

EXEMPTING POLICE FROM 18 U.S.C. § 924(c)

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INTRODUCTION

On January 19, 2009, President George W. Bush commuted the prison sentences of two Border Patrol agents.¹ The agents were convicted of shooting and wounding a drug smuggler who had attempted to escape arrest and flee to Mexico.² The two agents, Ignacio Ramos and Jose Compean, were convicted not only of assault and related charges but also of violating what is commonly referred to as § 924(c), a federal statute that imposes a mandatory minimum sentence for involvement of a firearm in a crime of violence or drug trafficking crime.³ Although the President believed the agents “deserved to be punished,” he also believed the sentences, which exceeded ten years, were excessive.⁴

Agents Ramos and Compean’s prosecution sparked outrage among members of Congress.⁵ Their anger was not solely because the agents were prosecuted for shooting a drug smuggler while attempting to arrest him; such prosecutions are not unheard of.⁶ What sparked much of the outrage in Ramos and Compean’s case was the fact that, beyond charges for assault and denial of civil rights, the agents were additionally charged under § 924(c), which carried a mandatory ten-year sentence.⁷

Although this prosecution brought the issue of § 924(c) charges against police officers to the forefront, numerous officers have been charged under the statute. When § 924(c) was originally enacted, police officers were exempt from punishment under the statute

1. See Todd J. Gillman & Laura Isensee, *Bush Frees Border Agents: Sentences Commuted but Conviction Stands for Shooting Smuggler*, DALLAS MORNING NEWS, Jan. 20, 2009, at 1A.

2. See *infra* Part II.

3. 18 U.S.C. § 924(c) (2006).

4. Gillman & Isensee, *supra* note 1, at 1A (quoting a “White House official”).

5. See *infra* Part II.B.

6. In 2008, a Border Patrol agent was tried twice, resulting in two hung juries, for fatally shooting an illegal immigrant while the victim, depending on the testimony believed, was either on his knees surrendering or attempting to crush the agent’s skull with a rock. See Josh Brodesky, *Jurors Can’t Reach Verdict in Killing by Border Agent*, ARIZ. DAILY STAR, Mar. 8, 2008, at A1 (first trial); Brady McCombs, *Border Agent’s Retrial Another Mistrial*, ARIZ. DAILY STAR, Nov. 5, 2008, at B1.

7. 18 U.S.C. § 924(c).

when they *carried* a firearm during a felony, but could be punished if they *used* a firearm, for instance by firing it.⁸ Later, § 924(c) was amended to remove any exemption for police officers.

This Note proposes that Congress exempt police officers from § 924(c) if two conditions are met. First, at the time the underlying crime of violence or drug trafficking crime occurs, the officer must be authorized to carry the firearm either by the local law enforcement agency or by federal statute. Second, the officer must be acting in the performance of his duties. The exemption would apply both to carrying and using a firearm.

Part I outlines the history of § 924(c) and the evidentiary requirements for conviction. Part II analyzes Ramos and Compean's prosecution, their appeal, and the congressional and public reaction. Part III outlines this Note's proposal—an altered version of § 924(c). Part IV gives justifications for why police should receive an exemption. Part V answers criticisms of this Note's proposed exemption. Part VI briefly discusses possible corollary arguments applicable to the Federal Sentencing Guidelines.

I. SECTION 924(c)

A. *History of the Statute*

In 1968, Congress debated an amendment to a gun control bill that would punish those who committed crimes with firearms.⁹ The amendment's original language imposed a ten-year mandatory minimum sentence on anyone who used or carried a firearm while committing certain enumerated crimes.¹⁰ The amendment's purpose was to "persuade the criminal to leave his gun at home."¹¹

During floor debate, some representatives expressed concern that the amendment would apply to police officers who commit a felony

8. See *infra* Part I.A.

9. See 114 CONG. REC. 21,765-66 (1968); see also *United States v. Howard*, 504 F.2d 1281, 1286 (8th Cir. 1974) (outlining the legislative history of § 924(c)).

10. See 114 CONG. REC. 21,063 (1968).

11. *Id.* at 22,244 (statement of Rep. Randall). The proposal "would affect no one but the criminal, particularly the hardened repeat offender, who, like a mad dog, has proven in recent years he cannot be permitted to run amok in society." *Id.* at 21,061 (statement of Rep. Casey).

while carrying their firearm.¹² One representative asked whether an officer could be subject to prosecution if “a policeman carrying a gun, as policemen do, were to slap somebody and it were found that he was not justified in doing so.”¹³ Another representative raised concerns about an officer who pushed someone improperly “in the course of a sudden dispute.”¹⁴

The amendment’s sponsor agreed that these hypothetical situations were problematic.¹⁵ Congress passed a modified version of the amendment, which exempted police officers and those with licensed firearms from punishment for carrying a firearm during a felony. The statute, known as § 924(c), imposed a sentence between one and ten years on anyone who used a firearm to commit a felony or who *unlawfully carried* a firearm while committing a felony.¹⁶ Police officers were therefore exempt when they committed a felony while *carrying* a gun; no exemption was given for *using* a gun.

In 1984, Congress deleted “unlawfully” from § 924(c) and changed the underlying offense from “any felony” to any “crime of violence.”¹⁷ In a footnote, the Senate Committee on the Judiciary’s report explained the deletion of “unlawfully.”¹⁸ According to the report, a police officer who commits a crime with a firearm should be punished the same as a person not legally authorized to carry a

12. See *United States v. Ramirez*, 482 F.2d 807, 814 (2d Cir. 1973) (citation omitted) (discussing the legislative debate concerning charging police officers).

13. 114 CONG. REC. 21,788 (1968) (statement of Rep. Yates).

14. *Id.* at 21,789 (statement of Rep. Scheuer).

15. *Id.* at 21,792 (statement of Rep. Casey). Representative Casey asked his colleagues to “get after these fellows who continue to be turned loose over and over again to commit crime We are not after all these exceptions, all the incidents you talk about, like ... [h]e had a permit to carry a pistol ... gets angry and pushes someone else.” *Id.* These hypothetical cases were concerned with an officer *carrying* a gun, not *using* a gun.

16. Gun Control Act of 1968, Pub. L. No. 90-618, § 924, 82 Stat. 1213, 1224. Since 1971, sentences under § 924(c) are served consecutively. See Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 13, 84 Stat. 1880, 1889-90 (1971).

17. Continuing Appropriations, Pub. L. No. 98-473, § 1005, 98 Stat. 1837, 2138-39 (1984). A “crime of violence” is defined as a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or ... involves a substantial risk that physical force ... may be used.” 18 U.S.C. § 924(c)(3) (2006).

18. S. REP. NO. 98-225, at 314 n.10 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3492. This report accompanied the Comprehensive Crime Control Act of 1984, which the Senate passed in 1984 and was the basis for the language in the appropriations bill. 1984 U.S.C.C.A.N. 3182.

firearm.¹⁹ Because the amended § 924(c) included a requirement that the firearm be used or carried “during and in relation to any crime of violence,” the report described the “unlawfully” language as unnecessary; the new language would shield a situation such as “a pugilistic barroom fight” when the gun is “carried in a pocket and never displayed or referred to,” because “the weapon played no part in the crime.”²⁰ In 1986, drug trafficking was added as an underlying crime.²¹

In 1998, Congress passed the current version of § 924(c), which added the possession of a firearm as a basis for prosecution.²² The current statute punishes anyone “who, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm” or “in furtherance of any such crime, possesses a firearm.”²³

There are three possible minimum sentences: five years (the default sentence), seven years (if the firearm is brandished), and ten years (if the firearm is discharged).²⁴ Second and subsequent convictions result in mandatory minimum sentences of twenty-five years.²⁵ The sentences are served consecutively;²⁶ that is, they are served after the sentences received for the underlying crime of violence or drug trafficking crime.

B. Proving the Elements of § 924(c)

To prove possession “in furtherance” of the underlying crime, more than the mere presence of the firearm must be established.²⁷

19. S. REP. NO. 98-225, at 314 n.10 (“[P]ersons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon, as in the extremely rare case of the armed police officer who commits a crime, are ... deserving of punishment.”).

20. *Id.*

21. Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 449, 456-57 (1986).

22. Pub. L. No. 105-386, 112 Stat. 3469, 3469-70 (1998); see also Angela LaBuda Collins, Note, *The Latest Amendment to 18 U.S.C. § 924(c): Congressional Reaction to the Supreme Court’s Interpretation of the Statute*, 48 CATH. U. L. REV. 1319, 1347-48 (1999) (discussing the legislative history behind the current § 924(c)).

23. 18 U.S.C. § 924(c)(1)(A) (2006).

24. *Id.*

25. *Id.* § 924(c)(1)(C).

26. *Id.* § 924(c)(1)(D)(ii).

27. *United States v. Ceballos-Torres*, 218 F.3d 409, 414 (5th Cir. 2000) (citation omitted).

The government must show “that the firearm was possessed to advance or promote the criminal activity.”²⁸ Factors considered to determine whether the possession furthered the underlying crime include “whether the weapon is stolen” and “the status of the possession (legitimate or illegal).”²⁹

To prove that the defendant carried the firearm “during and in relation to” the underlying crime, the government must “establish a nexus between the carriage of the firearm and the underlying offense.”³⁰ The defendant must have “intended the weapon to be available for use” during the underlying crime.³¹ Further, “the presence and availability of a weapon permits a jury to infer an intent to use the weapon should there be an ‘evident need.’”³²

To prove that the defendant used the firearm, the government must show “active employment” of the firearm.³³ This can be established by showing that the firearm was brandished or discharged.³⁴

II. AGENTS RAMOS AND COMPEAN

The current version of § 924(c) allows a prosecutor to bring charges against police officers for their firearms’ involvement in drug crimes or violent encounters with civilians. The trial of Agents Ramos and Compean brought public attention to this issue. This Part outlines the altercation, the trial, the appeal, and the subsequent congressional and public reaction.

A. The Altercation, Trial, and Appeal

On February 17, 2005, Border Patrol Agent Jose Compean, on patrol near Fabens, Texas, received an alert that a sensor at the

28. H.R. REP. NO. 105-344, at 11-12 (1997).

29. *Ceballos-Torres*, 218 F.3d at 415; *accord* *United States v. Frederick*, 406 F.3d 754, 763 (6th Cir. 2005); *United States v. Wahl*, 290 F.3d 370, 376 (D.C. Cir. 2002).

30. *United States v. Shuler*, 181 F.3d 1188, 1190-91 (10th Cir. 1999) (citing *United States v. Lampley*, 127 F.3d 1231, 1241 (10th Cir. 1997)).

31. *Id.* at 1190 (citing *United States v. Richardson*, 86 F.3d 1537, 1548 (10th Cir. 1996)).

32. *United States v. Coyle*, 998 F.2d 548, 550 (8th Cir. 1993) (citation omitted).

33. *See United States v. Bailey*, 516 U.S. 137, 143 (1995).

34. *See supra* text accompanying note 24.

