
“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.”

I. INTRODUCTION

It is well settled that the presumption of mens rea in criminal law applies to federal criminal statutes. It remains debatable, however, whether this presumption applies to sentencing provisions contained within federal criminal statutes. 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.

---

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, the current version of § 924(c) is the result of a 1998 amendment. 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. Congress went even further, adding additional and harsher mandatory minimum sentences for brandishing or discharging a firearm. Section 924(c) imposes substantial penalties and is a powerful tool for federal prosecutors. 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.

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.


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).


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


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)).


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.\textsuperscript{16} Federal courts differ in their interpretations of the provisions contained in § 924(c)(1)(A).\textsuperscript{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).\textsuperscript{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.\textsuperscript{19} The courts have focused on the language of the statute and the provision’s status as a sentencing factor without examining legislative history.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{18} See supra note 17 (pointing out nature of disagreement).

\textsuperscript{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)).

\textsuperscript{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.

\textsuperscript{21} See infra Part II.A (providing legislative history of statute).

\textsuperscript{22} See infra Part II.D (setting forth principles of statutory construction and mens rea presumption).

\textsuperscript{23} See infra Part III (concluding general intent required to apply ten-year sentence for discharge of firearm under § 924(c)).
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. The Act provided for a mandatory sentence of one to ten years for carrying a firearm “unlawfully during the commission of any federal felony.” Since its inception, however, Congress has amended the statute many times.

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

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

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).
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. 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.”

In 1986, Congress passed the Firearms Owners’ Protection Act, which contained amendments to § 924(c). 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. 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. Prior to the 1998 amendment, however, the courts interpreted § 924(c) as containing a separate mens rea requirement apart from § 924(a). Specifically, courts provide 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).
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.
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.\textsuperscript{36}

2. 1998 Amendment and Current Statutory Language

Congress enacted the current version of § 924(c) through an amendment passed in 1998.\textsuperscript{37} Congress was responding to the Supreme Court’s decision in \textit{Bailey}, which narrowly construed the meaning of “use.”\textsuperscript{38} In \textit{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.\textsuperscript{39} In response, Congress added “possession in furtherance of” a crime as an alternative to the “uses or carries” language.\textsuperscript{40} The proponents of the amendment recognized the need for stronger penalties to deter drug traffickers from arming themselves.\textsuperscript{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...
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


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


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.


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.”

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

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. 
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. 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. The Court found no tradition or past congressional practice of treating “brandishing” and “discharging” as elements. Rather, “brandishing”
and “discharging” appear several times in the Federal Sentencing Guidelines as sentencing factors. 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. 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.

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). In United States v. Nava-Sotelo, 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 id. 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.


64. 354 F.3d 1202 (10th Cir. 2003).
More recently, in United States v. Dean, 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. In contrast, in United States v. Dare, the Ninth Circuit concluded that the defendant must act with general intent in discharging the firearm. Likewise, in United States v. Brown, 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. With two circuit courts on each side of the debate, these interpretations have a substantial effect on a defendant facing a § 924(c) charge. 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. 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. Nava-Sotelo, carrying a loaded firearm, attempted to free his brother, an inmate, while prison officials transported him from a dental clinic. A struggle ensued when a prison official attempted to disarm him, and the firearm discharged into the ground. Nava-Sotelo’s finger was on the trigger. The district court found that he brandished the gun but never pointed the firearm toward the officials. The district court concluded that the discharge was accidental and involuntary, imposing a seven-year, rather than a
ten-year, consecutive sentence. 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.

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. The court observed the lack of an express scienter provision under the statute’s plain language. 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.

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. To support this conclusion, the court looked to other circuit court cases refusing to apply mens rea to sentencing factors. The court also reasoned that the rationale for implying a mens rea to an element is not present when construing sentencing factors. 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. 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.

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, 556 (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. 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. The court, however, did conclude, without any detail or explanation, that the rule did not apply in this case.

