

**Applying the Presumption of Mens Rea to a Sentencing Factor:
Does 18 U.S.C. § 924(c)(1)(A)(iii) Penalize the Accidental
Discharge of a Firearm?**

“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory ‘But I didn’t mean to,’ and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.”¹

I. INTRODUCTION

It is well settled that the presumption of mens rea in criminal law applies to federal criminal statutes.² It remains debatable, however, whether this presumption applies to sentencing provisions contained within federal criminal statutes.³ Circuit courts have confronted this issue when deciding whether trial courts should impose the sentencing enhancement for discharging a firearm contained in 18 U.S.C. § 924(c)(1)(A) on a defendant who has accidentally discharged a firearm.⁴

1. *Morissette v. United States*, 342 U.S. 246, 250-51 (1952) (footnotes omitted) (examining history of presumption of mens rea in criminal law).

2. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70-72 (1994) (applying presumption of mens rea to Protection of Children Against Sexual Exploitation Act); *Staples v. United States*, 511 U.S. 600, 618 (1994) (holding presumption of mens rea governs interpretation of National Firearms Act criminalizing possession of unregistered machinegun); *Liparota v. United States*, 471 U.S. 419, 425-26 (1985) (applying presumption of mens rea to federal statute prohibiting certain actions involving food stamps); *Morissette*, 342 U.S. at 250-51 (applying common law presumption of mens rea to federal embezzlement statute); see also *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437-38 (1978) (applying presumption against strict liability crimes to Sherman Act offence). In *Gypsum*, the Court noted that “far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.” *Gypsum*, 438 U.S. at 438. Mens rea literally means “guilty mind,” but the term has taken on several different meanings in criminal law. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 115-17 (3d ed. 2001) (explaining ambiguity and variant meanings of term “mens rea”). In this Note, mens rea refers to a morally blameworthy state of mind. See *id.* at 116-117 (defining broad definition of mens rea as culpable mental state).

3. See *infra* notes 152-154 and accompanying text (examining whether presumption of mens rea applies to sentencing factors).

4. Compare *United States v. Dean*, No. 06-14918, 2008 WL 441602, at *4 (11th Cir. Feb. 20, 2008) (concluding statute does not have separate mens rea requirement for “discharge” enhancement), and *United States v. Nava-Sotelo*, 354 F.3d 1202, 1204 (10th Cir. 2003) (concluding statute imposes penalty for

Passed in response to *Bailey v. United States*,⁵ the current version of § 924(c) is the result of a 1998 amendment.⁶ The amendment increased the scope of the statute by prohibiting possession of a firearm, whereas the prior version only prohibited the use and carrying of a firearm.⁷ Congress went even further, adding additional and harsher mandatory minimum sentences for brandishing or discharging a firearm.⁸ Section 924(c) imposes substantial penalties and is a powerful tool for federal prosecutors.⁹ This new statutory language broadens the statute's application and has allowed federal prosecutors to seek a ten-year mandatory sentence for the unintended, accidental discharge of a firearm.¹⁰

involuntary discharge of firearm), *with* *United States v. Brown*, 449 F.3d 154, 156 (D.C. Cir.) (concluding statute does not punish involuntary discharge of firearm), *modified*, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing). Section 924(c)(1)(A) provides in relevant part:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (2006). The Federal Sentencing Guidelines, promulgated in 1987, also contain sentencing enhancements for offenders who commit crimes involving firearms, but these provisions are different than those provided for by statute, and when they conflict, the courts apply the statutory sentences rather than the Guidelines. *See* Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 42 (2000) (explaining difference between enhancements in Federal Sentencing Guidelines and statutory sentence enhancements).

5. 516 U.S. 137 (1995), *superseded by statute*, Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998) (codified at 18 U.S.C. § 924(c)(1)(A) (2006)).

6. *See* Act to Throttle Criminal Use of Guns § 1(a)(1) (adding new provisions to statute in response to *Bailey*). In *Bailey*, the Supreme Court limited the scope of the statute by narrowly defining the use of a firearm to "active employment." *See Bailey*, 516 U.S. at 148 (stressing if Congress intended broad definition of "use," it would have instead used term "possession"). The Court characterized "active employment" to include "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm." *Id.* (distinguishing active use from possession).

7. *See* Angela LaBuda Collins, Note, *The Latest Amendment to 18 U.S.C § 924(c): Congressional Reaction to the Supreme Court's Interpretation of the Statute*, 48 CATH. U. L. REV. 1319, 1323-24 (1999) (explaining congressional reaction to *Bailey* resulted in extending reach of statute).

8. *See* Act to Throttle Criminal Use of Guns § 1(a)(1) (adding new provisions to statute).

9. *See* Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1666-67 (2002) (noting harsh penalties motivate prosecutors to charge § 924(c) violations). For example, the statute applies even where the underlying crime already provides an enhancement for carrying a firearm. *See* Tyler B. Robinson, Note, *A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under Section 924(c)*, 96 MICH. L. REV. 783, 783 (1997) (examining application of statute).

10. *See* Appellant's Opening Brief at 8, *United States v. Nava-Sotelo*, 354 F.3d 1202 (10th Cir. 2003) (No. 02-2338), 2003 WL 23411756, at *8 (arguing ten-year sentence applies even if defendant did not

The application of this statute subjects criminal defendants to inconsistent prosecution and stiff consecutive sentences that are ineligible for parole.¹¹

Opponents of the legislation correctly predicted that the new mandatory minimum penalties in § 924(c) would have ludicrous consequences.¹² The House Committee on the Judiciary recently considered the statute's unfavorable consequences and has considered revisiting the use of mandatory minimum sentences such as § 924(c).¹³ The harshness of this statute is demonstrated by the Supreme Court's interpretation in *Harris v. United States*,¹⁴ where the Court held that the brandish and discharge provisions are sentencing factors rather than elements of the crime.¹⁵ As a result, prosecutors do not have to formally charge defendants with discharging a firearm, and a

personally discharge firearm). Seeking to broaden the scope of the statute, federal prosecutors aggressively apply § 924(c) to a wide range of factual scenarios. See Beale, *supra* note 9, at 1665-66 (exposing government's efforts to expand application of statute by broadly interpreting statutory terms). For example, prosecutors charged a paraplegic confined to a wheelchair with "use" of a firearm that was hidden in a crawl space under his house. See *id.* at 1671-72 (citing *United States v. Torres-Medina*, 935 F.2d 1047, 1048 (9th Cir. 1991)).

11. See 18 U.S.C. § 924(c)(1)(D) (2006) (prohibiting courts from placing defendants on probation or allowing imprisonment to run consecutively with other terms); Note, *Mens Rea in Federal Criminal Law*, 111 HARV. L. REV. 2402, 2417-18 (1998) (noting substantial discretion in prosecuting violations of federal criminal laws); see also Beale, *supra* note 9, at 1679-80 (criticizing unfair use of § 924(c) as prosecutorial plea bargaining chip). Compare Appellant's Opening Brief at 8, *United States v. Nava-Sotelo*, 354 F.3d 1202 (10th Cir. 2003) (No. 02-2338), 2003 WL 23411756, at *8 (arguing ten-year sentence applies even if defendant did not personally discharge firearm), with *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir.) (noting government conceded ten-year sentence would not apply if officer rather than defendant discharged firearm), *modified*, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing). The use of § 924(c) has caused racial disparity in the application of sentences and an increase in the risk of convictions of innocent defendants. See Beale, *supra* note 9, at 1679.

12. See 144 CONG. REC. H10329-01 (daily ed. Oct. 9, 1998) (statement of Rep. Scott) (arguing sentencing out of proportion compared to sentences for other crimes). Representative Robert C. Scott observed that someone convicted of possessing five grams of crack cocaine and in possession of a gun will receive ten years in prison, whereas the sentence for voluntary manslaughter is five years, and for rape, four years. See *id.* In a recent House hearing on mandatory minimum sentencing, Judge Paul G. Cassell exposed several examples of the harsh effects of § 924(c). See *Hearing on "Mandatory Minimum Sentencing Laws—The Issues" Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter *Hearing on Mandatory Minimum Sentencing*], available at <http://judiciary.house.gov/oversight.aspx?ID=343> (statement of Judge Paul G. Cassell); see also *House Hearing Looks at Mandatory Minimum Sentencing Issues*, 39 THE THIRD BRANCH, July, 2007, <http://www.uscourts.gov/ttb/2007-07/househearing/index.html>. Judge Cassell spoke out against the statute's mandatory effect requiring him to sentence a young first-time offender to life and noted the "irrational" penalties as compared to crimes involving more serious offenses. See *Hearing on Mandatory Minimum Sentencing, supra* (statement of Judge Paul G. Cassell).

13. See generally *Hearing on Mandatory Minimum Sentencing, supra* note 12 (examining negative aspects of mandatory minimum sentencing in light of border agent sentencing). The committee's inquiry into mandatory minimum sentencing was motivated in part by an incident involving a federal prosecutor who charged a Border Control Agent under § 924(c) for firing at a fleeing drug-smuggler in the course of his duties. See 153 CONG. REC. H7053-02 (daily ed. June 25, 2007) (statement of Rep. Jones) (discussing improper prosecution of border agents under § 924(c)(1)(A)).

14. 536 U.S. 545 (2002).

15. See *id.* at 558 (interpreting statutory language as sentencing factors rather than offense elements).

judge, rather than a jury, decides whether a defendant has violated the statutory provision by a preponderance of the evidence.¹⁶

Federal courts differ in their interpretations of the provisions contained in § 924(c)(1)(A).¹⁷ Specifically, courts disagree about whether a defendant is culpable under the statute for the unintended discharge of a firearm or, stated differently, whether there is a mens rea requirement implicit in the discharge provision of § 924(c)(1)(A)(iii).¹⁸ To examine this issue, this Note will review four circuit court cases demonstrating two conflicting approaches to deciding whether the ten-year sentence applies to the accidental discharge of a firearm.¹⁹ The courts have focused on the language of the statute and the provision's status as a sentencing factor without examining legislative history.²⁰ As the answer turns on congressional intent, this Note will provide a detailed examination of the statute's legislative history and the 1998 amendment adding the discharge provision.²¹ It will then discuss how the Supreme Court has interpreted the discharge provision and used rules of statutory construction and the rule of lenity in relation to issues of mens rea.²² This Note will then analyze the conflicting interpretations of § 924(c)(1)(A)(iii) and suggest which approach is most appropriate in light of the legislative history and rules of construction.²³ Lastly, this Note will conclude that imposing a mens rea requirement in sentencing factors such as § 924(c)(1)(A)(iii) is consistent with congressional intent and traditional notions of criminal law and, together with the rule of lenity, may be a way to combat the harsh effects of mandatory

16. *See id.* (stating judicial fact-finding in sentencing does not implicate Fifth or Sixth Amendments); *see also* Julie L. Hendrix, *Harris v. United States: The Supreme Court's Latest Avoidance of Providing Constitutional Protection to Sentencing Factors*, 93 J. CRIM. L. & CRIMINOLOGY 947, 961 (2003) (reviewing Court's reasoning in *Harris*); *infra* note 62 (discussing why Court dismissed constitutional challenge to provisions as sentencing factors).

17. *Compare* United States v. Dean, No. 06-14918, 2008 WL 441602, at *4 (11th Cir. Feb. 20, 2008) (affirming ten-year sentencing enhancement for accidental discharge because enhancement does not require separate proof of intent), *and* United States v. Nava-Sotelo, 354 F.3d 1202, 1206 (10th Cir. 2003) (applying sentence for accidental discharge because rationale for implying mens rea absent for sentencing factors), *with* United States v. Brown, 449 F.3d 154, 158 (D.C. Cir.) (vacating sentence for unintentional discharge due to statute's structure and presumption against strict liability), *modified*, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing), United States v. Dare, 425 F.3d 634, 641 n.3 (9th Cir. 2005) (stating "discharge" requires general intent), *and* United States v. Daija, No. 07 Cr. 609(JSR), 2008 WL 96564, at *3 n.1 (S.D.N.Y. Jan. 10, 2008) (agreeing with reasoning in *Dare* and *Brown* requiring intentional, not accidental, discharge of firearm).

