapon or assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable as a felony, or an attempt or conspiracy

162. *See supra* notes 93-110 and accompanying text.

163. 18 U.S.C. § 1 (1982) states that any offense punishable by imprisonment for more than one year is a felony.

164. *See supra* notes 118-19 and accompanying text.

to commit any of the foregoing offenses.¹⁶⁵

Most of the crimes listed in section 2901(c) are crimes against people. The crimes against property, such as housebreaking in the nighttime, are listed so that both confusion and imprecision are avoided. By listing the specific crimes which may be considered "crimes of violence" section 2901(c) avoids the misinterpretations and conflicting decisions which have already occurred under section 924(c). Section 2901(c) demonstrates that Congress is capable of enumerating the offenses targeted as violent crimes.

It is also helpful to examine two titles in the CCCA in order to get a better understanding of the crimes Congress considered under these chapters.¹⁶⁶ Title X, of which section 924(c) is a part, is labelled "Miscellaneous violent crime amendments," and Title XI is labelled "Serious nonviolent offenses."¹⁶⁷ Title X includes crimes such as murder for hire, use of armor-piercing bullets, kidnapping of federal officials, maiming, involuntary sodomy, destruction of motor vehicles or energy facilities, assault upon federal officials, arson, and pharmacy robbery and burglary.¹⁶⁸ Examples of crimes listed under Title XI's "Serious nonviolent offenses" include warning an accused of an upcoming search, receipt or sale of stolen bank property, and providing or possession of contraband in a federal penitentiary.¹⁶⁹ Title XI's nonviolent offenses provide some guidance as to which crimes Congress considered as nonviolent. However, not all violent crimes were included in Title X's "Miscellaneous violent crime amendments." It is also important to note that narcotics transactions are not listed in either Titles X or XI.

Congress included section 924(c) in Title X of the CCCA; yet, it is ironic that in section 16(b)'s definition of a crime of violence, physical force does not need to be an element of the offense.¹⁷⁰ Under section 16(b) an offense can be determined a crime of violence as long as it creates a substantial risk that physical force will be used. Section 16(a) includes offenses with violence as an element, so enumeration of every crime with violence as an element is not necessary. Yet, because section 16(b) is vague, Congress should specify the felonies that do *not* have violence as an element which it intended to consider as crimes of violence.

165. 28 U.S.C. § 2901(c) (West Supp. 1985).

166. Generally, the title or subtitle of an act does not control the actual language of the statute. *See generally* *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 620 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

167. 1984 U.S. CODE CONG. & AD. NEWS 3182-83.

168. *Id.* at 3483-3522.

169. *Id.* at 3508-22.

170. 18 U.S.C.A. § 16(b) (West Supp. 1985).

It would be beyond the scope of this Comment to list every crime which Congress should include in yet another amended section 924(c). It is a legislative task to determine which crimes when combined with the use of firearms, should fall under section 924(c)'s mandatory penalties. For example, if the use of firearms during a narcotics transaction is a major public concern, then it should be listed in section 924(c), or at the very least in section 16(b) which defines a crime of violence. Preferably, Congress will completely abolish the term crime of violence in section 924(c). The following is a suggestion of how relevant parts of section 924(c) could be reworded to avoid problems of misinterpretation.

Whoever uses or carries a firearm:

- (a) during any felony that has as an element the use, attempted use, or threatened use of physical force, or
- (b) during any of the following misdemeanors which have as an element the use, attempted use, or threatened use of physical force: [list by statute], or
- (c) during any of the following felonies: [list by statute] [statute would continue as written].

The above suggestion is only a skeleton of what the statute should look like. By wording the statute as recommended, all felonies with physical force as an element would be included; Congress would have to list any misdemeanors or felonies without violence as an element. Moreover, Congress can use its legislative powers to investigate which crimes it wants to address. The legislature intended section 924(c)'s harsh penalties to help deter the use of handguns during certain crimes. The crimes listed in section 924(c) should reflect this legislative purpose. Congress should also refer to the enumerated crimes by code number to avoid confusion. Although the result will be a less flexible statute with little or no room for interpretation, clarity is preferable to haphazard interpretations of a vague statute, especially when mandatory sentencing is involved.

Finally, Congress should reconsider its use of the term "and in relation to" a crime of violence. This wording allows courts to decide that the carrying of a firearm during any crime means it could have been used in relation to that crime. If this is what Congress intended, the statute should expressly state that carrying a firearm during *any* crime immediately constitutes a crime of violence. Although Congress may have added the words "in relation to" to limit the scope of the statute,¹⁷¹ courts may expand section 924(c) beyond Congress' original intention. Thus, if

171. See *supra* notes 120-25 and accompanying text.

Congress enumerates the crimes which are "crimes of violence," it could avoid the inherent ambiguities in the term "in relation to a crime of violence."

Similarly, if Congress wants to impose a mandatory penalty for carrying a firearm during narcotics transactions, or even for trespassing or vandalism of federal property, it should list these crimes among the offenses covered by section 924(c). This solution may appear unduly burdensome, but when mandatory penalties without the possibility of parole are being imposed, the burden seems reasonable. The legislature has previously listed the specific crimes it intends to address in a statute,¹⁷² and in the present case, it should do so again.

V. CONCLUSION

Courts should not be burdened with interpreting crimes which are not clearly defined. Shifting the burden of defining a crime of violence to the courts will only result in additional ad hoc decisions. Congress, in enacting the CCCA, sought to create a tougher and more consistent criminal code.¹⁷³ Congress also wanted to encourage uniform sentencing.¹⁷⁴ Perhaps it tried to accomplish too much at once. Perhaps the imprecision in section 924(c) is simply oversight, or maybe Congress intended to give courts leeway in applying section 924(c). Regardless of its intent, Congress was responsible for amending the original section 924(c) and creating mandatory penalties under the CCCA.

Unless Congress directs its attention to the myriad of problems created by section 924(c), courts will continue struggling to interpret its vague language. Conflicting decisions will continue to cause different sentences for the same crime. Ultimately, the CCCA's goal of creating determinate sentences will fail. Even worse, a person could be imprisoned for a mandatory five or ten years for a crime which Congress never intended to address in section 924(c). The legislature chose to tackle the criminal code system—it should now accept the responsibility of correcting the ambiguities and inaccuracies it has created.

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172. *See supra* note 165 and accompanying text.

173. *See supra* notes 73-84 and accompanying text.

174. *Id.*

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