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. 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. 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. 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. 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).
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.\textsuperscript{109} In determining that there is a general intent requirement implicit in “discharge,” the D.C. Circuit disagreed with the decision in \textit{Nava-Sotelo}.\textsuperscript{110} First, the court looked to the language and structure of the statute.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{114}

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

\textsuperscript{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. \textit{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).

\textsuperscript{110} See \textit{id.}

\textsuperscript{111} See United States v. Brown, 449 F.3d 154, 156 (D.C. Cir.) (inferring from progression in penalization, increasingly culpable conduct), \textit{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”).

\textsuperscript{112} See \textit{id.} at 155-57 (examining context of discharge provision).

\textsuperscript{113} See \textit{id.} at 157 (following D.C. Circuit’s practice of applying presumption against strict liability to aggravating circumstances that increase sentences); \textit{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 \textit{Brown}, recognized that part of its reasoning in \textit{Harris} had been undermined by subsequent Supreme Court precedent, but also distinguished the statutory provisions and concluded that \textit{Harris} did not apply to the interpretation of § 924(c)(1)(A). \textit{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 \textit{Harris v. United States}, the Supreme Court case.

\textsuperscript{114} See \textit{id.} at 157 (comparing presumption against strict liability to rule of lenity).
require strict construction because they deprive a person of liberty.\footnote{117} According to the court, laws that enhance sentences should therefore be strictly construed because they deprive a person of liberty.\footnote{118}

The government, however, argued that the language is plain and unambiguous with “\textit{[n]o words of qualification or limitation}.”\footnote{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.”\footnote{120} The court disagreed, believing that Congress had to define “brandish” to give the term a broader meaning than that provided in the dictionary.\footnote{121} The court also observed that the government’s position would create an absurd result that Congress could not have intended.\footnote{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.\footnote{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.\footnote{124}

4. United States v. Dean

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

\begin{footnotes}
\item[117] Id. (analyzing reason for rule of statutory construction).
\item[118] United States v. Brown, 449 F.3d 154, 157 (D.C. Cir.) (supporting decision to apply rule against strict liability to sentencing enhancement), \textit{modified}, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing).
\item[119] \textit{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).
\item[120] \textit{See} id. (arguing Congress explicitly provided mens rea for “brandish” and therefore purposefully left out mens rea for “discharge”).
\item[121] \textit{See} Brown, 449 F.3d at 157 (rejecting government’s argument).
\item[122] \textit{See} id. (considering government’s position).
\item[123] \textit{See} id. (criticizing strict liability interpretation of discharge provision).
\item[124] \textit{See} United States v. Brown, 449 F.3d 154, 157 (D.C. Cir.) (hypothesizing result of sentencing factor as strict liability), \textit{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. \textit{See} id.
\item[125] United States v. Dean, No. 06-14918, 2008 WL 441602, at *1 (11th Cir. Feb. 20, 2008).
\item[126] \textit{Id}. Dean instructed everyone to get down on the floor, and then entered the teller area. \textit{Id}.
\item[127] \textit{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. \textit{Id}.
\item[128] \textit{Id}. (describing discharge as accidental). After the shot, Dean immediately ran out of the bank with approximately $3,642.00. \textit{Id}.
\end{footnotes}
knew about the robbery, possessed the gun, and had a joint drug debt with Dean.\textsuperscript{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).\textsuperscript{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.\textsuperscript{131} First, the court looked to its own precedent in \textit{United States v. Brantley},\textsuperscript{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.\textsuperscript{133} In \textit{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.\textsuperscript{134}

Next, the court examined the reasoning of \textit{Nava-Sotelo} and \textit{Brown}.\textsuperscript{135} The court did not find \textit{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.\textsuperscript{136} Therefore, the court adopted the Tenth Circuit’s approach in \textit{Nava-Sotelo}, holding the defendants strictly accountable for the firearm’s discharge because of the underlying vicious will to conspire.\textsuperscript{137}

D. Statutory Interpretation

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

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

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

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

\textsuperscript{132} 68 F.3d 1283 (11th Cir. 1995).