18. *See supra* note 17 (pointing out nature of disagreement).

19. *See infra* Part II.C (providing summary of circuit court decisions addressing issue of whether general intent implied in § 924(c)(1)(A)(iii)).

20. *See infra* Part II.C (discussing reasoning behind circuit court decisions). None of these decisions discuss the legislative history of the statute. *See generally, e.g.,* Dean, 2008 WL 441602; Brown, 449 F.3d 154; Dare, 425 F.3d 634; Nava-Sotelo, 354 F.3d 1202.

21. *See infra* Part II.A (providing legislative history of statute).

22. *See infra* Part II.D (setting forth principles of statutory construction and mens rea presumption).

23. *See infra* Part III (concluding general intent required to apply ten-year sentence for discharge of firearm under § 924(c)).

minimum sentencing provisions.²⁴

II. HISTORY

A. Legislative History of the Statute

1. Enactment and Initial Amendments

Congress originally enacted the statute that is now § 924(c) as part of the Gun Control Act of 1968.²⁵ The Act provided for a mandatory sentence of one to ten years for carrying a firearm “unlawfully during the commission of any federal felony.”²⁶ Since its inception, however, Congress has amended the statute many times.²⁷

Congress significantly amended the statute in passing the Comprehensive Crime Control Act of 1984.²⁸ The 1984 Act created a mandatory five-year sentence “for use of a firearm during a federal crime of violence.”²⁹ Congress

24. See *infra* Part III (analyzing congressional intent, presumption of mens rea, and mandatory minimum sentencing schemes).

25. See Gun Control Act of 1968, Pub. L. No. 90-618, tit. I, § 102, 82 Stat. 1213, 1223-24 (codified at 18 U.S.C. § 924(c)(1)(A) (2006)); see also Collins, *supra* note 7, at 1319 (tracing statute to its origin). The Gun Control Act of 1968 was an amendment to the Omnibus Crime Control and Safe Streets Act of 1968, which made it a crime for a felon to receive a firearm in interstate commerce. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. VII, §§ 1201-1203, 82 Stat. 197, 236, *repealed by* Firearm Owners’ Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 449, 459 (1986) (codified in scattered sections of 18 U.S.C.); Beale, *supra* note 9, at 1668 n.116 (tracing history of § 924(c)).

26. See Gun Control Act of 1968, Pub. L. No. 90-618, tit. I, § 102, 82 Stat. 1213, 1223-24 (codified at 18 U.S.C. § 924(c)(1)(A) (2006)). The Act provided in part:

Whoever (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than ten years.

Id. By including the term “unlawfully,” the statute initially contained a loophole in that a felon who carried a gun while committing a felony, but had a firearm permit, could escape the mandatory sentence. See Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of “Use a Firearm”*, 73 WASH. U. L.Q. 1159, 1191-92 (1995).

27. See Collins, *supra* note 7, at 1319 (noting statute amended six times in ten years).

28. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 1005, 98 Stat. 2028, 2138 (codified at 18 U.S.C. § 924 (2006)) (amending § 924(c)). Among other reasons for amending the statute, Congress sought to override two Supreme Court cases that rendered the statute inapplicable where an element of the underlying crime involved gun possession. See S. REP. NO. 98-225, at 313 (1983) (criticizing Supreme Court’s decisions in *Busic v. United States*, 446 U.S. 398 (1980), and *Simpson v. United States*, 435 U.S. 6 (1978)). The Act therefore provided that those who violate § 924(c) are subject to the sentencing enhancements in addition to any sentence for the underlying crime. See *id.* (reporting need to make sentences ineligible for parole and not to run concurrently).

29. See Comprehensive Crime Control Act of 1984 § 1005. The amendment changed § 924(c) to read:

Whoever, during and in relation to any crime of violence, including a crime of violence which

removed the term “unlawfully” in order to impose culpability even if the offender carried a registered gun.³⁰ In response to concerns that removing “unlawfully” would apply the statute to lawful firearm possession unrelated to the crime committed, however, Congress added the phrase “during and in relation to.”³¹

In 1986, Congress passed the Firearms Owners’ Protection Act, which contained amendments to § 924(c).³² Here, Congress’s purpose was to clarify that in passing the Gun Control Act of 1968, it did not intend to place undue restrictions on the lawful possession and use of firearms.³³ With this goal in mind, Congress added a mens rea element to § 924(a), requiring that the offender act either knowingly or willfully, depending on the violation.³⁴ Prior to the 1998 amendment, however, the courts interpreted § 924(c) as containing a separate mens rea requirement apart from § 924(a).³⁵ Specifically, courts

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

Id.

30. See *id.*; Cunningham & Fillmore, *supra* note 26, at 1193-96 (tracing history of statute).

31. See Comprehensive Crime Control Act of 1984 § 1005 (amending § 924(c)); Michael J. Riordan, *Using A Firearm During and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 U.S.C. § 924(c)(1)*, 30 DUQ. L. REV. 39, 43-45 (1991) (analyzing congressional intent). Congress also narrowed liability by changing the underlying violation from a felony to a “crime of violence.” See Comprehensive Crime Control Act of 1984 § 1005.

32. See Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 449, 459 (1986) (codified at 18 U.S.C. § 924(c)(1)(A) (2006)) (amending § 924(c)).

33. See *Bryan v. United States*, 524 U.S. 184, 189 (1998) (noting history of firearm statute). The original statute made it a federal crime to sell firearms without a license. *Id.*

34. See Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 449, 459 (1986) (codified at 18 U.S.C. § 924(c)(1)(A) (2006)); *Bryan*, 524 U.S. at 189 (examining history of § 924(a)). As originally enacted in 1968, §§ 922(a)(1) and 924 did not provide for an express mens rea requirement, and therefore arguably imposed strict liability. See *Bryan*, 534 U.S. at 187. Congress also changed the penalty to a mandatory fixed five-year sentence for using or carrying a firearm in relation to a drug trafficking crime or crime of violence. See Firearms Owners’ Protection Act § 104(a) (amending statute); see also Collins, *supra* note 7, at 1328 (reviewing legislative history). While Congress did limit the statute by adding a mens rea requirement, it also expanded the reach of the statute and provided for a longer sentence. See Firearms Owners’ Protection Act § 104(a) (applying penalties to drug trafficking crimes and imposing thirty-year sentence for use of machine gun). Then, in 1988, Congress passed an amendment extending the definition of drug trafficking crimes to possession with intent to distribute. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4373 (codified as amended at 18 U.S.C. § 924(c)); Pragati Bhatt Patrick & Thomas Bak, *Firearms Prosecutions in the Federal Courts: Trends in the Use of 18 U.S.C. § 924(c)*, 6 BUFF. CRIM. L. REV. 1189, 1192 (2003) (summarizing history of statute).

35. See *infra* note 36 and accompanying text (describing interpretation of mens rea requirement prior to

inferred that knowledge of the facts constituting the offense—carrying or using a firearm during and in relation to a violent crime or drug trafficking crime—established the required level of culpability.³⁶

2. 1998 Amendment and Current Statutory Language

Congress enacted the current version of § 924(c) through an amendment passed in 1998.³⁷ Congress was responding to the Supreme Court's decision in *Bailey*, which narrowly construed the meaning of “use.”³⁸ In *Bailey*, the Court held that a defendant could only be convicted under § 924(c) if the defendant actively used a firearm, rather than having merely possessed one.³⁹ In response, Congress added “possession in furtherance of” a crime as an alternative to the “uses or carries” language.⁴⁰ The proponents of the amendment recognized the need for stronger penalties to deter drug traffickers from arming themselves.⁴¹

The amendment created new penalties: a seven-year minimum sentence if the gun is brandished and a ten-year minimum sentence if the gun is

1998 amendment).

36. See *United States v. Santeramo*, 45 F.3d 622, 623-24 (2d Cir. 1995) (collecting cases and joining other circuits holding knowledge required where no specific mens rea in criminal offense). In *Santeramo*, the court held that the government must prove that the defendant had knowledge of the use of the firearm to establish a violation of § 924(c). *Id.* at 624; see also *Riordan*, *supra* note 31, at 44-45 (demonstrating lack of explicit mens rea in underlying offense interpreted as general intent requirement); *Robinson*, *supra* note 9, at 785 (asserting knowledge of facts constituting offense establishes required culpability level).

37. Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998) (codified at 18 U.S.C. § 924(c)(1)(A) (2006)) (amending § 924(c)). The amended statute provides in relevant part:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Id.

38. See *Collins*, *supra* note 7, at 1349 (discussing congressional reaction to *Bailey*).

39. *Bailey v. United States*, 516 U.S. 137, 143 (1995), *superseded by statute*, Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998) (codified at 18 U.S.C. § 924(c)(1)(A) (2006)).

40. See Act to Throttle Criminal Use of Guns § 1(a)(1) (amending statute to prohibit possession of firearm in furtherance of violent or drug trafficking crime).

41. See *Gun Control Issues: Hearing on S. 191—Criminal Use of Guns Before the S. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Thomas G. Hungar), available at 1997 WL 235739. Mr. Hungar noted that because the Federal Sentencing Guidelines did not provide sufficient penalties to overcome the loophole created by *Bailey*, Congress needed the amendment to broaden the reach of the statute. *Id.*

discharged.⁴² The current language of the statute resulted from a compromise between the House and Senate.⁴³ As introduced in the House, the bill amended the statute to apply, “if the firearm is discharged during and in relation to the crime.”⁴⁴ Specifically, the House Bill sought to impose increased mandatory minimum sentences, and proposed replacing the “uses or carries” test with “increased penalties for escalating egregious conduct.”⁴⁵ The proponents specified that in the case of a conviction for brandishing or discharging, the government must show that “the firearm was used ‘during and in relation to’ the commission of the federal crime of violence or drug trafficking crime,” and not as the result of a mere accident.⁴⁶ The opponents expressed concern that the increases in penalties for brandishing and discharging were disproportionately severe in relation to more violent crimes.⁴⁷

Congress did not define the term “discharge” in the 1998 amendment.⁴⁸ Congress did, however, define the term “brandish,” in part, as “to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person.”⁴⁹ During testimony before the Senate Committee on the Judiciary, Thomas G. Hungar commended the

42. 18 U.S.C. § 924(c)(1)(A) (2006) (setting forth statutory criminal penalties). Although minimally relevant to statutory construction, it is interesting to note the origin of the idea to add additional sentences for discharging and brandishing a firearm. See Cunningham & Fillmore, *supra* note 26, at 1199 (noting minimal relevance to statutory construction of prior unsuccessful amendments of § 924(c)). In 1990, Senator Phil Gramm proposed a bill adding a twenty-year mandatory sentence for “[w]hoever . . . discharges a firearm with intent to injure another person.” See 136 CONG. REC. S9224-01 (1990) (proposing amendment to S. 1970). In 1991, Senator Joseph R. Biden submitted a bill to replace “uses or carries” with “discharges, uses, carries or otherwise possesses.” See S. 1241, 102d Cong. (1991), 137 CONG. REC. S9158. In 1995, Representative Bob Barr proposed a bill to amend the statute in a way most similar to the 1998 amendment. See H.R. 1488, 104th Cong. § 3 (1995), 141 CONG. REC. H4430 (1995). The bill proposed new provisions for a five-year sentence if a person possessed a firearm, a ten-year sentence if a person brandished a firearm, and a twenty-year sentence if a person “discharges a firearm with intent to injure another person.” See *id.*

43. See Hofer, *supra* note 4, at 63 (comparing Senate Bill 191 with House Bill 424).

44. See H.R. 424, 105th Cong. (1997) (introduced in House). The “during and in relation to” language did not appear in the version adopted by the House. See H.R. 424, 105th Cong. (1998) (passed by House).

