

## Boston College Journal of Law & Social Justice

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Volume 34

Issue 3 *Electronic Supplement*

Article 5

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March 2014

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### Recommended Citation

Shannyn Gaughan, *Is it Automatic?: The Mens Rea Presumption and the Interpretation of the Machinegun Provision of 18 U.S.C. § 924(c) in United States v. Burwell*, 34 B.C.J.L. & Soc. Just. E. Supp. 53 (2014), <http://lawdigitalcommons.bc.edu/jlsj/vol34/iss3/5>

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# IS IT AUTOMATIC?: THE MENS REA PRESUMPTION AND THE INTERPRETATION OF THE MACHINEGUN PROVISION OF 18 U.S.C. § 924(C) IN *UNITED STATES v. BURWELL*

SHANNYN GAUGHAN\*

**Abstract:** In *United States v. Burwell*, the United States Court of Appeals for the District of Columbia Circuit reviewed en banc the question of whether the Government must prove that the Defendant knew of the firearm's automatic capability before invoking 18 U.S.C. § 924(c)(1)(B)(ii)'s mandatory thirty-year minimum sentence. The majority affirmed the Defendant's conviction, holding that the D.C. Circuit's previous holding in *United States v. Harris* determined that no mens rea applies to the machinegun provision. The dissenting opinion, however, argued that the Supreme Court's decision in *United States v. O'Brien*, in which the Court held that the automatic capability of the firearm was an element of the offense, calls for the mens rea presumption to extend to that element. This Comment explains the differences in interpretation of the mens rea presumption between the majority and dissent, and argues that the dissenting opinion more accurately reflects the fundamental principles of the mens rea presumption.

## INTRODUCTION

On July 15, 2005, a jury convicted Bryan Burwell and several co-defendants of a Racketeer Influenced and Corrupt Organizations (RICO) conspiracy and an armed bank robbery conspiracy.<sup>1</sup> In addition, the jury also convicted Burwell independently of armed robbery and of using or carrying a machinegun during the course of committing a violent crime.<sup>2</sup> The federal district court judge sentenced Burwell to eleven years and three months for the RICO conspiracy conviction, eleven years for the armed bank robbery conviction, and five years for conspiracy to commit armed

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\* Staff Writer, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE (2013–2014).

<sup>1</sup> 18 U.S.C. § 371 (2006); 18 U.S.C. § 1962(d) (2006); *United States v. Burwell (Burwell I)*, 690 F.3d 500, 502–03 (D.C. Cir. 2012) (en banc); see also *United States v. Burwell (Burwell II)*, 642 F.3d 1062, 1065 (D.C. Cir. 2011), *aff'd en banc*, 690 F.3d 500 (D.C. Cir. 2012).

<sup>2</sup> *Burwell I*, 690 F.3d at 503; see also 18 U.S.C. § 924(c)(1)(B)(ii) (2006) (federal criminal statute for using or carrying a weapon during the course of committing a violent crime); 18 U.S.C. § 2113(d) (2006) (federal criminal statute for armed robbery).

robbery, all to be served concurrently.<sup>3</sup> In addition, the judge sentenced Burwell to thirty years, to be served consecutively with the other three sentences, for using or carrying a machinegun during the armed robbery.<sup>4</sup>

Burwell appealed, arguing that the Government failed to present sufficient evidence of his knowledge of the automatic character of his weapon and thus failed to support a conviction under the federal firearms offense statute—18 U.S.C. § 924(c)(1)(B)(ii).<sup>5</sup> The Court of Appeals for the D.C. Circuit affirmed Burwell's conviction and sentence, relying on its prior decision in *United States v. Harris*, which held that a defendant need not have knowledge of the automatic character of the gun in order to be convicted under § 924(c)(1)(B)(ii).<sup>6</sup> Burwell then sought a rehearing en banc.<sup>7</sup>

