Saint Louis University Public Law Review

Volume 21
Number 1 *The Jury's Role in Administering Justice in the United States (Volume XXI, No. 1)*

Article 7

2002

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JUDICIAL INSTRUCTIONS, DEFENDANT CULPABILITY, AND JURY INTERPRETATION OF LAW

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American courts give criminal juries a lot of authority on the decisions that are delegated to them. Acquittals cannot be reviewed and convictions are reviewed very deferentially.[1] So it is an important question which issues juries get, which decisions they make, and what guidance and resources they are given to make those decisions. Trial judges must properly assign those issues to juries when they give jury instructions and they must convey those instructions in a way that enables the jury to fulfill their important, largely unreviewable, tasks competently.

Judges have two distinct tasks in conveying law to juries in American courts. First, they must discern which parts of the law are within the jury's purview and thus must be conveyed to them in instructions. This issue is partly a matter of constitutional law; the jury must decide all *material* issues in the charge.[2] Partly this is a matter of statutory interpretation, especially whether the legislature intended a portion of the statute under which defendant is charged to be an element of the crime, and thus in jury's purview, or a mere sentencing factor, in which case it is reserved for the judge. And partly this issue is a matter of common law; for instance, judges may need to determine the applicability of a common law defense to a statutory crime.[3] From these sources judges must determine which parts of statutes under which defendants are charged must be conveyed to juries through instructions.

Once those decisions are made, judges must determine how to convey that law, meaning how to compose the instructions. Sometimes they will simply read the statute to the jury; sometimes they will read versions of the law drawn

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1. *See* Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

2. *See* United States v. Gaudin, 515 U.S. 506, 511 (1995).

3. *See* United States v. DeZarn, 157 F.3d 1042, 1051 (6th Cir. 1998) (discussing "literal truth" defense to perjury).

from appellate opinions or model jury instructions.[4] (In some cases, like *DeZarn*, a key defense may be clear from common law; judges must devise instructions for that law as well.) Other times, judges perceive the need—and social science confirms the need—to paraphrase statutes and case law in ways more understandable to lay jurors. Those judgments on re-phrasing instructions often have substantive implications.

These judicial tasks and the doctrines courts have evolved to guide them are, I believe, linked to the jury's normative role, which is to apply law in a way that assesses the culpability of a defendant and assesses his conduct normatively, and not merely positively. The contemporary nature of criminal law creates a special set of problems for statutory application arising from the multiple functions that criminal rules serve. Criminal statutes long have been understood as serving two distinct functions.[5] First, criminal statutes announce "conduct rules" to the general public, giving them ex ante warning about the standards to which they must conform their behavior in order to avoid criminal punishment.[6] Statutes tell us what conduct is prohibited or, occasionally, required. Second, criminal statutes provide "decision rules" or principles for adjudicating individual cases of conduct-rule violations.[7] Decision rules are directed at those who adjudicate cases rather than at the general public. Although scholars typically consider judges as the primary audience for these rules, and prosecutors when they make charging decisions as a secondary audience, criminal juries are also guided by these rules. While conduct rules need to be clear and simple, so that all citizens can readily understand and follow them, decision rules often must be more subtle and complicated, in order to "take account of the complex and varied situational factors relevant to

4. *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 403 (1999) (describing trial judge reading relevant statute passages to the jury and then composing supplemental explanations of the statute's meaning).

5. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626 (1984) (citing JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (Wilfrid Harrison ed., 1948)); Kent Greenawalt, *A Vice of Its Virtues: The Perils of Precision in Criminal Codification, as Illustrated by Retreat, General Justification, and Dangerous Utterances*, 19 RUTGERS L.J. 929 (1988); Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857 (1994) [hereinafter Robinson, *Functional Analysis*]; Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990) [hereinafter Robinson, *Rules of Conduct*].

6. *See* Dan-Cohen, *supra* note 5, at 626, 630.

7. *See id.* "Principles of adjudication" is Robinson's phrase. *See* Robinson, *Rules of Conduct*, *supra* note 5, at 731. Dan-Cohen uses "decision rule." *See* Dan-Cohen, *supra* note 5, at 627.

an actor's blameworthiness, as well as the capacities and characteristics of the particular actor."[8]

The distinction between conduct rules and decision rules is useful for understanding the normative nature of criminal law and thus the normative nature of the application of criminal statutes. Criminal judgments carry a special condemnation of moral blameworthiness that violations of other rules (say, tort rules) do not. Each criminal adjudication assesses not only whether a conduct-rule violation occurred, but also whether the violation is blameworthy.[9] The terms of criminal statutes, then, are normative as well as positive; a guilty verdict is a moral, as well as descriptive, judgment. Although a guilty verdict is at bottom a moral assessment of blameworthiness, the inquiry should not be an ad hoc one guided solely by the judge or jury's moral intuitions. Rather, decision rules guide the judgment; those rules strive, with only partial success, to insure a consistency of moral standards across cases and conduct rules.[10] They also aim to limit the decisionmaker, who, after all, can dictate governmental control of a citizen's liberty.

A criminal verdict is inevitably an individualized assessment of the defendant's character. It evaluates his judgment in choosing a particular course of action in particular circumstances. In doing so, the verdict serves criminal law's expressive function of assessing the moral quality of his judgment, and thereby his character.[11] Criminal law requires not simply that we obey rules, but that each person "pursue his chosen ends with a due regard for us—with a certain amount of maturity, disinterestedness, and

8. Robinson, *Rules of Conduct*, *supra* note 5, at 732.

9. *See* PETER BRETT, AN INQUIRY INTO CRIMINAL GUILT 40 (1963); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 395-401, 532-38 (1978) (describing "persistent tensions in legal terminology . . . between the descriptive and normative uses of the same terms," and recounting "a normative theory of guilt," rather than a merely descriptive one, that emerged in the nineteenth century); SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 65-106 (1987) (contrasting positivists' focus on social dangerousness as the basis for criminal sanction with the dominant concern with blameworthiness and "moral innocence," which explains mens rea requirements and excuses such as the insanity defense); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 301-46 (1996).

10. *Cf.* Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1465 (1995) (arguing that no juror exercising practical reason "proceeds every step of the way making highly particularized decisions—that would be impossible," and that jurors "must generalize from past experience").

11. *See* R.B. Brandt, *A Motivational Theory of Excuses in the Criminal Law*, *in* CRIMINAL JUSTICE: NOMOS XXVII 165 (J. Roland Pennock & John W. Chapman eds., 1985) (arguing that "criminal liability requires a motivational fault" so that criminal law punishes only those whose "behavior is a result of some defect of standing motivation (one might say 'character' instead)"); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 436 (1958).

perspicacity."[12] We condemn wrongdoers not solely for violating rules but "also for exhibiting the kind of character failing associated with insufficient commitment to the moral norms embodied in the community's criminal law."[13]

Judges' construction of law in jury instructions plays an important role in whether and how jurors assess defendants' culpability. This normative judgment, recent scholarship has persuasively argued, is a nearly inextricable component of the statutory application task.[14] It is also, I suggest, the functional goal behind the key traditional American rationale for the jury, which is to interpose a panel of citizens between the individual and the government as a check on government abuse of power. Before the government—either in the form of a legislature that enacted oppressive, indefensible laws, or an executive official abusing prosecutorial authority—can deprive a citizen of liberty, a panel of citizens not only assesses whether the defendant violated the elements of the statute, but also whether his actions were blameworthy.

If, as I suggest, juries make normative judgments about offender culpability when applying law and courts structure a variety of doctrines to ensure that jurors make such judgments, it is an important question whether juries' apply law in a defensible, appropriate way. What sort of applications of rules constitute a normatively appropriate construction of law—are questions that the study of statutory interpretation pursues.[15] The second part of this paper, then, offers data from a small empirical examination of whether juries apply judicial instructions using interpretive methods that are familiar to judges (such as looking to plain textual meaning, statutory purpose or public values),[16] and whether they pursue those interpretive tasks with the goal of applying law in a way that assesses defendant's moral culpability.

