JURISDICTIONAL ELEMENTS AND THE JURY

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Do jurisdictional elements in criminal statutes actually matter? Of course, formally, the answer is obvious; jurisdictional elements are of paramount importance. In fact, they often serve as the entire justifying basis for a federal (rather than state) criminal prosecution. But beyond mere technicalities, do jurisdictional elements actually make a difference in a jury deliberation room?

In pursuit of an answer, this Article undertakes a novel empirical study designed to assess the antecedent issue of how laypeople weigh jurisdictional elements when determining guilt. The project's experiment ultimately finds that when one increases the amount of evidence demonstrating a defendant's substantive guilt, laypeople improperly transmute their decisions regarding that substantive guilt into determinations regarding supposedly independent jurisdictional elements. That is, the study suggests that individual laypeople increasingly—and improperly—deem jurisdictional elements satisfied as a defendant's substantive guilt becomes more apparent.

Given that empirical finding, the Article offers a number of contributions to the normative literature. For one, it directly raises follow-on questions as to whether jurisdictional elements truly constitute a meaningful barrier to federal prosecution, especially when a defendant's factual guilt seems clear. Of course, a jurisdictional requirement that ebbs and flows based on layperson perceptions of a defendant's substantive guilt is no jurisdictional requirement at all. Additionally, the project informs enduring debates in courts and Congress. Namely, the Article's insights about layperson epistemology

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encourage renewed scrutiny of the optimal balance of decision-making authority in the courtroom.

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INTRODUCTION

Do jurisdictional elements in criminal statutes matter? Formally, the answer is obvious—jurisdictional elements are of paramount importance. In fact, following the Supreme Court's landmark decision in *United States v. Lopez*, jurisdictional elements often serve as the entire justifying basis for a federal (rather than state) criminal prosecution; they are a federal prosecution's *raison d'être*.[1]

But beyond legal formalities, do jurisdictional elements in criminal statutes *actually* matter? That is, do they actually make a difference in a jury deliberation room? Intuitively, there is room for doubt. Imagine, for instance, that a juror is fully convinced that a defendant committed a particularly egregious offense; nonetheless, she fails to see how the defendant's heinous crime affects "interstate commerce."[2] Will that layperson truly vote to acquit the defendant on legally complex jurisdictional grounds despite her certainty of the defendant's factual and moral culpability? Or, perhaps even implicitly, will her perceptions about a defendant's substantive guilt shape supposedly independent determinations about jurisdiction?

This Article begins the process of exploring these pressing empirical questions.

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1 United States v. Lopez, 514 U.S. 549, 561 (1995) (noting that jurisdictional elements "ensure, through case-by-case inquiry, that the [conduct] in question" relates to one of Congress's constitutionally enumerated powers).

2 For example, the Hobbs Act criminalizes, inter alia, "the unlawful taking or obtaining of personal property from [another] person . . . against his will, by means of actual or threatened force, or violence, or fear of injury," but only so long as that conduct "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a)–(b).

Article III outlines the criminal jurisdiction of federal courts.[3] It does not grant the federal judiciary limitless authority to resolve criminal disputes but instead requires that a criminal case arise under the Constitution or a congressionally enacted criminal statute before a federal court may oversee its adjudication.[4] In reality, because the Constitution does not set forth an extensive list of criminal activities, a federal court's criminal jurisdiction often depends on congressional discretion.[5] That is, federal courts often look to criminal statutes enacted by Congress, rather than provisions within the Constitution, to identify the source and scope of their jurisdiction.

But Congress itself is constrained.[6] It may not "punish felonies generally," but must instead see that all of its criminal statutes "are connected to one of its constitutionally enumerated powers," such as its power to regulate interstate commerce.[7] To ensure it meets this fundamental requirement, Congress often takes steps to directly highlight the source of its enabling constitutional authority within criminal statutes. Usually, this is accomplished through the inclusion of so-called jurisdictional elements in criminal offenses.[8]

As noted, jurisdictional elements serve to establish the basis for federal jurisdiction by forcing prosecutors to prove a particularized connection between a defendant's conduct and a constitutionally enumerated congressional power.[9] For example, the Gun-Free School Zones Act of 1995, a post-*United States v. Lopez* revision of the Gun-Free School Zones Act of

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[3] *See* U.S. CONST. art. III, § 2, cl. 1.

[4] *Id.*; Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) ("Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.").

[5] *See* Thomas J. Egan, *The Jurisdictional Element of 18 U.S.C. § 844(i), A Federal Criminal Commerce Clause Statute*, 48 J. URB. & CONTEMP. L. 183, 188 (1995) ("The only real restriction [to federal jurisdiction] is congressional discretion.").

[6] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821) ("Congress cannot punish felonies generally . . . .").

[7] Torres v. Lynch, 136 S. Ct. 1619, 1624 (2016) ("Congress cannot punish felonies generally . . . ; it may enact only those criminal laws that are connected to one of its constitutionally enumerated powers, such as the authority to regulate interstate commerce." (citations and internal quotation marks omitted)).

[8] *Id.* ("[M]ost federal offenses include, in addition to substantive elements, a jurisdictional one, like the interstate commerce requirement . . . .").

[9] *See* United States v. Lopez, 514 U.S. 549, 561 (1995); Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1204 &3 n.3 (2006) (listing cases in which the Supreme Court has considered the "bounds of Congress's enumerated powers").

1990, criminalizes the possession of a firearm within a school zone but only so long as the firearm "moved in or that otherwise affects interstate or foreign commerce."[10] Likewise, the Military Extraterritorial Jurisdiction Act states that federal courts have jurisdiction over extraterritorial crimes committed by government employees or contractors but only if the defendant's employment "relates to supporting" a Defense Department mission.[11] Where prosecutors do not demonstrate the satisfaction of these typically independent jurisdictional elements beyond a reasonable doubt, no conviction may stand.[12]

As jurisdictional elements became increasingly common in criminal statutes, courts began to wrestle with the question of which institutional entity—judge or jury—should resolve them.[13] On the one hand, jurisdictional elements require a significant amount of factfinding to establish the predicate context to which the law will be applied; on the other hand, once that factual predicate is in place, the resolution of jurisdictional elements hinges on the application of paradigmatically legal standards.[14] The first federal appellate courts to address these mixed questions of law and fact determined that courts should have the final say.[15] The Second Circuit, for example, found that it was appropriate for juries to establish the facts necessary to resolve jurisdictional elements, but when it came to determining whether, say, a robbery affected interstate commerce, a judge should step in.[16]

In *United States v. Gaudin*, however, the Supreme Court upended this approach, holding that the Fifth and Sixth

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10 18 U.S.C. § 922(q)(2)(A).

11 *See* 18 U.S.C. §§ 3261, 3267.

12 *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869))).

13 *See* United States v. Calder, 641 F.2d 76, 78 (2d Cir. 1981) ("It was for the court to determine as a matter of law the jurisdictional question of whether the alleged conduct affected interstate commerce; it was for the jury to determine whether the alleged conduct had in fact occurred."); United States v. Augello, 451 F.2d 1167, 1170 (2d Cir. 1971) ("[I]t was for the court, and not the jury, to determine whether the Government's evidence, if believed, would bring the activities of the defendant within the statute and sustain federal jurisdiction."); *see also* United States v. Vasquez, 267 F.3d 79, 89 (2d Cir. 2001) (interpreting *Calder* and *Augello*).

14 *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 512 (1995) (noting that resolving mixed questions involves "the determination of . . . subsidiary questions of purely historical fact" but also "requires applying the [relevant] legal standard . . . to these historical facts").

15 *See* Calder, 641 F.2d at 78; *Augello*, 451 F.2d at 1170.

16 *Calder*, 641 F.2d at 78.

Amendments require juries—not judges—to resolve both the factual and legal components of mixed-question jurisdictional elements contained within criminal statutes.[17]

Gaudin seemingly effected a material shift in courtroom practice, as jurisdictional issues previously resolved by judges fell to the exclusive decision-making province of juries. As foreshadowed above, juries began deciding whether the possession of a firearm in a school zone "affect[ed] interstate commerce" with minimal reference to the robust judicial doctrine built up around the Commerce Clause;[18] juries began considering whether a defendant's employment "related to supporting" a Defense Department mission absent pages of judicial precedent detailing that standard.[19]

Nonetheless, some courts downplayed this delegation of duty, insisting that "[t]here is little reason to believe that juries will have substantially different interpretations of [jurisdictional elements] than judges and therefore, practically speaking, *Gaudin* [did] little to alter the status quo."[20]

But is that claim empirically sound? To commence exploration of that question, this Article undertakes a novel empirical study designed to assess the antecedent issue of how individual laypeople weigh jurisdictional elements when determining guilt. Through a novel experiment,[21] the Article offers initial insight suggesting that laypeople discount (or even disregard) the importance of jurisdictional elements in criminal statutes.

The Article's empirical study begins with a hypothesis, one buoyed both by popular intuition and by the existing social psychology literature:[22] that as one alters the amount of evi-

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17 515 U.S. at 522–23 ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.").

18 United States v. Lopez, 514 U.S. 549, 561 (1995).

19 United States v. Slatten, 865 F.3d 767, 781 n.1 (D.C. Cir. 2017) ("MEJA [Military Extraterritorial Jurisdiction Act] adds a jurisdictional element to the underlying offenses, which element constitutes a jury issue that must be established by the government beyond a reasonable doubt." (citing United States v. Williams, 836 F.3d 1, 6–7 (D.C. Cir. 2016))).

20 Bilzerian v. United States, 127 F.3d 237, 241 (2d Cir. 1997).

21 The survey, as well as the entire study, was approved by the University of Arkansas Institutional Review Board (IRB). Its protocol number is number 2006270908.

22 For example, the project rests on a foundation established in Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 519 (1991) ("[T]he juror is a sense-making information processor who strives to create a meaningful summary of the evidence available that explains what happened in the events depicted through witnesses,

dence demonstrating a defendant's substantive guilt, laypeople will improperly transmute their decisions regarding substantive guilt into their determinations regarding supposedly independent jurisdictional elements. That is, the Article hypothesizes that laypeople will increasingly (and improperly) deem *jurisdictional* elements satisfied when the only variable that changes is the amount of *substantive* evidence demonstrating a defendant's guilt. Though technical, the hypothesis accords with common sense and a robust existing literature.[23] Consider a few quick illustrations. If a layperson believes that a defendant did indeed rob a victim, will she really acquit that robber simply because she does not see a connection between the robbery and the abstract notion of "interstate commerce?" If a layperson believes that someone has murdered a victim overseas, will they really vote to acquit the murderer merely because they are unsure if his employment is "related to supporting" a Defense Department mission?[24] In both contexts, it is possible, perhaps even rational, for laypeople to disregard legalistic, nebulous jurisdictional elements and allow the substantive evidence to control their general verdict.

With that hypothesis in hand, the Article then presents the results of a novel empirical study designed to test it.[25] As part of the study, three hundred participants—laypeople—were recruited to decide a fictional criminal case. Inspired by the Supreme Court's landmark Commerce Clause decision in *United States v. Lopez*, the fictional case involves a gun found on the grounds of a high school.[26] Law enforcement accuse a twelfth grader of bringing the gun to school and charge him under the aforementioned Gun-Free School Zones Act. To find him

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exhibits, and arguments at trial."); Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCH. 857, 868 (1991) (finding that jurors form "naive concepts of crime categories" and that these "prototypes . . . play a role in decision making"); Dan M. Kahan, *Lay Perceptions of Justice vs. Criminal Law Doctrine: A False Dichotomy?*, 28 HOFSTRA L. REV. 793, 795 (2000) ("Experimental studies suggest that jurors identify crimes prototypically rather than algorithmically.").

23 *See, e.g.*, Pennington & Hastie, *supra* note 22, at 519 (concluding that juries use "witnesses, exhibits, and arguments" to summarize and make sense of the evidence presented at trial); Smith, *supra* note 22, at 868 (finding that people use prototypes of crime categories when judging an individual's guilt); Kahan, *supra* note 22, at 795 ("[J]urors consult inventoried prototypes, which consist not of necessary and sufficient conditions, but rather of collections of attributes, against which putative instances of a crime are judged more or less typical.").

24 Notably, this exact question was at issue in *United States v. Slatten*. *See* 865 F.3d at 781.

25 Appendix A contains a complete replication of this Article's survey, including all of the variants employed in each experimental condition.

26 *See* United States v. Lopez, 514 U.S. 549, 551 (1995).

guilty, therefore, the study participants must have found both that the student is the actual owner of the firearm and that the firearm "moved in or . . . otherwise affects interstate or foreign commerce."[27] Within that general context, the three hundred study participants were then randomly subdivided into six experimental conditions. The conditions varied in the amount of substantive evidence ("low" or "high") tying the defendant to the gun and the amount of jurisdictional evidence ("weak," "close," or "strong") demonstrating satisfaction of the jurisdictional element.

The results of the study suggest that, as hypothesized, individual laypeople do not make independent jurisdictional determinations when pursuing a general verdict. Instead, the amount of evidence demonstrating a defendant's substantive guilt has a statistically significant effect on layperson confidence in the satisfaction of a jurisdictional element. Where there is more evidence demonstrating a defendant's substantive guilt, there is greater layperson confidence in jurisdiction; where substantive evidence decreases, so too does layperson confidence in jurisdiction. For example, in the study, if the participants were more convinced that the firearm belonged to the twelfth grader, they were more confident that the firearm "moved in" or "affected" interstate commerce; if they were less convinced that the firearm was his, their confidence in the satisfaction of the jurisdictional element decreased. Of course, as an analytical matter, the study is designed to ensure that the question of whether the firearm belonged to the defendant has no legal bearing on the supposedly independent jurisdictional determination.[28] Yet the study suggests that laypeople inappropriately transmute decisions about substantive guilt into decisions about jurisdiction.[29] Figure 1 offers an introduction to this Article's key empirical findings—findings that are explored in full in the pages below.[30]

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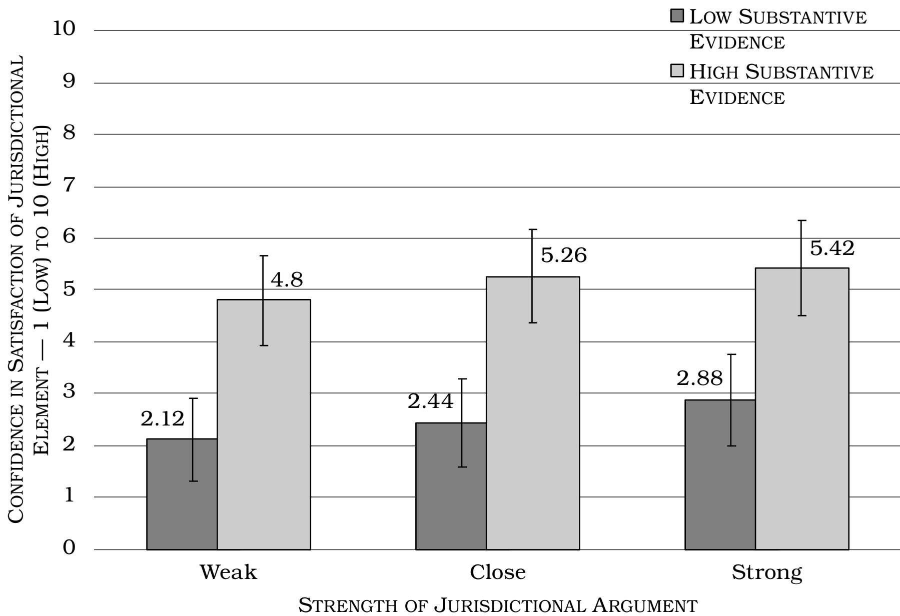
27 18 U.S.C. § 922(q)(2)(A).

