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### Bringing Jury Instructions Into the Twenty-First Century

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#### Recommended Citation

Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 Notre Dame L. Rev. 449 (2006).

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## ARTICLES

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### BRINGING JURY INSTRUCTIONS INTO THE TWENTY-FIRST CENTURY

*Nancy S. Marder\**

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\* Professor of Law, Chicago-Kent College of Law. I want to thank Jay Tidmarsh and the *Notre Dame Law Review* for inviting me to contribute to this symposium issue. I also appreciate the comments I received from participants at the International Conference: Clarity and Obscurity in Legal Language in Boulogne-sur-Mer, France when I presented this paper as part of a panel on "Clarity in Communication with Citizens." I am grateful to colleagues at Chicago-Kent for their suggestions and ideas when I presented this paper at a Faculty Workshop. I also benefited enormously from the library assistance of Lucy Moss at Chicago-Kent.

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## INTRODUCTION

Jury instructions present an interesting conundrum: they are the sole vehicle by which judges instruct jurors on the law and on their tasks before the jury begins its deliberations, and yet jury instructions are written and presented in a manner that defy comprehension to those untrained in the law. At least thirty years of empirical research<sup>1</sup> supports the view that jury instructions are written in a language intended for lawyers rather than laypersons and that jurors have difficulty understanding the instructions. Jury instructions are challenging because they rely on legal terms of art, complex sentence structure, and an overarching organization that is difficult to discern. The use of “pattern instructions,” in which the instructions are written for the generic case and are used by a trial judge in a particular case, exacerbates the problem because the language is typically drawn from case law or statutes and written in general terms. Nevertheless, trial judges are reluctant to deviate from these boilerplate instructions because the instructions have received the imprimatur of appellate courts.

To make matters worse, the trial judge typically reads the bulk of the instructions to the jury after the lawyers’ closing arguments but before the jury goes into the jury room to begin its deliberations. In some jurisdictions in which jurors are not allowed to take notes<sup>2</sup> or are not given a written copy of the instructions to follow,<sup>3</sup> jurors must

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1 See *infra* Part I.

2 The trend is toward allowing jurors to take notes, with the court providing them with pen and pad with which to do so, see JURY TRIAL INNOVATIONS 141–43 (G. Thomas Munsterman et al. eds., 1997); G. Thomas Munsterman & Paula L. Hannaford-Agor, *Building on Bedrock: The Continued Evolution of Jury Reform*, JUDGES’ J., Fall 2004, at 10, 15, but not all courts have adopted this practice, see Munsterman & Hannaford-Agor, *supra*, at 15 (“Only a small handful of states continue to restrict juror note taking.”); see also Terry Carter, *The Verdict on Juries*, A.B.A. J., Apr. 2005, at 41, 44 (“A lot of people think that [juror note-taking] is a no-brainer, but it’s only done in about half the courtrooms in the country . . . .” (quoting B. Michael Dann, former Chief Judge of Maricopa County, Arizona)).

3 Courts in some jurisdictions provide a written copy of the jury instructions to every juror so that each can follow along as the judge reads the instructions aloud to the jury. See, e.g., ARIZ. R. CIV. P. 51(b)(3) (“The court’s preliminary and final instructions on the law shall be in written form and a copy of the instructions shall be furnished to each juror before being read by the court.”); ARIZ. R. CRIM. P. 21.3(d) (same). However, in other states, such as Illinois, courts only provide the jury with one written copy to refer to during the jury deliberations. See ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL 7 (2005 ed.) [hereinafter IPI]. In other states, such as New York, courts do not provide the jury with even a single written copy of the jury instructions. See Carter, *supra* note 2, at 42 (reporting on New York’s pilot studies, including giving jurors

simply sit and listen to the judge as he or she reads from reams of instructions, which in some cases can take hours to complete. For example, the written version of the jury instructions in the state criminal trial of Michael Jackson spanned ninety-eight pages,<sup>4</sup> and the written version of the jury instructions in the state criminal trial of Richard Scrushy encompassed seventy-eight pages.<sup>5</sup> When one juror on the Scrushy jury became ill and had to be replaced with an alternate, the jury was instructed again. The instructions took two hours for the judge to read, during which "one juror nodded off."<sup>6</sup> Imagine a lecture<sup>7</sup> that proceeded over the course of several hours, contained foreign words and difficult concepts, and was delivered in a somber manner befitting the task but that was hardly engaging. It is not surprising that the form and substance of jury instructions pose a challenge for jurors.

Interestingly, in spite of the many empirical studies over the years, pinpointing myriad weaknesses in the language and presentation of jury instructions, jury instructions have remained fairly impervious to change. The central question that this Article will explore is why jury instructions have remained so resistant to change in spite of an ever growing body of studies suggesting the need for change.

There are a number of plausible theories to explain the lack of change. One theory, which I will call the "institutional process," focuses on who drafts the instructions, the pressures they are under, and the priorities they have. Another theory, which I will label the "acculturation process," recognizes that instructions serve other purposes in addition to teaching jurors about the law and their tasks, and that the

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copies of the written instructions, and noting that these practices have been tried on an experimental basis but have not yet been adopted as accepted practices).

4 John M. Broder, *Instructions, All 98 Pages, May Be Slowing Jackson Jury*, N.Y. TIMES, June 12, 2005, § 1, at 32.

5 Reed Abelson, *For Scrushy, Vexed Jury Could Still Give Verdict*, N.Y. TIMES, May 30, 2005, at C1 (noting that there were "78 pages of instructions to the jury").

6 Simon Romero, *Fraud-Trial Jury Is Told To Restart for an Alternate*, N.Y. TIMES, June 23, 2005, at A1.

7 The classroom analogy is apt. A short film, produced by the Institute of the International Association of Defense Counsel (IADC) Foundation, vividly illustrates what would happen if students were asked to learn in the same way that jurors are. See Videotape: Order in the Classroom (Institute of the IADC Foundation 1998). In the film, students are told that their academic course will be conducted according to certain rules (which happen to be the rules of the jury). For example, they will not be allowed to take notes, ask questions, or even know the subject matter of the course until after the course is over. Their looks of bewilderment, frustration, and disbelief suggest how jurors must feel when confronted with the rules of the jury, including how and when they are instructed about the law.

current instructions accomplish these other, more subtle, purposes even if they fall short of accomplishing the widely-acknowledged goal of educating jurors. Another explanation, which I will refer to as the “skeptic’s view,” challenges whether there is a problem with the jury instructions either because the skeptics have a general distrust of empirical studies or because they believe empirical studies fail to measure what the jury actually grasps. Finally, there is the “traditionalist’s view,” which is that these are how instructions have long been written and presented, and therefore, that this is how it should always be done. Each of these theories can offer some window into why jury instructions have been so resilient to change. If we understand why the instructions have been so resistant to change, then perhaps we can challenge some of the barriers to change rather than simply seeing the same basic reforms ignored year after year.

Any of these theories also could explain not just why the language of the instructions has been so impervious to change, but also why the presentation of the instructions has been so difficult to alter. Typically, judges read the instructions aloud to jurors, no matter how many pages they span or how many hours it might take. Usually, the reading takes place after the attorneys have concluded their closing arguments but before the jury has begun its deliberations. Lessons from the classroom, however, suggest that a lengthy lecture is not the best, or certainly not the only, way to impart difficult information. People learn in different ways, and thus the challenge is to provide instructions in multiple forms so that they reach as many jurors as possible. This is more pressing today than ever before as state and federal courts seek to draw jury venires that are as diverse as possible.

This Article will be structured as follows. Part I will provide a brief look at some of the key findings of the empirical studies that tested juror comprehension of jury instructions. Part II will explore possible theories for the lack of change in jury instructions and what difference it makes if jurors do not understand the instructions. Just when the reader begins to question whether reforms in this area will ever be possible, Part III will provide a glimmer of hope suggested by changes in state jury practices. Several states, including Arizona, California, Delaware, and even Illinois, have begun to take steps to revitalize their jury instructions, some in dramatic ways and some in small, incremental ways. As described in Part IV, the innovations that emerge from these states suggest avenues that other courts, both state and federal, can pursue. Similarly, Part V will consider possible explanations for why the way in which judges instruct juries has remained impervious to change and Part VI will offer innovative ways to present jury instructions, some of which have been adopted by a few states and

federal courts and some of which are still in the drawing-board phase. Part VII will consider why the presentation of jury instructions matters, particularly to a new generation of jurors raised on new technologies, and to a citizenry that is becoming increasingly multicultural.

## I. THE PROBLEM

Empirical studies for at least the last thirty years, if not longer,<sup>8</sup> have shown that jurors have difficulty understanding jury instructions. Researchers have found that jurors are confused because the instructions use legal jargon<sup>9</sup> or ambiguous language,<sup>10</sup> awkward grammatical constructions,<sup>11</sup> and an organization that is difficult to discern.<sup>12</sup> When researchers rewrote the instructions to make them more comprehensible, jurors had less difficulty with them.<sup>13</sup> Thus, the problem,

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8 Although much of the empirical work was done in the 1970s, there were early studies suggesting that jurors had difficulty understanding judges' instructions. See, e.g., Robert M. Hunter, *Law in the Jury Room*, 2 OHIO ST. L.J. 1, 10-13 (1935); Morison R. Waite, *Trial by Jury*, 11 U. CIN. L. REV. 119, 191-200 (1937). However, these early studies predate the pattern jury instructions adopted by many states after California and Illinois led the way.

