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J.D. Candidate, May 2014, The Catholic University of America, Columbus School of Law; B.A., 2007, Macalester College. The author wishes to thank Professor Wagner for his invaluable guidance. The author also wishes to thank her friends and family for their patience and support. Finally, the author would like to thank those of her Catholic University Law Review colleagues that expended valuable time and effort working on this Comment for their contributions.

WHAT WAS HE THINKING? MENS REA'S DETERRENT EFFECT ON MACHINEGUN POSSESSION UNDER 18 U.S.C. § 924(C)

Stephanie Power[+]

> *I'm concerned about a [racial epithet] who thinks it's wise to come to a business transaction with automatic weapons. . . . For his own good, tell Bruce Lee and the Karate Kids none of us are carrying automatic weapons. Because here, in this country, it don't add inches to your [anatomical term], you get a life sentence for it.*[1]

Although mistaken about the sentence, as Frank Costello, Jack Nicholson's character in *The Departed*, explained, carrying a machinegun is a crime in itself in the right context.[2] 18 U.S.C. § 924(c)(1)(B)(ii) imposes a thirty-year mandatory minimum sentence for using, carrying, or possessing a machinegun during the commission of or in relation to a federal crime of violence or a drug-trafficking crime—regardless of whether the perpetrator actually knew the firearm was a machinegun.[3] While some courts have held that § 924(c)(1)(B)(ii) does not require proof of knowledge of the firearm's characteristics,[4] others have questioned the validity of this determination.[5]

Common law principles require, with few exceptions, that all crimes be defined in light of a strong presumption favoring mens rea.[6] However, federal crimes are "creatures of statute," and thus Congress has the prerogative to create

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1. THE DEPARTED (Warner Bros. Pictures 2006).
2. *See* 18 U.S.C. § 924(c)(1)(B)(ii) (2006).
3. 18 U.S.C. § 924(c)(1)(A)–(B) (2006).
4. *See* United States v. Burwell, 690 F.3d 500, 508 (D.C. Cir. 2012) (requiring no additional proof of mens rea), *cert. denied*, 133 S. Ct. 1459 (2013).
5. *See id.* at 528 (Kavanaugh, J., dissenting) (disagreeing emphatically with the majority's holding and arguing that the government should have to prove that the defendant knew what type of firearm he possessed); *see infra* notes 13–14 and accompanying text.
6. *See* Morissette v. United States, 342 U.S. 246, 250 (1952) (explaining that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

and define them.[7] Congress may choose not to require mens rea for a particular crime, regardless of common law rules.[8] As a result, some suggest Congressional authority to define crimes should be limited by adopting the common law's mens rea presumption.[9]

Section 924(c)'s machinegun provision acts as a microcosm in which to examine the limitation debate because the provision does not contain an explicit mens rea requirement.[10] Consequently, courts interpreting the statute disagree on the proper construction of § 924(c) and questions remain as to whether the provision requires the government to prove knowledge of the firearm's type.[11] Since the Supreme Court redefined the boundaries of the debate in 2010, two Circuit Courts of Appeal have held that § 924(c) does not require actual knowledge.[12] In contrast, three circuits have assumed, *arguendo*, that knowledge is required.[13] Although no circuit split currently exists, the potential for a split is present.[14]

The machinegun provision's lack of mens rea raises two questions: first, whether Congress intended to exclude a mens rea requirement from the statute's definition,[15] and second, whether including a mens rea requirement serves the

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7. Liparota v. United States, 471 U.S. 419, 424 (1985) (citing United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)); *see also* Marvin Zalman, *The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory*, 20 VILL. L. REV. 897, 926 (1975) ("[C]rime is what the state outlaws.").

8. *See* United States v. Bailey, 444 U.S. 394, 406 (1980) (noting that common law principles are subordinate to congressional intent); United States v. Balint, 258 U.S. 250, 251–52 (1922) ("While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime . . . there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement."); *Burwell*, 690 F.3d at 508 (observing that "certain offense elements do not require proof of an additional mens rea").

9. *See, e.g.*, C. Peter Erlinder, *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law*, 9 AM. J. CRIM. L. 163, 164 (1981) (detailing the consequences of the failure to consistently define the term "crime").

10. 18 U.S.C. § 924(c)(1)(B)(ii) (2006); *see Burwell*, 690 F.3d at 512 (noting that the machinegun provision does not contain an explicit mens rea requirement).

11. *Compare Burwell*, 690 F.3d at 516 (holding that the government need not prove knowledge of the firearm characteristic); United States v. Haile, 685 F.3d 1211 (11th Cir. 2012) (per curiam) (same), *cert. denied*, 133 S. Ct. 1723 (2013); *with* United States v. Franklin, 321 F.3d 1231, 1240 (9th Cir. 2003) (assuming, without deciding, that the government must prove the defendant's knowledge of the firearm type); United States v. Rodriguez, 54 F. App'x. 739, 747 (3d Cir. 2002) (same); United States v. Dixon, 273 F.3d 636, 640–41 (5th Cir. 2001) (same).

12. *Burwell*, 690 F.3d at 516 (D.C. Circuit); *Haile*, 685 F.3d at 1218 (Eleventh Circuit).

13. *See Franklin*, 321 F.3d at 1240 (Ninth Circuit); *Rodriguez*, 54 F. App'x at 747 (Third Circuit); *Dixon*, 273 F.3d at 640–41 (Fifth Circuit).

14. *Burwell*, 690 F.3d at 511 (noting specifically the "possibility of a future circuit split").

15. *See infra* Part I.B. (explaining that congressional intent controls and, therefore, that courts are responsible for interpreting statutes in which mens rea is ambiguous or absent to determine whether Congress intentionally omitted a mens rea requirement).

statute's underlying deterrent purpose.[16] If Congress fails to expressly include mens rea in a criminal statute or if it is unclear to which elements a mens rea term applies, courts must determine what Congress intended in drafting the statute.[17] For example, the provision's legislative history indicates that Congress intended § 924(c) to deter offenders from carrying firearms to facilitate crimes.[18]

Economic theory offers a valuable lens through which to examine whether a mens rea requirement serves the deterrent purpose of the law.[19] Scholars applying economic analysis to legal concepts predominately focus on the deterrent value of the laws in question.[20] There are two types of economic analysis of law: traditional and behavioral.[21] Applying both the traditional and behavioral frameworks provides a method to examine what deterrent effect including a mens rea requirement in the machinegun provision may have on potential offenders.[22]

Finally, the lack of a mens rea requirement in a statutory crime may also raise due process concerns regarding the proportionality of the amount of punishment inflicted relative to the level of culpability required to inflict it.[23] Some scholars suggest that this concern arises in the criminal context when a defendant is severely punished for unwittingly committed acts.[24]

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16. *See infra* Part I.D. (discussing the machinegun provision's deterrent purpose in the context of economic efficiency).

17. *See* Staples v. United States, 511 U.S. 600, 604–05 (1994) (quoting Liparota v. United States, 471 U.S. 419, 424 (1985) (noting that congressional intent controls in interpreting ambiguous statutes).

18. *See* Muscarello v. United States, 524 U.S. 125, 132 (1998).

19. *See, e.g.*, Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741 (1993) (discussing mens rea from an economic perspective).

20. *See, e.g.*, *id.* at 743 (explaining the basic assumptions and theories underlying economic analysis of the law).

21. *See* Russel Korobkin, *A "Traditional" and "Behavioral" Law-and-Economics Analysis of* Williams v. Walker-Thomas Furniture Company, 26 U. HAW. L. REV. 441, 445 (2004). The traditional, or optimal enforcement, theory offers a limited framework for analyzing deterrence by applying economic theory under a rigid set of assumptions about human behavior to roughly determine the "optimal levels" of punishment and enforcement to reduce crime. *See infra* Part II.A. Behavioral economic analysis offers a somewhat more useful framework for evaluating deterrence because it modifies some of the assumptions made under traditional theory to create a framework that better reflects human behavior. *See infra* Part III.B.

22. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, STAN. L. REV. 1471, 1473 (discussing crime under the behavioral economic theory); Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193, 1221 (1985) (analyzing criminal intent from a traditional economic perspective).

23. Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 LAW & CONTEMP. PROBS 109, 110 (2012).

24. *See id.* at 110–11; *see also* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005). Courts have also concluded that punishment should be proportionate to guilt. *See, e.g.*, Illinois v. Valley Steel Prods. Co., 375

This Comment considers whether inferring a mens rea requirement from the machinegun provision serves § 924(c)'s deterrent purpose. This Comment also analyzes the importance of deterrence in determining congressional intent and assessing punitive proportionality of the machinegun provision. This Comment begins by introducing the provision, examining what constitutes a crime, and identifying justifications for criminal punishment. It then discusses mens rea and its role in crime deterrance. Next, this Comment discusses previous the judicial interpretations of the provision, considers congressional intent, and examines mens rea from an economic perspective. Finally, this Comment concludes that imposing a mens rea requirement for the firearm-characteristics element of the machinegun provision serves the deterrent purpose of the statute. This Comment proposes that courts should interpret the machinegun provision consistently with congressional intent and proportionality by requiring specific knowledge of the firearm's characteristics or, in the alternative, that Congress should amend the provision to include a specific knowledge requirement.

I. DETERMINING CONGRESSIONAL INTENT ABSENT AN EXPLICIT MENS REA REQUIREMENT

18 U.S.C. § 924(c)(1) applies if a defendant uses or carries a firearm during and in relation to a crime of violence or drug trafficking offense or possesses a firearm in furtherance of such an offense.[25] A defendant may receive a mandatory minimum sentence of between five and thirty years for violating § 924(c)(1), depending on his specific actions and the type of firearm possessed.[26]

The machinegun provision, § 924(c)(1)(B)(ii), imposes the highest penalty under § 924(c)(1).[27] The machinegun provision provides that, "[i]f the firearm possessed by a person convicted of a violation of this subsection . . . is a machinegun . . . the person shall be sentenced to a term of imprisonment of not

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N.E.2d 1297, 1305 (Ill. 1978) ("It would be unthinkable to subject a person to a long term of imprisonment for an offense he might commit unknowingly.").

