UNKNOWN ELEMENTS: THE MENS REA QUESTION IN 18 U.S.C. § 924(c)(1)(B)(ii)'S MACHINE GUN PROVISION

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18 U.S.C. § 924(c)(1)(B)(ii) imposes an additional mandatory minimum sentence of thirty years for the possession of a machine gun during and in relation to a drug trafficking or violent crime. Prior to 2010, federal courts commonly excluded a mens rea requirement from § 924(c)(1)(B)(ii) by reasoning that machine gun possession was a sentencing factor, not an element of the offense to be found by a jury. In 2010, however, the Supreme Court held in United States v. O'Brien *that machine gun possession was an element of the offense that must be proven to a jury beyond a reasonable doubt. In light of* O'Brien*'s removal of one major tenet on which prior courts justified their interpretation of § 924(c)(1)(B)(ii)'s mens rea requirement, this Note examines remaining arguments for continuing to exclude a mens rea requirement from the provision.*

*Specifically, this Note examines the opinions of two post-*O'Brien *cases from the Eleventh and D.C. Circuits, which reaffirmed their prior exclusion of a mens rea requirement from § 924(c)(1)(B)(ii). The Note suggests that, contrary to the Eleventh and D.C. Circuit opinions, canons of mens rea interpretation do not compel the exclusion of a mens rea requirement from § 924(c)(1)(B)(ii). That is, the Supreme Court's mens rea case law does not provide a cut-and-dried canon of interpretation that clearly determines § 924(c)(1)(B)(ii)'s mens rea question. Nonetheless, this Note observes, the Court has exhibited an implicit concern with ensuring that mental culpability be proportionate to the punishment imposed in certain areas of its mens rea jurisprudence. As such, courts should require a mens rea showing for machine gun possession because doing so would be consistent with the Court's underlying concern with proportionality between sentencing and mental culpability.*

INTRODUCTION

18 U.S.C. § 924(c)(1) imposes additional mandatory minimum sentences for the possession of a firearm during and in relation to a drug trafficking crime or a crime of violence (the "predicate offense").[1] If a defendant uses a firearm during a predicate offense, § 924(c)(1)(A)(i) imposes an additional mandatory minimum sentence of five years. If the firearm is a machine gun or has a silencer, the mandatory minimum sky-

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1. 18 U.S.C. § 924(c)(1) (2012).

rockets from five to thirty years under § 924(c)(1)(B)(ii)—a sixfold increase from the use of a nonautomatic firearm.

In 2010, the Supreme Court held in *United States v. O'Brien* that, due in part to § 924(c)(1)(B)(ii)'s imposition of a "drastic, sixfold increase" in sentencing, a jury must find beyond a reasonable doubt that a defendant used a machine gun in order to qualify for § 924(c)(1)(B)(ii)'s sentencing increase.[2] *O'Brien*'s holding undermined federal courts' prior assumption that machine gun possession was a mere "sentencing factor" that could be found by a judge at sentencing.[3] Despite the severity of § 924(c)(1)(B)(ii)'s mandatory minimum, the *O'Brien* Court explicitly declined to address whether a jury must also find that a defendant was aware that the gun was a machine gun.[4]

By declining to address the status of § 924(c)(1)(B)(ii)'s mens rea requirement, *O'Brien* not only leaves open the question of mens rea in § 924(c)(1)(B)(ii), but it also highlights a gap in Supreme Court mens rea jurisprudence concerning the relationship between mental culpability and punishment. Specifically, the *O'Brien* Court's emphasis on § 924(c)(1)(B)(ii)'s "drastic" sentencing increase but refusal to decide the mens rea requirement for machine gun possession indicates a lack of clear doctrine on how a sharp change in sentencing implicates an offense's mens rea requirement. The importance of clarifying the relationship between mental culpability and punishment is especially important for statutes like § 924(c)(1)(B)(ii) that trigger a steep sentencing increase based only on the existence of an external condition, and whose mandatory nature precludes judges from exercising discretion based on a context-specific determination of defendants' mental states.[5]

Prior to *O'Brien*, the Eighth, Tenth, Eleventh, and D.C. Circuits ruled that a defendant's knowledge that his or her gun was a machine

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2. 130 S. Ct. 2169, 2174, 2177, 2180 (2010).

3. See, e.g., infra Part I.A.2 (discussing pre-*O'Brien* cases finding § 924(c)(1)'s machine gun provision was sentencing factor).

4. 130 S. Ct. at 2173 ("The issues in the present case do not require the Court to consider any contention that a defendant . . . must be aware of the weapon's characteristics. This opinion expresses no views on the point."). Three years after *O'Brien*, the Court held in *Alleyne v. United States* that, under the Sixth Amendment right to a jury trial, any facts that increase the mandatory minimum sentence in a criminal statute are elements of the offense, which must be found by a jury beyond a reasonable doubt. 133 S. Ct. 2151, 2160 (2013). Although *Alleyne* provided an additional, constitutional basis for *O'Brien*'s classification of § 924(c)(1)(B)(ii) as an element of the offense, *Alleyne* did not address the relationship between (1) when a jury must find a fact that triggers a mandatory minimum increase and (2) when a jury must find a mental state with respect to such a fact.

5. See, e.g., Erik Luna & Paul G. Cassell, Mandatory Minimalism, 32 Cardozo L. Rev. 1, 13 (2010) ("[Mandatory minimums] eliminate judicial discretion to impose a prison term lower than the statutory floor, making case-specific information about the offense and offender irrelevant, at least to the extent that these facts might call for a below-minimum sentence.").

gun was irrelevant for conviction under § 924(c)(1)(B)(ii).[6] These circuits provided two major rationales for their decisions. First, courts cited the fact that § 924(c)(1)(B)(ii) was merely a sentencing factor,[7] not an element of the offense.[8] Second, courts observed that no mens rea should be required for machine gun possession because § 924(c)(1) already ensured that a defendant would have a "vicious will," due to § 924(c)(1)(A)'s requirement that defendants use their weapons for the purpose of facilitating a predicate crime.[9] Under courts' "vicious will" rationale, a threshold awareness of wrongdoing—i.e., the decision to use any firearm to commit a predicate crime—is sufficient to justify the additional thirty-year mandatory minimum for machine gun possession, so long as the relevant external circumstance (that the firearm was automatic) exists.

This Note argues that in light of *O'Brien*'s reclassification of § 924(c)(1)(B)(ii) as an element of the offense, the Supreme Court's explicit canons of mens rea interpretation are insufficient to determine whether § 924(c)(1)(B)(ii) should require a mens rea showing for machine gun possession. Nonetheless, the Court has exhibited an implicit concern with ensuring proportionality between mental culpability and punishment in certain areas of its mens rea jurisprudence. Thus, even though the Court's established canons of interpretation do not decide the mens rea issue in § 924(c)(1)(B)(ii), imposing a mens rea requirement would best serve the Court's underlying concern with ensuring proportionality between mental culpability and sentencing.

Part I of this Note explains *O'Brien*'s implications for prior interpretations of mens rea in § 924(c)(1)(B)(ii) and provides a general overview of the Supreme Court's mens rea jurisprudence. Part II discusses and evaluates courts' treatment of mens rea in § 924(c)(1)(B)(ii) after *O'Brien*. Part II.A examines the D.C. and Eleventh Circuits' specific responses to *O'Brien* in *United States v. Burwell*[10] and *United States v. Haile*,[11] respectively. Part II.B illustrates that if § 924(c)(1)(B)(ii) is not a sentencing factor, arguments in favor of excluding a mens rea requirement are ambiguous at best. Part II.B then suggests that the Supreme Court's

6. See infra Part I.A.2 (discussing relevant case law).

7. For a history of federal courts' practice of excluding mens rea requirements from sentencing factors, see infra notes 24–26 and accompanying text. Courts appear to refer to "sentencing factor" and "sentencing enhancement" interchangeably. See, e.g., *O'Brien*, 130 S. Ct. at 2173, 2178 (finding § 924(c)(1)(B)(ii) was not "sentencing factor," and noting government's position that § 924(c)(1)(B)(ii) was "sentencing enhancement"); United States v. Ciszkowski, 492 F.3d 1264, 1268–69 (11th Cir. 2007) (finding "firearm characteristics in § 924(c) are sentencing factors," and referring to § 924(c) as "enhancement statute").

8. See, e.g., infra Part I.A.2 (discussing decisions on mens rea in § 924(c)(1)(B)(ii)).

9. See, e.g., infra notes 28–31 and accompanying text (discussing Tenth and D.C. Circuits' use of "vicious will" rationale).

10. 690 F.3d 500 (D.C. Cir. 2012) (en banc).

11. 685 F.3d 1211 (11th Cir. 2012).

prior mens rea case law reveals an implicit concern with ensuring that a defendant's mental culpability is proportionate to the penalty imposed. Part III concludes by arguing that in light of the Court's concern with proportionate sentences, a mens rea requirement should attach to § 924(c)(1)(B)(ii) due to its harsh mandatory sentencing increase.

I. SUPREME COURT MENS REA INTERPRETATION AND § 924(c)(1): AN OVERVIEW

A. *Mens Rea Case Law on 18 U.S.C § 924(c)(1)(B)(ii) and* United States v. O'Brien

This section summarizes courts' treatment of mens rea in § 924(c)(1)'s machine gun provision prior to *O'Brien*. Part I.A.1 gives an overview of mens rea distribution in § 924(c)(1). Part I.A.2 summarizes courts' rationales for excluding a mens rea requirement from § 924(c)(1)'s machine gun provision, observing that courts have justified their decisions on the rationale that (1) machine gun possession is a sentencing factor, not an element of the offense, and (2) § 924(c)(1)(B)(ii) already ensures a threshold awareness of wrongdoing (i.e., a threshold "vicious will") because a defendant must knowingly commit the predicate offense. Part I.A.3 explains how *O'Brien* undermines the sentencing factor justification by reclassifying § 924(c)(1)(B)(ii) as an element of the offense.

1. *The Statute: 18 U.S.C. § 924(c)(1).* — 18 U.S.C. § 924(c)(1) provides additional mandatory minimum sentences for anyone who, "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm."[12] Sections 924(c)(1)(A)(i)–(iii) specify additional minimum sentences of five, seven, and ten years for use, brandishing, and discharge of the firearm, respectively.[13] Section 924(c)(1)(B)(ii) specifies an additional sentence of thirty years if the firearm is a machine gun or is equipped with a silencer.[14] Section 924(c)(1)(D) requires the additional sentence to be served consecutive to any other term of imprisonment imposed for the predicate crimes.[15]

The Supreme Court has already ruled on mens rea distribution in § 924(c)(1)(A), 924(c)(1)(A)(ii), and 924(c)(1)(A)(iii). Regarding § 924(c)(1)(A), the Court held that the involvement of the firearm can-

12. 18 U.S.C. § 924(c)(1)(A) (2012).

13. § 924(c)(1)(A)(i)–(iii).

14. § 924(c)(1)(B)(ii). For the purposes of the statute, "'machinegun'" is defined as, inter alia, "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b) (2012). "Firearm silencer" is defined as, inter alia, "any device for silencing, muffling, or diminishing the report of a portable firearm." 18 U.S.C. § 921(a)(24).

15. § 924(c)(1)(D).

not be the "result of accident or coincidence" because the firearm must be used "in relation to" the predicate crime.[16] Additionally, § 924(c)(1)(A)(ii)'s brandishing provision requires that the defendant intended to use the firearm to intimidate another person.[17] In contrast, the Court ruled that § 924(c)(1)(A)(iii)'s discharge provision required no mens rea showing.[18]

2. *Federal Case Law on Mens Rea in § 924(c)(1)'s Machine Gun Provision.* — Case law on mens rea in § 924(c)(1)'s machine gun provision has remained consistent despite a structural amendment in 1998 (and an accompanying Supreme Court interpretation of the pre-amendment statute in 2000[19]). Prior to its amendment in 1998, 18 U.S.C. § 924(c)(1) read:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . be sentenced to imprisonment for five years, . . . and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.[20]

Congress's 1998 amendment separated § 924(c)(1) into the subsections discussed above.[21] Specifically, the amendment separated the machine gun provision from § 924(c)(1) and placed it in § 924(c)(1)(B), which reads: "If the firearm . . . (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years."[22]

In construing both versions of the statute, courts of appeals have held that no mens rea is necessary with respect to machine gun posses-

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16. Smith v. United States, 508 U.S. 223, 238 (1993); see also Dean v. United States, 129 S. Ct. 1849, 1857 (2009) (Stevens, J., dissenting) ("As we have said before, [§ 924(c)(1)(A)'s] relational terms convey that it does not reach inadvertent conduct." (construing *Smith*, 508 U.S. at 238)).

17. See § 924(c)(4) ("[T]he term 'brandish' means, with respect to a firearm, 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 . . . ."); see also *Dean*, 129 S. Ct. at 1853–54 ("The defendant must have intended to brandish the firearm, because the brandishing must have been done for a specific purpose." (construing § 924(c)(4))).

18. See *Dean*, 129 S. Ct. at 1856 ("Section 924(c)(1)(A)(iii) requires no separate proof of intent. The 10-year mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident."). For further discussion of *Dean*'s holding, see infra notes 87–99 and accompanying text.

19. See infra notes 32–36 and accompanying text (discussing *Castillo v. United States*).

20. 18 U.S.C. § 924(c)(1) (Supp. III 1997).

21. See supra notes 12–15 and accompanying text (summarizing subsections of § 924(c)(1)).

22. 18 U.S.C. § 924(c)(1)(B)(ii) (Supp. V 1999). The 1998 amendment also altered the wording of the penalty from "imprisonment for thirty years" to "imprisonment of not less than 30 years." Compare id., with 18 U.S.C. § 924(c)(1) (Supp. III 1997).

sion, reasoning that the provision was a sentencing factor, not an element of the offense. Courts based their rationale on a "sentencing factor" canon of mens rea interpretation, which assumes that sentencing factors, which are determined by a judge at sentencing, do not require mens rea showings.[23] Courts have developed this "sentencing factor" justification for excluding a mens rea requirement through a somewhat indirect line of reasoning. The canon began with *McMillan v. Pennsylvania*, which held that sentencing factors need not be found by a jury, but, instead, could be determined by a judge at sentencing.[24] One implication of *McMillan* was that juries need not find a defendant's mental state with respect to a sentencing factor, insofar as juries need not find a sentencing factor *at all*.[25] As a result, post-*McMillan* federal courts repeatedly justified their exclusion of a mens rea requirement on the rationale that the provision was a sentencing factor, not an element of an offense.[26]

a. *Pre-2000 Case Law.* — Prior to 2000, the D.C. and Tenth Circuits found that the pre-amendment version of § 924(c)(1) required no mens rea showing with respect to machine gun possession. In *United States v. Harris*, the D.C. Circuit held that whereas the government must show "[d]eliberate culpable conduct . . . as to the *essential elements* of the crime—the commission of the predicate offense and the use of a firearm," no mental state regarding the "*sentence enhancement* for use of a machine gun" was necessary.[27] *Harris* further justified its holding by invoking a "vicious will" rationale (i.e., reasoning that the defendant already possessed a threshold awareness of wrongdoing by committing the predicate offense). Specifically, the court noted "that the essential elements of the

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23. See infra notes 52–54 and accompanying text for a critique of the "sentencing factor" canon.

