Maybe Once, Maybe Twice: Using the Rule of Lenity to Determine Whether 18 USC § 924(c) Defines One Crime or Two

F. Italia Patti†

INTRODUCTION

Suppose that a drug dealer in Los Angeles goes to meet a buyer. The dealer possesses a handgun and intends to use the gun if the buyer does not pay him. He hands drugs to the buyer. The buyer refuses to pay. The dealer tells the buyer that he has a gun and that he will use it if the buyer does not pay. The buyer pays the dealer. They go their separate ways. The Los Angeles drug dealer faces a mandatory minimum penalty of five years for the role that the gun played in this drug transaction.[1]

Now suppose the exact same transaction occurs in Minneapolis. The Minneapolis drug dealer could face a sentence six times as severe: one mandatory minimum penalty of five years for the first violation, possessing the gun during a drug trafficking crime, and another mandatory minimum penalty of twenty-five years for the second violation, using the gun in furtherance of that drug trafficking crime.[2] This disparity[3] stems from ambiguous

† BA 2008, The University of Chicago; JD Candidate 2014, The University of Chicago Law School.

1 See 18 USC § 924(c)(1)(A) (establishing a mandatory minimum penalty of five years for the first offense of "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm").

2 See 18 USC § 924(c)(1)(C) ("In the case of a second or subsequent conviction under this subsection, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years.").

3 There is broad agreement that geographic sentencing disparities are problematic. See, for example, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L Rev 1, 4 (1988) (arguing that one of Congress's primary purposes in enacting the new federal sentencing statute "was to reduce [the] 'unjustifiably wide' sentencing disparity"); United States Sentencing Commission, Proposed Sentencing Guideline for United States Courts, Dissenting View of Commissioner Paul H. Robinson, 52 Fed Reg 3919, 3986–88 (1987) (criticizing the Sentencing Guidelines in part because they do not do enough to decrease the disparity and may actually increase it). Consider Lynn Adelman and Jon Deitrich, *Disparity: Not a Reason to "Fix"* Booker, 18 Fed Sent Rptr (Vera) 160, 160–61 (2006) (arguing that the concern about regional disparity, while somewhat overblown, is not entirely unwarranted, but also noting that the concern is not a sufficient justification for changing sentencing laws).

language in 18 USC § 924(c).[4] Section 924(c) proscribes "during and in relation to any crime of violence or drug trafficking . . . us[ing] or carr[ying] a firearm, or . . . in furtherance of any such crime, possess[ing] a firearm."[5] Some courts—including the Seventh[6] and Ninth Circuits[7]—interpret the provision as defining a single crime that could be committed by either using a firearm during a crime or possessing a firearm in furtherance of a crime. Other courts—including the Fifth,[8] Sixth,[9] Eighth,[10] Tenth,[11] and Eleventh Circuits[12]—read the provision as defining two separate crimes, one for use of a firearm during a crime and another for possession of a firearm in furtherance of a crime.[13]

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4 There is also disagreement over whether a single drug trafficking offense can be the predicate offense for more than one § 924(c) conviction, which contributes to this disparity. See *United States v Diaz*, 592 F3d 467, 471–74 (3d Cir 2010) (collecting cases). The Eighth Circuit interprets § 924(c) as defining two separate crimes. See *United States v Gamboa*, 439 F3d 796, 808–09 (8th Cir 2006). The court also allows a single drug trafficking offense to be the predicate offense for multiple § 924(c) convictions. See *United States v Lucas*, 932 F2d 1210, 1223 (8th Cir 1991) ("[T]hese separate uses [of firearms] properly support separate section 924(c) charges, even though both of the charges relate to the same predicate offense."). The combined effect of these two interpretations of § 924(c) is that the Minneapolis drug dealer potentially faces a thirty-year sentence for actions that some circuits classify as a single crime warranting only a five-year sentence.

5 18 USC § 924(c)(1)(A).

6 See, for example, *United States v Haynes*, 582 F3d 686, 703 (7th Cir 2009).

7 See, for example, *United States v Arreola*, 467 F3d 1153, 1158 (9th Cir 2006).

8 See, for example, *United States v Owens*, 224 Fed Appx 429, 430 (5th Cir 2007).

9 See, for example, *United States v Combs*, 369 F3d 925, 933 (6th Cir 2004).

10 See, for example, *United States v Gamboa*, 439 F3d 796, 810 (8th Cir 2006).

11 See, for example, *United States v Lott*, 310 F3d 1231, 1246 (10th Cir 2002).

12 See, for example, *United States v Timmons*, 283 F3d 1246, 1250 (11th Cir 2002).

13 The First and Fourth Circuits have acknowledged that there is disagreement as to how many crimes § 924(c) defines but have not answered the question. See *United States v Ayala-Lopez*, 493 Fed Appx 120, 127 n 2 (1st Cir 2012) ("Nor is it necessary here to determine whether § 924(c)(1)(A) creates two separate offenses or merely specifies two separate means of committing a single offense."); *United States v Robinson*, 627 F3d 941, 954 (4th Cir 2010) ("The circuit courts are divided on whether § 924(c) creates one offense or two. . . . The question is whether that difference matters here. We do not think that it does, and so we need not decide how many offenses § 924(c) creates."). But see *United States v Woods*, 271 Fed Appx 338, 343 (4th Cir 2008) (stating its agreement with the circuits that have concluded that § 924(c) defines two offenses without elaborating on its reasoning, because the determination was irrelevant to the question before the court). The Third Circuit briefly addressed the question of how many crimes § 924(c) defines. See *United States v Pryor*, 195 Fed Appx 65, 69 (3d Cir 2006) ("[Section 924(c)] therefore provided for two separate offenses."). But a later opinion from a district court in the Third Circuit determined that the Third Circuit had not yet addressed the question. See *United States v Johnson*, 2010 WL 322143, *7 (WD Pa). The Second Circuit has not weighed in on how many crimes § 924(c) defines, but "district courts in this circuit have found the Seventh [Circuit's] and Ninth Circuit's reasoning more persuasive." *Johnson v United States*, 2013 WL 103174, *6 n 11 (SDNY) (collecting cases from district courts within the Second Circuit).

There is a mandatory minimum penalty of five years for violating § 924(c). A subsequent conviction incurs a mandatory minimum sentence of twenty-five years.[14] If that subsequent conviction involves a machine gun or a firearm equipped with a silencer, the mandatory sentence is life imprisonment.[15] Heightened sentences for a second or subsequent § 924(c) conviction are typically imposed on defendants convicted of violating § 924(c) who were also convicted of violating § 924(c) in a previous case.[16] If § 924(c) defines two distinct crimes,[17] however, separate convictions for both possessing and using the same firearm in connection with the same crime could trigger the twenty-five-year mandatory minimum for a second conviction. That is precisely the situation that the Minneapolis drug dealer faces. According to the Eighth Circuit's understanding of § 924(c), the Minneapolis drug dealer committed two crimes by possessing a gun in furtherance of a drug trafficking crime and, in mentioning the gun, also by using it. As a consequence, he can be convicted of violating § 924(c) twice and face the heightened penalty established for multiple § 924(c) violations.[18] By comparison, because the Ninth Circuit interprets § 924(c) as defining a single crime, the Los Angeles drug dealer faces five years for conduct that would lead to a thirty-year sentence in Minneapolis.

Although interpreting § 924(c) as including two crimes frequently leads to longer sentences, defendants have argued that § 924(c) defines two crimes because this argument provides a basis to challenge the indictment. That is, defendants whose crimes were charged in a single count have argued that § 924(c) actually defines two distinct crimes and that their indictments are therefore unconstitutional.[19] On the other hand, defendants charged with two separate crimes have argued that § 924(c) actually defines a single crime and that their indictments therefore unconstitutionally charge the same crime twice.[20]

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14 See 18 USC § 924(c)(1)(C)(i).

15 See 18 USC § 924(c)(1)(C)(ii).

16 See, for example, *United States v Powell*, 693 F3d 398, 401 n 4 (3d Cir 2012) (explaining that the mandatory minimum for a § 924(c) conviction was three hundred months, or twenty-five years, because the defendant had a previous § 924(c) conviction on his record).

17 This assumes that one drug trafficking crime can be the predicate offense for two § 924(c) violations, which the Eighth Circuit allows. See *Lucas*, 932 F2d at 1223.

18 See *Hamberg v United States*, 675 F3d 1170, 1171–73 (8th Cir 2012).

19 See note 42.

20 See US Const Amend V; 41 Am Jur 2d Indictments and Informations § 205 at 946–47.

Because courts have reached different conclusions about how many crimes § 924(c) defines, it is difficult for both defendants and prosecutors to predict which indictments are constitutional.[21]

This Comment addresses the question of how many crimes § 924(c) defines. Part I explains the history of § 924(c). Part II considers the disagreement among courts as to how many crimes § 924(c) defines and explains that the disagreement persists because first-order tools of statutory interpretation fail to conclusively resolve this question. Part III argues that because first-order tools of statutory interpretation do not conclusively indicate how many crimes § 924(c) defines, courts must look to second-order tools of statutory interpretation like the canons of construction. Specifically, this Comment suggests that courts look to the rule of lenity. This Comment clarifies the rule of lenity, explaining that it requires courts to interpret statutes so that they lead to less punishment. Building on that clarification of the rule of lenity, this Comment argues that courts invoking the rule of lenity must interpret § 924(c) as defining a single crime because this interpretation leads to less punishment. This solution is not limited to the question of how many crimes § 924(c) defines. Courts generally struggle to determine whether a statute defines two separate crimes or alternative means for committing a single crime.[22] This solution can resolve otherwise intractable questions of how many crimes any given statute creates.

I. THE HISTORY OF § 924(C)

This Part summarizes the history of § 924(c), explaining the statutory amendment that led to the current circuit split.

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[21] See Part II.A.

[22] For example, 26 USC § 7201 provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony." Courts disagree about whether the statute creates two separate crimes (the willful attempt "to evade or defeat any tax" and the willful attempt to evade or defeat the "payment" of any tax) or a single crime that can be committed two ways (by either attempting to evade a tax or attempting to evade the payment of a tax). Compare *United States v Dack*, 747 F2d 1172, 1174 (7th Cir 1984) (interpreting 26 USC § 7201 as creating two separate crimes), with *United States v Mal*, 942 F2d 686, 688 (9th Cir 1991) (holding that 26 USC § 7201 creates a "single crime of tax evasion"); *United States v Huguenin*, 950 F2d 23, 26 (1st Cir 1991) (holding that 26 USC § 7201 does not necessarily create two separate crimes); *United States v Dunkel*, 900 F2d 105, 107 (7th Cir 1990), vacd on other grounds 498 US 1043 (1991) (same).

