“Experimental jurisprudence” is a novel empirical approach to jurisprudence. This practice has grown into a movement, as scholars increasingly conduct experimental-jurisprudential studies of legal concepts including causation, consent, intent, knowledge and reasonableness. Despite clear progress, the approach’s justification is still surprisingly opaque. To put it most provocatively: Jurisprudence is the study of deep and longstanding theoretical questions about law’s nature, but “experimental jurisprudence” simply surveys laypeople. Experimental jurisprudence seems to miss the mark on two counts. First, the wrong group: Laypeople—with no legal expertise—are a strange population to survey about legal criteria of causation or consent. Second, the naturalistic fallacy: Even if surveys of laypeople tell us something about what law is, they do not tell us what law should be.

This Essay fills this justificatory gap, providing an articulation and defense of experimental jurisprudence. It argues that although jurisprudence is often considered the domain of legal experts, experimental surveys of laypeople provide crucial and unique insights. Moreover, the collection of this empirical data can, in fact, contribute to normative jurisprudential debates. The Essay concludes by arguing that once experimental jurisprudence is appropriately understood, it becomes clear that the practice is not merely consistent with the aims of traditional jurisprudence; it is actually an essential branch of jurisprudence.
CONTENTS

I. WHAT IS EXPERIMENTAL JURISPRUDENCE? ...........................................3

II. EXISTING WORK .......................................................................................8

III. EXPERIMENTAL JURISPRUDENCE: 5 ½ MYTHS ..................................18

   The ½ Myth: Experimental Jurisprudence Has No Normative Implications ....19
   Myth 1: Experimental Jurisprudence Should Study Legal Experts, Not Laypeople ..22
   Myth 2: Experimental Jurisprudence Aims to Model Legal Decision Making ........27
   Myth 3: Any Empirical Study is Either “Experimental Jurisprudence” or Not .......29
   Myth 4: Experimental Jurisprudence Requires Conducting Experiments ........33
   Myth 5: Experimental Jurisprudence is Not Really Jurisprudence ................35

CONCLUSION .................................................................................................37
EXPERIMENTAL JURISPRUDENCE

I. WHAT IS EXPERIMENTAL JURISPRUDENCE?

The Essay’s answer is simple: Experimental jurisprudence is scholarship that takes a jurisprudential question and addresses it with experiments.¹

This two-part definition is straightforward.² But it leads to surprising implications about the nature of “jurisprudence” and the research it calls for.³ Before getting there (Part III), the Essay introduces experimental jurisprudence or “XJur” (Part I) and a framework to understand its diverse research (Part II).

To unpack this two-part definition (“experimental” plus “jurisprudence”), it is helpful to reflect on the meaning of jurisprudence. That is itself controversial.⁴ But consider some representative descriptions:

- In the United States, jurisprudence is “mostly synonymous with ‘philosophy of law’…. [but there is also] a lingering sense of ‘jurisprudence’ that encompasses high legal theory … the elucidation of legal concepts and normative theory from within the discipline of law.”⁵

- Jurisprudence is “the most fundamental, general, and theoretical plane of analysis of the social phenomenon called law…. Problems of jurisprudence include whether and in what sense law is objective … the meaning of legal justice … and the problematics of interpreting legal texts.”⁶

- The “essence of the subject … involves the analysis of general legal concepts.”⁷

¹ [Thanks and acknowledgements]


³ It is mostly straightforward. See Part III infra (on why “experimental jurisprudence” is better understood as “empirical jurisprudence”).


⁷ Tur, supra, at 152.
These each characterize jurisprudence broadly—and somewhat differently. As such, this Essay understands jurisprudence inclusively. Jurisprudence is a “broad church.”8 It is concerned with descriptive questions, seeking to clarify legal concepts and legal interpretation, as well as normative questions about what law should be.9 It approaches these questions from a theoretical perspective, but it is not (in principle) committed to a particular methodology.10

Despite this breadth, if forced to identify the “core” of jurisprudence, many would point to analytical jurisprudence.11 At the very least, this is a branch of longstanding jurisprudential importance. It examines legal concepts including the law itself,12 causation,13 reasonableness,14 punishment,15 and property.16 “Conceptual analysis” investigates which features these legal concepts have; this also raises questions about which features they should have.17

As its name suggests, conceptual analysis is the project of analyzing concepts. Jurisprudence scholars reflect on legal concepts and attempt to articulate their features. Some have expressed skepticism about this program, but it remains an extremely popular approach to jurisprudence. As Langlinais and Leiter put it, in “many areas of philosophy, doubts about the kind of conceptual and linguistic analysis . . . have become common . . . . [But] not so in legal philosophy.”18

The most common way to assess proposed analyses of legal concepts is to reflect on hypothetical test cases or “thought experiments.”19 These can provide some intuitive evidence about whether the proposed analysis is successful.20

As an example, consider a toy analysis of the legal concept of reasonableness. This concept is central to legal determinations from tort negligence,21 to open contract price terms,22 to the line between murder and manslaughter.23 The term

8 Julie Dickson, Ours Is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry, 6 JURISPRUDENCE 207 (2015); see also Dan Friel, Evidence-Based Jurisprudence: An Essay for Oxford, ANALISE E DIREITO (2020).
9 E.g. ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION (2011).
10 Dickson, supra.
11 Tur, supra, at 152.
16 E.g. 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 795-99 (1885); Felix S. Cohen, Dialogue on Private Property, 9 RUTGERS L. REV. 357 (1954).
18 Alex Langlinais & Brian Leiter, The Methodology of Legal Philosophy, in THE OXFORD HANDBOOK OF PHILOSOPHICAL METHODOLOGY.
19 Id.
21 Restatement (Third) of Torts: Liability for Physical Harm § 3 (2005).
22 Uniform Commercial Code § 2-305.
“reasonable” appears in over one-third of modern published judicial decisions. So a theoretical question of great practical significance is: what is “reasonable”?

A conceptual analysis of reasonableness might begin by reflecting on seemingly important properties of the concept. For example, it might seem that—very broadly speaking—an important feature is that what is reasonable is in some sense good. In the context of negligence law, we might consider the view that reasonable care is just care that is expected to lead to the best consequences: If some action is expected to lead to overall bad (or even sub-optimal) consequences, it is not reasonable; and if something is expected to lead to overall welfare-maximizing results, it is reasonable.

Next, this (toy) jurisprudential analysis might reflect on some thought experiments. For example, consider a thought experiment that might question this welfare-maximizing analysis of reasonableness:

**Life-Saving Negligence**: Imagine that a company produces and sells yachts. For each yacht that they sell, they donate twenty-percent of the profits to a high-impact charity. That charity donation ultimately saves five lives per yacht sale. Yacht production also creates pollution. The company decides to maximize their production, ignoring any other effects of production. This choice foreseeably leads to severe pollution levels that kill a number of people in the factory’s town each year—about one person per yacht produced.

This decision to maximize production is welfare maximizing (five lives saved for each lost—plus the benefits of yachts). But it seems—intuitively—that the company has not acted with “reasonable care.”

Such a reaction to this thought experiment represents something like a legal-philosophical discovery. Insofar as we place significant weight on that response, we might conclude that the proposed conceptual analysis needs revision. That intuition (if shared) suggests that reasonable care is not simply welfare-maximizing care, and we should refine the analysis, test that revision with more cases, refine the analysis in light of those, and so on.

The Life-Saving Negligence case is a thought experiment that seems to elicit a

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24 Harvard University, Caselaw Access Project Historical Trends v.1.0, Graph of “reasonable,” https://case.law/trends/?q=reasonable (last visited June 20, 2019).
25 Or maybe not. Perhaps some readers do not share the intuition. The aim here is not to analyze reasonableness, but to demonstrate a very familiar method of analysis. One other important possibility in thought experimentation is that the intuitions are not shared.

Ignoring unshared intuitions can lead to some problems. If those “who do not share the intuitions are simply not invited to the games,” Robert Cummins, Reflection on Reflective Equilibrium, Rethinking Intuition 116 (Oxford: Rowman & Littlefield, 1998), there is a danger that the process of conceptual analyses falls victim to groupthink and information cascades. The “shared” intuition takes on increasing strength as those with minority views leave the debate.
shared response (e.g. the company’s acts are welfare-maximizing, but not reasonable). This response is an “intuition.” A jurist describes some scenario (actual or hypothetical) and invites readers to consider some question about the scenario: Does the care seem reasonable; which action seems like the cause; or is that rule a legal rule? Classic thought experiments and corresponding intuitions in legal theory include Holmes’s Bad Man,26 the criminality of Fuller’s Speluncean Explorers,27 excuses for Kadish’s Mr. Fact and Mr. Law,28 and the legal effect of hypothetical rules like “no vehicles in the park”29 or “it is a misdemeanor to sleep in any railway station.”30

Experimental jurisprudence can be thought of as a method of empirical thought experimentation. As an example, consider an experimental jurisprudence study about reasonableness.31 That study assessed lay judgments, seeking evidence about the ordinary concept of reasonableness. In Part III the Essay turns to a defense of XJur’s focus on lay judgments. But for now, assume for the sake of illustration that these results arose in a study of legal experts.

The experiment studied the concept of reasonableness, against the background of two types of important theories. On the first, reasonableness is about what is some sense good; reasonableness is welfare maximizing, normatively justified, virtuous, or right.32 On the second, reasonableness is about what is common. The reasonable is what is customary, average, or typical.

The experimental jurisprudence study hypothesized that there is some truth in both sides of this debate. It predicted that the (ordinary) concept of reasonableness is informed by both prescriptive considerations (e.g. what is good) and statistical ones (e.g. what is average). This is a proposed conceptual analysis: The concept of reasonableness is a “hybrid” of what is average and ideal, much like our ordinary concept of what is “normal.”33

As in a typical jurisprudential analysis, this conceptual proposal makes some predictions about how the concept applies. Traditional thought experimentation tests predictions with clever hypotheticals. Experimental jurisprudence tests predictions with empirical studies. In this case, the proposed “hybrid” conceptual analysis holds that reasonableness reflects both norms about what is average and norms about what is ideal (or good). This account predicts that, when the relevant average and ideal diverge, the reasonable quantity would be intermediate. For example, consider the number of weeks that a criminal trial is delayed. The ideal and average would likely diverge; if there is a delay, ideally it

26 Oliver W. Holmes, The Path of Law, 10 HARV. L. REV. 457 (1897).
28 MONRAD PAULSEN & SANDY KADISH, CRIMINAL LAW 485-86 (1962).
would only last a few weeks, while the perceived average delay is much larger, say many months. If the perceived average and ideal diverge in this way, the account predicts that a “reasonable” delay would be intermediate, say just a couple months.