This paper will proceed in two parts. The first Part will explore recent decisions, largely by the United States Supreme Court, that have clarified the parameters of jury authority, and thus what issues the jury gets to decide (and

12. Huigens, *supra* note 10, at 1424.

13. Dan M. Kahan, *Ignorance of Law Is an Excuse - but Only for the Virtuous*, 96 MICH. L. REV. 127, 130 (1997).

14. *See, e.g.*, Huigens, *supra* note 10, at 1464-65; Dan-Cohen, *supra* note 5, at 630-31.

15. Easy rule-application decisions typically are so because all interpretive concerns—plain meaning, purpose, justice of the outcome—point the same way once facts are determined. *Cf.* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1018, 1065, 1082 (1989) (asserting that public values have less influence in statutory application decisions when the text being interpreted is clear and supported by other factors such as legislative history or statutory purpose).

16. *Cf.* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 164-66, 432-33 (1966) (offering a "liberation hypothesis," based on extensive research of actual jury decisionmaking, that suggests that jurors allow values and norms to affect decisions primarily when the evidence in a case is weak or close).

on which it will receive instructions). Together, these decisions identify three key sources of law that define jury authority, and thus to which judges must turn when transforming statutes and common law into jury instructions. Those sources are constitutional law, statutory interpretation and common law. Interestingly, the cases also point out how an expansion of jury authority sometimes favors the state and at other times favors the defendant, though in each instance jury authority expands in a way that encompasses judgment of defendant's culpability. The final section of this Part will briefly look at one aspect of how judges convey law to juries—whether they simply read statutes to juries, paraphrase them, or provide juries with the statute plus an explanatory gloss—and whether that choice removes interpretive duties from the jury. Part II will discuss a study involving a set of mock jury deliberations that suggest how, even in the simplest of criminal cases prosecuted under a simple statute, jurors infuse their application of law with normative considerations of the defendant's culpability. This study offers at least some clues as to whether juries make the sorts of normative judgments of culpability that appellate courts preserve for them and that criminal adjudication theory sets as their task.

I.

A. Initial Parameters of Authority: Jury Issues and Levels of Agreement Required for Verdicts

1. Facts Decided by the Judge versus Facts Decided by the Jury

The Supreme Court in *Jones v. United States*[17] returned to an ambiguous and still-evolving body of doctrine that helps to set the parameters of jury authority, particularly with regard to assessing defendants' culpability. In *Jones*, defendant was convicted under a federal statute that punishes car-jacking (i.e., theft of a car while the owner is still in control of the vehicle). The trial judge's charge to the jury, however, included only the first paragraph of the statute, which states the elements of "tak[ing] a motor vehicle . . . by force and violence or by intimidation" while "possessing a firearm." The statute provides for an enhanced sentence, however, if serious injury or death occurs to a victim.[18] The question posed in the case is whether the jury must determine the existence of those facts as well, though they related only to whether the sentence may be increased. Relying largely on an analysis of legislative intent, the Court construed the statute to mean that the injury

17. 526 U.S. 227, 244-46, 248 (1999).

18. 18 U.S.C. § 2119 (Supp. 1992).

questions were elements of the crime, which must be determined by the jury, rather than mere sentencing factors, which could be determined by a trial judge. In reaching that conclusion, the Court reasoned that it wanted to avoid construing the statute in a way that raised doubts about its constitutionality, and it noted that the case law under the criminal jury trial right of the Sixth Amendment (as well as due process doctrine) "suggests" that legislatures and courts may not take from juries the determination of "any fact . . . that increases the maximum penalty for a crime."[19] While legislatures have full authority to define crimes, they cannot manipulate procedural safeguards such as jury fact-finding by labeling as a "sentencing factor" an essential fact that increases liability.

Jones suggests, then, that facts that are important to the final determination of defendant's level of culpability, at least with regard to his actions during the criminal conduct (as opposed to his prior criminal conduct), should be reserved for the jury. One cannot read too much into *Jones*; the Court expressly noted its doctrine on this point is unresolved, and thus a legislature may be able to circumvent much of this restriction by more clearly drafting a statute to assign such issues to the judge as part of the sentencing decision.[20] Judges retain the sole power (when granted by the legislature) to assess important facts beyond the immediate criminal conduct that affect sentencing, such as defendant's history of criminal conduct and the extent of victim injury. Nonetheless, *Jones* suggests an under-utilized way of viewing the law that governs what issues judges must cede to juries. That division of authority can be seen not merely as mediating the state's power over the defendant; it also serves the systemic value of ensuring jury decisions remain meaningful in a particular way. Preservation of such issues for the jury ensures that the jury adjudicates the important facts—and receives legal instructions upon the issues—most relevant to assessing defendant's moral culpability.

2. Incomplete Agreement on Required Facts and Theories

Once the issues and facts reserved for the jury are identified, there arises a separate question as to the *level* of agreement jurors must reach with respect to a given element or fact.When the defendant is charged with murder, must all jurors agree that defendant committed the killing with a particular weapon, or that he intended to kill rather than merely killed by accident during the course of a robbery? The U.S. Supreme Court has left wide leeway, as a matter of constitutional law, for juror disagreement on the particular facts or theories underlying a charge.[21] Prosecutors have authority to charge a defendant on

19. *Jones*, 526 U.S. at 243 n.6.

20. *See id.*

21. *See* Schad v. Arizona, 501 U.S. 624, 630-32 (1991).

alternate theories about what facts constituted the actus reus (e.g., whether defendant killed the victim by gunshot or by drowning) or the mens rea (e.g., whether by premeditation or felony murder). Legislatures can enumerate different means by which prosecutor can prove elements and by which jury can find elements; juries need not agree on those alternative means. In this sense both the legislature's and the prosecutor's power is expanded; the prosecutor can offer two or more theories at trial for proving the same element. Jurors can disagree on which facts fulfill the element yet still render a guilty verdict. The jury need not resolve those competing theories with the same level of agreement (say, super-majority if not unanimity) that they are required to reach on the basic elements, such as whether a homicide occurred.[22]

Thus verdicts can be incompletely theorized, although only to a certain extent still undefined by constitutional law. There are outer limits of due process, the Court suggests, on which act or mental state the jury must agree actually occurred.[23] There is an obvious due process concern with vagueness—that the defendant be able to identify what offense is prohibited by the statute and alleged in the indictment—and also with fairness, such that even sufficiently specified offenses (say, embezzlement and murder) cannot be alternate bases for liability.[24] Judges use those doctrinal limits occasionally to narrow prosecutorial charges. Beyond those basic limitations, however, the key responsibility is the jury's, which gets a lot of leeway to determine how much unanimity on theories or facts that it wants to underlie its verdict.

Apparently, it is common for juries to get no instruction on whether they are allowed to have disagreements underlying the verdict. This is, then, a tilt toward one form of broad jury authority. It leaves to the jury's collective judgment and conscience how much agreement is necessary for conviction (assuming, questionably, they identify level of agreement as a topic they should consciously address). In theory, this breadth of jury authority could work for either the defendant or the state. The jury could decide, for example, that complete unanimity on theory and facts is required, despite the constitutional acceptability of incomplete agreement. But over a range of cases, the doctrine favors the state. It allows juries to convict without full agreement among jurors on underlying facts or theory, a breadth of authority that surely some juries exercise. Yet, just as we see in the statutory

22. The Court's recent decision in *Richardson v. United States*, 526 U.S. 813 (1999), does not change the constitutional doctrine. *Richardson* held that a jury must agree on the specific facts that constitute each "violation" in the "continuing series of violations" proscribed in 21 U.S.C. § 848(a). But that decision was reached as a matter of statutory interpretation rather than common law. After *Richardson*, it appears Congress could amend the statute so as not to require that level of agreement, and its only boundary would be the broad parameters set by *Schad*.