U.S.-Mexican border had been activated.³⁵ Another agent saw a van driving near the area of the sensor and began to pursue it.³⁶ Driving the van was Oswaldo Aldrete-Davila, who had illegally entered the United States from Mexico to smuggle 743 pounds of marijuana.³⁷ Aldrete-Davila sped away from the agents, starting a high speed chase.³⁸ Aldrete-Davila eventually crashed his van into a ditch near the border, jumped out, and ran toward Mexico.³⁹ Compean, shotgun in hand, was waiting on the other side of a levee that stood between Aldrete-Davila and his escape to Mexico.⁴⁰

What happened next was disputed at trial. Compean testified that he struggled with Aldrete-Davila, during which Aldrete-Davila threw dirt in Compean's face and ran toward Mexico.⁴¹ Compean claimed that while Aldrete-Davila was running, Aldrete-Davila turned to look back at him and had something in his hand.⁴² Compean opened fire at Aldrete-Davila with his service handgun, firing one magazine, switching it for a new one, and firing a few more shots—all of which missed.⁴³

On the other hand, Aldrete-Davila testified that Compean fell down the ditch after losing his balance while trying to hit him with the shotgun.⁴⁴ Aldrete-Davila claimed he never turned back to look at Compean while running away nor had anything in his hand.⁴⁵

Agent Ignacio Ramos arrived on the scene shortly before the altercation between Compean and Aldrete-Davila. Ramos ran

35. *United States v. Ramos*, 537 F.3d 439, 444 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1615 (2009).

36. *Id.*

37. Miguel Bustillo, *Agents Get Prison for Wounding a Smuggler*, L.A. TIMES, Oct. 20, 2006, at 1.

38. *Ramos*, 537 F.3d at 444.

39. *Id.*

40. *Id.* at 444-45.

41. *Id.* at 445.

42. *Id.*

43. *Id.*

44. *Id.* Aldrete-Davila testified that after he told Compean, "Take it easy man. Don't hit me," Compean responded, "Stop, you shit Mexican." 7 Transcript of Record at 106, *United States v. Ramos*, 537 F.3d 439 (5th Cir. 2008) (No. 05-CR-856-K6), available at http://www.usdoj.gov/usao/twx/press_releases/Compean-Ramos/index.html [hereinafter *Trial Transcript*]. Compean denied the exchange. *Id.* at 83. Agent Juarez, who was on the scene, corroborated Aldrete-Davila's account of the struggle at trial. *Ramos*, 537 F.3d at 445.

45. *Ramos*, 537 F.3d at 445.

toward the levee and heard shots fired.⁴⁶ He reached the top of the levee, saw Compean on the ground and Aldrete-Davila running with something in his hand, and shot once at Aldrete-Davila.⁴⁷ Ramos's shot hit Aldrete-Davila in his buttocks.⁴⁸ Aldrete-Davila managed to cross the Rio Grande into Mexico, where he was picked up by unidentified individuals and taken to a medical facility.⁴⁹

Compean and another agent picked up some of the shell casings that Compean had fired and threw them into a water-filled ditch.⁵⁰ Neither Ramos nor Compean reported the shooting, nor did any other agent or supervisor on the scene that day.⁵¹

Through family relationships between Aldrete-Davila and a Border Patrol agent, the shooting came to the attention of the Department of Homeland Security.⁵² A special investigator looked into the incident and eventually arrested Ramos and Compean.⁵³ Aldrete-Davila was granted immunity in return for testifying.⁵⁴ The U.S. Attorney charged the agents with twelve counts, including assault with intent to commit murder, assault with a dangerous weapon, denial of constitutional rights, and discharge of a firearm in commission of a crime of violence under § 924(c).⁵⁵ The agents were found guilty of all counts except assault with intent to commit murder.⁵⁶ Ramos was sentenced to eleven years imprisonment, and Compean was sentenced to twelve years—ten years of each sentence due to the § 924(c) charge.⁵⁷

On appeal to the Fifth Circuit, Ramos and Compean unsuccessfully argued that § 924(c) cannot apply to law enforcement officers because they do not have fair warning that it applies to their on-

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 445-46.

52. *Id.* at 443-44. Aldrete-Davila's mother knew the mother-in-law of an agent in Arizona.

6 *Trial Transcript, supra* note 44, at 228-30. That agent could not find a record of the shooting and referred the incident to the Department of Homeland Security. *Id.* at 236-37.

53. *Ramos*, 537 F.3d at 446.

54. *Id.* at 444.

55. *Id.* at 443.

56. *Id.* at 446.

57. *Id.*

duty actions.⁵⁸ Though upholding the sentences, the court noted, “We can surely debate whether there is an intuitive distinction between a violent criminal or a drug trafficker using a gun during the course of their trade and a police officer using a gun against a fleeing felon; however, neither the statute nor the cases make such a distinction.”⁵⁹

B. Congressional and Public Reaction

The prosecution caused an uproar. One petition calling for President Bush to pardon the agents garnered over 160,000 signatures.⁶⁰ The head of the Border Patrol union warned that the precedent set by the prosecution could endanger agents, because “if [they] use [their] weapon[s] in self-defense, [they] too can be looking at [ten] years in federal prison.”⁶¹ One congressman complained that the agents were doing their jobs and were punished for it, while the drug smuggler was treated like an innocent victim.⁶² One senator was concerned that the prosecution “could have a chilling effect” on Border Patrol agents carrying out their duties.⁶³

In a letter to Attorney General Alberto Gonzales, six congressmen expressed concerns over the § 924(c) charge.⁶⁴ They argued that because the statute “historically [has] been used in violent crime and drug trafficking cases ... it appears that its application in the present case is unwarranted.”⁶⁵ The letter recommended limiting § 924(c) charges against police officers to “heinous crimes, such as

58. *Id.* at 456.

59. *Id.* at 458.

60. See Jerry Seper, *Petition Readied for Two Border Agents*, WASH. TIMES, Dec. 22, 2006, at A3.

61. James Pinkerton, *Sentences Upheld for Two Border Agents*, HOUS. CHRON., July 29, 2008, at A1.

62. See Jerry Seper, *Gonzales Asked To Probe Prosecution of Agents*, WASH. TIMES, Sept. 27, 2006, at A3.

63. See *id.* The worry was expressed by Senator Dianne Feinstein from California. For her efforts, Feinstein, though considered “a dangerous liberal” by conservatives, became “a star in their eyes.” Edward Epstein, *Right Hails Feinstein in Border Agent Flap*, S.F. CHRON., July 22, 2007, at A1.

64. Press Release, Representative Walter B. Jones, House Members Join Jones To Question Improper Charge Against U.S. Border Patrol Agents (Oct. 13, 2006), available at <http://jones.house.gov/release.cfm?id=455>.

65. *Id.*

sexual assaults, which are clearly outside the realm of official duties.”⁶⁶

Though this letter recognized that police can be charged under the statute, some members of Congress seemed unaware that § 924(c) had been amended to explicitly allow the prosecution of police officers.⁶⁷ Ramos and Compean, having been charged with *using* a firearm during a crime of violence, would not have been exempt from any version of the statute; earlier versions provided an exemption only when officers *carried* a firearm during a felony.

Not all reaction to the prosecution was negative. Some commentators praised the prosecution for going after “rogue” agents who “failed to report the shooting, lied to investigators, tried to conceal evidence and filed a false report.”⁶⁸ Others complained that the two agents were wrongly heralded as heroes.⁶⁹

In the end, concern over the prosecution crossed party lines and went beyond border states.⁷⁰ A bill calling for a commutation of the agents’ sentences, introduced by a Massachusetts Democrat, had

66. *Id.* The congressmen feared that the prosecution set “a dangerous precedent of application to law enforcement officers trying to act within the scope of their official duties.” *Id.*

67. *See, e.g.,* Todd J. Gillman, *Senators Decry Agents’ Sentence: Hearing Examines ’05 Border Shooting of Fleeing Drug Smuggler*, DALLAS MORNING NEWS, July 18, 2007, at 1A (“Lawmakers said the [Ramos and Compean] case will force them to ... clarify that [Congress] never meant to apply the gun-enhanced sentencing rules to police and federal agents whose jobs require them to carry weapons.”); Jerry Seper, *Hill Letter Asks Bush To Review Jailed Agents’ Case*, WASH. TIMES, July 31, 2008, at A3 (reporting on letter from congressmen stating § 924(c) was not intended to apply to on-duty officers).

68. Editorial, *Misrepresentation: In the Case of Two Rogue Border Patrol Agents, the Truth Has Been Sacrificed to Unprincipled Lies*, HOUS. CHRON., Aug. 8, 2007, at 10.

69. *See, e.g.,* Pamela Colloff, *Badges of Dishonor*, TEX. MONTHLY, Sept. 2007, at 150; Andrew C. McCarthy, *The Border-Patrol Two Deserve Jail*, NAT’L REV., Jan. 29, 2007, <http://article.nationalreview.com/?q=MTQ4OWJjZTNmODMwNzhlMzA2MzZhYzJmYWM2NjBkYzI=>; *cf.* Martin S. Pinales, *Border Shooting Provides Window of Opportunity Regarding Mandatory Minimums*, 31 CHAMPION 4 (2007) (arguing that the focus should be on the excessive mandatory minimums, not whether the agents are heroes).

70. Representative Bill Delahunt, a Democrat from Massachusetts, called the § 924(c) charge “harsh and unnecessary.” *See* Press Release, Representative Ted Poe, Poe/Delahunt Continue Calls for Justice for Border Agents Ramos and Compean—75 Members Make Bipartisan Plea for Presidential Action (July 31, 2008), *available at* <http://poe.house.gov/news/DocumentSingle.aspx?DocumentID=99219>.

eighty-one cosponsors.⁷¹ In one of his last acts in office, President Bush commuted the agents' sentences.⁷²

III. PROPOSED CHANGE

In the aftermath of Ramos and Compean's prosecution, members of Congress and others advocated an exception from § 924(c) for police officers. This Part proposes such an exemption. First, a Michigan statute that exempts police officers from a firearm sentencing enhancement is analyzed to provide useful guidance for any proposed change to § 924(c). Next, this Note's proposal is outlined and applied to cases in which police were charged under § 924(c). Finally, recent congressional proposals to amend § 924(c) are critiqued.

A. *The Michigan Statute*

Michigan has exempted police officers from an enhanced sentence for the possession of a firearm during the commission of a felony. Though perhaps not unique among states, Michigan's statute and the history of its enactment are useful guides in the current debate over § 924(c).⁷³

In 1984, while investigating an armed robbery, Detroit police officer Theodore LeClaire, off-duty and in plain clothes, saw a man he believed to be involved in the robbery.⁷⁴ LeClaire stopped the man's van and ordered him out of the car.⁷⁵ An altercation ensued, during which LeClaire pistol-whipped the suspect.⁷⁶ LeClaire was

71. H.R. Con. Res. 267, 110th Cong. (2007). For other congressional actions, see H.R. Res. 563, 110th Cong. (2007) (granting a "Congressional Pardon"); H.R. Con. Res. 37, 110th Cong. (2007) ("[e]xpressing the Sense of Congress" that the agents should be pardoned).

