

COMMENTS

Sentencing Discretion at Gunpoint: How to Think about Convictions Underlying § 924(c) Mandatory Minimums

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[M]andatory minimum sentences are perhaps a good example of the law of unintended consequences.

—William H. Rehnquist¹

INTRODUCTION

*United States v Booker*² rapidly broadened judicial discretion in federal sentencing by rendering the United States Sentencing Guidelines merely advisory. But the Guidelines do not apply to sentences for all crimes. Some criminal statutes, such as 18 USC § 924(c), establish separate mandatory minimum sentences. Because *Booker* only applies to the Guidelines, it does not apply to crimes with statutory mandatory minimum sentences. Section § 924(c) makes it a crime to use a firearm in the course of committing a crime of violence or a drug trafficking offense, and the statute punishes the use of the firearm with a mandatory minimum sentence. Prosecutors separately charge the underlying crime of violence or drug trafficking offense (underlying offense), and underlying offenses are usually punished by the Guidelines. Section 924(c) indicates that the mandatory minimum must run subsequent to other convictions. Therefore, a defendant convicted of a § 924(c) firearms offense and a crime of violence must serve his entire Guidelines sentence for the crime of violence before beginning his mandatory minimum sentence for the § 924(c) conviction. When sentencing such a defendant, the court uses broad *Booker* discretion to determine the appropriate sentence for the underlying

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¹ William H. Rehnquist, *Luncheon Address*, in United States Sentencing Commission, *Drugs and Violence in America: Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 283, 286 (1993).

² 543 US 220 (2005).

crime of violence, but the court cannot lower the mandatory minimum under § 924(c). When considering the appropriate sentence for the underlying crime, a judge may want to use his *Booker* discretion to consider the total amount of time the defendant will spend in prison, including the amount of time the defendant will have to serve under § 924(c) after completing the Guidelines sentence. This Comment focuses on the extent to which judges may consider the presence of a firearms mandatory minimum³ when sentencing a defendant on the separate, underlying charge.

Most circuits that have addressed the issue have held that a judge may not consider the time a defendant will subsequently serve under § 924(c) when determining the appropriate punishment for the underlying offense. These courts reason that when a judge decides to lower the Guidelines sentence because of the consecutive mandatory minimum that the defendant will serve after the Guidelines sentence ends, the judge undermines Congress's purpose in setting that consecutive mandatory minimum.

Section 924(c), however, does not abrogate a judge's sentencing discretion for the underlying offense. Two portions of the statute discuss the treatment of underlying conduct. First, § 924(c) provides that its punishments shall be given "in addition to the punishment provided for such crime of violence or drug trafficking crime."⁴ Second, the statute also provides that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed."⁵

This Comment shows that neither of these provisions limits a judge's discretion to consider the totality of the defendant's punishment when sentencing for the underlying offense, so long as the sentence for the firearms conviction is not below the mandatory minimum and the firearms sentence runs consecutively with the sentence for the underlying conviction. Because § 924(c) does not affect judicial

³ Even though there are multiple statutes carrying mandatory minimums, most opinions dealing with this Comment's issue involve mandatory minimums under § 924(c). Many statutes bearing mandatory minimums do not have underlying convictions. See, for example, 21 USC § 841 (relating to the manufacture and distribution of controlled substances); 21 USC § 844 (relating to the possession of controlled substances); 21 USC § 960 (imposing penalties for the import or export of controlled substances). But see 18 USC § 1028A (involving a consecutive mandatory minimum for identity theft). Because § 1028A does involve an underlying conviction, this Comment draws on its language, history, and related jurisprudence for the purposes of interpreting § 924(c).

⁴ 18 USC § 924(c)(1)(A).

⁵ 18 USC § 924(c)(1)(D)(ii).

sentencing discretion for underlying crimes, ordinary *Booker* discretion applies. Therefore, the boundaries for sentencing the underlying conduct are recent Supreme Court precedent, 18 USC § 3553(a), and 18 USC § 3661.⁶ All of these sources suggest that a judge should consider the totality of the defendant's sentence. This Comment in no way disputes that judges generally lack the power to sentence below mandatory minimum sentences. Rather, this Comment examines the separate sentences for the underlying conviction, for which judges already have broad discretion to deviate from the Guidelines.⁷

Part I of this Comment reviews the background and mechanics of § 924(c) as well as recent changes to Guidelines jurisprudence. It introduces 18 USC § 1028A, a statute that also creates consecutive mandatory minimums, for the purpose of comparing the two texts and legislative histories. Part II discusses recent district and circuit court opinions that address the emerging tension among the courts concerning whether judges may consider the § 924(c) mandatory minimum when sentencing for the underlying offense. Part III uses § 1028A to come to the correct interpretation of § 924(c) and argues that courts should be allowed to consider the presence of a consecutive mandatory minimum to the extent that the minimum bears on the relevant statutory sentencing factors.

I. BACKGROUND

When a defendant is sentenced under § 924(c), he receives both the mandatory minimum sentence for the firearm offense and a separate sentence for the underlying conduct. The sentence for the underlying conduct is calculated with reference to the (now advisory) Guidelines and pursuant to 18 USC § 3553, 18 USC § 3661, and *Booker*

⁶ See *Spears v United States*, 129 S Ct 840, 843 (2009) (affirming the district court's substitution of a 20-to-1 crack-powder ratio for the Guidelines' 100-to-1 ratio); *Kimbrough v United States*, 552 US 85, 91, 101–02 (2007) (allowing for departures because of policy-based disagreements with the guidelines); *Rita v United States*, 551 US 338, 351 (2007) (noting the wide range of acceptable considerations for sentencing courts and upholding an appellate presumption of reasonableness when sentences fall within the Guidelines' recommendation); *Gall v United States*, 552 US 38, 50 (2007) (holding that district courts, in deciding whether to sentence within the Guidelines' recommended range, must make an "individualized assessment based on the facts presented").

⁷ Although not this Comment's focus, it is worth noting that the Supreme Court has granted certiorari on a separate issue involving the interpretation of § 924(c). See *United States v Abbott*, 574 F3d 203 (3d Cir 2009), cert granted, 130 S Ct 1284 (2010). The Court will decide whether the opening clause of § 924(c)—which states that "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law"—precludes the mandatory firearms minimum when the defendant is subject to another mandatory minimum under this or another statute bearing a mandatory minimum.

and its progeny.⁸ The defendant's total sentence is therefore a product of both congressionally mandated minimums, in which judges have no discretion, and Guidelines-based sentences, for which judges have broad sentencing discretion. Part I.A provides an overview of § 924(c), discussing the language of the statute, its mechanics, its history, and its relationship with the Guidelines. Part I.B describes recent Supreme Court precedent on judicial sentencing discretion.

A. Interpreting § 924(c)

1. Language and mechanics.

Section 924(c) creates mandatory minimum sentences for possessing, brandishing, or discharging a firearm in the course of committing a crime of violence or drug trafficking crime.⁹ It explicitly discusses sentencing for underlying conduct in two places. First, the statute describes the mandatory minimum as being “in addition to the punishment provided for such crime of violence or drug trafficking crime.”¹⁰ Second, the statute provides that “no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.”¹¹

For an example of how § 924(c) operates, suppose Joe Robber robs a bank with a firearm. Further suppose that the prosecutor charges Mr. Robber, and he is convicted under § 924(c) for the use of the firearm and under 18 USC § 2113 for the robbery itself. Note that the § 2113 charge is for an unarmed bank robbery, because Mr. Robber is already being charged for the use of the firearm. If Mr. Robber had simply carried a firearm, he would receive an automatic five years;¹² if he brandished it, he would receive seven.¹³ Mr. Robber would receive a mandatory minimum of ten years if he discharged the firearm.¹⁴ All of these firearms sentences would begin after the end of his sentence for the bank robbery. The length of the mandatory minimum depends on how many times Mr. Robber has been convicted under

⁸ For a discussion of the development of Supreme Court jurisprudence on federal sentencing under the Guidelines, see Part I.B.1.

⁹ 18 USC § 924(c)(1)(A).

¹⁰ 18 USC § 924(c)(1)(A).

¹¹ 18 USC § 924(c)(1)(D)(ii).

¹² 18 USC § 924(c)(1)(A)(i).

¹³ 18 USC § 924(c)(1)(A)(ii).

¹⁴ 18 USC § 924(c)(1)(A)(iii).

§ 924(c). If Mr. Robber had previously been convicted under § 924(c), he would serve twenty-five years for the new § 924(c) conviction.¹⁵

Now suppose that Joe Robber had been a little more ambitious and had robbed three banks while possessing a firearm before he was caught. Mr. Robber could be charged and convicted for three bank robberies and three firearms counts under § 924(c). Assuming Mr. Robber had never been previously convicted under § 924(c), Mr. Robber would serve his time for the bank robberies, and then he would serve five years for the first § 924(c) conviction and twenty-five years for each of the subsequent two firearm convictions.¹⁶ Thus, after Mr. Robber finishes his robbery sentences, he will serve another fifty-five years in prison for having a firearm while committing those robberies. Note that a prosecutor may choose not to charge Mr. Robber under § 924(c) and instead just charge him under the bank robbery statute. In that case, his Guidelines “offense level” would increase for the possession of the firearm.¹⁷ Such an enhancement may add an additional 29 to 46 months to the low end of the Guidelines range, depending on Mr. Robber’s criminal history category.¹⁸ Given these lower enhancements, Mr. Robber would much prefer that the prosecutor charge him with the armed bank robbery rather than charge him for unarmed bank robbery and separately for the firearm.