Participants were assigned randomly to three different groups. The first group made judgments about the “average” quantity of various domains. For example, they were asked to provide their view of the “average” number of weeks that a criminal trial is delayed. The second group made judgments about “ideal” quantities, for example the “ideal” number of weeks that a criminal trial is delayed. The third “reasonable” group, provided their estimates of the “reasonable” quantity for each domain. Across various different domains, the mean reasonable quantity was intermediate between divergent average and ideal quantities, at rates higher than chance. For example, the reasonable number of weeks’ delay before a criminal trial (10) fell between the judged average (17) and ideal (7). These results provide evidence that the ordinary concept of reasonableness is a “hybrid” concept, informed by both prescriptive and statistical considerations.\(^{34}\)

This is just one example of experimental jurisprudence, but it demonstrates a typical approach. With this first example in mind, the reader may already be warming to the idea that “experimentation” is not so unwelcome in jurisprudence. There is much in common between traditional jurisprudence and experimental jurisprudence: Both propose theories about legal concepts (e.g. reasonableness is welfare-maximization, or reasonableness is a “hybrid” of statistical and prescriptive norms); both test those theories with (thought) experiments; and both revise the conceptual analysis in light of the findings.

At the same time, there are some very important differences between the approaches. Traditional jurisprudence is normally conducted in the seminar room, or in the pages of law reviews, among professors and scholars with significant training and expertise. Experimental jurisprudence is normally conducted online, by surveying laypeople who typically know very little about the law. In analyzing the concept of legal reasonableness, why should we think that the views of someone with no legal training should be particularly helpful?

The remainder of the Essay builds the infrastructure to answer this question. Next, Part II details some examples of recent experimental jurisprudence, proposing a framework to unify these diverse projects. Part III debunks “five and half” popular myths about experimental jurisprudence. In doing so, the Essay distinguishes experimental jurisprudence from seemingly similar approaches to legal scholarship. Together these three Parts clarify and justify the movement of experimental jurisprudence and conclude that, despite its novelty, it should be understood as a movement at the core of traditional jurisprudence.

\(^{34}\) Tobia, supra.
II. EXISTING WORK

To understand the significance of experimental jurisprudence movement, it is instructive to study the work in that area. There are many recent examples of experimental jurisprudence, and this Part’s brief overview cannot do justice to all of those.\textsuperscript{35} This Part highlights experimental jurisprudence studies across several areas: studies of mental states (including knowledge, recklessness, and intent), consent, reasonableness, causation, ownership, the self, law itself, and interpretation.\textsuperscript{36}

The order of presentation reflects the breadth of experimental jurisprudence. Much of the best-known experimental jurisprudence studies concepts that are specifically referenced in law: knowledge, intent, consent, reasonableness. But experimental jurisprudence also studies concepts that are not explicitly referenced as an object of study in law, including the self, or the concept of law itself. Finally, experimental jurisprudence studies broader classes of concepts. For example, in addition to studying the specific concept of causation (e.g. relevant to the law of tort negligence citing the criterion of “cause”), it also studies a broader type of causal reasoning (e.g. relevant to employment law rules analyzing whether some act was performed “because of” X or whether some act “results from” X).

This Part concludes with some broader considerations about the nature of experimental jurisprudence, in light of this investigation. Although it often seems that experimental jurisprudence focuses on studying terms cited explicitly in law (e.g. “consent” or “reasonable”), this is not its primary criterion. Rather, experimental jurisprudence can study any ordinary concept that is counterpart to something of legal relevance. For example, it studies the ordinary concepts of consent or reasonableness, to inform legal theorizing about consent or reasonableness. But it also studies ordinary concepts that do not have a counterpart appearing prominently in jury instructions: responsibility, or voluntariness, or personal identity and the self. As such, the key question in identifying an area of potential experimental jurisprudential study is not whether the term is cited explicitly in some legal rule, but rather whether it refers to something of legal significance.

\textit{Mental states: knowledge, recklessness, intent}

From criminal law mens rea to the distinction between intentional and non-intentional torts, mental states have great legal significance. What is knowledge, recklessness, or intent? Experimental jurisprudence has contributed to these legal questions by studying these ordinary concepts.

As a first example, consider the legal distinction between knowledge and

\textsuperscript{35} For another list of experimental jurisprudence see Stefan Magen & Karolina Prochownik, Legal X-Phi Bibliography, https://zrsweb.zrs.rub.de/institut/clbc/legal-x-phi-bibliography/.

Electronic copy available at: https://ssrn.com/abstract=3680107
recklessness. Vilares et al. sought to test whether there is an ordinary distinction between knowledge and recklessness. To do so, they ran a neuroscientific experiment, evaluating whether different brain states were associated with attributions of knowledge and recklessness.37

They conducted an fMRI study involving a “contraband scenario.” Participants evaluated different scenarios in which they could carry a suitcase, which might have contraband in it, through a security checkpoint. The probability that the suitcase had contraband varied across different scenarios—in some scenarios participants were completely sure that the suitcase had contraband (“knowledge condition”) and in others, there was merely a risk that the suitcase had contraband (“recklessness conditions”).

The study found that participants’ evaluation of the two states (knowledge, recklessness) were associated with different brain regions. Moreover, the fMRI data predicted whether participants faced a knowledge or recklessness scenario (out of sample, at rates greater than chance). This provides evidence that the legal concepts are, in part, running parallel to an ordinary distinction. This finding suggests that the legal categories of knowledge and recklessness are actually founded on the ordinary notions.

Another set of recent studies have focused on the concepts of intent and acting intentionally.38 As one example, experimentalists have found that ordinary people are sometimes sensitive to the severity of a side-effect when judging whether it was produced intentionally.39 Recall the Essay’s earliest hypothetical about the “life-saving negligence.”40 The company aimed to sell yachts, which would raise money for them and for charity, but that production decision had one bad side-effect: creating pollution that would kill some other people. Did the company intentionally pollute? Research shows that in these cases, people are more inclined to judge that pollution is more intentionally produced when it is deadly than when it is non-fatal (all else equal).41

These studies about ordinary concepts raise a number of intriguing jurisprudential questions. In an approach similar to that of traditional jurisprudence, experimental jurisprudence scholars debate these possibilities: is severity sensitivity a performance error (or a “mistaken” intuition in response to the thought experiment); and should the legal criterion of intentional action reflect this “severity-sensitivity” feature of the ordinary concept? In response to this

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40 Part I, supra.

normative question, some argue no, while others have raised considerations in favor of yes. As in traditional jurisprudence, these debates are not easily resolved. But learning more about the ordinary concept raises new and important questions about how law should understand knowledge, recklessness, intent, and other mental states.

**Consent**

As a next example, consider the experimental jurisprudence study of consent. The groundbreaking work in this area comes from Roseanna Sommers, who has investigated the meaning of consent across a range of legal contexts. One important line of her work focuses on the relationship between deception and consent. Law often holds that material deception vitiates consent; when someone’s agreement is gained through deception about a material fact, there is not valid consent. For example, imagine that I offer to sell you a car with “only 10,000 miles” and you agree. In reality, the car has 100,000 miles. Your agreement would not be “consensual” if you relied upon my misrepresentation.

Sommers’s experimental jurisprudence of consent has found, however, that ordinary people often attribute “consent” in circumstances in which there has been significant deception. In one of Sommers’s experimental hypotheticals, a single woman does not desire to sleep with married men. The woman asks a potential partner about his marital status, and he lies and says he is not married. The woman then agrees to sleep with him. In this case, the overwhelming majority of participants judged that the woman did “give consent to sleep with [the man].” Despite deception regarding a very important fact (the man’s marital status), people attribute consent.

Given the crucial role that consent has across torts, criminal law, and contracts, these findings raise broad questions. Is the legal notion of consent consistent with the ordinary concept? Of course, this experiment does not settle

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42 See, e.g., Kneer & Bourgeois-Gironde, supra.
45 Id.
46 Id. This relates to the discussion, infra, of classes of concepts. Many take experimental jurisprudence to focus primarily on concepts cited by law (e.g. consent). But experimental jurisprudence studies (correctly) a wide range of concepts and classes of concepts that have legal significance.
47 Heidi M. Hurd, The Moral Magic of Consent, 2 LEGAL THEORY 121, 123 (1996) (consent :“turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography”).
this complex jurisprudential question.

But it does provide the longstanding jurisprudential debate with new and unique insights. For example, Sommers's further studies indicate that what drives this effect is something about what seems an “essential” part of the agreement.\(^{48}\) If there is deception about the essence of the contract or arrangement, that vitiates consent; but deception about less essential features does not. Here again, this data does not settle the debate about how law should identify the right criteria of legal consent. But it provides important information for analysis; now knowing that our intuitions about what seems consensual depend on our view of what is “essential” to the agreement (and not what’s material), does that give us any reason to revise the legal notion of consent?

Reasonableness

Experimental studies have also clarified the ordinary notion of what is reasonable. From the first year of American law school, torts classes ask what kind of precautions would be taken by “the reasonable person”; contracts classes estimate the “reasonable time” in which a contract offer remains open; criminal law considers what “reasonable provocations” would mitigate murder to manslaughter, and constitutional law elaborates “reasonable suspicions” and “reasonable expectations of privacy.” So what does it mean for something to be “reasonable?”