Upon rehearing en banc, the judges of the D.C. Circuit narrowed their review to deciding a single question: whether the Government must prove that a defendant knew of the automatic capability of the weapon used before a judge may invoke the mandatory thirty-year minimum sentence required by § 924(c)(1)(B)(ii).<sup>8</sup> The circuit judges diverged on the issue, publishing two concurring opinions and two dissenting opinions in addition to the majority opinion, with each opinion differing in its interpretation and application of precedent from both the D.C. Circuit and the Supreme Court.<sup>9</sup> Namely, the judges disagreed about the effect of the Supreme Court's decision in *United States v. O'Brien*—which held that the machinegun provision of § 924(c)(1)(B)(ii) is an offense element and not a sentencing factor.<sup>10</sup> Ultimately, the majority affirmed Burwell's mandatory and consecutive thirty-year sentence by holding that no mens rea applied to the machinegun provision.<sup>11</sup> In contrast, Judge Brett M. Kavanaugh maintained in his dis-

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<sup>3</sup> *Burwell I*, 690 F.3d at 502–03.

<sup>4</sup> *Id.*

<sup>5</sup> 18 U.S.C. § 924(c)(1)(B)(ii); *Burwell I*, 690 F.3d at 502–03. On appeal, Burwell challenged only the mandatory thirty-year consecutive sentence imposed because of the automatic capability of the firearm used in the robbery. *See Burwell I*, 690 F.3d at 502–03.

<sup>6</sup> *See* 18 U.S.C. § 924(c)(1)(B)(ii); *Burwell I*, 690 F.3d at 503 (citing *United States v. Harris*, 959 F.2d 246, 258–59 (D.C. Cir. 1992)).

<sup>7</sup> *Burwell I*, 690 F.3d at 503. Appellate review en banc may be granted to clarify inconsistent decisions within a circuit court. *See* FED. R. APP. P. 35(a)(1)–(2). The entire panel of judges from within the circuit, rather than a selected panel of three judges generally used for appellate review, decide cases reviewed en banc. *See id.*

<sup>8</sup> 18 U.S.C. § 924(c)(1)(B)(ii); *Burwell I*, 690 F.3d at 502.

<sup>9</sup> *See Burwell I*, 690 F.3d at 502, 515–17, 519, 527–28.

<sup>10</sup> *See* 18 U.S.C. § 924(c)(1)(B)(ii); *Burwell I*, 690 F.3d at 502, 505, 542; *United States v. O'Brien*, 560 U.S. 218, 234–35 (2010).

<sup>11</sup> *Burwell I*, 690 F.3d at 516. Mens rea refers to the state of mind that a defendant must be proven to possess in order for the proscribed conduct to amount to a crime. *See Morissette v. United States*, 342 U.S. 246, 264 (1952). In *Morissette*, the Supreme Court explained that mens rea is the “mental element” required for injurious conduct to amount to a crime. *See id.*

senting opinion that the Supreme Court's decision in *O'Brien* required a mens rea of "knowingly" for the machinegun element.<sup>12</sup>

Part I of this Comment summarizes the facts relevant to Burwell's case and the procedural history resulting in an en banc review by the D.C. Circuit. Part II elaborates on the divergent interpretations of *O'Brien* and *Harris*, as discussed by Judge Janice Brown's majority opinion and Judge Kavanaugh's dissenting opinion, and includes an explanation of the mens rea presumption as presented in these two opinions. Finally, Part III argues that the majority's decision reflects an unsettling resistance to the mens rea presumption, and undermines the retributive goals of the legal system. Part III also notes that despite the majority's dismissal of the Supreme Court's stance on mens rea in *O'Brien*, Judge Kavanaugh's dissenting opinion accurately emphasizes the significance of the presumption of mens rea in ensuring fundamental values of justice.

#### I. THE D.C. CIRCUIT AFFIRMS BURWELL'S CONVICTIONS AND GRANTS A REHEARING EN BANC TO RESOLVE COMPETING INTERPRETATIONS OF THE MENS REA PRESUMPTION AND 18 U.S.C. § 924(C)(1)(B)(II)

Between 2003 and 2004, a gang of bank robbers engaged in a series of violent bank robberies in the Washington, D.C. area.<sup>13</sup> The gang bought four AK-47 automatic assault rifles and used these weapons during their bank robberies.<sup>14</sup> On one occasion, the gang used these weapons to shoot at a police car.<sup>15</sup> Following this specific instance, Burwell joined the gang and participated in two violent armed bank robberies.<sup>16</sup> On both occasions, Burwell carried an AK-47, but there is no evidence that he ever fired his weapon.<sup>17</sup>

