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Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes

Darryl K. Brown*

In one of the few existing recordings of American juries deliberating in an actual criminal case, Wisconsin v. Reed,1 we observe jurors struggling with how they should apply a statute in a case in which the facts are not in real dispute. The defendant is charged with felon in possession of a gun, and all agree that he has a felony record and owned a pistol until he turned it over to the police upon their request. The statute contains three elements. The defendant must (a) have a felony conviction, (b) have possessed a gun, and (c) have known that he possessed the gun. Despite the apparent simplicity of the case, the jurors deliberate for two hours and acquit. Their deliberations include some intriguing, and perhaps worrisome, statements. "I think we have more capabilities than to say, one-two-three, these are met on a very simple level. I don't think, as jurors, that is necessarily our role," says one juror. "Is he a threat to society? And if we decide he's guilty, is that just?" another asks. "What about sending a message? I'm thinking of a message I'd like to send to the DA's office." In the latter part of the discussion, jurors struggle to interpret this simple statute. "I'm having trouble with that word 'gun,' but I'm really having trouble with this word 'to know,'" says one. "Perhaps he didn't, in the full sense of the word, know he possessed a firearm," suggests another.2

The Reed jury's acquittal is often described as nullification.3 Yet the deliberation reveals jurors engaged in an extended, thoughtful,

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1. See Frontline: Inside the Jury Room (PBS television broadcast, Apr. 8, 1986) (partial transcript on file with author); see also Stephen J. Adler, The Jury (1994); CBS Reports: Enter the Jury Room (CBS television broadcast, Apr. 16, 1997).


3. See infra note 232 and accompanying text.
and — I will argue — necessary effort of statute application. Seen as a project of statutory interpretation, the deliberation raises the interesting issue of whether jurors interpret statutes in a manner that at all resembles the well-studied strategies of judicial statutory interpretation. The considerations that these jurors raise, it turns out, mimic concerns familiar from judges’ construction of statutes. If jurors are sometimes led into complex interpretive debates, what prompts this? Many would probably respond that untrained, undisciplined jurors are inclined to exceed the mandate that limits them to “applying the law” to the facts they find. Yet we already know from the voluminous literature of statutory interpretation and from earlier, legal-realist insights that “application” can be a complicated, value-laden, and ambiguous task rather than a rote, mechanical one.

The label “law application” obscures the complexity of the jury’s task. The considerable recent public law literature on statutory interpretation helps to clarify the creative, normative nature of application, which inevitably entails a degree of law-creating and policymaking. Law application is now widely seen as a complex, dynamic process informed by substantive values and contextual considerations rather than as a process determinatively guided by a methodology such as plain meaning or drafters’ intent. This literature, however, is largely concerned with statutes in civil public law contexts rather than criminal codes, and it is completely devoid of any effort to describe how juries apply statutes. This is a deficiency

4. See generally William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994); William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 570 (2d ed. 1995) (asserting that statutory interpretation is “very much an art and very much not a science”). See also T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 22 (1988) (describing traditional approaches to interpretation as aiming to “excavate[e] statutory meaning” through either textualism or intentionalism, and defending newer methods that take account of changed circumstances and values); id. at 57 (“Interpreters [of statutes] are not reporters or historians, searching out the facts of the past. They are creators of meaning.”); Philip P. Frickey, Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law, 78 Cal. L. Rev. 1137, 1178 & n.222 (1990) (defining “a ‘dynamic’ interpretation of federal statutes” as one “in tension with the expectations of the enacting Congress and perhaps with the statutory language, but compatible with contemporary values and context”); Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 Va. L. Rev. 1295, 1323 (1990) (“Statutory language has no single or objective meaning. It, like legislative history, is subject to ‘manipulation’ (or, perhaps more accurately, interpretation),” (footnote omitted)); id. at 1366 (stating that “there is no denying the policy component of statutory interpretation”). But see, e.g., Antonin Scalia, A Matter of Interpretation 14-37 (1997); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989) (arguing for a textualist approach to statutory interpretation).

5. See, e.g., Eskridge, supra note 4, at 70-74. Eskridge urges us to study statutory interpretation “from the bottom up” rather than concentrating on U.S. Supreme Court opinions.
in the statutory interpretation literature, but it is a more serious gap in studies of the jury.

Although modern juries apply law as well as find facts, they rarely are given guidance in the application task, in contrast to the considerable advice they receive on factfinding. Studies of the jury tend to focus on its factfinding task, in part because that process raises issues of keen interest to trial lawyers and litigants, such as what sorts of evidence jurors find persuasive and what biases affect their findings. Many studies explore issues related to law application, such as the role that norms or notions of justice may play in verdicts, particularly when those views conflict with the plain meaning of statutes and other jury instructions. Yet few studies directly address the issue of how juries interpret legal language rather than trump it with compelling normative concerns or personal biases. Social science literature often relies on inadequate conceptions of statutory application to assess juries, assuming that juries either

He also laments the "juriscentric" bias in statutory interpretation study and notes that much interpretation is done by people other than judges. Yet he never mentions juries. See id.; see also Eskridge & Frickey, supra note 4.

6. State and federal jury instructions convey to juries a reductionist image of application as rote and mechanical. They typically say no more about applying statutes than such commands as "[i]t is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply these rules of law to the facts as you find them." 1 Edward J. Devitt et al., Federal Jury Practice and Instructions § 12.01, at 325 (4th ed. 1992); see also id. at 326-29 (collecting instructions used in several federal circuits); id. § 12.02-08, at 331-48, §§ 15-16, at 403-545 (collecting jury instructions that guide evidence interpretation and factfinding). Modern juries have lost their broad authority from an earlier era to "judge" the law. See Sparf & Hansen v. United States, 156 U.S. 51, 74 (1895) (rejecting a federal jury's right to nullify); Jeffrey Abramson, We, The Jury 67-88 (1994) (recounting the history of jury nullification power and judicial responses to it); Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 903-07 (1994); Morris S. Arnold, A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation, 128 U. Pa. L. Rev. 829, 848 (1980); William E. Nelson, The Eighteenth Century Background of John Marshall's Jurisprudence, 76 Mich. L. Rev. 893, 904-17 (1978).

7. For an anthology of social science literature addressing jury issues that demonstrates the emphasis on issues of factfinding accuracy and sources of bias, see Juries: Formation and Behavior (Robert M. Krivohey ed., 1994). Legal scholars, who have drawn from cognitive science research for more utilitarian studies of jury decisionmaking, also concentrate on jury factfinding. See, e.g., Albert Moore, Trial by Schema, 37 UCLA L. Rev. 273 (1989). Commonly expressed concerns about the jury's role in the legal system, such as its ability to understand complex statistical or scientific evidence, also implicate its factfinding role.

8. Hastie concluded that such research thus far has explored insufficiently the "role of 'the juror's sense of justice' in juror decisions" or "where jurors' ultimate verdicts are guided by considerations of fairness, equity and justice." Reid Hastie, Introduction to Inside the Juror: The Psychology of Jury Decision Making 28-29 (Reid Hastie ed., 1993); see also Caton F. Roberts et al., Verdict Selection Processes in Insanity Cases, 17 Law & Hum. Behav. 261, 262 (1993) (noting that, with regard to guilty-but-mentally-ill verdicts, "the nature of the psychological processes underlying the decisional effects . . . on lay persons' verdicts has remained relatively unexplored" and that "[w]e do not have an understanding of the decisional mechanisms responsible" for such verdicts).
"follow" and "apply" the law or ignore it to follow their own senses of justice, preferences, or biases.9

Courts and legal scholars have done no better. One prominent jury scholar, Reid Hastie, recently noted that "[i]ntuitions . . . about how jurors will behave have been the primary source of guidance for the formation and application of legal policies," especially by courts.10 "The result has been a reactive, fragmented, and sometimes incoherent collection of speculations about juror behavior."11 This simplistic understanding of law application is reflected in jury instructions and much jury research, and it conflicts with our complex picture of statutory construction by judges and agencies.12

9. Even leading social science scholars brush over the issue of the interpretive process with limited observations such as "[the jury] sometimes bends the law to comport with its own sense of what is just, fair, and equitable. Some will argue that this is still wrong, the law should always be followed." VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 163 (1986) (emphasis added); see also James P. Levine, The Legislative Role of Juries, 1984 Am. B. Found. Res. J. 605, 609 ("Do juries generally follow the frequent admonitions of judges that they must apply the law as is . . . or to do they . . . register the public pulse . . . ?"). But see NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 279-97 (1995) (discussing how jurors "construe" insanity instructions rather than either follow them literally or ignore them).


11. Hastie, supra note 8, at 4.

12. Neither do scholars address jurors' interpretation task on another common occasion for examining jury decisionmaking: the debate over nullification. The nullification decision, as traditionally conceived, follows the statutory interpretation task. That is, once jurors decide what the law means and how it is supposed to be applied, they decide whether they will do so, or instead ignore the law to serve some other goal or value. But see infra section III.D.2 (citing studies by Irwin A. Horowitz finding that nullification instructions can affect the factfinding discussion in jury deliberations and suggesting that the factual "story" that jurors compose is itself contingent on the law to be applied to it, as well as compelling normative concerns). Scholars addressing nullification tend to discuss the issue in a dichotomous framework: juries either should or should not be able to ignore law on occasion in order to pursue justice that law would not achieve. Thus conceived, this discussion also skips over the jury's interpretation of law.

A more subtle view of nullification, however, places such verdicts on a continuum with verdicts that literally and uncontroversially apply law, and thereby understands nullification verdicts as interpretive acts that reconcile legal rules with concerns of context, public values, and consequences of application. Cf. Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 MINN. L. REV. 1149 (1997) (suggesting that, under prevailing conceptions of the rule of law, some verdicts that seem to be nullification may in fact be principled decisions that enforce legal rules that conflict with the statute at issue). George Fletcher has argued that nullification is an "unfortunate and misleading" term, because it suggests "an act of disrespect toward the law." GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 154 (1988). He argues that many nullification verdicts strive "not to defeat the law, but to perfect the law, to realize the law's inherent values." Id. That view opens the way for exploring jury applications of law as interpretive acts akin to those that judges accomplish. Fletcher, however, does not develop that description, and he describes nullification verdicts as "the jury vot[ing] its conscience," id., with little consideration of legal and extralegal interpretive tools jurors use to overcome the strong feeling — encouraged by standard instructions — that they should literally apply legal rules.
What constitutes “bending” the law and whether a given construction counts as “following” the law — what, in short, constitutes a normatively appropriate application of law — are questions that the study of statutory interpretation pursues. Many of the cases that juries decide are likely to pose significant interpretive issues. Most cases settle before trial, so those that go to juries are disproportionately hard or close in some way. Many are close only because of factual disputes; but some significant portion also pose significant rule-interpretation issues, which typically are difficult because text, purpose, justice, and other context concerns point in different directions. Limited conceptions of statutory construction lead to ill-founded criticisms of juries’ interpretive approaches and decisions because they presuppose an untenable formalism for rule application. A more complex description of interpretive practice prompts reassessment of how well juries employ instructions and apply law.

This article offers a preliminary theory of how juries apply criminal rules and aims to add to the study of juries a new recognition of jurors as interpreters of statutes. I build this theory on new analysis of two jury deliberation data sets, supplemented by review of earlier empirical studies. The first source is the recording of the deliberation in Wisconsin v. Reed. The second is a set of eight mock jury deliberations based on a single theft case, Michigan v. Harris. The tools of statutory interpretation scholarship yield insights on how juries resolve difficult problems of law application. This article also builds that analysis from empirical research in the behavioral sciences, support underutilized in legal scholarship on statutory interpretation.

This focus on jury interpretation of statutes, in turn, provides insights into a central project of criminal adjudication. Criminal law scholarship emphasizes at the conceptual level that criminal judgments are individualized assessments of moral culpability. A focus on jury application of statutes allows us to explore how such evaluations actually are accomplished at the “ground level” of individual case adjudication. At this level we see in action the tension

13. 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).

14. 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).
between a core rule-of-law value — consistent application of statutes across cases — with criminal law's goal of judging each defendant's culpability individually. The latter requires a morally attuned inquiry in which finding the breach of a conduct rule is merely a prerequisite rather than the complete analysis. Yet reaching judgments through statutory interpretation informed by broader public values and norms may seem to jeopardize both the rule of law and the democratic legitimacy of adjudication.15

Similar tensions occur within the jury's decision. Jurors must interpret law in order to apply it, and that interpretive process occurs in a broad context of considerations beyond the text's plain meaning or the legislature's intent. Juries interpret statutes in light of the factual context revealed at trial; the purposes to which the statute is being put (and may be put generally); instrumental concerns such as the incentive effects of a judgment; public values,16 common notions of justice, and social norms; and the jury's institutional role in the larger justice system.

Part I of this article sets the stage by discussing the unique function of criminal law and the special set of demands it imposes on the interpretation of criminal statutes. Part II elaborates the practical reasoning approach to statutory interpretation, drawing on sources in hermeneutics and pragmatism.17 Part III surveys existing social science research for empirical evidence on jury decisionmaking and, in particular, interpretive methods. Though few studies focus explicitly on interpretation of statutory language as opposed to nullification or miscomprehension of statutes, the literature suggests that juries use interpretive practices that are captured by descriptions of dynamic construction and practical reasoning.

Part IV then uses the practical-reasoning model, informed by empirical research, to study the jury-deliberation data. The Reed deliberation reveals a rich, complex process of statutory interpreta-

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16. 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 13, 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").

17. This description is well developed in the literature on judicial interpretation. Those familiar with it may want to skim or skip this part, though here it serves to connect the function of criminal adjudication, described in Part I, with the empirical findings about juror decisionmaking explored in the next two Parts.
tion that shares many strategies with judicial methods. Further, it finds the jury employing its interpretive strategy to fulfill the normative function of criminal law described in Part I. Next, I examine the set of mock jury deliberations in *Michigan v. Harris*, a fictional property theft case. Facing a different problem of construction and different normative concerns, the *Harris* juries use a similarly sophisticated process. Despite close attention to statutory language, the *Harris* juries experienced somewhat less success at achieving a defensible judgment of moral culpability and with using public-values analysis. This final Part suggests a descriptive theory of jury interpretation of criminal statutes. Concluding remarks discuss implications of this study for criminal law’s conceptual purpose of normative judgment, for the related, practical purpose of revising jury instructions, and for the future direction of research on juries and statutory application.

I. The Functions of Criminal Statutes and the Purpose of Criminal Judgment

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. 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. Statutes tell us what conduct is prohibited or, occasionally, required. Second, crim-

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18. *Harris* is based closely on *Morissette v. United States*, 342 U.S. 246 (1952). For further description of this study, see infra section IV.B.

19. Although this article deals only with jury interpretation of criminal statutes, many of the interpretive practices are likely the same for juries on civil cases. The implications of these interpretive practices will differ somewhat because the civil jury need not evaluate moral culpability. Additionally, I focus solely on substantive law statutes, as opposed to rules governing such procedural issues as assessing witness credibility and circumstantial evidence, or rules specifying the burden of proof and presumption of innocence. Such rules require interpretation as well, and surely affect culpability assessment, but I have not explored those implications here.


21. See Dan-Cohen, supra note 20, at 626, 630.
inal statutes provide "decision rules" or principles for adjudicating individual cases of conduct-rule violations. 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 also are 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 an actor's blameworthiness, as well as the capacities and characteristics of the particular actor."23

Many defenses are easy to understand as decision rules. If we take the crime of assault as a typical conduct rule, the defense of duress can be understood as a decision rule. The conduct rule is violated if the defendant hits the victim, but the defendant may not be held liable if he was under duress to hit the victim — if he succumbed to pressure to which most people, including his judge and jury, would yield.24 The conduct rule is directed to the defendant: "don't intentionally hit others." The decision rule guides the assessment of whether his conduct-rule violation is blameworthy. The defendant hit the victim, but he did not do so voluntarily, in the sense that we construct voluntariness with regard to fair options and circumstances. His conduct in the context of the duress he faced is not blameworthy. Note that it is not necessary for the defendant to know of such a decision rule when trying to conform his conduct to the law. All he needs to know is the conduct rule; presumably the duress decision rule only applies when the defendant would yield to the duress whether he knew of that decision rule or not.25

Decision rules also arise within the basic elements of an offense. For example, the mental elements of offenses often function as decision rules; they are not necessary to formulate the rule announcing prohibited conduct. The conduct rule for theft, for example, forbids taking the property of another. But one who violates that rule — who takes another's property — may not be guilty if he lacked the requisite mens rea, which may require knowledge or

22. See id. "Principles of adjudication" is Robinson's phrase, see Robinson, Rules of Conduct, supra note 20, at 731, while Dan-Cohen uses "decision rule," see Dan-Cohen, supra note 20, at 627. This article generally uses the phrase "decision rules."


24. See Dan-Cohen, supra note 20, at 633; Robinson, Rules of Conduct, supra note 20, at 744.

25. See Dan-Cohen, supra note 20, at 630-42 (discussing duress).
purpose when he was merely negligent or even reasonably careful but still wrong about the property's rightful owner. Similarly, homicide rules forbid conduct likely to result in taking the life of another. But the mens rea elements function as decision rules because the degree of one's liability depends on one's mental state; defendants who do the same conduct and cause the same harm will be judged differently depending on whether their acts were purposeful, reckless, or negligent.26

Not all mental elements function solely as decision rules. The mens rea requirements of attempt offenses, for example, serve to define the prohibited conduct.27 I will not elaborate on the complexities of which elements across the typical array of crimes serve which functions; that work has been done well by others.28 For the purposes of this article, it is important simply to note that mental state elements often serve the key function of guiding the liability decision, and that is so even in the simplest of crimes, such as theft and possession offenses. As we will see, when jurors struggle with a difficult liability decision, they frequently focus on mental state elements. This typically occurs when the violation of a conduct rule is clear but the defendant's blameworthiness for that violation is not.

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.29 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 blame-

27. See Robinson, Rules of Conduct, supra note 20, at 737.
29. 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 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).
worthiness, 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. 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. 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 perspicacity." 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."

