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Smith v. United States and the Modern Interpretation of 18 U.S.C. 924(c): A Proposal to Amend the Federal Armed Offender Statute

Thomas A. Clare

Smith v. United States and the Modern Interpretation of 18 U.S.C. § 924(c): A Proposal to Amend the Federal Armed Offender Statute

"Ambiguity lurks in generality and may thus become an instrument of severity."[1]

I. INTRODUCTION

Mandatory minimum sentencing provisions[2] have been a part of the federal criminal justice system since 1790.[3] Only recently, however, have these provisions been enacted as part of a comprehensive system of sentencing and aimed at entire classes of offenders.[4] In the last decade, Congress has made increased use of mandatory minimum sentencing provisions in the war on drugs.[5] The increased use of such provisions, when viewed in the light of a still-escalating crime rate, has sparked considerable debate concerning the propriety and effectiveness of mandatory minimum penalties. In turn, this debate has triggered closer scrutiny of many of the federal criminal statutes that contain these provisions.

18 U.S.C. § 924(c), one of the most frequently used mandatory minimum sentencing provisions, is also one of the most hotly debated.[6] Acknowledging the strong connection between drugs

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1 McComb v. Jacksonville Paper Co., 336 U.S. 187, 197 (1949) (Frankfurter, J.).

2 As used in this Note, "mandatory minimum," "mandatory minimum sentencing provisions," and related terms refer to statutory provisions requiring the imposition of a specified minimum sentence when criteria specified in the relevant statute have been met. *See* UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4 (1991) [hereinafter SENTENCING COMMISSION REPORT].

3 *See* Act of Apr. 30, 1790, ch. 9, § 3, 1 Stat. 112, 113. Many capital offenses in the late 18th century were originally only punishable by death. *See* SENTENCING COMMISSION REPORT, *supra* note 2, at 5 & n.7.

4 *Id.* at 5; Michael J. Riordan, *Using a Firearm during and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 USC § 924(c)(1)*, 30 DUQ. L. REV. 39 (1991); *see also* SENTENCING COMMISSION REPORT, *supra* note 2, at n.9.

5 *See generally* William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305 (1993).

6 *See* SENTENCING COMMISSION REPORT, *supra* note 2, at 10-12. United States v. Henry, 878 F.2d 937, 943 (6th Cir. 1989) (recognizing that many § 924(c) violations are "not without controversy").

and guns, Congress enacted section 924(c), which proscribes the "use[]" or "carr[ying]" of a firearm "during and in relation to a crime of violence or drug trafficking crime."[7] Section 924(c) contains a mandatory minimum sentencing provision that requires judges to sentence offenders to five, ten, or thirty years incarceration without possibility of parole, probation, or a suspended sentence.[8]

Courts have experienced some difficulty in determining what constitutes a "use" of a firearm "during and in relation to" a drug trafficking offense.[9] This difficulty has especially manifested itself

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7 18 U.S.C. § 924(c)(1) (1988 & Supp. IV 1992). In its entirety, the statute provides:

> (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barrelled rifle, short-barrelled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. 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 or drug trafficking crime 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.
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> (2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).
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> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felons and–
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> > (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
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> > (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c).

8 *Id.*

9 *See* Riordan, *supra* note 4, at 40; *see also* Vivian Artenstein Alberts, Comment, *Federal Sentencing Enhancement: Mandatory Penalties for Firearms Use Under the Comprehensive Crime Control Act of 1984*, 19 LOY. L.A. L. REV. 823, 849 (1986) (predicting this difficulty).

in cases where the firearm is not used in the traditional sense of brandishing or firing the weapon. Outside of these traditional roles for firearms, three primary theories of "use" have been espoused by the prosecution in section 924(c) cases: "use" of the firearm as an item of commerce in a guns-for-drugs exchange,[10] "use" of the firearm as passive protection for a narcotics stash,[11] and "use" of the firearm solely to "embolden" the defendant.[12] Much of the debate surrounding section 924(c) centers around the statute's applicability to these nontraditional uses.

The United States Courts of Appeals have given the statutory language of section 924(c) a broad reading. Finding only minimal limitations in the requirement that the firearm be used "during and in relation to" the predicate offense, these courts have consistently found the statute broad enough to encompass each of the three nontraditional theories of use frequently relied upon by the prosecution in 924(c) cases.

Recently, the United States Supreme Court affirmed this interpretation and further broadened the scope of section 924(c) in *Smith v. United States*.[13] Holding that the exchange of a firearm for narcotics constitutes a "use" of the firearm "during and in relation to" a drug trafficking offense within the meaning of section 924(c),[14] the *Smith* Court endorsed an "expansive" interpretation of the statute.[15] Albeit in dicta, the Court approved an even lower threshold for conviction than had previously been articulated by the circuit courts of appeals.

As adopted by the lower courts, the *Smith* Court's formulation of culpability under section 924(c) is an extremely broad interpretation of its statutory language. Because the statute carries such severe mandatory penalties, this broad interpretation must be carefully evaluated. It is critical to determine the specific conduct Congress sought to address in the statute. Without such a determination, a person may be imprisoned for a mandatory five, ten, or thirty years for a crime Congress never meant to address.

This Note discusses the modern interpretation of section 924(c) and the circumstances under which a person "during and

10 *See infra* Part VII.A.
11 *See infra* Part VII.B.
12 *See infra* Part VII.C.
13 113 S. Ct. 2050 (1993).
14 *Id.* at 2060.
15 *Id.* at 2054 ("use"); *id.* at 2058 ("in relation to").

in relation to . . . [a] drug trafficking crime . . . uses or carries a firearm" within the meaning of the statute. After discussing the breadth of the modern interpretation in the context of nontraditional theories of "use" under section 924(c), this Note argues that the current statutory language provides inadequate guidance to courts in applying the statute. Part II contains a brief history of mandatory minimum sentencing. Part III traces the evolution of 18 U.S.C. § 924(c) and attempts to explain the interpretive difficulty surrounding the current statutory language. Part IV discusses the basic principles of section 924(c) analysis. After discussing the Supreme Court's decision in *Smith v. United States* in Part V, Part VI examines the applicability of section 924(c) to the three nontraditional theories of "use" and the effect of the *Smith* decision upon each theory. Part VII critically evaluates the modern interpretation of section 924(c) and explores the need for statutory reform. Finally, Part VIII contains a proposal that Congress redraft section 924(c) in order to clarify the specific conduct which it was meant to address.

II. MANDATORY MINIMUM SENTENCING PROVISIONS

The Constitution of the United States does not allocate the responsibility for federal sentencing to any one branch of government.[16] Instead, the three branches share the power to determine the scope and extent of punishment for federal offenses.[17] This system of interlocking responsibility enables each branch to serve as a check upon the power of the others.

The executive branch, through the exercise of discretion in bringing criminal prosecutions, occupies a collateral role in federal sentencing; Congress and the judicial branch each have a more direct role. To trace the history of mandatory minimum sentencing provisions, therefore, the role of Congress must be examined in relation to the power of the judicial branch.[18] While the judicial branch is empowered by the Constitution to try offenses and

16 Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993); *see* Mistretta v. United States, 488 U.S. 361, 364 (1989).

17 Hatch, *supra* note 16, at 185.

18 *See generally* Hatch, *supra* note 16.

impose punishment,[19] Congress is granted the power to define crimes and set the degree and method of punishment.[20] To the extent that Congress exercises this power and limits judicial discretion, it checks the power of the judicial branch in the area of federal sentencing.[21]

Only recently in our nation's history, however, has Congress begun to exercise this power:[22]

> For almost a century, Congress delegated near-absolute discretion to the sentencing judge to determine the duration of a sentence within a customarily wide range. The power of the sentencing judges grew stronger when judges were granted the power to suspend imprisonment sentences in favor of probation. In 1910, Congress delegated further sentencing power when it established the United States Parole Commission, which was charged with evaluating and setting the release date of federal prisoners.[23]

Under this regime, the sentencing judge had almost complete discretion to determine the punishment for a federal offense. The amount of each sentence actually served by a particular defendant depended upon the Parole Commission's case-by-case determination of the defendant's rehabilitation. As a result, federal criminal sentencing was largely unpredictable, with similarly situated defendants often serving grossly disparate prison terms.[24]

This system of indeterminate sentencing[25] was made neces-

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19 *Ex parte* United States, 242 U.S. 27, 41-42 (1916) ("Under our constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial.").

20 *Id.* at 42; *see also* U.S. CONST. art. I, § 8, cl. 10 (empowering Congress to "define and punish Felonies committed on the high Seas, and Offenses against the Law of Nations").

21 Hatch, *supra* note 16, at 185.

22 *Id.* at 186.

23 *Id.*

24 *Id.* at 187. A 1983 Senate Judiciary Report cited several studies indicating disparate practices among federal judges. *See* Continuing Appropriations, 1985—Comprehensive Crime Control Act of 1984, S. REP. NO. 225, 98th Cong., 1st Sess. 41-46 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3224. *See, e.g.*, ANTHONY PARTRIDGE & WILLIAM ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 1-3 (1973); Whitney N. Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163, *reprinted in* 119 CONG. REC. 6060 (1973).

25 As used in this Note, "indeterminate sentencing" refers to a sentencing scheme that

> sets only a maximum or both a maximum and a minimum sentence for a particular crime or class of crimes. This scheme allows judges discretion in setting the sentence anywhere below the maximum or within the range allowed. It also

sary by the widespread acceptance of a rehabilitation model of punishment.[26] During the second half of the twentieth century, however, public and official dissatisfaction with this crime control model grew. As the focus gradually shifted from rehabilitation to deterrence, Congress began to assume greater control in federal sentencing,[27] beginning with the Narcotic Control Act of 1956.[28]

The Narcotic Control Act provided mandatory minimum sentences of considerable length for most drug importation and distribution offenses.[29] The Act prohibited probation, suspended sentences, and parole for offenders convicted of these offenses.[30] Critics of the Act, arguing that many prosecutors would decline to prosecute violators under such harsh provisions, charged that such measures would actually reduce deterrence.[31] In 1970, Congress concluded that its effort to deter through minimum mandatory sentences had been a failure.[32] That year, it passed the Comprehensive Drug Abuse Prevention and Control Act of 1970,[33] repealing virtually all of the drug-related mandatory sentencing provisions.[34] The nation was not yet ready to abandon the rehabilitation model.

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refers to sentencing schemes that grant prison administrators, parole boards, and others discretion to determine how much of the sentence imposed is actually served and where and under what conditions it will be served.

Louis B. Meyer, *North Carolina's Fair Sentencing Act: An Ineffective Scarecrow*, 28 WAKE FOREST L. REV. 519, 520 (1993) (citations omitted).

26 Where rehabilitation is accepted as a central goal of punishment, discretion in sentencing and release must necessarily lie with the judge and the Parole Commission since each is better situated to evaluate an individual defendant's potential for rehabilitation. *See* Hatch, *supra* note 16, at nn.16-17 and accompanying text.

27 *Id.* at 187.

28 Pub. L. No. 84-728, 70 Stat. 567 (repealed 1970).

29 Narcotic Control Act, § 103, 70 Stat. at 653-55. Unlike modern mandatory minimum sentencing provisions, the Narcotic Control Act of 1956 provided mandatory sentencing ranges rather than fixed terms.

30 *Id.* The Senate Judiciary Committee expressed some discomfort with these severe measures. *See* S. REP. NO. 1997, 84th Cong., 2d Sess. 6 (1956) (recognizing "objections in principle").