23. *Schad*, 501 U.S. at 632.

24. *Id.* at 633.

interpretation issues examined below, this choice of jury authority—allowing jurors to determine what level of agreement they will reach to render a verdict—may well relate to jury assessments of culpability. Jurors can determine what degree of consensus they must reach in order to render a verdict, perhaps requiring more agreement for the facts of some elements, for more serious charges, or when the choices between factual theories connote significantly different levels of blameworthiness.[25]

B. Statutory Interpretation and Assessments of Culpability

The construction of statutes is usually framed in terms of the tension between a reading that protects the defendant—exemplified by the rule of lenity, a statutory construction canon that commands ambiguities be construed in defendants' favor—and a reading that expands the statute in favor of prosecutors, such as construing the statute to cover more varieties of conduct.[26] But another way to view those interpretive options is to assess whether the construction presents additional issues to the jury; in that sense, statutory interpretation expands or contracts jury authority. With that consideration in mind, interpretations may be mediated not only by the fairness concerns that underlie the lenity rule, or by deference to decisions of the politically accountable branch of government, which underlies respect for legislative intent that explains some expansive readings favored by prosecutors. It may also be mediated by whether a jury is competent to handle the issue. Competency, it turns out, has little to do with complexity, because we give juries incredibly complex statutes. Instead, it seems to have more to do with (a) whether the issue is one that helps assess the 'defendant's moral culpability, (b) whether the jury has access to resources that courts deem relevant to statutory construction, such as coherence with related statutes that sheds light on legislative intent. The first concern may explain why some expansions of

25. States may choose to narrow the jury's authority and require complete agreement on means of crime commission or other key facts. Judges in particular may do so through their drafting of jury instructions. Arizona's Supreme Court, for one, encourages as a matter of policy (but does not require) separate verdict forms when an element can be proven by two different means. (The trial court could, for example, give the jury one verdict form for premeditated murder and one for felony murder.) Such mechanisms clarify jury's reasoning for purposes of judicial sentencing and appellate review, although in some sense they constrain jury authority—the authority to reach incompletely theorized agreements. Yet one still might see such approaches as relating to culpability. If one distrusts juries to calibrate their level of agreement according to a fact's relevance to culpability, then such judicial procedures force jurors to deliberate and to render a guilty verdict only after they have reached consensus on crucial issues.

26. For discussion of a recent, high-profile example, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (discussing child-abuse statutes interpreted to criminalize drug use during pregnancy).

jury authority seem to favor defendants, while others tend to favor the state. The latter, which I address in section C of this Part, through a discussion of *United States v. Sun-Diamond Growers*,[27] clarifies the division of statutory interpretation power between judge and jury.

Consider *United States v. Gaudin*.[28] Mr. Gaudin was charged, in effect, with perjury—more precisely, with making false statements on federal housing loan documents. The statute under which he was charged forbade "wilfully falsif[ying] . . . a material fact, or mak[ing] any false . . . statements or representations. . . ."[29] It was undisputed that defendant's alleged "false . . . statements" must be "material" in order for him to be liable. The trial judge, however, concluded that materiality was a legal question for the judge; he instructed the jury that they were to accept that defendant's alleged statements were material.[30] Defendant appealed his conviction, asserting that the constitutional doctrine requires that the jury be given the issue of materiality. The Supreme Court agreed and held that the issue of materiality is an element of the crime and thus must be decided by the jury.

There is, admittedly, nothing inherently "pro-defendant" in reserving this decision for the jury. It may be that judges would more frequently find false statements to be immaterial than jurors would. But the ex ante assumption of most defendants, I suspect, matches that of Mr. Gaudin: they expect that their chances are better with a jury. Regardless, the decision unequivocally reaffirms jury authority. And the issue of materiality is an important one to incorporate into the jury's general verdict of guilt or acquittal. Materiality, after all, reveals whether the defendant's statements were mere technical, blameless violations, or to the contrary, whether they were important enough

27. 526 U.S. 398 (1999).

28. 515 U.S. 506 (1995).

29. *Gaudin*, 515 U.S. at 509, recounted the statute in full:

Section 1001 of Title 18 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1988). It is uncontested that conviction under this provision requires that the statements be "material" to the Government inquiry, and that "materiality" is an element of the offense that the Government must prove. The parties also agree on the definition of "materiality": The statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." Kungys v. United States, 485 U.S. 759, 770 (1988) (internal quotation marks omitted). The question for our resolution is whether respondent was entitled to have this element of the crime determined by the jury.

30. *Gaudin*, 515 U.S. at 508.

that they indicate his larger intent and even his motive and character. Materiality measures not only the effect of defendant's actions in terms of social harm (whether the falsification likely led to improper loans) but also his culpability (in large part because extent of harm can be in an important component of culpability judgments). To protect the culpability assessment implicit in guilty verdicts, juries need to consider the element of materiality. *Gaudin*, then, reaffirms the constitutional breadth of jury authority to the extent required to let the lay panel assess defendant's full blameworthiness before it approves the government's effort to punish him.

The implications of *Gaudin* stand in some contrast to a recent federal court of appeals decision in *United States v. DeZarn*,[31] in which the court of appeals upheld the perjury conviction of Mr. DeZarn, who made false statements under oath to a government investigator. The court accepted DeZarn's contention that his answers were literally true responses to literal understandings of the investigator's questions. But it found the questions were misstatements by the investigator and that both DeZarn and the questioner knew what the question was really intended to ask; to that actual topic at issue, DeZarn's answers were misleading or false.

The *DeZarn* decision is more a matter of statutory and common-law interpretation rather than constitutional law; the court had to define the reach of the perjury statute in this context, particularly in light of U.S. Supreme Court precedent holding that "literal truth" is a defense to at least some perjury prosecutions. The *DeZarn* court read that defense doctrine narrowly, distinguishing the situation in which that doctrine arose—a defendant's non-responsive answer to a question—from DeZarn's circumstance, which the court viewed as a clear, responsive answer that (though literally true) conveyed false information when the questions are examined in context.

DeZarn, then, is an example of an expansion of jury authority that works to the defendant's disadvantage. Defendant wanted this case never to get to the jury. Instead, the court permitted the case to go to the jury with a range of evidence on the context of the questions and answers at issue. That evidence allowed the jury to view the defendant's actions in fuller light and context—to assess his actual blameworthiness. An alternate approach can be seen as limiting the jury to more narrow, factual tasks: what literal questions were asked and whether the literal answers were truthful. Allowing the jury broader interpretive leeway of the event, by more broadly interpreting the statute to cover literally truthful answers in some contexts, allows a more accurate assessment of defendant's culpability.

This theme of ensuring that issues crucial to assessing blameworthiness get to the jury occurs elsewhere in recent Supreme Court cases. In *United States v.*

31. 157 F.3d 1042 (6th Cir. 1998).

Cheek,[32] the defendant did not file required income tax returns and was charged under federal statutes that provide that any person "who willfully attempts in any manner to evade or defeat any tax . . . or the payment thereof" is guilty of a felony, while "[a]ny person required [by law to file a tax return] who wilfully fails to . . . make such return" is guilty of a misdemeanor.[33] His defense was that, as a result of his own research and participation in tax-protester seminars, he sincerely believed that income tax statutes were unconstitutional and, therefore, he had no obligation to pay. The Court noted that its prior decisions made clear that "wilfulness" in criminal tax statutes requires the government to prove the defendant knew of the duty and intentionally violated it.[34] "Wilfulness" requires specific intent. Yet the trial court had instructed the jury that Cheek must have "honestly *and reasonably* believed that he was not required to pay income taxes or file tax returns," and that "[a]n honest but unreasonable belief is not a defense and does not negate wilfulness."[35] The Supreme Court held those jury instructions to be in error, reversed the conviction and sent the case back for retrial on an interpretation of the statute that allows even an unreasonable belief to constitute a defense if it is honestly held by the defendant.

