

2003

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Recommended Citation

78 Chi.-Kent L. Rev. 1281 (2003)

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JURORS AS STATUTORY INTERPRETERS

LAWRENCE M. SOLAN*

INTRODUCTION

This Article examines how aspects of the jury system combine to produce both important strengths and embarrassing weaknesses in the process of adjudication, especially in criminal cases. In the United States, criminal law is entirely statutory: there are no common-law crimes.¹ At least in principle, it is up to the court to decide as a legal matter whether particular conduct falls within a statute's prohibitions. All the jury need do, again in principle, is to decide whether the government has proven beyond a reasonable doubt that the defendant did all of the things that make up the various elements of the crime.

This was not always so. From the time of the country's founding until the end of the nineteenth century, criminal juries were responsible for determining the law as well as for finding the facts.² The practice was considered an important part of the structure of democratic government, dating back to seventeenth-century England.³ During the colonial period of American history, it took on special significance. One way to make sure that the English government did not subject the colonists to oppressive laws was to continue the common-law tradition of placing twelve citizens as a buffer between

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1. At least under federal law, this has been true since the early nineteenth century. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

2. See Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 377-79; Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87.

3. For the history of the development of this doctrine in England, see THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800*, at 153-99 (1985). For an overview of the history, see Irwin A. Horowitz et al., *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207 (2001).

Parliament and the criminal justice system. What we now call nullification was considered an important protection against tyranny.⁴ In fact, one of the injuries listed in the Declaration of Independence was deprivation “in many cases, of the benefit of trial by jury.”⁵

Upon the founding of the Republic the practice stood, and was taken seriously as one of the institutions that protected democratic values in the context of governmental structure that allowed for little participation from the citizenry. Alexander Hamilton wrote in *The Federalist*:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.⁶

If the legislature and executive became intoxicated with their own power and passed oppressive laws, they would still have to get past a jury to obtain a conviction—no easy feat, it was predicted.⁷

As judges became more professional and as the value of uniform treatment by the law grew to overcome concerns about tyranny, however, the role of the jury shrunk through the first hundred years of this country’s history. By the end of the nineteenth century, judges were instructing the jury in detail on the law, and jurors were expected to abide by these instructions. As the Supreme Court put it in 1895, “it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts. . . .”⁸ Thus ended the jury’s official role as statutory interpreter.

Nonetheless, the maxim that jurors find the facts while judges articulate the law is an overstatement. Jurors are not limited to responding to special verdict questionnaires, which a judge or some functionary uses to determine whether the law was broken. That may be true with such matters as adding court costs or interest on to a judgment, but it does not characterize the main event of the trial process. Rather, juries enter verdicts, first by finding the facts and then by determining whether the facts as they found them constitute a violation of the law. Deciding whether a statute applies to a given set

4. Harrington, *supra* note 2, at 393.

5. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

6. THE FEDERALIST NO. 83 (Alexander Hamilton) (Clinton Rossiter, ed. 1999) at 467.

7. See Harrington, *supra* note 2, at 398–400.

8. *Sparf v. United States*, 156 U.S. 51, 102 (1895).

of facts is what judges do when they interpret statutes, and it is part of the jury's job as well.

Scholars have taken note of this similarity in function between judge and jury, especially in the context of jury nullification. Darryl Brown has suggested that examining the deliberations of nullifying juries provides evidence that jurors today engage in a great deal of statutory interpretation, notwithstanding the official story to the contrary.⁹ Relying on filmed deliberations in a small sample of actual cases, Brown argues that what may appear superficially to constitute nullification by jurors of the legal standards they have been instructed to apply may instead reflect jurors deciding whether guilt in a particular case would promote the justice values for which the statute was enacted. Such discussion closely resembles the discourse of statutory interpretation in which courts and legal academics engage. Brown proposes a model of practical reasoning to account both for the decisions that courts make about a statute's applicability under various circumstances, and the decisions of jurors to convict or acquit.

Approaching the role of the jury from a more historical perspective, Nancy Marder argues similarly.¹⁰ Marder compares the current conventional model of the jury with what she calls a process model and concludes that what is typically seen as nullification may be recast as jurors participating actively in a system designed to give them authority to determine that a law is inapplicable in a given situation.

This Article looks more closely at how the legal system deals with jurors as interpreters of statutes. Judges use a host of tools in interpreting statutes, many of which are not available to jurors. For example, to the extent that legislative history is useful in determining the intent of the legislature, jurors are clearly not the ones to conduct the relevant analysis. Nonetheless, just as the jury can be seen as an institution that filters legal proceedings through a "communal sense of right and wrong" before convicting a person of a crime,¹¹ some aspects of statutory interpretation ordinarily performed by judges do precisely the same thing. Among them are the rule that requires judges to interpret statutes to avoid absurd results, and the rule that the words in a statute are to be interpreted according to their ordi-

9. See Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199 (1998).

10. Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 879-80 (1999).

11. Yeazell, *supra* note 2, at 91.

nary meaning. Each of these canons of construction is designed to make sure that the substantive law as written does not become so overreaching as to defeat reasonable goals of justice—just what the jury is supposed to do.

Moreover, jurors do not enter the jury room as blank slates. Rather, they perform their duty with a wealth of prior knowledge about what typically characterizes crimes to which they are exposed in our culture, whether from newspapers, books, magazines, or television. Jurors are typically asked in *voir dire* whether they or members of their families have been victims of the types of crime for which the defendant is on trial, but even without such experience people develop a sense of the characteristics of a prototypical rape, burglary, robbery, etc.¹² Experimentation shows that it is hard for people to put these notions aside and to replace them with the statutory definitions contained in the instructions that the judge reads to them.¹³ Judges, in contrast, with their legal training and experience, may not succumb to precisely the same set of influences as jurors. This suggests that the jury should be especially suited to determine a statute's "ordinary meaning" and to decide whether the defendant's conduct fits within that meaning.¹⁴

In addition, how much interpretation is delegated to jurors depends in large part on how they are instructed. Some instructions appear to leave a great deal of interpretive discretion to jurors, while others attempt to control the process with such precision that the instructions are virtually incomprehensible in their length and detail. The type of instruction that a jury is likely to hear is, in turn, partly a function of how the legislature drafted the law that the instruction is intended to describe. A detailed statute that contains its own glossary, for example, is likely to lead to instructions that reflect this legislative choice. Statutes drafted more skeletally leave room for different styles of instruction. The system appears to be ambivalent about the jury's role in a scheme that purports to seek uniform treatment through precise and sometimes complex statutory law.

12. Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857 (1991).

13. *Id.*

14. For discussion of how jurors use prototypes, see Dan M. Kahan, *Lay Perceptions of Justice vs. Criminal Law Doctrine: A False Dichotomy?*, 28 HOFSTRA L. REV. 793 (2000). For an interesting discussion of prototypes in the context of jury nullification, see Katherine T. Kixmiller, *Jury Nullification: A Morally Appropriate Response or a License for Bias?* (2001) (unpublished undergraduate thesis, Princeton University) (on file with author).

Part I of this Article shows how the trial process leaves jurors with varying amounts of discretion with respect to the interpretation of statutes. The system is not of a single mind about this issue. Nonetheless, instructions often leave jurors with tasks that are very similar to deciding whether to apply such canons as the ordinary meaning rule and the absurd result rule, which are used regularly by appellate judges. Part II illustrates the different attitudes toward jurors as interpreters of statutes with the federal mail fraud and money laundering statutes. Some model instructions are short and leave it to the jury to determine the fit between the facts in the case and the law, while others are enormously detailed in an effort to reduce the jury's role to that of fact finder only. This part argues that more often than not, courts prefer instructions that mimic the language of the statute, whether or not this language is comprehensible, especially when the statute is complex and contains statutory definitions, as many contemporary criminal statutes do. Part III is a brief conclusion in which different models of the role of judge and jury in interpreting statutes are explored.

I. MODERN JURORS AS STATUTORY INTERPRETERS

A. *How Issues of Statutory Interpretation Arise*

Statutory interpretation is traditionally seen as the business of the court. Judicial statements like the following are commonplace: "The interpretation of a statute is a question of law which this Court reviews *de novo*."¹⁵ Jurors are not part of this picture. But the lines are not so clear once one considers how questions of statutory interpretation make their way to the appellate courts that ultimately decide the questions. One procedural context intended to remove the jury from the process is a motion to dismiss an indictment or civil complaint. When a court grants a motion to have the charges dropped because the statute does not properly apply to the defendant's alleged conduct, the jury never hears the matter. In fact, taking the case away from the jury is the defense lawyer's goal in making the motion. But when the defendant loses the motion to

15. King v. Moore, 312 F.3d 1365, 1366 (11th Cir. 2002); see also Lozen Int'l, L.L.C. v. Sea-Land Serv., Inc., 285 F.3d 808, 813 (9th Cir. 2002); Fritz v. Principi, 264 F.3d 1372, 1374 (Fed. Cir. 2001).

dismiss, or never makes such a motion, the case may ultimately go to trial, and the court decides how to instruct the jury.

