

SENTENCING FACTORS AND INTENT: THE ROLE OF MENS REA IN A FEDERAL GUN STATUTE

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I. INTRODUCTION

Bob walks into a bank, raises his loaded 9mm Berretta pistol, and demands cash. As Bob scoops up money from the counter, he mishandles his weapon and accidentally fires a round into the ceiling, injuring no one. Depending on where in the United States this incident occurs, Bob may have just added three additional years to his prison sentence for discharging his firearm.

Section 924(c)(1)(A) of the Gun Control Act of 1968¹ is a federal gun control statute, which imposes mandatory minimum prison sentences on those who commit certain crimes with firearms. The statute begins by listing the elements of a complete crime in the following principle paragraph:

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¹ 18 U.S.C. § 924(c)(1)(A) (2000). Setting out the relevant portions of the statute in full:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Id.

[A]ny 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, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years.²

To receive the five-year mandatory sentence under this paragraph, a defendant must be indicted under this section and either plead guilty or be found guilty by a jury.³ The statute contains two further provisions, however, which increase the mandatory minimum sentences depending on the existence of two additional factors.⁴ The statute increases the minimum sentence to seven years “if the firearm is brandished,”⁵ and to ten years “if the firearm is discharged.”⁶

In 2002, the Supreme Court in *Harris v. United States*⁷ ruled that these brandishing and discharge provisions were sentencing factors and not separate offenses.⁸ Thus, the sentencing judge must impose an increased sentence of seven or ten years even though “[t]hat factor need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.”⁹ To increase a defendant’s sentence from five years to seven or ten years requires only a judicial finding of the existence of certain facts by a preponderance of the evidence.¹⁰ This Comment explores whether a judge, while sentencing a defendant under § 924(c)’s discharge provision, is required to find that the defendant intended to discharge the firearm. In the example given above, Bob accidentally discharged the firearm into the ceiling. In the D.C. and Ninth Circuits, Bob would not receive the increased sentence because he lacked the intent to discharge the firearm.¹¹ However, in the Tenth and Sixth Circuits, Bob is strictly liable

² *Id.* § 924(c)(1)(A).

³ *See Harris v. United States*, 536 U.S. 545, 551–52 (2002).

⁴ 18 U.S.C. § 924(c)(1)(A)(ii–iii).

⁵ *Id.* § 924(c)(1)(A)(ii).

⁶ *Id.* § 924(c)(1)(A)(iii).

⁷ 536 U.S. 545.

⁸ *Id.* at 556.

⁹ *Id.* at 568.

¹⁰ *See id.* at 568–69.

¹¹ *See United States v. Brown*, 449 F.3d 154 (D.C. Cir. 2006); *United States v. Dare*, 425 F.3d 634 (9th Cir. 2005).

for the discharge and must serve the minimum ten-year prison sentence.¹²

Before discussing the circuit split regarding whether the discharge provision requires intent, the following issue must be clarified: how can a judge increase a defendant's sentence based on facts not alleged in the indictment nor found by a jury without offending the constitutional requirements declared by the Supreme Court in *Apprendi v. New Jersey*¹³ and subsequent cases? Under *Apprendi*, "any fact . . . that increases the penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."¹⁴ The answer lies in § 924(c)'s unstated statutory maximum of life imprisonment.¹⁵ A jury conviction under § 924(c)'s underlying offense of using or carrying a firearm during the commission of a crime, even without finding that the defendant brandished or discharged the firearm, would subject the defendant to a potential sentence range from five years to life in prison.¹⁶ In fact, the plurality in *Harris*, cognizant of *Apprendi*'s holding, distinguished § 924(c) from the statute at issue in *Apprendi*, noting that § 924(c) contains no prescribed statutory maximum, thus, "the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished [or discharged] the firearm."¹⁷

Yet, as this Comment discusses, doubt as to *Harris*'s viability lingers due to shifting dynamics within the Supreme Court, and discordant rulings and dicta in later Supreme Court sentencing opinions.¹⁸ The Court has been expanding Sixth Amendment protections by limiting a judge's ability to increase penalties during the sentencing phase.¹⁹ If *Harris* were to be overruled, § 924(c)'s brandishing and discharge provisions would no longer be sentencing factors to be found by a judge, but criminal elements with full procedural protections of a jury trial.²⁰ If so, mens rea could not be averted so easily,

¹² See *United States v. Nava-Sotelo*, 354 F.3d 1202 (10th Cir. 2003); *United States v. Tunstall*, 49 Fed. Appx. 581 (6th Cir. 2002).

¹³ 530 U.S. 466 (2000).

¹⁴ *Id.* at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

¹⁵ *United States v. Gamboa*, 439 F.3d 796, 811 (8th Cir. 2006).

¹⁶ *Id.*; *Dare*, 425 F.3d at 640; *United States v. Sandoval*, 241 F.3d 549, 551 (7th Cir. 2001); see also *Harris v. United States*, 536 U.S. 545, 554 (2002).

¹⁷ *Harris*, 536 U.S. at 554.

¹⁸ *United States v. Malouf*, 377 F. Supp. 2d 315, 327 (D. Mass. 2005).

¹⁹ See *Cunningham v. California*, 549 U.S. 270 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi*, 530 U.S. 466.

²⁰ See *Harris*, 536 U.S. at 560 (distinguishing between offense elements and sentencing factors).

and the courts that currently impose strict liability on § 924(c)'s discharge provision would find little justification for doing so. But *Harris* has not yet been overruled.²¹ Thus, this Comment must proceed under the assumed viability of *Harris*'s ruling that § 924(c)'s discharge provision is a sentencing factor and not a separate element to be found by a jury.

The circuit courts that have split regarding § 924(c)'s mens rea requirement have not only differed in their conclusions but also in their analytical methods.²² One side uses traditional tools of statutory interpretation, which includes an analysis of the text, structure, and history of the statute backstopped by the doctrines of lenity and the presumption against strict liability.²³ These courts conclude that the statute is ambiguous but that Congress intended for the discharge provision to require mens rea.²⁴ Yet the fact that *Harris* ruled that the discharge provision is a sentencing factor has created an alternative analysis because sentencing factors generally do not afford the same procedural rights to defendants as regular offense elements.²⁵ The question then becomes whether a judge can automatically dismiss the mens rea requirement for a sentencing factor simply because it is a sentencing factor. This characterizes the position taken by the circuits which have concluded that § 924(c)'s discharge provision does not require criminal intent.²⁶ These courts rely heavily on *Harris*, and seem to create a rule that judges need not determine a defendant's mental culpability when finding facts that are sentencing enhancements and not elements of a crime.²⁷

The fact that a judge can theoretically sentence a defendant up to life in prison under § 924(c)'s underlying offense would threaten to make any debate over the discharge provision's intent requirement either irrelevant or completely academic if not for the actual practice in federal courts today. For instance, judges who sentence defendants under § 924(c) rarely, if ever, deviate from the applicable minimum sentence.²⁸ Thus, a defendant who is sentenced under the dis-

²¹ *United States v. Grier*, 475 F.3d 556, 575 (3d Cir. 2007).

²² Compare *United States v. Nava-Sotelo*, 354 F.3d 1202 (10th Cir. 2003), with *United States v. Brown*, 449 F.3d 154 (D.C. Cir. 2006).

²³ *E.g.*, *Brown*, 449 F.3d 154.

²⁴ *E.g.*, *id.* at 158.

²⁵ See *Harris*, 536 U.S. at 560.

²⁶ *E.g.*, *Nava-Sotelo*, 354 F.3d at 1206.

²⁷ *Id.*

²⁸ *Harris*, 536 U.S. at 578 (Thomas, J., dissenting).

The suggestion that a 7-year sentence could be imposed even without a finding that a defendant brandished a firearm ignores the fact that the

charge provision will almost always receive a sentence of exactly ten years, but if found not to have discharged a firearm, would usually serve only seven years for brandishing, or even five years if the defendant neither brandished nor discharged the firearm.²⁹ The stakes are raised by § 924(c)'s imposition of mandatory sentences, which not only preclude judges from departing downward to compensate for individualized circumstances,³⁰ but also run consecutively with any other sentence.³¹ Finally, a judicial finding that the defendant discharged a firearm condemns him to at least three additional years in federal prison without the possibility of parole.³²

Parts II and III of this Comment explore the statute's legislative history and discuss the Supreme Court's increasingly fragile decision in *Harris*.³³ Part IV discusses the divergent rulings among circuit courts and explores the different methods these courts have used to analyze whether the discharge provision of § 924(c) requires intent.³⁴ Part V discusses the rule created in the Tenth Circuit that sentencing factors do not require a finding of mens rea, and demonstrates that such a rule is unworkable and inaccurate.³⁵ Part VI discusses the standard tools that federal courts use in interpreting a statute to determine whether it requires a finding of mens rea, and also argues that the discharge provision is ambiguous regarding mens rea.³⁶ Finally, this Comment concludes that courts should require that the defendant intended to discharge a firearm under § 924(c)'s discharge provision.

sentence imposed when a defendant is found only to have "carried" a firearm "in relation to" a drug trafficking offense appears to be, almost uniformly, if not invariably, five years. Similarly, those found to have brandished a firearm typically, if not always, are sentenced only to 7 years in prison while those found to have discharged a firearm are sentenced only to 10 years.