9 See, e.g., Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 617 (reporting that jury studies up until this point, with the exception of one, had found that "legalese" had hindered jurors' efforts to understand the instructions).

10 See, e.g., Bernard S. Meyer & Maurice Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 JUDICATURE 105, 106-07 (1971) (examining questions submitted by juries and noting that they often arise from unfamiliar or abstract words).

11 See, e.g., Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1328 (1979) (finding that jury instructions are not well understood and that "specific linguistic constructions may be at the root of at least some of the comprehension problems"); *id.* at 1359 ("The results of the study also indicate that these constructions—rather than the legal complexity of the jury instructions—were responsible for comprehension problems.").

12 See, e.g., Bruce Dennis Sales et al., *Improving Comprehension for Jury Instructions*, in 1 PERSPECTIVES IN LAW & PSYCHOLOGY: THE CRIMINAL JUSTICE SYSTEM 23, 31-67 (Bruce Dennis Sales ed., 1977) (explaining that jury instructions' comprehensibility can be improved through attention to vocabulary, grammatical construction, and organization).

13 See, e.g., AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 13-15 (1982); Charrow & Charrow, *supra* note 11, at 1328-41; Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors To Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 161-62, 183-96 (1982); *id.* at 194 ("[P]sycholinguistic changes in pattern instructions can improve jurors' abilities to both comprehend and apply jury instructions.").

though longstanding, is not intractable. Indeed, there are texts devoted exclusively to how to improve jury instructions.<sup>14</sup>

There were a number of studies in the 1970s showing that jurors had trouble understanding jury instructions. For example, in one study funded by the National Science Foundation, mock jurors were assigned to one of three groups, and each group viewed a videotaped trial using actors.<sup>15</sup> A control group received no instruction, while the experimental groups received either the original pattern instructions or rewritten instructions. After the trial, each juror was sent questionnaires to complete in an effort to determine the effect that jury instructions had on the juror's understanding of the law. The researchers found that "the presentation of pattern instructions was as effective as not presenting [instructions] at all."<sup>16</sup> As the authors later wrote about the study: "The most alarming finding was that jurors receiving the pattern instructions made about the same proportion of errors in their verdicts as jurors not receiving any instructions at all (39% vs. 40% errors)."<sup>17</sup> This study was not alone in this finding.<sup>18</sup> However, the researchers in this early study also found that they could rewrite the instructions to improve jurors' comprehension of them. Jurors who received the rewritten instructions scored significantly higher on a comprehension questionnaire than jurors who received the original pattern instructions.<sup>19</sup>

The authors conducted a second study in which mock jurors were given the opportunity to deliberate to see whether jury deliberations would correct for individual juror misunderstandings.<sup>20</sup> In this study, mock jurors viewed a four-hour videotaped trial and were assigned to one of thirty-three juries consisting of about six jurors each. Some of the juries received Michigan's pattern instructions and some received

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14 See, e.g., ELWORK ET AL., *supra* note 13 (providing guidelines for improving jury instructions); Charrow & Charrow, *supra* note 11, at 1328-41 (providing a methodology to improve jury instructions); Laurence J. Severance et al., *Criminology: Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 207-13, 226-27 (1984) (providing examples of rewritten instructions).

15 See Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163 (1977).

16 *Id.* at 176.

17 ELWORK ET AL., *supra* note 13, at 13-14.

18 See, e.g., *id.*; *Panel Two: Innovations for Improving Courtroom Communications and Views from Appellate Courts*, 68 IND. L.J. 1061, 1071 (1992) ("What you find [from empirical research] is that the uninstructed jurors are equally accurate or inaccurate as the instructed jurors." (statement of Michael J. Saks, Professor of Law and Psychology, Univ. of Iowa)).

19 Elwork et al., *supra* note 15, at 176.

20 See ELWORK ET AL., *supra* note 13, at 14.



rewritten instructions designed to improve comprehension. The juries deliberated, and their deliberations were recorded and analyzed. The jurors also completed individual questionnaires to test their comprehension of the instructions. Those who received the Michigan pattern instructions “showed significant deficits in their understanding” of contributory negligence compared to those who received the rewritten instructions.<sup>21</sup> The findings suggested that deliberations did not correct for individual misunderstandings and that the instructions could be rewritten to improve juror comprehension.<sup>22</sup>

Another study also found that mock jurors understood more of the instructions after deliberations than beforehand, but that they still misunderstood key concepts in the instructions.<sup>23</sup> In this study, mock jurors were told about a trial, given instructions, and took a multiple choice test based on the instructions. Afterward, they were assigned to juries of six and given the same test as a jury that they had taken as individuals. The deliberating juries scored higher than they had as individuals, but “86 percent of the criminal juries were unable to respond accurately to what is proof of guilt, and over one-half of the civil juries did not correctly answer the question on proximate cause.”<sup>24</sup> Other empirical studies reached similar results.<sup>25</sup>

In a study of Florida’s standard jury instructions, researchers sought to test whether the instructions conveyed legal concepts effectively.<sup>26</sup> Mock jurors in the experimental group were shown a videotaped instruction from a burglary case, whereas the control group did not receive any instructions. Mock jurors in both groups received a forty-item objective test. Although the experimental group did show a statistically significant gain in comprehension compared to the control group, the “results of the study confirmed the fear of many trial lawyers and judges that jurors, even after receiving instructions, may not understand the law sufficiently.”<sup>27</sup>

More recent studies reinforced the findings of these earlier pioneering studies. One study in the 1980s found that mock jurors’ comprehension of criminal jury instructions improved after they were

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21 *Id.* at 15.

22 *Id.*

23 See Forston, *supra* note 9, at 614.

24 *Id.* at 615.

25 *Id.* at 615–16.

26 See David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480 (1976). This study is also described in Raymond W. Buchanan et al., *Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions*, COMM. Q., Fall 1978, at 31.

27 Strawn & Buchanan, *supra* note 26, at 480.

given instructions that had been rewritten to avoid jargon and to simplify structure.<sup>28</sup> When the study was repeated using former jurors, rather than college students, the study found that they had better comprehension when they were given the revised, rather than the pattern, instructions and when they were given an opportunity to deliberate.<sup>29</sup> A study in the 1990s, also using former jurors, found that they understood the instructions on the law less than one-half of the time.<sup>30</sup> Although another study found that jurors' comprehension of the pattern instructions was low, this same study found that jurors' understanding improved when the instructions were rewritten.<sup>31</sup>

The findings of jurors' lack of comprehension of death penalty instructions presents the problem in its starkest form. If jurors do not understand the instructions when the life or death of the defendant is at stake the consequence is extreme. There have been studies documenting a variety of failures with death penalty instructions, including that jurors do not understand particular words used in the death penalty statutes,<sup>32</sup> that they interpret the words according to their ordinary meanings instead of their particular legal meanings in the death penalty context,<sup>33</sup> or that they fail to understand the nature of their task in the sentencing phase of a death penalty case, including how to identify and weigh aggravating and mitigating factors.<sup>34</sup> Furthermore,

28 See Severance et al., *supra* note 14, at 213.

29 *Id.* at 218–20, 224.

30 See Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 550 (1992).

31 See Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure To Communicate*, 74 JUDICATURE 249, 251 (1991) ("The results of the experiment confirmed what other researchers had found: jurors' comprehension of the pattern instructions was low, and jurors understood the rewritten instructions better than the pattern instructions . . .").

32 See, e.g., *United States ex rel. Free v. Peters*, 806 F. Supp. 705, 729–30 (N.D. Ill. 1992) (agreeing that Professor Zeisel's study demonstrated that the Illinois death penalty instructions violated Free's constitutional rights, including the statute's use of certain words like "preclude," which did not convey the "weighing" that jurors are supposed to undertake in evaluating aggravating and mitigating circumstances), *aff'd in part, rev'd in part*, 12 F.3d 700 (7th Cir. 1993).

33 See, e.g., Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 8 (1993) (analyzing data as part of the Capital Jury Project's interviews with former capital case jurors in South Carolina and finding that jurors, who were not instructed about that state's statutorily mandated prison sentences and who were only instructed that "life imprisonment" and "death sentence" are to be understood in their plain and ordinary meaning, sentenced defendants to death when they would not have done so if fully informed about the law).

34 According to one study conducted by the Capital Jury Project, which relied on interviews with more than 500 capital jurors, jurors do not know that mitigating factors do not have to be proven beyond a reasonable doubt. See, e.g., Scott Burgins,

the case law is replete with instances in which jurors have expressed their confusion with the instructions and sought assistance from the court, either by asking for dictionaries or by asking the judge to explain terms in a way that a layperson would understand.<sup>35</sup>

## II. WHY JURY INSTRUCTIONS HAVE ELUDED CHANGE SO EFFECTIVELY

In spite of numerous empirical studies<sup>36</sup> documenting various ways in which jurors do not understand jury instructions, jury instructions have resisted change. What plausible explanations are there for judges' and lawyers' adherence to the status quo? What is it about jury instructions—about the way they are created, the purposes they serve, or how they are evaluated—that have made them so impervious to reform for so long?