At that point, the court has two alternatives. It can simply instruct the jury on what the statute says and allow the jurors to decide whether the facts as established violate the statute, or it can give specific instructions on the meanings of the statutory terms that specifically establish a relationship between the evidence in the case and the statute. In one instance, the jury is given considerable latitude not only to find the facts, but also to determine whether the statute covers the facts as the jury found them, the latter of which is typically regarded as a legal question. In the other, the court attempts to keep the jury on a "short leash."¹⁶ Whichever approach the court takes, a subsequent appellate opinion that deals with the issue of statutory interpretation is procedurally about the instructions to the jury in the case.

Both of these very different approaches to instructing the jury can be found in the case law on statutory interpretation. Consider *Smith v. United States*,¹⁷ a case widely discussed in the literature on statutory interpretation. There, the defendant was in the process of trading an unloaded machinegun for some illegal narcotics when he got cold feet and decided to run. The police caught up with him and charged him with attempting to use a firearm "during and in relation to . . . [a] drug trafficking crime."¹⁸ A jury convicted Smith, and the judge sentenced him to the mandatory thirty-year sentence for using a machine gun during a drug trafficking crime. On appeal, Smith argued that the trial court should have instructed the jury that use in trade does not constitute "use" for purposes of the statute.¹⁹ The court of appeals rejected this contention as a matter of statutory interpretation. The jury was not, however, instructed in the opposite direction either: that use in trade *does* constitute "use" for purposes of the statute. If it had been, the issue would have been raised on appeal. Rather, at trial it was up to the jury to determine whether Smith had violated the statute by his conduct. That made jurors

16. The less legalistic, more expansive alternative is more consistent with the traditional jury. See Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1261 (2001) (suggesting that the jury be given the opportunity to play a more active role in the trial process, consistent with the traditional, more expanded role of the jury prior to the twentieth century).

17. 508 U.S. 223 (1993).

18. 18 U.S.C. § 924(c)(1) (1988).

19. *United States v. Smith*, 957 F.2d 835, 836 n.4 (11th Cir. 1992).

interpreters of the statute as well as finders of fact. On the other hand, after the *Smith* decision, prosecutors may argue that they are entitled to an instruction that “using” a firearm during a drug trafficking crime includes trading it for illegal drugs.

Smith suggests that jurors play a significant role as statutory interpreters unless and until an appellate court rules in a published opinion on a particular issue concerning the statute’s applicability. Since there are many issues that are never resolved in that way, jurors remain statutory interpreters with respect to portions of many statutes. Moreover, even when an appellate court does decide an issue, it is possible to construe the decision as *permitting* the jury to find that the statute applies, rather than as *requiring* the jury to so find. Even on the weaker alternative, *Smith* shows, at least indirectly, that the juror’s role as statutory interpreter has not been entirely eliminated, notwithstanding the modern rule that statutory interpretation is up to the court—not the jury.

Now consider, in contrast, another recent statutory interpretation case, *Bryan v. United States*,²⁰ in which a different dynamic occurred at trial with respect to the role of the jury. In that case, the defendant was accused of violating the Firearm Owners’ Protection Act²¹ by “willfully” dealing in firearms without a license. At issue in the case was what it means to “willfully” violate the statute. The defendant asked for an instruction that jurors “must be persuaded that with the actual knowledge of the federal firearms licensing laws Defendant acted in knowing and intentional violation of them.”²² Instead, the trial judge told the jury that “the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.”²³

The Supreme Court affirmed the conviction, holding that knowledge that the defendant was in some manner acting wrongly met the “willfulness” requirement under the statute. Neither the parties nor the trial judge considered leaving it to the jury to determine whether the defendant’s state of mind constituted willful violation of the statute. Now that *Bryan* has been decided, that approach to interpreting the statute is very unlikely to occur in the future.

20. 524 U.S. 184 (1998).

21. 18 U.S.C. § 924(a)(1)(D).

22. *Bryan*, 524 U.S. at 190 n.10.

23. *Id.* at 190.

Taken together, these two cases illustrate the uncertainty we continue to have about the role that jurors should play in the criminal justice system. In *Smith*, the Court left a great deal up to the jury. It was up to the jury to determine what counted as “using a firearm.” But in *Bryan*, the trial court, urged by both sides, left little to chance, providing a legal definition for the state of mind requirement. I do not argue that the court was wrong to do so. There is a substantial body of law interpreting the mens rea requirements of criminal statutes,²⁴ and uniformity in the application of the criminal laws is a goal worth pursuing. But these cases lead to two very different pictures of the role that the jury is expected to play in the trial process.

B. How Judges and Juries Engage in Statutory Interpretation

1. Jurors as Discoverers of Ordinary Meaning

Statutes are most often seen as directives that force interpretation from the top-down. They list conditions that must be met for the statute to apply. Consider, for example, the New Jersey statute that makes stalking a crime:

A person is guilty of stalking, a crime of the fourth degree, if he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or a member of his immediate family or to fear the death of himself or a member of his immediate family.²⁵

It is easy enough to divine from the statute the “elements” of stalking. In other words, the statute is itself a definition of the crime that sets forth a set of conditions that are individually necessary and in the aggregate sufficient for stalking to occur. Jury instructions are, at least on their surface, designed around this structure. Standard instructions lay out the elements of a crime and tell the jurors that the government must prove each of the elements beyond a reasonable doubt.

But sorting out the elements of a crime is not the task that judges find difficult when they are confronted with problems of statutory

24. For insightful discussion of these terms as used in statutes, see Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753 (2002).

25. N.J. STAT. ANN. § 2C:12-10(b) (West Supp. 2003). For further discussion of this statute, see Lawrence M. Solan, *Finding Ordinary Meaning in the Dictionary*, in LANGUAGE AND LAW (M. Robinson ed., forthcoming 2003).

interpretation. Rather, the problem is almost always a question of how broadly individual words in a statute should be interpreted. For example, the stalking statute does not define "course of conduct." How should the legal system decide when an alleged stalker's actions meet that requirement?

There are two ways of answering questions about word meaning: from the top-down, using definitions, and from the bottom-up, based on everyday experience. Continuing with our example, the statute is the legislature's definition of stalking, much like a dictionary definition. But the words within the statute are themselves subject to definition or to interpretation based on how well they match prototypical occurrences based on the experience of the interpreter. Many psychologists believe that we think both ways: in deciding the circumstances in which a concept applies, we look for defining features (i.e., features that are necessary or sufficient for the word to be used appropriately in a given context), and we look for similarity between the prototypical use of the concept and the situation at hand.²⁶

Judges look at word meaning both ways, sometimes without being aware of any inconsistency in the structure of the argument. To illustrate, let us return to *Smith*.²⁷ Justice O'Connor's majority opinion focused on the plain meaning of the statute. The law punishes those who "use a firearm" during a drug-trafficking crime. Smith used a machine gun, albeit as an object of barter rather than as a weapon. Therefore, the statute applies to Smith. For authority, O'Connor relied on a host of dictionaries, among other things. The holding reflects this approach: "Both a firearm's use as a weapon and its use as an item of barter fall within the plain language of § 924(c)(1), so long as the use occurs during and in relation to a drug trafficking offense. . . ." ²⁸

Interestingly, the majority opinion at one point acknowledges the importance of context in statutory interpretation: "Language, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear

26. For some examples of this perspective from the psychological literature, see, for example, PHILIP N. JOHNSON-LAIRD, *MENTAL MODELS* (1983); Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 *PSYCHOL. BULL.* 3 (1996); Edward E. Smith et al., *Alternative Strategies of Categorization*, 65 *COGNITION* 167 (1998); Edward E. Smith & Steven A. Sloman, *Similarity — Versus Rule-Based Categorization*, 22 *MEMORY & COGNITION* 377 (1994).

27. 508 U.S. 223 (1993).

28. *Id.* at 240.

when the word is analyzed in light of the terms that surround it.”²⁹ But the majority does little to contextualize its analysis.

Not so according to Justice Scalia’s dissent, which opens by stating the importance of context in construing the words of a statute.