In making such judgments we often become acutely aware of the limited, indeterminate nature of criminal statutes for this normative purpose. Criminal law is always an incomplete restatement of morality and social norms. Criminal statutes — even decision rules, which refine our judgment of conduct-rule violations — inevitably lack the nuance to control fully the particularized moral judgment of a defendant's conduct in his specific context. Kyron Huigens argues:


32. Huigens, supra note 30, at 1424.


34. See Greenawalt, supra note 20, at 929 (discussing "the problem of precision in criminal codes"). Greenawalt argues that because "the need for relatively concise language imposes constraint" and "unless a formulation is to be wholly open-ended . . . only a limited number of factors can be taken into account," *id.* at 929, there is a need for judicial interpretation, and "judges should feel less constrained than is ordinarily appropriate by the evident import of the words chosen for the statute" if "situations are really extraordinary," *id.* at 950. See also Kahan, supra note 33, at 129. See generally HANS-GEORG GADAMER, *Truth and Method* 38 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989) ("[T]he order-
[R]ules and standards . . . are and should remain heuristic devices: they do not actually serve a public, prescriptive role. Having arrived at a rule, we ought to return our attention to the individual case it is supposed to explain. . . . [D]efenses are legislated only in bare outline, and . . . our true object of study is the actual, individualized adjudication of a person by a jury. . . .

What is at issue in the trial is the pattern of individual choices that led to the act and hence to the harm. The factfinder, in deciding the case, will accept or reject the decision the actor made in the circumstances she faced . . . . The jurors will accept or reject the particular conception of the good and the scheme of ends that led the actor into the conflict and to the resulting harm.35

The tensions in criminal statutes arising from their dual functions36 — and from the moral nature of the judgment they guide but cannot fully embody — are addressed in large part by the institution of the jury.37 Thus, the jury’s task is a difficult one: to make individualized moral judgments through application of indeterminate rules with terms that must be given normative content from broadly held social norms.38

35. Huigens, supra note 30, at 1439.

36. Unfortunately, neither contemporary criminal codes nor the instructions that transmit them were written with the distinction between conduct rules and decision rules in mind. Statutes are written to serve both the conduct and decision purposes at once; following the influential Model Penal Code, state criminal codes are designed largely around distinctions between mens rea and actus reus elements, and between offenses and defenses. As a result, statutes at times may not serve either function well. The key purpose of recent criminal law scholarship on this topic, by such leading scholars as Meir Dan-Cohen and Paul Robinson, has been to identify and clarify these multiple functions served by criminal statutes, and thereby to provide a basis both for a general critique of current codes and for code revision. See generally Dan-Cohen, supra note 20; Robinson, Rules of Conduct, supra note 20. This distinction between the parts of statutes that primarily define criminal conduct and those that aim to guide adjudication in response to such conduct creates tension in statutory application.

37. See Huigens, supra note 30, at 1466 (“We employ juries because we place the person prior to the rule, because we are sensitive to the possibility that none of the rules may be adequate to describe justice in the given situation, and because the rules may conflict in a way that only human hands can unravel.”); Kahan & Nussbaum, supra note 29, at 309-10 (noting the assumption of modern courts that “juries are generally better at making fact-specific appraisals of defendants’ emotions,” which underlie the normative judgments of criminal law).

38. This task calls to mind Rawls’s description of “reflective equilibrium,” in which we check the seeming mandates of a rule applied to particular facts against our “considered judgment” about the proper outcome of that case. See John Rawls, A Theory of Justice 48-51 (1971). When rule application and judgment about outcome conflict, Rawls describes a process of mediating the two concerns until a judgment in the case yields reflective equilibrium between the two sources of judgment. See id. at 17-53. We can also note here the similarity to Llewellyn’s context-sensitive description of legal reasoning and judicial decision-making. See Karl N. Llewellyn, Jurisprudence: Realism in Theory and Practice 221-22 (1962) [hereinafter Llewellyn, Jurisprudence]; see also Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 268-85 (1960) [hereinafter Llewellyn, Common Law] (describing “situation sense”).
The delicacy of the problem speaks to the importance of analyzing closely how the jury actually accomplishes or fails at this task. That analysis is the goal of Part IV. To acquire some analytical tools for that study, however, it is helpful first to review the substantial scholarship on statutory interpretation by public-law scholars, who have put more effort recently into statutory interpretation theory than criminal law scholars. In particular, they have developed a contemporary understanding of practical reasoning as a persuasive description of judicial interpretation. This understanding fits closely with the contemporary view of criminal culpability as a judgment on character.

II. JURY VERDICTS AS PRACTICAL REASON

A. Practical Reasoning in Statutory Interpretation

Over roughly the last two decades, public-law scholars have developed descriptions of judicial decisionmaking — particularly of statutory interpretation and constitutional judicial review — based on the model of practical reasoning. Practical reasoning stands in sharp contrast to more traditional models of legal reasoning. Traditional approaches start with foundational principles from which, through deductive analysis, one arrives at a judgment for a particular case. These approaches define successful interpretation as adherence to a method. They typically posit that either the text, legislative intent, or the overarching purpose of the rule should guide application; all share the presupposition that such a first principle or grand theory can guide and control rule application. In this sense the traditional approaches strive for an objectivism that minimizes reference to the context of the decision. They also seek to restrict the discretion of rule interpreters (courts) and thereby exclude the influence of contemporary values or personal preferences. They strive generally to minimize the substantive content of the interpretive process and to make rule application determinate.

39. While criminal law is a species of public law, it is traditionally considered separately from the preoccupations of other public law areas, most typically constitutional law, administrative law, and legislation studies.

40. See William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN. L. REV. 321, 324-45 (1990); Zeppos, supra note 4, at 1310-35, 1368 (criticizing textualism and the formalist "idea that there must be a foundationalist theory to dictate predictable outcomes").

41. See Eskridge & Frickey, supra note 40, at 324-45.

42. See id.; see also Schacter, supra note 15 (describing four approaches to statutory interpretation built upon differing notions of democratic theory).
A considerable number of scholars have argued that none of the traditional approaches effectively achieves these goals. More broadly, they deny the possibility of acontextual decisionmaking that ignores all considerations except relevant first principles such as the plain meaning of the statute. Practical reasoning understands decisionmaking as inductive and polycentric, drawing from an interconnected "web of beliefs" or shared, but sometimes conflicting, community values and norms. This approach recognizes the situated nature of reasoning that includes both the context of the case and the community of the decisionmakers. Judgments cannot be objectively verified as correct under this model, but they can be checked for both their degree of fit with the relevant community's web of beliefs and their success at accommodating competing concerns. Such reasoning can be understood as a practice midway between purely ad hoc, subjective judgment at one end and the ideal of foundationalist, objective decisionmaking at the other.

Legal scholars who have developed practical reasoning descriptions of judicial decisionmaking rely on several sources for the model. Some trace their premises back to Aristotle's idea of phronesis, the quality of situated moral judgment, employing it as a model for reaching appropriate answers to specific cases without a universal or objective theory of what is right. Practical reason-


45. See Zeppos, supra note 4, at 1341 (asserting that absence of choice due to a constraining methodology need not be the only measure of interpretive legitimacy).

46. See Aristotle, Nicomachean Ethics bks. V-VI (Hippocrates G. Apostle trans., 1984); Eskridge & Frickey, supra note 40, at 323; Huigens, supra note 30, at 1454-55 (describing one who possesses practical reason as "not simply know[ing] universal truths," but rather having "the capacity to integrate the universal and the particular: to identify and pursue the good amid the contingencies of practical human affairs" and "generate[e] flexible, creative responses . . . without relying on doctrine or ideology, without demanding certainty"). But see Mark V. Tushnet, Anti-Formalism in Recent Constitutional Theory, 83 MICH. L. REV. 1502, 1534-36 (1985) (arguing that the social conditions for the widespread practice of Aristo-
ing's more contemporary roots build on the tradition of American pragmatism, which abandons attempts to ground knowledge and judgment in foundations outside of history and context, 47 and from legal realists' understandings of legal reasoning, such as Karl Llewellyn's notion of "situation sense" and descriptions of judicial decisionmaking. 48

The practical-reasoning model draws from hermeneutics the acknowledgement that decisionmakers inevitably bring their own "prejudices and fore-meanings" 49 — or background preunderstandings, perspectives, and values — to the interpretive task. "The real meaning of a text . . . does not depend on the contingencies of the author and his original audience. . . . [I]t is always co-determined also by the historical situation of the interpreter . . . . " 50 For Gadamer, "situation" implies "a standpoint that limits the possibility of vision," or more simply, a "horizon" that "includes everything that can be seen from a particular vantage point." 51 Hermeneutics, and practical-reasoning strategies that borrow from it, seeks to inform or "fuse" the interpreter's limited horizon with other horizons, including those of the text's author and the text's historical origins. 52 One cannot separate application, the present situation and


47. See Richard J. Bernstein, Beyond Objectivism and Relativism (1983); Richard Rorty, Contingency, Irony and Solidarity (1989).

48. See Llewellyn, Jurisprudence, supra note 38; see also Farber, supra note 43, at 535-41 (discussing the connection between Llewellyn and current practical-reasoning models).


50. Gadamer, supra note 34, at 296. "That is why understanding is not merely a reproductive but always a productive activity as well." Id.

51. Id. at 302.

52. See id. at 306. This is roughly the idea of the "hermeneutic circle," which posits that because the whole can be understood only by analyzing its parts, and each part only with reference to the whole, one should attempt to build a more sophisticated understanding of an issue by alternating between perspectives of the whole and the various parts. For a comparable descriptive idea developed from studies of juror factfinding processes, see W. Lance Bennett & Martha S. Feldman, Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture 49-50 (1981) ("[T]he studies suggest [that] the interpreter shifts among the information or sets of symbols that have been assimilated, the emerging idea that seems to be the point of the story, and new bits of information or groups of symbols. The emerging set of connections and constraints guides the listener's use
use for which one interprets a text, from understanding. Just as, following Aristotle, one cannot determine a right course of action independently of the situation, even though that decision is informed by general values, one cannot arrive at a correct textual interpretation separately from the context to which it is applied.

Practical-reasoning scholarship concedes some degree of discretion and indeterminacy in statutory interpretation. Its advocates acknowledge that decisionmaking "involves creativity and choice among competing arguments and values," and in that sense is a means of policymaking. While its methods are not clearly delineated, because practical reasoning is more a mode of cognitive activity or practice than a method or set of rules, the considerations one weighs in employing practical reasoning are familiar. As Eskridge and Frickey describe the process in their study of U.S. Supreme Court decisions, an interpreter will look at "a broad range of evidence" to form "a preliminary view of the statute."

The interpreter then develops that preliminary view by testing various possible interpretations against the multiple criteria of fidelity to the text, historical accuracy, and conformity to contemporary circumstances and values. Each criterion is relevant, yet none necessarily trumps the others. Thus while an apparently clear text, for example, will create insuperable doubts for a contrary interpretation if the other evidence reinforces it... an apparently clear text may yield if other considerations cut against it...

of the vast store of background knowledge about social life that is necessary for sensible interpretation.

53. See GADAMER, supra note 34, at 307-08. Gadamer also states that the person "applying" law [at times may] have to refrain from applying the full rigor of the law... In restraining the law, he is not diminishing it but, on the contrary, finding the better law... [E]very law is in a necessary tension with concrete action, in that it is general and hence cannot contain practical reality in its full concreteness... The law is always deficient, not because it is imperfect in itself but because human reality is necessarily imperfect in comparison to the ordered world of law, and hence allows of no simple application of the law.

Id. at 318.

54. See id. at 312-17; see also LLEWELLYN, JURISPRUDENCE, supra note 38, at 221-22.

55. Frickey, supra note 4, at 1218; see also GADAMER, supra note 34, at 296 ("[U]nderstanding is not merely a reproductive but always a productive activity as well."); Eskridge & Frickey, supra note 40, at 345-47.

56. See, e.g., Eskridge & Frickey, supra note 40, at 345; Frickey, supra note 4, at 1201 (concluding that "formalism in interpretation... has not governed many important federal Indian law cases").

57. See Daniel A. Farber & Philip P. Frickey, Practical Reason and the First Amendment, 34 UCLA L. Rev. 1615, 1616 (1987); cf. GADAMER, supra note 34, at 295 (arguing that hermeneutics is not a "procedure or method" but a clarification of "the conditions in which understanding takes place," which always includes "[t]he prejudices and fore-meanings that occupy the interpreter's consciousness").

58. Eskridge & Frickey, supra note 40, at 352. For a refinement of the theory, see ESKIDGE, supra note 4, at 55-57; see also William N. Eskridge, Jr., Dynamic Statutory
Generally, then, we expect a practical reasoning approach to statutory interpretation to consider the same range of concerns relied upon by more traditional approaches, but we also expect such an approach to prioritize less formally or to weigh dispositively any one factor. Thus, plain meaning of a text remains a primary consideration that frequently will end the inquiry absent strong contradiction from other sources. Evidence of drafter’s intent, as well as a more general assessment of a statute’s purpose, often exert a strong pull if they contradict plain meaning. So does concern with “horizontal coherence” of the statute with other, related provisions in either the same act or other laws regulating the same topic or conduct.

More abstract considerations include evolution of the statute in light of changed circumstances over time, and the consistency of an outcome with public values — widely held social norms that arise from, or are embodied in, sources of law such as the Constitution, statutes, regulations, or case law. Additionally, interpreters might consider their own institutional role, both perceived authority and limits to it — for example, “courts must apply the legislature’s law, so we give compelling weight to legislative intent” — and their role vis-à-vis other players, such as the legislature and executive officials. These more abstract concerns are likely to change an application only if their conflict with more concrete factors — plain meaning, drafter’s intent — is especially compelling. Practical-meaning interpretation, then, will consider arguments based on a variety of concerns that inform statutory meaning, weighing each in light of the others.

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59. See Eskridge, supra note 13 (discussing public values in Supreme Court statutory interpretation).

60. See Eskridge, supra note 4, at 74-80.

61. An example of such an interpretation by the U.S. Supreme Court, much analyzed in the dynamic-interpretation literature, is the Court’s decision in Bob Jones University v. United States, 461 U.S. 574 (1983). See Eskridge & Frickey, supra note 40, at 343-48. Bob Jones was a private, Christian university with racially discriminatory policies. The IRS denied it a tax exemption for institutions “organized and operated exclusively for religious, charitable . . . or educational purposes.” 26 U.S.C. § 501(c)(3) (1982). The Supreme Court, employing an expansively interpretivist approach to the statute, held that the university did not qualify for the exemption even though it was an educational institution whose racial policies were grounded in its religious commitments. See Bob Jones Univ., 461 U.S. at 604.

62. See generally Eskridge, supra note 4, at 48-74.
B. Practical Reasoning as a Descriptive Theory of Jury Decisionmaking

Practical reasoning should be an appealing model to test against evidence concerning how juries apply statutes. Jurors are not trained in rules and procedures and thus would seem unlikely to pursue a formal, deductive method. Case law references to the jury in forming its judgments with a community’s collective conscience and perspective imply a practical-reasoning model. Further, practical reasoning relies in part on the notion of an interpretive community, and juries are groups designed to represent local communities and to bring local norms and “common sense” to bear on legal judgments. Juries learn through the trial much detail about the factual context of their cases, and we would expect contextual considerations to affect their decisions. Practical reasoning accepts context as a significant consideration. Finally, for criminal juries in particular, practical reasoning suggests a realistic means of applying rules to achieve individual judgments of moral culpability, which more literal, acontextual application would undermine.

In the analysis below, we will see that criminal juries explicitly consider a range of the factors weighed in practical reasoning approaches to interpretation — plain meaning, statutory purpose, social norms, institutional role — often with an eye consciously turned toward the normative justice of the culpability assessment. In short, practical reasoning describes criminal jury decisionmaking roughly as well as it does judicial decisions, and thus it provides a normatively attractive perspective for understanding jury practices that are now subjected to criticism as insufficiently literal in construction or deductive in method.


64. On the purpose of representative juries, see Taylor, 419 U.S. at 530 (asserting that the jury brings the community’s “commonsense judgment”); Apodaca, 406 U.S. at 410 (same); Williams, 399 U.S. at 100 (same). Cf. Eskridge, supra note 4, at 71-74 (discussing the role of “communities of interpretation” in statutory application).

65. Pragmatic jury decisionmaking poses the same countermajoritarian difficulty faced by judges in acts of judicial review and statutory interpretation. Statutory interpretation, and constitutional review, is legitimate only if it is objective, foundational, and nonpolitical; otherwise, unelected judges — and juries — are usurping political power from democratic branches. Any substantive, nonmechanical decisionmaking by juries challenges the legislature that drafted the statute and the democratically accountable prosecutor who initiated the charge. Yet judicial review is justified as a check on the tyranny of the majority and executive discretion exercised against citizens. The arguments for statutory interpretation are similar and, at this point, familiar: not only is policymaking inevitable in applying statutes, it is needed to assess the fit between the general rule and the specific case and to review the
To begin exploring the descriptive power of practical reason in jury decisionmaking, first I review existing empirical research on jury decisionmaking and, to a lesser extent, research on other lay approaches to legal reasoning. This literature partially documents jurors’ use of interpretive strategies and substantive considerations of the sort described in practical-reasoning theories of judicial construction of statutes. It also provides insights and analytical tools for the subsequent Part, in which I explore jury deliberations in two cases for evidence of interpretive approaches.