31 Modern critics of mandatory minimum penalties employ these same arguments. *See* JAMES Q. WILSON, THINKING ABOUT CRIME 201 (1977) ("The more severe the penalty, the more unlikely that it will be imposed."); DIANA GORDON, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, DOING VIOLENCE TO THE CRIME PROBLEM: A RESPONSE TO THE ATTORNEY GENERAL'S TASK FORCE at 9 (NCCD 1981).

32 Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 201 (1993).

33 Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C §§ 801-971 (1988 & Supp. IV 1992)).

34 Schulhofer, *supra* note 32, at 201.

"Fourteen years later the pendulum swung again."[35] By 1984, dissatisfaction with the indeterminate sentencing system[36] caused Congress to once again evaluate its role in federal sentencing. Congress desired to increase the deterrent effectiveness of punishment by establishing certainty in sentencing.[37] Congress implemented this goal by enacting the Sentencing Reform Act of 1984[38] and through the increased promulgation of mandatory minimum sentences.[39]

The Sentencing Reform Act of 1984 fundamentally altered our nation's sentencing goals and practices.[40] Rehabilitation of offenders was specifically rejected as a goal of federal criminal sentencing.[41] The SRA created the United States Sentencing Commission,[42] charging this body with producing a sentencing guidelines system that would ensure that similar offenders, com-

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35 *Id.*

36 Dissatisfaction with the federal criminal sentencing process was motivated in large part by the work of federal Judge Marvin E. Frankel. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228-29 (1993). In his distinguished work, CRIMINAL SENTENCES: LAW WITHOUT ORDER, Judge Frankel criticizes the "lawlessness" of sentencing, asserting that gross disparity in sentencing is inevitable in any system without meaningful constraints on the discretion of the sentencing judge. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972).

37 SENTENCING COMMISSION REPORT, *supra* note 2, at 7; *see also* 28 U.S.C. § 991(b)(1)(B) (1988); United States v. Wong, 2 F.3d 927, 935 (9th Cir. 1993) (Morris, J., dissenting) ("Congress' primary goal in enacting the SRA was to provide certainty and fairness in sentencing.") (internal quotation marks omitted).

38 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

39 *See generally* Hatch, *supra* note 16, at 188-95.

40 The objectives for sentencing announced by the SRA were: (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with educational or vocational training, medical care, or other correctional treatment. 18 U.S.C. § 3553(a)(2) (1988). *See also* Mistretta v. United States, 488 U.S. 361, 366 (1989) ("[The SRA] rejects imprisonment as a means of promoting rehabilitation . . . ").

41 *See* S. REP NO. 225, *supra* note 24, at 38-40, 50 (rejecting the model of "coercive rehabilitation" in favor of deterrence, incapacitation, and certainty in sentencing), *reprinted in* 1984 U.S.C.C.A.N. at 3223-25, 3232-34; *see also* 28 U.S.C § 994(k) (1988) (requiring that the Guidelines reflect "the inappropriateness of imposing . . . imprisonment for the purpose of rehabilitation").

42 28 U.S.C. § 991 (1988). Thus, a stated goal of the sentencing guidelines system is "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6) (1988).

mitting similar offenses, would be sentenced in a similar fashion.[43] The guideline system is binding on judges[44] and severely limits their discretion. To further ensure certainty in sentencing, the Act abolished parole.[45]

"Congress' pursuit of enhanced sentencing effectiveness through certain and objective punishment did not end with enactment of the SRA. From 1984 to 1990, Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime."[46] According to a 1991 report of the United States Sentencing Commission,[47] Congress sought to advance several policy interests with these sentencing provisions:[48] retribution, deterrence,[49] incapacitation for the serious offender, reduction of disparity in sentences, inducement of cooperation,[50] and inducement of guilty pleas.

Today, there are approximately 100 separate federal mandatory minimum penalty provisions located in sixty different criminal statutes.[51] "The sheer number of these provisions, however, creates a somewhat misleading picture of the way in which federal mandatory minimum sentencing provisions are applied. In practice, relatively few statutes requiring mandatory minimum sentences are used with frequency; a considerably larger number . . . are virtually never used."[52] During the period from 1984 to 1990, four statutes accounted for approximately 94 percent of the cases where the defendant was sentenced under a mandatory minimum

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43 28 U.S.C. § 991(b)(1)(B) (1988). A discussion of the United States Sentencing Commission and the Sentencing Guidelines is outside the scope of this Note. For an overview of the Commission and the Guidelines, see generally Kay A. Knapp & Denis J. Hauptley, *U.S. Sentencing Guidelines in Perspective: A Theoretical Background and Overview, in* U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE 3-18 (Dean J. Champion ed., 1989); William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

44 18 U.S.C. § 3553(b) (1988).

45 *Id.*

46 Hatch, *supra* note 16, at 192.

47 *See* SENTENCING COMMISSION REPORT, *supra* note 2.

48 *Id.* at 13-15.

49 Those supporting mandatory minimum sentencing provisions claim that these statutes are more effective in promoting both specific and general deterrence through the certainty of substantial punishment.

50 Cooperation with officials in criminal investigations is the only statutorily-recognized justification for the court to impose a sentence below the mandatory minimum sentence. *See* 18 U.S.C. § 3553(e) (1988).

51 *See* SENTENCING COMMISSION REPORT, *supra* note 2, at 10.

52 *Id.*

provision.[53] These four statutes, including 18 U.S.C. § 924(c), have recently come under heightened scrutiny because of their frequent use.

III. 18 U.S.C. § 924(c)

The original version of 18 U.S.C. § 924(c) was enacted as part of the Gun Control Act of 1968.[54] The original section 924(c) imposed a mandatory minimum sentence of between one and ten years upon an offender who "uses" or "carries a firearm unlawfully during the commission of any [federal] felony."[55] The 1968 version of the statute, however, had many weaknesses which undermined its deterrent force. Nothing in the original statute prohibited parole. Moreover, the sentencing judge could suspend the 924(c) sentence or substitute probation on defendant's first conviction under the section.[56] The statute's effectiveness as a tool for prosecutors was further reduced by a series of United States Supreme Court cases interpreting section 924(c) as a cumulative enhancement provision rather than a separate, additional offense.[57] These forces combined to greatly reduce the applicability

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53 *Id.* These four statutes, 21 U.S.C. § 841 (manufacture and distribution of controlled substances), 21 U.S.C. § 844 (possession of controlled substances), 21 U.S.C. § 960 (import/export of controlled substances), and 18 U.S.C. § 924(c) (carrying or using a firearm during a drug or violent crime) all involve drugs and weapons violations. *Id.*

54 Pub. L. No. 90-615, 82 Stat. 1214 (codified as amended at 18 U.S.C. §§ 921-928 and scattered sections of 26 U.S.C.) (1988 & Supp. IV 1992). The original § 924(c) was not included in the original gun control bill. Instead, it was offered as an amendment on the House floor by Representative Poff, and passed the same day it was introduced. 114 CONG. REC. 22,231, 22,248 (1968). Consequently, legislative history is scarce. *See* Alberts, *supra* note 9, at 823 n.3; *see also* Simpson v. United States, 435 U.S. 6, 13 & n.7 (1978) (recognizing the scarcity of legislative history).

55 18 U.S.C. § 924(c) (1982). The statute provides in relevant part:

> 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.

Id.

56 *Id.*

57 Under such an interpretation, the penalty provisions of § 924(c) were deemed to merge into any enhancement found in the predicate statute. *See* Busic v. United States, 446 U.S. 398 (1980) (holding that sentence may not be increased under § 924(c) if defendant's sentence had already been enhanced under the underlying felony statute on account of the firearm); Simpson v. United States, 435 U.S. 6 (1978).

and effectiveness of section 924(c).

In 1984, still faced with a rapidly escalating crime rate, Congress enacted the Comprehensive Crime Control Act of 1984 (CCCA).[58] The CCCA, as its name suggests, sought to overhaul many areas of the criminal justice system including bail, forfeiture, sentencing, and narcotics enforcement.[59] The CCCA made several important changes to section 924(c). The text was amended to make it clear that Congress intended section 924(c) to be a separate offense and punishable in addition to the predicate.[60] Unlike the original version, the amended section contained no requirement that the carrying of a firearm during a felony be "unlawful." Consistent with the sentencing reforms of the CCCA, the amended section 924(c) eliminates the discretion of the sentencing judge and fixes punishment at five years for the first offense and ten years for the second. Most importantly, however, the 1984 version introduced the requirement that the firearm be used or carried "*during and in relation to*" a crime of violence.[61]

Section 924(c) was amended again in 1986 by the Firearms Owners' Protection Act.[62] The most important change to section 924(c) was to make it applicable to drug offenses. This was accomplished by adding the phrase "or drug trafficking crime" after "any

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58 Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

59 Alberts, *supra* note 9, at 823.

60 18 U.S.C. § 924(c) (1988 & Supp. IV 1992). The amendment made clear that punishment for § 924(c) is to be "in addition to the punishment for [the predicate offense]" and that "a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon" may serve as a predicate for § 924(c). *Id.*

61 *Id.* The 1984 version provided:

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

Id.

62 Pub. L. No. 99-308, § 104(a)(2)(A)-(E), 100 Stat. 449, 456 (1986).

crime of violence."[63] The 1986 version also distinguished among types of firearms, raising the mandatory minimum penalty to ten years if the firearm is a machine gun or equipped with a silencer.[64]

Since 1986, Congress has twice increased section 924(c)'s penalty provisions.[65] The current version of the statute imposes a five year mandatory minimum penalty for the first offense.[66] If the firearm is a short-barrelled shotgun or short-barrelled rifle, the sentence is ten years.[67] If the firearm is a machine gun or equipped with a silencer, section 924(c) mandates a 30-year term.[68] A second conviction under section 924(c) triggers a 20-year sentence or life imprisonment if the second conviction involved a machine gun or silencer.[69] Parole, probation, and suspended sentences remain forbidden.[70]

With such severe penalties authorized, it is critical that courts determine exactly what conduct is proscribed by section 924(c). In its current form, section 924(c) is violated by a defendant who "uses or carries" a firearm "during and in relation to a crime of violence or drug trafficking crime."[71] The component phrases of this language were enacted in three different amendments to the section by three different sessions of Congress.[72] Undoubtedly, this piecemeal legislation of section 924(c) is responsible for much

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63 *Id.* § 104(a)(2), 100 Stat. 454. The 1986 amendment also added § 924(c)(2) which defined "drug trafficking crime" as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))." *Id.* § 104(a)(2), 100 Stat 457. After the 1986 amendment, § 924(c)(3) defined "crime of violence" as "an offense that is a felony and . . . (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* § 104(a)(2), 100 Stat. 457.

64 *Id.*

65 *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6460, 102 Stat. 4181, 4373-74; Crime Control Act of 1990, Pub. L. No. 101-647, § 1101, 104 Stat. 4789, 4829.

66 18 U.S.C. § 924(c)(1) (1988 & Supp. IV 1992). For the complete text of the statute, see *supra* note 7.

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 "Uses or carries" dates from the original 1968 version. The "during and in relation to" language was introduced in 1984; the 1986 amendment added "drug trafficking crime."

of the interpretive difficulty surrounding its broad language.