28 *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (noting that where jurisdiction "ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause" (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869)).

29 And notably, the transmutation effect holds even when one adjusts the strength of the jurisdictional arguments. Even when the jurisdictional question is not particularly close, and there is a strong argument for or against jurisdiction, it is still perceptions about substantive evidence (rather than direct jurisdictional evidence) that continue to drive statistically significant differences in layperson opinions about jurisdiction.

30 All data supporting this Article's figures and table is on file with the author and available upon request.

FIGURE 1: EFFECT OF SUBSTANTIVE EVIDENCE ON LAYPERSON JURISDICTIONAL DETERMINATIONS



Given its empirical findings, this Article contributes in numerous ways to the ongoing normative literature. In particular, the Article offers a preliminary suggestion that *Gaudin*'s delegation of decision-making authority did indeed "alter the status quo" by introducing inappropriate jurisdictional flexibility in criminal cases.[31] The study suggests that individual laypeople walk into the courtroom with a dangerous prior; that prior, in turn, gives rise to a demonstrable risk that jury determinations regarding the satisfaction of jurisdictional elements might hinge, in part, on the legally irrelevant evidence of a defendant's substantive guilt.

And that jurisdictional flexibility is significant for a number of reasons.

First, it suggests that individual laypeople—future jurors—are not predisposed to limit the power of the federal government when proper enforcement of jurisdictional limitations to prosecution is most necessary. If jurisdiction is to serve as an independent bulwark limiting the power of the federal govern-

[31] *Contra* Bilzerian v. United States, 127 F.3d 237, 241 (2d Cir. 1997) (stating that "[t]here is little reason to believe that juries will have substantially different interpretations of [jurisdictional elements] than judges and therefore, practically speaking, *Gaudin* [did] little to alter the status quo.").

ment, it must apply equally across all criminal prosecutions.[32] A jurisdictional requirement that ebbs and flows based on layperson perceptions of a defendant's substantive guilt is no jurisdictional requirement at all. Indeed, selective expansion of the federal government's ability to prosecute crimes where substantive guilt is conclusive runs contrary to the mandate that where jurisdiction "ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[33] More fundamentally, it violates the legal system's normative pursuit of equal protection and horizontal equity.[34] Far from treating like cases alike, layperson-driven jurisdictional flexibility sees an independent basis for acquittal in one case become all but ineffectual in another.

Second, the identification of layperson-driven jurisdictional flexibility should inspire renewed consideration of the appropriate balance of decision-making authority in the courtroom. Of course, *Gaudin* is unlikely to be overruled; given principles of *stare decisis*, the Supreme Court itself is unlikely to claw back decision-making authority over jurisdictional elements from the jury.[35] But avenues for change still exist. Normative reform directly combatting the material risk of jurisdictional flexibility is still possible. For one, courts might require the use of special verdict forms rather than general verdict forms in criminal cases.[36] This Article's empirical study

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[32] Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39, 72 (2003) ("[T]he criminal law promises to apply *equally* and *fairly* to all who commit crimes within the jurisdiction.").

[33] *Steel Co.*, 523 U.S. at 94.

[34] *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 80 (2d ed. 2008) (noting that "the ideal of justice" requires the law to "treat[ ] morally like cases alike and morally different ones differently"); Vincent Chiao, Ex Ante *Fairness in Criminal Law and Procedure*, 15 NEW CRIM. L. REV. 277, 279 (2012) (stating that a requirement of an equitable criminal law is that it "treats like cases alike"); Jennings v. Rodriguez, 138 S. Ct. 830, 865 (2018) (Breyer, J., dissenting) ("[T]he law treats like cases alike.").

[35] *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) ("Respecting *stare decisis* means sticking to some wrong decisions."); Cal. Cmtys. Against Toxics v. EPA, 928 F.3d 1041, 1052 (D.C. Cir. 2019) ("*Stare decisis* means that 'the same issue presented in a later case in the same court should lead to the same result.'" (quoting *In re* Grant, 635 F.3d 1227, 1232 (D.C. Cir. 2011))); Flowers v. United States, 764 F.2d 759, 761 (11th Cir. 1985) ("*Stare decisis* means that like facts will receive like treatment in a court of law.").

[36] *See, e.g.*, United States v. Reed, 147 F.3d 1178, 1180 (9th Cir. 1998) (ruling that use of a special verdict form is within the discretion of the court); Vichare v. AMBAC Inc., 106 F.3d 457, 465 (2d Cir. 1996) ("The formulation of special verdict questions rests in the sound discretion of the trial judge, and should be reviewed by an appellate court only for an abuse of that discretion."); United States v. Stonefish, 402 F.3d 691, 698 (6th Cir. 2005) ("Over the course of

suggests that special verdicts could significantly combat instances in which laypeople vote to convict despite acknowledging an insufficient jurisdictional basis for that general verdict.[37] Additionally, layperson-driven jurisdictional flexibility can be fought by policymakers in Congress. Despite *Gaudin*'s holding, the Supreme Court has left Congress a clear path for delegating decision-making authority over jurisdiction to judges rather than juries. By making its own findings about how regulated conduct is categorically traceable to a constitutionally enumerated congressional power, "Congress is able to avoid the reasonable-doubt and jury-trial requirements with a simple statutory drafting choice."[38]

The Article proceeds in three parts. Following this introduction, Part I sets the stage for the Article's hypothesis. It explores the legal landscape—in particular, the delegation of decision-making authority over mixed-question jurisdictional elements—before and after the *Gaudin* decision. Part I also delves into the social psychology literature, demonstrating that the Article's hypothesis is not a shot in the dark but is instead a natural extension of previously observed phenomena.

Part II then details this project's empirical study. A controlled experiment examined whether study participants—laypeople—were increasingly willing to deem a jurisdictional element satisfied when evidence of the defendant's substantive guilt increases but evidence actually demonstrating satisfaction of a jurisdictional element remains constant. As hypothesized, participants did increasingly deem the jurisdictional element satisfied. Part II therefore suggests the existence of a transmutation effect by which jury perceptions of non-jurisdictional, substantive evidence are seen to improperly influence supposedly independent determinations regarding jurisdictional elements. At a broader level, the presence of this transmutation effect suggests that laypeople do not fully respect jurisdictional elements as independent defensive safeguards limiting the power of the federal government. After laying out the details of the study, Part II also addresses potential objections and obstacles to the project.

Part III considers the normative implications of this Article's empirical study. Notably, the project has the potential to

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the last two decades . . . exceptions to the general rule disfavoring special verdicts in criminal cases have been expanded and approved in an increasing number of circumstances." (brackets and internal quotation marks omitted)).

37 *See infra* Part III.

38 Lemos, *supra* note 9, at 1205.

be of great interest to both courts and policymakers in Congress. Special verdicts may play a central role in combatting jurisdictional flexibility. Additionally, the Supreme Court has afforded Congress significant latitude in constructing criminal statutes, and the study here may give Congress reason to pause before including jurisdictional requirements as elements of an offense. After considering these implications, the Article offers a conclusion.

I
BACKGROUND

A. Legal Landscape

Jurisdiction is power.[39] In the criminal context, it constitutes an enabling grant of authority pursuant to which courts may receive evidence of a crime, adjudicate guilt, and fashion an appropriate remedial or punitive measure.[40] Yet, in the federal system, criminal jurisdiction is not limitless.[41] Article III of the Constitution mandates that, for federal jurisdiction to exist, a criminal case must arise under the "Constitution, the [l]aws of the United States, and [t]reaties."[42] Before overseeing the adjudication of a crime, a court has an independent obligation to identify the source of its jurisdiction and the scope of that authority. If a court finds jurisdiction to be lacking, its only responsibility is to announce that fact and dismiss the case.[43] Regardless of the egregiousness of the conduct at issue or the necessity of judicial intervention, a federal court acting without jurisdiction acts *ultra vires*.[44]

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39 *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).

40 *Cf.* United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

41 Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) ("Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.").

42 U.S. CONST. art. III, § 2, cl. 1; *see also* Egan, *supra* note 5, at 186–87 ("The Constitution empowers federal courts to adjudicate all cases, civil and criminal, arising under the Constitution, the laws of the United States, and treaties.").

43 *Steel Co.*, 523 U.S. at 94 (noting that where jurisdiction "ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause"); United States v. Tony, 637 F.3d 1153, 1157 (10th Cir. 2011) ("[W]ithout jurisdiction the court cannot proceed at all in any cause." (quoting *id.*)).

44 *See, e.g.*, State v. Johnson, 156 P.3d 596, 599 (Kan. 2007) ("A judgment for an offense where the court is without jurisdiction to decide the issue is void.");

The search for grants of criminal jurisdiction often turns to congressional statutes. The Constitution itself sets forth only a short list of irregular criminal activities: activities including piracy on the high seas,[45] counterfeiting,[46] and treason.[47] Congress therefore fills the gaps, enacting statutes to criminalize conduct that does not involve international pirates or revolutionary riots. But Congress itself is constitutionally constrained with respect to the types of conduct it can criminalize.[48] The legislative branch lacks the authority to punish felonies generally.[49] Instead, it can only enact criminal laws that flow from one of Congress's constitutionally enumerated powers, such as its authority under the Commerce or Necessary and Proper Clauses.[50]

As a result, Congress often takes steps to directly highlight the source of its enabling constitutional authority within criminal statutes.[51] It usually does this in one of two ways.

First, Congress occasionally includes within criminal statutes factual findings that purport to demonstrate how certain types of regulated conduct are traceable to one of Congress's

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United States v. Tenet Healthcare Corp., 343 F. Supp. 2d 922, 925 (C.D. Cal. 2004) ("[A] court without jurisdiction over certain claims has no choice but to dismiss them regardless of their gravity or potential validity.").

45 U.S. CONST. art. I, § 8, cl. 10 (providing that Congress may "define and punish [p]iracies and [f]elonies committed on the high [s]eas, and [o]ffences against the [l]aw of [n]ations").

46 U.S. CONST. art. I, § 8, cl. 6 (stating that Congress may "provide for the [p]unishment of counterfeiting the [s]ecurities and current [c]oin of the United States").

47 U.S. CONST. art. III, § 3, cl. 2 (providing that Congress may "declare the [p]unishment of [t]reason, but no [a]ttainder of [t]reason shall work [c]orruption of [b]lood, or [f]orfeiture except during the [l]ife of the [p]erson attainted."); *see also* Egan, *supra* note 5, at 187 (noting that treason is among the few criminal activities enumerated in the Constitution).

48 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821) ("Congress cannot punish felonies generally . . . .").

49 Torres v. Lynch, 136 S. Ct. 1619, 1624 (2016) ("In our federal system, Congress cannot punish felonies . . . ; generally . . it may enact only those criminal laws that are connected to one of its constitutionally enumerated powers, such as the authority to regulate interstate commerce." (citations and internal quotation marks omitted)); Bond v. United States, 572 U.S. 844, 854 (2014) ("A criminal act committed wholly within a State 'cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.'" (quoting United States v. Fox, 95 U.S. 670, 672 (1878))).

50 *Bond*, 572 U.S. at 854 ("The Federal Government . . . has no [general] authority and can exercise only the powers granted to it, including the power to make all Laws which shall be necessary and proper for carrying into Execution the enumerated powers." (citations and internal quotation marks omitted)).)

51 *See Torres*, 136 S. Ct. at 1624 (noting that the jurisdictional element "ties the substantive offense . . . to one of Congress's constitutional powers . . . thus spelling out the warrant for Congress to legislate").

constitutionally enumerated powers.[52] In the Controlled Substances Act, for instance, Congress included within the preamble of the statute its determination that the possession, distribution, and manufacture of marijuana related to an interstate market for illegal drugs and, therefore, that Congress could properly criminalize such conduct under its Commerce Clause power.[53] Rather than requiring that a prosecutor demonstrate beyond a reasonable doubt that a particular defendant's actions fall within the jurisdictional scope of a constitutionally valid congressional statute, factual findings by Congress altogether remove the jurisdictional question from the scrutiny of a trial-level factfinder. For instance, after the enactment of the Controlled Substances Act, a prosecutor no longer needed to convince a judge or jury that a defendant's intrastate possession of illicit drugs related to interstate commerce. Instead, the prosecutor simply needed to prove the non-jurisdictional (i.e., substantive) elements of the crime; jurisdictional questions became questions of law.[54] Thus, when Congress decides to include factual findings within its criminal statutes, it "is able to avoid the reasonable-doubt and jury-trial requirements with a simple statutory drafting choice."[55]

But Congress need not always make its own findings to establish federal criminal jurisdiction. Rather, Congress also has the option of including so-called "jurisdictional elements" within criminal statutes. These elements, which Congress usually places directly alongside the substantive elements that define an offense, serve to establish the basis for federal jurisdiction by having prosecutors prove a particularized connection between a defendant's conduct and an enumerated congressional power.[56] That is, jurisdictional elements ensure "through case-by-case inquiry, that the [conduct] in question" relates to one of Congress's constitutional powers.[57] For example, the Hobbs Act criminalizes, inter alia, "the unlawful taking

52 Lemos, *supra* note 9, at 1255–56 ("Jurisdictional elements and findings-based statutes differ only with respect to the threshold question whether activity *X* had some effect on interstate commerce in the individual case—jurisdictional elements require a case-by-case assessment of whether the defendant's act *X* affected interstate commerce, whereas findings-based statutes rest on Congress's judgment that every act *X* affects interstate commerce.").

53 Gonzales v. Raich, 545 U.S. 1, 12 n.20 (2005) (stating that Congress found, inter alia, that "controlled substances . . . commonly flow through interstate commerce immediately prior to such possession").

54 *See* Lemos, *supra* note 9, at 1206.

55 *Id.* at 1205.

56 *See* United States v. Lopez, 514 U.S. 549, 561 (1995).