III. SOCIAL SCIENCE RESEARCH ON JURY DECISIONMAKING

A. Cognitive Models of Jury Decisionmaking

1. Use of Stories in Factfinding and Decisionmaking

A large body of social science literature addresses a wide range of issues related to jury decisionmaking.66 An important contribution for present purposes is the cognitive psychological model of jury decisionmaking developed over the last two decades, of which Pennington and Hastie’s story model is the best known and most elaborate.67 The story model, which focuses more on factfinding than law application, “identifies three processing substages: evidence evaluation; learning the verdict choice set; and an evidence-verdict match process.”68 During the factfinding process, jurors selectively evaluate evidence and create intuitively coherent narrative structures, or stories, that allow them to make sense of evidence. Once given the law and verdict categories by the judge, jurors seek the best match between the story representations of the evidence and their memories of verdict categories. If it finds a “subjectively satisfactory” match, the jury renders a verdict.69

The story model suggests that, during the factfinding process, jurors impose on the trial information — both relevant evidence and other available facts and social data — a narrative story organi-

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66. Much of this research is related to factfinding issues that are not relevant here — issues such as how credible jurors find eyewitness identifications, or how race, class, and gender differences affect assessments of credibility and other factfinding tasks.

67. See REID HASTIE ET AL., INSIDE THE JURY (1983); Hastie supra note 8. Hastie, in a summary of current behavioral science models of jury decisionmaking, identifies three formal, mathematical models in addition to his own cognitive model. None of these approaches directly addresses issues of legal interpretation by juries.

68. Hastie, supra note 8, at 26.

69. See id.
zation. That story is shaped by their knowledge of similar events — for example, knowledge of similar crimes, or similar patterns of human behavior — and by generic expectations about necessary story elements — for example, human motivations. This imposition of narrative is "an active, constructive comprehension process in which evidence is organized, elaborated, and interpreted."70 Pennington and Hastie further claim that the constructed story determines the jury's decision, and "differences in story construction [and final decisions] must arise from differences in world knowledge, that is, differences in experiences and beliefs about the social world."71

Other researchers have reached similar conclusions using different research methods.72 Bennett and Feldman, drawing from their ethnographic studies of real jury trials, emphasize that jurors necessarily situate evidence-based stories within a preexisting social context that includes criteria for a coherent, plausible story of human conduct.73 "In the process of taking incidents from one social context and placing them in another, the [juror] selects data, specifies the historical frame, redefines situational factors, and suggests missing observations. In short, he or she can re-present an episode in a version that conforms with his or her perspective ...."74 This study also stresses that "background understandings" and "background knowledge" inevitably serve as the source for inferences jurors must make to interpret and reach judgments about social action.75 Their findings describe a contextual approach to reasoning that situates factfinding within preexisting assumptions about human conduct. They find as well that jurors have a fairly consistent goal of reaching decisions consonant with notions of justice.76 This impulse, we might predict, could lead jurors to explore nonliteral statutory applications.

71. Id. at 196.
72. Hastie and his colleagues used an experimental model of mock juries and simulated trials. See id. at 204-13.
73. See BENNETT & FELDMAN, supra note 52, at 11. With a somewhat different goal of describing how criminal juries make social judgments and justice conclusions — concerns likely to affect statutory interpretation as well — their work also resulted in a model of story construction to describe the process of factfinding and legal judgment.
74. Id. at 65 (endnote omitted).
75. See id. at 50.
76. See id. at 8 (asserting that jurors must process large amounts of "information in special ways that conform to the norms of justice and the legal requirements of cases").
The important point to draw from these studies is their similarity to the hermeneutic and practical reasoning descriptions of judicial interpretation. Jurors incorporate considerations from their experience to situate and give meaning to the data they receive in the trial. While jurors' background perspectives influence decision-making, the narratives they impose on evidence are not purely individual or idiosyncratic. Consistent with pragmatist and hermeneutic premises, the narrative structures that individuals have available to organize factual information are those that are shared within a community. Background assumptions about social life and human conduct provide the basis to connect evidence to factual inferences and conclusions.

To understand and make use of legal instructions, jurors face a difficult task of converting the instructions to legal "categories" with a list of features that must be applied to the (constructed) factual story. Though underdeveloped in the story model, statutory interpretation fits in this stage and entails "reflection on the meaning of the verdict categories." Similarly, use of stories by jurors, argue Bennett and Feldman, "provide[s] the most obvious link between everyday analytical and communicational skills and the requirements of formal adjudication procedures," including "how jurors apply legal statutes." The jurors' reasoning process resembles the inductive assessment of multiple concerns found in practical reasoning. Interestingly, it is also reminiscent of Llewellyn's description of the judges' decisionmaking. Through their "situation sense," judges assess facts with reference to "a significant life-problem-situation into which they comfortably fit." Having typified a case and identified key, relevant components, they "let the particular equities begin to register" in light of common sense, ap-


78. See ALBERT J. MOORE ET AL., TRIAL ADVOCACY: INFERENCE, ARGUMENTS, AND TECHNIQUES (1996) (emphasizing attention to background sources for factual inferences); see also JEROME FRANK, COURTS ON TRIAL 22-24 (1949) (arguing that facts are not found but are processed through a series of "refractions"); Moore, supra note 7, at 275-83 (arguing that jurors process information using schemas drawn from their own social experiences).

79. See Pennington & Hastie, supra note 70, at 199-200. Pennington and Hastie suggest that the classification of a story into an appropriate verdict category is likely to be a deliberate process. [A] juror may have to reason about whether a circumstance in the story such as "pinned against a wall" constitutes a good match to a required circumstance, "unable to escape," for a verdict of not guilty by reason of self-defense. Id. at 200.

80. Id. at 203.

81. BENNETT & FELDMAN, supra note 52, at 10.

82. LLEWELLYN, JURISPRUDENCE, supra note 38, at 222.
preciation for society's needs, "feel for an appropriate rule," and respect for precedent.83 Both understandings give a central role to nondeductive reasoning and judgments arising from the decisionmaker's background experience.

2. Interpretive Construction of Facts in Criminal Law

Neither set of studies gives much attention to the interpretation of legal rules, or how application of those rules affects either story construction or final decisions.84 Still, the studies provide at least two suggestive insights. The first we have noted: jurors employ a situated, context-sensitive approach to factfinding and decision-making that corroborates hermeneutic and pragmatic perspectives.85 Jurors interpret the meaning of facts with reference to a broader social context. At the same time that they construct factual meaning in a reciprocal relation with their preunderstandings about the social world,86 they also determine the meaning of statutory terms conveyed by instructions and verdict choices, a process that further influences factual construction.87

Second, such descriptions of factual interpretation should remind us of a well-identified interpretive difficulty in criminal law. Mark Kelman has noted that "[l]egal argument can be made only after a fact pattern is characterized by interpretive constructs," which he suggests typically make "a single legal result seem[ ] inevi-

83. See id. at 221-22; see also LLEWELLYN, COMMON LAW, supra note 38, at 268-85 (discussing the idea of "situation sense").

84. As in other social science studies of juries, the working assumption appears to be that legal rules are formal and fixed, their application unproblematic. Bennett and Feldman, for example, describe the jury's task as "constructing an interpretation for the defendant's alleged activities and determining how that interpretation fits into the set of legal criteria that must be applied." BENNETT & FELDMAN, supra note 52, at 8. Stories that jurors construct from evidence "produce interpretations that can be categorized easily within the legal statutes that apply to a case." Id. at 10; see also id. (asserting that stories reduce "complex bodies of evidence" to "terms that correspond nicely to legal categories").

85. See, e.g., id. at 64-65. Bennett and Feldman describe a process of fact interpretation, in fact, that closely matches the hermeneutic-circle strategy described by Gadamer of continued reexamination from varying perspectives in order to reevaluate the whole and its various parts. See supra note 52. They describe jurors as "building an interpretation by working back and forth" among various cognitive operations and "testing the result against the other side's story . . . taking incidents from one social context and placing them in another." BENNETT & FELDMAN, supra note 52, at 64-65; cf. Zeppos, supra note 4, at 1338 ("Fact finding is no less of an interpretive act than statutory interpretation.").

86. See, e.g., GADAMER, supra note 34, at 226-71, 291-96; see also supra section II.A (discussing practical-reasoning literature).

87. See, e.g., Roberts et al., supra note 8, at 262-63 (discussing the possibility that different verdict options "might directly influence the process of evaluation and 'construal' of information from cases" and citing studies suggesting such influence).
Kelman argues that interpretive constructs in criminal law occur in four forms, all of which operate unconsciously or "non-rationally" to shape our view of the defendant's behavior.89 One construct involves the choice of broadly or narrowly constructing the relevant time frame. This decision whether to consider events that happen either before or after the criminal incident depends on whether the events seem relevant to judging the defendant's behavior.90 Similarly, even when employing a broader time frame, one may choose to take a disjointed or unified view of a defendant's choices during that time, allowing earlier events or states of mind to become more or less relevant.91 One may comparably choose to construe the defendant's intent narrowly — relating solely to physical actions at the moment of the alleged crime — or more broadly to include his goals and the criminal nature of his conduct.92 Finally, criminal law must choose whether to view the defendant narrowly — as a unique individual with a specific set of perceptions and capabilities — or more broadly as a person of normal capacities.

89. See id.
90. See id. at 593-94.
91. Kelman offers this illustration:
The earlier "moment" may be the time at which a defendant made some judgment about the situation she was in, some judgment that at least contributed to the ultimate decision to act criminally. For instance, the defendant negligently believes she must use deadly force to defend herself and then she intentionally kills someone, having formed that belief...

Once we agree to look at these earlier moments, we must decide whether to disjoin or unify the earlier moment with the later moment. We can treat all the relevant facts as constituting a single incident, or we can disjoin the events into two separate incidents. ...

... Is a negligent decision to kill followed by an intentional killing a negligent or intentional act? Id. at 595; see also id. at 616-20 (discussing further disjointed versus unified accounts).

For examples of deliberations in which jurors discussed time-frame issues — specifically, how much of defendant's prior life experience was relevant to his insanity defense — see RITA JAMES SIMON, THE JURY AND THE DEFENSE OF INSANITY 140-41 (1967) ("[L]ike the jurors in the incest case, these jurors [in a housebreaking case] also stressed the defendant's behavior at the time of the crime rather than his childhood or other events in his past. ... In both trials the jurors focused on the defendant's behavior immediately preceding and following the crime."). See also id. at 142-43 (discussing jurors' review of evidence beyond the moment of the crime).

92. See Kelman, supra note 88, at 595-96, 620-33. As one of several illustrations of this construct, Kelman points to cases of impossible attempts. For example, in People v. Jaffe, 78 N.E. 169 (N.Y. 1906), the defendant was acquitted of attempting to receive stolen property because the goods that he expected to receive had been recovered by the police. One can view Jaffe as broadly intending to receive stolen property, if the facts had been as he assumed them to be. Viewed more narrowly, Jaffe intended only to receive these specific goods, which in fact were no longer "stolen goods"; thus, his intent was merely to receive specific non-stolen items. See Kelman, supra note 88, at 621-22.
to whom widely held assumptions about human traits and abilities apply.93

In the analysis of jury deliberations below, we see that jurors make just these sorts of decisions about interpretive constructions. We will also see, as Kelman argued — with reference to judges and commentators rather than juries — how these factual constructions also help jurors make legal decisions.94 Implicit in both the social science story model and Kelman’s analysis of interpretive constructs is a series of normative baselines about what facts are relevant to an understanding of the events described at trial.95 Those baselines are largely implicit in what seems commonsensical and plausible — the sorts of social assumptions we expect jurors to bring to the factfinding task, and the sort that Kelman describes as unconscious or nonrational. 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 — if it conflicts with a “considered judgment” about the proper moral assessment of the defendant’s action.

93. See Kelman, supra note 88, at 596, 633-42. The law must make this choice, for example, in evaluating a provocation defense to a homicide case, for which the defendant’s lethal response must be reasonable. No reasonable person would kill another when provoked by a victim’s conduct that is not lethally threatening itself, such as a spouse’s act of adultery. On the other hand, someone just like the defendant, with his temperament, perceptions, and patterns of judgment, would kill, because this defendant did. See id. at 636-37. Courts have negotiated this unresolvable question of how particularized to make the reasonable-person standard — that is, how many of the defendant’s traits and circumstances to include in the model — with a wide variety of answers. See generally Richard G. Singer, The Resurgence of Mens Rea: II — Honest but Unreasonable Mistake of Fact in Self Defense, 28 B.C. L. Rev. 459 (1987). For a discussion of jury deliberations that address this issue, see SIMON, supra note 91, at 161 (concluding that most jurors in the study “seemed to feel that the ability to distinguish between right and wrong should have been internalized as part of one’s basic personality” and thus held the defendant to that expectation).

94. See Irwin A. Horowitz, The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials, 9 LAW & HUM. BEHAV. 25 (1985) [hereinafter Horowitz, Effect] (suggesting that instructions can affect the fact discussions in deliberations and that the factual story jurors compose is contingent on the law to be applied to it); Irwin A. Horowitz, Jury Nullification: The Impact of Instructions, Arguments and Challenges on Jury Decision Making, 12 LAW & HUM. BEHAV. 439 (1988) [hereinafter Horowitz, Impact].

B. Studies of the Effects of Attitudes, Ideologies, Values, and Sentiments on Jury Verdicts

1. Attitudes and Ideology

In light of the effect of perspectives and social context on factfinding and judgment processes, there has been considerable empirical study of "extralegal" influences on jury decisionmaking, ranging from demographic factors — race, gender, age, economic status — to social attitudes and political ideology. Many such factors affect, to varying degrees, which facts jurors remember or emphasize and which final judgments seem more plausible or preferable. While such considerations are the stock-in-trade of trial lawyers' jury-selection strategies, many correlate so weakly with verdict choices that they are ineffective predictors of juror behavior.96

Case-relevant attitudes or ideological commitments probably affect decisions most strongly. Ellsworth found in one study, for example, that attitudes toward capital punishment, which correlate with a collection of views about crime and the criminal justice system generally, subtly affect a range of small decisions that go into criminal-verdict choices.97 Such attitudes affect perceptions of the plausibility of witnesses, the availability of alternative cognitive "scripts" or stories for making sense of the evidence, the possibility of mistaken conviction, and the individual sense of how much doubt constitutes reasonable doubt.98 Another study found that, in a civil action for damages against police officers who conducted an illegal search, awards were affected by juror knowledge of the search's outcome — whether it yielded illegal drugs — by the seriousness of the offense, and, in some cases, by jurors' political attitudes or ideology.99 Such information and ideology seemed to affect verdicts


98. See Ellsworth, supra note 97, at 58.


With regard to assessments of a search's legality, judges are also concerned with outcome information. See William J. Stuntz, Warrants and Fourth Amendment Remedies, 77 VA. L. REV. 881 (1991) (describing the Fourth Amendment warrant requirement as serving to prevent judicial bias from search-outcome information available in a postsearch suppression hearing).
by indirectly influencing the construction of a knowledge structure
to interpret and summarize evidence of the case.100

Two points about these findings are important here. First, atti-
tudes, though apparently stronger than demographic distinctions,
have proven generally ineffective as predictors of final decisions be-
cause other factors — including evidence and trial procedures —
suppress their controlling effects.101 Several studies confirm that
when evidence is relatively strong, the influence on juries of legally
irrelevant facts as well as moderate disagreements with substantive
rules is minimal.102 The effect of such factors increases in close
cases, but the variation in outcomes does not substantially differ
from those the justice system produces without the jury.103

More important, attitudinal and ideological biases are hardly
limited to jurors, which diminishes their relevance for a specifically
jury-focused theory of interpretation. An extensive and growing
political-science literature examines attitudinal influences on judi-
cial decisionmaking, particularly in Supreme Court opinions.104
Like attitudinal studies of juries, research on judicial ideology sug-
gests that judges' political and social attitudes substantially affect
decisionmaking. One implication is that comparable findings about
juries are unexceptional. Together, the research simply suggests
that any human decisionmaker is significantly affected by ideologi-
cal predispositions that legal training cannot suppress.105

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100. See Casper & Benedict, supra note 99, at 65-82.
102. See, e.g., Martha A. Myers, Rule Departures and Making Law: Juries and Their Ver-
103. See, e.g., Donald Black, The Behavior of Law (1976) (arguing from empirical
evidence that legal outcomes consistently vary across forums and legal institutions with such
legally irrelevant, social factors as the wealth or social status of parties); Donald Black,
104. See, e.g., Robert A. Carp & C.K. Rowland, Policymaking and Politics in the
Federal District Courts (1983) (arguing from empirical data that judicial attitudes —
personal values and backgrounds as well as regional customs — affect decisions, particularly
in close cases); Sheldon Goldman & Thomas P. Jahnige, The Federal Courts as a Po-
litical System 134-84 (3d ed. 1985); Glendon Schubert, The Judicial Mind Revis-
ited: Psychometric Analysis of Supreme Court Ideology (1974) (describing an atti-
tudinal theory of Supreme Court decisionmaking); Jeffrey A. Segal & Harold J. Spaeth,
The Supreme Court and the Attitudinal Model (1993); Harold J. Spaeth, The Attitudi-
nal Model, in Contemplating Courts 296 (Lee Epstein ed., 1995); see also Gerald N.
(1991) (recounting blatant judicial bias in legal interpretation on civil rights issues); id. at 332-
35 (describing lower courts' resistance to criminal procedure mandates that conflict with local
practices).
105. More significant, attitudinal descriptions in large part may collapse into legal-
reasoning descriptions of decisionmaking. If most theories of statutory interpretation — and
constitutional review — acknowledge substantive discretion of decisionmakers and accept a
legitimate role for public values or political morality, it becomes difficult to distinguish be-
Several studies have examined a topic closely related to ideological influences — the effects of jurors' notions of justice related to specific, factual scenarios. Finkel tested whether popular attitudes regarding the felony-murder rule and accessory liability affected verdicts when jurors had to apply those two rules in a death-penalty prosecution. Two points from the study are especially interesting here. First, Finkel identifies a widely held value — proportionality — through which jurors apparently mediate the application of law. Second, he identifies instruction language that changes many verdicts but does not fully control them in the sense of producing outcomes we would expect from uniform, literal application of legal rules. Thus, the study identifies jurors struggling between strong, widely held norms and conflicting criminal law rules, a struggle mediated by interpretation of instructions. It seems some jurors resolve that tension by applying statutes literally and against personal or community preferences; others resolve it against literal application, by either ignoring the instruction or dynamically interpreting it. The effort to define the effect, if any, of social norms on
divide illegitimate biases and legitimate incorporation of public norms, theories of government, or well-argued policy choices.