### A. *An Institutional Process Theory*

One approach is to consider who creates jury instructions, the constraints these drafters are under, and the priorities they have as a way of explaining why there has been so little change in this area of the law. I will call this the “institutional process” theory because it focuses on the institutional actors and the processes they follow in the creation and implementation of jury instructions.

#### 1. The Drafters

Pattern jury instructions are created in different ways. They can be written by a committee of lawyers and judges, as is the practice in

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*Jurors Ignore, Misunderstand Instructions*, A.B.A. J., May 1995, at 30, 31 (“Particularly befuddling to jurors was how to weigh mitigating and aggravating factors during the sentencing stage.”). According to the Capital Jury Project’s interviews of former capital jurors in South Carolina, “[a]bout half the jurors incorrectly believe that a mitigating factor must be proven beyond a reasonable doubt. Less than a third of jurors understand that mitigating factors need only be proved to the juror’s personal satisfaction.” Eisenberg & Wells, *supra* note 33, at 11. In a California study using college-educated students as mock jurors, the researchers found “there was a widespread inability to comprehend the central terms of capital penalty phase decision making, and that there was far more confusion attached to the concept of mitigation than aggravation.” Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California’s Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411, 420 (1994). In the California study, the mock jurors also had difficulty identifying which factors were aggravating and which were mitigating. *Id.* at 422–23.

<sup>35</sup> See, e.g., Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 19–21 (citing cases).

<sup>36</sup> See *supra* Part I.

Illinois,<sup>37</sup> by a committee of judges, as was the practice in California,<sup>38</sup> or by a judge, who collects his own and other judges' instructions, refines them, and ultimately makes them available to all judges by publishing them.<sup>39</sup> The main point is that pattern jury instructions are written by professionals for use by other professionals.

The lawyers and/or judges who draft pattern jury instructions share an overriding concern. They want the instruction to encapsulate the law of that jurisdiction correctly. One way to do this is to use the language of the statute or case, even if it means using legal terms of art in the instruction itself. By adhering so closely to the statute or case law, the drafters adhere to language that was intended for the legal community in the first place. The drafters do not want the instruction to cause problems for a trial judge when the case goes up on appeal. A flawed instruction can result in the case being sent back down to the trial judge for a new trial. This result is a costly one for the parties and the judge. Thus, the drafters are concerned that the instruction "get it right."<sup>40</sup> The trial judge who uses the instruction shares this concern. The trial judge is usually careful not to deviate from the instruction because he or she does not want to be reversed on appeal and have the case return for a new trial.<sup>41</sup> Appellate courts often support this position. For example, an appeals court in Califor-

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37 See, e.g., Gerald C. Snyder, *Foreword to the First Edition (1961)* of IPI, *supra* note 3, at xvii, xviii ("The members the Supreme Court appointed to [the initial] Committee consisted of three law professors, five judges and nine lawyers actively engaged in the trial of civil litigation, in behalf of both Plaintiffs and Defendants.").

38 See, e.g., Mike Kataoka, *Eschewing Obfuscation: The Judicial Council Strives for Plain English with Its New Jury Instructions*, CAL. LAW., Dec. 2000, at 52, 53 ("For roughly 60 years, the Los Angeles County Superior Court has controlled a piece of this state's legal business by owning the rights to both CALJIC (California Jury Instructions—Criminal) and BAJI (Book of Approved Jury Instructions)—the preferred standardized texts that spell out exactly how juries in California should be instructed.").

39 See, e.g., LEONARD B. SAND ET AL., *MODERN FEDERAL JURY INSTRUCTIONS (CIVIL)* (2004).

40 See, e.g., Leonard Post, *Spelling It Out in Plain English*, NAT'L L.J., Nov. 8, 2004, at 1, 19 ("We have to hit a home run—if we hit a triple, we're in trouble . . . We would like as humanly as possible to get them [the new criminal jury instructions] right." (quoting Justice Carol Corrigan, Chairwoman of the Judicial Council Task Force on Jury Instructions and Chairwoman of the Criminal Subcommittee in California)).

41 At one conference, Federal District Court Judge Stanley Sporkin, when asked why he did not break with past practice and improve the jury instructions, looked over to then Chief Judge Abner Mikva of the United States Court of Appeals for the District of Columbia, and explained: "[Chief Judge Mikva] would overturn me." Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 IND. L.J. 1101, 1111 (1993).

nia advised trial judges who were inclined to clarify the pattern instruction on reasonable doubt simply to “[l]et it be.”<sup>42</sup>

## 2. The Intended Audience

Although at one level jury instructions are supposed to be written for jurors, in fact, they are written by the legal community for the legal community. Even when the drafters recognize that the instructions need to reach two audiences—laypersons and appellate judges—the latter receives priority. As the drafters work on the jury instructions, they have fellow judges and lawyers in mind. The drafters struggle to create jury instructions that accurately convey the law as it has been expressed in statutes or interpreted in case law. They strive to use “neutral” language that does not favor plaintiffs or defendants.<sup>43</sup> They are concerned with the nuances of words and phrases and whether an instruction they have written accurately tracks the requirements of a statute or the elements of a judicial test. They are comfortable with the legal language because they have been trained in it. After years of schooling and practice, the legal terms have become a second language to them. The drafters are hard-pressed to put themselves in the position of those who hear these words for the first time and who have not had the benefit of such training.

Rarely do the drafters, whether committees of judges and lawyers or judges alone, include laypersons, such as former jurors, or those specially trained in communication, such as linguists.<sup>44</sup> Thus, there is little opportunity for the drafters to receive feedback from laypersons. The drafters have difficulty putting themselves in the position of laypersons because they are so immersed in the law that they no longer distinguish between the legal meaning of a word and its ordinary usage nor do they turn to those who might provide them with this information. Asking the drafters to consider the ordinary understanding of legal terms is like asking them to recall what it was like to

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42 *People v. Johnson*, 14 Cal. Rptr. 3d 780, 787 (Ct. App. 2004); *see People v. Garcia*, 126 Cal. Rptr. 275, 276–78 (Ct. App. 1975) (collecting cases from several jurisdictions on efforts by trial courts to improve upon the reasonable doubt instruction, which usually led to reversals on appeal).

43 Indeed, jury instruction committees that include lawyers usually include lawyers from both the plaintiffs’ and defense bar so that the committee will have the benefit of both perspectives and will select language that does not appear to favor one group over the other.

44 The recent committee in California is an exception. As part of a recent effort by some judges, lawyers, and law professors to rewrite the California jury instructions in plain language, a new committee sought the input of laypersons and linguists. For a fuller account of this effort, see *infra* Part III.A.

be a first-year law student when everything about the law was new and foreign. The law has become so deeply ingrained in them, as it is for all lawyers and judges, that it would be hard, if not impossible, for them to recall what they understood when they first began law school.

Thus, pattern jury instructions are drafted by professionals who are immersed in the law and who address other professionals similarly trained. Even if the drafters want to make the instructions accessible to those without such training, they find it difficult to do so. When faced with the choice of simplifying the language but risking reversal or using the legal language, the legal language prevails.<sup>45</sup>

### 3. Appellate Review

The drafters' concern with choosing the correct legal language is not misguided in light of how appellate judges review jury instructions. Appellate review of jury instructions tends to focus on parsing the language of the instruction to make sure that the particular word or phrase properly embodies the law. Although jurors are sometimes denied the opportunity to hear selected portions of the instructions again, appellate judges have the opportunity to pore over the written instructions and to engage in a close reading of them, aided by any tools that they find useful, such as dictionaries or other statutes. The drafters of jury instructions are "rational actors," to use the economists' phrase. They concentrate on the language of the instructions and use precise legal terms whenever possible because they know that the appellate judges will review the instructions with a fine-tooth comb. The drafters, in creating the instructions, gear their approach to the appellate judges' review and not to the jurors' level of comprehension.

Consider, for example, the jury instructions in the case of *Arthur Andersen LLP v. United States*.<sup>46</sup> A jury had found the accounting firm, Arthur Andersen, guilty of violating § 1512(b)(2)(A) and (B) of the United States Code, which provides, in relevant part:

Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person . . . with intent to . . . cause or induce any person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair

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45 See, e.g., *Foreward to the Fourth Edition (1995)* of IPI, *supra* note 3, at ix ("At times, the committee has been forced to choose between simplicity and accuracy, and it has been necessary to come down on the side of accuracy.").

46 125 S. Ct. 2129 (2005).

the object's integrity or availability for use in an official proceeding . . . shall be fined . . . or imprisoned . . . .<sup>47</sup>

The issue had arisen when Arthur Andersen maintained its "document retention policy" in the face of a potential, but not yet ongoing, Securities and Exchange Commission (SEC) investigation of Enron Corporation, one of Arthur Andersen's clients. This policy called for documents to be destroyed on an ongoing basis unless litigation was threatened or had officially commenced.