25. 18 U.S.C. § 924(c)(1)(A) (2006). The statute reads, in relevant part:

> [A]ny 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 . . . be sentenced to a term of imprisonment of not less than 5 years.

Id.

26. *See* 18 U.S.C. § 924(c)(1)(A)(ii) (imposing a minimum seven-year sentence if the firearm is "brandished"); 18 U.S.C. § 924(c)(1)(A)(iii) (imposing a minimum ten-year sentence if the firearm is discharged); 18 U.S.C. § 924(c)(1)(B)(i) (imposing a minimum ten-year sentence if the firearm is semi-automatic); 18 U.S.C. § 924(c)(1)(B)(ii) (imposing a minimum thirty-year sentence if the firearm is a machinegun).

27. *See* 18 U.S.C. § 924(c)(1)(B)(ii) (mandating a minimum thirty-year sentence).

less than 30 years."[28] Courts have used the traditional tools of statutory interpretation to determine whether the common law presumption against strict liability should apply to this provision.[29] Understanding the role mens rea plays in the American criminal justice system and its function as a definitional tool is important to this inquiry.[30]

A. Mens Rea Theoretically Ensures That Only the Criminally Culpable Are Punished

Punishment, the consequence of violating social duties, should only be inflicted upon those deserving of it.[31] A crime is "a breach and violation of the public rights and duties, due to the whole community" that results in social harm.[32] Each crime traditionally requires both an act (actus reus) and intent to do that act (mens rea).[33] A criminal conviction—the embodiment of criminal punishment[34]—is the means by which society condemns the breach of social duties.[35] Because criminal punishment is an expression of social condemnation,

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28. *Id.* This provision also applies to "destructive device[s]" and firearms "equipped with a firearm silencer or firearm muffler." *Id.*

29. *See, e.g.*, Castillo v. United States, 530 U.S. 120, 124 (2000).

30. *See* Morissette v. United States, 342 U.S. 246, 250 (1951) (emphasizing the importance of mens rea).

31. *See* Sanford H. Kadish, *Why Substantive Criminal Law—A Dialogue*, 29 CLEV. ST. L. REV. 1, 10 (1980) ("It is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy."); *see also* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4–5 (1968) (delineating five characteristics of criminal punishment: "(1) It must involve pain or other consequences normally considered unpleasant[;] (2) It must be for an offence against legal rules[;] (3) It must be of an actual or supposed offender for his offence[;] (4) It must be intentionally administered by human beings other than the offender[; and] (5) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.").

32. SIR WILLIAM BLACKSTONE, THE COMMENTARIES OF SIR WILLIAM BLACKSTONE, KNIGHT, ON THE LAWS AND CONSTITUTION OF ENGLAND 362 (ABA ed. 2009); *see also* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (defining a crime as "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community"). Notably, the Constitution does not define what constitutes a crime. Louis D. Bilionis, *Process, The Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1277 (1998).

33. WAYNE R. LAFAVE, CRIMINAL LAW 10 (4th ed. 2003); *see also* Walter Wheeler Cook, *Act, Intention, and Motive in Criminal Law*, 26 YALE L.J. 645, 646–47 (1917) (discussing the difficulty of defining what constitutes an "act" and "intent" because of the ambiguous nature of both terms, which has resulted in a multitude of possible interpretations).

34. *See* Hart, *supra* note 32, at 404–05. Criminal conviction embodies "the expression of the community's hatred, fear, or contempt for the convict." George K. Gardner, Bailey v. Richardson *and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953).

35. *See* Hart, Jr., *supra* note 32, at 405; *see also* Blackstone, *supra* note 32, at 362 (defining criminal punishment as "evils or inconveniences consequent upon crimes and misdemeanors; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehavior in those, to regulate whose conduct such laws were respectively made").

an actor should only be punished when the actor is deserving of it.[36] However, the justifications for criminal punishment are complex and cannot be confined to a singularly punitive purpose.[37]

An effective criminal justice system must balance efficiency with the duty to punish only the culpable.[38] Some scholars suggest that, instead of punishment, the primary objective of criminal law should be to minimize social harm by encouraging or discouraging certain behavior.[39] A crime's mens rea requirement serves both of these functions by ensuring that only those culpable of the crime are punished.[40] Yet, under American jurisprudence, there are circumstances in which an offender's mens rea is disregarded.[41]

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36. Kadish, *supra* note 31, at 10 ("It is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy.").

37. *See* HART, *supra* note 31, at 3 (noting that the concept of punishment is innately complex because "different principles (each of which may in a sense be called a 'justification') are relevant at different points in any morally acceptable account of punishment"); *see also* Hart, *supra* note 32, at 401 (explaining that the complexity of social goals requires a system that balances multiple values and thus "[a] penal code that reflected only a single basic principle would be a very bad one"). There are four commonly recognized justifications for inflicting punishment on those who commit criminal acts: retribution, deterrence, incapacitation, and reform. *See* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1 (2003). Under a retributivist theory when a person inflicts social harm by breaking the law, society justifies punishing him as a form of vengeance or as a means of restoring social equilibrium. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 17–18 (5th ed. 2009). Deterrence, incapacitation, and reform are all forms of utilitarian punishment, which seeks to prevent future harm. *Id.* at 14–15. Classic utilitarian theory reasons that an individual will "avoid criminal activity if the perceived . . . punishment outweighs the expected" benefit. *Id.* Under a deterrence theory, an individual is punished in order to warn that offender and any potential future offenders of the consequences of such action. *Id.* at 15. Under an incapacitation theory, a person is imprisoned primarily to prevent him from committing future criminal acts. *Id.* Reformation theory considers punishment, usually in the form of imprisonment, as a means of correcting undesirable behaviors, thereby preventing future criminal activity. *Id.*

38. *See* Hart, *supra* note 32, at 408–09. Some scholars suggest that no single goal or value justifying criminal law can accomplish this objective. *See, e.g.*, *id.* at 406 (quoting LIVINGSTON HALL & SHELDON GLICK, CASES ON THE CRIMINAL LAW AND ITS ENFORCEMENT 19 (3d ed. 1958)). For example, H.L:A. Hart suggests that, although punishing a person who did not commit the charged crime may deter others from acting, this punishment instills uncertainty, unrest, and distrust in the population, which can ultimately break down the system. HART, *supra* note 31, at 20–21. Nonetheless, H.M. Hart suggests that a system in which punishment is solely retrospective fails to take advantage of the opportunity to prospectively deter or eliminate behavior that results in social harm. Hart, *supra* note 32, at 408–09.

39. *See, e.g.*, HART, *supra* note 31, at 7–8.

40. *See* DRESSLER, *supra* note 37, at 117 (noting that courts generally "require proof that the person charged with a criminal offense had a culpable state of mind").

41. *See* United States v. Bailey, 444 U.S. 394, 305–06 (1980) (citing United States v. Foal, 420 U.S. 671, 684 (1975)) (recognizing that Congress can dispense with a mens rea requirement if it intends to do so); *see also* Staples v. United States, 511 U.S. 600, 605–07 (1994) (explaining that the mens rea presumption does not apply to public welfare crimes).

1. Mens Rea Embodies Criminal Law's Fault Requirement

The mens rea principle ensures that a defendant will only be found guilty if he possessed a mind correspondingly guilty to the act he committed.[42] Mens rea refers to the intention with which an individual commits a criminal act.[43] A criminal act is intentional if the individual intends the result of his actions by either desiring the result or knowing that the result is practically certain to occur from his actions, regardless of his desire to cause it.[44] Intent generally encompasses knowledge.[45] Therefore, criminal mens rea refers to the desire to produce a specific result, the knowledge that a particular result will almost certainly ensue from the actor's conduct, or both.[46]

Despite the well-established nature of mens rea as a protective doctrine, courts have failed to require it as an essential element in American criminal jurisprudence.[47] Courts have consistently acknowledged that, in decreasingly limited instances, Congress may dispense with a mens rea requirement in favor of strict liability.[48] However, Congress's power to define crimes is not

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42. *See* Morissette v. United States, 342 U.S. 246, 250 (1952); *see also* United States v. U. S. Gypsum Co., 438 U.S. 422, 437 (1978) (noting that *Morissette* established "an interpretative presumption that *mens rea* is required"). Mens rea is so entrenched in criminal jurisprudence that one scholar noted "the requirement of mens rea contributes to the meaning and value of our lives as moral beings." Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51, 61 (2003).

43. *See* BLACK'S LAW DICTIONARY 1075 (9th ed. 2009) (defining mens rea as "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness"). Scholars summarize the mens rea principle with Latin phrase "*[a]ctus non facit reum nisi mens sit rea*" ("'an act does not make [a person] guilty, unless the mind be guilty'"). DRESSLER, *supra* note 37, at 117.

44. Cook, *supra* note 33, at 657–58.

45. *See* MODEL PENAL CODE § 2.02(2) (specifying four forms of mens rea). The Model Penal Code (MPC) divides intent into two separate terms: "purposely" and "knowingly." § 2.02(2)(a) & (b). The MPC also identifies two additional forms of culpability: recklessness and negligence. § 2.02(c) & (d). Of the four forms of mens rea, "knowingly" is the most common in criminal statutes. Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 CALIF. L. REV. 895, 897 (2000).

