Authentically Innocent: Juries and Federal Regulatory Crimes

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INTRODUCTION

Few ideals reign more supreme than the jury as conscience of our community and moral arbiter of a criminal defendant’s conduct. As one leading scholar notes, juries do “more than reliable fact-finding”; they render “normative judgment.” Accordingly, “criminal trials are unavoidable morality plays, focusing on the defendant’s moral blameworthiness or lack thereof,” and “[n]o man who claims innocence can be condemned as guilty unless the community, via the jury, pronounces him worthy of moral condemnation.”

These ideals are no more than myth for most federal criminal cases today. For a wide range of the most commonly charged federal crimes, judges routinely instruct juries to convict defendants regardless of their moral culpability—that is, even if there is no proof or finding that the defendant knew she was doing something wrong. Here are a few examples:

- An immigrant alien may be criminally convicted for unlawfully reentering the United States even if she believed that she had
A defendant charged with felon-in-possession-of-a-firearm may be convicted even if mistaken about his felony history (e.g., he had been previously assured by a court that he did not have a felony history or he believed that his prior conviction had never formally been entered or had been expunged).  

A defendant charged with criminal possession of an unregistered firearm may be convicted even if he mistakenly thought the firearm was registered as required.

A defendant charged with illegal disposal of toxic waste may be convicted even if she is ignorant of the waste's toxic qualities or even if she thought that her employer had a proper permit to allow disposal.

The problem I describe arises with regulatory or public order crimes, which include drug trafficking, weapons, immigration, and environmental offenses. They are usually general intent crimes, defined by Congress without identifying precisely what the prosecution must prove a defendant knew or intended. General intent crimes differ from specific intent crimes for which Congress requires proof of a defendant's intent to do something wrong or otherwise to violate the law (e.g., conspiracy, wire fraud, mail fraud, or money laundering). Today, regulatory crimes are the bread-and-butter of a federal prosecutor's docket—about 70% of crimes charged in the federal courts—and their share of the docket is growing.

Ironically, despite the types of case examples set forth above involving the conviction of blameless defendants, the Supreme Court has vowed not to interpret general intent statutes to “criminalize a broad range of apparently innocent conduct.” Under this interpretive rule of “apparent innocence,” “a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.” This standard requires a judge to conduct an element-by-element review of a criminal statute to consider which of the element facts, if known to a hypothetical defendant, would mean that a defendant knew her conduct was not innocent. The judge then applies the statute to require proof that a defendant knew these “wrongful” facts. Importantly, a defendant need not know the law charged against her. Nor need the defendant be proved to have known additional element facts that a court deems extraneous to

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4. See discussion infra Part II.A.
5. See discussion infra Part II.B.
6. See discussion infra Part I.
7. See discussion infra Part II.C.
8. See discussion infra Part I.
knowledge of wrongdoing. “The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”

In recent years, the apparent innocence rule has displaced strict liability rules, such as the public welfare offense doctrine, which used to apply to general intent regulatory offenses. For this reason, many scholars have praised the apparent innocence rule, extolling it as no less than a rule of “mandatory culpability” that prevents the conviction of morally blameless defendants.

This Article suggests the contrary. Although the apparent innocence rule is preferable to outright strict liability, it is now apparent that it has fallen far short in practice of ensuring mandatory culpability. Despite its asserted purpose to protect innocence, the apparent innocence rule has quietly allowed the conviction of a wide range of blameless defendants for crimes that are among the most commonly charged in our federal courts today.

Why has the apparent innocence rule failed? Because of its method that reposes too much authority in judges, rather than juries, to decide what knowledge is “wrongful.” The rule tasks judges with deciding as a blanket matter of statutory interpretation which of the element facts of

12. John Shepard Wiley, Jr., Not Guilty by Reason of Blamelessness: Culpability in Criminal Interpretation, 85 VA. L. REV. 1021, 1022 (1999) (describing and praising the apparent innocence approach as “a method of statutory construction that [he calls] the rule of mandatory culpability” and that is “an important and welcome development” over the traditional public welfare doctrine); see Richard Singer & Douglas Husak, Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer, 2 BUFF. CRIM. L. REV. 859, 888 (1999) (praising apparent innocence rule as “breathing] new life into [the Court’s] oft-repeated view that mens rea is an essential part of criminal law”); Stephen F. Smith, Proportionality and Federalization, 91 VA. L. REV. 879, 889 (2005) (noting that “[the Supreme Court has a satisfactory record—lately, at least—of construing federal statutes to exempt morally blameless conduct from criminal condemnation” and that it “uses heightened mens rea requirements to hard-wire into the definition of the crime judicially enforceable protections for blameless conduct”); cf. Joseph E. Kennedy, Making the Crime Fit the Punishment, 51 EMORY L.J. 753, 756–63, 842–47 (2002) (approving results reached by the “apparent innocence” cases but critiquing Wiley and arguing that the result of these cases is explained by the Supreme Court’s wish to avoid incarceration of a defendant who did not know he was doing wrong); Note, The New Rule of Lenity, 119 HARV. L. REV. 2420, 2434–35 (2006) (describing apparent innocence rule as part of a “new rule of lenity” generally applied by the Rehnquist Court when confronted with ambiguous statutes).
13. A blameless defendant does not know that her conduct violated either a particular law or a societal standard that she believed would likely be the subject of some legal prohibition. Of course, true “moral blameworthiness” for conduct may not turn exclusively on a defendant’s state of mind as to the elements of an offense but depend instead on the existence of extenuating circumstances that are not sufficiently severe to support a legal defense of necessity or duress—for example, the poor mother who steals a loaf of bread to feed her hungry—but-not-starving children. This Article does not attempt to address all such choice-of-two-evil situations in which a defendant might be said to be morally blameless; it focuses more narrowly on the conviction of defendants who are ignorant or misled about aspects of the elements of the offense.
an offense, if known to a defendant, connote her wrongful knowledge. The jury’s role is correspondingly constricted. The jury does not decide on all the facts of a case if a particular defendant knew she was doing wrong. Instead, as to a defendant’s mental state, a jury decides only if the defendant knew particular element facts that a judge has deemed wrongful. Because the defendant’s awareness or lack of awareness of additional facts is not required and therefore irrelevant, the jury will not learn of this evidence, even when this additional evidence casts doubt on whether the defendant knew she was doing wrong (for example, a jury would not learn that an alien charged with illegal reentry believed that she had permission to reenter the United States).

Judges’ generalities about wrongfulness too often fail. Judges cannot universally anticipate what facts, if known to a defendant, invariably suffice to reflect awareness of wrongdoing. A court’s determination that certain conduct is not innocent is often no more than a conclusion that the conduct is usually suspect—a conclusion that begs the ultimate question whether a particular defendant on trial actually knew she was doing wrong. That is the case for deported aliens who are found again in the United States—the courts conclusively presume guilty knowledge by relieving the prosecution from proving that the alien knew she did not have permission to reenter the country. It is also the case for felons charged with illegal possession of firearms—the courts conclusively presume guilty knowledge by relieving the prosecution from proving that the defendant knew of his prior conviction, much less that he knew the conviction was a felony. And the same holds true for a variety of environmental pollution offenses—the courts conclusively presume guilty knowledge by relieving the prosecution from proving the defendant knew she did not have a license or permit to dispose of the waste. Moreover, even if a defendant’s knowledge of certain facts connotes some awareness of wrongdoing, such knowledge may well be of wrongfulness that is far less serious than the type of harm actually targeted by the statute that has been charged.

It is not simply that juries are sidelined from deciding if a defendant knew some of the facts that legitimately bear on wrongfulness. But, because juries are confined to considering only the defendant’s knowledge of element “facts,” the apparent innocence rule also screens out evidence of a defendant’s awareness that what she did was wrong. Consider a contrite defendant who tells the police at the scene of a crime: “I’m terribly sorry!” This is not relevant evidence in a general intent case, because it does not reflect the defendant’s knowledge of facts. Thus, despite its avowed purpose to screen the innocent from the guilty, the apparent innocence rule excludes from a jury’s consideration the most straightforward evidence of a defendant’s guilty conscience.
In short, the acclaimed rule of "mandatory culpability" devolves to a rule of "presumptive culpability" or "partial culpability." And it perversely excludes evidence of non-facts that nonetheless signify a defendant's awareness of wrongdoing. The apparent innocence rule does not vindicate the innocence interests it purports to serve. And the reason is because judges have abrogated the role of the jury to decide if defendants knew they were doing wrong.

What is the solution? Judges should stop telling juries which facts conclusively show guilty knowledge and stop confining juries to considering only defendants' knowledge of these facts. Juries should be free to consider evidence of everything a defendant knew and believed, even facts that a defendant is proved not to have known and circumstances that judges may not think are ordinarily suggestive of innocence. The jury may then decide for itself if the defendant acted with knowledge that what she did was wrong. Justice Jackson's words from a different context ring equally true here: "[J]uries are not bound by what seems inescapable logic to judges," at least when it comes to deciding if a defendant knew she was doing wrong.

The Supreme Court should replace the apparent innocence rule with an authentic innocence rule of jury-found culpability for general intent crimes. An authentic innocence rule would free the jury to decide if a defendant knew she was doing wrong. Specifically, the jury would determine if the defendant knew she was doing the type of wrong that is the target of the criminal statute charged against her. No longer should juries be bound by the acontextual generalizations of judges about wrongfulness.

Can jury-found culpability be implemented as a practical matter? Yes—judges already have broad common law authority to determine the manner in which they instruct juries. The fact that Congress defines offenses does not control the manner in which courts explain the elements of an offense to a jury. Accordingly, federal judges should first instruct juries (as they already do today) to determine the existence of each factual conduct element of an offense (e.g., did the defendant reenter the country without permission?). Next, in lieu of the present practice of selecting which facts to tell the jury that the defendant must be proved to have known, trial courts should instruct juries to engage in a broader inquiry: to decide if the defendant knew enough about her conduct and the circumstances to know that she was engaged in wrongdoing of the kind that the statute was designed to prohibit. Let the jury decide which facts or circumstances, if known to the defendant, crossed the threshold from "innocent" in nature to worthy of condemnation by criminal conviction.

The authentic innocence rule should be a default rule of statutory interpretation for general intent crimes, not a rule of constitutional dimension. If Congress wishes to impose criminal sanctions against some defendants even if they did not know they were doing wrong, it probably may do so. Nor does an authentic innocence rule affect cases where Congress has required specific intent—a purpose or knowledge to do harm, to defraud, or to violate the law itself. The authentic innocence rule is for the vast and growing majority of cases where Congress has failed to say what a defendant must have culpably known or intended. Authentic innocence best serves the Supreme Court’s vow to protect innocent conduct.

Today more than 95% of federal criminal cases are resolved by guilty pleas rather than trial. Jury-found culpability will doubtlessly change prosecutors’ decisions regarding which cases to charge in the first place as well as defense counsel’s advice to clients about pleading guilty in the face of triable facts suggesting that the defendant acted without knowledge of wrongdoing. Jury-found culpability has broad implications for the charging, plea, and trial stages of vast numbers of federal criminal cases.

The authentic innocence rule also comports with the Supreme Court’s general expansion of the decisional powers of criminal trial juries. The Court has now rebuffed the notion that federal judges rather than juries may decide certain “legal” elements at trial (such as whether a false statement was “material”). Most recently, the Court has revolutionized the jury’s role to determine the full range of facts that are mandatory to any heightened sentence that a judge may impose. Authentic innocence can revitalize the rightful responsibility of juries to render true culpability judgments in federal courtrooms today.

In Part I below, I survey the Supreme Court’s general approach to statutory interpretation of mens rea requirements. I illustrate the operation of these principles in the context of a case example (“Sam and the Bomb”) involving a frequently charged federal firearms statute, and I

16. See Ronald Wright, Trial Distortion and the End of Innocence in Federal Criminal Justice, 154 U. Pa. L. Rev. 79, 90–91 (2005) (reviewing statistics showing increase in federal guilty pleas to historic high of more than 95% of cases in 2002); cf. Stephanos Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L. J. 1097, 1099 (2001) (“The reigning academic orthodoxy is preoccupied with jury trials, making them the center of attention and devoting countless articles to them.”).
show how the apparent innocence rule exposes some morally blameless defendants to criminal conviction.

In Part II, I use several examples of federal general intent statutes to show how the Court's current approach allows the conviction of criminal defendants who did not know they were doing wrong. As I will show, not even jury nullification potentially protects against the conviction of an innocent-minded defendant, because a trial court will ordinarily apply the rules of evidence to foreclose, for lack of relevancy, a jury from hearing evidence of the defendant's innocent state of mind.

Finally, in Part III, I develop my argument that a true rule of mandatory culpability would commit to the trial jury—rather than to judges—the decision whether a defendant knew she was doing the type of wrong targeted by the charged statute. I show that the jury is best positioned to account for unique facts of each case and to engage in a normative evaluation of a defendant's knowledge of wrongfulness. I explain how such an approach could be implemented yet satisfy potential objections about allowing a mistake-of-law defense or encouraging jury nullification. I suggest, in short, that a court should let the jury decide if a defendant knew she was doing wrong.

I. AN ILLUSTRATION AND BACKGROUND OF THE APPARENT INNOCENCE RULE

Consider the following example. Sam is driving one day when the police pull him over and find in the trunk of his sedan a cardboard box labeled "fireworks." Inside the box, however, the police find a powerful homemade bomb. Sam is indicted under the National Firearms Act, a federal law that prescribes up to ten years of prison for any person who "receive[s] or possess[es] a firearm which is not registered to him in the National Firearms Registration and Transfer Record."

Sam eventually gets a copy of the law and he sees that it defines the term "firearm" in specialized detail to include, among other objects, the type of explosive device found in his car, as well as other highly dangerous items like machine guns, grenades, and short-barreled shotguns. But beyond an intricate definition for a "firearm," the statute stands oddly silent about what the prosecution must prove that Sam knew:

(a) Must Sam have known that there was anything at all in the trunk of his car?

20. See 26 U.S.C. § 5845(a)-(f) (2000) (defining "firearm" to include eight broad categories of dangerous weapons, principally including machine guns, shotguns with barrels less than eighteen inches in length, rifles with barrels less than sixteen inches in length, silencers, and destructive devices such as bombs, grenades, and other explosive devices).
That he had a bomb (and not just scrap metal or holiday fireworks)?

That he had a bomb and that it was not registered?

That he had a bomb and that it was not registered specifically on the National Firearms Transfer Registration Record (as opposed to some other state or local registry)?

That he knew all the facts above and that the law prohibited possession of a bomb that was not registered with the National Firearms Transfer Registration Record?

For all these issues of what Sam must know, the statute does not say or explain.