In *Arthur Andersen*, the United States Supreme Court unanimously held that the instructions used by the district court and affirmed by the Fifth Circuit did not properly encapsulate the law. One of the instruction's failings<sup>48</sup> was that it did not define "corruptly" correctly. Although the Fifth Circuit Pattern Jury Instruction defined "corruptly" as "'knowingly and dishonestly, with the specific intent to subvert or undermine the integrity'"<sup>49</sup> of a proceeding, the district court used the government's version in which the jury was told to convict if it found that Arthur Andersen intended to "'subvert, undermine, or impede'"<sup>50</sup> the governmental fact-finding by reminding employees to adhere to the document retention policy.

The Supreme Court focused on whether the statute's use of "knowingly . . . corruptly persuades" and the district court's instruction, which omitted "dishonesty" and added "impeded" so that the instruction read "knowingly with the specific intent to subvert, undermine or impede," still captured the statute's meaning. The Court concluded that it did not. To do so it compared the written words of the statute with the written words of the pattern instruction and the district court's instruction. The Court also relied on dictionary definitions as well as other statutes that had employed several of the words in contention, such as "knowingly," in other contexts.<sup>51</sup>

The drafters of jury instructions write with an eye to such appellate scrutiny. Their audience includes not only the lawyers in the courtroom, but also the appellate judges who might ultimately review the instructions on appeal. On the one hand, this is as it should be. On the other hand, there does seem to be irony in this situation. As the drafters worry about whether they are translating the statute into proper instructions, and as the appellate courts, including the Su-

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47 18 U.S.C. § 1512(b)(2)(A), (B) (2000).

48 The instruction's other failing was that it did not require a "nexus" between the "'persua[sion] to destroy documents and any particular proceeding." 125 S. Ct. at 2136.

49 *Id.*

50 *Id.*

51 *Id.* at 2136-37.

preme Court, give a close reading to the instructions to make sure that the addition or subtraction of particular words has not shifted the burdens established by the legislature, the jurors are forgotten. Unlike the judges, the jurors are not always given a written copy of the instructions to pore over. In fact, if they ask a question about a particular part of the instructions or want a particular section of the trial transcript reread, their request might be denied because, as one judge recently explained, they might emphasize one part over other parts.<sup>52</sup> If they do ask a question about a particular part of the instruction and the judge tries to be responsive, then he or she will typically reread that part of the instruction, perhaps more slowly or in a louder voice than the earlier reading.<sup>53</sup> Were the jurors, at least in federal court, to consult dictionaries or other outside sources, they could be found to have engaged in juror misconduct.<sup>54</sup> Jurors are not given the tools that reviewing judges have, and yet they are even less prepared than judges to understand the instructions, both because they are usually not trained in the law<sup>55</sup> and because their formal education might be limited. So, while the Justices question whether “‘impede’ has broader connotations than ‘subvert’ or even ‘undermine,’”<sup>56</sup> many of the jurors might be unfamiliar with any of these words, much less be able to discern the nuances among them.

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52 See, e.g., Bloomberg News, *9 Days, No Verdict from Scrushy Jury*, CHI. TRIB., June 2, 2005, § 3, at 2 (“Jurors sent a note to U.S. District Judge Karon Bowdre asking for a readback of ‘a small portion of the transcript of a witness.’ . . . Bowdre denied the request. ‘For me to read a small portion of the testimony to you from the lengthy transcript could unduly emphasize one bit of testimony to the exclusion of all other testimony,’ Bowdre wrote back to the jury.”).

53 See, e.g., Jacqueline Connor, *Jurors Need To Have Their Own Copies of Instructions*, L.A. DAILY J., Feb. 25, 2004, at 7, 7 (“When jurors would send out questions asking about the meaning of a concept or term, the custom was always to reread the instruction, as if the jurors would understand a second recital with the renewed dulcet tones of the judicial officer.”); Kataoka, *supra* note 38, at 53 (“[Judges] sit up there and read the instructions and watch people trying really hard to understand. And often the judges respond to questions by simply reading the same instructions louder.”) (quoting Justice Carol A. Corrigan, Chairwoman of the Judicial Council Task Force on Jury Instructions and Chairwoman of the Criminal Subcommittee in California)).

54 See FED. R. EVID. 606(b).

55 Lawyers can serve as jurors now that many jurisdictions have eliminated exemptions, including the one that exempted lawyers from jury duty. See, e.g., Margaret Graham Tebo, *Duty Calls*, A.B.A. J., Apr. 2005, at 35, 35 (“At least 40 states allow lawyers to serve on juries, a steady shift from earlier times when many states excluded lawyers from jury pools . . . . Only seven states exclude lawyers, and a few more give judges wide latitude to excuse them . . .”).

56 *Arthur Andersen*, 125 S. Ct. at 2136.



### B. *The Acculturation Process Theory*

Another explanation for jury instructions' resistance to change is that perhaps jury instructions serve other purposes, even if they are subtle, unacknowledged purposes, so that it matters less that jury instructions fail in their central purpose, which is to educate jurors, because they succeed in these other purposes. I identify this theory as the "acculturation process" because these other purposes include inspiring in jurors respect for the judge and his or her expertise, and impressing upon jurors the power of the law and the need to approach their task with seriousness of purpose.

The ostensible purpose of jury instructions is to educate jurors about the law, as well as about their roles and responsibilities in the trial process. For many jurors, this may be their first contact with the legal system and their first time in a courtroom. Everything about the law is new to them, other than what they have learned about trials from movies, books, and television. The judge's instructions explain the trial process to jurors and what they can expect at each stage. Judges typically explain to jurors that the judge's role is to determine the law<sup>57</sup> and the jurors' role is to find the facts and to apply the law as the judge gives it to them to the facts as they find them.<sup>58</sup> The jury instructions are supposed to provide this information, but as discussed above,<sup>59</sup> the instructions often fall short because they are directed to an audience of professionals rather than laypersons. It may be, however, that while jurors do not understand all of the words, meanings, or distinctions contained in the instructions, they nevertheless take away certain lessons from these instructions. These lessons are not necessarily the ones intended by the drafters, but they are useful lessons nonetheless and help to explain why the drafters have not felt compelled to make the instructions more understandable.

#### 1. Commanding Respect

One of the effects of the jury instructions on the juror is to inspire respect for the judge, the proceedings, and the power of the law.

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<sup>57</sup> Judges typically explain to the jury: "I instruct you that the law as given by the Court in these and other instructions constitute the only law for your guidance. It is your duty to accept and to follow the law as I give it to you even though you may disagree with the law." KEVIN F. O'MALLEY ET AL., 1A FEDERAL JURY PRACTICE AND INSTRUCTIONS § 10.01, at 5 (5th ed. 2000).

<sup>58</sup> Judges typically instruct the jury as to its role as follows: "Your job is to decide all of the factual questions in this case . . . . I will decide all of the legal questions in this case . . . ." *Id.* § 10.01, at 8.

<sup>59</sup> See *supra* Part II.A.

The jurors are often subjected to lengthy instructions rendered in a language that is almost foreign to them. However, even if they do not understand the charge itself, they may take away a respect for what is taking place in the courtroom. The instructions, whether they are understood in their entirety or not, show that the judge has undisputed mastery of this arcane language, and this reinforces the judge's status as a figure of authority in the courtroom. Of course the judge's robe, gavel, dais, and central location in the courtroom also reinforce his or her authority.<sup>60</sup> The jurors would look to the judge as a figure of authority anyway because they have little or no experience in the courtroom, whereas the judge typically has much experience, but the jury instructions provide another opportunity for the judge to impress upon jurors the judge's expertise. As one appellate judge in Alabama recognized: "[W]e have to reject any unspoken fear that using 'plain' or more common language will somehow make us appear less knowledgeable, and/or diminish the integrity of the proceedings."<sup>61</sup>

The jury instructions, often rendered in a formal, archaic language that is obscure to those untrained in the law, also might help the jurors to recognize the enormity of their task and help them to take it seriously. The special language of the instructions, just like the special language throughout the trial, replete with objections, rulings from the bench, and whispered sidebars, helps the jurors to distinguish this setting from other settings. This is not entertainment, even though the jurors might be most familiar with trials from various forms of entertainment. This is not an ordinary, everyday meeting, and thus it requires language that is different from ordinary, everyday speech.<sup>62</sup>

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60 See, e.g., Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1075 (1995); cf. Susan S. Silbey & Patricia Ewick, *The Architecture of Authority: The Place of Law in the Space of Science*, in THE PLACE OF LAW 75, 80–81 (Austin Sarat et al. eds., 2003) ("Up until the nineteenth and twentieth centuries, the laboratory was a 'truth spot,' a place in which the empirical truths of science were revealed to a select audience of gentlemen. . . . Knowledge and truth were thus inscribed onto the laboratory and the social ties that connected scientists, their laboratory spaces, and their public." (footnotes omitted)).

61 Scott Donaldson, *Is It Time for the 'Plain English' Jury Charge?*, 66 ALA. LAW. 61, 63 (2005).

62 One article, written by a judge and a professor, recognized the need for a formal style, but not for foreign words, in the courtroom. They explained: "An elevated style is justified in the courtroom setting because of the need to symbolically suggest and enforce formal behavior. However, uncommon words are not required by any consideration." Strawn & Buchanan, *supra* note 26, at 482.