Following a jury trial, a jury convicted all of the co-defendants of a RICO conspiracy and of a conspiracy to commit armed bank robbery.<sup>18</sup> In addition, the jury returned a guilty verdict for Burwell, convicting him of armed robbery and of using or carrying a machinegun while committing a violent crime.<sup>19</sup> The district court judge sentenced Burwell to concurrent terms of eleven years and three months for the RICO conspiracy conviction,

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<sup>12</sup> See *Burwell I*, 690 F.3d at 550, 553 (Kavanaugh, J., dissenting).

<sup>13</sup> *United States v. Burwell (Burwell I)*, 690 F.3d 500, 502 (D.C. Cir. 2012) (en banc).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 502–03. The jury convicted the defendants of RICO conspiracy pursuant to 18 U.S.C. § 1962(d) and of conspiracy to commit armed bank robbery pursuant to 18 U.S.C. § 371. See 18 U.S.C. § 371 (2006); 18 U.S.C. § 1962(d) (2006).

<sup>19</sup> *Burwell I*, 690 F.3d at 503; see also 18 U.S.C. § 924(c)(1)(B)(ii) (2006) (federal criminal statute that penalizes using or carrying a weapon during the course of committing a violent crime); 18 U.S.C. § 2113(d) (2006) (federal criminal statute for armed robbery).

eleven years and three months for the armed bank robbery conviction, and five years for the conspiracy to commit armed robbery conviction.<sup>20</sup> In addition, the judge sentenced Burwell to an additional thirty years to be served consecutively pursuant to 18 U.S.C. § 924(c)(1)(B)(ii) for carrying a machinegun during the robbery.<sup>21</sup> 18 U.S.C. § 924(c)(1)(B)(ii) provides that any person who is convicted of using or carrying a firearm in furtherance of a crime of violence or a drug trafficking crime shall be sentenced to a mandatory thirty-year minimum sentence of imprisonment, in addition to the punishment for the predicate crime.<sup>22</sup>

Burwell appealed his conviction under § 924(c)(1)(B)(ii) to the D.C. Circuit, arguing that the Government had failed to prove that Burwell knew of the automatic firing capability of the weapon he used, and therefore, had failed to present sufficient evidence to support the conviction.<sup>23</sup> A panel of judges affirmed the district court's conviction and sentence, holding that the Government did not need to prove Burwell's knowledge of the automatic capability of the weapon because no mens rea requirement applied to the machinegun provision.<sup>24</sup> The D.C. Circuit subsequently granted Burwell's motion for a rehearing en banc to answer a narrow question of law: whether the Government must prove that a defendant knew of the automatic capability of a weapon before a judge may invoke the mandatory thirty-year mini-

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<sup>20</sup> *Burwell I*, 690 F.3d at 503.

<sup>21</sup> *Id.*; see also 18 U.S.C. § 924(c)(1)(B)(ii).

<sup>22</sup> 18 U.S.C. § 924(c)(1)(B)(ii) ("If the firearm possessed by a person convicted of a violation of this subsection . . . is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years."). For the purposes of 18 U.S.C. § 924(c)(1)(B)(ii), the term "machinegun" is defined pursuant to § 5845(b) of the National Firearms Act, which defines "machinegun," in relevant part, as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." National Firearms Act, 26 U.S.C. § 5845(b) (2006).

<sup>23</sup> *Burwell I*, 690 F.3d at 503. Before closing arguments at trial, the court granted the Government's motion to preclude from closing arguments by the defense any argument that the Defendant could not have known of the automatic character of the firearm. *Id.* at 518 n.1. The court held that any such comment in a closing argument was "irrelevant and improper." *Id.* (quoting *United States v. Morrow*, No. CRIM.A. 04-355CKK, 2005 WL 3163804 (D.D.C. June 20, 2005)). Burwell's counsel did not oppose this motion at trial. See *id.* at 517–18 (Henderson, J., concurring).