2. History of § 924(c) and evidence of congressional intent.

Because § 924(c) was enacted as a floor amendment to the Gun Control Act of 1968,¹⁹ there is little legislative history to aid in the interpretation of the original Act.²⁰ Before discussing congressional intent regarding the consecutive nature of the sentence, it is first useful to get a handle on the overall purpose of the statute. Congress passed the Act shortly after the assassinations of Martin Luther King, Jr and

¹⁵ 18 USC § 924(c)(1)(C).

¹⁶ See *Deal v United States*, 508 US 129, 133 (1993) (noting that any other reading of the statute “would give a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions of § 924(c)(1) by opting to charge and try the defendant either in separate prosecutions or under a multicount indictment”).

¹⁷ See USSG § 2B3.1(b)(2).

¹⁸ See, for example, USSG § 2B3.1(b)(2) (indicating that for robbery, discharging a firearm carries a seven-level enhancement, using a firearm carries a six-level enhancement, and brandishing or possessing a firearm carries a five-level enhancement).

¹⁹ Gun Control Act of 1968, Pub L No 90-618, 82 Stat 1213, codified as amended at 18 USC § 921 et seq.

²⁰ For further discussion of the legislative history that is available, see *Simpson v United States*, 435 US 6, 13–14 (1978) (using a floor statement to evince congressional intent in the absence of any legislative hearings or committee reports). See also *United States v Angelos*, 345 F Supp 2d 1227, 1233–35 (D Utah 2004) (noting that “the court is left only with a few statements made during floor debate”), *affd*, 433 F3d 738 (10th Cir 2006).

Robert F. Kennedy. The conference report noted that the purpose of the Act was to “provide for better control of the interstate traffic in firearms.”²¹ Discussion on the House floor indicated that the purpose of the statute was to encourage criminals to leave their guns at home if they intended to go out and commit felonies.²²

The Act as proposed, and as passed, had no consecutiveness provision,²³ although such an amendment was proposed on the House floor.²⁴ The provision mandating that sentences be served consecutively was adopted by the House but was removed from the bill in conference.²⁵ Richard Poff, a Republican representing Virginia, offered the amendment as an alternative to one that contained harsher minimum sentences.²⁶ There was little discussion of how the Act would relate to existing sentencing structures.²⁷ The Act was finally amended to mandate consecutive sentencing as part of the Omnibus Crime Control Act of 1970.²⁸ Although the House version of the Omnibus Crime Control Act did not contain an amendment mandating that the § 924(c) sentence run consecutively, the Senate version was adopted in conference.²⁹ This amendment mandated consecutive sentencing only for repeat § 924(c) convictions and also eliminated the possibility for judges to suspend the sentence or to allow it to be served on parole. Consecutiveness for the first conviction under § 924(c) was not mandated until 1984.³⁰

²¹ HR Conf Rep No 90-1956, 90th Cong, 2d Sess (1968), in 114 Cong Rec H 30568 (Oct 10, 1968), reprinted in 1968 USCCAN 4426, 4426.

²² 114 Cong Rec H 22231 (July 19, 1968) (Rep Poff).

²³ Gun Control Act of 1968, 82 Stat at 1224.

²⁴ 114 Cong Rec at H 22231-48 (cited in note 22) (Rep Poff) (“My substitute is . . . stronger in that it compels the court to impose the sentence to run consecutively upon the penalty previously imposed for the basic crime.”).

²⁵ HR Conf Rep No 90-1956, 114 Cong Rec at H 30571 (cited in note 21) (“The conference substitute is identical to the House bill, except that . . . concurrent sentencing under the section is not prohibited.”). The requirement of consecutive sentences was added again in 1971. See Omnibus Crime Control Act of 1970, Pub L No 91-644, 84 Stat 1880, 1889-90 (1971).

²⁶ 114 Cong Rec at H 22231 (cited in note 22).

²⁷ Representative Poff described the amendment as “invoking separate and supplemental penalties,” and it originally mandated that the sentence run consecutive to any term of imprisonment imposed for the underlying felony. 114 Cong Rec at H 22231 (cited in note 22) (Rep Poff). Bill Harsha, a Republican representing Ohio who supported the amendment, noted that judges had been “too lenient in their exercise of judicial discretion.” 114 Cong Rec at H 22234 (cited in note 22) (Rep Harsha).

²⁸ Omnibus Crime Control Act of 1970, Pub L No 91-644, 84 Stat 1880, 1889-90 (1971).

²⁹ HR Conf Rep 91-1768, 91st Cong, 2d Sess (1970), reprinted in 1970 USCCAN 5842, 5848.

³⁰ See Comprehensive Crime Control Act of 1984 § 1005(a), Pub L No 98-473, 98 Stat 1837, 2138-39 (“[N]or shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried.”).

There is good reason to believe that Congress meant § 924(c) to deter the use of firearms more generally and did not mean to target the limited felonies for which the federal courts had jurisdiction. That Congress was not targeting the underlying felonies makes it more likely that Congress did not mean to affect judicial discretion in determining an appropriate punishment for those underlying felonies. At various points throughout its history, § 924(c) was presented as a way of combating gun violence without affecting lawful gun owners. After Representative Poff first introduced the amendment, Representative Roman Pucinski, a Democrat from Illinois, described the proposal as ignoring the “bulk of the problem”—namely the use of firearms in all crimes, the majority of which are state crimes.³¹ Importantly, Representative Poff agreed that the “bulk of the problem rests in that area” but argued that “if the Federal Government is to deal with that . . . the only way we can proceed under the Constitution is to amend the Constitution.”³² Representative Poff further stated that the bill was meant to combat gun violence but could do so only insofar as gun violence could create federal jurisdiction.³³ When the bill was later amended, the Senate Judiciary Committee report quoted Senator Mike Mansfield in describing the bill’s intended target: “Gun crime is a national disgrace. . . . [N]o burden is imposed on the law-abiding gun owner. . . . The burden falls squarely where it belongs—on the criminal and the lawless; on those who roam the streets, gun in hand, ready and willing to perpetrate their acts of violence.”³⁴ Insofar as the legislative history speaks to the relationship between the use of the gun and the underlying felony, it indicates that the felonies affected were not targeted as needing further deterrence. Congress wanted to deal with the use of weapons however it could, and bootstrapping the weapons violation to preexisting federal felonies was the only way Congress could accomplish its goal.

Another broad theme in § 924(c)’s legislative history is the continuous elongation of its mandated minimums and the expansion of its coverage. As originally enacted, the statute mandated a one-year minimum for the first use of a firearm to commit a felony and a five-year minimum for subsequent offenses.³⁵ In 1971, Congress amended the statute so that subsequent offenses would be punishable by a two-year

³¹ 114 Cong Rec at H 22232 (cited in note 22) (Rep Pucinski) (“[T]his amendment would really omit the people that are creating the biggest problem in this country.”).

³² *Id.* (Rep Poff).

³³ *Id.*

³⁴ S Rep No 91-539, 91st Cong, 1st Sess 2 (1969), reprinted in 115 Cong Rec S 34838 (Nov 19, 1969) (Sen Mansfield).

³⁵ Gun Control Act of 1968, 82 Stat at 1224, codified as amended at 18 USC § 924(c).

mandatory minimum and so that these sentences also would not run concurrently with any sentence imposed for the underlying conduct.³⁶ In 1984, Congress again increased the mandatory minimum to five years for the first instance of offending conduct.³⁷ The Firearms Owners' Protection Act of 1986³⁸ further increased mandatory minimums for certain kinds of especially dangerous firearms and amended the statute so that it also applied to drug trafficking offenses.³⁹ Congress continued to increase mandatory minimums for subsequent offenses until 1998, when it increased the minimum to its current length of twenty-five years.⁴⁰ Some judges have cited the many increases in the mandatory minimums as suggestive of their unreasonableness.⁴¹

3. 18 USC § 1028A as a basis for interpretation.

Section 1028A, passed in 2000, provides separate punishment for identity theft during or in relation to certain other felonies.⁴² The statute is similar to § 924(c) in that both statutes establish a consecutive mandatory minimum and both are triggered by an underlying felony. The relevant provisions are in subsection (b):

(b) Consecutive sentence. Notwithstanding any other provision of law—

...

(2) except as [otherwise provided], no term of imprisonment imposed on a person under this section shall run concurrently with

³⁶ Omnibus Crime Control Act of 1970, 84 Stat at 1889–90, codified as amended at 18 USC § 924(c). Although this Act lowered the mandatory minimum for subsequent offenses, the amendment to 18 USC § 924(c) was entitled “Stricter Sentences,” anticipating that by making the mandatory minimums consecutive, the overall sentences would be longer.

³⁷ Comprehensive Crime Control Act of 1984 § 1005, 98 Stat at 2138–39, codified as amended at 18 USC § 924(c).

³⁸ Firearms Owners' Protection Act of 1986, Pub L No 99-308, 100 Stat 449, codified as amended at 18 USC § 921 et seq.

³⁹ Firearms Owners' Protection Act of 1986 § 104, 100 Stat at 457, codified as amended at 18 USC § 924(c) (increasing the mandatory minimum “if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler”).

⁴⁰ Act of Nov 13, 1998, Pub L No 105-386, 112 Stat 3469, 3469, codified as amended at 18 USC § 924(c).