45. See H.R. REP. NO. 105-344, at 6 (1997) (proposing graded penalties for possession, brandishing, and discharging firearm).

46. See *id.* at 11-12 (analyzing proposed statutory amendment). The proponents specified that the higher standard of “in furtherance of” should be applied to possession, and a lower standard of “during and in relation to” should be applied to brandishing and discharging the firearm. *Id.* The proponents stressed that the firearm must have some purpose or effect with respect to the underlying crime, and it must not be present as a result of an accident or coincidence. *Id.* (expressing desire to preserve meaning of “during and in relation to” as interpreted in *Smith*). But see 144 CONG. REC. H531 (1998) (statement of Rep. McCollum) (clarifying convictions for brandishing and discharging must be committed in furtherance of crime).

47. See H.R. REP. NO. 105-344, at 19 (criticizing increased penalties). The opponents observed that the result “defies logic” when a court could sentence a defendant to “five years for manslaughter, two years for serious assault, three and one-half years for assault with intent to murder, six years for rape and four years for kidnapping, but between 15 and 35 years for possessing a gun in connection with a drug offense where no one is injured.” *Id.*

48. See Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, 112 Stat. 3469 (1998) (codified at 18 U.S.C. § 924(c)(1)(A) (2006)).

49. *Id.* (defining “brandish”).

additional penalties “when the defendant actually fires the weapon in committing the underlying crime.”⁵⁰ Senator Jesse Helms’s testimony explained that the purpose behind the amendment was to send “a clear message to criminals: If you possess a gun in any way to further your violent criminal behavior, you get a minimum of five years in the slammer; and if you fire the weapon, it’s 10 years—minimum.”⁵¹

Most importantly, the 1998 amendment increased the sentence terms by including the language “term of imprisonment of *not less than*.”⁵² This changed the sentences from a fixed five-year term to a minimum five-year term with a maximum life term.⁵³ Likewise, brandishing and discharging a firearm carry maximum sentences of life in prison.⁵⁴ Congress, in effect, created new mandatory minimum sentences with maximum terms of life in prison.⁵⁵

B. The Supreme Court’s Interpretation of § 924(c)(1)(A)(iii)

Although “brandish” and “discharge” are aggravating factors contained in the statute, the Supreme Court held in *Harris* that they are sentencing factors, not elements of the crime.⁵⁶ In deciding that §§ 924(c)(1)(A)(ii) and (iii) are sentencing factors, the Court considered Congress’s intent by looking at the statute’s language.⁵⁷ While the statute does not explicitly label the subsections as sentencing factors, by setting out separate subsections for the penalty terms, the inference is that Congress intended the subsections to be sentencing factors.⁵⁸ The Court found no tradition or past congressional practice of treating “brandishing” and “discharging” as elements.⁵⁹ Rather, “brandishing”

50. *Gun Control Issues: Hearing on S. 191—Criminal Use of Guns before the S. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Thomas G. Hungar), available at 1997 WL 235739 (concluding increased penalty when defendant discharges firearm advances goal of incarcerating dangerous offenders).

51. *See Gun Control Issues: Testimony Before the S. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Sen. Jesse Helms), available at, 1997 WL 235726 (indicating bill intended to “crack down on gun-toting thugs”). Congress’s underlying policy behind § 924(c) was “to persuade the man who is tempted to commit a federal felony to leave his gun at home.” Collins, *supra* note 7, at 1325 (quoting Representative Poff’s statement sponsoring § 924(c) amendment). The mandatory minimum sentences imposed also advance Congress’s goal of limiting judicial discretion in sentencing. *See Riordan, supra* note 31, at 42 (noting judges required to impose non-advisory, non-parolable § 924(c) sentences).

52. *See Act to Throttle Criminal Use of Guns*, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998) (codified at 18 U.S.C. § 924(c)(1)(A) (2006) (emphasis added) (amending penalties).

53. *See Hofer, supra* note 4, at 64 (examining 1998 amendment to statute).

54. *See* 18 U.S.C. § 924(c)(1)(A) (2006); *see also Harris v. United States*, 536 U.S. 545, 574 (2002) (Thomas, J., dissenting) (observing plurality’s reasoning based on maximum life term of imprisonment for any § 924(c)(1)(A) violation).

55. *See supra* note 53 and accompanying text (highlighting change in sentencing).

56. *See Harris*, 536 U.S. at 556 (holding “brandishing” and “discharging” not elements of crime).

57. *See id.* at 556 (engaging in statutory interpretation to decide whether Congress intended “brandishing” as element or sentencing factor).

58. *See id.* at 552 (observing federal laws usually place elements in single sentence and sentencing factors in subsections).

59. *Id.* at 553 (contrasting with frequent congressional use of “serious bodily injury” as offense element).

and “discharging” appear several times in the Federal Sentencing Guidelines as sentencing factors.⁶⁰ Therefore, Congress likely intended that courts treat the provisions in §§ 924(c)(1)(A)(ii) and (iii) the same way they are treated elsewhere—as sentencing factors.⁶¹ As a result, the *Harris* Court held that the brandish and discharge provisions used as sentencing factors do not have to be alleged in the indictment, found beyond a reasonable doubt, or submitted to the jury.⁶²

C. Differing Interpretations of 18 U.S.C. § 924(c)(1)(A)(iii)

To date, four circuit courts have addressed whether there is a mens rea requirement for the discharge provision in § 924(c)(1)(A).⁶³ In *United States v. Nava-Sotelo*,⁶⁴ the Tenth Circuit held that culpability under the statute does not depend on whether the defendant discharged the firearm intentionally or

60. See *Harris v. United States*, 536 U.S. 545, 553-54 (2002) (listing sections of Sentencing Commission Guidelines Manual containing provisions for “brandishing” and “discharging”). The Guidelines provide that in determining specific offense characteristics, the court may consider “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.” See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A) (2006). Therefore, under the Guidelines, the enhancement only applies if the discharge of a firearm was “committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.” See *id.* § 2B3.1(b)(2) (providing sentence adjustment for discharge of firearm during robbery); *id.* § 2A2.2(b)(2) (enhancing sentence for discharge of firearm for aggravated assault). Nevertheless, courts disagree whether the defendant must have discharged the gun or whether the sentence enhancement applies when someone other than the defendant discharges the gun. Compare *United States v. Hill*, 381 F.3d 560, 563 (6th Cir. 2004) (holding enhancement not applicable where security guard shot defendant), *United States v. Gordon*, 64 F.3d 281, 284 (7th Cir. 1995) (holding enhancement not applicable where guard fired gun during struggle with defendant), and *United States v. Mendola*, 807 F. Supp. 1063, 1065-66 (S.D.N.Y. 1992) (holding enhancement not applicable where firearm discharged by guard, not by defendant or co-conspirator), with *United States v. Roberts*, 203 F.3d 867, 870 (5th Cir. 2000) (holding enhancement warranted where defendant did not fire gun, but “induced and willfully caused” deputy to fire gun), *United States v. Triplett*, 104 F.3d 1074, 1083 (8th Cir. 1997) (enhancing defendant’s sentence under guidelines when not clear whether defendant fired gun), and *United States v. Williams*, 51 F.3d 1004, 1011 (11th Cir. 1995) (holding firearm discharge fairly attributed to defendant where defendant induced third party to fire in self-defense), *abrogated by Jones v. United States*, 526 U.S. 227 (1999).

61. See *Harris*, 536 U.S. at 554 (determining congressional intent).

62. See *id.* at 558. Rather, sentencing factors are found by a judge and usually subjected to a more lenient burden of proof—a preponderance of the evidence. See Jacqueline E. Ross, *What Makes Sentencing Factors Controversial? Four Problems Obscured by One Solution*, 47 VILL. L. REV. 965, 965-66 (2002). The Court applied the constitutional principle used to distinguish elements from sentencing factors which states that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (setting forth constitutional principle governing distinction between offense elements and sentencing factors). The Court, however, recognized that Congress had the power to create these sentencing factors where the crime carried a possible life sentence and the judge could have imposed the sentence without the additional fact. See *Harris*, 536 U.S. at 556.

63. See *infra* notes 64-67 and accompanying text (discussing interpretations of 18 U.S.C. § 924(c)(1)(A)(iii) in Ninth, Tenth, Eleventh, and D.C. Circuits).

64. 354 F.3d 1202 (10th Cir. 2003).

accidentally.⁶⁵ More recently, in *United States v. Dean*,⁶⁶ the Eleventh Circuit agreed with the Tenth Circuit and concluded that defendants are subject to the ten-year mandatory minimum sentence for an accidental discharge.⁶⁷ In contrast, in *United States v. Dare*,⁶⁸ the Ninth Circuit concluded that the defendant must act with general intent in discharging the firearm.⁶⁹ Likewise, in *United States v. Brown*,⁷⁰ the D.C. Circuit agreed with the Ninth Circuit and held that for the enhanced sentence to apply, a defendant must act with general intent in discharging the firearm.⁷¹ With two circuit courts on each side of the debate, these interpretations have a substantial effect on a defendant facing a § 924(c) charge.⁷² The result means the difference between receiving a five- or seven-year sentence, as opposed to a ten-year sentence, on top of the sentence for the underlying crime.⁷³ This Part will chronologically review the aforementioned cases and trace the development of this circuit split.

1. *United States v. Nava-Sotelo*

In *Nava-Sotelo*, the Tenth Circuit considered whether a trial court must impose a mandatory ten-year consecutive sentence for the accidental discharge of a firearm.⁷⁴ Nava-Sotelo, carrying a loaded firearm, attempted to free his brother, an inmate, while prison officials transported him from a dental clinic.⁷⁵ A struggle ensued when a prison official attempted to disarm him, and the firearm discharged into the ground.⁷⁶ Nava-Sotelo's finger was on the trigger.⁷⁷ The district court found that he brandished the gun but never pointed the firearm toward the officials.⁷⁸ The district court concluded that the discharge was accidental and involuntary, imposing a seven-year, rather than a

65. *See id.* at 1204 (concluding statute imposes penalty for involuntary discharge of firearm).

66. No. 06-14918, 2008 WL 441602 (11th Cir. Feb. 20, 2008).

67. *Id.* at *1.

68. 425 F.3d 634 (9th Cir. 2005).

69. *See id.* at 641 n.3 (concluding "discharge" requires general intent).

70. 449 F.3d 154 (D.C. Cir.), *modified*, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing).

71. *See id.* at 156 (ruling general intent requirement implicit in "discharge").

72. *See supra* notes 64-67 (listing circuit court cases deciding whether § 924(c)(1)(A)(iii) penalizes accidental discharge); *supra* text accompanying note 73 (explaining effect of differing interpretations).

73. *See* 18 U.S.C. §§ 924(c)(1)(A)(i)-(iii) (2006) (setting forth enhanced sentences).

74. *United States v. Nava-Sotelo*, 354 F.3d 1202, 1203 (10th Cir. 2003) (presenting issue on appeal).

75. *See id.*

76. *See id.* (noting prison officer grabbed for gun and caused firearm to discharge).

77. *See id.* at 1203 (explaining position of defendant's hand on gun). *But see* Appellee's Answer Brief at 1-2, *United States v. Nava-Sotelo*, 354 F.3d 1202 (10th Cir. 2003) (No. 02-2338), 2003 WL 23411757 at *1-2 (stating gun fired only because officer grabbed Nava-Sotelo's hand and squeezed it).