It is, however, a “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.” That is particularly true of a word as elastic as “use,” whose meanings range all the way from “to partake of” (as in “he uses tobacco”) to “to be wont or accustomed” (as in “he used to smoke tobacco”).³⁰

Scalia devotes most of his dissent to arguing that the “ordinary meaning” of the expression “use a firearm” is to use the firearm as a firearm. Based on one’s everyday experience, one would expect the Congress to have this sense in mind when it enacted the statute. Scalia notes: “To be sure, ‘one can use a firearm in a number of ways,’ . . . including as an article of exchange, just as one can ‘use’ a cane as a hall decoration—but that is not the ordinary meaning of ‘using’ the one or the other.”³¹

The tension in *Smith*, then, is between the top-down “plain meaning” approach of the majority, and the bottom-up “ordinary meaning” approach of the dissent.³² This is exactly the tension that characterizes the jury system. In fact, Darryl Brown repeatedly describes the deliberations of juries that “nullify” as relying upon the statute’s “ordinary meaning.”³³

The experimental literature supports the notion that jurors tend to concern themselves with the “ordinary meaning” of a statute. In one set of studies, Vicki Smith presented subjects with the names of a number of crimes, including assault, burglary, kidnapping, murder, and robbery, and asked them to list what they considered the most common characteristics of those crimes.³⁴ She then presented a second set of subjects with scenarios of crimes that met the statutory definitions, but did not contain the prototypical features of the crime. For example, a ransom demand and youthful victim were the two most prevalent features of kidnapping, but play no role in the defini-

29. *Id.* at 229.

30. *Id.* at 241–42 (Scalia, J., dissenting) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)).

31. *Id.* at 242 (citation omitted).

32. For more detailed discussion of this distinction, see Solan, *supra* note 25.

33. Brown, *supra* note 9, at 1263–65.

34. Smith, *supra* note 12.

tion of the crime in kidnapping statutes. The results were that the conviction rates were much higher when the facts contained prototypical scenarios than when they contained atypical scenarios, even though both scenarios fit the statutory definitions without controversy.³⁵

What does this say about the role that jurors play as statutory interpreters in the criminal justice system? Judges are ambivalent about striking down prosecutions based on facts that fit within a statute's literal language, but outside of its ordinary meaning. Certainly they have done so, sometimes in very prominent cases,³⁶ but often enough, as they did in *Smith*, judges opt for a broad interpretation if the statutory language easily enough supports it. Jurors do not always opt for ordinary usage either, as the guilty verdict in *Smith* illustrates. Yet the combination of the two events—trial motions (to dismiss or to instruct the jury narrowly) and jury deliberation—serve to keep the application of statutes somewhere within the meanings that ordinary people would find plausible.

2. Jurors as Discoverers of Absurd Results

By the same token, both judges and jurors engage in analysis under the “absurd result rule.” Appellate courts refer to the rule often in cases involving statutory interpretation.³⁷ A classic example is *United States v. Kirby*,³⁸ a case decided in 1868. Kirby was a local sheriff in Kentucky, who had a warrant for the arrest of Farris for murder. Farris was a letter carrier. Kirby caught up with him while Farris was delivering the mail on his route and arrested him. In a postbellum display of federal power, Kirby was himself arrested, tried, and convicted of interfering with the delivery of the United States mail. In reversing the conviction, the Supreme Court had this to say:

35. *Id.* at 864; see also Brown, *supra* note 9; Kahan, *supra* note 14 (for further discussion of the ramifications).

36. Probably the most famous case of this kind is *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), in which the Court held that an English minister, brought to the United States by his congregation, did not count as a person performing “labor” because, while within the literal meaning of the statute, a member of the clergy is not within the spirit of the statute.

37. For two recent examples by courts of appeals, see *Chapman v. Higbee Co.*, 319 F.3d 825, 832 (6th Cir. 2003), and *Taylor v. Vermont Department of Education*, 313 F.3d 768, 779 (2d Cir. 2002).

38. *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868).

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.³⁹

The absurd result rule is both stronger and weaker than the ordinary meaning canon. On the one hand, absurd results need not result from an excessively broad interpretation of a particular word. In *Kirby*, it was the whole situation that made the result indefensible as a fair dispensation of justice. On the other hand, absurdity is not a very exacting standard for a system of justice. There may be prosecutions that a community would regard as disproportionate that do not rise to the level of absurdity. In fact, Brown discusses jurors making exactly that point when deliberating in a case in which they regarded the charges as unfairly harsh.⁴⁰

It is here that jurors provide defendants with an extra level of protection beyond that given by appellate courts applying the absurd result rule. If a prosecution is too aggressive and the defendant is a sympathetic person, jurors have the right not to convict. Marder discusses this category of “nullification” in terms of her process model of the jury.⁴¹ The jury serves as a buffer against prosecutors who attempt to take advantage of linguistic nuances that might put conduct within the scope of a statute that was never intended to apply to a particular situation. Appellate judges are charged with performing a similar task, but there is no guarantee that their assessment of the fit between statutory language and ordinary meaning captures the sense of the community at large. From a linguistic perspective, jurors who acquit in such cases are merely applying the “ordinary meaning” rule to entire events, rather than to particular statutory words.⁴² In this sense, jurors are participating in the task of statutory interpretation, using tools very much like those used by judges.

39. *Id.* at 486–87.

40. Brown, *supra* note 9, at 1264–65.

41. Marder, *supra* note 10, at 879–80.

42. While well beyond the scope of this Article, linguists have argued that language often treats events as objects. Consider, “Did you see that?” “That” is a pronoun and can refer to some event that happened outside and was visible through a window even if no one in the conversation had earlier said anything. For discussion, see RAY JACKENDOFF, FOUNDATIONS OF LANGUAGE 315–18 (2002); Carol Tenny & James Pustejovsky, *A History of Events in Linguistic Theory*, in *EVENTS AS GRAMMATICAL OBJECTS: THE CONVERGING PERSPECTIVES OF LEXICAL SEMANTICS AND SYNTAX 3* (Carol Tenny & James Pustejovsky eds., 2000).

II. JURY INSTRUCTIONS AND STATUTORY FIDELITY

Let us see how, in typical cases, the system attempts to guide jurors in their task of determining whether a statute applies to the facts before them. When judges decide whether particular conduct violates a statute, they engage in minute analysis, looking closely at the statutory language and at extrinsic sources, such as legislative history, dictionaries, other sections of the statute, and so on. Jurors have neither the time nor the resources to do this. In fact, the material that would allow them to do so is not available to them. Thus, the legal system must decide what to tell jurors about the law.

Jury instructions are supposed to accomplish this task. But statutes are very difficult to understand. Thus, the system is torn between promoting fidelity to statutory language and writing instructions that jurors can follow. Both concerns are clearly visible in the array of instructions that courts use, with compromises often apparent within a particular instruction. But the decision about how to instruct a jury creates higher stakes than that. The more detailed the instruction, the less the risk, if the jurors indeed follow the minutia, that jurors will use their everyday experience to reach a verdict. If every relevant word is defined, and every contingency the subject of an instruction, then the task of the jury becomes more mechanical, at least if everything works as designed.⁴³ In this sense, the decision about how to instruct a jury is at least in part a decision about how much to leave to the jury the task of interpreting the statute. Below we see how this dynamic plays out by looking first at the federal mail fraud statute, which is a relatively short law, and then at the federal money laundering statute, which is a very long and complex law designed to leave little to chance. Finally this part of the Article examines judicial pronouncements concerning the relationship between statutory language and jury instructions.

A. Instructing on Mail Fraud—Presenting the Ideas of a Simple Statute

The federal mail fraud statute reads in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of

43. See Kahan, *supra* note 14; Smith, *supra* note 12 (showing that it is sometimes very difficult to dislodge people's prior understanding of a crime and to replace it with the statutory definition contained in the jury instructions).

false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do . . . knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing . . . shall be fined not more than \$ 1,000,000 or imprisoned not more than 30 years, or both.⁴⁴

Some of the language, like the language of statutes generally, is complex. For example, the statute is one long sentence. In order to understand it, one must in some sense “know” the following:

1. The subject of the sentence is a clause that begins “whoever,” and the predicate of the sentence begins with “shall be fined.”

2. The subject of the clause that is the sentence’s subject is the word “whoever,” along with a clause that modifies that word, and the predicate of the clause that is the subject of the sentence begins with “knowingly.” The main verb is “causes.”

3. The clause beginning “having devised” modifies “whoever” and is embedded within the clause that is the sentence’s subject.

4. The predicate of the clause that is the sentence’s subject is complex, with the phrase “to be delivered by mail” embedded in the predicate. It is a passive clause, whose subject is missing. Thus, the sentence does not specify who must do the delivering, just that the defendant cause the delivery.