Id.

²⁹ *Id.*

³⁰ 18 U.S.C. § 924(c)(1)(A)(i–iii) (2006) (defining the terms of imprisonment as "not less than" five, seven, or ten years).

³¹ *Id.* § 924(c)(1)(D)(ii).

³² *See id.* § 924(c)(1)(D)(i).

³³ *See infra* notes 37–97 and accompanying text.

³⁴ *See infra* notes 98–180 and accompanying text.

³⁵ *See infra* notes 181–203 and accompanying text.

³⁶ *See infra* notes 202–43 and accompanying text.

II. THE HISTORY OF 18 U.S.C. § 924(C) AND ITS DISCHARGE PROVISION

The present form of § 924(c)(1)(A) is rooted in the Gun Control Act of 1968³⁷ and is the product of multiple amendments throughout the years.³⁸ The original statute imposed a mandatory minimum sentence of at least one year on offenders who “use” or “carry” a firearm during the commission of any federal felony.³⁹ However, the statute’s effect was weakened because it allowed parole and sentencing judges could suspend the sentence; furthermore, Supreme Court cases interpreted the provision as a cumulative enhancement instead of a separate offense.⁴⁰ Because of these ways to get around the penalty, Congress amended § 924(c) with the Comprehensive Crime Control Act of 1984,⁴¹ which reduced potential variations in sentences. Specifically, the amendment ensured that an offender who used a firearm “during and in relation to any crime of

³⁷ Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

(c)Whoever—

- (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
 - (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
- shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

Id.

³⁸ Thomas A. Clare, *Smith v. United States and the Modern Interpretation of 18 U.S.C. § 924(c): A Proposal to Amend the Federal Armed Offender Statute*, 69 NOTRE DAME L. REV. 815, 823–26 (1994).

³⁹ Pub. L. No. 90-618, 82 Stat. 1213.

⁴⁰ Clare, *supra* note 38, at 823.

⁴¹ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended in various sections of 18 U.S.C. and 28 U.S.C.). The Act amended 18 U.S.C. § 924(c) to read as follows:

Whoever, during and in relation to any crime of violence . . . uses or carries a firearm, shall, in addition to the punishment for such crime of violence, be sentenced to imprisonment for five years. . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment, including that imposed for the crime of violence in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

Id.

violence” would serve a minimum sentence of five years that was consecutive to the sentence for the underlying offense.⁴²

In 1986, Congress again amended the statute with the passage of the Firearms Owners’ Protection Act,⁴³ which made the mandatory minimum five-year sentence applicable when an offender uses or carries a firearm during a “drug trafficking crime.”⁴⁴ Between 1986 and 1998 additional amendments both redefined “drug trafficking crime” into the definition that is still used today⁴⁵ and varied sentence lengths based on the type of firearm involved.⁴⁶

In 1995, the Supreme Court determined what type of activity satisfied the “uses and carries” language of the statute.⁴⁷ The Court unanimously held that for the accused to be liable for “use” of the firearm, the accused must have actively employed the firearm so that the firearm is an operative factor in the underlying offense.⁴⁸ Thus, the Court substantially narrowed the scope of the statute, decreasing its potential use by prosecutors.⁴⁹

To restore the statute’s effectiveness,⁵⁰ in 1998 Congress amended the statute to ensure that the penalties set forth would apply not only to someone who uses and carries a firearm, but also to

⁴² *Id.*

⁴³ Firearms Owners’ Protection Act of 1986, Pub. L. No. 99-308, § 104(a)(2) (A–F), 100 Stat. 449, 456–57 (1986).

⁴⁴ *Id.*

⁴⁵ See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 6212, 102 Stat. 4181, 4360 (“the term ‘drug trafficking crime’ means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)”).

⁴⁶ See Crime Control Act of 1990, Pub. L. No. 101-647, 1101, 104 Stat. 4789, 4829 (increased sentences for short-barreled shotguns, short-barreled rifles, and destructive devices); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 110102, 108 Stat. 1796, 1996 (1998) (increased sentences for semi-automatic assault weapons).

⁴⁷ *Bailey v. United States*, 516 U.S. 137, 150 (1995).

⁴⁸ *Id.* at 143.

⁴⁹ Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 60–61 (2000) (estimating that “between 1500 and 2250 cases in a typical year were disqualified for Section 924(c) by the Bailey decision”). To demonstrate how much of an impact these estimated numbers had, see 144 CONG. REC. H530, H531 (daily ed. Feb. 24, 1998) (statement of Rep. McCollum) (“According to the U.S. Sentencing Commission, there were 10,576 defendants sentenced from 1991 to 1996 under this section.”).

⁵⁰ See 144 CONG. REC. S. 12670 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine) (referring to the bill as “the Bailey Fix Act, also known as the use or carry bill”).

one who possesses a firearm during and in relation to a crime.⁵¹ These amendments to the statute were the last substantial changes to the statute and have given the statute its current structure and substance. In these amendments, Congress also added the “brandish” and “discharge” provisions.⁵² The statute still rejects both probation and concurrent sentences,⁵³ creating what is known as a mandatory minimum sentence.

The modern-day mandatory minimum sentences were developed in 1956⁵⁴ and marked the beginning of a gradual shift in Congress’s sentencing goals from rehabilitation to deterrence.⁵⁵ Before the advent of mandatory minimums, most statutes allowed judges great freedom to exercise discretion at sentencing.⁵⁶ However, since the onset of mandatory minimum statutes, defendants have been increasingly vulnerable to generalized penalties that disregard unique circumstances.⁵⁷ By maximizing deterrence and limiting judicial discretion during sentencing, these statutes may lead to great “miscarriages of justice.”⁵⁸ Justice Kennedy has called for the abolition of mandatory minimums, calling them “unwise and unjust.”⁵⁹ Justice Breyer has also criticized them, calling them “fundamentally inconsistent with Congress’ simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines.”⁶⁰ Similar criticism has been leveled specifically at § 924(c)’s mandatory minimum penalties. For instance, political uproar ensued in January 2007, after two U.S. Border Patrol agents received mini-

⁵¹ Mandatory Minimum Prison Sentences for Firearms Violations, Pub. L. No. 105-386, 112 Stat. 3469, 3469–70 (1998).

⁵² *Id.*

⁵³ 18 U.S.C. § 924(c)(1)(D) (2006).

⁵⁴ U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (1991), *available at* http://www.ussc.gov/r_congress/MANMIN.pdf.

⁵⁵ Clare, *supra* note 38, at 820.

⁵⁶ Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 788 (2002).

⁵⁷ *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 522–23 (E.D.N.Y. 1993) (“The Anglo-American tradition of individualized sentencing is under great pressure from a system that has *both* deprived sentencing judges of much of their discretion *and* imported many questions traditionally handled at the conviction stage into the sentencing process.”).

⁵⁸ Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1045 (2004).

⁵⁹ Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

⁶⁰ *Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring).

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imum ten-year sentences under § 924(c)'s discharge provision for shooting a suspected drug smuggler.⁶¹ The sentences drew heavy criticism from members of Congress for being too lengthy, and, as a result, lawmakers introduced a rash of legislation to remedy the perceived injustice.⁶² None of the attempted remedies, however, included modification of the statute itself.⁶³

III. *HARRIS V. UNITED STATES*⁶⁴

A. *The Discharge Provision Is a Sentencing Factor, Not an Element of an Offense*

In *Harris v. United States* in 2002, the Supreme Court analyzed the amended statute, specifically the brandish provision. Petitioner Harris ran a pawnshop, and at trial he was found guilty of selling marijuana to his friend while holstering a semiautomatic pistol at his side.⁶⁵ Normally he carried the gun with him in his shop regardless of whether he was selling drugs.⁶⁶ The federal prosecutor indicted Harris under § 924(c)(1)(A), but the indictment said nothing of “brandishing” and only alleged the elements from the statute’s principal paragraph—that Harris possessed a firearm during the commission of a drug trafficking crime.⁶⁷ A judge found Harris guilty as charged at a bench trial, found by a preponderance of evidence during the sentencing hearing that Harris had brandished the gun, and sentenced him to seven years.⁶⁸ The appellate court subsequently affirmed.⁶⁹

After granting certiorari, the Supreme Court sought to determine whether the “brandish” provision was a sentencing factor or a

⁶¹ Jerry Seper, *Border Agents’ Punishment “High,” Sentencing Guidelines Directed by Congress, Prosecutor Says*, WASH. TIMES, Jan. 25, 2007, at A4.