IV. INTERPRETING "DURING AND IN RELATION TO"

In 1984, Congress eliminated the requirement that the firearm be carried unlawfully. This change was based on a determination by Congress "that persons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon . . . are as deserving of punishment as a person whose possession of the gun [is unlawful]."[73] Congress was concerned, however, that dropping this requirement would subject persons who "lawfully, but inadvertently, possessed a gun . . . in unrelated criminal activity" to prosecution under section 924(c).[74] The addition of the "in relation to" language was specifically intended by Congress to allay this concern.[75] Congress felt "the requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime."[76]

In *United States v. Stewart*,[77] the Ninth Circuit Court of Appeals examined the amended section 924(c). Supreme Court Justice Anthony Kennedy, then sitting on the Ninth Circuit, expressed the court's view that Congress intended the "in relation to" language to limit the element of "during."[78] The *Stewart* court further held that this language was not intended to create an

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73 S. REP. NO. 225, *supra* note 24, at 314 n.10, *reprinted in* 1984 U.S.C.C.A.N. at 3942 n.10.

74 *Id.*

75 *See* United States v. Correa, 6 F.3d 1070, 1084 n.25 (5th Cir. 1993); United States v. Stewart, 779 F.2d 538, 539 (9th Cir. 1985) (Kennedy, J.).

76 S. REP. NO. 225, *supra* note 24, at 314 n.10, *reprinted in* 1984 U.S.C.C.A.N. at 3492 n.10. This Senate Report footnote is the only legislative history that exists for the addition of the "in relation to" requirement. The footnote provides:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape . . . . Moreover, the requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime. such a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

Id; *see also Stewart*, 779 F.2d at 538; United States v. Brown, 915 F.2d 219, 224 (6th Cir. 1990) (explaining that the "in relation to" language made explicit what was previously implicit in the statute: there must be some relationship between the weapon and the drug crime).

77 779 F.2d 538 (9th Cir. 1985).

78 *Id.* at 539.

additional element of the offense or to make section 924(c) a crime of specific intent.[79]

To establish that a defendant "use[d]" a firearm "during and in relation to" a drug crime, courts have required the prosecution to establish two connections.[80] The prosecution must show beyond a reasonable doubt (1) a nexus between the weapon and the defendant, and (2) some facilitative nexus between the firearm and the predicate offense.[81]

In order to establish the nexus between the defendant and the firearm, the government, at a minimum, must show that a particular defendant actually or constructively possessed a particular firearm.[82] When possession of the firearm is actual, open, and notorious, courts have no difficulty in finding this nexus satisfied and that the defendant "use[d]" the firearm within the meaning of the statute.[83] Constructive possession of the firearm is sufficient to establish the connection between the firearm and defendant. Courts will usually find that a defendant constructively possessed a firearm where one or more of the following factors are present:[84] close physical proximity to the firearm, possessory interest in the firearm, or dominion and control over the premises on which the firearm was located.[85] A past connection to the firearm may also

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79 *Id.* at 540; *see also Brown*, 915 F.2d at 225. For a discussion of the state of mind required for conviction under § 924(c), see Riordan, *supra* note 4, at 44-47.

80 Smith v. United States, 113 S. Ct. 2050 (1993); United States v. Garrett, 903 F.2d 1105, 1111 (7th Cir.), *cert. denied*, 498 U.S. 905 (1990).

81 *Smith*, 113 S. Ct. at 2053; United States v. Derr, 990 F.2d 1330, 1337 (D.C. Cir. 1993). Not all courts formulate the elements of § 924(c) as requiring two discrete showings. *See* United States v. Poole, 878 F.2d 1389, 1393 (11th Cir. 1989) (requiring the government to show one connection between the defendant, the guns, and the drugs). Regardless of formulation, it is important for the practitioner to remember that both nexuses must be proven. *See* United States v. Long, 905 F.2d 1572 (D.C. Cir.) (requiring acquittal upon failure to prove connection between defendant and firearm), *cert. denied*, 498 U.S. 948 (1990).

82 *Long*, 905 F.2d at 1576

83 *See infra* note 87.

84 *Long*, 905 F.2d at 1578.

85 *Id. See, e.g.*, United States v. Clemis, 11 F.3d 597, 601 (6th Cir. 1993); United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir. 1990); United States v. Alvarado, 882 F.2d 645, 654 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1114 (1990); United States v. Robinson, 857 F.2d 1006, 1010 (5th Cir. 1988); United States v. Matra, 841 F.2d 837, 840-41 (8th Cir. 1988). *Compare* United States v. Anderson, 881 F.2d 1128 (D.C. Cir. 1989) (holding that jury may reasonably infer that a person exercising dominion and control over given premises constructively possesses contraband found on those premises) *with Long*, 905 F.2d at 1581 (overturning conviction of occasional visitor).

be sufficient to satisfy this nexus.[86]

The "during and in relation to" language requires the prosecution to prove a nexus between the firearm and the predicate crime of violence or drug trafficking crime. Again, this nexus is easily established when the firearm is fired, brandished, or used to threaten a victim in the course of the crime.[87] Section 924(c), however, has not been limited to these "traditional" uses of a firearm. A defendant may be convicted even if he never brandished, fired, or referred to the weapon during the commission of the offense.[88]

Where the firearm has not been brandished or fired, the government must allege an alternative theory of how it was "used" to facilitate the drug trafficking predicate. The three most commonly espoused theories of use are as follows: 1) defendant "used" the firearm as an item of barter in a guns-for-drugs trade;[89] 2) by virtue of the gun's proximity to narcotics, the defendant "used" the firearm to protect the stash;[90] 3) because it was hidden nearby, the defendant "used" the firearm by deriving confidence (becoming "emboldened") by its presence.[91] When these nontraditional theories of use were espoused by the government, the courts encountered greater difficulty applying the "during and in relation to" requirement and determining the outer boundaries of culpability. Not until the Supreme Court's decision in *Smith v. United States*[92] did the lower courts have authoritative guidance in applying section 924(c)'s vague language.

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86 *See, e.g.*, United States v. Evans, 888 F.2d 891 (D.C. Cir. 1989) (upholding conviction of drug trafficker arrested across town from apartment where drugs were stored and weapons kept for protection of stash), *cert. denied*, 494 U.S. 1019 (1990).

87 *See, e.g.*, United States v. Brown, 995 F.2d 1493 (10th Cir.) (offender carried gun during narcotics transaction and pointed it at drug customer's head), *cert. denied*, 114 S. Ct. 353 (1993); United States v. Dabdoub-Canez, No. 91-10219 (9th Cir. 1992) (defendant pointing cocked gun at police when confronted); *Evans*, 888 F.2d at 896 (defendant pointing gun at government informant).

88 *See, e.g.*, United States v. Johnson, 12 F.3d 827, 833 (8th Cir.), *cert. denied*, 113 S. Ct. 3012 (1993); United States v. Correa-Ventura, 6 F.3d 1070, 1086 (5th Cir. 1993); United States v. Jefferson, 974 F.2d 201, 205 (D.C. Cir. 1992); *Clemis*, 11 F.3d at 601; United States v. Vasquez, 909 F.2d 235, 239 (7th Cir.), *cert. denied*, 111 S. Ct. 2826 (1990); United States v. Power, 881 F.2d 733, 737 (9th Cir. 1989); United States v. Meggett, 875 F.2d 24, 29 (2d Cir), *cert. denied*, 493 U.S. 858 (1989); United States v. Brockington, 849 F.2d 872, 876 (4th Cir. 1988).

89 *See infra* Part VII.A.

90 *See infra* Part VII.B.

91 *See infra* Part VII.C.

92 113 S. Ct. 2050 (1993).

V. *SMITH V. UNITED STATES*

Decided during the 1992-93 term, *Smith* is the most recent pronouncement by the Supreme Court on section 924(c). *Smith* addressed the specific question of whether exchanging a firearm for narcotics constitutes a violation of section 924(c).[93] The significance of this decision, however, extends far beyond addressing this single nontraditional theory of "use." In concluding that a guns-for-drugs exchange does violate section 924(c), the Court provided lower courts with extensive guidance for interpreting the statutory language that applies to all section 924(c) cases and theories of "use."

A. Facts

John Angus Smith and a companion travelled from Tennessee to Florida for the purpose of purchasing cocaine, hoping to resell it at a profit.[94] While there, Smith contacted an acquaintance, Deborah Hoag, to inquire about possible sources for the drugs.[95] Hoag arranged for a meeting between Smith and a local dealer.[96] At this meeting, the dealer expressed an interest in purchasing Smith's MAC-10 firearm, a small, lightweight weapon that had been modified to operate as an automatic.[97] Smith indicated that he might be willing to sell the weapon.[98]

Unfortunately for Smith, Hoag had contacts not only with narcotics traffickers but also with law enforcement officers; she had served as a confidential informant for the Broward County Sheriff's office on previous occasions.[99] Hoag introduced Smith to an undercover officer posing as a pawnshop dealer.[100] When the

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93 *Id.* at 2052.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* The Court characterized the MAC-10 as "a favorite among criminals" because of its small size and devastating firepower. A modified MAC-10 such as Smith's can fire more than 1,000 rounds per minute. *Id*; *see also* United States v. Phelps, 895 F.2d 1281, 1285 (9th Cir. 1990) (Kozinski, J., dissenting from a denial of rehearing en banc) (discussing the technical specifications of the MAC-10 and its prevalence in the drug trade.). According to Judge Kozinski, "[n]o self-respecting drug dealer in South Florida would be without one." *Id.*

98 113 S. Ct. at 2052.

99 *Id.*

100 *Id.*

undercover officer expressed an interest in purchasing the MAC-10, Smith indicated his willingness to trade the weapon for two ounces of cocaine.[101] The undercover officer departed, promising to try and acquire the cocaine.[102] Prior to the officer's return, Smith attempted to leave the area and was apprehended by the police after a high-speed chase.[103] At the time of his arrest, Smith was found in possession of the MAC-10 and three other weapons.[104]

Smith was convicted of various drug trafficking offenses and of violating 18 U.S.C. § 924(c). On appeal to the Eleventh Circuit, Smith argued that section 924(c) covers only situations in which the firearm is used as a weapon.[105] The Eleventh Circuit affirmed Smith's 924(c) conviction, reasoning that the plain language of the statute contains no such requirement.[106] Instead, the court held that any use of "the weapon to facilitate in any manner the commission of the offense" suffices.[107] To resolve a conflict among the circuits in applying section 924(c) to guns-for-drugs exchanges,[108] the Supreme Court granted certiorari.[109]

Writing the majority opinion, Justice O'Connor framed the issue before the Court: "whether the exchange of a gun for narcotics constitutes 'use' of a firearm 'during and in relation to . . . [a] drug trafficking crime' within the meaning of 18 U.S.C. § 924(c)(1)."[110] In a 6-3 decision, the Court upheld Smith's conviction, ruling that Smith's use of a firearm as an item of commerce in a guns-for-drugs exchange violated section 924(c).[111]

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101 *Id.*

102 *Id.*

103 *Id.* at 2053.

104 *Id.*

105 *Id.*

106 Smith v. United States, 957 F.2d 835, 836 (11th Cir. 1992), *aff'd*, 113 S. Ct. 2050 (1993).

107 *Id.* at 837 (internal quotation marks omitted).