72. See Gillman & Isenses, *supra* note 1. For a critique of the commutation, see Editorial, *Politics of Pardons: Bush Mostly on Track but Errs on Border Agents*, DALLAS MORNING NEWS, Jan. 21, 2009, at 22A.

73. For a statute that tracks the original language of § 924(c), see NEB. REV. STAT. § 28-1205 (2007) (punishing the use or the *unlawful possession* of a firearm).

74. *People v. LeClaire*, 357 N.W.2d 925, 926 (Mich. Ct. App. 1984).

75. *Id.*

76. *Id.*

charged with felonious assault and possession of a firearm during the commission of a felony.⁷⁷

The trial court dismissed the charges because the firearm enhancement “wasn’t meant to cover police officers who are by order required to carry a firearm.”⁷⁸ Further, “it would be a violation of rights to require [officers] to carry a weapon and then to accuse them of a felony of carrying the weapon that they’re required to carry in the first place.”⁷⁹

The Michigan Court of Appeals disagreed, finding no legislative intent to exempt off-duty officers from the statute.⁸⁰ The court explained that it would not “change the meaning of that statute by imposing [its] own notions or beliefs regarding its wisdom or efficacy.”⁸¹

One year later, on June 27, 1985, Officer Jim Khoury responded to reports of a fight.⁸² Two men were fighting and one, James Hester, had a knife.⁸³ What happened next was disputed at trial between witnesses and Khoury. According to witness accounts, Khoury approached Hester from behind, cocked his gun, touched the gun to Hester’s temple, and fired when Hester attempted to move away, killing him.⁸⁴ On the other hand, Khoury testified that he yelled at the men to stop fighting and drew his gun when he saw that Hester had a knife.⁸⁵ Khoury explained that Hester swung at him, and although the knife missed, Hester’s wrist hit Khoury’s left arm, causing the gun in Khoury’s other hand to accidentally fire.⁸⁶

Khoury was convicted in a bench trial of manslaughter, death from a firearm pointed intentionally but without malice, and like LeClaire, possession of a firearm during the commission of a

77. *Id.* Under § 924(c), LeClaire would have been charged with the use of a firearm during and in relation to a crime of violence.

78. *Id.*

79. *Id.*

80. *Id.* at 926-27.

81. *Id.* at 926.

82. *People v. Khoury*, 448 N.W.2d 836, 837 (Mich. Ct. App. 1989), *rev’d*, 467 N.W.2d 810 (Mich. 1991).

83. *Id.*

84. *Id.* Witnesses testified that Hester was never aware of Khoury’s presence and held the knife in a defensive position. *Id.* at 838.

85. *Id.* at 837. Khoury initially thought Hester was going to stab the other man. *Id.*

86. *Id.*

felony.⁸⁷ On appeal, Khoury argued that the charge of possession of a firearm could not apply to him as an on-duty police officer.⁸⁸ The Michigan Court of Appeals disagreed, reasoning that because the legislature had already granted police officers immunity from civil liability, it could likewise grant immunity from criminal liability but had not done so.⁸⁹ Further, the court could think of “no public policy consideration that would justify granting police officers immunity from criminal prosecution for their criminal acts.”⁹⁰

On December 5, 1990, the Michigan legislature passed a firearms bill⁹¹ that contained a provision exempting police officers from punishment under the statute used to prosecute LeClaire and Khoury.⁹² The amended statute, which is currently in force, generally punishes any person “who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony.”⁹³ But it “does not apply to a law enforcement officer who is authorized to carry a firearm while in the official performance of his or her duties, and who is in the performance of those duties.”⁹⁴

Four months after the statute was altered to exempt police officers, the Michigan Supreme Court, on a motion for reconsideration, reversed Khoury’s conviction for possession of a firearm.⁹⁵ The court explained that the “[l]egislature recently clarified the meaning of the statute” by enacting the new exemption provision, and thus had never intended the statute to apply to police officers.⁹⁶

87. *Id.* at 836.

88. *Id.* at 838.

89. *Id.* at 839.

90. *Id.*

91. HOUSE OF REPRESENTATIVES OF THE STATE OF MICH., JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MICHIGAN, regular Sess., vol. 5, at 5911-12 (1990).

92. Act of Dec. 27, 1990, No. 321, § 750.227b, 1990 Mich. Pub. Acts 1813-14.

93. MICH. COMP. LAWS ANN. § 750.227b (West 2004). Unlike § 924(c), there is no requirement that the firearm be used “in furtherance” or “during and in relation to” the underlying crime. See *People v. Perry*, 326 N.W.2d 437, 439 (Mich. Ct. App. 1982).

94. MICH. COMP. LAWS ANN. § 750.227b.

95. *People v. Khoury*, 467 N.W.2d 810 (Mich. 1991) (order granting reconsideration in part and denying in part).

96. *Id.* For a short summary of *Khoury*, see Ronald J. Bretz & Jack Van Coevering, *Annual Survey of Michigan Law June 1, 1990 - May 31, 1991: Criminal Law*, 38 WAYNE L. REV. 803, 824-25 (1992).

B. The Proposed Amendment to § 924(c)

This Note proposes § 924(c) be amended to provide an exemption similar to that in Michigan. Section 924(c) should be amended to exempt:

- (a) a law enforcement officer,
- (b) who is qualified to carry the firearm when the crime of violence or drug trafficking crime occurs, and
- (c) is acting in the performance of his duties when the crime is committed.

The proposed exemption to § 924(c) has three elements which must be met for it to apply. These elements are addressed below, and cases of officers charged under § 924(c) are provided to illustrate how the exemption would apply.

1. Law Enforcement Officer

The exemption would only apply to a law enforcement officer. A definition of “law enforcement officer” is provided in 5 U.S.C. § 8401(17), which includes a person whose duties are primarily “the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States.”⁹⁷ Such a definition for purposes of § 924(c) would be expanded to include those investigating violations of state law.

Michigan’s exemption does not include private security guards,⁹⁸ and neither would the proposed § 924(c).⁹⁹

2. Qualified To Carry the Firearm When the Crime Is Committed

The second requirement is that the officer is qualified to carry the firearm at the time he commits the crime of violence or drug

97. 5 U.S.C. § 8401(17) (2006).

98. See *People v. Calhoun*, No. 195493, 1997 WL 33350516, at *2 (Mich. Ct. App. May 30, 1997).

99. Blackwater guards working in Iraq for the State Department would also be denied the exemption. Five guards were recently charged under § 924(c) for conduct while working in Iraq. See News Release, Department of Justice, Transcript of Blackwater Press Conference (Dec. 8, 2008), available at 2008 WL 5125947, at *8.

trafficking crime. This requirement would be in dispute when the police officer commits a crime while off-duty.

In numerous jurisdictions, off-duty police officers are required to carry their firearms.¹⁰⁰ Some jurisdictions allow off-duty officers to assume their law enforcement role when an offense has been committed in their presence.¹⁰¹ In Chicago, for example, roughly a quarter of police shootings each year are by off-duty officers.¹⁰²

It would not make sense to limit the proposed § 924(c) to only those officers officially “on the clock.” As one writer explained, if a police officer is required to combat crime at all times, he should also be permitted to have the “tools of his trade.”¹⁰³

Under 18 U.S.C. § 926B, qualified state and local police officers may carry a concealed firearm while off-duty.¹⁰⁴ The statute requires the officer to carry proper identification as a police officer, and he must be authorized by his police department to carry the firearm.¹⁰⁵

An off-duty officer carrying a concealed weapon as privileged under the federal statute presents a different case than the typical armed off-duty officer. The officer is not “forced” to be armed at all times, as in some jurisdictions, but rather has chosen to carry a concealed weapon. If the officer is expected to intervene in a crime he sees take place, however, he may need to use that weapon to perform his duties.

This Note’s proposal should extend to an off-duty officer carrying a concealed weapon under the federal statute. The federal government preempted state firearm laws concerning off-duty police

100. In 1978, twenty-four of forty-nine large police departments required their officers to carry guns while off-duty. James J. Fyfe, *Always Prepared: Police Off-Duty Guns*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 73 (1980). For arguments over whether to disarm off-duty officers, compare Jay Gerald Safer, *Deadly Weapons in the Hands of Police Officers, On Duty and Off Duty*, 49 J. URB. L. 565, 574-79 (1971) (arguing against disarmament), with Fyfe, *supra*, at 80-81 (arguing in favor).

101. See Nick Madigan, *The Dilemma of Being Armed and Off Duty: Baltimore Officer’s Death Stirs Debate on Police Weapon Policy*, BALT. SUN, Apr. 26, 2008, at A1.

102. *Id.*

103. Safer, *supra* note 100, at 579.

104. 18 U.S.C. § 926B (2006); see also *id.* § 926C (permitting retired police officers to carry a concealed firearm). Private property and state and local government property are exempt. *Id.* § 926.

105. *Id.* § 926B(a), (c)-(d).

officers, restraining the states' ability to regulate whether those officers may carry concealed weapons. In return, the federal government should forfeit the right to prosecute an off-duty officer under § 924(c) after he engages in conduct with a concealed weapon that violates § 924(c).

3. Acting in the Performance of His Duties

The third requirement, that the officer acts in the performance of his duties, is the most likely of the three to be disputed.

One approach would be to declare that as soon as the officer commits the underlying crime of violence or drug trafficking crime, he is no longer acting in the performance of his duties. In other words, "because an officer has no duty to take illegal action, he is not engaged in his 'duties' ... if his conduct is unlawful."¹⁰⁶ This approach would render an exemption to § 924(c) meaningless, because the statute is only implicated after an officer commits an illegal act. Officer Khoury, for example, would not have been exempt from Michigan's statute if this approach had been adopted.

A better approach would be to determine whether the officer was performing a law enforcement task. As one court explained, the test is whether the officer is "acting within the scope of what the [officer] is employed to do" or "is engaging in a personal frolic of his own."¹⁰⁷ This approach comports with Michigan's exemption, which includes conduct like that of Officer Khoury but does not exempt an officer involved in a "[p]urely personal confrontation."¹⁰⁸ Cases in which police officers were charged under § 924(c) are provided below to illustrate this standard.

An important note must be made about the example cases and even Ramos and Compean's prosecution. An exemption from § 924(c) would not result in no punishment for the officer; he could still be guilty of assault, drug trafficking, denial of constitutional rights, or other crimes. Rather, the officer would be exempt from punishment for the involvement of his firearm. To demonstrate this

106. *People v. Gonzalez*, 800 P.2d 1159, 1176 (Cal. 1990).

107. *United States v. Heliczer*, 373 F.2d 241, 245 (2d Cir. 1967).

108. *People v. Carmona*, No. 266228, 2007 WL 750415, at *2 (Mich. Ct. App. Mar. 13, 2007).

point, the cases below identify when the officers were charged with other crimes, including denial of constitutional rights under 18 U.S.C. § 242.¹⁰⁹

a. Crimes of Violence

The following cases involve an underlying crime of violence.¹¹⁰ In such situations, officers will often be acting in the performance of their duties and thus be exempt from the statute.

i. Conduct That Would Fall Under the Exemption

Ramos's and Compean's conduct would fall under the exemption, as they were in the pursuit of a suspect when they committed their crimes of violence. The following cases would also fall under the exemption.