46. LAFAVE, *supra* note 33, at 244.

47. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107 (1962) ("*Mens rea* is an important requirement, but is not a constitutional requirement. . . ."). Scholars have attempted to define mens rea requirements a substantive constitutional right by using a penumbras and emanations theory similar to Justice Douglas's argument in *Griswold v. Connecticut*. *See* Bilionis, *supra* note 32, at 1284–85 (citing 381 U.S. 479 (1965)) (explaining that the Supreme Court has not embraced this theory).

48. *See* Liparota v. United States, 471 U.S. 419, 424 (1985) (citing United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812)) (acknowledging that it is the prerogative of the legislature to define the elements of a federal crime); *see also* Bilionis, *supra* note 32, at 1288 (explaining that strict liability has been an accepted part of Supreme Court jurisprudence since the Court decided *Shevlin-Carpenter Co. v. Minnesota* in 1910). A strict liability crime is a crime that does not contain a mens rea requirement, thereby criminalizing conduct regardless of the actor's mindset while committing it. *See* United States v. U. S. Gypsum Co., 438 U.S. 422, 437–38 (1978).

absolutely unlimited.[49] The courts have intervened in situations in which Congress has failed to adequately define the mental element of a crime.[50]

B. The Common Law Mens Rea Presumption Only Applies to Federal Crimes in Certain Situations

With the exception of public welfare offenses,[51] courts presume mens rea is an element of a crime absent a manifestation of congressional intent to the contrary.[52] At a minimum, courts require "some indication of congressional intent, express or implied" to dispense with a mens rea requirement.[53] If "some indication" of congressional intent exists, that intent controls, regardless of the common law presumption.[54] However, this principle does not apply if a statutory element criminalizes "otherwise innocent conduct."[55] If this happens, courts will apply the mens rea presumption and attach a mens rea requirement to the requisite element.[56] If the element does not criminalize conduct that would be otherwise innocent, courts typically avoid reading new elements into the statute.[57]

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49. *See* Staples v. United States, 511 U.S. 600, 618–19 (1994) (noting that courts may infer a mens rea requirement if Congress has not manifested an intent to omit it).

50. Morissette v. United States, 342 U.S. 246, 250 (1952); *see also Staples*, 511 U.S. at 605–06 (explaining that offenses defined without a mens rea element are disfavored and "some indication of congressional intent, express or implied, is required to dispense with [it] as an element of a crime."); *Liparota*, 471 U.S. at 424–25 (rejecting an interpretation of a statute that resulted in the criminalization of conduct that would be otherwise innocent).

51. Public welfare crimes are strict liability crimes that are generally permitted only in the limited circumstances in which the offense is regulatory in nature. *See Staples*, 511 U.S. at 606–07 (noting that public welfare statutes may not contain a mens rea requirement); *Liparota*, 471 U.S. at 433 (explaining that public welfare offenses generally criminalize "conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety"); *see also* Brown, *supra* note 23, at 109–10 (explaining that imposing liability without mens rea is justified "on instrumental grounds—prevention of harm—and on proof (generally, in some sense) of a causal relationship between the actor and the risk that the offense targets").

52. *See United States Gypsum Co.*, 438 U.S. at 437 (1978) (quoting *Morissette*, 342 U.S. at 263); *see also* United States v. Balint, 258 U.S. 250, 251–52 (1922) (noting that, at common law, mens rea was typically necessary for all crimes even if it was not expressly included in the statute).

53. *Staples*, 511 U.S. at 606.

54. *Id.*

55. U. S. v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994) (citing *Morissette*, 342 U.S. at 260) (explaining that, under Court precedent, the mens rea presumption applies to "each of the statutory elements that criminalize otherwise innocent conduct").

56. Carter v. United States, 530 U.S. 255, 269 (2000) (quoting *X-Citement Video*, 513 U.S. at 72) (noting that the common law presumption requires courts to infer mens rea terms from a statute only if it is "necessary to separate wrongful conduct from 'otherwise innocent conduct'").

57. *See* Dean v. United States, 129 S. Ct. 1849, 1853 (2009) (quoting Bates v. United States, 522 U.S. 23, 29 (1997)) (refusing to infer a mens rea requirement from the discharge provision under § 924(c)(1)(A)(iii), in part because the Court disfavors reading words or elements into a statute).

If a federal criminal statute lacks a mens rea requirement, courts interpreting the statute must employ tools of statutory interpretation to determine if the omission was intentional.[58] To determine congressional intent, courts traditionally look to the statutory "language, structure, context, history, and such other factors that typically help to determine a statute's objectives."[59] Courts generally conclude that Congress did not intend to dispense with a mens rea requirement if the omission results in injustice.[60] If a federal statute does not criminalize otherwise innocent conduct, the question becomes whether Congress intended to create a strict liability offense through its silence on mens rea.[61] In conducting this analysis, courts must consider whether the offense or its elements are generally viewed as the type properly subject to strict liability.[62]

C. It Is Unclear Whether the Government Must Prove a Defendant Knew the Type of Firearm Used Under 18 U.S.C. § 924(c)(1)(B)(ii)

1. Supreme Court Precedent Does Not Address Intent Corresponding to Firearm-Type

While the Supreme Court has declined to comment on the machinegun provision's mens rea debate, the Court has addressed whether the weapon type is an element of the crime, rather than a sentencing factor.[63] This distinction is important because establishing a provision as an element of a crime arguably imposes a higher burden of proof on the government than establishing it as a sentencing factors.[64] Ultimately, the Court has concluded that the weapon type constitutes an element of the crime, first under the 1988 version of the statute in

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58. *Staples*, 511 U.S. at 604–05.

59. Castillo v. United States, 530 U.S. 120, 124 (2000) (construing a prior version of § 924(c)(1)).

60. *Staples*, 511 U.S. at 606.

61. *See X-Citement Video, Inc.*, 513 U.S. at 72 (explaining that, under Supreme Court precedent, the mens rea presumption applies to "each of the statutory elements that criminalize otherwise innocent conduct"); United States v. Bailey, 444 U.S. 394, 405–06 (1980) (citing United States v. Feola, 420 U.S. 671, 684 (1975)) (explaining that not all elements require a corresponding intent requirement).

62. The mens rea presumption does not apply to public welfare offenses. *See supra* notes 51–52 and accompanying text. If a crime is a public welfare offense and contains no mens rea requirement (explicit or implicit), the mens rea presumption does not apply and the court automatically concludes Congress did not intend to require proof of mens rea. *See Staples*, 511 U.S. at 606.

63. *See* United States v. O'Brien, 130 S. Ct. 2169, 2172 (2010).

64. *Id.* at 2174. The government must prove elements of a crime beyond a reasonable doubt, whereas sentencing factors can be proved by a preponderance of the evidence. *Id.* (citing Hamling v. United States, 418 U.S. 87, 117 (1974)) (noting that the burden of proof for elements is beyond a reasonable doubt); McMillan v. Pennsylvania, 477 U.S. 79, 91–92 (1986) (holding that the burden of proof for sentencing factors is by a preponderance of the evidence).

Castillo v. United States,[65] and again under the current version of the statute in *United States v. O'Brien*.[66] In both cases, the Court considered five factors aimed at discerning congressional intent to make its determination: "(1) language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history."[67] In *Castillo*, the Court held that the weapon-type language of the machinegun provision "refer[s] to an element of a separate, aggravated crime" beyond the basic crime defined by 18 U.S.C. § 924(c)(1)(A)(i).[68] The Court found that all five factors supported this conclusion, although it noted that the legislative history was not particularly instructive.[69]

The *O'Brien* Court reached the same conclusion under the amended statute.[70] Although the Court explained that the structure of the amended statute treated the machinegun provision more like a sentencing factor than an element of the crime,[71] it nonetheless found that the "substantial weight" of the other *Castillo* factors and the lack of clear congressional intent to treat the amended provision differently outweighed the effect of the structural change.[72] Although the Court determined that the weapon type was an element of the § 924(c)(1)(B)(ii) offense, it explicitly refused to resolve the separate question of whether the government must prove mens rea with respect to the weapon type.[73] That question depends on a separate showing of congressional intent.[74]

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65. Castillo v. United States, 530 U.S. 120, 121 (2000). Most of the jurisprudence considering the weapon-specific knowledge issue pre-dates the Supreme Court's determination in *O'Brien*. *See, e.g.*, United States v. Burwell, 690 F.3d 500, 514 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013); United States v. Gamboa, 439 F.3d 796, 812 (8th Cir. 2006); United States v. Franklin, 321 F.3d 1231, 1240 (9th Cir. 2003); United States v. Rodriguez, 54 F. App'x 739, 747 (3d Cir. 2002); United States v. Dixon, 273 F.3d 636, 640–41 (5th Cir. 2001); United States v. Eads, 191 F.3d 1206, 1212–14 (10th Cir. 1999).

66. *O'Brien*, 130 S. Ct. at 2180.

67. *Id.* at 2175 (citing *Castillo*, 530 U.S. at 124–31).

68. *Castillo*, 530 U.S. at 131.

69. *Id.* at 124–31.

70. *O'Brien*, 130 S. Ct. at 2180.

71. *Id.* (noting that the amended statute moved the machinegun language to a separate subsection located between the discharge and brandishing sentencing factors and the recidivist provisions, which are also considered to be sentencing factors).

72. *Id.* at 2179–80 ("This structural or stylistic change, though, does not provide a clear indication that Congress meant to alter its treatment of machineguns as an offense element."). Although the previous version of the statute was at issue in *Castillo*, the 1998 amendment took effect two years before *Castillo* was decided. *Id.* at 2175.

73. *Id.* at 2173 (explaining that the Court's holding expressed no opinion regarding the "contention that a defendant who uses, carries, or possesses a firearm must be aware of the weapon's characteristic").