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

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

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

\textsuperscript{136} \textit{Id.} at *5 (disagreeing with \textit{Brown}’s conclusion that statute’s higher penalty must contain intent requirement).

\textsuperscript{137} \textit{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 \textit{Brantley}).

\textsuperscript{138} \textit{See WAYNE R. LAFAVE, CRIMINAL LAW § 2.2 (3d ed. 2000) (considering when ambiguity exists).
construction to determine what Congress intended. To rules of statutory construction are “axioms of experience,” not rules of law. To interpret a statute the Supreme Court looks to its language, context, legislative history, and motivating policy. The Court first examines the statute’s language and gives the words their ordinary and plain meaning. The statutory words are also examined in context of the entire statute. Examining legislative history and purpose also gives insight into Congress’s intent when it enacted the statute.

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. The rule, however, is modified for statutory crimes for which applying it would frustrate the legislature’s intent. Imposing culpability for a crime in which the offender lacks a mens rea does not violate due process.

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.


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).


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. 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. When a statute does not contain a mens rea provision, courts generally presume the legislature imposed a general intent requirement. General intent is typically found where the defendant acts voluntarily and with knowledge of his actions.

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. 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. Courts have often

---

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 Morissette 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).  
151. “[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 Morissette v. United States, 342 U.S. 246, 263 (1952)).  
153. See Singer, supra note 149, at 143 (tracing history of avoiding mens rea by characterizing statutory provisions as sentencing factors).
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.\textsuperscript{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.\textsuperscript{155}

\section*{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.\textsuperscript{156} The rule of lenity is a principle of statutory construction with constitutional underpinnings, requiring strict construction of penal laws.\textsuperscript{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.\textsuperscript{158} Lenity applies to penalty provisions as well as substantive penal

\begin{footnotesize}
\textsuperscript{154} See, e.g., United States v. Figuereo, 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). \textit{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, \textit{supra} note 149, at 152-53 (pointing to unsupported conclusion that a strict liability presumption attaches to drug penalty provisions); see also Ross, \textit{supra} note 62, at 975 (noting assumed endorsement of strict liability when legislature makes the issue a sentencing factor).

\textsuperscript{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).


\textsuperscript{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. \textit{See} Livingston Hall, \textit{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. \textit{See} Bass, 404 U.S. at 347-48 (explaining reasons behind rule of lenity); Dan M. Kahan, \textit{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).

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. On the other hand, a court may not manufacture ambiguity to defeat congressional intent.

Unfortunately, the Court has inconsistently applied the rule of lenity to questions of mens rea interpretation in statutes. 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. 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.” At least one commentator has even suggested that the rule of lenity represents the true basis for the presumption of lenity in federal mens rea jurisprudence; infra notes 162-163 and accompanying text (summarizing Court’s inconsistent use of rule).

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 Kahana, 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 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).

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


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.

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).


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. Many of the amendments targeted culpable behavior. Historically, Congress’s amendments to § 924(c) favor mens rea, punish culpable conduct, and do not impose strict liability. 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. Even prior unsuccessful attempts to add penalties for discharging a firearm required proof of culpability, such as “with intent to injure.” 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. 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.

The purpose of the statute also supports implying a general intent requirement in the discharge provision. The purpose behind the statute is to deter criminal behavior, incapacitate offenders, and limit judicial discretion in sentencing. 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. Increasing penalties for unintentionally discharging a gun does not effectively serve a deterrence-related function. 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 Morrisette 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-Sotelo* 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-Sotelo* 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.\textsuperscript{200} Just because a crime is statutorily created does not mean that the presumption should not apply.\textsuperscript{201} Like other canons of construction, it should be used to determine congressional intent.\textsuperscript{202} The decisions, like \textit{Nava-Sotelo} and \textit{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.\textsuperscript{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.\textsuperscript{204} Furthermore, the rule of lenity applies to sentencing factors.\textsuperscript{205} As some have suggested, the presumption of mens rea is an application of the rule of lenity.\textsuperscript{206} Therefore, like the rule of lenity, the presumption of mens rea is another canon of interpretation that should apply to sentencing factors.\textsuperscript{207}