108 Shortly before the Eleventh Circuit decided Smith's appeal, the Court of Appeals for the D.C. Circuit reached the same conclusion. United States v. Harris, 959 F.2d 246, 261-62 (D.C. Cir.) (per curiam), *cert. denied*, 113 S. Ct. 362 (1992). The Ninth Circuit, however, had reached the opposite conclusion. United States v. Phelps, 877 F.2d 28, 30-31 (9th Cir. 1989). *See infra* notes 146-52 and accompanying text.

109 Smith v. United States, 113 S. Ct. 53 (1992). The indictment only alleged Smith "used" the MAC-10. Accordingly, the Court did not consider whether Smith carried the MAC-10 within the meaning of the statute. *Id.* at 2054.

110 113 S. Ct. at 2052 (alteration in original).

111 *Id.* at 2060.

B. Interpreting Section 924(c)

Since "use" is nowhere defined in the statute, the Court held, it must be given its ordinary meaning.[112] To this end, the Court examined the Webster's New International Dictionary of English Language definition of "use": "to convert to one's service" or "to employ."[113] Black's Law Dictionary contained a similar definition: "to make use of; to covert to one's service; to employ; to avail one's self of; to utilize; to carry out a purpose or action by means of."[114] The Court found that Smith's "handling of the MAC-10 . . . falls squarely within th[e]se definitions."[115] By attempting to trade his MAC-10 for the drugs, the Court held, "he 'used' or 'employed' it as an item of barter to obtain cocaine; he 'derived service' from it because it was going to bring him the very drugs he sought."[116]

Affirming the reasoning of the Eleventh Circuit, Justice O'Connor emphasized that the phrase "as a weapon" does not appear in the statute.[117] If Congress had intended to create such a significant restriction, the Court reasoned, it would have given a clearer indication.[118] "Rather, § 924(c)(1)'s language sweeps broadly, punishing any use of a firearm, so long as the use is 'during and in relation to' a drug trafficking offense."[119]

To further support the proposition that "use" of a firearm is not limited to traditional uses, the Court also examined the United States Sentencing Guidelines.[120] Section 2B3.1(b)(2) of the Guidelines provides for an increase in the defendant's offense level if the offense involved a firearm. The magnitude of the increase depends on the nature of the involvement of the firearm. A seven-point upward adjustment is authorized if the firearm "was discharged;" a five-point adjustment if the firearm was "brandished, displayed, or possessed;" and a six-point adjustment if the firearm

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112 *Id.* at 2054.

113 *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 2806 (2d ed. 1949)).

114 *Smith*, 113 S. Ct. at 2054 (quoting BLACK'S LAW DICTIONARY 1541 (6th ed. 1990)).

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.* at 2055-56.

is "otherwise used."[121] Unless the six-point enhancement for "other uses" is surplusage, the *Smith* Court reasoned, there must be "uses" of firearms apart from traditional uses such as firing and brandishing.[122] Having determined that Smith's conduct constituted a "use" of the MAC-10, the Court went on to consider whether it fulfilled the "during and in relation to" requirement.

In similar fashion, Smith's handling of the firearm was found to meet any reasonable construction of the "in relation to" requirement.[123] Consequently, Justice O'Connor stated, it would not be necessary for the court to "determine the precise contours" of this language.[124] Despite this statement, however, the Court expounded upon the proper interpretation to be given section 924(c).

Justice O'Connor asserted that the phrase "in relation to" is also expansive, meaning "with reference to" or "as regards."[125] "The phrase 'in relation to' thus . . . clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence."[126] Instead, the gun must at least "facilitate, or have the potential of facilitating" the drug trafficking offense.[127] After rejecting Smith's argument based on lenity,[128] the Court made the following observation about Congress' choice of language for section 924(c):

> It may well be that Congress, when it drafted the language of [§] 924(c), had in mind a more obvious use of guns in connection with a drug crime, but the language [of the statute] is not so limited[;] nor can we imagine any reason why Congress would not have wished its language to cover this situation. Whether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or deal-

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121 *Id. See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 2B3.1(b)(2)(A)-(C) (1992).

122 113 S. Ct. at 2055. The Court made a similar argument from 18 U.S.C. § 924(d). This section authorizes seizure of firearms "intended to be used" in various listed offenses. 18 U.S.C. § 924(d)(1) (1988). Justice O'Connor points out that a substantial number of listed offenses contemplate a "use" of the firearm other than firing or brandishing.

123 113 S. Ct. at 2059.

124 *Id.*

125 *Id.* at 2058-59 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 2102 (2d ed. 1949)).

126 113 S. Ct. at 2059.

127 *Id.* (quoting United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.)).

128 *Id.* at 2059-60.

ers, their introduction into the scene of drug transactions dramatically heightens the danger to society.[129]

Smith v. United States is an important decision for section 924(c) analysis. Although specifically disclaiming an intent to do so, the *Smith* Court defined the outer limits of the statutory language. In the process of endorsing a broad interpretation of the "during and in relation to" language, the *Smith* decision effected two significant results. First, the Court established a very low threshold for conviction under section 924(c). Secondly, the *Smith* decision opened the door for an increased use of section 924(c) to reach nontraditional theories of firearm use. Each of these effects of the *Smith* decision will be examined in turn.

1. Low Threshold For Conviction

In dicta, the *Smith* Court made two important statements about the limits of section 924(c)'s "during and in relation to" requirement. As adopted by the lower courts and incorporated into section 924(c) analysis, these statements have significantly lowered the threshold of conduct required to support a conviction.

(a) Negative Proposition.—In order to support a conviction, the Court stated, "the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence."[130] With this statement, the *Smith* Court illuminated the boundaries of section 924(c) by defining the range of conduct that is outside its scope. The lower courts have adopted the Court's statement as the yardstick of section 924(c) culpability.[131] Because the *Smith* Court narrowly defined the range of conduct that is outside the scope of section 924(c), the standard has, in effect, become a negative proposition: a conviction will be upheld so long as the presence of

129 *Id.* (alteration in original) (quoting United States v. Harris, 959 F.2d 261, 262 (D.C. Cir.), *cert. denied*, 113 S. Ct. 362 (1992)).

130 113 S. Ct. at 2059. Applying this standard, the Court upheld Smith's conviction, finding that "[t]he MAC-10's presence in this case was not the product of happenstance." *Id.*

131 *See infra* note 132.

the firearm on the scene is not accidental or coincidental.[132] Under such a formulation, the defendant has the difficult task of showing that the firearm was "entirely unrelated" to the predicate offense in order to escape conviction.[133]

The D.C. Circuit applied this analysis in *United States v. Bailey*.[134] During a routine traffic stop of Bailey's automobile, police observed him push something between the driver's seat and front console.[135] A search of the passenger compartment yielded 27 individually wrapped plastic bags containing a total of 30 grams of cocaine.[136] In the trunk, police found a loaded 9 millimeter handgun and $3,216 in cash.[137] Bailey was convicted of possession with intent to distribute five grams or more of cocaine[138] and of violating 18 U.S.C. § 924(c).[139] Challenging the sufficiency of the evidence for the 924(c) count, Bailey appealed his conviction to the Circuit Court of Appeals for the District of Columbia.

"Clearly," the D.C. Circuit found, "the gun had the purpose of protecting the cash in the trunk, and only slightly less obviously, had the purpose of protecting the drugs and money on Bailey's person. This is not a case where 'the firearm's presence is coincidental or entirely unrelated to the crime.'"[140] As such, the court found that a rational jury could easily have concluded that Bailey "used" the handgun in the trunk of the car he was driving "during and in relation to" a drug trafficking crime.[141]

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132 *See, e.g.*, United States v. Hughes, No. 93-2159, 1994 WL 29939, at *4 (8th Cir. Feb. 7, 1994); United States v. DeLeon, No. 93-1375, slip op. at 1 (1st Cir. Nov. 10, 1993); United States v. Van Pelt, No. 92-40042-01-SAC, 1993 WL 360329, at *6 (D. Kan. Aug. 17, 1993); United States v. Lloyd, 10 F.3d 1197, 1212 (6th Cir. 1993); United States v. Villagrana, 5 F.3d 1048, 1051 (7th Cir. 1993) (denial of rehearing en banc); United States v. Harmon, 996 F.2d 256, 258 (10th Cir. 1993); United States v. Bailey, 995 F.2d 1113, 1119 (D.C. Cir. 1993).

133 This language is derived from the legislative history of the 1984 amendment. *See* S. REP. NO. 225, *supra* note 24, at 314 n.10, *reprinted in* 1984 U.S.C.C.A.N. at 3942 n.10; *see, e.g.*, United States v. Lloyd, 10 F.3d 1197, 1212 (6th Cir. 1993); United States v. Gomez-Arrellano, 5 F.3d 464, 467 (10th Cir. 1993); United Sates v. Brown, 915 F.2d 219, 224 (6th Cir. 1990); United States v. Bailey, 995 F.2d 1113, 1118 (D.C. Cir. 1993); United States v. Bafia, 949 F.2d 1465, 1475 (7th Cir. 1991).

134 995 F.2d 1113 (D.C. Cir. 1993).

135 *Id.* at 1114.

136 *Id.*

137 *Id.*

138 21 U.S.C. § 841(a) (1988).

139 995 F.2d at 1114.

140 *Id.* at 1119 (quoting United States v. Smith, 113 S. Ct. 2050, 2059 (1993)).

141 *Id.*

(b) "Potential of facilitating . . ."—The *Smith* Court further lowered the threshold for conviction under section 924(c) by relaxing the nexus required between the firearm and the predicate offense. The Court stated that "the gun at least must 'facilitate, *or have the potential of facilitating,*' the drug trafficking offense."[142] Prior to the decision in *Smith*, not all courts had recognized that a firearm having only the "potential of facilitating" the predicate would support a conviction under § 924(c).[143]

Following the decision in *Smith*, many lower courts have incorporated this dicta into their analysis of section 924(c) convictions.[144] Citing *Smith*, one court recently stated, "the Supreme Court has . . . recognized that 'potential of facilitating' establishes the requisite relation" between the firearm and the predicate offense.[145] For many courts, the Supreme Court's dicta merely affirmed the broad interpretation of section 924(c) already in place. For other courts, however, the "potential of facilitating" language marked a significant lowering of the threshold of conduct required to sustain a conviction—previously, some actual facilitation of the predicate had been required. The "potential of facilitating" language, used by the *Smith* court to uphold a conviction based on a guns-for-drugs exchange, has also given rise to an increased use of section 924(c) to reach other nontraditional uses of firearms.

VI. NONTRADITIONAL USES OF A FIREARM

A. Use of Firearm as an Item of Commerce

1. Prior to *Smith v. United States*

Prior to pronouncement by the Supreme Court in *Smith v. United States*, there had been a split in the circuits on whether

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142 *Id.* (quoting United States v. Stewart, 779 F.2d 538, 539 (9th Cir. 1985)) (emphasis added).

143 Many courts seemed to require that the firearm actually facilitate the predicate offense. *See, e.g.*, United States v. Derr, 990 F.2d 1330, 1337 (D.C. Cir. 1993); United States v. Wilkinson, 926 F.2d 22, 25 (1st Cir.), *cert. denied*, 111 S. Ct. 2813 (1991); United States v. Ocampo, 890 F.2d 1363, 1371 (7th Cir. 1989); United States v. Acosta-Cazares, 878 F.2d 945, 952 (6th Cir.), *cert. denied*, 493 U.S. 899 (1989); United States v. Laguardia, 774 F.2d 317, 321 (8th Cir. 1985).