78. *See United States v. Nava-Sotelo*, 232 F. Supp. 2d 1269, 1276-77 (D.N.M. 2002) (summarizing lower court's findings after considering conflicting testimony from officer), *rev'd*, 354 F.3d 1202 (10th Cir. 2003). The officer testified that Nava-Sotelo pointed the firearm at the victims but had made prior statements that Nava-Sotelo only carried the gun pointing downward. *See id.*

ten-year, consecutive sentence.⁷⁹ The Tenth Circuit reversed, holding that a judge must impose a ten-year sentence under § 924(c)(1)(A)(iii) even for the accidental and involuntary discharge of a firearm.⁸⁰

In determining that the ten-year mandatory minimum sentence for discharging a firearm applies to a defendant who accidentally discharges a firearm, the Tenth Circuit first examined the language of the sentencing statute.⁸¹ The court observed the lack of an express scienter provision under the statute's plain language.⁸² Nava-Sotelo argued that the court should imply a mens rea element to the discharge provision because of the common law and Supreme Court preference for a mens rea requirement in the absence of explicit congressional intent to dispose of mens rea.⁸³

In response, the court characterized the discharge provision as a mere sentencing factor that did not deserve the same treatment as an element of the offense.⁸⁴ To support this conclusion, the court looked to other circuit court cases refusing to apply mens rea to sentencing factors.⁸⁵ The court also reasoned that the rationale for implying a mens rea to an element is not present when construing sentencing factors.⁸⁶ With sentencing provisions, according to the court, there is no risk of punishing an innocent actor—there is already a “vicious will” present in committing the underlying offense.⁸⁷ Therefore, Nava-Sotelo's act of knowingly carrying the firearm during the underlying crime was sufficient to satisfy a mens rea requirement for the offense, and it alleviated the concerns of imposing strict liability for the gun's discharge.⁸⁸

79. *Id.* at 1278.

80. *See* United States v. Nava-Sotelo, 354 F.3d 1202, 1207 (10th Cir. 2003) (reversing and remanding to district court).

81. *See id.* at 1205.

82. *Id.* (pointing out statute's language does not require knowledge or intentional discharge of firearm).

83. *See id.* (acknowledging argument for implying mens rea). The Supreme Court recognizes the common law presumption that criminal offenses contain a mens rea. *See* Staples v. United States, 511 U.S. 600, 605-06 (1994) (implying knowledge to element of crime pertaining to characteristics of firearm); Liparota v. United States, 471 U.S. 419, 424 (1985) (implying knowledge to element of crime pertaining to unauthorized acquisition of food stamps).

84. *See Nava-Sotelo*, 354 F.3d at 1205-06 (concluding sentencing factors not subject to preference for implied mens rea requirement). The Supreme Court classified the brandish and discharge provisions as sentencing factors. *See* Harris v. United States, 536 U.S. 545, 566 (2002).

85. *See Nava-Sotelo*, 354 F.3d at 1206 (citing lack of mens rea in sentencing enhancements such as drug quantity and minor status); *see also* United States v. King, 345 F.3d 149, 153 (2d Cir. 2003) (concluding no awareness requirement in mandatory minimum sentencing enhancement); United States v. Gonzalez, 262 F.3d 867, 870 (9th Cir. 2001) (holding no knowledge requirement where sentencing enhancement based on use of minor in counterfeiting); United States v. Lavender, 224 F.3d 939, 941 (9th Cir. 2000) (concluding requiring proof of mens rea for sentencing enhancement in robbery would have negative effects); United States v. Schnell, 982 F.2d 216, 222 (7th Cir. 1992) (determining obliterated serial number merely a sentencing enhancement not an element of substantive offense).

86. *See* United States v. Nava-Sotelo, 354 F.3d 1202, 1207 (10th Cir. 2003) (stating reason for treating sentencing factors and elements differently).

87. *See id.* (internal quotation marks omitted) (noting lack of risk in punishing innocent actor).

88. *See id.* (presuming vicious will in carrying firearm precludes concern in imposing strict liability).

In its final reason for finding Nava-Sotelo strictly liable for the gun's discharge, the court refused to apply the rule of lenity.⁸⁹ The court recognized that the Supreme Court restricts the rule of lenity to aid in resolving ambiguity and only applies it when congressional intent is unclear.⁹⁰ The court, however, did conclude, without any detail or explanation, that the rule did not apply in this case.⁹¹

2. United States v. Dare

In *Dare*, the issue on appeal was whether imposing the ten-year sentence for discharging a firearm violates the Sixth Amendment when the sentence is imposed by judicial fact-finding by a preponderance of the evidence standard.⁹² Dare was intoxicated and had fired his rifle out the front door of his house after selling a small amount of marijuana to an informant.⁹³ The district judge reluctantly ruled that the government satisfied the standard of proof, establishing by a preponderance of the evidence that Dare discharged the firearm "in conjunction with the drug transaction," and sentenced Dare to ten years in prison.⁹⁴ Dare appealed on the issue that the court should have applied a higher standard of proof because his sentence violated the Due Process Clause and the Sixth Amendment to the United States Constitution.⁹⁵ Dare also

89. See *id.* (rejecting Nava-Sotelo's argument for applying rule of lenity). The rule of lenity provides that criminal statutes should be construed against the government if after examining the language, structure, and legislative history, its meaning remains ambiguous. See Dressler, *supra* note 2, at 47-48; see also *infra* notes 156-164 and accompanying text (defining and discussing application of rule of lenity).

90. See *Nava-Sotelo*, 354 F.3d at 1207 (discussing rule of lenity); see also *Liparota v. United States*, 471 U.S. 419, 427 (1985) (warning rule should not be used to override Congress's intent); *Callahan v. United States*, 364 U.S. 587, 596 (1961) (warning against use of rule to create ambiguity where there is none).

91. See *Nava-Sotelo*, 354 F.3d at 1207 (holding rule of lenity not applicable).

92. See *United States v. Dare*, 425 F.3d 634, 635-36 (9th Cir. 2005) (presenting issue on appeal).

93. *Id.* Dare's friend brought an undercover drug informant into a bar and approached Dare informing him that the informant wanted to purchase marijuana. *Id.* Neither Dare nor his friend was aware that the buyer was a drug informant. *Id.* Dare was "pretty well trashed" after having been drinking for several hours with co-workers. *Id.* (internal quotation marks omitted). He brought the informant and his friend to his home where he sold the informant a bag of marijuana for \$200. *Id.* After the informant declined the invitation to smoke, Dare went to the next room and brought back a loaded shotgun and said, "[I don't] want any badges coming back at me for selling drugs." *Id.* Dare handed the gun to his friend and asked if he wanted to go shoot it outside. *Id.* After his friend declined, Dare discharged the gun into the air aiming it out the front door over a woodpile. *Id.*

94. See *id.* at 638 (reporting district court ruling). The district judge, observing his lack of discretion, stated:

I find it outrageous . . . that this man, for 12 grams of marijuana, is going to spend ten years of his life in a federal prison And at the very most, I could say, well, seven years is the best deal, and that borders on outrageous. But that's what the law is You have a man . . . who is recognized as hard working, honest, reliable, who would give the shirt off his back to anybody, who has given two sons to this country to defend this country, and we're going to lock him up for ten years and that's not outrageous? I think it is. So I will be part of the outrage. Unwillingly. But I'm going to do it.

Id. at 637.

95. See *id.* (summarizing grounds for appeal).

argued the district court erroneously rejected his argument that his intoxication precluded him from having the mens rea required for brandishing or discharging the firearm.⁹⁶

On appeal, the Ninth Circuit rejected Dare's constitutional claims and affirmed Dare's sentence.⁹⁷ The Ninth Circuit concluded without further explanation that "discharge" requires general intent, whereas "brandish" requires specific intent.⁹⁸ Therefore, Dare's intoxication defense was invalid because intoxication is not a defense to a general intent crime.⁹⁹

3. United States v. Brown

In *Brown*, like *Nava-Sotelo*, the issue on appeal was whether the accidental discharge of a firearm requires a ten-year sentence.¹⁰⁰ Brown entered a bank in Washington, D.C., armed with a semi-automatic pistol, approached a bank manager, and forced her to take him to the locked teller area.¹⁰¹ Brown directed a bank employee to fill a bag with cash, but became impatient and threw the bag at another employee.¹⁰² Brown then pressed the gun against the back of the second employee's head.¹⁰³ The employee stuffed the bag with cash and gave it to Brown.¹⁰⁴ When Brown went to close the bag, his gun fired.¹⁰⁵ Startled by the gun's discharge, Brown asked whether he hurt anyone.¹⁰⁶ The bullet lodged in the ceiling and did not hurt anybody.¹⁰⁷ The district judge concluded that for the enhanced sentence to apply, Brown did not have to discharge the gun knowingly, and imposed a sentence that included ten years under § 924(c)(1)(A)(iii).¹⁰⁸ On appeal, the circuit court reversed and

96. See *Dare*, 425 F.3d at 641 n.3 (articulating Dare's mens rea argument on appeal).

97. *Id.* at 641, 643 (rejecting Sixth Amendment and due process claims).

98. See *United State v. Dare*, 425 F.3d 634, 641 n.3 (9th Cir. 2005) (asserting mens rea requirement for "discharge"). The court concluded that "brandish" contains a specific intent requirement because it requires the offender to display the firearm to "make the presence of the firearm known to another person in order to intimidate that person." *Id.* (internal quotation marks omitted).

99. See *id.* (rejecting mens rea defense).

100. See *United States v. Brown*, 449 F.3d 154, 155 (D.C. Cir.) (presenting issue on appeal), *modified*, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing).

101. See *id.* at 155 (explaining Brown forced teller at gunpoint).

102. *Id.* (explaining Brown became irritated because he thought teller moved too slowly).

103. *Id.* (explaining Brown jammed barrel of gun into back of employee's head).

104. *Brown*, 449 F.3d at 155.

105. *Id.* at 155 (describing discharge of firearm).

106. *United States v. Brown*, 449 F.3d 154, 155 (D.C. Cir.) (indicating Brown asked twice whether he hurt anyone), *modified*, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing). The bank employees replied that nobody was hurt. *Id.*

107. See *id.* *Brown*, holding the pistol to the second employee's head, demanded the employee direct him to the nearest exit. *Id.* Shortly thereafter, police apprehended Brown due to a customer having observed the robbery through a window. *Id.*

108. See *id.* at 156 (highlighting lower court's ruling). The trial court unnecessarily submitted the sentencing factor to the jury to decide, beyond a reasonable doubt, whether the firearm discharged. See Brief for Appellee at 38, *United States v. Brown*, 449 F.3d 154 (No. 04-3159), 2006 WL 52906 at *38 (noting burden only preponderance of evidence found by judge); see also *Harris v. United States*, 536 U.S. 545, 568 (2002)

remanded for resentencing.¹⁰⁹

In determining that there is a general intent requirement implicit in “discharge,” the D.C. Circuit disagreed with the decision in *Nava-Sotelo*.¹¹⁰ First, the court looked to the language and structure of the statute.¹¹¹ The court reasoned that because the other two sentencing provisions, which focused on the possession, use or carrying, and brandishing of a firearm, contain a mens rea requirement, the discharging provision therefore implies a mens rea requirement.¹¹² The court explained that implying a mens rea requirement for discharging a firearm was logical because the statute’s form is a progression in culpability from lesser offense to greater offense, from lesser danger to greater danger.¹¹³ Furthermore, it noted that given the lesser culpability, accidental discharge did not provide sufficient increase in risk compared to intentional brandishing to explain congressional intent to increase the sentence by three to five years.¹¹⁴

The court also disagreed with *Nava-Sotelo*’s holding that the presumption against strict liability in criminal statutes should not apply to aggravated circumstances that increase sentencing.¹¹⁵ It observed that the rule of construction against strict liability is founded on the principle that courts should strictly construe penal laws.¹¹⁶ The court further noted that the penal laws

(holding § 924(c)(1)(A) contains sentencing factors). Prosecutors need not allege sentencing factors in an indictment, submit them to a jury, nor prove them beyond reasonable doubt. *See Harris*, 536 U.S. at 556.