As amended in 1998,[23] 18 USC § 924(c) provided that "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime," be sentenced to a prison term of between five and thirty years. Unlike the current version of the statute, the 1998 version did not mention possession of a firearm in furtherance of a violent or drug trafficking crime.[24] From the late 1980s through the mid-1990s, circuit courts interpreting the previous version divided over the proper definition of "use[ ]" of a firearm.[25] Courts debated whether mere possession constituted "use"[26] and reached different conclusions about whether guns that were present but inaccessible (for example, hidden under mattresses or in dressers) could trigger § 924(c).[27]

In *Bailey v United States*,[28] the Supreme Court resolved the circuit split, articulating a narrow definition for "use" of a firearm. The Court held that to establish "use," "the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime."[29] The Court elaborated, "The active-employment understanding of 'use' certainly includes brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm."[30] Further, "even an offender's reference to a firearm in his posses-

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23 See An Act to Throttle Criminal Use of Guns, Pub L No 105-386, 112 Stat 3469 (1998), codified at 18 USC § 924(c). The original act provided a mandatory minimum sentence for anyone who "(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States." Gun Control Act of 1968, Pub L No 90-618, 82 Stat 1213, 1224 (1968), codified at 18 USC § 921 et seq. Section 924(c) was modified several times between its 1968 enactment and the 1998 amendment.

24 For the original enactment, see Gun Control Act of 1968, 82 Stat at 1223–24. For the original codification, see 18 USC § 924(c) (1994).

25 See *Bailey v United States*, 516 US 137, 142 (1995) (discussing the debate among the circuit courts); *United States v Castro-Lara*, 970 F2d 976, 982–83 (1st Cir 1992); *United States v Hager*, 969 F2d 883, 888–89 (10th Cir 1992); *United States v Torres-Rodriguez*, 930 F2d 1375, 1385–86 (9th Cir 1991); *United States v Feliz-Cordero*, 859 F2d 250, 254 (2d Cir 1988).

26 Compare *Torres-Rodriguez*, 930 F2d at 1385, with *Castro-Lara*, 970 F2d at 983.

27 Compare *Feliz-Cordero*, 859 F2d at 254 (explaining that a firearm that is not "quickly accessible" does not satisfy § 924(c) "use"), with *Hager*, 969 F2d at 888–89 (determining that a firearm in "close proximity" satisfies § 924(c) "use").

28 516 US 137 (1995).

29 Id at 150.

30 Id at 148.

sion" that is "calculated to bring about a change in the circumstances of the predicate offense is a 'use,' just as the silent but obvious and forceful presence of a gun on a table can be a 'use.'"[31] However, the Court noted that "the inert presence of a firearm, without more," would not constitute "use" for purposes of § 924(c).[32]

Members of Congress were dissatisfied with this narrow definition because it made it more difficult to prosecute § 924(c) violations. Senator Jesse Helms referred to *Bailey* as "the Supreme Court's blunder" because of its effect on § 924(c) prosecutions.[33] Congress amended the provision with the explicit intent of making § 924(c) cases easier to prosecute. Senator Michael DeWine explained, "[*Bailey*] severely restricted an important tool used by federal prosecutors to put gun-using drug criminals behind bars. . . . The question before this Congress for almost four years, two Senate hearings, and seven bills was how to restore this crime fighting tool."[34] DeWine also outlined the specific conduct that the act was intended to reach: "not only instances of brandishing, firing or displaying a firearm . . . but also to those situations where a defendant kept a firearm available to provide security . . . or was otherwise emboldened by its presence in the commission of the offense."[35] The emphasis on situations in which a firearm was present but not necessarily employed further underscores Congress's intent to overrule *Bailey*.[36] To do so, Congress replaced the statutory language penalizing anyone who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm"[37] with language penalizing anyone who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a

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31 Id.

32 *Bailey*, 516 US at 149.

33 A Bill to Throttle Criminal Use of Guns, S 43, 105th Cong, 1st Sess, in 143 Cong Rec 470, 764 (Jan 21, 1997) (statement of Senator Jesse Helms). See also *United States v Pleasant*, 125 F Supp 2d 173, 180–81 (ED Va 2000) ("The discussions in both the Senate hearing . . . and the House Committee Report . . . reflect that Congress was intimately aware of the decision in *Bailey* and sought to avoid its restrictive effects.").

34 Bailey "Use or Carry" Firearms Bill, S 191, 105th Cong, 2d Sess, in 144 Cong Rec S 12670 (daily ed Oct 16, 1998) (statement of Senator Michael DeWine).

35 Id at S 12671 (cited in note 34) (statement of Senator Michael DeWine).

36 See *To Provide for Increased Mandatory Minimum Sentences for Criminals Possessing Firearms, and for Other Purposes*, HR Rep No 105-344, 105th Cong, 1st Sess 4–5, 14 (1997).

37 18 USC § 924(c) (1994).

firearm, or who, in furtherance of any such crime, possesses a firearm."[38]

In amending the statute, Congress made sure to capture more conduct than *Bailey*'s reading of the prior version of the statute captured. Congress did not make clear, however, if it intended to capture more conduct by creating an additional crime or by adding an additional prong to the single crime defined by § 924(c).

II. DISAGREEMENT OVER HOW MANY CRIMES § 924(C) DEFINES

Having explained the amendment to § 924(c) that raised the question of how many crimes that provision defines in Part I, this Comment turns to the split in the circuit courts that the amendment engendered. This Part begins by explaining that, when Congress does not clarify how many crimes a statute defines, defendants can raise two different and conflicting challenges to their indictments. In their attempts to respond to these challenges, courts have interpreted the statute using what this Comment will refer to as "first-order tools of statutory interpretation." These are the tools of statutory interpretation that courts commonly look to first when faced with statutory interpretation questions. This Part describes the three first-order tools that courts have relied on in interpreting § 924(c). Next, it summarizes the decisions of the circuit courts that have addressed the question of how many crimes § 924(c) defines by invoking these first-order tools. Finally, this Part explains why the first-order tools of statutory interpretation fail to indicate how many crimes § 924(c) defines.

A. Confusion Resulting from Congress's Failure to Specify How Many Crimes § 924(c) Defines

When Congress does not make clear how many crimes a statute defines, it opens the door to two different challenges to indictments brought under the statute. All indictments must follow certain rules. One is avoiding duplicity.[39] Another is avoiding multiplicity.[40] In the context of § 924(c), duplicity challenges

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[38] Act to Throttle Criminal Use of Guns, 112 Stat at 3469.

[39] See *Gerberding v United States*, 471 F2d 55, 59 (8th Cir 1973) ("[Duplicity's] vice is that a general verdict will not reveal whether the jury found the defendant guilty of one crime and not guilty of the other, or guilty of all.").

[40] See id at 58 ("'Multiplicity' is the charging of a single offense in several counts.").

are warranted only if a statute defines two separate offenses. Similarly, multiplicity challenges are warranted only if a statute defines a single offense. By being unclear about how many crimes § 924(c) defines, Congress has made it possible for some defendants to raise duplicity challenges (arguing that the statute defines two crimes) and others to raise multiplicity challenges (arguing that the statute defines one crime).

An indictment is duplicitous if a single count contains charges for two or more distinct offenses.[41] For example, if multiple blows each constitute a discrete assault, the prosecution must charge the defendant for each blow in a separate count. Similarly, assuming that evading arrest and hiding evidence are separate crimes, a single count of an indictment cannot charge a defendant with evading arrest *and* with hiding evidence. The indictment would need to include one count for evading arrest and a separate count for hiding evidence. Accordingly, if § 924(c) defines two crimes, § 924(c) indictments charging both "use" and "possession" in a single count would be duplicitous.

Duplicity is prohibited because it violates the Fifth and Sixth Amendments.[42] The primary constitutional concern with duplicitous indictments is that they make it difficult for both defendants and jurors to distinguish the crimes that the defendant has been charged with. A duplicitous indictment undermines a defendant's Sixth Amendment right to be informed of the charges against him because it makes it difficult for the defendant to understand the content of each charge.[43] A duplicitous indictment also undermines his Sixth Amendment right to conviction only by a unanimous jury verdict because a jury could find against the defendant without agreeing about all of the elements of each crime.[44] A secondary concern is that duplicitous indictments

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41 See *Abney v United States*, 431 US 651, 654 (1977) (explaining that an indictment was duplicitous because it charged two offenses—a conspiracy offense and an attempt to violate the Hobbs Act—in a single count). See also 41 Am Jur 2d Indictments and Informations § 207 at 948 (defining duplicity as the charging of two or more distinct offenses in the same count).

42 US Const Amend V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."); US Const Amend VI ("[T]he accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.").

43 See Thomas Lundy, *Duplicity—Part Two: A Methodology for Determining When Specific Juror Unanimity Is Required*, 34 The Champion 49, 49 (Dec 2010); 41 Am Jur 2d Indictments and Informations § 207 at 949 ("The vices of duplicity arise from a breach of the defendant's Sixth Amendment right to know the charges that he or she faces.").

44 See 41 Am Jur 2d Indictments and Informations § 207 at 949.

may lead to double jeopardy violations.[45] A duplicitous indictment obscures which offense the defendant was actually convicted of. If the defendant is charged with an additional offense after conviction on a duplicitous count, it may be unclear whether the subsequent charge alleges an offense for which the defendant was already convicted.[46]

Defendants must raise duplicity challenges before trial.[47] If they do not, they waive the challenge.[48] If the challenge is unintentionally waived, the plain error standard of review applies.[49] Under this very deferential standard, the court has the discretion to remedy an error only if the error is obvious and affects the defendant's substantial rights.[50] Courts exercise this discretion only when the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.[51]

An indictment is multiplicitous if it contains charges for one offense spread across two or more separate counts.[52] Multiplicity may result from spreading factual predicates across multiple counts or, as in *United States v Gamboa*,[53] spreading statutory elements over multiple counts.[54] For example, if a series of blows constitutes only one assault, the prosecution may only charge the defendant with one count of assault. Similarly, consider a hypothetical crime, the elements of which are evading arrest and hiding evidence. An indictment charging that crime could not contain one count for evading arrest and a separate count for hiding evidence. The indictment would need to charge the single crime of evading arrest and hiding evidence together in a single count. Accordingly, if § 924(c) defines a single crime, then § 924(c) indictments charging "use" in one count and "possession" in a separate count would be multiplicitous.