⁴¹ See, for example, *Angelos*, 345 F Supp 2d at 1233. It is important to note that it is not necessary to believe that the § 924(c) mandatory minimums are irrational or too harsh in order to argue that the presence of the minimum should not affect judicial discretion in sentencing for the underlying felonies. But courts that do account for the mandatory minimum in sentencing for the underlying conduct often express reservations about the wisdom of § 924(c) mandatory sentences. See, for example, *United States v Ezell*, 417 F Supp 2d 667, 674 (ED Pa 2006) (noting that, after “nearly forty years of judicial interpretation and Congressional amendments,” the court was bound to a mandatory minimum of 132 years), *affd*, 265 Fed Appx 70 (3d Cir 2008).

⁴² 18 USC § 1028A(a).

any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section.⁴³

Although both § 1028A and § 924(c) set consecutive mandatory minimums where there are underlying convictions, the statutes differ in their instructions to courts on whether to consider the presence of a mandatory minimum when sentencing for underlying charges. Section 1028A(b)(2) is almost identical to the § 924(c)(1)(D)(ii) provision, which reads as follows:

Notwithstanding any other provision of law . . . no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.⁴⁴

The statutes' similarity is unsurprising, because there is evidence that § 1028A was modeled in part on § 924(c).⁴⁵ Importantly, although both contain a "consecutive" clause, § 1028A(b)(3) has a separate and unique provision that specifically addresses judicial sentencing discretion.

Several courts have noted the statutory similarity as grounds for

⁴³ 18 USC § 1028A(b).

⁴⁴ 18 USC § 924(c)(1)(D)(ii).

⁴⁵ See *Theft Investigation and Penalties: Hearing on HR 1731 before the House Subcommittee on Crime, Terrorism, and Homeland Security*, 108th Cong, 1st Sess (2003) (testimony of Timothy Coleman, Counsel to the Assistant Attorney General), online at <http://judiciary.house.gov/legacy/coleman032304.htm> (visited Aug 30, 2010) ("Because 'aggravated identity theft' is unusual in that it is a derivative offense, like the conduct prohibited by § 924(c), a similar approach makes eminent sense here.").

meaningful contrast,⁴⁶ and in *United States v Vidal-Reyes*,⁴⁷ the First Circuit compared the statutes to determine the appropriate level of judicial discretion in considering the presence of a § 1028A mandatory minimum when sentencing for other conduct.⁴⁸ The First Circuit indicated that a court may consider the presence of a § 1028A mandatory minimum when sentencing non-underlying conduct. Pedro Vidal-Reyes was convicted of aggravated identity theft under § 1028A, but his other convictions did not underlie the § 1028A mandatory minimum because of the “temporal disparities between their commission and the commission of the aggravated identity theft charges.”⁴⁹ The First Circuit established a presumption that the district court has the discretion to consider the entirety of a defendant’s sentence unless the statute, when read in light of congressional intent, says otherwise.⁵⁰ The court ultimately found that the § 1028A mandatory minimum was not meant to curb judicial discretion when sentencing for non-underlying offenses.⁵¹ The court further implied that a sentencing court may be able to consider the presence of a consecutive mandatory minimum in sentencing for the underlying conduct where the mandatory minimum statute does not specifically preclude such consideration, although the court did not reach this issue.⁵² The Seventh and Ninth Circuits have referenced *Vidal-Reyes* when discussing whether a district court may consider the presence of a consecutive mandatory minimum under § 924(c) when sentencing for the underlying felony.⁵³ Neither opinion held that a district court has such discretion.

⁴⁶ See, for example, *United States v Rose*, 587 F3d 695, 705–06 (5th Cir 2009) (contrasting the mens rea requirements in the two statutes); *United States v Flucker*, 343 Fed Appx 474, 475 n 1 (11th Cir 2009) (noting that a court may sentence below § 924(c) or § 1028A mandatory minimums only upon the government’s motion); *United States v Jenkins-Watts*, 574 F3d 950, 970 (8th Cir 2009) (using a similar case concerning § 924(c) to show that a defendant may be convicted under § 1028A without being charged with the underlying offense); *United States v Reiss*, 278 Fed Appx 991, 992 (11th Cir 2008) (noting the similarities between the two statutes in concluding that under both statutes a defendant may be convicted without being charged with the underlying felony); *United States v Godin*, 476 F Supp 2d 1, 2–3 & n 2 (D Me 2007) (describing § 924(c) as an “apt analogy” to § 1028A with respect to mens rea requirements).

⁴⁷ 562 F3d 43 (1st Cir 2009).

⁴⁸ See *id.* at 52 n 7 (“There is evidence that 924(c) influenced the drafting of § 1028A.”).

⁴⁹ *Id.* at 50 n 6 (noting that the non-underlying nature of the other counts was not in dispute).

⁵⁰ *Id.* at 49.

⁵¹ *Vidal-Reyes*, 562 F3d at 51.

⁵² See *id.* at 49, 52.

⁵³ See *United States v Ressam*, 593 F3d 1095, 1124 n 8 (9th Cir 2010); *United States v Calabrese*, 572 F3d 362, 369 (7th Cir 2009). Neither opinion discusses *Vidal-Reyes* or § 1028A at any length.

B. The Expansion of Judicial Discretion under the United States Sentencing Guidelines

Ordinarily, the offense underlying § 924(c) has no mandatory minimum itself, and judges are allowed considerable discretion in determining the appropriate sentence. This Part discusses the legal bounds of this ordinary *Booker* sentencing discretion. After these boundaries are established, it becomes clearer that the consideration of a subsequent § 924(c) mandatory minimum falls within the scope of *Booker* sentencing discretion.

1. Statutory and Guidelines treatment of underlying felonies.

When determining a defendant's sentence, courts must consider the factors enumerated in 18 USC § 3553(a). Where the § 3553(a) factors directly conflict with the advisory Guidelines, the factors control.⁵⁴ These factors are: (1) the “nature and circumstances of the offense and the history and characteristics of the defendant”; (2) the “need for the sentence imposed” to reflect the enumerated purposes of punishment; (3) the “kinds of sentences available”; (4) the sentence suggested by the Guidelines; (5) pertinent Sentencing Commission policy statements; (6) “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”; and (7) the need for restitution.⁵⁵ The statute requires that a sentencing court “impose a sentence sufficient, but not greater than necessary, to comply with” the previously enumerated purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation.⁵⁶ Sentencing discretion is also subject to 18 USC § 3661, which provides, in full: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”

Unlike § 3553(a) and § 3661, the Guidelines directly address the issue of judicial discretion in sentencing for underlying conduct that has triggered a mandatory minimum. USSG § 5G1.2(a) provides, “[T]he sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of

⁵⁴ See *Kimbrrough v United States*, 552 US 85, 113 (2007) (Scalia concurring).

⁵⁵ 18 USC § 3553(a).

⁵⁶ 18 USC § 3553(a) (stating that a sentence should “provide just punishment,” “afford adequate deterrence,” “protect the public from further crimes,” and “provide the defendant with needed . . . training”).

imprisonment, shall be determined by that statute and imposed independently.” Of course, after *Booker*, the Guidelines are advisory.⁵⁷

Some tension exists between § 5G1.2(a) and § 3553(a)(6), which instructs judges to avoid the creation of unwarranted disparities among similarly situated defendants. For instance, imagine that two defendants commit identical armed bank robberies. One is charged with the bank robbery and receives a Guidelines enhancement for brandishing a firearm, while the other is charged separately for the bank robbery and the use of the weapon under § 924(c). Assuming identical criminal histories, the first defendant’s total Guidelines sentence range will often be substantially lower than the second defendant’s mandatory minimum for the use of the weapon alone.⁵⁸ Such a disparity is arguably “unwarranted” under § 3553(a)(6), yet this disparity is required by § 5G1.2(a)’s mandate to sentence the § 924(c) offense and the underlying offense independently. The new emphasis on the § 3553 sentencing factors in light of *Booker* and *Kimbrough v United States*⁵⁹ creates a tension that did not need to be reconciled when the Guidelines were binding.

2. Sentencing discretion under the Guidelines before and after *Booker*.

The Sentencing Reform Act of 1984⁶⁰ created the United States Sentencing Commission for the purpose of “establish[ing] sentencing policies and practices” by developing guideline sentences for federal criminal conduct.⁶¹ Part of the Act’s purpose was to alleviate perceived disparities in federal criminal sentences due to the great degree of judicial discretion.⁶² There was a widespread concern that a federal defendant’s sentence was largely a function of which judge was conducting the sentencing rather than a function of the defendant’s conduct.⁶³ By reducing judicial discretion, however, it became possible for a prosecutor to affect a defendant’s sentence by manipulating the charge, thus worsening sentencing disparities among similarly situated defendants. Because of this possibility, the Guidelines introduced

⁵⁷ When analyzing the importance of USSG § 5G1.2(a), not all circuits acknowledge the Guidelines’ generally advisory nature. See, for example, *United States v Franklin*, 499 F3d 578, 584 (6th Cir 2007) (referring to § 5G1.2(a) as a “mandate”).

⁵⁸ See text accompanying notes 10–18.

⁵⁹ 552 US 85 (2007).

⁶⁰ Sentencing Reform Act of 1984, Pub L No 98-473, ch 2, 98 Stat 1987, codified as amended at 18 USC § 3551 et seq and 28 USC § 991 et seq.

⁶¹ 28 USC § 991(b)(1).

⁶² 28 USC § 994(m).

⁶³ See Marvin E. Frankel, *Criminal Sentences: Law without Order* 12–25 (Hill and Wang 1973).