Officer Williams

A case factually similar to Ramos's and Compean's altercation with Aldrete-Davila is the prosecution of Officer John Williams. After Williams stopped Adam Hall's car for a traffic violation, the two men engaged in a struggle, resulting in Hall fleeing in his vehicle after Williams sprayed him with mace.¹¹¹ A high speed chase ensued, engaging three other officers.¹¹² The officers eventually fired upon Hall's vehicle, puncturing a tire and forcing Hall to flee on foot.¹¹³ After he was intercepted and stopped by a police car,

109. 18 U.S.C. § 242.

110. For additional cases involving crimes of violence, see *United States v. Acosta*, 470 F.3d 132, 133 (2d Cir. 2006); *United States v. Chinnery*, No. 03-1299, 2003 WL 21469342, at *8 (3d Cir. June 26, 2003); *United States v. Bates*, Nos. 01-2893, 01-2894, 01-3023, 2002 WL 31027879, at *1 (3d Cir. June 12, 2002); *United States v. Epley*, 52 F.3d 571, 575 (6th Cir. 1995); *United States v. Parker*, 25 F.3d 442, 444 (7th Cir. 1994); *United States v. Warme*, No. 09CR19A, 2009 WL 2713943, at *1 (W.D.N.Y. Aug. 26, 2009); *Pickard v. United States*, 312 F. Supp. 2d 735, 739 (D. V.I. 2004) (motion to vacate from defendant in *Bates*); *United States v. Melendez*, No. 03-80598, 2004 WL 162937, at *1 (E.D. Mich. Jan. 20, 2004); *United States v. Francies*, No. 01 C 0109, 2002 WL 31415496, at *1 (N.D. Ill. Oct. 24, 2002); *United States v. Harloff*, 807 F. Supp. 270, 271-72 (W.D.N.Y. 1992); Michael Perlstein, *Ex-Officer Sentenced in Bank Heist Plan*, NEW ORLEANS TIMES PICAYUNE, Mar. 17, 2005, at 1.

111. *United States v. Williams*, 343 F.3d 423, 429 (5th Cir. 2003).

112. *Id.*

113. *Id.* at 430.

Hall raised his hands above his head.¹¹⁴ Williams, who was chasing Hall on foot, took another officer's firearm and shot Hall in the upper back.¹¹⁵ Williams was charged and convicted under § 242 and § 924(c), and sentenced to a year and a half imprisonment on the § 242 charge and a consecutive ten-year sentence on the § 924(c) charge.¹¹⁶

Officer Aguilar

After Officer Jimmy Aguilar arrested a suspect and was bringing him to his police car, the suspect head-butted him.¹¹⁷ The two men fought, during which Aguilar dropped his knee into the suspect's face and choked him, all while the suspect was handcuffed.¹¹⁸ One fellow officer testified that Aguilar, after finally subduing the suspect, placed his gun in the suspect's mouth and twisted it in a threatening manner.¹¹⁹ Aguilar was charged under § 242 and § 924(c) but was convicted only under § 242 and sentenced to five years imprisonment.¹²⁰

Officer Winters

Larry Floyd, a prisoner in Mississippi, disguised himself as a woman and successfully escaped from prison.¹²¹ After stealing a car and crashing into a ditch, he was eventually apprehended by prison guards.¹²² While in a vehicle and being transported back to prison, Terry Winters, a prison officer, straddled Floyd and struck him on his head with his gun, causing profuse bleeding.¹²³ Winters was

114. *Id.* Williams claimed that Hall had grabbed something from his truck and while running had turned to look at the chasing officers. This claim was not supported by the other officers. *Id.*

115. *Id.* Williams later told his superior that he shot Hall because "he was tired of chasing [Hall] and tired of fooling with [Hall]." *Id.* The victim recovered from the gunshot wound. *Id.*

116. *Id.* at 429, 431.

117. *United States v. Aguilar*, No. 05-51433, 2007 WL 2693460, at *1 (5th Cir. Sept. 13, 2007).

118. *Id.*

119. *Id.*

120. *Id.*

121. *United States v. Winters*, 105 F.3d 200, 202 (5th Cir. 1997).

122. *Id.*

123. *Id.* Under the "code of conduct" for guards and other custodial personnel in the Mississippi prison system ... the brutalizing of recaptured escapees was condoned if not encouraged." *Id.* at 206. *But cf.* *United States v. McGill*, 952 F.2d 16 (1st Cir. 1991). In *McGill*, a prison guard shot dead an inmate while reenacting the Russian Roulette scene from the film *The Deerhunter*, including crying "mau, mau" prior to pulling the trigger. *Id.*

charged and convicted under § 242 and § 924(c),¹²⁴ and sentenced to six years imprisonment, five of those years due to the § 924(c) charge.¹²⁵

Officers Williams, Aguilar, and Winters would all fall under the exemption as they were acting in the performance of their duties when their crimes of violence were committed. These duties include apprehending a suspect, escorting a suspect to a police car, and transporting a suspect to jail.

ii. Conduct That May Fall Under the Exemption

The following two cases involve conduct that may fall under the exemption; it is unclear whether the conduct was sufficiently tied to the officers' duties.

Officers Brown and Troxel

Around 9:00 p.m. Tab Wilhoit parked his delivery truck and decided to take a nap.¹²⁶ He was awoken by a man who had poked his head through the truck's window and asked for money, which Wilhoit gave him hoping that the man would leave.¹²⁷

Off-duty officers David Brown and Bruce Troxel, both drinking at a nearby strip club, were informed that there was drug activity outside.¹²⁸ A man outside admitted selling drugs, pointed to Wilhoit's truck, and explained that he received a few dollars from the driver.¹²⁹ The officers asked Wilhoit to exit the truck, but he refused, fearful he was being robbed.¹³⁰ After Troxel showed his

at 17-18. Though the conduct occurred in 1984, when police were exempt from § 924(c) for *carrying* a firearm, the defendant could have been charged with *using* a firearm, but he was only charged under § 242. *See id.* at 17.

124. *Winters*, 105 F.3d at 203. *But cf.* *United States v. Henderson*, 409 F.3d 1293, 1296 (11th Cir. 2005) (officer who pistol-whipped arrestee charged under § 242 but not § 924(c)).

125. *Winters*, 105 F.3d at 203. After deliberating for seven and a half hours, the jury informed the judge that it was unable to reach a verdict. The judge informed the jury that failure to agree on a verdict would result in the case being tried again. The jury returned a guilty verdict thirty minutes later. *Id.* at 203-04.

126. *United States v. Brown*, 250 F.3d 580, 582 (7th Cir. 2001).

127. *Id.* at 582-83.

128. *Id.* at 583. Brown worked at the strip club as a bouncer, but he was not working the night of the incident. *Id.*

129. *Id.*

130. *Id.*

badge and Wilhoit continued to refuse to open the door, Troxel reached inside the window and began to choke Wilhoit, attempting to pull him outside the truck.¹³¹ Wilhoit responded by stabbing Troxel in the arm with a pocket knife.¹³² Brown was wearing a police jumpsuit and showed Wilhoit the word “Police” on the back of it, and pointed his gun at him.¹³³ Wilhoit then exited the vehicle, and the officers hit him repeatedly, put their guns to his head, and threatened to kill him if he told anyone about the incident.¹³⁴

Brown and Troxel were charged and convicted under § 242 and § 924(c).¹³⁵ On the § 242 charge, Brown was sentenced to five years and ten months imprisonment, while Troxel was sentenced to five years and three months.¹³⁶ Both received a consecutive five-year sentence under § 924(c).¹³⁷

It would appear the two off-duty officers were in the performance of their duties, as the appellate court mentioned that the officers failed to file a report of the incident, which is required “when an officer injures a civilian *in the course of his duties* or is injured himself.”¹³⁸ Arguably the conduct went beyond the officers’ duties, however, when after the altercation the officers threatened to kill Wilhoit and never attempted to make an arrest.

Officers Acosta and Skinner

After an extensive investigation by the FBI, nine detectives from the Buffalo police department were charged with taking bribes, stealing from drug dealers, and filing false search warrants.¹³⁹ Only two of the detectives were convicted of violating § 924(c),¹⁴⁰ with one

131. *Id.* The window was open six to eight inches. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 584.

136. See Brief for Appellee, *United States v. Brown*, Nos. 00-2565, 00-3026, 250 F.3d 580 (7th Cir. 2001), <http://www.usdoj.gov/crt/briefs/browntroxel.htm>.

137. *Id.*

138. *Brown*, 250 F.3d at 586 (emphasis added).

139. See Michael Beebe & Dan Herbeck, *Scapegoats in Blue?*, BUFF. NEWS, Jan. 16, 2005, at A1. *But cf.* *United States v. DiLorenzo*, No. S1 94 Cr. 303, 1995 WL 169003 (S.D.N.Y. Apr. 10, 1995) (officer conducted illegal searches to steal drugs but was not charged under § 924(c)).

140. Beebe & Herbeck, *supra* note 139; see also *United States v. Ferby*, No. 00-CR-0053A, 2005 WL 1544802, at *1 (W.D.N.Y. July 1, 2005) (detective from same investigation found

officer sentenced to seven years and nine months imprisonment and the other to forty-five years.¹⁴¹

Like in Ramos and Compean's case, the § 924(c) charge sparked controversy due to its mandatory sentence.¹⁴² One former detective worried about the effect of charging police for carrying a gun, but also cautioned that an officer "should never misuse the gun or the badge."¹⁴³ The U.S. Attorney defended the charges, explaining that this was not "a case of cops using their guns to carry out official duties" but rather "to conduct illegal drug raids, breaking into houses."¹⁴⁴

Despite the U.S. Attorney's assertion, similar cases in which an officer robbed or extorted a suspect while searching him would be close calls because the charge is often robbery and extortion "under color of official right."¹⁴⁵ This crime occurs when the officer uses his position to illegally obtain money.¹⁴⁶ Though one court described such activity as "outside the scope of [the officer's] authority,"¹⁴⁷ it is not clear that when the crime of violence is committed (the robbery), the officer would be acting outside the performance of his duties (conducting a search).

iii. Conduct That Would Fall Outside the Exemption

The following case illustrates conduct that would fall outside the exemption.

Officer Juan Contreras sexually assaulted a woman after stopping her vehicle and driving her to a remote area.¹⁴⁸ A grand jury returned an indictment for aggravated kidnapping and aggravated sexual assault.¹⁴⁹ After the indictment and before trial,

not guilty of violating § 924(c)).

141. *United States v. Acosta*, 470 F.3d 132, 134 (2d Cir. 2006).

142. Beebe & Herbeck, *supra* note 139.

143. *Id.*

144. *Id.*

145. For a case in which an officer was charged with robbery under color of official right but not § 924(c), see *United States v. Pledge*, No. 01-4624, 2002 WL 31689434, at *1 (4th Cir. Dec. 3, 2002).

146. See *United States v. Tillem*, 906 F.2d 814, 821 (2d Cir. 1990).

147. *United States v. Parker*, 165 F. Supp. 2d 431, 467 (W.D.N.Y. 2001).