Part I of this Essay introduced one of the experimental studies on reasonableness, which suggested that the ordinary notion of what is reasonable is a hybrid. In deciding if something is reasonable, we draw on our conception of what is typical and what is ideal or good. Reasonableness is not equivalent to either of those facts, but it is produced in some combined “hybrid” judgment—similar to the way in which we assess what is “normal.”\(^{49}\)

Other recent work has uncovered similar evidence about the ordinary concept. Reasonableness is distinct from (welfare-maximizing) rationality.\(^{50}\) And while lay judgments of what is legally reasonable are affected by consideration of what most people would do in the circumstance,\(^{51}\) they are not affected by consideration of what would be economically efficient in the circumstance.\(^{52}\)

Here it is worth commenting briefly on how some of this research emerged. The “hybrid” prediction about reasonableness arose from similar work on the cognitive science of normality.\(^{53}\) This work in cognitive science, conducted without jurisprudential questions in mind, opened new possibilities in theorizing

\(^{48}\) Sommers, supra.

\(^{49}\) Bear & Knobe, supra.

\(^{50}\) Igor Grossman, Richard P. Eibach, Jacklyn Koyama & Qaisar B. Sahi, Folk Standards of Sounds Judgment; Rationality Versus Reasonableness, 6 SCIENCE ADVANCES (2020).

\(^{51}\) Tobia, supra.


\(^{53}\) Bear & Knobe, supra.
legal reasonableness. If legal criteria (e.g. the criteria of what is reasonable) are at times connected to the corresponding ordinary notion (e.g. reasonableness), this inspiration from cognitive scientific theory may prove useful. If ordinary concepts are at the root of legal concepts, discoveries about ordinary concepts will facilitate discoveries useful to jurisprudential debates.

**Caution**

As a third example, turn to experimental jurisprudence of causation. Jurisprudence has long studied “the plain man’s notions of causation.” Experimental jurisprudence has made new progress on that traditional inquiry.

When thinking about potential causes there are several plausible features of significance. One is the potential cause’s necessity: Would the outcome have occurred if not for the cause? A second is its sufficiency: Was the cause enough to bring about the outcome?

Studies in cognitive science have shown that the ordinary concept of causation is informed by both of these features. James Macleod establishing this important branch of experimental jurisprudence by designing a seminal study to test whether this feature of the ordinary concept also manifests in people’s judgments about cases of legal causation. He considered three legal examples: a scenario asking, did death “result from” a certain drug; a scenario asking, was an employee terminated “because of” his age; and a scenario asking whether someone was assaulted “because of” his religion.

Participants considered one of four types of cases, each of which varied whether the cause was necessary or sufficient to bring about an outcome:

(i) necessary and sufficient;
(ii) necessary but not sufficient,
(iii) sufficient but not necessary, and
(iv) not sufficient and not necessary.

For example, in the drug case, a protagonist buys three drugs from multiple dealers. The relevant drug may have been (i) the only drug potent enough to kill (alone), (ii) the only drug that is potent drug in combination either of the others,

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54 The view that ordinary concepts are *never* at the root of the corresponding legal notion seems extremely unlikely. That possibility would also call for a radical rethinking of traditional methods of jurisprudence. If legal criteria of consent, or causation, or reasonableness were completely unrelated to the corresponding ordinary notion, why does jurisprudence engage in the project of thinking about what seems consensual, causal, or reasonable?


58 MacLeod, supra.
(iii) one of three drugs potent enough to kill (alone), or (iv) one of several drugs potent in combination with any other.

That experiment made two striking discoveries. First, people attributed causation in cases in which the cause was not a but-for cause (e.g. iii and iv). Second, sufficiency had an important effect on ordinary judgments of causation. These findings cohere with recent cognitive scientific findings that ordinary judgments of causation are influenced by both necessity and sufficiency.59

Ownership

Experimentalists have also studied the concept of ownership. Here again, experimentalists draw on the rich field of cognitive science. Scientists have argued that children have a rich theory of ownership,60 which may undergird a (lay) theory of legal ownership.61 As one brief example of an experimental jurisprudence study of ownership, consider a recent paper. Experimentalists studied how people evaluate “finder versus landowner cases,” cases in which one person finds something on someone else’s land. They found that participants were more inclined to view the finder as the owner when the found object was in a public (rather than private) space.62

The self

This next example serves as an important proof of concept. The preceding examples involve concepts that law cites explicitly. But experimental jurisprudence also studies some ordinary concepts that have a less obvious relation to law.

As one example, consider the concepts of personal identity and the self. These terms do not frequently manifest in legal texts or opinions. Nevertheless, experimental jurisprudential study of these concepts has advanced legal scholarship in a surprising way.

Drawing on a large literature in experimental psychology of the self,63

59 Recent cognitive scientific has also highlighted another significant factor in ordinary judgments of causation: (ab)normality. See generally Knobe & Shapiro, supra; see also Andrew Summers, Common-Sense Causation in the Law, 38 OXF. J. LEG. STUD. 793 (2018); Lawrence Solan, & John Darley, Causation, Contribution, and Legal Liability: An Empirical Study, 64 LAW & CONTEMP. PROBLEMS 265 (2001).

60 Shaylene E. Nancekivell, Ori Friedman & Susan A. Gelman, Ownership Matters: People Possess a Naïve Theory of Ownership, 23 TRENDS IN COG. SCI. 102 (2019).


63 See, e.g., Dan Bartels & Lance Rips, Psychological Connectedness and Intertemporal Choice, 139 J. EXP. PSYCHOL. 49 (2010); Dan Bartels & Oleg Urminsky, On Intertemporal Selfishness: The Perceived
Christian Mott investigated whether judgments about the self might explain the intuitiveness of criminal punishment or statutes of limitations. Broadly speaking, the hypothesis was that what makes statutes of limitations seem appropriate is something to do with our sense that people change over time.

To test this hypothesis, Mott presented participants with a scenario in which a person recklessly drives drunk. In eleven different versions of the scenario, police find a security camera video showing the person’s action and are able to identify him. The key difference is that in the first version, police find the video the next day, in the second, the police find the video three years later; in the third, six years later; in the fourth, nine years later . . . ; and in the last, thirty years later. Participants evaluated whether it is “right” for the person to be “arrested and punished” immediately after the video is found.

Unsurprisingly, agreement that the man should be arrested and punished decreased with the years passing. Participants evaluated that the man was most deserving of punishment when the video was found the next day, and agreement decreased as more time elapsed between the incident and time of arrest.

Mott also asked participants to evaluate three other questions. First was a “deterrence” question regarding whether the man would have been less likely to drive drunk if he knew he would be arrested and punished [the next day, three years later ... thirty years later]. Second was a “repose” question regarding whether the man has the right to be able to stop worrying about being arrested and punished [the next day, three years later, ... thirty years later]. Third was a connectedness question about whether the man who recklessly drove was “completely connected’ or “completely disconnected” from the person he is when the police find the video [the next day, three years later, ... thirty years later]. A mediation analysis found that the effect of time on punishment was explained by connectedness and repose but not deterrence.


This is a very striking finding. Although many would think the ordinary justification of statutes of limitations is linked to intuitions about deterrence, Mott’s findings suggest that it is more closely connected to concerns about repose and the self. In this case, this finding raises a largely overlooked legal question. Should legal punishment take into consideration intertemporal connectedness? For example, is someone less deserving of punishment for a crime that they committed after they have undergone large personal change? As in the other examples, the experimental findings will not directly resolve these questions about punishment and responsibility. But they provide new insight into these topics and suggest questions that jurisprudence might consider asking.

**Law itself**

Consider the concept of law itself. Raff Donelson and Ivar Hannikainen examined how ordinary people understand law. In an important series of experiments, they tested whether ordinary people (and legal experts) endorsed Fuller’s conditions of the inner morality of law. For example, do people think that law has to be consistent, general, intelligible, public, and stable?

That study investigated two questions. First, are these conditions of law seen as necessary? Second, do laws in practice observe these principles? The results—from ordinary people and experts alike—are fascinating. There was strong endorsement of these as principles of law. That is, laws must be prospective, stable, intelligible, and general. Yet, participants also agreed that there are some laws that are (in fact) not prospective, stable, intelligible, or general.

As with the other experimental jurisprudential studies, the lesson here is not for the law to simply reflect the ordinary notion. Donelson and Hannikainen do not recommend that law have a self-contradictory nature. Rather, the experiment adds insight into traditional jurisprudential debates. What features do we believe laws must and do have, and what explains those judgments?

**Interpretation**

A final area of experimental jurisprudence is study of legal interpretation. One example of experimental jurisprudence in this area is study related to the jurisprudential focus on “ordinary meaning.” In legal interpretation—of statutes, contracts, and constitutions—courts often look to the “ordinary,” “public,” or “plain” meaning of the legal text. There are important debates and disagreements about how to elaborate these concepts. Yet, on a number of plausible views, plain, ordinary, and public meaning are closely linked to facts

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about how ordinary people understand terms and texts.

For example, one study used experiments to assess several possible sources of legal-interpretive evidence. It assigned participants to one of three groups. The first made ordinary conceptual judgments (e.g. answering questions like “Is a car a vehicle?”, “Is a bicycle a vehicle?”, and so on). The next group made similar judgments, armed with just a dictionary definition. The other group made similar judgments, using data from “legal corpus linguistics”. The study found that the judgments of these three groups diverged dramatically.

This finding has several implications. Some are more straightforward practical implications about how courts are likely to use certain sources of evidence in assessing a text’s “ordinary meaning.” But others are jurisprudential implications. For example, if a dictionary and corpus linguistics provide dramatically different evidence about the “ordinary meaning” of the same terms, does this give us reason to rethinking the legal concept of ordinary meaning, or the success of certain versions of textualism and originalism?

Concluding thoughts

This summary, although not entirely brief, has only scratched the surface. There is much other experimental jurisprudence not covered here, such as experimental jurisprudence of contract and punishment.

Before turning to the next Part, it is worth briefly assessing what connects these diverse experimental jurisprudential projects. One common view is that XJur studies ordinary concepts that are cited explicitly in law: e.g. consent or reasonable. XJur does study those concepts, but not because of their explicit legal citation. The real criterion of XJur is whether the legal object of study has an ordinary language counterpart. This difference is clarified in Figure 1 below.