“real-conduct” sentencing,⁶⁴ which was designed in part to lessen the prosecutor’s ability to affect the length of the defendant’s sentence by manipulating the charges.⁶⁵

Before *Booker*, the Guidelines were mandatory. This meant that judges had to sentence defendants within the applicable Guidelines range, based on the severity of the offense and the defendant’s criminal history, unless the judge had reason to grant a departure available under the Guidelines for certain enumerated reasons.⁶⁶ The Guidelines approved of other grounds for departure only where the judge found “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”⁶⁷

In *Booker*, the Supreme Court held that the mandatory nature of the Guidelines violated the Sixth Amendment.⁶⁸ As a result, the Court excised 18 USC § 3553(b)(1), the provision that made the Guidelines mandatory, and 18 USC § 3742(e), which established de novo review of sentencing determinations. The decision rendered the Guidelines merely advisory.⁶⁹ Now, judges are required to consider the § 3553(a) factors in every case to determine whether the Guidelines sentence is appropriate.⁷⁰

3. Expansion of sentencing discretion.

Since *Booker*, the Supreme Court has continued to expand judicial sentencing discretion. A judge may not presume that a within-Guidelines sentence is reasonable.⁷¹ The § 3553(a) factors remain the measure of a sentence’s reasonableness.⁷² Therefore, § 3553(a)’s requirements that sentences not create “unwarranted disparities” and that they be “no greater than necessary” have greater import than they previously did.

⁶⁴ Real-conduct sentencing refers to sentences that reflect how the crime was actually committed rather than how the crime is charged. Judges can account for underlying conduct at sentencing even where this conduct did not contribute to the charged offenses. See USSG § 1B1.3.

⁶⁵ See Michael O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U Cin L Rev 749, 783 (2006).

⁶⁶ USSG § 1A1.4b (“The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds ‘an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission.’”).

⁶⁷ 18 USC § 3553(b)(1).

⁶⁸ 543 US at 244.

⁶⁹ *Id.* at 255.

⁷⁰ See *Gall v United States*, 552 US 38, 49–50 (2007).

⁷¹ See *Nelson v United States*, 129 S Ct 890, 892 (2009), citing *Rita v United States*, 551 US 338, 351 (2007); *Gall*, 552 US at 50.

⁷² See *Gall*, 552 US at 49–50.

Kimbrough enabled judges to depart from the Guidelines purely for policy reasons in crack cocaine cases. Here the Supreme Court determined that judges could freely disagree with the crack cocaine sentencing Guidelines in an ordinary, mine-run case.⁷³ Its decision was based, in part, on the fact that the United States Sentencing Commission was not acting in its “characteristic institutional role” when it developed the crack cocaine Guidelines.⁷⁴ *Kimbrough* left the door open for policy-based departures from the Guidelines in other circumstances, although such departures need to be justified.⁷⁵

The Supreme Court expanded policy-based departures in *Spears v United States*⁷⁶ and *Gall v United States*.⁷⁷ In *Spears*, the Court held that a judge may substitute a different crack-to-powder ratio instead of using the Guidelines’ ratio.⁷⁸ Therefore, not only is a judge entitled to a policy-based disagreement with the Guidelines, but in some cases he may affirmatively substitute his own policy judgment.⁷⁹ In *Gall*, the Supreme Court held that extraordinary circumstances need not exist in order to justify a sentence outside the range recommended by the Guidelines.⁸⁰ The case is indicative of the Court’s shift away from requiring judges to find unique circumstances to justify a departure.

If a judge were to consider the presence of a mandatory minimum when sentencing for the underlying conduct, he would have to oppose the Guidelines’ directive in § 5G1.2(a). Opposition to § 5G1.2(a) would probably not be based on unique characteristics of the particular defendant before the court, but instead on a policy disagreement with the Guidelines themselves, much like how judges can sentence outside the Guidelines in crack cocaine cases regardless of the individual characteristics of the defendant.

⁷³ *Kimbrough*, 552 US at 110–11. See also *Spears* 129 S Ct at 843 (characterizing *Kimbrough* as “a recognition of district courts’ authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case”).

⁷⁴ *Kimbrough*, 552 US at 109.

⁷⁵ *Id.* at 108–10.

⁷⁶ 129 S Ct 840 (2009).

⁷⁷ 552 US 38 (2007).

⁷⁸ 129 S Ct at 843 (“A sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity.”).

⁷⁹ *Id.*

⁸⁰ 552 US at 50–51 (holding that sentencing decisions, including sentences outside of the Guidelines, were to be reviewed under an abuse of discretion standard).

II. JUDICIAL RESPONSES

When faced with the question of whether sentencing courts may consider the totality of a defendant's sentence when sentencing for underlying conduct under § 924(c), the Second, Sixth, Seventh, and Eighth Circuits have found that judges must consider the underlying conduct in isolation, as if the § 924(c) mandatory minimum did not exist.⁸¹ Other courts have reasoned that judges should be allowed to consider the totality of the defendant's sentence.⁸² This Part first discusses the circuit courts that follow the majority approach and then discusses several courts that take a different approach.

A. Considering Underlying Conduct in Isolation of Mandatory Minimums: The Majority Approach

Several circuits have held that a sentencing judge may not consider the totality of a sentence when sentencing a defendant for the underlying crime where the defendant is already subjected to a count that bears a mandatory minimum for the use of a firearm.⁸³ These circuits rely primarily on two arguments. First, if a sentencing court is allowed to consider the existence of a consecutive mandatory minimum, the two sentences will effectively bleed into one another, thus undermining congressional intent. Second, the language of the Guidelines arguably supports this interpretation of the statute.

1. The Seventh and Second Circuits: Reliance on congressional intent.

The Seventh and Second Circuits express a fear that discretionary sentences and mandatory sentences will bleed into one another—that

⁸¹ *United States v Chavez*, 549 F3d 119, 135 (2d Cir 2008); *United States v Franklin*, 499 F3d 578, 584 (6th Cir 2007); *United States v Roberson*, 474 F3d 432, 436 (7th Cir 2007); *United States v Gregg*, 451 F3d 930, 937 (8th Cir 2006).

⁸² See *United States v Ezell*, 417 F Supp 2d 667, 678 (ED Penn 2006), *affd*, 265 Fed Appx 70, 71 (3d Cir 2008); *United States v Ciszkowski*, 430 F Supp 2d 1283, 1288 (MD Fla 2006), *affd*, 492 F3d 1264, 1271 (11th Cir 2007). See also *Franklin*, 499 F3d at 587–89 (Moore concurring in the judgment) (“[N]ot only is it plausible that the sentencing statutes permit the district court to consider the effect of a mandatory sentence in reaching its ultimate sentencing determination, it is the only sensible interpretation.”).

⁸³ The Ninth Circuit has come to a similar conclusion in *United States v Working*, 287 F3d 801, 807 (9th Cir 2002), but because this is a pre-*Booker* case, the Ninth Circuit has indicated that it may revisit the subject. In *United States v Ressam*, 593 F3d 1095 (9th Cir 2010), the Ninth Circuit acknowledged that “[w]hen the district court first imposed Ressam’s sentence, it considered only the total term of imprisonment and asked ‘the government to allocate according to the statutory minimums among the counts in consecutive and concurrent [terms] as necessary to arrive at’ the total.” *Id.* at 1124 n 8. The court then indicated that it did not reach the question of whether the sentencing judge committed error when he chose “not to determine and impose independent sentences for each of the three consecutive terms” because neither party raised the issue. *Id.*

if a court considers the presence of a consecutive mandatory minimum, the two sentences will be effectively conflated and the court will actually be reducing the statutory minimum, thus undermining congressional intent.⁸⁴ This interpretation is grounded in the § 924(c)(1)(D) provision that “no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person.” Courts interpret the requirement that the sentence not run concurrently as precluding the possibility of its consideration in determining the appropriate sentence for the underlying charge. But, significantly, these opinions do not grapple with alternative interpretations of the word “concurrent.”⁸⁵

In *United States v Roberson*,⁸⁶ the Seventh Circuit addressed the issue of whether it was within the sentencing judge’s discretion to adjust the sentence for the underlying conviction because she “found a 130 month sentence unreasonable on the facts of this case and contrary to the purposes of sentencing under § 3553.”⁸⁷ The sentencing judge indicated that because she “had no power to adjust the . . . consecutive sentence,” she would adjust the sentence for the underlying conduct.⁸⁸ Judge Richard Posner characterized this reasoning as essentially a disagreement with Congress.⁸⁹ Furthermore, the court held that *Booker* “did not authorize district judges to ignore statutory sentencing ranges.”⁹⁰ Judge Posner reasoned that by considering the length of the mandatory minimum, the district judge effectively lowered the consecutive mandatory minimum.

Additionally, the court indicated that sentencing courts should not consider the presence of a consecutive mandatory minimum even though that minimum may be the consequence of prosecutorial discretion to charge the defendant separately for the use of the firearm. If the government had only charged the defendant with the underlying offense, the defendant would have likely received a reduced sentence

⁸⁴ The Sixth Circuit adopted similar reasoning in *Franklin*, 499 F3d at 584–85:

If the sentence on the count carrying a mandatory consecutive sentence were accumulated with other sentences for purposes of reaching the total punishment under § 5G1.2(d), Congress’s specific statutory requirement that the sentence be imposed independent of any other sentence and run consecutive to any other sentence would have little meaning.