144 *See, e.g.*, United States v. Hughes, No. 93-2159, 1994 WL 29939, at *4 (8th Cir. Feb. 7, 1994); United States v. Harmon, 996 F.2d 256, 259 (10th Cir. 1993); United States v. Mejia, 8 F.3d 3, 5 (8th Cir. 1993).

145 *Harmon*, 996 F.2d at 259 (upholding jury instruction including "potential of facilitating" language) (quoting *Smith*, 113 S. Ct. at 2059).

exchanging a firearm for narcotics constituted a "use" of the firearm "during and in relation to" the underlying drug crime. Shortly before the Eleventh Circuit decided Smith's appeal and answered this question in the affirmative, the D.C. Circuit had reached the same conclusion.[146] Like the Eleventh Circuit, the D.C. Circuit based its decision on the broad language of section 924(c), finding no requirement therein that the weapon be used as an offensive or defensive weapon.[147]

In *United States v. Phelps*,[148] the Court of Appeals for the Ninth Circuit had reached the opposite conclusion. The Ninth Circuit examined the legislative history of section 924(c) and concluded that Congress had not intended the statute to apply to this "unusual" situation.[149] Instead, the *Phelps* court found, "Congress directed the [original] statute at 'persons who chose to carry a firearm as an offensive weapon for a specific criminal act.'"[150] Citing this restrictive purpose for the statute, the *Phelps* court found the "in relation to" language ambiguous in the context of a guns-for-drugs trade.[151] With such ambiguity present, the Ninth Circuit held that the principle of lenity required an interpretation favorable to the defendant.[152]

2. *Smith v. United States*

Smith v. United States specifically and authoritatively decided section 924(c)'s applicability to a guns-for-drugs exchange. Holding that such an exchange constitutes a "use" of the firearm "during and in relation to" a drug trafficking crime within the meaning of section 924(c),[153] the Supreme Court endorsed a broader view of the statute's purpose than that articulated by the Ninth Circuit in *Phelps*. In finding that a more restrictive reading contravened the statute's purpose, Justice O'Connor stated:

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146 *See* United States v. Harris, 959 F.2d 246, 261-62 (D.C. Cir.) (per curiam), *cert. denied*, 113 S. Ct. 362 (1992).

147 *Id.* at 261.

148 877 F.2d 28 (9th Cir. 1989).

149 *Id.* at 30.

150 *Id.* (quoting S. REP. NO. 225, *supra* note 24, at 314 n.10, *reprinted in* 1984 U.S.C.C.A.N. at 3492 n.10.).

151 *Id.*

152 *Id.* In Smith v. United States, the Supreme Court specifically rejected the argument based on lenity. *See supra* note 128.

153 113 S. Ct. at 2060. In part, the Court's holding was based on an application of the "potential of facilitating" standard. *See supra* notes 126-27 and accompanying text.

> When Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination . . . . The fact that a gun is treated momentarily as an item of commerce does not render it inert or deprive it of destructive capacity. Rather, as experience demonstrates, it can be converted instantaneously from currency to cannon.[154]

3. Post-*Smith*

Since the decision in *Smith v. United States*, no court has had occasion to apply section 924(c) to a guns-for-drugs exchange.[155] The *Smith* decision, however, makes it clear that such an exchange falls squarely within the language of the current version of the statute and is sufficient to support a conviction.[156]

B. Passive Protection of Narcotics Stash

Much of the controversy arising under section 924(c) stems from situations where a firearm is located strategically near a stash of narcotics or cash. In these cases, the government's theory of "use" is that the firearm's mere presence serves to protect the stash and the defendant's possession of the narcotics. Like all section 924(c) cases, culpability turns on whether the defendant "used" the firearm "during and in relation to" the drug trafficking predicate.[157]

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154 113 S. Ct. at 2060. Earlier in the opinion, Justice O'Connor noted that "[o]ne need look no further to the pages of the Federal Reporter to verify the truth of [this] observation . . . . In Phelps, 'the MAC-10 suddenly transmogrified [from an item of commerce] into an offensive weapon . . . . [He] opened fire and shot a deputy sheriff.'" *Id.* at 2059 (quoting United States v. Phelps, 895 F.2d 1281, 1288 n.4 (Kozinski, J., dissenting from denial of rehearing en banc)).

155 In United States v. Sparks, 2 F.3d 574 (5th Cir. 1993), *cert denied*, 114 S. Ct. 720 (1994), the court noted that, among other firearm uses, the defendant had allowed his sellers to exchange crack cocaine for firearms. The Fifth Circuit found sufficient evidence to uphold the § 924(c) conviction, based in part on Smith v. United States. *See also* United States v. Overstreet, 5 F.3d 295 (8th Cir. 1993).

156 In United States v. Harris, the D.C. Circuit implied that actual transfer of the firearm was required to sustain a conviction under § 924(c). *Harris*, 959 F.2d at 261 ("We think that once the MAC-10 passed into appellants' hands the facilitative nexus was satisfied."). The *Smith* decision imposed no such restriction; the conviction was upheld despite the fact that Smith and the undercover officer never completed the proposed exchange. Nor does *Smith* distinguish between a defendant who receives a firearm in exchange for narcotics and the defendant who transfers the firearm in such an exchange.

157 *See generally* Riordan, *supra* note 4.

1. Prior to *Smith v. United States*

In cases where the government's theory of "use" is the passive protection of a narcotics stash, the courts have consistently reviewed section 924(c) convictions under either the "fortress theory" or a "more than strategic proximity theory" or both.[158] Under either theory, and even prior to *Smith v. United States*, a majority of the circuit courts have interpreted the "during and in relation to" requirement quite broadly.

The "more than strategic proximity theory" is nothing more than a specific application of the regular section 924(c) analysis to the passive protection theory of "use." In order to sustain a conviction, the prosecution must establish the usual nexus between the defendant and the firearm and between the firearm and the predicate drug offense.[159] In passive protection cases, the former is usually established by demonstrating defendant's constructive possession of the firearm or the premises on which it is located.[160] To satisfy the nexus between the predicate and firearm in such situations, however, courts claim to require "something more than the strategic proximity of drugs and firearms."[161]

In reality, however, the "more than strategic proximity theory" is deceptively named; the "something more" that supposedly separates possession from "use" is often illusory. Even prior to *Smith*, a majority of the circuit courts interpreted the "during and in relation to" requirement very broadly, accepting as sufficient almost any relationship between the firearm and the predicate. Although each circuit articulated the standard differently, a conviction would generally be upheld where the firearm facilitated the drug offense "in any manner."[162] Applying this broad standard to passive protection cases, these courts would find a facilitative nexus in the firearm's availability to protect the stash in a contingency or dur-

158 United States v. Pace, 10 F.3d 1106, 1117 (5th Cir. 1993).

159 *See supra* note 81 and accompanying text.

160 *See supra* notes 82-86 and accompanying text.

161 *See* Riordan, *supra* note 4, at 48; United States v. Wilson, 884 F.2d 174, 177 (5th Cir. 1989).

162 *See, e.g.*, United States v. Montgomery, 990 F.2d 266, 270 (9th Cir. 1993); United States v. Williams, 982 F.2d 1209, 1214 (8th Cir.), *cert. denied*, 111 S. Ct. 2033 (1991); United States v. Christian, 942 F.2d 363, 368 (6th Cir.), *cert. denied*, 112 S. Ct. 905 (1991); United States v. Wilkinson, 926 F.2d 22, 25 (1st Cir.), *cert. denied*, 111 S. Ct. 2813 (1991); United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990).

ing an escape.[163] Thus, a very low threshold for conviction evolved for passive protection cases analyzed under the "more than strategic proximity" theory.

The courts have also invoked the "fortress theory" in analyzing cases where the government's theory of use is passive protection.[164] "In a nutshell, the 'fortress theory' . . . states that the 'sheer volume of weapons and drugs makes reasonable the inference that the weapons involved were carried in relation to the predicate drug offense.'"[165] *United States v. Acosta-Cazares*[166] stated the reasoning behind the fortress theory: "[j]ust as weapons are kept at the ready to protect military installations against a potential enemy attack, so too may weapons be kept at the ready to protect a drug house, thereby safeguarding and facilitating illegal transactions."[167]

The fortress theory demonstrates that, even prior to *Smith*, a majority of courts were willing to broaden the scope of the phrase "during and in relation to." Under the fortress theory, courts evaluating whether a firearm was "used . . . during and in relation to" an offense look beyond the intentions of the defendant as he engaged in the precise conduct that comprised the predicate offense. Rather, the totality of circumstances surrounding the commission of the crime are examined: "the emboldened sallying

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163 This result is explicitly supported by the Senate Report describing the 1984 amendment to § 924(c)(1) which added the "in relation to" language:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape.

S. REP. NO. 225, *supra* note 24, at 314 n.10, *reprinted in* 1984 U.S.C.C.A.N. at 3492 n.10. *See, e.g.*, United States v. Brown, 915 F.2d 219, 226 (6th Cir. 1990); United States v. Payero, 858 F.2d 928, 929-30 (1st Cir. 1989); United States v. Brockington, 849 F.2d 872, 876 (4th Cir. 1988).

164 For a discussion of § 924(c) and the fortress theory, see Riordan, *supra* note 4, at 52-54.

165 United State v. Pace, 10 F.3d 1106, 1117 (5th Cir. 1993) (quoting United States v. Wilson, 884 F.2d 174, 177 (5th Cir. 1989)); *see, e.g.*, United States v. Meggett, 875 F.2d 24 (2d. Cir.), *cert. denied*, 493 U.S. 858 (1989) (finding that presence of weapons coupled with evidence that apartment was used as processing point for large quantities of narcotics gave rise to inference that firearms were an integral part of narcotics operation); United States v. Matra, 841 F.2d 837 (8th Cir. 1988) (inference permissible where defendant had ready access to submachine gun in house that was "veritable fortress" and contained large quantity of high purity cocaine and large amount of cash).

166 841 F.2d 837 (8th Cir. 1988).

167 *Id.* at 842.

forth, the execution of the transaction, the escape, and the likely responses to contingencies that might have arisen during the commission of the crime."[168] Thus, under either the "fortress theory" or the "more than strategic proximity theory," the majority of circuits were willing to interpret section 924(c) as encompassing the passive protection theory of "use."

2. The D.C. Circuit Approach

Prior to *Smith*, the D.C. Circuit had developed a more narrow approach to passive protection cases. Under this approach, the court would examine a series of factors to determine if the passive firearm was used "during and in relation to" the predicate offense.[169] Evolving through a series of cases, this factor analysis led to a more restrictive application of section 924(c).

In *United States v. Bruce*,[170] the police executed a search warrant at the home of the defendant. "Bruce told them that 'everything [they] wanted was in his coat pocket hanging in the closet.'"[171] In the pockets of the trench coat, police found various quantities of crack cocaine, cocaine powder, and marijuana packaged for distribution. Also in the coat's pockets, police found a brown bag containing a belt buckle which held a fully loaded .22 four-shot derringer.[172] In addition to several counts of possession and possession with intent to distribute, Bruce was convicted of violating 18 U.S.C. § 924(c).[173]

On appeal to the D.C. Circuit, Bruce argued that there was no proof either that the gun was used to safeguard the drugs or that any drug distribution took place in which the gun played a facilitating role.[174] In overturning Bruce's conviction, the D.C. Circuit considered the size of the weapon, classifying it as "hardly the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house."[175] The D.C. Circuit also discussed the analytical difficulty in the government's claim that the Derringer was used to facilitate the passive crime of possession with intent to distribute:

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168 United States v. Brown, 915 F.2d 219, 226 (6th Cir. 1990).
169 *See* United States v. Morris, 977 F.2d 617, 621-22 (D.C. Cir. 1992).
170 939 F.2d 1053 (D.C. Cir. 1993).
171 *Id.*
172 *Id.* at 1054.
173 *Id.*
174 *Id.* at 1053.
175 *Id.* at 1055.