⁶² Fred Lucas, *No More Federal Money to Jail Border Agents, Congressman Says* at CNSNEWS.COM, Jan. 26, 2007, <http://www.cnsnews.com/news/viewstory.asp?Page=/Nation/archive/200701/NAT20070126e.html>. Attempted remedies included petitioning the president to exercise his presidential veto, drafting legislation to deny funding specifically for the incarceration of the agents, and attempting to vacate the court’s ruling. *Id.*

⁶³ Douglas A. Berman, *Using the Border Agent Case as a Catalyst for Federal Sentencing Reform*, SENT’G L. & POL’Y, Jan. 29, 2007, http://sentencing.typepad.com/sentencing_law_and_policy/2007/01/using_the_borde.html.

⁶⁴ 536 U.S. 545.

⁶⁵ *Id.* at 550.

⁶⁶ *Id.* at 573, n. 1 (Thomas, J., dissenting).

⁶⁷ *Id.* at 551.

⁶⁸ *Id.*

⁶⁹ *Id.*

separate offense.⁷⁰ The Court presumed from the structure of § 924(c) that “its principal paragraph defines a single crime and its subsections identify sentencing factors.”⁷¹ The Court also found no congressional tradition of treating “brandishing” and “discharging” as separate offenses.⁷² Moreover, the Federal Sentencing Guidelines had a history of treating “brandishing” and “discharging” as sentence enhancements.⁷³ The Court thus determined that the 1998 amendments were likely a byproduct of those guidelines.⁷⁴

Finally, the Court found that the incremental increase from five to seven years under the brandishing provision was consistent with the traditional role of sentencing enhancements because “the required findings constrain, rather than extend, the sentencing judge’s discretion.”⁷⁵ The Court found of particular importance the fact that the brandishing provision only increases the minimum sentence under a statute which carries no maximum sentence.⁷⁶ For instance, under the statute, a judge could sentence a defendant anywhere from the prescribed mandatory minimum up to life in prison, regardless of whether the defendant brandished a firearm.⁷⁷ The Court compared § 924(c) to the statute at issue in *McMillan v. Pennsylvania*,⁷⁸ which also imposed mandatory minimum sentences and which the Court also upheld.⁷⁹ The *Harris* Court found that the mandatory penalty enhancement under the brandishing provision does not implicate the constitutional concerns that were raised in *Apprendi*.⁸⁰ The Court therefore had no problem treating the brandishing provision as a sentencing factor when it only slightly increased the mandatory minimum sentence under a statute that allowed a judge to sentence the defendant “well in excess of seven years.”⁸¹ The *Harris* Court, how-

⁷⁰ *Harris*, 536 U.S. at 552.

⁷¹ *Id.* at 553.

⁷² *Id.*

⁷³ *Id.* (noting that “[u]nder the Sentencing Guidelines, moreover, brandishing and discharging affect the sentences for numerous federal crimes”).

⁷⁴ *Id.*

⁷⁵ *Id.* at 554.

⁷⁶ *Harris*, 536 U.S. at 557.

⁷⁷ *Id.* at 554; *see also* United States v. Gamboa, 439 F.3d 796, 811 (8th Cir. 2006) (noting that “§ 924(c)’s unstated statutory maximum is life in prison”).

⁷⁸ 477 U.S. 79 (1986).

⁷⁹ *Id.* at 91.

⁸⁰ *Harris*, 536 U.S. at 565.

⁸¹ *Id.* at 554.

ever, did not discuss the mens rea requirement of the discharge or brandish provision because it was not raised in the petitioner's brief.⁸²

The practical consequences of determining that a statutory provision is a sentencing factor are substantial. Sentencing factors can be tried in a separate hearing where the rules of evidence and burdens of proof are heavily altered in favor of the government.⁸³ Once the government establishes "a threshold mens rea to convict the defendant of the substantive crime," the courts generally have not required finding mens rea during the sentencing phase to increase penalties.⁸⁴ Critics argue against sentencing hearings because these hearings fail to provide the same procedural protections as trials, such as the right to confront adverse witnesses, notice of the charges, and the right to trial by jury.⁸⁵

B. Yet Harris Teeters on the Brink of Invalidity

The validity of *Harris's* ruling is tenuous.⁸⁶ The *Harris* opinion garnered only a slim five-to-four plurality—Justices Thomas, Stevens, Souter, and Ginsberg dissented, while Justice Breyer merely concurred in part.⁸⁷ The four dissenting Justices argued that punishment under the increased mandatory minimum penalty for brandishing should afford defendants all the constitutional protections that are afforded under any other offense.⁸⁸ The dissent reasoned that the same principles that guided the Court in *Apprendi* were also present here when dealing with mandatory minimum sentences⁸⁹: "[w]hether

⁸² Brief of Petitioner, *Harris v. United States*, 536 U.S. 545 (2002) (No. 00-10666).

⁸³ Richard Singer, *The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139, 145 (2000).

⁸⁴ Alun Griffiths, Comment, *People v. Ryan: A Trap for the Unwary*, 61 BROOK. L. REV. 1011, 1028–29 (1995).

⁸⁵ Jacqueline E. Ross, *What Makes Sentencing Facts Controversial? Four Problems Obscured by One Solution*, 47 VILL. L. REV. 965, 965 (2002).

⁸⁶ *United States v. Malouf*, 377 F. Supp. 2d 315, 327 (D. Mass. 2005).

⁸⁷ *Harris*, 536 U.S. at 569–83.

⁸⁸ *Id.* at 579–80 (Thomas, J., dissenting).

[T]here are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum. . . . In either case the defendant must be afforded the procedural protections of notice, a jury trial, and a heightened standard of proof with respect to the facts warranting exposure to a greater penalty.

Id.

⁸⁹ *Id.* at 579 (Thomas, J., dissenting) ("It is true that *Apprendi* concerned a fact that increased the penalty for a crime beyond the prescribed statutory maximum, but

one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.”⁹⁰ The departure of Justices Rehnquist and O’Connor, two of the Justices in the *Harris* plurality, has increased the fragility of that decision. Their replacements, Chief Justice Roberts and Justice Alito, recently diverged from *Harris*’s ruling in determining the breadth of *Apprendi*’s application during sentencing.⁹¹

In addition to *Harris*’s foundational cracks, federal courts have expressed doubts as to its continuing validity in light of recent Supreme Court decisions in *Blakely v. Washington*⁹² and *Booker v. United States*.⁹³ Through *Blakely* and *Booker*, the Court extended the breadth of *Apprendi*’s Sixth Amendment jury protections, although not specifically to federal mandatory minimum statutes.⁹⁴ Several lower and appellate courts have inferred from these recent opinions that *Harris* is no longer good law, arguing that the Court’s reasoning in *Blakely* and *Booker* extends to § 924(c)’s mandatory minimum sentencing enhancements.⁹⁵ Moreover, courts have treated the discharge provision

the principles upon which it relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum.”).

⁹⁰ *Id.*

⁹¹ See *Cunningham v. California*, 549 U.S. 270 (2007). Chief Justice Roberts joined the majority in invalidating California’s determinate sentencing scheme for violating *Apprendi*’s rule that juries must determine all facts that expose a defendant to a greater sentence. Justice Alito, dissenting, would have upheld the sentencing scheme, positing that “[t]he Court . . . has never suggested that all factual findings that affect a defendant’s sentence must be made by a jury.” *Id.* at 873 (Alito, J., dissenting).

⁹² 542 U.S. 296 (2004).

⁹³ 543 U.S. 220 (2005).

⁹⁴ See *Id.* at 243 (U.S. Sentencing Guidelines); *Blakely*, 542 U.S. at 303 (Washington State Sentencing Reform Act).

⁹⁵ *United States v. Dare*, 425 F.3d 634, 647–648 (9th Cir. 2005) (Bea, J., dissenting) (stating that *Harris* is limited by *Booker*, in that § 924(c)’s statutory maximum for *Apprendi* purposes is now the five-year maximum imposed by the Sentencing Guidelines unless the jury finds beyond a reasonable doubt that the defendant discharged the firearm); *United States v. Harris*, 397 F.3d 404, 413–14 (6th Cir. 2005) (concluding that “*Booker* does require that § 924 Firearm-Type Provision enhancements be charged in the indictment and proved to a jury beyond a reasonable doubt”). The Sixth Circuit noted in dicta that it could not apply its conclusion to § 924(c)’s discharge provision, even though the provision that it ruled on is similar in structure and form, simply because doing so would expressly violate *Harris*’s holding that the discharge provision was a sentencing factor to be found by a judge. *Id.* at 414 n.5; see also *United States v. Malouf*, 377 F. Supp. 2d 315, 324–25 (D. Mass. 2005) (positing that the Supreme Court’s extension of the Sixth Amendment in *Blakely* “necessarily casts doubt on *Harris*’s distinction between mandatory minimum provisions and statutory maximums. . . . Moreover, if Federal Sentencing Guidelines troubled the majority in *Booker*, despite the possibility of downward departures, mandatory minimum provisions are likely to be of even greater concern.”).

as a fact to be determined by a jury beyond a reasonable doubt, even after *Harris*.⁹⁶ For instance, the lower court in *United States v. Brown*, in which a defendant was charged under § 924(c), sent to the jury the question of whether the defendant discharged the weapon to ensure compliance with *Apprendi*'s constitutional requirements.⁹⁷

Because *Harris* has not been expressly overruled, this Comment must proceed under the assumption that § 924(c)'s discharge provision is a sentencing factor to be found by a judge by a preponderance of the evidence. However, in light of the Court's recent sentencing opinions, the validity of *Harris*'s conclusions remains doubtful. Certainly if punishment under the discharge provision required the same constitutional protections as any other offense, the arguments for applying strict liability would diminish.