148. *United States v. Contreras*, 950 F.2d 232, 234-35 (5th Cir. 1991).

149. *Id.* at 235.

Contreras hatched a plan to kill the victim to prevent her from testifying, but the FBI prevented the plan's success.¹⁵⁰ A new indictment was returned, including § 242 and § 924(c) charges for both the sexual assault and the plan to kill the victim, for which Contreras was found guilty¹⁵¹ and sentenced to sixty-one years imprisonment.¹⁵²

Clearly, Contreras was acting outside his duties when he drove his victim to a secluded area to rape her, unlike cases in which the officer is pursuing or searching a suspect. And unlike in *Winters*, Contreras was not transporting his victim primarily for a legal purpose. The plot to kill the victim was also clearly outside his duties.

b. Drug Trafficking Crimes

The following cases involve an underlying crime of drug trafficking.¹⁵³ Unlike officers charged with underlying crimes of violence, those charged with drug trafficking almost never would fall within the exemption from § 924(c).

i. Conduct That May Fall Under the Exemption

A case that may fall under the exemption is that of Officer Joy Barber. Barber became romantically involved with a drug dealer, eventually assisting his drug operation by warning him and his

150. *Id.* at 235-36.

151. *Id.* at 236; *see also* United States v. Guidry, 456 F.3d 493, 496 (5th Cir. 2006) (concerning an officer charged under § 924(c) for rape).

152. United States v. Contreras, 134 F. Supp. 2d 820, 823 (S.D. Tex. 2000).

153. For additional drug trafficking cases, *see* United States v. Bristol-Martir, 570 F.3d 29, 38 (1st Cir. 2009); United States v. Gonzales, 528 F.3d 1207, 1212-13 (9th Cir. 2008); United States v. Bucci, 525 F.3d 116, 121 n.1 (1st Cir. 2008); United States v. King, Nos. 06-4683, 06-4724, 2008 WL 731112, at *1 (4th Cir. Mar. 19, 2008); United States v. Vazquez Guadalupe, 407 F.3d 492, 495 (1st Cir. 2005); United States v. Villafane-Jimenez, 410 F.3d 74, 78 (1st Cir. 2005); United States v. Sanchez-Berrios, 424 F.3d 65, 72 (1st Cir. 2005); United States v. Patterson, 348 F.3d 218, 221 (7th Cir. 2003); United States v. Novaton, 271 F.3d 968, 983 (11th Cir. 2001); United States v. Washington, 106 F.3d 983, 990 (D.C. Cir. 1997); United States v. Green, No. 94-60139, 1995 WL 413129, at *1 (5th Cir. June 21, 1995); United States v. Rivera, 889 F.2d 1029, 1030 (11th Cir. 1989); United States v. Warne, No. 09CR19A, 2009 WL 2713943, at *1 (W.D.N.Y. Aug. 26, 2009); Rob Modic, *Ex-Officer Guilty on Arms Count*, DAYTON DAILY NEWS, Oct. 20, 2005, at B1.

acquaintances of law enforcement investigations.¹⁵⁴ At one point, Barber engaged in a traffic stop of a drug dealer who was a rival of her drug-dealing friends and harassed him for allegedly stealing from them.¹⁵⁵ Barber was charged with drug trafficking and § 924(c) but was acquitted of the § 924(c) charge.¹⁵⁶ Barber was sentenced to twelve years and seven months imprisonment.¹⁵⁷

Officer Barber was arguably in the performance of her duties when she stopped the drug dealer's car, even if she had ulterior motives. She had full authority to conduct the stop, and therefore may fall under the exemption.¹⁵⁸

ii. Conduct That Would Fall Outside the Exemption

Barber is an outlier because most drug trafficking cases would clearly fall outside the exemption. Such a case is provided as an example.

Officer John Radcliff became involved in a drug conspiracy with members of his wife's family which involved selling methamphetamine.¹⁵⁹ Radcliff was charged and convicted of violating drug trafficking laws and § 924(c) for an occasion in which he escorted, while in his police vehicle and in uniform with his firearm, a car driven by his wife that contained drugs.¹⁶⁰ Radcliff was sentenced

154. *United States v. Barber*, No. 93-5678, 1994 WL 406547, at *1 (4th Cir. Aug. 4, 1994).

155. *Id.*

156. *Id.* Despite her acquittal, Barber was assigned a two-point sentencing enhancement for possession of a weapon. *Id.* at *4.

157. *Id.* at *1.

158. *Cf. United States v. Muxlow*, 759 F. Supp. 1258 (E.D. Mich. 1991) (allowing officer who stopped a vehicle to seize cocaine for a drug organization to plead guilty to drug charges and not § 924(c)).

159. *United States v. Radcliff*, 331 F.3d 1153, 1155 (10th Cir. 2003).

160. *Id.* at 1157. *But cf. United States v. Partida*, 385 F.3d 546, 553 (5th Cir. 2004) (involving officer who escorted drugs in police car but was not charged under § 924(c)); Press Release, U.S. Attorney for the N. Dist. of Ill., U.S. Dep't of Justice, Fifteen South Suburban Law Enforcement Officers Among 17 Defendants Charged in FBI Undercover Probe for Allegedly Providing Armed Security for Purported Large-Scale Drug Deals (Dec. 2, 2008), available at http://www.usdoj.gov/usao/iln/pr/chicago/2008/pr1202_01.pdf (providing that officers who provided armed escorts not charged under § 924(c)).

to nineteen years imprisonment, which included a five-year sentence under § 924(c).¹⁶¹

Officer Radcliff was clearly acting outside his duties when he engaged in drug trafficking, as is the case in the vast majority of similar situations. This is contrasted to those officers making arrests or stopping a vehicle, as escorting drugs is wholly outside an officer's duties. Therefore, the exemption's third requirement, that the officer have acted in the performance of his duties, would include more cases of crimes of violence than drug trafficking crimes.

C. Recent Congressional Proposals

In the wake of Ramos and Compean's prosecution, members of Congress introduced proposals to amend § 924(c). These are inadequate, as they are either too narrow or too broad.

One congressional proposal would amend § 924(c) by providing an exemption for on-duty officers who commit a crime of violence during or in relation to the pursuit or apprehension of a criminal.¹⁶² This proposal has shades of the common law "fleeing felon rule," which authorized an officer's use of deadly force to prevent a suspected felon's escape.¹⁶³

This exemption is too narrow because it only applies to on-duty police officers. This "on-the-clock" view ignores the fact that many jurisdictions require police to be armed at all times, and many off-duty police are expected to intervene when they see a crime take place.¹⁶⁴

A second proposal exempts anyone who is authorized to carry a firearm for their employment and commits a crime of violence

161. See Mike McPhee, *Ouray Deputy Convicted in Drug Ring Kills Self*, DENV. POST, Jan. 6, 2002, at B2. A fellow officer, LeRoy Todd, was also convicted of drug trafficking and § 924(c) for various events, including one occasion during which he allowed, in exchange for sex, a drug kingpin's girlfriend to remove drugs from a trailer prior to a search. *Id.* Hours before Todd was scheduled to be moved to federal prison, he hung and killed himself. *Id.*

162. See H.R. Res. 6367, 110th Cong. (2008).

163. BRUCE A. ARRIGO, INTRODUCTION TO FORENSIC PSYCHOLOGY 9 (2000). This rule was modified in a 1985 Supreme Court decision that limited the use of force. See *id.* (discussing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

164. See *supra* Part III.B.2.

during *or* in relation to that employment.¹⁶⁵ This exemption is too broad, as it extends beyond police officers to include security guards and bounty hunters, who neither assume the same degree of risk, nor acquire the same degree of training, as police.¹⁶⁶ “During” the employment is also overly broad as a “personal frolic” would be included so long as the person is on the clock.

IV. WHY POLICE SHOULD RECEIVE AN EXEMPTION

Under this Note’s proposal, some police officers would receive a protective shield from the statute that is denied to the average citizen. This shield is justified because police are required to be armed and must at times use force while in the performance of their duties. Additional criminal penalties are also available against police officers that are not applicable to ordinary citizens.

A. *Police/Criminal Distinction*

Congress enacted § 924(c) to target criminals who used or carried guns while committing crimes. Most police officers are required to be armed and do not have the choice the criminal has—to leave the gun at home. The firearm is so integral to the uniform of a police officer that § 924(c) convictions have been upheld on the premise that when a drug dealer hires an officer to escort drugs, the gun necessarily comes with the officer.¹⁶⁷ For many officers, their firearm is the “primary symbol of law enforcement.”¹⁶⁸ Imposing criminal liability on the premise that the defendant should not have had the gun in the first place does not make sense when applied to police officers.¹⁶⁹

165. See H.R. Res. 3436, 110th Cong. (2007).

166. See, e.g., Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 765-68 (1996) (comparing bounty hunters and police officers). This Note’s proposed definition of “law enforcement officer” would exclude these problematic groups.

167. See, e.g., *infra* text accompanying note 209.

168. PETER SCHARF & ARNOLD BINDER, *THE BADGE AND THE BULLET: POLICE USE OF DEADLY FORCE* 32 (1983).

169. For a parallel example, imagine applying a four-point increase in the Federal Sentencing Guidelines to an officer for crimes committed while in the performance of his duties while wearing body armor. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.5 (2007).

B. Police Must Use Force

Police are required to use force in the line of duty.¹⁷⁰ When making an arrest, officers are allowed to use an amount of force that is reasonably necessary, as determined ex post by a court.¹⁷¹ Reasonableness is determined based upon the facts and circumstances surrounding the arrest.¹⁷² This standard of “reasonableness” has been criticized as not providing adequate guidance to officers regarding the amount of force they may use.¹⁷³

When police use violence, it is often “a messy matter with uncertain dimensions.”¹⁷⁴ In shootings, police use their weapons in “an individualized response to an immediate, particular, and always peculiar situation.”¹⁷⁵ In violent encounters between police and citizens, there is “some or substantial, though perhaps unwitting, contribution on the part of the citizen” for the outbreak of violence.¹⁷⁶

Such academic descriptions of the violent encounter between police and citizens are grounded in reality. From 2003 to 2005, police killed 1,095 people during arrest.¹⁷⁷ Ninety-six percent of the

The statute authorizing the sentencing enhancement lists examples of officers killed by criminals wearing body armor and asserts that officers’ lives could be spared if more armor were issued to them. *See* 42 U.S.C. § 3796ll-3 (2006). Congress did not intend to encourage officers to “leave their body armor at home.” The enhancement has been applied to officers acting outside the scope of their duties in drug trafficking cases. *See, e.g., United States v. Haynes*, 582 F.3d 686, 711-12 (7th Cir. 2009).

170. *See, e.g.,* Peter K. Manning, *Violence and the Police Role*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 135, 136 (1980) (“[P]olice represent the power and authority of the state and thus must be violent.”).

171. *See* JOHN C. KLOTTER, LEGAL GUIDE FOR POLICE: CONSTITUTIONAL ISSUES 83-84 (6th ed. 2002); DENNIS M. PAYNE, POLICE LIABILITY: LAWSUITS AGAINST THE POLICE 11 (2002) (“[U]se only that force necessary to overcome the resistance offered by the arrestee.”).