> When the predicate offense is possession with intent to distribute, the government fails to carry its burden of demonstrating use if the evidence shows only possession of a gun which it may be inferred he intended to use in some future distribution of narcotics. Instead, the evidence must support the inference that the gun was used to protect the defendant's [present] unlawful possession of drugs that he intended to distribute in the future.[176]

According to the D.C. Circuit, therefore, the proof required to sustain a conviction under section 924(c) varies with the nature of the predicate offense. Under this approach, protection of future distribution does not qualify as use "during and in relation to" the predicate of possession with the intent to distribute. After *Bruce*, therefore, the size of the weapon and the predicate offense charged are factors to be considered in evaluating a section 924(c) charge based on passive protection. These factors were expanded in later cases.

In *United States v. Derr*,[177] police executed a search warrant for the home at which Derr was staying. In a locked closet in the bedroom which Derr had been using, police found an unloaded .357 magnum and a plastic bag containing nine rounds of .357 ammunition. Directly under the gun and bullets was another plastic bag containing both Derr's birth certificate and a padlocked wooden box. Inside the box, the officers found 18.4 grams of cocaine, $1100 in cash, a small portable scale, a glass plate, and various paraphernalia for drug distribution.[178]

Citing *Bruce*, the court stated that

> [a]lthough an individual may 'use' a gun without ever firing or brandishing it, . . . there must be evidence showing that the firearm actually facilitated the possession of drugs. Usually this is done by showing that the gun was used to protect the stash. It is not, however, enough that the gun was intended to be used to protect the possession at some later time.[179]

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176 *Id.* at 1056. The court distinguished between intention to use the firearm to protect subsequent distribution, which would not be a basis for conviction under the court's approach, and protection of the present possession of the drugs, which would be sufficient to support a § 924 conviction. Finding no evidence of the latter, the court overturned Bruce's conviction. *Id.* at 1056-57.

177 990 F.2d 1330 (D.C. Cir. 1993).

178 *Id.* at 1332.

179 *Id.* at 1337.

The court enumerated a set of non-exclusive factors it considers in weighing whether a gun had actually been used to protect present possession: "[the degree to which] the gun is accessible to the defendant [for current use], whether it is located in proximity to the drugs (which may cut either way depending on the facts of a particular case), whether it is loaded, what type of weapon it is, and finally, whether there is expert testimony regarding the government's particular theory of "use."[180] Relying heavily on the gun's inaccessibility to defendant for current use, the court overturned Derr's conviction.

In *United States v. Robinson*,[181] an unloaded .22 Derringer was found in a locked trunk alongside drugs, narcotics ledgers, and marked money from a drug transaction with an undercover officer. The defendant was convicted of possession with intent to distribute and of violating of 18 U.S.C. § 924(c). The D.C. Circuit reversed Robinson's section 924(c) conviction after analyzing the following factors: lack of evidence of past use, the limited firepower of the Derringer, the fact that it was unloaded, its location in a locked container, and the fact that there was only one weapon.[182]

At the heart of the D.C. Circuit's approach is the requirement that "a 924(c) conviction be predicated upon a drug offense charged in the indictment and proved at trial."[183] Where the charged predicate offense is possession with intent to distribute, the D.C. Circuit examines a series of restrictive factors to determine if section 924(c) has been violated.[184] After *Bruce*, *Derr*, and *Robinson*, these factors include the size of the firearm, the number of firearms found at the scene, the status of the weapon as loaded or unloaded, the proximity of the firearm to the narcotics, and any evidence of defendant's past use of the firearm in connection with the drug trade.[185]

The D.C. Circuit is alone in adopting this approach. Her sister circuits do not require that the "related" drug trafficking

180 *Id.* at 1338; *see also* United States v. Morris, 977 F.2d 617, 621-22 (D.C. Cir. 1992).

181 997 F.2d 881 (D.C. Cir. 1993).

182 *Id.* at 887-89.

183 *See* United States v. Bailey, 995 F.2d 1113, 1120 (D.C. Cir. 1993) (Ginsburg, D.H., J., dissenting).

184 *See Morris*, 977 F.2d at 622.

185 *See infra* notes 169-82 and accompanying text; *see also Morris*, 977 F.2d at 621-22.

crime be charged or its elements proved beyond a reasonable doubt.[186] Consistent with a broad reading of the statute, other circuits have specifically rejected many of the factors considered by the D.C. Circuit: size of the gun,[187] restriction of the "fortress" theory to "crack houses,"[188] whether the firearm was loaded,[189] number of weapons,[190] and evidence of past actual use.

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186 In the other circuits, a successful charge under § 924(c) can be made without separately charging the underlying drug offense. *See* United States v. Kimberlin, No. 93-5113, 1994 WL 62107, at *3 (4th Cir. Mar. 3, 1994); United States v. Hill, 971 F.2d 1461, 1463-64 (10th Cir. 1992) (en banc); United States v. Munoz-Fabela, 896 F.2d 908, 910-11 (5th Cir.), *cert. denied*, 498 U.S. 824 (1990); United States v. Hunter, 887 F.2d 1001, 1003 (9th Cir.), *cert. denied*, 493 U.S. 1090 (1989). The D.C. Circuit, however, is in accord with the other Circuit Courts of Appeals in holding that a § 924(c) conviction can be upheld notwithstanding acquittal on the predicate offense. *Compare* United States v. Robinson, 997 F.2d 884, 895 n.5 (D.C. Cir. 1993) (collecting D.C. Circuit cases) *with* United States v. Wilkins, 911 F.2d 337, 338 n.1 (9th Cir. 1990). *See also Munoz-Fabela*, 896 F.2d at 911.

187 A survey of case law found the D.C. Circuit to be alone in considering this factor. Courts commenting on the issue have found the hierarchy of firearms found in the statute to be sufficient. *See, e.g.*, United States v. Sims, 975 F.2d 1225, 1236 (6th Cir. 1992) (denial of rehearing en banc), *cert. denied*, 113 S. Ct. 1315 (1993); *Cf* United States v. Robinson, 997 F.2d 884, 897 (D.C. Cir. 1993) (Henderson, J., dissenting) ("A drug defendant's choice of a less effective firearm does not effect his use of it. The reason any firearm no matter its size of firepower violates section 924(c)(1) is obvious: Any gun can kill or wound."); *see also id.*, 997 F.2d at 897 (Henderson, J., dissenting) (pointing out that it was a Derringer that took the life of Abraham Lincoln).

188 Most circuits merely require that the number of guns present and the level of drug activity be sufficient to support the "fortress" theory. *See supra* note 165 and accompanying text.

189 *See* United States v. Guiterrez-Silva, 983 F.2d 123 (8th Cir. 1993); United States v. Willis, 6 F.3d 257, 265 (5th Cir. 1993) (holding that fact that gun was unloaded or inoperative does not insulate defendant); United States v. Martinez, 912 F.2d 419, 420-21 (10th Cir. 1990); *see, e.g.*, United States v. Castro-Lara, 970 F.2d 976 (1st Cir. 1992) (unloaded gun in trunk of car), *cert. denied*, 113 S. Ct. 2935 (1993); United States v. Hill, 967 F.2d 902 (3rd Cir. 1992) (rifle unloaded and found with stock separated from barrel); *see also* DIRTY HARRY (Warner Bros. 1971) (bank robber decides not to reach for pistol when inspector points gun at him and says, "I know what you're thinking: 'Did he fire six shots, or only five?' Well, to tell you the truth, in all this excitement I've kinda lost track myself. But being this is a .44 magnum, the most powerful handgun in the world, and would blow your head clean off, you've got to ask yourself one question: 'Do I feel lucky?' . . . Well, do ya, punk?"), *quoted in* United States v. Bailey, 995 F.2d 1113, 1120 n.* (D.C. Cir. 1993) (Ginsburg, D.H., J., dissenting).

190 *See* United States v. Correa-Ventura, 6 F.3d 1070, 1085-86 (5th Cir. 1993) (holding number of firearms "used" or "carried" irrelevant for conviction purposes); United States v. Johnson, 986 F.2d 134, 137 (6th Cir.) ("[T]he use of a single firearm can support multiple § 924(c) convictions, as long as each is supported by a distinct predicate offense."), *cert. denied*, 113 S. Ct. 3012 (1993); United States v. Casey, 776 F. Supp. 272, 275 (E.D. Va. 1991) ("One gun in the wrong hands can be just as dangerous as two.").

3. Post-*Smith*

Smith v. United States seemingly endorsed the expansive approach to passive protection cases utilized in the majority of the circuit courts. The decision endorsed a broad definition of "use" and explicitly held that the firearm need not be used as a weapon in order to fall within the conduct prohibited by the statute.[191] Moreover, *Smith* endorsed the view that a firearm having the "potential of facilitating" the predicate offense will support a conviction. This seems to vindicate the approach to passive protection cases taken by a majority of the circuits, which looks beyond the instant possession offense to future distribution, contingencies, or escape. Following *Smith*, the majority of circuit courts have continued to apply section 924(c) expansively in passive protection cases.[192]

The effect of *Smith* on section 924(c) litigation in the D.C. Circuit is considerably more uncertain. The recent decisions from this circuit indicate both an unwillingness to retreat from the formalistic factor-oriented approach as well as some dissatisfaction with this approach.[193]

C. Emboldening the Defendant

The final nontraditional "use" of a firearm found in section 924(c) cases is closely related to the passive protection theory of use. Like the passive protection theory, the "emboldening" theory of "use" does not rely upon the defendant's actual or open handling of the firearm. Unlike the passive protection theory, however, it is not limited to situations where narcotics, cash, or drug paraphernalia is found nearby. In "emboldening" cases, the

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191 113 S. Ct. 2050, 2054 (1993).

192 *See, e.g.*, United States v. Paulino, 13 F.3d 20 (1st Cir. 1993); United States v. Lloyd, 10 F.3d 1197, 1212 (6th Cir. 1993); United States v. Villagrana, 5 F.3d 1048, 1051-52 (7th Cir. 1993) (denial of rehearing en banc); United States v. Meija, 8 F.3d 3, 5 (8th Cir. 1993); United States v. McFadden, No. 92-2265, 1994 WL 6606, at *9 (1st Cir. Jan. 18, 1994); United States v. Lewis, 3 F.3d 252, 255 (8th Cir. 1993).