## 2. Inspiring Awe

The jury instructions, with their legal terms and Latin phrases, also might convey to jurors a sense of awe in what is transpiring before them. They are asked to participate in a remarkable process, and the obscurity of the instructions helps them to appreciate that. An inkling of this can be gleaned during the voir dire. When jurors enter the courtroom, many are eager to be excused from jury service. However, as the voir dire progresses, a transformation often occurs. Jurors put aside their excuses and become intent upon serving.<sup>63</sup> Once they are selected to serve, they want to do a good job. The instructions given before they embark on deliberations remind them of the purpose for which they have been called and inspire them to do the best job they can.

Although it might be straining the point, the jury instructions can be seen as ritual. With their archaic formulations and obscure words, they separate the trial from ordinary, daily life. The instructions, as they have been read in countless other trials, connect jurors to the past and give them a sense that they are part of a larger, ongoing endeavor. The obscurity of the terms also might give jurors a sense of distance from what they are being asked to do, so that they are not overwhelmed by the enormity of their task, which is to render judgment.<sup>64</sup>

## 3. The Trade-Offs

On the positive side, the jury instructions may inspire jurors to have respect for judges, courts, and the law, so that even if the instructions fall short of their primary purpose of juror education, they nonetheless succeed in these unstated purposes. It might be that jurors do not need to understand each and every word of the instructions for them to grasp intuitively these other lessons.

On the negative side, however, jury instructions that do not actually speak to jurors in language they understand might reinforce juror passivity<sup>65</sup> as jurors fail to acquire knowledge about the law and their

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63 For an individual account of this transformation, see Dan Hatfield, *Jury Service an Engaging Adventure*, JUDGES' J., Fall 2004, at 34, 36 ("Surprisingly, that [excusal] was a bittersweet moment for me. I had gone from wanting to get out of this [jury service], to a heartfelt obligation to serve.").

64 Cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986) ("[J]udges deal pain and death.").

65 For a discussion of the disadvantages of jurors as passive receptacles, in contrast to jurors as active learners, see B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1241 (1993).

role in the trial process. They might feel overwhelmed and ill-equipped to perform their task. Such frustration can lead to a loss of respect for a legal system that fails to give them basic information but requires them, in the most extreme case, to make a life-or-death decision. As jurors grapple to understand the instructions, those outside the courtroom, including lawyers, parties, and even some judges, might lose faith that juries decide cases based on the law and instead conclude that juries reach their verdicts based on whim or fancy.<sup>66</sup>

### C. *The Skeptical View*

Another theory that might explain why there has been so little change in jury instructions is that judges might be skeptical of the empirical studies in spite of decades of research pointing to the need for change in the instructions. In other areas of the law judges have questioned the role that empirical studies should play in shaping the law. It could be that those who are in a position to change the instructions simply do not believe that there is anything wrong with the instructions, empirical studies notwithstanding. Or it could be that they are skeptical, not of empirical studies in general, but of empirical studies in this area of the law in particular. Finally, it could be that they do not think jurors will listen to instructions no matter how clearly they are written, and so they are skeptical of the need for change as well. I will explore each of these variations of the “skeptical view” that could explain judicial inaction toward jury instructions.

#### 1. Skepticism That There Is a Problem

Jury instructions are not the only area of the law in which judges have ignored or misused empirical studies. There are other areas in which this has occurred. For example, there are many empirical studies showing that eyewitness testimony can be unreliable, and yet judges have declined to instruct jurors on the vagaries of eyewitness testimony. On other questions, such as proper jury size, they have misused empirical studies. Thus, it might be that jury instructions are just another example of judges declining to take account of empirical findings, particularly when they clash with longstanding judicial practices.

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66 See, e.g., JEROME FRANK, *COURTS ON TRIAL* 130 (1949) (“Many juries in reaching their verdicts act on their emotional responses to the lawyers and witnesses . . . [W]e have juries avoiding—often in ignorance that they are so doing—excellent as well as bad rules, and in capricious fashion.”).

a. Ignoring Empirical Studies

The unreliability of eyewitness testimony is one area in which there is a body of empirical studies documenting how difficult it is for eyewitnesses to make accurate identifications, and yet judges do not typically give an instruction to the jury on how unreliable this testimony can be. There are many studies<sup>67</sup> showing that eyewitnesses have difficulty making an accurate identification, particularly when their observation took place when they were under stress, when conditions (like lighting or weather) were poor, when there was not much time for observation, or when there was a cross-racial identification.<sup>68</sup> In spite of the empirical evidence, judges tend not to instruct juries on these difficulties. They do not provide juries with any information about these studies because juries are supposed to decide how credible an eyewitness is and what weight to give his or her testimony; judges worry that any instruction in this context might intrude into the province of the jury.

One problem is that there is a commonly-held view that “seeing is believing.” In other words, that we can trust what we see and that we can trust what others see. This is a view that helps us get through the day. We do not ask every time we see something whether we can trust what we see; rather, we simply assume that we can. Thus, the ordinary, commonsense view that jurors are likely to hold is that eyewitness testimony is reliable. They are unlikely to be aware of the factors that will make it unreliable. Without an instruction from the judge telling them about the findings from empirical studies, jurors are likely to believe that eyewitness testimony is reliable.

A second and related problem is that eyewitness identification is very powerful. Once an eyewitness makes an identification in court and says “this is the person who committed the crime; I saw this person with my own eyes,” it is hard to challenge that identification.<sup>69</sup>

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67 See NANCY S. MARDER, *THE JURY PROCESS* 132 n.35 (2005) (citing studies).

68 See, e.g., Robert Buckhout, *Eyewitness Testimony*, *SCI. AM.*, Dec. 1974, at 23, 25.

69 See, e.g., ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 9 (1979) (“Jurors have been known to accept eyewitness testimony pointing to guilt even when it is *far* outweighed by evidence of innocence.”); Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 *STAN. L. REV.* 969, 970 (1977) (“For the layperson, visual identification of the defendant by the victim or witness often provides the most persuasive evidence, which cannot be overcome by contrary evidence supporting the accused.”).

Even when there is a strong alibi defense, which should call into question the eyewitness testimony, jurors will believe the testimony.<sup>70</sup>

In the face of so many studies, it seems that judges should at least share with juries some of the factors that might make the eyewitness testimony unreliable. Yet, judges are reluctant to do so. One explanation is that they are skeptical of the studies and believe, like jurors, that eyewitness identification is generally reliable.<sup>71</sup>

#### b. Misusing Empirical Studies

Another area of the law that illustrates this uneasy relationship between judges and empirical studies and the way in which the former have misused the latter, is on the question of the proper size of the jury. In the 1970s, there were a number of cases on jury size that explored how small a jury could be without violating the United States Constitution. In 1970, in *Williams v. Florida*,<sup>72</sup> the United States Supreme Court held that there was nothing magical<sup>73</sup> about a twelve-person jury and that a six-person jury in a criminal case was constitutional. At that time, there were few empirical studies that had examined jury size; thus, the Court surmised that jury size would make little difference to jury deliberations.

In 1973, when *Colgrove v. Battin*<sup>74</sup> was decided, there were already a number of studies suggesting that a reduction in jury size would have deleterious effects on the jury. A small jury would limit the number of minorities on any given jury, make it more difficult for hold-outs to maintain their position, and increase the chance of producing outlier verdicts, particularly for damage awards decided by small juries.<sup>75</sup> However, the Court had already held in *Williams v. Florida* that

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70 See, e.g., SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL 79–82 (1988) (providing examples of erroneous eyewitness identification that persuaded juries in spite of strong alibi defenses by the defendants).

71 Of course, there are other explanations. One is that judges are careful not to intrude into the province of the jury and that the question of credibility is one that belongs to the jury. Another explanation is that it is hard to figure out the appropriate steps to take. There are a number of ways to address the problem, from offering an instruction to allowing experts to testify on the vagaries of eyewitness identification. See *id.* at 84 (describing these and other alternatives).

72 399 U.S. 78 (1970).

73 *Id.* at 102 (“We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance ‘except to mystics.’” (quoting *Duncan v. Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting))).

74 413 U.S. 149 (1973).

75 See, e.g., Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 716–19 (1971).

a criminal jury could consist of six jurors;<sup>76</sup> thus, it would be hard-pressed to hold that a civil jury had to consist of a greater number of jurors than a criminal jury. The criminal jury, in the Court's view, served a critical function as an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."<sup>77</sup> The Court, impelled by its logic in *Williams v. Florida*, concluded that the civil jury need not consist of twelve jurors. To reach this conclusion, however, it had to ignore the growing number of studies that had detailed the harms of the six-person jury and to rely on the few, methodologically flawed studies that had not found any differences between six- and twelve-person juries. This was, in the words of one empiricist, a "shoddy use of social science."<sup>78</sup>

When *Ballew v. Georgia*<sup>79</sup> was decided in 1978, the Court returned to this body of empirical studies and held that a criminal jury (and by implication a civil jury) could not go below six jurors. However, there was no principled basis for deciding that six-person juries were constitutional and five-person juries were not. The empirical studies that the Court relied on in *Ballew* should also have informed its decision in *Colgrove*. As this example illustrates, the Justices were willing to discount a large body of empirical studies when they created a conflict with the Court's own line of cases. In the case of jury size, there was a need for consistency between criminal and civil juries. That logic was more compelling to the Justices than the empirical studies and the harms they revealed about six-person juries. In the case of jury instructions, judges might be similarly skeptical about the empirical studies detailing the problems because the instructions have been in effect for a long time. Thus, the empirical evidence is in conflict with the judges' own longstanding experience with the instructions. Once again, the conflict is resolved against the empirical studies and in favor of the judges' own logic and experience.