Sam's problem is far from unusual. As William Stuntz has observed, the National Firearms Act is not "some obscure backwater of the federal criminal code" but "remains one of the staples of federal gun prosecutions."21 Indeed, beyond firearms offenses, the federal criminal code is replete with regulatory or general intent offenses of the kind charged against Sam.22 This includes not only firearms offenses but also drug trafficking and immigration offenses—these three offense categories collectively account for more than 70% of the crimes charged in the federal courts, and the proportion is increasing over time.23


22. As distinct from a "specific intent" crime, a "general intent" crime prohibits certain conduct but without explicitly requiring that the defendant have intended or desired by her conduct to break the law or to do wrong (such as to defraud). See Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes 230 (1989) (defining "general intent" offense to include situations where "it is sufficient to convict when the defendant did what in ordinary speech we would call simply an intentional action," without proof that the defendant intended further consequences from his action). Of course, in light of the more refined mental state definitions set forth in the Model Penal Code, the terms "general intent" and "specific intent" have fallen into some disfavor. See United States v. Bailey, 444 U.S. 394, 403 (1980). However, the terms have not fallen into disuse. See, e.g., Carter v. United States, 530 U.S. 255, 268-69 (2000). The term "regulatory" offense also defies precise definition but ordinarily refers to "a broad collection of statutes dealing with matters within the purview of federal, state, and local administrative agencies, such as the environment, product and workplace safety, labor and employment, trade, the issuance of securities, the collection of taxes, housing, and traffic and parking." Stuart P. Green, Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 Emory L. J. 1533, 1544 (1997); accord Susan L. Pilcher, Ignorance, Discretion and the Fairness of Notice: Confronting 'Apparent Innocence' in the Law, 33 Am. Crim. L. Rev. 1, 32 (1995) ("Estimates suggest that over three hundred thousand federal regulations are punishable by criminal penalties enforceable through the combined efforts of as many as two hundred different federal agencies.").
For the criminally accused, what the government must prove means far more than our academic exercise here. Imprisonment—rather than probation—is imposed in about ninety percent of firearms, drug, and immigration cases.4

In contrast to federal specific intent crimes (i.e., criminal statutes that contain a textual requirement of a defendant’s intent to do wrong or knowledge of the wrongful nature of her acts), 25 federal general intent statutes frequently fail to say what a criminal defendant must have known in order to be convicted and jailed. Some of these statutes—like the National Firearms Act—stand altogether silent about whether a person must act “knowingly” or with any other particular mental state (e.g., intentionally, willfully, recklessly, etc.).26 Other general intent statutes deploy the term “knowingly” but do not say what particular aspects of the offense a defendant must know.27 Resorting to what Dan

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(See Justice Statistics, supra note 23, at 20 tbl.15 (2003).

25. A specific intent requirement “demands that the government prove that a defendant had general knowledge of the law which forbade his actions and acted with the specific intent to circumvent that law. But the government need not prove the defendant had knowledge of the specific regulation governing the conduct engaged in—in other words, a defendant cannot avoid prosecution by claiming that [he or she] had not brushed up on the law.” United States v. Brodie, 403 F.3d 123, 147 (3d Cir. 2005) (internal quotations and citations omitted); accord Samuel W. Buell, Novel Criminal Fraud, 81 NYU L. Rev. 1971, 2032 (2006) (“Criminal fraud laws, like most other important white-collar prohibitions, require a showing of ‘specific intent’ (a purpose to defraud, to obstruct justice, to falsify government reports, etc.).”). Examples of such common federal “specific intent” offenses—ones that expressly require in their text a defendant’s knowledge, purpose, or intent to do wrong—include mail, wire, and bank fraud, 18 U.S.C. §§ 1341, 1343, 1344 (2000), robbery and larceny, 18 U.S.C. §§ 2113(a)-(b) (2000), money laundering, 18 U.S.C. § 1956 (2000), and obstruction of justice. See, e.g., Arthur Anderson LLP v. United States, 544 U.S. 696, 696 (2005) (interpreting “knowingly . . . corruptly” requirement of federal obstruction of justice statute, 18 U.S.C. §1512(b)). To the extent that a general intent crime may be charged as a conspiracy, attempt, or aiding-and-abetting offense, a defendant’s purpose or knowledge to do wrong is also required. See, e.g., Braxton v. United States, 500 U.S. 344, 350-51 (1991) (noting that a charge of attempt to kill a federal officer under 18 U.S.C. § 1114 requires proof of defendant’s intent to kill the officer); United States v. Feola, 420 U.S. 671, 691 (1975) (noting prevailing rule that “a conspiracy, to be criminal, must be animated by a corrupt motive or a motive to do wrong”); Nye & Nissen v. United States, 336 U.S. 613, 620 (1949) (finding that aiding and abetting liability established where defendant “consciously shares in any criminal act”).


27. See, e.g., 18 U.S.C. § 922(g)(1) (2000) (unlawful gun possession by a previously convicted felon); 18 U.S.C. § 232aA(a)(1) (2000) (mailing, transporting, or shipping child pornography); 21 U.S.C. § 841(a) (2000) (drug dealing). One notable exception is a recent amendment by Congress to an anti-terrorism statute that specifies the type of knowledge a defendant must be proved to have had. See 18 U.S.C. § 2339B(a)(1) (2000) (prohibiting “knowingly provid[ing] material support or resources to a foreign terrorist organization” and further specifying that “[t]o violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . that the
Kahan deems a "virtue of vagueness," Congress has through this imprecision left it to the courts to decide the requirements of mens rea.\textsuperscript{28} In response, the Supreme Court has declined to presume absolute strict liability—that the prosecutor may secure a conviction without any proof of a defendant's mental state. Instead, the Court has concluded that a trial court's instructions must require the jury to determine that the defendant acted knowingly in some manner.\textsuperscript{29} "[T]he requirement of some mens rea for a crime is firmly embedded, [and] far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."\textsuperscript{30} What does this mean for Sam? At a minimum, he does not get convicted simply because there was a bomb that he did not know about in the trunk of his car.

Although the Court stands willing to imply some form of mental state requirement even if the text of a statute has none, the Court also abides by the venerable principle that ignorance of the law is no excuse.\textsuperscript{31} Correlatively, the Court has long since abandoned a vision of the jury as "law giver" and subordinated the jury to the legal interpretations of judges.\textsuperscript{32} Therefore, absent explicit statutory language connoting a higher mental state requirement (for example, a "willfulness" requirement, as discussed below), the Court declines to construe a criminal statute to require that a defendant be shown to have known of the law that she is charged with violating.\textsuperscript{33} Sam can be convicted even if he had never read or heard of the federal firearms statute charged against him.

\textsuperscript{28} See Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 SUP. CT. REV. 345, 369 (1994) [hereinafter Kahan, Lenity]; see also Dan M. Kahan, Ignorance of the Law Is an Excuse—But Only for the Virtuous, 96 Mich. L. REV. 127, 153 (1997) [hereinafter Kahan, Ignorance of the Law] (noting that despite the maxim "that legislatures alone are responsible for defining crimes . . . criminal statutes typically emerge from the legislature only half-formed and must be completed through contentious, norm-laden modes of interpretation that are functionally indistinguishable from common-law making").

\textsuperscript{29} See Staples v. United States, 511 U.S. 600, 605 (1994).


\textsuperscript{31} Bryan v. United States, 534 U.S. 184, 196 (1998) (noting the "traditional rule that ignorance of the law is no excuse"); see also Kahan, Ignorance of the Law, supra note 28 (discussing "classic" Holmesian view for disallowance of "mistake of law" doctrine and proposing alternative "anti-Holmesian" view).


\textsuperscript{33} See, e.g., Cheek v. United States, 498 U.S. 192, 200–01 (1991) (requiring violation of "known
In short, the prosecution in a general intent case must prove a defendant had at least some knowledge of what she was doing. But the prosecution does not have to prove that the defendant knew she was breaking a specific law.

Beyond these threshold precepts, the rules are otherwise murky about just what the prosecution must prove a defendant knew. One might think that even if a defendant need not know of the law she was violating, she should at least be proved to know each of the element facts that qualify her conduct for conviction. After all, if the existence of a particular fact is important enough to be included by Congress as a factual element of conviction, why shouldn’t the government have to prove that the defendant knew that this fact existed? Under such a know-every-fact approach, Sam would have to be proved to have known: (a) that there was a bomb in his car, (b) that he possessed it, and (c) that the bomb was not registered in the National Firearms Transfer Registration Record.

Despite some overbroad dicta in recent cases, the know-every-fact approach has not carried the day. The courts routinely uphold criminal convictions for federal general intent crimes on the basis of partial strict liability—that is, on the basis of a defendant’s knowledge of some, but not all, of the element facts underlying her offense.

An early vehicle for strict liability was the public welfare offense doctrine. The doctrine holds that public safety concerns spawned by an increasingly interdependent, industrial society warrant imposing liability on a defendant even if she does not know all the facts surrounding her conduct. Under this view, a defendant who engages in activities for

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34. See Dixon v. United States, 126 S. Ct. 2437, 2441 (2006) (“Unless the text of the statute dictates a different result, the term “knowingly” merely requires proof of knowledge of the facts that constitute the offense.”) (quoting Bryan, 524 U.S. at 193) (emphasis added)); Staples, 511 U.S. at 605 (referring in passing to “a conventional mens rea element, which would require that the defendant know the facts that make his conduct illegal”) (emphasis added). As shown below, despite these statements, the Supreme Court has not actually required a defendant to have knowledge of every fact that renders her conduct illegal.

35. H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 31 (Oxford Univ. Press 1968) (noting that a “strict liability” crime is one “where it is not defence to show that the accused, in spite of the exercise of proper care, was ignorant of the facts that made his act illegal”); Kenneth W. Simons, When Is Strict Criminal Liability Just?, 87 J. Crim. L. & Criminology 1075, 1079 (1997) (“Strict criminal liability is conventionally understood as criminal liability that does not require the defendant to possess a culpable state of mind.”); Wiley, supra note 12, at 1031-33 (noting “one common meaning” of strict liability “that refers to a crime that has at least one element as to which no mental state is required” and a “second meaning of ‘strict liability’ [that] describes criminal liability that arises upon proof that a defendant has done a forbidden act, without any proof about that defendant’s mental state,” but adopting third definition of “strict liability” to mean “liability without proof of culpability, not liability without proof of mental state”).

which she is on notice that she stands in a “responsible relation to a public danger” need not be proved to have known all the details of conduct that has jeopardized the welfare of others. To the extent that this would allow for the conviction of a defendant who did not know she was doing so, the public welfare doctrine trusts prosecutors not to pursue undeserving defendants.\textsuperscript{37}

The public welfare doctrine began in 1922 when the Court construed a felony drug dealing statute in \textit{United States v. Balint} not to require a defendant to know he was dealing with illegal drugs.\textsuperscript{38} It gained momentum in 1943 in \textit{United States v. Dotterweich} when the Court allowed a company president to be convicted for his company’s shipment of mislabeled adulterated drugs even though the president did not know the drugs to be mislabeled or adulterated.\textsuperscript{39} Several years later, the doctrine faltered in 1952 when the Court declined in \textit{Morissette v. United States} to apply it to common law crimes.\textsuperscript{40} The doctrine rose again in 1971 in \textit{United States v. International Minerals & Chemical Corp.}, involving another regulatory offense applied to a defendant charged with shipping acid through the mail.\textsuperscript{41}

For Sam’s case, the public welfare doctrine would mean that so long as he knew that he had something dangerous in his car, he was on notice that he stood in a responsible relation to a public danger. He need not have known more specifically that he had a powerful bomb—rather than fireworks—much less need he have known that the bomb was not in fact registered.

More recently, the Supreme Court has increasingly applied the apparent innocence rule in place of the public welfare offense doctrine. In contrast to the public welfare doctrine’s emphasis on the potential harm to society, the apparent innocence doctrine laudably focuses on avoiding the conviction of a defendant for conduct she would not be expected to know is wrong. The rule was foreshadowed as early as 1952 in \textit{Morissette} when the Court declined to apply the public welfare doctrine to a defendant charged with conversion of government property

\footnotesize{“[t]raffic of velocities, volumes and varieties unheard of [that] came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct,” and the “[w]ide distribution of goods [that] became an instrument of wide distribution of harm”). See generally Francis B. Sayre, \textit{Public Welfare Offenses}, 33 COLUM. L. REV. 55 (1933).\textsuperscript{37} United States v. Dotterweich, 320 U.S. 277, 284–85 (1943) (noting that “[h]ardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting,” and “[o]ur system of criminal justice necessarily depends on ‘conscience and circumspection in prosecuting officers’” (quoting \textit{Nash v. United States}, 229 U.S. 373, 378 (1913))).\textsuperscript{38} 258 U.S. 250, 254 (1922).\textsuperscript{39} 320 U.S. at 281.\textsuperscript{40} 342 U.S. at 262.\textsuperscript{41} 402 U.S. 558, 559, 563 (1971).}
after he took spent bomb casings from government land in circumstances suggesting that he believed his trespass not to be wrongful and the scrap metal to be abandoned.42 Justice Jackson’s opinion in Morissette famously observed that “[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.”43

In 1971, the Court considered in United States v. Freed the case of a defendant charged with illegal possession of a hand grenade.44 The defendant was charged under the National Firearms Act—the same statute as charged against Sam—and he contended that the government must prove he knew that the hand grenades were not registered.45 The Court ruled that “[t]he Act requires no specific intent or knowledge that the hand grenades were unregistered.”46 Focusing on the individual’s expectation about the legitimacy of his conduct, the Court reasoned that “[t]his is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act.”47

The Court applied the apparent innocence rule again in 1985 in Liparota v. United States when it considered what a defendant must have known in order to be prosecuted for violating the federal food stamp law. The statute prescribed criminal penalties for “whoever knowingly uses, transfers, acquires, alters, or possesses [food stamp] coupons or authorization cards in any manner not authorized by [the statute] or the regulations.”48 Frank Liparota, who ran a sandwich shop in Chicago, was convicted after he met with an undercover agent in the backroom of his shop and paid cash to the agent for food stamps at well below the face-value amount of the food stamps.49 The trial court instructed the jury in a manner that permitted Liparota to be convicted merely on the basis of proof that he knew the nature of his actions (buying food stamps for cash) and without any awareness that what he did was illegal.50

The Supreme Court reversed. It concluded that the statute “requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations,” citing the “background assumption of our criminal law” that “criminal offenses requiring no mens rea have a ‘generally disfavored status.’”51 The Court reasoned that “to interpret the statute otherwise would be to criminalize a broad range of apparently

42. See Morissette, 342 U.S. at 248–49.
43. Id. at 259.
44. 401 U.S. 601 (1971).
45. See id.
46. Id. at 607.
47. Id. at 608.
49. Id. at 421.
50. Id. at 422–23.
innocent conduct.” It imagined various scenarios of “innocent” breaches of the food stamp regulations: a hypothetical defendant who was not qualified to receive food stamps but nonetheless “possessed” them without authorization solely because they were mistakenly mailed to him due to an administrative error, or a defendant who unlawfully “altered” the mistakenly sent food stamps by tearing them up, or a defendant who unlawfully “transferred” the food stamps by simply throwing them away. In response to the government’s reliance on the public welfare doctrine, the Court ruled that the misuse of food stamps did not pose the kind of public safety threat as the shipment of adulterated drugs in Dotterweich.

In 1994, the Court applied the apparent innocence rule again in Staples v. United States, in which the defendant Harold Staples was charged under the National Firearms Act with unlawful possession of an unregistered automatic firearm (a machine gun). Staples conceded that he had a prohibited firearm but contended that he thought it was merely a legal semi-automatic weapon and not a fully automatic machine gun that was subject to the Act. By a five to four decision, the Court agreed with Staples. In the Court’s view, the statute could improperly extend to “any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement . . . , despite absolute ignorance of the gun’s firing capabilities, if the gun turns out to be an automatic.”

The Court distinguished Freed (the hand grenade case) on the ground that it involved knowledge of a different factual element (the statute’s registration requirement, not its definition of the factual characteristics of a regulated firearm): “[D]ifferent elements of the same offense can require different mental states.” The Court also reasoned that guns were different from hand grenades—that not “all guns [can] be compared to hand grenades,” because “the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country.” Thus, “[i]n glossing over the distinction between grenades and guns, the Government ignores the particular care we have taken to avoid construing a statute to dispense with mens rea where doing so would ‘criminalize a broad range of apparently innocent

52. Id. at 426.
53. Id. at 426-27.
54. Id. at 433.
55. 511 U.S. 600, 602-03 (1994).
56. Id. at 603.
57. Id. at 601-02.
58. Id. at 615.
59. Id. at 609.
60. Id. at 610.
conductor.