5. The clause beginning “having devised” has no subject of its own, but we interpret “whoever” as its subject.

There are many more complexities in the structure of this language, just about all of which make it more difficult to process.⁴⁵ Yet once one parses one’s way through the statute, just about all of these relationships among its clauses and phrases fall into place. In fact, parties and judges routinely argue over the meanings of words in a statute, but rarely over a statute’s syntax.⁴⁶ This is true of the mail fraud statute as well. One interpretive problem in the mail fraud

44. 18 U.S.C. § 1341 (2000). This is an abbreviated version of the statute, for purposes of discussion.

45. For discussion of how syntax and word choice affect the comprehensibility of jury instructions, see Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); see also AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982).

46. See Lawrence M. Solan, *Why Laws Work Pretty Well, but Not Great: Words and Rules in Legal Interpretation*, 26 LAW & SOC. INQUIRY 243, 245–47 (2001) (reviewing STEVEN PINKER, WORDS AND RULES: THE INGREDIENTS OF LANGUAGE (1999)) (analyzing cases decided under the federal bribery statute as being almost exclusively about the meanings of the statute’s words, and not its structure).

statute does, however, appear to have arisen from syntactic ambiguity. Courts have held, consistent with the language of the statute, that the statute does not require that the person doing the mailing be the defendant.⁴⁷ Any lack of clarity results from the use of the passive construction without an agent, "causes to be delivered by mail." The statute does not specify by whom. Otherwise, arguments over the applicability of this statute are largely over the scope of its various terms.

How much of the interpretation of the statute should be left to the jury? If the jury were to decide on a case-by-case basis whether the defendant has to be the one doing the mailing, it would lead to inconsistent outcomes in cases with similar facts. Two juries with different linguistic intuitions could decide differently even if they both would have acted the same had they understood the statute the same way. No court would accept this risk of inconsistent verdicts today. Rather, courts rule as a matter of law in such cases, and instruct the jury accordingly.

In contrast, interpretation of the statute's terms requires decisions to be made about borderline cases. What counts as a scheme to defraud? How clear does the defendant's statement have to be to count as a representation or a promise? These are questions that may be resolved by courts, but they are the kinds of conceptual questions that people grapple with every day, and upon which people may differ as a result of different perspectives and experiences. The issue comes down to the tension between democratic participation and uniform treatment.

The conflicting vision of the jury's role as interpreter comes through both in a leading Supreme Court case interpreting the statute, and in the various approaches to jury instructions that have been proposed. In *Schmuck v. United States*,⁴⁸ the defendant had been operating a business in which he would roll back the odometers of used cars and then sell the cars to dealers who would resell them to customers at prices inflated to reflect the inaccurately low mileage resulting from Schmuck's scheme. No mailing was involved until after the customer bought the car and the dealer used the mail to register the newly purchased vehicle with the state motor vehicle department in Wisconsin. The question raised in *Schmuck* was

47. See, e.g., *United States v. Castor*, 558 F.2d 379, 385 (7th Cir. 1977).

48. 489 U.S. 705, 707 (1989).

whether any mailing occurred “for the purpose of executing” a fraudulent scheme, given that the fraud had been completed before the mailing occurred.

In a 5-4 decision, the Supreme Court affirmed the conviction. The Court held that the trial court had properly denied the defendant’s motion to dismiss the indictment. That led to a trial in which the jury issued a guilty verdict. As for the jurors’ role as interpreters of the statute, the Court held:

Thus, Schmuck’s was not a “one-shot” operation in which he sold a single car to an isolated dealer. His was an ongoing fraudulent venture. A rational jury could have concluded that the success of Schmuck’s venture depended upon his continued harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers.⁴⁹

The Court’s assumption seems correct. It is at least possible to draw the inference that Schmuck was advantaged by the mailing.

This approach leaves a great deal of discretion to the jury. The chain of thought that the Court deems “possible” permits the jury to convict a defendant of allowing others to use the mail for the sake of facilitating some future fraudulent scheme of which the defendant was not charged, as Justice Scalia points out forcefully in his dissent.⁵⁰ At least in principle, jurors are permitted to convict only when the government has proven the crime for which the defendant was indicted beyond a reasonable doubt. In contrast, the Court appears to have left room for a common-law crime of mail fraud.⁵¹

But not all mail fraud instructions give jurors such broad discretion. For example, many instructions make it clear that, as in *Schmuck*, the person using the mail as part of the scheme may be someone other than the defendant.⁵² Other instructions explain the mens rea requirements. For example, in *United States v. Lennartz*,⁵³ the Seventh Circuit affirmed the use of the “ostrich” or “conscious avoidance” instruction. The case involved a commercial ambulatory service that routinely overcharged Medicare for the distances it drove and for waiting time while patients underwent kidney dialysis. The

49. *Id.* at 711–12.

50. *Id.* at 723 (Scalia, J. dissenting).

51. See Dan M. Kahan, *Lenity and Federal Law Crimes*, 1994 SUP. CT. REV. 345, 373–78 (arguing that the breadth of some statutes, including the mail fraud statute, leaves so much judicial discretion as to make them tantamount to common-law crimes).

52. See, e.g., *United States v. Voss*, 787 F.2d 393, 401 (8th Cir. 1986).

53. 948 F.2d 363 (7th Cir. 1991).

owner of the company claimed ignorance of the drivers' corrupt practices, although there was evidence to the contrary. The court instructed the jury:

When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of the conduct and did not act through ignorance, mistake, or accident. Knowledge may be proved by the defendant's conduct and by all the facts and circumstances surrounding the case. Knowledge may be inferred from a combination of suspicion and indifference to the truth. If a person is found to have had a strong suspicion that things were not what they seemed or that someone had withheld some important facts yet shut his eyes for fear of what he would learn, that person may be inferred to have acted knowingly or with knowledge, as I have used these terms.⁵⁴

Such tugs of war are a typical part of the trial. For almost every issue, one party will want the jury to be told in no uncertain terms that its discretion is limited, while the other party will want to rely on the jury's discretion.

It is instructive in this context to compare two model jury instructions with radically different approaches. They are set out in the Appendix. The Federal Judicial Center ("FJC"), the research arm of the federal judiciary, has opted for a plain-language approach that summarizes the statute in words that are relatively easy to understand.⁵⁵ The instruction is 225 words long, and makes certain tradeoffs between fidelity to the legislature's choice of words and comprehensibility. It does not mention that the defendant need not be the one who did the mailing, although that issue is not relevant in run-of-the-mill mail fraud cases, for which the instruction is designed.

Contrast this instruction with a lengthy one derived from the case law in various federal circuits, and contained in a practice volume called *Modern Federal Jury Instructions* ("MFJI").⁵⁶ It is more than 2,000 words long, including alternative paths that the instruction might take depending upon the facts. The shortest version that I could compile still has more than 1,500 words. It leaves nothing to chance, except the possibility that the instruction is so long and complicated that it cannot reasonably serve to inform jurors of the subtleties that its very structure is intended to convey.

54. *Id.* at 368–69.

55. FEDERAL JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS § 85 (1987).

56. 2 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS §§ 44-4 to -6 (2002).

Both instructions divide the statute into three elements. While I will not look closely at all of the language, let us compare how each instruction handles the first element: that the defendant has devised “any scheme or artifice to defraud.”⁵⁷ The FJC instruction states this element succinctly, but deviates from the statutory language:

First, that _____ made a plan [e.g.: to obtain money based on giving false information about the Apex Corporation to Sarah Stone and Rubin Ross].⁵⁸

The instruction has substituted “plan” for “scheme,” and instead of using the word “defraud” describes what the fraud is alleged to be. Elsewhere the instruction says it is against the law to “cheat” someone out of property instead of its being illegal to “devise a plan to defraud. . . .”

The use of the word “cheat” is especially interesting. Not only is that word absent from the mail fraud statute, but Congress rarely uses it at all. I could find only one occurrence in the entire United States Code—a statute that regulates commodities exchanges makes it a crime “to cheat or defraud or attempt to cheat or defraud such other person.”⁵⁹ Yet not only do people use it frequently in everyday speech (beginning at a very young age), but judges often enough use the word to describe a defendant’s conduct or to define fraudulent behavior.⁶⁰

I focus on the word “cheat” because we all know it so well that we are likely to have mental models of prototypical cheating based on various experiences. This means that the language of the FJC instruction, by including terms that jurors can relate to their own experience, may make it easier for them to exercise judgment in determining whether alleged conduct is actually serious enough to warrant a conviction. In other words, the language of the instruction invites the jury to play its traditional part in the adjudication of criminal cases. If the defendant’s conduct does not match all jurors’ sense of what it means to cheat someone, the best the government should be able to expect is a hung jury.

57. 18 U.S.C. § 1341 (2000).