But the Sixth Circuit has recently indicated that it may reconsider the issue in light of *Kimbrough*. See *United States v Mongham*, 356 Fed Appx 831, 838–39 (6th Cir 2010).

⁸⁵ See Part III.A.

⁸⁶ 474 F3d 432 (7th Cir 2007).

⁸⁷ *Id.* at 434.

⁸⁸ *Id.*

⁸⁹ *Id.* (“She is of course entitled to her view, but she is not entitled to override Congress’s contrary view.”).

⁹⁰ *Roberson*, 474 F3d at 434.

subject only to the Guidelines' firearm enhancement.⁹¹ Judge Posner stated that "[t]he judiciary has no authority to second-guess the government's choice of which crimes to charge."⁹² The Seventh Circuit held that sentencing courts must "pick[] a sentence for the [underlying crime] without regard for the fact that a gun had been used in it, and then tack[] on" the mandatory minimum sentence.⁹³ Judge Posner acknowledged the potential tension between mandatory minimum sentences and § 3553(a)'s purposes of punishment, which instruct courts to avoid unwarranted disparities between similarly situated defendants.⁹⁴ He reasoned, however, that the specific nature of § 924(c) trumps the general instructions set forth in § 3553(a).⁹⁵ Notably, he assumed that § 924(c) governs sentencing for the underlying conviction, which depends entirely on one's interpretation of the statute.⁹⁶

In *United States v Calabrese*,⁹⁷ the Seventh Circuit reaffirmed its decision in *Roberson* and made clear that "even shaving off a single month from the sentence on the underlying crime thwarts Congress's will."⁹⁸ It is worth noting that the Seventh Circuit's second visit to the issue occurred after the Supreme Court's opinion in *Kimbrough*.

The Second Circuit's analysis of the issue in *United States v Chavez*⁹⁹ is largely similar. The opinion heavily cites to *Roberson*, and emphasizes that the consideration of a consecutive mandatory minimum in sentencing for the underlying conduct would effectively make the § 924(c) sentence concurrent.¹⁰⁰ The court also focused on the clause of § 924(c) that provides that the penalties for the weapons conviction shall be imposed "in addition to" the sentence for the underlying conviction.¹⁰¹

⁹¹ See text accompanying notes 16–19.

⁹² *Roberson*, 474 F3d at 434.

⁹³ *Id.*

⁹⁴ *Id.* at 436 ("The district judge was correct that there are two statutes in play and that they are not completely harmonious."). See also *Franklin*, 499 F3d at 584–85 ("When any downward variance of the guideline range is based on the effect of a mandatory sentence, congressional intent is repudiated, just as if the mandatory sentence itself had been reduced.").

⁹⁵ *Roberson*, 474 F3d at 436. See also *Chavez*, 549 F3d at 134–35 (determining that § 924(c) expressly prohibits a judge from using § 3553(a) factors to justify § 924(c)'s mandatory minimum penalties running concurrently with any other penalties).

⁹⁶ See Part III.D.

⁹⁷ 572 F3d 362 (7th Cir 2009).

⁹⁸ *Id.* at 369.

⁹⁹ 549 F3d 119 (2d Cir 2008).

¹⁰⁰ *Id.* at 135.

¹⁰¹ *Id.* at 134.

2. The Eighth Circuit approach: Reliance on the Guidelines' interpretation.

The Eighth Circuit has relied most heavily on the how the Guidelines interpret consecutive mandatory sentences.¹⁰² USSG § 5G1.2(a) states that “the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.” In contrast to § 924(c), the Guidelines' language clearly supports the prohibition against considering the defendant's consecutive mandatory minimum. The Eighth Circuit has buttressed its reliance on the Guidelines' interpretation by reasoning that “*Booker* does not relate to statutory sentences.”¹⁰³ The opinion does not address an important argument: that the sentencing provision for the underlying conviction is based on the Guidelines, which are subject to *Booker*. In relying on the Guidelines as an authoritative source, the Eighth Circuit mistakenly treats the Guidelines as mandatory.

B. Considering the Totality of the Defendant's Sentence: The Minority Approach

Several courts have come to the conclusion that a sentencing judge may consider the totality of a defendant's sentence in sentencing for charges underlying a § 924(c) count. District court opinions adopting this approach have been affirmed on defendants' appeals in the Eleventh and Third Circuits,¹⁰⁴ although these circuit opinions did not address the merits of the district court arguments on the issue.¹⁰⁵ Judge Karen Nelson Moore of the Sixth Circuit also presented a compelling argument for considering the totality of the defendant's sentence in her

¹⁰² See *United States v Hatcher*, 501 F3d 931, 933 (8th Cir 2007) (finding the severity of the mandatory minimum to be an “improper factor” in the district court's sentence for the underlying conduct). Although other circuit opinions rely on the Guidelines' interpretation of the statute, the Eighth Circuit has relied more exclusively on the Guidelines' interpretation in its reasoning. The Eighth Circuit has, however, cited to the Seventh Circuit's analysis in *Roberson*. See *Gregg*, 451 F3d at 937.

¹⁰³ *Hatcher*, 501 F3d at 933.

¹⁰⁴ See *Ezell*, 417 F Supp 2d at 669, *affd*, 265 Fed Appx 70; *Cizzkowski*, 430 F Supp 2d at 1283, *affd*, 492 F3d 1264.

¹⁰⁵ Because the cases came to the circuit courts on the defendants' appeals, the opinions do not create precedent on the issue. See *Greenlaw v United States*, 128 S Ct 2559, 2566 (2008) (“Even if there might be circumstances in which it would be proper for an appellate court to initiate plain-error review, sentencing errors that the Government refrained from pursuing would not fit the bill.”).

concurrence in *United States v Franklin*.¹⁰⁶ Several of these opinions are openly hostile to the severity of § 924(c) consecutive mandatory minimums.¹⁰⁷ This Comment does not analyze the wisdom of § 924(c), but endeavors to discern the degree of discretion judges have in sentencing for the underlying conduct. This Part seeks to disentangle the justifications for the courts' reasoning.

1. Establishing a floor.

Judge Moore, in her concurrence in *Franklin*, argued that congressional intent points to the creation of a floor for the defendant's total sentence.¹⁰⁸ She indicated that in the absence of a consecutive mandatory minimum, the sentencing court has the discretion to consider any sentence below the statutory maximum (in this case, twenty years).¹⁰⁹ Therefore, the defendant's seven-year consecutive mandatory minimum would only reduce the judge's discretion such that the total sentence must be between seven and twenty-seven years.¹¹⁰ Furthermore, she argued that "[t]he § 3553(a) factors require the district court to give at least some consideration to the total amount of time that a defendant will spend in prison."¹¹¹ To buttress this argument, Judge Moore relied on § 3553(a)'s parsimony provision—that a sentence cannot be "greater than necessary . . . to protect the public from further crimes of the defendant."¹¹² Key to this argument is that a defendant's

¹⁰⁶ 499 F3d 578, 587–89 (6th Cir 2007) (Moore concurring in the judgment). Notably, the Sixth Circuit has indicated that it may overturn its decision in this case. See *Mongham*, 356 Fed Appx at 838–39. See also note 84.

¹⁰⁷ Mandatory minimums under § 924(c) are widely criticized. In a recent hearing in front of the House Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security, federal district judge Paul G. Cassell commented, "[It] remains hard for me to this day to explain why . . . [a] murderer received a far shorter sentence than a drug dealer who simply carried a firearm to several drug deals." Mandatory Minimum Sentencing Laws—The Issues, Hearing before the Subcommittee on Crime, Terrorism and Homeland Security of the Committee on the Judiciary, 110th Cong, 1st Sess 43–44 (2007), online at <http://judiciary.house.gov/hearings/printers/110th/36343.pdf> (visited July 10, 2010). Judge Cassell also broadly criticized federal mandatory minimums in his testimony and proposed a specific solution that would allow greater judicial discretion in sentencing for conduct underlying a § 924(c) conviction. But Judge Cassell emphasized a broader need to get rid of problematically harsh mandatory minimum sentences. *Id.* He also proposed "unstacking" § 924(c) penalties. *Id.* These suggestions are legislative in nature and have not been enacted.

¹⁰⁸ 499 F3d at 587–89 (Moore concurring in the judgment) (arguing that using the consecutive mandatory minimum as a floor "is just as plausible a means of vindicating the intent behind § 924(c) as is requiring the district court to ignore the mandatory [minimum] in reaching its decision on the other counts of a conviction").

¹⁰⁹ *Id.* at 587.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Franklin*, 499 F3d at 587–88 (Moore concurring in the judgment) (noting that under the majority's rule, any attempt by a district court to calculate a sentence for a defendant based on

individual history and characteristics may require a greatly reduced sentence regardless of the existence of a § 924(c) conviction.¹¹³ The opinion also hints at the problematic nature of determining an appropriate sentence for individual counts of a conviction without regard to the total sentence. For instance, the availability of a drug treatment program may depend on the total length of a defendant's sentence, and a judge may want to consider this as a reason for imposing a particular sentence for the underlying conduct.¹¹⁴

In *United States v Ezell*,¹¹⁵ Eastern District of Pennsylvania Judge Jan Dubois addressed the defendant's challenge to a 132 year mandatory minimum sentence.¹¹⁶ "Reluctantly" finding that it must impose these consecutive sentences,¹¹⁷ the court gave a sentence of only one day for the underlying offenses, a string of bank robberies.¹¹⁸ Although *Ezell* criticized the mandatory nature of § 924(c), the court did not discuss its Guidelines departure. Rather, the court's opinion merely referred to the prison term of 132 years and one day as "the minimum allowed by law."¹¹⁹ The Third Circuit opinion in *Ezell* did not explicitly acknowledge the district court's consideration of the mandatory minimum in sentencing for the underlying conduct.¹²⁰ Because the district court's treatment of the mandatory minimum was not raised on appeal, the decision has no precedential authority on this issue.¹²¹

2. The *Ciszkowski* approach.

In *United States v Ciszkowski*,¹²² the Middle District of Florida held that "the pertinent question for the district judge, recognizing the

the parsimony provision "would require the district court to sentence the defendant to that number of years *plus seven*" (emphasis added).