172. KLOTTER, *supra* note 171, at 86 (discussing *Graham v. Connor*, 490 U.S. 386 (1989)).

173. *See, e.g.,* Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1143-44 (2008).

174. Manning, *supra* note 170, at 138.

175. John Van Maanen, *Beyond Account: The Personal Impact of Police Shootings*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 145, 146 (1980).

176. Arnold Binder & Peter Scharf, *The Violent Police-Citizen Encounter*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 112, 115-16 (1980). Dennis Payne cites a study that found the best predictor of an officer’s use of force was the use of force by the suspect. *See* PAYNE, *supra* note 171, at 172.

177. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, ARREST-RELATED DEATHS IN THE UNITED STATES, 2003-2005, at 3 (2007).

victims were killed by the officer's firearm, and three quarters were being arrested for a violent crime.¹⁷⁸ In the same period, 380 officers were killed in the line of duty.¹⁷⁹

Because of this uncertainty and fluidity when police use violence, developing controls on the use of that violence is particularly difficult.¹⁸⁰ Coupled with the vague "reasonableness" standard under which courts evaluate police action, officers face a regime in which "unreasonable" force in a "messy matter" can lead to between five and ten years in federal prison due to their firearms' involvement in the crime.

With these facts in mind, an exemption from § 924(c) is justified. Officers often must make quick decisions on whether to use force in situations that are hazy at best. Ordinary criminals, on the other hand, have the luxury of not placing themselves in such volatile situations in the first place. Imposing a harsh penalty upon police officers, on top of the underlying crime, is unfair in such a context. Admittedly, this justification applies with greater force to underlying crimes or violence, but as demonstrated above these are the situations most likely to fall under the exemption.

C. Alternate Liabilities for Police

Certain federal criminal statutes are applicable when a police officer commits a crime that are not applicable against private citizens.¹⁸¹ Section 242 provides for criminal prosecution when, under the color of law, one deprives another of any "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."¹⁸² The standard maximum sentence under the statute is one year in prison, although if the use, attempted use, or threatened use of a dangerous weapon occurred,

178. *Id.* at 2.

179. *Id.* at 3. Of those, 221 officers were killed accidentally. *Id.*

180. See Manning, *supra* note 170, at 139.

181. Police officers are also subject to civil liability under 42 U.S.C. § 1983. The statute provides a remedy only when the officer is acting under a state law. See *Soldevila v. Sec'y of Agric. of the U.S.*, 512 F.2d 427, 429 (1st Cir. 1975); see also MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 5:2 (3d ed. 2004) (Bivens actions); VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 40 (2d ed. 1997) (success rates of § 1983 claims).

182. 18 U.S.C. § 242 (2006).

the defendant may be sentenced up to ten years in prison.¹⁸³ The government must prove that the defendant acted wilfully to deprive the victim of a right secured by the U.S. Constitution or a statute.¹⁸⁴ Also, the officer must have had “fair warning” that his conduct would be proscribed by the statute.¹⁸⁵

An officer must have acted under the color of law to be successfully prosecuted under § 242. The statute covers an officer’s acts while in the performance of his duties, including when he is off-duty so long as he acts pursuant to his authority.¹⁸⁶ Police officers have been found to violate § 242 even in personal situations, so long as “an air of official authority” existed, for example by displaying a badge or accessing a restricted area to which only officers have access.¹⁸⁷

Applying § 242 to police officers has advantages over § 924(c). Unlike § 924(c), which imposes a mandatory minimum sentence, the judge has discretion under § 242 when sentencing the defendant. Additionally, there is no requirement that the sentence under § 242 be served consecutively. This lessens the harsh impact from sentencing when an officer uses unreasonable force.

To address this harsh impact of § 924(c), the statute could be altered to exempt officers from the mandatory minimum sentence, rather than punishment under the statute generally, allowing judges to determine the appropriate sentence under the statute. An exemption is preferred to such an approach. The purpose of § 924(c), to encourage criminals to “leave their guns at home,”¹⁸⁸ does not make sense when applied to police officers regardless of the length of the prison sentence.

Some commentators have argued that § 242 is underutilized due to the requirement of wilful action by the officer and concerns over

183. *Id.* Whether § 242 should be amended to remove the penalty for the firearms’ involvement is beyond the scope of this Note.

184. *Williams v. United States*, 341 U.S. 97, 101 (1951).

185. See Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 *YALE L.J.* 2195, 2211 (2003).

186. See *United States v. Christian*, 342 F.3d 744, 750-52 (7th Cir. 2003); see also *AVERY ET AL.*, *supra* note 181, § 1:2 (analyzing the analogous civil statute).

187. *United States v. Christian*, 342 F.3d 744, 751-52 (7th Cir. 2003) (citing cases).

188. See *supra* text accompanying note 11.

federalism.¹⁸⁹ Although the Justice Department has a nearly 100 percent success rate in prosecuting civil rights cases such as hate crimes, prosecutions for official misconduct, including police brutality, have success rates in the 60 to 70 percent range.¹⁹⁰ Explanations for the low rate of § 242 prosecutions include inadequate resources, lack of interest by prosecutors, and the general difficulty in prosecuting police officers.¹⁹¹ Because the federal government prosecutes local police officers only when the local authority fails to do so,¹⁹² low numbers of federal prosecutions are only a problem if local prosecutors refuse to prosecute legitimate cases and the federal government fails to fill the void.

As noted above, the majority of situations in which an officer would be exempt under this Note's proposed § 924(c) are those with underlying crimes of violence. In all but two of such cases cited in this Note, prosecutors brought § 242 charges as well.¹⁹³ It does not appear that federal prosecutors are reluctant to charge § 242 in the context of cases in which § 924(c) is also charged.

V. ARGUMENTS AGAINST ALTERING § 924(c)

This Part analyzes arguments against altering § 924(c). First, one argument asserts that § 924(c) already contains adequate protections for police officers, and thus no need to amend it exists. Second, some argue that jurors may already give officers the benefit of the doubt. As a result, jurors may be reluctant to convict an officer under § 924(c) unless the conduct is particularly egregious. Third, some take the position that U.S. Attorneys, who have

189. See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 466-67 (2004) (noting that because § 242 permits prosecution for "ordinary torts and crimes," federalism concerns "may lead prosecutors to err on the side of underenforcement").

190. See HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES* 94 (1998).

191. See *id.* at 90; see also Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 501-03 (2008).

192. See HUMAN RIGHTS WATCH, *supra* note 190, at 89.

193. See *United States v. Parker*, 25 F.3d 442 (7th Cir. 1994) (involving an officer who drove a getaway car for a bank robbery); *United States v. Francies*, No. 01 C 0109, 2002 WL 31415496 (N.D. Ill. Oct. 24, 2002) (involving an officer who robbed drug dealers).

discretion over whether to charge § 924(c), will not file § 924(c) charges unless an officer's conduct was so beyond the pale as to warrant the mandatory minimum. Finally, if police officers believe they are "above the law," granting an exemption may only further this view and lead to more rogue officers. Though these arguments may have merit, they are not sufficient to overcome the justifications to amend § 924(c).

A. Statutory Protections Already in Place

Under § 924(c), the firearm must be used or carried "during and in relation to" the underlying crime, or possessed "in furtherance" of the crime.¹⁹⁴ Simply having the weapon on your person is not sufficient. In fact, one of the factors that courts consider when determining whether a gun was possessed "in furtherance" of the underlying crime is the legality of the possession.¹⁹⁵ An argument may be made that § 924(c) contains adequate safeguards against unjust application to police officers who are on-duty and performing their duties.

When an officer commits an underlying drug trafficking crime, the statutory language does provide sufficient protection; such protection is lacking when the underlying crime is a crime of violence.

1. Drug Trafficking Crimes

In drug trafficking cases, courts and juries consider an officer's on-duty status and his activities when determining guilt under § 924(c). The following cases illustrate this point.

Officer Russell

Officer Garrett Russell sold drugs to a government informant on three occasions.¹⁹⁶ Two of the sales occurred while Russell was on-duty, in his police cruiser, wearing his uniform and his firearm.¹⁹⁷

194. For an explanation of these standards, see *supra* Part I.B.

195. See *supra* text accompanying note 27.

196. *United States v. Russell*, 76 F.3d 808, 809-10 (6th Cir. 1996).

197. *Id.*

The third occasion was while Russell was off-duty in his personal car, on his way home from work, but still wearing his uniform and firearm.¹⁹⁸ In addition to drug trafficking charges, Russell was charged under § 924(c) for each of the three sales, but was convicted only for the sale while off-duty.¹⁹⁹ Russell was sentenced to three years and three months imprisonment on the drug counts and a consecutive five-year sentence under § 924(c).²⁰⁰

Russell appealed his § 924(c) conviction, arguing that his off-duty possession of the gun was incidental and due to his employment as a police officer.²⁰¹ The Sixth Circuit disagreed and upheld the conviction.²⁰²

The jury presumably determined that Russell's firearm was not present "in furtherance" of his drug crimes while he was on-duty, but it was when he was off-duty. This distinction reveals that the jury ensured that the presence of the weapon did not trigger an automatic § 924(c) conviction and the on-duty status of the officer was considered by the jury.

Officers Moore, Ramos, Young, and Jackson

In Chicago, an undercover officer and the defendant police officers agreed that the defendants would escort drug couriers around the city for the undercover officer's mock drug operation.²⁰³ If the couriers were pulled over, the defendants were to show their police badges and prevent a search of the courier's car.²⁰⁴ The defendants were charged and convicted of drug trafficking and § 924(c).²⁰⁵ The officers received sentences ranging from 9 years to 115 years, primarily due to multiple consecutive sentences under § 924(c).²⁰⁶

198. *Id.* at 810.

199. *Id.*

200. *Id.*

201. *Id.* at 810-11 & nn.5-6.

202. *Id.* at 812 ("[A] reasonable juror could conclude that Russell used and/or carried the firearm ... to protect the [drugs] and facilitate [their] sale.").

203. *United States v. Moore*, 363 F.3d 631, 634-35 (7th Cir. 2004).

204. *Id.* at 635.

205. *Id.* at 634, 639; *cf.* *United States v. Gutierrez*, 343 F.3d 415, 416-17 (5th Cir. 2003) (involving officer acquitted of § 924(c) charges for escorting drug dealers).

206. See Steve Warmbir, *Leader of Austin 7 Cops Gets 115 Yrs.*, CHI. SUN-TIMES, Oct. 19, 2001, at 14.

On appeal, the defendants argued that the presence of the firearms was coincidental because, as police officers, they were required to carry their weapons.²⁰⁷ One of the officers argued that he was only instructed to show his badge, and thus never intended to use his gun.²⁰⁸ The Seventh Circuit rejected these arguments because the officers were “hired to play the role of a police officer, which necessarily entails carrying a service revolver.”²⁰⁹ The court made sure to point out that “we are not holding that any time a police officer commits a drug trafficking offense or a crime of violence while carrying his or her police weapon, the officer automatically has violated § 924(c).”²¹⁰

Courts and juries appear to scrutinize the degree to which the firearm played a role in the drug trafficking crime. Although an assumption may exist that the firearm was involved, such as the assumption that the firearm comes with the officer, the connection between the crime and the firearm is not automatic.