For the jury, the *Cheek* holding substantially changes the instructions it will receive and the terms on which it will determine the defendant's liability. One could view the change as having little effect on the *scope* of jury authority; the issue is simply which of two rules the jury will use to assess evidence and determine guilt. Yet if culpability is the organizing concern of jury authority (and criminal litigation generally), the *Cheek* holding expands jury authority in an important respect, and again signals that statutes should be construed so as to ensure issues relevant to culpability get to the jury. Under the *Cheek* trial court's approach, the judge rather than the jury would have made an important decision about culpability—that unreasonable beliefs can never negate liability, no matter how honestly and in good faith the defendant acted. The Supreme Court's reading of the statute, in contrast, requires the jury to assess both the honesty and sincerity of defendant's beliefs and actions. It puts the jury's judgment (and only the jury's) squarely on issues that reveal moral blameworthiness—the defendant's state and mind and personal intentions. The jury can still assess the reasonableness of defendant's actions, but does so now only as evidence from which to make inferences about the

32. 498 U.S. 192 (1991).

33. 26 U.S.C. §§ 7201, 7203 (1954).

34. *Cheek*, 498 U.S. at 201.

35. *Id.* at 196-97. To drive the point home, the trial court told the jury that "[a]dvice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense." *Id.* at 197.

sincerity of his claims, rather than as a sine qua non for liability. And in the *Cheek* case itself, there was clear evidence the jury considered its assessment of defendant's subjective beliefs to be the crucial component of a judgment on liability: after returning a guilty verdict they felt was compelled by the judge's instructions, the jurors took it upon themselves to jointly sign a written "complaint against the narrow and hard expression under the constraints of the law," adding that at least some jurors believed that defendant's beliefs were sincere although unreasonable.[36] That response suggests the Court's interpretation of the statute accords with what at least some lay jurors consider to be the central concern for assessing culpability in such cases.

C. Levels of Statutory Interpretation: Allocation Between Judge and Jury

Several aspects of the jury-instruction doctrine, then, expand or control the range of juries' authority, including authority to interpret and apply law. The recent case of *United States v. Sun-Diamond Growers*[37] highlights a somewhat different issue: the decision shows the level of statutory interpretation that judges can effectively dictate to the jury. The facts of *Sun-Diamond* and the statute under which defendant was prosecuted are not especially important. Defendant was a trade association charged with making illegal gifts to a government official with administrative authority over issues of concern to the defendant's members. The Supreme Court disapproved of the expansive gloss that the trial court gave to the illegal-gratuity statute, holding that a more narrow construction (more favorable to defendant) was the proper interpretation of the statute, consistent with legislative intent.[38]

What is more interesting for our purposes is how the trial court instructed the jury on the applicable statute. The trial court read to the jury the exact language of the statute under which defendant was charged, but it also explained the statute to the jury—it offered the jury the trial judge's interpretation of the statutory language. The Supreme Court disagreed with that interpretation and looked to Congress's intent to determine the statute's reach; it paid particular attention to "the context of the statutory scheme" meaning, to other, related statutes that describe and criminalize similar conduct,[39] a strategy sometimes called "horizontal coherence."

In giving priority to that mode of analysis to determine legislative intent for a statute, the Court gives priority to a mode that the jury is unlikely to be able to engage in. American courts typically do not give juries statutes that are not directly applicable to the defendant's alleged conduct, merely as a resource

36. *Cheek*, 498 U.S. at 198 n.6.
37. 526 U.S. 398 (1990).
38. *Id.* at 405-06, 412.
39. *Id.* at 404, 408-09.

for interpreting the statute at issue. Juries do have the ability to engage in another, primary means of determining legislative intent; they can try to determine the statute's intent from its plain language and seeming purpose. But if "horizontal coherence"— i.e., consistency with other statutes—is a primary means of determining statutory meaning, juries are ill-equipped for that task. Courts will take it upon themselves to provide an explanation of a statute's meaning, which is to say (as in *Sun-Diamond*) an instruction that limits the statute's meaning and coverage.

Interestingly, while *Sun-Diamond* says, in effect, that if a court explains a statute's meaning to a jury that it must get it right, there is apparently no constitutional or other requirement that trial courts explain statutes to juries. Trial judges could simply read the applicable statutory passages to the jury (as the trial judge did in *Sun-Diamond*) and leave it to the jury to interpret the law's meaning and reach. Because jury acquittals are not reviewed and convictions are reviewed deferentially when correctly instructed, juries could then come to wrong interpretations (as did the *Sun-Diamond* trial judge) without having that error corrected by review. (In theory, of course, such errors will work only in the defendant's favor. Convictions based on wrong interpretations can be overturned, as *Sun-Diamond* illustrates.) Trial courts have the discretion, then, through their drafting of instructions, to grant the jury greater or lesser interpretative leeway. Alternatively, they can follow the example of the *Sun-Diamond* trial court—which is in fact the custom, I believe—and take for themselves an initial, substantial portion of the interpretive work.

It is important to recognize that even when courts impose on juries a binding interpretation of a statute, the jury frequently still has significant interpretive leeway. Again, the facts of *Sun-Diamond* provide an example. The defendant gave the Agricultural Secretary several thousand dollars worth of gifts at a time when the Secretary's department had pending before it two issues of great interest to the defendant's members (regulation of pesticide and changes in access to federal funds to market defendant's goods overseas). The statute prohibits giving "anything of value" to a public official "for or because of any official act performed or to be performed by such public official."[40] The trial judge interpreted the statute in his jury instruction to mean that liability arises if defendant gave an "unauthorized compensation simply because [the official] held public office" and the gift need not be "linked to any specific or identifiable official act or any act at all."[41] The Supreme Court held instead that the statute requires the government to "prove a link between a thing of value conferred upon a public official and a specific 'official act' for

40. 18 U.S.C. § 201(c)(1)(A) (1962).

41. *Id.* at 403.

or because of which it was given."[42] Even under such a statutory gloss, the jury still has the considerable task not only of determining the difficult factual question of the defendant's intent, but also the meaning or content of such legal language as giving "for or because of" an official act. The jury may arrive at a sense of defendant's intent and still have difficulty whether that intent amounts to giving a gift "for or because of" a future act.

In fact, even the most simple statutory language— or well-crafted judicial paraphrases of statutes—can leave significant interpretive issues for the jury. And those issues often implicate the defendant's culpability; the jury can use judgments about culpability to inform its statutory construction. The *Sun-Diamond* jury, on re-trial, could conclude that the defendant's intent is morally blameworthy and use that judgment to lead it to a construction of the statute and judicial instructions ("for or because of") that inculpates the defendant. Part II of this paper recounts laboratory evidence that juries do exactly that—use normative judgments about culpability to guide their conclusions about both factual issues such as mens rea and construction of relatively simple statutory language.

II.

A. A Note on Jury Comprehension of Statutes and Judicial Drafting of Instructions

Social science research has demonstrated that jurors do not consistently apply jury instructions literally. One explanation for these findings is that jurors simply do not understand the instructions.[43] They may not remember rules or statutory elements they are given through instructions and they may misunderstand rules of which they have some memory, particularly if they have strong preconceptions about the alleged crime.[44] The methodology used in some studies likely exaggerates the amount of miscomprehension.[45]

42. *Id.* at 414.

43. *See* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 3-24 (1982); Paul H. Robinson, Are Criminal Codes Irrelevant?, 68 S. CAL. L. REV. 159, 170-75 (1994); Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153 (1982).

44. *See* REID HASTIE ET AL., INSIDE THE JURY 168-72 (1983); Severance & Loftus, *supra* note 43, at 157-61, 194 (discussing studies); Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 507, 508-11 (1993).