109. *See Brown*, 449 F.3d at 159 (holding government must show defendant acted with general intent to discharge firearm). After holding § 924(c)(1)(A)(iii) implies general intent, the court then determined that *Brown* did not act with general intent. *Id.* However, the court later reconsidered this ruling, acknowledging that the district court must resolve the factual issues relevant to sentencing. *See United States v. Brown*, 463 F.3d 1, 1 (D.C. Cir. 2006) (remanding factual issue to district court).

110. *See Brown*, 449 F.3d at 156 (agreeing with Ninth Circuit instead of Tenth Circuit).

111. *See id.* (examining text of statute).

112. *See United States v. Brown*, 449 F.3d 154, 156 (D.C. Cir.) (inferring from progression in penalization, increasingly culpable conduct), *modified*, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing); *United States v. Harris*, 959 F.2d 246, 258 (D.C. Cir. 1992) (stating intent required to convict for use of firearm during drug trafficking crime); *see also* 18 U.S.C. § 924(c)(4) (2006) (defining “brandish” as “displaying . . . in order to intimidate”).

113. *See Brown*, 449 F.3d at 156 (deducing intentional discharge requirement consistent with progression reserving greater penalty for more culpable act).

114. *See id.* at 155-57 (examining context of discharge provision).

115. *Id.* at 157 (following D.C. Circuit’s practice of applying presumption against strict liability to aggravating circumstances that increase sentences); *see also United States v. Burke*, 888 F.2d 862, 866 n.6 (D.C. Cir. 1989) (applying presumption against strict liability to Federal Sentencing Guidelines). The D.C. Circuit also addressed perceived inconsistency with its prior decision in *United States v. Harris*. *See Brown*, 449 F.3d at 157-58. In *Harris*, the D.C. Circuit held that there was no separate mens rea requirement for the sentencing enhancement in § 924(c)(1)(B), so that the thirty-year enhancement applied even if the defendant was unaware that the firearm he possessed was a machinegun. *Harris*, 959 F.2d at 259. The court, in *Brown*, recognized that part of its reasoning in *Harris* had been undermined by subsequent Supreme Court precedent, but also distinguished the statutory provisions and concluded that *Harris* did not apply to the interpretation of § 924(c)(1)(A). *Brown*, 449 F.3d at 157-58. The reader should note that *United States v. Harris*, the D.C. Circuit case, is not to be confused with *Harris v. United States*, the Supreme Court case.

116. *See Brown*, 449 F.3d at 157 (comparing presumption against strict liability to rule of lenity).

require strict construction because they deprive a person of liberty.¹¹⁷ According to the court, laws that enhance sentences should therefore be strictly construed because they deprive a person of liberty.¹¹⁸

The government, however, argued that the language is plain and unambiguous with “[n]o words of qualification or limitation.”¹¹⁹ This supported the conclusion that Congress intentionally left out a mens rea element, especially because Congress provided a definition for “brandish” but not for “discharge.”¹²⁰ The court disagreed, believing that Congress had to define “brandish” to give the term a broader meaning than that provided in the dictionary.¹²¹ The court also observed that the government’s position would create an absurd result that Congress could not have intended.¹²² Namely, an offender would receive a mandatory ten-year minimum sentence if he dropped the weapon to comply with a police officer’s command and accidentally caused the gun to discharge.¹²³ Even more absurd, an armed robber would receive the ten-year enhanced sentence if a law enforcement officer or bank teller discharged the gun after retrieving it from the robber.¹²⁴

4. United States v. Dean

The issue on appeal in *Dean* was whether § 924(c)(1)(A)(iii) contains a requirement that the defendant discharge the firearm intentionally.¹²⁵ Dean entered a bank in Rome, Georgia wearing a mask and carrying a pistol.¹²⁶ During the robbery, Dean held the pistol in his right hand while opening a teller drawer with his left hand.¹²⁷ As he grabbed the cash, his pistol discharged into the teller partition, and “he cursed himself as if the shot was inadvertent.”¹²⁸ Dean lived with his brother-in-law, Lopez, who the government maintained

117. *Id.* (analyzing reason for rule of statutory construction).

118. *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir.) (supporting decision to apply rule against strict liability to sentencing enhancement), *modified*, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing).

119. *See* Brief for Appellee at 39, *United States v. Brown*, 449 F.3d 154 (No. 04-3159), 2006 WL 52906 at *39 (examining statute’s language).

120. *See id.* (arguing Congress explicitly provided mens rea for “brandish” and therefore purposefully left out mens rea for “discharge”).

121. *See Brown*, 449 F.3d at 157 (rejecting government’s argument).

122. *See id.* (considering government’s position).

123. *See id.* (criticizing strict liability interpretation of discharge provision).

124. *See United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir.) (hypothesizing result of sentencing factor as strict liability), *modified*, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing). At oral argument, the government conceded that the ten-year sentence would not apply in this situation. *See id.*

125. *United States v. Dean*, No. 06-14918, 2008 WL 441602, at *1 (11th Cir. Feb. 20, 2008).

126. *Id.* Dean instructed everyone to get down on the floor, and then entered the teller area. *Id.*

127. *Id.* (recounting circumstances leading up to Dean’s discharge of firearm). The teller was below the station on her knees as he took the money. *Id.*

128. *Id.* (describing discharge as accidental). After the shot, Dean immediately ran out of the bank with approximately \$3,642.00. *Id.*

knew about the robbery, possessed the gun, and had a joint drug debt with Dean.¹²⁹ The jury found both Dean and Lopez guilty of a Hobbs Act conspiracy as well as aiding and abetting each other in the discharge of a firearm during an armed robbery in violation of § 924(c)(1)(A)(iii).¹³⁰

In determining that both defendants are subject to the ten-year penalty in § 924(c)(1)(A)(iii) for Dean's accidental discharge, the Eleventh Circuit reasoned that § 924(c) is a sentencing enhancement and not an element of an offense, therefore, no separate intent is required.¹³¹ First, the court looked to its own precedent in *United States v. Brantley*,¹³² when it addressed the § 924(c) machinegun enhancement and held that a defendant does not need to be aware of a firearm's nature for a court to apply the thirty-year enhancement.¹³³ In *Brantley*, the court reasoned that the underlying intentional possession of a firearm supplied sufficient mens rea because the defendant already had a vicious will, thus negating the need for the presumption of mens rea for the enhancement.¹³⁴

Next, the court examined the reasoning of *Nava-Sotelo* and *Brown*.¹³⁵ The court did not find *Brown* persuasive for two reasons: the statute penalizes conduct, not mental state, and sentencing enhancements are treated differently than offenses with respect to the presumption against strict liability.¹³⁶ Therefore, the court adopted the Tenth Circuit's approach in *Nava-Sotelo*, holding the defendants strictly accountable for the firearm's discharge because of the underlying vicious will to conspire.¹³⁷

D. Statutory Interpretation

A statute suffers from ambiguity when it is unclear whether it applies to a certain factual situation.¹³⁸ To resolve ambiguity, courts use the canons of

129. *Dean*, 2008 WL 441602, at *2 (explaining circumstances behind charges against co-defendant Lopez).

130. *Id.* The court sentenced Dean to 100 months for conspiracy and 120 months for aiding and abetting the discharge. *See id.* The court likewise sentenced Lopez to seventy-eight months and 120 months. *See id.*

131. *United States v. Dean*, No. 06-14918, 2008 WL 441602, at *1 (11th Cir. Feb. 20, 2008).

132. 68 F.3d 1283 (11th Cir. 1995).

133. *See Dean*, 2008 WL 441602, at *4 (reviewing similar case involving mens rea challenge to sentencing enhancement).

134. *Brantley*, 68 F.3d at 1289-90 (holding sentencing enhancement does not require mens rea). *Brantley* came to this conclusion by relying on the D.C. Circuit's reasoning in *Harris*, a case that the D.C. Circuit later distanced itself from in *Brown*. *See id.* at 1289-90; *supra* note 115 (discussing D.C. Circuit's refusal to apply *Harris* to § 924(c)(1)(A)(iii)).

135. *Dean*, 2008 WL 441602, at *4-5 (reviewing circuit court cases directly addressing whether § 924(c)(1)(A)(iii) penalizes accidental discharge).

136. *Id.* at *5 (disagreeing with *Brown*'s conclusion that statute's higher penalty must contain intent requirement).

137. *United States v. Dean*, No. 06-14918, 2008 WL 441602, at *5 (11th Cir. Feb. 20, 2008) (agreeing with Tenth Circuit's reasoning as consistent with Eleventh Circuit precedent in *Brantley*).

138. *See* WAYNE R. LAFAYE, CRIMINAL LAW § 2.2 (3d ed. 2000) (considering when ambiguity exists).

construction to determine what Congress intended.¹³⁹ Rules of statutory construction are “axioms of experience,” not rules of law.¹⁴⁰ To interpret a statute the Supreme Court looks to its language, context, legislative history, and motivating policy.¹⁴¹ The Court first examines the statute’s language and gives the words their ordinary and plain meaning.¹⁴² The statutory words are also examined in context of the entire statute.¹⁴³ Examining legislative history and purpose also gives insight into Congress’s intent when it enacted the statute.¹⁴⁴

1. *The Presumption of Mens Rea in Criminal Law*

At common law, as a general rule, mens rea was a necessary element of every crime.¹⁴⁵ The rule, however, is modified for statutory crimes for which applying it would frustrate the legislature’s intent.¹⁴⁶ Imposing culpability for a crime in which the offender lacks a mens rea does not violate due process.¹⁴⁷

139. *See id.* (describing purpose of statutory construction rules to resolve ambiguity). The principle of separation of powers dictates that legislative intent should guide the interpretation of a statute. *See* NORMAN J. SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION § 45:5 (6th ed. 2001). Unless the judiciary carries out the will of Congress when interpreting a statute, it encroaches on the authority of Congress to make the laws. *See id.*

140. *See* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952) (interpreting criminal provisions of Fair Labor Standards Act).

141. *See* Castillo v. United States, 530 U.S. 120, 124 (2000) (setting forth aids to statutory construction).

142. *See* Bailey v. United States, 516 U.S. 137, 144-45 (1995) (considering plain meaning of “use” in § 924(c)(1) as first rule of statutory construction), *superseded by statute*, Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998) (codified at 18 U.S.C. § 924(c)(1)(A) (2006)); Perrin v. United States, 444 U.S. 37, 42-43 (1979) (considering ordinary meaning of “bribery” as first step in construing statute).

143. *See* Jones v. United States, 526 U.S. 227, 232-33 (1999) (looking to statutory context to decide term’s character as sentencing factor or element); *Bailey*, 516 U.S. at 145 (examining words in context of statute).

144. *See* Muscarello v. United States, 524 U.S. 125, 133 (1998) (referring to congressional record to determine meaning of “carry” in § 924(c)); *Basic v. United States*, 446 U.S. 398, 405-06 (1980) (examining legislative history of § 924(c)), *superseded by statute*, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 § 1005, 98 Stat. 1837, 2138. On the other hand, use of legislative history to resolve ambiguity in criminal statutes may be improper because the public should be able to understand a statute without having to refer to congressional records, hearings, and reports. *See* Ratzlaf v. United States, 510 U.S. 135, 147-49 (1994) (refusing to give weight to legislative history to interpret mens rea requirement in criminal statute), *superseded by statute*, Community Development Banking Act of 1994, H.R. Conf. Rep. No. 103-652, at 194; LaFave, *supra* note 138, § 2.2, at 88 (disapproving use of legislative history to interpret ambiguous statute). Due process requires that criminal statutes give fair notice of crimes, and the statute will be void if “men of common intelligence must necessarily guess at its meaning and differ as to its application.” *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (setting forth void-for-vagueness doctrine).

145. *See* United States v. Balint, 258 U.S. 250, 251 (1922) (tracing common-law rule requiring scienter as necessary element in proof of crime). The fundamental premise for criminal liability is that a mere act does not make one guilty unless the actor’s mind is guilty. *See* LaFave, *supra* note 138, § 3.4(a), at 225.