\textbf{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.\textsuperscript{208} Notwithstanding this conclusion, even if it remained ambiguous whether the discharge provision contained a

\begin{itemize}
\item \textsuperscript{200} See supra note 145 and accompanying text (pointing to history of mens rea requirement in criminal law).
\item \textsuperscript{201} See supra note 2 and accompanying text (finding well-settled principle indicating mens rea presumption applies to federal statutory crimes).
\item \textsuperscript{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).
\item \textsuperscript{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 \textit{Morissette} and \textit{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 \textit{Morissette}, 342 U.S. at 250-51.
\item \textsuperscript{204} See supra notes 145-151 and accompanying text (tracing history and meaning of presumption of mens rea).
\item \textsuperscript{205} See supra note 159 and accompanying text (discussing cases in which Court has applied rule of lenity to statutory penalty provisions).
\item \textsuperscript{206} See supra note 164 and accompanying text (tracing presumption of mens rea to rule of lenity).
\item \textsuperscript{207} See supra note 157 and accompanying text (observing rule of lenity as canon of construction); supra note 159 and accompanying text (observing presumption of mens rea as canon of construction closely related to rule of lenity).
\item \textsuperscript{208} See supra Part III.A (analyzing language, context, history and motivating policy of § 924(c) discharge enhancement).
\end{itemize}
mens rea requirement, the rule of lenity would require the same result.\footnote{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.\footnote{210} The Court has also applied the rule of lenity to penalty provisions.\footnote{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.\footnote{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.\footnote{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.\footnote{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.\footnote{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

\footnote{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).

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


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

\footnote{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).

\footnote{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).

\footnote{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.\textsuperscript{216} The rule of lenity may also be a way to counter the use of mandatory minimum sentencing.\textsuperscript{217} Mandatory minimum sentencing provisions such as § 924(c) are poorly drafted and subject to conflicting yet reasonable interpretations.\textsuperscript{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.\textsuperscript{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 \textit{Harris}, the prosecution does not have to charge a

\begin{flushright}
\begin{minipage}{0.95\textwidth}
\begin{itemize}
\item \textsuperscript{216} See \textit{supra} Part III.B (arguing presumption of mens rea should apply to sentencing factors).
\item Sentencing factors are typically subject to proof by a preponderance of the evidence standard. See \textit{Ross, supra} note 62, at 965-66. Judicial discretion in sentencing more effectively ensures that criminal punishment corresponds with justice and culpability. See \textit{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 \textit{id.} at 754.
\item \textsuperscript{218} See \textit{infra} note 219 (explaining how rule of lenity may allay harsh mandatory minimum sentences).
\item \textsuperscript{217} See 18 U.S.C. § 924(c) (2006); \textit{Patrick & Bak, supra} note 34, at 1206 (observing § 924(c) still subject to statutory interpretation issues and circuit disagreement after 1998 Amendment); \textit{Collins, supra} note 7, at 1356 (suggesting current amendment to § 924(c) will require future Supreme Court review); \textit{see also} 18 U.S.C. § 844 (setting forth mandatory minimums for drug possession); \textit{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). \textit{Compare United States v. Nava-Sotelo, 354 F.3d 1202, 1206 (10th Cir. 2003) (holding ten-year sentence applies to accidental discharge), \textit{with United States v. Brown, 449 F.3d 154, 158 (D.C. Cir.) (holding ten-year sentence does not apply to accidental discharge), \textit{modified, 463 F.3d 1 (D.C. Cir. 2006) (remanding to district court to find facts relevant to sentencing).}}
\item \textsuperscript{219} See \textit{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); \textit{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).}}
\end{itemize}
\end{minipage}
\end{flushright}
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.

Elizabeth H. Kelly