57 *Id.*

or obtaining of personal property from [another] person . . . against his will, by means of actual or threatened force, or violence, or fear of injury" but only so long as that conduct "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce."[58] Alongside the traditional "substantive" elements that speak to the criminal guilt of a defendant, such as whether there was an unlawful taking or threats of violence, one can identify the jurisdictional element requiring that the criminal conduct have a connection to interstate commerce.[59] The Military Extraterritorial Jurisdiction Act (MEJA) is similar.[60] MEJA geographically extends the criminal jurisdiction of federal law, authorizing—in certain circumstances—the prosecution of extraterritorial crimes committed by civilians employed by the Department of Defense (DOD) or its contractors.[61] Under the portion of MEJA here relevant, government employees and contractors may be prosecuted for felonies committed overseas, so long as their employment "relates to supporting" a Defense Department mission.[62] Thus, in a MEJA prosecution, the government must prove traditional, substantive elements of, say, assault alongside the jurisdictional element of whether the defendant's employment related to supporting a DOD mission at the time of the assault.[63]

A number of other criminal statutes in a number of different contexts contain similar jurisdictional elements. 18 U.S.C. § 922(q)(2)(A) criminalizes the possession of a firearm in a school zone, but only if the firearm "moved in or . . . otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 7(8) geographically extends federal criminal jurisdiction to include offenses occurring on "any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or

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58 18 U.S.C. § 1951(a)–(b).

59 *See* United States v. Calder, 641 F.2d 76, 78 (2d Cir. 1981) ("It [is a] . . . jurisdictional question . . . whether the alleged conduct affected interstate commerce . . . .").

60 *See* 18 U.S.C. §§ 3261, 3267.

61 18 U.S.C. § 3261(a).

62 18 U.S.C. § 3267(1)(A)(i)–(iii).

63 United States v. Slatten, 865 F.3d 767, 781 n.1 (D.C. Cir. 2017) ("MEJA adds a jurisdictional element to the underlying offenses, which element constitutes a jury issue that must be established by the government beyond a reasonable doubt." (citing United States v. Williams, 836 F.3d 1, 6–7 (D.C. Cir. 2016))).

against a national of the United States."[64] 18 U.S.C. § 1153 provides jurisdiction over a federal offense "when committed by [a Native American] on [a] reservation."[65] 18 U.S.C. § 1519 provides federal jurisdiction for the prosecution of record falsification so long as that conduct took place in relation to "the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States."[66] The list of statutes containing jurisdictional elements is as diverse as it is lengthy.[67]

Yet in almost all contexts, an offense's jurisdictional element is largely independent from its neighboring non-jurisdictional (i.e., substantive) elements.[68] One can envision any number of scenarios in which the amount of evidence demonstrating a defendant's guilt with respect to the substantive elements of a crime increases but the evidence demonstrating satisfaction of the jurisdictional element remains constant. In the Hobbs Act context, for example, additional eyewitnesses testifying that a particular defendant was in fact the assailant or additional forensic evidence linking a robbery to the defendant do not increase the likelihood that the robbery affected interstate commerce.[69] Likewise, in the MEJA context, additional evidence demonstrating that a government contractor accused of assault possessed the requisite mens rea does not increase the likelihood that her employment "related to supporting" a Defense Department mission.[70]

Historically, the near-independence of jurisdictional elements gave rise to a stark tension as courts struggled with the

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64 *See* United States v. Thomas, 443 F. App'x 501, 503–04 (11th Cir. 2011) (interpreting 18 U.S.C. § 7(8)).

65 In fact, the statute uses the term "Indian" in place of "Native-American." United States v. Cruz, 554 F.3d 840, 843 (9th Cir. 2009). As the *Cruz* court acknowledged, "there appears to be something odd about a court of law in a diverse nation such as ours deciding whether a specific individual is or is not 'an Indian.'" *Id.* at 842. "Although some prefer the term 'Native American' or 'American Indian,'" the court deemed it appropriate to "use the term 'Indian' throughout [its] opinion as that is the term employed in the statutes at issue in [the] appeal." *Id.* at 842 n.1.

66 18 U.S.C. § 1519.

67 *See* 18 U.S.C. § 32(a)(1) (destruction of aircraft or aircraft facilities); 18 U.S.C. § 37(b) (violence at international airports); 18U.S.C. § 39A(a) (aiming a laser pointer at an aircraft); 18 U.S.C. § 175(a) (prohibitions with respect to biological weapons); 18 U.S.C. § 228(a)(2) (failure to pay child support); 18 U.S.C. § 289 (false claims for pensions); 18 U.S.C. § 594 (intimidation of voters).

68 *See* Torres v. Lynch, 136 S. Ct. 1619, 1624 (2016) ("[M]ost federal offenses include, in addition to substantive elements, a jurisdictional one, like the interstate commerce requirement . . . .").

69 *See* 18 U.S.C. § 1951(a).

70 *See* 18 U.S.C. § 3267(1)(A)(i)–(iii).

question of which institutional entity—judge or jury—should resolve them at trial. Compounding the difficulty of appropriately delegating decision-making authority over jurisdictional elements was deep uncertainty surrounding whether the jurisdictional elements primarily presented legal or factual inquiries. And this uncertainty existed for good reason—the distinction between questions of law and questions of fact is deceptively complex. Although any first-year law student could properly classify those issues that fall at the polar ends of the continuum (whether a defendant punched a victim is a question of fact; how one should interpret "established by the State," as used in the Patient Protection and Affordable Care Act, is a question of law), identifying the line of demarcation where factual inquiries end and legal ones begin proves exceedingly "vexing."[71] Located within the murky middle ground of the law-fact continuum exists an entirely distinct legal hybrid: mixed questions of law and fact. Jurisdictional elements fall within this category.

A mixed question of law and fact requires a decisionmaker to determine how a law or legal doctrine applies to a specific universe of facts. At the time that mixed questions are resolved, the facts at issue are admitted or assumed; the legal rule is undisputed. The only remaining question is how the law applies to the given facts. Allocating decision-making authority over mixed-question jurisdictional elements in criminal offenses thus gives rise to a difficult choice, as deeming either the jury or the judiciary the appropriate decisionmaker seemingly violates a centuries-old maxim guiding practice at criminal trials: *ad quaestionem facti non respondent jurisperiti, ad quaes-*

71 Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982)). Indeed, the Supreme Court has described the law-fact line of demarcation as "slippery" and "elusive" while admitting that, institutionally, it has "not charted an entirely clear course" when classifying questions as factual or legal in nature. *Id.*; *see* G. Alexander Nunn, *Law, Fact, and Procedural Justice*, 70 Emory L. J. 1273, 1275-78 (2021).

tionem juris non respondent juratores:[72] judges do not decide questions of fact, juries do not resolve questions of law.[73]

Forced to choose, the early consensus among the United States Courts of Appeals was that the judiciary was the appropriate entity to resolve the mixed-question jurisdictional elements. The Second Circuit, for example, noted that "in a Hobbs Act case, 'it was for the court to determine as a matter of law the jurisdictional question of whether the alleged conduct affected interstate commerce.'"[74] Although the mixed-question jurisdictional element required juries "to determine whether the alleged conduct had in fact occurred,"[75] it was—as it had long been stated to be—the emphatic province of the judiciary to "say what the law is."[76]

The Supreme Court, however, upended this approach in *United States v. Gaudin*.[77] Relying primarily on historical analysis, the Court determined that, in order to satisfy the Fifth and Sixth Amendments' requirement that a jury resolve every element of an offense, mixed-question jurisdictional elements must be wholly resolved by juries.[78] Rejecting the argument that the legal component of mixed-question elements could be decided by courts after a jury's determination of the underlying facts, the Court noted that "the jury's constitutional responsi-

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72 This seventeenth-century maxim is attributed to Henry de Bracton. *E.g.*, Isaack v. Clark, 80 Eng. Rep. 1143, 1150; 2 Bulst. 306, 315 (1613). Of course, the maxim fails to fully account for the historical American practice in which juries decided questions of law in civil cases. *See* Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 44 (1990) ("For much of the century following ratification of the [Seventh] Amendment, federal civil juries were told that they were responsible for deciding law as well as fact, giving such attention as they might choose to the judge's instructions on the law."); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 377 (1999) (arguing that the "standard allocation of power between judge and jury is . . . of relatively recent origin").

73 Margaret L. Moses, *The Jury-Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. REV. 561, 565 (2001) ("The general rule, therefore, is that in cases where there is a jury, the jury's function is to decide questions of fact. The judge, on the other hand, will determine matters of law."). *But see* Carrington, *supra* note 72, at 44.

74 United States v. Vasquez, 267 F.3d 79, 89 (2d Cir. 2001) (internal brackets omitted) (quoting United States v. Calder, 641 F.2d 76, 78 (2d Cir. 1981)).

75 *Calder*, 641 F.2d at 78.

76 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Heartland Plymouth Ct. MI, LLC v. NLRB, 838 F.3d 16, 29 (D.C. Cir. 2016) ("Let the word go forth: for however much the judiciary has emboldened [another legal decisionmaker], *we* 'say what the law is.'" (quoting *id.*)).

77 515 U.S. 506, 523 (1995).

78 *See id.* at 518–19 (rejecting proposition that a mixed-question element "is to be decided by the judge" as "contrary to the uniform general understanding . . . that the Fifth and Sixth Amendments require conviction by a jury of *all* elements of the crime").

bility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."[79] Although, as explored above, Congress may construct criminal offenses such that jurisdictional questions are not located within an element of the offense, there exists a "right to have a jury determine, beyond a reasonable doubt, [a defendant's] guilt of every element of the crime with which he is charged."[80]

In *Gaudin*'s wake, juries across the country began to assume their new responsibility as quasi-legal decisionmakers. In recognition that "the [*Gaudin*] Court held that all elements of a crime, including those involving mixed questions of law and fact, must be decided by a jury,"[81] the Second Circuit was forced to reverse its previous course. From *Gaudin* forward, a jury would need to determine whether a robbery affected interstate commerce in a Hobbs Act prosecution.[82] Likewise, the post-*Gaudin* D.C. Circuit mandated that MEJA's mixed-question jurisdictional element be resolved by the jury in every MEJA prosecution.[83]

Surprisingly, however, many courts downplayed the seemingly material shift in decision-making authority, insisting that there is "little reason to believe that juries will have substantially different interpretations of [mixed question jurisdictional elements] than judges and therefore, practically speaking, *Gaudin* [did] little to alter the status quo."[84]

B. Social Psychology Literature

The social psychology literature provides reason to doubt courts' claims regarding the minimal significance of *Gaudin*. Phenomena identified in previous empirical studies suggest that there exists significant danger that juries might fail to afford mixed-question jurisdictional elements their due independence and acquitting force, particularly when the evidence demonstrating satisfaction of the substantive elements of the crime is definitive. This section seeks to briefly outline the foundational studies that serve as the basis for my hypothesis.

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79 *Id.* at 514.

80 *Id.* at 522–23.

81 United States v. Parkes, 497 F.3d 220, 227 (2d Cir. 2007).

82 *Id.* at 230.

83 United States v. Slatten, 865 F.3d 767, 781 n.1 (D.C. Cir. 2017) ("MEJA adds a jurisdictional element to the underlying offenses, which element constitutes a jury issue that must be established by the government beyond a reasonable doubt." (citing United States v. Williams, 836 F.3d 1, 6–7 (D.C. Cir. 2016))).

84 Bilzerian v. United States, 127 F.3d 237, 241 (2d Cir. 1997).

Consider, first, the social psychological literature exploring the decision-making processes of juries. Writing in what has become a foundational piece, Nancy Pennington and Reid Hastie argue that jury verdicts are primarily driven by overarching, general narratives rather than atomistic consideration of the elements that constitute a particular crime.[85] To develop this claim, Pennington and Hastie first recognize that the presentation of proof at trial is a disorderly affair. Prosecutors and defense counsel often present direct evidence and witness testimony in a non-linear, non-chronological order, offering small grains of insight into the jury bit by bit.[86] In an effort to make sense of the granular offerings, Pennington and Hastie see the jury as persistently engaged in the process of "story" making; that is, juries are continually seeking to incorporate new evidence and testimony into an overarching narrative that provides an account for the conduct at issue and can in turn determine an appropriate verdict.[87] Of course, because the evidence and proof presented at trial will inevitably fail to provide a fully comprehensive depiction of the events at issue, the construction of the narrative will require jurors to fill gaps with their background knowledge of events similar to the one at issue. Ultimately, "[m]eaning is assigned to trial evidence through the incorporation of . . . evidence into one or more plausible accounts or stories describing 'what happened' during events testified to at the trial."[88] "General knowledge about the structure of human purposive action sequences and stories, characterized as an episode schema, serves to organize events according to the causal and intentional relations among them as perceived by the juror."[89] A jury's constructed story then drives its decision of what is an appropriate verdict. Although jury instructions admonish the factfinders to ensure that the prosecution has met its burden of proving each element of a criminal offense beyond a reasonable doubt, Pennington and Hastie see verdict selection as a global process in which narratives are broadly matched with verdict categories.[90] Rather than careful scrutiny of each element and issue,

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[85] *See* Pennington & Hastie, *supra* note 22, at 520 ("[A] central cognitive process in juror decision making is *story construction*.").

[86] *See id.* at 523.

[87] *See id.*

[88] *Id.* at 529.

[89] *Id.*

[90] *Id.* at 530.

the overarching "story the juror constructs determines the juror's verdict."[91]

Psychological phenomena explored in other studies provide insight into how jurors construct stories and map those stories onto verdicts. Emotions, for instance, can influence jurors' evaluations of evidence and lead them to favor a particular narrative that accords with their preconceptions.[92] Empirical studies have found that "reactions to the events that led to the trial, primarily anger; reactions to participants involved in the trial, primarily anger, sympathy, and fear; and reactions to evidentiary exhibits, primarily disgust and horror" can materially affect a jury's ultimate legal determinations, even for issues only tangentially related to the emotion-evoking stimulus.[93] Relatedly, Professor Vicki Smith has demonstrated how a defendant's consistency with criminal "prototypes" can forcefully influence determinations of guilt.[94] "[J]urors are not very much influenced by formal tests embodied in the substantive criminal law doctrines; instead they consult prototypical representations, absorbed from their immersion in social and cultural life, to determine whether the facts add up to a particular crime or defense."[95] Where a defendant fits the jury's conception of a criminal prototype, the jury will more easily favor narratives that ascribe guilt to the defendant.

Of course, reliance on these extra-legal influences does not cease once a juror has crafted a story but instead carries into the evaluation of jury instructions and the selection of an appropriate verdict. Studies have suggested that, on the whole, jurors understand the law to be whatever they intuit it to be.[96] That is, jurors "use[ ] their pre-existing knowledge or beliefs about what constitutes a particular crime rather than the judge's instructions about what constitute[s] the crime."[97] This phenomenon raises concerns that jurors might discount (or

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91 Reid Hastie, *Emotions in Jurors' Decisions*, 66 BROOK. L. REV. 991, 996 (2001).