106. I do not mean to imply, by the separate headings for this section and the preceding one, a sharp conceptual distinction between ideology or attitudes and public values or justice notions. I separate them only to follow the distinctions in the studies I discuss here and to suggest, for present purposes, a narrow definition of ideology that links it closely with mainstream political positions, while suggesting, with the terms "values" and "justice", notions that are less consciously political and more instinctual dispositions. The distinction is not one that can withstand much scrutiny.

107. The felony-murder rule holds a defendant guilty of murder if an unlawful killing occurs during the course of a felony, whether or not the killing was intentional. See Joshua Dressler, Understanding Criminal Law § 31.06, at 479 (1995).


109. Jurors apparently felt strongly that just outcomes required treating accomplices less severely than principal perpetrators in felony-murder scenarios, although criminal law dictates equal liability for them. See Finkel, supra note 9, at 169-71 (discussing findings of proportionality sentiment).

110. Jurors given a "conclusive presumption" instruction convicted defendants of felony murder more frequently than those who received no such instruction or those who received a "nullification" instruction, which informed them they had the "final authority to decide whether or not to apply a given law," to which they need only give "respectful attention." See Finkel & Smith, supra note 108, at 148 (reprinting instructions); id. at 153-54 (discussing experiment results). For a discussion of similar studies on the effects of instructions, see infra notes 160-81 and accompanying text.
rule-application decisions should remind us of judicial public-values analysis.111

In their seminal study of juries, Kalven and Zeisel relied on judges' assessments about juror reasoning to explain verdicts that disagreed with decisions judges would have rendered in the same case.112 Based on these judicial assessments, Kalven and Zeisel identified several sentiments that seemed to explain some verdicts.113 In one pattern of verdicts in assault and homicide cases, jurors seemed to construe self-defense rules liberally to expand concepts of adequate provocation. Jurors seemed to excuse some proportional violent responses to insults or other belligerent, provocative, or condemnable victim behavior, such as police brutality against a defendant charged with assault, or the record of abuse by a husband who was shot by his wife.114 The authors concluded that the jury's "view is not so much that the defendant was blameless, but that in light of the provocation by the victim, the defendant's punishment should be moderated."115 They found "the jury's responses to provocation and harassment are based on a delicate calculus"116 and demonstrate "the moderation of the jury's revolt against the law."117

Drawing the comparison to Finkel's findings, we can describe Kalven and Zeisel's jurors as demonstrating another aspect of the proportionality value. The concern here is proportional allocation

111. See supra notes 16, 59-60, and accompanying text.
112. Kalven and Zeisel asked judges whether they would have rendered the same decision as the jury and then — in the minority of cases in which judge and jury disagreed — asked judges' opinions about why the jury arrived at its verdict. See Kalven & Zeisel, supra note 14, at 45. The study concluded generally that jurors competently evaluate non-technical evidence and do not allow extralegal concerns to change decisions in most cases. See id. at 149-62. Yet it had several drawbacks for an exploration of jurors' interpretive practice. The data is based entirely on judges' views and opinions, so we have little information directly from juries other than the verdict. There is insufficient consideration of factors other than juror sentiments, such as the quality of lawyering, that may have affected case outcomes, and jury instructions are not recounted nor considered closely in the explanation of verdicts. For related criticisms of the study, see Günther, supra note 101, at xviii-xxi.
113. Some appeared to be simply incidents of bias that would be difficult to fit into any normatively defensible theory of adjudication. Sympathy or dislike for defendants, for example, seemed to affect a small percentage of those cases in which the judge and jury disagreed. See Kalven & Zeisel, supra note 14, at 214-18; Hans & Vidmar, supra note 9, at 135 (noting that Kalven and Zeisel found sympathy to be a factor in only four percent of trials). Subsequent research, however, has not consistently found significant sympathy effects. See Hans & Vidmar, supra note 9, at 134; Francis C. Dane & Lawrence S. Wrightsman, Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts, in The Psychology of the Courtroom 83 (Norbert L. Kerr & Robert M. Bray eds., 1982).
114. See Kalven & Zeisel, supra note 14, at 221-41.
115. Id. at 240.
116. Id. at 231.
117. Id. at 229.
of blame between defendant and victim, rather than between multiple defendants. In these cases as well, jurors appear to aim for a morally nuanced verdict — often by rendering a verdict for a lesser-included offense as a compromise between acquittal and literal application of the principal statute — that takes account of the victim's contributory fault or assumption of risk.\textsuperscript{118}

Moreover, the use of such a proportionality value can be understood as an interpretive device to achieve the individualized assessment of culpability that is the underlying purpose of criminal adjudication. A crucial tool for judging a defendant's conduct is to compare it not only to what we expect from ourselves and others in that situation, but also — at least implicitly, and perhaps even unconsciously — to what others do in situations the criminal law identifies as related. Criminal law categorizes together as intentional homicides, for example, both the act of euthanasia committed by a nurse upon a consenting, terminally ill patient and a paradigmatic robbery-murder of a stranger. We should expect some difference in judgments of the degree of moral culpability between such disparate cases, even under the same legal rule, and expect that rule interpretation will be informed by such strong background understandings as the proportionality sentiment.\textsuperscript{119} That effect may not differ in kind from judges' use of background norms when engaged in statutory interpretation as well as constitutional review.\textsuperscript{120}

Just as, under a dynamic or practical-reasoning analysis of judicial interpretation, statutes are less likely to be applied according to their common-sense meaning when other considerations point toward alternate readings, strong conflicts between plain meaning and widely held popular notions of fairness relating to criminal judgments are likely sources for dynamic interpretation of instructions by juries. Robinson and Darley recently have documented several contexts in which popular notions about what legal rules are or should be depart from common law rules or contemporary criminal codes.\textsuperscript{121} They found, for example, that most of their survey

\textsuperscript{118} See \textit{id.} at 242-57. Victims who were reckless or intoxicated, for example, often moved juries to acquit a defendant or convict him of a lesser charge. \textit{See id.} at 254-57.

\textsuperscript{119} Cf. Kahan & Nussbaum, \textit{supra} note 29, at 309, 313-14 (assessing the moral quality of each defendant's motivating emotions to distinguish between two defendants who killed with a claim of provocation).

\textsuperscript{120} See, e.g., Aleinikoff, \textit{supra} note 4, at 56-62 (discussing the use of norms in statutory interpretation); Owen M. Fiss, \textit{The Supreme Court, 1978 Term — Foreward: The Forms of Justice}, 93 Harv. L. Rev. 1 (1979) (discussing the use of public values in constitutional review).

respondents — like Finkel’s mock jurors — would assign less liability to accomplices than principal perpetrators, in contrast to most criminal codes. Across a range of criminal law issues, including the role of harm and renunciation in attempts and failures to rescue, they found that subjects — just as Kalven and Zeisel detected among real jurors — make “more nuanced distinctions between similar but not identical cases” than criminal codes do. The tension between popular notions and rules could be good news if popular distinctions are made for defensible reasons. It shows that individualized assessments of moral culpability, sensitive to circumstances and background norms, are not only a theoretical goal of criminal law; they are also part of the popular understanding of criminal law’s purpose.

The results of Robinson and Darley’s study do not mean people vote for personal outcome preferences when they become jurors. Assigned the role of juror, one may feel a stronger obligation to ignore personal sentiments and apply the legal rules conveyed through instructions fairly literally. On the other hand, perhaps

122. See id. at 41-42. For a similar finding in a mock-juror study, see FINKEL, supra note 9, at 154-71.

123. Robinson and Darley’s subjects gave weight to whether harm occurred, thus punishing criminal attempts less severely than completed offenses and allowing a renunciation defense for attempts that were nearly complete and for which most codes allow no such defense. They also detected clear community sentiment for a rule requiring a higher threshold for attempt liability than the prevailing rule — that is, the actor must be in “dangerous proximity” of completing the crime rather than merely taking a “substantial step” toward completion. Additionally, subjects supported liability for failing to rescue others in distress, though most codes impose no such liability. See ROBINSON & DARLEY, supra note 121, at 13-51.

124. See id. at 50. As part of that inclination toward fine-tuned judgments, respondents also supported grading of offenses on a long continuum that distinguishes between offenses even more finely than the eight or nine grades of offenses now typical in most codes. See id. at 198.

125. The purpose of Robinson and Darley’s study primarily was to identify popular consensus about the appropriate content of legal rules, which rule drafters could use to inform their revision of rules. See id. at 215.

126. We see strong evidence of this feeling in the Harris juries, discussed infra at section IV.B. For discussion of evidence that jurors feel constraints to their authority and discretion when serving as jurors, see, e.g., GUINThER, supra note 101, at 58; HANS & VIdMAR, supra note 9, at 154-57 (reviewing research, concluding that “[d]epartures [from instructions] occurred predominantly in those cases where the evidence itself was ambiguous or contradictory,” and quoting one juror who felt compelled to follow instructions against her personal preferences and who noted that “[t]he way the judge charged us, we had no choice,’ that ‘personal views don’t count,’ and that she ‘was in full agreement with the defendants until we were charged by the judge’ ” (quoting JESSICA MITfORD, THE TRIAL OF DOCTOR SPOCK (1969))); SIMON, supra note 91, at 163-70; Robert W. Balch et al., Socialization of Jurors: Voir Dire as a Right of Passage, 4 J. CRIM. JUST. 271 (1976); Diane L. Bridgeman & David Marlowe, Jury Decision Making: An Empirical Study Based on Actual Felony Trials, 64 J. APPLIED PSYCHOL. 91, 98 (1979), reprinted in JURIES: FORMATION AND BEHAVIOR, supra note 7, at 91, 98.
instructions conflict so strongly with notions of just outcomes that jurors do allow popular sentiments to lead them to implausible interpretations of statutes.127 Two points remain for exploration: evidence of legal-reasoning approaches employed by nonlawyers in the justice system, and the effect that instructions have on jury decisions.

C. Lay Approaches to Legal Reasoning

Studies of how people without legal training behave in courts as parties, advocates, and judges suggest insights on how jurors may construe and apply legal rules. John Conley and William O'Barr studied lay litigants in small-claims courts, where some judges are also nonlawyers.128 Their extensive, qualitative study of litigants and judges' discourse in the litigation context revealed several interesting features of lay ideas, strategies, and thought processes about law. Conley and O'Barr divided litigants descriptively into two broad groups along a "rules-relationships continuum."129 Litigants nearer the relational end of the continuum understand and describe their disputes in terms of social relationships and mutual obligations; their accounts downplay individual autonomy and control over events and emphasize the context and social networks in which disputes arise. They seek to resolve disputes with reference to contextualized social rules rather than literal application of legal rules.130 "Rule-oriented" litigants, in contrast, take a more legalistic, contractual approach to dispute description and resolution that more closely matches formal notions of legal process. They view law as a set of clear rules that allocates responsibility regardless of status and context; they view society as "a network not of relationships, but of contractual opportunities that each individual has the power to accept or reject on a case-by-case basis."131

Despite the contrast between relational litigants' contextual orientation and the dominant view of law as a deductive process employing sets of rules, relational litigants "are not illogical in the sense of reacting to problems in an unstructured or random fashion. Their reasoning is indeed systematic, but their logic is so different

127. See GUINTHER, supra note 101, at 58 (noting that, while "people don't forget their prejudices just because they become jurors, events within the trial and deliberation processes act as reductive factors," including "[t]he solemn oath that all jurors take to be impartial").


129. See id. at 58.

130. See id.

131. Id. at 59.
from the law's as to be largely imperceptible to those in whom the tradition of formal legal analysis is deeply ingrained."\textsuperscript{132}

Moreover, Conley and O'Barr found similar distinctions among small-claims court judges.\textsuperscript{133} Some were lawyers, while others had only brief training designed for small-claims court judges. Neither sort of training suppressed variations in judges' views of rules or the relevance of context, relationships, and norms.\textsuperscript{134} Three of the study's judicial "types" are most relevant here.\textsuperscript{135} "Strict adherent" judges "view[ ] the law as a set of inflexible neutral principles" and their judicial role as "nondiscretionary application of the abstract rules and principles that constitute the law."\textsuperscript{136} "Authoritative decision makers" are similarly firm in their belief that they follow the law, but they "emphasize their personal responsibility for decisions" and "give no indication that there is any source of legal authority beyond their personal opinions."\textsuperscript{137} In contrast, the "law

\textsuperscript{132.} \textit{Id.} at 60. This contextual approach is comparable to the story construction strategies that jurors typically employ. See \textit{Bennett \& Feldman, supra} note 52, at 49-61, 71-73 (identifying "interpretive rules" that jurors use to construct a coherent story from evidence and identify a central point for that story that builds on background knowledge and understandings).

\textsuperscript{133.} See \textit{Conley \& O'Barr, supra} note 128, at 85-112.

\textsuperscript{134.} See \textit{id.} at 111-12 ("[W]e have attempted to dismantle the stereotype of 'the judge' as impassive arbiter. We have shown that informal court judges are highly variable in their conceptions of law, their views of their role, and their approaches to problem solving. Much of this variation can be explained in terms of the rules-relationships continuum we developed in reference to litigants.").

\textsuperscript{135.} The two other types of judges are the "mediators," who try to avoid ruling at all by instead encouraging or nearly coercing settlements, \textit{see id.} at 90-96, and the "proceduralists," who "place high priority on maintaining procedural regularity" and "rarely, if ever, interject themselves personally into cases by seeking to mediate or encouraging extralegal compromises," \textit{id.} at 101.

\textsuperscript{136.} \textit{Id.} at 85.

\textsuperscript{137.} \textit{Id.} at 96. They also "often express critical opinions about the in- and out-of-court behavior of the parties," \textit{id.} at 96, entertaining the sort of considerations that, if made by juries, would be cited as evidence of improper, extralegal reasoning. The authors cite a sample passage of such reasoning and commentary by one judge. The plaintiffs had purchased a used refrigerator with a warranty from the defendant. The refrigerator quickly broke, causing food spoilage. The plaintiffs had the appliance repaired by another for $50 and sought a refund for the refrigerator plus reimbursement for lost food. The judge explained his judgment of awarding the plaintiffs only the $50 repair fee as follows:

Okay, I'm not satisfied that... that is something that he should be responsible for at this point. Um, you know I think he's got a right to try to come out and fix it and if something there is wrong. But when something goes wrong and you lose the food, that's not, I don't believe that's part of the guarantee. The guarantee is to come out and fix it. Your refrigerator can go wrong. A new one can go bad. Um, I'm going to award you the $50 right here. I think you did the right thing by, by giving him a chance and then going on and getting somebody else to fix it ....

\textit{Id.} at 97. The authors note that the judgment "contains no reference to a body of law that guides... [the judge's] decision making," that the judge "responds in the first person... thereby personalizing the dispute between the plaintiff and the court," and that he offers "gratuitous, if favorable, assessments about the conduct of the plaintiff" and thereby "steps beyond the bounds of making a legal decision to evaluate and comment on the behavior of
maker" is a judge who "views the law not as a constraint, but as a resource" and "renders judgments consistent with his or her sense of fairness and justice."138 The variation in approaches to law thus appears even among those with judicial experience and legal training.139

In light of such evidence, we can expect that nonlawyers would bring similar orientations toward the law with them when they enter the jury room; the jury deliberations examined in the next Part confirm this expectation. Some jurors may be rule-oriented and attempt to apply instructions in a quasi-formalist manner familiar to lawyers. Others, however, may attempt to employ rules in a more contextualized assessment of the case and reach a verdict that accords with shared notions of social obligations and responsibility as well as or instead of applicable rules.140 The contextualized approach of this latter group of jurors raises the concern about the displacement of rules with personal notions of justice. Such jurors — like authoritative judges — may deliberate with more personal references to themselves and to litigants and cite more extralegal considerations; some — like law-making judges — may strive to reconcile rule application with strongly felt justice norms.

Traditional understandings of law application and of the jury's proper role implicitly prefer rule-oriented thinkers and lead to misgivings about relational jurors. The latter group, however, may in fact be reasoning just as "legally" as rule-oriented jurors. Interpreting rules with a contextualized assessment of social relationships and obligations is a normatively legitimate form of understanding and applying law that judges have widely employed, and scholars have endorsed, in recent years. The discussion of practical reason-

the litigants." Id. at 98. In other cases, such commentary revealed how the judge "believes that the people who bring their troubles to his court ought to reform their lives." Id.; cf., e.g., Visher, supra note 96, at 3-4, 12-14 (discussing "extralegal" influences on jury decisionmaking).

139. That should not be surprising. Legal scholars' long-running debates over proper approaches to judicial review and statutory application demonstrate comparable variations. See e.g., Eskridge & Frickey, supra note 40 (discussing and criticizing several prominent approaches to statutory interpretation); Michael J. Perry, The Legitimacy of Particular Conceptions of Constitutional Interpretation, 77 VA. L. Rev. 669 (1991) (discussing various approaches to judicial review); Zeppos, supra note 4 (discussing and criticizing approaches to statutory interpretation).
140. It would be interesting to classify mock jurors in such studies as Finkel's using a rule-oriented/relation distinction. See Finkel, supra note 9, at 154-71; supra text accompanying notes 129-31. It may well be that those jurors who declined to treat accomplices the same as principals in the felony-murder scenario are disproportionately relational, contextual thinkers, while those who applied the statutes literally, perhaps despite conflicts with strong justice sentiments, may be mostly rule-oriented.
ing in public-law scholarship is one obvious example.141 But the relational approach is familiar to private-law judges and scholars as well.142 The trend in contract and tort law has been toward taking account of the inevitable complexities in social relationships found in business contracts and dealings and away from a narrower, more literal rule application that discounts context and social norms.143 We might view relational thinkers on juries as fitting within this judicial practice.144

We need to assess juror decisionmaking with an analysis more complex than simply asking whether they literally apply statutes. We need to compare jurors' approaches with actual judicial practice in order to assess whether contextualized, relational approaches to rule application are normatively appropriate within contemporary, postformalist traditions of law interpretation.