58. FEDERAL JUDICIAL CTR., *supra* note 55.

59. 7 U.S.C.A. § 6b(a)(i) (West 1999 & Supp. 2003).

60. For a recent example, see *United States v. Thomas*, 315 F.3d 190, 200 (3d Cir. 2002) (quoting *State v. Weigel*, 477 A.2d 372, 378 (N.J. Super. Ct. App. Div. 1984)) (“In common parlance, the word ‘defraud’ means to cheat or wrongfully deprive another of his property by deception or artifice.”).

The first element in the mail fraud instruction from MFJI, in contrast, edited to exclude optional provisions that do not routinely apply, comes much closer to what a jury is likely to hear:

The first element that the government must prove beyond a reasonable doubt is that there was a scheme or artifice to defraud [the victim] of money or property . . . by means of false or fraudulent pretenses, representations or promises.

This first element is almost self-explanatory.

A "scheme or artifice" is merely a plan for the accomplishment of an object.

A scheme to defraud is any plan, device, or course of action to obtain money or property . . . by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.

"Fraud" is a general term which embraces all the various means by which human ingenuity can devise and which are resorted to by an individual to gain an advantage over another by false representations, suggestions or suppression of the truth, or deliberate disregard for the truth.

Thus, a "scheme to defraud" is merely a plan to deprive another of money or property . . . by trick, deceit, deception or swindle.

The scheme to defraud is alleged to have been carried out by making false (or fraudulent) statements (representations) (claims) (documents).

A statement, representation, claim or document is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made.

A representation or statement is fraudulent if it was falsely made with the intention to deceive.

Deceitful statements of half truths or the concealment of material facts, and the expression of an opinion not honestly entertained may also constitute false or fraudulent statements under the statute.

The deception need not be premised upon spoken or written words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance. If there is deception, the manner in which it is accomplished is immaterial. . . .

The false or fraudulent representation (*or failure to disclose*) must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision (*e.g.*, with respect to a proposed investment).

This means that if you find a particular statement of fact to have been false, you must determine whether that statement was one that a reasonable person or investor might have considered important in making his or her decision. The same principle applies to fraudulent half truths or omissions of material facts. . . .

In addition to proving that a statement was false or fraudulent and related to a material fact, in order to establish a scheme to defraud, the government must prove that the alleged scheme contemplated depriving another of money or property (or of the intangible right of honest services).

However, the government is not required to prove that the defendant himself originated the scheme to defraud. Furthermore, it is not necessary that the government prove that the defendant actually realized any gain from the scheme or that the intended victim actually suffered any loss. . . .

A scheme to defraud need not be shown by direct evidence, but may be established by all of the circumstances and facts in the case. . . .⁶¹

In actual cases, an instruction of this sort will be tailored to the facts of the particular case. Nonetheless, it contains some typical features that reflect the legal system's longstanding concerns about the jury system. Putting to one side the almost entertaining remark, "This first element is almost self-explanatory," the instruction actually uses more or less the same language of the shorter FJC instruction. It explains: "Thus, a 'scheme to defraud' is *merely a plan to deprive another of money or property . . . by trick, deceit, deception or swindle.*"

Nonetheless, the MFJI instruction attempts to keep the jurors' analysis of the case under tight control to assure that different defendants accused of committing the same crime will be treated more or less the same, and in accordance with established legal principles. Definitions of the elements of the crime that result from various judicial decisions make their way into the instructions. As the corpus of published opinions expands, so do the instructions that the jury must digest. Uniformity of treatment is what motivated the reduction of the jury's law-finding function in the nineteenth century.⁶² More than a hundred years later, it has resulted in complex, linguistically loyal instructions that are difficult to understand. What they give lawyers and trial judges is the peace of mind that comes with defer-

61. 2 SAND ET AL., *supra* note 56, §§ 44-3 to -6.

62. See Harrington, *supra* note 2, at 380.

ence to the legislature and appellate judges put in charge of enacting and clarifying the criminal law.

Taken together, the two mail fraud instructions illustrate the endpoints of the different perceptions of the modern American criminal jury. The FJC instruction treats the jury as an institution whose job it is to exercise its judgment wisely once it is introduced to the governing legal principles. It says little about the law in the abstract, opting instead to describe as illegal the facts as the government alleges them. The MFJI instruction does just opposite.

B. Money Laundering: Legislative Control of Jury Deliberations

The focus of this Article has thus far been on how courts control the scope of jury deliberations, whether by deciding issues as a matter of law, or by presenting jurors with instructions designed to minimize their discretion in reaching a verdict. Courts are an appropriate institution to investigate because it is the trial court that decides which instructions to present, and because it is the appellate courts that decide whether the instruction fairly presents jurors with a description of the law. But the analysis should begin before the courts get involved. The starting point should really be the legislature, and its decision to draft laws that are likely to lead to one vision of the jury versus another. In both criminal and regulatory legislation, statutes are becoming longer and more complex. Whether the result of negotiation and compromise,⁶³ or a statement to judges and juries that they are not to be trusted,⁶⁴ Congress in particular has been leaving less and less to the discretion of others, especially in the realm of the criminal law. The mail fraud statute may give courts some room to determine the wording, length, and tone of the instruction. But long, complicated statutes, as a practical matter, do not. Consider the federal money laundering statute,⁶⁵ presented below in relevant part:

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activ-

63. This position is consistent with the public choice model of legislation. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

64. Consider for example the Federal Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2001).

65. 18 U.S.C. § 1956 (2000).

ity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

- (A) (i) with the intent to promote the carrying on of specified unlawful activity; or
- (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
- (B) knowing that the transaction is designed in whole or in part—
 - (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
 - (ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than \$ 500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.⁶⁶

The syntax of the statute is rather convoluted, but the elements of the crime are clear. To commit the crime of money laundering the defendant must: (1) conduct or attempt to conduct a financial transaction, (2) knowing that the property involved represents the proceeds of some form of unlawful activity, (3) with the intent to promote the carrying on of the unlawful activity. In addition, like many statutes, this one contains a set of statutory definitions.⁶⁷ Legal scholars are accustomed to reading (and sometimes criticizing) such definitions. But lay people are not. How should a jury be instructed when the legislature has taken the care to define statutory terms, but has done so in language that is very difficult to understand? Consider the following example. The statute is entitled “Laundering of monetary instruments.” Jurors are not likely to be familiar with that term. This might give a court the opportunity to define the term in everyday language that jurors might understand. For example, let us say that the defendant is accused of laundering cash and personal checks. A court may say something like: “The statute makes it a crime to launder ‘monetary instruments.’ You may not be familiar with that term. For our purposes, it includes cash and personal checks.” But Congress defines the term in the statute:

- (5) the term “monetary instruments” means (i) coin or currency of the United States or of any other country, travelers’ checks, personal checks, bank checks, and money orders, or (ii) investment

66. *Id.* § 1956(a)(1).

67. *Id.* § 1956(c).

securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery. . . .⁶⁸

This definition is largely irrelevant, and not easy to understand because it contains the names of instruments with which many jurors are likely to be unfamiliar. Hearing it may confuse some jurors and cause others to stop listening carefully because the language can be alienating. But to instruct the jury on only the potentially applicable portions of this section misses an important point that Congress wrote into the statute: the definition of “monetary instruments” is written broadly, in order to catch as many such instruments as possible. Unless the judge reads the definition, the jury will not be made privy to that fact, but if the judge reads it, the language is likely to be confusing.

Standard jury instructions resolve this problem with a compromise. The judge gives a number of examples, but leaves out the exotic ones:

The term “monetary instrument” includes, among other things, coin or currency of the United States or any other country, personal checks, traveler’s checks, cashier’s checks, bank checks, money orders, and investment securities or negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery.⁶⁹

This strikes me as a perfectly reasonable jury instruction. But it is a far cry from the FJC’s approach to instructing the jury on mail fraud. The top-down approach to jury instruction has won. The structure of the statute makes it difficult to do otherwise.

For other terms, the instructions succumb completely to the language of the statute, making the terms very difficult to understand. Consider, for example, the MFJI instruction that defines “financial transaction”:

The term “financial transaction” means a transaction involving a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree, or a transaction which in any way or degree affects interstate or foreign commerce and involves the movement of funds by wire or other means, or involves one or more monetary instruments, or involves the transfer of title to any real property, vehicle, vessel or aircraft.⁷⁰

This language closely tracks the language of the statute:

68. *Id.* § 1956(c)(5).

69. 3 SAND ET AL., *supra* note 56, § 50A-3.