92 *See* NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 69–86, 106–07, 235–41 (2000); George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, *in* HANDBOOK OF AFFECTIVE SCIENCES 619, 628–29 (Richard Davidson, Klaus R. Scherer & H. Hill Goldsmith eds., 2001).

93 *See* Hastie, *supra* note 91, at 1007–09.

94 *See* Smith, *supra* note 22, at 868.

95 Kahan, *supra* note 22, at 793 (citing Smith, *supra* note 22, at 868).

96 *Id.*

97 Barbara A. Spellman, *Reflections of a Recovering Lawyer: How Becoming a Cognitive Psychologist—and (in Particular) Studying Analogical and Causal Reasoning—Changed My Views About the Field of Psychology and Law*, 79 CHI.-KENT L. REV. 1187, 1208 (2004) (summarizing Professor Smith's research).

even disregard) instructions that are not intuitively connected to the underlying criminal episode at issue.

Further compounding this risk is a robust empirical literature demonstrating that laypeople are deeply skeptical of and opposed to "legal loopholes."[98] Generally speaking, a legal loophole is a term used to denote a particular legal rule or doctrine that one perceives to be a means by which an otherwise culpable individual can circumvent or entirely avoid the rightful punishment he or she is due.[99] At the most fundamental level of justice, legal loopholes violate the central tenet that like cases should be treated alike, as those who are able to take advantage of the perceived "get out of jail free card" escape the sanctions usually imposed on similarly-situated defendants.[100] Naturally, those who classify a particular legal doctrine as a legal loophole are adamantly opposed to its application.[101] Consider, for example, the insanity defense in criminal cases.[102] Empirical studies have demonstrated that up to eighty-nine percent of respondents hold the view that "the insanity plea is a loophole that allows too many guilty people to go free."[103] Building on the discovery of this widespread perception—a perception that is, in fact, nothing more than a myth[104]—further studies show that sixty-six percent of respon-

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98 *See* Eric Silver, Carmen Cirincione & Henry J. Steadman, *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 L. & HUMAN BEHAV. 63, 64 (1994) ("Public opinion data have shown that the public's most prevalent concern regarding the insanity defense is that it is a loophole through which would-be criminals escape punishment for illegal acts."); Michael L. Perlin, *The Insanity Defense: Nine Myths That Will Not Go Away, in* THE INSANITY DEFENSE: MULTIDISCIPLINARY VIEWS ON ITS HISTORY, TRENDS, AND CONTROVERSIES 3, 5–10 (Mark D. White ed., 2017).

99 *See* Silver, Cirincione & Steadman, *supra* note 98, at 65.

100 Aristotle first identified this principle as central to the notion of justice, and many contemporary theorists and legal philosophers, including Ronald Dworkin, Lon Fuller, H.L.A. Hart, and John Rawls, recognize that coherence (or a like principle) is an essential component of the legitimacy of the rule of law. *See* ARISTOTLE, NICOMACHEAN ETHICS 115–23 (Martin Ostwald trans., 1962) (n.d.); *see also* H.L.A. HART, THE CONCEPT OF LAW 159 (2d ed. 1994) ("Treat like cases alike and different cases differently . . . ."); RONALD DWORKIN, LAW'S EMPIRE 164–67 (1986) (stating that the principle "that we must treat like cases alike . . . requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, [and] to extend to everyone the substantive standards of justice or fairness it uses for some"); LON FULLER, THE MORALITY OF LAW 64–90 (1964) (describing the attributes of legal morality, one of which is a lack of contradictory rules); JOHN RAWLS, A THEORY OF JUSTICE 206–07 (rev. ed. 1999) ("One kind of unjust action is the failure of judges and others in authority to apply the appropriate rule or interpret it correctly.").

101 *See* Silver, Cirincione & Steadman, *supra* note 98, at 63–65.

102 *Id.*

103 *Id.* at 64.

104 Michael Perlin, *supra* note 98, at 6–10.

dents believe an insanity plea should not be allowed as a complete defense to a crime, and fifty percent suggest that it should be abolished entirely.[105] Perceptions regarding the fairness of a particular rule can thus influence one's belief as to whether it should be determinative in a particular case.[106]

When reconciled with the legal landscape explored above, the social psychology literature gives reason to suspect that *Gaudin* may have effected a material change by delegating jurisdictional elements to jurors. As noted, jurisdictional questions are largely independent of the "traditional," substantive elements of a criminal offense; the evidence demonstrating that a defendant did indeed engage in some egregious conduct could be overwhelming, yet no conviction may stand where the court lacks jurisdiction. But the social psychology literature gives ample reason to suspect that juries may (consciously or subconsciously) allow their determinations regarding the substantive elements of a crime to influence their conclusions with respect to jurisdictional elements. This phenomenon could be an extension of emotional, narrative-based decision making—juries might conclude the defendant engaged in some deplorable behavior and deem that conduct worthy of punishment regardless of the outcome suggested by an atomistic analysis of the elements or jury instructions. Alternatively (or perhaps concurrently), the phenomenon could be a result of

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105 Silver, Cirincione & Steadman, *supra* note 98, at 64.

106 Building on this latter point, the widespread distaste for legal loopholes is perhaps related to a broader concept. Generally speaking, "people's reactions to their experiences with legal authorities are strongly shaped by their subjective evaluations of the justice of the procedures used to resolve their case." Tom Tyler & David Markell, *The Public Regulation of Land-Use Decisions: Criteria for Evaluating Alternative Procedures*, 7 J. EMPIRICAL LEGAL STUD. 538, 541 (2010). The way in which cases are resolved, rather than the outcome of any particular case, has the most significant impact on the perceived legitimacy of the proceedings. *See id.* at 546–47. For example, factors including litigants' ability to have a voice and present their side of a dispute, the degree of respect attributed to the litigants, and the perceived neutrality of the proceedings materially influence assessments of legitimacy and, ultimately, willingness to abide by legal pronouncements. *See id.* at 547–48. As is relevant here, the import of procedural justice also reaches beyond the immediate parties of a particular case. Indeed, third parties' evaluations of evidence can vary drastically depending on their perceptions of fairness; that is, the general public may dislike—or even discount—certain types of evidence based on the perceived fairness of the way that evidence is used in court. Professor Justin Sevier, for example, demonstrates that people dislike and discount hearsay evidence not because it leads to suboptimal decisional accuracy but instead because it is seen as procedurally unjust to convict based on secondhand evidence. *See* Justin Sevier, *Popularizing Hearsay*, 104 GEO. L.J. 643, 664 (2016) (reporting "empirical evidence that laypeople conceive the hearsay rule as one that protects the dignity interests of litigants and not the accuracy of legal decisions").

juries deeming jurisdictional elements in criminal statutes legal loopholes, "get out of jail free cards" that should not serve as the basis for an otherwise-guilty defendant to escape responsibility. In either event, the social psychology literature points to a pressing fact—there exists a risk that juries might fail to evaluate jurisdictional elements with the independence and importance they are due. The following Part seeks to empirically examine that possibility.

II
LAYPEOPLE AND JURISDICTIONAL ELEMENTS

At core, this Article seeks to explore a simple question—in reaching a general verdict, do laypeople care about jurisdictional elements in criminal statutes? Although the aforementioned social psychology literature offers compelling reasons to question the significance that laypeople afford jurisdictional elements,[107] there is as yet an absence of empirical studies directly examining the issue. This Article begins to fill that gap in the literature with its own novel experiment.

Thus, the pages below detail the background, methodology, and results of a controlled study designed to examine individual laypeople's epistemological approach toward jurisdictional elements in criminal statutes. In particular, the experiment tested whether study participants were more willing to find a jurisdictional element satisfied as evidence of a defendant's substantive guilt increased but evidence actually demonstrating satisfaction of the jurisdictional element remained constant.[108] As a layperson becomes increasingly convinced that a defendant committed a crime—that the defendant, say, brought a gun to school grounds—will she nonetheless vote to acquit merely because she fails to see a connection between the defendant's actions and interstate commerce?[109] More to the point, will her confidence level in

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[107] *See, e.g.*, Pennington & Hastie, *supra* note 22, at 556 ("Jurors who construct different stories will either have brought different bases of world knowledge to the task or will have incompletely processed information presented at trial."); Smith, *supra* note 22, at 868 (explaining that "the judge's instructions did not change subjects' decision strategies for" assault, kidnapping, or burglary, despite the instructions "differ[ing] considerably in complexity"); Kahan, *supra* note 22, at 793 ("[J]urors are not very much influenced by formal tests embodied in the substantive criminal law doctrines; instead they consult prototypical representations, absorbed from their immersion in social and cultural life, to determine whether the facts add up to a particular crime or defense.").

[108] *See infra* Appendix A.

[109] Lacking the legal expertise required to fully appreciate jurisdictional requirements, the layperson's intuitive move is perhaps to allow perceptions of

the satisfaction of the jurisdictional element remain constant when unrelated substantive evidence increases but the legally relevant jurisdictional evidence remains the same?

This Article's empirical study sought to directly explore those questions, hypothesizing that substantive evidence would materially influence layperson confidence in the satisfaction of jurisdictional elements. And, as the sections below illustrate, the experimental results offer statistically-significant support for that hypothesis. Ultimately, the study suggests that laypeople do not consider jurisdiction in a vacuum; instead, layperson confidence in the satisfaction of a jurisdictional element ebbs and flows based on the amount of evidence demonstrating a defendant's substantive guilt. As a formal legal matter, substantive determinations of guilt are often independent from jurisdictional determinations.[110] As a functional matter, though, this study suggests that laypeople materially conflate the two inquiries, rendering jurisdictional determinations a duplicative proxy for substantive guilt.

A. Background: The Experimental Context

Before diving into the study's methodology, it is useful to first establish the legal backdrop employed by the study. To wit, this Article's experimental context focuses on the jurisdictional element contained within 18 U.S.C. § 922(q)(2)(A). This particular statutory provision will likely prove familiar to many readers, as its immediate predecessor was the focus of the Supreme Court's notable Commerce Clause decision in *United States v. Lopez*.[111]

In *Lopez*, the Supreme Court considered whether Congress's legislative power under the Commerce Clause authorized its enactment of the Gun-Free School Zones Act of 1990, which criminalized the possession of firearms in school zones.[112] Of particular importance, the Gun-Free School

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substantive guilt to serve as a proxy for the jurisdictional inquiry. *Cf.* United States v. Lopez, 514 U.S. 549, 561 (1995) (asserting, albeit implicitly, that a jurisdictional element would see a factfinder make an independent assessment of whether the regulated conduct in a case implicated interstate commerce).

[110] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (noting that where jurisdiction "ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause"); United States v. Tony, 637 F.3d 1153, 1157 (10th Cir. 2011) ("[W]ithout jurisdiction the court cannot proceed at all in any cause." (quoting *id.*).

[111] *Lopez*, 514 U.S. at 551 (considering the Gun-Free School Zones Act of 1990, which prohibited "any individual [from] knowingly . . . possess[ing] a firearm at a place that [she] knows . . . is a school zone").

[112] *Id.*

Zones Act of 1990 did not originally contain a jurisdictional element; rather, it set forth an offense that simply and directly forbade "any individual [from] knowingly . . . possess[ing] a firearm at a place that [she] knows . . . is a school zone."[113] Despite the absence of a jurisdictional element that would at least purportedly demonstrate a particularized connection between the regulated activity and interstate commerce, proponents of the Gun-Free School Zones Act insisted that the law nonetheless fell comfortably within Congress's Commerce Power.[114] They argued, inter alia, that the presence of guns on school grounds undermines the ability of school officials to foster a safe educational environment; the absence of a safe school environment, in turn, results in less-capable graduates whose diminished educational experience has a negative impact on the U.S. economy.[115] The proponents then insisted that this effect, in the aggregate, has a substantial relation to interstate commerce.[116]

A five-justice majority of the Supreme Court disagreed. The *Lopez* majority noted that the regulated conduct—possession of firearms in school zones—simply affected local students at local schools and did not implicate any interstate movement of goods or individuals. Stated more bluntly, it was a provision that had "nothing to do with 'commerce' or any sort of economic enterprise."[117] To find a connection to Congress's Commerce Power, then, the Court would need "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[118] The *Lopez* Court rejected that inferential approach and ultimately struck down the Gun-Free School Zones Act as an unconstitutional overreach.[119]

But in striking down the Gun-Free School Zones Act, the *Lopez* Court provided guidance, albeit implicitly, on how Congress might save the statute. In reaching its holding, the Court repeatedly emphasized that 18 U.S.C. § 992(q)(2)(A) contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate com-

113 *Id.*
114 *Id.* at 564.
115 *Id.*
116 *Id.*
117 *Id.* at 561.
118 *Id.* at 567.
119 *See id.* at 567–68.

merce."[120] Thus, in emphasizing the absence of a jurisdictional element, the Court offered a seemingly straightforward instruction to Congress—to salvage the law, simply include a jurisdictional element that requires a jury to make a case-by-case determination that gun possession affects interstate commerce.[121]

In line with the *Lopez* decision, Congress quickly passed a revision of 18 U.S.C. § 992(q)(2)(A) entitled the Gun-Free School Zones Act of 1995. The new law was nearly identical to the old—it criminalized the possession of firearms in school zones. However, unlike the Gun-Free School Zones Act of 1990, the revised law requires that the firearm in question "moved in or . . . otherwise affects interstate or foreign commerce."[122] The small addition has made a big difference. Appellate courts have unanimously found that the inclusion of the new jurisdictional element renders the statute constitutional under Congress's Commerce Power as, now, the jury will necessarily make a determination in every case that the possession of a firearm in a school zone affects interstate commerce.[123]

But does the jury actually make that determination? As discussed, there is reason to worry that juror determinations regarding the satisfaction *vel non* of a jurisdictional element might not be solely (or even partially) based on reasoned consideration of, say, a connection between a particular item or action and interstate commerce; instead, layperson opinions about the strength of the substantive evidence in a case might strongly influence determinations regarding jurisdiction.[124] Although courts perceive of jurisdictional elements as requiring juries to give serious, deliberate consideration to a jurisdictional question as it manifests in a particular situation, laypeople might simply consider that analysis a mere afterthought.

B. Methodology

With that legal background in hand, we now turn to methodology. Once again, the study sought to directly assess the level of respect laypeople afford jurisdictional elements in criminal statutes. And, as emphasized above, the ex ante hypothe-

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120 *Id.* at 562.

121 *See id.*

122 18 U.S.C. § 922(q)(2)(A).

123 *See* United States v. Danks, 221 F.3d 1037, 1039 (8th Cir. 1999); United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005).

124 *See supra* subpart I.B.

sis for this study was that participants would be more willing to find a jurisdictional element in a criminal statute satisfied as the substantive evidence of the defendant's guilt increased, even when the evidence demonstrating satisfaction of the independent jurisdictional element remained constant.