24. 477 U.S. 79, 91 (1986) ("States may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense . . . [and] in this case the preponderance standard satisfies due process.").

25. See Richard Singer, The Model Penal Code and ~~Three~~ Two (Possibly Only One) Ways Courts Avoid Mens Rea, 4 Buff. Crim. L. Rev. 139, 151 (2000) (noting post-*McMillan* courts' rationale that because sentencing factor was not "element of the crime, there was no need for a jury instruction . . . on mens rea"); see also id. at 143 ("Between 1986 and 2000, federal courts . . . avoided the question of whether mens rea applied . . . by denying that the fact was an element at all but was, rather, a 'sentencing factor.'").

26. See, e.g., United States v. Nava-Sotelo, 354 F.3d 1202, 1205–06 (10th Cir. 2003) (holding no mens rea requirement applied because "§ 924(c)'s brandishing and discharge provisions are 'sentencing factors to be found by the judge, not offense elements to be found by the jury'"); see also Alun Griffiths, Comment, *People v. Ryan*: A Trap for the Unwary, 61 Brook. L. Rev. 1011, 1028–29 (1995) (suggesting courts' refusal to consider mens rea with respect to sentencing factors originated from fact that sentencing factors were determined at sentencing stage, while sufficient mens rea had been found during trial phase).

27. 959 F.2d 246, 259 (D.C. Cir. 1992) (emphasis added), abrogated on other grounds by United States v. Stewart, 246 F.3d 728, 731–32 (D.C. Cir. 2001).

crime (drug trafficking and use of a firearm) already require a showing of *mens rea*."[28]

Similarly, in *United States v. Eads*, the Tenth Circuit found a mens rea showing unnecessary because the mens rea requirement for the predicate crime sufficiently ensured that defendants would have a "vicious will."[29] The *Eads* court thus reasoned, "The rationale . . . that a separate mens rea for the type of weapon need not be proven is the view that § 924(c)(1)(B) is a sentencing enhancement rather than an element of the offense."[30] Thus, § 924(c)(1)(B)(ii)'s status as a sentencing enhancement was a determining factor in the court's decision.[31]

b. Castillo v. United States *and Post-2000 Case Law.* — In 2000, the Supreme Court held in *Castillo v. United States* that the machine gun provision of the pre-1998 version of § 924(c)(1) was an element of the offense, not a sentencing factor.[32] Due to the procedural posture of the case (an appeal from a pre-1998 trial), *Castillo*'s holding only applied to the pre-1998 version of the statute, and did not address the 1998 amendment.[33] Moreover, the *Castillo* Court addressed only whether a jury must find that a defendant used a machine gun, and did not decide the mens rea question.[34] Among other arguments,[35] the Court noted that the severity of the machine gun provision's mandatory sentencing increase weighed in favor of requiring a jury finding.[36]

Despite *Castillo*, courts continued to exclude a mens rea requirement from § 924(c)(1)(B)(ii). In doing so, however, courts felt it necessary to classify the post-1998 version of § 924(c)(1)'s machine gun provision as a sentencing factor. Some courts distinguished *Castillo*, reasoning

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28. Id.

29. 191 F.3d 1206, 1213–14 (10th Cir. 1999).

30. Id. at 1213.

31. See *Nava-Sotelo*, 354 F.3d at 1206 ("We concluded the type of firearm used or carried under § 924(c) was a sentencing enhancement rather than an element of the offense and, therefore, a separate mens rea for the type of weapon need not be proven." (construing *Eads*, 191 F.3d at 1213–14)).

32. 530 U.S. 120, 131 (2000).

33. Id. at 121–22.

34. Id. at 131.

35. The Court also invoked the following four arguments: First, the structure of § 924(c)(1) was an unbroken sentence, suggesting the entire sentence, including the machine gun provision, defined elements of the crime. Id. at 124–25. Second, sentencing factors generally involve characteristics of the offender, while firearm-type provisions are typically elements of the offense—particularly in statutes where, as in § 924(c)(1), the use and carrying of a firearm is itself a substantive crime. Id. at 126–27. Third, not requiring a jury to find what type of gun the defendant used could create a potential conflict between the judge and jury: Where multiple weapons are at issue, it is possible that the jury might find that a defendant "used" only the pistol, while the judge imposes a sentence based on the machine gun. Id. at 127–28. Fourth, legislative history indicated that Congress discussed the "use" provision with the same language as the machine gun provision. Id. at 129–30.

36. Id. at 131.

that Congress reclassified the machine gun provision as a sentencing factor by moving the provision to a separate subsection. For instance, in *United States v. Gamboa*, the Eighth Circuit held that there was no mens rea requirement for § 924(c)(1)(B)(ii).[37] The court found that the separation of the machine gun provision into a different subsection indicated that § 924(c)(1) was an "offense with subsets of persons singled out for more severe punishment."[38] Thus, the court concluded, "[b]ecause the facts concerning the type of firearm . . . are sentencing factors, and not elements of the offense . . . the United States was not required to show [mens rea for machine gun possession]."[39] Similarly, in *United States v. Morrow*, the D.C. district court declined to require a mens rea showing for machine gun possession, reasoning that the 1998 amendment reclassified the machine gun provision as a sentencing factor.[40] *Morrow* is particularly notable because the opinion suggested that, but for the amendment, *Castillo* may have required a mens rea showing: "Taken to its liberal limit, [*Castillo*'s] ruling might have suggested that the government must prove scienter as to the precise nature of the weapon in order to obtain a 30 year mandatory minimum sentence . . . ."[41]

The Tenth and Eleventh Circuits also declined to require a mens rea showing for machine gun possession. These circuits, however, assumed that § 924(c)(1)(B)(ii) was a sentencing factor without any mention of *Castillo*.[42] The fact that courts found it important to continue to assert, despite *Castillo*, that machine gun possession was a sentencing factor suggests that the "sentencing factor" canon was a crucial rationale behind courts' interpretation of § 924(c)(1)(B)(ii)'s mens rea requirement.[43]

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37. 439 F.3d 796, 812 (8th Cir. 2006).

38. Id. at 811.

39. Id. at 812.

40. No. CRIM.A. 04-355CKK, 2005 WL 3163804, at *4 (D.D.C. June 20, 2005), aff'd en banc sub nom. United States v. Burwell, 690 F.3d 500 (D.C. Cir. 2012).

41. Id. at *3. After *O'Brien*, *Morrow* was reconsidered en banc by the D.C. Circuit as *United States v. Burwell*. See infra Part II.A for further discussion of *Burwell*'s decision to reaffirm *Morrow*.

42. See, e.g., United States v. Ciszkowski, 492 F.3d 1264, 1269 (11th Cir. 2007) ("[B]ecause § 924(c) is an *enhancement statute*, it does not require proof of 'particularized knowledge' of the weapon characteristics. . . . [A] person violating § 924(c) had already demonstrated a 'vicious will' . . . . Thus, there was no risk of punishing an innocent actor by applying the *enhancements*." (emphasis added) (quoting United States v. Brantley, 68 F.3d 1283, 1289–90 (11th Cir. 1995))); United States v. Brown, 400 F.3d 1242, 1255 n.9 (10th Cir. 2005) ("Knowledge that a gun is a machine gun is not an element of the third count . . . for carrying a gun during and in relation to a drug trafficking crime." (citing United States v. Eads, 191 F.3d 1206, 1212–14 (10th Cir. 1999))).

43. Additionally, some courts of appeal have expressed willingness, after *Castillo*, to entertain the idea that § 924(c)(1)(B)'s subsections require mens rea showings once *Castillo* found machine gun possession to be an element of the offense. These cases, however, did not decide the issue or address it at length. See, e.g., United States v. Rodriguez, 54 F. App'x 739, 747 (3d Cir. 2002) ("[A]ssuming without deciding that knowledge was required, any failure to submit the element of knowledge to the jury was

Ten years after *Castillo*, however, a new Supreme Court case would call this rationale into doubt.

3. United States v. O'Brien *Undermines the Sentencing Factor Rationale.* — In 2010, the Supreme Court held in *United States v. O'Brien* that § 924(c)(1)(B)(ii) was an element of the offense to be proven to a jury, not a sentencing factor.[44] In so doing, *O'Brien* eliminated the primary assumption on which prior courts had justified exclusion of a mens rea requirement from the machine gun provision. Contrary to post-*Castillo* federal courts, *O'Brien* found that Congress merely relegated the machine gun provision to a separate subsection to "[break] up a lengthy principal paragraph, which exceeded 250 words . . . into a more readable statute," not to indicate that machine gun possession should be a sentencing enhancement.[45] The Court also reiterated three of *Castillo*'s rationales: (1) that firearm characteristics are typically elements of an offense (as opposed to sentencing factors, which traditionally involve characteristics of the offender);[46] (2) that unfairness may result from classification of the machine gun provision as a sentencing factor if a jury found that the defendant's gun was nonautomatic, while the judge finds at sentencing that the defendant used a machine gun;[47] and (3) that the severity of the sentencing increase—a "drastic, sixfold increase"—"strongly suggests a separate substantive crime."[48]

Although *O'Brien* explicitly declined to address the mens rea requirement for § 924(c)(1)(B)(ii),[49] it noted that "[t]he immense danger posed by machineguns [and] the *moral depravity in choosing the weapon* . . . support the conclusion that this prohibition is an element of the crime, not a sentencing factor."[50] The Court's recognition of an increased "moral depravity" in using a machine gun is significant because it suggests that at least part of § 924(c)(1)(B)(ii)'s additional sentence ac-

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harmless error. . . . [T]he jury would have found that the Appellants knew that they possessed a machine gun or a gun with a silencer if the knowledge instruction was given."); United States v. Dixon, 273 F.3d 636, 640–41 (5th Cir. 2001) (assuming "without deciding that *Castillo* makes the defendant's knowledge of the short-barreled characteristic of the shotgun an element of the offense under § 924(c)(1)," but finding jury instruction sufficiently clear to indicate knowledge of firearm type was required).

44. 130 S. Ct. 2169, 2180 (2010).

45. Id.

46. Id. at 2176 (citing Castillo v. United States, 530 U.S. 120, 126 (2000)).

47. Id. at 2177 (citing *Castillo*, 530 U.S. at 128). This situation would occur in a case where multiple firearms are involved: While the jury may find defendant satisfied the elements of the crime with a pistol, it may not communicate this fact to the sentencing judge, who may then impose a sentence based on a machine gun that was also present at the crime. See *Castillo*, 530 U.S. at 128.

48. *O'Brien*, 130 S. Ct. at 2177 (citing *Castillo*, 530 U.S. at 131).

49. Id. at 2173 ("The issues in the present case do not require the Court to consider any contention that a defendant who uses, carries, or possesses a firearm must be aware of the weapon's characteristics. This opinion expresses no views on the point.").

50. Id. at 2178 (emphasis added).

counts for the increased moral culpability of consciously choosing a machine gun. The mention of a heightened moral depravity also directly contradicts *United States v. Harris*'s reasoning that the sentencing increase did not account for an increase in mental culpability.[51]

Therefore, *O'Brien* undermines federal courts' prior reliance on the assumption that § 924(c)(1)(B)(ii) was a sentencing factor to justify their exclusion of a mens rea requirement. *O'Brien* does not, however, speak to the legitimacy of the "vicious will" rationale—namely, that once a statute ensures a minimal degree of mental culpability, no mens rea requirement should extend to additional elements of the statute. The remainder of this Note explores whether the Supreme Court's canons of mens rea interpretation support the continued exclusion of a mens rea requirement from § 924(c)(1)(B)(ii). Part I.B offers a survey of the Court's mens rea jurisprudence and establishes that the Court has not treated the mere existence of a threshold awareness of wrongdoing as a factor weighing against the exclusion of a further mens rea requirement.

However, before proceeding to the next section, it is important to note that although some courts have explicitly acknowledged the "sentencing factor" canon for excluding mens rea,[52] it is problematic to conclude that a sentencing factor does not require a mens rea inquiry based on *McMillan*'s holding that sentencing factors need not be proven to a jury.[53] This is because the rule that a jury need not find a sentencing factor does not imply that mens rea is always irrelevant for sentencing factors. For instance, mens rea could still be implicated at the sentencing stage, where a judge could make a determination regarding a defendant's mental state. Indeed, some courts have extended mens rea requirements into federal sentencing guidelines.[54] Thus, it is questionable

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51. United States v. Harris, 959 F.2d 246, 259 (D.C. Cir. 1992) ("[T]here does not seem to be a significant difference in *mens rea* between a defendant who commits a drug crime using a pistol and one who commits the same crime using a machine gun; the act is different, but the mental state is equally blameworthy."), abrogated on other grounds by United States v. Stewart, 246 F.3d 728, 731–32 (D.C. Cir. 2001); see also supra notes 27–28 and accompanying text (discussing *Harris*, including court's finding use of machine gun does not reflect more depraved mental state).

52. See, e.g., United States v. Nava-Sotelo, 354 F.3d 1202, 1206 (10th Cir. 2003) ("Because the brandishing and discharge provisions of § 924(c) are sentencing factors, not elements, the government was not required to show that Nava-Sotelo knowingly or intentionally discharged his weapon. Accountability is strict . . . ."); see also Singer, supra note 25, at 143 ("Between 1986 and 2000, federal courts (and to some extent their state counterparts) often avoided the question of whether mens rea applied to a statutorily enunciated fact by denying that the fact was an element at all but was, rather, a 'sentencing factor.'").

53. McMillan v. Pennsylvania, 477 U.S. 79, 91–93 (1986).

54. Courts have held, for example, that U.S. Sentencing Guidelines Manual § 2G2.2(b)(4) (2012)—which imposes a sentence enhancement for the sexual exploitation of minors involving "material that portrays sadistic or masochistic conduct or other depictions of violence"—requires a finding of intent to possess images of minors engaged in violent acts. See, e.g., United States v. Tucker, 136 F.3d 763, 764 (11th Cir.

whether the "sentencing factor" canon should qualify as an established canon of mens rea interpretation.

