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. Rehnquist

INTRODUCTION

United States v Booker² 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

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 minimum 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.” 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.”

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

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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. 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.

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

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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. 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. 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.” 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.”

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; if he brandished it, he would receive seven. Mr. Robber would receive a mandatory minimum of ten years if he discharged the firearm. 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

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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).
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." 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.

The Act as proposed, and as passed, had no consecutiveness provision, although such an amendment was proposed on the House floor. The provision mandating that sentences be served consecutively was adopted by the House but was removed from the bill in conference. Richard Poff, a Republican representing Virginia, offered the amendment as an alternative to one that contained harsher minimum sentences. There was little discussion of how the Act would relate to existing sentencing structures. The Act was finally amended to mandate consecutive sentencing as part of the Omnibus Crime Control Act of 1970. 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. 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.
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 de-
termining 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.” Importantly, Repre-
sentative 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 Con-
stitution.” 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. When the bill was later amended,
the Senate Judiciary Committee report quoted Senator Mike Mans-
field 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—one the criminal and the
lawless; on those who roam the streets, gun in hand, ready and willing
to perpetrate their acts of violence.” Insofar as the legislative history
speaks to the relationship between the use of the gun and the underly-
ing 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 bootstrap to the weapons violation
to preexisting federal felonies was the only way Congress could ac-
complish its goal.

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

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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
mandatory minimum and so that these sentences also would not run concurrently with any sentence imposed for the underlying conduct. In 1984, Congress again increased the mandatory minimum to five years for the first instance of offending conduct. The Firearms Owners' Protection Act of 1986 further increased mandatory minimums for certain kinds of especially dangerous firearms and amended the statute so that it also applied to drug trafficking offenses. Congress continued to increase mandatory minimums for subsequent offenses until 1998, when it increased the minimum to its current length of twenty-five years. Some judges have cited the many increases in the mandatory minimums as suggestive of their unreasonableness.

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. 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

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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.


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”).


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," and in United States v Vidal-Reyes, 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. 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." 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. The court ultimately found that the § 1028A mandatory minimum was not meant to curb judicial discretion when sentencing for non-underlying offenses. 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. 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. 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.


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. 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. 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. 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

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.\(^7\)

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.\(^8\) 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\(^9\) 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 1984\(^6\) created the United States Sentencing Commission for the purpose of "establish[ing] sentencing policies and practices" by developing guideline sentences for federal criminal conduct.\(^4\) Part of the Act’s purpose was to alleviate perceived disparities in federal criminal sentences due to the great degree of judicial discretion.\(^6\) 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.\(^5\) 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).


\(^{61}\) 28 USC § 991(b)(1).

\(^{62}\) 28 USC § 994(n).

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

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. 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.”

In Booker, the Supreme Court held that the mandatory nature of the Guidelines violated the Sixth Amendment. 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. Now, judges are required to consider the § 3553(a) factors in every case to determine whether the Guidelines sentence is appropriate.

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. The § 3553(a) factors remain the measure of a sentence’s reasonableness. 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.

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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.


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.


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. 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. Kimbrough left the door open for policy-based departures from the Guidelines in other circumstances, although such departures need to be justified.

The Supreme Court expanded policy-based departures in Spears v United States and Gall v United States. In Spears, the Court held that a judge may substitute a different crack-to-powder ratio instead of using the Guidelines' ratio. 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. 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. 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.

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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).
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.8 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.\textsuperscript{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.”

In United States v Roberson,\textsuperscript{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.”\textsuperscript{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.\textsuperscript{88} Judge Richard Posner characterized this reasoning as essentially a disagreement with Congress.\textsuperscript{89} Furthermore, the court held that Booker “did not authorize district judges to ignore statutory sentencing ranges.”\textsuperscript{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

\textsuperscript{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).

\textsuperscript{85} See Part III.A.

\textsuperscript{86} 474 F3d 432 (7th Cir 2007).

\textsuperscript{87} Id at 434.

\textsuperscript{88} Id.