To study that effect, I planned to adjust two independent variables. The first variable, naturally, was the strength of the substantive evidence demonstrating a defendant's guilt.[125] When holding the evidence demonstrating satisfaction of the jurisdictional element constant, does increasing the likelihood of the defendant's substantive guilt increase layperson confidence in the existence of jurisdiction? The second independent variable was the strength of the evidence directly demonstrating satisfaction of the jurisdictional element. If the jurisdictional question is not particularly close, but is instead either clearly satisfied or clearly insufficient, does substantive evidence still materially affect layperson jurisdictional determinations?

Thus, as the pages below demonstrate, the project employed a three by two experimental design for a total of six experimental conditions:

JURISDICTIONAL EVIDENCE

Jurisdictional Evidence

Substantive Evidence			
	• Weak Jurisdictional Evidence • High Substantive Evidence	• Close Jurisdictional Evidence • High Substantive Evidence	• Strong Jurisdictional Evidence • High Substantive Evidence
	• Weak Jurisdictional Evidence • Low Substantive Evidence	• Close Jurisdictional Evidence • Low Substantive Evidence	• Strong Jurisdictional Evidence • Low Substantive Evidence

How, though, were these experimental conditions tested? To execute the study, I created six different Qualtrics surveys

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[125] Notably, to adequately study the dependent variable (layperson jurisdictional confidence), the study needed to ensure that adjusting the strength of the evidence would not affect the jurisdictional inquiry, at least as a formal matter. If participants read that the defendant bought a gun from a different state, for example, that would concurrently increase the likelihood both that he "possessed" the firearm, as required by 18 U.S.C. § 922(q)(2)(A), and that the gun "moved in or affected" interstate commerce. Recognizing this risk, the study was designed to make the jurisdictional question independent of issue of the defendant's substantive guilt.

(corresponding to the six different experimental conditions) and used the Amazon Mechanical Turk platform to recruit 300 unique participants.[126] Fifty participants were randomly slotted into each of the six experimental conditions.[127] A complete copy of the experimental survey, including all its variants, can be found in Appendix A.[128] For reader ease, however, a general description of each experiment is below.

Participants in all six of the experimental conditions received a vignette that describes a duffle bag found on school grounds—a fact pattern roughly analogous to *United States v. Lopez*. Inside the duffle bag is a firearm, ammunition, and a list of potential targets. Every indication is that a school shooting was forthcoming. There exists uncertainty, however, as to whom the duffle bag belongs—who was the individual who was going to carry out the attack? School officials point police investigators in the direction of Scott Jacobs, who has a history of run-ins with teachers and school administrators. Police then conduct an independent investigation of Jacobs.

At this point in the vignette, the amount of substantive evidence linking Jacobs to the duffle bag varied depending on whether participants were (randomly) assigned to the "high substantive evidence" or "low substantive evidence" independent variable groups. In the high evidence group, participants read that investigators found security video footage of an individual, likely Jacobs, hiding the black duffle bag on school grounds. Moreover, forensic analysis reveals Jacobs's fingerprints on the duffle bag, gun, and ammunition. Finally, inves-

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126 Although MTurk is a relative newcomer to the empirical scene, meta-analyses have demonstrated that it provides a generally representative sample of the Internet-using demographic. *See* Adam J. Berinsky, Gregory A. Huber & Gabriel S. Lenz, *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351, 366 (2012); Michael Buhrmester, Tracy Kwang & Samuel D. Gosling, *Amazon's Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSPECTIVES ON PSYCH. SCI. 3, 5 (2011). Indeed, other leading scholars have employed MTurk surveys to capture on provide potential insight on juror behavior. *See, e.g.*, Sevier, *supra* note 106, at 667 (using MTurk to explore prospective jurors' posture towards hearsay).

127 As outlined below, the surveys terminated the participation of anyone who failed to answer basic comprehension questions. To account for participant loss, therefore, I intentionally over-recruited my target population of fifty by seeking between fifty-five and sixty participants for each experimental condition. To maintain uniformity, however, I only evaluated the first fifty valid responses in each experimental condition. Any surplus (typically one or two responses per experimental condition) was disregarded.

128 The survey, as well as the entire study, was approved by the University of Arkansas Institutional Review Board (IRB). Its protocol number is number 2006270908.

tigators discover the Jacobs has likely stolen the gun from his previous employer. It is all but certain that Jacobs was plotting the attack.

In the low evidence group, participants read that Jacobs has a history of disciplinary run-ins with school officials and once threatened to "get payback" for what he perceived as unfair treatment by school administration. The evidence perhaps gives rise to a general motive, but there is no direct evidence linking Jacobs to the duffle bag.

Both experimental groups then read that prosecutors have charged Jacobs under the post-*Lopez* revision of 18 U.S.C. § 922(q)(2)(A) for possessing a firearm in a school zone.[129] They were provided with jury instructions for Jacobs's trial that are directly adopted—in some cases verbatim—from real-world instructions.[130] In the instructions, participants read that, to convict Jacobs, they must find three elements beyond a reasonable doubt. First, that Jacobs "possessed" a firearm on school grounds; second, that the firearm "moved in or otherwise affected interstate or foreign commerce," and third, that Jacobs knew or should have known that he was in a school zone when he possessed the gun.[131] The instructions also include definitions for key phrases in the elements, including the definition of "possess," "firearm," "knowingly," and—most importantly—"moved in or otherwise affected interstate commerce." Again, the definitions provided in the experimental instructions were taken verbatim from real-world instructions.[132]

Following the instructions, juries read closing arguments from both the prosecution and defense counsel. The first set of arguments centers around whether Jacobs "possessed" the gun as required by 18 U.S.C. § 922(q)(2)(A).[133] The arguments of course varied depending on the strength of the substantive evidence at issue in the experimental group.

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129 *See* 18 U.S.C. § 922(q)(2)(A).

130 *See* Jury Instructions, United States v. Otero-Marquez, No. 3:12-cr-00115-DRD, 23-25 (D.P.R. Apr. 20, 2015), 2015 WL 13624425; Jury Charge, United States v. Harper, No. 1:11-cr-0004-RLF-GWC, 27-29 (D.V.I. July 25, 2014), 2011 WL 12520094; Jury Instructions, United States v. Burns, No. 3:16-cr-00132-CRB (N.D. Cal. Mar. 29, 2016); CRIM. PATTERN JURY INSTRUCTIONS 63-64 (CRIM. PATTERN JURY INSTRUCTION COMM. OF THE U.S. CT. OF APPEALS FOR THE TENTH CIR. 2011); MANUAL OF MODEL CRIM. JURY INSTRUCTIONS FOR THE DIST. CTS. OF THE NINTH CIR. 8.143B (NINTH CIR. JURY INSTRUCTIONS COMM., amended 2018).

131 *See* 18 U.S.C. § 922(q)(2)(A).

132 *See* sources cited *supra* note 130.

133 *See* 18 U.S.C. § 922(q)(2)(A).

The participants then read arguments regarding the second element—that Jacobs's possession of the firearm "affected interstate commerce." Here, the arguments varied based on whether the participants were further divided (again randomly) into experimental conditions that offered "weak," "close," or "strong" jurisdictional arguments. Within each of those three jurisdictional variants, though, both the "high" and "low" substantive evidence groups received identical jurisdictional arguments.

For explanatory purposes, it is easiest to begin with the experimental condition offering "close" jurisdictional arguments, as the arguments there simply mirrored the arguments that were at play in *United States v. Lopez*.[134] Pinning the "close" jurisdictional variant to *Lopez* is particularly useful because, in *Lopez*, the Supreme Court justices themselves were split five to four as to which argument was most compelling.[135] In the "close" variant, the prosecution argues—in accordance with the rejected line in *Lopez*—that Jacobs's possession of the firearm (especially an unregistered, stolen gun) undermines the ability of school officials to foster a safe educational environment; the absence of a safe school environment, in turn, results in less-capable graduates whose diminished educational experience has a negative impact on the United States economy.[136] Defense counsel, in contrast, insists that Jacobs's possession of the firearm did not affect interstate commerce as required by 18 U.S.C. § 922(q)(2)(A). The defense argues, as did five justices in *Lopez*, that the possession of a gun in a school zone has nothing to do with "commerce" or any sort of economic enterprise.[137] The defense therefore concludes by noting that Jacobs is a local student at a local school, and there is no indication that he had recently traveled with the gun out of state.

The experimental conditions for "strong" and "weak" jurisdictional evidence used the "close" variant as a template but also introduced material differences to participants. In the "strong" variant, for example, the participants read that a pamphlet was found in the duffle bag alongside the gun and ammunition. This pamphlet establishes that the gun was manufactured in Ohio and, therefore, it must have moved in

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134 514 U.S. 549 (1995).

135 *See id.* at 550.

136 *Id.* at 564.

137 *Id.* at 561 (finding that possession of a firearm in a school zone has "nothing to do with 'commerce' or any sort of economic enterprise").

interstate commerce to arrive in San Antonio, Texas.[138] To further demonstrate satisfaction of the jurisdictional element, the evidence establishing the interstate movement of the firearm is presented alongside the *Lopez*-based argument suggesting that school violence affects commerce.[139] Participants need only have found one ground persuasive to deem the jurisdictional element satisfied. In the face of this strong jurisdictional evidence, the defense's closing argument is largely perfunctory. It concedes that "the gun and ammunition were manufactured in Ohio," thereby further alerting participants to that key piece of information. Ultimately, though, the defense digs in, simply noting that "Jacobs is a local student at a local school."[140]

In the experimental condition for "weak" jurisdictional evidence, participants also read that a pamphlet was found in the duffle bag. In this variant, however, the pamphlet indicates that both the gun and ammunition were manufactured at a local plant in San Antonio, just two miles from the high school at issue. During closing arguments, therefore, prosecutors concede that the gun and ammunition have never left Texas; for appearances, the only argument that the prosecution makes is a speculative claim that materials used to manufacture the gun perhaps came from outside of Texas. No direct evidence supports that raw speculation. Additionally, in the "weak" variant, the prosecution abandons the *Lopez*-based argument that school violence affects interstate commerce.[141] Instead, participants are solely offered an unfounded claim about the unknown origins of the materials. Conversely, the defense's closing arguments directly attack the weakness of the prosecution's case for jurisdiction. It emphasizes that "the gun at issue never left San Antonio, let alone Texas." Especially due to the fact that "the firearm had always remained within a single city," the defense insists that "the possession of the gun in a school zone has nothing to do with 'commerce' or any sort of economic enterprise."[142]

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138 United States v. Lemons, 302 F.3d 769, 772 (7th Cir. 2002) (finding that a post-*Lopez* felon in possession statutes "merely requires a showing that the firearm moved across state lines at one point in time"); *see also* United States v. Moore, 425 F. App'x 347, 350 (5th Cir. 2011) (noting that movement of items "across state lines . . . constitutes transportation via interstate commerce" (quoting *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002))).

139 *Lopez*, 514 U.S. at 564.

140 *See infra* Appendix A.

141 The claim is therefore weaker than the rejected line in *Lopez*.

142 *See infra* Appendix A.

Following these differing arguments about the jurisdictional element, all six experimental conditions then reach the end of the vignette. To conclude, the participants read arguments regarding the third element of the criminal statute—whether Jacobs knew or should have known that he was in a school zone when he possessed the gun.

Once participants read their assigned materials, they faced a series of questions. First, the survey asked a couple of basic questions designed to ensure participants paid attention to the applicable story. For instance, the survey asked readers the last name of the defendant in the case (Jacobs). Only those participants that answered these baseline questions correctly were allowed to continue.

So as not to highlight the fact that the study sought to test participants' sensitivity to jurisdictional elements, each survey initially asked a series of misdirecting questions to "hide the ball" as to the true interest of the study. For example, the survey asked participants to rate, on a scale from one (non-probative) to ten (extremely probative), how significant they thought certain pieces of evidence were in demonstrating Jacobs's guilt. In the high evidence group, for instance, it asked participants to rate how probative the fingerprint matches were in proving that Jacobs was guilty of possessing a gun in a school zone. The surveys repeated this form of question for each distinct piece of evidence in the applicable fact pattern.

Thereafter, coming to the heart of the study, the survey asked participants to determine if the defendant should be found guilty under 18 U.S.C. § 922(q)(2)(A). Immediately following this quantitative inquiry, it provided a free-response form and asked participants to supply, in writing, their reasons for arriving at the previous conclusion. The survey also took an element-by-element approach to the criminal statute, asking participants on a scale from one (low) to ten (high) their confidence level that each element of the offense was satisfied. This element-by-element inquiry enabled specific identification of the extent to which participants increasingly deemed jurisdictional elements satisfied when there exists additional (but unrelated) evidence of substantive criminal guilt. Finally, the survey concluded by disclosing the purpose of the study.

C. Results

To a statistically-significant level, the study results supported the initial hypothesis that substantive evidence affects layperson determinations about supposedly-independent ju-

risdictional elements. In particular, Table 1 below offers a global look at how substantive evidence affected participant jurisdictional determinations, an effect that remained consistent regardless of the strength of the actual jurisdictional evidence.

TABLE 1: RESULTS OF EXPERIMENTAL SURVEY

	Weak Jurisdictional Evidence	Close Jurisdictional Evidence	Strong Jurisdictional Evidence
Conviction Rate (HSE[1])	82%	76%	68%
Confidence in Satisfaction of Jurisdictional Element (HSE)	4.80 (of 10)	5.26 (of 10)	5.42 (of 10)
Conviction Rate (LSE[2])	14%	18%	18%
Confidence in Satisfaction of Jurisdictional Element (LSE)	2.12 (of 10)	2.44 (of 10)	2.88 (of 10)
Significance of Differences in Jurisdictional Confidence -- P(T<+t) one-tail	0.000026485	0.000019883	0.000254253

As Table 1 demonstrates, layperson perceptions regarding the satisfaction of jurisdictional elements were highly contingent on the strength of substantive evidence. Where substantive evidence demonstrating a defendant's guilt increased, confidence in the satisfaction of (legally-)unrelated jurisdictional elements also increased; where substantive evidence was weak, confidence in the satisfaction of jurisdictional elements declined. Interestingly, this effect remained statistically significant regardless of the strength of the jurisdictional evidence that, as a formal matter, should actually influence jurisdictional determinations. As Figure 2 below shows, in each of the "weak," "close," and "strong" jurisdictional variants, there still existed statistically-significant differences in jurisdictional confidence contingent upon whether the participants were exposed to a "high" or "low" amount of substantive evidence demonstrating the defendant's guilt.