74. *See supra* notes 58–62 and accompanying text (explaining that if a statute lacks an express mens rea term, courts must determine whether Congress intended to imply one regardless).

2. Courts Have Held That Various Provisions in the Basic Offense Set Forth in § 924(c)(1) Require Evidence of Mens Rea

Because statutory provisions cannot be read in isolation, looking at the way previous courts have treated mens rea requirements for other elements in § 924(c) is instructive in the mens rea inquiry for the machinegun provision.[75] Section 924(c)(1)(B)(ii) creates a substantive crime separate from the root crime defined in § 924(c)(1).[76] Courts interpreting § 924(c)(1) have found that the following elements have corresponding mens rea requirements: (1) "during and in relation to . . . uses or carries;" (2) "in furtherance of . . . possesses;" (3) "crime of violence or drug trafficking crime;" and (4) a "firearm" (for which "machinegun" and other devices are substituted in the machinegun provision).[77]

Courts have interpreted the phrase "during and in relation to . . . uses or carries" as requiring the firearm to "have some purpose or effect with respect to" the underlying offense.[78] Although Congress rejected limiting the statute's ambit to active employment of a firearm with the "Bailey Fix Act,"[79] courts subsequently interpreting the provision have indicated that merely possessing a firearm is insufficient to violate the statute.[80] These decisions demonstrate that

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75. Smith v. United States, 508 U.S. 223, 233 (1993) (interpreting a previous iteration of the statute and explaining that words or provisions of a statute cannot be read without considering their context within the whole statute).

76. *See supra* notes 65–66 and accompanying text.

77. *See* 18 U.S.C. § 924(c)(1)(A) & (B) (2006).

78. *See Smith*, 508 U.S. at 238 ("[I]ts presence or involvement cannot be the result of accident or coincidence."). *Smith* was decided before the statute was amended to include the "possession" element, but courts continue to follow this requirement. *See, e.g.*, Muscarello v. United States, 524 U.S. 125, 135 (1998) (interpreting the "carry" portion of the "use or carry" element in a broader, yet similar, fashion to include situations in which a defendant knowingly has a firearm in his vehicle, as within the scope of the statute); Angela LaBuda Collins, Note, *The Latest Amendment to 18 U.S.C. § 924(c): Congressional Reaction to the Supreme Court's Interpretation of the Statute*, 48 CATH. U. L. REV. 1319, 1350 (1999) (explaining that the *Muscarello* decision was a precursor to the 1998 amendment to § 924(c) to include the possession element).

79. In *United States v. Bailey*, the Supreme Court held that, to be convicted under § 924(c)(1), the government must prove that the defendant did more than merely possess a firearm; after reviewing "the language, context, and history of § 924(c)(1)," the Court concluded "that the Government must show active employment of the firearm." 516 U.S. 137, 144 (1995), *superseded by statute*, Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469, 3469–70 (codified at 18 U.S.C. § 924(c)(1)(A)). In 1998, Congress added the "possession" element to § 924(c) to directly address the Court's holding in *Bailey* with what is colloquially known as the "Bailey Fix Act". *See* Collins, *supra* note 78, at 1348–50 (detailing the legislative history behind the Bailey Fix Act). The Bailey Fix Act addressed situations in which the offender only possessed the firearm, but still maintained the requisite nexus between the firearm and the underlying offense. *See id.* at 1349–50 (explaining that Congress intended the Bailey Fix Act to expand the scope of § 924(c)).

80. *See* Dean v. United States, 129 S. Ct. 1849, 1858 (2009) (Stevens, J., dissenting) (arguing that the Court has taken the position that the relational terms in § 924(c) indicate that the use, carriage, or possession of the firearm cannot be inadvertent).

an offender must have *intended* to have a firearm in some capacity directly related to the underlying offense.[81]

Courts have also required mens rea for two additional elements: the intent for the underlying offense,[82] and knowledge of the firearm itself.[83] In *United States v. Burwell*, the Court recognized that the government must prove that the defendant carried an object he knew was a firearm.[84] Other courts interpreting the provision have held or noted the same.[85] Based on these interpretations, the basic offense provided by § 924(c)(1)(A)(i) requires that a defendant intended to possess what he knew was a firearm to facilitate the commission of an underlying offense that he intended to commit.[86] If the government can prove all of the aforementioned elements, the defendant is subject to a mandatory minimum five-year prison sentence.[87] The question then becomes whether Congress intended to subject a defendant to a mandatory-minimum sentence six times higher than the root crime's sentence for unknowingly carrying a specific type of firearm under § 924(c)(1)(B)(ii).[88]

3. Three Circuits Have Suggested that the Machinegun Provision Requires Proof of Knowledge of the Gun's Characteristics

The Third, Ninth, and Fifth Circuits have assumed, *arguendo*, that the government must prove that a defendant knew the gun he possessed was a machinegun under § 924(c)(1)(B)(ii).[89] In *United States v. Franklin*, the Ninth Circuit concluded that the "evidence was sufficient for a rational jury to find that [the defendant] knew the weapon was capable of being fired in an automatic

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81. *See* United States v. Burwell, 690 F.3d 500, 507 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013) (holding that the government must "prove that the defendant intentionally use or carried a firearm, or intentionally possessed a firearm, during or in furtherance of" the underlying offense).

82. *Id.*

83. *See* Muscarello v. United States, 524 U.S. 125, 126–27 (1998) (explaining that § 924(c)(1) applies to an offender who "*knowingly* possesses and conveys firearms in a vehicle" (emphasis added)); United States v. Harris, 959 F.2d 246, 258–59 (D.C. Cir. 1992) (per curiam) (noting that the government must show that the offender actually knew that the object he used to facilitate the underlying crime was a gun), *abrogated on other grounds by* United States v. Stewart, 246 F.3d 728, 731 (2001).

84. *See* 690 F.3d at 507.

85. United States v. Ciszkowski, 492 F.3d 1264, 1269 (11th Cir. 2007) (relying on United States v. Brantley, 68 F.3d 1283, 1289 (11th Cir. 1995)); *Harris*, 959 F.2d at 258–59 (D.C. Cir. 1992).

86. *See* Dean v. United States, 129 S. Ct. 1849, 1857 (2009); *Burwell*, 690 F.3d at 507.

87. 18 U.S.C. § 924(c)(1)(A)(i) (2006).

88. *Compare id.* (imposing a mandatory five-year sentence), *with* 18 U.S.C. § 924(c)(1)(B)(ii) (2006) (imposing a mandatory thirty-year sentence).

89. *See* United States v. Franklin, 321 F.3d 1231, 1240 (9th Cir. 2003); United States v. Rodriguez, 54 F. App'x 739, 747 (3d Cir. 2002); United States v. Dixon, 273 F.3d 636, 640–41 (5th Cir. 2001).

setting."[90] The Third Circuit, in *United States v. Rodriguez*, held that the trial court's failure to instruct the jury that they must find the defendant knew that he carried a machinegun during a robbery was harmless error and "assum[ed] without deciding that knowledge [of the machinegun's characteristics] was required."[91] Similarly, in *United States v. Dixon*, the Fifth Circuit assumed without deciding that the defendant's knowledge of the his weapon's characteristics was an element of the crime defined by § 924(c)(1).[92] These cases did not require the court determine whether the machinegun provision required knowledge of the firearm's characteristics because it was clear to the court in each case that the defendant knew he had carried a machinegun.[93]

4. Two Circuits Have Concluded That the Machinegun Provision Does Not Require Proof of Knowledge of the Weapon Type

The Courts of Appeals for the District of Columbia Circuit and the Eleventh Circuit have both weighed in on the debate surrounding machinegun provision's mens rea requirement.[94] Each court determined that the provision does not require proof of knowledge that the defendant's firearm was a machinegun.[95] In *United States v. Burwell*, the D.C. Circuit conducted a thorough statutory analysis of the issue, examining the statute's text, structure and context, purpose, sentence severity, and potential to criminalize otherwise innocent conduct.[96]

With respect to the provision's text, the *Burwell* court explained that the grammar used in the provision "telegraphs [congressional] intent to eliminate an additional mens rea requirement."[97] The court considered the text's explicit lack of a mens rea requirement and the use of passive voice indicative of Congress's

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90. *Franklin*, 321 F.3d at 1240 (applying a plain error standard of review). In *Franklin*, the defendant fired the weapon at the police while attempting to escape after robbing a credit union. *Id.* Machinegun fire is distinctive, as automatic weapons are the only firearms able to fire multiple rounds with a single pull of the trigger, producing a "burst" of shots. *North Carolina Gun Ownership FAQs*, NORTH CAROLINA RIFLE & PISTOL ASSOCIATION, http://www.ncrpa.org/faq/ownership.shtml (last visited Jan. 2, 2014).

91. *Rodriguez*, 54 F. App'x at 747.

92. *Dixon*, 273 F.3d at 640–41.

93. *See Franklin*, 321 F.3d at 1240; *Rodriguez*, 54 F. App'x at 747; *Dixon*, 273 F.3d at 640–41.

94. *See, e.g.*, United States v. Burwell, 690 F.3d 500, 516 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013); United States v. Haile, 685 F.3d 1211, 1218 (11th Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 1723 (2013).

95. *Burwell*, 690 F.3d at 516; *Haile*, 685 F.3d at 1218.

96. *Burwell*, 690 F.3d at 511–15. The Eleventh Circuit issued its opinion in *Haile* less than two months before the *Burwell* court issued its opinion, but the court simply dismissed the matter as a nonissue because of precedent that explicitly "'does not require proof of particularized knowledge of the weapon characteristics.'" *Haile*, 685 F.3d at 1218 (quoting United States v. Ciszkowski, 492 F.3d 1264, 1269 (11th Cir. 2007)). Similarly, the *Burwell* court relied heavily on the D.C. Circuit Court of Appeals' decision in *Harris* in concluding that the government need not show mens rea as to the weapon type. *Burwell*, 690 F.3d at 516.