To the extent, then, that the "sentencing factor" canon is undermined by a logical gap between the fact that no jury finding is necessary and the proposition that no mens rea inquiry is necessary, this Note's thesis—that Supreme Court mens rea jurisprudence does not militate against a mens rea requirement for § 924(c)(1)(B)(ii), and even weighs in favor of imposing a mens rea requirement—applies not only to the state of the law after *O'Brien*, but before it as well.

B. *The Supreme Court's Mens Rea Case Law Does Not Require Limiting Mens Rea Distribution to a Threshold Awareness of Wrongdoing*

This section provides a landscape of the Supreme Court's canons for mens rea interpretation. Specifically, it seeks to establish that, under the Court's mens rea jurisprudence, the mere fact that a statute guarantees a threshold awareness of wrongdoing is not, in itself, an independent factor that precludes the extension of a mens rea requirement into further elements of a statute. Part I.B.1 discusses the Court's treatment of statutes that could potentially criminalize defendants who believed their conduct to be entirely innocent. It describes the "innocence rule" canon, where a mens rea requirement is extended to a statutory element if doing so is needed to avoid criminalizing defendants without any awareness of wrongdoing. Part I.B.2 addresses the Court's treatment of statutes that sufficiently ensure a defendant has some awareness of wrongdoing (what the Court often refers to as a "vicious will"), such that the "innocence rule" is not implicated. Part I.B.2 observes that, for these statutes, the Court has applied other canons of interpretation that weigh against extending a mens rea requirement to other elements in the statute. The section further suggests, however, that the Court has not invoked the mere presence of a vicious will as a stand-alone justification for declining to extend a mens rea requirement in a statute. Finally, Part I.B.3 discusses *Flores-Figueroa v. United States*, a recent case suggesting that the Court is willing to extend the mens rea requirement in a statute beyond what is necessary to ensure a threshold vicious will.[55]

1998) (per curiam) ("We . . . find that intent is a necessary requirement of a § 2G2.2(b)[(4)] enhancement, and find that there was sufficient evidence that [the defendant] intended to possess material depicting minors involved in sadistic, masochistic, or other violent acts."); United States v. Kimbrough, 69 F.3d 723, 734 (5th Cir. 1995) (upholding trial court's finding that defendant "intentionally ordered and possessed pornography which depicted sadistic or masochistic conduct" for purpose of § 2G2.2(b)(4) sentence enhancement). Though the text of what is now § 2G2.2(b)(4) formerly appeared as § 2G2.2(b)(3), the language is identical.

55. See Flores-Figueroa v. United States, 129 S. Ct. 1886, 1890 (2009) (extending mens rea requirement to fact that identification belonged to another person for statute prohibiting use of identification belonging to another).

1. *Contours of the Innocence Rule.* — In a line of cases beginning with *Morissette v. United States*,[56] the Supreme Court appears to follow an "innocence rule" of interpretation, in order to protect individuals who believed their conduct was entirely innocent. Under the "innocence rule," the Courtrequires a mens rea showing for a statutory element if the statute would otherwise criminalize "apparently innocent conduct"—that is, conduct that a hypothetical defendant might believe was entirely innocent.[57] The "innocence rule," however, does not apply to "public welfare offenses,"[58] which are regulatory measures designed to require a heightened duty of care from individuals with specific social responsibilities (for instance, food and drug distributors), but which carry "relatively small" penalties and do not reflect strong moral reprobation or "grave damage" to an offender's reputation.[59] The rationale behind the public welfare offense exception is that, for certain activities that have a severe impact on the public, public safety outweighs the law's concern with protecting defendants who believed their conduct to be entirely innocent.[60]

Staples v. United States illustrates the Court's application of the "innocence rule."[61] In *Staples*, the defendant was charged with possessing a filed-down rifle that allowed for automatic firing in violation of 26 U.S.C.

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56. 342 U.S. 246, 248, 275–76 (1952) (holding statute criminalizing "'knowingly convert[ing]' government property" required knowledge property belonged to someone else and was not abandoned (quoting 18 U.S.C. § 641 (1952))); see also Liparota v. United States, 471 U.S. 419, 424–25 (1985) (holding statute criminalizing "'knowing[]'" use of food stamps in unauthorized manner required knowledge such use was unauthorized (quoting 7 U.S.C. § 2024(b)(1) (1982))).

57. See, e.g., Joseph E. Kennedy, Making the Crime Fit the Punishment, 51 Emory L.J. 753, 836 (2002) ("[T]he Court now *appears* to be employing a 'categorical innocence rule' under which any mens rea interpretation that might result in the conviction of an innocent under any possible hypothetical is rejected absent an unequivocally clear command to the contrary from Congress."); Stephen F. Smith, Proportional Mens Rea, 46 Am. Crim. L. Rev. 127, 130 (2009) ("If . . . the prohibited act . . . could potentially reach innocent conduct, courts adopt more stringent mens rea requirements designed to exclude all innocent conduct . . . .").

58. For examples of public welfare offenses, see United States v. Dotterweich, 320 U.S. 277, 278, 281 (1943), which declined to imply a mens rea requirement into a statute criminalizing delivering adulterated drugs through interstate commerce, and United States v. Balint, 258 U.S. 250, 254 (1922), which held a statute criminalizing the sale of certain narcotics did not contain a knowledge requirement, since the statute was intended to protect the public, and the burden was on the drug seller to ensure the drugs were not narcotics.

59. Cf., e.g., *Morissette*, 342 U.S. at 256 (describing common characteristics of "public welfare offenses").

60. See *Dotterweich*, 320 U.S. at 281 ("In the interest of the larger good [a public welfare offense] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."); *Balint*, 258 U.S. at 254 ("Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.")

61. 511 U.S. 600 (1994).

§ 5861(d).[62] The *Staples* decision extended a knowledge requirement to § 5861(d), holding that a defendant must know that the gun was automatic.[63] In supporting its mens rea presumption, the Court reasoned that the statute would otherwise "make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons."[64] Notably, *Staples* observed that § 5861(d)'s "potentially harsh" punishment of "up to 10 years' imprisonment" influenced its interpretation of the statute.[65]

The Court has also established its willingness to extend a mens rea requirement to protect apparently innocent conduct, even if doing so violated the "most natural grammatical reading" of a statute.[66] *United States v. X-Citement Video, Inc.* concerned a statute prohibiting the transportation through interstate commerce of pornographic material involving minors.[67] 18 U.S.C. § 2252 criminalized the activity of "[a]ny person who—(1) knowingly transports or ships [through interstate commerce] . . . any visual depiction, if—(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct."[68] The Court acknowledged that the "most natural grammatical reading . . . suggests that the term 'knowingly' modifies only the surrounding verbs," such as "transports" or "ships."[69] However, the Court reasoned that such an interpretation of the statute's mens rea distribution could criminalize what appeared to the defendant to be innocent conduct: "If we were to conclude that 'knowingly' only modifies the relevant verbs in § 2252, we would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material."[70] Accordingly, *X-Citement Video* declined to "simply follow the most grammatical reading,"

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62. Id at 603–04; see also 26 U.S.C. § 5861(d) (1988) ("It shall be unlawful for any person . . . to receive or possess a [firearm capable of automatic firing] which is not registered to him in the National Firearms Registration and Transfer Record.").

63. *Staples*, 511 U.S. at 619.

64. Id. at 620. The Court noted, "[A]ny person . . . who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic." Id. at 615.

65. Id. at 616 ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*."); see infra Part III.A (arguing Court is hesitant to classify statutes with harsh penalties as public welfare offenses due to concern with ensuring proportionality between punishment and culpability); see also Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 522–24 (1994) (interpreting statute criminalizing sale of drug paraphernalia by mail to require knowledge customers were likely to use goods with drugs).

66. United States v. X-Citement Video, Inc., 513 U.S. 64, 68–69 (1994).

67. Id. at 65–66.

68. 18 U.S.C. § 2252 (2012).

69. *X-Citement Video*, 513 U.S. at 68.

70. Id. at 69.

holding that a defendant must know that the visual depiction involved the use of a minor engaging in sexual conduct.[71]

While *Morissette* and its progeny define the innocence rule for mens rea interpretation, *United States v. Freed* illustrates the public welfare exception to the innocence rule. The statute at issue in *Freed* was 26 U.S.C. § 5861(d),[72] the same statute at issue in *Staples*.[73] The *Freed* Court held that, with respect to the unlawful possession of unregistered hand grenades, § 5861(d) did not require that defendants know about the unregistered status of their grenades.[74] The Court held that grenades were "highly dangerous offensive weapons," whose registration was necessary to facilitate a federal regulatory program for public safety.[75] As such, it was the owner's burden to ascertain whether a grenade fell within the scope of § 5861(d)'s regulation requirement because Congress determined that the potential danger unregistered grenades posed to the public outweighed the "'possible injustice'" of penalizing an innocent grenade owner.[76] Thus, the *Freed* Court justified its decision not to require knowledge that a grenade was unregistered by finding that § 5861(d)'s registration provision, as applied to hand grenades, was a public welfare offense.[77]

The cases above illustrate the Court's use of the innocence rule to protect apparently innocent conduct and the public welfare exception to the innocence rule. The next section, in contrast, discusses the Court's treatment of statutes that already ensure a threshold awareness of wrongdoing.

2. *Threshold "Vicious Will" Statutes.* — In contrast to the *Morissette* line of cases, where the Court invoked a mens rea presumption to protect apparently innocent conduct, the Court has been less clear on mens rea interpretation in cases where a statute already ensures a threshold awareness of wrongdoing. In one line of cases, the Court cited the fact that a statute already ensured a vicious will to support its decision to exclude a further mens rea requirement. Courts of appeals often cite these cases as standing for the proposition that the mere existence of a thresh-

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71. Id. at 70.

72. 401 U.S. 601, 607 n.12 (1971); see also 26 U.S.C. § 5861(d) (2012).

73. See supra notes 61–65 and accompanying text (discussing *Staples*).

74. *Freed*, 401 U.S. at 609.

75. Id.

76. Id. at 610 (quoting United States v. Balint, 258 U.S. 250, 254 (1922)).

77. Professor Joseph Kennedy has suggested that another factor weighing in favor of *Freed*'s classification of § 5861(d)'s registration provision as a public welfare offense was the sentencing discretion the statute afforded to judges, who could adjust a sentence to fit the defendant's actual culpability on a case-by-case basis. See Kennedy, supra note 57, at 774 (attributing *Freed* Court's willingness to extend strict liability to grenade's unregistered status to fact that "judge who found himself sentencing a truly 'innocent' hand-grenade possessor" could "sentence the offender anywhere from probation to ten years of imprisonment").

old vicious will precludes the extension of mens rea requirements into further elements of a criminal statute.[78] However, in these cases, including *United States v. Feola* and *Dean v. United States*, the Court did not treat the presence of a vicious will as a stand-alone justification for declining to extend mens rea requirements. Rather, other canons of statutory interpretation also weighed against requiring a further showing of mens rea.[79] In contrast, *Flores-Figueroa v. United States* held that if ordinary grammatical usage weighed in favor of reading the mens rea requirement across further elements, courts should extend the mens rea distribution beyond what was necessary to ensure a threshold awareness of wrongdoing.[80]

The interpretive canon applied in *United States v. Feola* dictated that no mens rea showing is necessary for "jurisdictional elements."[81] *Feola* involved a federal statute prohibiting the assault of federal officers.[82] The statute had no explicit mens rea provision, and the Court declined to require knowledge that the victim was a federal officer, reasoning that "[a]ll the statute requires is an intent to assault, not an intent to assault a federal officer."[83] Specifically, the Court emphasized the jurisdictional function of the "federal officer" element by noting that Congress intended 18 U.S.C. § 111 to "insure a *federal forum* for the trial of offenses involving federal officers" and "uniformly vigorous protection of federal

78. See, e.g., United States v. Burwell, 690 F.3d 500, 505–07 (D.C. Cir. 2012) (en banc) (finding *Staples* Court imposed mens rea requirement to avoid criminalizing "'apparently innocent conduct'" and statute at issue poses no similar "risk of unfairness because the defendant 'knows from the very outset that his planned course of conduct is wrongful'" (quoting Staples v. United States, 511 U.S. 600, 610 (1994); United States v. Feola, 420 U.S. 671, 685 (1975))).

79. See infra notes 81–86 and accompanying text (discussing *Feola*, 420 U.S. 671); infra notes 89–99 and accompanying text (discussing Dean v. United States, 129 S. Ct. 1849 (2009)).

80. 129 S. Ct. 1886, 1890, 1894 (2009).

81. "Jurisdictional elements" are statutory elements that establish circumstances under which a court has jurisdiction over a particular act, but which do not generally speak to the defendant's degree of guilt or moral wrongdoing. See Singer, supra note 25, at 201–04 (describing how courts have declined to imply mens rea requirements into elements conferring federal jurisdiction to offenses); Darryl K. Brown, Federal Mens Rea Interpretation and the Limits of Culpability's Relevance, 75 Law & Contemp. Probs., no. 2, 2012, at 109, 113 ("The distinctive nature of federal criminal law, in which offenses often include elements specifying the basis for federal jurisdiction, has led to a presumption of strict liability for jurisdictional elements. These elements rarely play a normative role in defining criminal wrongdoing.").

82. The statute read: "Whoever forcibly assaults . . . any person designated in section 1114 [including federal officers] . . . while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both." 18 U.S.C. § 111 (1970).

83. *Feola*, 420 U.S. at 684.

personnel."[84] As such, a mens rea requirement would defeat the purpose of § 111's "federal officer" element.[85]

The *Feola* Court noted that its interpretation of § 111 did not violate the innocence rule, stating that its decision was "no snare for the unsuspecting" because a defendant "knows . . . that his planned course of conduct is wrongful," regardless of his victim's identity.[86] Nonetheless, as established by the Court's invocation of the "jurisdictional element" canon, the presence of a threshold awareness of wrongdoing was not the sole factor on which the court based its decision to exclude a mens rea requirement.