D. Studies of Whether Jurors Follow Instructions on Law

1. A Note about Jury Comprehension of Rules and 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.145 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 preconcep-

141. See Eskridge, supra note 13, at 1017-18, 1063.


143. See Feinman, supra note 142, §7.3.1-.3.2, at 192-95. As Feinman notes:

The fundamental policy orientation of the relational approach is that the intertwined aspects of relationships carry with them responsibilities that persons in the relationships owe to one another. People in relationships and relational networks are interconnected; their interconnectedness means that they must attend to one another's interests at the same time that they protect their own interest. These relational responsibilities often should be enforced by legal rules. Id. § 7.3.2, at 194.

144. We also may understand relational thinkers as employing in part a strong version of Rawls's process of reflective equilibrium, in as much as they double-check rule application with considered notions of just outcomes and employ a contextual analysis in attempts to reconcile the two. See Rawls, supra note 38, at 48-51.

tions about the alleged crime. Such findings seem to pose obvi­
ous problems for acceptable jury interpretation of statutes.

Despite its seriousness, juror miscomprehension is a problem
largely separate from jury rule interpretation. This is because, first,
the methodology used in some studies likely exaggerates the
amount of miscomprehension, and, more important, the blame for
jurors’ lack of understanding lies to a significant extent with courts
rather than juries.

On the first point, some of the studies that identify juror misun­
derstanding of statutes survey jurors individually at some point af­
ter they have been instructed and find significant errors in retention
and comprehension by individuals. Yet, as Hastie has argued and
supported with data, 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 per­
cent for information from judge’s instructions, if one credits a jury
with recall of information that any one juror remembers. He also
documented significant correction of jurors’ legal errors by other
jurors during deliberations, a factor other studies did not explore.
Moreover, Hastie’s findings are based on juries that received in­
structions in a manner now known to limit comprehension: jurors
received instructions only once, and only orally from the judge.

Second, 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 in­
structions orally from the judge at the end of trial, and often cannot

146. See Hastie et al., supra note 67, at 168-72; Severance & Loftus, supra note 145, at
157-61, 194 (discussing studies); Vicki L. Smith, When Prior Knowledge and Law Collide:

147. See Hastie et al., supra note 67, at 80-81, 88-89, 168-70; see also Elwork et al.,
supra note 145, at 3-24 (discussing problems with jury instructions in general).

148. See Hastie et al., supra note 67, at 81.

149. See id. at 80-81 (noting that individual jurors answered questions on instructions
with 30% accuracy, but a “more meaningful examination of memory” found the jury’s col­
lective memory of instructions was over 80% accurate); see also Finkel, supra note 9, at 283
(discussing empirical studies “showing that jurors do not ignore or willfully disregard in­
structions but that they remember and comprehend them”). Correction of jurors’ misunder­
standing of instructions by other jurors repeatedly occurs in the set of eight Harris mock jury
deliberations discussed infra section IV.B. See, for example, Transcript of Harris Jury No. 2,
at 9-11 (on file with author), in which other jurors try to correct Juror 2’s incorrect under­
standing of the law.

150. See Hastie et al., supra note 67, at 17, 49-50, 169; see also id. at 231 (recom­
manding that jurors be given written copies of instructions and instructed more than once on
key rules).
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. Further, there is evidence that jurors misunderstand instructions defining crimes because the definitions conflict with lay preconceptions of what acts and circumstances constitute those crimes. Research indicates as well that properly crafted instructions can largely correct this tendency and improve jurors' understanding of crime definitions. Without such reforms, we cannot assess juror capacity to understand and correctly apply instructions given optimum opportunity.

151. 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 Abramson, supra note 6, at 91 (describing "judges' furious, quick-paced, jargon-laced set of instructions" to juries).

152. See Austin, supra note 151, at 60-65 (noting that the instructions in the case under study averaged 102 words per sentence, while modern American prose averages 21 words, and were written at a "sixteenth grade level" requiring graduate education to comprehend fully); Elwork et al., supra note 145, at 3-24, 35-56; Hastie et al., supra note 67, at 231; Raymond W. Buchanan et al., Legal Communication: An Investigation into Juror Comprehension of Pattern Instructions, COMM. Q., Fall 1978, at 31, 32-35 (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 (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 146, 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).

153. See Vicki L. Smith, Prototypes in the Courtroom: Lay Representations of Legal Concepts, 61 J. PERSONALITY & SOC. PSYCHOL. 857 (1991); Smith, supra note 146. 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. See Smith, supra, at 861 tbl. 1.; Smith, supra note 146, at 529-30.

154. See Smith, supra note 146, 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").

Further, as noted above, juries seem to perform better collectively, by correcting individual errors, than studies of isolated mock jurors — such as Smith's studies, see Smith, supra note 153; Smith supra note 146 — would predict. While individual jurors may incorrectly recall evidence or legal rules, collectively a jury has near total recall of both. See supra notes 147-49 and accompanying text; see also Hans & Vidmar, supra note 9, at 121 ("[T]he jury decision really derives from the deliberation of twelve people. Any lack of comprehension on the part of individual jurors may be corrected through group discussion."). Thus, it may be that group deliberations would suppress the effect of juror preconceptions about criminal statutes found by Smith just as it can fill in the gaps in the memories of individual jurors.
nor draw conclusions about jurors’ interpretive deficiencies separate from those caused by current instruction practices.155

Whatever a jury’s capacity with regard to law application, considerable evidence suggests that jurors are conscientious about and committed to following instructions and correctly applying rules, and they believe they understand most instructions.156 More important, the largest studies of real and mock jury trials find that jurors reach the result that lawyers and judges consider correct an overwhelming majority of the time.157 Thus, despite evidence of miscomprehension, jurors’ attempts to follow instructions are often generally successful.158 They appear to understand, as a group, enough of the law usually to render acceptable verdicts.159

2. Effects of Instructions on Juror Decisions

Several studies employing mock jurors have demonstrated that jury instructions have significant effects on verdicts, leading jurors

155. Finally, one must bear in mind the realistic standard to which jurors should be held. The issue is not whether jurors achieve perfect recall and comprehension of instructions, but whether, within a set of procedures that maximizes their abilities, they compare sufficiently well to trial judges who perform similar tasks of statutory application. Most lawyers would probably assume that judges with law degrees, practical experience, and access to law libraries are superior interpreters of legal rules. But I suspect empirical data might prove surprising in a study comparing the comprehension of judges and jurors, especially in the lower tiers of state courts where most jury trials occur and judges are selected by election rather than professional merit, face considerable case-load pressures that limit research time and often require immediate rule-application decisions, have minimal or no law clerk support, preside over areas of law in which they have no practical experience, and face an array of pressures or incentives arising from their institutional setting that may influence discretionary choices. For a discussion of judicial competence, see GUNThER, supra note 101, at xix (citing surveys of attorneys about judicial competence in federal and state courts).

156. See id. at 59 (concluding, based on new studies and a review of research, that “jurors generally attempt to follow all . . . instructions the judge gives them”); id. at 73 (finding that most jurors surveyed “believed they understood ‘most’ of what the judge told them about the law, and they might not be wrong”); id. at 89 (reporting that 46% of jurors said the law given by the judge was the most important factor in their decisions); id. at 100 (reporting a survey of civil trial attorneys that found more than 90% agreed that jurors had grasped legal issues well); cf. id. at 83 (reporting survey results finding that most jurors thought their fellow jurors took their duties seriously). But see id. at 88, 99 (noting studies that find jurors discuss topics the judge told them to ignore, such as insurance in civil trials, with such factors intruding more often when evidence is close or the correct verdict unclear, but concluding that the impact of such “irrelevancies” is minimal).

157. See GUNThER, supra note 101, at 73; Haste et al., supra note 67, at 59-60 (finding most mock juries in a homicide trial reached a verdict of second-degree murder — the correct verdict, in the lawyers’ opinions — with manslaughter, the next most plausibly correct choice, occurring as the second most common verdict); Kalven & Zeisel, supra note 14, at 429-30 (finding nine percent of jury verdicts clearly incorrect).

158. See, e.g., Hans & Vidmar, supra note 9; Bridgeman & Marlowe, supra note 126, at 97-98 (concluding that “the jury by and large does understand the case and get it straight, and . . . the evidence itself is a major determinant” (quoting Kalven & Zeisel, supra note 14, at 162)); Myers, supra note 102, at 781.

159. See GUNThER, supra note 101, at 102.
to decisions different from ones they would reach with different instructions or none at all. As one example, Greenwald studied juror acceptance of self-defense claims based on battered woman’s syndrome (BWS) when the threat to the defendant was not immediate and physical but arose instead from long-term patterns of abuse.160 Mock jurors who received a broad “psychological” self-defense instruction returned a substantially higher percentage of not-guilty verdicts based on the BWS defense than jurors who received a traditional “physical” self-defense instruction or none at all.161 The study also provides strong evidence that instructions on substantive criminal law significantly affect jurors. Jurors understand instructions sufficiently for legal rules to prompt verdict decisions that differ from their uninstructed sentiments.

Sanders and Colasanto reported similar constraining effects of instructions. Using the same data set analyzed in section IV.B, they tested the effects of general intent versus specific intent instructions on a set of mock juries deciding a case in which the defendant was accused of stealing from vacant property old bricks that he claimed to believe were abandoned.163 As they should, juries more frequently convicted the defendant under the general-intent instruction, which required only intent to do the act — admitted by the defendant — rather than intent to violate the law.164 That finding, and further study on the binding effect of legal instructions, led Sanders and Colasanto to conclude that “juries do

160. See Jessica P. Greenwald et al., Psychological Self-Defense Jury Instructions: Influence on Verdicts for Battered Women Defendants, 8 BEHAV. SCI. & L. 171 (1990), discussed in FINKEL, supra note 9, at 244-45.

161. See Greenwald et al., supra note 160, at 173-75. Greenwald sought to explore whether a revised instruction could improve the success of self-defense claims raised by battered women defendants. BWS claims are often not successful with juries, which has raised charges that either jurors are biased or that traditional self-defense rules are constructed on a male norm of immediate physical threat that ignores the psychological injury to women in abusive relationships. See id. at 172-73.

162. Sanders and Colasanto’s paper analyzes verdict decisions, while the next Part of this article studies transcripts of the deliberations that yielded those decisions.

163. 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 fact pattern in this experiment was based on Morissette v. United States, 342 U.S. 246 (1952). The general-intent instruction required the jury to find only that the defendant intended the act of taking the bricks, “and it is not necessary to establish that the defendant knew that his act was a violation of the law.” The specific-intent instruction required the jury to find that the defendant “knowingly did an act that the law forbids, purposely intending to violate the law.” See Sanders & Colasanto, supra, at 9-10.


165. Sanders and Colasanto also varied an instruction on the binding effects of the law. One instruction told jurors that it was their duty to apply the law as the judge stated it; an alternate version told jurors that instructions were merely intended as a helpful guide in reaching a “just and proper verdict.” Id. at 9. Consistent with the premise that the defendant
use judicial instructions in deciding cases” and do feel constrained by the most restrictive instructions to convict despite personal sentiments.166 “[J]ury decision-making appears to be more principled than when the effect of instructions is left unexamined” and generally “can be rational and principled.”167

Horowitz also examined the effects of instructions imposing a duty to apply the law. In a large study of mock juries, he found that a strong nullification instruction — more explicit than is used in any jurisdiction — affected verdicts in drunken-driving and euthanasia cases, though in different ways. The driver-defendant was relatively unsympathetic, and juries convicted him more often under the nullification instruction.168 The euthanasia defendant, on the other hand, was depicted very sympathetically, yet probably was guilty under the statute; juries acquitted him more frequently under the strong nullification instruction.169 In contrast, the instruction had no significant effect in a typical robbery-murder case.170 Interestingly, a weaker nullification instruction prompted no significant differences in verdicts or deliberations compared to juries that received no such instruction.171

Further, Horowitz observed that instructions affected the contents of deliberations. When informed of nullification power, jurors spent less time discussing evidence and more on defendant characteristics, especially in the euthanasia case.172 They also gave more consideration to the case outcome and the defendant’s intent in their evaluations of evidence.173 Instructions changed not only verdicts but also the reasoning by which they were reached. Note the

166. See id. at 13, 17.
167. Id. at 13, 17-18.
168. See Horowitz, Effect, supra note 94, at 31-32, 34.
169. See id. at 31-32.
170. See id. at 33.
171. See id. at 30-32. The weaker nullification instruction was one still used in Maryland, one of two states that give nullification instructions. See id. at 30.
172. See id. at 34-35. A subsequent study found the same effect whether the nullification information came from a judge’s (strong version) instruction or merely a defense attorney's argument: jurors treated sympathetic defendants more leniently and dangerous defendants more harshly. See Horowitz, Impact, supra note 94, at 446. Thus, a defense nullification argument backfired and increased the likelihood of a guilty verdict in an unsympathetic drunken-driver case. In scenarios in which the prosecutor challenged the defense nullification argument, the nullification effect was significantly diminished. See id. at 446; id. at 452 (concluding that “a challenge, and not a very direct one at that, to nullification sentiments is quite sufficient to curb the juries’ potential desire to be liberated from the evidence”).
characteristics of deliberations without nullification information: Horowitz found them focused on evidence and legal issues, with little attention to legally irrelevant matters. Yet even the broader considerations that the strong nullification instruction prompted may fit within a practical-reasoning description of criminal judgment as an evaluation of character. Some attention to certain defendant characteristics — like mental capacity or motive, but not race — and to the justice of the outcome may contribute legitimately to an assessment of moral blameworthiness that criminal law theorists identify as a necessary component of a just guilty judgment.174

Finally, the seminal study examining the effect of instructions on juries — the Chicago Jury Project’s experiments on the insanity defense — found that instructions had a significant effect.175 Tested with sixty-eight mock juries, the study found that juries given an insanity defense instruction based on the M’Naghten176 case returned guilty verdicts significantly more often than juries given a Durham177 instruction or an instruction with no legal standard, which presumably allowed community sentiment to provide the rule.178 Jurors given the Durham instruction also deliberated longer.179

The M’Naghten instruction makes the defendant’s ability to distinguish right from wrong the basis of its insanity standard. Interestingly, however, jurors given the other two instructions often addressed that ability as well, though less frequently than

174. See Kahan & Nussbaum, supra note 29, at 313-14, 373 (noting that we may rightly judge less harshly the mother who impulsively kills the rapist of her daughter than the man who impulsively kills a gay person out of homophobic hatred, because the former held a socially appropriate valuation of her daughter’s well-being while the latter held a socially condemnable prejudice).

175. See Simon, supra note 91, at 70-77, 184-85, 199.

176. M’Naghten’s Case, 10 Clark & Finnelly 200, 8 Eng. Rep. 718 (H.L. 1843), discussed in Simon, supra note 91, at 8 (noting that “[u]nder the M’Naghten rule the defendant is excused only if he did not know what he was doing or did not know that what he was doing was wrong”). For the instruction given to mock jurors, see Simon, supra note 91, at 45.

177. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), discussed in Simon, supra note 91, at 8 (noting the Durham rule “states that a defendant is excused if his act was the product of a mental disease or defect”). For the instruction given to mock jurors, see Simon, supra note 91, at 45-46. See also id. at 72-73 (noting that the Durham instruction “produces a powerful difference in jurors’ verdicts” compared to the M’Naghten instruction).

178. The “standardless” instruction stated only: “[I]f you believe the defendant was insane at the time he committed the act of which he is accused, then you must find the defendant not guilty by reason of insanity.” Simon, supra note 91, at 46; see also id. at 72-73 (summarizing jury verdict data for different instructions). But see Fenkel, supra note 9, at 280-82 (reporting other studies of insanity instructions that yielded no significant differences in verdicts).

179. See Simon, supra note 91, at 75.
M'Naghten juries — a sentiment M'Naghten may have helped shape. That seems to suggest that the M'Naghten standard incorporates an issue that popular sentiment considers crucial to determinations of responsibility in insanity cases. It also suggests that lay approaches to criminal judgment, at least in this context, use considerations that explore the defendant's moral capacity.

E. Conclusion

The foregoing review of empirical literature reveals considerable evidence that juries reason, incorporate contextual and normative considerations, and reach outcomes in ways comparable to judicial decisionmaking. What the literature does not fully answer is how jurors reach their verdicts in light of the interacting effects of fact interpretation, strong norms and justice notions, approaches of legal reasoning, and application of instructions. More specifically, we still do not have a description of rule interpretation by juries in terms of contemporary legal-reasoning strategies — a description of the content of jury reasoning about statutes. Values and norms sometimes affect verdicts, but we understand that some effects of values in judicial interpretation are both inevitable and, in some forms, normatively attractive. If we can determine the considerations that lead jurors away from literal interpretations, we may find that they resemble judicial interpretive strategies that are widely regarded as acceptable, and even desirable. Qualitative study of jury deliberations can help us build a new, positive description of jury application of rules, one grounded in actual jury practice, as a process of practical reason. That description, in turn, will provide a basis for normative reassessment of how well juries interpret statutes.

IV. Statutory Interpretation in Jury Deliberations

With the background of statutory-interpretation theory and the insights of empirical jury research, I now look at jury deliberations

180. See id.
181. For a more extensive discussion, see id. at 132-80.
182. Even deliberations are not a full window into juror reasoning, just as judicial opinions do not reveal the full range of considerations and influences on judges' decisionmaking. Cf. W.S. Merwin, Asian Figures 65 (1973) (recounting a Chinese proverb: "A judge decides for ten reasons, nine of which nobody knows"). It is clear that most jurors come to the deliberation with fairly strong inclinations toward a verdict option, which means they have reasoned alone, silently, about the application of rules to the facts. Not all of such private reasoning is likely to be revealed in group deliberation, nor are key factors that change jurors' minds during deliberation necessarily clear from the spoken discussion.
in two cases in order to construct a preliminary theory of jury interpretation of statutes. The cases complement each other in the insights they collectively provide into jury reasoning. Both involve application of relatively simple statutes to cases in which the facts of the defendant's conduct and circumstances are not in real dispute. Both focus on different but related issues of mens rea — the defendant's knowledge or intention. In both cases juries explicitly focus on the language of relevant instructions to decide those issues. Yet the factual contexts vary in significant ways that are useful for comparative study. *Wisconsin v. Reed* involves a very sympathetic, mentally challenged defendant, while *Michigan v. Harris* centers on a defendant of normal intelligence for whom some jurors express modest sympathy but others do not. *Reed* is a gun-possession case, a regulatory charge that implicates background concerns of public safety.183 *Harris* is a theft case, a *malum in se* offense that invokes strong norms of property rights. These factual permutations lead juries to draw on a range of different considerations in their struggles to resolve application of scienter requirements and, through that process, pass judgment on the defendant's culpability.