¹¹³ *Id.*

¹¹⁴ *Id.* at 588 (citing a case in which the district court varied upward from the Guidelines sentence so that the defendant could qualify for a substance abuse treatment program).

¹¹⁵ 417 F Supp 2d 667 (ED Penn 2006), *affd*, 265 Fed Appx 70 (3d Cir 2008).

¹¹⁶ 417 F Supp 2d at 669. *Ezell* was convicted of six counts of robbery under the Hobbs Act, 18 USC § 1951, aiding and abetting under 18 USC § 2, and six counts under § 924(c), one of which carried a seven-year mandatory minimum and the others of which carried consecutive mandatory minimums of twenty-five years each. *Ezell*, 417 F Supp 2d at 669.

¹¹⁷ *Ezell*, 417 F Supp 2d at 671. Jamal Ezell challenged the minimum on separation of powers and due process grounds in addition to challenging the court's interpretation of § 924(c). The defendant also presented a *Booker* challenge to the mandatory minimum, but this argument was futile because *Booker* does not apply to statutorily mandated minimums. *Id.* at 677.

¹¹⁸ *Id.* at 678.

¹¹⁹ *Id.* at 673.

¹²⁰ 265 Fed Appx at 70–71. The court in a footnote stated: "Without consideration of the § 924(c) charges, the Guideline Imprisonment Range for Ezell's history and conduct would be 168 to 210 months." *Id.* at 72 n 3.

¹²¹ See note 105.

¹²² 430 F Supp 2d 1283 (MD Fla 2006), *affd*, 492 F3d 1264 (11th Cir 2007).

inevitable minimum mandatory sentence, is what additional term attributable to the advisory guidelines component of the total sentence is required to create a total sentence that is ‘reasonable’ under *Booker* in light of the factors arrayed at Section 3553(a).”¹²³ On its face, this reasoning is not unlike the reasoning in the *Franklin* concurrence.¹²⁴ The *Ciszkowski* court, however, established different formulas depending on whether the mandatory minimum is greater or less than the advisory Guidelines sentence.¹²⁵ The court reasoned that the statutory purpose of the lesser Guidelines range can be served by the greater statutory minimum. This reasoning seems to suggest a de facto concurrent sentence while maintaining a formally consecutive sentence. The court acknowledged that in the majority of cases, the defendant will be sentenced to all or the majority of the recommended Guidelines sentence,¹²⁶ which may serve to counter the presumption that once the presence of the mandatory minimum can be considered, wide departures from that minimum would frequently occur. Invoking the express language of § 924(c), the court found that it is necessary for the sentence to be served consecutively to the sentence for the underlying crimes, and that the statute is silent regarding judges’ discretion in sentencing for the underlying crimes.¹²⁷

The Eleventh Circuit affirmed.¹²⁸ The district court had considered the totality of the defendant’s sentence.¹²⁹ The § 924(c) minimum was 30 years, and the Guidelines range for the two convictions of underlying conduct was 188 to 235 months.¹³⁰ The district court ultimately sentenced Wojtek Ciszkowski to 12 months for each count of underlying conduct—a radical departure from the Guidelines—and the Eleventh Circuit found that the district court’s sentence was reasonable. It did not directly address this portion of the district court’s analysis, but it acknowledged that the district court was “ostensively taking into consideration the 30-year mandatory minimum to be imposed on the § 924(c) count.”¹³¹

¹²³ 430 F Supp 2d at 1287.

¹²⁴ See notes 108–16 and accompanying text.

¹²⁵ *Ciszkowski*, 430 F Supp 2d at 1288.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Importantly, this issue was not raised on appeal, again eliminating any precedential value on this issue. See note 105.

¹²⁹ See *Ciszkowski*, 430 F Supp 2d at 1287–88.

¹³⁰ *Id.* at 1287.

¹³¹ *Ciszkowski*, 492 F3d at 1268 n 3.

3. Undercutting prosecutorial discretion.

Another reason judges may want to consider the totality of a defendant's sentence is the degree of prosecutorial discretion involved in § 924(c) cases.¹³² Section 3553(a)(6) directs judges to consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." It draws the judge's attention to the defendant's conduct rather than to the statutes under which the defendant was convicted. In disallowing unwarranted disparities between similarly situated defendants, the statute arguably compels a sentencing court to consider the prosecutor's decision to charge the defendant separately for the use of the weapon under § 924(c) rather than simply charging the defendant for the underlying conduct with a Guidelines enhancement for using the weapon.¹³³

The district court in *United States v Roberson*¹³⁴ ("*Roberson II*") engaged in a prosecutorial discretion analysis. Judge Joan Gottschall pointed out that under the Seventh Circuit's interpretation of the question, prosecutorial discretion trumps judicial discretion when the prosecutor has a choice whether to charge the defendant with a count bearing a mandatory minimum.¹³⁵ Namely, the prosecutor, by deciding whether to charge the defendant for the underlying crime and § 924(c) or for just the underlying crime with a Guidelines enhancement, ultimately has much more say than the judge in what sentence the defendant will receive. Any discrepancy between the mandatory minimum and the Guidelines enhancement is largest when the judge cannot take the discrepancy into account when sentencing for the underlying conduct. Ultimately, Judge Gottschall relied on other mitigating factors to give the defendant a sentence ten months less than the sentence the Guidelines suggested; given the Seventh Circuit's instructions on remand, she was unable to take into account the prosecutor's discretion in charging the case.¹³⁶

¹³² Particularly harsh mandatory minimums implicate prosecutorial discretion in other ways as well. For instance, in *United States v Angelos*, 345 F Supp 2d 1227 (D Utah 2004), the district court discussed how the defendant's sentence was largely a product of a particularly difficult plea bargaining process: "In short, Mr. Angelos faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence." *Id.* at 1232.

¹³³ See, for example, USSG § 2B3.1(b)(2) (indicating that for robbery, discharging a firearm carries a seven-level enhancement, using a firearm carries a six-level enhancement, and brandishing or possessing a firearm carries a five-level enhancement). An enhancement for brandishing or possessing a firearm, if applied to a bank robber with a criminal history category of II, would increase the Guidelines sentence from a range of 46 to 57 months to a range of 78 to 97 months.

¹³⁴ 573 F Supp 2d 1040 (ND Ill 2008).

¹³⁵ *Id.* at 1045.

¹³⁶ *Id.* at 1051.

This type of analysis is not unique to *Roberson II*. Although *Ezell* did not reference § 3553(a)(6), the court seemingly invoked prosecutorial discretion concerns when it compared the defendant's would-be sentence under the Guidelines alone (168 to 210 months) with the mandatory minimum under § 924(c), which was 132 years for the weapons convictions alone. The court noted: "The government has not provided a single convincing reason why a sentence under the Sentencing Guidelines would not achieve all of the goals of sentencing in this case."¹³⁷ By questioning the wisdom of the 132 year sentence in comparison to the Guidelines sentence the defendant would have received, the court highlighted the degree of prosecutorial discretion involved. In contrast, the court emphasized its complete lack of discretion to reduce the mandatory minimum.¹³⁸ After comparing the Guidelines sentence to the mandatory minimum, the court sentenced the defendant to "132 years and one day, the minimum allowed by law."¹³⁹

Prosecutorial charging discretion often tends to conflict with § 3553(a)(6) and real-conduct sentencing. In response to other areas of potential conflict between prosecutorial discretion and § 3553(a)(6)'s directive, most circuits have held that any difference between sentences for defendants charged separately with § 924(c) conduct and those charged without the separate mandatory minimum is an acceptable consequence of prosecutorial discretion.¹⁴⁰

III. MANDATORY MINIMUMS ESTABLISH A FLOOR FOR CONSIDERING § 3553(A) FACTORS

This Comment argues that § 924(c) establishes an absolute floor. The extent to which a defendant's sentence differs from the Guidelines is determined by the § 3553(a) factors so long as the defendant's total sentence is not below that floor.

Many factors compel sentencing courts to consider the presence of a mandatory minimum when determining the necessary punishment for the defendant's underlying conduct. First, this Part argues

¹³⁷ *Ezell*, 417 F Supp 2d at 672.

¹³⁸ *Id* at 672–73.

¹³⁹ *Id* at 673.