<sup>24</sup> *Burwell I*, 690 F.3d at 503 (citing *United States v. Harris*, 959 F.2d 246, 257–59 (D.C. Cir. 1992)). The D.C. Circuit held that the decision in *United States v. O'Brien* did not affect the holding in *United States v. Harris*, that no mens rea applied to the machine gun provision, because *O'Brien* "expressly refrained from deciding" whether a mens rea applied to that element. See *United States v. Burwell*, 642 F.3d 1062, 1070 (D.C. Cir. 2011). As the court explained, in the "absence of an affirmative statement of the Court, we adhere to our precedent in holding that conviction under § 924(c) does not require proof the defendant knew the weapon was a machinegun." See *id.*; see also *United States v. O'Brien*, 560 U.S. 218, 234–35 (2010).

num sentence pursuant to § 924(c)(1)(B)(ii), or whether the additional mandatory sentence may be imposed through strict liability.<sup>25</sup>

In her concurring opinion, Judge Karen LeCraft Henderson reasoned that the present case should have been denied en banc review because the holding in *United States v. Harris* has been “clear and consistent for twenty years.”<sup>26</sup> Nevertheless, the five separate opinions in this decision demonstrate the varied understandings of the mens rea presumption after *United States v. O’Brien*.<sup>27</sup>

## II. DIVERGENT VIEWS OF THE MENS REA PRESUMPTION AND THE EFFECT OF *O’BRIEN* ON *HARRIS*

Of the five opinions in *United States v. Burwell*, Judge Brown’s majority opinion and Judge Kavanaugh’s dissenting opinion most directly address the competing interpretations of the mens rea presumption.<sup>28</sup> The two opinions diverge most starkly in their understanding of *United States v. Harris* and *United States v. O’Brien*, two cases that have similarly addressed the machinegun provision of 18 U.S.C. § 924(c).<sup>29</sup> In the majority opinion, Judge Brown centered her analysis on the D.C. Circuit’s prior decision in *Harris*, as interpreted in light of the intervening Supreme Court decision of *O’Brien*.<sup>30</sup> Conversely, in his dissent, Judge Kavanaugh reasoned that the ruling in *O’Brien* governed the case because it effectively overturned *Harris*.<sup>31</sup> These opposite approaches reflect divergent understandings of the mens rea presumption.<sup>32</sup>

<sup>25</sup> See *Burwell I*, 690 F.3d at 502–04.

<sup>26</sup> *Id.* at 517 (Henderson, J., concurring). A review en banc is appropriate in two circumstances: to maintain consistency in the court’s case law, or to address questions of law that are of exceptional importance. See FED. R. APP. P. 35(a)(1)–(2).

<sup>27</sup> See Michael A. McCall et al., *Criminal Justice and the U.S. Supreme Court’s 2009–2010 Term*, 41 CUMB. L. REV. 227, 237 (2011) (noting that, despite the unanimity of the *O’Brien* decision, the case cannot “be characterized as exhibiting complete unanimity in that at least one concurring opinion was filed”). Compare *Burwell I*, 690 F.3d at 509 (stating that “we cannot say that the conceptual underpinnings of *Harris* have been weakened at all”), with *id.* at 542 (Kavanaugh, J., dissenting) (stating that “[t]he Supreme Court’s decision in *O’Brien* thus knocked out the fundamental underpinnings of this Court’s decision in *Harris*”).

<sup>28</sup> See *United States v. Burwell (Burwell I)*, 690 F.3d 500, 505 (D.C. Cir. 2012) (en banc); *id.* at 528, 542, 553 (Kavanaugh, J., dissenting).

<sup>29</sup> See *Burwell I*, 690 F.3d at 505 (stating that *United States v. Harris* remains good law after *United States v. O’Brien*); *id.* at 528, 542, 553 (Kavanaugh, J., dissenting) (explaining that *O’Brien* effectively overruled *Harris*); see also 18 U.S.C. § 924(c) (2006); *United States v. Harris*, 959 F.2d 246, 258 (D.C. Cir. 1992); *United States v. O’Brien*, 560 U.S. 218, 234–35 (2010).

<sup>30</sup> See *id.* at 514–15.