146. *See* United States v. Feola, 420 U.S. 671, 679-84 (1975) (relying on legislative history to limit mens rea to only one element of offense); *Balint*, 258 U.S. at 251-52 (stating courts must construe legislative intent to determine whether to make scienter an element).

147. *See* Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 67-69 (1910) (holding criminalization of unintentional trespass on state lands does not violate due process). The Court noted exceptions to the general principle that Congress may not make an innocent act a crime where negligence supplies the criminal intent and where the exception supports the public welfare. *Id.* at 67-68.

The Court, however, has developed a canon of statutory interpretation in favor of implying mens rea to the elements of crimes.¹⁴⁸ When the legislature imposes a long sentence that gravely damages the offender's reputation, it supports the presumption that the legislature did not intend to dispense with a mens rea.¹⁴⁹ When a statute does not contain a mens rea provision, courts generally presume the legislature imposed a general intent requirement.¹⁵⁰ General intent is typically found where the defendant acts voluntarily and with knowledge of his actions.¹⁵¹

Federal courts have escaped deciding mens rea questions in statutes by declaring that certain factual requirements are sentencing factors rather than elements of the crime.¹⁵² For example, some courts avoid requiring knowledge as to the amount of drugs or type of drug possessed in federal drug statutes by characterizing the provisions as sentencing factors.¹⁵³ Courts have often

148. See *Carter v. United States*, 530 U.S. 255, 267-68 & n.6 (2000) (describing presumption favoring mens rea as interpretative principle).

149. See *Staples v. United States*, 511 U.S. 600, 616 (1994) (concluding ten-year sentence imposed by 26 U.S.C. § 5861(d) supports implying mens rea). On the other hand, some authorities believe the Court will only read mens rea into a statute where the statute would otherwise criminalize innocuous conduct. See Richard Singer, *The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139, 174-75 (2000) (recounting examples where Court implies mens rea only to protect innocent defendant); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1023 (1999) (explaining Court's method of implying mental element when statute would otherwise punish morally blameless person); see also *Carter*, 530 U.S. at 269 (recalling scope of presumption of mens rea). In *Staples*, the Court acknowledged that regulatory offenses, also known as public welfare offenses, do not require a reading of mens rea, but such offenses are usually limited to statutes where the "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." See *Staples*, 511 U.S. at 617-18 (internal quotations omitted) (quoting *Morrisette v. United States*, 342 U.S. 246, 256 (1952)).

150. See *Carter*, 530 U.S. at 267-68 (articulating presumption of general intent); LaFave, *supra* note 138, § 3.4(b) (observing courts often imply general intent when statute lacks mental state).

"[Mere] omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them."

United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) (quoting *Morrisette v. United States*, 342 U.S. 246, 263 (1952)).

151. See *Carter*, 530 U.S. at 267-68 (defining general intent as knowledge of the act); Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 342, 344 (2001) (observing general intent inferred from voluntary act but noting uncertainty in definition of general intent).

152. See Singer, *supra* note 149, at 143 (tracing history of avoiding mens rea by characterizing statutory provisions as sentencing factors).

153. See Singer, *supra* note 149, at 152 (observing federal courts' treatment of statutory provisions for drug amount as sentencing factors); see also *United States v. King*, 345 F.3d 149, 152-53 (2d Cir. 2003) (holding amount and type of drugs under 18 U.S.C. § 841(b) sentencing factors not requiring mens rea); *United States v. Valencia-Gonzalez*, 172 F.3d 344, 346 (5th Cir. 1999) (holding type of drugs possessed as strict liability sentencing factor).

refused to institute a mens rea requirement as a matter of statutory construction after observing congressional intent to create a sentencing factor, yet give no history or reason for this presumption.¹⁵⁴ Other courts refuse to institute a mens rea requirement for sentencing factors because a defendant who commits the underlying offense already has a vicious will; therefore, any additional mens rea to guard against innocent conduct is unnecessary.¹⁵⁵

2. *The Rule of Lenity*

If after examining the language, context, legislative history, and motivating policy, the meaning of a criminal statute remains ambiguous, a court may apply the rule of lenity.¹⁵⁶ The rule of lenity is a principle of statutory construction with constitutional underpinnings, requiring strict construction of penal laws.¹⁵⁷ The rule states that when a statute is ambiguous or uncertain after examining its language, structure, and legislative history, a court will resolve it in favor of the accused.¹⁵⁸ Lenity applies to penalty provisions as well as substantive penal

154. See, e.g., *United States v. Figueroa*, 404 F.3d 537, 540-41 (1st Cir. 2005) (concluding mens rea presumption inapplicable to Guidelines enhancement of incarcerated deportee found in United States); *United States v. Gonzalez*, 262 F.3d 867, 870 (9th Cir. 2001) (holding Sentencing Guidelines do not require mens rea because not criminal offenses); *United States v. Lavender*, 224 F.3d 939, 941 (9th Cir. 2000) (refusing to add mens rea requirement to sentencing Guidelines); *United States v. Sherbondy*, 865 F.2d 996, 1001-02 (9th Cir. 1988) (remarking sentencing enhancements should not carry their own mens rea). But see *United States v. Schnell*, 982 F.2d 216, 220 (7th Cir. 1992) (considering presumption of mens rea in Sentencing Guidelines but finding congressional intent for strict liability); Singer, *supra* note 149, at 152-53 (pointing to unsupported conclusion that a strict liability presumption attaches to drug penalty provisions); see also Ross, *supra* note 62, at 975 (noting assumed endorsement of strict liability when legislature makes the issue a sentencing factor).

155. See, e.g., *United States v. King*, 345 F.3d 149, 153 (2d Cir. 2003) (holding drug-type enhancement does not require mens rea because no risk of criminalizing innocent conduct exists); *United States v. Brantley*, 68 F.3d 1283, 1289-90 (11th Cir. 1995) (explaining rationale for presumption of mens rea does not apply to machinegun sentencing enhancement); *United States v. Harris*, 959 F.2d 246, 259 (D.C. Cir. 1992) (per curiam) (deciding no mens rea required for sentencing enhancement because underlying offense already requires mens rea).

156. See *Castillo v. United States*, 530 U.S. 120, 131 (2000) (considering rule of lenity as principle favoring interpretation of § 924(c) machine-gun provision as separate crime); *Callanan v. United States*, 364 U.S. 587, 596 (1961) (concluding rule of lenity applied last in construing ambiguous criminal statute). See generally *Ladner v. United States*, 358 U.S. 169 (1958) (applying rule against increasing penalty when language and legislative history do not resolve conflicting interpretations); *Bell v. United States*, 349 U.S. 81 (1955) (applying rule against interpretation of statute that would create multiple offenses out of single act); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) (applying rule where ambiguous whether statute creates one offense or punishes each act statute targets).

157. See *United States v. Bass*, 404 U.S. 336, 347-48 (1971) (discussing rule of lenity). The rule that penal statutes must be strictly construed arose in seventeenth century England when hundreds of crimes were punishable by death, many of which were minor offenses. See Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 750-51 (1935) (tracing history of rule of lenity). Today, the rule is used to ensure not only that the public is on notice of crimes and their severity, but also that legislatures define crimes. See *Bass*, 404 U.S. at 347-48 (explaining reasons behind rule of lenity); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345 (1994) (noting rule not just simple principle of statutory construction, but also protection of "near-constitutional" values).

158. See *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) (stressing ambiguity must be grievous to invoke lenity); *United States v. Granderson*, 511 U.S. 39, 54 (1994) (invoking lenity when government's

laws so that a court will not impose a federal criminal sentence if the statutory interpretation is no more than a guess as to Congress's intent.¹⁵⁹ On the other hand, a court may not manufacture ambiguity to defeat congressional intent.¹⁶⁰

Unfortunately, the Court has inconsistently applied the rule of lenity to questions of mens rea interpretation in statutes.¹⁶¹ Some Justices refrain from applying the rule of lenity to statutes that are silent with respect to mens rea due to a lack of ambiguity.¹⁶² Others have expressed preference for invoking the rule where the statute is "simply ambiguous, or silent, as to the precise contours of [the] mens rea requirement."¹⁶³ At least one commentator has even suggested that the rule of lenity represents the true basis for the presumption of

position not unambiguously correct); *Bass*, 404 U.S. at 347 (invoking lenity after finding language and legislative history unclear). In *Bass*, the Court applied the rule to the Omnibus Crime Control and Safe Streets Act, which provided that a person convicted of a felony "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm" shall be punished as prescribed therein. See *Bass*, 404 U.S. at 337 (quoting 18 U.S.C. app. § 1202(a)). The indictment did not allege that the firearm involved was possessed "in commerce or affecting commerce." *Id.* at 337-38. The issue presented was whether the government had to show the firearm's nexus to commerce or whether the statute penalized mere possession by a felon. *Id.* at 339. After examining the Congressional Record, the Court found no language to resolve the narrow issue whether "in commerce" applied to "possesses." *Id.* at 347. The Court declared the statute ambiguous and concluded Congress did not "plainly and unmistakably" make it a federal crime for a convicted felon merely to possess a gun. *Id.* at 348-49. See generally 73 AM. JUR. 2D Statutes § 197 (2001) (defining rule of lenity).

159. See *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (examining application of rule of lenity); see also *Simpson v. United States*, 435 U.S. 6, 14-15 (1978) (applying rule of lenity in favor of criminal defendant), *superseded by statute*, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 § 1005, 98 Stat. 1837, 2138. The *Bifulco* Court warned that it would not increase a criminal penalty if the statutory interpretation were no more than a guess as to what Congress intended. See *Bifulco*, 447 U.S. at 387. In *Simpson*, the Court applied the rule of lenity to § 924(c) to resolve whether the firearm sentence authorized by § 924(c) could be applied where the underlying crime was also enhanced based on use of a firearm. *Simpson*, 435 U.S. at 16. Congress later amended the statute to clearly express intent that the penalties in § 924(c) should be applied notwithstanding the underlying crime, also enhancing the sentence based on use of a firearm. See *supra* note 28 (discussing Comprehensive Crime Control Act of 1984).

160. See *Smith v. United States*, 508 U.S. 223, 239-41 (1993) (refusing to interpret statute according to rule of lenity). In *Smith*, the Court deferred to Congress's intent that the term "use" include the bartering of a firearm because Congress intended to target the danger of combining guns and drugs, despite whether the gun was an item of commerce. See *id.* The Court thus upheld the statute's general purpose instead of a narrower interpretation of it. See *id.*

161. See *Kahan*, *supra* note 157, at 346 (highlighting Court's unpredictable and sporadic use of rule of lenity); *Mens Rea in Federal Criminal Law*, *supra* note 11, at 2414 (noting inconsistency in invoking rule of lenity in federal mens rea jurisprudence); *infra* notes 162-163 and accompanying text (summarizing Court's inconsistent use of rule).

162. See *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (considering it unnecessary to apply lenity due to mens rea presumption and precedent interpreting mens rea).