Again, in *Dean v. United States*, the Court declined to extend a mens rea requirement to a statutory element because other canons of interpretation weighed against requiring a mens rea showing.[87] *Dean* concerned 18 U.S.C. § 924(c)(1)(A)(iii), which imposes a ten-year mandatory minimum for the discharge of a firearm during and in relation to a crime of violence or drug trafficking crime.[88] The Court decided to exclude a mens rea requirement from the discharge provision for two reasons. First, the Court looked to the text of the statute, noting that both the absence of an explicit intent requirement in subsection (iii) and the use of passive voice ("if the firearm is discharged") weighed against a mens rea requirement.[89] The Court also observed that whereas § 924(c)(1)(A)(ii)'s brandishing provision was later defined in § 924(c)(4) with an explicit intent requirement,[90] subsection (iii)'s discharge provision had no such definition. The Court thus reasoned that by including an explicit mens rea requirement in subsection (ii), but omitting it from subsection (iii), Congress purposely excluded a mens rea requirement from the discharge provision.[91]

Second, the Court distinguished § 924(c)(1)(A)(iii) as a "sentencing factor," which "'often involve[s] . . . special features of the manner in which a basic crime was carried out,'" from the "basic crime" of "using or carrying a firearm during and in relation to a violent or drug trafficking crime."[92] The Court also noted, "The *sentencing enhancement* in subsection

84. Id. at 683–84 (emphasis added).

85. Id. at 684 ("[Section] 111 cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer.").

86. Id. at 685.

87. 129 S. Ct. 1849, 1856 (2009).

88. 18 U.S.C. § 924(c)(1)(A)(iii) (2012).

89. *Dean*, 129 S. Ct. at 1853.

90. See § 924(c)(4) ("'[B]randish' means, with respect to a firearm, 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 . . . ." (emphasis added)).

91. *Dean*, 129 S. Ct. at 1853–54. *Dean*'s argument regarding § 924(c)(4)'s mens rea language is discussed and questioned infra notes 135–138 and accompanying text.

92. *Dean*, 129 S. Ct. at 1854 (quoting Harris v. United States, 536 U.S. 545, 553 (2002), overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013)).

(iii) accounts for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is responsible."[93] The *Dean* opinion did not explicitly state that the discharge provision's classification as a sentencing enhancement precluded a mens rea presumption. However, the Court repeatedly cited *Harris v. United States*, which held that a sentencing factor need not be found by a jury.[94] The *Dean* Court's multiple references to § 924(c)(1)(A)(iii) as a "sentencing enhancement" and citation of *Harris* suggest, at least, that the Court's classification of § 924(c)(1)(A)(iii) as a sentencing factor contributed to its decision not to require a mens rea with respect to the discharge provision.[95]

Thus, two canons are at play in *Dean*. One is the "sentencing factor" canon,[96] which holds that sentencing factors require no mens rea interpretation. The second canon is the textual presumption that if Congress included explicit language in one section of a statute but omitted it in another, the omission was intentional.[97] In the context of mens

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93. Id. at 1855 (emphasis added).

94. *Harris*, 536 U.S. at 556 ("The statute regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury."); see also *Dean*, 129 S. Ct. at 1854–55 (citing *Harris*, 536 U.S. at 553). The Court overturned *Harris* in *Alleyne*, 133 S. Ct. at 2155, 2160. Under *Alleyne*, the § 924(c)(1) discharge provision would be an element of the offense because firearm discharge is an external fact that increases the mandatory minimum sentence. See id. at 2158 ("Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt."). *Dean*'s reliance, then, on the "sentencing factor" rationale for its analysis of § 924(c)(1)(A)(iii) may no longer be valid. The validity of *Dean*'s reasoning, however, does not affect this Note's discussion of *Dean*, which merely seeks to establish that at the time *Dean* was decided, the Court did not rely on the existence of a threshold awareness of wrongdoing to reach its decision not to require a mens rea showing with respect to firearm discharge.

95. See *Dean*, 129 S. Ct. at 1854 ("The better reading of the statute is that the adverbial phrases in the opening paragraph—'in relation to' and 'in furtherance of'—modify their respective nearby verbs, and that neither phrase extends to the *sentencing factors*." (emphasis added)).

96. See supra notes 23–26, 52–54 and accompanying text for background on the "sentencing factor" canon and a criticism of its validity.

97. The Supreme Court acknowledged this canon in *Russello v. United States*: "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" 464 U.S. 16, 23 (1983) (alteration in *Russello*) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)). Michael D. Shumsky has noted that the Court has generally rejected the idea that congressional silence should influence statutory interpretation, unless (1) Congress omitted language in one part that it included in another part of the same statute or (2) the silence pertains to an excluded item in an enumerated list. Michael D. Shumsky, Severability, Inseverability, and the Rule of Law, 41 Harv. J. on Legis. 227, 269 n.205 (2004) (referring to former exception as "*Russello* Rule" and latter as "*expressio unius*" rule); see also Geoffrey P. Miller, Pragmatics and the Maxims of Interpretation, 1990 Wis. L. Rev. 1179, 1196 (explaining "[w]hen a legislature expressly provides a particular bit of information, it creates a 'conversational' setting . . . in which other information of the

rea interpretation, courts have reasoned that if Congress used explicit mens rea terminology in one section of a statute, but excluded it from another, then Congress intended to exclude a mens rea requirement from the section without explicit terminology.[98] Although the *Dean* Court noted that its interpretation still ensured an awareness of wrongdoing because a defendant would already be aware of committing a predicate offense with a firearm,[99] the sole existence of a threshold "vicious will" was not necessarily sufficient, in itself, to exclude a mens rea requirement from the discharge provision. Thus, cases like *Dean* and *Feola* do not stand for the principle that the mere fact that a statute already ensures some minimal awareness of wrongdoing is itself enough to prohibit a further mens rea presumption.

3. *The Extension of Mens Rea Beyond a Threshold Vicious Will:* Flores-Figueroa v. United States. — In contrast to *Dean* and *Feola*, *Flores-Figueroa v. United States*[100] suggests that the Court is willing to presume a mens rea requirement for statutory elements even beyond what is minimally necessary to ensure a vicious will. *Flores-Figueroa* concerned 18 U.S.C. § 1028A(a)(1), which imposes a two-year sentence on "[w]hoever . . . knowingly . . . uses, without lawful authority, a means of identification of another," in addition to a sentence for using false identification.[101] The Court held that, in accordance with "ordinary English grammar," "knowingly" should apply to all "object[s] as set forth in the sentence," including the fact that the identification belonged to another person.[102] The Court thus required knowledge that the false identification belonged to someone else, even though the statute already ensured an awareness of wrongdoing by requiring the deliberate use of false identification. In so doing, the Court refused to limit the mens rea distribution in § 1028A(a)(1) to what was necessary to ensure a threshold awareness of wrongdoing.

Flores-Figueroa is significant for two reasons. First, by citing grammatical structure as its reason for extending a statute's mens rea distribution beyond a threshold awareness of wrongdoing, *Flores-Figueroa* establishes a hierarchy of canons for mens rea interpretation when read in light of *X*-

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same type is expected to be conveyed," and arguing failure to convey such information in similar settings may be interpreted as intentional omission).

98. See, e.g., United States v. Soler, 275 F.3d 146, 152 (1st Cir. 2002) (applying *Russello* canon to 21 U.S.C. § 841 (2012), which included "knowingly or intentionally" language in subsection (a) but not subsection (b)(1)(C)).

99. *Dean*, 129 S. Ct. at 1855 ("The fact that the actual discharge of a gun covered under § 924(c)(1)(A)(iii) may be accidental does not mean that the defendant is blameless.").

100. 129 S. Ct. 1886 (2009).

101. 18 U.S.C. § 1028A(a)(1) (2012); see *Flores-Figueroa*, 129 S. Ct. at 1888–89.

102. *Flores-Figueroa*, 129 S. Ct. at 1890 ("In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action . . . .").

Citement Video. That is, while *X-Citement Video* suggests that the innocence rule trumps the dictates of ordinary grammar, *Flores-Figueroa* establishes that ordinary grammatical structure may require courts to extend mens rea beyond a threshold vicious will. *X-Citement Video* and *Flores-Figueroa*, then, suggest that any hypothetical interest the Court may have in limiting mens rea distribution to a threshold awareness of wrongdoing is a weak one: While the innocence rule is superior to grammatical structure, both the innocence rule and grammatical structure override the hypothetical interest in limiting mens rea distribution to a threshold vicious will.

Second, *Flores-Figueroa*'s language and holding gesture toward the Court's interest in using mens rea distribution to limit the degree to which pure chance determines a defendant's sentence. The Court noted the severity of the punishment, referring to the two-year sentence enhancement as "heavily penalizing" a defendant.[103] Moreover, the effect of the holding, as Justice Alito pointed out in his concurrence, was to prevent pure "chance" from determining whether a defendant who merely intended to use a fake identification number would qualify for conviction under § 1028A(a)(1).[104] Otherwise, whether such a defendant would qualify for § 1028A(a)(1)'s two-year additional sentence would depend on whether the number he or she made up simply *happened* to belong to someone else.[105]

Thus, *Flores-Figueroa* indicates that there exist other factors—grammatical structure, explicitly; sentencing severity, implicitly[106]—that could trigger a broader reading of mens rea distribution within a statute.

II. THE WAKE OF *O'BRIEN*: THE OPEN QUESTION OF MENS REA IN § 924(c)(1)(B)(ii)

As discussed in Part I.A.3, the Supreme Court held in *United States v. O'Brien* that § 924(c)(1)(B)(ii) was an element of the offense, not a sen-

103. Id.

104. Id. at 1896 (Alito, J., concurring in part and concurring in the judgment).

105. Lower federal courts, however, have declined to follow *Flores-Figueroa*'s holding that an adverb regarding mens rea ought to be extended to all elements in the remainder of the sentence. See infra notes 176–187 and accompanying text for a discussion of how federal courts have distinguished their interpretations of similarly worded juvenile sexual exploitation statutes from *Flores-Figueroa*. For further analysis of how federal courts have declined to apply *Flores-Figueroa*'s holding to similarly worded statutes, see generally Leonid (Lenny) Traps, Note, "Knowingly" Ignorant: Mens Rea Distribution in Federal Criminal Law After *Flores-Figueroa*, 112 Colum. L. Rev. 628 (2012).

106. See The Supreme Court, 2008 Term—Leading Cases, 123 Harv. L. Rev. 153, 321 (2009) (construing *Flores-Figueroa* as holding "only intentional identity theft may be blameworthy enough to justify an addition of two years to a sentence," and arguing "Court's discussion of the difficulty of proving the crime suggests that the Court has embraced a more gradient view of culpability"); see also Brown, supra note 81, at 121 (arguing "consequence" of *Flores-Figueroa*'s grammar-based canon is "to link punishment *proportionately* to liability").

tencing enhancement.[107] In so doing, *O'Brien* eliminated an assumption on which prior courts had justified decisions to exclude a mens rea requirement for machine gun possession.[108] A question arises, then, as to whether those prior holdings remain valid.

Part II demonstrates that if § 924(c)(1)(B)(ii)'s status as a sentencing factor no longer weighs in favor of excluding a mens rea requirement, no remaining canon of statutory interpretation provided in the Supreme Court's mens rea jurisprudence gives a definitive answer to the question of mens rea in § 924(c)(1)(B)(ii). Part II.A explains the D.C. and Eleventh Circuits' post-*O'Brien* arguments for continuing to exclude a mens rea requirement from the machine gun element. Part II.B illustrates that, contrary to holdings by those circuits, remaining canons of mens rea interpretation after *O'Brien* leave the issue of mens rea in § 924(c)(1)(B)(ii) ambiguous at best. Specifically, Part II.B demonstrates that there is no clear canon of statutory interpretation that dictates either for or against the inclusion of a mens rea requirement in § 924(c)(1)(B)(ii). It does so by examining arguments marshaled by the majority and dissent in *United States v. Burwell*, the D.C. Circuit's response to *O'Brien*, and showing that these arguments are inconclusive.

A. *Mens Rea Cases After* O'Brien*:* United States v. Burwell *and* United States v. Haile

Since *O'Brien*, two circuits—the Eleventh and D.C. Circuits—have reconsidered the mens rea requirement of § 924(c)(1)(B)(ii). Both circuits upheld their past decisions that no mens rea showing for machine gun possession was necessary.

In light of *O'Brien*, the D.C. Circuit granted a rehearing en banc in *United States v. Burwell*,[109] which was an appeal from *United States v. Morrow*.[110] In its en banc decision, the *Burwell* court reaffirmed its holding that § 924(c)(1)(B)(ii) required no mens rea showing, despite § 924(c)(1)(B)(ii)'s status as an element of the offense.[111] The *Burwell* majority marshaled three main arguments. First, it relied on the principle of stare decisis, declining to "set aside a circuit precedent that has governed our interpretation for twenty years,"[112] as established in

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107. 130 S. Ct. 2169, 2180 (2010).

108. See supra Part I.A.3 (discussing *O'Brien*).

109. 690 F.3d 500 (D.C. Cir. 2012) (en banc), aff'g 642 F.3d 1062 (D.C. Cir. 2011).

110. No. CRIM.A. 04-355CKK, 2005 WL 3163804 (D.D.C. June 20, 2005), aff'd en banc sub nom. *Burwell*, 690 F.3d 500; see supra note 41 and accompanying text (addressing *Morrow*'s recognition that, but for 1998 amendment, *Castillo*'s holding that machine gun provision was element might have required mens rea showing).

111. 690 F.3d at 516.

112. Id. at 504 ("'[T]he doctrine of stare decisis is of fundamental importance to the rule of law.'" (quoting Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987))).

Harris.[113] The court pointed out that the *Harris* decision did not explicitly rely on the classification of § 924(c)(1)(B)(ii) as a sentencing enhancement.[114] Second, the court noted that *O'Brien* itself declined to address the mens rea question.[115] Third, the court invoked the threshold vicious will argument, noting that § 924(c)(1) already ensured an awareness of wrongdoing.[116] Thus, because the "government is still required to establish *mens rea* with respect to the predicate crime and with respect to the use . . . of the firearm," a knowledge requirement with respect to gun type was not necessary to prevent the criminalization of apparently innocent conduct.[117] In supporting the rule limiting mens rea to a threshold vicious will, the court analogized to other courts' interpretations of "similarly structured statutes," which did not require proof of mens rea for all elements, so long as *some* mens rea requirement "separate[d] innocent from criminal conduct."[118]

In addition to the majority opinion, two judges—Judge Rogers and Judge Kavanaugh—offered separate dissents. Judge Rogers argued that the Supreme Court's rules for interpreting mens rea requirements "cannot provide the answer to whether the machinegun provision requires proof of *mens rea*."[119] Judge Rogers listed three interpretive rules: first, that an explicit mens rea provision extends through the end of a sentence, applying to each element in a sentence;[120] second, that if a statute provides no explicit mens rea requirement, courts should presume a mens rea requirement to avoid criminalizing apparently innocent conduct;[121] and third, that there is no presumption against strict liability for public welfare offenses, which involve light penalties.[122] Judge Rogers

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113. See supra notes 27–28 and accompanying text (discussing *Harris*'s holding that § 924(c)(1)(B)(ii) contained no mens rea requirement).