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45 See US Const Amend V.

46 See Luisa Caro and Alan S. Marzilli, *Indictments*, 84 Georgetown L J 930, 947–48 (1996).

47 See Charles Alan Wright, et al, 1A *Federal Practice and Procedure: Criminal* § 145 at 97 & n 7 (West 4th ed 2008).

48 See id (explaining that "an objection to duplicity is waived if not raised prior to trial"). But see id at 97–98 & n 8 (explaining that some courts only consider the objection waived if it is raised after the verdict).

49 See *Puckett v United States*, 556 US 129, 135 (2009).

50 See id.

51 See id.

52 See 41 Am Jur 2d Indictments and Informations § 205 at 946.

53 439 F3d 796 (8th Cir 2006).

54 See id at 808.

Multiplicity violates the Double Jeopardy Clause of the Fifth Amendment because it exposes defendants to double liability for committing a single offense.[55] Like duplicity challenges, multiplicity challenges must be raised before trial to avoid waiver.[56]

Defendants charged with "use" and "possession" in a single count have alleged that their indictments are duplicitous, whereas defendants charged with "use" and "possession" in different counts have argued that their indictments are multiplicitous. Courts' varied responses to these challenges have led to judicial disagreement over how many crimes § 924(c) defines.

B. The First-Order Tools of Statutory Interpretation

To address duplicity and multiplicity challenges, courts must determine how many crimes § 924(c) defines. Courts depend on legislatures to explain how many discrete crimes a statute creates because there is no natural unit of crime.[57] Courts deciding this question have relied primarily on three first-order tools of statutory interpretation: the statute's text and structure, the statute's legislative history, and the test created in *Blockburger v United States*.[58]

Courts' starting point for interpreting a statute, including determining how many crimes it defines, is the statute's text and structure.[59] This analysis involves "deriv[ing] meaning from the internal structure of the text and conventional or dictionary meanings of the terms used in it."[60]

Courts also look to a statute's legislative history for insight into how many crimes it defines.[61] The legislative history can include earlier drafts of the law, committee reports, transcripts of

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55 See Caro and Marzilli, 84 Georgetown L J at 950 (cited in note 46).

56 See Wright, et al, 1A *Federal Practice and Procedure: Criminal* § 145 at 102–03 (cited in note 47).

57 See *Sanabria v United States*, 437 US 54, 69–70 (1978) ("It is Congress . . . which establishes and defines offenses. . . . Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice.").

58 284 US 299 (1932).

59 See Norman J. Singer and J.D. Shambie Singer, 2A *Statutes and Statutory Construction* § 45:1 at 1 (West 7th ed 2007) ("When an authoritative written text of the law has been adopted, the particular language of the text is always the starting point on any question concerning the application of the law.").

60 Id at § 45:12 at 133.

61 See id at § 45:38 at 542 ("Historical information is an important source of insight and enlightenment about most human affairs. . . . [A]nyone faced with a legal problem can appreciate the relevance of information about circumstances which led to the enactment of a statute.").

floor debates, and signing statements.[62] A statute's legislative history can be probative of how many crimes it defines if reports or debates contain explicit references to the number of crimes or discussions of the mechanics of prosecution at a level of detail that reveals whether different prongs of the statute are intended to be treated as separate crimes.[63]

Finally, courts examining § 924(c) have relied on the *Blockburger* test to determine how many crimes a statute defines. In *Blockburger*, the Court announced a test that is used to determine whether prosecution under two statutory provisions violates the Double Jeopardy Clause.[64] If the two provisions create two separate crimes, prosecution under both provisions does not implicate the Double Jeopardy Clause. If they create the same crime, prosecution under both provisions violates the Double Jeopardy Clause. Under the *Blockburger* test, "to determine whether there are two offenses or only one," courts ask "whether each provision requires proof of a fact which the other does not."[65] If each provision depends on unique proof, they define separate crimes and there is no double jeopardy bar to prosecuting a defendant under each provision.

C. Cases Holding that § 924(c) Defines a Single Offense

Relying on the first-order tools explained above, the Ninth and Seventh Circuits have interpreted § 924(c) as defining a single crime.

In *United States v Arreola*,[66] Jose Arreola met undercover officer Roberto Martinez in a parking lot.[67] Arreola invited Martinez into the back of his car, where he offered to sell the undercover officer seventy ounces of heroin.[68] A team of officers then arrested Arreola.[69] A later search revealed that there was a semiautomatic handgun in the glove compartment of Arreola's car,

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62 See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 Stan L Rev 1833, 1872 (1998).

63 See Wayne R. LaFave, 1 *Substantive Criminal Law* § 2.2(e) at 128–32 (West 2d ed 2003) (surveying the role of legislative history in the statutory interpretation of criminal law).

64 US Const Amend V.

65 *Blockburger*, 284 US at 304.

66 467 F3d 1153 (9th Cir 2006).

67 See id at 1155.

68 Id.

69 Id.

car, within easy access of his associates, who were sitting in the front seats.[70] Arreola had an extra magazine in his pocket.[71]

The prosecution charged Arreola with violating § 924(c) two different ways in a single count. Count three of the indictment charged that Arreola "did knowingly and intentionally use and carry the firearm discussed below during and in relation to, and possessed the same firearm in furtherance of the drug trafficking crimes set forth in Counts One and Two of this Indictment."[72] In a direct appeal of his conviction after trial, Arreola challenged his indictment on the basis of duplicity.[73] That is, he alleged that the prosecution had charged him with two separate crimes in a single count.[74]

The court applied the Ninth Circuit's *United States v UCO Oil*[75] test to determine how many crimes § 924(c) defines.[76] The test's first two factors evaluate a statute's language and legislative history. The third and fourth ask a question similar to that asked by the *Blockburger* test: whether the provisions proscribe sufficiently distinct conduct to permit the defendant to be charged under both. Analyzing the first factor, the *Arreola* court determined that the statutory language does not clearly indicate that § 924(c) creates two separate offenses. The court observed that, while the statute defines two distinct acts,[77] two distinct acts sometimes constitute a single crime.[78] The *Arreola* court also considered the statute's structure, observing that "Congress could have chosen . . . to create separate sub-parts, which would have presented a stronger argument that it creates separate offenses, but it did not."[79] Second, the court examined the legisla-

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70 See *Arreola*, 467 F3d at 1155.

71 Id.

72 Id at 1155–56.

73 Id at 1156, 1161.

74 *Arreola*, 467 F3d at 1156, 1161.

75 546 F2d 833 (9th Cir 1976).

76 *Arreola*, 467 F3d at 1157, citing *UCO Oil*, 546 F2d at 836–37. The court described the prongs as the "language of the statute"; "the legislative history and statutory context"; "whether the statute proscribes 'distinctly different kinds of conduct,'" or conduct that falls "'within the conventional understanding' of one crime"; and, finally, the "appropriateness of multiple punishment[s] for the conduct charged." *Arreola*, 467 F3d at 1157–60, quoting *UCO Oil*, 546 F2d at 836–37.

77 *Arreola*, 467 F3d at 1158 ("[W]hile it is clear . . . that § 924(c) names two distinct acts, it does not create two separate offenses.").

78 Id, citing *United States v Street*, 66 F3d 969, 974 (8th Cir 1995) (clarifying that multiple "acts of violation in one sentence" of a statute that imposes a single penalty for all violations constitutes a single offense).

79 *Arreola*, 467 F3d at 1157.

tive history (including earlier drafts of the bill and the House Report) and determined that it "does not conclusively support either interpretation, but tends to suggest that Congress intended to create a single offense," because Congress did not adopt a proposal that would have explicitly separated the two prongs into separate offenses.[80]

After examining the text and legislative history, the court turned to the two factors that are similar to the *Blockburger* test. The court looked at "whether the statute proscribes 'distinctly different kinds of conduct,' or whether the proscribed conduct is 'regarded as [falling] within the conventional understanding' of one crime."[81] The court found that, because the conduct proscribed by the two parts of § 924(c) is "difficult to distinguish conceptually," the third *UCO Oil* factor indicates that § 924(c) must create a single crime.[82] Finally, the court considered "the 'appropriateness of multiple punishment[s] for the conduct charged in the indictment.'"[83] The court explained that it would be "absurd" to impose multiple punishments on a defendant who violated both prongs of § 924(c) because "the [defendant] could be punished twice for one contiguous act."[84]

Weighing these factors, the court determined that § 924(c) defines a single offense.[85] It thus upheld Arreola's conviction against his duplicity challenge.[86] For all six counts of the conviction, including one count for violating § 924(c), Arreola received a total sentence of approximately sixteen years.[87]

In *United States v Haynes*,[88] the Seventh Circuit also concluded that § 924(c) defines one offense.[89] From at least 1999 through 2005, the four *Haynes* defendants—corrupt police officers

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80 Id at 1158–59, citing S 191, 105th Cong, 1st Sess, in 143 Cong Rec 633 (Jan 22, 1997); HR 424, 105th Cong, 1st Sess, in 143 Cong Rec 153 (Jan 9, 1997); HR 424, 105th Cong, 1st Sess, in 143 Cong Rec H 9557 (Oct 24, 1997); 144 Cong Rec at 532 (statement of Representative Waters); id at 534 (statement of Representative McCollum); HR Rep No 105-344 at 11–13 (cited in note 36).

81 *Arreola*, 467 F3d at 1159, quoting *UCO Oil*, 546 F2d at 837.

82 *Arreola*, 467 F3d at 1160.

83 Id, quoting *UCO Oil*, 546 F2d at 837–38.

84 *Arreola*, 467 F3d at 1160.

85 Id at 1161.

86 Id.

87 Appellant's Opening Brief, *United States v Arreola*, Appeal No 04-10504, *2 (9th Cir filed Sept 21, 2005) (available on Westlaw at 2005 WL 3755662) (noting that Arreola received a sentence of 190 months).