<table>
<thead>
<tr>
<th>Does the object of study have an ordinary language counterpart?</th>
<th>Is the object of experimental study cited explicitly in (real) law?</th>
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<tbody>
<tr>
<td>Yes</td>
<td>Yes: Cause; consent; intent; reasonable</td>
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<td></td>
<td>Rarely or Never: The self; the concept of law</td>
</tr>
<tr>
<td>No</td>
<td>No: Parol evidence rule; stare decisis; Hand formula</td>
</tr>
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<td></td>
<td>Legal positivism; soft law; Kaldor-Hicks efficiency</td>
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Figure 1. A framework for identifying types of experimental jurisprudence

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Many assume that the most important objects of XJur’s study are just those that are cited explicitly in law: consent, reasonableness, intent. This is partly a result of the (mistaken) view that experimental jurisprudence is principally concerned with predicting how lay juries will decide cases.\textsuperscript{70} Of course, many experimental jurisprudence studies have focused on those concepts. Unsurprisingly, many important legal concepts also appear with regularity in real legal texts.

However, this criteria—what terms and phrases appear legal texts—is not a completely reliable way of determining useful experimental jurisprudential projects. There are a number of other notions that are rarely or never cited explicitly in law, but which nevertheless are crucial jurisprudential (and more broadly, legal) concepts. This includes concepts of personal identity and the self, (moral) responsibility, and even the concept of law itself.

To take just one example, consider the concept of numerical identity. This is a crucial legal concept. It is implicated as a necessary criterion of most interesting diachronic legal relations. When are you bound by that contract? Only when you are the same person as one of the parties who originally agreed to it. When does he deserve criminal punishment? Only when he is the same person as the one who committed the crime. Yet, “numerical identity” is hardly ever cited explicitly by courts.\textsuperscript{71} The same is true of many other notions that might have legal significance: although courts discuss “law”, it is rare to refer to the concept of law, or the concept of soft law, or concepts like Kaldor-Hicks efficiency.

That said, there is not much to learn from studying the ordinary concept of the parol evidence rule or soft law, as there is no ordinary concept.\textsuperscript{72} The better criterion for identifying useful experimental jurisprudential inquiries is whether the legal object has a corresponding ordinary language counterpart. Because experimental jurisprudence focuses specifically on ordinary cognition,\textsuperscript{73} these ordinary concepts are the most valuable to study.

The crucial criterion is whether a counterpart of some ordinary concept plays (or might play) an important role in the law. This is true of ordinary concepts whose counterpart is cited (e.g. the ordinary notion of what is reasonable, consensual, self-defense, or retribution) but also ones that are not explicitly cited (e.g. the ordinary notion numerical identity or of the concept of law itself).

Before turning to the next Part, there is one final wrinkle to address. XJur often focuses on specific legally significant concepts (e.g. ownership). But sometimes it focuses on broader classes of concepts, for example studying how law treats concepts that admit of a broad range of potential category members.\textsuperscript{74}

\textsuperscript{70} See Part III infra (Myth 2).
\textsuperscript{71} A Westlaw search returns ten cases.
\textsuperscript{72} Of course, if these legal concepts are composed of concepts that have ordinary counterparts, then studying the lay view of those might prove useful.
\textsuperscript{73} See Part III infra.
\textsuperscript{74} E.g. Tobia, supra.
One good example of this is Jamie Macleod’s work on “causation.”75 Those studies examine lay judgments of vignettes using different phrases—such as “because of” and “result from”—that are taken to reflect ordinary causal reasoning. Another good example is Roseanna Sommers’s work on “consent.”76 Those experiments study judgments about “consent,” but also about whether “permission” was granted or whether an act was “autonomously authorize[d].”77

These experiments report similar patterns of judgment across vignettes using these varied terms, and are taken to reveal something more general about ordinary causal or consensual reasoning—rather than only something about some more specific concept (e.g. the concept of because of).

III. EXPERIMENTAL JURISPRUDENCE: 5½ MYTHS

With an introduction to experimental jurisprudence (Parts I and II), the Essay now turns to a defense of this approach. To do this, it considers a series of critiques of experimental jurisprudence—objections, concerns, and claims of the movement’s insignificance. This Section’s “five and a half myths” framing takes inspiration from a seminal piece on legal positivism by John Gardner.78 Debunking each myth further clarifies the nature of experimental jurisprudence; and collectively, the explanations justify XJur’s aims and methods.

The first two and a half myths are challenges to the significance of experimental jurisprudence: it has no normative implications; it is misguided in its focus on laypeople rather than legal experts; and it is an impoverished form of mock jury analysis (and thus an impoverished form of legal psychology).

The next two claims concern the definition: Any study is either “experimental jurisprudence” or not; and an author of experimental jurisprudence must conduct at least one experiment. These claims seem not only true, but logically required. But they are myths. Understanding why further clarifies the nature and aims of experimental jurisprudence and its deep connection to traditional jurisprudence.

These first four and half myths provide the groundwork for debunking the final myth: experimental jurisprudence is not really jurisprudence. Perhaps surprisingly; XJur is actually consistent with the aims and methods of traditional jurisprudence. Moreover, the Essay argues, traditional jurisprudential questions specifically call for the kind of work conducted in experimental jurisprudence. As such, experimental jurisprudence should be understood as not merely consistent with jurisprudence, but at its core.

75 E.g. Macleod, supra.
76 E.g. Sommers, supra.
77 Id.
The ½ Myth: Experimental Jurisprudence Has No Normative Implications

First consider the half-myth: experimental jurisprudence has no normative implications. Moreover, it seems impossible for experimental jurisprudence to carry normative implications. The method of surveying laypeople might provide insight into what law is, but cannot provide insight into what law ought to be. To say otherwise is to commit the naturalistic fallacy, deriving an ought from an is. Or so it might seem.

This is a “half” myth because it is not strictly false. Some experimental jurisprudence has no normative implications, as it has no normative ambitions. The same is true, of course, for much legal scholarship—many important works provide only descriptive findings, with no further normative ambitions. This is true of certain doctrinal analyses, legal histories, descriptive economic modeling, political-scientific predictions of legal decision making, and so on.

The same is also true for some (non-experimental) jurisprudence. Not all jurisprudential works conclude with a set of recommendations for legal reform, or statements about what law should be. Arguably, most of traditional jurisprudence is non-normative in this way. At least some conceptual analyses of legal concepts intend to speak to what law is, not what it should be.79

This disciplinary score-keeping may seem pedantic, but a central claim of this Essay is that experimental jurisprudence is truly jurisprudence (see Myth 5). If all jurisprudence must be normative, then there would be a burden on this Essay to show that the is true of all experimental jurisprudence. However, not all jurisprudential projects are normative, so it is possible for experimental uptake of those non-normative questions to nevertheless remain jurisprudential.

Although this first half myth is not strictly false, it is very misleading (and thus something of a myth). Although experimental jurisprudence need not have normative ambitions, the best experimental jurisprudence makes normative contributions.

To see how an experimental finding might lend itself to making a normative jurisprudential contribution, consider two different experimental studies about law. As the first, imagine that someone studied how mock jurors attribute “reasonableness” in sexual harassment cases. Suppose that the empirical finding is that the race of the harasser makes a difference in lay judgment of whether some remark was would be considered intimidating, hostile or abuse by a “reasonable person.” Participants are more lenient towards putative harassers who are white, compared to putative harassers who are Black (in the same exact context). The same remark is seen as more reasonable when it spoken by the white speaker.

So far this is just a descriptive finding. But it can quickly support a normative conclusion with the addition of a bridge premise: if harassment law privileges

speakers (in the very same context) merely on the basis of race, the law should be reformed. This is an extremely plausible bridge premise, and a normative conclusion follows: given the empirical finding, harassment law should be reformed.  

Now consider the earlier (real) experimental jurisprudence example concerning reasonableness. That study found that the ordinary concept of reasonableness reflects a “hybrid” of considerations about what is typical/average and what is good/ideal. As before, this empirical fact does not straightforwardly imply normative conclusions; no drawing an ought from an is. But we can imagine, as before, a possible bridge principle. This could even be a very general principle like: Given tort law’s historical connection to community values, the legal criteria of reasonableness should reflect the ordinary concept—whatever it is. When we couple this bridge principle with the empirical finding, we conclude that the legal criteria of reasonableness should reflect this newly discovered feature of the ordinary concept.

Note here, that this bridge principle (law should reflect features of the ordinary concept) is actually plausible in many circumstances. This might be supported by rule of law values including publicity, fair notice, and consistency among lay juries and expert judges. As such, it is important to know: what are the features of the ordinary concept?

Experimental jurisprudential findings can also raise new bridge principles. For example, before this study about reasonableness, many of the theoretical debates about reasonableness pitted “prescriptivist views” (e.g. reasonableness is welfare-maximization, virtuousness, or moral justification) against “statistical views” (e.g. reasonableness is what is common). The discovery that we, as ordinary people, are equipped with this intriguing “hybrid” concept opens up a theoretical possibility that might otherwise seem impractical: Perhaps reasonableness is a delicate balance of both prescriptive and statistical norms.

Now compare these two studies (the hypothetical study about race and reasonableness and the real study about “hybrid” reasonableness) and their normative implications. There are many similarities. Both derive normative implications from the empirical finding, plus a normative bridge principle. One feature of “experimental jurisprudence” is that these bridge principles are often more theoretically complex than the bridge principles used to derive normative implications from a typical law and psychology study. Recall the bridge principle of the example sexual harassment study: if judgment of harassment is affected by the race of the harasser, this is a bias that should be corrected. Imagine the study found evidence of this. This would be an extremely important implication, but theoretically there are not many new or controversial questions raised. Most

80 As an example of a similar type of study that draws some prescriptive conclusions, see Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, Does Unconscious Racial Bias Affect Trial Judges, 84 NOTRE DAME L. REV. 1196 (2009).

would agree that the conclusion follows.