<sup>31</sup> See *id.* at 528 (Kavanaugh, J., dissenting) (citing *Staples v. United States*, 511 U.S. 600, 619 (1994)).

<sup>32</sup> See *id.* at 515 (majority opinion). Compare *id.* at 508 (“[T]his Court and others have frequently found that certain offense elements do not require proof of an additional *mens rea*, so long

### A. Precedent Decisions in *Harris* and *O'Brien*

In *Harris*, the D.C. Circuit faced a challenge to the Defendant's conviction under the machinegun provision of § 924(c) after the district court failed to instruct the jury to deliver a guilty verdict only if the Defendant knew of the gun's automatic firing capability.<sup>33</sup> The D.C. Circuit followed well-established rules of statutory interpretation to analyze the existence of any mens rea requirement in the provision.<sup>34</sup> The D.C. Circuit acknowledged the presumption of mens rea as delineated in *Morissette v. United States*, in which the Supreme Court noted that the traditional belief in free will requires that conduct can be made criminal only when done with the proper malicious intent.<sup>35</sup> Nevertheless, the D.C. Circuit found that the structure of § 924(c) suggests that Congress intended strict liability to attach to the machinegun provision of the crime, and therefore the provision did not require an additional mens rea.<sup>36</sup>

The D.C. Circuit reasoned that the mens rea requirement was satisfied in the machinegun provision because the Defendant needed to intentionally use a firearm in the commission of a drug trafficking or violent crime.<sup>37</sup> Whether the weapon used was automatic or not, the court in *Harris* explained, does not reflect any difference in the moral blameworthiness of an actor who is already guilty of intentionally engaging in the predicate crime.<sup>38</sup> The *Harris* court therefore concluded that the fundamental purpose of the mens rea presumption is satisfied in the machine gun provision.<sup>39</sup>

In *O'Brien*, the Supreme Court considered a challenge similar to the one posed in *Harris*.<sup>40</sup> In *O'Brien*, the Government appealed a decision by the First Circuit that affirmed a district court's dismissal of a thirty-year

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as the offense as a whole carries a scienter requirement that separates innocent from criminal conduct.”), *with id.* at 528 (Kavanaugh, J., dissenting) (“[T]he presumption of mens rea means that, unless Congress plainly indicates otherwise, the Government must prove the defendant’s mens rea for each element of the offense.”).

<sup>33</sup> See *Harris*, 959 F.2d at 258; see also 18 U.S.C. § 924(c).

<sup>34</sup> See *Harris*, 959 F.2d at 258.

<sup>35</sup> See *id.* (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)). *Morissette v. United States* provides:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

342 U.S. at 250.

<sup>36</sup> See *Harris*, 959 F.2d at 258; see also 18 U.S.C. § 924(c).

<sup>37</sup> See *Harris*, 959 F.2d at 258–59.

<sup>38</sup> See *id.* at 259.

<sup>39</sup> See *id.*

<sup>40</sup> See *O'Brien*, 560 U.S. at 221; see also *Harris*, 959 F.2d at 258.

minimum sentence pursuant to § 924(c)(1)(B)(ii).<sup>41</sup> The district court had reasoned that the Government had failed to indict, charge, and prove the Defendant's knowledge of the automatic character of the weapon.<sup>42</sup> The Supreme Court accordingly addressed the narrow question of whether the machinegun provision is an element to be proved to a jury beyond a reasonable doubt, or if it was only a sentencing factor to be found by a judge by a preponderance of the evidence.<sup>43</sup> The Supreme Court unanimously held that the machinegun provision must be proven beyond a reasonable doubt as an element of the crime.<sup>44</sup> The Court relied upon several considerations, including the severity of the penalty and the drastic increase in punishment for use of an automatic weapon, which the Court suggested are indicative of Congress's intent to create a separate substantive crime.<sup>45</sup> Although the Court affirmatively concluded that the machinegun provision was an element of a substantive crime, the Supreme Court reserved comment on whether it was necessary to prove knowledge of the automatic capability of the weapon used.<sup>46</sup>

*B. Interpretations of the Effect of O'Brien on Harris by the Majority and Dissenting Opinions*