IV. THE FEDERAL COURTS OF APPEAL WRESTLE OVER INTENT

The Federal Courts of Appeal are split regarding whether sentencing judges are required to determine mens rea under § 924(c)'s discharge provision.⁹⁸ One side of the split would hold a defendant strictly liable under the discharge provision regardless of the defendant's intent.⁹⁹ The other side of the split requires the judge to determine that a defendant has formed a requisite intent before imposing the mandatory ten-year sentence.¹⁰⁰ This Part explores in detail both sides of the debate by discussing the various methods that the courts of appeals have used to analyze the issue and the reasoning behind their conclusions.

A. *Strict Liability and the Nava-Sotelo Rule*

The Sixth Circuit was the first to address this issue, in *United States v. Tunstall*,¹⁰¹ in which the defendant robbed a bank with a

⁹⁶ See Brief of Appellee at 38–39 n.11, *United States v. Brown*, 449 F.3d 154 (D.C. Cir. 2006) (No. 04-3159) (explaining that at trial, the jury determined the issue of whether defendant discharged the firearm, even though “[p]utting the issue of whether the firearm was discharged to the jury was not required and contrary to the ruling of *Harris*”).

⁹⁷ See *id.*

⁹⁸ Compare *United States v. Nava-Sotelo*, 354 F.3d 1202, 1206 (10th Cir. 2003), and *United States v. Tunstall*, 49 Fed. App'x 581 (6th Cir. 2002), with *United States v. Brown*, 449 F.3d 154 (D.C. Cir. 2006), and *United States v. Dare*, 425 F.3d 634, 640 (9th Cir. 2005).

⁹⁹ *Nava-Sotelo*, 354 F.3d at 1206; *Tunstall*, 49 Fed. App'x at 582.

¹⁰⁰ *Brown*, 449 F.3d at 156; *Dare*, 425 F.3d at 641 n.3.

¹⁰¹ *Tunstall*, 49 Fed. App'x at 581.

shotgun and accidentally discharged the shotgun upon fleeing the bank.¹⁰² Tunstall pled guilty to armed robbery and to using a firearm while committing a crime of violence under § 924(c)(1), and the judge enhanced his sentence to ten years because the firearm was discharged.¹⁰³ The Sixth Circuit approved Tunstall's sentence without a great deal of analysis, noting simply that section 924(c) lacked an express intent requirement.¹⁰⁴ However, the court also found that Tunstall's ten-year sentence would alternatively have been appropriate under § 924(c)(1)(B)(i), because the weapon he used was a shotgun.¹⁰⁵ Thus, the opinion provides little insight regarding the analysis of the statute's discharge provision.

The Tenth Circuit, in *United States v. Nava-Sotelo*,¹⁰⁶ conducted a more thorough analysis and found that a sentencing judge must increase a sentence to ten years for an accidental discharge, regardless of the defendant's intent.¹⁰⁷ In a plot to free his brother from federal prison, Nava-Sotelo approached two officers with a loaded firearm in his hand while they were escorting his brother from a dental clinic back to prison.¹⁰⁸ One officer struggled with Nava-Sotelo and grabbed for the gun, causing the firearm to discharge into the ground while Nava-Sotelo's finger was on the trigger.¹⁰⁹ Nava-Sotelo had never pointed the firearm at anyone.¹¹⁰

Nava-Sotelo was charged under several federal statutes, including discharge of a firearm during a crime of violence under § 924(c), and he pled guilty to all counts.¹¹¹ During the pre-sentencing hearing, the district court addressed Nava-Sotelo's objections that "he should receive only a seven-year consecutive sentence . . . rather than a ten-year sentence, because the discharge of the firearm was accidental and involuntary."¹¹² The court agreed and sentenced him to seven years.¹¹³ The government "accept[ed] the district court's factual finding that the discharge of the firearm was accidental, even involuntary. Nonetheless, it insist[ed] the language of § 924(c) plainly

¹⁰² *Id.* at 582.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 354 F.3d 1202 (10th Cir. 2003).

¹⁰⁷ *Id.* at 1206.

¹⁰⁸ *Id.* at 1203.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1204.

¹¹² *Nava-Sotelo*, 354 F.3d at 1204.

¹¹³ *Id.*

requires the district court to impose a ten-year consecutive sentence; whether the discharge of the firearm was intentional or accidental is of no moment.”¹¹⁴

First, the Tenth Circuit recognized that the plain language of the statute does not expressly require that the defendant intentionally discharge the weapon to be liable for the ten-year mandatory minimum.¹¹⁵ Instead of using traditional tools of statutory construction and exploring legislative history and intent, the court focused on the ruling in *Harris* that the brandishing and discharge provisions are sentencing factors.¹¹⁶ The court distinguished a sentencing factor from an element of an offense, declaring that “[o]nly the latter requires a mens rea.”¹¹⁷ To support this proposition, the court cited its prior decision in *United States v. Eads*.¹¹⁸ In *Eads*, the court held that a person carrying a machine gun during a drug trafficking offense could be given a minimum sentence of thirty consecutive years in prison under § 924(c) without finding that the defendant knew that the firearm was a machine gun.¹¹⁹ The court based its decision on its finding that Congress intended that the type of weapon be a sentencing factor rather than an element of the offense.¹²⁰

To bolster its assertion that sentencing factors do not require a finding of mens rea, the Tenth Circuit cited numerous opinions from federal courts of appeals that discarded the mens rea requirement for sentencing factors under various federal statutes and guidelines.¹²¹ The court further explained that Nava-Sotelo had already demon-

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1205.

¹¹⁶ *Id.* at 1205–06.

¹¹⁷ *Id.* at 1206 n.8.

¹¹⁸ 191 F.3d 1206 (10th Cir. 1999).

¹¹⁹ *Id.* at 1214. The *Eads* court ruled under 18 U.S.C. § 924(c)(1)(B) (1994), which provides:

If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machine-gun 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.

18 U.S.C. § 924(c)(1)(B).

¹²⁰ *Eads*, 191 F.3d at 1214.

¹²¹ *United States v. Nava-Sotelo*, 354 F.3d 1202, 1206 (10th Cir. 2003) (citing *United States v. King*, 345 F.3d 149 (2d Cir. 2003); *United States v. Gonzalez*, 262 F.3d 867 (9th Cir. 2001); *United States v. Schnell*, 982 F.2d 216 (7th Cir. 1992); *United States v. Lavender*, 224 F.3d 939 (9th Cir. 2000)).

strated his “vicious will”; thus he was not being penalized for his “apparently innocent conduct.”¹²²

Finally, the court dismissed the defendant’s rule of lenity argument by finding Congress’s purpose in making this provision a sentencing factor was clear and unambiguous,¹²³ thus falling back on its original claim that sentencing factors do not require a mens rea. Since the Supreme Court in *Harris* concluded that the discharge provision is a sentencing factor, anyone who argues that the provision requires a finding of mens rea would be “shoveling sand against the tide.”¹²⁴ The Southern District of New York reiterated this proposition in *United States v. Whitley*.¹²⁵ In *Whitley*, the defendant held up two store clerks with a firearm. While stealing money from the cash register, he accidentally shot himself in the face.¹²⁶ The court, citing *Nava-Sotelo*, simply ruled that a jury need not consider the defendant’s intent to discharge a firearm under § 924(c).¹²⁷ Moreover, other courts have relied on this rule to hold defendants strictly liable for sentencing enhancements in other provisions under § 924(c).¹²⁸

In *United States v. Dean*,¹²⁹ the Eleventh Circuit followed the Tenth Circuit’s ruling in *Nava-Sotelo* and affirmed that § 924(c)’s discharge provision lacked a mens rea requirement.¹³⁰ Petitioner Dean was convicted of a bank robbery in which he had accidentally discharged his gun while grabbing the money.¹³¹ Recognizing that the provision lacks any express mens rea requirement, the court of appeals focused on the fact that defendants convicted of the offense triggering sentence enhancement pursuant to § 924(c) have already demonstrated a vicious will; therefore, “the danger of imposing punishment upon an innocent party is absent.”¹³² This analysis mirrors the Tenth Circuit reasoning in *Nava-Sotelo*, yet the court in *Dean* did not go so far as to rule that sentencing factors are inherently strict liability provisions. Moreover, the court noted that discharging a firearm presents a greater risk of harm than mere possession or bran-

¹²² *Id.* at 1207.