¹⁴⁰ See, for example, *United States v Molina*, 530 F3d 326, 332 (5th Cir 2008) ("[A]s a general rule, . . . substantial deference is accorded decisions requiring the exercise of prosecutorial discretion, and those decisions are not subject to judicial review absent a showing of actual vindictiveness or an equal protection violation.") (citations and quotation marks omitted). See also *Williams v Illinois*, 399 US 235, 243 (1970) ("The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences."); *United States v Duncan*, 479 F3d 924, 928 (7th Cir 2007) ("Absent a showing of invidious discrimination, we shall not second guess a prosecutor's decision regarding the charges it chooses to bring.").

that § 924(c) should be interpreted in light of 18 USC § 1028A. Section 1028A, which provides mandatory minimum sentences for identity theft, suggests that when Congress required that § 924(c) sentences not run concurrently, Congress did not mean to restrict sentencing discretion with regard to the length of the sentence for the underlying felony.¹⁴¹ Second, recent Supreme Court precedent establishes the § 3553(a) factors as the definitive measure of a reasonable sentence, absent contrary congressional intent. Some specific § 3553(a) factors allow judges to consider the presence of a consecutive mandatory sentence. Third, this Part shows that there is nothing in the text or history of § 924(c) that suggests that Congress meant to prohibit sentencing courts from considering the presence of the mandatory minimum when sentencing for underlying conduct. Finally, this Part addresses Judge Posner's argument that the consideration of a subsequent mandatory minimum necessarily reduces the length of that mandatory minimum, effectively creating a concurrent sentencing system.

A. Interpreting § 924(c) in Light of § 1028A

Since originally enacting § 924(c), Congress has demonstrated its ability to explicitly preclude a sentencing court from considering the totality of a defendant's sentence when sentencing for the underlying conduct. In doing so, Congress showed its understanding that a mandate that the sentence not run "concurrently" does not limit this kind of judicial discretion. In 2004, Congress established mandatory minimums in identity theft cases in the Identity Theft Penalty Enhancement Act.¹⁴² Like § 924(c), § 1028A contains a clause mandating that its terms of imprisonment not run concurrent to any sentence for underlying conduct.¹⁴³ Congress deemed it necessary, however, to include an additional clause indicating that sentencing courts are not to account for the presence of the § 1028A mandatory minimum when sentencing for the underlying conduct:

[I]n determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise

¹⁴¹ Although § 1028A was passed after § 924(c), Congress has amended § 924(c) more recently. See Protection of Lawful Commerce in Arms Act § 5, Pub L No 109-92, 119 Stat 2095, 2102 (2005), codified at 18 USC § 924(c)(5).

¹⁴² Identity Theft Penalty Enhancement Act § 2, Pub L No 108-275, 118 Stat 831, 831-32 (2004), codified at 18 USC § 1028A.

¹⁴³ 18 USC § 1028A(b)(2).

take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section.¹⁴⁴

The inclusion of this additional clause demonstrates that Congress did not believe that the first clause would effectuate this purpose, because if it did, the second clause would be redundant, violating an accepted canon of statutory construction.¹⁴⁵ To be clear, in enacting § 1028A, Congress did not understand a prohibition on “concurrent” sentencing to preclude judges from considering the mandatory minimum when sentencing for the underlying conduct. Notably, there is no provision in § 924(c) that corresponds to the above-quoted explicit limit on judicial discretion. Section 924(c) contains only a prohibition on “concurrent” sentencing that is almost identical to the one in § 1028A(b)(2). Courts should employ the canon of construction that Congress uses the same term consistently in different statutes.¹⁴⁶ Congress’s ability to be clear about the issue in § 1028A therefore indicates that Congress did not mean to limit a sentencing court’s discretion with respect to underlying convictions under § 924(c).

The legislative history of § 1028A reveals that it was meant to affect judicial sentencing discretion, whereas the legislative history of § 924(c) does not reference how the proposed legislation could affect underlying sentencing. The Congressional Record and House Report indicate that when passing § 1028A, Congress meant to prevent judges from considering the existence of a subsequent mandatory minimum when sentencing for the underlying conduct.¹⁴⁷ The legislative history demonstrates that, in large part, while both § 924(c) and § 1028A were reactions to new criminal threats, § 1028A responded to the growing

¹⁴⁴ 18 USC § 1028A(b)(3).

¹⁴⁵ See *United States v Alaska*, 521 US 1 (1997) (“The Court will avoid an interpretation of a statute that renders some words altogether redundant.”) (quotation marks omitted); *Circuit City Stores, Inc v Adams*, 532 US 105, 117–19 (2001) (employing a similar form of statutory interpretation in the context of Commerce Clause jurisdiction).

¹⁴⁶ See *Hawaiian Airlines v Norris*, 512 US 246, 254 (1994) (interpreting the word “grievances” by looking to past congressional usage); *Pierce v Underwood*, 487 US 552, 564 (1988) (interpreting the words “substantially justified” in 28 USC § 2412(d)(1)(A) by explaining how those words are used in the Federal Rules of Civil Procedure).

¹⁴⁷ Compare 114 Cong Rec at H 22231–48 (cited in note 22); text accompanying notes 19–41 with Identity Theft Penalty Enhancement Act: Report Together with Dissenting Views, HR Rep No 108-528, 108th Cong, 2d Sess 9 (2004), reprinted in 2004 USCCAN 779, 786 (“Additionally, [§ 1028(c)] contains several provisions to ensure the intent of this legislation is carried out. It mandates that the enhancement be imposed as a consecutive sentence and expressly prohibits a judge from ordering the sentence to run concurrently with that of the underlying offense.”); 150 Cong Rec H 4811 (daily ed June 23, 2004) (Rep Schiff) (arguing that, under the predecessor to § 1028A, judges sentenced identity theft concurrently with underlying conduct, making two convictions “merge[] for sentencing purposes”); id (Rep Sensenbrenner) (“[O]pponents of mandatory minimums would have a much more compelling case if they could assure Congress that the judges are faithfully following the sentencing guidelines.”).

threat of identity theft by identifying as the problem existing lax sentencing practices for the underlying conduct. Conversely, congressional debate on § 924(c) overwhelmingly focused on creating a separate deterrent for the use of handguns in the course of other felonies.¹⁴⁸ The differences in the statutes' language reflect their differing purposes.

Although § 1028A helps illuminate the correct interpretation of § 924(c), no court has used § 1028A to construe the language of § 924(c) in sentencing for conduct underlying the firearms charge. The First Circuit compared the two statutes when determining the reasonableness of a sentence underlying a § 1028A conviction in *Vidal-Reyes*.¹⁴⁹ The court determined that although the district court does not have authority to consider the existence of the mandatory § 1028A sentence, it is only because Congress was clear on this point in the statutory language.¹⁵⁰ In dicta, the court reasoned that in absence of this clarity, for instance in § 924(c) cases, sentencing discretion to consider the existence of a subsequent mandatory sentence would be preserved.¹⁵¹ The Seventh and Ninth Circuits have cited *Vidal-Reyes* in discussing sentencing discretion for convictions underlying § 924(c), although neither has engaged in any comparative analysis of the statutes.¹⁵²

B. The Directives of § 3553(a) and § 3661

Absent evidence of contrary congressional intent, the § 3553(a) factors remain the measure of reasonableness. A sentencing court should be able to consider the totality of a defendant's sentence under § 3553(a).¹⁵³ Under §§ 3553(a)(2), 3553(a)(6), and 3661, the defendant's total sentence may often be a relevant sentencing consideration. In other words, § 924(c) provides a floor over which a judge must apply the affirmative directives of § 3553(a).

¹⁴⁸ See 114 Cong Rec at H 22231–48 (cited in note 22).

¹⁴⁹ See notes 47–52 and accompanying text.

¹⁵⁰ See *Vidal-Reyes*, 562 F3d at 52.

¹⁵¹ *Id.* (“[Section] 924(c) does not contain any provision that parallels § 1028A(b)(3), and thus no plain text bearing directly on the question of when the mandatory term can be taken into account by sentencing courts.”).

¹⁵² See *United States v Calabrese*, 572 F3d 362, 369 (7th Cir 2009); *United States v Ressam*, 593 F3d 1095, 1124 n 8 (9th Cir 2010).

¹⁵³ Allowing judges discretion to consider the mandatory minimum when sentencing for the underlying offense could create problems if the mandatory minimum sentence is overturned. In these cases, the only remaining sentence would be for the underlying offense sentence, which the judge intentionally lowered because of the (now missing) mandatory minimum sentence. These problems are likely to be minimal, however, because sentences are rarely overturned. More than 85 percent of all weapons-offense charges result in a guilty plea, and less than 8 percent go to trial. Bureau of Justice Statistics, *Federal Justice Statistics, 2006* table 4.2, online at <http://bjs.ojp.usdoj.gov/content/pub/html/fjst/2006/fjs06st.cfm> (visited May 11, 2010). Furthermore, on appeal in 2006, approximately 87 percent of firearms convictions were affirmed. *Id.* at table 6.2.

There are several ways in which § 3553(a) factors may support a lower sentence for a conviction underlying a § 924(c) offense. Most importantly, the parsimony provision of § 3553(a)(2) requires that sentencing courts not issue a sentence “greater than necessary” to serve the statutorily enumerated purposes of punishment. If a defendant is facing a lengthy mandatory consecutive sentence, he may not need as long a sentence for the underlying conduct in order to “afford adequate deterrence to criminal conduct,”¹⁵⁴ “protect the public from [his] further crimes,”¹⁵⁵ or “provide him with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”¹⁵⁶

Second, § 3553(a)(6) requires sentencing judges to consider the need to avoid “unwarranted disparities among defendants with similar records who have been found guilty of similar conduct.” This may support a judge’s ability to account for a prosecutor’s decision to charge a defendant under § 924(c) rather than seeking a Guidelines enhancement for the use of a firearm where this decision results in a sentence longer than would be recommended under the Guidelines. Judge Gottschall uses this very argument—that prosecutorial discretion tends to overshadow judicial discretion in § 924(c) cases.¹⁵⁷ To effectuate § 3553(a)(6), judges should be able to counteract the disparities caused by prosecutorial discretion through more lenient sentences for underlying offenses.