The Staples majority also rebuffed the government’s invitation to apply the public welfare doctrine to the regulation of firearms: “Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation.” Accordingly, in the absence of a “clear statement” from Congress dispensing with a mens rea requirement, “we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with mens rea.” It emphasized that “our holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect.”

Several months after Staples, the Court considered United States v. X-Citement Video, Inc., involving a statute that prohibited any person from “knowingly” transporting, shipping, receiving, distributing, or reproducing a “visual depiction,” if such depiction “involves the use of a minor engaging in sexually explicit conduct.” The Court conceded at the outset that the “most natural grammatical reading” of this statute was that “the term ‘knowingly’ modifies only the surrounding verbs” (transport, distribution, etc.), and “the word ‘knowingly’ would not modify the elements of the minority of the performers, or the sexually explicit nature of the material, because they are set forth in independent clauses separated by interruptive punctuation.” But it rejected this reading of the statute:

If we were to conclude that “knowingly” only modifies the relevant verbs in § 2252, we would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material. For instance, a retail druggist who returns an un inspected roll of developed film to a customer “knowingly distributes” a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct. Or, a new resident of an apartment might receive mail for the prior resident and store the mail unopened. If the prior tenant had requested delivery of materials covered by [the statute], his residential successor could be prosecuted for “knowing receipt” of such materials. Similarly, a Federal Express courier who delivers a box in which the shipper has declared the contents to be “film” “knowingly

61. Id. (quoting Liparota v. United States, 471 U.S. 419, 426 (1985)).
62. Id. at 611.
63. Id. at 618.
64. Id. at 620.
67. Id. at 68.
transports” such film. We do not assume that Congress, in passing laws, intended such results. 68

The Court noted that “Morissette, reinforced by Staples, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.” 69 However, this does not require a defendant’s knowledge of all the element facts of an offense: “The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” 70

Yet again in 1994, the Court expanded its application of the apparent innocence rule, this time in the context of a statute that penalized “willful”—as opposed to “knowing”—misconduct. In Ratzlaf v. United States, the Court considered a statute that prohibited anyone from “willfully” engaging in the “structuring” of bank deposits to evade the federal reporting requirements imposed on banks for large cash transactions (i.e., staging transactions in amounts slightly less than the reportable amount of $10,000). 71 Waldemar Ratzlaf was a gambler who showed up one day at a Nevada casino with $160,000 of cash gambling proceeds in a shopping bag. 72 He wanted to give the cash to the casino in order to pay off his prior gambling debt from a bad night of blackjack, and he told the casino that “he did not want any written report of his payment to be made.” 73 The casino vice-president, however, told Ratzlaf that the casino could not accept a cash payment of more than $10,000 without filing a currency transaction report. 74 Ratzlaf, his wife, and a casino employee responded by going to several area banks in Nevada and California, where they used the cash to buy cashier’s checks in the amount of $9,500—just under the legal reporting limit. 75 At some of the banks, the Ratzlafs bought two $9,500 checks—one for each of them—but then cancelled the transactions when they were told that the dual purchase would trigger the bank’s filing a currency report. 76 Ratzlaf returned to the casino later the same day and paid off $76,000 of the debt. 77 In the ensuing weeks, Ratzlaf recruited three more people to use cash to buy cashier’s checks under the reporting limit, and he himself

68. Id. at 69.
69. Id. at 72.
72. Id. at 150 (Blackmun, J., dissenting).
73. Id.; see also United States v. Ratzlaf, 976 F.2d 1280, 1281–82 (9th Cir. 1992).
74. Ratzlaf, 510 U.S. at 150 (Blackmun, J., dissenting).
75. Id.
76. Id.
77. Id.
bought five more cashier checks within one week.\(^78\)

At trial, Ratzlaf admitted "that he structured cash transactions, and that he did so with knowledge of, and a purpose to avoid, the banks' duty to report currency transactions in excess of $10,000."\(^79\) But Ratzlaf insisted that the "willfulness" requirement of the statute required not just that he know of the reporting requirement but that he know that his structuring activity—the staging of deposits just under $10,000 in order to avoid triggering the reporting requirement—was itself illegal.\(^80\) He relied on *Cheek v. United States*,\(^81\) a recent decision of the Court that had construed a "willful" requirement in a criminal tax evasion statute to require proof that a defendant knew the provision of tax law with which he was charged with violating.\(^82\)

By a five to four margin, the Supreme Court agreed with Ratzlaf, concluding that the "willfulness" requirement evinced Congress' intent to require knowledge that structuring itself was unlawful, even despite some "contrary indications in the statute's legislative history."\(^83\) The Court acknowledged that there were "bad men" who engage in structuring activity to conceal illegally-earned money from detection by the government, but it declined to accept that structuring activity is "inevitably nefarious."\(^84\) It posited hypothetical circumstances in which a legitimate businessman might well decide to structure transactions for lawful purposes, such as to "reduce the risk of an IRS audit," to decrease "the likelihood of burglary, or in an endeavor to keep a former spouse unaware of his wealth."\(^85\) Thus, the Court concluded that "we are unpersuaded by the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring."\(^86\)

In dissent, Justice Blackmun noted that historically no distinction had been recognized between a requirement of "willful" and "knowing" conduct; the Model Penal Code construed "willful" to require only consciousness of the act, not consciousness that the act was unlawful.\(^87\) "[T]he conduct at issue—splitting up transactions involving tens of thousands of dollars in cash for the specific purpose of circumventing a

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78. *Id.*
79. *Id.* at 140 (majority opinion).
80. *Id.* at 138.
82. *Cheek*, 498 U.S. at 202-03.
83. *Ratzlaf*, 510 U.S. at 146-47 n.17; *see also id.* at 158-59 (Blackmun, J., dissenting) (reviewing legislative history).
84. *Id.* at 144 (majority opinion).
85. *Id.* at 144, 145 (footnotes omitted).
86. *Id.* at 146.
87. *Id.* at 151 (Blackmun, J., dissenting). Blackmun urged that *Cheek* be limited to the complex context of the internal revenue code. *Id.* at 157.
bank's reporting duty—is hardly the sort of innocuous activity" at issue in the Liparota food stamp fraud case. Ratzlaff "was anything but uncomprehending as he traveled from bank to bank converting his bag of cash to cashier's checks in $9,500 bundles," and "as a result of today's decision, Waldemar Ratzlaf—to use an old phrase—will be 'laughing all the way to the bank.'"

Four years later, in Bryan v. United States, the Court returned again to the meaning of "willful"—this time in the context of a firearms law penalizing one who "willfully" violates a separate law forbidding dealing in firearms without a federal license. Sillasse Bryan used various "straw purchasers" to buy firearms in Ohio under false pretenses. After assuring the straw purchasers that he would render the firearms untraceable by filing off their serial numbers, Bryan resold the firearms on street corners in New York City that were known as locations for drug dealing activities.

Although "[t]he evidence was unquestionably adequate to prove that [Bryan] was dealing in firearms, and that he knew that his conduct was unlawful," there was "no evidence that he was aware of the federal law that prohibits dealing in firearms without a federal license." Accordingly, if the Court construed "willful" as it had in Cheek and Ratzlaf to require knowledge of the law charged against him, Bryan's conviction would have to be reversed. The Court, however, decided that "[t]he word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." This was a prelude to the Court's dilution of the willfulness standard to require only that "[t]he jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." The Court did not further require—as in Cheek and Ratzlaf—knowledge of the law that was alleged to be violated, and the Court distinguished Cheek and Ratzlaf on the ground that they "involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent

88. Id. at 155.
89. Id. at 162. Congress was not amused by the Court's Ratzlaf decision and promptly amended the statute to make clear that a structurer need not know his conduct to be illegal. See Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, § 411(a), (c)(1), 108 Stat. 2160, 2253 (codified at 31 U.S.C. §§ 5322(a)-(b), 5324(c) (1994)).
91. Id. at 188–89.
92. Id. at 189.
93. Id.
94. Id.
95. Id. at 191 (citing Spies v. United States 317 U.S. 492, 497 (1943)).
96. Id. at 193.
According to the Court, “the willfulness requirement of [the statute] does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required.”

In dissent, Justice Scalia accepted the notion that the government need not have proven that Bryan “knew the law” in the sense that he could cite “chapter and verse from Title 18 of the United States Code.” But he maintained that the defendant must be “generally aware that the actus reus punished by the statute—dealing in firearms without a license—is illegal.” He faulted the majority for being “willing to accept a mens rea so ‘general’ that it is entirely divorced from the actus reus this statute was enacted to punish.” Thus, Bryan was guilty of willfully dealing federal firearms without a license based on the jury’s conclusion that, even though “he had never heard of the licensing requirement,” he knew “he had violated the law by using straw purchasers or filing the serial numbers off the pistols,” which was conduct that was separately proscribed by other firearms laws. Under the same reasoning, Bryan could be convicted if he knew any other conduct associated with his firearms dealing was illegal—for example, “that his street-corner transactions violated New York City’s business licensing or sales tax ordinances,” or “that the car out of which he sold the guns was illegally double-parked, or if, in order to meet the appointed time for the sale, he intentionally violated Pennsylvania’s speed limit on the drive back from the gun purchase in Ohio.” According to Justice Scalia, “[o]nce we stop focusing on the conduct the defendant is actually charged with (i.e., selling guns without a license), I see no principled way to determine what law the defendant must be conscious of violating.” He concluded that the term “willfully” was ultimately ambiguous, such that the rule of lenity warranted requiring proof that Bryan knew he was required to obtain a firearms license for his street-corner dealings.

How does Sam fare under this line of “apparent innocence” precedents? As an initial matter, the statute charged against him does not contain a “willful” requirement. Therefore, the government will not have to prove he knew the law (Ratzlaf) or even that he knew he was doing something wrong (Bryan). Nor will the government have to prove

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97. Id. at 194.
98. Id. at 196.
99. Id. at 202 (Scalia, J., dissenting).
100. Id.
101. Id.
102. Id.
103. Id.
104. Id. at 202-03.
105. Id. at 205.
he knew of the registration requirement (Freed), but Sam must be proved to have known the factual characteristics of the contraption in his trunk that qualify it as a bomb, as opposed to other items (such as fireworks) that are not subject to the criminal prohibition of the National Firearms Act (Staples).

Why shouldn’t the government have to prove that Sam knew the bomb was not registered? The government’s rationale would be that carrying around bombs is not itself “otherwise innocent” activity—the would-be terrorist or malicious malcontent does not go free just because he was strategically ignorant of—or indifferent to—the bomb’s registration status.

This reasoning may doubtlessly hold true for many cases. Yet suppose that Sam is a highway construction foreman, and he believes that the bomb is indeed registered in connection with its intended use for a demolition project? Suppose his boss falsely assured him of that very fact earlier in the morning—perhaps even gave him a bogus permit certificate? Under the apparent innocence rule, Sam’s belief does not matter. He need not be shown to have had any knowledge at all about the registration status of the bomb. His belief that it was registered is irrelevant and not a defense. Sam will be convicted merely upon proof that he knew it was a bomb that was in the car and that the bomb was not federally registered (regardless of what Sam knew about its registration status).

Sam’s case underscores the methodological fault of the apparent innocence rule. The rule tasks judges with deciding as a matter of law what conduct is “innocent” and what is not—hence, what facts as a class connote “wrongful” conduct. From this judges designate which fact elements must be proved to have been known by the defendant. Because this process unfolds as an exercise in statutory interpretation, the facts that a defendant must be proved to have known become set and established as a matter of law applicable to all future cases involving the same statute. The jury, in turn, decides solely the facts that the courts have decreed of significance to assessing a defendant’s personal culpability. Unless Congress happens to have imposed a willfulness

106. See Rogers v. United States, 522 U.S. 252, 254–55 (1998) (plurality opinion) (“[T]he mens rea element of a violation of § 5861(d) requires the Government to prove that the defendant knew that the item he possessed had the characteristics that brought it within the statutory definition of a firearm. It is not, however, necessary to prove that the defendant knew that his possession was unlawful, or that the firearm was unregistered.” (footnote omitted)).

107. The same would hold true under the Model Penal Code, because the Code forecloses a “mistake of fact” defense as to any fact for which a defendant is not otherwise required to have had a culpable state of mind. See MODEL PENAL CODE § 2.04(1)(a) (1962); George Fletcher, Dogmas of the Model Penal Code, 2 BUFF. CRIM. L. REV. 3, 17 (1998) (noting that, under the Code “[i]f no state mental [sic] is required for the particular element, then a mistake as to that element is irrelevant,” and this “eliminates the problem of mistake as an independent arena of moral and theoretical inquiry”).
requirement, the jury does not decide—with the benefit of all the facts at trial—if a particular defendant who knew only element facts A and B (but not facts C and D) acted with awareness that what she did was wrong.

This confinement of juries to the determination of “just the facts” is part of what Victoria Nourse has identified as the “denorming of mens rea.”108 As Nourse explains, “[o]nce upon a time, mens rea meant culpability,” but now under steriley scientific notions of knowledge advanced by the advent of the Model Penal Code, the concept of “mens rea look[s] less like ‘guilty mind’ than simply ‘mind.’”109 Congress has not adopted the Model Penal Code as a template for a standardized code of federal crimes, but the Supreme Court has liberally borrowed from the Code’s concept of “element analysis” with its methodological breakdown of crimes into discrete elements and its focus on requiring an element-by-element evaluation of the mental state required for criminal conviction.110 Accordingly, as Ann Hopkins has noted, mens rea is often viewed “as a strictly factual judgment rather than as a moral assessment,” such that “courts do not ask today’s jurors to pass judgment on a defendant’s blameworthiness, but instead ask them only to resolve the factual issue of what mental event took place in the accused’s mind at the time she performed the prohibited act.”111

Many scholars fancifully exalt the power of a jury to “apply the law to the facts” and even “to ignore the letter of the law when it believes justice so requires.”112 But these dreamy descriptions of jury


109. Id. at 365-66 (2002); see also Kyron Huigens, What Is and Is Not Pathological in Criminal Law, 101 Mich. L. Rev. 811, 815 (noting how “culpability provisions of the [Model Penal] Code did not merely simplify and consolidate traditional mens rea categories” but “also eschewed the kind of frank normative assessments featured in traditional criminal fault concepts such as ‘implied malice’ and ‘depraved heart’”).

110. United States v. Bailey, 444 U.S. 394, 406 (1980) (noting that “[c]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime” (internal quotation marks omitted)); MODEL PENAL CODE AND COMMENTARIES § 2.02 at 229 (1985).