45. Hastie has argued from substantial research that juries as a group likely understand instructions better than any single member does. Hastie's study of a large set of mock juries found jury memory averaged slightly over eighty percent for information from judge's instructions, if one credits a jury with recall of information that any one juror remembers. *See* HASTIE ET AL., *supra* note 44, at 81. He also documented significant correction of jurors' legal

Moreover, juror miscomprehension is a problem partly separate from jury rule interpretation because much of the blame for jurors' lack of understanding lies, to a significant extent, with courts rather than juries.

Courts could substantially improve jury comprehension of instructions with two sorts of changes: rewriting them to reduce complexity and legal terminology and improving the manner in which instructions are presented. Traditionally, jurors receive instructions orally from the judge at the end of trial and often cannot take written notes.[46] Studies indicate comprehension could substantially improve if jurors received written copies of instructions to take to the jury room, if they received key instructions at the start as well as the end of the trial, and if instructions were written in shorter sentences using fewer arcane terms.[47] Further, there is evidence that jurors misunderstand instructions defining crimes because the definitions conflict with lay

errors by other jurors during deliberations, a factor other studies did not explore. *See id.* at 80-81 (noting that individual jurors answered questions on instructions with less than thirty percent accuracy, but a "more meaningful examination of memory" found the jury's collective memory of instructions was over eighty percent accurate); *See also* NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 283 (1995) (discussing empirical studies "show[ing] that jurors do not ignore or willfully disregard instructions but that they remember and comprehend them."). Correction of jurors' misunderstanding of instructions by other jurors repeatedly occurs in the set of eight Harris mock jury deliberations discussed below. *See, e.g.*, Transcript of Harris Jury No. 2, at 9-11 (on file with author), in which other jurors try to correct Juror 2's incorrect understanding of the law.

46. *See, e.g.*, ARTHUR D. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY 55-65 (1984) (discussing juror comprehension of instructions in a case that was tried to two juries because the first jury hung, with only the second jury receiving written copies of the instructions and pretrial, verbal instructions); *See also* JEFFREY ABRAMSON, WE, THE JURY 91 (1994) (describing "judges' furious, quick-paced, jargon-laced set of instructions" to juries).

47. *See* AUSTIN, *supra* note 46, at 60-65 (noting that the instructions in the case under study averaged 102 words per sentence, while modern American prose averages twenty-one words, and were written at a "sixteenth grade level" requiring graduate education to comprehend fully); ELWORK ET AL., *supra* note 43, at 3-24, 35-56; HASTIE ET AL., *supra* note 44, at 231; Raymond W. Buchanan et al., *Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions*, 26 COMM. Q., 31, 32-35 (1978) (finding that jurors given pattern instructions show better comprehension of law than uninstructed subjects); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1308 (1979) (finding improved comprehension when instructions are rewritten); Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 LAW & HUM. BEHAV. 159 (1985) (finding that mock jurors' decisions are affected by changes in burden-of-proof instructions); Vicki L. Smith, *Impact of Pretrial Instructions on Jurors' Information Processing and Decision Making*, 76 J. APPLIED PSYCHOL. 220 (1991) (finding that instructing jurors before as well as after trial improves juror comprehension); Smith, *supra* note 44, at 510, 533 (reviewing research literature and reporting results of an experiment with a revised instruction that "produced remarkable improvements" in mock jurors' use of legal categories rather than lay conceptions of crime elements).

preconceptions of what acts and circumstances constitute those crimes.[48] Research indicates as well that properly crafted instructions can largely correct this tendency and improve jurors' understanding of crime definitions.[49]

B. Case Study: Mock Jury Application of Law and Assessment of Culpability

I now turn to a set of mock jury experiments in order to illustrate the salience of two issues discussed above. The first is the significant scope of legal interpretive tasks remaining for jurors even after they are given clear statements of relatively simple statutes; the other is the importance of moral culpability assessments in those interpretations and in final verdicts. My findings suggest, I believe, that the court, in using culpability as an organizing principle of jury authority, structures jury authority around the central concern lay people want to focus on in rendering criminal judgments, and also is more likely to present jurors with the issues and concerns through which they want to mediate their interpretation of statutes.

The experiments centered on a case file called *Michigan v. Harris*,[50] which raises the traditional criminal law interpretive challenge of defining the reach of a state-of-mind requirement across several statutory elements. In particular, the *Harris* mock juries repeatedly struggled with whether the statute's intent requirement applied to circumstance as well as conduct elements of the crime.

In *Harris*, fictional defendant William Harris is a retired machinist who took a pile of bricks from a vacant property on which they had been sitting for

48. *See* Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857 (1991). As an example of such preconceptions, Smith's research indicates that lay notions of kidnapping occasionally assume that the crime requires a ransom demand, that the motive must be money, or, in the case of child victims, that the motive arise from the context of a custody battle. *Id.* at 861 tbl. 1.

49. *See* Smith, *supra* note 44, at 533 (finding that test instructions designed to correct erroneous preconceptions of crime definitions "produced remarkable improvements" and are "a promising way of improving decision accuracy").

50. The case file was constructed, and this mock jury experiment conducted, by Professor Joseph Sanders and his colleagues at the University of Michigan. Sanders had forty-eight mock juries, usually six members each, deliberate for about thirty minutes each. Not all reached unanimous verdicts. The variables tested were public ownership versus private ownership of the property; general-intent instructions versus specific-intent instructions; and an instruction commanding jurors to follow the law given by the judge versus one stating that the law was intended only to be helpful in reaching a just and proper verdict. The experiment is further described in James A. Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 LAW & HUM. BEHAV. 83, 86-89 (1985). My data for this article consists of eight transcribed jury deliberations——one from each "cell" of the research design, that is, one deliberation under each of the variable conditions——as well as the paper by Sanders and Diane Colasanto that analyzed the verdicts of all forty-eight mock juries. *See* Joseph Sanders & Diane Colasanto, *The Use of Judicial Instructions in Jury Decision Making* 7-10 (n.d.) (unpublished manuscript, on file with author).

the eight months since the property's sole building had burned down.[51] All remains of the burned building except the bricks had been removed. The lot was fenced and had a "private property" sign but lacked a gate.[52] The bricks were marred by burn scars and old mortar. Harris stated at trial that he came to assume, during the eight months between when the building burned and when he took the bricks, that the bricks were abandoned. So, one afternoon Harris loaded them into his truck, took them home, cleaned them, and built a barbecue with them. He was seen loading the bricks by a woman who lived across the street from the vacant property and who knew him socially. When the owner reported the bricks missing to the police, the police checked with the woman, and she identified Harris. Harris admitted to the police, and at trial, that he took the bricks because he thought they were abandoned.

The only real legal issue in *Harris*, then, was the defendant's state of mind. Half the mock juries on the *Harris* case received a general-intent instruction, which stated in part that "the defendant's intention is inferred from his voluntary commission of the act forbidden by law, and it is not necessary to establish that the defendant knew that his act was a violation of the law."[53] The other half received a specific-intent instruction, which stated in part that "the crime charged in this case requires proof of specific intent . . . . To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law."[54] In addition, both juries were told:

> To sustain the charge of theft, the State must prove the following propositions:
>
> First: That Steven P. Connolly[55] was the owner of the bricks in question; and
>
> Second: That the defendant knowingly obtained unauthorized control over the bricks; and
>
> Third: That the defendant intended to deprive Steven P. Connolly permanently of the use or benefit of the bricks.[56]

51. For the background facts of the Harris mock case, see Transcript of Michigan v. Harris: Trial Simulation 1-6 (on file with author).

52. Ownership of the property was actually one of the variables tested in this mock trial; half the juries were told an individual owned the lot and that it was posted "private property," while the other half were told the state of Michigan owned it, and thus the sign read "property of the state of Michigan." *See* Sanders & Colasanto, *supra* note 50, at 8-9.