2. *Crime of Violence*

When the underlying crime is a crime of violence, jurors appear to convict more easily on the § 924(c) charge. This is likely because the firearm is directly involved in the crime by being brandished or discharged.

There are exceptions. In *Aguilar*, Officer Aguilar was acquitted of the § 924(c) charge.²¹¹ In that case, only one of the fellow officers who was at the scene testified that Aguilar had placed his gun in the suspect’s mouth,²¹² and the jury may not have believed the testimony. This is more likely than the jury making a policy decision that because Aguilar was on-duty, and the fight with the

207. *Moore*, 363 F.3d at 640.

208. *Id.*

209. *Id.* at 641.

210. *Id.* For another Seventh Circuit case that goes to lengths to tie the defendant police officer’s firearm to the underlying drug trafficking crime, see *United States v. Haynes*, 582 F.3d 686, 701-05 (7th Cir. 2009).

211. See *supra* text accompanying note 120.

212. See *supra* text accompanying note 119.

suspect occurred during an arrest, the firearm charge should not apply.²¹³

In Ramos and Compean's case, the jury considered the fact that the agents were on-duty at the time the conduct occurred. Ramos's attorney described speaking with jurors after the trial who told her that the agents "were just out there doing their jobs, but they shouldn't have shot."²¹⁴ The agents were indicted for "discharge of a firearm in commission of a crime of violence" under § 924(c).²¹⁵ Once the jury determined that the agents had assaulted the drug smuggler, conviction on the § 924(c) charge was almost automatic because the evidence was not disputed that the agents had fired their weapons.²¹⁶

Jurors convict on § 924(c) more readily for crimes of violence and scrutinize more closely for drug trafficking charges. The statutory language of § 924(c) does provide adequate protection for officers involved in drug offenses. For crimes of violence, a change in the statute is necessary to ensure that a crime committed by an officer in the performance of his duties is not the basis of a § 924(c) charge.

B. Jurors Believe Police

A second argument against altering § 924(c) makes the case that police have an advantage in criminal prosecutions that ordinary citizens lack: jurors may give more credibility and weight to the testimony of police officers.²¹⁷ Some argue police officers may believe they have this advantage, lessening the hesitancy to shoot

213. This scenario can be compared to situations in which the officer is acquitted of the underlying crime of violence and the § 924(c) charge. *See, e.g., United States v. Chinnery*, No. 03-1299, 2003 WL 21469342 (3d Cir. June 26, 2003).

214. 18 *Trial Transcript*, *supra* note 44, at 15-16.

215. 17 *id.* at 4.

216. The U.S. Attorney made this point, stating "[t]here seems little doubt ... that Compean and Ramos used their firearms." *Hearing to Examine the Prosecution of Ignacio Ramos and Jose Compean Before the S. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter *Hearing*] (statement of Johnny Sutton, U.S. Att'y), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=2872>.

217. *See* HUMAN RIGHTS WATCH, *supra* note 190, at 90. For a discussion of juries and civil liability for police officers, see Armacost, *supra* note 189, at 468 ("[T]he tendency ... to favor police officers over alleged victims of excessive force is reinforced by a widely held public view that a little bit of police brutality is simply the price we pay for crime control.").

a suspect if an officer believes his life is in danger, preferring to take his chances with a jury.²¹⁸ Jurors may especially side with police when they are charged with denial of a defendant's rights.²¹⁹

The jury in Ramos and Compean's case was prominent in the public debate following the conviction. The prosecuting U.S. Attorney used the jury as a bulwark against congressional criticism. He explained that the agents were clearly guilty because "West Texas juries don't convict cops easily."²²⁰ Others countered that had the jury been informed that Aldrete-Davila had brought another load of drugs into the United States after receiving immunity and while waiting to testify at the trial, the jury would not have convicted the agents.²²¹

In many cases, however, there are additional factors that may have influenced the jury more than merely the defendant's status as a police officer. After Ramos and Compean's trial, reports surfaced that some jurors had convicted the agents against their will. Three jurors stated that they were told by the foreman that the verdict had to be unanimous and voted guilty because they were outnumbered.²²² Two jurors claimed that other jurors demanded a quick verdict in order to be done with deliberations before spring break.²²³ Of course, these statements may have been made in reaction to the public outcry against their verdict, but they do

218. See William B. Waegel, *How Police Justify the Use of Deadly Force*, 32 SOC. PROBS. 144, 147 (1984) ("I'd rather be judged by twelve than carried out by six' is familiar to every urban police officer.").

219. See Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L.Q. 45, 59 (1987). *But see* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 236-39 (1966) (arguing that jurors acquit defendants who injure or kill an officer when the officer used excessive force during an altercation).

220. Gillman, *supra* note 67.

221. See Seper, *supra* note 67. In other words, the jury was unable to properly assess Aldrete-Davila's credibility when he claimed that he was "a first-time offender trying to earn money to pay for his mother's medical bills." James Pinkerton, *Sentences Upheld for Two Border Agents*, HOUS. CHRON., July 29, 2008, at A1. Aldrete-Davila was eventually sentenced to nine and a half years for smuggling drugs while awaiting Ramos and Compean's trial. See Jerry Seper, *Drug Smuggler Shot by Border Agents Sentenced*, WASH. TIMES, Aug. 7, 2008, at A3.

222. Jerry Seper, *Border Agents Seek New Trial*, WASH. TIMES, Nov. 6, 2006, at A3.

223. Jerry Seper, *Border Patrol Agents' Conviction Riles Union Chief*, WASH. TIMES, Aug. 16, 2006, at A3. For another illustration of an impatient jury, see *supra* note 125.

illustrate that whether the defendant is a police officer is not so overwhelmingly influential as to determine the jury's verdict.²²⁴

Additionally, the argument that jurors believe police more than they believe other witnesses is not a narrow criticism against an exemption from § 924(c). Such a jury bias would affect decisions on the underlying crime as well, such as assault or drug trafficking. Juries may give police the benefit of the doubt, but a reliance on the jury's temperament provides a loose rule and weak predictability for police officers.

C. Prosecutorial Discretion

A third argument against altering § 924(c) assures that prosecutorial discretion prevents unnecessary application of § 924(c). Because prosecutors choose which cases to bring to trial,²²⁵ an exemption for police officers may be unnecessary. This argument assumes that U.S. Attorneys only charge officers under § 924(c) if their conduct was so egregious as to warrant the statutory minimum.

Prosecutorial discretion was discussed when § 924(c) was first debated in Congress and concerns were raised over the proposed language's broad reach. The legislation's sponsor attempted to blunt criticism by noting, "[T]he U.S. attorney has the discretion of even filing a case."²²⁶

In Ramos and Compean's case, the prosecutor became a major focus of the public furor. U.S. Attorney Johnny Sutton was either "Satan" who should be "thrown into the same jail cells as Ramos and Compean," or a tough-on-crime prosecutor from Texas doing his job.²²⁷ Critics of the prosecution claimed Sutton "lied to the

224. The jurors' remorse also may have occurred because jurors are generally not allowed to know the potential prison sentences when determining guilt. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 79-80 (2003).

225. See, e.g., JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES 13 (1978) (listing ways U.S. Attorneys "wield awesome authority" in criminal cases).

226. 114 CONG. REC. 22,230 (1968) (statement of Rep. Casey).

227. Richard A. Serrano, *U.S. Attorney Put on Defensive*, L.A. TIMES, May 14, 2007, at A8.

American people” and “prosecuted the good guys and gave immunity to the bad guys.”²²⁸

In his testimony before the Senate Judiciary Committee, Sutton argued that, as a prosecutor, he had to charge law enforcement officers when they broke the law.²²⁹ He invoked the cloak of prosecutorial discretion, informing the committee that of the fourteen other shootings by Border Patrol agents in El Paso over the previous six years, no officers had been charged.²³⁰ Under Justice Department policy, federal prosecutors “pursue the most serious, readily-provable offense or offenses that are supported by the facts of the case.”²³¹ Charges made under § 924(c) are proper, he argued, because Congress had not exempted police and § 924(c) charges further the goal of reducing gun violence.²³²

Sutton’s reference to departmental policy about which charges to pursue concerns a September 22, 2003 memorandum from Attorney General John Ashcroft to federal prosecutors. The memorandum stated, “The use of statutory enhancements is strongly encouraged, and federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements, such as ... the filing of a charge under 18 U.S.C. § 924(c), are sought in all appropriate cases.”²³³ Federal prosecutors can decline to bring charges under § 924(c) only with written approval in exceptional cases.²³⁴ There is no mention of differing standards when charging a police officer.

As noted earlier, prosecutors can easily prove the elements of § 924(c) for an officer who commits a crime of violence. If federal prosecutors are “strongly encouraged” to bring charges under § 924(c) and the exceptions are limited and do not include police

228. *Id.* (quoting Rep. Dana Rohrabacher).

229. *Hearing, supra* note 216.

230. *Id.*

231. *Id.*

232. *Id.*

233. Memorandum from Att’y Gen. John Ashcroft to All Fed. Prosecutors Regarding Policy on Charging of Criminal Defendants (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

234. *Id.*

officers, then it is unlikely that prosecutorial discretion is a valid bulwark against criminal liability.²³⁵

Further, such reliance on prosecutors to use their discretion does not provide adequate guidelines for officers to determine when they might face criminal liability. The potential punishment is great, as at a minimum the officer will be sentenced to five years in prison.²³⁶ Allowing prosecutors to determine their own standards for when an officer should be prosecuted under § 924(c) provides too much discretion for a statute with such harsh penalties.

This concern is validated by examining cases in which police officers were not charged under § 924(c) for conduct similar to cases in which charges were brought. The following three cases illustrate the point.

1. Crime of Violence: Wrongful Shooting

At 5:30 a.m., seventy-two-year-old officer Adolph Bradley and his partner observed a station wagon roll through a stop sign and attempted to stop the vehicle for a traffic violation.²³⁷ The sixty-year-old driver of the station wagon continued on, and, in what the Seventh Circuit described as “something out of a ‘Dirty Harry’ movie,” Bradley leaned out of the passenger window of the police vehicle and fired a warning shot into the air from his .357 Magnum.²³⁸ The station wagon continued driving at twenty-five miles per hour, so Bradley fired into the vehicle, his hollow-point bullet hitting a metal plate in the back of the driver’s seat.²³⁹ The station wagon stopped, and Bradley followed his bullet with a stream of expletives, shouting “get out of this car mother fucker before I blow your God damned brains out!”²⁴⁰ The driver of the station wagon then exited the vehicle, at which point he and

235. Although the Justice Department could change its policy, a statutory change is preferable as it prevents fluctuations in policies with a new President or Attorney General.

236. 18 U.S.C. § 924(c)(a)(1) (2006).

237. *United States v. Bradley*, 196 F.3d 762, 765 (7th Cir. 1999).