114. *Burwell*, 690 F.3d at 505. Among other arguments (discussed infra Part II.B), the *Burwell* court supported its assertion that *Harris* did not rely on the status of § 924(c)(1)(B)(ii) as a sentencing factor by observing, "[T]he *Harris* Court referred to the machinegun provision as *both* an 'element of the offense,' and a 'sentence enhancement.'" Id. Nonetheless, although *Harris* referred once to § 924(c)(1)(B)(ii) as "this element of the crime," it later explicitly distinguished § 924(c)(1)(B)(ii) as a "sentence enhancement" distinct from other "essential elements of the crime." United States v. Harris, 959 F.2d 246, 258–59 (D.C. Cir. 1992).

115. *Burwell*, 690 F.3d at 505.

116. Id. at 503, 505–07 (arguing mens rea requirement need only be extended to element if not doing so would risk criminalizing "'broad range of apparently innocent conduct'" (quoting Staples v. United States, 511 U.S. 600, 610 (1994))).

117. Id. at 507.

118. Id. at 507–08; see also infra notes 140–150, 176–187 and accompanying text (analyzing *Burwell*'s analogies to other statutes).

119. *Burwell*, 690 F.3d at 524 (Rogers, J., dissenting).

120. Id. at 520–21.

121. Id. at 521; see also supra notes 56–60 and accompanying text (describing Supreme Court's use of innocence rule to protect defendants who believed their conduct entirely innocent).

122. *Burwell*, 690 F.3d at 521 (Rogers, J., dissenting).

then noted that the question of § 924(c)(1)(B)(ii)'s mens rea status was "uncharted territory," because the provision fit under none of these interpretive rules.[123] Finding that traditional canons provided no guidance, Judge Rogers analogized to *Staples v. United States*, in which the Supreme Court found that a ten-year sentence was "harsh" enough to warrant a mens rea presumption and that "'a gun may give no externally visible indication that it is fully automatic.'"[124] Judge Rogers thus argued that *Staples* dictated a ruling in favor of imposing a mens rea requirement in § 924(c)(1)(B)(ii).[125]

Judge Kavanaugh's dissent presented both doctrinal and normative arguments. With respect to his doctrinal argument, Judge Kavanaugh construed *Flores-Figueroa v. United States*[126] as holding that "[a] requirement of mens rea applies to each element of the offense unless Congress has plainly indicated otherwise,"[127] and, accordingly, concluded that § 924(c)(1)(B)(ii), as an element of the offense, required proof of mens rea.[128] Judge Kavanaugh also cited a group of Supreme Court cases, including the *Morissette* line of cases, arguing that they stood for the clear principle that courts should presume a mens rea requirement for each element of an offense.[129]

Judge Kavanaugh also made a second, normative argument. He argued that a rule limiting mens rea distribution only to what was needed to ensure a minimal awareness of wrongdoing would lead to a moral paradox, where mens rea would be presumed in an element that "in-

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123. Id. at 525. Part II.B presents a version of Judge Rogers's argument that no canons of statutory interpretation resolve the mens rea question in § 924(c)(1)(B)(ii).

124. Id. at 526–27 (quoting Staples v. United States, 511 U.S. 600, 615 (1994)).

125. Id. at 527 ("I take the Supreme Court at its word when it stated that 'the penalty imposed by a statute has been a *significant* consideration in determining whether the statute should be construed as dispensing with *mens rea*.'" (quoting *Staples*, 511 U.S. at 616)).

126. 129 S. Ct. 1886 (2009). For a discussion of the Court's holding in *Flores-Figueroa*, see supra notes 101–106 and accompanying text.

127. *Burwell*, 690 F.3d at 537 (Kavanaugh, J., dissenting).

128. Id. at 541 ("Because the automatic character of the gun is an element of the offense, and because the presumption of mens rea applies to each element of the offense, the presumption of mens rea applies here.").

129. Id. at 532–36 ("Under the traditional presumption of mens rea as expounded by *Morissette*, courts presume a mens rea requirement for each element of the offense unless Congress plainly indicates otherwise."); see also Carter v. United States, 530 U.S. 255, 269 (2000) (reasoning statute requiring knowledge of taking property by force or intimidation should not, hypothetically, apply to person engaging in forceful taking while sleepwalking); United States v. Bailey, 444 U.S. 394, 408 (1980) (requiring knowledge that defendants left prison without authorization in prison escape statute, thus preventing conviction of defendants who believed they had permission to leave); United States v. U.S. Gypsum Co., 438 U.S. 422, 440–41 (1978) (implying intent requirement into Sherman Act provisions because "behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct"); supra Part I.B.1 (discussing *Morissette*, *Staples*, and *X-Citement Video*).

crease[s] the defendant's punishment from no prison time to a term of 2 years," but excluded from an element that would "increase the punishment from 10 years to 30 years."[130] In this case, a two-year sentence increase would trigger a mens rea extension, while a much greater twenty-year increase would not.

In addition to the D.C. Circuit, the Eleventh Circuit also considered *O'Brien*'s effect on mens rea in § 924(c)(1)(B)(ii). In *United States v. Haile*, the Eleventh Circuit addressed the mens rea question in a mere three paragraphs, holding that § 924(c)(1)(B)(ii) contained no mens rea requirement.[131] The court first observed that *O'Brien* did not decide the mens rea status of § 924(c)(1)(B)(ii).[132] It then invoked stare decisis, reasoning that because *O'Brien* "did not expressly overrule" or "even mention" *United States v. Ciszkowski*,[133] an earlier Eleventh Circuit case declining to imply a mens rea requirement into the machine gun provision, *Ciszkowski* was still good law.[134] Thus, even though the Supreme Court removed a key rationale behind pre-*O'Brien* decisions for excluding mens rea from § 924(c)(1)(B)(ii), the two circuits that have reconsidered the mens rea question maintained their previous stance that no mens rea showing for machine gun possession was required.

B. *Post-*O'Brien *Ambiguity in § 924(c)(1)(B)(ii) Mens Rea*

Part II.B examines arguments in favor of and against requiring a mens rea showing for machine gun possession, and explains that the Supreme Court's canons of interpretation do not answer the mens rea question in § 924(c)(1)(B)(ii). This Part shows that the arguments of both the *Burwell* majority and Judge Kavanaugh's dissent are inconclusive. Part II.B.1 addresses the textual argument that Congress's use of explicit mens rea language elsewhere in § 924(c)(1) signifies an intentional decision to exclude mens rea language from § 924(c)(1)(B)(ii). Part II.B.2 questions the *Burwell* majority's doctrinal assumption that mens rea distribution within a statute should be limited to what is minimally necessary to ensure an awareness of wrongdoing. Part II.B.2 suggests that, far from establishing a rule that mens rea ought to be limited to a threshold vicious will, Supreme Court case law reveals an underlying concern with ensuring proportionality between mental culpability and punishment. Finally, Part II.B.3 concludes with a note that, although there is no clear rule that mandates the *exclusion* of a mens rea require-

130. *Burwell*, 690 F.3d. at 529 (Kavanaugh, J., dissenting).

131. 685 F.3d 1211, 1218 (11th Cir. 2012).

132. Id. ("*O'Brien* did not hold that a defendant's knowledge that a firearm is a machine gun must also be so proved. And nothing in the text of § 924(c)(1)(B)(ii) makes knowledge of the firearm's characteristics an element of the offense.").

133. 492 F.3d 1264, 1269 (11th Cir. 2007).

134. See *Haile*, 685 F.3d at 1218 (citing *Ciszkowski*, 492 F.3d at 1269) (concluding *O'Brien* did not overrule *Ciszkowski*); see also supra note 42 (discussing *Ciszkowski*'s holding that machine gun provision contained no implicit mens rea requirement).

ment, there is likewise no cut-and-dried canon that clearly mandates the *inclusion* of a mens rea requirement in § 924(c)(1)(B)(ii), contrary to what Judge Kavanaugh argued in his *Burwell* dissent.

1. *The Textual Argument in Favor of Excluding Mens Rea.* — One canon weighing against a mens rea requirement is the textual presumption that, where Congress includes particular language in one section of a statute, but excludes it in another, the exclusion is intentional.[135] Two forms of this argument can be made with respect to § 924(c)(1)(B)(ii). First, whereas § 924(c)(4) defines "brandish" as making a firearm's presence known to another "in order to intimidate," § 924(c) does not explicitly require a state of mind regarding the machine gun.[136] Because Congress consciously included a mens rea requirement for the brandishing provision, but omitted one from the machine gun provision, Congress must have intentionally excluded a mens rea requirement from § 924(c)(1)(B)(ii).[137]

There is, however, an alternative explanation for § 924(c)(4)'s "brandish" definition. As the D.C. Circuit argued prior to *Dean*, Congress may have thought it necessary to define "brandish" not because it was the only provision that required a mens rea showing, but rather, because "[t]he statute's definition of 'brandish' is broader than the dictionary definition."[138] That is, Congress may have included § 924(c)(4) to ensure that the brandish provision applies to situations where the gun is not visible, but where the defendant has nonetheless verbally made its presence known, even if an assertion of verbal presence may not fit into a dictionary definition of "brandish." Thus, § 924(c)(4) does not necessarily establish congressional intent to exclude mens rea requirements from § 924(c)(1)'s other mandatory maximum provisions. Had Congress intended to ascribe a specific mens rea requirement exclusively for brandishing a firearm, Congress would have more likely included mens rea terminology in § 924(c)(1)(A)(ii), the brandishing provision itself. The fact that Congress only included a mens rea requirement in a separate subdivision, as one part of its general definition of "brandish," suggests that the "in order to intimidate" language of § 924(c)(1)(4) was included to signal Congress's use of a

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135. See, e.g., supra notes 97–98 and accompanying text (discussing textual canon for presuming intentional exclusion).

136. See, e.g., United States v. Burwell, 690 F.3d 500, 512 (D.C. Cir. 2012) (en banc).

137. Id. ("Here, it cannot be said that Congress simply *forgot* about *mens rea* when it drafted § 924(c), as the drafters of the statute quite clearly chose to require a showing of intent for one particular provision but not for the others.").

138. United States v. Brown, 449 F.3d 154, 157 (D.C. Cir. 2006), abrogated by Dean v. United States, 129 S. Ct. 1849 (2009). Although *Dean* rejected *Brown*'s finding that § 924(c)(4)'s "brandish" definition did not indicate congressional intent to give the brandishing provision an exclusive mens rea requirement, the *Dean* Court did not specifically address *Brown*'s rationale that Congress intended § 924(c)(4)'s definition to indicate a broader definition of "brandish," rather than to create an exclusive mens rea requirement. See *Dean*, 129 S. Ct. at 1853–54.

broad definition of "brandish"—not to signal an intent to bestow a mens rea requirement on the brandishing provision exclusively.

The second argument is that § 924(c)(1)(B)(ii) is separated from § 924(c)(1)(A), whose language suggests that the defendant must be aware that the gun is used "in relation to" the crime.[139] In contrast, § 924(c)(1)(B)(ii) contains no similar language requiring a specific mental state with respect to machine gun possession. This argument is implicit in the *Burwell* majority's comparison of § 924(c)(1)(B)(ii) with "similarly structured statutes" that do not require mens rea with respect to certain elements. *Burwell* analogized to, among other statutes, 21 U.S.C. § 841,[140] 21 U.S.C. § 860,[141] 18 U.S.C. § 2113,[142] and 18 U.S.C. § 1361,[143] which each contain penalty-enhancement provisions that are separated from the main part of the statute by a subsection or paragraph.[144] *Burwell* argued that because other courts have declined to imply mens rea requirements into the penalty-enhancement provisions of these statutes, § 924(c)(1)(B)(ii) likewise needs no implicit mens rea provision.[145]

The above-listed "similarly structured" statutes, however, differ from § 924(c)(1) insofar as they contain *explicit* mens rea language.[146] Accordingly, for these statutes, one could argue that Congress intended to exclude a mens rea requirement from the penalty provision by including

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139. Section 924(c)(1)(A) applies to "any person who, during and *in relation to* any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. § 924(c)(1)(A) (2012) (emphasis added). The Supreme Court held in *Smith v. United States* that "in relation to" indicates that § 924(c)(1)(A)'s carry-and-possess provision requires some degree of knowledge that the firearm is used to facilitate the predicate crime. Smith v. United States, 508 U.S. 223, 238 (1993) ("The phrase 'in relation to' . . . clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence."); see also supra note 16 and accompanying text (discussing *Smith*'s interpretation of § 924(c)(1)(A)).

140. 21 U.S.C. § 841 (2012) (prohibiting manufacture, possession, and distribution of controlled substances, and prescribing specific penalties for quantities and types of substances involved).

141. Id. § 860 (prescribing enhanced penalty for § 841 violation occurring within 1,000 feet of schools or 100 feet of youth centers).

142. 18 U.S.C. § 2113 (defining bank robbery offense and penalty levels by monetary value of property stolen).

143. Id. § 1361 (defining offenses and penalties by value of property damaged).

144. See United States v. Burwell, 690 F.3d 500, 507–08 (D.C. Cir. 2012) (en banc) (comparing § 924(c)(1)(B)(ii) with "similarly structured statutes").

145. Id.

146. See 18 U.S.C. § 1361 (stating, "[w]hoever *willfully* injures or commits any depredation against any property of the United States" (emphasis added)); id. § 2113 (stating, "with *intent* to commit in such bank . . . any felony affecting such bank" (emphasis added)); 21 U.S.C. § 841(a) (stating, "it shall be unlawful for any person *knowingly or intentionally*" (emphasis added)); id. § 860(a) (predicating penalty provision on § 841(a)).

explicit mens rea language in the main part of the statute, but omitting mens rea language from the separate penalty-enhancement provision.[147]

In contrast, § 924(c)(1) contains no explicit mens rea terminology; rather, the mens rea requirement was a result of the *Smith* Court's interpretation of the phrase "in relation to."[148] Outside of *Smith*'s interpretation, "in relation to" does not necessarily require the defendant's awareness of the gun. For instance, a gun might be used "in relation to" a crime of violence without the defendant's awareness if a defendant did not realize there was a gun in his or her pocket during a robbery, but the gun intimidated the victim who saw it. In this case, the defendant technically carried a firearm "in relation to" a crime of violence. It is possible, however, that the defendant could perform the robbery without ever being aware of the gun's presence. *Smith* thus limited the definition of "in relation to" by holding that the gun's presence could not have been a result "of accident."[149] Thus, unlike in the "similarly structured statutes" discussed above, where explicit mens rea terminology indicated a high likelihood that Congress consciously considered the mens rea distribution within each statute,[150] § 924(c)(1)'s "in relation to" language does not manifest the intentional exclusion of a mens rea requirement from § 924(c)(1)(B)(ii).