97. *Burwell*, 690 F.3d at 512.

intent.[98] In examining the structure and context of the machinegun provision, the *Burwell* court relied on the Supreme Court's decision in *Dean v. United States*.[99] Adhering to the maxim *expressio unius est exclusio alterius*,[100] the court found that, because Congress had included a mens rea requirement in § 924(c)(1)(A)(ii)—the "brandishing" sentencing factor—but not in the machinegun provision, the omission was intentional.[101]

In examining the provision's legislative history, the *Burwell* court looked primarily to the statute's stated purpose.[102] Section 924(c) was enacted as part of the Gun Control Act of 1968.[103] The provision was meant "to persuade the man who is tempted to commit a Federal felony to leave his gun at home."[104] The machinegun provision was added to the statute in 1986.[105] Congress amended the machinegun provision in 1988 to increase the penalty to thirty years.[106] In 1998, Congress relocated the machinegun provision to its own

98. *Id.* at 510 (quoting Dean v. United States, 129 S. Ct. 1849, 1853 (2009) (explaining that the statute's language "refers to a state of being that exists 'without respect to a specific actor, and therefore without respect to any actor's intent or culpability.'"). Section 924(c)(1) contains a single explicit mens rea requirement located in § 924(c)(1)(A)(ii), the "brandish" provision. *See Dean*, 129 S. Ct. at 1853 (quoting 18 U.S.C. § 924(c)(4) (2006)) ("Congress expressly included an intent requirement for [the brandish] provision, by defining 'brandish' to mean '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.'").

99. *Burwell*, 690 F.3d at 512. In *Dean*, the Court indicated that omitting language in one statutory provision and including it in another related provision is presumed to be intentional. *Id.* (quoting *Dean*, 129 S. Ct. at 1854).

100. *See* BLACK'S LAW DICTIONARY, *supra* note 43, at 661–62 (describing *expressio unius est exclusio alterius* as a statutory construction canon that stands for the proposition that holding one thing excludes its alternative). Although the *Dean* Court did not expressly use the Latin phrase, the Court's reasoning nonetheless reflects this principle. *See Dean*, 129 S. Ct. at 1854.

101. *Burwell*, 690 F.3d at 512.

102. *Id.* at 512-13. The appellant in *Burwell* claimed that the statute's legislative history did not provide guidance on the mens rea issue. *See* Reply Brief of Appellant on Rehearing *En Banc* at 8 n.1, *Burwell*, 690 F.3d 500 (No. 06-3070). The government disagreed, arguing that the legislative history indicated that Congress intended to omit mens rea from the provision. *See* Letter from Ronald C. Machen Jr., United States Attorney for the District of Columbia, to Mark J. Langer, Clerk, United States Court of Appeals (Jan. 23, 2012).

103. Busic v. United States, 446 U.S. 398, 404 n.9 (1980), *superseded by statute*, Act of Oct. 12, 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 1837, 2138–39 (codified as amended at 18 U.S.C. § 924(c) (2006)).

104. 114 CONG. REC. 22,231 (1968)) (statement of Rep. Poff)).

105. Firearms Owners' Protection Act, Pub. L. No. 99-308, §104(a)(2), 100 Stat. 449, 456–57 (1986) (codified as amended at 18 U.S.C. § 924(c)(1)(B)(ii) (2006)).

106. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6460(1), 102 Stat. 4181, 4373–74 (codified as amended at 18 U.S.C. § 924(c)(1)(B)(ii)). The original penalty imposed by the first iteration of the machinegun provision was 10 years. *See id.* (changing the sentence from ten to thirty years).

subsection and made the penalty a mandatory minimum sentence.[107] The *Burwell* court suggested that the weapon-specific provisions § 924(c)(1)(B)(i) and § 924(c)(1)(B)(ii) "reflect Congress's desire to create a deterrent commensurate with the increased danger posed by these weapons."[108]

After examining the penalty's effect on innocent behavior, the *Burwell* court reaffirmed that the machinegun provision "poses no danger of ensnaring 'an altar boy who made an innocent mistake.'"[109] The court noted that, because the § 924(c)(1) offenses are predicated on the commission of the underlying felony and because the defendant must intentionally carry or possess a firearm as a means of facilitating that felony,[110] an innocent person would never be convicted under the statute.[111] In reaching its decision, the court adhered to its position in *United States v. Harris*, concluding that the intent to possess a firearm included the intent to possess that firearm's characteristics and thus the crime could not be construed as a public welfare offense lacking a mens rea requirement.[112] In effect, the *Burwell* court reasoned that, because the crime contained at least one intent element, it was acceptable to impose a more severe penalty under § 924(c)(1)(B)(ii) without requiring knowledge of the firearm's characteristics.[113]

Three judges dissented in *Burwell*.[114] Judge Kavanaugh strongly objected to the majority opinion, arguing that it subjected offenders to higher penalties without an adequate showing of intent.[115] Judge Kavanaugh rejected the notion that, because one of the elements of the crime under § 924(c) is an underlying felony with a corresponding mens rea requirement, § 924(c) is absolved of requiring additional mens rea for independent provisions.[116] He argued that the presumption against strict liability requires courts to avoid criminalizing otherwise innocent conduct and should also apply to statutes that impose a

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107. *See* Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469, 3469 (codified at 18 U.S.C. § 924(c)(1)(B)(ii)) (changing the penalty from a mandatory sentence to a mandatory minimum sentence by creating a separate penalty provision).

108. United States v. Burwell, 690 F.3d 500, 513 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. at 1459.

109. *Id.* at 513 (quoting United States v. Harris, 959 F.2d 246, 259 (D.C. Cir. 1992)).

110. *Id.* at 514.

111. *Id.* at 507.

112. *Id.* at 514; *Harris*, 959 F.2d at 259 ("[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.").

113. *Burwell*, 690 F.3d at 514.

114. *Id.* at 502 (The three dissenting judges were Judge Rogers, Judge Kavanaugh, and Judge Tatel.).

115. *Id.* at 528 (Kavanaugh, J., dissenting) (arguing that, because Congress did not explicitly indicate its intent to dispense with mens rea, the government must prove mens rea for each element).

116. *Id.* at 544 (Kavanaugh, J., dissenting) ("[T]he fact that the defendant is a 'bad person' who has done 'bad things' does not justify dispensing with the presumption of mens rea. . . .").

significantly higher penalty for essentially the same level of culpability as a lesser-related crime.[117]

Judge Kavanaugh premised his dissent, in part, on the Supreme Court's decision in *Flores-Figueroa v. United States*.[118] Kavanaugh suggested that, although the machinegun provision does not fit perfectly within the ambit of the presumption against strict liability because it is not completely devoid of a mens rea requirement, the harsh penalty it inflicts on a potentially unknowing offender invokes the spirit of the doctrine.[119] He reasoned that an offender could

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117. *Id.* at 544–45 (Kavanaugh, J., dissenting). Kavanaugh argued that it is just as unfair to subject a defendant to a twenty-year enhancement in penalty without requiring mens rea as it is to punish a defendant under a strict liability statute even though, if mens rea were required, the defendant would be innocent. *Id.* at 544 (Kavanaugh, J., dissenting) (relying on Flores-Figueroa v. United States, 129 S. Ct. 1886, 1888–89 (2009)). The majority rejected Judge Kavanaugh's argument on the grounds that neither the machinegun provision nor § 924(c)(1) contains an explicit mens rea requirement, unlike the statute at issue in *Flores-Figueroa*, which did. *Id.* at 515. The majority further explained that the Court's "strongly textual approach" in *Flores-Figueroa* may actually reject the "judicial creation of a mens rea requirement for every element in the face of statutory silence." *Id.* at 516; *see also* Dean v. United States, 129 S. Ct. 1894, 1853 (2009) (quoting Bates v. United States, 552 U.S. 23, 29 (1997)) (refusing to read a mens rea requirement into the discharge provision in § 924(c)(1)(A)(iii)).

118. *Burwell*, 690 F.3d at 516 (overviewing Judge Kavanaugh's discussion of *Flores-Figueroa*). Judge Rogers took a slightly different position in her dissent, focusing predominately on the severity of the penalty and arguing that its magnitude "requires for conviction proof of the defendant's knowledge that the firearm was a machinegun." *Id.* at 520 (Rogers, J., dissenting). The majority rejected Rogers's approach as "unbounded," explaining that "a balancing test completely unmoored from circuit or Supreme Court precedent—is substantially *broader* than anything we have proposed." *Id.*