88 582 F3d 686 (7th Cir 2009), vacd on other grounds, *United States v Vizcarra*, 668 F3d 516 (7th Cir 2012).

89 *Haynes*, 582 F3d at 703.

and drug dealers—were involved in a criminal enterprise.[90] Working off information from the drug dealers, the police officers would conduct traffic stops and illegal searches of the residences of other drug dealers.[91] They seized drugs and money, keeping the money and selling the drugs.[92]

Eural Black, one of the police officers, carried his service weapon with him during these raids; the court concluded that "[a] reasonable jury could have found that Black carried his police handgun in order to make it appear that he was a legitimate cop performing legitimate police work."[93] Of course, "[n]one of this was legitimate law enforcement activity."[94]

He filed a direct appeal of his conviction,[95] challenging his indictment on the basis of duplicity.[96] Counts four and seven of the indictment—which pertained to separate incidents—each charged that Black "knowingly possessed a firearm in furtherance of, *and* used, carried, and brandished a firearm during and in relation to, a drug trafficking crime."[97] Black alleged that each of these counts was duplicitous because it charged two different crimes in a single count.[98]

Unlike in *Arreola*, the *Haynes* court did not engage in a fine-grained analysis of § 924(c). The court noted that because Black did not raise his duplicity challenge before trial, the issue was waived and the deferential plain error standard of review applied.[99] Applying this deferential standard, the court simply stated that the Seventh Circuit had "not decided that § 924(c) criminalizes two separate and distinct offenses."[100] The court observed that prior Seventh Circuit jurisprudence "suggests that § 924(c) charges one offense that may be committed in more ways than

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90 Id at 692–93.

91 Id at 693.

92 Id.

93 *Haynes*, 582 F3d at 703.

94 Id at 693.

95 Id at 692.

96 There were four defendants in *Haynes*, but the § 924(c) duplicity analysis applied only to Black's conviction. See id at 703–04. One other defendant appealed his conviction under § 924(c) but did not raise the question of how many crimes § 924(c) defines. See id at 707–08.

97 *Haynes*, 582 F3d at 703.

98 Id.

99 Id. Although applying the plain error standard would be proper in all cases in which defendants raise duplicity and multiplicity issues for the first time after trial, the *Haynes* court emphasized that it was applying a deferential standard. Id.

100 Id.

one."[101] The court further concluded that there was no plain error in the indictment or instructions and upheld Black's conviction against his duplicity challenge.[102] Black received a total sentence of forty years, including approximately twenty-five years for violating § 924(c).[103]

D. Cases Holding that § 924(c) Defines Two Separate Offenses

Also relying on the first-order tools of statutory interpretation, the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have interpreted § 924(c) as defining two crimes.

In *United States v Gamboa*,[104] officers searched Michael Gerald Gamboa's business for evidence of drug trafficking activity.[105] They had been investigating him for approximately a year as the leader of a methamphetamine-trafficking operation.[106] The officers seized "nine firearms, more than 500 grams of methamphetamine, and over $9,000 in cash."[107]

The prosecution charged Gamboa with violating § 924(c) two different ways in two different counts.[108] Count four of the indictment charged that Gamboa knowingly used and carried firearms during and in relation to the drug trafficking crime charged in count one.[109] Count five charged that Gamboa possessed a firearm in furtherance of the drug trafficking crimes charged in count one.[110] In a direct appeal of his conviction, Gamboa raised a multiplicity objection to the indictment.[111]

To resolve Gamboa's appeal and determine if his indictment violated the Double Jeopardy Clause, the court first applied the *Blockburger* test to decide whether § 924(c) defines one crime or two.[112] The court explained, "Count Four does require at least one element not required in Count Five. Count Four requires a

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[101] *Haynes*, 582 F3d at 703. No other Seventh Circuit case provides a more detailed analysis.

[102] Id at 704.

[103] Id at 697. See also Opening Brief and Argument for Eural Black Defendant-Appellant, *United States v Black*, Nos 08-1616, 08-1466, 08-1608, 08-1617, *13 (7th Cir filed Dec 18, 2008) (available on Westlaw at 2008 WL 5794006).

[104] 439 F3d 796 (8th Cir 2006).

[105] Id at 801.

[106] Id.

[107] Id.

[108] See *Gamboa*, 439 F3d at 808–09.

[109] Id at 809.

[110] Id at 809–10.

[111] Id at 808–09.

[112] *Gamboa*, 439 F3d at 809.

finding that Gamboa 'used and carried' the firearms, while Count Five merely requires possession."[113] Similarly, the court noted, "Count Five charged possession 'in furtherance of' a drug trafficking crime, while Count Four charged . . . use[ ] . . . 'during and in relation to' a drug trafficking crime," and "'in furtherance of' requires a slightly higher standard of participation than . . . 'during and in relation to.'"[114] On this basis, the court determined that count five required an element that count four did not. The court therefore concluded that § 924(c) defines two separate offenses.[115] It upheld Gamboa's conviction against his multiplicity challenge. Gamboa received a thirty-year sentence for count four *and* life in prison for count five.[116]

In *United States v Combs*,[117] the Sixth Circuit also determined that § 924(c) defines two crimes. Sometime in 2000 or 2001, Leon Combs gave Josh Miller drugs in exchange for three rifles.[118] Miller alerted the police and explained that he had given Combs guns in exchange for drugs on several occasions.[119] When the police searched Combs's house and person, they found a loaded pistol and OxyContin and Dialudid pills.[120]

The prosecution charged Combs with two violations of § 924(c). Count four alleged that "Combs 'in furtherance of a drug trafficking crime . . . did unlawfully possess firearms'"; this allegation stemmed from the trade with Miller of drugs for guns.[121] Count three alleged that "Combs 'during and in relation to a drug trafficking crime . . . did possess a . . . pistol'"; this allegation stemmed from the ensuing police search.[122] Combs filed a

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113 Id at 810.

114 Id.

115 Id. In addition to using the *Blockburger* test to answer a question that the test is not equipped to address, the *Gamboa* court likely misapplied the *Blockburger* test. See Part II.E.3. Under *Blockburger*, the relevant question is whether each element requires unique proof, not whether each offense has a unique element. See *Blockburger*, 284 US at 304.

116 Amended Judgment as to Michael Gerald Gamboa, *United States v Gamboa*, Docket No 3:02-cr-00047-RRE, *3 (D ND filed June 8, 2006).

117 369 F3d 925 (6th Cir 2004).

118 Id at 930.

119 Id.

120 Id.

121 *Combs*, 369 F3d at 930.

122 Id. Although the *Combs* court analyzed how many crimes § 924(c) defines, this discussion may be dicta because there was another basis for dismissing Combs's indictment. Count three of Combs's indictment charged Combs with possession of a firearm during and in relation to a drug trafficking crime. The prosecution borrowed one element from each prong of § 924(c). The text of the indictment in count four is parallel to the indictment in *Arreola*, but, as the court explained, the jury instructions on count four also borrowed one element from each prong. See id at 934–35. The jury instructions on count

direct appeal of his conviction.[123] In his appeal, he alleged that counts three and four each inappropriately mixed the elements of two separate crimes into a single count.[124]

Although Combs's challenge was not strictly a duplicity challenge, the court analyzed how many crimes § 924(c) defines and determined that "[t]he issue of whether or not § 924(c) criminalizes two distinct offenses directs the outcome of Combs's primary challenges to his conviction."[125] In doing so, the *Combs* court, like the *Arreola* court, looked to the statutory text, legislative history, and proof required for each offense.[126] Of the statutory text, the court said, "The two prongs of the statute are separated by the disjunctive 'or,' which . . . suggests the separate prongs must have different meanings."[127]

Assessing the legislative history, the court opined, "By its adding possession as a prohibited act, and requiring a higher standard of participation to charge a defendant with the act, we understand Congress to have delineated a new offense within the same statute."[128]

The court also determined that each prong required unique proof because, it posited, "use" connotes more than mere possession, and "in furtherance of" connotes a higher standard of participation than "during and in relation to."[129] After reviewing these factors, the court held that § 924(c) defines two separate offenses.[130] The court reversed Combs's conviction, providing two explanations: first, because the indictment charged a single crime in two counts, and second, because counts three and four both used one element from each prong of § 924(c) (charging

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four concerned the court in the same way as the text of count three. Id. Regardless of whether § 924(c) defines one crime or two, the legislative history clearly suggests that the prosecution cannot borrow one element from each prong: "[S]omeone who possesses a gun that has nothing to do with the crime does not fall under 924(c)." 144 Cong Rec at S 12671 (cited in note 34) (statement of Senator DeWine). Congress was concerned about prosecuting defendants "where there is [ ] an insufficient nexus between the crime and the gun," which suggests that Congress may not have intended to criminalize possession during (as opposed to possession in furtherance of or use during) a covered crime. Id.

123 *Combs*, 369 F3d at 929.

124 See Appellant Leon Combs's Final Brief in Support of Appeal, *United States v Combs*, No 01-5997, *22 (6th Cir filed Aug 20, 2002) (available on Westlaw at 2002 WL 34204120).

125 *Combs*, 369 F3d at 930.

126 See id at 931–33.

127 Id at 931.

128 Id at 932.

129 See *Combs*, 369 F3d at 932–33.

130 Id at 933.

possession of a weapon during a crime, rather than possession in furtherance of or use during commission of a crime).[131] Of the circuit court cases that have interpreted how many crimes § 924(c) defines, *Combs* is the only one to reverse the defendant's conviction on the ground that the indictment charged the incorrect number of crimes. However, nothing changed for the defendant as a result of winning his duplicity challenge. After remand the prosecution reindicted Combs on the two firearms charges.[132] It properly charged him with the two separate § 924(c) violations committed on two separate occasions (trading drugs for guns with Josh Miller and possessing firearms and pills).[133] He was convicted of both violations[134] and sentenced to five years for the "use and carry" of a firearm and twenty-five years for "possessing three firearms."[135]

Although winning the duplicity challenge put Combs in the same position he would have been in had he never raised the challenge, it could have put him in a worse position. Because the Sixth Circuit interprets § 924(c) as defining two separate offenses, Combs could have been indicted with an additional count of violating § 924(c). Recall that Combs gave Miller drugs in exchange for rifles.[136] This trade involved both the use of a firearm during a drug trafficking crime (because the firearm was bartered)[137] and the possession of a firearm in furtherance of a drug trafficking crime (because the firearm advanced the trade).[138] The trade could thus constitute a violation of each of the separate crimes that § 924(c) defines. Combs was fortunate not to face separate charges for both "use" and "possession" of a firearm when he was reindicted. Being indicted for two crimes instead of one, and consequently facing a longer sentence, is a real risk of winning a duplicity challenge.