However, in the experimental jurisprudence study (finding that reasonableness judgment is affected by the average and ideal), the construction of the bridge principle itself is much more jurisprudential. Should reasonableness standards reflect the lay concept of reasonableness? This is much more debatable. Moreover, now that the study has clarified more about what the lay concept is, this question about the ordinary concept is enriched by the detail that finding provides. There might be some general reasons to support law using the ordinary criteria (e.g. concerns about publicity and fair notice), but there are also now specific reasons, revealed by the empirical study. Now that we know that the lay notion of “reasonableness” is informed by consideration of what is common, we can ask does that feature fit the aims of (e.g.) tort negligence law?

This is one heuristic for distinguishing “experimental jurisprudence” from legal psychology. Experimental jurisprudence is jurisprudence, concerned with theoretical questions about law. As such, the findings do not usually carry simple normative implications. More often they raise new questions and inform normative debates.

This raises a crucial point that sits at the root of this first half-myth. Sometimes a “normative contribution” is understood as a contribution that settles some question of what we should do or how law should be. But this is a mistake. Another (much more honest) normative contribution is to inform a normative debate with reasons and arguments. Experimental studies, coupled with normative bridge principles, provide new reasons and arguments for normative conclusions. Given the complex jurisprudential debates with which experimental jurisprudence engages, these questions may not be settled in a simple and straightforward manner. But that comes with the territory of addressing the theoretical questions of jurisprudence.

The broader point here is the Humean one: No empirical study will by itself deliver normative conclusions. To derive the normative conclusion (“N”), the empirical finding (“E”) must be coupled with some normative bridge principle (e.g. “If E, then N”). Experimental jurisprudence does not actually need to articulate and defend these bridge principles; this is why this first myth is only a half myth. Experimental jurisprudence, like traditional jurisprudence, sometimes has purely descriptive ambitions.

However, many examples of experimental jurisprudence do take this additional normative step. This is why this first myth is indeed partly myth; experimental jurisprudence often involves normative argumentation. For example, scholars have argued that legal reasonableness should reflect discovered features of the ordinary concept,82 legal intent should not reflect discovered features of the ordinary concept,83 legal cause should reflect discovered features of

the ordinary concept, and interpretation of terms’ “ordinary meaning” should reflect facts about lay understanding of language. Other experimental jurisprudence studies develop other sorts of normative implications; such as conclusions about how legal scholars and interpreters should use dictionaries and corpus linguistics in identifying the “ordinary meaning” of legal terms and phrases.

Experimental jurisprudence does not always have normative implications, but the claim that it never does is entirely myth.

Myth 1: Experimental Jurisprudence Should Study Legal Experts, Not Laypeople

Now we turn to the full myths. The first is a very popular claim: Experimental jurisprudence is misguided in its choice of population. Jurisprudence is a field for legal experts, who have acquired legal knowledge. Yet, experimental jurisprudence surveys lay populations, with no legal expertise. Why look to people with no legal training for insight about legal concepts?

Perhaps XJur is just young, dumb, and broke: Experimental jurisprudence is in its infancy; its experimentalists have not yet realized the full implications of relying on lay populations as substitutes for expert populations; and they have no access to expert ones. On this view, the best version of the XJur movement would study only legal experts—lawyers, judges, legislators, legal theorists—but for now these populations are difficult and costly to access, so experimentalists have settled for a cheaper alternative.

This is a cynical view of the movement, and it is also a very common one. However, this view fundamentally misunderstands experimental jurisprudence. What makes this first myth mythical is the idea that for any experimental jurisprudential study, the best population would be an expert one. Most experimental jurisprudence deliberately studies laypeople, and for good reason.

It is true that for some experimental jurisprudential questions, an expert population can be instructive. However, it is intriguing that when experimental jurisprudence does recruit expert populations, they are analyzed as comparisons to lay populations. There are many experimental jurisprudence studies of only laypeople, but it is much less common to find studies of only experts. And even in those few studies that have recruited only legal experts, the results of experts

84 James Macleod, Ordinary Causation: A Study in Experimental Statutory Interpretation, 94 IND. L.J. 957 (2019).
86 E.g. Shlomo Klapper, Soren Schmidt & Tor Tarantola, Ordinary Meaning from Ordinary People.
87 E.g. Tobia, supra.
88 This is an important distinction between experimental jurisprudence and other legal psychology, such as Chris Guthrie, Jeffrey j. Rachlinksi & Andrew J. Wistrich, Blinking on the Bench: How Judge Decide Cases, 92 CORNELL L. REV. 1 (2007).
are analyzed in relation to prior findings about laypeople.89

This suggests something surprising about the role of the lay population in experimental jurisprudence. That population is actually more fundamental to the central XJur project than the population of legal experts. The idea that experimentalists recruit lay populations for cost-minimization is inconsistent with the practice. After all, it is cheaper to recruit a lay population than an expert one, but studies of laypeople are not free. So why do experimental jurisprudence projects that have successfully recruited legal experts also recruit laypeople? The answer is that experimental jurisprudence is principally concerned with jurisprudential debates that are informed by facts about lay cognition.

Why might facts about lay cognition bear on jurisprudence? Scholars of experimental jurisprudence have identified several persuasive reasons. One is that laypeople engage with the law (and should engage with the law). As Roseanna Sommers convincingly explains, laypeople serve in legal roles including deciders, subjects, and victims.90 Laypeople serve on juries, they sign contracts, and they are affected by laws. If we seek understanding of the legal concept of consent or reasonableness, part our inquiry involves studying the potential jurors who apply those concepts. We might also look to the laypeople who take themselves to be bound or protected by those concepts in contracts or statutes. Insofar as theories of jurisprudence are partly concerned with what is happening “on the ground”, there is reason to look to all the people who create and participate in that law.

These concerns are loosely connected to another set of important theoretical reasons: rule of law values. Many theories of legal legitimacy claim that law should be public (to laypeople and experts alike), that it should provide fair notice, or that it should be applied consistently (e.g. as applied by lay juries or expert judges). As James Macleod persuasively argues, these rule of law values play an important role in traditional jurisprudence: “Hart and Honoré, for example, appealed to rule of law values” like publicity and fair notice in their jurisprudential analyses.91

A similar line of justification comes from consideration of the “democratic” nature of law. On some theories, law should reflect ordinary judgments and concepts, to allow citizens to have democratic input into the legal system.92 This view is most associated with the democratic view of criminal law,93 but it might

89 Kneer & Bourgeois-Gironde, supra (studying judgments of intent in a population of judges, based on paradigms and prior results in studies on laypeople, such as Joshua Knobe, Intentional Action and Side Effects in Ordinary Language, 63 ANALYSIS 190 (2003)).
90 Sommers, supra.
91 Macleod, supra, at 981.
supply reasons more broadly. Insofar as these democratic considerations are relevant, they would tend to provide reasons in favor of using ordinary concepts—those accessible to the demos. If that’s right, we have to learn what—in fact—the relevant ordinary concepts are.

All of these considerations support the conclusion that for certain jurisprudential theories and debates, experimental methods provide uniquely useful contributions. If some jurisprudential theory or debate is (even partly) concerned with law “on the ground,” or rule of law values, or law’s democratic nature, then experimental jurisprudential study of lay cognition makes a valuable contribution to that debate.

This Essay aims to add one further, and much more general justification of XJur’s focus on laypeople. One implication of this more general justification is that the experimental jurisprudence approach is not limited to only those jurisprudential debates premised on publicity or democracy, or where there is also a relevant jury instruction citing the analyzed concept. Beyond all of those justifications, experimental jurisprudence is actually called for by one of the most general and longstanding aims within jurisprudence.

That jurisprudential aim can be thought of as “the analysis of legal criteria.” For example, what is the legal criteria of causation, or reasonableness, or intent? These questions can be read descriptively or normatively: When is something, in fact, a cause; or, how should law evaluate whether something is a cause? For the sake of argument, assume that traditional jurisprudence involves both types of projects—descriptive and normative. Surprisingly, both of these traditional jurisprudential projects actually call for the empirical study of lay cognition.

As an example, consider a prototypical example of traditional jurisprudence: Keating’s Reasonableness and Rationality in Negligence Theory. Keating argues that tort negligence is grounded in reasonable (and not “rational”) risk imposition, and that it should be. More broadly, Keating argues, tort reasonableness is better explained by social contract theory than by law and economics.

Perhaps surprisingly, that (non-experimental) work of jurisprudence begins with a reflection about our ordinary cognition: “Latent in our ordinary moral consciousness, and manifest in philosophical reflection, is a distinction between reasonableness and rationality.” This appeal to ordinary cognition is not merely rhetorical or motivational. Throughout the article, Keating emphasizes the central role that ordinary cognition plays in the jurisprudential argument:

The claims of and the case for the social contract conception can be summarized in three theses. First, because negligence law assigns paramount importance to the concept of reasonableness, it receives stronger

95 Id. at 311.
support from social contract theory than from economics.\(^{96}\)

Not all of Keating’s arguments depend on empirical facts about the ordinary concept of reasonableness, but this first one reflects a very important and often overlooked mode of jurisprudence. For legally significant concepts that have an ordinary counterpart—like reasonableness, cause, intent, consent, or even the self or law—a central question is: What is that ordinary concept? And this question is a jurisprudential one.

Of course, the legal criteria are not necessarily equivalent to the criteria of the ordinary concept, but traditional jurisprudence understands that there is something critically important in grappling seriously with the features of the corresponding ordinary concept. For example, Keating argues that the ordinary notion of reasonableness supports social contract theory:

Social contract theory holds that persons must be held “responsible for their ends.” They must, that is, moderate the demands that they make on social institutions so that those demands fit within the constraints of mutually acceptable principles. This is simply an extension of our ordinary idea of reasonableness.\(^{97}\)

This jurisprudential argument for the social contract theory of reasonableness depends crucially on an empirical claim about the ordinary concept. As it happens, recent experimental jurisprudence research provides some further support for Keating’s view. Scholars have discovered that there is, in fact, an important distinction between the ordinary notion of reasonableness and rationality, and one that tracks some of Keating’s hypotheses.\(^{98}\) Moreover, as Keating intuited, the ordinary concept of reasonableness is closer to consideration of what is socially acceptable (e.g. customary and good),\(^{99}\) and not necessarily what is economically rational or efficient.\(^{100}\)

In this example, Keating’s intuitions about the ordinary concept of reasonableness were impressively insightful. Later experimental jurisprudence studies lend further support to Keating’s (empirical) jurisprudential hypotheses.