53. *Id.* at 9-10.

54. *Id.* at 10.

55. For the half of the juries told that property was publicly owned, the instructions substituted "the State of Michigan" for Connolly's name. *See* Transcript of Michigan v. Harris: Trial Simulation 12 (on file with author).

Thus structured, the *Harris* case poses a familiar issue of criminal law: the nature of a defendant's intent and the nature of intent required for conviction. Must the defendant intend only the physical act—picking up bricks—or also the consequences—depriving the owner of their use? Must he intend also the *criminal nature* of the act—that is, must he intend to commit a crime, or at least intend to do something he knows is wrong? The differing instructions address this issue, but the language common to both raises it as well. The *Harris* juries struggled with whether the requirement that "the defendant knowingly obtained unauthorized control" meant: (a) that he took the bricks—which he happened not to have authority to do—to which his knowledge or mistaken belief was irrelevant, or (b) that he took the bricks knowing he was not authorized to do so. They debated, in other words, a basic problem of criminal code construction: does the mens rea requirement extend only to the conduct element, or also to the circumstance element?[57] This interpretive problem goes to the heart of defining culpability: Is one blameworthy under the former construction, or only under the latter? For answers, jurors turned to a core set of norms and a broader set of interpretive strategies.

The *Harris* fact pattern includes several elements addressed by jurors that point toward acquittal. Some jurors find the defendant somewhat sympathetic: he has no criminal record, except for a reckless driving conviction.[58] His alleged criminal act and its resulting harm were, in the view of some jurors, de minimus.[59] Others viewed it as conduct better addressed by civil proceedings focused on restitution rather than criminal blame.[60] In accord with Kalven and Zeisel's findings about assessments of victim's behavior, several juries raised the issue of whether the property owner was remiss in not putting a gate on the property, posting a sign on the bricks, or otherwise preventing the appearance of abandonment.[61] Moreover, for many jurors, the defendant's claim that he

56. Transcript of Michigan v. Harris Trial Simulation 12-13 (instructions given to mock juries) (on file with author); *see, e.g.*, Transcript for Harris Jury No. 8, at 11 (on file with author); Transcript for Harris Jury No. 2, at 16 (on file with author).

57. *See, e.g.*, Transcript for Harris Jury No. 7, at 8-10.

58. *See, e.g.*, Transcript for Harris Jury No. 6, at 6, 10 (deciding that Harris was "not a criminal," even to those convinced he committed this criminal act). Other jurors had no sympathy for the defendant. *See, e.g.*, Transcript for Harris Jury No. 4, at 26 ("I think the guy was trying to get away with something."). Like the Reed jurors, members of several of the Harris juries disapproved of allowing "sympathy" to affect their judgment and tried, consciously at least, not to allow sympathy or emotion to affect their, or fellow jurors', judgments.

59. *See, e.g.*, Transcript for Harris Jury No. 4, at 12-13.

60. *See, e.g.*, Transcript for Harris Jury No. 8, at 8 (several jurors agreeing that the "equitable" outcome would be restitution or "return the bricks and it's all over").

61. *See* Transcript for Harris Jury No. 5, at 2, 10-11; Transcript for Harris Jury No. 7, at 4; Transcript for Harris Jury No. 8, at 7; *See also* KALVEN & ZEISEL, *supra* note 16, at 242-57.

intended no crime and believed he was taking abandoned property made his intent insufficient for conviction.[62]

None was sufficiently strong to overcome many jurors' plain-language interpretations of the statute, particularly under the general-intent instruction. The plain-language approach here is strengthened by considerations that point toward conviction, leading many jurors to feel no need to explore interpretations of intent instructions that would support acquittal.[63] The most important such factor, discussed by every jury and dominating discussion of some, was a common norm or value we can identify as a law-based public-value—the private-property norm.[64]

For many jurors, this theft case implicated the strong value they place on private ownership of property, including the right to exclude others and to do with property what one wishes—such as leaving items untended indefinitely. Many jurors expected the law to be applied so as to reinforce this fundamental property norm and to impose no ongoing obligations on owners, such as posting signs to forestall assumptions of abandonment.[65] Jurors who held strongly to the private property norm occasionally voiced overt disagreement with the specific-intent requirement, which they saw as undercutting criminal convictions for those who take others' property.[66] On the other side, one juror who leaned strongly toward acquittal because she thought the defendant's intent was insufficiently blameworthy also voiced disagreement with the law.[67] More often, jurors did not overtly voice such disagreement but did allow

62. *See, e.g.*, Transcript for Harris Jury No. 6, at 5, 7; Transcript for Harris Jury No. 7, at 14.

63. Of the eight deliberations studied here, none of the juries unanimously acquitted the defendant. Jury No. 1 hung 3-3, Jury No. 2 hung 4-2 for acquittal, Juries Nos. 3 & 6 voted unanimously for guilty, and the remainder hung with 4-1, 4-2, or 6-1 majorities voting for conviction. *See* Harris transcript materials (on file with author) (verdict forms accompanying each transcript document file). The high percentages of hung juries presumably arose from the thirty-minute time limit on deliberations.

64. Public values, as I use the term here, refer to widely held social norms that have some grounding in legal and political culture. *See* Eskridge, *supra* note 15, at 1007-08 (defining public values as "legal norms and principles that form fundamental underlying precepts for our polity - background norms that contribute to and result from the moral development of our political community . . . [those that] appeal to conceptions of justice and the common good, not to the desires of just one person or group").

65. *See, e.g.*, Transcript for Harris Jury No. 2, at 23; Transcript for Harris Jury No. 5, at 11 ("It's private, it belongs to somebody else. You want to have to post . . . the whole front of your front lawn no trespassing, private property, . . . just to prevent somebody from walking off with something that's . . . . . in your front yard?").

66. *See, e.g.*, Transcript for Harris Jury No. 4, at 20 ("I wish they hadn't put . . . in [the element requiring proof that the defendant intended to deprive the owner of property]."); *id.* at 28 ("We're going to have to edit that tape [which recorded the judge's instructions on specific intent].").

67. *See* Transcript for Harris Jury No. 3, at 5-6.

strongly held property norms to convince them of an application of the intent requirement that supported conviction. This property norm was so strong and pervasive that for many jurors it was the explicit baseline of their legal reasoning. Most juries had members who concluded that the defendant failed to perform an implicit obligation to check with the owner before taking the bricks,[68] an expectation that arises from the property norm. The norm also cut against the defendant's asserted belief that the property was abandoned. Jurors who strongly held to the norm tended either to find the defendant's claimed belief incredible or, if honestly held, then unreasonable and worthy of little weight.[69] The property norm in its strongest version—expressed by members of several juries—undercuts the very idea of abandonment, that is, that ownership can be relinquished by any means other than express gift or sale and that property can be unowned.[70]

The property norm provides an important baseline for the *Harris* jurors' understanding of the defendant's intent. For those starting with the assumption that all property is owned and can never be taken without first asking the owner, the defendant's decision to take the bricks necessarily implied that he also intended to deprive the owner of the bricks.[71] The strongest version of this approach, imbuing the property norm with clear moral content, inferred also that anyone taking property—and thus knowingly depriving its owner of it—knew also that he was committing a moral wrong, if not a crime.[72]

68. *See* Transcript for Harris Jury No. 2, at 6-8, 11; Transcript for Harris Jury No. 4, at 11; Transcript for Harris Jury No. 5, at 1-2, 4, 6, 11; Transcript for Harris Jury No. 8, at 4, 19, 20.

69. *See, e.g.*, Transcript for Harris Jury No. 2, *passim* (Juror 2); Transcript for Harris Jury No. 5, at 9; Transcript for Harris Jury No. 6, at 2, 3, 10.