The majority and dissenting opinions in *Burwell* drew heavily on the precedential cases of *O'Brien* and *Harris* in interpreting the mens rea requirement for § 924(c)(1)(B)(ii).<sup>47</sup> The majority opinion in *Burwell* ruled that *Harris* remains good law in spite of *O'Brien*'s holding that the machinegun provision is an element of the offense and not a sentencing factor, as it was treated in *Harris*.<sup>48</sup> Judge Brown stated that *Harris* did not turn on the classification of the machinegun provision as a sentencing factor.<sup>49</sup> Rather, *Harris* relied primarily on congressional intent, as evidenced by the structure of the statute, to penalize defendants who have been found guilty of the predicate crimes and whose weapon had an automatic firing capability.<sup>50</sup>

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<sup>41</sup> *O'Brien*, 560 U.S. at 223–24; see also 18 U.S.C. § 924(c)(1)(B)(ii).

<sup>42</sup> See *O'Brien*, 560 U.S. at 223–24.

<sup>43</sup> *Id.* at 224.

<sup>44</sup> See *id.* at 235, 241; see also *Burwell I*, 690 F.3d at 528 (Kavanaugh, J., dissenting) (stating that “the Supreme Court has recently and unanimously ruled that the automatic character of the gun is an element of the Section 924(c) offense”).

<sup>45</sup> See *O'Brien*, 560 U.S. at 218–19.

<sup>46</sup> See *Burwell I*, 690 F.3d at 517 (Henderson, J., concurring).

<sup>47</sup> See *id.* at 504 (majority opinion); *id.* at 528 (Kavanaugh, J., dissenting); see also 18 U.S.C. § 924(c)(1)(B)(ii); *O'Brien*, 560 U.S. at 234–35; *Harris*, 959 F.2d at 259.

<sup>48</sup> See *Burwell I*, 690 F.3d at 508–09; see also *O'Brien*, 560 U.S. at 234–35; *Harris*, 959 F.2d at 259.

<sup>49</sup> See *Burwell I*, 690 F.3d at 505; see also *Harris*, 959 F.2d at 259.

<sup>50</sup> See *Burwell I*, 690 F.3d at 505.



The clarification made in *O'Brien*, therefore, does not undermine the substantive holding in *Harris* that the mens rea presumption does not attach to the automatic character of the weapon.<sup>51</sup> The majority noted that this presumption is reserved for essential elements of the offense that would otherwise criminalize innocent conduct.<sup>52</sup> In addition, the concurring opinion noted that Burwell would not be prejudiced by an additional thirty-year mandatory minimum sentence because the evidence suggested that he knew that the gang used automatic AK-47s.<sup>53</sup>

Conversely, in his dissenting opinion Judge Kavanaugh argued that *O'Brien* effectively overruled *Harris* by making the automatic nature of the weapon an element of the offense and thereby required the Government to prove Burwell's knowledge of the weapon's automatic capabilities.<sup>54</sup> Judge Kavanaugh interpreted the mens rea presumption broadly, insisting that the presumption applies to each element of an offense, absent a plainly contrary intent by Congress.<sup>55</sup>

The dissent argued, in opposition to the majority opinion, that the Supreme Court has never limited the mens rea presumption to elements of an offense that would otherwise criminalize innocent conduct.<sup>56</sup> Rather, Judge Kavanaugh called for a broad interpretation of the mens rea presumption, such that it applies to essential elements of a statute "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."<sup>57</sup> He asserted that such an application of the mens rea presumption preserves fundamental principles of fairness and justice.<sup>58</sup> Accordingly, Judge Kavanaugh concluded that a mens rea applies to the automatic capability of the machinegun provision because it

<sup>51</sup> See *id.* at 508–09. Judge Brown noted in her opinion:

Absent either a clear statement from the Supreme Court establishing a presumption of *mens rea* for every element of an offense or a clear demarcation in our caselaw between our treatment of elements and sentencing factors, we cannot say that the conceptual underpinnings of *Harris* have been weakened at all, much less weakened so much as to justify abandoning it.

*Id.*

<sup>52</sup> See *id.* at 508.