2. *The Threshold Vicious Will Argument in Favor of Excluding Mens Rea.* — The *Burwell* majority also argued that § 924(c)(1)(B)(ii) should not require an additional mens rea showing because § 924(c)(1) already ensured a threshold awareness of wrongdoing.[151] *Burwell* made this argument in two ways. First, *Burwell* pointed to the Supreme Court's mens rea jurisprudence and asserted that the Court presumes a mens rea requirement only if a statute would otherwise criminalize apparently innocent

147. See, e.g., United States v. King, 345 F.3d 149, 152–53 (2d Cir. 2003) ("[T]he language of § 841 clearly conveys Congress's intent to subject drug dealers to the enhancements provided in § 841(b) regardless of their awareness of drug type and quantity. . . . Only § 841(a) contains a *mens rea* requirement . . . . Section 841(b) contains no mens rea requirement . . . ."); United States v. Soler, 275 F.3d 146, 152 (1st Cir. 2002) (reasoning inclusion of "knowingly or intentionally" language in § 841(a) and omission of similar language from § 841(b)(1)(C) demonstrated congressional intent to exclude mens rea requirement from § 841(b)(1)(C)'s provision for increased sentence if death resulted from drug sale).

148. Smith v. United States, 508 U.S. 223, 238 (1993); see also supra note 16 and accompanying text (discussing *Smith*'s interpretation of "in relation to").

149. *Smith*, 508 U.S. at 238.

150. See, e.g., supra notes 140–147 and accompanying text (discussing 18 U.S.C. §§ 1361, 2113 and 21 U.S.C. §§ 841, 860).

151. See United States v. Burwell, 690 F.3d 500, 505, 507 (D.C. Cir. 2012) (en banc) ("The Supreme Court developed the presumption in favor of *mens rea* for one particular reason: to avoid criminalizing otherwise lawful conduct."); see also John Shepard Wiley Jr., Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation, 85 Va. L. Rev. 1021, 1128 (1999) (asserting Supreme Court follows "rule against requiring superfluous culpability," where Court requires minimally sufficient mens rea requirement necessary to avoid criminalizing apparently innocent conduct).

conduct.[152] *Burwell* cited *United States v. Feola* and *Dean v. United States* as cases where the Court declined to extend a mens rea requirement because doing so was not necessary to distinguish criminal conduct from innocent conduct.[153] Second, *Burwell* pointed to case law from other circuits and analogized to other statutes for which federal courts purportedly limited mens rea to what was minimally necessary to ensure an awareness of wrongdoing.[154] These statutes include the "similarly structured statutes" discussed above,[155] in addition to 18 U.S.C. §§ 2423[156] and 2241(c).[157] Although the latter two statutes, prohibiting the sexual exploitation of minors, both include the victim's age as an element of the offense, federal courts have not required knowledge that the victim was underage.[158] The following sections address *Burwell*'s interpretation of Supreme Court jurisprudence and courts of appeals case law, respectively.

a. *Supreme Court Jurisprudence on the Vicious Will Limitation.* — The mere presence of a vicious will is not dispositive of the § 924(c)(1)(B)(ii) mens rea question because the Supreme Court has not established a clear rule that mens rea distribution in a statute should be limited to what is necessary to ensure a minimum awareness of wrongdoing. As discussed in Part I, cases that declined to extend a mens rea requirement did so because the statutes they considered either (1) fell into the public welfare offense exception to the innocence rule, or (2) fell within the purview of additional canons of interpretation that militated against the extension of a mens rea requirement.

Additionally, unlike the registration provision of § 5861(d), the statute at issue in *United States v. Freed*, § 924(c)(1)(B)(ii) is hardly a public

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152. See *Burwell*, 690 F.3d at 505–07 (citing *Staples*, *Morissette*, and *X-Citement Video*); see also supra Part I.B.1 (explaining cases where Court implied mens rea requirement to satisfy innocence rule).

153. See *Burwell*, 690 F.3d at 507 ("There is thus no risk of unfairness because the defendant 'knows from the very outset that his planned course of conduct is wrongful.'" (quoting United States v. Feola, 420 U.S. 671, 685 (1975))); see also supra Part I.B.2 (discussing *Feola* and *Dean*).

154. *Burwell*, 690 F.3d at 508.

155. See supra notes 140–147 and accompanying text (discussing *Burwell*'s analogy to "similarly structured statutes").

156. Mann Act § 4, 18 U.S.C. § 2423 (2012) (criminalizing "knowingly transport[ing] an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution").

157. 18 U.S.C. § 2241(c) (criminalizing "knowingly engag[ing] in a sexual act with another person who has not attained the age of 12 years"). For a discussion and evaluation of *Burwell*'s treatment of §§ 2241(c) and 2423, see infra notes 176–187 and accompanying text.

158. See, e.g., United States v. Cox, 577 F.3d 833, 836–38 (7th Cir. 2009) ("[We] hold that § 2423(a) does not require that the Government prove that a defendant knew his victim was a minor."); United States v. Juvenile Male, 211 F.3d 1169, 1171 (9th Cir. 2000) ("[M]istake of age is no defense to a § 2241(c) offense.").

welfare offense. [159] It may be argued that *Freed*'s analysis applies to § 924(c)(1)(B)(ii) because machine guns, like grenades, are "highly dangerous offensive weapons" that threaten the public interest.[160] However, public welfare offenses generally involve "relatively small" penalties,[161] as illustrated by § 5861(d)'s sentence of "not more than ten years" or a fine of "not more than $10,000," which allows judicial discretion to give lesser punishments to defendants with lower degrees of mental culpability.[162] In contrast, § 924(c)(1)(B)(ii)'s mandatory thirty-year enhancement allows no such discretion to index punishment to mental culpability. Thus, § 924(c)(1)(B)(ii)'s harsh mandatory sentence precludes its status as a public welfare offense.

Supreme Court case law, moreover, suggests that the Court's possible adherence to a vicious will limitation is weak, insofar as the Court was willing to extend a mens rea requirement beyond a minimal "vicious will" in *Flores-Figueroa* in order to satisfy a rule of grammatical interpretation.[163] Whereas *Flores-Figueroa* followed ordinary English grammar, *X-Citement Video* rejected the "most natural grammatical reading" of a statute in order to protect defendants who believed their conduct was innocent from prosecution.[164] Thus, read together, *Flores-Figueroa* and *X-Citement Video* suggest that, in a hierarchy of mens rea interpretation, the Court's potential interest in limiting mens rea distribution to a threshold awareness of wrongdoing is weaker than both its interest in following a statute's explicit grammatical structure and in protecting defendants who are unaware of wrongdoing.

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159. See United States v. Freed, 401 U.S. 601, 609 (1971) ("This is a regulatory measure in the interest of the public safety . . . ."); see also supra notes 72–77 and accompanying text (discussing *Freed*'s holding).

160. *Freed*, 401 U.S. at 609. The classification of a grenade or machine gun as "highly dangerous" differs from *Staples*'s classification of nonautomatic guns as items for which there is a "long tradition of widespread lawful . . . ownership." Staples v. United States, 511 U.S. 600, 610 (1994).

161. Morissette v. United States, 342 U.S. 246, 256 (1952); United States v. Burwell, 690 F.3d 500, 520 (D.C. Cir. 2012) (en banc) (Rogers, J., dissenting) ("[T]he mandated thirty-year minimum, consecutive term of imprisonment means the public welfare exception is inapposite."); see also id. at 514 (majority opinion) (acknowledging § 924(c)(1)(B)(ii) is not public welfare offense, "under which the government need not prove *mens rea* at all," but concluding § 924(c)(1) sufficiently requires threshold mens rea showing).

162. 26 U.S.C. § 5871 (2012); see also supra note 77 (discussing Professor Kennedy's argument that judicial sentencing discretion weighed in favor of *Freed* Court's construction of § 5871's application to unregistered grenades as strict liability offense).

163. See, e.g., supra Part I.B.3 (discussing *Flores-Figueroa*'s analysis of mens rea distribution).

164. See 513 U.S. 64, 68–69 (1994) (extending knowledge requirement to fact that prohibited visual depiction involved "use of a minor engaging in sexually explicit conduct"); supra notes 66–71 and accompanying text (explaining *X-Citement Video*'s interpretation of 18 U.S.C. § 2252).

Furthermore, scholars have argued that Supreme Court doctrine has already implicitly rejected the rule that mens rea distribution should be limited to a minimal awareness of wrongdoing. Professor Stephen F. Smith, for instance, has observed that by imposing a high "knowledge" standard rather than a lower "recklessness" standard in cases where an implied mens rea is necessary to ensure an awareness of wrongdoing,[165] the Court required a higher showing of mens rea than what is necessary to "guarantee some minimal level of culpability."[166] Thus, he argues, the Court has demonstrated an implicit interest in ensuring that the level of mens rea is proportional to the sentence.[167] Professor Smith acknowledges that the Court's concern with ensuring proportionality between mens rea and punishment has only been exhibited in cases where it determines that an implied mens rea is necessary to avoid criminalizing apparently innocent conduct.[168] Nonetheless, the Court's default imposition of a high "knowledge" requirement at least establishes that it does not always follow the principle that mens rea presumptions should be limited to a threshold awareness of wrongdoing. Moreover, Professor Smith's hypothesis that an underlying concern with ensuring proportionality between mental culpability and punishment drives the Court's decisions in the *Morissette* line of cases is consistent with *Flores-Figueroa*, in which the Court acknowledged the absurdity of citing the defendant's awareness of wrongdoing to justify imposing a punishment for drug possession on a defendant who knowingly stole a bag, but who was unaware that the bag contained illegal drugs.[169]

At least one scholar, however, has argued that the Supreme Court has adopted the rule of limiting mens rea to the vicious will threshold. Professor John Shepard Wiley has observed that the Court will "whittle[]

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165. See, e.g., *X-Citement Video*, 513 U.S. at 78 (requiring knowledge that visual depiction involved use of minor engaging in sexual conduct); *Staples*, 511 U.S. at 618–19 (requiring knowledge that gun was machine gun); Liparota v. United States, 471 U.S. 419, 425 (1985) (requiring knowledge that acquisition or possession of food stamps was unauthorized by statute); *Morissette*, 342 U.S. at 276 (requiring knowledge that stolen property belonged to government).

166. See Smith, supra note 57, at 138 ("This would have meant that Staples would have been guilty if he should have known of his gun's automatic-firing capability and that Liparota . . . could have been convicted if [he] should have known [his] conduct was illegal.").

167. Id. at 141 (noting Court "raise[s] the required mens rea to a level that is sufficient to ensure that the acts that give rise to criminal liability will be *sufficiently culpable* to deserve the available penalties").

168. Id. at 143 ("[C]urrent doctrine is structured in such a way that courts can use mens rea to solve proportionality problems only if there happens to be an independent problem of punishing blameless behavior.").

169. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1890 (2009) ("Would we apply a statute that makes it unlawful '*knowingly* to possess drugs' to a person who steals a passenger's bag without knowing that the bag has drugs inside?"); see also supra notes 103–106 and accompanying text (interpreting *Flores-Figueroa* Court's opinion as normative judgment).

the scienter requirement down to a minimally sufficient and intrusive level" necessary to avoid criminalizing defendants who believed their conduct was legal.[170] Professor Wiley refers to this practice as the "rule against requiring superfluous culpability," which seeks to avoid imposing "unnecessary burdens on effective law enforcement."[171] Professor Wiley cites *Posters 'N' Things, Ltd. v. United States*, in which the Court held that a defendant was required to know that "customers in general are likely to use the merchandise [defendant sold in the mail] with drugs," and explicitly declined to require that it was the defendant's "'conscious object'" for the merchandise to be used with drugs.[172] Professor Wiley argues that the Court imposed the minimally necessary degree of mens rea to ensure the defendant had a minimal threshold culpability by (1) requiring only "'knowledge,'" not "'purpose,'" (2) not requiring knowledge that a customer would "'actually'" use the item with illegal drugs, and (3) not requiring knowledge of selling "'drug paraphernalia' within the meaning of the statute."[173]

Although Professor Wiley's argument shows that the *Posters 'N' Things* Court imposed a lesser mens rea requirement than it could have, the argument does not necessarily establish that the Court reduced its mens rea requirement to the absolute minimum level. After all, the Court did not adopt a negligence or recklessness standard (for instance, one where a reasonable person *would have known* that customers would likely use the merchandise with drugs). As such, *Posters 'N' Things* can also be interpreted as falling under Professor Smith's analysis of the *Morissette* line of cases, which impose more than the minimally sufficient level of mens rea.[174] Thus, the Supreme Court has not expressed a clear interest in restricting statutory mens rea requirements to a threshold awareness of wrongdoing.

b. *Federal Courts' Use of the Vicious Will Limitation.* — As discussed above, *Burwell* also supported its use of the rule that mens rea should be limited to a threshold vicious will by citing federal court decisions that declined to imply mens rea requirements into other statutes, reasoning that the statute already ensured an awareness of wrongdoing. Part II.B.1

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170. Wiley, supra note 151, at 1128.

171. Id.

172. Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 523–24 (1994) (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978)) (construing since-repealed prohibition in 21 U.S.C. § 857(a) against "us[ing] . . . services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia").

173. Wiley, supra note 151, at 1128 (quoting *Posters 'N' Things*, 511 U.S. at 524) ("These three adjustments eased the prosecutor's task of winning convictions under this statute. The *Posters 'N' Things* decision thus demonstrates the Court's presumption that Congress seeks effective law enforcement at the same time it intends that only culpable people will go to prison.").