70. *See, e.g.*, Transcript for Harris Jury No. 4, at 9, 21; Transcript for Harris Jury No. 5, at 2 ("It's got to belong to somebody."); Transcript for Harris Jury No. 7, at 11 ("I personally think . . . property . . . does belong to somebody." (first ellipsis in original)); *id.* at 20 ("But how can somebody abandon it when it's on private property?" "That's what I don't get either. I don't get that at all."); Transcript for Harris Jury No. 8, at 12, 17 ("Even 'abandoned' doesn't mean that it's not . . . doesn't belong to someone." "All property is owned by somebody." (ellipsis in original)).

71. *See, e.g.*, Transcript for Harris Jury No. 7, at 13-14 ("I'm beginning to feel that quite possibly this guy did have the intent of . . . depriving this guy of his bricks . . . . [T]he intent is established because he never tried to find out if he could have them . . . . [A]nd he knew that the bricks were not his."); Transcript for Harris Jury No. 8, at 11-13.

72. *See, e.g.*, Transcript for Harris Jury No. 2, *passim* (Juror 2); *see also* Transcript for Harris Jury No. 5, at 1 ("Now I'm sure he knows right from wrong . . . in the sense that . . . he knew there was a sign there saying private property, and private property is . . . just exactly what it says, belongs to somebody else and what's on it, you know . . . belongs to somebody else . . ."); *id.* at 2 ("I'm sure that in the back of his mind that he knew that [the bricks] had to belong to someone . . . [y]ou just don't do that."); *id.* at 7; Transcript for Harris Jury No. 7, at 12-13 (Jurors 5 & 6); *id.* at 16 ("[H]e knows that that's wrong it says private property."; "Sign that says private property . . . to me it's not abandoned, it is private property."); Transcript for Harris Jury No. 8, at

With this baseline assumption about "common moral sense," such jurors concluded that the defendant's admission that he took the bricks met the statutory requirement that the "defendant knowingly obtained unauthorized control over the bricks." Jurors could reach this conclusion by either statutory or factual construction: either the mens rea element does not extend to the circumstance element of no-authorization because extending it allows more acquittals and so weakens property rights, or the defendant, knowing that he did not ask the owner's permission, thereby knew that his taking was unauthorized.[73] Thus, by deciding to take the bricks "the defendant intended to deprive [the owner] permanently of the use or benefit of the bricks."[74]

Mark Kelman argued several years ago that criminal law poses inevitable difficulties of interpretive construction, such that,"[l]egal argument can be made only after a fact pattern is characterized by interpretive constructs." One may view a defendant's intent narrowly or broadly, or restrict consideration to a narrow or broad time frame.[75] Kelman suggests that the ultimate fit of a factual and legal interpretation hinges in large part on the baseline normative vision that it serves. Jurors construct such factual interpretations for a purpose, which is to assess culpability in light of criminal statutes. Factual interpretation and statutory interpretation, then, likely have an interactive or reciprocal relationship: a factual story will make a particular application of a statute seem obvious, appropriate, or most plausible. Conversely, statutory language that seems to compel one result in light of an initial factual understanding may prompt a jury to reconsider its construction of facts if that initial result is discomforting.

It should not surprise us, then, that a decisionmaker would tend to be persuaded by a construction of an instruction that most readily serves her sense of the proper outcome. Here, conviction and the underlying property norm are served by not extending the mens rea requirement to the circumstance element of authorization. Should that construction seem unpersuasive, the

7 ("[I]t's a terrible thing to think that the man's property was taken in the first place, you know." "That's true, yes."); *id.* at 20 ("[P]roperty does belong to somebody. Now I could conceive of myself maybe going in there and saying, I could probably get away with a truckload of these bricks . . . . But, by the same token, going in there, I would have to say in my own mind, I know that building must belong to somebody.").

73. *See, e.g.*, Transcript for Harris Jury No. 8, at 4.

74. *See, e.g.*, Transcript for Harris Jury No. 4, at 28; Transcript for Harris Jury No. 5, at 13 ("By taking [the bricks] he willfully deprived [the owner].").

75. Mark Kelman, *Interpretive Construction in Substantive Criminal Law*, 33 STAN. L. REV. 591, 593 (1981); *see also, id.* at 595, 620-27 (describing "interpretive constructs" such as broad versus narrow framing).

decisionmaker may reassess the factual interpretation to conclude that the defendant possessed intent with regard to the lack of authorization as well.[76]

As part of the property-norm approach, some jurors referred to the fact that the defendant violated a separate law not at issue—the law of trespass.[77] The trespass concern is a natural extension of the property norm, but we can also view the perceived relevance of defendant's trespass as an effort by the jury at "horizontal coherence" within the collection of statutes that protect property. Legislation scholars note that courts sometimes turn to statutes related to the one they must apply—others in the same act or regulating similar matters—for help in construing the statute's meaning and ensuring the compatibility of this application with the purposes of other statutes.[78] Comparably, jurors concerned with trespass violations—and motivated by a strong property norm—wanted the theft statute in *Harris* broadly interpreted. Failure to convict for this taking, they reasoned, implicitly permits trespass and weakens property owners' right to exclude others from their land. A coherent regime of statutes that enforce property rights will strictly forbid both trespasses and takings.

A few jurors with strong property-rights views expressed no sympathetic understanding of Harris's conduct; any trespass and taking seemed to them plainly wrong. But more jurors voiced some sympathy. Demonstrating the strength of the property norm, even jurors who found the defendant an amiable retiree, who was "not a criminal" and who intended no crime still thought he committed a "mistake of judgment" that merited conviction.[79]

Interpretations based on a strong property norm conflicted with the familiar premise that moral blame requires the defendant to know and intend the full nature of his act with knowledge of all relevant circumstances. This premise supports a mistake-of-fact defense, and it led a minority of the *Harris* jurors to vote for acquittal. Most juries conscientiously analyzed instructions,[80] often listening repeatedly to a recording of them. They tried to

76. Eskridge has offered a gravity metaphor to describe the varying influence public values may have on statutory interpretation in relation to other considerations. *See* Eskridge, *supra* note 15, at 1018-19. Thus, a public value to which an interpreter is strongly committed exerts a strong "gravitational pull" toward an interpretation that accords with it, particularly if the language is unclear. *See id.* Its pull will be weaker, however, if it conflicts with clear language. *See id.*

77. *See, e.g.*, Transcript for Harris Jury No. 1, at 18; Transcript for Harris Jury No. 8, at 4.

78. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 239 (1994) (tracing the horizontal-coherence concern back to the legal realists and noting that it strives for compatibility not only with current statutes but also with current norms). *See generally id.* at 239-74 (distinguishing and discussing horizontal and vertical coherence).

79. *See* Transcript for Harris Jury No. 6 *passim*.

80. *See, e.g.*, Transcript for Harris Jury No. 1, at 22; Transcript for Harris Jury No. 3, at 4; Transcript for Harris Jury No. 4, at 6; Transcript for Harris Jury No. 5, at 14-19; Transcript for Harris Jury No. 7, at 10, 15; Transcript for Harris Jury No. 8, at 11-14.

determine whether the mens rea requirement extended to all elements, particularly the elements of knowledge of ownership and knowledge of the criminal nature of the act. They assessed how the defendant's belief that the property was abandoned fit within their legal analysis and reconciled this larger process with their conflicting sentiments about the wrongfulness of the taking and the basically benign nature of the defendant's intent.[81]

The property norm thus provided a moral framework within which to judge Harris's culpability and, more specifically, the mistake-of-fact defense that his belief about abandonment raised. The pervasiveness of references to the defendant's duty-to-ask and to the unreasonableness of his assumption of abandonment provides a way to assess whether the defendant's mistake was unreasonable and thereby his conduct culpable. With the property norm as the baseline for their judgment, jurors found Harris's mistake blameworthy.