FIGURE 2: EFFECT OF SUBSTANTIVE EVIDENCE ON LAYPERSON JURISDICTIONAL DETERMINATIONS

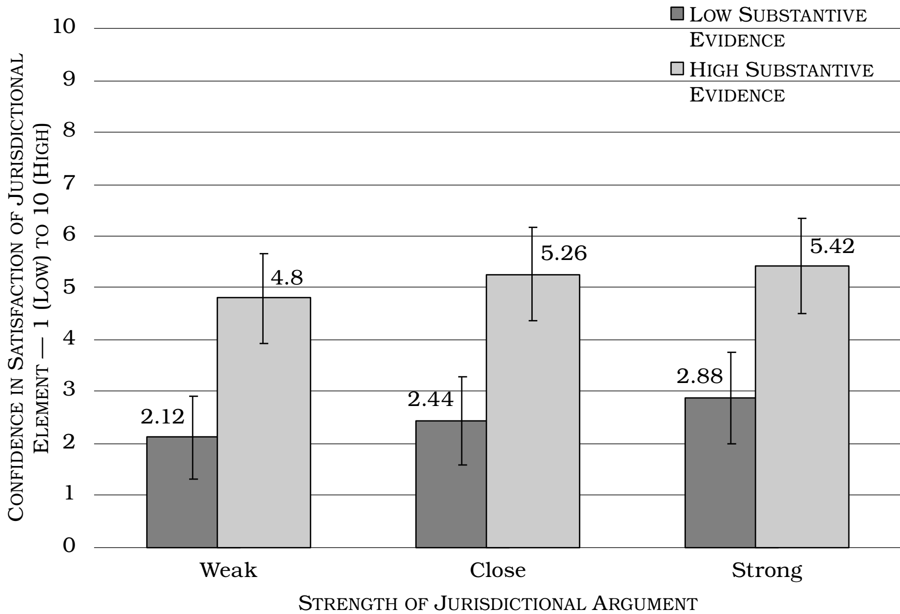

Figure 2 above also reveals another important phenomenon. Although substantive evidence had a statistically significant effect on layperson perceptions regarding the satisfaction of the jurisdictional element, jurisdictional evidence did not. That is, participants did not respond to stronger jurisdictional evidence by increasing their jurisdictional confidence levels at a statistically significant rate; nor did they decrease their jurisdictional confidence levels when exposed to weak jurisdictional evidence. Rather, substantive evidence controlled. It drove jurisdictional confidence, even though, as a formal legal matter, it is unrelated.

D. Obstacles and Objections

As with any project that ultimately seeks to assess jury behavior, there are a few obstacles and objections that warrant consideration.

An obvious qualification that is important to emphasize in the context of this project is that jury behavior in a real-world setting could differ drastically from that which is observable in a controlled experiment. Not only does a jury reach a conclusion through group decision making, but that decision making is undertaken in recognition of the solemnity of the proceedings and the importance of the factfinders' role in the courtroom. In contrast, this experiment sought to assess the

decision-making approach of individual laypeople undertaking an internet survey with no real-world ramifications. To what extent, then, can the study results be extrapolated to real-world settings? That is, what level of external validity is possible?

To be sure, field experiments, which seek to observe behavioral patterns in natural environments, have superior levels of external and ecological validity when compared to controlled experiments.[143] But controlled experiments do have their advantages.[144] For one, controlled experiments are able to obtain higher levels of internal validity; they enable a researcher to manipulate independent variables while keeping all other aspects of the experiment constant, thereby allowing the researcher to determine with greater confidence that any statistically-significant deviations between two experimental conditions are indeed the result (even a causal result) of the experimental manipulation.[145] In contrast, field experiments must rely on certain statistical techniques in an attempt to defeat alternative plausible explanations for a particular result. Although these statistical techniques do enable field experiments to achieve significant insights about a particular phenomenon, the general consensus in the scholarly literature is that they are not able to achieve the same level of internal validity as controlled experiments.[146]

143 *See* John M. Conley, William J. Turnier & Mary R. Rose,Rose *The Racial Ecology of the Courtroom: An Experimental Study of Juror Response to the Race of Criminal Defendants*, 2000 WIS. L. REV. 1185, 1187 (2000) ("External validity . . . refers to whether the inferences drawn from the study can be applied to groups beyond those actually studied."); ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 172 (2010); Thomas A. Kochan, *Legal Nonsense, Empirical Examination and Policy Evaluation*, 29 STAN. L. REV. 1115, 1119 n.12 (1977) (book review) ("The tradeoff between power of design (internal validity) and the relevance of the research (external validity) to some target population is often debated between those who favor laboratory research and those who favor field research.").

144 Conley, Turnier & Rose, *supra* note 143, at 1188 ("In experimental work, control and realism can be inversely proportional: given limited resources, gains in one are compensated for by concessions in the other.").

145 Justin Sevier, *Vicarious Windfalls*, 102 IOWA L. REV. 651, 705 (2017) ("[C]ontrolled experiments have greater internal validity than do field studies because the design of the study is kept uniform in all respects with the exception of the variables studied in the experiment.").

146 *Id.* at 705?06 ("It is possible for field researchers to control for potential confounding factors in their experimental designs post hoc, but researchers generally agree that a controlled laboratory design remains the gold standard for making causal statements about the effects of environmental variables on human behavior.").

As suggested, others might note that, even though the controlled experiment suggests that individual laypeople do not afford jurisdictional elements in criminal statutes their due independence, group decision making will remedy this problem.[147] This objection, although material, does not negate the import of this study's potential findings. Stated succinctly, priors matter. Although empirical studies have demonstrated that group decision making can counteract many of the biases held by individual participants, the ex ante layperson posture toward jurisdictional elements remains important. The mental framework that laypeople carry into the deliberation room can have a determinative effect on the outcome in a case, despite the remedial nature of group decision making.[148]

III
FINDINGS AND IMPLICATIONS

As explored above, courts have generally assumed that there is "little reason to believe that juries will have substantially different interpretations of [jurisdictional elements] than judges and therefore, practically speaking, *Gaudin* [did] little to alter the status quo."[149] This study provides the first empirical data point for the countervailing view that laypeople might be ill-equipped to decide jurisdictional elements.

In particular, the study's primary finding is that substantive evidence of a defendant's guilt affects layperson confidence in the satisfaction of independent jurisdictional elements.[150] That is, the study suggests that laypeople transmute substantive evidence into evidence demonstrating the satisfaction of a jurisdictional element. Consider again, for example, how participants approached the jurisdictional element in the study detailed above. When the only evidence tying Jacobs to the firearm was a speculative, character-based claim, participants were incredibly wary that prosecutors had sufficiently demonstrated satisfaction of the jurisdictional element. In the "close"

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147 *E.g.*, Dan Bang & Chris D. Frith, *Making Better Decisions in Groups*, ROYAL SOC'Y OPEN SCI., Aug. 2017, at *6 ("Many of the problems of individual decision making can be mitigated if individuals join with others to make decisions in a group.").

148 For example, group decision making has not prevented racial animus from affecting jury decisions. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 870 (2017) (finding that a juror impermissibly "deploy[ed] a dangerous racial stereotype to conclude petitioner was guilty" and "encouraged other jurors to join him in convicting on that basis").

149 Bilzerian v. United States, 127 F.3d 237, 241 (2d Cir. 1997).

150 *See supra* Part II.

jurisdictional variant, for instance, participants reported an aggregate confidence level of 2.44 out of 10 that the jurisdictional element had been satisfied. And remarkably, this skepticism towards the jurisdictional element existed throughout all of the jurisdictional variants. Even in the face of "strong" jurisdictional arguments, where participants read that the gun in question traveled from Ohio to Texas,[151] participants were unwilling to express great confidence regarding the jurisdictional element's satisfaction. In that context, they only reported an aggregate confidence level of 2.88 out of 10. Indeed, the study found no statistically significant indication that directly adjusting the strength of the jurisdictional evidence affected participant confidence regarding the jurisdictional element.

What did drive up participant confidence regarding satisfaction of the jurisdictional evidence? Legally-unrelated evidence demonstrating Jacobs's substantive guilt. When participants in the "high substantive evidence" variant read that the evidence tying Jacobs to the firearm included security camera footage and fingerprint matches, among other items, confidence levels in the satisfaction of the *jurisdictional* element shot up. In the "close" jurisdictional variant, participants reported an aggregate confidence level of 5.26 out of 10 that the jurisdictional element had been satisfied—a statistically significant increase from the 2.44 confidence level expressed by the comparable "low substantive evidence" group reading identical jurisdictional arguments. In the "weak" jurisdictional variant, changing from "low" to "high" substantive evidence caused jurisdictional confidence ratings to increase from 2.12 to 4.80. In the "strong" variant, confidence levels rose from 2.88 to 5.42. Both increases also constituted statistically significant deviations. Within each of those three jurisdictional variants, none of the jurisdictional evidence changed. Yet changes in substantive evidence bridged the gap, inappropriately increasing confidence in jurisdictional satisfaction.

Before moving to the implications of these findings, a few other observations are in order. First, it is important to recognize that jurisdictional arguments seemed ineffectual not only with respect to jurisdictional confidence but also with respect to general conviction rates. For instance, the study's highest

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151 United States v. Lemons, 302 F.3d 769, 772 (7th Cir. 2002) (finding that a post-*Lopez* felon in possession statutes "merely requires a showing that the firearm moved across state lines at one point in time"); *see also* United States v. Moore, 425 F. App'x 347, 350 (5th Cir. 2011) (noting that movement of items "across state lines . . . constitutes transportation via interstate commerce" (quoting United States v. Runyan, 290 F.3d 223, 239 (5th Cir. 2002))).

conviction rate came from the "high substantive evidence" group within the *weak* jurisdictional variant. Despite only expressing an aggregate confidence level of 4.80 that the jurisdictional element was satisfied, 82% of the participants in that experimental condition voted to convict the defendant. Notably, that conviction rate was higher than the 76% conviction rate for the "high substantive evidence" group in the "close" jurisdictional variant, as well as the 68% conviction rate in the "high substantive evidence" group within the "strong" jurisdictional variant. Were jurisdictional considerations playing a determinative role in general verdict decisions, we would expect to see weaker jurisdictional confidence correlate with weaker conviction rates. This study did not see statistically significant findings in that respect. Only substantive evidence had a statistically significant effect on conviction rates, with the "low substantive evidence" group driving down conviction rates to 14%, 18%, and 18% for the "weak," "close," and "strong" jurisdictional variants respectively.

Stepping back, though, the study's finding that the strength of jurisdictional arguments failed to significantly influence both jurisdictional confidence and general conviction rates accords with the existing social psychology literature.[152] For one, there is an inherent tension between jurisdictional elements and the holistic jury decision-making process modeled by Hastie and Pennington.[153] Jurisdictional elements necessarily require atomistic consideration of a technical legal question, a question that is analytically independent yet equally important.[154] Our current understanding of jury epistemology, though, suggests that juries do not make ultimate verdict determinations by working through insular elements

152 *See, e.g.*, Pennington & Hastie, *supra* note 22, at 519; Vicki L. Smith, *supra* note 22, at 868; Kahan, *supra* note 22, at 795.

153 *See, e.g.*, Pennington & Hastie, *supra* note 22, at 519 ("Our conclusion is that the juror is a sense-making information processor who strives to create a meaningful summary of the evidence available that explains what happened in the events depicted."); Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCH. 242, 243 (1986) (explaining that the authors' model "is based on the hypothesis that jurors impose a narrative story organization on trial information, in which causal and intentional relations between events are central"); Hastie, *supra* note 91, at 996 (explaining that the author's model's "distinctive claim is that the story the juror constructs determines the juror's verdict").

154 *See* Lemos, *supra* note 9, at 1255 ("Jurisdictional elements ask, 'did *X* activity affect interstate commerce in this instance?' The answer to that question can change from case to case, depending on the particular circumstances of the defendant's conduct: one defendant's act of extortion may have an effect on interstate commerce while another's may not.").

seriatim.[155] Instead, narratives control verdict determinations, and substantive evidence—rather than jurisdictional evidence—seems more influential in narrative construction. Additionally, layperson nonreactivity to jurisdictional arguments makes intuitive sense. To a lawyer who benefited from multiple semesters studying the intricacies of the Commerce Clause's jurisprudential evolution, the differences between the "weak," "close," and "strong" jurisdictional variants might feel obvious.[156] But to the layperson approaching the jurisdictional question with only the aid of jury instructions and attorney arguments, determining what influences "interstate commerce" (or even why it matters if a crime affects interstate commerce) could prove elusive.[157] In the face of an inaccessible, legalistic inquiry, it is perhaps rational for laypeople to merely allow substantive evidence to control both general verdicts and, constitutively, jurisdictional determinations.

Ultimately, in suggesting that laypeople's jurisdictional determinations are heavily influenced by substantive evidence, this Article has significant normative implications. Minimally, the study suggests that laypeople walk into the courtroom with a dangerous prior; the epistemological benefits of group and courtroom decision making notwithstanding,[158] that prior gives rise to a demonstrable risk that jury determinations regarding the satisfaction of jurisdictional elements might hinge, in part, on the legally-irrelevant evidence of a defendant's substantive guilt. In recognition of that risk, courts and policymakers can take discrete steps to dampen any jurisdictional transmutation effect.

First, this Article's findings should encourage additional exploration of special verdicts. Of course, special verdicts are a

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155 Joshua Vanderslice, *Say "What" Again: How Amending Rule 801(d)(1)(B) Made More Evidence Admissible*, 35 REV. LITIG. 161, 172 (2016) ("Under the story model, juries reach verdicts based on a story of what happened, rather than atomistic logic." (citing Pennington & Hastie, *supra* note 22, at 519)).

156 Jason Skolnik, Note, *And Then Along Came John: Federal Statutory Interpretation in Contravention of State Law Violates Principles of Federalism*, 36 LOY. L.A. L. REV. 1651, 1651 (2003) ("In 1995, the Supreme Court restored the Commerce Clause to the curriculum of every law school in the nation by invalidating the Gun-Free School Zones Act in *United States v. Lopez*." (footnotes omitted)).)

157 David M. Fine, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252, 277 (1998) (recognizing that modern Commerce Clause analysis is "not necessarily intuitive" and instead requires "close attention to the language of *Lopez* and to the long evolution of Commerce Clause jurisprudence").

158 *E.g.*, Bang & Frith, *supra* note 147, at *6 ("Many of the problems of individual decisionmaking can be mitigated if individuals join with others to make decisions in a group.").

means of encouraging jury consideration of each element of an offense.[159] Rather than simply requiring the jury to deliberate as to whether a defendant is broadly guilty or not guilty, special verdicts require jurors to work through each element of an offense in turn.[160] Only when the jury affirmatively deems each element satisfied can a conviction stand.[161] In the context of jurisdictional elements, special verdicts could prove quite useful. For instance, recall that, despite the relatively substantial conviction rates in the "high substantive evidence" group, that group's confidence in the satisfaction of the jurisdictional element was not particularly compelling. In the "high substantive evidence" group of the "close" jurisdictional variant, for instance, 76% of participants found the defendant guilty beyond a reasonable doubt. Contemporaneously, though, their aggregate confidence level in the satisfaction of the jurisdictional element was a mere 5.26 out of 10. Conjunction paradox issues aside,[162] that confidence level reveals that

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159 Prendergast v. Pac. Ins. Co., No. 09-CV-6248P, 2013 WL 5567656, at *6 n.7 (W.D.N.Y. Sept. 25, 2013) ("As a general matter, special verdicts require the jury to answer factual questions, and the court applies the law to the jury's findings to determine the verdict."); *see also* Aczel v. Labonia, 584 F.3d 52, 58 (2d Cir. 2009) (quoting *Verdict*, BLACK'S LAW DICTIONARY (9th ed. 2009)).