119. *Id.* at 529 (Kavanaugh, J., dissenting). Kavanaugh argued that the Supreme Court has never limited the mens rea presumption by applying it only if otherwise innocent conduct is criminalized. *Id.* (Kavanaugh, J., dissenting). Instead, he proposed that the presumption can also apply "*both* when necessary to avoid criminalizing apparently innocent conduct . . . *and* when necessary to avoid convicting the defendant of a more serious offense for apparently less serious criminal conduct." *Id.* (Kavanaugh, J., dissenting). The majority predicated its counterargument on the fact that the crime proscribed by the machinegun provision already contains two mens rea requirements corresponding to other elements. *Id.* at 512. The majority also relied heavily on *Dean*, in which the Supreme Court held that omitting a mens rea requirement in one provision and including it in another part of the statute is clear evidence that Congress intended the omission. *Id.* at 512 (citing Dean v. United States, 129 S. Ct. 1849, 1854 (2009)). *Dean* considered mens rea only in the context of two of § 924(c)(1)(A)'s provisions, which the Court held were sentencing factors. *Dean*, 129 S. Ct. at 1853. In her dissent, Judge Rogers also argued that a statute's silence on the mens rea issue is not necessarily indicative of congressional intent to exclude a mens rea requirement. *Burwell*, 690 F.3d at 520 (Rogers, J., dissenting) (quoting United States v. United States Gypsum Co., 438 U.S. 422, 436–37 (1978)). Rogers implied that Congress may have declined to include an explicit mens rea requirement because it presumed that the statute would be construed in light of the established mens rea presumption. *Id.* (Rogers, J., dissenting). The majority's argument ignored both the six-fold increase in penalty for using a machinegun, 18 U.S.C. § 924(c)(1)(B)(ii) (2006) (imposing a thirty-year penalty, six times the ten-year penalty found in § 921(c)(1) (2006)), and the "moral depravity" in choosing to use a machinegun to facilitate a crime, *see* United States v. O'Brien, 130 S. Ct. 2169, 2178 (2010) ("The immense danger posed by machineguns, the moral depravity in choosing the weapon, and the substantial increase in the

unwittingly choose an automatic weapon without understanding the full implications of his choice and therefore be unfairly subjected to a thirty-year minimum prison sentence.[120] Additionally, given the array of guns falling within the definition of a machinegun, the machinegun provision could even apply to a defendant who actively attempted to avoid using a qualifying weapon.[121] While Judge Kavanaugh's arguments likely fail to overcome the "some plain indication" standard for congressional intent, they still resonate on the fairness of such a harsh penalty without requiring mens rea for the firearm type.[122]

5. Mens Rea Should Ensure That Offenders Are Punished Proportionally to the Level of Harm Inflicted

Including a mens rea element in a crime's definition ensures proportionate culpability—the notion that a person should be punished proportionally to his level of guilt.[123] For example, in tort cases, an excessive penalty can rise to the level of an "arbitrary deprivation of life, liberty, or property [under] the Due Process Clause."[124] In *BMW of North America, Inc. v. Gore*, the Supreme Court explained that the Fourteenth Amendment's Due Process Clause prohibits excessive punishment of tortfeasors.[125] The Court held that imposing two million dollars in punitive damages in a case involving a car dealer that caused approximately four thousand dollars in actual damages was unconstitutionally excessive.[126]

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minimum sentence provided by the statute support the conclusion that this prohibition is an element of the crime, not a sentencing factor."); *Burwell*, 690 F.3d at 519 (Rogers, J., dissenting) ("[T]he Supreme Court has twice stated that carrying a machinegun involves heightened culpability.").

120. *Burwell*, 690 F.3d at 544 (Kavanaugh, J., dissenting) (expressing concern with the possibility that an individual will be convicted under the machinegun provision even if the type of firearm was not apparent by simply looking at it); *see also* Staples v. United States, 511 U.S. 600, 613–14 (1994) (observing that a regulation applied to a firearm may be insufficient to put a possessor on notice of a penalty related to it).

121. *See Burwell*, 690 F.3d at 548 (Kavanaugh, J., dissenting) (explaining that it is possible for the mechanism differentiating a machinegun from a semi-automatic weapon to break down, converting the semi-automatic weapon into a machinegun without the defendant's knowledge); *id.* at 522 (Rogers, J., dissenting) (citing *Staples*, 511 U.S. at 614–15 (1994)) (noting that a semiautomatic weapon can be converted into a machinegun intentionally, or by wear and tear without the defendant's knowledge, thus making the carrying of the machinegun entirely innocent).

122. *See id.* at 544.

123. *See* Brown, *supra* note 23, at 114 (explaining that attaching mens rea to an element "links punishment proportionately to culpability"); *see also* BMW of North America, Inc. v. Gore, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) (noting that there is constitutional importance in creating legal standards that limit a jury's discretion in punishing wrongdoing so that both the trial judge and the reviewing appellate court have adequate authority to ensure reasonable and rational punishment).

124. *See Gore*, 517 U.S. at 586 (Breyer, J., concurring).

125. *See id.* at 562.

126. *Id.* at 562–64.

In *Flores-Figueroa*, the Supreme Court used similar reasoning in the criminal context.[127] The Court examined an identity theft statute and concluded that the term "knowingly" applied to all elements of the crime following the placement of the term, not just to the element immediately succeeding the knowledge requirement.[128] In his concurrence, Justice Alito explained that the Court's holding required proof of knowledge of all of the statute's elements because imposing an additional penalty on an already culpable offender should not "depend[] on chance."[129] As Judge Kavanaugh reasoned in *Burwell*, *Flores-Figueroa* can represent the Court's willingness to infer a mens rea requirement from criminal statutes to ensure proportionate punishment.[130]

D. A Mens Rea Requirement is Valuable from an Economic Perspective

A statute's deterrent purpose should not be interpreted as automatically displacing the culpability principle, which is protected by a mens rea requirement.[131] Rather, mens rea should be omitted only if there is evidence that dispensing with the requirement more effectively deters criminal conduct.[132] An economic analysis provides a useful lens through which to examine mens rea's deterrent effect.[133] Economic analysis of criminal law is predicated on the idea that economic theory helps to promote more efficient criminal law doctrines.[134] "Efficiency" in relation to criminal law usually refers to the outcome sought by optimal-enforcement theory.[135] Optimal-enforcement theory states that crime may be reduced (deterred) to its "optimal level" by manipulating the

127. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1893–94 (2009).

128. *Id.*

129. *Id.* at 1896 (Alito, J., concurring).

130. *See* United States v. Burwell, 690 F.3d 500, 544 (D.C. Cir. 2012) (Kavanaugh, J., dissenting), *cert. denied*, 133 S. Ct. 1459 (2013); *see also* Brown, *supra* note 23, at 110 (arguing that *Flores-Figueroa* stands for the principle that "not applying a statute's requirement of knowledge to all elements is inconsistent with [a] heavy penalty").

131. *See Burwell*, 690 F.3d at 512–15 (considering traditional factors of statutory interpretation, such as the purpose of a statute, its language, its structure, and its context).

132. *See supra* note 38 and accompanying text (explaining that a fair justice system balances efficiency and culpability to ensure that only those deserving punishment are punished).

133. *See* Posner, *supra* note 22, at 1206.

134. *Id.* at 1194. Gary Becker was the first to enunciate this theory. *Id.* at 1193 (citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968)). Becker intended to use economics to determine resource allocation for the criminal justice system. Becker, *supra*, at 170. Becker theorized that it was possible to use economic tools to determine the optimal level of harm society could withstand and subsequently calibrate resources—such as police power—and punishment levels to reach that level of harm. *Id.*

135. *See* Posner, *supra* note 22, at 1195. Criminal acts are inefficient because they take resources away from those who can put them to their best use. *Id.* at 1196. In other words, crime bypasses the marketplace by facilitating wealth transfers without payment, thereby transferring resources from someone who values them more to someone who values them less, evidenced by their refusal to pay for them. *Id.*

probabilities that an offender will be caught and convicted.[136] Essentially, the theory seeks to minimize a crime's harm to society by efficiently allocating the finite resources available to law enforcement and the judiciary.[137]

However, optimal-enforcement theory makes two controversial assumptions that ultimately limit the model's utility. Optimal-enforcement theory assumes that all individuals are rational actors who seek to maximize their own utility and who engage in a fully informed cost/benefit analysis before deciding whether to undertake a particular action.[138] Behavioral economic theory criticizes these assumptions and consequently predicates its economic models on a different set of assumptions derived from psychological and sociological studies of human behavior.[139] Therefore, it is necessary to consider mens rea's role in deterrence under both the optimal-enforcement and behavioral economic theories.

II. LAW AND ECONOMICS THEORIES SUPPORT THE INCLUSION OF A MENS REA REQUIREMENT IN THE MACHINEGUN PROVISION TO SERVE ITS DETERRENT PURPOSE

A. Under Optimal-Enforcement Theory, Mens Rea Facilitates the Deterrent Purpose of a Statute

Optimal-enforcement theory provides a means of analysis to determine the optimal level of sanctions for a particular crime.[140] However, establishing and implementing such sanctions precisely is daunting and costly.[141] As a result, some economists claim that the criminal justice system skews toward imposing high, roughly determined penalties to deter and punish crime.[142] Critics suggest

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136. *See* Parker, *supra* note 19, at 743. According to optimal-enforcement theory, the optimal level of crime occurs "where the total social costs of crime and punishment together are minimized." *Id.* Optimal-enforcement theory attempts to engender a scenario in which the least amount of money is spent to produce the greatest amount of prevention of harm. *Id.*

137. *Posner*, *supra* note 22, at 1196. Economists consider harm in the criminal context a reduction of society's overall wealth. *See id*. at 1197-98. For example, killing someone reduces society's overall wealth by eliminating the contributions the victim may have made. *Id.* Robbery or burglary harms society by forcing people to spend money to protect themselves from loss that could have been spent to produce something useful or beneficial. *Id.* at 1198. Posner refers to these crimes as "pure coercive transfers of wealth." *Id.* at 1196.

138. GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976).

139. *See* Richard H. McAdams & Thomas S. Ulen, *Behavioral Criminal Law and Economics* 3–4 (U. Chi. L. Sch. Pub. L. & Legal Theory Working Paper No. 244, 2008), *available at* http://www.law.uchicago.edu/files/files/244-440_0.pdf.

140. Parker, *supra* note 19, at 743.

141. *Id.* at 754. Unlike other sciences, it is difficult to create experiments to determine how manipulating the factors affecting the probability of catching and convicting a criminal increases or decreases deterrence. *Id.* For example, police departments are unlikely to be receptive to an economist dictating the number of officers on the streets at a given time in order to test how many more (or fewer) officers are necessary to deter crime by one percent.