<sup>53</sup> *Id.* at 518 (Henderson, J., concurring).

<sup>54</sup> *Id.* at 528, 542, 553 (Kavanaugh, J., dissenting); see also *O'Brien*, 560 U.S. at 235; *Harris*, 959 F.2d at 259.

<sup>55</sup> See *Burwell I*, 690 F.3d at 528, 543 (Kavanaugh, J., dissenting).

<sup>56</sup> *Id.* at 543.

<sup>57</sup> *Id.* at 529.

<sup>58</sup> See *id.* at 527; see also *Liparota v. United States*, 471 U.S. 419, 427 (1985) (stating that the presumption of mens rea supports the longstanding principle that ambiguous criminal statutes should favor lenity).

is an element that may lead to the conviction of a more serious crime regardless of the defendant's knowledge.<sup>59</sup>

### III. *BURWELL*'S HOLDING JEOPARDIZES A BROAD APPLICATION OF THE MENS REA PRESUMPTION

The mens rea presumption, in accordance with the fundamental presumption of innocence afforded to each accused individual, ensures that criminal liability is imposed only on individuals who act with a culpable state of mind.<sup>60</sup> The majority's opinion threatens to undermine the retributivist goal of the mens rea presumption, which is to hold an individual criminally responsible in proportion to his culpability.<sup>61</sup> Moreover, the majority opinion risks the imposition of disproportionately high sentences based on the premise that a defendant has been deemed a bad actor.<sup>62</sup> The majority's interpretation of the mens rea presumption, as it stands after *United States v. Harris* and *United States v. O'Brien*, may lead to aggravated sentences despite a defendant's lack of moral culpability.<sup>63</sup>

This result contradicts the purpose of the mens rea presumption and fails to achieve the proportionality of criminal culpability and liability that is an essential objective of the criminal justice system.<sup>64</sup> As Judge Kavanaugh aptly reasoned in his dissent, "the fact that the defendant is a 'bad

<sup>59</sup> See *Burwell I*, 690 F.3d at 546 (Kavanaugh, J., dissenting).

<sup>60</sup> See *Liparota v. United States*, 471 U.S. 419, 425 (1985) (emphasizing that "an injury can amount to a crime only when inflicted by intention" (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952))); *Morissette*, 342 U.S. at 275 (holding that a presumption that every defendant possessed criminal intent "would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime").

<sup>61</sup> See *Solem v. Helm*, 463 U.S. 277, 290 (1983) (holding that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted."); see also *United States v. O'Brien*, 560 U.S. 218, 235 (2010); *United States v. Harris*, 959 F.2d 246, 256 (D.C. Cir. 1992).

<sup>62</sup> See *United States v. Burwell (Burwell I)*, 690 F.3d 500, 530–31, 544 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting) (citing Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (1962)). In his article *Mens Rea and the Supreme Court*, Herbert Packer explains:

[T]o punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future . . . It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or a retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.

Packer, *supra* at 109.

<sup>63</sup> See *Burwell I*, 690 F.3d at 544 (Kavanaugh, J., dissenting).

<sup>64</sup> See *id.* at 552–53; see also *Solem*, 463 U.S. at 290.

person' who has done 'bad things' does not justify dispensing with the presumption of mens rea in this fashion and imposing 20 years of additional mandatory prison time."<sup>65</sup> The decision in this case cuts deep into the fundamental values of justice in the criminal process and compromises the established principles that have protected the rights of the accused.<sup>66</sup>

Moreover, the majority opinion in *United States v. Burwell* encourages an ad hoc approach to determining whether an element of a crime requires a showing of a specific mens rea before criminal liability may be imposed.<sup>67</sup> Rather than adopting a clear rule that applies a mens rea to every element of a crime, the majority rule calls for a judicial analysis to determine whether a particular element of a crime requires a mens rea in order for the offense to criminalize certain conduct.<sup>68</sup> Such an ad hoc approach deprives an actor of a clear warning that a harsh criminal penalty may be imposed for his or her conduct.<sup>69</sup>