70. *Id.*

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree. . . .⁷¹

When the statute's glossary does not define a term but the instruction does, the instruction is written more comprehensibly. Consider the following definition taken from the MFJI instruction: "Proceeds can be any kind of property, not just money."⁷² This shows that the drafters of these instructions are capable of writing in plain English when the opportunity presents itself.

C. *Mixed Loyalties: The Text Usually Wins*

Most often, jury instructions based on particular criminal statutes simply track the language of the statute. However, this is not always so. The Supreme Court reversed a death sentence *because* the trial court allowed the jury to rely only on the language of a statute without further guidance. In *Godfrey v. Georgia*,⁷³ the defendant was sentenced to death under a Georgia statute that permitted the jury to impose the death penalty for a murder that "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."⁷⁴ The instruction to the jury was the statute itself, without further explanation. The Supreme Court of Georgia affirmed the death sentence, but the Supreme Court of the United States reversed. Even though the Georgia death penalty statute had been found constitutional, and even though the instruction tracked the language of the statute, the Court found that the instruction gave the jury no guidance:

In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly

71. 18 U.S.C. § 1956(c)(4).

72. 3 SAND ET AL., *supra* note 56, § 50A-3.

73. 446 U.S. 420 (1980).

74. *Id.* at 422 (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)).

vile, horrible and inhuman.” Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge’s sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)’s terms. In fact, the jury’s interpretation of § (b)(7) can only be the subject of sheer speculation.⁷⁵

In recent years the Court has had a mixed record in deciding whether to strike down unclear jury instructions in death penalty cases.⁷⁶ Yet *Godfrey* remains a good illustration of one approach to the relationship between jury instructions and a statute’s words: the instruction must be loyal to the meaning of the statute; however, if the statutory language is either hard to understand or is simply too vague to be of much help, the instruction *must* go beyond the words of the statute itself.

Courts sometimes recognize the need for clarification of statutory language simply as a matter of sound judicial management. Consider, for example, *State v. Alexander*,⁷⁷ a case decided by the Supreme Court of New Jersey in 1994. The defendant was accused of violating various drug laws, including New Jersey’s “drug kingpin” statute. Alexander had hired another individual named Harewood to sell crack cocaine to Alexander’s customers. Alexander would supply Harewood with cocaine. Harewood would sell the cocaine and collect the money. Alexander would then get 70% of the receipts; Harewood got the other 30%.⁷⁸ Below is the relevant part of the drug kingpin statute:

A person is a leader of a narcotics trafficking network if he conspires with others as an organizer, supervisor, financier or manager, to engage for profit in a scheme or course of conduct to unlawfully manufacture, distribute, dispense, bring into or transport in this State methamphetamine, lysergic acid diethylamide, phencyclidine or any controlled dangerous substance classified in Schedule I or II, or any controlled substance analog thereof. Leader of narcotics trafficking network is a crime of the first degree and upon conviction thereof . . . a person shall be sentenced to an ordinary term of

75. *Id.* at 428–29.

76. Compare *Weeks v. Angelone*, 528 U.S. 225, 227 (2000) (even when jurors claim not to have understood a term in an instruction, courts are under no obligation to offer a meaningful explanation.), with *Kelly v. South Carolina*, 534 U.S. 246 (2002) (most recent in a series of cases holding that jurors must be informed when life without parole is the only alternative to death penalty and government puts defendant’s future dangerousness into issue). See generally, Peter M. Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation*, 1995 UTAH L. REV. 1.

77. 643 A.2d 996 (N.J. 1994).

78. *Id.* at 997.

life imprisonment during which the person must serve 25 years before being eligible for parole.⁷⁹

Its language is opaque at best, even though the Supreme Court of New Jersey had earlier held that it survived attack for being unconstitutionally vague.⁸⁰ Affirming a decision of an intermediate appellate court,⁸¹ the New Jersey Supreme Court in *Alexander* held that explanation of the statutory terms was required. It held that the trial court

should instruct the jury that it must find that the defendant occupies a high-level position, that is, a position of superior authority or control over other persons, in a scheme or organization of drug distribution (or manufacture or dispensing or transporting), and that in that position the defendant exercised supervisory power or control over others engaged in an organized drug-trafficking network.⁸²

This additional language was needed, the court explained, to make the instruction consistent with the purpose of the statute, which was set forth in a statement of purpose that was part of the statute itself. Moreover, the court explained:

This Court has made abundantly clear that correct jury instructions are at the heart of the proper execution of the jury function in a criminal trial: “[a]ppropriate and proper charges to a jury are essential for a fair trial.” A court’s obligation properly to instruct and to guide a jury includes the duty to clarify statutory language that prescribes the elements of a crime when clarification is essential to ensure that the jury will fully understand and actually find those elements in determining the defendant’s guilt.

For the purpose of instructing and guiding juries, courts regularly explain and define statutory language consistent with legislative intent. Courts commonly clarify statutory language to give more precise meaning to statutory terms to effect the legislative intent and to make sure that juries carry out that intent in determining criminal culpability.⁸³

Thus, at least in New Jersey, courts sometimes take seriously the role of the juror as statutory interpreter and provide jurors with the kind of explanatory material that judges themselves use when they perform that task.

For the most part, though, courts do not reverse convictions when the instructions tracked the language of the statute. As the Eighth Circuit recently put it: “The best way to comply with [the

79. *Id.* at 998 (quoting N.J. STAT. ANN. § 2C:35-3 (West 1987)).

80. *State v. Afanador*, 631 A.2d 946, 950 (N.J. 1993).

81. *State v. Alexander*, 624 A.2d 48 (N.J. Super. Ct. App. Div. 1993).

82. *Alexander*, 643 A.2d at 1000.

83. *Id.* (citations omitted).

Federal Death Penalty Act] is to actually use the language of the statute in the jury instruction.”⁸⁴ Thus, statutory language can offer a safe harbor for trial courts concerned about being reversed, just as statutory language provides a safe harbor for prosecutors who draft indictments.

State courts typically also approve instructions that track a statute’s exact words, regardless of how comprehensible they are. A Minnesota statute says: “No employer or agent thereof shall directly or indirectly solicit or require a polygraph, voice stress analysis, or any test purporting to test the honesty of any employee or prospective employee.”⁸⁵ At a trial over an employer’s use of a polygraph, the Supreme Court of Minnesota approved the trial court’s refusal to define “solicit,” since the trial court “used the exact words of the statute.”⁸⁶ This does not mean that the exact words are required. They are not. The Supreme Court of Hawaii has made it clear that the “trial court is not required to instruct the jury in the exact words of the applicable statute but to present the jury with an understandable instruction that aids the jury in applying that law to the facts of the case.”⁸⁷ But using a statute’s exact words generally creates a safe harbor for trial judges.⁸⁸ It is rare to find a reversal, whether or not the language of the statute used in the instruction is comprehensible to the average person.

The legal system is thus of two minds when it comes to letting the jury rely on the exact words of a statute. Sometimes the system is satisfied with a “read the statute and run” approach to the jury. At other times, it takes the role of the jury seriously in deciding whether the exact words are the best words.

In contrast, although “[a] defendant is entitled to an instruction on his theory of the case if the instruction is a correct statement of the law and if he has offered sufficient evidence for the jury to find in his

84. *United States v. Paul*, 217 F.3d 989, 997 (8th Cir. 2000); *see also Harjo v. Gibson*, No. 99-7041, 2000 WL 796091, at *4 (10th Cir. June 21, 2000) (“Instructing the jury according to the statutory language of the aggravator, as the trial court did, meets constitutional standards.”); *Farrington v. Senkowski*, 214 F.3d 237, 244 (2d Cir. 2000) (“These instructions on larceny mirror the statutory language, and were therefore not ‘clearly constitutionally deficient.’” (citations omitted)).

85. MINN. STAT. ANN. § 181.75(1) (West 1993).

86. *Kamrath v. Suburban Nat’l Bank*, 363 N.W.2d 108, 111 (Minn. Ct. App. 1985).

87. *State v. Apao*, 586 P.2d 250, 263 (Haw. 1978); *see also State v. Barbour*, 258 S.E.2d 475, 481 (N.C. Ct. App. 1979).