163. See *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting) (arguing for consistent application of rule of lenity in era of new federal crimes); see also *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-04 (2005) (applying rule of lenity considering application of "knowingly" in statute criminalizing corrupt persuasion of withholding documents); *Ratzlaf v. United States*, 510 U.S. 135, 147-49 (1994) (considering hypothetical application of rule of lenity to resolve ambiguity in application of "willfulness"), *superseded by statute*, Community Development Banking Act of 1994, H.R. Conf. Rep. No. 103-652, at 194. Justices Scalia and Ginsberg would have applied the rule of lenity to determine whether "willfully" in § 924(a)(1)(D) requires a mental state more than intent to perform the forbidden act. *Bryan*, 524 U.S. at 204-05 (Scalia, J., dissenting).

mens rea in criminal law.¹⁶⁴

E. Criticisms of Mandatory Minimum Sentences

After considering Congress's intent when creating the § 924(c)(1)(A) sentencing factors, several Supreme Court Justices have expressed concern for the highly controversial nature and unfair effect of mandatory minimum sentences.¹⁶⁵ One concern is that mandatory minimum sentences take away sentencing discretion from judges even when the offender might warrant a lesser penalty due to unusual circumstances.¹⁶⁶ Another concern is that mandatory minimum sentences transfer power to prosecutors who can control sentencing by choosing whether to charge the offense or plea bargain.¹⁶⁷ Congress has effectively allowed the disparity in sentencing, which it sought to alleviate when it passed the Sentencing Guidelines, to continue through inconsistent prosecutions.¹⁶⁸

In a recent hearing before the House Committee on the Judiciary, the Committee considered criticisms of mandatory minimum sentences and invited suggestions for reform from a panel of speakers.¹⁶⁹ Studies show that mandatory minimum sentencing schemes place a costly and unnecessary burden on the public because they require taxpayer funding for new prisons and are the least cost-effective means of reducing crime.¹⁷⁰ A recent study has also concluded that mandatory minimums do not "send a message" to would-be

164. See Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2434-36 (2006) (tracing the presumption in favor of mens rea to the rule of lenity); cf. Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 755-56 (2002) (suggesting new rule of lenity interprets mens rea in federal statutes based on possible sentence); Wiley, *supra* note 149, at 1078 (observing rule in favor of mental culpability in statutory crimes resembles rule of lenity). Some of the principal cases articulating the presumption of mens rea in criminal statutes rely on the rule of lenity to construe the statute in favor of the accused. See *Liparota v. United States*, 471 U.S. 419, 427 (1985) (stating mens rea requirement in keeping with rule of lenity); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) (noting rule of lenity justified reading mens rea into statute otherwise silent on it).

165. See *Harris v. United States*, 536 U.S. 545, 568-69 (2002) (acknowledging soundness of criticism of mandatory minimum sentences); *id.* at 570 (Breyer, J., concurring) (portraying mandatory minimum sentencing as unfair).

166. *Id.* at 570-71 (Breyer, J., concurring) (criticizing mandatory minimum sentences for failure to achieve sentencing proportionality).

167. See *id.* (highlighting transfer of power from judiciary to executive branch).

168. See *id.* (observing counterproductive effect of mandatory minimum sentencing schemes).

169. See *Hearing on Mandatory Minimum Sentencing*, *supra* note 12 (considering flaws of mandatory minimum sentencing provisions such as § 924(c)). The panel consisted of Judge Paul G. Cassell, U.S. Attorney Richard Roper III, Marc Mauer, Executive Director of The Sentencing Project, T.J. Bonner, President of the National Border Patrol Counsel, and Serena Nunn, a first-time offender sentenced to twelve years under a mandatory minimum provision. See *House Hearing Looks at Mandatory Minimum Sentencing Issues*, *supra* note 12.

170. See 144 CONG. REC. H531 (1998) (statement of Rep. Scott) (commenting on high cost of mandatory minimum sentencing and waste to taxpayers); JONATHAN P. CAULKINS ET AL., *MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY?* xvi (1997) (concluding mandatory minimum sentences for drug-related crimes not justifiable on basis of cost-effectiveness).

criminals or effectively serve the purpose of deterring crime.¹⁷¹

III. ANALYSIS

A. Analysis of Legislative Intent

Examining the statutory language is the first consideration in deciding whether § 924(c)(1)(A)(iii) incorporates a mens rea requirement.¹⁷² At first glance, the discharge provision appears to impose strict liability because there is no explicit mens rea requirement and the provision is written in the passive voice.¹⁷³ The statute as a whole, however, negates this assumption.¹⁷⁴ The discharge provision is the last of three subfactors, the first two of which require a showing of mens rea.¹⁷⁵ Treating the last subfactor, which carries the most serious penalty, as strict liability is contrary to the criminal law theory that the punishment should fit the crime and the criminal.¹⁷⁶

Although a defendant who discharges a firearm already has a “vicious will” by committing the predicate crime of carrying a firearm, Congress is really assigning a higher punishment to the separate act of discharging the firearm.¹⁷⁷ A separate act carrying a separate sentence should have a mens rea presumption.¹⁷⁸ Traditionally, an increase in punishment represents an increase in culpability.¹⁷⁹ Therefore, the statute’s language probably requires general intent for the discharge provision, because when a statute is silent with respect to mens rea, the courts usually infer a general intent requirement.¹⁸⁰

171. See *Hearing on Mandatory Minimum Sentencing*, *supra* note 12 (statement of Marc Mauer, Executive Director, The Sentencing Project) (explaining false premises upon which Congress based mandatory minimum sentencing schemes).

172. See *supra* note 142 and accompanying text (discussing examination of plain meaning of language as first step in statutory construction).

173. See 18 U.S.C. § 924(c)(1)(A)(iii) (2006) (enhancing sentence “if the firearm is discharged”).

174. See *United States v. Brown*, 449 F.3d 154, 156 (D.C. Cir.) (concluding intent required for discharge provision after examining context and Congressional intent), *modified*, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing).

175. See 18 U.S.C. § 924(c)(1)(A) (delineating three sentencing subfactors); *supra* note 112 and accompanying text (discussing mental states required for firearm possession and brandishing provisions).

176. See *Morissette v. United States*, 342 U.S. 246, 251 n.5 (1952) (citing justifications for punishment requiring proportionality between crime and mental state); *Brown*, 449 F.3d at 157 (observing lack of mens rea would create disproportional sentence for firearm discharge).

177. See *supra* notes 85-87 and accompanying text (describing why predicate crime’s mens rea may satisfy mens rea requirement); *supra* note 41 and accompanying text (discussing purpose of amendment increasing punishment for discharging firearm).

178. See *LaFave*, *supra* note 138, § 3.4(a), at 225 (stating mere acts do not make actor guilty without proof of guilty mind).

179. See *generally Staples v. United States*, 511 U.S. 600, 616 (1994) (stating measure of penalty material to determining whether statute dispenses with mens rea); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978) (discussing traditional notion that punishment must relate to mental state); *LaFave*, *supra* note 138, § 3.8(a), at 259 (recognizing greater possible punishment generally implies greater requirement of fault).

180. See *supra* notes 148, 150 and accompanying text (discussing presumption of general intent).

The legislative history of § 924 also supports a general intent requirement for the discharge provision.¹⁸¹ Many of the amendments targeted culpable behavior.¹⁸² Historically, Congress's amendments to § 924(c) favor mens rea, punish culpable conduct, and do not impose strict liability.¹⁸³ Likewise, with respect to the 1998 amendment, the House Reports that considered adding provisions for "brandish" and "discharge" displayed the proponents' intent to target egregious behavior rather than accidental or unintentional conduct.¹⁸⁴ Even prior unsuccessful attempts to add penalties for discharging a firearm required proof of culpability, such as "with intent to injure."¹⁸⁵ Although this language was not memorialized in the amendment, the legislative history reveals no congressional intent to impose strict liability for the discharge of a firearm.¹⁸⁶ Furthermore, Congress did not express any intent that the crime's mens rea—knowledge of the facts—should not carry over into the penalty provisions.¹⁸⁷

The purpose of the statute also supports implying a general intent requirement in the discharge provision.¹⁸⁸ The purpose behind the statute is to deter criminal behavior, incapacitate offenders, and limit judicial discretion in sentencing.¹⁸⁹ Reading general intent into the discharge provision only requires that the defendant act voluntarily and with knowledge that he is discharging the firearm for the sentencing enhancement to apply.¹⁹⁰ Increasing penalties for unintentionally discharging a gun does not effectively serve a deterrence-related function.¹⁹¹ In addition, while the purpose of the new penalty provisions is to punish increasingly egregious conduct, accidentally firing a gun

181. See *supra* Part II.A (examining legislative history of statute); *supra* note 144 and accompanying text (demonstrating use of legislative history to interpret Congress's intent).

182. See, e.g., *supra* note 26 and accompanying text (discussing addition of "unlawfully" in Gun Control Act of 1968); *supra* note 31 (explaining Comprehensive Crime Control Act of 1984 adding "during and in relation to" language); *supra* notes 32-34 and accompanying text (discussing Firearm Owners' Protection Act addition of mens rea requirements to § 924(c) penalties).

183. See *supra* notes 32-34 (discussing Firearm Owners' Protection Act's addition of mens rea requirements to § 924(c) penalties).

184. See *supra* notes 45-47 and accompanying text (examining concerns for criminalizing culpable conduct and proportionality of penalties).

185. See *supra* note 42 (highlighting prior unsuccessful amendments penalizing intentional discharge of firearm).

186. See *supra* Part II.A.2 (reviewing legislative history of § 924(c) discharge provision).

187. See *supra* note 36 and accompanying text (referencing interpretation of statute's mens rea requirement prior to 1998 amendment).

188. See *supra* note 51 and accompanying text (examining purpose behind 1998 amendment to § 924(c)).

189. See *Muscarello v. United States*, 524 U.S. 125, 132 (1998) (recognizing purpose to "combat the dangerous combination of 'drugs and guns'"); *Gun Control Issues: Testimony Before the S. Comm. on the Judiciary*, *supra* note 51 (expressing concern that hundreds of criminals released due to *Bailey* decision); *supra* notes 41, 51 (citing Congress's goal in deterring criminal behavior).

190. See *supra* note 151 and accompanying text (discussing definition of general intent).

191. See *Morissette v. United States* 342 U.S. 246, 251 n.5 (1952) (noting justifications for penalization are illusory without requiring culpable mental state); LaFave, *supra* note 138, § 3.8(c) (acknowledging punishment without mens rea does not deter person or others from acting).

is no more egregious than flashing a gun to intimidate.¹⁹²

Furthermore, requiring general intent for discharging a firearm does not subvert Congress's goal of incapacitating offenders who use guns during a crime.¹⁹³ Defendants, like *Brown* and *Dean*, who pulled the trigger by accident, or *Nava-Sotelo*, who fired the gun only because the officer squeezed his hand, would still receive a seven-year enhanced sentence for brandishing a firearm.¹⁹⁴ Moreover, requiring prosecutors to prove general intent will not further burden the prosecution because general intent is normally inferred by a person's voluntary conduct.¹⁹⁵

B. The Presumption of Mens Rea Should Apply to Sentencing Factors

Nava-Sotello and *Dean* were flawed to the extent that these decisions refused to apply the presumption of mens rea to the sentencing factors in § 924(c).¹⁹⁶ The court's general conclusion that the presumption in favor of mens rea does not apply to sentencing enhancements is incorrect.¹⁹⁷ Congress has created sentencing factors that contain explicit mens rea requirements, such as those in § 924(c)(1)(A).¹⁹⁸ Therefore, it is a false assumption that any time a legislature creates a sentencing factor, it is intended to be a strict liability enhancement.¹⁹⁹ On the contrary, the presumption of mens rea should apply to

192. See *supra* note 45 and accompanying text (observing intent to penalize "escalating egregious conduct" when penalizing brandishing and discharging of firearm); see also *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir.) (comparing relative egregiousness of accidental discharge to intentional brandish), *modified*, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing).

193. See *Gun Control Issues: Testimony Before the S. Comm. on the Judiciary, supra* note 51 (estimating hundreds of criminals set free due to *Bailey* decision).

194. See *United States v. Nava-Sotelo*, 232 F. Supp. 2d 1269, 1278 (D.N.M. 2002) (refusing to apply ten-year enhancement for discharging firearm, but applying seven-year enhancement for brandishing), *rev'd*, 354 F.3d 1202 (10th Cir. 2003).

195. See *supra* note 151 and accompanying text (discussing definition of general intent). Implementation of strict liability is often justified on the grounds that under certain circumstances it would be too difficult to prove fault. See *LaFave, supra* note 138, § 3.8(c). In a § 924(c)(1)(A)(iii) prosecution following *Dare* and *Brown*, "the Government must show that 1) the defendant possessed a firearm in furtherance of the relevant drug trafficking crime, 2) the defendant continued to possess it in furtherance of the crime when it was discharged, and 3) the defendant discharged the firearm intentionally, that is, not accidentally." *United States v. Daija*, No. 07 Cr. 609(JSR), 2008 WL 96564, at *3 (S.D.N.Y. Jan. 10, 2008).