The courts in *United States v Lott*,[139] *United States v Timmons*,[140] and *United States v Owens*[141] found that § 924(c) defines

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131 See id at 934–35.

132 *United States v Combs*, 218 Fed Appx 483, 484 (6th Cir 2007).

133 Id.

134 Id.

135 Judgment in a Criminal Case, *United States v Combs*, No 6:04-cr-00054-DCR-EBA, *1–2 (ED Ky filed Dec 27, 2004).

136 *Combs*, 369 F3d at 930.

137 See *Bailey*, 516 US at 148 ("The active-employment understanding of 'use' certainly includes . . . bartering.").

138 See *Combs*, 369 F3d at 933.

139 310 F3d 1231 (10th Cir 2002).

140 283 F3d 1246 (11th Cir 2002).

two separate crimes without any analysis. In *Lott*, the Tenth Circuit simply said, "This count included two distinct offenses for which the jury could have found Gary Lott guilty."[142] Lott was sentenced to concurrent life sentences for various drug trafficking crimes and a consecutive five-year sentence for violating § 924(c).[143] In *Timmons*, the Eleventh Circuit proceeded as if § 924(c) creates distinct offenses but did not analyze the issue.[144] Timmons received a total sentence of approximately fifteen years for two counts of possession with intent to distribute and two counts of violating § 924(c) (he was acquitted of one count of violating § 924(c), but the judge used the conduct charged to enhance his sentence).[145] In *Owens*, the Fifth Circuit said that "'[section] 924(c) criminalizes two separate offenses—(1) using or carrying a firearm during and in relation to a drug trafficking crime, and (2) possessing a firearm in furtherance of a drug trafficking crime.'"[146] The court explained that "[t]he indictment did not charge Owens with using or carrying a firearm. Thus, we assume arguendo that the indictment charged Owens with possessing a firearm in furtherance of a drug trafficking crime."[147] Owens was charged with only one count of violating § 924(c), for which he was sentenced to five years.[148]

E. The First-Order Tools of Statutory Interpretation Produce Indeterminate Results

This Section explains that the disagreement among the circuit courts about how many crimes § 924(c) defines persists because the first-order tools of statutory interpretation do not conclusively resolve the question. It details why the statute's language, its legislative history, and the application of the *Blockburger* test do not point to a resolution.

1. The statute's language and structure are ambiguous.

The language of statutes is frequently ambiguous: "[T]he phrasing of a document, especially a complicated enactment,

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141 224 Fed Appx 429 (5th Cir 2007).
142 *Lott*, 310 F3d at 1246.
143 Id at 1237.
144 *Timmons*, 283 F3d at 1249–50.
145 Id at 1247–48.
146 *Owens*, 224 Fed Appx at 430, quoting *Combs*, 369 F3d at 931.
147 *Owens*, 224 Fed Appx at 430.
148 Id.

seldom attains more than approximate precision."[149] The plain language of § 924(c) offers little insight into the number of crimes it creates. Section 924(c)(1)(A) reads:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—(i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.[150]

This statutory text *does* clearly describe two separate acts: first, "during and in relation to any crime of violence or drug trafficking . . . us[ing] or carr[ying] a firearm," and second, "in furtherance of any such crime, possess[ing] a firearm."[151] It does *not* say, however, if these acts are two distinct crimes or two alternative means of committing a single crime.[152]

The structure is also indeterminate. The fact that the statute does not locate the two prongs in separate subsections may initially suggest that they constitute a single crime. The other subsections of § 924 each set out one crime and the applicable penalties. For example, § 924(b) provides that, in connection with some forms of criminal activity, "[w]hoever . . . ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both."[153] Section 924(c) similarly describes

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[149] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum L Rev 527, 528 (1947). See also Singer and Singer, 2A *Statutes and Statutory Construction* § 45:1 at 1–6 (cited in note 59) (explaining that statutes are often ambiguous because language itself is ambiguous).

[150] 18 USC § 924(c)(1)(A).

[151] 18 USC § 924(c)(1)(A).

[152] In *Schad v Arizona*, 501 US 624 (1991) (Souter) (plurality), a plurality of the Court, interpreting the Arizona first-degree murder and felony-murder statutes, said that if a statute establishes two alternative means of committing a crime, these alternatives can be either parts of a single crime or separate crimes. The plurality suggested that lower courts should look to legislative intent or past interpretations of the statute, rather than to the text itself, in order to determine if the statute creates separate crimes or alternative means. Id at 636–37. So even though the text clearly enumerates two different acts, *Schad* does not reveal whether those acts constitute separate crimes.

[153] 18 USC § 924(b). Similarly, § 924(d) provides that "[a]ny firearm or ammunition involved in or used in any knowing violation of [various subsections of §§ 922 and 924]

the prohibited conduct and then establishes the applicable penalties, making the structure of § 924(c) parallel to the structure of other sections that each define a single crime.[154]

Inferring that each subpart contains only a single crime, however, "makes too much of the numbering system."[155] Because there is not an established presumption that each numbered subpart must define one offense,[156] assuming that Congress intends each subpart to contain only a single crime assumes too much. Moreover, numbering the statutes is "often the work of the Office of the Law Revision Counsel," not "Congress itself."[157] Trying to glean congressional intent from the numbering system is thus ill-advised, as the numbering is not necessarily Congress's.

The fact that Congress amended § 924(c) further obscures whether it includes two crimes. When Congress amends a statute, "Different offenses may end up as different paragraphs precisely because drafters do not want to renumber other subsections, whose designations have become familiar."[158] Moreover, "changing one subsection's designation in order to make room for another can wreak havoc with cross-references elsewhere in the United States Code. Prudent drafters prefer to avoid that risk, even if it means adding paragraphs or sub-parts to other subdivisions of a statute."[159]

2. The legislative history does not address the question of how many crimes § 924(c) defines.

"Legislative history is often ambiguous and inconclusive" for two reasons.[160] First, Congress is comprised of many individuals,

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. . . where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture."

154 See 18 USC § 924(c)(1)(A)(i)–(iii) (describing prohibited conduct in § 924(c)(1)(A) and outlining the penalties in each subsection).

155 *United States v Loniello*, 610 F3d 488, 492 (7th Cir 2010).

156 Id.

157 Id. The Law Revisions Counsel "converts the Statutes at Large into the United States Code." Id.

158 Id.

159 *Loniello*, 610 F3d at 492 (citation omitted).

160 Singer and Singer, 2A *Statutes and Statutory Construction* § 48:2 at 548 (cited in note 59). See also *United States v Public Utilities Commission of California*, 345 US 295, 319 (1953) (Jackson concurring):

> I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of

who do not necessarily have a singular intention when they pass a law.[161] Because there can be as many intentions as there are individual members of Congress, there may be no one intent that is readily discernible from floor debates, drafts, and reports. Second, and most relevant to the question of statutory interpretation at hand, legislative history does not necessarily speak to every question that a statute may raise.

The legislative history of § 924(c) does not reveal how many crimes it defines. None of the legislative history materials addresses the question.[162] The legislative history of § 924(c) makes two points clear. First, members of Congress amended the statute to "restore" § 924(c) as the "crime fighting tool" it was pre-*Bailey*.[163] Second, while members of Congress did want to make § 924(c) prosecutions easier, at least one member suggested that they also wanted to ensure that "someone who possesses a gun that has nothing to do with the crime does not fall under 924(c)."[164] In these discussions, however, members of Congress did not address whether possession of a gun in furtherance of a crime constitutes a crime separate from use of a gun during a crime.

3. The *Blockburger* test determines whether multiple punishments are constitutional, not how many crimes a statute defines.

Finally, there are two reasons why the *Blockburger* test[165] does not indicate how many crimes § 924(c) defines. First, application of the *Blockburger* test will help answer whether it is constitutionally *permissible* for a statute to define two separate crimes, but not whether the statute *actually defines* two separate crimes. Although some courts do apply the *Blockburger* test in determining how many crimes a statute defines, this use of

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Congressmen and act according to the impression we think this history should have made on them.

161 See generally Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 Intl Rev L & Econ 239 (1992).

162 See, for example, HR Rep No 105-344 at 2–4 (cited in note 36) (omitting mention of the number of offenses § 924(c) creates in a statement of why an amendment to the statute is needed); 144 Cong Rec at S 12670–71 (cited in note 34) (statement of Senator DeWine); *United States v Pleasant*, 125 F Supp 2d 173, 180–81 (ED Va 2000) (discussing the legislative history).

163 144 Cong Rec at S 12670 (cited in note 34) (statement of Senator DeWine).

164 Id at S 12671.

165 See Part II.B.

the test is erroneous. Just because a statute *can* permissibly define two separate crimes under *Blockburger* does not mean that it actually *does*.[166] As the Ninth Circuit noted in *UCO Oil*, "The fact that a statute encompasses various modes of violation requiring different elements of proof . . . does not compel" the conclusion that the statute creates separate offenses.[167] That is, *Blockburger* sets a constitutional floor for when a statute may define two separate offenses, but does not answer the statutory interpretation question of how many crimes a statute actually defines. Interpreting § 924(c) as defining two separate crimes may be constitutionally permissible under *Blockburger*, but that does not mean that it is correct.