\(^{96}\) Id. at 382 (emphasis added).

\(^{97}\) Id. at 370 (emphasis added) (“Reasonable people do not have an extravagant sense of the importance of their own preferences and aspirations in comparison with the aspirations of others. Moreover, reasonable people do not believe that their projects warrant the commitment of a disproportionate share of social wealth, and they do not make demands on others that they would be unwilling to honor themselves”).

\(^{98}\) Igor Grossman, Richard P. Eibach, Jacklyn Koyama & Qaisar B. Sahi, Folk Standards of Sounds Judgment; Rationality Versus Reasonableness, 6 SCIENCE ADVANCES (2020) (finding a distinction between the ordinary concepts of reasonableness and rationality).

\(^{99}\) Tobia, supra.

\(^{100}\) Christopher Jaeger, The Empirical Reasonable Person 72 ALA. L. REV. (forthcoming 2021) (finding that the law notion of reasonableness is affected by what is customary moreso than what is economically rational).
But it is certainly possible that in some cases, this kind of intuitive armchair jurisprudence might not capture the whole picture of ordinary cognition.

This disconnect—between what a legal expert assumes about the ordinary concept and what is in fact true about the ordinary concept—might arise for a number of reasons. One possibility is that the legal expert just makes a mistake. Their intuition about the ordinary concept does not actually reflect the features of the ordinary concept. Perhaps the author was not thinking sufficiently clearly, or was unconsciously biased in favor of their own theory. Studying the ordinary concept more robustly (with empirical methods) can help avoid these errors. As James Macleod puts it, “Hart and Honoré, after all, had a sample size of two: Hart and Honoré.”

Experimental jurisprudence can serve as an empirically robust method of jurisprudential conceptual analysis.

It could also be the case that the legal expert, in virtue of all of their expertise and training, has actually lost access to the ordinary concept. When law students acquire a new concept of causation or consent, do they still have access to the ordinary one, or has their causal reasoning changed both in and out of law? This is an open empirical question. But if this “loss of the ordinary concept” sometimes occurred, this is another type of case in which experimental jurisprudence of lay cognition would play a helpful role. There are of course some features of the legal concept that laypeople cannot access, but it is possible that there also features of the ordinary concept that legal experts cannot access. Given the classical jurisprudential project of comparing ordinary to legal concepts, this possibility would call for a jurisprudential division of conceptual labor; with laypeople as the experts of ordinary concepts and cognition.

A final possibility is that some features of the ordinary concept are not easily accessible by introspection—for anyone, layperson or expert. For example, recall the “hybrid theory of reasonableness.” On that view, reasonableness judgment reflects a hybrid of statistical and prescriptive considerations. It is not entirely obvious how to test such a subtle feature of the concept with the traditional mode of armchair thought experimentation. No matter how hard we reflect, it is difficult to cleanly identify whether one’s own notion of the reasonable is a hybrid of considerations of the average and ideal.

However, it is possible to begin to assess that hypothesis with experimental jurisprudence. In the study discussed previously, a large number of participants were assigned to separate groups to evaluate average, ideal, and reasonable quantities, and then the mean ratings were statistically analyzed to assess whether average and ideal ratings both predict reasonableness ratings. This provides some evidence in favor of the proposed account.

The lesson of debunking this first myth is that XJur experimentalists are not unwittingly studying the wrong population. A central part of experimental jurisprudence is the study of a certain type of lay cognition. And this is precisely

101 Macleod, supra, at 1021.
102 E.g. Gardner & Hart, infra.
because a central part of jurisprudence is such study of lay cognition. Jurisprudence has long been concerned with “our moral intuitions,”103 “intuitions of a community”—not the seminar room community, but rather our social-legal community.104 As Jeremy Waldron explains, “It is not enough that we have considered what Kant said to Fichte,”105 intuitions of legal philosophers are to be assessed against what is in fact, “out there, in the world.”106

Myth 2: Experimental Jurisprudence Aims to Model Legal Decision Making

The next myth is that experimental jurisprudence aims to model legal decision making. On this view, experimental jurisprudence’s studies are at their core “mock jury” (or “mock judging”) studies, aiming to help predict what is most likely to happen in the real world: How will a judge or juror decide a case, or how will a layperson react to a contract provision or criminal code?

It is very tempting to draw this conclusion about experimental jurisprudence. After all, the approach focuses specifically on lay judgments. So it reasonable to think that experimental jurisprudence aims to speak some of the most ways in which laypeople’s judgments impact the law, such as through their role as jurors.

However tempting, this view is mistaken. Experimental jurisprudence does not aim to model legal decision making. And as a consequence, experimental jurisprudence is generally not very good at modeling legal decision making.

As a comparison, consider the very sophisticated branch of legal psychology that does specifically aim to model legal behavior and decision making—from the behavioral effect of contract provisions to jury decision making.107 In those studies, experimentalists employ rich multi-paragraph vignettes, with generous background and legal context.108 To best model jury decision making, the best studies would provide many important procedural details and example jury instructions.109

In contrast to those approaches, experimental jurisprudence generally uses

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103 E.g. Kimberly Kessler Ferzan, Justifying Self-Defense, 24 LAW & PHILOSOPHY 711, 749 (2005) (emphasis added) (on the role of intuition in justifying the proposed analysis of self defense).


105 Jeremy Waldron, How to Argue for a Universal Claim, 30 COLUM. HUM. RTS. L. REV. 305, 313 (1999). Waldron’s point concerns the comparison of our (Western) human rights intuitions against the intuitions of those from other (non-Western) countries. The point relevant to this Essay is that it is also assumed that the relevant intuitions are not just those of expert legal theorists—what matters are the views of “people or whole societies.” Id. at 306.

106 Id. at 313.


108 Id.

deliberately short and abstract scenarios, ones that shed many complications of real legal decision-making contexts. Studies often use vignettes of just one paragraph,\textsuperscript{110} or a series of extremely short questions.\textsuperscript{111}

Moreover, experimental jurisprudence typically studies lay judgments arising in a deliberately non-legal context. Very few experimental jurisprudence studies begin with the prompt, “Imagine that you are a juror...”. Nor are participants typically invited to deliberate with others (as would be the case in jury decision making). Rather, experimental jurisprudence most often tells some story about ordinary life and interrogates how the *ordinary* concept (e.g. of intent, cause, consent, or reasonableness) applies.

The myth that XJur focuses on modeling legal decision making leads to much confusion. That is not its aim, and to assume that it is creates the impression that experimental jurisprudence is some form of impoverished legal psychology.

This impression also overshadows experimental jurisprudence’s true aims. Because experimental jurisprudence is jurisprudence, it is typically entering a theoretical conversation, not an applied one. For example, in an experimental study of some concept, say *reasonableness*, the principal experimental-jurisprudential goal is never to predict how *in fact* jurors will apply the New York jury instruction for negligence. Rather, the aim is gain insight into the ordinary concept of *reasonableness*; how do we think about what is reasonable—and should those features also characterize the legal concept? There is of course some overlap in these questions; an answer to the latter experimental-jurisprudential question would likely contribute some evidence to the question about jury modeling (insofar as the jury instruction relies heavily on the term “reasonable”).\textsuperscript{112} But there are various complexities and complications of the real world jury decision that the experimental jurisprudence study simply does not seek to address: How jurors will apply New York state negligence law is an important practical question, but it is not a jurisprudential one.

As another example, consider experimental jurisprudence of legal interpretation. Recall *Testing Ordinary Meaning*, which studied how laypeople, law students, and judges used dictionaries and legal corpus linguistics data to assess the “ordinary meaning” of terms like “vehicle.”\textsuperscript{113} Participants received either very brief questions (e.g. “Is an airplane a vehicle?”) or a dictionary definition or legal corpus linguistics dataset, followed by very brief questions.

One might try to understand that project as a model of *actual* judging behavior. That interpretation would be mistaken. In the real world, there are countless other complicating factors. Judges would be able to look through more

\textsuperscript{110} E.g. Kneer & Bourgeois-Gironde, *supra*; Tobia, *supra* note 41.

\textsuperscript{111} E.g. Tobia, *supra* (“what is a reasonable interest rate for a loan” vs. “what is an average interest rate for a loan”).

\textsuperscript{112} Some experimental jurisprudence pieces make this claim. E.g. Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2303 (2020); Tobia, *supra* at 346.

\textsuperscript{113} E.g. Tobia, *supra*. 

Electronic copy available at: https://ssrn.com/abstract=3680107
than one dictionary, they could reflect more thoroughly, they could speak to their clerk(s), they would also be aware of the political valence of the case at hand, which may affect their use of the dictionary, and so on.\textsuperscript{114}

That project does not understand itself as a \textit{model} of judicial behavior. Rather it sets out to address jurisprudential questions including: Is a dictionary definition a reliable measure of ordinary meaning? To do this, it employs a very abstract methodology. It provides the judge participants only the definition. This allows assessment of very different questions, such as: If a judge were to rely on just the information provided by a dictionary, how would they interpret a legal text?

Here again, both sorts of questions are interesting and important. It is useful to predict how judges will actually decide cases. But that kind of political scientific \textit{prediction} is a different project from that of jurisprudence. The other type of question—is a dictionary definition a reliable measure of ordinary meaning—is a jurisprudential one, about the nature of legal interpretation.

\textbf{Myth 3: Any Empirical Study is Either “Experimental Jurisprudence” or Not}

Pick an empirical study—any empirical study. Now consider this apparent truism: That study is either “experimental jurisprudence” or it is not. It seems clear, perhaps even logically necessary, that this statement is true.

However, this too is a myth. Whether a particular study or finding is “experimental jurisprudence” depends on more than the raw data itself. The very same set of empirical data may be “experimental jurisprudential” in one context but not another. The reason is that the same data might serve a number of purposes; but data only becomes “experimental jurisprudential” when it serves as evidence \textit{in jurisprudence}. Understanding this process—how data can be transformed into experimental jurisprudence—is crucial to understanding the approach and how it differs from other forms of empirical legal scholarship.