238. *Id.*

239. *Id.* Bradley later claimed that he believed the driver reached for a gun, a claim his partner contradicted. *Id.* at 769.

240. *Id.* at 766.

Bradley recognized each other as boyhood friends, and no traffic citation was issued.²⁴¹

Bradley did not report the shooting, contrary to his police department's policy.²⁴² The driver, despite the childhood friendship, reported the incident to the FBI and Bradley was indicted and convicted under § 242.²⁴³ Though facing up to five years in prison, Bradley was sentenced to probation.²⁴⁴ This was perhaps because Bradley had "a good reputation" and "strong ties with members of the communities in which he worked."²⁴⁵

Bradley could have been charged under § 924(c), with a ten-year sentence for discharge of a firearm during a crime of violence, as his situation resembles that for which Ramos and Compean were charged. In fact, Bradley's conduct was more disturbing due to his apparent intent to kill a motorist for running a stop sign.

2. Drug Trafficking: Escorting Drugs

Reynaldo Marmolejo, an Immigration and Naturalization Service (INS) agent, was convicted of drug trafficking and related charges for transporting drugs from Mexico into the United States for a drug cartel.²⁴⁶ The transports were made in INS vehicles, while Marmolejo was carrying his service firearm.²⁴⁷ During sentencing, the district court did not enhance Marmolejo's sentence for his possession of a firearm.²⁴⁸ Marmolejo was sentenced to nineteen years and ten months imprisonment.²⁴⁹

The Fifth Circuit vacated the sentence for failure to apply the firearm enhancement.²⁵⁰ The court reasoned that, despite the fact that Marmolejo was required to carry his firearm, using an armed

241. *Id.* at 765-66.

242. *Id.* at 766.

243. *Id.*

244. See Roy Malone, *Former Longtime Police Officer in Brooklyn Who Shot at Motorist Gets Three Years' Probation*, ST. LOUIS POST-DISPATCH, Mar. 27, 1999, at 4. The sentence was vacated and remanded by the Seventh Circuit. *Bradley*, 196 F.3d at 772.

245. *Bradley*, 196 F.3d at 765.

246. *United States v. Marmolejo*, 106 F.3d 1213, 1215 (5th Cir. 1997).

247. *Id.* at 1216.

248. *Id.*

249. *Id.* at 1215.

250. *Id.*

INS agent as an “armed guard to protect [the drugs]” was the perfect cover for the drug cartel.²⁵¹

A § 924(c) charge could have applied, similar to other cases in which officers escorted drugs, either for carrying the firearm during and in relation to the crime or possessing the firearm in furtherance of the crime, both with a five-year sentence. Officer Radcliff was sentenced to five years in prison, beyond the prison time for drug charges, for escorting a drug shipment in a car driven by his wife;²⁵² Agent Marmolejo escaped such punishment for nearly identical conduct.

3. Acting Outside Official Duties: Personal Vendetta

Officer William Tarpley became aware of a past affair between his wife and Kerry Vestal.²⁵³ With his wife’s aid, Tarpley arranged for Vestal to come to his home, where Tarpley planned to assault Vestal.²⁵⁴ When Vestal arrived, Tarpley began to beat him and inserted his service firearm into Vestal’s mouth, threatening to kill him.²⁵⁵ Tarpley was charged and convicted under § 242²⁵⁶ and sentenced to two years and nine months imprisonment.²⁵⁷ Had Tarpley been charged under § 924(c), he would have faced a five-year consecutive sentence for the use of a firearm during a crime of violence.

Although Officer Aguilar was charged under § 924(c) for allegedly placing a firearm in an arrestee’s mouth,²⁵⁸ Tarpley was not similarly charged for equally, if not more, egregious conduct. As illustrated by this cases and others, the consequences of leaving § 924(c) charges to prosecutorial discretion can be great. This is especially troubling when two similar factual situations are

251. *Id.* at 1216.

252. *See supra* text accompanying note 160.

253. *United States v. Tarpley*, 945 F.2d 806, 807 (5th Cir. 1991).

254. *Id.* at 807-08.

255. *Id.* at 808.

256. *Id.* Tarpley acted “under color of law” because he repeatedly referred to himself as an officer and claimed he could kill and get away with it as an officer. *Id.* at 809.

257. *See* Brief of Appellee at 2-3, *United States v. Tarpley*, 945 F.2d 806 (5th Cir. 1991) (No. 91-1043), 1991 WL 11245473.

258. *See supra* text accompanying note 119.

presented and one officer faces a hefty mandatory minimum consecutive sentence while the other does not.

D. Police Believe They Are Above the Law

A fourth argument against altering § 924(c) focuses on the psychology of police officers. Police may have an attitude that they are above the law.²⁵⁹ The profession attracts people who view themselves as a moral force for good aligned against the forces endangering ordinary citizens.²⁶⁰ This image of their role, some suggest, accounts for “the most shocking abuses of police power.”²⁶¹ If this is true, giving police officers an exemption from § 924(c) may only add to the notion that the law does not apply to police to the same extent it does to ordinary citizens.

It seems unlikely that an exemption from § 924(c) would result in more violence by police officers. The consequences of using unreasonable force include criminal liability under § 242 and, for state law enforcement officers, civil liability.²⁶² The officer would almost surely lose his job if found guilty.²⁶³ Police also often suffer various psychological problems after shootings.²⁶⁴

Additionally, it is wrong to make policy judgements assuming that police officers believe the law does not apply to them. Such an assumption could be a justification to forbid officers from carrying firearms in the first place. It is unclear how many officers would be tempted by an exemption in § 924(c) to act violently in violation of the law, but evidence from Michigan indicates that the number is not significant. Forty-five § 242 and § 241 (conspiracy) cases were

259. See, e.g., JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 146 (1993).

260. *Id.* at 92.

261. *Id.* at 93.

262. See *supra* note 181. In *Brown*, the victim received a \$475,000 settlement from the city of Gary, Indiana. See Andy Grimm, *Shooting Victim's Father Files Suit*, MERRILLVILLE POST-TRIB., May 16, 2006, at A1. For an analysis of officers' fear of civil litigation, see KAPPELER, *supra* note 181, at 6-7.

263. In one study of officers involved in shootings, 34 percent feared legal or administrative problems. See David Klinger, *Police Responses to Officer-Involved Shootings*, NAT'L INST. OF JUST. J., Jan. 2006, at 21, 23.

264. See *id.* at 21-23; see also ARRIGO, *supra* note 163, at 97.

referred to federal prosecutors in Michigan for fiscal year 1996.²⁶⁵ The two states closest to Michigan in population, Ohio and Georgia, had eighty cases and seventy-one cases referred, respectively.²⁶⁶

VI. FEDERAL SENTENCING GUIDELINES

Police officers face proper sanctions under the Federal Sentencing Guidelines. For instance, an additional two points may be added for the abuse of a position of public trust.²⁶⁷ Officers who assault a suspect while the suspect is handcuffed face a two-point increase in the Guidelines for physically restraining the victim in the course of the crime.²⁶⁸

If officers are exempt from § 924(c), a problem may arise when an officer is assigned an increase in the Guidelines for the firearm's role in the underlying crime. For example, aggravated assault carries a base offense level of fourteen.²⁶⁹ If a firearm was discharged, the offense level increases by five; if a firearm was used, the level is increased four levels; and if a firearm was brandished or its use threatened, the level is increased by three.²⁷⁰ For drug crimes, two levels are added for the possession of a firearm.²⁷¹

The same justifications for the exemption from § 924(c) apply to the Guidelines, although in a less compelling way. Although § 924(c) imposes a mandatory sentence, the Guidelines are advisory, and thus the stakes are lessened compared to a mandatory minimum sentence.²⁷²

Currently, amending the Guidelines may not be necessary due to their advisory nature. If courts or U.S. Attorneys were to prob-

265. See HUMAN RIGHTS WATCH, *supra* note 190, at 386-87. For a case from Michigan, see *United States v. Melendez*, No. 03-80598, 2004 WL 162937 (E.D. Mich. Jan. 20, 2004) (eighteen Detroit officers charged under § 242 and § 924(c)).

266. See HUMAN RIGHTS WATCH, *supra* note 190, at 385, 387.

267. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2007); see, e.g., *United States v. Parker*, 25 F.3d 442, 449-50 (7th Cir. 1994) (applying two points to officer who drove his police cruiser as a getaway car during a bank robbery).

268. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.3 (2007); see, e.g., *United States v. Evans*, No. 95-5714, 1996 WL 233056 (4th Cir. May 8, 1996).

269. U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(a) (2007).

270. *Id.* § 2A2.2(b)(2). Note the parallels to the sentencing levels of § 924(c).

271. *Id.* § 2D1.11(b)(1).

272. See *United States v. Booker*, 543 U.S. 220, 233 (2005).

lematically apply enhancements subsequent to an altered § 924(c), amending the Guidelines may become necessary to prevent punishments obtained through the “back-door.”²⁷³

CONCLUSION

Police officers should be exempt from § 924(c) if certain conditions are met. First, when the underlying crime is committed, the officer must be authorized to carry the firearm either by the local law enforcement agency or by federal statute. Second, the officer must be acting in the performance of his duties. This exemption should apply to both on- and off-duty officers because many police officers are required to carry firearms even when off-duty. The exemption is further justified because police officers confronted with violent situations often have only moments to respond, and their actions are reviewed afterward under a vague “reasonableness” standard. An exemption from the statute would protect officers in such situations, and would likely not apply to an officer who is engaged in drug crimes. It bears repetition that officers would remain liable for the underlying crime; the exemption only applies to the sentence for the firearm’s involvement in the crime.

Ramos and Compean’s case placed this issue in the public forefront despite prior prosecutions of law enforcement officers under § 924(c). Congress has blamed prosecutors for being overzealous against police officers who were doing their jobs. Prosecutors, in turn, have blamed Congress for imposing a mandatory minimum sentence and not providing an exemption for police. It is time for Congress to make explicit what apparently many believed was implicit: the presence or use of a police officer’s firearm, which he is authorized to carry, should not be the basis of a harsh sentence

273. *See, e.g.*, *United States v. Sivils*, 960 F.2d 587, 592 (6th Cir. 1992) (involving two officers not charged under § 924(c) but given two-point enhancement); *United States v. Ruiz*, 905 F.2d 499, 507 (1st Cir. 1990) (giving a two-point enhancement to an officer not charged under § 924(c)). *But see* *United States v. Siebe*, 58 F.3d 161, 162-63 (5th Cir. 1995) (vacating a two-point enhancement because it was applied on the premise that an officer who is issued a firearm automatically carried that firearm during a drug crime). Officer Barber, discussed above, was acquitted of § 924(c) charges but assigned a two-point enhancement. *United States v. Barber*, No. 93-5678, 1994 WL 406547, at *4 (4th Cir. Aug. 4, 1994).

when the officer commits a crime while acting in the performance of his duties.

*Noah A. Kuschel**

* J.D. Candidate 2010, William & Mary School of Law; B.A. 2004, The University of Rochester. I would like to thank my family, friends, and the Law Review staff for their help in bringing this Note to publication.