88. *See, e.g., State v. Booth*, 276 N.W.2d 673, 677–78 (Neb. 1979).

favor,”⁸⁹ defendants are not entitled to have the judge read the exact language of the instruction they suggest.⁹⁰ As long as the judge “substantially covered the point that [the defendant] sought to get across,” the instruction will be affirmed on appeal.⁹¹

The point of these cases is clear enough to trial judges: you will rarely get into trouble if you explain a statute to jurors by reading its language to them. We are willing, for the most part, to accept the legal fiction that jurors understand what they are told, even when we know they do not. In fact, it is a nearly un rebuttable principle of law that jurors *do* understand the instructions that are read to them. As Chief Justice Rehnquist wrote in deciding that it was proper for a trial judge simply to repeat an instruction in a death penalty case that jurors said they did not understand:

A jury is presumed to follow its instructions. Similarly, a jury is presumed to understand a judge’s answer to its question. Weeks’ jury did not inform the court that after reading the relevant paragraph of the instruction, it still did not understand its role. To presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge’s answer.⁹²

A jury wishing to be better instructed must state its failure to understand and then argue with the judge about his solution in order to be heard. It is not realistic to expect this to happen. Thus, not only does the opinion accept the legal fiction, it works to keep juror comprehension fictional.

III. CONCLUSION: COMMUNAL JUSTICE AND STATUTORY INTERPRETATION

In their important studies, Paul Robinson and John Darley compare a set of criminal-law doctrines with the views of individuals

89. See, e.g., *United States v. Dozal*, 173 F.3d 787, 796 (10th Cir. 1999) (quoting *United States v. McIntosh*, 124 F.3d 1330, 1337 (10th Cir. 1997)) (internal quotations omitted).

90. *Id.*

91. *United States v. Smith*, No. 93-5953, 1994 WL 162584, at *5 (6th Cir. Apr. 28, 1994); see also *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 346 (2d Cir. 1994) (“The district court is not obligated to charge the jury using the exact words proposed by a party. . . . While a more specific instruction might have been helpful, there is no basis for concluding that the jury was given a misleading or inaccurate impression of the law.”).

92. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citations omitted). For discussion of the Court’s dismissive attitude toward juror understanding, see Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1085–89 (2001).

concerning crime and punishment.⁹³ They find that “often the legal codes and the community standards reflect similar rules in assigning liability to a case of wrongdoing; but also often they do not.”⁹⁴ In the introductory chapter, they argue that this comparison is important:

[R]ecent empirical evidence suggests that criminal law’s most effective mechanism of compliance is not the deterrent threat of sanction; it is its capacity to authoritatively describe the moral and proper rules of conduct. People will follow those rules not because they fear punishment for violating them but because they see themselves as good and law-abiding people who are inclined to obey the law because it is the right thing to do. Most important, the compliance power of criminal law is directly proportional to its moral credibility. If the criminal law is seen as unjust in one instance, its moral credibility and its concomitant compliance power are, accordingly, incrementally reduced.⁹⁵

Robinson and Darley focus their attention on particular legal doctrines that do not match community standards of justice. To the extent that they are correct that this gap diminishes the moral force of the law, one solution is to change the doctrines, which requires legislative action. This solution, however, is not accomplished easily.

Consider, for example, California’s “three strikes” law that calls for a sentence of twenty-five years to life for a third offense.⁹⁶ The Supreme Court has ruled that the statute does not violate the Eighth Amendment’s prohibition of cruel and unusual punishment in a 2003 case involving a series of three thefts over a period of years. The last theft, which triggered the statute’s application, was of three golf clubs.⁹⁷ A companion case involved a similar sentence, where the triggering crime was the theft of videotapes from two department stores.⁹⁸ The Court based its decision in large part on its “traditional deference to legislative policy choices” in determining how long a sentence to impose.⁹⁹

The application of the three strikes statute in such circumstances may well offend some people’s sense of justice. Many would consider a sentence of up to life in prison for shoplifting extreme, no matter what illegal acts a person had committed years earlier. The vigorous

93. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995).

94. *Id.* at 2.

95. *Id.* at 6 (citing TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990)) (citation omitted).

96. CAL. PENAL CODE § 667(e)(2)(A) (West 1999).

97. *Ewing v. California*, 123 S. Ct. 1179, 1183 (2003).

98. *Lockyer v. Andrade*, 123 S. Ct. 1166, 1169–70 (2003).

99. *Ewing*, 123 S. Ct. at 1187 (Kennedy, J., concurring).

dissent of four justices certainly demonstrated that there is no consensus that the law as applied in such cases even meets the most minimal standards of proportionality that constitutional doctrine requires.¹⁰⁰ But the law is not likely to be repealed, leaving neither the legislature nor the courts to protect against prosecutions that are more aggressive than community values would permit.

A second approach to the gap between statutory law and community standards of justice is to embed into the system procedures that diminish the likelihood that people will actually be convicted for conduct that is not deemed by the community to be antisocial, or at least not as antisocial as the law would have it. As Marder points out, juries in some California counties are unlikely to convict an individual of an offense that will trigger the three strikes law if the jury believes the application of that law to a particular case is unjust.¹⁰¹ This reluctance, in turn, affects decisions to prosecute.¹⁰² By reducing the rate of conviction for prosecutions that would result in disproportionate punishment, juries, at least in some counties, are limiting the statute's application to the kinds of cases that led to the statute's enactment in the first place. Prosecutions for violations that stray too far from the prototype are less likely to be successful, consistent with the experimental literature discussed earlier in this Article.¹⁰³ Therefore, they are less likely to occur at all, since prosecutors' offices have no reason to waste their resources.

Examples like these have led commentators to look favorably on the role that juries play in such cases. But they do not fully address the larger questions about the proper role of jurors as statutory interpreters. To see why, let us return to Mr. Schmuck, who was convicted of mail fraud.¹⁰⁴ The applicability of the statute to the facts of the case was questionable. Yet the jury convicted. In other cases, courts have reversed convictions by applying the rule of lenity and ruling that a prosecution was improper.¹⁰⁵ There are thus instances in which the community values expressed by jurors lead to conviction

100. *Id.* at 1193–1207 (Breyer, J., dissenting).

101. See Marder, *supra* note 10, at 895–99; Nancy S. Marder, *Juries, Drug Laws & Sentencing*, 6 J. GENDER, RACE & JUSTICE 337, 341–52 (2002).

102. Marder, *supra* note 10, at 897. Kixmiller, *supra* note 14, also makes this point.

103. See Smith, *supra* note 12.

104. *Schmuck v. United States*, 489 U.S. 705 (1989).

105. For examples that deal largely with linguistic issues in such cases, see Lawrence M. Solan, *Law, Language and Lenity*, 40 WM. & MARY L. REV. 57 (1998).

when the language of the statute does not apply, at least not clearly so.

One way to handle this problem is by giving the jurors greater discretion, but instructing them accordingly. In another article, Darryl Brown has suggested that when disputes arise over the wording of jury instructions, and both versions are acceptable as a matter of law, principles of lenity dictate that the judge should give the defendant the benefit of the doubt and read his proposed instruction.¹⁰⁶ Brown's proposal, while well-intentioned, is not likely to win over many courts. For one thing, not all defense-proposed instructions are the most faithful to the overall meaning of the statute, even if they are legally acceptable. Courts will want to continue to make that analysis.

My proposal is a more modest one. Courts should continue to permit jurors to interpret statutes to allow their verdicts to reflect the standards of the community. This process was originally contemplated as a unidirectional filter, and should remain so. Thus, courts should continue applying such canons as the absurd result rule and the ordinary meaning rule to weed out cases that appear to exceed the intended scope of a statute. If a case survives that level of scrutiny and makes its way to the jury, a defendant will have yet another chance for acquittal if the prosecution is more aggressive than the ordinary meaning and the jury's sense of decency permit. Whenever possible, instructions should be drafted so that they do not undermine the jury's ability to exercise this level of discretion.

Providing even this much role for the jury is controversial, at least in some instances. Returning to California's three strikes law, certain procedures make it harder for jurors to bring community values into their deliberations. California law permits bifurcated trials in three strikes cases.¹⁰⁷ First a jury determines guilt or innocence on the crime that constitutes the third strike. Then that same jury determines whether the defendant was earlier convicted of other crimes that make up the first two strikes.¹⁰⁸ The court pronounces sentence based on these verdicts. The procedure is consistent with

106. Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. CAL. L. REV. 1105, 1124 (2000).

107. CAL. PENAL CODE §§ 1025, 1044; *see* *People v. Cline*, 71 Cal. Rptr. 2d 41 (Cal. App. 1998) (holding it proper for court to grant prosecutor's motion for bifurcation in three strikes case).

108. *See* *People v. Tindall*, 102 Cal. Rptr. 2d 533, 536 (2000) (holding that same jury must decide both issues).

the general notion that jurors are not supposed to take sentencing considerations into account in deciding guilt or innocence.¹⁰⁹

The function of this bifurcation, of course, is to reduce the chances that jurors know that they are sitting in a three strikes case during the first phase of the trial, so that they will not apply community values of lenity and proportionality to the decision-making process. Judges and prosecutors will not always succeed in keeping from the jury the fact that they are sitting on a three strikes case.¹¹⁰ Yet the goal is clear enough, and it is very much at odds with the traditional role of the jury as a mechanism to filter excessively harsh prosecutions.