¹²³ *Id.*

¹²⁴ *Id.* at 1205.

¹²⁵ No. S1-04-Cr.-1381, 2005 U.S. Dist. LEXIS 29868 (S.D.N.Y. Nov. 28, 2005).

¹²⁶ *Id.* at *2.

¹²⁷ *Id.* at *7–8.

¹²⁸ See, e.g., *United States v. Gamboa*, 439 F.3d 796, 812 (8th Cir. 2006).

¹²⁹ No. 06-14918, 2008 U.S. App. LEXIS 3507 (11th Cir. Feb. 20, 2008).

¹³⁰ *Id.* at *12.

¹³¹ *Id.* at *3.

¹³² *Id.* at *12.

dishing, and that the enhancements apply to conduct, not intent.¹³³ Finally, the court denied that the presumption against strict liability exists when dealing with sentencing enhancements.¹³⁴

B. Requirement Intent

The Ninth Circuit briefly addressed the issue of a requirement of intent in *United States v. Dare*.¹³⁵ Dare brought two men to his home from a bar, one of whom was a police informant, and sold the informant a \$200 bag of marijuana.¹³⁶ Dare then produced his shotgun, stating “that he ‘didn’t want any badges coming back at me for selling drugs.’”¹³⁷ He offered the gun to his friend to shoot, yet his friend declined to do so.¹³⁸ Dare, who had a history of shooting off his gun with visitors,¹³⁹ fired the gun out his door into the air.¹⁴⁰

Dare pleaded guilty for possessing the shotgun in furtherance of the drug trafficking crime but disputed the penalty under the discharge provision,¹⁴¹ claiming that he was intoxicated and that the provision required a finding of specific intent.¹⁴² The district court judge reluctantly sentenced Dare to ten years under the discharge provision, upset that he “had no discretion here.”¹⁴³ Meanwhile, the judge sentenced Dare to zero months for possession of marijuana.¹⁴⁴

The majority of the circuit court’s opinion discussed the applicable Sixth Amendment protections for the discharge provision under *Apprendi*, *Blakely*, and *Booker* and the standard of proof required to sentence a defendant under the provision.¹⁴⁵ The court merely ad-

¹³³ *Id.* at *13.

¹³⁴ *Id.*

¹³⁵ 425 F.3d 634 (9th Cir. 2005).

¹³⁶ *Id.* at 636.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 644 (Bea, J., dissenting).

¹⁴⁰ *Id.* at 636 (Leavy, J.).

¹⁴¹ *United States v. Dare*, 425 F.3d 634, 637 (9th Cir. 2005).

¹⁴² *Id.* at 641 n.3.

¹⁴³ *Id.* at 637. The trial judge felt that the mandatory sentence was unfair:

You have a man who’s lived in a community for 25 years, who is recognized as hard working, honest, reliable, who would give the shirt off of his back to anybody, who has given two sons to this country to defend this country, and we’re going to lock him up for ten years and that’s not outrageous? I think it is. So I will be a part of the outrage. Unwillingly. But I’m going to do it.

Id.

¹⁴⁴ *Id.* at 638.

¹⁴⁵ *Id.* at 638–48.

dressed Dare's intent argument in a footnote, noting that the statute does not define "discharge," and determined that the discharge provision under § 924(c) requires a finding of general intent.¹⁴⁶ Thus, the court posited, Dare's intoxication defense failed.¹⁴⁷

The D.C. Circuit conducted a thorough analysis of the discharge provision's intent requirement in *United States v. Brown*.¹⁴⁸ Brown entered a bank with a semiautomatic pistol and forced bank employees at gunpoint to fill a bag with cash.¹⁴⁹ As Brown zipped up the bag, his gun went off.¹⁵⁰ He was startled and asked around if anyone was hurt, but no one was.¹⁵¹ The trial court, being overly cautious in light of *Apprendi*, sent the issue of the discharge to the jury to determine beyond a reasonable doubt.¹⁵² While deliberating, the jury asked the judge whether the gun had to be discharged knowingly, and the judge responded that it did not.¹⁵³ The jury found that the firearm had been discharged, and the judge imposed a ten-year sentence.¹⁵⁴

On appeal, the court of appeals analyzed the structure of § 924(c)(1)(A), noting that that the first two provisions—the underlying offense and brandishing provisions—both required proof of mens rea.¹⁵⁵ In examining the applicability of the underlying offense provision of § 924(c)(1), the court looked to *United States v. Harris*,¹⁵⁶ in which the same court had interpreted the pre-1998 version of § 924(c) and determined that intent was required.¹⁵⁷ In its analysis of the brandishing provision, the court considered the statute's definition of brandish and found it to contain an explicit intent requirement.¹⁵⁸ The statute defines "brandish" as "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person."¹⁵⁹ The court

¹⁴⁶ *Id.* at 641–42 n.3.

¹⁴⁷ *United States v. Dare*, 425 F.3d 634, 641–42 n.3 (9th Cir. 2005).

¹⁴⁸ 449 F.3d 154 (D.C. Cir. 2006).

¹⁴⁹ *Id.* at 155.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Brief of Appellee at 38–39 n.11, *United States v. Brown*, 449 F.3d 154 (D.C. Cir. 2006) (No. 04-3159).

¹⁵³ *Brown*, 449 F.3d at 155.

¹⁵⁴ *Id.* at 155–56.

¹⁵⁵ *Id.*

¹⁵⁶ 959 F.2d 246 (D.C. Cir. 1992). Do not confuse this case with the Supreme Court's decision in *United States v. Harris*, 536 U.S. 545 (2006). See *supra* Part II.

¹⁵⁷ *Harris*, 959 F.2d at 258–59.

¹⁵⁸ *Brown*, 449 F.3d at 157.

¹⁵⁹ 18 U.S.C. § 924(c)(4) (2006).

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reasoned that § 924(c) defines “brandish” because Congress intended the term to have a broader meaning than the dictionary definition.¹⁶⁰ For instance, under the statute a defendant can “brandish” a hidden or invisible firearm by making its presence known.¹⁶¹ Indeed, the drafters of § 924(c) stated that

[t]he Committee expects that even when a person displays the outline of a firearm through clothing or other similar shroud the definition of brandish will be satisfied. For example, this would encompass such conduct as a person pointing a firearm through a coat pocket, so that only the outline of the barrel of the firearm is visible.¹⁶²

Thus, the court concluded, the natural progression of the statute is to penalize increasingly culpable behavior, and since discharging a firearm is a more culpable act, it should require proof of mens rea as well.¹⁶³

Expressing distaste for strict liability penalties, the court marshaled various arguments to support its position. Two doctrines that shaped the court’s discussion include the general presumption against strict liability in criminal statutes and the rule of lenity.¹⁶⁴ The court was also concerned that clearly innocent defendants could be held strictly liable for the discharge of a firearm, regardless of their role in the discharge.¹⁶⁵ For instance, under a strict liability reading, a defendant might be penalized if a third party took control of the firearm and discharged it or if the firearm discharged when the defendant dropped it to comply with a police order.¹⁶⁶

The court also confronted its prior holding in *United States v. Harris*,¹⁶⁷ in which it found that a provision in the pre-1998 version of 18 U.S.C. § 924(c)—prescribing a thirty-year minimum sentence to defendants who use a machine-gun during the commission of a crime—does not require a finding that the defendant know of the precise nature of the weapon.¹⁶⁸ The *Harris* court refused to imply a mens rea requirement into the machine gun provision because it could not distinguish culpability between a person who commits a crime with a pistol and one who uses a machine-gun, claiming that

¹⁶⁰ *Brown*, 449 F.3d at 157.

¹⁶¹ *Id.*

¹⁶² H.R. REP. NO. 105-344, at 12–13 (1997).

¹⁶³ *Brown*, 449 F.3d at 156.

¹⁶⁴ *Id.* at 157.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ 959 F.2d 246 (D.C. Cir. 1992).

¹⁶⁸ *Id.* at 258–59.