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

\textsuperscript{90} Roberson, 474 F3d at 434.
subject only to the Guidelines' firearm enhancement." Judge Posner stated that "[t]he judiciary has no authority to second-guess the government's choice of which crimes to charge." 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." 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. He reasoned, however, that the specific nature of § 924(c) trumps the general instructions set forth in § 3553(a). Notably, he assumed that § 924(c) governs sentencing for the underlying conviction, which depends entirely on one's interpretation of the statute.

In United States v Calabrese, 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." 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 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. 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.

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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. 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." 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, although these circuit opinions did not address the merits of the district court arguments on the issue. Judge Karen Nelson Moore of the Sixth Circuit also presented a compelling argument for considering the totality of the defendant's sentence in her

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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; Ciszkowski, 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.\textsuperscript{106} Several of these opinions are openly hostile to the severity of § 924(c) consecutive mandatory minimums.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{112} Key to this argument is that a defendant’s

\textsuperscript{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.

\textsuperscript{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, “[H] 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.

\textsuperscript{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”).

\textsuperscript{109} Id at 587.

\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{114}

In \textit{United States v Ezell},\textsuperscript{115} Eastern District of Pennsylvania Judge Jan Dubois addressed the defendant’s challenge to a 132 year mandatory minimum sentence.\textsuperscript{116} “Reluctantly” finding that it must impose these consecutive sentences,\textsuperscript{117} the court gave a sentence of only one day for the underlying offenses, a string of bank robberies.\textsuperscript{118} Although\textit{ 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.”\textsuperscript{119} The Third Circuit opinion in\textit{ Ezell} did not explicitly acknowledge the district court’s consideration of the mandatory minimum in sentencing for the underlying conduct.\textsuperscript{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.\textsuperscript{121}

2. The Ciszkowski approach.

In \textit{United States v Ciszkowski},\textsuperscript{122} the Middle District of Florida held that “the pertinent question for the district judge, recognizing the

\begin{itemize}
  \item the parsimony provision “would require the district court to sentence the defendant to that number of years plus seven”) (emphasis added).
  \item Id.\textsuperscript{113}
  \item 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).
  \item Id 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 \textit{Booker} challenge to the mandatory minimum, but this argument was futile because \textit{Booker} does not apply to statutorily mandated minimums. Id at 671.
  \item See note 105.
  \item 430 F Supp 2d 1283 (MD Fla 2006), affd, 492 F3d 1264 (11th Cir 2007).
\end{itemize}
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).” 125 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 “ostensibly taking into consideration the 30-year mandatory minimum to be imposed on the § 924(c) count.” 131

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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.
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. 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.

The district court in United States v Roberson 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. 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.

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." 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. 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."  

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.

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

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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:

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

\(^{141}\) 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).


\(^{143}\) 18 USC § 1028A(b)(2).
take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{144} 18 USC § 1028A(b)(3).


\textsuperscript{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. 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. 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. 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. 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.

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). 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).

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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/fjsst/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

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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. First, in describing the mandatory minimum as being "in addition to the punishment provided for such crime of violence or drug trafficking crime," 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." 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. 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). Because the Guidelines are now only advisory, and sentencing courts are free to disagree with the Guidelines, 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. Several of the recent Supreme Court cases do note that advisory sentencing is inapplicable to departures from congressionally mandated minimums. 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

\[\text{163} \text{ See United States v. Hatcher, 501 F.3d 931, 933 (8th Cir. 2007) (referring to § 5G1.2(a) as “unequivocal” that the mandatory minimum may not be taken into account). The Ninth Circuit adopted very similar reasoning in the pre-Booker case United States v. Working, 287 F.3d 801 (9th Cir. 2002), but it has indicated that it may reconsider the issue in light of the intervening Supreme Court precedent. See note 83.}\]

\[\text{164} \text{ See Kimbrough, 552 US at 91, 101–02.}\]

\[\text{165} \text{ See, for example, Roberson, 474 F.3d at 437.}\]

\[\text{166} \text{ See, for example, Kimbrough, 552 US at 104–05.}\]
discussed above, such a reading is completely consistent with the text of the statute as well of its legislative history.\footnote{167}{See Parts III.B and III.C.}

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."\footnote{168}{Roberson, 474 F3d at 436.}

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
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.