A. **Statutory Interpretation by the Jury in Wisconsin v. Reed**

With permission of a Wisconsin state court, the PBS documentary program *Frontline* arranged to videotape the deliberations of jurors in an actual criminal case. In that case, Leroy Reed was charged with possession of a gun by a convicted felon. The facts were undisputed.184 Reed had been convicted of a felony several years earlier. He was not steadily employed and, according to expert testimony — which his in-court behavior seemed to confirm — he was of "substantially sub-average" intelligence and could read only at a second-grade level. He legally purchased a handgun as part of a plan to take a mail-order course to become a private detective. While "hanging around the courthouse," a police officer asked Reed for identification and he produced the bill of sale for the gun he had purchased. He explained that he was taking a correspondence course to become a private detective and, as part of the course, needed the gun for protection. The officer discovered that

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183. Though one might predict that a case in which a defendant is charged solely with having purchased and possessed a handgun — which was illegal for him because of his status as a convicted felon — might raise norms invoking a right to bear arms arising from the Constitution's Second Amendment, in fact no juror in *Reed* alluded to such norms or rights.

184. *See* *Frontline: Inside the Jury Room*, supra note 1.
Reed had a criminal record and asked Reed to go home, get the gun, and bring it to the police department; Reed did so. He gave officers a statement that he owned the gun, and he was arrested.

In closing arguments, the prosecutor emphasized that jurors had agreed to apply the law without sympathy or speculation. The defense attorney in effect argued for jury nullification, suggesting that “the law is being misapplied to these facts,” and that “you have the power, despite all the technical legality, to find Leroy Reed not guilty. You’re not violating the law by doing this.” The judge, however, refused to give a jury instruction on nullification; he told the jurors that they must follow legal instructions. The statute required proof of three elements for conviction: that Reed was a convicted felon; that he possessed a gun; and that he knew he possessed the gun.

The elements of the statute seemed clear to the jury; several jurors identified the three elements and noted that they had to find them proven beyond a reasonable doubt in order to convict. The jury deliberated more than two hours before reaching a unanimous verdict of acquittal, and its discussion touched on several interpretive strategies courts use to construe statutes. Several jurors, during their first round of comments, adopted a plain-meaning view of the statute and stated that they believed the three elements had been proven “technically.” For a minority of jurors, this consideration was sufficiently strong that it led them to a preliminary vote of guilty, and no juror initially thought the statute ambiguous. One of the traditional considerations of statutory interpretation — ordinary meaning of the text — was thus a strong factor early in the deliberation.

Some jurors spoke hesitantly or apologetically of feeling “sympathy” and of allowing that to affect their judgment. A vocal minority — apparently “rule-oriented” thinkers — explicitly chastised or discouraged such sympathetic, contextual considerations.

185. See id.
186. Id.
187. See id. Recalling Horowitz’s study, we would expect the defense argument to have some effect on deliberations and the verdict, but that effect should be mitigated by the prosecutor’s counterargument. See Horowitz, Impact, supra note 94, at 443-46. In his second study, Horowitz tested mock jurors with a simulated trial based closely on Reed; he found a strong effect of nullification arguments and instructions for this fact scenario. See id.
188. See Frontline: Inside the Jury Room, supra note 1.
189. Jurors’ comments included: “Technically, the man is guilty . . . .”; “I agree that Mr. Reed is guilty based on the law.”; and “I think those three elements have been met that yes he is guilty of the crime.” Id.
190. See id.
They urged that the statute's plain meaning was the only proper consideration and it mandated a guilty verdict.\(^{191}\) This strand of the debate exhibits a clear conception of the jury's proper institutional role — to apply law objectively without excessive influence by emotional, subjective considerations — and also about the proper way that the law should be applied. The argument contains a clear underlying sense — though it does not prevail — that law should be read and applied in a literal, mechanical manner; facts or sentiments not identified as relevant by such a common-sense reading of the statute should play little or no role in the final judgment.\(^{192}\)

Several jurors, however, expressed discomfort with this literal reading of the statute. The facts that troubled some jurors — the defendant's sympathetic character, due to his substandard intelligence and clearly nonthreatening demeanor, and also the questionable police judgment in arresting such a person even after his full cooperation\(^{193}\) — were not legally relevant ones in a narrow sense. These sentiments conflict with the initial pull of the text's plain meaning. The jury's attention to them corresponds to a practical-reasoning approach of judges who may reconsider a statute's plain meaning if other factors point toward alternate constructions.\(^{194}\)

Prompted by these concerns, the Reed jury addressed a wide range of considerations familiar from judicial statutory interpretation. One recurring theme was a countervision to the literal approach of the jury's role in applying the law. One juror, a doctor, stated, "[I]t's a tough position to be in, to say I am a judge of the

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191. See id. This is behavior we see throughout the Harris juries' deliberations as well. See infra section IV.B.

192. Juror comments recounted in HANS & VIDMAR, supra note 9, at 156-57 (quoting a juror explaining why she voted guilty despite her sympathy for the defendants' actions: "I'm in agreement with what they're trying to accomplish . . . but they did break the law . . . [M]y personal views don't count . . . If we allow people to break the law, we're akin to anarchy . . . I knew they were guilty when we were charged by the judge. I did not know prior to that time — I was in full agreement with the defendants until we were charged by the judge. That was the kiss of death!").

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194. See Eskridge, supra note 4, at 55-57; Eskridge & Frickey, supra note 40, at 352. We can also recognize the relational reasoning Conley and O'Barr identified in lay litigants; despite the text's plain meaning, several jurors intuited notions of social justice, social roles, and responsibility that conflicted with that meaning. See supra notes 123-38 and accompanying text. We might recognize here also the Rawlsian process of checking the formal application of general rules against a more context-sensitive situation sense about the proper outcome of a given case — against our "considered judgment." See RAWLS, supra note 38, at 20-21, 48-52, 579.
law, but I think that’s what the jury system is for.” He repeatedly insisted “I am not a computer” and argued that the jury’s job was more than to assess mechanically whether evidence met literal readings of the statute:

But I think we have more capabilities than to say, one, two, three, these [elements] are met on a very simple level. Cut and dried, guilty. I don’t think that we as jurors, that is necessarily our role. We are here to do more than that. I’m trying to decide in my own mind, has justice been done here? I don’t care what the law says. Has justice been done . . . . That’s what we’re here to do.

This view holds that justice considerations have a proper place in reaching a verdict and exhibits an intuitive construction of the jury’s role in the legal system. This sense of institutional purpose gave jurors a conceptual opening to consider approaches other than a literal reading of the statute. Another juror offered the computer metaphor as well and struggled with the same issue of whether a jury could do anything other than literal rule application:

Are we obligated . . . to follow the letter of the law and find him guilty, or are we obligated as a jury to use our special level of conscience . . . . According to the law as it’s written, he meets the criteria. Do we rise above that somehow? Is there a place for us to then say . . . we cannot in good conscience find him guilty?

At least two jurors, throughout most of the deliberation, thought not. A vocal minority of jurors insisted that only a literal application of the statute was within the jury’s authority. Even


196. Id. The context of this case may have led some jurors to assume that jurors have a broader role in applying the law. The case contained no factual disputes, and factfinding is a key jury function. With that task effectively eliminated, jurors may have searched for another purpose for their role. This sense of the jury’s role in law interpretation is much weaker in the Harris juries. See infra section IV.B.

197. Chicago Jury Project researchers found similar evidence in mock jury deliberations that jurors sometimes consider the jury’s institutional role within the justice system. See Simón, supra note 91, at 163-70. They noted “the jury’s recognition of its representative role and its sense of responsibility to society,” id. at 170-71, and much discussion of the distinction between “the expert’s function and the jury’s responsibility,” id. at 163. They concluded that “[t]he jury is too impressed with its importance as an institution and with its responsibility to the court and to the community at large to relinquish its decision-making powers.” Id. at 170.

198. This sense of their role recalls Huijgen’s point that “we do instruct juries. We do not mechanically hold persons to account against a rigid code.” Huijgen, supra note 30, at 1466. Huijgen’s continues his point with an argument that describes both the Reed jury’s predicament and key points of its deliberations: “We employ juries because we place the person prior to the rule, because we are sensitive to the possibility that none of the rules may be adequate to describe justice in the given situation, and because the rules may conflict in a way that only human hands can unravel.” Id.


200. See id. Interestingly, in Reed as well as in Harris, it was the better-educated jurors — a doctor, college professor, school psychologist, and teacher — who were most willing to explore interpretations beyond plain meaning. Those with presumably less formal education
jurors who, early in deliberations, expressed an inclination to mediate literal application with other considerations made clear that they agreed generally with this criminal statute and were hesitant to disregard it. One such juror insisted that he wanted "to be a good juror" and added, in a sentiment explicitly stated by at least one other juror as well, "I think this is a good law. And I don't want to say or do anything that suggests that I don't take that law seriously." Nevertheless, jurors such as these (the majority) demonstrated — to recall Conley and O'Barr's formulation — a less rule-oriented reasoning than those who argued throughout for literal application.

Most jurors were troubled sufficiently by contextual factors to make them notable parts of the discussion. One juror's justice calculus — whether the legal process has punished the defendant sufficiently without conviction — corresponds well with the findings of Kalven and Zeisel's jury study. "Leroy Reed has really had enough punishment, if you will, for what he did that was so wrong . . . . Between his arrest and between his days in court now, an awful lot must have happened to him." While appropriately focused on normative justice for the defendant, this view neglects the importance of the verdict as a judgment on his culpability. Yet if jurors are at fault for making such an evaluation, it is a fault they share with judges. Studies of urban traffic courts find judges frequently dismiss cases on the rationale that having to come to court is punishment enough for a minor ticket.

Several jurors' concerns had a relational and instrumental tone. One juror was troubled by what she considered improper police behavior. "I don't think if they are living to the letter of the law that [the police officer] had any right to ask this man to go home and bring in that weapon." While her assumption about the law is

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202. See Kalven & Zeisel, supra note 14, at 301-05.
incorrect, her concern reveals a relational-reasoning inclination to place judgment of the defendant's conduct in a broader context of morally or socially improper official behavior. Jurors also explicitly discussed signaling the prosecutor's office about the use of its discretion in pursuing this charge, again setting the defendant's conduct in a broader context that gives attention to the moral judgment of other actors.206 One juror said he "winc[ed]" as "a cognitive 7 year old [the defendant207] get[s] caught up in this legal mechanism . . . with this exquisitely agonizing thoroughness" and "puts him through the entire mill . . . It was like watching a grown man beat a child."208 Voicing a comparable instrumental concern, another juror assessed the social need for a conviction. "I look at the defendant and I think, '[I]s he a threat to society?' . . . And if he's dangerous to society, why would the [police] detective . . . allow him to bring the gun in, transport it on a public bus . . . if he felt that he was a dangerous felon?"209

Such instrumental concerns are familiar components of legal reasoning.210 Yet if the jury based its verdict on such factors, its rationale and reasoning would rightly be condemned for neglecting its objective of voicing moral judgment on individual conduct, and perhaps for ignoring statutory text. Interestingly, however, the Reed jury did not abandon statute application to base its verdict explicitly on such concerns. In accord with its resistance to nonliteral statute construction, the jury eventually turned to a close analysis of statutory language, reading key terms consistently with the considerations pointing away from a guilty verdict. A minority of

206. See id.
207. The defense's expert witness at trial stated that the defendant had the cognitive capacity of a seven-year-old. See id.
208. Id. In response to the perceived inappropriateness of the prosecution, this juror elsewhere says, "I'd like to send [a message] to the DA's office. . . . [T]he message would be, dammit to hell, I'm afraid to walk to my car in the parking lot. . . . [My students are] being mugged. And you give me, you give me Leroy. And I feel like saying, guys, you're doing a hell of a job." Id.
209. Id. Another juror immediately responded "I don't think that's a question," and then another went on to discuss "these bigger questions about where's justice, who's being served, and why was this case brought?" Id.
210. One obvious example is the law-and-economics movement's argument that the incentive effects of rules should serve efficiency or other behavioral goals, but instrumental concerns have a broader history in modern legal reasoning as well. See Robert Summers, Instrumentalism and American Legal Theory (1982).

The Supreme Court has also identified instrumental concerns as part of the justification for the Sixth Amendment's criminal jury trial right. See, e.g., Lockhart v. McCree, 476 U.S. 162, 174-75 (1986) (asserting that juries guard against the "'exercise of arbitrary power' " coming from an "'overzealous or mistaken prosecutor' " (quoting Taylor v. Louisiana, 419 U.S. 522, 530 (1975)); Johnson v. Louisiana, 406 U.S. 356, 373 (1972) (same); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (same).
the jurors was inclined to apply the statute literally and reach a
guilty verdict; the remainder wanted a way to vote not guilty and
yet do so within a good-faith application of the statute.

Discussion of statutory language focused on the word "know" in
the element of the statute requiring that the defendant knew he had
a gun. Jurors’ reluctance to ignore the law and desire for a just
outcome led them to explore whether this defendant, who had lim-
ited cognitive capabilities, knew he possessed the gun. The context
and purpose of the term’s application to this cognitively subaverage
defendant were important. Jurors struggled to construct and agree
upon a functional definition of “know.” One juror — an English
professor — admitted, “I’m having trouble with the word ‘gun,’ but
I’m really having trouble with that word ‘to know.’ ”211 Another
juror, a school psychologist, suggested this inquiry:

I wonder if we could find room in the law, for those of us that feel we
need to follow the letter of the law, that perhaps he didn’t, in the full
sense of the word, know he was a felon, and didn’t, in the full sense of
the word, know that he possessed a firearm. . . . Even among psychol-
ogists this is going to be a very debatable issue. You know, I think
we’re talking about at what level did he know it, we need what that
is.212

The jurors who held out the longest for a guilty verdict resisted this
level of inquiry into the statute’s meaning.213 But most jurors found
it relevant and persuasive, seemingly because it helped to bridge
their broader justice concerns about convicting the defendant with
their desire to apply the statute with integrity rather than disregard
it.

In construing the word “know,” the Reed jurors faced a recur-
ring problem of interpretive construction in criminal law of the type
that Kelman argued is typically resolved “nonrationally.”214 Yet
the jury’s construction of this mens rea term resembles a well-
established judicial policy for construing criminal statutes — the
rule of lenity. That rule, grounded largely on notions of fair warn-
ing, calls for penal statutes to be construed narrowly, so that ambi-
guities work in favor of the defendant.215 Courts recognize that the

212. Id.
213. See id.
214. See Kelman, supra note 88; see also supra text accompanying notes 84-91.
States, 401 U.S. 808, 812 (1971); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL
LAW 77-78 (2d ed. 1986) (discussing the rule of lenity); id. at 76 (noting that “courts some-
times conclude that what seems to be clear language is so harsh or foolish or devoid of sense
that it is ambiguous after all”); id. at 78-79 (noting that courts continue to apply the rule of
rule varies, however, with the nature of the crime. For plainly wrong or horrible \textit{(malum in se)} crimes, the rule applies less stringently than for \textit{malum prohibitum} crimes that violate no clear social norms.\footnote{216. See O.W. Holmes, Jr., \textit{The Common Law} 50 (1881); J.W. Hurst, \textit{Dealing with Statutes} 64-65 (1982) (arguing that courts follow community standards as a context in which to construe the ambit of a statute); LaFave & Scott, supra note 215, at 79 (noting that the rule applies more strictly to crimes "involving morally bad conduct \ldots than those involving conduct not so bad").} Reed's crime was hardly a clear moral wrong.\footnote{217. On the contrary, gun ownership accords with a strong constitutional norm grounded in the Second Amendment right to bear arms, though jurors did not mention this.} He violated a typical regulatory statute that should be construed narrowly under the lenity rule.\footnote{218. The Model Penal Code replaces the lenity rule with one requiring that statutory terms be given their "fair import." See Model Penal Code § 1.02(3) (1985). One arguably can interpret the statutory term "know" as the jury did in the \textit{Reed} case under the approach of the Model Penal Code as well.} Moreover, in finding an ambiguity\footnote{219. Nor is the jury doing anything different from courts in finding a simple word like "know" ambiguous. See LaFave & Scott, supra note 215, at 76-79.} in the state-of-mind requirement and then opting for a more stringent construction, the \textit{Reed} jury mimicked a longstanding judicial custom of increasing the level of the required mens rea element, or implying one even when the statute does not provide it, in order to effectuate the lenity rule and ensure that a culpable mental state accompanies any conviction.\footnote{220. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978) (stating that the Court, "in keeping with the common-law tradition and with the general injunction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of leniency,' has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide" (quoting Lewis v. United States, 401 U.S. 808, 812 (1971))).} 

Mens rea elements often serve a decision-rule function of guiding the individualized judgment of culpability.\footnote{221. See supra notes 20-30 and accompanying text.} Such a judgment in \textit{Reed} had to take account of the defendant's limited intelligence — a fact central to assessing his culpability, his capacity for practical judgment, and thereby his character. But it had to do so without clear guidance from criminal rules, because Reed could not make a plausible insanity plea and was found competent to stand trial.

Dan-Cohen summarizes the common law tradition of constructing sciencer elements by concluding that "the defendant's state of mind satisfies the mens rea requirement in a criminal statute if the defendant perceives the facts and the nature of his conduct in terms of the statute's ordinary-language description of them." \footnote{222. Dan-Cohen, supra note 20, at 662.}
mens rea requirement calls not only for knowledge of facts but also “of the legal categories under which they fall,” both of which depend on “linguistic categories.”