111. Hopkins, supra note 15, at 401.

112. E.g., Rachel E. Barkow, Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing, 152 U. PA. L. REV. 33, 49-51 (2003) (noting that “[t]he Fifth Amendment’s Double Jeopardy Clause protects the jury’s general verdict of acquittal, whether it is because the jury disagrees that the facts establish legal guilt or because the jury believes that, although the defendant is guilty under the letter of the law, she should not be deemed morally blameworthy because of some higher principle of justice”); see also Lawrence M. Solan, Jurors as Statutory Interpreters, 78 CHI.-KENT L. REV. 1281, 1283-85 (2003) (“Deciding whether a statute applies to a given set of facts is what judges do when they interpret statutes, and it is part of the jury’s job as well.”); cf. Brown, supra note 3, at 1204 (noting that juries “must interpret law in order to apply it, and that interpretive process occurs in a broad context of considerations beyond the text’s plain meaning or the legislature’s intent”); Nancy L. Marder, The Myth of the Nullifying Jury, 93 NW. U. L. REV. 877, 882, 908-10 (1999) (discussing jury’s unreviewable power to nullify and arguing that juries have legal
empowerment do not reflect the restrictive reality for juries in federal courtrooms today (with which I am familiar from nearly ten years as a federal criminal prosecutor). Juries are not simply handed a copy of a criminal statute and told to interpret the law or decide how it should apply it to the facts before them. Instead, federal trial courts issue detailed instructions describing each factual element of the offense and narrowing the jury's consideration to whether each factual element has been proved. For example, in a felon-in-possession gun case, the statute prohibits a felon from knowingly possessing a firearm "in or affecting commerce." Juries do not mull the monetary metaphysics of the term "commerce" or ponder the nuances of nexus suggested by a term as broad as "in or affecting." They cannot even go to a dictionary to look up these terms. Instead, they are told by the judge's instructions—which are based on boilerplate instruction form books—that the element of "in or affecting commerce" means proof that the gun at some point in time traveled across a state line (a fact which the prosecution typically proves from shipping records or from evidence that the gun was manufactured in a different state or country than where it was found). Juries mechanically decide if this singular fact of the gun's crossing a state line is true and they do so without interpreting or applying the law in any manner.

Once a judge's instructions have issued, little remains of the law for a jury to apply or interpret. If there is ambiguity in the instructions, juries do not make up their own legal rules; instead, they send notes to the judge requesting clarification.

gap-filling interpretive role akin to judges). In defense of the commentators, I should note that the Supreme Court has also proclaimed the jury's historical role to be more than mere fact finding and to apply the law to facts. See United States v. Gaudin, 515 U.S. 506, 513 (1995) (noting that "[j]uries at the time of the framing could not be forced to produce mere 'factual findings,' but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence" and noting "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts"). But the Court has not taken account of the instructional practice in the federal courts today as described above. So, for example, in Gaudin, the Court held that the jury—not the judge—must determine the element of "materiality" in a federal false statement case, yet without suggesting that juries may freely interpret the meaning of "materiality"; in fact, standard jury instructions particularize the definition of "material" to mean a statement that is naturally capable of influencing the decision of the relevant decisionmaker. See, e.g., Kevin F. O'Malley et al., Federal Jury Practice and Instructions § 40.03 (6th ed. 2006); see also Kungys v. United States, 485 U.S. 759, 770 (1988) (defining materiality).

116. O'Malley et al., supra note 112, at § 20.07 (describing manner in which court should respond
What of the jury's power to nullify? Juries doubtlessly have the right and power as, Justice Holmes put it, "to bring in a verdict in the teeth of both law and facts," and if nullification means acquittal for a criminal defendant, this action is unreviewable by any court because of the Double Jeopardy Clause. But juries are most assuredly never advised of their nullification power. To the contrary, federal juries are told that it is the judge who determines the law and that the judge's legal instructions are controlling even if the jury disagrees with the law. They are admonished that "[n]either shall you be concerned with the wisdom of any rule of law stated by the Court," and they are warned in the most sobering of terms that "regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base any part of your verdict upon any other view or opinion of the law than that given in these instructions." Not surprisingly, "the analysis of jury behavior during deliberations in real trials show that jurors see themselves as obligated to apply the law, and that they spend a significant portion of their time during deliberations discussing the law." If the trial court gets wind of a juror's intent to nullify, the juror is subject to dismissal.

Lest any doubt remains about the fact-decider limitations of the jury's role, jurors are routinely reminded that "[y]ou were chosen as jurors for this trial in order to evaluate all of the evidence received and to decide each of the factual questions presented by the allegations brought by the government in the indictment." At no time are federal juries invited to find, apply, or interpret the law—much less alerted that they

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118. See, e.g., United States v. Carr, 424 F.3d 213, 219-20 (2d Cir. 2005) ("[A] trial court is not required to inform a jury of its power to nullify. . . . [T]he power of juries to 'nullify' or exercise a power of lenity is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent." (citations omitted)); United States v. Edwards, 101 F.3d 17, 19-20 (2d Cir. 1996) (collecting cases to the effect that "juries have the power to ignore the law in their verdicts, [but] courts have no obligation to tell them they may do so"); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) ("While jurors may choose to flex their muscles, ignoring both law and evidence in a gadarene rush to acquit a criminal defendant, neither the court nor counsel should encourage jurors to exercise this power.").
119. O'Malley et al., supra note 112, at § 12.01 ("It is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply these rules of law to the facts as you find them to be from the evidence received during the trial."); accord Ninth Circuit Manual of Model Criminal Jury Instructions 3.1 (2003); Pattern Criminal Federal Jury Instructions for the Seventh Circuit 1.01 (1998) (instructing that "[y]our first duty is to decide the facts from the evidence in this case," and "[y]our second duty is to apply the law that I give you to the facts," and "[y]ou must follow these instructions, even if you disagree with them");
121. See United States v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997).
122. O'Malley et al., supra note 112, at § 12.01 (emphasis added).
are free to disregard it. Federal juries are told just to find the facts—not the law or their conscience—in federal courtrooms today.

It follows that unless a federal jury is told to decide if a defendant knew she was doing something wrong, there is little reason to suppose that the jury’s ultimate verdict will incorporate any kind of a normative evaluation of a defendant’s moral blameworthiness. This is especially so because, unless a general intent statute contains a “willfulness” requirement, application of the apparent innocence rule will restrict the evidence that the jury hears of a defendant’s potentially innocent state of mind. Once a court has decided what fact elements a defendant must be proved to have known, the rest of what a defendant knew or believed does not matter—the defendant’s knowledge of other fact elements is legally irrelevant and therefore subject to preclusion from evidence at trial. Evidence about the defendant's awareness or ignorance of additional fact elements (such as Sam’s belief that the explosive was registered) will never come before the jury, and the jury will have no reason or basis to exercise its power to nullify.

When courts as an exercise in statutory interpretation take it on themselves to decide what conduct is “innocent,” the inquiry soon becomes academic in the absence of a tie to the facts of a particular case. If “innocence” is judged simply by reference to the text of the charged statute itself, then the inquiry sinks in circularity, as the very question is what mental state suffices to make certain conduct a crime under the statute that has been charged. On the other hand, if the “innocence” of conduct is judged by reference to some other uncharged statute, then the inquiry strays off course, as the defendant is held accountable for a different or lesser crime or wrong than that which has been charged. If “innocence” is to be judged by reference to no statute at all, then the inquiry founders on abstract intuitions of what type of conduct society believes to be wrong.

And this last inquiry raises an additional but central question: whether judges—rather than juries—are the most competent and legitimate arbiters of what conduct society deems wrongful. I will return to this issue after reviewing in the next section of this Article the numerous federal cases in which the apparent innocence rule has continued to allow—indeed to invite—the conviction of morally blameless defendants.

123. See Fed. R. Evid. 401, 402. The concern is more than theoretical, as reflected by examples of such successful motions in limine to preclude evidence of a defendant’s innocent state of mind in Part II.A below.
II. MENS REA AND COMMON FEDERAL GENERAL INTENT CRIMES

The Supreme Court's approach to interpreting mens rea requirements has played out in numerous lower court decisions involving federal general intent crimes. This includes some of the most commonly charged federal offenses such as immigration, firearms, and environmental crimes. The Court's current approach often results in relieving the prosecution from proving a defendant's knowledge of element facts that bear on whether the defendant believed she was doing anything wrong. Conversely, for some cases, the Court's current approach requires excessive knowledge—that a defendant know the details of particular factual elements that do not bear on the wrongfulness of his conduct. This is another drawback of the methodology of resolving culpability issues on a categorical, element-by-element basis, rather than considering the full range of a particular defendant's conduct. Moreover, because the current doctrines focus only on what facts a defendant knew (outside the “willful” line of cases), this precludes the jury from receiving and evaluating highly guilt-probative evidence of “non-facts,” such as a defendant's confession that she knew the law and intended to do wrong.

These themes play out in three very commonly-charged federal offense categories: (1) immigration cases, (2) firearms cases, and (3) environmental crimes cases. At the end of this section, I examine the alternative approach taken by the Model Penal Code’s “material elements” analysis and show how it also proves similarly problematic because of its restrictive element-by-element approach to resolution of mens rea issues.

A. IMMIGRATION CRIMES

Federal immigration cases now account for 25% of all federal criminal cases. The prosecution of these crimes has more than tripled in the last ten years. The most commonly charged immigration crime prohibits an alien who has been previously removed or deported from the United States from reentering the country. Defendants convicted under the “illegal re-entry” statute receive an average prison term of three years.

125. See Federal Justice Statistics Resource Center, Number of Defendants in Cases Filed, http://fjsrc.urban.org/analysis/t_sec/title.cfm?stat=t&year=2005&t_ch=tsec&str_title=+8&title=+8 (check “All sections” box and choose display option) (showing 11,652 cases charged under 8 U.S.C. §§ 1326, 1326(a), and 1326(b) in 2005 of 17,371 total immigration cases charged) (last visited Oct. 31, 2007); Justice Statistics, supra note 23, at 8 fig.9 (showing increase in immigration cases from 5,526 in 1994 to 20,341 in 2003, with nearly 12,000 immigration cases in 2003 being illegal reentry prosecutions).
126. See Justice Statistics, supra note 23, at 8 fig.9.
127. See Sentencing Commission, supra note 23, at fig.E (including average sentence for post-
The illegal reentry statute makes criminal a previously deported alien's reentry into the United States "unless . . . the Attorney General has expressly consented to such alien's reapplying for admission." Like many general intent crimes, the statutory text describes conduct only—it does not contain any requirement that a defendant have acted knowingly, intentionally, or with any particular state of mind. Must an alien know each of the following element facts that are necessary to her conviction:

(a) that she is an alien and not a citizen of the United States?
(b) that she was previously removed or deported?
(c) that she has reentered the United States? or
(d) that she did not have the consent of the Attorney General to reenter the United States?

The federal courts have answered mostly "no" to these questions. An alien may be convicted even if she believes she is not an alien, even if she believes that her prior departure from the country was not by means of compulsory deportation, even if she is not aware that she has actually reentered the United States, and even if she mistakenly believes that the Attorney General has consented to her readmission.


129. See United States v. Johnson, 87 F. App'x. 195, 196 (2d Cir. 2004) (rejecting argument that defendant "should have been allowed to present evidence that he believed in good faith that his past military service in the United States armed forces qualified him for naturalization, and he consequently did not know that he was not permitted to reenter the United States"); see also United States v. Sotelo, 109 F.3d 1446, 1447-48 (9th Cir. 1997) (holding that defendant's belief that he was a national and not an alien was not a defense to unlawful reentry charge). This Article cites unpublished cases such as Johnson above, not because they are binding as precedent, but because they indicate how the courts will treat particular claims; indeed, the fact that the courts have disposed of some claims by unpublished opinion is indicative of the court's view that the issues decided are well-settled by precedent and not worthy of formal publication. See, e.g., 2ND Cir. R. 0.23 (providing for use of summary orders where "no jurisprudential purpose would be served by a written opinion"), available at http://www.ca2.uscourts.gov/Docs/Rules/LR.pdf.

130. United States v. Martinez-Morel, 118 F.3d 710, 713 (10th Cir. 1997) (affirming preclusion of defense that defendant believed his prior departure from country had been voluntary and not by deportation, despite alien's proffer of a form he had received from the INS advising him of his right to voluntary departure rather than deportation).

131. See United States v. Reyes-Medina, No. 94-1923, 1995 WL 247343, at *2 (1st Cir. Apr. 25, 1995) ("Although it is true that many people do not realize that Puerto Rico is a U.S. possession, the sincerity or reasonableness of Reyes' beliefs is irrelevant."). But see United States v. Salazar-Gonzalez, 458 F.3d 851, 856 (9th Cir. 2006) (noting that illegal reentry defendant must know he has reentered the United States); United States v. Carlos-Colmenares, 253 F.3d 276, 278 (7th Cir. 2001) ("Intent to reenter is an element—it is hardly likely that Congress would have made it a crime to be transported involuntarily to the United States, say by an airplane hijacker . . . .") (internal citations omitted)).

132. See Carlos-Colmenares, 253 F.3d at 277, 278 (collecting cases and concluding that "intent to reenter the country without the Attorney General's express consent is not an element of section
The courts have applied the apparently innocent rule to dispense with these additional mental state requirements. For example, in *United States v. Martinez-Morel*, the Tenth Circuit distinguished *Staples* and *X-Citement Video* on the ground that “unlike the conduct proscribed in *X-Citement Video* [child pornography] and *Staples* [machine gun possession], crossing international borders is a type of conduct ‘generally subject to stringent public regulation.’”133 Circularly assuming its conclusion, the court added that “[c]entering a country in violation of its immigration laws is not otherwise innocent conduct.”134

Other courts have justified their strict liability approach by suggesting that an alien should know to be careful about reentering because the INS routinely warns departing aliens that their reentry would be illegal.135 Ironically, however, when the tables are turned, and aliens attempt to show that they were misadvised by the INS about the legality of reentering the country, the courts bar them from presenting such evidence.136 The upshot is that the courts dispense with requiring

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134. Id. at 716 (internal quotation marks omitted).

135. See *United States v. Morales-Palacios*, 369 F.3d 442, 448 (5th Cir. 2004) (“[U]pon being deported, an alien has been given both oral and written notice that he or she cannot reenter without the express permission of the Attorney General.”); *United States v. Torres-Echevarria*, 129 F.3d 692, 697–98 (2d Cir. 1997) (noting “the practice of the INS is to advise them that they face criminal liability for an unlawful return” and that “deportation itself is sufficient to impress upon the mind of the deportee that return is forbidden,” so that “[t]he statute simply, and logically, makes the presumption of unlawful intent conclusive”).

136. See *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2002) (precluding defense on basis of bad advice in INS form given to alien upon prior departure that suggested that the alien could reenter the country without criminal consequence after five years); see also *United States v. Aquino-Chacon*, 109 F.3d 936, 939 (4th Cir. 1997). The INS form also misadvised aliens that they faced a penalty of only two years’ imprisonment for reentry, when in fact they faced a penalty of up to twenty years of imprisonment; nevertheless, the federal appeals courts have declined to authorize a downward departure on this ground. See, e.g., *United States v. Miranda-Ramirez*, 309 F.3d 1255, 1261 (10th Cir. 2002) (finding a downward departure improper where Congress did not contemplate this
proof of a defendant's guilty knowledge, despite their own demonstrably suspect assumption that aliens know they do not have permission to return.

The practical effect of this precedent restricting the scope of what an alien must be proved to have known is that the prosecution will successfully preclude an alien from adducing evidence of an innocent state of mind. Consider the case of Jose Mancebo-Santiago, who sought to introduce evidence at his illegal reentry trial that when he had been previously deported he had not been warned that it was illegal to return and that the INS did not take back his alien registration "green card." Several months after his deportation to the Dominican Republic, he flew to Puerto Rico (United States territory), where he showed his Dominican passport and his green card to the INS inspector, and he was duly admitted into the United States. The court barred this evidence, declaring that "[t]he evidence appears to be calculated to unduly prejudice the jurors by presenting them with evidence probative of the defendant's good faith and mistaken belief which are legally irrelevant." Having been barred from adducing evidence of his innocent state of mind, Mancebo-Santiago was convicted and sentenced to one hundred months' imprisonment.