Finally, § 3661, although not as directly relevant as § 3553, also provides direction to district courts in their consideration of the totality of a defendant’s sentence. The statute provides that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”¹⁵⁸ Allowing sentencing courts to consider the totality of the defendant’s conduct adds more weight to § 3553(a)(6)’s mandate that similarly situated defendants receive similar sentences.

This Comment does not argue that § 3553(a) and § 3661 always compel courts to lower sentences for underlying conduct because of the presence of a consecutive mandatory minimum. Rather, it argues

¹⁵⁴ 18 USC § 3553(a)(2)(B).

¹⁵⁵ 18 USC § 3553(a)(2)(C).

¹⁵⁶ 18 USC § 3553(a)(2)(D).

¹⁵⁷ See *Roberson II*, 573 F Supp 2d at 1045. But see *Williams v Illinois*, 399 US 235, 243 (1970) (“Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear.”); *United States v Duncan*, 479 F3d 924, 928 (7th Cir 2007).

¹⁵⁸ 18 USC § 3661.

that district courts must always consider whether these factors compel a different sentence. It is conceivable that, in the extraordinary case, the § 3553(a) factors may compel a judge to impose as low a sentence as permissible, just as the factors may sometimes compel a judge to impose a sentence for the underlying conviction that is higher than that suggested by the Guidelines. The natural lower limit on a judge's discretion is the mandatory minimum itself.

C. The Language of § 924(c)

The language of the statute, even when interpreted separately from § 1028A, suggests that existing levels of discretion for underlying conduct remain intact. The statute discusses the presence of underlying sentences in two places.¹⁵⁹ First, in describing the mandatory minimum as being “in addition to the punishment provided for such crime of violence or drug trafficking crime,”¹⁶⁰ the statute's language implies that the punishment for underlying conduct is statutorily provided. Second, the statute also states that “no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.”¹⁶¹ Thus, in mandating that the minimum not run concurrently, the statute precludes a defendant from being able to serve time for two convictions at once. Importantly, this language does not directly speak to the length of the sentence for the underlying felony, nor does it directly speak to judicial discretion in the determination of that length. Rather, the statute only requires that whatever sentence a judge determines is appropriate for the underlying felony will end before the defendant begins serving his sentence for the use of a weapon. The statute creates a completely separate crime and sentence.¹⁶² It is fully consistent with

¹⁵⁹ The Second Circuit has read the opening clause of the section to imply that the § 924 mandatory minimums are triggered only where no other statute (potentially including any statute outlawing the underlying conduct) contains a greater mandatory minimum. See *United States v Whitley*, 529 F3d 150, 153–58 (2d Cir 2008). This is not a widespread reading, but for now it is useful to note that this is a third section of the statute that could, in theory, interact with underlying conduct. Even if such a reading is taken seriously, however, the presence of any underlying conduct conviction bearing a greater mandatory minimum changes the sentence for the § 924 conduct and not the other way around. The language of this clause cannot be read to affect sentencing discretion for underlying conduct. See note 7.

¹⁶⁰ 18 USC § 924(c)(1)(A).

¹⁶¹ 18 USC § 924(c)(1)(D)(ii).

¹⁶² See *Simpson v United States*, 435 US 6, 10 (1977) (“[Section] 924(c) creates an offense distinct from the underlying federal felony.”).

the language of the statute to interpret it as primarily concerned that the defendant is indeed punished separately for the use of the weapon.

One potential justification for curbing judicial discretion is that another source of law indicates that judges do not have the discretion to account for the existence of a mandatory minimum when sentencing for the underlying conduct—namely USSG § 5G1.2(a).¹⁶³ Because the Guidelines are now only advisory, and sentencing courts are free to disagree with the Guidelines,¹⁶⁴ the Guidelines themselves cannot be taken to preclude a sentencing court from considering the existence of the mandatory minimums. Several circuits, however, have argued that the shift to an advisory Guidelines regime does not affect cases that involve mandatory minimums.¹⁶⁵ Several of the recent Supreme Court cases do note that advisory sentencing is inapplicable to departures from congressionally mandated minimums.¹⁶⁶ This raises the question whether the mandatory minimum statute is applicable to the judge's sentencing discretion when determining the appropriate sentence for the underlying conviction. If *Booker* sentencing discretion applies to underlying convictions that ordinarily fall under the Guidelines, then an additional charge under § 924(c) should not negate *Booker* sentencing discretion for underlying conduct.

D. The Majority's Misconception

The Seventh Circuit in *Roberson* argued that § 924(c) implies that judges should not have discretion to consider the totality of the defendant's sentence. In order for the statute to be interpreted as implying this limitation, such discretion would have to be incompatible with the statute's clear purpose. The statute, however, could easily be read to respond to weapons-related sentencing solely by creating a separate offense and separate mandatory sentence from which the district court is not allowed to depart. Section 924(c) should not be taken to imply that Congress intended to increase the penalties for the underlying conduct. Congress only intended to punish the use of the weapon, which cannot be considered part of the underlying conduct. As

¹⁶³ See *United States v Hatcher*, 501 F3d 931, 933 (8th Cir 2007) (referring to § 5G1.2(a) as “unequivocal” that the mandatory minimum may not be taken into account). The Ninth Circuit adopted very similar reasoning in the pre-*Booker* case *United States v Working*, 287 F3d 801 (9th Cir 2002), but it has indicated that it may reconsider the issue in light of the intervening Supreme Court precedent. See note 83.

¹⁶⁴ See *Kimbrough*, 552 US at 91, 101–02.

¹⁶⁵ See, for example, *Roberson*, 474 F3d at 437.

¹⁶⁶ See, for example, *Kimbrough*, 552 US at 104–05.

discussed above, such a reading is completely consistent with the text of the statute as well of its legislative history.¹⁶⁷

Furthermore, reading § 924(c) to restrict sentencing court discretion to account for the existence of the mandatory minimum will often conflict with the § 3553(a) factors. The Seventh Circuit acknowledges a conflict between § 924(c) and the § 3553(a) factors, and resolves the conflict by arguing that § 3553(a) is a “very general statute” whereas the mandatory minimums are “specifically prescribed by Congress.”¹⁶⁸ Section 924(c) is only more specific if Congress intended § 924(c) to apply to judicial sentencing discretion for the underlying conduct. If Congress prescribed § 924(c) to serve as a floor, then Congress still requires judges to consider the § 3553(a) factors when they sentence defendants under the Guidelines. Section 924(c) is only “specifically” applicable to judicial discretion with respect to sentencing for underlying conduct if the statute purports to have anything to do with discretion for underlying conduct sentences. Neither the language of the statute nor the legislative history suggests that the statute addresses sentencing discretion for underlying conduct. Rather, § 1028A strongly implies that § 924(c) was not meant to address judicial discretion for underlying conduct.

Judge Posner argues that § 924(c) must control judicial discretion for underlying conduct, because if judges were allowed to consider mandatory sentences, some judges may be inclined to reduce their discretionary sentences. A reduction in discretionary sentences would result in a “carve out” of the mandatory sentence, because judges would not give such a low discretionary sentence if it were not for the high mandatory sentence. If this were to happen, then defendants would have shorter overall sentences than they would have if judges could not reduce their discretionary sentences. Therefore, the discretionary sentences would be lower because of a mandatory minimum. But there is nothing wrong with this outcome, so long as Congress gave judges the discretion to consider such factors under § 3553(a) and § 3661 and Congress never revoked that discretion. Section 924(c) is not about maximizing a defendant’s sentence whenever possible; the statute punishes the defendant’s use of a firearm in a felony with a certain number of years in addition to whatever *discretionary* sentence the judge imposes for the underlying conduct. If Congress thought that the statute should punish the defendant’s use of a weapon in addition to the discretionary sentence the judge would have given if the judge did not know about

¹⁶⁷ See Parts III.B and III.C.

¹⁶⁸ *Roberson*, 474 F3d at 436.

the § 924(c) sentence, then Congress should have said so. Congress articulated this preference in § 1028A but did not do so in § 924(c).

CONCLUSION

Nothing in § 924(c) or in its legislative history indicates that Congress intended to reduce judicial sentencing discretion for conduct underlying the statute. Furthermore, when the statute is read in light of § 1028A, it is clear that § 924(c) is not meant to limit judicial discretion. Although the Guidelines indicate that courts should not consider the existence of a mandatory minimum,¹⁶⁹ *Booker* rendered the Guidelines merely advisory.¹⁷⁰ Moreover, after *Kimbrough*, a court may depart from the Guidelines for purely policy-based reasons.¹⁷¹ Sentencing courts should, therefore, be able to exercise their sentencing discretion to ensure that defendants' sentences are not greater than necessary to achieve § 3553's purposes. So long as the sentencing court's reasons for considering the totality of the defendant's sentence are grounded in § 3553(a)'s factors, the court's reasons are permissible. It is incorrect to say that a sentencing court must ignore a consecutive mandatory minimum when the presence of that minimum affects how the § 3553(a) factors apply to the underlying felony conviction. To say that a sentencing court, when determining the minimum punishment necessary, must ignore that a defendant will consecutively serve five, thirty, or fifty-five years is absurd.

¹⁶⁹ USSG § 5G1.2(a).

¹⁷⁰ *Booker*, 543 US at 245.

¹⁷¹ *Kimbrough*, 552 US at 91.