142. *Id.* at 754.

that, although these penalties may still efficiently deter crime, they create an information-cost problem because individuals will expend unnecessary resources to avoid breaking the law.[143]

Studies addressing the role mens rea plays in an optimal-enforcement economic analysis of crime are relatively scarce.[144] Some scholars suggest that mens rea may operate as a proxy for "the offender's responsiveness to punishment, the probability the offender will be detected, or the expected harm of the criminal act."[145] However, one proponent of optimal enforcement theory suggests that these proxy theories inadequately explain mens rea's role and instead argues that mens rea reduces a potential offender's likelihood to gather "self-characterizing information," thus affecting the offender's analysis of the probability that he will be caught and convicted if he commits the crime.[146] In either case, a mens rea requirement corrects the information-cost problem associated with roughly determined penalties by imposing a ceiling on the amount of information a person must gather to avoid being convicted of a crime.[147]

For general intent crimes, a mens rea requirement "is designed to ensure that an actor possesses self-characterizing information *without* having invested anything in the attainment of that information."[148] In other words, optimal enforcement theory supports the notion that a mens rea requirement ensures that

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143. *Id.* at 754, 772–73. Parker argues that high sanctions cause people to overinvest in gathering and processing information to determine whether they will be caught and be punished. *Id.* Although this appears to be a positive evaluation—as no crime is generally considered to be the optimal level of crime—many individuals will expend considerable time and effort, which could be spent far more productively, to avoid punishment. *See id.* at 773. Consider a situation in which jaywalking is punished by five years in prison. As a result of this penalty, a few people might jaywalk, but many more would invest significant amounts of time and effort to avoid the five-year penalty, ultimately an inefficient use of that time. *See id.* (citing a similar example involving a death penalty for violating the speed limit).

144. *Id.* at 743.

145. *Id.* at 744. Judge Posner offers another theory, positing that the intent requirement deters crime by identifying those who intend to engage in prohibited behavior and thereby affecting the probability of conviction and future action. Posner, *supra* note 22, at 1221 (suggesting that the intent requirement serves three economic functions: "[1] identifying pure coercive transfer, [2] estimating the probability of apprehension and conviction, and [3] determining whether the criminal sanction will be an effective (cost-justified) means of controlling undesirable conduct"). Posner's theory is concerned with specific intent instead of knowledge and therefore falls outside the scope of this Comment.

146. Parker, *supra* note 19, at 745–46 (defining "self-characterizing information" as information the offender has about himself and his actions).

147. *Id.* at 746. Lowering the severity of a sanction decreases its deterrent effect, resulting in increased social harm. *Id.* at 757. For any given level of punishment, a certain percentage of the population is willing to engage in a particular undesirable behavior. *Id.* at 757–58. The higher the penalty for the behavior, the lower the percentage of people willing to engage in it, due to the increased cost that it incurs. *Id.*

148. *Id.* at 769.

only the culpable are punished, and thereby promotes efficient allocation of judicial resources and reduces information costs to the public.[149]

Accordingly, strict liability should be imposed only if the cost of gathering information is high and the harm resulting from the behavior is easily foreseeable.[150] If the magnitude of harm—including the possibility of wrongful conviction—is indeterminate, mens rea should be required because, in this situation, the criminal justice system will most likely inefficiently deter criminal conduct.[151] A mens rea requirement resolves this problem by ensuring that only the culpable are convicted.[152]

B. Under Behavioral Economic Theory, Mens Rea Also Facilitates the Deterrent Purpose of a Statute

Behavioral economic theory builds upon the optimal-enforcement theory model by modifying its assumptions to more accurately reflect human behavior.[153] Behavioral economists assume that individuals make systematic mistakes.[154] For example, people tend to be more optimistic about their own prospects for success than they are about the average person's.[155] Behavioral economists also find that, rather than rationally weighing costs and benefits, most people act impulsively and without knowledge of the precise legal consequences of their actions.[156] Similarly, economists suggest that people are much more confident about the accuracy of their predictions than their postdictions.[157]

Given these assumptions, behavioral economists suggest that an offender's optimistic nature regarding his chances of being caught, coupled with the likelihood that he does not understand the possible consequence of his actions, negatively affect an offender's ability to predict whether he will be convicted

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149. *See id.*

150. *Id.* at 770–71; *see also* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1524 (1984).

151. *See generally* Cooter, *supra* note 150, at 1526–30 (explaining how the allocation of costs and resources affects the level of precaution a potential offender will take for a given action).

152. *See* Parker, *supra* note 19, at 809–10.

153. *See* Jolls, *supra* note 22, at 1473–74 (explaining that behavioral economics seeks to "model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior"). Behavioral economists consult behavioral observations from sociological or psychological research to better reflect behavioral outcomes, and thus to better identify methods by which to deter undesirable behavior. *Id.* at 1474.

154. *See* McAdams & Ulen, *supra* note 139, at 4 (noting that people make systematic, decisive mistakes "away from the predictions of rational choice theory").

155. *Id.* at 4–5 (explaining that people tend to rely on the status quo to predict future outcomes, especially if it is consistent with their beliefs).

156. *Id.* at 13–15 (reporting empirical results indicating that people generally fail to calculate the consequences of their behavior and do not generally know of or consider potential punishments).

157. Ehud Guttel & Alon Harel, *Uncertainty Revisited: Legal Predictions and Legal Postdiction*, 107 MICH. L. REV. 467, 469 (2008).

and what punishment he will receive if he is.[158] The presence of a mens rea requirement increases a potential perpetrator's uncertainty about the outcome of his criminal actions.[159]

Some proponents of behavioral economic theory suggest that incorporating mens rea into the elements of a crime "allows for past uncertainty."[160] Therefore, any conjecture relating to the effect of mens rea on actual liability involves postdiction instead of prediction.[161] Conversely, strict liability completely removes mens rea from the equation, which decreases past uncertainty and thus makes it easier for potential perpetrators to predict the outcome of their actions.[162] Postdiction generally produces a greater deterrent effect than prediction because individuals are less confident about their postdictions.[163] Therefore, according to behavioral economic theory, including a mens rea requirement in a crime's definition increases past uncertainty, which requires postdiction and is therefore more likely to deter crime.[164]

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158. *See id.* at 491–92; *see also* Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 425 (2007) ("Strict liability . . . becomes appealing only when two conditions are met: first, the market renders ignorance costless for potential offenders; second, ignorance is not socially optimal.").

159. Guttel & Harel, *supra* note 157, at 493, 496–97 (describing additional situations in which increasing uncertainty in turn increases deterrence, such as broad or discretionary sentencing schemes and statutes that impose liability for actions of co-conspirators.

160. *Id.* at 493.

161. *See id.* ("The requirement of mens rea . . . does not presuppose certainty concerning existing circumstances, but only understanding of the possibility that the relevant circumstances may apply."). Guttel and Harel discuss the effect of mens rea on property crimes for which the severity of the sentence "depends on the value of the object stolen." *Id.* at 494. They note that the perpetrator's consideration of his chances of success will involve postdiction because the factors relevant on which the severity of his sentence depends are already established at the time the perpetrator commits the crime. *Id.*

162. *See* Guttel & Harel, *supra* note 157, at 493–97. It is easier to predict outcomes under a strict liability regime because the government does not need to prove intent at trial. *See* Staples v. United States, 511 U.S. 600, 606 (1994).

163. *See* Guttel & Harel, *supra* note 157, at 497.

164. *See supra* notes 157–63 and accompanying text. Conversely, some argue that mens rea may actually deter offenders from gathering necessary information about their behavior in order to be able to claim ignorance if caught. *See* Hamdani, *supra* note 158, at 425–26 (claiming that "[m]ens rea discourages potential offenders from obtaining valuable information concerning offense elements, whereas strict liability produces optimal incentives to obtain such information"). However, in some instances, it is too "expensive" to not gather circumstantial information before committing a crime; in those cases, mens rea discourages the criminal conduct. *Id.* at 433–34. Choosing to carry a machinegun is a situation in which the cost of ignorance is very high, due to the danger using a machinegun poses to its carrier. *Id.* at 433–34 (citing *Staples*, 511 U.S. at 612–13).

III. THE GOVERNMENT SHOULD BE REQUIRED TO PROVE THAT A DEFENDANT KNEW HIS FIREARM WAS A MACHINEGUN

Because criminal punishment is a reflection of social condemnation, only deserving individuals should be punished.[165] Requiring proof of mens rea is the primary means to ensure that only those who deserve to be punished are actually punished and that the punishment is proportionate to their level of culpability.[166] Courts are required to identify some indication of congressional intent to overcome the mens rea presumption, except if the statute would criminalize otherwise innocent behavior.[167] Congress did not explicitly include a mens rea requirement in § 924(c)(1)(B)(ii), nor did it explicitly indicate intent to dispose of the requirement; therefore the inquiry is limited to whether Congress implicitly intended to exclude mens rea from the machinegun provision.[168]

To convict a defendant under the machinegun provision, the government must prove that the defendant possessed a machinegun in furtherance of a violent or drug-related crime.[169] Under § 924(c)'s basic provision, the government must prove that the defendant intended to knowingly possess a firearm to facilitate a crime he intended to commit.[170] The only difference in the government's burden of proof under § 924(c)(1)(A)(i) and § 924(c)(1)(B)(ii) is that, under the machinegun provision, the government must prove that the type of firearm the defendant possessed was a machinegun or one of the other listed weapons.[171]

Under the current interpretations of the machinegun provision, it is not clear whether courts must attach a mens rea requirement to the firearm-type element of the machinegun provision. Some courts have assumed that the provision requires mens rea.[172] Others have held that mens rea is not required because some of the statutory interpretation factors indicate congressional intent to

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165. *See supra* notes 32–35 and accompanying text (discussing mens rea and its purpose to ensure that only those who are culpable are punished).