To help illustrate this, consider as an example a common—and I suspect increasingly common—type of empirical finding. These are findings related to the so-called “ordinary meaning” or “plain meaning” of legal texts.\textsuperscript{115} Empiricists conduct experiments to assess how ordinary people understand some term or phrase in a legal text, in an effort to provide evidence about the term or phrase’s ordinary meaning.

Recently, one such survey was conducted to study the ordinary meaning of the phrase “carries a firearm”\textsuperscript{116} That survey was motivated by \textit{Muscarello v. United States},\textsuperscript{117} a case concerning a criminal statute, which held that the ordinary


\textsuperscript{115} Omri Ben-Shahar & Lior Jacob Strahilevitz, \textit{Interpreting Contracts via Surveys and Experiments}, 92 N.Y.U. L. REV. 1753, 1765 (2017); Klapper, Schmidt & Tarantola, supra; Tobia, supra.

\textsuperscript{116} Klapper, Schmidt & Tarantola, supra.

\textsuperscript{117} 524 U.S. 125 (1998).
meaning of the phrase “carries a firearm” includes conveying a gun in the locked glove compartment of a vehicle.

The experimentalists provided survey participants with the following scenario and question:

The law requires certain mandatory minimum penalties be imposed on anyone who “during and in relation to any drug trafficking crime, uses or carries a firearm.”

Suppose a person keeps a gun in the locked glove compartment of their car during a drug deal, just in case it was ever needed, but doesn’t ever take it out.

How much do you agree with the following statement: That person’s conduct qualifies for the mandatory minimum penalties.

Participants rated their agreement on a six point scale, from strongly disagree to strongly agree. Seventy-three percent of participants agreed (“agree strongly,” “agree,” or “agree somewhat”), while twenty-seven percent disagreed (“disagree strongly,” “disagree,” or “disagree somewhat”). The authors interpret these results as supporting the holding in Muscarello; the ordinary meaning of “carrying a firearm” includes conveying a gun in the locked glove compartment of a vehicle.

This is a very interesting finding with important practical implications; for example, it could help us predict future litigation. But this is not—as some might assume—experimental jurisprudence. To be clear, this is in no way a criticism of that study or its method. And, as it happens, that paper also presents a second study and analysis, which make an important contribution within experimental jurisprudence. A key purpose of this Essay is to define “experimental jurisprudence,” and this study is simply an instructive example of a type of finding that is commonly (but wrongly) associated with that movement.

The reason that this finding is not experimental-jurisprudential is not for a lack of normativity. In fact, the authors seem to endorse a normative argument and conclusion. Broadly speaking, the argument is something like: (1) If most laypeople endorse this statement, Muscarello was correct about the “ordinary meaning” of the statement and Muscarello should not have been decided differently; (2) most people do endorse this statement; so (C) Muscarello was

118 Moreover, despite this Essay’s affection for experimental jurisprudence, it acknowledges that many other forms of legal scholarship might be more interesting or more important!
119 Klapper, Schmidt & Tarantola, supra.
120 Also recall that experimental jurisprudence need not imply normative conclusions.
correct about the “ordinary meaning” of the statement and should not have been decided differently.

The reason that this experimental study is not “experimental jurisprudential” is it is not jurisprudential. The finding is taken to tell us something interesting about an important applied question (about whether Muscarello correctly determined the ordinary meaning). But this is not a jurisprudential question. There is no broader theoretical implication drawn from the experimental finding. This finding is not taken to evince something about the concept of ordinary meaning, the nature of legal interpretation, or even the concept of carrying or carrying a firearm.

As a comparison, imagine a different piece of scholarship analyzing Muscarello or Heller, or some other important case of legal interpretation. The scholar argues that the court actually relied on the wrong sources of interpretive evidence; rather than relying on these dictionaries, the court should have relied on those dictionaries. And relying on those dictionaries would have changed the outcome. This is an important argument, but it is not a jurisprudential argument, one from high theory or within legal philosophy. This is very different from jurisprudential scholarship grappling with the meaning of legal justice, or even “the problematics of interpreting legal texts.” These ordinary meaning surveys are more straightforward applications of experimental survey methods to legal problems, more aptly described as something like “applied ordinary meaning analysis.” Given certain background assumptions about ordinary meaning, this new tool of experimentation helps us to compute the answer.

It is important to distinguish this type of applied surveying from experimental jurisprudence because many think of surveying as the paradigmatic form of experimental jurisprudence. Perhaps the most common misconception of experimental jurisprudence is that it is the method of surveying laypeople to provide answers about how law should be applied. This misconception is the product of several myths (including the first half myth and this one). However, any survey of laypeople about some legal topic is not necessarily experimental jurisprudence.

At the same time, what is fascinating about many of these surveys is that, they can be transformed into experimental jurisprudence. Consider another paper that asks very similar experimental “survey” questions about ordinary terms, such as “Is an airplane a vehicle?” The empirical finding is yes, about 70% of people today say an airplane is a vehicle. That could be understood as “applied ordinary meaning analysis,” for example, helping us predict how future courts will interpret contracts referring to “vehicles.”

But in that paper, this result was elaborated in a very different way. For one, it was embedded within a broader experimental framework. One group of

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122 See also, e.g., Ben-Shahar & Strahilivetz, supra.
123 Tobia, supra.
participants answered those questions (Is a car a vehicle; Is a bicycle a vehicle; etc.), another answered the same questions using a dictionary, and the third using legal corpus linguistics. This kind of broader experimental framework is usually a sign of experimental jurisprudence, as opposed to applied surveying.\textsuperscript{124}

But the key feature that makes this data “experimental jurisprudential” is that there is also a set of jurisprudential questions in the vicinity: Do all of these methods provide reliable evidence about “ordinary meaning,” and if they diverge, what does that imply about the concept of \textit{ordinary meaning}, the prospects of textualist and originalist theories, and the nature of interpretation? The study did find some dramatic divergence among those methods, which supports \textit{jurisprudential} implications about all of these questions.

The key point is that this common type of survey data—what do ordinary people think \textit{X} means—is not itself experimental jurisprudence. But it could be. To become experimental jurisprudence, the experimental work must engage some jurisprudential questions. Since this kind of “jurisprudential engagement” comes from the data analysis, and different papers and authors might analyze differently, the same data could either be experimental jurisprudence—or not.

The same is true of all experimental jurisprudence studies. They could have been taken to only address some more straightforward, applied questions:

- What do most people believe is the \textit{reasonable} number of days to return a product ordered online when there is no warranty?\textsuperscript{125}

- What do most people say about the key question in \textit{Burrage} (a case concerning liability under the \textit{Controlled Substance Act}),\textsuperscript{126} did death “result from” the drug sold?\textsuperscript{127}

- Do most people judge that sex-by-deception is consensual?\textsuperscript{128}

Any of those findings could have been used in a (merely) applied way. How will juries decide this case; or was that case decided correctly?

What makes those papers \textit{experimental jurisprudence} is that they develop and grapple with jurisprudential implications of these findings. The data is analyzed to provide evidence about the ordinary concepts of \textit{reasonableness}, \textit{causation} (e.g. “results from”), and \textit{consent}—not just evidence about how some particular case was or should be decided. And the papers raise jurisprudential questions—most

\textsuperscript{124} Although it is not sufficient. For example, here all of that data might be understood in a merely applied way: We now have more data (surveys, dictionary use, corpus linguistics use) to predict some specific court determinations of ordinary meaning or assess some past determinations.

\textsuperscript{125} Tobias, \textit{supra}.

\textsuperscript{126} \textit{Burrage v. United States}, 571, U.S. 204 (2014).

\textsuperscript{127} McCleod, \textit{supra}.

\textsuperscript{128} Sommers, \textit{supra}.

Electronic copy available at: https://ssrn.com/abstract=3680107
commonly the question: Should this feature of the ordinary concept (that the experiment has discovered or explained) be reflected in the legal criteria? For example, now that we learn that sex-by-deception is compatible with the ordinary notion of consent, should the legal criteria of consent be compatible with sex-by-deception? And how does our new understanding of why the ordinary notion of consent has this feature enrich that debate about the legal criteria?129

The examination of this myth might seem somewhat pedantic. Is this merely a terminological debate over what we call “experimental jurisprudential” and what we call something else? It might seem that nothing of great significance turns on this debate about disciplinary categorization.

This is partly a terminological issue. But this question (what is experimental jurisprudence and what is not) is the central topic of this Essay. Moreover, this practice, defining new legal scholarship approaches, is a standard and important one in law.130 If the worry applies here, it applies broadly.

Beyond pointing to partners in guilt, there is a special response to this concern about “experimental jurisprudence.” If something is experimental jurisprudence, it is jurisprudence.131 And that categorization matters. Insofar as jurisprudence seeks the truth about its theoretical questions, it is worthwhile to correctly identify what is, and what should be, part of that discussion.

**Myth 4: Experimental Jurisprudence Requires Conducting Experiments**

This is a myth for two reasons. First, “experimental” jurisprudence is a slight misnomer, as the approach does not require experiments. The better name would be “empirical jurisprudence,” as the movement should include work of scholars who conduct non-experimental empirical studies in the service of jurisprudence. For example, scholars have used (empirical, not experimental) corpus linguistics to study the ordinary concept of causation.132 As XJur emerges, the “big data” and law movement also grows.133 And some of those project have jurisprudential aims or potential. Despite some obvious differences between experimental and (non-experiential) empirical methods, the Essay’s considerations about experimental jurisprudence would also apply to “empirical jurisprudence.”

If that were the whole problem with this myth, it would become a true statement with one modification: Experimental Jurisprudence Requires

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129 Id.
131 See Myth 5 infra.
132 E.g. Justin Systma, Roland Bluhm, Pascale Willemsen, & Kevin Reuter, *Causal Attributions and Corpus Analysis*.
Conducting Empirical Studies. Yet, that too, is a myth. The second error is less obvious, and its correction is more interesting.