One is aware of a given fact only when one can provide some certain description of it. When we inquire into a defendant’s state of mind and ask whether she was aware of the nature of her conduct, we must already possess a tentative (or hypothetical) description of a mode of conduct provided by the relevant criminal statute. It is only against such a description that we can ascertain and judge the defendant’s state of mind: did her perception of the facts match the description in the statute? One can, for example, fully appreciate the fact that one’s finger is pulling a small metal lever connected to a larger metal instrument and yet fail to know that one is “pulling the trigger of a gun” or that one is “shooting,” let alone that one is about to “kill” someone. To say simply that mens rea requires knowledge only of facts obscures the crucial choice of the description against which the adequacy of that knowledge will be measured.

From this analysis — which develops Kelman’s argument about choices in interpretive construction — we can further understand both the Reed jury’s difficulty with constructing an appropriate definition of knowledge and the difficulty of factually describing Reed’s mens rea. The jurors’ effort to define the content of the word “know” was an attempt to arrive at a “description of a mode of conduct” against which to compare Reed’s state of mind. Dan-Cohen’s example of the choices one must make to construct a baseline description of firing a gun to commit a homicide is precisely analogous to the Reed jury’s choice among alternative levels of knowledge against which to judge Reed. One juror described just such a change in his baseline choice this way:

... I came into this room saying the same thing, yes, the three points are met, on face value, he’s guilty. Now those first two points, you could define them, you know, it says that he had to know that he possessed a gun. He might have “known” that he possessed a piece of his [private detective] course. ... Maybe he just was simply following instructions. He had no relationship like you or I or anybody else does in this room between a gun and bang-bang. ... [He thinks] he’s now going to be a detective. “I’m going to be a stand-up citizen and be a detective,” and the course says something about a gun. He’s going to do everything he can to do it right. Did he really know what he was

223. Id.
224. Id. at 662-63.
225. See Kelman, supra note 88; supra text accompanying notes 84-91.
doing or the consequences, did he know a gun was purchased, or did he purchase an item of his course.227

Rather than inappropriately reading ambiguity into a clear and simple term, the Reed jurors recognized and explicitly debated an inevitable choice that must be made in statutory application — a choice no doubt frequently overlooked by judges and juries alike.228 We can see why Reed’s mental capacity prompted this inquiry and made his case difficult. Dan-Cohen notes that a defendant needs “merely ordinary linguistic aptitude” to understand criminal rules and that a mens rea requirement is “satisfied when the defendant has acted with the awareness normally possessed by an intelligent member of a moral and linguistic community.”229 The jury quite plausibly concluded that Reed lacked such ordinary capacity,230 and as a consequence his blameworthiness was insufficient to warrant a conviction. Thus in Reed, as in criminal judgments generally, the decisions made in construction of statutes involve unavoidable normative choices. Through such choices criminal judgment is always, at some level, a personal, moral, and context-sensitive assessment.231

This interpretive struggle suggests — contrary to some commentators, including the Frontline narrator232 — that the verdict was not an act of nullification. That is, the jury did not deliberately disregard a statute that by all plausible constructions mandated conviction. Rather, they construed the statute, motivated by justice, policy, and moral concerns, in a manner that allowed, or even required, a not-guilty verdict. We can see, in the jury’s extended effort to arrive at a working definition of the statutory term, the same sort of decisionmaking that has prompted scholars of judicial decisionmaking to describe statutory interpretation as inevitably a process of creative policymaking. It also provides an effective example of practical reasoning in criminal-statute construction. In turn, we see how practical reason serves the task of criminal adjudication to


228. That judges overlook such choices in interpretive construction is a central point made by Mark Kelman. See Kelman, supra note 88.

229. Dan-Cohen, supra note 20, at 663.

230. This is true even though his capacity did not implicate competency or insanity rules.

231. See Huigens, supra note 30; supra text accompanying notes 27-38.

232. See Frontline: Inside the Jury Room, supra note 1; see also Horowitz, Impact, supra note 94, at 443 (describing the Reed verdict as resulting from “the jury’s explicit decision to nullify the law”); Alan W. Schefflin & Jon M. Van Dyke, Merciful Juries: The Resilience of Jury Nullification, 48 WASH. & LEE L. REV. 165, 168 (1991) (describing the Reed verdict as nullification).
assess ex post whether one who violates a rule of conduct is blameworthy.

B. Statutory Interpretation in the Mock Jury Deliberations of Michigan v. Harris

While Reed presents the problem of defining the content of a single statutory term in light of several contextual factors, Michigan v. Harris\(^{233}\) raises the difficulty of defining the reach of a state-of-mind requirement across several statutory elements. The Harris juries easily defined the content of the intent requirement and focused on whether it applied to circumstance as well as conduct elements. Because they pursued this problem of statutory interpretation with reference to a widely held social norm based in the common law, we also can view the Harris juries as using a public-values analysis common in judicial interpretation.

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 the eight months since the property’s sole building had burned down.\(^{234}\) 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.\(^{235}\) 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

\(^{233}\) 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 48 mock juries, usually six members each, deliberate for about 30 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, supra note 163, which analyzed the verdicts of all 48 mock juries.

\(^{234}\) For the background facts of the Harris mock case, see the Harris Case Stimulus (on file with author).

\(^{235}\) 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 163, at 8-9.
reported the bricks missing to the police, the police checked with
the woman, and she identified Harris. Harris admitted to the po-
lice, 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 defend-
ant’s intention is inferred from his voluntary commission of the act
forbidden by law, and it is not necessary to establish that the de-
fendant knew that his act was a violation of the law.”236 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 de-
fendant knowingly did an act which the law forbids, purposely in-
tending to violate the law.”237 In addition, both juries were told:

To sustain the charge of theft, the State must prove the following
propositions:
*First:* That Steven P. Connolly238 was the owner of the bricks in ques-
tion; 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.239

Thus structured, the *Harris* case poses a familiar issue of crimi-
nal law: the nature of a defendant’s intent and the nature of intent
required for conviction. Must the defendant intend only the physi-
cal act — picking up bricks — or also the consequences — depriv-
ing 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 instruc-
tions 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

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236. Id. at 9-10.
237. Id. at 10.
238. For the half of the juries told that property was publicly owned, the instructions
substituted “the state of Michigan” for Connolly’s name. *See supra* note 235.
239. 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.
of criminal code construction: does the mens rea requirement extend only to the conduct element, or also to the circumstance element? 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, save for a reckless driving conviction. His alleged criminal act and its resulting harm were, in the view of some jurors, de minimus. Others viewed it as conduct better addressed by civil proceedings focused on restitution rather than criminal blame. 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. Moreover, for many jurors, the defendant's claim that he intended no crime and believed he was taking abandoned property made his intent insufficient for conviction.

None were 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. The most important

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

241. 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. See Transcript for *Harris* Jury No. 1, at 10; Transcript for *Harris* Jury No. 2, at 22.

242. See, e.g., Transcript for *Harris* Jury No. 4, at 13.

243. 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").

244. 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 14, at 242-57.

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

246. 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 30-minute time limit on deliberations.
such factor, discussed by every jury and dominating discussion of some, was a common norm we can identify as a law-based public-value — the private-property norm. 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.247

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,248 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.249

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.250

247. 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?").

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. 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]."). 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. See Transcript for Harris Jury No. 3, at 5-6. More often, jurors did not overtly voice such disagreement but did allow strongly held property norms to convince them of an application of the intent requirement that supported conviction.

248. 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.

249. 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.

250. 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)).
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 an owner of the bricks.\textsuperscript{251} 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.\textsuperscript{252}

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.\textsuperscript{253} Thus, by deciding to take the bricks "the defendant intended to deprive [the owner] permanently of the use or benefit of the bricks."\textsuperscript{254}

Recall again Kelman's critique of interpretive construction of criminal law doctrine, its relation to factual interpretation, and the normative premises on which such constructions must be made.\textsuperscript{255} If the ultimate fit of a factual and legal interpretation hinges in

\textsuperscript{251} 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.

\textsuperscript{252} 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 7 ("[T]here'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 ("[T]he property 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.").

\textsuperscript{253} See, e.g., Transcript for Harris Jury No. 8, at 4.

\textsuperscript{254} 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].")

\textsuperscript{255} See supra notes 88-95 and accompanying text.
large part on the baseline normative vision that it serves, then it should not surprise us 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 decisionmaker may reassess the factual interpretation to conclude that the defendant possessed intent with regard to the lack of authorization as well.256

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.257 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.258 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.

While 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 — more jurors voiced some sympathy. Demonstrating the strength of the property norm, even jurors who found the defendant an amiable retiree who was

256. 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 13, 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.

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

258. See ESKRIDGE, supra note 4, at 239 (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).
“not a criminal” and who intended no crime still thought he com-
mited a “mistake of judgment” that merited conviction.259

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 de-
fense, and it led a minority of the Harris jurors to vote for acquittal.
Most juries conscientiously analyzed instructions,260 often listening
repeatedly to a recording of them. They tried to 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 recon-
ciled this larger process with their conflicting sentiments about the
wrongfulness of the taking and the basically benign nature of the
defendant’s intent.261

The property norm thus provided a moral framework within
which to judge Harris’s culpability and, more specifically, the mis-
take-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.

259. See Transcript for Harris Jury No. 6. Here again we see how jurors sometimes recog-
nize the nature of criminal adjudication as a judgment about moral choices. In accord with
Robinson and Darley’s findings about citizen sentiments on punishment, see Robinson &
Darley, supra note 121, at 210-12, jurors thought of their decision in a larger context of just
deserts for the defendant. Many wanted the defendant punished very lightly — or made
simply to pay restitution — but still felt a guilty verdict was necessary, either to label accu-
rately the nature of his conduct or because the rule of law demanded it. See, e.g., Transcript
for Harris Jury No. 4, at 27; Transcript for Harris Jury No. 5, at 18 (“I think we have to find
him guilty. Now the judge . . . maybe [will] give him a suspension . . . . he wouldn’t put him in
jail . . . .”); Transcript for Harris Jury No. 8, at 8-9 (“I think he’s really based on the law [and]
to me the man is guilty. It is an unfortunate thing that he’s guilty, and if, in a broader sense, there
is justice, he won’t go to jail.” “I would have to agree. It’s an unfortunate . . . . I feel kind of bad
that the gentleman [is guilty] . . . . but the law was broken, as far as I’m concerned, and he was
guilty . . . .” (first ellipsis in original)); id. at 25.

260. 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.

261. See, e.g., Transcript for Harris Jury No. 7, at 12-13 (finding that the defendant’s mis-
taken 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 inter-
pretation 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.
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. 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.

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." But a larger number of 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. 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.

The recurrent theme among jurors that the law is objective and constrains their discretion connects closely with recurring views about the proper role of juries. A few jurors repeated the dominant notion from the Reed jury that jurors are not "computers" and are expected to apply the law in light of widely held values and com-

262. 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 29, at 395-401, 516-41 (tracing the shift from criminal law judgments as largely descriptive to "the centrality of normative guilt in the criminal process").

263. See id. at 532-38.

264. 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 Disposition: The Attribution Process in Person Perception, in 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 219 (L. Berkowitz ed., 1965). The above sources are both discussed in Finkel, supra note 9, at 159.

265. 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").

266. For criticisms of judges who claim to apply statutes by such purportedly neutral criteria as plain meaning, see, e.g., Aleinikoff, supra note 4; Eskridge, supra note 13; Frickey, supra note 4; Zeppos, supra note 4.
mon sense. But in contrast to Reed, 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. 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.

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.

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 consider-

267. "But why is the jury, you individuals, brought in and asked to react . . . if not to provide a human understanding . . . . It seems to me that the reason juries are used is because a law that's absolute can too easily be misused, and the human element of a jury adds some relativity to it." Transcript for Harris Jury No. 3, at 14; id. at 16 ("[M]aking such a decision under the qualifications offered me by the judge really distorts and disillusioned what my conception of the purpose of the jury is."); id. at 17.

268. 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 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." Juror 2 fits well Conley and O'Barr's description of "rule-oriented" litigants and judges. See CONLEY & O'BARR, supra note 128, at 59.

269. 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.").
ation 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 . . . .” 270 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 commonsense 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 law implausibly, verging on “nullifying” to achieve conviction. 271 Public-values analysis, for 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. 272

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

271. 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).

272. In his discussion of public-values analysis, Eskridge asks:

Is a public values approach a determinate or coherent approach to statutory interpretation? As deployed by the current Court it is not, and I am not optimistic that another group of nine Justices would do the analysis any more consistently or coherently. The upshot of this criticism is that the Justices have a great range of value choices to make under public values analysis, and that in turn raises a third question. Can the Court justify its value choices in all these cases? No. My analysis of the recent cases suggests that the Court's overall set of public values is biased in ways that are hard to justify. Eskridge, supra note 13, at 1062. Legal scholars' criticisms of judicial reasoning as improperly value-laden are too numerous to mention. For two well-known examples from different perspectives, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS
C. A Note on Jury Interpretation of Insanity Instructions

As a final note of comparison to the Reed and Harris juries, we can look to existing studies of how juries interpret insanity instructions. By directly presenting the issue of whether the defendant can be held morally responsible for his actions, insanity doctrine poses a more overtly substantive problem of application than the simple theft and possession statutes of Harris and Reed. Jurors must determine at what level the defendant knew what he was doing and what level of knowledge is required for culpability; they must decide whether he knew his act was wrong and what wrong means.\footnote{273} Under another formulation, they also may have to assess whether a "mental disease or defect" made him unable to "conform his conduct" to the law.\footnote{274} None of the standard versions of the defense lends itself to a plain-language construction that a juror could mechanically apply without normative construction of the statutory terms and evaluation of the defendant.\footnote{275}

The Chicago Jury Project recorded the deliberations of a large set of mock juries that were given the insanity-plea case United States v. King.\footnote{276} In that case, the defendant, who performed adequately at his job during the time of his alleged crimes, pled insanity to charges that he had incestuous relations with his daughters over a period of years. Findings from these deliberations, drawn from Rita Simon's account of the study,\footnote{277} reveal some now-familiar strategies and considerations by jurors. The King juries discussed the duties and limits implicit in the jury's institutional role. Like the Reed and Harris jurors who resisted computer-like judgment by

\footnote{273. See M'Naghten's Case, 10 Clark & Fnnelly 200, 211-12, 8 Eng. Rep. 718, 723 (H.L. 1843); Peter W. Low et al., The Trial of John W. Hinckley, Jr.: A Case Study in the Insanity Defense 10-14 (1986); Simon, supra note 91, at 20-24; see also Finkel, supra note 9, at 280-81 (describing from empirical research how jurors seem to "construe" key legal concepts in insanity instructions, especially the word "know").}

\footnote{274. This requirement comes from the last clause of the Model Penal Code statement of the insanity defense, which combines components from M'Naghten with the "irresistible impulse" test. See Model Penal Code § 4.01(1) (1985).}

\footnote{275. In one sense, then, jurors' interpretations of these rules are less interesting, because we easily recognize that the rules call for substantive construction and moral judgment, just as we know jurors must create substantive meaning for broad standards such as reasonableness. This article has focused on the simplest statutes, with the assumption that more complex ones only increase and make more obvious the interpretive demands on juries. Still, the contrast is useful because insanity doctrine is a classic decision rule that overtly raises the judgment of culpability.}

\footnote{276. King was taken from the actual trial transcript of United States v. King, No. 655-5 (D.C. Cir. 1956); see Simon, supra note 91, at 50-51.}

\footnote{277. See Simon, supra note 91.}
rote application, the King juries identified for themselves a judgmental role separate from rubber-stamping expert opinion on the defendant's sanity. One juror argued, "[W]e don't have to accept what [expert witnesses] say as truth and that is it. In other words, they would be deciding for us. We would not be deciding for ourselves what is right in this particular case."278 Another added, "That is right, you don't need a jury if you are going to take two doctors' words and say that this man is insane. Why do you need a jury?"279 Though some expressed frustration at the psychiatrists' refusal to offer an opinion on the ultimate legal issue of insanity, the study found that jurors were not inclined to abdicate, in Simon's words, the jury's "responsibility to the court and the community" to make the final legal judgment independently.280

Deliberations also revealed a consistent tendency to consider the purposes of criminal law generally and the insanity rule in particular, as well as to assess the likely effect of any judgment on the defendant and on society.281 Although the facts of the case gave the defendant a relatively weak case, jurors generally tempered a presumably strong inclination to punish harshly with concerns about the effectiveness of treatment and the relative benefits of incarceration versus civil commitment for the defendant and society.282 With regard to these concerns, deliberations frequently took a purposive tone, analogous to the purposive method of statutory interpretation offered by legal-process theorists to describe judicial practice.283

This approach, however, led jurors to other purposes of criminal law, — specifically of the insanity defense — thereby partially diverted their focus on moral culpability. In addition to the character-based retributive theory of moral culpability, criminal law has long juggled the competing concerns of crime prevention and public safety through the goals of deterrence, incapacitation, and rehabilitation.284 The insanity defense in particular raises this issue

278. Id. at 164.
279. Id. A third juror added, "If that is the case [i.e., that the jury had to endorse an expert's opinion], this case shouldn't ever have gone to a jury." Id.
280. See id. at 169-70.
281. See, e.g., id. at 170-74.
282. See id. at 170-73.
283. See generally ESKRIDGE, supra note 4, at 143-51 (discussing Hart and Sacks's purposive theory of statutory construction and emphasizing the considerable discretion remaining for courts that employ it).
284. See LOW ET AL., supra note 273, at 3-5 (discussing the difficulties created for the insanity defense by the competing purposes of criminal law); SINGER & GARDNER, supra note 26, at 87-122 (reviewing general justifications for criminal punishment).
for juries when, as in King, jurors are informed that a not-guilty-by-reason-of-insanity verdict means automatic civil commitment for the defendant. Simon reported that “jurors claimed that they were seeking a verdict that would best prepare the defendant, his family, and the community for the day when the defendant would eventually return to society.”\footnote{285} Even after much deliberation, some jurors were uncertain “which alternative, imprisonment or commitment, was more likely to secure the results they were most anxious to attain: rehabilitation for the accused and security for society and for the defendant’s family.”\footnote{286} As one example, a juror who urged a not-guilty verdict argued:

The law is not meant to punish, but it is meant to correct the situation. I mean we are not helping his family or him or society by putting him in a prison. The only possible way of helping him and his family and society is by putting him where he can be helped and that is in a mental institution.\footnote{287}

Here again a conceptual difficulty in criminal law becomes a practical adjudication problem for juries. The general verdict combines the decision about the defendant’s culpability with one on the justification of civil commitment. This is seen in the common view of insanity as a decision between punishing, or at least incapacitating, the defendant criminally or civilly.\footnote{288} This conflation of culpability and therapeutic concerns distracts jurors from the need first to assess the defendant’s blameworthiness in light of his condition—a moral judgment guided by criminal law—and then to assess whether civil commitment is justified for medical reasons.\footnote{289}

Despite such purposive concerns, however, deliberations did not reveal that jurors allowed those considerations to determine decisions. More significant, the deliberations revealed a strong concern for an accurate adjudication of moral culpability and a verdict that

\begin{itemize}
\item \footnotemark[285] Simon, supra note 91, at 174.
\item \footnotemark[286] Id. at 171.
\item \footnotemark[287] Id. For additional transcriptions of juror deliberations on this issue and discussion, see id. at 171-74.
\item \footnotemark[288] See Fletcher, supra note 29, at 540-41 (quoting Herbert Packer that the not-guilty-by-reason-of-insanity verdict is "a direction to punish but not to punish criminally").
\item \footnotemark[289] See id. (noting “[t]he common observation” that insanity merely “determine[s] whether the social response to the defendant’s conduct (condition) is to be imprisonment or hospitalization,” and arguing that this view “combine[s] incompatible issues” of blameworthiness and propriety of civil commitment); see also Finkel, supra note 9, at 286-88 (surveying scholarly criticism of insanity tests as insufficiently focused on moral judgment and overemphasizing medical symptoms); cf. Reform of the Federal Insanity Defense: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 98th Cong. 390-91 (1984) (statement of Professor Stephen J. Morse, University of Southern California) (criticizing the prevailing insanity rules and debates as pushing “pseudomedicalizations” and creating “an aura of false precision”).
\end{itemize}
reflected the defendant's moral culpability. Most juries rejected the insanity plea and found the defendant guilty. But his mental disorder was sufficient to make jurors uncomfortable about equating him with the paradigm of the typical law-breaker, and thus uncomfortable with their limited verdict options. Simon observed:

[Some jurors] seemed to be searching for a compromise between the two verdict alternatives provided by the law — guilty or not guilty by reason of insanity. They were unwilling to find the defendant not guilty by reason of insanity because they were too impressed both with the heinousness of the crime and with the rational, calculated manner in which, to their minds, the defendant carried it out. On the other hand, for almost the same reasons, they were uneasy about having the defendant treated as an ordinary criminal. An ideal solution... would have allowed them to find the defendant guilty, but in need of medical treatment.290

Simon further observed that a few jurors had "not even a shadow of a doubt about his sanity. But most of the jurors saw and were affected by a shadow. In the end, however, the shadow was not strong enough to relieve the defendant of his responsibility to society."291

The conclusion that jurors maintain attention on the assessment of moral culpability finds support in subsequent studies of jury decisions on insanity issues. Finkel conducted extensive studies with mock jurors in search of the rationales, or mental "constructs," that motivate verdicts in insanity cases. He identified two "high-order constructs" that jurors employed across a range of insanity cases and that explained most variations in the verdicts for those cases. Jurors most often employed either a "capacity" construct that focused on whether the defendant was capable of making responsible choices or a "culpability" construct that assessed blameworthiness in light of the defendant's behavior before the criminal act.292 Together, these intuitive approaches strongly indicated that lay citizens view insanity as a moral question of responsibility and blameworthiness. Instructions based on different insanity tests produced little difference in verdict outcomes in Finkel's studies.293 That likely is a product of both the nature of the cases and the limitations of the written rules. Insanity cases, even to lay citizens, are clearly decisions about moral culpability; criminal law has been un-

290. Simon, supra note 91, at 172.
291. Id. at 175; see also Id. at 177 ("[T]he data demonstrate that the jury recognizes the distinction between a clinical diagnosis and the application of a moral legal criterion, and that they understand it is the latter which they must use in deciding the case.").
292. See Finkel, supra note 9, at 288-91.
293. See id. at 292-97.
successful in capturing a subtle, compelling, normative analysis in its insanity standards.\textsuperscript{294} Insanity rules are incapable of a plain-meaning application. As a result, jurors interpret the indeterminate terms of such rules with help from available social norms that shape our shared notions of responsibility and blameworthiness.

\textbf{Conclusion: Toward A Practical Reasoning Model of Jury Statutory Interpretation — and Its Implications}

From the foregoing, we can summarize a tentative collection of interpretive tools and strategies that jurors employ to apply statutes and their use for judgments of culpability. Perhaps the most obvious — and to some, the most surprising — is jurors' inclination to turn first to a plain-meaning or literal interpretation of statutory language. Even the \textit{Reed} jury, which eventually settled on an interpretation more subtle and context-sensitive than the most common literal reading, began with several acknowledgements of the "letter of the law" and serious debate about whether the jury had anything further to discuss beyond it.\textsuperscript{295} The \textit{Harris} juries largely adhered to interpretations that seemed to correspond to the plain meaning of the intent instructions, although that language contained such a fundamental ambiguity about the elements to which the mens rea requirement applied that no single meaning is compelling.\textsuperscript{296}

\textit{Reed} and \textit{Harris} provide an interesting contrast in this respect. The \textit{Reed} jury felt compelled by the defendant's capacity and circumstances to interpret the statute closely in search of a meaning for the mens rea term that reconciled with compelling justice concerns. The \textit{Harris} jurors mostly were much less inclined by their defendant's predicament and character to search beyond an ordinary meaning for that term's content. They spent much of their time seeking to define plain meaning with regard to the term's reach — what elements required intent or knowledge. The \textit{Harris} juries that departed from a more plausible reading did so primarily to serve a compelling public value — the property norm — that was the defining background notion of most deliberations, rather than to assess the defendant's culpability. More often, the property norm set the moral framework against which jurors evaluated

\textsuperscript{294} Cf. Greenawalt, \textit{supra} note 20, at 929, 950 (discussing the limitations of criminal code drafting that prevent the drafting of rules to cover every fact scenario).

\textsuperscript{295} See \textit{supra} text accompanying notes 189-96.

\textsuperscript{296} See \textit{supra} section IV.B.
Harris's actions — both his ends, taking the bricks, and his means, taking without asking — and implicitly his character.

The juries in both cases considered their institutional role, which helped define the parameters of acceptable interpretive choices and situated the jury in relation to other actors — police, prosecutors, legislatures — in the justice system. Yet the consideration of institutional role cut different ways, depending on which role-conception was persuasive. The Reed jury ultimately used its antiformalist view of the jury to prompt its close textual interpretation. The Harris juries that raised the issue largely concluded that they were obligated to seek an ordinary meaning for terms and avoid law reform or result-oriented application. This general inclination to follow ordinary meaning and attempt to apply it objectively corroborates the findings discussed in the earlier review of empirical jury studies.297 Several studies found juries generally applying instructions uncontroversially except where we would expect otherwise: in close cases,298 when given a strong nullification instruction in a morally compelling case,299 when fact patterns varied widely from prototypical ones — for example, euthanasia prosecuted as murder — or

297. See supra text accompanying notes 96-120 & 160-81. It is also in accord with findings that people obey and enforce the law unless they have substantial disrespect for it. See, e.g., LIND & TYLER, supra note 204; ROBINSON & DARLEY, supra note 121 (identifying respect for the law as an important factor in determining how likely one is to obey the law); TOM TYLER, WHY PEOPLE OBEY THE LAW (1990). Most historical patterns of jury nullification occur when communities broadly oppose a given law, such as the Fugitive Slave Act, Prohibition statutes, or civil rights laws. See generally Brown, supra note 12.

Drawing a lesson from Reed, we might note that jurors are affected not only by how much they respect the statute as a general, substantive rule, but also how they respect the law as applied in this case, or more precisely, the legal officials and institutions — the police officer or prosecutor — who decided to apply the law and initiate the case. Some Reed jurors disrespected that judgment, allowing them to struggle more easily with an interpretation of the statute that would match their instincts of situational justice. See Frontline: Inside the Jury Room, supra note 1. This no doubt connects with Tyler's procedural justice points as well: the Reed jurors thought that the overall justice process here was flawed, though the flaws resulted from discretionary judgments by the prosecutor and police rather than from any procedural structure. See Frontline: Inside the Jury Room, supra note 1.

298. Recall Kalven and Zeisel's confirmation of their "liberation hypothesis," finding that when plausible constructions of the facts could support multiple verdict options, jurors may give more weight to norms and values. See KALVEN & ZEISEL, supra note 14, at 164-66. For descriptions of comparable decisionmaking behavior by judges, see CARP & ROWLAND, supra note 104 (finding, in an empirical study of federal judges' attitudes and values, that such factors affect decisions mostly in close cases); ROBERT SALTER, DOING JUSTICE 63-79 (1991) (noting, in a first-person account by a judge of how he and other judges decide cases, that in close cases or when statutes are ambiguous or conflicting, judges are guided by their values and personal senses of justice — especially trial judges, who know the parties and the real-life implications of cases).

299. But see Horowitz, Impact, supra note 94, at 452 (concluding that jurors could be effectively coached into adopting a strict or literal application with a clear argument against nullification power).
when the ordinary meaning of instructions conflicted strongly with widely held social norms.\textsuperscript{300}

\textit{Reed} is an example of a jury compelled, by the ill-fit of the statute to the facts, to explore explicitly considerations and interpretive strategies beyond apparent plain meaning and rote application. The \textit{Harris} juries are probably a better example of common practice, but even there we saw the inevitable attention to — or simply effect of — considerations familiar from judicial interpretation. Juries took at least a brief account of statutory purpose, social norms, and concern about the final justice of the outcome. Finally, we saw jurors consider occasional instrumental concerns, such as the incentive effects of decisions on prosecutors and on other would-be criminal actors, and the effect of decisions on social institutions like property rights.\textsuperscript{301} Both the \textit{Reed} and \textit{Harris} cases exhibited the distinct effect of social norms or public values, which supports other findings of the effect of norms or values on jury legal interpretation, such as Finkel's findings of concern about proportional punishment.\textsuperscript{302}

Despite the wide-ranging interpretive inquiry that this account implies, the common-sense meaning of the statute remained the touchstone for both the \textit{Reed} jury and the \textit{Harris} jury. Other concerns often motivated reassessment of statutory terms rather than rejection of them. This study suggests that juries, like judges, rely on ordinary meaning — as in \textit{Harris} — once it is constructed. If the factual story that jurors have constructed fits the statute well and does not conflict with strongly felt considered judgments about the justice of the outcome, then the language of the statute will seem clear and incontrovertible to the jurors and they will consider little else.\textsuperscript{303} This approach is even more likely when juries take a limited view of their institutional authority.

\textsuperscript{300} See supra section III.B.2 (discussing Finkel's and Kalven and Zeisel's findings); supra section III.D.1 (discussing Smith's studies); supra section III.D.2 (discussing Greenwald's and Horowitz's studies).

\textsuperscript{301} Recall the Supreme Court's repeated references to the jury's function as a check on prosecutors, judges, and arbitrary governmental power. See, e.g., Lockhart v. McCree, 476 U.S. 162, 174-75 (1986); Taylor v. Louisiana, 419 U.S. 522, 539 (1975); Johnson v. Louisiana, 406 U.S. 356, 373 (1972).

\textsuperscript{302} See the discussion of Finkel's studies, supra notes 107-10 and accompanying text, and Robinson and Darley's survey, supra notes 121-25 and accompanying text.

\textsuperscript{303} This conclusion finds support in Hans and Vidmar's account of a juror who describes the constraint she and fellow jurors felt in the statutory language contained in the judge's charge, despite their sympathy for the defendant's actions. See \textsc{Hans & Vidmar, supra} note 9, at 156-57.
Further, the reasoning process by which juries weighed these competing considerations is largely captured by existing accounts of judicial practical reasoning. We saw from cognitive science studies that juries interpret facts as a story within background knowledge that includes normative assumptions. Studies of nonlawyers' reasoning styles in court revealed a division between those aiming for rule-bound, deductive approaches and those with a more contextual orientation grounded in social norms. From these insights plus the examination of the Reed and Harris juries, we find that jurors often test a preliminary sense of the statute's application and case outcome against the range of competing concerns that help evaluate both the accuracy of the legal interpretation and the justice of the result. While some jurors strive for a more rote, deductive approach to statute application, we see they are as vulnerable to criticism as judges who claim to apply plain meaning. The Harris jurors who urged literal application nevertheless had to choose implicitly the extent to which the intent requirement applied, and they typically did so informed by a strong commitment to the property norm or a sense of the proper culpability judgment for the defendant. In short, as practical-reasoning analyses find with respect to judges, the facts of the case — the story jurors construct — and the norms it implicates affect either the willingness of a jury to depart from its implicit presumption for literal statute application or how it will determine that “plain meaning” in the first place.

Through the examples of deliberations in these two cases, we also see the necessity of practical reasoning to a criminal law with a normative conception of guilt. The criminal adjudication, seeking a judgment on the defendant's character and the moral quality of his conduct, requires attention to the context and circumstance surrounding his actions as well as the law's application. Many of the factors that juries use to prompt more creative readings of statutes are precisely the sorts of concerns that criminal law demands. Checking rote application of ordinary meaning against social norms, public values, and context-specific facts is not only permissible, it implicitly is required by the nature of criminal judgment.

Given the nature of criminal adjudication, as well as the prevalence and acceptance of judicial decisionmaking characterized by practical reasoning, this study suggests that the basis for many traditional criticisms of the jury is wrong. Typically, juries are criticized for not applying statutes literally. Yet if practical reasoning is

304. A related concern is that juries do not understand statutes, an issue addressed supra, section III.D.1.
widely practiced by courts and is inevitable, as its advocates suggest, and if verdicts are particularized normative judgments of culpability, we perhaps should worry instead that juries feel too bound by the apparent plain meaning of statutes and limited conceptions of their role. That concern is corroborated by studies of lay judges and litigants, who are often more rule-bound and literalist than experienced judges with legal training. We have noted that juries generally are inclined to apply statutes literally; it may be this inclination — and the limited view of the jury's role that it implies — that leads some jurors to give the normative component of the culpability judgment insufficient attention and seriousness. Given the documented tendency of juries to approach their task with good faith, and to attempt to check jury members who stray from their apparent mandate, literalism that discounts moral evaluation seems a risk of equal magnitude to that of jurors ignoring the law in favor of idiosyncratic preferences.

Even though we have left law application to the jury, we incongruously have conceived of it, for the jury only, as a rote, uncreative process. Juries are sometimes misled by that view. This article, in contrast, has argued that law application, even for juries, is a complex, normative process. That conclusion has implications for jury instructions. In addition to the well-known problems of jury instructions — written in overly complex language, presented only orally at the end of trial — we might worry also at how little guidance instructions usually give jurors for statutory construction. Typically, juries receive virtually no help, save a command to take the law as the judge gives it and apply it without sympathy or interpretation. What guidance they do glean from such advice likely encourages static, literal application, which we should now view as problematic. We find in traditional instructions the stereotypical assumptions that juries are at great risk of giving in to sympathy or emotion and must be constantly urged to follow the law. Studies of jury decisionmaking — and lay legal reasoning generally — now

305. Conley and O'Barr raise the same possibility from their study of small-claims court judges, some of whom are lawyers and others of whom have no legal training. See supra text accompanying notes 133-39. They found one judge, who was not a lawyer and had less judicial experience than most judges they observed, who was a "strict adherent" and viewed the law as an inflexible set of rules he was compelled to apply. In contrast, another judge who had a law degree and was characterized as an "authoritative decision maker" typically explained his rulings in terms of his personal opinions rather than legal rules. Conley and O'Barr concluded from their study "that lack of legal training and experience correlate with the tendency to displace responsibility for decisions onto rules that are beyond the control of the decisionmaker. Such judges lack the legal acumen and resulting confidence to take more personal and creative approaches." Conley & O'Barr, supra note 128, at 110.

306. See supra note 6 and accompanying text.
are bringing us close to the point at which we should begin rewriting jury instructions based on assumptions with better foundations. If juries in fact frequently interpret statutes in an effort to achieve a more perfect judgment than mechanical application would yield, it is not due to the preparation or assistance they receive from the court system. The moral nature of criminal judgment, in particular, implies that we should urge attention to more than literal statute application. We should consider, in effect, canons of construction that would be useful and manageable for juries, canons that better serve the normative evaluation of guilt contained in criminal verdicts.

An attempt to redesign instructions so as to aid juries' interpretive efforts seems at least as likely as existing practice to facilitate satisfactory resolutions to the inevitable tensions — felt by jurors, litigants, and observers — that come from adjudicating moral judgments about varied instances of human conduct under the guidance of general rules. Judges and justice theorists have long recognized the need and virtue of judges' ability to mediate application of rules with case-specific "considered judgments" and an acquired "situation sense." Juries, charged with resolving cases that no other process has been able to resolve, face the same need. Instructions that acknowledge and aid the task of interpretation instead of ignoring it may help.

The acknowledgement that juries must interpret statutes changes the premise of much discussion about how the jury performs its job. The issue is no longer whether the jury "followed" the law or departed from it, because creative, dynamic interpretation is at times necessary, desirable, and inevitable. The question is the jury's competency at such interpretation. Evidence indicates that they accomplish the task in much the same way, with much the same effect, as judges.