In this way, jurors confronted the enduring tension in criminal law between descriptive and normative uses of the same term. On the mistake-of-fact issue, they opted for the latter.[82] In giving moral content to the mistake, the *Harris* juries used statutory application to make the normative judgment at the heart of criminal adjudication; at best, their reasoning led to verdicts that were fairly explicit and plausible evaluations of Harris's character while still working within the statutory language. One can disagree with the construction by challenging the jury's choice of norms, but the criminal law's equation of liability with moral blame makes statutory interpretation a necessary means to judge culpability.[83]

Still, a minority of jurors were particularly concerned that the defendant's intent was insufficient for criminal liability. For example, one juror repeatedly expressed the sentiment that "I feel he is innocent because he was not aware that what he was doing was a violation of the law."[84] But a larger number of

81. *See, e.g.*, Transcript for Harris Jury No. 7, at 12-13 (finding that the defendant's mistaken belief of abandonment negated the intent-to-deprive element). From the deliberation, it is unclear whether Jury No. 7's members do this primarily as a decision of statutory interpretation or more from normative reluctance to convict the defendant without such intent, though the premise of practical reasoning and dynamic interpretation is that those two are usually inseparably related.

82. The descriptive use, in contrast, would simply inquire whether the defendant in fact made the mistake that negated the intent or knowledge required to commit the crime defined in the statute. *See* FLETCHER, *supra* note 9, at 395-401, 516-41 (1978) (tracing the shift from criminal law judgments as largely descriptive to "the centrality of normative guilt in the criminal process").

83. *See id.* at 532-38.

84. Transcript for Harris Jury No. 3, at 13. This juror's sentiment is consistent with psychologists' understanding of attribution theory. *See* FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS (1958); Edward E. Jones & Keith E. Davis, *From Acts to*

jurors clearly felt bound by a more inculpatory reading of the law, and they felt that they had a duty to apply it objectively, regardless of their personal disagreement with it or sympathy for the defendant.[85] This is not to say, of course, that jurors who in good faith tried to apply the law neutrally in fact succeeded and were unaffected by norms or values. Judges, after all, are criticized for the same sorts of failures.[86]

The recurrent theme among jurors is that the law is objective and constrains their discretion connects closely with recurring views about the proper role of juries. Most of the *Harris* jurors felt the jury's only duty was to resolve factual disputes and apply the law neutrally, with as little interpretation as possible.[87] Juror 2's approach is particularly interesting in light of the fact that his jury was given the quasi-nullification instruction that stated the law as merely "intended to be helpful to you in reaching a just and proper verdict." In the most pointed example of this sentiment, one juror perceptively argued that juries should simply apply the law as it exists and that revising the law should be left to the legislature. In response to a juror who disagreed with the intent instructions and "resent[ed] having these qualifications placed on my judgment," four of her colleagues argued:

> Juror 2: That's an issue [to be settled] on a legislative basis rather than on juries and deliberations, and I still feel that you must work within the law . . . it's entirely reasonable to change the law, but you must change it at the right place and at the right time, and not as it stands.
>
> Juror 5: . . . I agree that you have to stand with what the law says, regardless of how you personally feel.
>
> Juror 6: So you have to buy the judge's [instructions], because he is theoretically interpreting the law.

Disposition: The Attribution Process in Person Perception, *in* ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY (Leonard Berkowitz, ed., vol. 2, 1965).

85. *See, e.g.*, Transcript for Harris Jury No. 3, at 15 (recording several jurors arguing that the law is and should be fixed and objective, that "there has to be something absolute you can count on," and that "there has to be something where it's either this or that").

86. For criticisms of judges who claim to apply statutes by such purportedly neutral criteria as plain meaning, see, e.g., Eskridge, *supra* note 15, at 1018-19.

87. *See* Transcript for Harris Jury No. 3, at 14 (recording two jurors describing the jury's role as one of settling factual disputes and not to interpret or adjust the law). Harris Jury No. 2 had a similar discussion:

> Juror 6: [That is] a very rigid interpretation.
>
> Juror 2: But, that's the only, that's the only interpretation we can give it.
>
> Juror 4: Well, it's the only interpretation you can give it.
>
> Juror 2: No, it's the only interpretation. It's against the law!

Transcript for Harris Jury No. 2, at 23.

> Juror 4: Yes, because we can't disagree with those instructions . . . . [W]e have to go by the charges, but if the charges are wrong, it's not [ours] to disagree with . . .
>
> Juror 2: I agree with what you're saying completely.[88]

The *Harris* juries also demonstrate the downsides of both the literalist approach to statutory application that many jurors initially favor and the role of public values in statutory interpretation. The jurors who were most committed to quasi-mechanical law application also tended to voice least often thoughts indicative of consideration of an individualized, careful judgment of the defendant's culpability. "[W]e are charged with really only one thing," one juror argued. "We are charged with applying the law that was given to us, by the judge, to this case . . . Did [the prosecution] meet the requirements of the law? If they did, the man's guilty"[89] For many—those who held strongly to the property norm and were given the general-intent instruction—the literalist approach coincided with their personal view of Harris's culpability; that undoubtedly made them comfortable with the literalist, seemingly common-sense, applications. For others, especially those less guided toward conviction by the property norm or less toward acquittal by state-of-mind concerns, their view that they should apply the law with little regard for context or consequences reduced the effort required to pursue a moral judgment.

For those who most adamantly endorsed the property norm, especially if given the specific-intent instruction under which the case for acquittal was strong, the force of this public value led some to interpret the law implausibly, verging on "nullifying" to achieve conviction.[90] Public-values analysis, for

88. Transcript for Harris Jury No. 3, at 5-6 (fourth ellipsis in original); *see id.* at 11-12 ("[W]hatever you want to do to effect a change [in the law] is entirely up to you, but it all depends on whether or not you believe that the laws should be changed . . . right here as we're discussing them or whether or not you think they should be affected through the legislature.").

89. Transcript for Harris Jury No. 8, at 24.

90. The strongest example here is probably a member of Jury No. 2, which was given the specific-intent instruction and voted 4-2 for acquittal. This juror was so committed to the property norm that he denied property could ever be abandoned, and thus that the defendant could ever honestly assume that it was. Note here how this background value affects the juror's finding (or interpretation) of facts. *See* Transcript for Harris Jury No. 2, at 8, 11-12, 17-18 (Juror 2). That norm led him to mistaken understandings of the specific- intent rule, such as, "'knowingly' simply means taking it . . . with the knowledge that he was taking it, that he wasn't taking it by accident." *Id.* at 18. He responded to jurors who offered correct understandings of the specific-intent law with remarks such as, "[D]id he intend to pay the state for the bricks? . . . He's guilty of not being better informed [that the bricks weren't abandoned]." The pattern of responses revealed an unwillingness—seen in a few other jurors, see, e.g., Transcript for Harris Jury No. 7, at 18 (Juror 6)—to accept a mens rea rule that required intent as to circumstance and result elements, a rule that would be insufficiently protective of private property. *See* Transcript for Harris Jury No. 2, at 17-18, 21-25 (Juror 2).

juries at least as much as for judges, can mean that the decisionmaker allows personal normative preferences to overcome stronger, more persuasive interpretations of statutes.

CONCLUSION

Two forces support the American jury's continuing role of making normative as well as positive, factual judgments. One is doctrinal developments from appellate courts that protect jury authority. Courts, under the mechanisms of constitutional, statutory and common law, continue to construe criminal statutory issues in a way that reserves for juries important decisions about the defendant's conduct beyond the facts of his actions. The other force is the seeming tendency of lay jurors to turn to normative judgments as part of their common interpretive tasks when applying criminal law. Interpretive tasks recur even when courts offer guidance on constructing statutes, and even when the statutes are relatively clear and simple. One question that remains is whether courts give juries sufficient assistance in identifying and resolving interpretive problems and consciously weighing the normative judgments with which they inform their factual and legal decisions.