166. *See supra* note 123 and accompanying text.

167. Carter v. United States, 530 U.S. 255, 269 (2000) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994)).

168. *See* 18 U.S.C. § 924(c)(1)(B)(ii) (2006) (lacking an explicit mens rea requirement); Staples v. United States, 511 U.S. 600, 606 (1994) (noting that congressional intent may be express or implied).

169. 18 U.S.C. § 924(c)(1)(A), (B)(ii) (2006).

170. 18 U.S.C. § 924(c)(1)(A)(i) (2006).

171. *Compare id.* (proscribing the use, carrying, or possession of a firearm during or in furtherance of a crime), *with* 18 U.S.C. § 924(c)(1)(B)(ii) (proscribing the use, carrying, or possession of a machinegun during or in furtherance of a crime).

172. *See, e.g.*, United States v. Franklin, 321 F.3d 1231, 1240 (9th Cir. 2003) (assuming that knowledge of the type of firearm is required because, based on the specific facts of the case, it was clear to the court that the defendant knew he had used a machinegun); United States v. Rodriguez, 54 F. App'x 739, 747 (3d Cir. 2002) (same); United States v. Dixon, 273 F.3d 636, 640–41 (5th Cir. 2001) (same).

forego requiring mens rea for the firearm's characteristics.[173] Additional authorities have rejected this argument, basing the mens rea analysis on the balancing of the statute's deterrent purpose intended by Congress and the inherent fairness of subjecting a defendant to a thirty-year penalty.[174]

Economic theory suggests that including a mens rea requirement for the firearm-type element serves the deterrent purpose of the statute.[175] Both optimal-enforcement theory and behavioral economic theory reach the same conclusion, despite the differences in their basic assumptions. Optimal-enforcement theory suggests that the criminal justice system tends to over-deter criminal activity by imposing harsher-than-necessary penalties, making a mens rea requirement necessary to efficiently deter crime by preventing accidental violations of the law.[176] Under optimal-enforcement theory, the machinegun provision's harsh penalty, triggered solely by the firearm's characteristic,[177] is evidence that the provision should have a corresponding mens rea requirement in order to reach an efficient result.

Behavioral economic theory suggests a similar result. Behavioral economics indicate that including a mens rea requirement for the firearm-characteristic element will increase the potential offender's uncertainty, therefore requiring that he postdict, rather than predict, whether he will be convicted.[178] A mens rea standard is appropriate in situations in which the cost of information is low and it is difficult to predict the amount of social harm that will result from the criminal conduct.[179] Under the machinegun provision, the cost of determining the type of firearm is relatively low because the evaluation requires only the inspection or firing of the weapon.[180] Conversely, it is difficult to predict the actual harm that will result from carrying, much less firing, a machinegun; the harm may be confined to panic or fear on the part of witnesses, or it may involve loss of life, which carries a significantyl higher social cost. Furthermore, a

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173. *See, e.g.*, *Burwell*, 690 F.3d at 516; United States v. Haile, 685 F.3d 1211, 1218 (11th Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 1723 (2013); United States v. Gamboa, 439 F.3d 796, 812 (8th Cir. 2006) (predicating its holding on the fact that the type of firearm is a sentencing factor); United States v. Eads, 191 F.3d 1206, 1213–14 (10th Cir. 1999) (same).

174. *See* supra notes 115–22 and accompanying text (discussing Judge Kavanaugh's and Judge Rogers's dissenting opinions in *Burwell*).

175. *See* Parker, *supra* note 19, at 762–63 (arguing that both optimal-enforcement theory and behavioral economic theory reach the same conclusion).

176. *See supra* notes 141–43 and accompanying text (explaining that the criminal justice system tends to impose harsher penalties because of the amount of resources and level of precision required to otherwise structure an effective punishment scheme).

177. *See Burwell*, 690 F.3d at 529 (Kavanaugh, J., dissenting) (emphasizing that the machinegun provision imposes "[t]wenty extra years of *mandatory* imprisonment").

178. *See* Guttel & Harel, *supra* note 157, at 498 (describing the benefits of postdict evaluation).

179. *See* Parker, *supra* note 19, at 770–71.

180. *See North Carolina Gun Ownership FAQs*, *supra* note 90 (explaining that machinegun fire is distinctive and, consequently, that firing the weapon will notify the user that he is using a machinegun).

machinegun may be dangerous to the offender himself, especially if the offender is unaware that the firearm is in fact a machinegun.[181] Both factors support the inclusion of a mens rea requirement.

Some scholars suggest that strict liability is a more effective deterrent than requiring mens rea because the government does not need to prove the offender's intent.[182] To the contrary, behavioral economists suggest that potential offenders are relatively optimistic about their chances of successfully committing a crime and fail to realize the severity of the potential penalty for their conduct.[183] A thirty-year sentence is not a deterrent if the potential offender is unaware of the penalty.

Similarly, imposing a penalty six times greater for carrying a machinegun than the five-year penalty imposed for carrying a pistol must depend on more than chance.[184] As Judge Kavanaugh explained in *Burwell*, the Supreme Court has not definitively endorsed a threshold eligibility theory for imposing criminal penalties.[185] There is a well-ingrained tradition in Supreme Court jurisprudence of requiring some degree of consistency with the common law mens rea presumption in situations in which Congress has not required otherwise.[186] The Court's implicit reasoning in *Flores-Figueroa* indicates that it is not inconsistent with the current state of the law to attach a mens rea requirement to the firearm-type element of the machinegun provision to ensure that a defendant who was unaware that the firearm he carried was a machinegun is punished proportionally to his level of culpability.[187] Additionally, attaching a mens rea requirement to the firearm-type element will prevent the arbitrary deprivation of liberty that could result from imposing a minimum thirty-year sentence for conduct that, under slightly different circumstances, could only warrant a five-year penalty.[188]

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181. *See Hamdani*, *supra* note 158, at 433–34 (noting that ignorance is particularly detrimental in cases in which there is a risk to personal safety by the failure to acquire knowledge).

182. *See id.* at 422 (explaining that strict liability is a better deterrent because "the subjective nature of mens rea and the heavy standard of proof in criminal trials increase the probability that courts [will] err in favor of defendants . . . [s]trict liability, in contrast, reduces the likelihood of such errors"). Strict liability is favorable to some because it can either induce possible perpetrators to either take greater precaution in their criminal actions or discourage criminal activity altogether). *Id.* at 423–25. However, these justifications tend to fail. *Id.*

183. *See supra* notes 158 and accompanying text. *But see* Hamdani, *supra* note 158, at 423 ("[T]he claim that it is substantially more challenging to prove defendants' awareness of those offense elements governed by strict liability is often inaccurate.").

184. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1896 (2006) (Alito, J., concurring).

185. Burwell v. United States, 690 F.3d 500, 544 (D.C. Cir. 2012) (Kavanaugh, J., dissenting), *cert. denied*, 133 S. Ct. 1459 (2013) (alluding to the proportionate culpability theory).

186. *See supra* Part I.B. (discussing the common law mens rea presumption).

187. *Brown*, *supra* note 23, at 110 (arguing that *Flores-Figueroa* "endorsed" the proportionate culpability theory).

188. *Compare* 18 U.S.C. § 924(c)(1)(B)(ii) (2006) (imposing a mandatory thirty-year sentence), *with* 18 U.S.C. § 924(c)(1)(A)(i) (2006) (imposing a mandatory five-year sentence). *See supra* notes 124–26 and accompanying text (discussing the due process concerns related to excessive or disproportionate punishment).

Therefore, when analyzing whether to require proof that a defendant knew the type of firearm he possessed or carried during the underlying crime, future courts should weigh the statutory purpose and proportionate culpability concern, which strongly favor inferring the requirement. Furthermore, Congress should consider revising the machinegun provision to include an explicit mens rea requirement for the firearm-type element to resolve the question entirely. Specifically, the machinegun provision should read: "If the firearm possessed by a person convicted of a violation of this subsection . . . is a machinegun . . . *and the person has knowledge of the characteristics that bring the firearm within this provision*, the person shall be sentenced to a term of imprisonment of not less than 30 years."[189] Congress should also include a definition for "knows" in Section 924(c)(1), and should adopt the Model Penal Code's definition of the term.[190] By taking both of these steps, Congress will clearly indicate its intent to include a mens rea requirement in the machinegun provision. Redefining the crime in this manner will efficiently balance Congress's deterrent intent with the fundamental fairness concerns that the mens rea presumption was constructed to address.

IV. CONCLUSION

Although the machinegun provision was intended to deter crime, it should balance deterrence goals with retributive principles by only punishing the culpable. As currently written, the sole differentiating factor between the machinegun provision, § 924(c)(1)(B)(ii), and § 924(c)'s basic offense, § 924(c)(1)(A)(i), is the firearm-type element. The extreme discrepancy between the sentences these provisions impose necessitates a mens rea requirement for the firearm-type element in the machinegun provision, pursuant to proportional culpability theory. Economic theory also supports the inclusion of a mens rea requirement in the machinegun provision to deter potential offenders. By imposing a mens rea requirement, Congress could maintain the provision's deterrent purpose as well as ensure proportionate culpability. Therefore, to balance deterrence and fairness the machinegun provision 18 U.S.C. § 924(c)(1)(B)(ii) should include a knowledge requirement.

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189. 18 U.S.C. § 924(c)(1)(B)(ii) (2006) (proposed language italicized).

190. According to the Model Penal Code,

> A person acts knowingly with respect to a material element of an offense when:
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

MODEL PENAL CODE §2.02(2)(b).