The courts sometimes justify their analysis by stressing that a criminal defendant need not know the law. Yet this point overlooks the relevant question: whether an alien knew of a baseline fact that must be shown in order to secure the alien's conviction—that the Attorney General had not granted permission to reenter. Knowledge of this singular fact may starkly separate guilty-minded from innocent conduct.

In view of the minimal proof requirements for illegal reentry cases,
little is left for a jury to decide. In 2005, the government's record at trial in illegal reentry cases was seventy-three guilty verdicts and just six acquittals or mistrials. Meanwhile, more than 10,800 defendants charged with illegal reentry chose to plead guilty rather than venture almost certain conviction at trial.

It has been long established that a crime of attempt is a specific intent offense—the notion is that one cannot attempt to commit an offense without an awareness that one is trying to commit an offense. But this principle does not seem to hold true for illegal reentry cases. In cases involving attempted illegal reentry (in which the alien was apprehended before completing entry into the United States), a majority of federal appeals courts to consider the issue have ruled that the government need not prove the alien's knowledge that she did not have the consent of the Attorney General to reenter the United States.

These courts have construed the attempt statute in this manner for the same reasons used to justify their restrictive interpretation of the substantive statute and have done so despite the absence of legislative history directing a restrictive interpretation. Effectively appropriating the jury's fact-finding role for themselves, the courts conclusively presume that aliens who seek to reenter the country were previously given "both oral and written notice that he or she cannot enter without the express permission of the Attorney General," such that "[t]he act of attempting to re-enter speaks for itself." According to one recent decision, "[t]here is, therefore, no need, in order to protect truly innocent behavior—including good faith attempts to seek permission to reenter—to require


144. Id.

145 Compare United States v. Rodriguez, 416 F.3d 123, 125 (2d Cir. 2005) ("[T]he offense of attempted illegal reentry under § 1326(a) does not require the government to allege or prove that a defendant had the specific intent to reenter the United States without the expressed permission of the Attorney General.")], cert. denied, 545 U.S. 1140 (2006), United States v. Morales-Palacios, 369 F.3d 442, 449 (5th Cir. 2004), United States v. Peralt-Reyes, 131 F.3d 956 (11th Cir. 1997) (per curiam), and United States v. Reyes-Medina, 53 F.3d 327 (1st Cir. 1995) (per curiam), with United States v. Smith-Baltinther, 424 F.3d 913, 923-26 (9th Cir. 2005) (holding that a defendant charged with attempted illegal reentry may assert defense that he reasonably believed he was a United States citizen upon seeking to reenter the country), and United States v. Gracia-Ulibarry, 231 F.3d 1188, 1191-92 (9th Cir. 2000) (en banc) ("[T]he attempt prong of § 1326 incorporates the well-established common law meaning of 'attempt' and requires proof of a specific intent to enter illegally."). See generally Baruch Weiss, What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law, 70 FORDHAM L. REV. 1341, 1351-53 (2002) (describing "state of chaos" among federal courts whether liability under aider-and-abettor statute requires specific intent or simple knowledge of underlying statute).

146. Morales-Palacios, 369 F.3d at 448.
proof of knowledge of the need for permission from the Attorney General or knowledge that no such permission had been granted." The courts allow for no possibility that such warnings were not given or not understood by the alien defendant.

In short, the illegal reentry cases suggest that “apparent innocence” principles do not translate to a rule of mandatory culpability. In these cases, the courts stand willing to assume—in the absence of support in the text or legislative history—that Congress intended to dispense with requiring the government to prove the alien’s knowledge of most of the element facts that are necessary to a conviction. The courts reach this result by assuming certain facts to be conclusively true (such that the alien was warned it would be illegal to reenter without consent of the Attorney General) or by deciding that such acts as crossing the United States border—which millions of persons legally do—are not “innocent” in nature.

A different criminal immigration statute illuminates a different problem with the “apparent innocence” approach. Ancelmo Figueroa was an immigration inspector who, by pre-arrangement with a co-conspirator, let certain aliens go through his inspection station at JFK airport without proper documentation. One day Figueroa let an alien named Garcia through his station. Garcia could not legally enter the United States, because he had previously been convicted of a kidnapping offense, which is deemed an inadmissible “aggravated felony” under immigration law. There was plenty of evidence that inspector Figueroa knew that Garcia could not legally enter the United States, but none to suggest that Figueroa knew more precisely that it was Garcia’s “aggravated felony” status that disqualified him from re-entering the United States.

The government charged Figueroa under an immigration statute that prescribes up to ten years’ imprisonment against any person who “knowingly aids or assists any alien excludable [as an aggravated felon] . . . to enter the United States.” Figueroa was not charged under a cognate provision that prohibits assisting the entry of any illegal alien, regardless of that alien’s criminal history, and that prescribes a lesser maximum penalty of five years’ imprisonment.

Figueroa contended at his trial that he could not be convicted of the more serious charged offense unless the government showed that he

147. Rodriguez, 416 F.3d at 128.
149. Id. at 113.
150. Id.
151. Id.
152. Id. at 112 (quoting 8 U.S.C. § 1327 (1994)).
153. Id. at 118 (citing 8 U.S.C. § 1324(a)(A)(iv) (1994)).
knew Garcia was an aggravated felon. The Second Circuit, however, ruled that Figueroa need only have known that Garcia was excludable; Figueroa did not have to know that Garcia was an aggravated felon. The court reasoned that Figueroa's conduct was not otherwise innocent. He knew that he was allowing the entry of an inadmissible alien, and the statute did not require further wrongful knowledge. In reliance on X-Citement Video, the court concluded that "scienter requirements should be presumed to stop once a defendant is put on notice that he is committing a non-innocent act."

Ancelmo Figueroa's case, and a line of other cases like it, are different from the immigration cases I have discussed above because there is no question that Figueroa knew he was doing something wrong. Yet Figueroa contended that he did not know the full scope of his wrongdoing. The court's response that he need not have had further knowledge suggests that the rule of "mandatory culpability" is, at best, a rule of "mandatory partial culpability." The apparent innocence rule is put to the service of a modified form of strict liability, which "occurs when a defendant culpably engages in criminal conduct that causes consequences other than those the defendant intended or contemplated, and the defendant is held liable for the further consequences automatically and without proof of the usual mens rea required for conviction for the further consequences."

Such enhanced liability may well be justified in the civil tort context, because the purpose is to spread losses among the most culpable. By contrast, in the criminal context, this enhanced liability operates like a "punishment-enhancement lottery," randomly assessing a defendant for consequences that he did not know or intend, while not doing so for other defendants whose conduct was accompanied by the same wrongful mental state but, by chance, not the same consequences.

154. Id. at 118–19.
155. Id. at 118; see also United States v. Flores-Garcia, 198 F.3d 1119, 1122 (9th Cir. 2000).
156. See Figueroa, 165 F.3d at 118–19.
157. See id.
158. Figueroa, 165 F.3d at 117 (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 71 (1994)).
159. See United States v. Cook, 76 F.3d 596, 601 (4th Cir. 1996) (defendant convicted for use of minor to engage in drug offense need not have known that he was using a minor "for the obvious reason that receiving illegal drugs is not otherwise innocent conduct"); United States v. LaPorta, 46 F.3d 152, 158–59 (2d Cir. 1994) (convicting defendant under 18 U.S.C. § 1361 for "willfully injur[ing] or commit[ting] any depredation against any property of the United States" and finding defendant need not have known property belonged to the United States because "arson is hardly 'otherwise innocent conduct'").
161. Id. at 395.
162. Id. at 385, 404. Morse cites the example of "two drag-racing agents who drive into facing
Of course, even if Figueroa did not actually know or intend to assist the entry of a convicted kidnapper (as opposed to an alien with no criminal history), it could be argued that Figueroa must have been aware of some possibility or probability that Garcia would be a criminal. This may be so. But the difficulty with the "otherwise innocent" approach is that it irrebuttable assumes it to be so. What if Figueroa was assured by his co-conspirator who arranged for Garcia to go through Figueroa's inspection station that Garcia had no criminal history? What if Figueroa obtained Garcia's criminal "rap sheet," which did not disclose a prior conviction, before he allowed Garcia to pass through his station? Under the apparent innocence rule, this evidence is categorically excluded at trial because, as a matter of categorical statutory interpretation, Figueroa's knowledge about Garcia's criminal history is not relevant.

B. Gun Crimes

Another very commonly charged federal offense prohibits a convicted felon from knowingly possessing a firearm that has traveled in interstate commerce—more than five thousand defendants are charged each year.163 The felon-in-possession statute prohibits one who has been "convicted . . . of any crime punishable by a term of imprisonment exceeding one year" from "possess[ing] in or affecting commerce, any firearm or ammunition."164 A separate statute prescribes a prison term of up to ten years' imprisonment for one who "knowingly violates" the felon-in-possession prohibition.165 The boilerplate elements of the federal felon-in-possession offense are: (1) that the defendant knowingly possessed a firearm; (2) that the defendant had been previously

163. 18 U.S.C. § 922(g)(1) (2000); BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS RESOURCE CENTER, http://fjsrc.urban.org/analysis/7_scc/stat.cfm?stat=1 (last visited Oct. 31, 2007) (select radio button "Number of defendants in cases filed"; highlight year "2005"; select radio button "Select by title and section within U.S.C."); click "Select"; highlight title "18-Crimes and Criminal Procedure"; highlight section "18 922G"; click desired display option) (offenses charged under Title 18 in 2005). Although there are a range of federal firearm criminal statutes, by far the most commonly charged is the felon-in-possession statute, 18 U.S.C. § 922(g)(1). Id. According to the Bureau of Justice Statistics, 5,513 defendants were charged in 2005 with felon-in-possession or other unlawful firearm possession under § 922(g); this was 15% of all defendants (38,427) charged in 2005 with offenses under the general federal criminal code (Title 18) and comprised more cases than charged with any other single provision in the general federal criminal code, id. According to the U.S. Sentencing Commission, for fiscal year 2005, more than 8,600 defendants (about 12% of all federal criminal cases) were charged with various federal firearms offenses. See SENTENCING COMMISSION, supra note 23, at tbl.3, available at http://www.ussc.gov/ANNRPT/2005/table3.pdf. The mean incarceration term for a federal weapons offense in fiscal year 2005 was 71.8 months. See id. at tbl.13 (statistics from Oct. 1, 2004 to Jan. 11, 2005), available at http://www.ussc.gov/ANNRPT/2005/table13_pre.pdf.


165. Id. § 924(a)(2) (2000).
Juries in felon-in-possession cases are categorically instructed that a defendant need only have knowledge of one of these three factual elements. He need only have knowingly possessed a firearm, but he may be convicted regardless of whether he knew that he was previously convicted of a felony offense or that his firearm had previously crossed a state line.

This imposition of partial strict liability will not raise a concern in the majority of cases. Most defendants are well aware of their prior felony history and, though they may be ignorant whether their firearm ever crossed a state line, it is difficult to argue that knowledge of this jurisdictional aspect bears on a defendant’s belief that he was doing something wrong.

Nevertheless, the current approach still ensnares a range of defendants who could not reasonably have believed they were doing something wrong. For example, it allows the conviction of a defendant who mistakenly believes that his prior "conviction" was never actually entered, that it was subsequently expunged, or that the prior conviction was merely a misdemeanor offense that did not disqualify him from possessing a firearm. It allows the conviction of a defendant who was...
assured by a judge that, notwithstanding his prior felony conviction, he could have guns for hunting purposes. It allows the conviction of a defendant who was assured by his counsel that he could possess firearms. And it allows the conviction of defendants who were advised by state judges, state prosecutors, and state probation officers that their prior legal proceedings had not resulted in a criminal conviction. In such cases—where a defendant believes that his prior conviction did not disqualify him from possessing a firearm—the defendant will be barred from trying to prove to the jury his innocent state of mind.

The apparent innocence rule has similarly operated to preclude a defendant from establishing an innocent-state-of-mind defense in the context of another firearms statute that regulates the possession of firearms silencers. Without identifying any particular mental state, the statute provides that “[i]t shall be unlawful for any person . . . to receive or possess a firearm [which includes a silencer] which is not identified by a serial number as required by this chapter.” Two federal appeals courts have ruled that a defendant need only know that she possessed a silencer and need not know that the silencer does not have a serial number. Accordingly, a defendant who believed that her silencer had a serial number stamped on its side would be barred from presenting evidence of her innocent state of mind.

A majority of federal circuit courts have also rejected requests for an “innocent possession” defense to illegal gun possession charges. Such a defense might apply, for example, if a felon defendant only momentarily touched a firearm before ridding himself of it or if a defendant took

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171. See United States v. Powell, 513 F.2d 1249, 1250–51 (8th Cir. 1975).
172. See United States v. Bruscantini, 761 F.2d 640, 641–42 (11th Cir. 1985) (convicting defendant despite reliance on advice of state judge and state prosecutor that prior nolo contendere plea to a burglary charge did not constitute a prior conviction); United States v. Goodie, 524 F.2d 515, 517–18 (5th Cir. 1975) (finding probation officer’s advice irrelevant to conviction but allowing it as a defense against defendant’s related specific intent offense of making a false statement on a federal firearms form regarding his conviction history, for which defendant was thereby acquitted).
175. Compare United States v. Holt, 464 F.3d 101, 107 (1st Cir. 2006) (rejecting “innocent possession” defense), cert. denied, 127 S. Ct. 2031 (2007), United States v. Gilbert, 430 F.3d 215, 220 (4th Cir. 2005), and United States v. Hendricks, 319 F.3d 993, 1007 (7th Cir. 2003), with United States v. Mason, 233 F.3d 619, 623 (D.C. Cir. 2000) (allowing an “innocent possession” defense to a felon-in-possession charge where the facts show that “(1) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory—i.e., in light of the circumstances presented, there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible”).
possession of a firearm to move it away from a child. Again, the courts’ interpretive approach forecloses juries from considering evidence negating a defendant’s knowledge of wrongdoing.

C. ENVIRONMENTAL CRIMES

As with immigration and firearms offenses, federal criminal environmental cases pose undue risks of the conviction of innocent-minded defendants. Two of the most commonly charged federal criminal statutes are the federal Clean Water Act ("CWA"), which prohibits "knowingly" discharging any pollutant to the waters of the United States without a permit, and the Resource Conservation Recovery Act ("RCRA"), which prohibits "knowingly" disposing, transporting, or storing hazardous waste without a permit. Both statutes penalize the handling or disposal of pollutants or hazardous waste without a governmental permit. A majority of appeals courts continue to require a defendant to have known only that she was discharging a pollutant or hazardous waste; they do not require the government also to prove a defendant's knowledge that she lacked a regulatory permit to do so. These rulings allow the conviction of defendants who genuinely but mistakenly believed that they were authorized to discard pollutants in the manner that they did. A defendant’s conviction in such circumstances cannot be justified by the maxim of "ignorance of the law is no excuse," because the defendant’s knowledge of law is not at issue—the issue is her knowledge of the fact that a permit was not obtained.