160 Michael S. Pardo, *The Paradoxes of Legal Proof: A Critical Guide*, 99 B.U. L. REV. 233, 273 (2019) (recognizing that "special verdicts require jurors to find only whether each element is satisfied" while also noting that most often omit "a separate question on the conjunction"); Julie K. Weaver, Comment, *Jury Instructions on Joint and Several Liability in Washington State*, 67 WASH. L. REV. 457, 464 (1992) ("Special verdicts require that the jury answer specific factual questions and leave the determination of the outcome of the case to the court that applies the law to the jury's findings of fact."); Charles N. Charnas, Comment, *Segregation of Antitrust Damages: An Excessive Burden on Private Plaintiffs*, 72 CALIF. L. REV. 403, 435 (1984) ("Special verdicts require the jury to give written answers to questions about specific factual issues in the case.").

161 *See* Floyd v. Laws, 929 F.2d 1390, 1396 (9th Cir. 1991) ("[A] trial court has two options when faced with an inconsistent special verdict. First, the court must try to reconcile the answers. Second, only if all attempts at reconciliation fail, the court may order a new trial."); Lavoie v. Pac. Press & Shear Co., a Div. of Canron Corp., 975 F.2d 48, 53 (2d Cir. 1992) ("Although Rule 49(a) provides no instructions to the trial court for resolving jury inconsistencies in its special verdicts, we have held that judgment may not be entered pursuant to inconsistent special verdicts.").

162 Broadly stated, the conjunction paradox is a phenomenon under which factfinders errantly choose to convict (or, in the civil context, find against) a defendant because their confidence level in the satisfaction of each element is above the requisite proof threshold; of course, what the factfinders fail to recognize is that the conjunction of their *elemental* confidence levels should cause their *overall* confidence level to fall below the applicable general proof threshold. David S. Schwartz & Elliott Sober, *The Conjunction Problem and the Logic of Jury Findings*, 59 WM. & MARY L. REV. 619, 624 (2017) (offering a robust explanation of the conjunction paradox). For example, if a civil offense contains two independent elements, and the jury's confidence in the satisfaction of each element is 70%,

many participants voted to convict despite material uncertainty regarding whether the jurisdictional element was actually satisfied. Indeed, Figure 3 below offers a two-sided histogram demonstrating that most participants were less-than-sure about the jurisdictional element.

FIGURE 3: FREQUENCY OF CONFIDENCE LEVELS

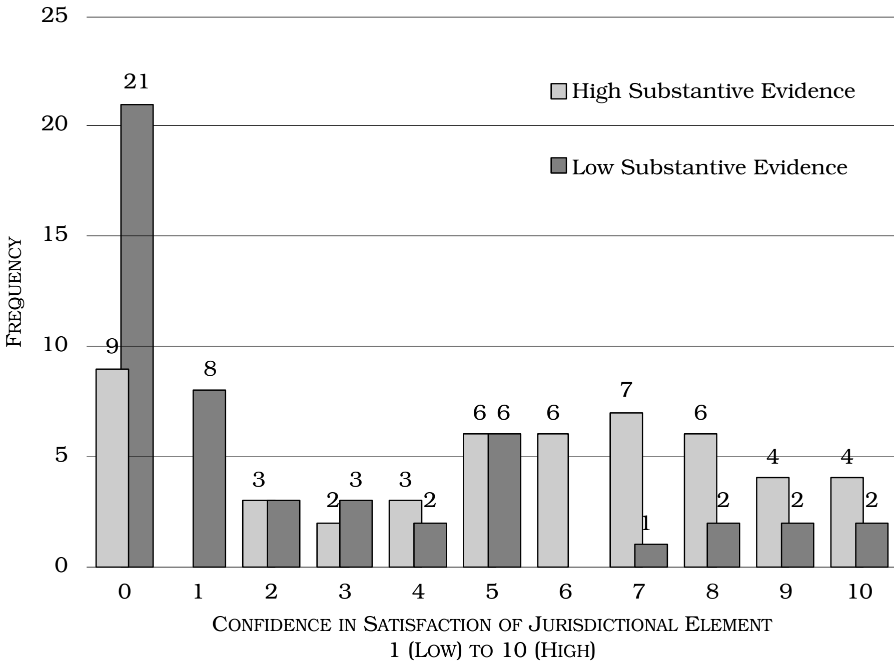

Figure 3 gives further support to the notion that special verdicts might prove useful in combatting layperson discounting of jurisdictional elements. Adopting a 90% confidence threshold as a stand-in for the reasonable doubt threshold,[163] Figure 3 hints that, within the "close" jurisdictional variant,

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they should deem the plaintiff's evidence insufficient under the preponderance threshold because the conjunction of their elemental confidence levels is 49%. *See* Pardo, *supra* note 160, at 238 ("[T]he probability of two (independent) events being true is the conjunction or multiplication of their individual probabilities."). The data gleaned by this study provided ample evidence of the conjunction paradox. Many participants failed to appreciate that the conjunction of their confidence levels in the satisfaction of both the substantive and jurisdictional elements fell below the preponderance threshold, let alone the reasonable doubt threshold. Moreover, many participants chose to convict despite confidence levels below 50% for the jurisdictional element alone. Ultimately, that practice seems to suggest that laypeople failed to weigh the jurisdictional element heavily when determining a general verdict.

[163] Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1256 (2013) ("[T]he criminal beyond-a-reasonable-doubt standard is akin to a probability greater than 0.9 or 0.95."); *see also* Brown v. Bowen, 847 F.2d 342,

only eight participants in the "high substantive evidence" group and four participants in the "low substantive evidence" group would have deemed the jurisdictional element satisfied beyond a reasonable doubt. If that suggestion proves true—a conclusion that would require additional empirical study to establish—conviction rates in the "close" jurisdictional variant would drop from 76% to a maximum of 16% in the high substantive evidence group and 18% to a maximum of 8% in the low substantive evidence group.[164]

In presiding over jury trials, district court judges have significant authority over whether to use a general or special verdict form.[165] This study's initial findings suggest that, where jurisdictional elements are at issue, courts should adopt the latter. Notably, encouraging special verdicts in discrete contexts is not a novel proposition. In fact, courts have already encouraged their use for the resolution of technical elements in cases involving entrapment[166] and firearm offenses.[167] Employing them in criminal cases where jurisdictional elements are at issue might ensure that the jury affords those jurisdictional elements their due independence and acquitting force.[168]

345?46 (7th Cir. 1988) (deeming the reasonable doubt standard a 0.9+ confidence threshold).

164 Note that it is a maximum of 16% and 8% because those participants who deem jurisdictional elements satisfied could conceivably find other elements unsatisfied.

165 *See, e.g.*, United States v. Reed, 147 F.3d 1178, 1181 (9th Cir. 1998) ("[U]se of a special verdict form is a matter of the district court's discretion to be determined on facts of each case."); Vichare v. AMBAC Inc., 106 F.3d 457, 465 (2d Cir. 1996) ("The formulation of special verdict questions rests in the sound discretion of the trial judge, and should be reviewed by an appellate court only for an abuse of that discretion."); United States v. Stonefish, 402 F.3d 691, 698 (6th Cir. 2005) ("Over the course of the last two decades . . . exceptions to the general rule disfavoring special verdicts in criminal cases have been expanded and approved in an increasing number of circumstances." (brackets and internal quotation marks omitted)).

166 *See* United States v. Poehlman, 217 F.3d 692, 698 n.7 (9th Cir. 2000) ("Because the determination of whether a defendant is entrapped is often confusing and difficult, we encourage district courts to use special verdict forms that query jurors as to the elements of the entrapment defense.").

167 *See* United States v. Perez, 129 F.3d 1340, 1342 (9th Cir. 1997) ("Because Cruz clearly 'used' a weapon under the *Bailey* definition, the jury should have been instructed to submit a special verdict form regarding which firearm, or firearms, he used in connection with the drug trafficking offense.").

168 United States v. Kim, 111 F.3d 1351, 1360 (7th Cir. 1997) ("[A] trial court may require the jury to return 'only a special verdict in the form of a written finding upon each issue of fact.' Such verdicts are designed to clarify the jury's findings, as well as facilitate appellate review, particularly where the special verdicts help to 'articulate the issues of fact subsidiary to the legal questions.").

Next, it is also important to recognize that courts are not the only vehicle for normative change. Rather, this project's findings should also inform policymakers in Congress. Recall that the *Gaudin* decision only mandates that jurisdictional *elements* be decided by juries; Congress may still delegate responsibility over jurisdictional questions to courts by not including them as elements of a criminal offense.[169] For example, as noted, Congress could instead make its own factual findings to demonstrate how certain types of conduct, writ large, relate to one of its constitutionally enumerated powers, just as it did in the Controlled Substances Act.[170] In these situations, Congress "is able to avoid the reasonable-doubt and jury-trial requirements with a simple statutory drafting choice."[171] To be sure, in that scenario, there is an important analytical distinction. If Congress makes its own generalized findings, courts will be required to determine if regulated behavior generally (rather than as-applied in a specific case) is traceable to a constitutionally-enumerated congressional power.[172] But given the study's suggestion of the existence of layperson reluctance to afford jurisdictional elements their due analytical independence, perhaps trading off particularized jurisdictional analysis for superior horizontal equity is the right move.

Finally, on the academic front, this Article demonstrates the need for further empirical exploration of jurisdictional elements. For one, given the Article's initial findings, future experiments should seek to explore how mock juries, deliberating together in a group, approach jurisdictional elements.[173] Additionally, other studies might examine whether laypeople's re-

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[169] United States v. Gaudin, 515 U.S. 506, 525 (1995) (Rehnquist, C.J., concurring) ("Nothing in the Court's decision stands as a barrier to legislatures that wish to define—or that have defined—the elements of their criminal laws in such a way as to remove [mixed question] issues . . . from the jury's consideration.").

[170] Gonzales v. Raich, 545 U.S. 1, 20 (2005) ("Findings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA.").

[171] Lemos, *supra* note 9, at 1205.

[172] *Id.* at 1255–56 ("Jurisdictional elements and findings-based statutes differ only with respect to the threshold question whether activity *X* had some effect on interstate commerce in the individual case—jurisdictional elements require a case-by-case assessment of whether the defendant's act *X* affected interstate commerce, whereas findings-based statutes rest on Congress's judgment that every act *X* affects interstate commerce.").

[173] Some of the more influential empirical studies on jury behavior have employed mock juries. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 L. & HUM. BEHAV. 337, 343 (2000); Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the "Will of the People,"* 3 PSYCH. PUB. POL'Y & L. 303, 331 (1997); Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on*

luctance to independently examine jurisdictional elements in criminal statutes could be remedied by offering a more robust explanation (perhaps within the jury instructions themselves) of the importance of jurisdiction. Empirical studies have suggested that offering explanations alongside instructions about disregarding evidence can increase compliance rates.[174] So it might be, too, with jurisdictional elements. Still other studies could assess whether changing demographic characteristics of defendants affects jurisdictional determinations, questioning whether the jurisdictional transmutation effect here identified is particularly harmful to historically marginalized groups.[175]

CONCLUSION

Jurisdiction is power.[176] Regardless of the egregiousness of a defendant's conduct, regardless of the severity of the crime at issue, regardless of the strength of one's convictions regarding the culpability of the defendant, a federal jury cannot convict a defendant absent proper jurisdictional authority.

This project sought to examine whether Article III's mandates are carried out effectively and consistently for all defendants. And its findings regarding layperson epistemology in the context of jurisdictional elements prove worrisome. Only the Constitution and Congress may determine a lower federal court's criminal jurisdiction;[177] jurors have no license to expand jurisdictional grants based on the circumstances of a particular case.

Decision Making and Information-Processing Strategies, 48 J. PERSONALITY & SOC. PSYCH. 267, 270 (1985).

[174] *See* Linda J. Demaine, *Realizing the Potential of Instructions to Disregard*, *in* MEMORY AND LAW 185, 189 (Lynn Nadel & Walter P. Sinnott-Armstrong eds., 2012) (noting that, where a rationale for disregarding evidence is provided, it must be convincing, otherwise the jury may be *more* likely to base its verdict on the inadmissible evidence); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 192 (2002) ("Research in social psychology and jury decision-making suggests that . . . provid[ing] explanations and reasons for the legal rules in addition to the rules themselves . . . improve[s] juror compliance with the substantive law.").

[175] *See* Brandon K. Applegate, John P. Wright, R. Gregory Dunaway, Francis T. Cullen & John D. Wooldredge, *Victim-Offender Race and Support for Capital Punishment: A Factorial Design Approach*, 18 AM. J. CRIM. JUST. 95, 105?07 (1993); J.L. Bernard, *Interaction Between the Race of the Defendant and that of Jurors in Determining Verdicts*, 5 L. & PSYCH. REV. 103, 109 (1979); Richard P. McGlynn, James C. Megas & Daniel H. Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. PSYCH. 93, 93 (1976); Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCH. 133, 133 (1979).

[176] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).

[177] Knapp Med. Ctr. v. Hargan, 875 F.3d 1125, 1128 (D.C. Cir. 2017).

APPENDIX A: EXPERIMENTAL SURVEY

A gun is found on the grounds of Edison High School in San Antonio, Texas. The San Antonio Police Department (SAPD) believe they have thwarted an attempted school shooter just before a terrible attack was to commence.

[*Weak Jurisdiction*] While on his morning patrol of Edison High, SAPD Officer John Taylor spotted a black duffle bag partially concealed behind a bush on school grounds. Inside the duffle bag, Officer Taylor found a Smith & Wesson pistol and dozens of 9mm rounds of ammunition. A pamphlet in the bag indicates that the pistol and ammunition were manufactured and sold in San Antonio at a plant just two miles from Edison High. Also inside the duffle bag was a list of names—potential targets—which included teachers and students at the high school. There's no question that an attack on the school was imminent.

[*Close Jurisdiction*] While on his morning patrol of Edison High, SAPD Officer John Taylor spotted a black duffle bag partially concealed behind a bush on school grounds. Inside the duffle bag, Officer Taylor found a Smith & Wesson pistol and dozens of 9mm rounds of ammunition. Also inside the duffle bag was a list of names—potential targets—which included teachers and students at the high school. There's no question that an attack on the school was imminent.