Second, application of the *Blockburger* test also does not determine whether § 924(c) can constitutionally define two separate crimes. The Supreme Court takes inconsistent approaches to cases involving two crimes when commission of one of the crimes necessarily involves committing all the acts that constitute the second crime, as is the case with § 924(c).[168]

For example, in *Ball v United States*,[169] the Court addressed prohibitions on possession and receipt of firearms. The Court held that because receipt necessarily involves possession, the two crimes were the same for double jeopardy purposes.[170] The Court explained that "Congress intended a felon in Ball's position to be convicted and punished for only one of the two offenses if the possession of the firearm is incidental to receiving it."[171] By contrast, in *United States v Woodward*,[172] the Court held that two crimes were separate even though the same conduct formed the basis of each count and the conduct necessary to violate one statute could involve violating the other.[173] *Woodward* addressed

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166 While *United States v Dixon*, 509 US 688 (1993), established that only the *Blockburger* test must be satisfied for two charges to permissibly be considered separate offenses for double jeopardy purposes, it did not hold that alternative means for committing a crime must be considered separate offenses just because they satisfy the *Blockburger* separate-elements test. See id at 703–04. Moreover, the *Schad* plurality found that statutory alternatives do not inherently define separate elements or separate crimes. *Schad*, 501 US at 635–36 (Souter) (plurality).

167 *UCO Oil*, 546 F2d at 838.

168 See Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 Georgetown L J 1183, 1221 (2004).

169 470 US 856 (1985).

170 Id at 862.

171 Id at 861.

172 469 US 105 (1985).

173 Id at 106–08 (explaining that proof of a currency-reporting violation does not necessarily include proof of a false statement offense).

the prohibition on willful failure to report carrying more than $5,000 into the United States and the prohibition on making a false statement to a US agency. Even though willful failure to report is incidental to making a false statement, the Court did not treat these two crimes as the same.[174] The Court allowed Woodward to be punished for both acts.[175]

These two decisions exemplify the ambiguity regarding how courts should respond when statutes proscribe acts that are distinct, but when one act necessarily entails the other. Although the Court was interpreting different statutes in these cases, the same reasoning applies equally to two different prongs of the same statute. The relevant question in both instances was whether a defendant can, under *Blockburger*, be punished for two different acts when completion of one act requires completion of the other.

This ambiguity undermines application of *Blockburger* to § 924(c). Two elements of § 924(c) are "use" and "possession."[176] Use necessarily entails possession.[177] The *Gamboa* court, although apparently without recognizing the difficulty that this creates for application of the *Blockburger* test, acknowledged this overlap. It explained that "implicit in a finding that Gamboa 'used and carried' firearms lies a finding that Gamboa simultaneously 'possessed' the firearms (because it would not be possible for him to use and carry firearms without also possessing them)."[178] "Use" and "possession" are, accordingly, parallel to receipt and possession as well as willful failure to report and making a false statement. Because the Court has not been clear about how to apply *Blockburger* to statutory elements that overlap in this way, the *Blockburger* test does not resolve whether double jeopardy bars multiple punishments for both "use" and "possession."

The third and fourth prongs of the Ninth Circuit's *UCO Oil* test, which *Arreola* employed, also produce indeterminate results because of this ambiguity. Like *Blockburger*, the third and fourth prongs of the *UCO Oil* test ask whether the conduct pro-

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174 See id at 107–08. See also Poulin, 92 Georgetown L J at 1221 (cited in note 168).

175 *Woodward*, 469 US at 109–10.

176 18 USC § 924(c)(1)(A).

177 See *Bailey*, 516 US at 144 (defining "use" as "active employment" and explaining that "active employment" involves possession).

178 *Gamboa*, 439 F3d at 810. See also *Combs*, 369 F3d at 932 (following *Bailey*'s definition of "use").

scribed by the two statutory provisions is distinct.[179] The ambiguity about whether "use" and "possession" should be treated as distinct thus clouds the *UCO Oil* test, just as it clouds the *Blockburger* test.

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None of the first-order tools of statutory interpretation—neither the language nor the legislative history nor the *Blockburger* test—offers a conclusive resolution to the question of how many crimes § 924(c) defines.

The indeterminacy produced by first-order tools of statutory interpretation in this context raises the question of why courts continue to rely on them. The circumstances of defendants' appeals offer some insight. In every case surveyed, the defendants faced strong evidence against them.[180] Further, as the *Haynes* court emphasized, appellate courts are generally applying the deferential plain error standard of review.[181] Notably, the courts upheld defendants' convictions in all but one of these cases. In the face of § 924(c)'s uncertainty and the limited review that appellate courts are to engage in, judges may be striving to reach the results that they feel the facts compel[182] and mustering the best evidence they can to do so. The first-order tools of statutory interpretation do not, however, provide conclusive evidence supporting either reading of the statute. The next Part discusses

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[179] See *Arreola*, 467 F3d at 1159–60 (explaining application of the third and fourth prongs of the *UCO Oil* test).

[180] For example, the *Haynes* defendants were involved in a crime spree so massive that the Seventh Circuit likened it to the film *Training Day*. *Haynes*, 582 F3d at 692 n 1. The evidence against them included wiretaps, visual surveillance, and information from a confidential informant. Id at 692–97 & n 2. Similarly, Gamboa, who was investigated as the leader of a methamphetamine-trafficking operation, was found with 500 grams of methamphetamine and $9,000 in cash. *Gamboa*, 439 F3d at 801. That amount of methamphetamine has an approximate street value of between $50,000 and $75,000. See Department of Justice, Press Release, *Twenty Individuals Charged for Their Involvement in Methamphetamine Distribution Ring* (July 11, 2012), online at http://www.justice.gov/usao/ncw/pressreleases/Charlotte-2012-07-11-johnson.html (visited Aug 12, 2014). Finally, Arreola was poised to sell seventy ounces of heroin to an undercover officer; a confidential informant witnessed the transaction. *Arreola*, 467 F3d at 1155.

[181] See *Haynes*, 582 F3d at 703.

[182] There is a wealth of scholarship discussing indeterminacy and extralegal influences on judicial decisionmaking. See generally, for example, Oliver Wendell Holmes Jr, *The Path of the Law*, 10 Harv L Rev 457 (1897) (arguing that the law is not completely determinate and that legal principles cannot be worked out like mathematics); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L J 1 (1984) (arguing that the law is not natural or objective, but that lawyers, judges, and scholars make political choices when shaping the law).

how the rule of lenity can better answer the question of how many crimes § 924(c) defines.

III. THE RULE OF LENITY POINTS TO ONE CRIME

The first Part of this Comment explained that an amendment to § 924(c) led to disagreement over how many crimes § 924(c) defines. The second Part explained that disagreement persists because the first-order tools of statutory interpretation do not conclusively answer the question. This Part proposes that courts look to the rule of lenity to determine whether § 924(c) contemplates one crime or two. It begins by explaining the rule of lenity, emphasizing that the rule should take into account the punishment that a defendant would eventually receive as opposed to focusing exclusively on a defendant's duplicity or multiplicity challenge. It then argues that, because the rule of lenity requires courts to consider how much punishment a defendant will receive, the rule instructs courts to interpret statutes—including § 924(c)—as defining fewer crimes.

A. The Rule of Lenity Guides Courts' Interpretations of Ambiguous Criminal Statutes

Because first-order tools of statutory interpretation do not resolve the question of how many crimes § 924(c) defines, courts must look to second-order tools such as the canons of statutory construction.[183]

The rule of lenity is a canon of construction that instructs courts to interpret ambiguous criminal statutes in favor of defendants.[184] It is the canon most directly applicable to ambiguous criminal statutes, and in practice courts commonly rely on the rule of lenity when faced with such statutes.[185]

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[183] See *Bell v United States*, 349 US 81, 83–84 (1955) (noting that when Congress leaves a statute's meaning ambiguous, courts should resolve the statutory doubt "in favor of lenity"). For a general discussion of the canons of statutory interpretation, see *Statutes*, 82 Corpus Juris Secundum § 364 at 448–51 (2009).

[184] See *United States v Santos*, 553 US 507, 514 (2008) (Scalia) (plurality) (explaining and applying the rule of lenity); *United States v Granderson*, 511 US 39, 54 (1994) ("In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in Granderson's favor."); *United States v Wiltberger*, 18 US (5 Wheat) 76, 95 (1820) ("The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.").

[185] See, for example, *United States v McLemore*, 28 F3d 1160, 1164–65 (11th Cir 1994):

While the canons of statutory construction have generally fallen into disrepute among scholars,[186] the utility of the rule of lenity, as opposed to other canons, is recognized by many scholars,[187] as well as the Court.[188] The rule's information-forcing capacity is a key reason for scholars' endorsement. When courts disagree about how to properly interpret a statute, it is desirable to employ a canon that creates incentives for the legislature to provide a robust articulation of law.[189] The rule of lenity encour-

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> The language of section 924(h) is not plain on its face. The legislative history is extremely sparse, and that which exists gives us little guidance as to the scope of the term "crime of violence" as it is used in section 924(h). Finally, the statutory scheme is similarly unhelpful. . . . When a criminal statute is ambiguous in its application to certain conduct, the rule of lenity requires it to be construed narrowly.

See also *United States v Jones*, 986 F2d 42, 44 (3d Cir 1993) ("[W]e would nevertheless have to conclude that 'the court' in this context is at least ambiguous. Having so concluded, we would be constrained to hold that the rule of lenity favors the district court's reading over that of the government."); *United States v Lindsay*, 985 F2d 666, 673 (2d Cir 1993) ("If we conclude that congress's intent is ambiguous, the rule of lenity would require us to conclude that the government may charge only one violation of § 924(c)(1) where the defendant uses multiple firearms in relation to a single drug trafficking offense."); *United States v Archer*, 461 F Supp 2d 213, 219 (SDNY 2006) ("To the extent the language can be interpreted otherwise, the Court agrees . . . that the question is 'at least ambiguous.' Thus, the rule of lenity applies."); *United States v Harkey*, 709 F Supp 977, 984 (ED Wash 1989) ("[D]ue to the ambiguity in § 924(e), and the limited guidance offered by the legislative history, coupled with the recent Ninth Circuit decision in *Chatman*, the rule of lenity requires this court to construe § 924(e) in favor of the accused.").

186 See generally Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand L Rev 395 (1950). See also Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U Chi L Rev 800, 805 (1983):

> To exaggerate slightly, it has been many years since any legal scholar had a good word to say about any but one or two of the canons, but scholarly opinion . . . has had little impact on the writing of judicial opinions, where the canons seem to be flourishing as vigorously as ever.

187 See, for example, *Leading Cases*, 122 Harv L Rev 276, 483 (2008):

> The Court's ready invocation of lenity . . . signal[ed] its reluctance to continue granting the government the benefit of an ambiguous wording. By interpreting ambiguous portions of the criminal code with a maximum of deference to the defendant, the Court placed the burden of clarity where it belongs: squarely in the halls of Congress.