Accordingly, the environmental cases are but another example of the underinclusive nature of the apparent innocence rule—that is, the

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179. See United States v. Technic Servs., Inc., 314 F.3d 1031, 1043 (9th Cir. 2002) (noting that the Clean Water Act "allows criminal penalties . . . regardless of whether the polluter is cognizant of the requirements of or even the existence of the permit," and therefore "[d]efendants' belief that permits were in place is irrelevant to the determination of whether they knowingly engaged in conduct that violated the Clean Water Act"); United States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 437–39 (6th Cir. 1998) (holding that defendant need not know that he lacked a permit to dispose hazardous waste); United States v. Laughlin, 10 F.3d 601, 606 (2d Cir. 1993) (same). But see United States v. Wilson, 133 F.3d 251, 264 (4th Cir. 1997) (holding that the government must show defendant’s knowledge that he did not have a permit for water discharge).
failure to require proof that may suggest a defendant acted with an innocent state of mind. Yet the environmental statutes also highlight a different failing of the courts’ element-by-element interpretative approach—one of rigid overinclusiveness in requiring, as to some elements, a defendant’s knowledge of factual details that cannot be said to bear on a defendant’s knowledge of wrongdoing. This fault is a by-product of courts’ decisions to require that a knowledge requirement attach, if at all, to entire elements, even if a single element is defined in great detail to include some aspects that bear on wrongfulness and other aspects that do not bear on wrongfulness.

Indeed, the lesson from Staples is that a defendant must know the precise factual characteristics of the object that she is alleged to have unlawfully handled, provided that such particular factual characteristics are what distinguish the object the defendant handled (e.g., a machine gun), from another object that it would be perfectly lawful for the defendant to handle (e.g., a semi-automatic assault rifle). Consistent with the Model Penal Code’s directive that knowledge be determined on an element-by-element basis, it is a unitary, discontinuous inquiry—if a defendant must “know” an element of the offense, a defendant must “know” all the factual aspects of an element of the offense.

In environmental cases, the required knowledge of the “facts that constitute the offense” (Bryan) may mean awareness of tediously technical and arcane details well beyond the cognition of the most evil-minded defendants. Consider, for example, a RCRA prosecution which invariably requires the government to prove that a substance disposed of by a defendant meets the detailed statutory definition of “hazardous waste.” If a particular waste is not specifically listed by the EPA as “hazardous waste,” then the only way it can qualify as “hazardous waste” is if, when subject to forensic testing, it displays certain hazardous characteristics for ignitability, corrosivity, reactivity, or toxicity.180

But, as Kathleen Brickey has noted, “merely determining whether a waste is hazardous can be daunting,” because the statutory “meaning of ‘hazardous waste’ is obscured by indeterminate regulatory terms of art, relentless redefinition, and highly complex rules.”181 For example, to show that a particular liquid waste qualifies as a hazardous waste because


181. Kathleen F. Brickey, Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory, 71 TUL. L. REV. 487, 527–28 (1996); see also Richard J. Lazarus, Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law, 83 GEO. L.J. 2407, 2434 (1995) (noting the complexity of environmental regulations and testimony of one EPA official to the effect that there were only “five people in the agency who understand what ‘hazardous waste’ is” and that “[w]hat’s hazardous one year isn’t [the next]—[and what] wasn’t hazardous yesterday, is hazardous tomorrow, because we’ve changed the rules”.

of its ignitable characteristics, the government would have to show that the substance

is a liquid, other than an aqueous solution containing less than twenty-four percent alcohol by volume and has flash point less than sixty degrees Celsius (140 degrees Fahrenheit), as determined by a Pensky-Martens Closed Cup Tester, using the test method specified in ASTM Standard D-93-79 or D-93-80 (incorporated by reference, see § 260.11), or a Setaflash Closed Cup Tester, using the test method specified in ASTM Standard D-3278-78 (incorporated by reference, see § 260.11), or as determined by an equivalent test method approved by the Administrator under procedures set forth in §§ 260.20 and 260.21.188

Now let us suppose the police catch Samantha late one night dumping a barrel of green-looking sludge in the woods off a city parking lot. The EPA tests the sludge as described above and finds that it is indeed “ignitable” and therefore within the legal definition of “hazardous waste.” Samantha admits to the police that she works as a truck driver and that she decided to just dump the waste where she thought no one would notice it instead of taking it to the facility where the company usually ships its waste. She readily admits she knew the waste was “nasty stuff” but she had never dealt with it before, had no idea what chemicals were in it, and certainly did not know if it was ignitable. Under Staples, Samantha must be acquitted. She has some sense that the waste is noxious but she does not know the specific factual characteristics that qualify the substance as “hazardous waste” subject to the RCRA’s prohibition. She is no different than the defendant in Staples, who knew he had a lethal weapon but did not know the precise factual characteristics that brought his weapon within the statutory definition of a firearm.

The absurdity of exonerating Samantha becomes even clearer if we suppose that she also told the police when they arrested her that she knew she did not have a permit to dump the waste and she dumped the waste where she did just to “settle a score” she had against the owner of the property. Under the apparent innocence rule, Samantha’s admissions are irrelevant and subject to exclusion from the evidence at trial. Samantha need not be proven to have had any idea whether she had a permit and she certainly need not be proven to have known or intended to do anything wrong—she just needs to know the exact facts about what she dumped (which she certainly does not).

Not surprisingly, but without consistent principle, the courts have declined to apply Staples to environmental dumpers like Samantha. Instead, for hazardous waste cases, the courts continue to require only

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188 40 C.F.R. § 261.21(a)(1) (2006). Highly detailed testing procedures are similarly required to show that a substance is some other form of characteristic waste, such as corrosive, reactive, or toxic. See id. § 261.22–24.
that a defendant be aware of the generally harmful nature or quality of the substance or waste that has been mishandled (i.e., that it was not water), without requiring knowledge of the added details that are nonetheless necessary to satisfy the statute.3 It is hard to argue with the common sense of the courts’ approach in this regard, but it cannot be reconciled with Staples or the Court’s avowals in Dixon and Bryan that a “knowing” requirement means knowledge of the “facts that constitute the offense.” To paraphrase Herbert Packer in a different context, the courts have decided that “mens rea is required for every offense, except when it isn’t.”

The courts follow the same incoherent approach for criminal cases under the Clean Air Act. In United States v. Weintraub, a real estate developer supervised a scheme in which day laborers were sent into a building under renovation and directed to “rip and strip” asbestos from the building’s pipes and boilers without wearing any protective equipment or taking other measures to prevent the inhalation of carcinogenic asbestos fibers.5 The Clean Air Act, however, does not apply to all forms of asbestos; it applies only to “regulated asbestos containing material,” which is technically defined in part to include only: (1) asbestos that is friable in form (i.e., likely to become airborne upon removal because it can be crushed to a powder form by hand pressure), and (2) asbestos that is present in more than one percent concentration as determined by scientific Polarized Light Microscopy testing.6

On appeal from his trial court conviction, Weintraub argued—in reliance on Staples and X-Citement Video—that the trial court erred because it allowed the jury to convict him only on the basis of his knowledge that the substance was asbestos and that the trial court did not further instruct the jury to determine that he knew the asbestos was friable (which was what would make the asbestos dangerous) or present in the requisite amounts as required to be subject to regulation.7 The Second Circuit rejected his argument, concluding that he need only have known the material to be asbestos, because such knowledge sufficed to put him on notice that the substance could be subject to regulation.8

As in the case of Samantha, Weintraub cannot be reconciled with the requirement of Staples that a defendant know the precise factual characteristics of the material that make it subject to regulation. I do not

183. See, e.g., United States v. Kelly, 167 F.3d 1176, 1181 (7th Cir. 1999).
185. 273 F.3d 139, 142 (2d Cir. 2001). I was one of the trial prosecutors in the case and defended the case for the government on appeal.
187. See Weintraub, 273 F.3d at 144–45.
188. See id. at 151.
endorse a requirement that environmental defendants be proved to have known the highly precise factual characteristics of pollutants and toxins that they dump or mishandle. My point is that such examples underscore the deficiencies of the current all-or-nothing, element-by-element interpretive approach. Judges fashion statute-by-statute, ad hoc formulae of what conduct is "innocent" or not. The alternative, as I suggest in Part III of this Article, is to let juries decide on a case-by-case basis if defendants knew they were doing wrong.


The Model Penal Code's "material elements" approach suffers from the same difficulty as the Supreme Court's free-form apparent innocence rule. The Code would require knowledge (or recklessness) as to each "material element," and it defines the term "material element" in a negative sense to include "an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with the harm or evil, incident to conduct, sought to be prevented by the law defining the offense."\(^{189}\) Just as with the apparent innocence rule, the Code leaves it to the courts to decide—as a categorical matter of statutory interpretation—if particular element facts are connected to the harm or evil targeted by the statute.

Suppose, for example, that Sally walks into a bank one day, reaches over the teller's counter, grabs a wad of bills from the cash drawer, then runs away only to be caught by the police with $1,100 in her bag. She is charged under the federal statute that prescribes up to ten years imprisonment for the theft of more than $1,000 from a bank whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC).\(^{190}\) But Sally is just a dumb thief. She did not count her money before she left the bank, and she has never heard of the FDIC, much less that it insures bank deposits. Must Sally be proved to know that she took more than $1,000? That the bank's deposits were insured by the FDIC? Under an honest application of the Model Penal Code's "material elements" approach, a court would conclude that Sally must know both these facts. The $1,000 monetary threshold certainly relates to the "harm or evil . . . sought to be prevented by the law defining the offense," because the very purpose of the statute is to stop people from taking the bank's money—the more money taken, the worse the offense. Although

189. See Model Penal Code § 1.13(10) (1962). If the legislature has not given element-by-element guidance as to the required mental state, a statute that contains a general "knowing" requirement would require "knowledge" as to each material element; a statute that is textually silent as to mental state would require at least recklessness as to each material element. See id. § 2.02(3)–(4).

190. 18 U.S.C. § 2113(b), (f) (2000). For the theft of more than $1,000, a defendant is subject to a felony penalty of up to ten years' imprisonment; for the theft of less than $1,000, a defendant is subject to a misdemeanor penalty of one year imprisonment. See id. § 2113(b).
the FDIC element could be viewed merely as federally jurisdictional in nature, it could also be said that Congress had a substantive interest in furnishing special protection for federal banks—as opposed to state or local banks—because their obligations are guaranteed by federal taxpayers. Hence, the FDIC element may not be "exclusively" jurisdictional in nature as the Code's "material elements" standard requires. In short, under the Model Penal Code's "material elements" approach, Sally likely goes free for failure of the government to prove her knowledge that more than $1,000 was taken and that the bank was federally insured.

In short, as discussed above, the apparent innocence rule has failed in a wide range of federal general intent crimes to protect the innocence purposes it vows to serve. Time and again defendants are convicted despite exculpatory knowledge concerning one or more elements of the offense. The Model Penal Code's material elements offense fares no better than the apparent innocence rule because of its similarly categorical nature that delegates to judges exclusively the power to determine what conduct is wrong.

III. TOWARD AUTHENTIC INNOCENCE

It is time for the Court to consider a new approach to the resolution of culpability for federal general intent crimes—a new approach that I shall call the authentic innocence rule of jury-found culpability. Rather than selecting what facts a defendant must be proved to know, the courts should instruct juries simply to determine if the defendant knew or believed that she was engaged in the kind of wrongdoing that is prohibited by the statute charged against her. I discuss below the justification for jury-found culpability and how it could easily be implemented by the courts. Lastly, I respond to several potential objections.

A. LETTING THE JURY DECIDE

I start from a baseline presumption that a defendant should not stand convicted of a crime if she did not know at the time that what she was doing was wrong. In Justice Jackson's oft-quoted words, "our substantive criminal law is based upon a theory of punishing the vicious will," and this "postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do

191. Indeed, Sally's argument would be strengthened by the fact that the current state of Commerce Clause law does not require Congress even to include an express jurisdictional element. The courts routinely infer the existence of federal jurisdiction simply from the nature of the class of commercial activities regulated, rather than any case-specific jurisdictional link. See, e.g., United States v. Moghadam, 175 F.3d 1269, 1275–76 (11th Cir. 1999); United States v. Bird, 124 F.3d 667, 670–77 (5th Cir. 1997).
wrong." Judge Posner has similarly observed that "[i]t is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted was a crime, or even that it was wrongful." The apparent innocence rule is in purpose consistent with the historical shift from a consequentialist theory of punishment embodied in the public welfare doctrine to retributivist theory that focuses on a defendant's moral blameworthiness.

This is not to say that there could never be conduct so imminently dangerous that Congress would not be justified for deterrence purposes if it imposed strict liability. But the focus here is on the default principle of culpability that should apply for general intent crimes, including the routine gun, drug, immigration, and environmental cases that fill most of the federal criminal docket. For these types of cases, and consistent with the Court's avowed goal to protect an innocent-minded defendant, it is most reasonable to presume an intent of Congress that the defendant be proved to have known she was doing wrong.

What does it mean to say that a defendant must have known she was doing "wrong"? This is an issue that the courts and commentators have long resolved in the context of insanity defenses and the traditional requirement of the M'Naghten rule that a defendant have known the difference between "right" and "wrong." A defendant knows she is doing wrong if she knows her conduct actually violates the law or—if ignorant of particular legal prohibitions—she knows her conduct crosses the boundary of what society believes to be permissible.

This latter aspect incorporates the moral perspective of society, not
just one individual or the defendant on trial. Just as "[t]he anarchist is not at liberty to break the law because he reasons that all government is wrong,"\textsuperscript{196} a defendant is not free to be judged solely by her own assessment of the wrongfulness of her conduct.\textsuperscript{197} The defendant in such cases would be aware that she is crossing a societally-prohibited line, even if she does not agree where society has drawn that line.

Once it is accepted that criminal penalties should be reserved only for those who choose to do something they know to be wrong, the relevant question is what adjudication method best ensures this result. Should courts resolve knowledge-of-wrongfulness issues as a categorical matter of law—that is, by deciding as an exercise of statutory interpretation which of the several particular factual elements, if known to a hypothetical defendant, mean that the defendant knew she was doing wrong? Or should trial courts instruct juries to resolve a particular defendant's knowledge of wrongfulness on a case-by-case basis—that is, to determine if a particular defendant knew enough about her conduct and all the surrounding circumstances to know that she was doing wrong?

Trial juries are the better choice. Each case potentially involves a unique mix of facts that bear on a particular defendant's knowledge that she was doing wrong, facts that courts do not always account for when crafting the contours of particular statutes. As Kyron Huigens has recognized, "[b]ecause moral condemnation is subtly responsive to variations in conduct and context, the public expects the criminal law to be subtly responsive in the same way . . . ."\textsuperscript{198} Only the jury at trial is positioned and normatively able to account for all the defendant-specific facts; juries consider an actual case, instead of imagining a typical one as judges do when deciding wrongfulness as a matter of statutory interpretation.\textsuperscript{199}

Juries are the constitutionally preferred decisionmaking body for matters bearing on a criminal defendant's responsibility. As the Supreme Court noted in making the right of jury trial applicable to the States, the framers recognized that "[p]roviding an accused with the right to be tried

\textsuperscript{196} People v. Schmidt, 110 N.E. 945, 950 (N.Y. 1915) ("The anarchist is not at liberty to break the law because he reasons that all government is wrong. The devotee of a religious cult that enjoins polygamy or human sacrifice as a duty is not thereby relieved from responsibility before the law.").

\textsuperscript{197} See Crenshaw, 659 P.2d at 493 ("If wrong meant moral wrong judged by the individual's own conscience, this would seriously undermine the criminal law, for it would allow one who violated the law to be excused from criminal responsibility solely because, in his own conscience, his act was not morally wrong.").

\textsuperscript{198} Huigens, supra note 109.