“the act is different, but the mental state is equally blameworthy.”¹⁶⁹ After examining this ruling, the *Brown* court professed that the conclusion reached in *Harris* was not only cast in doubt by dicta in a subsequent Supreme Court opinion¹⁷⁰ but was also easily distinguishable from the facts of the present case.¹⁷¹

In conclusion, the *Brown* court criticized the Tenth Circuit’s holding in *Nava-Sotelo* as “broad” and stated that “the proposition that the Constitution imposes no such requirement (assuming its truth) responds neither to our concern for disrupting § 924(c)’s apparent structure nor to the presumption against strict liability in criminal statutes and the rule of lenity.”¹⁷² This conclusion implies that even though the discharge provision may be a sentencing factor, such a finding does not automatically relieve the state from the burden of proving criminal intent. That implication directly conflicts with the proposition stated in *Nava-Sotelo*.¹⁷³

After determining that the discharge provision required some finding of intent, the *Brown* court pondered what level of intent would suffice.¹⁷⁴ Following the Model Penal Code’s approach to statutory interpretation,¹⁷⁵ the court settled on a form of general intent that included purpose, knowledge, or recklessness.¹⁷⁶ It believed that requiring some minimal level of intent was the best way to ensure the “exclusion of mere accident” as a punishable state of mind.¹⁷⁷ The court then found that Brown did not act recklessly when he discharged his weapon.¹⁷⁸ It reasoned that bank robbers who brandish weapons are acting inherently reckless; therefore, holding a robber accountable for a discharge because of this fact would nullify and make meaningless the mens rea requirement under the discharge

¹⁶⁹ *Id.* at 259.

¹⁷⁰ *Brown*, 449 F.3d at 158 (noting that “the difference between carrying a pistol and carrying a machinegun [is] ‘great, both in degree and kind’” (quoting *Castillo v. United States*, 530 U.S. 120, 126 (2000))).

¹⁷¹ *Id.* (opining that the characteristics of a weapon would almost always be obvious to the defendant).

¹⁷² *Id.*

¹⁷³ *United States v. Nava-Sotelo*, 354 F.3d 1202, 1206 n.8 (10th Cir. 2003).

¹⁷⁴ *Brown*, 449 F.3d at 158–59.

¹⁷⁵ *Id.* at 158 (citing MODEL PENAL CODE § 2.02(3) (1985)) (“When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts *purposefully, knowingly or recklessly* with respect thereto.”).

¹⁷⁶ *Id.* at 158–59.

¹⁷⁷ *Id.* at 158.

¹⁷⁸ *Id.* at 159.

provision.¹⁷⁹ Thus, in the D.C. Circuit, a defendant can be sentenced under § 924(c)'s discharge provision only if "the discharge itself arose out of any act manifesting additional disregard of others' safety."¹⁸⁰

V. THE DUBIOUS RULE THAT SENTENCING FACTORS NEVER REQUIRE DETERMINATIONS OF INTENT

The Tenth Circuit in *Nava-Sotelo* found the gun control statute to be unambiguous; therefore, it conducted a more limited statutory analysis than the D.C. Circuit conducted in *Brown*.¹⁸¹ The Tenth Circuit implied strict liability into § 924(c)'s discharge provision by combining the Supreme Court's ruling in *Harris* that the discharge provision is a sentencing factor with the blanket generalization that sentencing factors do not require mens rea.¹⁸² In doing so, the court promulgated a rule that defendants will always be strictly liable for any sentence enhancement that is not a separate offense.¹⁸³ This Part argues that the rule relied on by the *Nava-Sotelo* court—that mens rea is not implicated by a sentencing factor—is a distorted interpretation that has little legal support or justification.

Indisputably, with the creation of the Federal Sentencing Guidelines and mandatory minimum statutes, federal courts have increasingly treated sentencing enhancements as strict liability penalties.¹⁸⁴

¹⁷⁹ *Id.*

¹⁸⁰ *Brown*, 449 F.3d at 159.

¹⁸¹ *United States v. Nava-Sotelo*, 354 F.3d 1202, 1207 (10th Cir. 2003).

¹⁸² *Id.* at 1205–06.

¹⁸³ *Id.* at 1206 ("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; the mere fact that the weapon discharged is controlling."). Courts have since cited this rule to dismiss mens rea requirements under other provisions within 18 U.S.C. § 924(c). See *United States v. Gamboa*, 439 F.3d 796, 812 (8th Cir. 2006) (finding that defendant need not know that the firearm was a machine-gun to be sentenced under 18 U.S.C. § 924(c)(1)(B)(ii) (2006)).

¹⁸⁴ See Singer, *supra* note 83, 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.'"); Griffiths, *supra* note 84, at 1028–29.

Courts interpreting the mens rea requirements of both the mandatory-minimum statutes and the Sentencing Guidelines have emphasized their tendency to bifurcate the trial into discrete phases: a trial phase and a penalty phase. At the trial phase, prosecutors establish a threshold mens rea to convict the defendant of the substantive crime. At the penalty phase, therefore, there is no need to prove an additional mens rea for any of the aggravating factors linked to severity of sentence. These are not part of the "corpus delicti" of the crime, and therefore are factors beyond the reach of mens rea.

Courts have sentenced defendants under various enhancements regardless of mental culpability.¹⁸⁵ For instance, the cases that the *Nava-Sotelo* court relied on for its proposition that the discharge provision does not contain a mens rea requirement all found that sentencing enhancements, whether Guideline enhancements or criminal statutes, are strict liability penalties.¹⁸⁶ Ironically, however, two out of the four cases that the *Nava-Sotelo* court cited to support its rule that sentencing factors are strict liability penalties are from the Ninth Circuit,¹⁸⁷ which would later rule in *Dare* that § 924(c)'s discharge provision, a sentencing factor as defined by the Supreme Court, did require intent.¹⁸⁸ *Nava-Sotelo's* holding seems to have confused that court's statement that "sentencing factors . . . are *not normally required* to carry their own mens rea requirements"¹⁸⁹ with its own conclusion that sentencing factors can *never* carry their own mens rea requirements.¹⁹⁰

The remaining cases cited as support in *Nava-Sotelo* may also be distinguished by their reasoning. The courts in these cases all concluded that the enhancements at issue lacked intent requirements, but only after analyzing the statute or Federal Sentencing Guideline provision's structure and history.¹⁹¹ For instance, the *King* court re-

Id. (footnotes omitted).

¹⁸⁵ Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 891–92 (1999).

Criminal statutes frequently contain a strict liability element that makes a greater crime out of conduct that is already a crime without the strict liability element. Although the constitutionality of this use of strict liability is often challenged, it is almost always upheld. Thus, the survey revealed many decisions upholding statutes punishing felony murder (imposing strict liability as to causing a death during the intentional commission of a felony), the sale of illegal drugs in specially protected areas (imposing strict liability as to the specially protected area), and involving a minor in a crime, as victim or participant (imposing strict liability as to the age of the minor), as well as statutes enhancing sentences for otherwise illegal possession of a weapon because of some special fact about the weapon, such as it being stolen (imposing strict liability as to the special fact about the weapon).

Id. (footnotes omitted).

¹⁸⁶ *United States v. King*, 345 F.3d 149 (2d Cir. 2003); *United States v. Gonzalez*, 262 F.3d 867 (9th Cir. 2001); *United States v. Lavender*, 224 F.3d 939 (9th Cir. 2000); *United States v. Schnell*, 982 F.2d 216 (7th Cir. 1992).

¹⁸⁷ *Gonzalez*, 262 F.3d 867; *Lavender*, 224 F.3d 939.

¹⁸⁸ *United States v. Dare*, 425 F.3d 634, 641–42 n.3 (9th Cir. 2005).

¹⁸⁹ *Lavender*, 224 F.3d at 941 (emphasis added).

¹⁹⁰ *United States v. Nava-Sotelo*, 354 F.3d 1202, 1206 (10th Cir. 2003).

¹⁹¹ *King*, 345 F.3d at 152–53; *Schnell*, 982 F.2d at 220 ("As the *Mobley* and *Taylor* courts have demonstrated, both the structure and the history of the guidelines clear-

lied on the structure of 21 U.S.C. § 841,¹⁹² which places a mens rea requirement under subsection (a), the substantive offense, but not under subsection (b), the penalty section.¹⁹³ The court noted that since “one need not read subsection (a) in order for subsection (b) to be grammatically coherent,” then subsection (b) is independent and does not retain subsection (a)’s mens rea requirement.¹⁹⁴ But § 924(c)(1)(A)(iii), the discharge provision, is an incomplete phrase, and seemingly must be read in conjunction with § 924(c)(1)(A)(i) to be grammatically coherent. Since the underlying offense, § 924(c)(1)(A)(i), has been found to have an intent requirement,¹⁹⁵ the discharge provision would then require intent as well under *King*’s reasoning.¹⁹⁶

Not all federal courts agree that mens rea’s role disappears during the sentencing phase.¹⁹⁷ For example, several federal appellate courts have implied an intent requirement under a Guideline enhancement that increases the penalty for possession of child pornography if the material is sadistic or violent.¹⁹⁸ Furthermore, the Supreme Court has not ruled on this particular issue¹⁹⁹ but has ex-

ly show that the Sentencing Commission intended to omit the element of mens rea in § 2K2.1(b)(4).”).

¹⁹² 21 U.S.C. § 841 (2006).

¹⁹³ *Id.*

¹⁹⁴ *King*, 345 F.3d at 153.