See also, for example, Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U Chi L Rev 263, 280 (1982) (explaining the benefits of the rule of lenity); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S Ct Rev 345, 349 (noting that "[l]enity is almost universally celebrated among commentators").

188 See note 184.

189 See William N. Eskridge Jr, Philip P. Frickey, and Elizabeth Garrett, *Legislation and Statutory Interpretation* 8 (Foundation 2000) (describing the rule of lenity as forcing specificity); *United States v Taylor*, 487 US 326, 345–46 (1988) (Scalia concurring).

ages legislatures to draft statutes clearly if they want to ensure that laws are not underenforced. Professor William Eskridge explains that the rule of lenity is "particularly important in statutory interpretation" because it "often impels the Court to demand greater precision from elderly criminal statutes."[190] Professor Stephen Smith also explains, "To the extent legislatures generally share prosecutors' desire for broad criminal prohibitions, a rigidly enforced rule of lenity would operate as an information-forcing default rule, giving legislatures added incentive to make their wishes known ex ante."[191] Moreover, narrow construction of criminal statutes provides "fair warning of what has been prohibited."[192] The rule of lenity incentivizes Congress to be clearer in the first instance. If Congress does not approve of courts' lenient interpretation of a statute, it can amend the statute to ensure that courts interpret it differently in future cases. Thus, the information-forcing capacity of the rule of lenity operates both ex ante, to encourage clearer statutes in the future, and ex post, to facilitate amendment of statutes that are being interpreted in a manner inconsistent with Congress's intentions. For example, Congress introduced the 1998 amendment in response to the narrow definition of "use" that *Bailey* established.

Having explained some benefits of the rule of lenity, it is now necessary to address its scope. The rule of lenity instructs courts not only to consider if the defendant will be convicted, but

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190 William N. Eskridge Jr, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L J 331, 374, 376 (1991).

191 Stephen F. Smith, *Overcoming Overcriminalization*, 102 J Crim L & Criminol 537, 580–81 (2012). See also Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L Rev 885, 887 (2004) ("[T]he rule of lenity serves an interest in disclosure. It compels legislatures to detail the breadth of prohibitions in advance of their enforcement. . . . Without the rule, politicians might prefer to choose broad language that obscures the extent to which criminal laws encompass unremarkable conduct."); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum L Rev 2162, 2194 (2002):

> By providing the most lenient reading in ambiguous cases, the rule of lenity forces the legislature to define just how anti-criminal they wish to be. . . . [A]n overly narrow interpretation is far more likely to be corrected by statutory interpretation because prosecutors and other members of anti-criminal lobbying groups are heavily involved in legislative drafting and can more readily get on the legislative agenda.

192 David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 NYU L Rev 921, 935 (1992). See also *United States v Rodriquez*, 553 US 377, 404–05 (2008) (Souter dissenting); Eskridge, 101 Yale L J at 413–14 (cited in note 190) ("This rule serves the representation-reinforcing goal of protecting a relatively powerless group (people accused of committing crimes) and the normativist goal of injecting due process values of notice, fairness, and proportionality into the political process.").

also to construe statutes to expose defendants to less punishment. In *Bifulco v United States*,[193] the Court observed that the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."[194]

The Court has also noted that the rule cautions against reading multiple crimes into a statute. In *Bell v United States*,[195] the Supreme Court explained:

> When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. . . . [I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes.[196]

In *Bell*, the defendant was charged with two violations of the Mann Act,[197] which prohibited transporting in interstate commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[198] The two counts stemmed from a single trip during which Bell transported two different women.[199] Bell argued that he had committed only a single offense and thus could not be subject to separate punishment for each woman.[200] The Court acknowledged that the statute was ambiguous.[201] It concluded that, when faced with ambiguous criminal statutes, courts must interpret them as imposing less

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193 447 US 381 (1980).

194 Id at 387. See also *Rodriquez*, 553 US at 404–05 (Souter dissenting); *Ladner v United States*, 358 US 169, 177–78 (1958) (suggesting that courts choose a harsher punishment only when Congress speaks in "clear and definite" language). For a criticism of applying the rule of lenity to punishment, see Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U Toledo L Rev 511, 514 (2002) (claiming that justifications for using the rule of lenity for sentencing are "weak at best," and advocating that a "lesser" rule of lenity be applied specifically to sentencing).

195 349 US 81 (1955).

196 Id at 83–84.

197 18 USC § 2421.

198 *Bell*, 349 US at 82, quoting 18 USC § 2421.

199 *Bell*, 349 US at 82.

200 Id.

201 See id at 83 ("[One] could persuasively and not unreasonably reach either of the conflicting constructions [of the statute].").

punishment.[202] Based on this reasoning, the Court held that Bell had committed only one violation of the Mann Act.[203]

Neither *Bell* nor the other cases in which the Court has applied the rule of lenity to punishment have discussed application of the rule to determining how many crimes a statute defines.[204] Nonetheless, these cases broadly instruct courts to apply the rule of lenity to punishment,[205] which necessarily includes considering how many crimes a defendant will ultimately be convicted of.

Finally, note that the rule of lenity's information-forcing capacity applies equally to the punishment-focused application of the rule. By refusing to impose punishment that Congress has not transparently called for, courts encourage Congress to be explicit: if members of Congress think a particular sentence should attach to a certain crime, they must say so.[206]

B. Application of the Rule of Lenity to the Question of How Many Crimes § 924(c) Defines

With that groundwork laid, this Comment will now explain why the rule of lenity indicates that § 924(c) defines a single crime. Only one court (the Eastern District of North Carolina) has ever applied the rule of lenity to this question.[207] That court's use of the rule of lenity seems consistent with this Com-

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[202] See id.

[203] *Bell*, 349 US at 83–84.

[204] See, for example, *Bifulco*, 447 US at 387; *Ladner*, 358 US at 177 (noting that the defendant could be charged with a number of offenses commensurate with the number of victims, but not clarifying how the rule of lenity would impact the number of offenses charged, if at all).

[205] See, for example, *Bifulco*, 447 US at 387, 400; *Ladner*, 358 US at 177–78.

[206] See Eskridge, 101 Yale L J at 376 (cited in note 190).

[207] See *United States v Latham*, 903 F Supp 2d 354, 357 (ED NC 2012) (citation omitted):

> Further, the rule of lenity requires that doubt be resolved against turning a single transaction into multiple offenses. Here, defendant asks this Court to recognize § 924(c) as criminalizing two separate offenses and to dismiss count eleven as duplicitous. Given the statute's legislative history and the rule of lenity, the Court declines to do so. As such, defendants [sic] motion to dismiss count eleven as duplicitous is denied.

See also *United States v Jefferson*, 302 F Supp 2d 1295, 1301–02 (MD Ala 2004) (explaining that "[i]f this were a matter of first impression, this court would be guided by the rule of lenity," and noting the "unjust[ness]" of the sentence); Recent Case, *Criminal Law—Statutory Interpretation—Ninth Circuit Holds That 18 USC § 924(c)(1)(A) Defines a Single Firearm Offense*, 121 Harv L Rev 668, 675 (2007) (suggesting that a "refined" rule of lenity might apply to the question of how many crimes § 924(c) creates).

ment's argument, but the court offers too little explanation to fully guide other courts or commentators.[208]

This Comment argues that courts must look past the questions immediately before them and consider longer-term questions like how much punishment defendants may face. Considering these longer-term issues, courts should hold that § 924(c) defines a single crime. Finally, this Comment responds to arguments against applying the rule of lenity to § 924(c).

1. Because the rule of lenity instructs courts to consider how much punishment defendants will receive, courts should interpret § 924(c) as defining a single crime.

First, note that if courts interpreting § 924(c) do not look past the challenge immediately before them (for example, whether to hold that an indictment is duplicitous), the rule of lenity may not resolve the question of how many crimes § 924(c) defines. Defendants who raise duplicity challenges seek a ruling that § 924(c) defines a single crime, whereas defendants who raise multiplicity challenges seek a ruling that § 924(c) defines two crimes.[209] If courts consider only whether to find for a defendant on the narrow issue before them, the rule of lenity does not suggest any particular result.

However, if courts look past the immediate issue to how much punishment the defendant might ultimately receive, the rule of lenity indicates that § 924(c) defines a single crime because this interpretation will lead to less punishment. A sentence for two § 924(c) violations instead of one could be the difference between five and thirty years, or between thirty years and life. This is because § 924(c) violations can trigger statutory mandatory minimum sentences for a "second or subsequent conviction" that run consecutively with the sentence for the first conviction.[210] A second § 924(c) conviction carries a mandatory minimum sentence of twenty-five years; the mandatory minimum increases to life imprisonment if the firearm is a machine gun or is equipped with a silencer.[211] Per the mandatory minimum, if

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[208] See *Latham*, 903 F Supp 2d at 357.

[209] See Part II.A.

[210] 18 USC § 924(c)(1)(C).

[211] 18 USC § 924(c)(1)(C):

> In the case of a second or subsequent conviction under this subsection, the person shall—
>
> (i) be sentenced to a term of imprisonment of not less than 25 years; and

§ 924(c) defines two separate crimes, a defendant who both used a handgun during a crime and possessed that handgun in furtherance of the same crime could face an additional twenty-five years, even if the use and possession charges flowed from the same conduct.[212] That is, someone who had a gun on his person during a drug transaction and threatened to use it, or someone who traded a gun for drugs, could have committed two crimes, be sentenced separately for those crimes, and receive a sentencing enhancement for a second offense. By contrast, if § 924(c) defines a single crime that can be committed in either of two ways, the same defendant could be convicted only once for having a gun on his person and threatening to use it, or for trading a gun for drugs.[213] He would face a five-year sentence instead of a twenty-five-year sentence.

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

[212] See 18 USC § 924(c)(1)(C).