## 2. Skepticism That Empirical Studies Measure the Right Thing

Another reason that judges might not act upon the empirical studies showing the myriad ways in which jurors fail to understand

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<sup>76</sup> 399 U.S. at 102–03.

<sup>77</sup> *Duncan*, 391 U.S. at 156.

<sup>78</sup> Jeffrey J. Rachlinski, *The Story of Colgrove: Social Science on Trial*, in CIVIL PROCEDURE STORIES 371, 382 (Kevin M. Clermont ed., 2004); see Carter, *supra* note 2, at 45 ("The [U.S. Supreme C]ourt had been doing bad law and bad social science in the first two cases [*Williams* and *Colgrove*]." (quoting Professor Michael Saks, Ariz. State Univ. College of Law)).

<sup>79</sup> 435 U.S. 223 (1978).

jury instructions is that they might believe that the empirical studies are flawed.

In *Free v. Peters*,<sup>80</sup> for example, a majority of the panel on the Court of Appeals for the Seventh Circuit rejected the argument that the instructions in an Illinois capital case were so incomprehensible as to violate the U.S. Constitution<sup>81</sup> because the majority identified several methodological flaws with the empirical study that formed a basis of the appeal.

The empirical study of Illinois's capital case jury instructions was conducted by Hans Zeisel, a pioneer in the field of jury research. Zeisel was the coauthor, along with Harry Kalven, of *The American Jury*,<sup>82</sup> the most comprehensive empirical study ever done on the jury system. Zeisel conducted his study of the Illinois death penalty instructions by giving jurors who were called, but not selected, for jury duty a written test.<sup>83</sup> They had to answer eighteen true or false questions after having read a scenario similar to the facts in *Free's* case.<sup>84</sup> Initially, the instructions were based on the Illinois pattern instructions; subsequently, other mock jurors were given the actual instructions used in *Free's* trial.<sup>85</sup> The test takers in both groups fared poorly. For example, the mock jurors did not understand how to use the mitigating factors.<sup>86</sup>

Although the magistrate judge and the district court judge were persuaded by Zeisel's study that there was a high probability that jurors were confused,<sup>87</sup> the Seventh Circuit was not similarly convinced.<sup>88</sup> In particular, the majority rejected the Zeisel study because it failed to replicate how a jury actually works. The majority did not think that individuals taking a test on their own would predict how a criminal jury, consisting of twelve jurors working together, would understand and apply the instructions.<sup>89</sup> The majority also thought that the study's methodology was flawed because there was no control

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80 12 F.3d 700 (7th Cir. 1993) (Posner, C.J.).

81 According to *Boyde v. California*, 494 U.S. 370 (1990), an allegedly confusing instruction can violate the U.S. Constitution if there is a "reasonable likelihood" that it misled the jury into sentencing the defendant to death. *Id.* at 380.

82 HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

83 *Free*, 12 F.3d at 705.

84 *Id.*

85 *Id.*

86 *Id.*

87 *United States ex rel. Free v. Peters*, 806 F. Supp. 705, 709 (N.D. Ill. 1992); *United States ex rel. Free v. Peters*, 778 F. Supp. 431, 434-36 (N.D. Ill. 1991).

88 12 F.3d at 706.

89 *Id.* at 705.



group.<sup>90</sup> In the majority's view, Professor Zeisel also should have compared the results of these individual test takers to the results of other individual test takers who had received instructions that Professor Zeisel believed were clear and understandable. If the test takers who received the clear instructions did no better than the test takers who received the Illinois instructions, then there was a problem with the jury system in its entirety, rather than with the instructions in particular.

Judge Cudahy, writing in dissent, suggested that appellate judges should not be so quick to dismiss the work of a respected researcher, as well as the fact-finding of the magistrate judge and district court judge below. He wrote: "I do not think we can simply ignore their conclusions as the product of slap-dash research and scatter-brained analysis."<sup>91</sup>

However, the majority believed that it was the role of judges, and in particular appellate judges, to "decide whether a piece of social science research has sufficient reliability to provide a permissible basis for upsetting a jury verdict."<sup>92</sup> The majority retained its "skepticism . . . [because] [n]either in his brief nor at argument was [Free's] counsel able to explain how Zeisel's results can be taken seriously in light of the extraordinary vulnerability of his method."<sup>93</sup>

### 3. Skepticism That Jurors Will Listen

Finally, judicial skepticism could be based, not on doubts about empirical studies or their methodologies, but on whether jurors listen to instructions no matter how well drafted they are. This view would be most pronounced among those judges who are most skeptical about the jury system. Judge Jerome Frank is a prime example of this view. He distrusted the jury in general and doubted jurors' competence to follow instructions in particular:

Time and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language—that, indeed, for all the jury's understanding of them, they are spoken in a foreign language.<sup>94</sup>

Even judges who do not share Judge Frank's broad distrust of the jury might still be skeptical that jury instructions make a difference to

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<sup>90</sup> *Id.* at 706.

<sup>91</sup> *Id.* at 709 (Cudahy, J., dissenting).

<sup>92</sup> *Id.* at 706 (majority opinion).

<sup>93</sup> *Id.*

<sup>94</sup> JEROME FRANK, *LAW AND THE MODERN MIND* 195 (6th prtq. 1970).

jurors. One trial judge in Louisiana was so convinced that jurors do not pay attention to the instructions that he almost tried an experiment in his courtroom.<sup>95</sup> He planned on having an actual jury and a shadow jury hear a case. He would instruct the actual jury, but not the shadow jury. Each jury would retire to a separate jury room and deliberate. He predicted that both juries would reach the same verdict. At the last minute, he decided not to go forward with the experiment, for fear of reversal on appeal, but that did not change his view. He believed that jurors do not pay attention to the instructions. Unlike Judge Frank, however, this judge was not indicting the jury system. Rather, he thought that juries managed to reach the correct verdict *in spite of* the instructions. He is not alone in his views. As another judge explained: "If there is merit to the suggestion that jurors pay scant attention to instructions, it is because they have historically been incomprehensible, not only in content but also in presentation."<sup>96</sup>

#### D. *The Traditional View*

According to the traditional view, jury instructions should not change, and have not changed very much, because of tradition. Although judges and lawyers who hold this view would most likely support a little change over time, they would want the changes to the instructions to be small and incremental. In spite of empirical studies showing that jurors do not understand jury instructions, judges and lawyers would maintain the instructions as they are out of adherence to tradition.

##### 1. Instructions as "Precedent"

One way to regard jury instructions is as a form of precedent. The instructions have been passed down from judge to judge. Even before pattern instructions were prevalent, treatise writers collected judges' instructions so that they could be disseminated beyond an individual judge's courtroom.<sup>97</sup> With pattern instructions, the reach of the instructions is far greater. States have their own pattern instructions<sup>98</sup> and it is in the interest of state judges to follow the pattern

95 See American Judicature Society (AJS) Mid-Year Annual Meeting, The New ABA Jury Trial Standards: "Innovations" Go Mainstream? (Mar. 4, 2005) (transcript on file with author).

96 Connor, *supra* note 53, at 7.

97 See, e.g., MARTIN L. NEWELL, SACKETT'S INSTRUCTIONS AND REQUESTS FOR INSTRUCTIONS IN JURY TRIALS (Chicago, Callaghan & Co. 2d ed. rev. 1888).

98 Not all states have pattern jury instructions. Vermont, for example, does not have standard instructions; however, that is about to change because Vermont is in

instructions, and thus, to minimize the chance of reversal on appeal based on jury instructions. Even in states such as Michigan where adherence to the pattern instructions is “‘voluntary’” because the Michigan Supreme Court never formally adopted them, “‘everyone uses them because of the fear of being reversed.’”<sup>99</sup>

Although pattern instructions are adhered to closely, they are not immune to all change; rather, the changes tend to be small and incremental. An individual judge might attempt to clarify an instruction to the jury, only to be reminded by the appellate court that such embellishments are inadvisable.<sup>100</sup> Or an appellate court might clarify an instruction on appeal upon discerning some inadequacy with the accepted instruction. The process of change in jury instructions is gradual. The instructions are widely-accepted and followed, and while they are not completely impervious to all change, the changes that are made are small and incremental.

This incrementalist approach to change in jury instructions mirrors the incrementalist approach to change in case law. Cases are followed as precedent. Lower courts follow the precedents established by higher courts. This arrangement does not preclude all change. Courts occasionally overturn earlier precedents. It is simply that the change in case law tends to be gradual so that the law remains fairly stable and predictable and people know how to order their affairs. So, too, with jury instructions.