174. See, e.g., supra notes 165–168 and accompanying text (describing argument that, by imposing mens rea requirement of "knowledge," Supreme Court cases do not merely imply minimal degree of mens rea needed to ensure culpability).

argued that some of these statutes are distinguishable from § 924(c)(1)(B)(ii) because they include explicit mens rea terminology in the main section of the statute but exclude such terminology from the separate paragraph or subsection that contained the element in question.[175] In addition to the statutes discussed in Part II.B.1, however, *Burwell* also mentioned 18 U.S.C. §§ 2423 and 2241(c), which criminalize the sexual exploitation of juveniles.[176] These exploitation statutes differ from other statutes mentioned in *Burwell* in that the elements from which courts have excluded a mens rea requirement (i.e., that the victim is underage) are not presented as separate paragraphs, subsections, or even sentences of the main portions of §§ 2423 and 2241(c); rather, they are embedded in the same sentence as the main portion, which includes the express mens rea terminology.[177] Because the structures of §§ 2423 and 2241(c) mirror the structure of the identity theft statute in *Flores-Figueroa*, decisions not to imply a mens rea requirement into the underage elements of §§ 2423, 2241(c), and comparable statutes[178] seem to conflict with *Flores-Figueroa*'s holding that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element."[179] As such, outside of § 1028A(a)(1)'s aggravated identity theft context, courts do not appear to follow *Flores-Figueroa*'s holding that ordinary grammatical usage can trump the presumption that mens rea should be limited to only what is necessary to ensure a minimal awareness of wrongdoing. Therefore, it seems that even if the Supreme Court has not established a threshold vicious will limitation for mens rea interpretation, federal courts have invoked the presence of a vicious will as justification for declining to extend mens rea to statutory elements.

However, decisions interpreting the juvenile sexual exploitation statutes can be reconciled with *Flores-Figueroa*. In *Flores-Figueroa*, the Court

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175. See supra notes 146–150 and accompanying text (distinguishing 18 U.S.C. §§ 1361, 2113 (2012) and 21 U.S.C. §§ 841, 860 (2012) from 18 U.S.C. § 924(c)(1)(B)(ii)).

176. See, e.g., supra notes 156–158 and accompanying text (describing 18 U.S.C. §§ 2423, 2241(c)).

177. See 18 U.S.C. § 2241(c) (applying to defendant who "crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years"); § 2423 (applying to defendant "who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce"). Another similar juvenile sexual exploitation statute is § 2422(b), which criminalizes the use of interstate commerce to persuade victims under eighteen years to engage in prostitution or other illegal sex acts.

178. See, e.g., United States v. Daniels, 685 F.3d 1237, 1249 (11th Cir. 2012) (reasoning, unlike statute at issue in *X-Citement Video* where "'age of the performers is the crucial element separating legal innocence from wrongful conduct,'" defendant convicted under § 2422(b) engages in wrongful conduct regardless of victim's age (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 73 (1994))); United States v. Cox, 577 F.3d 833, 837 (7th Cir. 2009) ("[A]ge in § 2423(a) is not a factor that distinguishes criminal behavior from innocent conduct (as it was in the statute at issue in *X-Citement Video*) . . . .").

179. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1891 (2009).

noted that its grammar-based interpretive principle may not necessarily apply if "special contexts" dictate against extending a mens rea provision.[180] Professor Darryl K. Brown has suggested that such a "special context" may exist in the juvenile sexual exploitation statutes. He notes that, unlike § 1028A(a)(1)—where a defendant who uses a made-up identification number would be given no indication that the number belonged to another person[181]—juvenile sexual exploitation statutes like § 2423 ensure that a defendant is likely to act recklessly toward a victim's age, regardless of whether there is a mens rea requirement for the age element.[182] This is because § 2423 requires that a defendant knowingly have contact with the victim,[183] making it highly likely that the defendant has seen the victim and "thus providing . . . some basis at least to suspect or guess her age."[184]

Indeed, recent decisions reveal the belief that a defendant would be alerted to the high likelihood that a victim was underage by virtue of the statutes' other non-age elements. For instance, the Sixth Circuit noted that a defendant "would presumably know he is treading close to the line in transporting a young person to engage in illicit sexual activity."[185] Like-

180. Id. So far, courts have explicitly found that a "special context" exists with respect to statutes prohibiting juvenile sexual exploitation—namely, that Congress intended juvenile exploitation statutes to provide heightened protection for minors. At least one court, however, has found that no similar "special context" exists for a statute prohibiting the knowing transportation of an individual across interstate commerce for the purposes of prostitution. Compare *Daniels*, 685 F.3d at 1248 ("Clearly there is a 'special context' present [in § 2422(b)]—one not present in *Flores-Figueroa*—the protection of the very young, that calls for a contextual approach to statutory interpretation."), and *Cox*, 577 F.3d at 837 ("It seems implausible that Congress would [make] it . . . harder to prove a violation of § 2423(a) [prohibiting transportation of minors for prostitution] than of § 2421 [prohibiting transportation of any individual for prostitution], when the purpose of the former provision is to provide heightened protection for minors against sexual exploitation."), with United States v. Shim, 584 F.3d 394, 395–96 (2d Cir. 2009) (finding "[n]o special context" exists for 18 U.S.C. § 2421's prohibition of transporting individuals in interstate commerce, and thus requiring knowledge that transportation occurred in interstate commerce).

181. See *Flores-Figueroa*, 129 S. Ct. at 1896 (Alito, J., concurring) (noting, without mens rea requirement, whether defendant would qualify for two-year sentence increase under identity theft statute "depends on chance" made-up Social Security number happens to belong to real person).

182. Brown, supra note 81, at 125–27 ("The 'special context' that makes strict liability normatively acceptable is the type that characterizes the Mann Act offenses—offenders whose culpability regarding the strict liability element is typically apparent even without a mens rea requirement, thereby justifying the enhanced punishment triggered by that element.").

183. See 18 U.S.C. § 2423 (2012) (providing defendant must "knowingly transpor[t]" victim); see also § 2241(c) (providing defendant must "knowingly engag[e] in a sexual act with another person who has not attained the age of 12 years"); § 2422(b) (providing defendant must "knowingly persuade[] . . . individual who has not attained the age of 18 years").

184. Brown, supra note 81, at 115.

185. United States v. Daniels, 653 F.3d 399, 410 (6th Cir. 2011).

wise, the Eleventh Circuit observed that a "defendant . . . who lures and encourages young children into these activities does so at his own peril, regardless of what the victim says or how she appears."[186] Even without an official mens rea requirement for the age element, §§ 2241(c), 2423, and 2422(b) already ensure that the defendant has a reckless mental state with respect to the age element. Thus, the fact that courts have declined to extend a mens rea requirement to age elements in the juvenile sexual exploitation statutes does not stand for the principle that mens rea should be limited to only what is needed to establish a vicious will—rather, such decisions may be based on the reasoning that the statutes themselves already ensure some degree of mens rea with respect to the age elements.[187]

This section has attempted to show that, without § 924(c)(1)(B)(ii)'s status as a sentencing factor, no clear canon of mens rea interpretation weighs in favor of excluding a mens rea requirement from § 924(c)(1)(B)(ii). None of the Supreme Court's traditional canons of interpretation—the innocence rule, the exclusion of mens rea from jurisdictional provisions, or the textual argument based on Congress's selective exclusion of mens rea terminology—provide definitive guidance. The claim that other courts of appeals have clearly and consistently limited mens rea distribution to what is necessary to ensure a minimal awareness of wrongdoing is also tenuous.

3. *Interpretive Rules in Favor of a Mens Rea Requirement Are Similarly Inconclusive.* — No canon of statutory interpretation mandates the exclusion of a mens rea requirement from § 924(c)(1)(B)(ii), but there likewise exists no cut-and-dried rule that mandates the extension of a mens rea requirement to § 924(c)(1)(B)(ii). Although the *Burwell* majority made the too-cursory decision that existing canons of statutory interpretation clearly mandated the exclusion of a mens rea requirement from § 924(c)(1)(B)(ii), Judge Kavanaugh's dissent perhaps went too far in the opposite direction by arguing that the Supreme Court has clearly mandated the extension of a mens rea requirement to § 924(c)(1)(B)(ii).

As discussed in Part II.A.2, Judge Kavanaugh argued that *Flores-Figueroa* and the *Morissette* line of cases stood for the rule that a mens rea requirement adheres to all elements of an offense in the absence of a clear congressional indication to the contrary.[188] As Judge Rogers pointed out, however,[189] the cases Judge Kavanaugh cited were silent as to whether there must be an affirmative presumption of mens rea for *each*

186. United States v. Daniels, 685 F.3d 1237, 1250 (11th Cir. 2012).

187. For a discussion of whether a similar argument can be made that § 924(c)(1)(B)(ii) already ensures a defendant will act recklessly toward the possibility that his or her firearm is a machine gun, see infra notes 202–208 and accompanying text.

188. See supra notes 126–129 and accompanying text.

189. United States v. Burwell, 690 F.3d 500, 525 (D.C. Cir. 2012) (en banc) (Rogers, J., dissenting).

element. For instance, while *Flores-Figueroa* emphasized that its extension of a knowledge requirement was decided as a matter of "ordinary English grammar," it did not explicitly state that its grammar-based holding was equivalent to a broad presumption that all elements of an offense ought to contain a mens rea requirement.[190]

The other cases Judge Kavanaugh cited were instances where the presumption of mens rea was necessary to prevent the criminalization of apparently innocent conduct.[191] In particular, the Court in *Staples v. United States* emphasized that its decision to require knowledge that defendant's weapon was a machine gun was a "narrow" holding applicable to cases where defendants "wholly ignorant" of their offensive conduct might be subject to "lengthy prison terms."[192]

Although the Court has not given a universal mandate that mens rea must be presumed for *every* element of an offense, Judge Kavanaugh may be correct in suggesting that the Court favors a strong presumption of mens rea in many ambiguous cases. As Part III of this Note argues, this tendency toward a presumption of mens rea stems from a concern with ensuring that punishment is proportionate to a defendant's mental culpability.

III. COURTS SHOULD PRESUME A MENS REA REQUIREMENT FOR MACHINE GUN POSSESSION DUE TO § 924(c)(1)(B)(ii)'S HARSH MANDATORY SENTENCING INCREASE

This Part argues that, even though the Supreme Court's traditional canons of statutory interpretation do not determine whether § 924(c)(1)(B)(ii) should contain an implied mens rea requirement, courts should nonetheless require a mens rea showing for machine gun possession because doing so would be consistent with the Court's concern with ensuring proportionality between punishment and mental culpability. Part III.A argues that the Court's interest in proportionality is best served by requiring a mens rea showing for § 924(c)(1)(B)(ii), due to the statute's high thirty-year mandatory minimum sentencing increase (twenty-five years more than the five-year mandatory minimum for a defendant whose firearm was not a machine gun). Part III.B addresses the

190. See supra note 181 (addressing Justice Alito's discussion of "chance"). As discussed supra in notes 103–106 and accompanying text, however, *Flores-Figueroa* did include language that revealed a normative concern with removing pure chance as a determinant for sentencing severity. Here, this Note merely argues that *Flores-Figueroa* did not go so far as to establish a new canon that *all* elements require a mens rea showing.

191. *Burwell*, 690 F.3d at 533–36 (Kavanaugh, J., dissenting) (citing cases where Court implied mens rea requirement); see also, e.g., United States v. Bailey, 444 U.S. 394, 408 (1980) (requiring knowledge defendants left prison without authorization in prison escape statute, thus preventing conviction of defendants who believed they had permission to leave); supra Part I.B.1 (discussing *X-Citement Video*, *Staples*, *Posters 'N' Things*, *Liparota*, and *Morissette*).

192. 511 U.S. 600, 619–20 (1994).

applicability of the rule of lenity to the question of mens rea in § 924(c)(1)(B)(ii), observing that although the rule of lenity may apply in theory, the argument that mens rea should be imposed under this rule is weak, due to the Court's unclear doctrinal treatment of the rule of lenity.

A. *The Value of Proportionality in the Court's Mens Rea Case Law*

In prior cases, the Supreme Court has demonstrated an interest in ensuring that a defendant's mental culpability is proportionate to the level of punishment imposed. The Court has manifested this principle in three ways. First, in the Court's classification of "public welfare offenses," the Court has focused repeatedly on the degree and nature of the penalty involved.[193] Granted, instances where the Court has explicitly considered the degree of penalty in determining statutory mens rea requirements have been limited to the context of distinguishing between public welfare offenses (carrying no mens rea requirement whatsoever) and nonpublic welfare offenses that risked criminalizing apparently innocent conduct.[194] Such instances thus do not directly implicate statutes like § 924(c)(1)(B)(ii), which neither impose small penalties nor risk criminalizing conduct a defendant believed was innocent. However, the fact that the degree of penalty has held such a primary role in identifying strict liability public welfare offenses suggests, at least, that the Court's attitude toward mens rea jurisprudence is colored by a concern that a sentence be proportionate to the defendant's mental culpability.[195]

Second, as noted by Professor Smith, when the Court determines it must require a mens rea showing to protect defendants who believed their conduct to be innocent, the Court has declined merely to imply the minimal mens rea requirement of "negligence" or "recklessness," opting instead for a higher "knowledge" requirement.[196] This choice not to impose a minimal "negligence" or "recklessness" standard undermines a potential interest in limiting mens rea showing to a threshold degree of

193. See, e.g., id. at 616 ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*."); Morissette v. United States, 342 U.S. 246, 256 (1952) (noting, for public welfare offenses, "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation").

194. See, e.g., *Staples*, 511 U.S. at 618–19 ("[W]e note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge *only of traditionally lawful conduct*, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." (emphasis added)).

195. A similar view is adopted by Judge Rogers's dissent in *Burwell*, where she noted that although *Staples* involved a narrow "context of holding that the public welfare exception was inapplicable, there is no obvious reason to limit the relevance of this consideration to determining whether that exception applies to impose strict liability." 690 F.3d at 525 (Rogers, J., dissenting).

196. See supra notes 166–168 and accompanying text (discussing Professor Smith's argument).

awareness. Rather, the heightened "knowledge" requirement suggests that the Court is concerned with indexing the defendant's mental culpability to a level that is proportionate with the penalty.

Third, the Court's language in *United States v. O'Brien* suggests that it specifically views § 924(c)(1)(B)(ii)'s enhanced mandatory minimum as a reflection of the heightened mental culpability involved in consciously using an automatic weapon to commit the predicate offense. The Court stated: "The immense danger posed by machineguns, the *moral depravity in choosing the weapon*, and the substantial increase in the minimum sentence provided by the statute support the conclusion that this prohibition is an element of the crime, not a sentencing factor."[197] In order for § 924(c)(1)(B)(ii) to capture what the *O'Brien* Court identified as an increase in mental culpability, *some* degree of awareness of a gun's automatic firing capability is required.

Therefore, although the Supreme Court's mens rea jurisprudence does not give a definitive answer to the question of mens rea in § 924(c)(1)(B)(ii), the Court's (1) general concern with the severity of punishment in the context of determining whether a crime is a public welfare offense, (2) practice of imposing a high mens rea standard in cases where it has decided to require a mens rea showing, and (3) explicit recognition that § 924(c)(1)(B)(ii) is intended to capture the law's normative disapproval of *choosing* a machine gun suggest that the severity of § 924(c)(1)(B)(ii)'s mandatory thirty-year minimum weighs in favor of imposing a mens rea requirement.