196. See *supra* notes 84-87 and accompanying text (discussing court's reasoning in interpreting discharge provision); *supra* notes 131-137 (summarizing Eleventh Circuit's reasoning).

197. See *Brown*, 449 F.3d at 158 (doubting broad reasoning of *Nava-Sotello* conclusion that no mens rea required for sentencing factors). But see *supra* note 154 and accompanying text (providing instances where presumption of mens rea not applied to sentencing factors).

198. See 18 U.S.C. § 924(c)(1)(A)(ii) (2006) (setting forth sentencing enhancement for brandishing firearm); *id.* § 924(c)(4) (defining "brandish" as making presence of firearm known "in order to intimidate"); *United States v. Dare*, 425 F.3d 634, 641 n.3 (9th Cir. 2005) (concluding "brandish" contains specific intent requirement); *supra* note 60 (discussing mens rea in United States Sentencing Guidelines).

199. See *Ross, supra* note 62, at 975 (noting assumed endorsement of strict liability when legislature makes issue sentencing factor); *Singer, supra* note 149, at 152-53 (pointing to unsupported conclusion that presumption of strict liability attaches to drug penalty provisions).

sentencing factors because such presumption is a canon of interpretation with roots grounded in the common law.²⁰⁰ Just because a crime is statutorily created does not mean that the presumption should not apply.²⁰¹ Like other canons of construction, it should be used to determine congressional intent.²⁰² The decisions, like *Nava-Sotelo* and *Dean*, that refuse to apply mens rea to sentencing enhancements based on the determination that a defendant already has a vicious will, overlook the basic reasoning behind the presumption of mens rea.²⁰³ A mere act does not make one guilty unless the actor's mind is guilty, and this fundamental assumption should not vanish merely because the proscribed act is set out in a separate subsection of a statute.²⁰⁴

Furthermore, the rule of lenity applies to sentencing factors.²⁰⁵ As some have suggested, the presumption of mens rea is an application of the rule of lenity.²⁰⁶ Therefore, like the rule of lenity, the presumption of mens rea is another canon of interpretation that should apply to sentencing factors.²⁰⁷

C. *The Rule of Lenity Should Apply to § 924(c)(1)(A)(iii)*

The language, context, history, and motivating policy of the sentencing provisions contained in § 924(c)(1)(A) indicate that Congress did not intend to punish the accidental discharge of a firearm, but rather intended to punish defendants that act with general intent.²⁰⁸ Notwithstanding this conclusion, even if it remained ambiguous whether the discharge provision contained a

200. See *supra* note 145 and accompanying text (pointing to history of mens rea requirement in criminal law).

201. See *supra* note 2 and accompanying text (finding well-settled principle indicating mens rea presumption applies to federal statutory crimes).

202. See *Carter v. United States*, 530 U.S. 255, 267-68 (2000) (describing presumption favoring mens rea as interpretative principle); *supra* notes 138-139 and accompanying text (discussing canons of construction as tools for determining congressional intent).

203. See *supra* notes 84-87 and accompanying text (discussing Tenth Circuit's reasoning based on underlying vicious will); *supra* notes 131-137 (summarizing Eleventh Circuit's reasoning based on vicious will of principal offense). This interpretation is a reformulation of Blackstone's principle that "there must first be a 'vicious will,'" cited in *Morissette* and *Staples*. See *Staples v. United States*, 511 U.S. 600, 616-17 (1994); *Morissette v. United States*, 342 U.S. 246, 250-51 (1952). Furthermore, when the law punishes a separate and distinct act, like shooting a gun, the presumption of mens rea should apply because "[a] relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to.'" See *Morissette*, 342 U.S. at 250-51.

204. See *supra* notes 145-151 and accompanying text (tracing history and meaning of presumption of mens rea).

205. See *supra* note 159 and accompanying text (discussing cases in which Court has applied rule of lenity to statutory penalty provisions).

206. See *supra* note 164 and accompanying text (tracing presumption of mens rea to rule of lenity).

207. See *supra* note 157 and accompanying text (observing rule of lenity as canon of construction); *supra* note 159 and accompanying text (observing rule of lenity applies to sentencing factors); *supra* notes 148, 164 and accompanying text (observing presumption of mens rea as canon of construction closely related to rule of lenity).

208. See *supra* Part III.A (analyzing language, context, history and motivating policy of § 924(c) discharge enhancement).

mens rea requirement, the rule of lenity would require the same result.²⁰⁹ In past circumstances, the Supreme Court has used the rule of lenity to justify reading a mens rea requirement into a statute that was otherwise silent with respect to mens rea.²¹⁰ The Court has also applied the rule of lenity to penalty provisions.²¹¹ Therefore, unless Congress “plainly and unmistakably” penalized the accidental discharge of a firearm, a court should construe the sentencing provisions in § 924(c)(1)(A)(iii) in favor of the accused and require a mens rea.²¹²

D. *Quelling the Effects of Mandatory Minimum Sentencing*

Mandatory minimum sentencing schemes such as § 924(c) result in disproportionately harsh penalties, leave judges without discretion, and leave defendants at the mercy of federal prosecutors.²¹³ In light of these negative effects and in light of the studies that have found that they do not achieve their purposes in deterring crime or restricting disparate sentencing, Congress should reform the criminal code to eliminate mandatory minimum sentencing schemes.²¹⁴ Until that happens, however, applying the presumption of mens rea to sentencing factors may be one way to counter the negative effect of mandatory minimum sentences, such as § 924(c), on defendants.²¹⁵ Requiring mens rea for sentencing factors will restore judicial discretion by allowing judges to depart from a disproportionately harsh sentence when the mens rea is

209. See *supra* notes 156-160 and accompanying text (examining rule of lenity and its application to sentencing factors); *supra* note 163 and accompanying text (discussing application of rule of lenity to mens rea questions).

210. See *supra* note 163 and accompanying text (discussing cases in which Court has applied rule of lenity to mens rea questions).

211. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) (noting rule of lenity justified Court reading mens rea into statute silent with respect to mens rea).

212. See *supra* note 158 and accompanying text (examining when statute is ambiguous thereby justifying use of rule of lenity).

213. See *supra* notes 11-16 and accompanying text (describing harsh effects of § 924(c) on defendants); *supra* notes 148-51 and accompanying text (citing criticisms of mandatory minimum sentencing schemes).

214. See *supra* Part II.E (discussing flaws of mandatory minimum sentencing). See generally *Hearing on Mandatory Minimum Sentencing*, *supra* note 12 (considering congressional reform of mandatory minimum sentencing such as § 924(c) in light of studies).

215. See *supra* notes 11-16 and accompanying text (describing harsh effects of § 924(c) on defendants). The presumption of mens rea may be a way to limit the scope of federal criminal law, reduce prosecutorial discretion, and reduce overly harsh sentencing. See *Mens Rea in Federal Criminal Law*, *supra* note 11, at 2417-19 (proposing presumption of mens rea as answer to over federalization of crime). Mandatory minimum sentencing schemes transfer the power to sentence from judges to prosecutors because prosecutors have discretion to charge offenses with fixed sentences. See *supra* notes 167-168 and accompanying text (explaining criticisms of mandatory minimum sentences). Mandatory minimums also lead to unfair and harsh sentences because judges lack authority to consider lower sentences for defendants whose circumstances may justify some leniency. See *supra* note 166 and accompanying text (citing judicial criticism of § 924(c) sentencing scheme). A mens rea presumption will give judges some room to consider individual circumstances and impose a more proportional sentence. Cf. *Batey*, *supra* note 151 at 367 (describing how judges use general intent to achieve result they consider appropriate for individual cases).

not established by a preponderance of the evidence.²¹⁶ The rule of lenity may also be a way to counter the use of mandatory minimum sentencing.²¹⁷ Mandatory minimum sentencing provisions such as § 924(c) are poorly drafted and subject to conflicting yet reasonable interpretations.²¹⁸ The rule of lenity will allow a judge to apply a lesser sentence when the statute's mens rea requirement is unclear, giving the judge discretion to apply a sentence more proportional to the defendant's culpability.²¹⁹ Together, the presumption of mens rea and the rule of lenity may be a way to quell the negative effects of mandatory minimum sentencing.

IV. CONCLUSION

The federal courts should adopt the Ninth and D.C. Circuits' reading of § 924(c)(1)(A)(iii) and imply a general intent requirement in the sentencing provision for discharging a firearm. Such a reading is consistent with the presumption that Congress legislates according to traditional principles that render intent an important component of criminal statutes. Specifically, this reading conforms to the principle that an increase in punishment represents an increase in culpability and ensures that harsh sentences besmirching the defendant are not imposed by strict liability. Requiring general intent is also consistent with Congress's intent to punish increasingly egregious conduct and would not frustrate Congress's purpose in deterring and incapacitating criminals who use guns.

As the law stands under *Harris*, the prosecution does not have to charge a

216. See *supra* Part III.B (arguing presumption of mens rea should apply to sentencing factors). Sentencing factors are typically subject to proof by a preponderance of the evidence standard. See Ross, *supra* note 62, at 965-66. Judicial discretion in sentencing more effectively ensures that criminal punishment corresponds with justice and culpability. See Kennedy, *supra* note 164, at 873-74 (arguing Congress should restore judicial discretion in sentencing). Professor Kennedy concludes that there are competing tensions between judicial mens rea interpretations and congressional responses to impose mandatory sentencing schemes, such as the Guidelines, which are motivated by a desire to reduce judicial discretion in sentencing. See *id.* at 754.

217. See *infra* note 219 (explaining how rule of lenity may allay harsh mandatory minimum sentences).

218. See 18 U.S.C. § 924(c) (2006); Patrick & Bak, *supra* note 34, at 1206 (observing § 924(c) still subject to statutory interpretation issues and circuit disagreement after 1998 Amendment); Collins, *supra* note 7, at 1356 (suggesting current amendment to § 924(c) will require future Supreme Court review); see also 18 U.S.C. § 844 (setting forth mandatory minimums for drug possession); Singer, *supra* note 149, at 152-53 & n.35 (commenting on statutory drug penalty provisions and circuit confusion whether they constitute sentencing factors or elements). Compare *United States v. Nava-Sotelo*, 354 F.3d 1202, 1206 (10th Cir. 2003) (holding ten-year sentence applies to accidental discharge), with *United States v. Brown*, 449 F.3d 154, 158 (D.C. Cir.) (holding ten-year sentence does not apply to accidental discharge), modified, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing).

219. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-04 (2005) (applying rule of lenity regarding mental element in criminal statute); *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting) (arguing rule of lenity should apply when statute is ambiguous or silent as to mens rea); cf. *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (explaining court will not increase a sentence when rule of lenity applies to penalty provision); *Bell v. United States*, 349 U.S. 81, 83 (1955) (describing presumption against imposition of harsher sentence when statutory construction uncertain).

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defendant with discharging a firearm, the jury does not decide whether the defendant discharged a firearm, nor does the prosecution have to prove the defendant discharged a firearm beyond a reasonable doubt. Requiring the defendant to have discharged a firearm with general intent in order to impose the heightened sentence will afford defendants a defense at the sentencing stage and allow judges the ability to depart from an otherwise harsh mandatory sentence with no possibility for parole.

Courts should not adopt the Tenth Circuit's refusal to apply the presumption of mens rea to sentencing factors. The traditional notion of punishing culpability should not depend on a mere taxonomic distinction between sentencing factors and elements. Congress should reconsider the mandatory minimum sentencing scheme in § 924(c) and other statutes. Until it does, however, the presumption of mens rea and the rule of lenity may be ways to quell the harsh sentencing effects and allow judges to use discretion to apply a sentence in proportion to a defendant's culpability.

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