[*Strong Jurisdiction*] While on his morning patrol of Edison High, SAPD Officer John Taylor spotted a black duffle bag partially concealed behind a bush on school grounds. Inside the duffle bag, Officer Taylor found a Smith & Wesson pistol and dozens of 9mm rounds of ammunition. A pamphlet in the bag indicates that the pistol and ammunition were manufactured in Ohio. Also inside the duffle bag was a list of names—potential targets—which included teachers and students at the high school. There's no question that an attack on the school was imminent.

An urgent, wide-ranging investigation followed the discovery of the duffle bag. Despite the relatively nondescript nature of the duffle bag, firearm, and ammunition, school officials immediately pointed the police investigation in the direction of 12th grader Scott Jacobs. Jacobs is a known troublemaker at Edison High; his disciplinary record includes infractions for starting fights, attempted cheating, theft of student belongings, and illicit drug use. Thus, following the discovery of the duffle bag, school officials suspected that Jacobs might be behind the attempted attack—after all, no other student had amassed such a serious and extensive disciplinary record.

After receiving the tip from school officials, the SAPD conducted an independent investigation to determine if any evidence linked the firearm to Jacobs.

[*High Substantive Evidence*] Following this investigation, prosecutors decided to bring charges against Jacobs. This decision was primarily based on what the SAPD believes are three key pieces of evidence.

First, the SAPD reviewed security cameras at Edison High School. They found footage of a teenager wearing jeans, a red sweatshirt, and a San Antonio Spurs hat carefully hiding the black duffle bag behind a bush on school grounds just before the start of classes. Prosecutors note that when Jacobs was brought in for questioning, he was wearing jeans, a red sweatshirt, and a San Antonio Spurs hat—exactly the same outfit as the student on the security footage. Moreover, although the footage is somewhat grainy, the SAPD are confident they can make out Jacobs's face as he hid the duffle bag behind the bush.

Second, SAPD forensic examiners ran extensive tests on the duffle bag, pistol, and ammunition. On each of these items, forensic examiners were able to find partial fingerprints that match Jacobs's fingerprints.

Finally, San Antonio police established a link between the Smith & Wesson pistol and Jacobs. Although some of the gun's serial number had been filed off, police were able to discern its last four digits. Those last four digits matched a pistol that previously belonged to Jack Abrams, the owner of a hardware store in San Antonio where Jacobs was briefly employed. Jacobs was fired by Abrams after Abrams caught Jacobs pocketing money from the cash register. Abrams reported his pistol as missing shortly after Jacobs was fired. Police reason that Jacobs stole the gun to carry out the attack.

[*Low Substantive Evidence*] Following this investigation, prosecutors decided to bring charges against Jacobs. This decision was primarily based on what the SAPD believes are two key pieces of evidence.

First, the SAPD reviewed Jacobs's disciplinary files at the school and, in particular, his numerous past infractions. Although they don't find any direct evidence, they believe his frequent run-ins with school administration might have given him a motive to commit the shooting.

Second, the SAPD found it significant that, in recent months, Jacobs had repeatedly told his teachers that he'd get "payback" for what he perceived as unfair treatment by the school towards him.

Prosecutors charge Jacobs under 18 USC § 922(q)(2)(A), which criminalizes the possession of firearms in school zones. At trial, a federal district court judge instructs the jury on federal law and what they must find before deeming Jacobs guilty. In relevant portion, the judge's instructions[178] are as follows:

[178] These instructions were taken, in some instances verbatim, from real-world and model jury instructions. *See* United States v. Otero-Marquez, 2015 WL 13624425 (D.P.R.); United States v. Harper, 2011 WL 12520094 (D. Virgin Islands); United States v. Burns, Docket No. 3:16-cr-00132 (N.D. Cal. Mar 29, 2016); Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit, Criminal Pattern Jury Instructions (2011); Model Crim. Jury Instr. 9th Cir. 8.143B (2018).

Offense
The indictment in this case contains one count. The defendant Scott Jacobs is accused of possessing a firearm in a school zone in violation of Section 922(q)(2)(A) of Title 18 of the United States Code.

Section 922(q)(2)(A) provides that "[i]t shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."

Thus, for you to find defendant Scott Jacobs guilty of this crime, you must be satisfied that the government has proven each of the following things beyond a reasonable doubt:

First, that the defendant knowingly possessed a firearm, namely, a Smith & Wesson pistol;

Second, that the firearm moved in or otherwise affected interstate or foreign commerce;

Third, that the defendant possessed the firearm at a place where defendant knew or had reasonable cause to believe is a school zone (that is, in, or on the grounds of, or within 1,000 feet from Edison High School).

If the government fails to prove one of these elements beyond a reasonable doubt, then you must find that that element has not been proven and find the defendant not guilty. While the government's burden of proof is a strict and heavy burden, it is not necessary that it be proved beyond all possible doubt. It is only required that the government's proof exclude any reasonable doubt concerning that element.[179]

The following are legal definitions for your reference:

The word "knowingly" means that the act was done voluntarily and intentionally, not because of mistake or accident.

The term "firearm" means any weapon which is designed to, or may readily be converted to, expel a projectile by the action of an explosive.

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179 PATTERN JURY INSTRUCTIONS FOR FEDERAL CRIMINAL CASES DISTRICT OF SOUTH CAROLINA (Emily Deck Harrill, Ed. 2016).

The term "possess" means to have something within a person's control. Possession may be momentary or fleeting. Proof of ownership of the firearm is not required.

The term "moved in or otherwise affected interstate or foreign commerce" means that the firearm in any way involves, interferes with, changes, or alters commerce among the states. The effect can be minimal. It is not necessary for the government to prove that the defendant knew or intended that the firearm would affect commerce; it must prove only that the natural consequences of the firearm possession affected commerce in some way. Also, you do not have to find that there was an actual effect on commerce. The government must show only that the natural result of the offense would be to cause an effect on interstate commerce to any degree, however minimal or slight.

Following the judge's instructions to the jury, prosecutors and defense counsel make closing arguments as to why Jacobs should either be found guilty or innocent under the statute.

Prosecutors insist that Jacobs is guilty, and that absent the vigilance of the SAPD, he would have carried out a heinous school shooting. Pursuant to 18 U.S.C. § 922(q)(2)(A) and the jury instructions:

[*High Substantive Evidence*] Prosecutors first argue that Scott Jacobs "possessed" the Smith & Wesson Pistol. They emphasize 1) that Jacobs's fingerprint were found on the black duffle bag, the pistol, and the ammunition; 2) that he was captured on video hiding the bag behind the bushes; and 3) that he stole the gun from his prior employer Jack Abrams in order to carry out his attack. Prosecutors emphasize, per the jury instructions, that Jacobs clearly "possessed" the gun when he hid it behind the bushes, as the pistol was in his control as he walked onto school grounds.

[*Low Substantive Evidence*] Prosecutors first argue that Scott Jacobs "possessed" the Smith & Wesson Pistol. They emphasize 1) that Jacob is known troublemaker at Edison High with a long disciplinary record; and 2) that he previously told school officials that he'd get "payback" for what he perceived as unfair treatment by school officials. Taken together, prosecutors believe that these factors make Jacobs more likely than anyone else to be the perpetrator. Thus, prosecutors emphasize, per the jury instructions, that Jacobs must have been the student who clearly "possessed" the gun when he hid it behind the bushes.

[*Weak Jurisdiction*] Second, prosecutors insist that Jacobs's possession of the firearm affected interstate commerce. Although no one disputes that the gun was manufactured, sold, and always located within San Antonio city limits, prosecutors argue that it's possible—perhaps even likely—that the materials used during the gun manufacturing process came from outside of Texas. Prosecutors argue that that possibility meets the "minimal" requirement of the jury instructions.

[*Close Jurisdiction*] Second, prosecutors insist that Jacobs's possession of the firearm affected interstate commerce. Prosecutors argue that the presence of a gun on school grounds (especially an unregistered, stolen gun) undermines the ability of school officials to foster a safe educational environment; the absence of a safe school environment, in turn, results in less-capable graduates whose diminished educational experience has a negative impact on the U.S. economy. Prosecutors argue that this effect meets the "minimal" requirement of the jury instructions.

[*Strong Jurisdiction*] Second, prosecutors insist that Jacobs's possession of the firearm affected interstate commerce. Prosecutors emphasize that a pamphlet in the duffle bag indicated that the gun and ammunition were both manufactured in Ohio. Since Jacobs ended up with the gun in Texas, it must have moved in "interstate commerce." Moreover, prosecutors argue that the presence of a gun on school grounds (especially an unregistered, stolen gun) undermines the ability of school officials to foster a safe educational environment; the absence of a safe school environment, in turn, results in less-capable graduates whose diminished educational experience has a negative impact on the U.S. economy. Prosecutors argue that, collectively, these factors meets the "minimal" requirement of the jury instructions.

Finally, prosecutors argue that Scott Jacobs knew that he was in a school zone when he hid the Smith & Wesson pistol behind the bushes on school grounds (clearly within 1,000 ft of the school). Jacobs was a 12th grader at Edison High, meaning he had been a student for four years. Prosecutors insist that is implausible to believe that Scott didn't know he was at the high school during the morning in question.

Ultimately, prosecutors emphasize that a terrible tragedy—a school shooting—was avoided at the last second thanks to the vigilance of SAPD Officer John Taylor in finding the concealed duffle bag. Prosecutors ask the jury to find Scott Jacobs guilty of possessing a firearm in a school zone in violation of § 922(q)(2)(A).

[*High Substantive Evidence*] Defense counsel first argues that the black duffle bag did not belong to Jacob and he therefore did not "possess" it on school grounds. Despite the security camera footage and fingerprint matches, the defense emphasizes that Jacobs has never confessed to the crime. In the absence of a clear admission from him, the defense insists that there still exists a reasonable doubt as to whether Jacobs was indeed the student who brought the gun to the school. Moreover, the defense points out that Jacobs is not a registered gun owner, and therefore might not even know how to operate a firearm. Ultimately, the defense suggests that the prosecution is only targeting Jacobs because of the school's tip that he is a known troublemaker. Again, they insist that Jacobs never "possessed" the Smith & Wesson pistol.

[*Low Substantive Evidence*] The defense first argues that there is a complete absence of proof as to whether Jacobs was indeed the student that "possessed" the firearm. They note that prosecutors have only introduced Jacobs's school disciplinary record and his misguided comments to teachers; there's absolutely no direct evidence to demonstrate that Jacobs had anything to do with the black duffle bag or the firearm therein. According to the defense, this means that there is much more than a "reasonable doubt" as to whether Jacobs is guilty. The defense suggests that the SAPD has been unable to find any direct evidence as to whom the duffle bag actually belongs, and the prosecutors are trying to save face by accusing Jacobs of the crime solely based of his past disciplinary problems. The defense closes by emphasizing that just becomes someone has a history of trouble with school officials does not mean that they are automatically guilty of attempting to carry out a school attack.

[*Weak Jurisdiction*] Second, the defense also argues that, even if Jacobs did "possess" the gun, Jacobs's possession of the firearm did not affect interstate commerce as required by the 18 U.S.C. § 922(q)(2)(A). The defense emphasizes that the gun at issue never left San Antonio, let alone Texas. Rather, since it's manufacture, the firearm had always remained within a single city. Therefore, the defense insists that the possession of the gun in a school zone has nothing to do with "commerce" or any sort of economic enterprise.

[*Close Jurisdiction*] Second, the defense also argues that, even if Jacobs did "possess" the gun, Jacobs's possession of the firearm did not affect interstate commerce as required by the 18 U.S.C. § 922(q)(2)(A). The defense insists that the possession of a gun in a school zone has nothing to do with "commerce" or any sort of economic enterprise. It argues that Jacobs is a local student at a local school, and there is no indication that he had recently traveled with the gun out of state.

[*Strong Jurisdiction*] Second, the defense also argues that, even if Jacobs did "possess" the gun, Jacobs's possession of the firearm did not affect interstate commerce as required by the 18 U.S.C. § 922(q)(2)(A). The defense insists that the possession of a gun in a school zone has nothing to do with "commerce" or any sort of economic enterprise. It argues that, even though the gun and ammunition were manufactured in Ohio, Jacobs is a local student at a local school.

Finally, the defense insists that Jacobs should be acquitted because, even if he did "possess" the firearm, he did not bring the firearm into the school but instead hid it behind a bush on school grounds.

You have been selected as a juror.
Questions:

1. What is the last name of the defendant in this case?[180]

[180] This is simply a reading check. Participants who do not answer these questions correctly were not allowed to proceed.

   a. Brown
   b. Jacobs
   c. Smith

2. What crime is at issue in this case?[181]
   a. Drug possession in a school zone
   b. Firearm possession in a school zone
   c. Driving while intoxicated

<u>High Evidence Group</u>

3. On a scale from 1 (low) to 10 (high), how convincing is Jacobs's school disciplinary record in proving that Jacobs is guilty of possessing a gun in a school zone?

4. On a scale from 1 (low) to 10 (high), how convincing is the security camera footage in proving that Jacobs is guilty of possessing a gun in a school zone?

5. On a scale from 1 (low) to 10 (high), how convincing are the fingerprint matches in proving that Jacobs is guilty of possessing a gun in a school zone?

6. On a scale from 1 (low) to 10 (high), how convincing is the explanation of Jacobs's connection to the pistol (i.e., the gun's serial number partially matching his employer's stolen gun) in proving that Jacobs is guilty of possessing a gun in a school zone?

<u>Low Evidence Group</u>

4. On a scale from 1 (low) to 10 (high), how convincing is Jacobs's school disciplinary record in proving that Jacobs is guilty of possessing a gun in a school zone?

5. On a scale from 1 (low) to 10 (high), how convincing is Jacobs's "payback" comment in proving that Jacobs is guilty of possessing a gun in a school zone?

6. On a scale from 1 (low) to 10 (high), how convincing is the fact that Jacobs did not testify in proving that Jacobs is guilty of possessing a gun in a school zone?

7. Would you find Jacobs guilty or not guilty of possessing a gun in a school zone under 18 U.S.C. § 922(q)(2)(A)?

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181 *Id.*

a. Why do you believe that Jacobs is guilty or not guilty?

8. To find Jacobs guilty, you were required to find that all three elements of 18 U.S.C. § 922(q)(2)(A) were satisfied. On a scale from 1 (low) to 10 (high), how convinced were you that the first element of 18 U.S.C. 922(q)(2)(A)—that "the defendant knowingly possessed a firearm, namely, a Smith & Wesson pistol"—was satisfied?

9. On a scale from 1 (low) to 10 (high), how convinced were you that the second element of 18 U.S.C. § 922(q)(2)(A)—that "the firearm moved in or otherwise affected interstate or foreign commerce"—was satisfied?

10. On a scale from 1 (low) to 10 (high), how convinced were you that the third element of 18 U.S.C. § 922(q)(2)(A)—that "the defendant possessed the firearm at a place where defendant knew or had reasonable cause to believe is a school zone (that is, in, or on the grounds of, or within 1,000 feet from Edison High School)"—was satisfied?