\textsuperscript{199} Because the jury is assigned a decision-making role under either my approach or the apparent innocence rule, this Article does not explore the empirical evidence concerning the general accuracy of a criminal jury's findings. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 55-59 (Little, Brown, & Co. 1966) (suggesting 75.4% agreement rate between juries and judges).
by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,” and that “[i]f the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.”

In addition, the jury’s multi-individual, deliberative nature makes it better positioned to resolve a particular defendant’s knowledge of wrongfulness. The presence of twelve decision makers ensures the inclusion of a far broader range of views and life experiences than those of a single judge. As Justice Breyer has noted, “jurors possess an important comparative advantage over judges,” and “[i]n principle, they are more attuned to ‘the community’s moral sensibility,’ because they ‘reflect more accurately the composition and experiences of the community as a whole.’” Rachel Barkow and Jenia Iontcheva Turner have convincingly emphasized this advantage of the jury in their proposals to expand the jury’s role at sentencing.

In defense of the apparent innocence rule, it could be argued that it is not just a single trial judge but ultimately multiple judges in the chain of appellate review that resolve issues of federal statutory interpretation, such as what particular factual elements a defendant must be proved to have known. But no more than three judges of a federal appeals court are likely to take up the issue for any one case, and then their judgment will be binding on all other judges within their circuit. It is the rare case that receives en banc review in a federal court of appeals, much less certiorari review by the full Supreme Court.

Although championing the apparent innocence rule, John Shepard Wiley concedes a vulnerability: that judges may impose their personal

views of morality in deciding what facts are not “innocent” and that a defendant should therefore be proved to know. He cautions judges to be aware of this risk and urges them to “consult popular or consensus moral codes, not their own.” According to Wiley, judges should not ask: “Is X action immoral?” but rather, “Should a reasonable person engaged in X conduct be aware of a risk that a consensus of Americans considers X conduct to be morally wrongful?”

But judges will scarcely have reliable data about what particular conduct “Americans” consider to be wrong. Are they to rely on news media polls? Social science research? Wikipedia? What assurance can there be of any recent data directed at the particular moral issue presented in a case? Rather than asking judges to surmise what other people think is wrong, the better choice is to let a jury make this common-sense, community-contextual judgment.

Indeed, an individual juror’s sense of morality will implicitly tend to account for and accommodate the moral viewpoints of others in the community. As Paul Robinson and John Darley have noted, the average person does not gauge wrongfulness simply by reference to her own “personal view but on an intuitive but grounded notion of justice that the speaker believes is shared by the community of moral individuals.” And as Stuart Green observes, “[W]hen we say that a person is culpable or that an act is wrongful or harmful, we mean, at least in part, that a consensus of society would view the person or the act in that manner.”

Among the available alternatives, a trial jury is the best weathervane of the “popular or consensus moral code.” To be sure, there may be some regional differences in viewpoint. The Sixth Amendment requires a federal criminal jury to be selected “from the State and the district wherein the crime shall have been previously ascertained by law,” and this may suggest, as Stanton Krauss has noted, “that federal juries are expected to express a local view of the facts, which may or may not be in accord with the view of most Americans.” But this regional influence is counterbalanced by the fact that almost all federal prosecution decisions are made in the first place at the local level by United States Attorney’s Offices and without case-specific input or direction from national officials of the Department of Justice. Moreover, the Constitution’s “fair

204. Wiley, supra note 12, at 1072.
205. Id. at 1074.
206. Id. at 1075.
208. Green, supra note 22, at 1554.
209. U.S. Const. amend. VI.
cross-section principle" means that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community." This is a further safeguard against the prospect that the determination of knowledge of wrongfulness may be made by persons whose views are not representative of the community.

Of equal significance is that federal criminal juries must be unanimous. Unanimity means extreme views will tend to be screened out, and consensus will coalesce on core conceptions of what conduct is morally acceptable. This filtering process will tend toward convergence on moral conceptions that are truly representative of broader society and that appropriately serve as a benchmark for a determination of wrongfulness.

By contrast, panels of appellate judges need not be unanimous. A simple majority of judges will carry the day, as in Staples where only five of nine justices were convinced that possessing a semi-automatic gun (as opposed to a machine gun) was apparently innocent conduct. In Ratzlaf, only five justices were convinced that the prohibition against structuring of bank deposits was a sufficiently "complex" crime that warranted an interpretation of "willful" to require knowledge of the law. Such internal divisions among appellate judges about what conduct is "wrong" undermines the legitimacy of their normative determinations of what is "innocent" for future cases.

Perhaps most significantly from the perspective of a criminal defendant, she has a say over who sits on her jury. She may exercise peremptory challenges and thereby remove prospective jurors whom she fears may harbor views against her. By contrast, a criminal defendant has no right to pick the judge who sits on her case to decide what particular facts she must be proved to have known. A defendant's rights to assert peremptory challenges at jury selection are further insurance against the imposition of non-representative views about what conduct is "wrong."

To ask jurors to determine a defendant's knowledge of wrongfulness rather than simply her knowledge of particular facts is a significant step toward restoring normative values to the culpability inquiry. A true rule of mandatory culpability would let the jury decide if a defendant knew she was doing wrong.

The jury-found culpability approach also redresses unfairness that may result from cases of enhanced liability, as in the case of Ancelmo Figueroa, the immigration inspector who was convicted for assisting the illegal reentry of an aggravated felon despite the absence of proof to

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show that he knew he was assisting an aggravated felon. In contrast to the categorical approach of the apparent innocence rule, jury-found culpability would allow for a more discriminating assessment of culpability for cases like Figueroa’s. In some cases, the evidence will show actual knowledge of the aggravating circumstance, such as evidence that an immigration inspector charged higher prices for certain kinds of aliens. On such facts, the jury would almost certainly conclude that the inspector knew he was engaging in the kind of wrongdoing targeted by the statute. But in other cases (like Figueroa’s) where evidence of the inspector’s actual knowledge is scant, the jury will fall back on its common sense and experience to determine if Figueroa nonetheless knew he was doing the type of wrong prohibited by the statute. To inform this judgment, the prosecution can establish Figueroa’s length of service as an immigration inspector, the extent of his training and instruction in the hazards of allowing the entry of criminal aliens, and the general incidence of entry into the United States of aliens with criminal histories (as opposed to other illegal aliens). If, as was true in Figueroa’s case, the inspector has engaged in a pattern of allowing other aliens to illegally enter, then this will favor the prosecutor’s argument—that Figueroa must have appreciated the risk that some of the illegal aliens he was admitting would have a criminal past. But if the evidence suggests little likelihood that Figueroa would have reason to know of Garcia’s criminal history, then the jury could acquit Figueroa of the assistance-to-an-aggravated-felon crime, in favor of convicting him for the lesser crime of assistance-to-an-excludable-alien. Jury-found culpability allows a calibration of culpability, while the apparent innocence rule does not.

B. IMPLEMENTING JURY-FOUND CULPABILITY FOR GENERAL INTENT CRIMES

Jury-found culpability could be implemented by courts in a simple manner for federal general intent crimes. First, as a jury is already required to do, it must decide on the existence of each base factual element of the charged offense (apart from whether the defendant knew of any of these facts). Second, as to the critical issue of what a defendant knew, a trial court would no longer instruct the jury to decide if the defendant knew any particular one, two, or more of the base element facts—there would be no more element-by-element knowledge requirements. Instead, as to the issue of the defendant’s knowledge, the court would instruct the jury to decide more generally if the defendant knew she was engaged in the kind of wrongdoing that the statute was designed to prohibit.

Before turning to what this new standard means, let’s consider a preliminary question: are courts able to start instructing juries as I suggest without authorization from Congress? Yes—the federal courts
have broad common law authority to determine the manner in which they instruct juries at trial and to decide the framework for how juries should resolve the elements of a criminal statute. Although the Due Process Clause requires proof of each element of an offense beyond a reasonable doubt,\(^2\) no decision of the Supreme Court further requires as a constitutional matter that juries address a defendant’s knowledge of any particular facts on an element-by-element basis.\(^3\)

As with the apparent innocence rule, jury-found culpability would operate as no more than a default rule of statutory interpretation. Subject to any constitutional limits that might constrain Congress from dispensing altogether with mens rea requirements (a subject that I do not address),\(^4\) Congress would remain free for any particular statute to require that the jury determine a defendant’s knowledge of particular facts rather than her knowledge of wrongfulness. In such cases, strict liability would result from a clear legislative policy choice of Congress rather than an implicit interpretive choice of the courts.

Federal juries are no strangers to the type of culpability inquiry I suggest. They already do it for a wide range of specific intent cases. For conspiracy crimes, juries must determine that the defendant acted knowingly and willfully with a purpose to disregard the law.\(^5\) Other federal criminal statutes expressly require a defendant to act with fraudulent intent or with knowledge of unlawful activity.\(^6\)

As noted above, the jury would not decide simply if the defendant knew she was doing anything wrong. Instead, the jury would decide if the defendant knew she was engaged in wrongdoing of the type that is the target of the criminal statute charged against her. This limitation on the scope of wrongfulness is essential to ensure a correlation between the crime charged against the defendant and what the defendant knew she did wrong. It would prevent a jury, as Justice Scalia feared in his dissent in *Bryan*, from convicting a defendant for unlicensed firearms dealing solely because he knew it was “wrong” to have double-parked his car in the course of gun-selling activity.\(^7\)

but, in so doing, allowed a gas leak to develop that eventually injured an elderly neighbor.\textsuperscript{219} The defendant pleaded guilty to the theft but was further charged and convicted for maliciously causing a noxious thing to be taken by another person so as to endanger her life.\textsuperscript{220} The trial court had instructed the jury that “malice” was shown by the defendant's theft.\textsuperscript{221} On appeal, the defendant's conviction was reversed for lack of any evidence that the defendant intended by his theft to allow the gas leak or to cause personal injury.\textsuperscript{222}

Jury-found culpability would require the jury to decide if the defendant knew her wrongfulness to be of the \textit{general} type targeted by the statute. To require more—that the defendant knew her wrongdoing to be of the \textit{exact} type targeted by the statute—would effectively require the defendant to know the precise law charged against her. A defendant could argue that her lack of knowledge of any single factual element, even of a technical aspect or jurisdictional-type element that does not correspond to the harm involved, means that she did not know her conduct to be targeted by the statute. The result would exempt law-ignorant defendants who maliciously engage in conduct that Congress intended to forbid when it enacted the statute.

Juries already embark on a similar “scope of the statute” inquiry in civil tort cases where a plaintiff attempts to use a defendant's breach of a criminal or regulatory statute as evidence of the defendant's negligence. In such cases, juries are instructed that breach of the statute is evidence of negligence but only “if you also find that the statute at question was intended to prevent the specific harm which occurred.”\textsuperscript{223} In the same manner, a criminal trial jury can feasibly decide if the defendant knowingly engaged in wrongdoing of the kind that is targeted by the statute charged.

In any event, the jury's focus would be on the defendant's knowledge of wrongdoing, rather than her knowledge of particular facts. For this reason, a jury-found culpability rule would not require a defendant to know all or any particular element facts of the offense. Of course, the defendant’s proven knowledge of specific element facts would be highly relevant to the jury’s wrongfulness query, and there would almost certainly be a large overlap in many cases. For Sam's case,

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\textsuperscript{219} Regina v. Cunningham, [1957] 2 Q.B. 396, 398.
\textsuperscript{220} Id. at 398-99.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 401.
\textsuperscript{223} See Hopkins v. Medeiros, 724 N.E.2d 336, 348 n.19 (Mass. App. Ct. 2000) (quoting jury instruction); see also Stafford v. Borden, 625 N.E.2d 12, 15 (Ill. App. Ct. 1993) (finding that defendant's sale of third-party gasoline in type of container prohibited by law was not basis for recovery by a plaintiff who was a victim of third-party's arson because “[t]he requirement that gasoline be sold only in an approved container, however, bears no relationship to the prevention of arson”).
\end{flushright}
a jury would doubtlessly evaluate what Sam believed to be in the trunk of his car in order to decide if Sam knew he was acting wrongfully. If the jury found that Sam knew he had a bomb in the car, its focus would turn to the ostensible reason for Sam’s possession of an unregistered bomb. The jury could consider Sam’s background, his experience, and any reasons (if offered by Sam) to decide if he knew he was doing wrong.

C. The Objections

This final section addresses four anticipated objections to an authentic innocence rule of jury-found culpability: (1) that jury-found culpability contravenes the principle that ignorance of the law is no excuse to criminal liability; (2) that jury-found culpability will result in jury nullification; (3) that jury-found culpability raises notice and legality concerns; and (4) that rather than instituting jury-found culpability, the courts should simply allow a defendant to present and prove a good-faith defense to general intent crimes.

i. Jury-Found Culpability and Mistakes of Law

One predictable objection to jury-found culpability will be that it conflicts with the venerable maxim that “ignorance of the law is no excuse.” But requiring the defendant to know she was doing wrong does not require the defendant to know the law. Any possible confusion can be resolved by the trial court instructing the jury that, although it must determine whether the defendant knew she was engaged in wrongdoing, the government need not prove that the defendant knew of the statute that has been charged against her. This type of instruction is already used for federal specific intent crimes, such as conspiracy, for which the government must prove a defendant’s purpose to join in an unlawful scheme but not a defendant’s knowledge of the underlying law.224 Of course, if the evidence suggests that the defendant happens to know of the specific law charged against her and that she is violating that law, then this would be conclusive evidence that the defendant knew she was doing wrong.

Beyond the core principle that a defendant need not know of the specific law charged against her, the ignorance-of-law principle is properly understood not to relieve the prosecution from proving a defendant’s knowledge of law other than the law charged against her where such “other” law forms the basis for one of the elements of a criminal offense. A classic example is Regina v. Smith, in which the government charged a defendant tenant with damaging certain fixtures that he had installed in an apartment.225 The court concluded that the defendant’s ignorance of the legal rule deeming the fixtures to belong to

the landlord was a valid defense to the charge that he wrongfully destroyed the fixtures.26

Many of the statutory examples that I discuss in Part II above arguably involved such ignorance-of-other-law circumstances (e.g., an alien's lack of knowledge that she did not have consent of the Attorney General to reenter the United States, a felon-in-possession defendant's belief that his prior offense was not a felony, Sam's belief that his explosive device was registered for use at his construction job-site, or a hazardous waste dumper's belief that he had a permit to dispose of waste). Of course, these scenarios might just as easily be re-framed to present mistakes of fact rather than mistakes of law (e.g., that the felon-in-possession defendant believed his lawyer's assurance that no conviction had ever entered or that the waste dumper was not aware that a permit had not been obtained from the relevant agency).

Academics have long criticized the ephemeral distinction between "mistakes of fact" that exonerate criminal defendants and "mistakes of law" that are deemed irrelevant to criminal culpability.27 Classic examples abound of the senselessness of the distinction, such as "Mr. Fact" and "Mr. Law"—two friends who go hunting on October 15, within the lawful hunting season from October 1 to November 30.28 Mr. Fact, however, thought the date was September 15, and Mr. Law thought the lawful hunting season was only during the month of November, and both are prosecuted for the crime of attempting to hunt out of season.29 Although both are plainly equally culpable, Mr. Fact is exonerated because his mistake was one of fact as to what date it was, while Mr. Law is convicted because he misunderstood the law as to the dates of the legal hunting season.30 Both were mistaken, but Mr. Law is convicted only because he made the wrong mistake.31

This senseless distinction between mistakes of law and mistakes of fact is further support for reocusing the inquiry on whether the defendant believed she was doing wrong and not why she thought she

226. Id.; see also Gerald Leonard, Rape, Murder, and Formalism: What Happens if We Define Mistake of Law?, 72 U. COLO. L. REV. 507, 518 (2001) (noting that "a mistaken view of civil property law can exculpate if it leads the defendant to believe he has a right to the property" and that "such a mistake of property law is always a defense to larceny").