Judge Kavanaugh rightly asserted that where "the facts as the defendant believed them would have warranted conviction of a lesser offense and called for a lesser punishment, no legitimate purpose of criminal law—whether it be retribution, deterrence, or rehabilitation—is served by convicting him of an aggravated offense and imposing a more severe punishment."<sup>70</sup> The majority holding in this case imposes unjustly severe penalties without fair notice to defendants and without legitimately advancing any deterrence or retributive goals.<sup>71</sup>

Furthermore, Judge Kavanaugh's dissenting opinion suggests an interpretation of the mens rea presumption that is more consistent with core principles of criminal law.<sup>72</sup> The extension of a mens rea to each element protects

<sup>65</sup> *Burwell I*, 690 F.3d at 544 (Kavanaugh, J., dissenting).

<sup>66</sup> *See id.* at 552–53. In *Burwell*, Judge Kavanaugh reasoned:

Convicting a defendant of this Section 924(c) offense and imposing an extra 20 years of mandatory imprisonment based on a fact the defendant did not know is unjust and incompatible with deeply rooted principles of American law. The Supreme Court has applied the presumption of mens rea precisely to avoid such injustice.

*Id.*

<sup>67</sup> *See id.* at 546.

<sup>68</sup> *See id.* at 503 (majority opinion); *id.* at 525 (Kavanaugh, J., dissenting). The majority states that the mens rea presumption extends only to essential elements that require a mens rea in order to avoid criminalizing otherwise innocent conduct. *See id.* at 508 (majority opinion).

<sup>69</sup> *See Liparota*, 471 U.S. at 427 ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.").

<sup>70</sup> *Burwell I*, 690 F.3d at 544 (Kavanaugh, J., dissenting).

<sup>71</sup> *See id.* at 544, 552–53.

<sup>72</sup> *See id.* at 543 (citing WAYNE R. LAFAVE, CRIMINAL LAW 304 (5th ed. 2010)). In his textbook on criminal law, Wayne LaFave suggests that the idea that a "mistake by the defendant may be disregarded because of the fact that he actually intended to do some legal or moral wrong . . . is

the presumption of innocence and prevents the prosecution from having an easy path to a conviction.<sup>73</sup> Moreover, Judge Kavanaugh's interpretation of the necessity of mens rea respects basic human values of human will and the autonomy to choose between good and evil.<sup>74</sup> By broadly applying the mens rea presumption to every element of a crime, the dissenting opinion maintains the fundamental principles of lenity, notice, and culpability that have traditionally guided fairness and justice in our criminal system.<sup>75</sup>

## CONCLUSION

By holding that the mens rea presumption did not extend to the machinegun provision of 18 U.S.C. § 924(c)(1)(B)(ii), the decision in *United States v. Burwell* weakens the broad application of the mens rea presumption to each element of a criminal offense. The majority in *Burwell* reached this decision despite the Supreme Court's ruling in *United States v. O'Brien* that the automatic character of the firearm was an essential element of the offense. In the instant case, Burwell was sentenced to an additional thirty-year imprisonment, despite the Government's failure to prove that he knew of the automatic nature of the weapon. This added sentence is striking compared to the eleven-year total sentence imposed for the other three offenses of which he was convicted. This outcome is demonstrative of the severe consequences that a defendant may suffer, notwithstanding the government's failure to prove his or her culpability, as a result of the majority decision. This narrowing interpretation of the mens rea presumption threatens to undermine its essential purpose, which is to ensure that criminal penalties resulting in loss of liberty are justified by criminal intent.

Judge Kavanaugh's dissenting opinion, however, suggests a broad application of the mens rea requirement that would require the Government to prove the defendant's culpability for each element of a criminal offense before criminal liability could be imposed. Drawing from Supreme Court precedent in favor of a mens rea presumption, Judge Kavanaugh's approach protects the fundamental principles of fairness that our criminal system requires.

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unsound, and has no place in a rational system of substantive criminal law." LAFAVE, *supra* at 304–05.

<sup>73</sup> *Morissette*, 342 U.S. at 263.

<sup>74</sup> *See id.*

<sup>75</sup> *See Burwell I*, 690 F.3d at 543, 545, 552 (Kavanaugh, J. dissenting); *see also Liparota*, 471 U.S. at 427.