Moreover, requiring a mens rea showing for machine gun possession would address a concern invoked in Judge Kavanaugh's *Burwell* dissent: that there is moral absurdity in requiring a mens rea presumption for a statute that risks imposing a two-year sentence on a defendant who thought his or her conduct entirely innocent but, at the same time, excluding a mens rea requirement from an element that increases a defendant's sentence by twenty years where the defendant's mental culpability is no greater than that of a defendant who received a ten-year sentence.[198] Requiring a mens rea showing for § 924(c)(1)(B)(ii) would also be consistent with Justice Alito's interpretation of the majority opinion in *Flores-Figueroa*—namely, that the Court wanted to avoid allowing a harsh sentencing increase to be triggered by the "chance" existence of an external factor.[199]

Additionally, if the Court's default imposition of the "knowledge" standard truly reflects a belief that penalties should be proportionate to mental culpability, it would be arbitrary to only allow the Court to act on its concern with proportionality in cases where a defendant could be

197. United States v. O'Brien, 130 S. Ct. 2169, 2178 (2010) (emphasis added).

198. *Burwell*, 690 F.3d at 544 (Kavanaugh, J., dissenting).

199. See Flores-Figueroa v. United States, 129 S. Ct. 1886, 1896 (2009) (Alito, J., concurring).

punished for conduct he believed was innocent.[200] As some scholars have noted, a unique problem of mandatory minimum sentencing provisions is that once the conditions for the sentence increase are technically met, courts have no ability to adjust the sentence to reflect differences in culpability levels of various defendants on a case-by-case basis.[201] Thus, a mandatory minimum provision without a mens rea requirement eliminates the possibility that the criminal justice system would ever consider a defendant's mens rea with respect to the additional sentence imposed by the sentencing element. The statutory provision itself does not consider mental culpability, and the mandatory nature of the sentence it imposes denies judges discretion to consider mens rea during sentencing.[202] As such, no proportionality inquiry is allowed for statutes that guarantee a minimal awareness of wrongdoing but impose enormous mandatory sentence enhancements.

There is, however, a potential criticism of the view that the Court's concern with proportionality militates in favor of extending a mens rea requirement to § 924(c)(1)(B)(ii). Specifically, it is arguable that § 924(c)(1) already ensures a reckless mental state with regard to the nature of the weapon used. Like defendants convicted under §§ 2423 and 2241(c)—who have seen or interacted with their victims—defendants convicted under § 924(c)(1)(B)(ii) have seen and handled their firearms, and should thus be aware of the likelihood that their guns were automatic. [203]

There are at least two responses to this counterargument. The first is that factual circumstances of prior cases have demonstrated the possibility that defendants may, in good faith, mistake automatic firearms for nonautomatic ones. As the *Staples* Court recognized, a nonautomatic firearm may be altered into a machine gun without an obvious change in

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200. See, e.g., Smith, supra note 57, at 143 ("In short, current doctrine is structured in such a way that courts can use mens rea to solve proportionality problems only if there happens to be an independent problem of punishing blameless behavior.").

201. See, e.g., Paul G. Cassell, Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums), 56 Stan. L. Rev. 1017, 1018 (2004) ("[The] 'no escape' feature of the mandatory minimums can lead to possible injustices in particular cases."); Luna & Cassell, supra note 5, at 13 (recognizing mandatory minimums "eliminate judicial discretion to impose a prison term lower than the statutory floor, making case-specific information about the offense and offender irrelevant").

202. As discussed above, the mandatory sentence imposed by § 924(c)(1)(B)(ii) differs from the maximum sentence provision at issue in United States v. Freed, 401 U.S. 601 (1971), where the Court may have declined to impose a mens rea requirement on the unregistered status of a grenade because judges would still have discretion to impose lower penalties on defendants with lower degrees of culpability. See supra notes 161–162 and accompanying text (describing public welfare offenses).

203. See supra notes 181–187 and accompanying text (discussing how 18 U.S.C. §§ 2423 and 2241(c) ensure defendant has reckless mens rea with regard to victim's age, even without official mens rea requirement for age element).

its external physical properties.[204] Similarly, in *Burwell* both the defendants' and government's expert witnesses agreed that the defendants' weapons "contained no clear markings indicating that they could be put into automatic firing mode."[205] Thus, prior cases suggest that, without a mens rea requirement, § 924(c)(1)(B)(ii) would apply to defendants who were unaware of the likelihood that their guns could fire automatically.

Second, if the only reason § 924(c)(1)(B)(ii) does not require an implied mens rea showing is that § 924(c)(1) sufficiently ensures that a defendant has a reckless mental state with respect to the automatic nature of his weapon, courts should recognize this reasoning by explicitly imposing a reckless mens rea requirement on § 924(c)(1)(B)(ii) in the interest of transparency.

Providing a clear representation of what a statute requires for conviction is particularly important for offenses that contain mandatory minimum sentencing provisions. This is because prosecutors often use the threat of charging an offense with a mandatory minimum as leverage to obtain a guilty plea.[206] The resulting irony, as Professor Stephen J. Schulhofer points out, is that "flagrantly guilty" offenders often avoid mandatory minimums (by pleading guilty, thereby receiving a lesser sentence) while defendants with more ambiguous, "borderline" cases receive the harsh mandatory sentences because they have plausible defenses and are thus more likely to insist on trial.[207] With respect to the machine gun provision, "borderline" defendants may be those who believe their lack of mens rea with respect to the automatic nature of their weapon might be a successful defense at trial.[208] A court precedent or a version of § 924(c)(1)(B)(ii) that explicitly stated the machine gun provision's mens rea status would mitigate this disparity by making clear to offenders whether a mens rea-based defense would be a plausible argument at trial. Thus, an explicit imposition of a mens rea requirement would, in theory, reduce the probability that defendants who were unaware that their guns could fire automatically would be subject to the

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204. See Staples v. United States, 511 U.S. 600, 615 (1994) ("[V]irtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun . . . .").

205. United States v. Burwell, 690 F.3d 500, 503 (D.C. Cir. 2012) (en banc).

206. See Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 202 (1993) ("Mandatories then become little more than a bargaining chip, a 'hammer' which the prosecutor can invoke at her option, to obtain more guilty pleas under more favorable terms.").

207. Id. at 203 ("[B]argaining-chip mandatories tend to increase . . . disparity because . . . their most severe effects fall not on flagrantly guilty repeat offenders (who avoid the mandatory by their guilty pleas), . . . but rather on first offenders in borderline situations (who may have plausible defenses and are more likely to insist upon trial).").

208. The defendants mentioned in Part I.A, supra, who argued that § 924(c)(1)(B)(ii) requires knowledge of the automatic nature of their guns illustrate this point.

harsh mandatory minimum sentence simply because they miscalculated the odds that the court would require a mens rea showing for machine gun possession.

Furthermore, the implementation of an overt "recklessness" standard may also address the practical concern regarding the difficulty of proving whether a defendant actually knew of a gun's automatic firing capability.[209] A "recklessness" standard would provide a lower burden of proof for prosecutors while still ensuring that a defendant had an additional degree of mental culpability—higher than what is necessary to qualify for § 924(c)'s enhancements with a nonautomatic firearm.

B. *The Rule of Lenity*

Another argument in favor of imposing a mens rea requirement on § 924(c)(1)(B)(ii) is that the rule of lenity should apply because traditional canons of statutory interpretation give little guidance on the question of § 924(c)(1)(B)(ii)'s mens rea status. The rule of lenity generally holds that ambiguity in a criminal statute should be resolved in favor of the defendant.[210] The Supreme Court has treated the rule of lenity as a rule of last resort, appropriate only if no other principle of statutory construction applies.[211] The rationale behind the rule is, in part, the concern that statutes be clear, in order to provide fair warning to defendants about the repercussions of their actions.[212] Indeed, the Court has recognized that the rule of lenity is applicable to statutory provisions that increase the penalty imposed on defendants.[213] As such, it seems that § 924(c)(1)(B)(ii) is an appropriate candidate for the rule of lenity: As Part II illustrated, no background canon of interpretation determines whether § 924(c)(1)(B)(ii) should contain an implicit mens rea re-

209. See Wiley, supra note 151, at 1128 (suggesting courts limit mens rea to minimal culpability level to avoid placing "unnecessary burdens on effective law enforcement" arising from requiring proof of higher level of scienter).

210. E.g., Daniel C. Richman et al., Defining Federal Crimes (Chapters 2–4) 107 (Yale Law Sch., Pub. Law Working Paper No. 253, 2012), available at http://ssrn.com/abstract=2103868 (on file with the *Columbia Law Review*).

211. See Muscarello v. United States, 524 U.S. 125, 138 (1998) ("'The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended.'" (alteration in *Muscarello*) (quoting United States v. Wells, 519 U.S. 482, 499 (1997)) (internal quotation marks omitted)); Staples v. United States, 511 U.S. 600, 619 n.17 (1994) (declining to apply rule of lenity because statute's implicit mens rea requirement was not "grievously ambiguous," given "background rule of the common law favoring *mens rea*" in statutes that risk criminalizing apparently innocent conduct).

212. McBoyle v. United States, 283 U.S. 25, 27 (1931) ("[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.").

213. Bifulco v. United States, 447 U.S. 381, 387 (1980) (noting rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose").

quirement. Moreover, given the severe sentencing increase imposed by § 924(c)(1)(B)(ii), the rule of lenity's concern with fair warning weighs against surprising a defendant who did not exhibit a higher degree of "moral depravity"[214] in choosing a machine gun with an extra twenty-five-year sentencing increase because his or her weapon happened to have been altered to fire automatically.

The problem, however, with invoking the rule of lenity is simply that it is unclear what degree of ambiguity is required to trigger the rule. For instance, in *United States v. Bass*, the Court applied the rule of lenity by selecting the "narrower reading" of a statute that could be read in both narrow and broad terms.[215] The *Bass* Court reached its conclusion that the statute was sufficiently ambiguous to trigger the rule of lenity after acknowledging that while "legislative history might tip in the Government's favor," the statutory text favored the defendant.[216] By contrast, in *Muscarello v. United States*, the Court declined to apply the rule of lenity to statutory language that could be read in both narrow and broad terms.[217] Specifically, in interpreting § 924(c)(1), the *Muscarello* Court held that the term "carries" in "uses or carries a firearm" encompassed the transportation of a gun in a car glove compartment, despite the existence of a narrower definition of "carrying," limited to holding items on one's person.[218] Despite recognizing the existence of "statutory ambiguity," the Court noted that the degree of ambiguity was insufficiently "grievous" to implicate the rule of lenity because other factors (such as legislative history) counterbalanced the argument that some dictionaries limited "carrying" to holding items on one's person.[219]

Thus, *Muscarello* suggests that, even if there are plausible arguments in favor of different interpretations of a statute, there is no clear standard to determine whether the ambiguity is great enough to trigger the rule of lenity. This is the case with § 924(c)(1)(B)(ii), where there are plausible arguments in favor of both implying and excluding a mens rea require-

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214. United States v. O'Brien, 130 S. Ct. 2169, 2178 (2010); see also supra notes 49–51 and accompanying text (discussing *O'Brien*'s finding that § 924(c)(1)(B)(ii) reflects increased moral culpability in choosing to use machine gun).

215. 404 U.S. 336, 347 (1971). The statute imposed penalties on a felon "who receives, possesses, or transports [a firearm] in commerce or affecting commerce," and the Court held that "in commerce or affecting commerce" applied not only to "transports," but to "receives" and "possesses" as well. 18 U.S.C. app. § 1202(a) (1970) (repealed 1986); *Bass*, 404 U.S. at 347.

216. *Bass*, 404 U.S. at 346–47.

217. Muscarello v. United States, 524 U.S. 125, 138–39 (1998).

218. See id. at 130 (acknowledging Black's Law Dictionary defined "carry arms or weapons" as "[t]o . . . carry them upon the person or in the clothing" (quoting Black's Law Dictionary 214 (6th ed. 1990))); see also Richman et al., supra note 210, at 109 (arguing "dictionaries, usage guides, and the Bible," cited in majority and dissent's opinions, supported both narrow and broad interpretations of "carry," thus establishing issue of competing definitions "was a close one").

219. *Muscarello*, 524 U.S. at 138–39.

ment, but where no traditional rule of interpretation definitively resolves the issue. On one hand, the extreme mandatory sentence, the values animating the Supreme Court's mens rea case law, and the *O'Brien* Court's observation that § 924(c)(1)(B)(ii) punishes the moral depravity of choosing a machine gun weigh in favor of implying a mens rea requirement. On the other, the exclusion of mens rea terminology from § 924(c)(1)(B)(ii) and stare decisis concerns may weigh against a mens rea requirement. Therefore, although the theoretical formulation of the rule of lenity and its interest in ensuring fair notice suggest that § 924(c)(1)(B)(ii) should contain an implied mens rea requirement, the doctrinal application of the rule of lenity makes it unclear whether the application of the rule of lenity to § 924(c)(1)(B)(ii) would be persuasive to any court.

As discussed in Part III.A, however, the rule of lenity, as a canon of last resort, need not be invoked to decide the mens rea question. Rather, as Parts II and III.A attempt to show, the interpretive factors weighing in favor of a mens rea requirement are hardly in equipoise, with the interpretive factors weighing against it: Section 924(c)(1)(B)(ii)'s harsh mandatory sentencing increase and the Supreme Court's concern for proportionate sentencing in its mens rea jurisprudence favor requiring a mens rea showing, while the textual argument that Congress excluded mens rea terminology from § 924(c)(1)(B)(ii) and the doctrinal argument that mens rea distribution should be limited to a threshold vicious will are questionable.

CONCLUSION

O'Brien's holding that § 924(c)(1)(B)(ii) is an element of the offense removed the primary assumption on which courts had based their decision to exclude a mens rea requirement from § 924(c)(1)'s machine gun provision. This Note suggests that, in the wake of *O'Brien*, the Supreme Court's canons of mens rea interpretation do not clearly resolve the question of mens rea in § 924(c)(1)(B)(ii). Specifically, this Note argues that post-*O'Brien* circuit court cases have too quickly dismissed *O'Brien*'s relevance to mens rea in § 924(c)(1)(B)(ii) by relying on the principles of stare decisis and the use of the threshold vicious will limitation. In contrast to the post-*O'Brien* decisions of the Eleventh and D.C. Circuits, this Note argues that the Court's implicit concern with proportionality, coupled with the high mandatory penalty that § 924(c)(1)(B)(ii) imposes, militates in favor of requiring a mens rea showing for machine gun possession.