## 2. Instructions as Sacred Texts

In addition, the familiar words and cadences of jury instructions are reassuring to the bench and bar alike. Even if jurors do not understand the words, and a body of empirical studies suggests this is so, judges and lawyers understand the words and regard them as sacred texts.<sup>101</sup> They are familiar refrains, much like a favorite song or a

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the process of creating both criminal and civil jury instructions. *See Post, supra* note 40, at 19.

99 *Id.* (quoting Michigan Circuit Judge William Caprathe, who chaired the drafting committee for the criminal jury instructions).

100 *See, e.g.,* *People v. Johnson*, 14 Cal. Rptr. 3d 780, 786–87 (Ct. App. 2004) (“To any trial judge who feels the urge to clarify or explain reasonable doubt, we commend the concise history of the reasonable doubt standard that appears in the latest CALJIC compendium. . . . [There has been] ‘the universal approval’ by federal and state courts alike of CALJIC No. 2.90 ‘conclusively settl[ing]’ its ‘legal sufficiency and propriety.’”).

101 Joseph Kimble, *Revising Hallowed Text: Lessons from the U.S. Rules of Civil Procedure*, Keynote Speaker at International Conference: Clarity and Obscurity in Legal Language, Boulogne-Sur-Mer, France (July 6, 2005).

cherished prayer. They are so familiar that judges and lawyers might no longer think about the meaning of individual words or phrases, and whether they are clear or not to other listeners, just as one does not think about the words of a song from childhood but simply repeats them and appreciates their familiarity. Judges who have given these instructions for decades can repeat them verbatim. It is not surprising that many prefer these hallowed formulations to anything new that might be proposed.

### III. A GLIMMER OF HOPE

Although Part II explored possible explanations for why the language of jury instructions has remained largely unchanged in spite of an ever growing body of empirical studies suggesting that jurors have difficulty understanding these instructions, this Part will focus on a few of the states in which change is underway. These states provide a glimmer of hope in this area. They have indeed functioned as the “laboratories” that Justice Brandeis envisioned when he observed that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>102</sup> The success of some of these experiments has led national organizations, such as the American Bar Association (ABA), to promote these efforts on a national scale<sup>103</sup> and should lead federal courts to move in this direction as well.<sup>104</sup>

#### A. California’s “Plain Language” Effort

Although California is not the first state to rewrite its instructions to eliminate legal jargon,<sup>105</sup> it has undertaken one of the more extensive efforts in recent years. In the wake of the acquittal of O.J. Simpson in the state criminal trial, the Judicial Council of California established a Blue Ribbon Commission on Jury System Improvement

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102 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

103 See ABA, *PRINCIPLES FOR JURIES AND JURY TRIALS* (2005) [hereinafter ABA PRINCIPLES].

104 See, e.g., Patricia Manson, *Judges Test Plans for Smoother Jury Trials*, CHI. DAILY L. BULL., Oct. 7, 2005, at 1 (describing “a six-month trial run of practices proposed by the 7th Circuit Bar Association American Jury Project Commission” in an effort to “translate the [ABA] principles into practical procedures”).

105 In 1981, Alaska was one of the first states to rewrite its instructions into plain language. See James D. Wascher, *The Long March Toward Plain English Jury Instructions*, CBA REC., Feb.–Mar. 2005, at 50, 51. Delaware, Michigan, Minnesota, Missouri, and North Dakota adopted pattern instructions with “a plain language emphasis” and Arizona, Florida, Vermont, and Washington may soon follow suit. *Id.*

to review its jury system. One of the Commission's recommendations was that the Judicial Council appoint a Task Force "charged with the responsibility of drafting jury instructions that accurately state the law using language that will be understandable to jurors."<sup>106</sup> The Task Force should be "diverse, including judges, lawyers, representatives from the Committee on Standard Jury Instructions of the Superior Court of Los Angeles, linguists, communications experts, and other non-lawyers."<sup>107</sup> The Judicial Council appointed a Task Force consisting of "mainly judges and lawyers, although it also include[d] two members of the public."<sup>108</sup>

The Task Force was divided into two subcommittees, one to draft the civil instructions and the other to draft the criminal instructions. Although the subcommittees initially intended to work from the existing California pattern instructions, known as the *Book of Approved Jury Instructions (BAJI)*<sup>109</sup> and *California Jury Instructions: Criminal (CALJIC)*,<sup>110</sup> copyright problems precluded them from doing so. Accordingly, each subcommittee had to write the plain language instructions from scratch. According to one report, "California stands alone, at least for now, as the only state to have written new criminal and civil instructions from scratch."<sup>111</sup> As Justice Ward, the chair of the civil subcommittee recounted, this was an enormous undertaking; it took over six years to complete and represents "the most comprehensive revision of jury instructions in California history."<sup>112</sup> The criminal subcommittee is still at work on its instructions. As Justice Corrigan, the chair of this subcommittee, explained: "'Very few civil trials are overturned for jury instructions [unlike criminal trials]. . . . We would like as humanly as possible to get [the criminal instructions] right.'"<sup>113</sup>

The drafting process was extensive. According to Justice Ward's account, it began with staff attorneys at the Administrative Office of Courts who surveyed other states' instructions before submitting draft

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106 J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1444, 1517 (1996).

107 *Id.*

108 Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1100 (2001).

109 CIVIL COMM. ON CAL. JURY INSTRUCTIONS, CALIFORNIA JURY INSTRUCTIONS—CIVIL (BAJI) (2005) [hereinafter BAJI].

110 COMM. ON STANDARD JURY INSTRUCTIONS, CRIMINAL, OF THE SUPER. CT. OF L.A. COUNTY, CAL., CALIFORNIA JURY INSTRUCTIONS—CRIMINAL (CALJIC) (7th ed. 2003).

111 Post, *supra* note 40, at 19.

112 See James D. Ward, *Jury Practice: The New Civil Jury Instructions*, CAL. LAW., Feb. 2004, at 38, 38.

113 Post, *supra* note 40, at 19.

instructions to the subcommittees, which then refined them and presented them to the full Task Force.<sup>114</sup> Afterward, the instructions were sent out for public comment and an editorial staff monitored changes, made technical corrections, and maintained a consistent style. In sum, nineteen legal organizations and hundreds of individual lawyers assisted in the process, which culminated in the California Plain Language Civil Jury Instructions that took effect on September 1, 2003.<sup>115</sup> The criminal instructions are likely to be completed in 2005.

Both subcommittees tried to draft instructions that embodied plain language principles. These principles include using the active voice, avoiding double negatives and legal jargon, and writing in short sentences.<sup>116</sup> Both subcommittees tried to explain the legal concepts in simplified terms and to draft instructions that were geared toward a tenth-grade reading level.<sup>117</sup> The best way to illustrate their efforts is to compare one of the traditional *BAJI* instructions to one of the new plain language civil instructions.<sup>118</sup> *BAJI* 2.21 provides: "Failure of recollection is common. Innocent misrecollection is not uncommon."<sup>119</sup> The new instruction, *California Civil Instruction (CACI)* 107, reads: "People often forget things or make mistakes in what they remember."<sup>120</sup> The new instruction uses simple words, avoids double negatives, and draws examples from everyday life to make its point. Although the new instructions will be easier for jurors to understand, already some in the legal profession have registered complaints, including one lawyer who thought the new instructions are "dumbed down."<sup>121</sup>

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114 Ward, *supra* note 112, at 39.

115 *Id.*

116 For a fuller exposition of plain language principles, see Joseph Kimble, *The Elements of Plain Language*, MICH. B.J., Oct. 2002, at 44; David L. Mower, Comm. Chair, Utah Supreme Court Advisory Comm. on Plain English Criminal Jury Instructions, [http://users.mstar2.net/dmower/plain\\_english\\_guidelines.html](http://users.mstar2.net/dmower/plain_english_guidelines.html) (last visited Oct. 12, 2005) (citing Julie Damron, Nine Rules for Drafting in Plain English, [http://users.mstar2.net/dmower/SCAC\\_criminal/guidelines\\_to\\_revising\\_text\\_int.pdf](http://users.mstar2.net/dmower/SCAC_criminal/guidelines_to_revising_text_int.pdf) (last visited Oct. 12, 2005)).

117 Ward, *supra* note 112, at 39.

118 I do this exercise every year in my course on "Juries, Judges, and Trials," and the new instruction is always better received by students than the original *BAJI* instruction.

119 *BAJI*, *supra* note 109, § 2.21; see also Ward, *supra* note 112, at 40.

120 JUDICIAL COUNCIL OF CAL. CIVIL JURY INSTRUCTIONS, CALIFORNIA JURY INSTRUCTIONS § 107 (2003); see also Ward, *supra* note 112, at 40.