Although experimental jurisprudence does not require running experiments, it seems it must at least require some empirical study or data collection. However, some XJur does not proceed in this way. For example, consider Proximate Cause Explained: An Essay in Experimental Jurisprudence.134 Despite that Essay’s self-categorization as “experimental jurisprudence,” readers might be surprised to find that the paper does not report new experimental data. It is co-authored by one of the founders of “experimental philosophy” and the coiner of the phrase “experimental jurisprudence,” who are undoubtedly right in the categorization of their project as “Experimental Jurisprudence.” But it does not present any new experiments. So why, exactly, is it experimental jurisprudence?

The answer is that experimental jurisprudence requires data, not data-collection. So authoring experimental jurisprudence requires interrogating data. But the author need not themselves generate that data. Moreover, whoever originally collected the data (e.g. performed an experiment) need not have intended that it would ultimately play some role in experimental jurisprudence.

This last point carries an intriguing implication. If experimental jurisprudence data need not be collected as experimental jurisprudence data, it is possible that much of that data already exists, despite the novelty of the XJur movement. These would be extant data with untapped potential, ripe for jurisprudential analysis. One area full of such studies is the cognitive science of ordinary concepts; experimental work concerning lay notions of intent, cause, knowledge, and responsibility. An important version of experimental jurisprudence would analyze these empirical results, from a jurisprudential perspective, for example asking what these findings about ordinary concepts (e.g. the ordinary concept of intent) suggest about the legal concepts.135

The Knobe and Shapiro essay, “Proximate Cause Explained”, is a model of this version of XJur. There is a wealth of extant experimental data about the ordinary concept of causation. The authors analyze this data, with jurisprudential questions in mind, resulting in an extremely important experimental jurisprudential contribution—even without running any new experiments.

At first it seems paradoxical that “experimental jurisprudence” does not require experimentation. But this is consistent with its definition. Experimental jurisprudence is an approach to legal scholarship that takes a jurisprudential question and addresses it with experiments (or empirical work). One way to participate is to conduct a new empirical study and evaluate the jurisprudential implications, but another way is to just interrogate extant empirical studies.

There is, however, an important asymmetry in this definition. Although experimental jurisprudence does not require new experiments, it does require new jurisprudence. It is possible to transform old experiments into “XJur” with the addition of new jurisprudence. But it is not possible to create experimental jurisprudence from new experiments laid simply on top of old jurisprudence.

For example, imagine that someone surveyed law professors to learn what percentage endorse legal positivism; or assessed whether laypeople agree that the rule “no vehicles in the park” prohibits bicycles from the park. Perhaps 30% of professor endorse legal positivism and 70% of laypeople think the bicycle is prohibited from the park. Those experimental findings might be interesting. But those findings alone would not be experimental jurisprudential.

Myth 5: Experimental Jurisprudence is Not Really Jurisprudence

The final myth is that experimental jurisprudence is not really jurisprudence. At first glance this myth is compelling, as the standard picture of jurisprudence seems to diverge sharply from the standard picture of experimental jurisprudence. The boundaries of “jurisprudence” are debated, but the term calls to mind a certain picture. Contrast that with a common picture of experimental jurisprudence.

The image of jurisprudence: A group of learned legal experts debate law’s deepest theoretical questions, in an effort to determine what law should be.

The image of experimental jurisprudence: Some punk takes a longstanding jurisprudential question about what law should be and claims to settle it by asking laypeople on “MTurk.”

How can this latter approach possibly be part of the field of jurisprudence?

This image of experimental jurisprudence is common, but flawed. Debunking the previous four and a half myths lays the groundwork to understand why.

136 Knobe & Shapiro, supra.
137 See also Myth 3, supra.
138 See notes 4-7 supra.
Experimental jurisprudence does not always claim to address normative questions (see the 1/2 myth); and it does not recommend “mock juries for jurisprudence,” seeking to settle jurisprudential questions with simple polling—of laypeople or experts (see myth 2). Rather, it necessarily grapples with fundamentally jurisprudential questions about ordinary cognition (see myths 2 and 3) and interrogates them with a variety of empirical methods that are well-suited to addressing those questions (see myth 4).

Given the debate over the meaning of “jurisprudence,” it can be difficult to prove whether something is jurisprudence. But recall some of those common characterizations. Jurisprudence is “mostly synonymous with ‘philosophy of law’,…. [and also] the elucidation of legal concepts and normative theory from within the discipline of law,”140 it studies problems like “the meaning of legal justice … and the problematics of interpreting legal texts,”141 and the “essence of the subject … involves the analysis of general legal concepts.”142

Now that experimental jurisprudence is appropriately understood, it should be clear that the practice is not merely consistent with these aims of traditional jurisprudence; it is actually at the core of traditional jurisprudence. Jurisprudence has long included the interrogation of ordinary notions corresponding to legal concepts: What is the ordinary notion of cause, consent, intent, knowledge, recklessness, and reasonableness? Traditional jurisprudence notes that these facts about the ordinary notion should inform both descriptive and normative discussions about what legal criteria are and should be.

As a final example, consider a passage from Antony Honoré and John Gardner’s introduction to a handbook entry on “Causation in the Law”:

The basic questions dealt with in this entry are: (i) whether and to what extent causation in legal contexts differs from causation outside the law, for example in science or everyday life, and (ii) what are the appropriate criteria in law for deciding whether one action or event has caused another.143

This description identifies two of the most central questions of jurisprudence:

i. What is the relationship between ordinary and legal concepts? (e.g., is the legal concept of causation different from the ordinary one?)

ii. What are the criteria of legal concepts? (e.g., what is the appropriate criterion for deciding when something is a legal cause?)

142 Tur, supra, at 152.
These are two of the most central jurisprudential questions, and each of Part II’s examples of experimental jurisprudence provide direct evidence about (i) and grapple seriously with (ii) on the basis of their experimental discoveries.

Traditional jurisprudence is replete with these empirical and partly empirical questions (of the form i. and ii. above). And as Honoré and Gardner exemplify, these are jurisprudential questions. XJur is not mistakenly replacing jurisprudence with social science, but rather is making impressive progress on these fundamental and longstanding questions of jurisprudence. As such, experimental jurisprudence should be seen as not only compatible with jurisprudence, but rather at its core.

CONCLUSION

“Whither jurisprudence? Time will tell.”144 Yet, as some legal scholars herald the “death of jurisprudence,”145 one cannot help but wonder: whither jurisprudence?

One certainly hopes not. Recall Posner’s characterization of jurisprudence: It is “the most fundamental, general, and theoretical plane of analysis of the social phenomenon called law.”146 Surely there is great value in achieving legal wisdom about jurisprudential questions,147 and even from formulating and raising them.

So why the skepticism? One jurisprudential eulogy laments the ordinariness of legal normativity: “There is nothing distinctively ‘legal’ about legal norms.”148 A similar concern might apply to legal concepts: There is nothing distinctively legal about law’s notions of causation, knowledge, or reasonableness. Traditional jurisprudence withers as its questions dissolve into other disciplines.

Part of the excitement of experimental jurisprudence is that it transforms this pessimistic prediction into optimism. Rather than imagining jurisprudential questions dissolving into non-jurisprudential questions of moral philosophy or the social sciences, experimental jurisprudence reaffirms these questions’ fundamentally jurisprudential nature.

Longstanding jurisprudential questions about whether (and how) legal concepts differ from ordinary ones are partly empirical questions. It is very likely that many central legal concepts—including consent, intent, causation, reasonableness, knowledge, and recklessness—share some features with their ordinary counterpart. And it is possible that not all features of the ordinary concept are known. Empirical methods help address this central question of jurisprudence: what are the ordinary criteria? In many cases, law should not simply adopt the ordinary concept, but understanding the ordinary features—

144 Solum, supra note 1, at 2497.
147 “Jurisprudence” is from the Latin for “law” (jus) and “wisdom” (prudentia). Tur, supra 149.
148 Ben-Zvi, supra.
whether by thought experimentation or empirical study—raises important jurisprudential questions and is a central part of the analysis of the legal concept.

Experimental jurisprudence thereby re-opens a range of fascinating jurisprudential questions about law and its concepts. Moreover, it provides new tools to address these questions. Experiments have discovered new, subtle, and surprising conceptual features, all of which call for further theoretical analysis.

While experimental jurisprudence offers these new experimental methods, the movement also invites analysis from those who do not themselves conduct empirical studies. This is one lesson of the debunked myths: Experimental jurisprudence is an essential part of jurisprudence; but to participate, one need not run experiments or even collect original data. Empirical data is a prerequisite, but there is already an abundance of data ripe for experimental jurisprudential analysis. The cognitive science of ordinary language and concepts (e.g., concerning causation, intent, explanation, responsibility, and the self) is full of such data. Those studies are in some sense “suspended experimental jurisprudence,” relevant datasets waiting to be precipitated into experimental jurisprudence, upon the addition of thoughtful jurisprudential analysis.

As such, XJur is not a social scientific replacement of jurisprudence; it is a form of jurisprudence. Understanding the true nature of traditional jurisprudence reveals that it has always contained a central experimental jurisprudential program—one concerned with the nature of ordinary concepts and cognition and how they relate to legal criteria and law. As such, insofar as there is a justification for traditional jurisprudence, that also justifies and calls for this new experimental jurisprudence approach. Moreover, it is the opposing view—that jurisprudence has nothing to learn from the study of ordinary concepts—that reflects a dramatic break from traditional jurisprudence.

Despite growing skepticism about jurisprudence, the advances of the new XJur movement constitute important examples of jurisprudential progress. Through experimental study of ordinary language and concepts, scholars have developed new and insightful answers to some of the most central questions of jurisprudence: How should we interpret legal texts; what is the relationship between ordinary and legal concepts; and what are appropriate legal criteria?

Even legal scholars averse to the high theory of jurisprudence must acknowledge, these discoveries of experimental jurisprudence also bear on some of the most fundamental legal questions: What is our law, and what should it be?

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149 Perhaps legal concepts share many features of the corresponding ordinary ones; or perhaps they are very distinctive. The truth, I would bet, is that legal concepts most often reflect a mixture of features—some drawn from corresponding ordinary concepts, and others that are unique. But that remains an open empirical question. And the place to start is with experimental discoveries of the features of these concepts.