193 *See* United States v. Bailey, 995 F.2d 1113, 1119 (D.C. Cir. 1993) (questioning the precedential value of the *Derr* and *Bruce* decisions after *Smith*); *Id.* (Ginsburg, D.H., J., dissenting) ("Sometimes the law is 'a [sic] ass, a [sic] idiot,' Mr. Bumble. Our recent holdings in United States v. Derr and United States v. Bruce are cases in point.") (citations omitted); *see also* United States v. Robinson, 997 F.2d 881, 893 (D.C. Cir. 1993) (Henderson, J., dissenting) (calling the distinction between present and future intention an "exceedingly slippery slope") (quoting United States v. Morris, 977 F.2d 617, 623 (D.C. Cir. 1992) (Silberman, J., concurring)).

prosecution proceeds on the theory that the mere presence of the firearm at the scene emboldened the defendant to commit the predicate offense; the defendant is said to "use" the firearm by deriving criminal fortitude from its proximity.[194]

Like all section 924(c) cases, culpability in "emboldening" cases turns on whether the defendant "used" the firearm "during and in relation to" the drug trafficking predicate. Again, two nexuses are required. In "emboldening" cases, the firearm is often hidden nearby. The required nexus between the defendant and the firearm, therefore, is usually established by showing his actual or constructive possession of the firearm or the premises concealing it. To satisfy the "during and in relation to" requirement, there must also be a connection between the firearm and the predicate. In many cases, especially where the presence of the firearm is unknown to others and not discovered until after arrest, "emboldening" is the only available theory of use. The question, therefore, is whether this theory alone is sufficient to constitute a "use" of the firearm by the defendant "during and in relation to" the predicate offense.

1. Prior to *Smith v. United States*

Even prior to *Smith*, all courts ruling on this question have answered it in the affirmative.[195] Courts reasoning to this conclusion begin with the proposition that Congress added the phrase "in relation to" to keep the statute focused on those persons whose firearms "played a role" in their criminal conduct.[196] Courts have universally recognized, however, that the government is not required to show that the defendant displayed or brandished the firearm.[197] Rather, consistent with their inclination to read the statute broadly, courts examine "the totality of circumstances surrounding the commission of the crime: the emboldened sallying forth, the execution of the transaction, the escape, and the likely response to contingencies that might have arisen during

194 United States v. Brown, 915 F.2d 219, 224 (6th Cir. 1990).

195 *See, e.g.*, United States v. Perry, 991 F.2d 304, 310 n.1 (6th Cir. 1993) (holding that a "firearm that 'emboldens' a defendant may be 'used' within the meaning of § 924(c)"); United States v. Brown, 915 F.2d 219, 224 (6th Cir. 1990); United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985).

196 *See* S. REP. NO. 225, *supra* note 24, at 312-14, *reprinted in* 1984 U.S.C.C.A.N. at 3490-92; United States v. Brown, 915 F.2d 219, 224 (6th Cir. 1990).

197 *See supra* note 88 and accompanying text.

the commission of the crime."[198] The defendant's sole purpose in carrying the weapon need not have been facilitation of the drug trafficking crime.[199]

In *United States v. Stewart*,[200] while interpreting the phrase "in relation to," then-Judge Kennedy established a principle that is now "widely accepted" in the circuits:[201] A firearm may play a role in the offense, sufficient to support a section 924(c) conviction, simply by emboldening the defendant to act.[202] Several reasons have been offered to support this proposition. Courts have suggested that the availability of the weapon increases defendant's confidence level, which in turn increases the likelihood that the criminal undertaking will succeed.[203] Similarly, an "emboldened" defendant might commit a crime he would not otherwise attempt without the confidence provided by the weapon.[204]

Courts have identified two limits on the "emboldening" theory of "use." In order to sustain a conviction based on this theory, the defendant must have had knowledge of the weapon's presence at the time of the commission of the predicate offense. Secondly, the weapon must be sufficiently available to the defendant to support a reasonable inference that he felt emboldened by it.[205] Whether

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198 *Brown*, 915 F.2d at 226.

199 United States v. Plummer, 964 F.2d 1251, 1254 (1st Cir.), *cert. denied*, 113 S. Ct. 350 (1992); United States v. Blankenship, 954 F.2d 1224, 1229 (6th Cir.), *cert. denied*, 113 S. Ct. 288 (1992).

200 779 F.2d 538 (9th Cir. 1985).

201 United States v. Torres-Medina, 935 F.2d 1047, 1050 (9th Cir. 1991).

202 *Id.* at 1050; *Stewart*, 779 F.2d at 540; *see also* United States v. Williams, 923 F.2d 1397, 1403 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2033 (1991); United States v. Brown, 915 F.2d 219, 224 ("Even if a firearm remains hidden throughout a crime, it's concealed presence may have been in relation to the crime if it facilitated the crime by emboldening the defendant, giving him the security and confidence to undertake the criminal act."); United States v. Vasquez, 909 F.2d 235, 239 (7th Cir. 1990), *cert denied*, 111 S. Ct. 2826 (1991); United States v. Eaton, 890 F.2d 511, 512 (1st Cir. 1989), *cert. denied*, 495 U.S. 906 (1990); United States v. Meggett, 875 F.2d 24, 28 (2d Cir.), *cert. denied*, 493 U.S. 858 (1989); United States v. Wright, 932 F.2d 868, 881 (10th Cir.), *cert. denied*, 112 S. Ct. 428 (1991); United States v. Laguardia, 774 F.2d 317, 321 (8th Cir. 1985).

203 United States v. Matra, 841 F.2d 837, 843 (8th Cir. 1988); *see also* United States v. Rosado 866 F.2d 967, 969-70 (7th Cir. 1989), *cert. denied*, 493 U.S. 837 (1989).

204 *Cf.* United States v. Martinez-Jiminez, 864 F.2d 664, 667 (9th Cir.) (finding that a defendant who "feels secure" with a weapon "may not have begun the [crime] without it"), *cert. denied*, 489 U.S. 1099 (1989).

205 *See Stewart*, 779 F.2d at 540 ("If the firearm is within the possession or control of a person who commits an underlying crime . . . and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon . . . , whether or not such display or discharge in fact occurred, then there is a violation of the statute."). Some circuits require that the weapon be "readily" accessible to defendant. *See, e.g.*, Unit-

such an inference is legitimately raised depends on the circumstances of each case; the test may not be defined in terms of "feet, yards, or miles."[206] In application, however, this limitation is a weak one. The jury may reasonably infer availability of the firearm for "emboldening" purposes even if the weapon is out of reach during the commission of the crime, unloaded, or inoperable.[207]

United States v. Torres-Medina[208] illustrates the courts' willingness to apply the "emboldening" theory of "use" in section 924(c) cases. After raiding Torres-Medina's house pursuant to a search warrant, police located a trap door leading to a crawl space beneath the house. In the crawl space, they found 30 grams of cocaine, scales, a sifter, chemicals for "cutting" the cocaine, and a loaded nine millimeter handgun.[209] Torres-Medina was charged with possession of cocaine with intent to distribute and violation of 18 U.S.C. § 924(c).[210]

Evidence at trial revealed that Torres-Medina was a paraplegic and confined to a wheelchair, making personal access to the crawl space and handgun impossible.[211] An associate testified that he assisted Torres-Medina during drug deals when Torres-Medina was physically incapable of performing certain tasks on his own.[212] Despite the lack of personal access, the Ninth Circuit upheld Torres-Medina's 924(c) conviction, stating that "[t]he jury reasonably could have surmised that [the associate's] duties extended to retrieving the gun and cocaine . . . and under the circumstances . . . that the gun . . . emboldened [Torres-Medina] in the commission of his crime."[213]

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ed States v. Parrish, 925 F.2d 1293, 1297 (10th Cir. 1991); United States v. Acosta-Cazares, 878 F.2d 945, 952 (6th Cir.), *cert. denied*, 493 U.S. 899 (1989). Others have explicitly rejected the notion that it must be "readily" available. *See, e.g.*, United States v. Torres-Medina, 935 F.2d 1047, 1049 (9th Cir. 1991). *Cf.* United States v. Hadfield, 918 F.2d 987, 997 (1st Cir. 1990) (holding that firearm need not be "immediately available in order to facilitate drug deals"), *cert. denied*, 111 S. Ct. 2062 (1991).

206 United States v. Perez, 989 F.2d 1111, 1115 (9th Cir. 1993) (quoting *Torres-Medina*, 935 F.2d at 1049).

207 *Torres-Medina*, 935 F.2d at 1049.

208 935 F.2d 1047 (9th Cir. 1991).

209 *Id.* at 1048.

210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.*

2. *Smith v. United States*

Smith v. United States did nothing to contravene this broad application of section 924(c) in "emboldening" cases. On the contrary, *Smith* explicitly rejected the notion that "use" of a firearm for purposes of 924(c) is limited to "use" as a weapon.[214] Rather, following *Smith*, section 924(c) "sweeps broadly, punishing any 'use' of a firearm, so long as the use is 'during and in relation to' a drug trafficking offense."[215]

The "during and in relation to" language, the Court held, is also "expansive."[216] Although declining to define the "precise contours" of the language, the Court held that "[t]he phrase 'in relation to' . . . at a minimum . . . clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence."[217] Taking the Court's interpretation of these two phrases together, it thus appears that section 924(c) is satisfied by "any use of a firearm"[218] which has "some purpose or effect with respect to the drug trafficking crime."[219] The *Smith* decision left open the question of whether this standard is satisfied where the firearm's only role in the offense is to embolden the defendant.

3. Post-*Smith*

After the decision in *Smith v.United States*, the lower courts have continued to rule that "emboldening" the defendant constitutes sufficient "use" of a firearm "during and in relation to" the predicate offense to support a conviction under section 924(c).[220] Given the standard applied in *Smith*, this result is not surprising.

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214 113 S. Ct. at 2054. There is some indication in the *Smith* decision that the Supreme Court would even view the emboldening of the defendant as a traditional use of a firearm. *Id.* at 2053 (restating Smith's argument that § 924(c) is limited to situations where the firearm is used as a weapon).

215 *Id.*

216 *Id.* at 2058.

217 *Id.*

218 *Id.* at 2054.

219 *Id.* at 2059.

220 *See* United States v. Harmon, 996 F.2d 256, 258 (10th Cir. 1993) ("A firearm is used . . . in relation to a drug trafficking crime . . . when it emboldens the defendant to commit the drug trafficking crime."); United States v. Warner, 10 F.3d 1236, 1238 (6th Cir. 1993) (denial of rehearing en banc); United States v. Carillo-Rangel, No. 92-50180 (9th Cir. Sep. 1, 1993); United States v. Willis, 6 F.3d 257, 265 (5th Cir. 1993).

By increasing the defendant's confidence level, the firearm certainly produces "an effect with respect to the drug trafficking crime."[221] Courts have reached the same conclusion from the "potential to facilitate" language found in *Smith*.[222] Emphasizing the broad interpretation of section 924(c) endorsed by *Smith*, courts ruling on the issue have found no reason to revisit their earlier rulings upholding convictions based on the "emboldening" theory of use.

VII. NORMATIVE CONSIDERATIONS

Smith v. United States held that "a criminal who trades his firearm for drugs 'uses' it during and in relation to a drug trafficking offense within the meaning of section 924(c)(1)."[223] The significance of the decision, however, goes much further than this specific holding. In dicta, the Supreme Court provided interpretive guidance to lower courts on what constitutes "use" of a firearm "during and in relation to" a drug trafficking offense. Because the Court's dicta has been incorporated by the lower courts into their analysis of section 924(c), *Smith* has had the effect of standardizing the interpretation given to the current statutory language.

Following *Smith*, section 924(c) is given a uniformly "expansive" reading.[224] By granting the statute an expansive definition, excluding only the accidental or coincidental presence of a firearm, and allowing a conviction to stand where the firearm has only the potential of facilitating the offense, the Supreme Court has established a very low threshold for conviction. This low threshold, coupled with the harsh penalties mandated for conviction, warrants a closer examination of the modern application of section 924(c).