Despite such examples, even in an era seemingly far removed from one in which the jury was the finder of the law as well as the finder of fact, jurors can continue to play a positive role in determining the applicability of statutory law. To the extent that their contribution to the judicial process helps to narrow the gap between the community's views of justice and the outer reaches of the law, things have not changed much in over 200 years.

109. *People v. Nichols*, 62 Cal. Rptr. 2d 433, 434 (Cal. App. 1997); see Marder, *supra* note 101, at 345.

110. See Marder, *supra* note 101, at 346-47.

APPENDIX: TWO MAIL FRAUD JURY INSTRUCTIONS

Federal Judicial Center

The defendant, _____, is accused of [e.g.: planning to get money by giving false information to Sarah Stone and Rubin Ross] and using the mail in connection with this plan. It is against federal law to cheat someone if the mail is used. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ made a plan [e.g.: to obtain money based on giving false information about the Apex Corporation to Sarah Stone and Rubin Ross].

Second, that when _____ made the plan, he knew the information he was giving was false.

Third, that _____ mailed something (caused another person to mail something) for the purpose of carrying out this plan.

It does not matter whether this plan succeeded, or whether _____ made money from this plan. Nor does it matter whether the false information was contained in the material that was mailed. However, for you to decide that _____ is guilty, you must find, beyond a reasonable doubt, that _____ made this plan intending to deceive [Stone and Ross] and to make money from the plan and that the mail was used to carry out the plan. Each separate use of the mail during the carrying out of a scheme to defraud is a separate offense.¹¹¹

Modern Federal Jury Instructions

In order to sustain this charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that there was a scheme or artifice to defraud or to obtain money or property (*if applicable*: or the intangible right of honest services) by materially false and fraudulent pretenses, representations or promises, as alleged in the indictment;

Second, that the defendant knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent

111. FEDERAL JUDICIAL CTR., *supra* note 55.

nature and with specific intent to defraud (*if applicable*: or that he knowingly and intentionally aided and abetted others in the scheme); and

Third, that in execution of that scheme, the defendant used or caused the use of the mails (*or* a private or commercial interstate carrier *or* interstate wires) as specified in the indictment.

The first element that the government must prove beyond a reasonable doubt is that there was a scheme or artifice to defraud [the victim] of money or property (*if applicable*: or the intangible right of honest services) by means of false or fraudulent pretenses, representations or promises.

This first element is almost self-explanatory.

A “scheme or artifice” is merely a plan for the accomplishment of an object.

A scheme to defraud is any plan, device, or course of action to obtain money or property (or the intangible right of honest services) by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.

“Fraud” is a general term which embraces all the various means by which human ingenuity can devise and which are resorted to by an individual to gain an advantage over another by false representations, suggestions or suppression of the truth, or deliberate disregard for the truth.

Thus, a “scheme to defraud” is merely a plan to deprive another of money or property (or of the intangible right to honest services) by trick, deceit, deception or swindle.

The scheme to defraud is alleged to have been carried out by making false (or fraudulent) statements (representations)(claims)(documents).

A statement, representation, claim or document is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made.

A representation or statement is fraudulent if it was falsely made with the intention to deceive.

Deceitful statements of half truths or the concealment of material facts, and the expression of an opinion not honestly entertained may also constitute false or fraudulent statements under the statute.

The deception need not be premised upon spoken or written words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance. If there is deception, the manner in which it is accomplished is immaterial.

(*If applicable*: The failure to disclose information may also constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty to make such a disclosure, the de-

fendant actually knew such disclosure ought to be made, and the defendant failed to make such disclosure with the intent to defraud.)

The false or fraudulent representation (*or* failure to disclose) must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision (*e.g.*, with respect to a proposed investment).

This means that if you find a particular statement of fact to have been false, you must determine whether that statement was one that a reasonable person or investor might have considered important in making his or her decision. The same principle applies to fraudulent half truths or omissions of material facts.

(*If applicable:* The representations which the government charges were made as part of the scheme to defraud are set forth in paragraph—of the indictment, which I have already read to you. It is not required that every misrepresentation charged in the indictment be proved. It is sufficient if the prosecution proves beyond a reasonable doubt that one or more of the alleged material misrepresentations were made in furtherance of the alleged scheme to defraud.)

In addition to proving that a statement was false or fraudulent and related to a material fact, in order to establish a scheme to defraud, the government must prove that the alleged scheme contemplated depriving another of money or property (or of the intangible right of honest services).

However, the government is not required to prove that the defendant himself originated the scheme to defraud. Furthermore, it is not necessary that the government prove that the defendant actually realized any gain from the scheme or that the intended victim actually suffered any loss. (*If applicable:* In this case, it so happens that the government does contend that the proof establishes that persons were defrauded and that the defendant profited. Although whether or not the scheme actually succeeded is really not the question, you may consider whether it succeeded in determining whether the scheme existed.)

A scheme to defraud need not be shown by direct evidence, but may be established by all of the circumstances and facts in the case.

If you find that the government has sustained its burden of proof that a scheme to defraud, as charged, did exist, you next should consider the second element.

The second element that the government must prove beyond a reasonable doubt is that the defendant participated in the scheme to defraud knowingly, willfully and with specific intent to defraud.

“Knowingly” means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

"Willfully" means to act knowingly and purposely, with an intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

"Intent to defraud" means to act knowingly and with the specific intent to deceive, for the purpose of causing some financial or property loss to another (*if applicable*: or of depriving another of the intangible right of honest services).

The question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves one's state of mind.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is not required.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime must be established beyond a reasonable doubt.

Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of the defendant is a complete defense to a charge of mail (*or* wire) fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt.

Under the mail fraud statute, even false representations or statements, or omissions of material facts, do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statements may turn out to be.

(*If applicable*: There is another consideration to bear in mind in deciding whether or not defendant acted in good faith. You are instructed that if the defendant participated in the scheme to defraud, then a belief by the defendant, if such belief existed, that ultimately everything would work out so that no one would lose any money does not require a finding by you that the defendant acted in good faith. If the defendant participated in the scheme for the purpose of causing some financial or property loss to another, then no amount of honest belief on the part of the defendant that the scheme would

(e.g., ultimately make a profit for the investors) will excuse fraudulent actions or false representations by him.)

As a practical matter, then, in order to sustain the charges against the defendant, the government must establish beyond a reasonable doubt that he knew that his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the alleged fraudulent scheme for the purpose of causing some loss to another.

(If applicable: The government can also meet its burden of showing that the defendant had knowledge of the falsity of the statements if it establishes beyond a reasonable doubt that he acted with deliberate disregard of whether the statements were true or false, or with a conscious purpose to avoid learning the truth. If the government establishes that the defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless the defendant actually believed the statements to be true. This guilty, knowledge, however, cannot be established by demonstrating that the defendant was merely negligent or foolish.)

To conclude on this element, if you find that the defendant was not a knowing participant in the scheme or that he lacked the specific intent to defraud, you should acquit him. On the other hand, if you find that the government has established beyond a reasonable doubt not only the first element, namely the existence of the scheme to defraud, but also this second element, that the defendant was a knowing participant and acted with specific intent to defraud, and if the government also establishes the third element, as to which I am about to instruct you, then you have a sufficient basis upon which to convict the defendant.

The third and final element that the government must establish beyond a reasonable doubt is the use of the mails in furtherance of the scheme to defraud. *(For conduct occurring after September 13, 1994, add:* The use of the mails as I have used it here includes material sent through either the United States Postal Service or a private or commercial interstate carrier.)

The mailed matter need not contain a fraudulent representation or purpose or request for money. It must, however, further or assist in the carrying out of the scheme to defraud.

It is not necessary for the defendant to be directly or personally involved in the mailing, as long as the mailing was reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating.

In this regard, it is sufficient to establish this element of the crime if the evidence justifies a finding that the defendant caused the mailing by others. This does not mean that the defendant must specifically have authorized others to do the mailing. When one does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use of the mails can reasonably be foreseen, even though not actually intended, then he causes

the mails to be used. (*If applicable*: The government contends that it was reasonably foreseeable that the mails would be used in the ordinary course of business (e.g., to send confirmations of purchases), and therefore that the defendant caused the mailings.

With respect to the use of the mails, the government must establish beyond a reasonable doubt the particular mailing charged in the indictment. However, the government does not have to prove that the mailings were made on the exact date charged in the indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the mailing was made on a date substantially similar to the date charged in the indictment.¹¹²

112. 2 SAND ET AL., *supra* note 56, §§ 44-3 to -6.