¹⁹⁵ *United States v. Brown*, 449 F.3d 154, 156 (D.C. Cir. 2006); *Nava-Sotelo*, 354 F.3d at 1205.

¹⁹⁶ *Cf. King*, 345 F.3d at 153.

¹⁹⁷ *See United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 521 (E.D.N.Y. 1993).

The operation of the *mens rea* principle takes on a special character at the sentencing stage. Because most theoretical and doctrinal analysis of problems of mental states has focused on the conviction stage, one might assume that concerns about the *mens rea* principle fall away once a finding of guilt has attached. In fact, the opposite is true.

Id.; *see also United States v. Burke*, 888 F.2d 862, 866 n.6 (D.C. Cir. 1989) (“Although cases generally apply [the presumption against strict liability] to statutes that define criminal offenses, we have little doubt that it should also be applied to legal norms that define aggravating circumstances for purposes of sentencing.”).

¹⁹⁸ A defendant convicted under 18 U.S.C. § 2252(a)(2) (2006) for knowingly receiving child pornography will be subject to a four-level enhancement under U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(3) if “the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence.” Some circuit courts require a finding that the defendant intended to receive material that was sadistic, masochistic, or violent. *See United States v. Burnette*, No. 99-5585, 2000 U.S. App. LEXIS 26777 (6th Cir. Oct. 17, 2000); *United States v. Tucker*, 136 F.3d 763, 764 (11th Cir. 1998); *United States v. Kimbrough*, 69 F.3d 723, 734 (5th Cir. 1995). *But see United States v. Walton*, 255 F.3d 437 (7th Cir. 2001) (intent not required).

¹⁹⁹ *Kennedy*, *supra* note 56, at 755.

tended the rule of lenity to statutory provisions that enhance penalties.²⁰⁰

The holding in *Nava-Sotelo* is further weakened by the fact that the pillar on which it stands, the *Harris* Court's ruling that relegates the discharge provision to sentencing factor status, was tenuously decided by a five-to-four majority²⁰¹ and cast into doubt by subsequent Supreme Court decisions.²⁰² *Nava-Sotelo* relied on *Harris* to demonstrate that sentencing enhancements deny defendants the full range of procedural rights.²⁰³ Should the Court overrule or modify the holding in *Harris*, a sentencing enhancement that mandates three additional years in prison would invoke the full panoply of rights, including an intent requirement.

VI. WHY § 924(C)'S DISCHARGE PROVISION SHOULD NOT PENALIZE UNINTENTIONAL CONDUCT

A brief description of tools used by judges to determine legislative intent is necessary for an analysis of the discharge provision's intent requirement. An overriding concept in statutory interpretation of criminal statutes is the presumption of mens rea. The mens rea principle was summed up by William Blackstone as follows: "an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will."²⁰⁴ This principle has long been recognized as a staple for criminal punishment²⁰⁵ and continues to permeate modern criminal law as an indispensable theory.²⁰⁶ Yet the Supreme Court has never created a hard rule defining mens rea's constitutional role in statutory interpretation,²⁰⁷ much less clear guidance establishing the connection be-

²⁰⁰ *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

²⁰¹ See *supra* notes 86–90 and accompanying text.

²⁰² See *supra* notes 92–97 and accompanying text.

²⁰³ *United States v. Nava-Sotelo*, 354 F.3d 1202, 1206 (10th Cir. 2003).

²⁰⁴ 2 WILLIAM BLACKSTONE, COMMENTARIES *20–21.

²⁰⁵ See *Morissette v. United States*, 342 U.S. 246, 251 n.4 (1952).

²⁰⁶ See *id.* at 250 (describing mens rea as "no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."); *Dennis v. United States*, 341 U.S. 494, 500 (1951) ("The existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.");

²⁰⁷ *Staples v. United States*, 511 U.S. 600, 619–20 (1994) ("Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." (quoting *Morissette*, 342 U.S. at 260)); see also Darryl

tween criminal intent and sentencing factors under required mandatory minimum statutes.²⁰⁸ Instead, federal courts have been interpreting statutes by using a variety of tools that include the rule of lenity and the presumption against strict liability.²⁰⁹

The rule of lenity was originally developed in seventeenth- to eighteenth-century England to nullify harsh, unwarranted penalties.²¹⁰ When courts are faced with competing interpretations of a statutory provision and one would increase the defendant's penalty more than the other, the court should choose the more lenient interpretation if congressional intent is unclear.²¹¹ The touchstone of lenity is statutory ambiguity.²¹² If analysis of a statute's language, structure, history, and policies fails to reveal Congress's intent regarding a specific statutory provision, the defendant's interpretation of the statute should prevail.²¹³ The rule, although its enforcement is criticized as sporadic and unpredictable,²¹⁴ has been consistently applied by the Supreme Court to prevent the criminalization of unintentional conduct.²¹⁵ Additionally, the Court has used lenity to interpret statutory crimes as well as statutory provisions that increase penalties for those crimes, for, according to the Supreme Court, "this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."²¹⁶ Thus, mandatory minimum sentencing enhancements are subject to the rule of lenity.

Another doctrine of statutory interpretation, and one which grew out of the Court's enmity toward strict liability crimes,²¹⁷ is that

K. Brown, *Watching Legislatures for Apprendi's Effects on Plea Bargaining*, 4 CAL. CRIM. L. REV. 3, 11 (2002) (describing *Lambert v. California*, 355 U.S. 225 (1957), as "having suggested a constitutional requirement of mens rea that has since gone nowhere; even though the Court disfavors strict liability crimes by interpreting statutes to contain mens rea elements, no due process requirement has evolved from *Lambert* to seriously limit strict liability").

²⁰⁸ Kennedy, *supra* note 56, at 755.

²⁰⁹ See *United States v. Nofziger*, 878 F.2d 442, 452-53 (D.C. Cir. 1989); *Liparota v. United States*, 471 U.S. 419, 426 (1984).

²¹⁰ Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421, 2424 (2006).

²¹¹ *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

²¹² *Id.* at 387 (quoting *Lewis v. United States*, 445 U.S. 55, 65 (1980)).

²¹³ *Id.*

²¹⁴ *The New Rule of Lenity*, *supra* note 210, at 2423.

²¹⁵ *Id.* at 2431-33 (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *United States v. Aguilar*, 515 U.S. 593 (1995); *Staples v. United States*, 511 U.S. 600 (1994); *Ratzlaf v. United States*, 510 U.S. 135 (1994); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992)).

²¹⁶ *Bifulco*, 447 U.S. at 387.

²¹⁷ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437-38 (1978).

courts will interpret ambiguous statutes with a presumption against strict liability.²¹⁸ The Court will not dismiss an intent requirement in statutory provisions because of a “simple omission of the appropriate phrase from the statutory definition.”²¹⁹ Instead, congressional intent to discard a scienter requirement within a statute must be accompanied by some form of evidence of that intent within the statute’s structure or legislative history.²²⁰

From one perspective (essentially that of the D.C. Circuit), the issue of whether § 924(c)’s discharge provision requires a finding of criminal intent seems simply to be one of traditional statutory interpretation.²²¹ Thus, under principles of statutory construction, congressional purpose regarding whether a scienter is a required element must be determined by analyzing the text, structure, and history of the statute.²²² This Part argues that a traditional statutory analysis of the text, structure, history, and purpose of § 924(c)’s discharge provision produces an implied intent requirement, and alternatively, that the provision’s intent requirement is ambiguous and should be construed according to the rule of lenity and the presumption against strict liability.

While the underlying provision that criminalizes possession of a weapon during the commission of a violent or drug trafficking crime contains no express intent requirement, the courts have implied an intent requirement.²²³ The brandish and discharge provisions of § 924(c) also lack express intent requirements.²²⁴ However, as noted by the court in *Brown*,²²⁵ the statute contains a separate subsection that defines “brandish.”²²⁶ The majority of courts that have heard this issue have interpreted the definition of “brandish” as containing a requirement that the convicted intended to brandish the firearm.²²⁷

²¹⁸ *Morrisette v. United States*, 342 U.S. 246, 250–63 (1952).

²¹⁹ *U.S. Gypsum Co.*, 438 U.S. at 438.

²²⁰ *Id.* (“Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.”).

²²¹ *United States v. Brown*, 449 F.3d 154, 156 (D.C. Cir. 2006).

²²² *United States v. Granderson*, 511 U.S. 39, 53 (1994).

²²³ *Brown*, 449 F.3d at 156; *United States v. Nava-Sotelo*, 354 F.3d 1202, 1205 (10th Cir. 2003).

²²⁴ 18 U.S.C. § 924(c)(1)(A)(ii–iii) (2000).

²²⁵ *Brown*, 449 F.3d at 156.