[213] There are ways to ensure that defendants do not face multiple sentences for essentially the same conduct. First, the United States Sentencing Guidelines ("Guidelines") contain a Grouping Provision that advises courts to impose a single sentence for "[a]ll counts involving substantially the same harm"; this provision cautions against imposing multiple sentences for similar conduct that constitutes multiple crimes. Guidelines § 3D1.2. However, the Guidelines explicitly exempt § 924(c) from the Grouping Provision. See Guidelines § 2K2.4(b) ("[I]f the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) . . . the guideline sentence is the minimum term of imprisonment required by statute. [The Grouping Provision] . . . shall not apply to that count of conviction."). Second, some courts hold that each § 924(c) conviction must stem from a different predicate offense. See *United States v Diaz*, 592 F3d 467, 475 (3d Cir 2010) (vacating one of two § 924(c) convictions after concluding that a single underlying drug trafficking offense cannot be the predicate for multiple § 924(c) convictions); *United States v Franklin*, 321 F3d 1231, 1241 (9th Cir 2003) (same); *United States v Anderson*, 59 F3d 1323, 1334 (DC Cir 1995) (holding that only one § 924(c) violation may be charged per predicate offense); *United States v Cappas*, 29 F3d 1187, 1195 (7th Cir 1994) (affirming the dismissal of two of three counts under § 924(c) because the defendant committed only what "Congress intended to be one offense"); *United States v Privette*, 947 F2d 1259, 1262 (5th Cir 1991) ("Multiple sentences under § 924(c) must be based upon the number of drug trafficking crimes in which firearms were used."). However, other courts allow defendants to be charged with multiple counts of § 924(c) violations for simultaneous conduct stemming from the same predicate offense. See *United States v Camps*, 32 F3d 102, 106–07 (4th Cir 1994) (concluding that a single underlying drug trafficking offense can be the predicate for multiple § 924(c) convictions); *United States v Lucas*, 932 F2d 1210, 1223 (8th Cir 1991) (same); *Jefferson*, 302 F Supp 2d at 1302 (following other circuits' precedent dictating that two convictions for violations of § 924 stemming from simultaneous conduct trigger the sentencing enhancement under § 924(c)(1)(C)). In the other circuits (including the Sixth, Tenth, and Eleventh, which hold that § 924(c) defines two offenses), the question whether a single predicate offense can be the basis of multiple § 924(c) convictions is unresolved. See Part II.D.

Looking past issues immediately before the court to the sentence also makes sense in light of the minimal benefit to the defendant of winning a duplicity or multiplicity challenge. A finding that an indictment is multiplicitous or duplicitous usually does not require dismissal of the indictment,[214] so the case against the defendant may proceed even if he prevails. If an indictment is found to be multiplicitous, the prosecution can choose which count to proceed on.[215] Winning a duplicity challenge can actually put the defendant in a *worse* position. If the indictment is duplicitous, the prosecution may file a superseding indictment that charges the defendant with both crimes.[216] So if a defendant wins a duplicity challenge, he may be reindicted for two crimes and sentenced separately for each.[217] With a few narrow exceptions, double jeopardy does not preclude reindictment after an indictment is dismissed.[218] Finally, as noted above, if the defendant does not raise the challenge until after trial, the deferential plain error standard of review applies.[219] Even if the defendant prevails under this standard, the prosecution can still reindict. While the effects of winning a duplicity or multiplicity challenge are therefore minimal, the effects of being convicted of two crimes instead of one can be stark, as the example of § 924(c)'s operation shows.

In drafting § 924(c), Congress was not explicit that defendants should face multiple punishments for essentially the same conduct. Because Congress was not explicit, the rule of lenity cautions against interpreting § 924(c) as defining two crimes. Moreover, even in jurisdictions where a single underlying drug trafficking offense cannot be the predicate for multiple § 924(c) convictions, being charged with more crimes can still have nega-

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214 See Wright, et al, 1A *Federal Practice and Procedure: Criminal* § 145 at 94, 98 (cited in note 47) (explaining that duplicity and multiplicity are not fatal to the indictment).

215 See id at 98–100.

216 See 41 Am Jur 2d Indictments and Informations § 54 at 801.

217 See *United States v Combs*, 218 Fed Appx 483, 484 (6th Cir 2007) (discussing the case's procedural posture, wherein the prosecution reindicted Combs in response to the appellate court's holding that § 924(c) defined two separate crimes).

218 See 41 Am Jur 2d Indictments and Informations § 46 at 791–92 (explaining that the prosecution can reindict a defendant unless the indictment was dismissed: (1) "for want of prosecution"; (2) on motion by the government under Federal Rule of Criminal Procedure 48(a) (which allows for discretionary dismissals by the government); (3) "on motion by the government on the sole grounds of the interest of justice"; (4) "for a violation of the federal Speedy Trial Act"; or (5) "because of willful and flagrant prosecutorial misconduct"). See also *Illinois v Somerville*, 410 US 458, 470 (1973) (explaining that a defendant may be reindicted even after jeopardy attaches).

219 See text accompanying notes 47–51.

tive effects on a defendant. For example, being charged with two crimes may affect plea bargaining, eligibility for parole, social stigma, and whether a defendant qualifies as a repeat offender under repeat offender statutes or the Career Offender Guideline.[220] Therefore, courts should apply the rule of lenity to the question of how many crimes § 924(c) creates. Courts should hold that § 924(c) defines a single crime that can be committed two different ways, not two distinct crimes. Interpreting the statute to define a single crime complies with the rule of lenity because it exposes defendants to less-severe punishment.

Before addressing a few counterarguments, this Comment concludes its explanation of how to apply the rule of lenity to § 924(c) by considering the effect that the more lenient interpretation of § 924(c) could have on a defendant's sentence. Recall that Gamboa was convicted of two counts of violating § 924(c)—one for using firearms during a drug trafficking crime and one for possessing the same weapons during the same drug trafficking crime.[221] Not only did each crime involve identical firearms and drug trafficking, but the alleged facts did not distinguish the act of "use" from the act of "possession."[222] Consequently, if § 924(c) defined only a single crime, Gamboa could have been charged with only a single count of violating § 924(c). Gamboa received a thirty-year sentence on the first § 924(c) conviction under the machine gun enhancement[223] and a life sentence for the second § 924(c) conviction.[224] If he had been charged with only one count of violating § 924(c), he would have received just the thirty-year sentence.

2. The arguments against applying the rule of lenity to § 924(c) are unavailing.

This Comment now turns to discussing potential counterarguments. One might argue that the rule of lenity should not apply to § 924(c) because members of Congress were explicit

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[220] See Guidelines § 4B1.1. See also *Ball*, 470 US at 864–65 (explaining that multiple convictions for a single offense have negative effects beyond sentence length; for example, multiple convictions "may delay the defendant's eligibility for parole," "result in an increased sentence under a recidivist statute for a future offense," or "be used to impeach the defendant's credibility").

[221] *Gamboa*, 439 F3d at 800–01.

[222] See id at 810.

[223] Brief for Appellant, *United States v Gamboa*, No 03-2196, *9 (8th Cir filed Jan 14, 2004).

[224] *Gamboa*, 439 F3d at 800–01.

that the purpose of the 1998 amendment to § 924(c) was to aid criminal prosecutions.[225] The intention of legislators to aid prosecutions of § 924(c) violations may suggest that application of the rule of lenity is inappropriate. However, the Supreme Court has explicitly rebuffed the argument that an intention to aid prosecutions justifies casting aside the rule of lenity. The Court has explained that the legislature cannot express its intention to make prosecutions easier and then rely on courts to interpret ambiguous statutes as maximally punitive based on that stated intention. In *United States v Santos*,[226] a plurality of the Supreme Court explained that the government cannot ask the Court to "resolve the statutory ambiguity in light of Congress's presumptive intent to facilitate [ ] prosecutions" because "[t]hat position turns the rule of lenity upside down."[227] The plurality added, decisively, "We interpret ambiguous criminal statutes in favor of defendants, not prosecutors."[228]

Other critics of the rule of lenity complain that courts do not always apply it, creating some unpredictability.[229] The argument that courts do not consistently apply the rule of lenity is not an argument that courts should not apply the rule at all, however. Moreover, the sentencing-focused approach to the rule of lenity makes the rule's application much more straightforward. This approach asks courts to reach the result that will lead to more lenient sentences for defendants. Determining which outcome will result in lower sentences across the board is simpler than attempting to apply the rule of lenity to intermediate decisions in criminal cases, like those dealing with whether to uphold indictments.

The rule of lenity may not offer a perfect solution. It provides, however, the best way to achieve a uniform interpretation of § 924(c) as well as other statutes that may define one or multiple crimes. The rule of lenity can readily be applied to other questions of how many crimes an ambiguous statute creates. When it is not clear whether a statute defines one or two crimes, the rule points to interpreting the statute in whatever way will expose defendants to less punishment. Therefore, the rule of lenity

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225 See text accompanying notes 33–38.

226 553 US 507 (2008).

227 Id at 519 (Scalia) (plurality).

228 Id (Scalia) (plurality).

229 See, for example, Kahan, 1994 S Ct Rev at 346 & n 3 (cited in note 187) ("Judicial enforcement of lenity is notoriously sporadic and unpredictable.").

will always point to interpreting statutes as defining one crime instead of multiple crimes.

Attempts to interpret § 924(c) do point to one limitation of the rule of lenity. An initial ruling in favor of a defendant does not always benefit the defendant in the long run. If a ruling does not implicate long-term consequences for a defendant (as sentencing does), the rule of lenity may not point in favor of any one interpretation. Focusing on long-term over short-term consequences makes it possible for the rule to resolve questions of interpretation that it would not otherwise seem to address. At the same time, considering long-term consequences may indicate the inability of the rule of lenity to solve other problems of statutory interpretation.

CONCLUSION

Circuits are split as to whether § 924(c) creates two distinct crimes or alternative means of committing a single crime. The first-order tools of statutory interpretation do not conclusively answer that question. This Comment explains how courts might invoke the rule of lenity to determine how many crimes § 924(c) creates. It emphasizes that the rule of lenity instructs courts to construe statutes so as to impose less punishment. This means construing statutes to define fewer crimes. With this point in mind, courts can apply the rule of lenity to the question of how many crimes § 924(c) creates. Following the rule of lenity, courts must construe § 924(c) as defining a single crime because this interpretation would expose defendants to less punishment.

This solution is applicable beyond § 924(c). By explaining that considering long-term consequences like punishment requires courts to interpret statutes as defining fewer crimes, this Comment helps to clarify the rule of lenity writ large. As clarified, the rule of lenity offers a solution any time a court must determine whether an ambiguous statute creates one or two crimes.