229. Id.

230. Id.

was not doing wrong. In any event, even assuming a conflict between jury-found culpability and the mistake of law doctrine, this does not make jury-found culpability any less principled than the apparent innocence rule that is in force today. Although the Supreme Court has suggested adherence to “the background presumption that every citizen knows the law,” it routinely construes general intent statutes to require proof that the defendant knew of the specific law charged against her, as in Cheek (tax law), Ratzlaf (anti-structuring), and Liparota (food stamp regulations).

Perhaps most significant, the jury-found culpability approach aligns with the true purpose behind the principle that ignorance of the law is no excuse. As Dan Kahan has demonstrated, the conventional “Holmesian” basis for the ignorance principle is a “liberal positivist” concept that people should have incentives to learn the law, apart from any moral values that the law may represent. Contrary to this conventional view, Kahan shows that the ignorance principle is more convincingly defended by reference to “legal moralism”—the notion that the “law is suffused with morality and, as a result, can’t ultimately be identified or applied . . . without the making of moral judgments,” and “that individuals are appropriately judged by the law not only for the law-abiding quality of their actions but also for the moral quality of their values, motivations, and emotions—in a word, for the quality of their characters.”

Kahan combines “legal moralism” with what he calls the “prudence of obfuscation”—that is, the incentive of persons to learn the details of law so that they can specifically tailor their conduct to comply even in ways that they know not to be moral or in the spirit of the law. “The more readily individuals can discover the law’s content, the more readily they’ll be able to discern, and exploit, the gaps between what’s immoral and what’s illegal.” From this Kahan argues that the reason the law denies an ignorance excuse is to discourage citizens from strategically acquiring knowledge of the law for evasion purposes. The ignorance principle encourages moral behavior, because “if a citizen suspects the law fails to prohibit some species of immoral conduct, the only certain way to avoid criminal punishment is to be a good person rather than a

235. Id. at 128–29 (emphasis omitted).
236. Id. at 129 (emphasis omitted).
237. Id.
238. Id.
bad one."  

Consistent with Kahan’s understanding of the purpose served by the ignorance principle, jury-found culpability acknowledges the suffusion of criminal law prohibitions with moral concepts of wrongfulness, while empowering the jury to weed out strategic law evaders. Consider again the case of Waldemar Ratzlaf—whose conduct was anything but innocent, as evidenced by his traversing from bank to bank to deposit gambling proceeds after being advised of the currency transaction reporting law, and with awareness that he was under scrutiny from the Internal Revenue Service.

In light of the theoretical possibility that other hypothetical defendants could “innocently” structure cash deposits (such as a businessman seeking simply to conceal his transaction of large amounts of cash from would-be robbers), the Court in *Ratzlaf* applied the apparent innocence rule to conclude as a matter of blanket statutory interpretation that any defendant charged with structuring cash deposits must be proved to know structuring to be illegal. Jury-found culpability would have allowed a more tailored inquiry. The jury could distinguish between the tactical Ratzlaf and a future defendant who actually engaged in structuring for innocent-minded reasons. As Holmes notes, “[i]t needs no further explanation to show that, when the particular defendant does for any reason foresee what an ordinary man of reasonable prudence would not have foreseen, the ground of exemption [from liability] no longer applies.”

Moreover, because jury-found culpability is not categorical in the nature of a rule of statutory interpretation, it does not suffer from the same defect that Kahan identifies for the rule of lenity, which would require interpretation of a statute in a criminal defendant’s favor even for cases where it is clear that a defendant “ha[s] deliberately engaged in socially undesirable conduct” but who, because of the ambiguity that can be urged under the rule of lenity, “hope[s] to avoid punishment on the basis of an unanticipated gap in the law.” In short, jury-found culpability affords a more discriminating appraisal of defendants who engage in strategic law-evading activity, consistent with the purpose for negating an ignorance-of-law defense.

2. **Jury Nullification**

A jury-found culpability approach will not open the flood gates for “jury nullification,” at least as that term is properly understood. “Jury

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239. *Id.*
241. *Id.* at 149.
nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged." Jury-found culpability does not set guilty defendants free, but only defendants who did not know they were doing wrong. Under the jury-found culpability approach, the jury would still be instructed that it must accept the judge's determinations of law and that it could not decline to return a verdict simply because it does not agree with the law. Moreover, a jury would still receive the standard cautionary instructions that guard against consideration of rendering a verdict on the basis of pure sympathy for the defendant or the defendant's race, religion, or ethnicity.445

Jury-found culpability would empower the jury to acquit in cases where the defendant knows some or all of the facts of her offense but nonetheless did not know she was doing wrong. Consider the well-known case of Wisconsin v. Reed, which involved an ex-felon (Leroy Reed) who was charged with unlawful possession of a firearm by a convicted felon.446 Reed was a man of very limited mental capacity who took a mail-order course about how to become a private investigator and who then bought a gun as recommended by the course materials.447 One day he stood (without his gun) by the courthouse door to wait for business to come his way.428 Instead, a sheriff appeared, to whom Reed confided his career ambitions and his purchase of a gun.429 At the sheriff's request, Reed went home to get his gun and left it with the sheriff.430 The jury acquitted him.431

For cases like Leroy Reed, jury-found culpability would remove a common ground for jurors to nullify contrary to law. Because jury-found culpability would allow a broader mental state inquiry, jurors could now account in their verdict for the defendant's absence of a wrongful state of mind. As John Parry suggests, "[i]f moral judgments are inevitable at criminal trials, then the question is not whether to make such judgments, but rather who should make them and what constraints to place upon..."
them."\textsuperscript{252}

3. Notice and Legality

A third potential objection to jury-found culpability could be that its more flexible approach contravenes accepted principles of notice and legality—principles designed to assure that the citizenry is reasonably apprised of the scope of conduct that is illegal. Although defendants would not know exactly what facts the prosecution must prove that they knew, defendants would receive the greater benefit of knowing that she cannot be convicted at all unless found to have acted with knowledge that they engaged in the type of wrong prohibited by the charged statute. A defendant has no such assurance under the apparent innocence rule, for which the courts determine on a statute-by-statute basis (perhaps for the first time in a defendant’s particular case) which element facts a defendant must be proved to have known.

Jury-found culpability not only furnishes fair notice to criminal defendants but also, as a practical matter, will likely dissuade prosecutors from charging defendants with obscure regulatory crimes where the facts suggest little likelihood that the defendant knew she was doing wrong. To be sure, the criminal law justifiably serves a norm-changing function, and sometimes prosecutors will charge crimes in order to change concepts of moral wrongdoing, as with campaigns to prosecute “deadbeat dads” or drunk drivers. But jury-found culpability offers some protection against prosecutors moving too quickly to seek criminal penalties for the violation of counterintuitive or little-known rules.

For example, consider the case of Carlton Wilson, who was charged with unlawful possession of a firearm by one who is subject to a domestic protection order—a statute that was a “relatively new and obscure portion” of the federal criminal code at the time that Wilson was arrested in 1996.\textsuperscript{253} One day Wilson stopped his truck by the side of the road, and a police officer stopped to assist him.\textsuperscript{254} When the officer ran a routine check on Wilson’s name, he learned that Wilson was subject to an arrest warrant for failure to appear in court, and so he arrested him.\textsuperscript{255} An inventory search of Wilson’s truck found two firearms and another loaded handgun in a “fanny pack” that Wilson had been wearing.\textsuperscript{256}

More than a year before Wilson’s roadside encounter with the
police, he had appeared in state court where he consented to entry of a
two-year order of domestic protection from his ex-wife. There was no
indication that Wilson's prior abuse of his ex-wife involved guns. The
protection order was entered during the course of a ten minute hearing
in a state judge's chambers at which Wilson was not represented by a
lawyer. Nor did the state judge place a checkmark in the boilerplate
portion of the protection order that would have required Wilson to
divest himself of any guns. Wilson was not otherwise told by the state
judge that he could not possess a gun. The fact that the restraining
order contained no reference to guns may have lulled [Wilson] into
thinking that, as long as he complied with the order and stayed away
from his wife, he could carry on as before.

Wilson's conviction and sentence of forty-one months' imprisonment
was affirmed by a divided panel of the Seventh Circuit. The majority
reasoned that Wilson need only know the facts of his conduct (which it
was undisputed that he did—that he possessed a gun). The court
rejected Wilson's due process claim on the ground that Wilson did not
have to know the law.

In dissent, then-Chief Judge Posner argued that, because of the
"knowing" requirement of the statute, it was a "linguistically permissible
interpretation of the statute" to require that the "government would
have to prove that he knew that continued possession of guns after the
restraining order was entered was a crime." In Posner's view, Wilson
was the "classic unwarned defendant," and his situation differed from
cases involving the violation of "law [that] is common knowledge, as in
the case of laws forbidding people to own hand grenades, forbidding
convicted felons to own any firearms, and requiring a license to carry a
handgun."

Posner's proposed solution to reinterpret the statute highlights the
weakness of the categorical statutory interpretation approach to
evaluating a criminal defendant's culpability. Under Posner's view,
Carlton Wilson should have been proved to know the wrongfulness of his
conduct, while a felon-in-possession defendant would not. Both criminal

257. Id. at n.1.
258. Id. at 294–95 (Posner, C.J., dissenting).
259. Id. at 284 (majority opinion); id. at 294 (Posner, C.J., dissenting).
260. Id. at 294.
261. Id.
262. Id. at 295.
263. Id. at 293.
264. Id. at 289 (majority opinion).
265. Id. at 288–89.
266. Id. at 296 (Posner, C.J., dissenting).
267. Id.
268. Id. at 295 (internal citation omitted).
provisions, however, are subsections of the same statute, 18 U.S.C. § 922. They are both subject to the identical “knowingly violate” mental state requirements of 18 U.S.C. § 924(a)(2). No possible textual basis could justify treating the knowledge requirements of these two statutes differently in the way Posner proposed. The only reason to distinguish the two statutes would be the relative novelty of the domestic-protection-order provision. Yet, as the public over time became generally aware of the domestic-protection-order prohibition, the statute would presumably have to be “reinterpreted” again to be consistent with its companion felon-in-possession provision—to require only that a defendant know the facts of his conduct.

Jury-found culpability would solve this conundrum. It would leave it to the jury to determine if the defendant knew he was engaged in the type of wrongdoing prohibited by the statute. To make this decision, a jury could factor in the novelty of a criminal prohibition and the degree to which it could be said that a defendant like Carlton Wilson was fairly on notice that he was doing wrong. This comports with Samuel Buell’s observation that “[e]ven if the criminal law’s technical requirements for notice are mostly constructive and fictional, a residual commitment either to congruity between the criminal law and moral norms or to actual notice of the law remains an essential feature of our polity’s account of minimal due process, at least in serious criminal cases.”

A counterpart to Judge Posner’s concern with the enforcement of new criminal statutes is Judge Calabresi’s concern for the validity of obligations imposed by older statutes that, because of the passage of time, can no longer be said to reflect the community’s values (a phenomenon he calls “statutorification”). Among other measures, Calabresi posits an affirmative “judicial sunsetting” role for the courts in declining to enforce or apply time-worn statutes that have become “sufficiently out of phase with the whole legal framework.”

Whether the problem is criminal statutes that are too new or too old, jury-found culpability redresses this issue in a manner that would neither commit the courts to altering their interpretations of statutes over time (as Posner would do for new and obscure statutes) or require courts to decline to enforce some statutes (as Calabresi would do for obsolete statutes). Juries would temper the application of these statutes on a case-by-case basis where unfairness to the defendant was clear.

It is not just that statutes change over time. What society considers to be wrong also changes with time. Momentous events such as the

271. Id. at 165–66.
272. See, e.g., Green, supra note 22, at 1555 (“[S]ociety’s views of morality change over time and
September 11 terrorist attack or spates of student shootings in schools may well color a judge or jury's evaluation of whether a defendant knew his conduct to be wrongful. Today, a defendant with a weapon in an airplane or a school will be hard-pressed to claim that he was not aware of its wrongful.

The apparent innocence rule cannot adjust over time with society's evolving standards of wrongfulness. Because the apparent innocence rule operates by means of interpreting a statute to require knowledge of particular facts, the meaning of what facts connote wrongfulness is cast in perpetuity as a matter of statutory interpretation and entitled to continued adherence under *stare decisis*. By contrast, flexibility remains under jury-found culpability for juries to exonerate defendants who did not know they were doing wrong.


A final potential objection to jury-found culpability is whether there is a more narrowly tailored alternative to redress the shortcomings of the apparent innocence rule. For example, in cases where the defendant may not have known he was doing wrong, why not simply allow the defendant to raise and prove a “good faith” defense? As it is now, good faith is not ordinarily a defense to a general intent crime, and so allowance of a good faith defense would require a change in present practice. But placing the burden on the defendant of showing good faith would also undermine the government's baseline burden to prove its case beyond a reasonable doubt. Indeed, although a “good faith” defense is already allowed for specific intent cases, the courts have made clear that proof of good faith is not the defendant's burden; the burden at all times remains on the prosecution to negate the defendant's good faith as part of its obligation to establish that the defendant acted with specific intent. Moreover, requiring the defendant to prove his own good faith would be constitutionally problematic. The Constitution allows placing a burden on the defendant to prove defenses that are collateral or additional to the elements of the crime itself. For example, defenses such...

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... what one generation views as morally wrongful or socially harmful frequently deviates from the views of an earlier or succeeding generation.


274. Cf. Leipold, supra note 244, at 314–15 (proposing that legislatures create statutory jury nullification defense in cases where the jury does not believe conduct occasioned the harm or risk intended by a statute).

275. See, e.g., United States v. Ables, 167 F.3d 1021, 1031 (6th Cir. 1999). As noted in Part I, for specific intent statutes and other general intent statutes where Congress requires “willful” conduct the prosecution would be required to show the absence of good faith.

276. See, e.g., United States v. Harris, 185 F.3d 999, 1007 (9th Cir. 1999); United States v. Doyle, 130 F.3d 523, 540–41 (2d Cir. 1997).
as necessity, duress, and self-defense are exculpatory because they excuse or justify otherwise wrongful conduct; they do not negate a defendant's knowledge that his conduct is otherwise wrong. For this reason, in *Dixon v. United States*, the Supreme Court recently upheld a requirement that a defendant prove duress, noting that the defense "may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself." The duress defense "allows the defendant to 'avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary mens rea was present.'" In contrast to *Dixon*, to require a defendant generally to prove her own good faith in general intent cases would saddle the defendant with disproving an aspect of her own mens rea with respect to the factual elements of a crime.

**Conclusion**

Consistent with the jury's central role to render judgment in criminal cases, now is the time for the Court to revisit how juries resolve mens rea for federal general intent crimes. Indeed, the Supreme Court's development of the apparent innocence rule rests on its acknowledgement of the primacy of protecting innocent conduct. Only the Court's methodological approach of judicial element-by-element interpretation stands in the way of protecting innocence — to allow a jury to decide for each case if a defendant knew she was doing wrong.

The authentic innocence rule of jury-found culpability ensures a true culpability inquiry. There is little reason to suppose that Congress intends the conviction of the morally blameless. Nor should those who are accused — and the juries who judge them — expect anything less.

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278. *Id.* at 2442.