²²⁶ *Id.*

²²⁷ *Id.*; *United States v. Beaudion*, 416 F.3d 965, 968 (9th Cir. 2005) (“To ‘brandish’ a weapon for purposes of § 924(c)(1), then, requires: 1) the open display of the firearm, or knowledge of the firearm’s presence by another in some manner, and 2) the *purpose of intimidation.*” (emphasis added)); *United States v. Clark*, 41 Fed. Appx.

The statute, however, does not include a definition for the term “discharge.”

That the first two provisions contain an intent requirement while the third does not may yield dual interpretations: either (1) that Congress, by omitting an intent requirement for the third provision, intended to distinguish it from the others as not requiring mens rea;²²⁸ or alternatively, (2) that the intent requirement in the first two provisions creates a pattern of requiring mens rea, which naturally progresses to the third.²²⁹ The answer might lie in Congress’s use of definitions. Congress included the definition of “brandish” to ensure that the use of a firearm to threaten another, even though it might not be visible, would still trigger § 924(c)’s brandishing provision.²³⁰ Otherwise, courts would apply the plain and ordinary meaning of “brandish” and likely exclude non-visible, though threatening, uses of a firearm. Congress did not define “brandish” in the statute for the purpose of creating an explicit intent requirement. If it had then Congress would seem to have purposely omitted an explicit intent requirement for the discharge provision. Therefore, since Congress defined “brandish” in the statute specifically to address the use of concealed firearms—not to include an intent requirement—then the argument that Congress purposely left the term “discharge” without an intent requirement is weakened.

Furthermore, why include express requirements of intent for one term but not the other? According to its plain and ordinary meaning, to brandish an object is an inherently intentional action,²³¹ and Congress’s use of intent-based language, such as “in order to intimidate,”²³² added no extraordinary meaning to the term. This may indicate that Congress did not purposely draft an intent requirement into one term and omit it in another. Rather, Congress drafted the statute to define “brandish” ordinarily, albeit to also include hidden-brandishing, and left “discharge” alone. Again, this argues against

745, 749 (6th Cir. 2002); *United States v. Davis*, 240 F. Supp. 2d 322, 324–25 (E.D.P.A. 2003); *see also* *United States v. Cain*, 440 F.3d 672, 677 n.5 (5th Cir. 2006) (emphasizing that the “statute itself defines ‘brandish’ to include the display of a firearm ‘in order to intimidate [a] person.’”). *But see* *Nava-Sotelo*, 354 F.3d at 1205–06.

²²⁸ *Brown*, 449 F.3d at 157–58 (explaining the government’s arguments).

²²⁹ *Id.* at 156 (settling on this interpretation).

²³⁰ *Id.* at 157; *see also supra* notes 158–62 and accompanying text.

²³¹ *See Brown*, 449 F.3d at 157. Dictionary definitions of “brandish” include “[t]o wave or flourish threateningly, as a weapon,” and “[t]o shake or wave (a weapon) menacingly [or] to exhibit or expose in an ostentatious, shameless, or aggressive manner.” WEBSTER’S II NEW RIVERSIDE DICTIONARY 89 (1984); THIRD NEW INTERNATIONAL DICTIONARY 268 (1981).

²³² 18 U.S.C. § 924(c)(4) (2006).

viewing the discharge provision's lack of expressly stated intent as a third outlier. If both interpretations seem equally plausible, however, ambiguity invites the use of lenity and the presumption against strict liability.

An examination of the statute's congressional record reveals that the comments made by legislators regarding the increased sentence under the discharge provision overwhelmingly used the verb "discharge" in its active form with the defendant as the subject.²³³ For instance, Representative McCollum, then Chairman of the Subcommittee on Crime, made the following statements:

And unless we make it the law of the land that criminal gun use will put you in prison for a long, long time, we and all of our loved ones will continue to remain in grave danger any time some young thug *decides to pull the trigger*. . . . By golly, if *they pull the trigger* under this bill, they should get an additional 20-year mandatory sentence. . . . We have brandishing, which is pointing the gun, which gets 15, and *pulling the trigger*, which gets 20.²³⁴

Similar statements were made by Representative Buyer: "*if a thug discharges* the firearm, then the mandatory minimum is 20 years";²³⁵ and Representative Cunningham: "[i]f *he discharges* that weapon, count on 20 years in jail."²³⁶ The House Subcommittee report indicated that the statute imposes an additional sentence "[i]f *the person discharges* the firearm."²³⁷

The predominant use of "discharge" in its active form strengthens the argument that Congress intended for § 924(c)'s sentence enhancement to apply only to a defendant who personally committed the act of discharging the weapon. For instance, the numerous comments made that "pulling the trigger" results in an increased sentence²³⁸ seems to foreclose the concern that a defendant should be sentenced under the discharge provision if a third party grabbed the gun and shot it or if the defendant dropped the gun to comply with a

²³³ See 144 CONG. REC. H530 *passim* (1998). But see 144 CONG. REC. H530, H531 (statement of Rep. McCollum) (stating that "discharging will lead to a mandatory 20 years"); *id.* (stating that "the enhancement provisions for the crime, requires that . . . the discharging of the gun be committed"); *id.* at H535 (statement of Rep. Crane) ("If a gun is discharged during the crime, he will receive a 20 year prison term.").

²³⁴ 144 CONG. REC. H530, H531, H534 (1989) (statement of Rep. McCollum) (emphasis added). Note that the original House bill would have increased the mandatory minimum sentence to twenty years under § 924(c)'s discharge provision.

²³⁵ *Id.* at H533 (statement of Rep. Buyer).

²³⁶ *Id.* at H535 (statement of Rep. Cunningham).

²³⁷ H.R. REP. NO. 105-344, at 3 (1997).

²³⁸ *Id.* at 2-16.

police order and the gun accidentally discharged.²³⁹ Yet, just because the legislators intended for the discharge provision to apply only to the defendant who personally commits the act does not necessarily mean they required that the defendant be mentally culpable for the act. Still, comments such as those made by Representative McCollum that the statute protects the public from thugs who “decide to pull the trigger”²⁴⁰ supports the position that the discharge enhancement applies only to defendants who, in exercising their free will, decided and intended to discharge the firearm.

Until the 1998 amendments, a defendant who discharged a firearm during the commission of a crime would have been sentenced under § 924(c)’s underlying offense for “using or carrying” a firearm during a crime.²⁴¹ Even though the statute contained no express intent requirement, jury charges under § 924(c)’s “uses or carries” provision required the jury to find that the defendant knowingly or intentionally “used or carried” a firearm.²⁴² When Congress amended the statute, “[i]t replace[d] the ‘uses or carries’ test with increased penalties for any person who ‘possesses,’ ‘brandishes,’ or ‘discharges’ a firearm.”²⁴³ Again, Congress omitted an express intent requirement for discharging the firearm and made no mention of the required intent during Congressional deliberations or in Committee Reports.

VII. CONCLUSION

The federal courts should disregard the Tenth Circuit’s rule that sentencing factors do not require a finding of mens rea. Courts should require proof that that a defendant intended to discharge a firearm under § 924(c). The Tenth Circuit rule that sentencing factors do not require a finding of mens rea has little legal support and rests on a shaky Supreme Court decision. Other circuit courts, including those relied on by the court in *Nava-Sotelo*, have required a finding of criminal intent during the sentencing phase. Moreover, considering the Supreme Court’s recent push toward enhancing the procedural protections afforded to a defendant during sentencing, such a rule would likely fail under the Court’s scrutiny. A traditional analysis of congressional intent underlying § 924(c)’s discharge provision reveals little regarding the statute’s culpability requirements;

²³⁹ *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir. 2006).

²⁴⁰ 144 CONG. REC. H531 (statement of Rep. McCollum).

²⁴¹ *Bailey v. United States*, 516 U.S. 148 (1995).

²⁴² *See United States v. Malpeso*, 115 F.3d 155, 165 (2d Cir. 1997).

²⁴³ H.R. REP. NO. 105-344 (1997).

therefore, a court should be more willing to utilize the rule of lenity and the presumption against strict liability.

Finally, the opposition to mandatory minimum statutes as a whole may argue for requiring an intent determination. According to at least one commentator, the decreased procedural protections that a defendant receives during sentencing increases the importance of ensuring that the defendant is culpable.²⁴⁴ By ruling that the discharge provision is a sentencing factor, the Supreme Court in *Harris* has already minimized the procedural rights afforded to the accused. Thus, by mandating an increased sentence of three years for accidentally discharging a firearm, the statute may impose excessive punishment, which could otherwise be mitigated if judges were allowed discretion.²⁴⁵ Since judges are not allowed discretion to individualize sentences under mandatory minimum statutes, a movement toward imputing mens rea during the sentencing stage when these statutes are ambiguous may be a reasonable method to prevent unjust results.

²⁴⁴ Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT'G. REP. 121, 123 (1994).

²⁴⁵ See *United States v. Hungerford*, No. 05-30500, 2006 U.S. App. LEXIS 25529, at *1118-23 (9th Cir. Oct. 13, 2006) (Reinhardt, J., concurring).