In defining "use" of a firearm "during and in relation to . . . a drug trafficking offense," the courts have concluded that there is no requirement that (1) the defendant brandish, display or discharge the firearm,[225] (2) the defendant have actual possession

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221 *Smith*, 113 S. Ct. at 2059.

222 *See, e.g., Harmon*, 996 F.2d at 258 ("[W]hen a defendant carries a firearm during a drug trafficking crime as a source of protection or to embolden himself, the firearm has the potential to facilitate the drug trafficking crime, regardless of whether it actually facilitates the offense.").

223 113 S. Ct. at 2060.

224 *Id.* at 2058.

225 *See supra* note 88 and accompanying text.

of either the firearm or the drugs,[226] (3) the firearm be loaded or operable,[227] (4) a drug transaction have occurred at the place where the drugs are found,[228] (5) defendant be charged with the predicate offense,[229] (6) the sole purpose of the firearm was to protect the drug operation,[230] or (7) the firearm actually facilitate the predicate offense or be used "as a weapon."[231] Rather, a conviction will be upheld if the firearm merely has "some purpose or effect with respect to the drug trafficking crime," a standard that is satisfied if the firearm merely has the "potential of facilitating" the predicate or if its sole use is to "embolden" the defendant.

Despite the frequent assertion by courts that the standard maintains a distinction between "possession" and "use" of a gun by drug offenders in the context of prosecutions under section 924(c), it may be argued that the modern formulation has converted section 924(c) into a strict liability offense, criminalizing any "drug-crime-related" possession of a firearm.[232] Arguably, any gun that is both possessed by a drug offender and present at or near the site of a drug crime helps the offender carry out the drug crime.[233] It may do this by "emboldening" him, or perhaps by being available, should the need arise, to frighten others or to ensure the success of the drug crime.[234]

The legislative history of section 924(c) shows that Congress specifically sought to avoid criminalizing the mere possession of a firearm.[235] Consequently, courts have required that "something more" than mere possession is required to constitute a "use" of the firearm "during and in relation to" the drug predicate. Courts have often held, however, that the word "use" sometimes encompasses passive activity.[236] Under the modern formulation, there-

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226 *See supra* notes 83-86 and accompanying text.

227 *See supra* note 189 and accompanying text.

228 United States v. Hadfield, 918 F.2d 987, 997 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 2062 (1991).

229 *See supra* note 201.

230 *See supra* note 198 and accompanying text.

231 113 S. Ct. at 2054.

232 *See generally* United States v. McFadden, No. 92-2265, 1994 WL 6606, at *4 (1st Cir. Jan. 18, 1994) (Breyer, J., dissenting).

233 *Id.*

234 United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985).

235 *See supra* notes 73-76 and accompanying text.

236 *See* United States v. Long, 905 F.2d 1572, 1576-77 (D.C. Cir.) (recognizing that the word "use" is expansive and extends even to situations where the gun is not actively employed), *cert. denied*, 498 U.S. 948 (1990).

fore, the "something more" that separates "possession" from "use" is often illusory.

"[I]t is easier to see the need to distinguish (drug-crime-related) 'use' from 'possession' than it is to explain just how to make the distinction."[237] The major problem with section 924(c) is that it creates the potential for overly broad or inconsistent interpretations of what constitutes "use" of a firearm "during and in relation to" a drug trafficking predicate.[238] This could result in severe mandatory penalties being imposed by courts for crimes which are not intended to be within the scope of section 924(c).

Congressional intent for the language of section 924(c) is difficult to discern. As discussed above,[239] the statute's component phrases were enacted in three different amendments to the section by three different sessions of Congress.[240] This piecemeal legislation is undoubtedly responsible for much of the interpretive difficulty surrounding section 924(c) and raises the question of whether Congress intended the broad interpretation currently given to the completed statute.[241]

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."[242] With such severe penalties mandated for conviction, precise drafting of section 924(c) is critical; without it, a person could be imprisoned for a mandatory five, ten, or thirty years for a crime which Congress never intended to address in section 924(c).

VIII. PROPOSAL

The United States needs an effective federal sentencing provi-

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237 United States v. McFadden, No. 92-2265, 1994 WL 6606, at *5 (1st Cir. Jan. 18, 1994) (Breyer, J., dissenting).

238 The language of § 924(c) has been criticized by other commentators. For a discussion of the ambiguity in the term "crime of violence" as used by the statute, see Alberts, *supra* note 9, at 837-50.

239 *See supra* Part III.

240 *See supra* note 72.

241 This problem is further exacerbated by the scarcity of legislative history on § 924(c). *See supra* note 54.

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

sion dealing with firearms and drug trafficking. As acknowledged by many courts, firearms are "tools of the [drug trafficking] trade."[243] Indeed, this notion "is at the heart of [section 924(c)], which was intended to combat the deadly confluence of drugs and guns in our society."[244] In creating a separate mandatory penalty for using a firearm, however, Congress should have specified the underlying conduct it meant to address.

It is beyond the scope of this Note to address which "uses" of a firearm Congress should proscribe in section 924(c). It is a legislative task to determine whether the statute should reach both nontraditional uses and use of the firearm as a weapon. Such determinations, however, should be clearly enumerated in the statute. For example, if the use of a firearm to as passive protection of a narcotics stash is of sufficient public concern to warrant triggering the statute's mandatory penalties, then it should be listed in section 924(c).[245]

Preferably, Congress will completely abolish the "during and in relation to" language of section 924(c). The following is a proposal for how relevant parts of section 924(c) could be reworded to avoid problems of misinterpretation:

> (c)(1) Whoever uses or carries a firearm during the commission of any crime of violence or drug trafficking crime (including a drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, where the firearm is an integral part of such offense, shall in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years . . .
> (2) [retain the current language defining "drug trafficking crime"]
> (3) [retain the current language defining "crime of violence"]
> (4) For purposes of this subsection, a firearm is an "integral

243 United States v. Coslet, 987 F.2d 1493, 1495 (10th Cir. 1993); United States v. Pate, 932 F.2d 736, 737 (8th Cir. 1991); United States v. Buchanan, 910 F.2d 1571, 1573 (7th Cir. 1990); United States v. Hinds, 856 F.2d 438, 443 (1st Cir. 1988); United States v. Calisto, 838 F.2d 711 (3rd Cir. 1988).

244 United States v. Jefferson, 974 F.2d 201, 206 (D.C. Cir. 1992). *See also* Smith v. United States, 113 S. Ct. 2050, 2059 (1993) (The "introduction [of guns] into the scene of drug transactions dramatically heightens the danger to society.") (quoting United States v. Harris, 959 F.2d 246, 262 (D.C. Cir. 1992) (per curiam), *cert. denied*, 113 S. Ct. 362 (1992)).

245 *Cf.* Alberts, *supra* note 9, at 849.

part" of the predicate offense if:

(a) the firearm is fired, displayed, or brandished, or

(b) the firearm is exchanged or offered to be exchanged for narcotics, or

(c) it could be found under the circumstances that the defendant intended to use the gun if a contingency arose or to make his escape, or

(d) the firearm otherwise actively facilitated the offense.

This proposal reflects the current interpretation of section 924(c) except that it eliminates "emboldening" the defendant as a viable theory of "use" as inconsistent with congressional intent for the statute.[246] Substituting this structure for the "during and in relation to" language would allow Congress to define the precise conduct proscribed by the statute. "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."[247]

The specificity afforded by such a formulation has several advantages. It would further the goals of deterrence and certainty in sentencing by providing adequate notice of the specific conduct punishable under the statute. Implementing this statutory structure would also permit easy modification of section 924(c) to reflect changing congressional intent. By adding or removing elements of the definition of "integral part," Congress could broaden or narrow the statute's reach in a way not possible with the current formulation.

IX. CONCLUSION

In enacting the Comprehensive Crime Control Act, Congress endeavored to create "a tougher and more consistent criminal code."[248] As the crime-control model changed from rehabilitation

246 The Senate Report to the 1984 amendment of § 924(c) indicates that the "in relation to" language would "preclude [the statute's] application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight." S. REP. NO. 225, *supra* note 24, at 314 n.10, *reprinted in* 1984 U.S.C.C.A.N. at 3942 n.10. Under the modern interpretation, such a weapon would undoubtedly subject its possessor to § 924(c) culpability under the "emboldening" theory of use; *see also* United States v. McFadden, No. 92-2265, 1994 WL 6606, at *4-5 (1st Cir. Jan. 18, 1994) (Breyer, J., dissenting) (discussing how the emboldening theory of use may de facto criminalize possession of the firearm).

247 Alberts, *supra* note 9, at 849 (advocating a similar enumeration of "crimes of violence" as used in § 924 (c)).

248 *Id.* at 850; *see supra* notes 35-45.

to deterrence, Congress also sought to achieve uniform federal sentencing—partly through the use of mandatory minimum sentencing provisions.

Congress intended section 924(c)'s severe mandatory penalties to deter the use or possession of firearms in conjunction with drug trafficking crimes. Its component phrases enacted by three different sessions of Congress, section 924(c) now prohibits the "use" of a firearm "during and in relation to" a drug trafficking offense. Although Congress added the "in relation to" language to limit its scope, the courts have greatly expanded section 924(c)'s reach—quite possibly beyond congressional intent.

Smith v. United States affirmed and expanded the lower courts' broad reading of section 924(c); the statute now enjoys a uniformly "expansive" interpretation. The *Smith* decision established an extremely low threshold for conviction, excluding only those situations where the firearm's presence is entirely accidental or coincidental. Moreover, the decision endorsed the continued application of section 924(c) to nontraditional uses of firearms, including use of the firearm as an item of exchange, use of the firearm as a means of passive protection for a narcotics stash, and use of the firearm to embolden the defendant.

The major problem with the current section 924(c) does not stem from its intended severity, but rather from its imprecision. The phrases "use" and "during and in relation to" do not provide courts with sufficient guidance[249] nor citizens with sufficient notice of the conduct proscribed. While it is Congress' prerogative to combat violent crime, it should not ignore its constitutional obligation to draft precise criminal statutes; the courts should not be burdened with interpreting crimes which are not clearly defined. An even greater concern is that a person could be imprisoned for a mandatory five, ten, or thirty years for conduct never intended to fall within the statute. Until Congress corrects the ambiguity that inheres in the current version of 18 U.S.C. § 924(c),[250] the

249 Justice Scalia, dissenting in *Smith*, argues that the interpretation to be given this language is at best "eminently debatable." Smith v. United States, 113 S. Ct. 2050, 2063 (1993) (Scalia, J., dissenting).

250 The time for Congress to clarify § 924(c) is now. As of the writing of this Note, Congress is considering an amendment to § 924(c) as part of the Violent Crime Control and Law Enforcement Act of 1993. H.R. 3355, 103rd Cong., 1st Sess. § 2405 (1993). If enacted, this amendment would significantly increase the reach of § 924(c) by allowing any crime of violence or drug trafficking crime punishable under *state* law to serve as a predicate offense for § 924(c). *Id.* Because this amendment would dramatically increase the number of crimes that are § 924(c)-eligible, the need to clarify the statute is even

statute may fail in its role of promoting determinate sentencing. Even worse, its general language has the potential of being used as an instrument of severity against the citizens of the United States.

Thomas A. Clare[*]

greater. Congress should take the opportunity of this amendment to eliminate the vague language of the statute in favor of a specific definition of the conduct it is meant to address.

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