121 Post, *supra* note 40, at 19 (quoting plaintiffs' attorney William Weiss, a San Francisco solo practitioner). Other attorneys have complained that some of the new instructions are already out of date and do not accurately reflect California law. See

### B. Arizona's Impasse Instruction

In the early 1990s, Arizona, on the initiative of the Arizona Supreme Court,<sup>122</sup> undertook significant reform of its jury system. The innovations that Arizona implemented then still place it in the vanguard of jury reform almost a decade later. Among its more leading edge reforms were allowing jurors to submit written questions for witnesses during the trial, allowing jurors to engage in preverdict deliberations in civil trials,<sup>123</sup> and allowing researchers to film some of the actual jury deliberations to study how the new reforms were working.<sup>124</sup> With respect to jury instructions, the Arizona reforms were equally far reaching. There were changes to the timing and presentation of the instructions, as will be discussed more fully in Part VI, as well as a commitment to plain language instructions<sup>125</sup> and to gearing the instructions to a sixth-grade reading level.<sup>126</sup> Perhaps most significant,<sup>127</sup> for a jury that had reached an impasse, the judge was to eschew the traditional *Allen*<sup>128</sup> charge, and instead, to instruct the jury

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David M. Axelrad & Curt Cutting, *Jury Practice: Problematic New Civil Jury Instructions*, CAL. LAW., May 2004, at 20.

122 In 1993, the Arizona Supreme Court established a jury reform committee to provide a "comprehensive review of jury service . . . and requested innovative recommendations for major changes." B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 280 (1996).

123 *Id.* at 281.

124 See, e.g., Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 4-5 (2003) ("This Article described the results of the experiment stimulated by the Pima County Superior Court in Tucson and supported by the Arizona Supreme Court to evaluate the Discussions innovation. A unique feature of this experiment among research on juries is that an Arizona Supreme Court Order permitted us to videotape 50 civil trials and the discussions and deliberations of the juries." (footnote omitted)).

125 See Dann & Logan, *supra* note 122, at 282 ("Use Only Plain English in Trials, Especially in Legal Instructions."); *id.* ("Make Jury Instructions Understandable and Case-Specific and Give Guidance Regarding Deliberations.").

126 See Junda Woo, *Arizona Panel Suggests Jury Reforms*, WALL ST. J., Oct. 25, 1994, at B5.

127 See Mark Curriden, *Jury Reform*, A.B.A. J., Nov. 1995, at 72, 76 ("But the rule that has gotten the most attention [in Arizona] is one requiring judges to create a dialogue with juries who appear to be deadlocked or at an impasse.").

128 *Allen v. United States*, 164 U.S. 492, 501 (1896) (holding that there was no error when the jury returned for further instructions and the trial court judge instructed the jurors to reexamine their views). The judge delivered a lengthy charge, which included the following:

[A]lthough the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the

that the judge was available to engage in a dialogue with the jury if the jury thought that it would help to resolve the impasse.<sup>129</sup>

When a jury reaches an impasse, it typically sends a note to the judge saying that it is having trouble reaching agreement and that it is not sure what to do next. At that point, the judge usually delivers an *Allen* charge, as judges have done since at least 1896,<sup>130</sup> and which has been described by one court as “a sharp punch to the jury, reminding [the jurors] of the nature of their duty and the time and expense of a trial, and urging them to try again to reach a verdict.”<sup>131</sup> This instruction has been approved in federal court and in many state courts,<sup>132</sup> even though it puts pressure on a jury to reach a verdict. It sends conflicting messages: it reminds jurors that they should try to reach a verdict, thereby putting pressure on them to do so, and yet, it tells jurors that they should vote consistent with their sense of what is right in the case.

The new Arizona instruction takes a less heavy-handed and more constructive approach than the traditional *Allen* charge. Now when an Arizona jury sends a note to the judge indicating difficulty in reaching consensus, the judge can instruct the jury as follows:

This instruction is offered to help your deliberations, not to force you to reach a verdict.

You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to areas of disagreement.

If you still have disagreement, you may wish to identify for the court and counsel which issues or questions or law or fact you would like counsel or court to assist you with. If you elect this option, please list in writing the issues where further assistance might help bring about a verdict.

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case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

*Id.*

129 ARIZ. R. CIV. P. 39(h); ARIZ. R. CRIM. P. 22.4; see also Dann & Logan, *supra* note 122, at 283.

130 164 U.S. at 501.

131 United States v. Anderton, 679 F.2d 1199, 1203 (5th Cir. 1982).

132 Not every state has agreed with the federal practice of giving an *Allen* charge. California, for example, prohibits the charge. See, e.g., People v. Gainer, 566 P.2d 997, 1006 (Cal. 1977).



I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is reasonably probable that you could reach a verdict as a result of this procedure, it would be wise to give it a try.<sup>133</sup>

This instruction allows the judge to be more honest with and helpful to the jury than the traditional instruction. In the traditional instruction, the judge informs the jury that he is not pressuring the jurors to reach a verdict, when in fact he is. In the traditional instruction, the judge leaves the jury as confused as to what steps to take to resolve the impasse as it was when it first sent the note to the judge. In contrast, the new instruction creates an opportunity for a judge-jury "dialogue"<sup>134</sup> to see if there is additional information that either the judge or counsel are permitted to provide that would assist the jury in its decisionmaking. The judge is allowed to play a more constructive role, as is the jury. The jury now knows to focus on the points of agreement and disagreement and to see if additional argument by the attorneys, presentation of evidence, or clarification of instructions will help it on the remaining points of disagreement. With the new instruction, the jury is given the opportunity to articulate the difficulty it is having and to take steps to ameliorate the problem; this approach is consistent with the "active" model of jurors that jury reformers in Arizona and elsewhere have urged.<sup>135</sup>

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133 ARIZ. R. CIV. P. 39(h) cmt; ARIZ. R. CRIM. P. 22.4 cmt; *see also* Dann & Logan, *supra* note 122, at 283 n.6.

134 Dann & Logan, *supra* note 122, at 283.

135 *See* THE BROOKINGS INST., CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM: REPORT FROM AN AMERICAN BAR ASSOCIATION/BROOKINGS SYMPOSIUM 16 (1992) ("[W]e generally support measures that would move the jury from being a 'passive' factfinder to taking a more 'active' part in the trial process . . ."); Dann, *supra* note 65, at 1241 ("Relying on the evidence produced by scientific studies and having as their goals better-informed jurors and more accurate verdicts, social scientists, law professors, a few judges, and others paint a far different picture of jurors and advocate a far different model for the jury than the one now followed in most courtrooms in this country. They all agree on one thing: jurors must be permitted to become more active in the trial."); Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1267-69, 1281 (2001) (describing the ways that technology can help jurors to be active participants in the trial process); B. Michael Dann, *From the Bench: Free the Jury*, LITIG., Fall 1996, at 5, 5 ("[T]he traditional passive jury that absorbs evidence and law should be changed to an active jury that participates as a near equal with judge and counsel."); *Waking Up Jurors, Shaking Up Courts*, TRIAL, July 1997, at 20, 20 [hereinafter *Waking Up Jurors*] ("The 'passive juror' notion is an antiquated legal model that is neither educational nor democratic. It flies in the face of what we know about human nature to assume that jurors remain mentally passive, refrain from using preexisting frames of reference, consider and

### C. Other States' Efforts

Other states have taken steps to make their jury instructions more understandable, but these efforts have not entailed the extensive reforms undertaken by California and Arizona.<sup>136</sup> According to the National Center for State Courts, Hawaii, Iowa, Michigan, Oregon, Pennsylvania, and Wisconsin have revised their civil jury instructions to some degree with simplification as the goal.<sup>137</sup> The American Judicature Society would add Delaware, Minnesota, Missouri, and North Dakota to that list.<sup>138</sup> According to the new Director of the Center for Jury Studies at the National Center for State Courts, Delaware sends drafts of its instructions to a specialist who reads them for their plain language and edits them accordingly.<sup>139</sup> In Illinois, the Illinois Supreme Court Committee on Pattern Jury Instructions in Civil Cases, for which I am the Reporter, is in the process of reviewing instructions to try to put them into plain language so that they will be understood by laypersons. The Seventh Circuit recently completed pattern instructions for use in the federal courts, and while the committee of judges and lawyers “‘didn’t go quite as far as California did,’” according to committee member U.S. District Court Judge Matthew F. Kennelly, the committee did try to write instructions that were “‘shorter, more direct and to the point’” than many standardized jury instructions.<sup>140</sup> According to another federal district court judge: “Numerous state and federal circuit and district courts have organized committees to revise and update jury instructions expressed in plain English. It remains a nascent art, but nevertheless modest optimism is justified.”<sup>141</sup>

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remember all the evidence, and suspend all judgment until they begin formal deliberations.” (quoting Arizona Superior Court Judge B. Michael Dann)).

136 Courts in New York, under the leadership of Chief Judge Judith S. Kaye, have made tremendous strides in improving jury service for New Yorkers. See *infra* Part IV.A.1. These reforms, though, focused more on improving conditions, rather than tools, for jurors. As Chief Judge Kaye recently explained: “‘We started with the nuts and bolts of how you get a jury to the courthouse, and then we moved to how they’re treated . . . . Now we’ve moved on to utilization and comprehension—how jurors can best go about their work.’” Carter, *supra* note 2, at 43.

137 See Post, *supra* note 40, at 19.

138 See Am. Judicature Soc’y, Jury Improvements, [www.ajs.org/jc/juries/jc\\_improvements\\_plainenglish.asp](http://www.ajs.org/jc/juries/jc_improvements_plainenglish.asp) (last visited Jan. 12, 2006).

139 Interview with Paula Hannaford-Agor, Dir. of the Ctr. for Jury Studies, Nat’l Ctr. for State Courts (June 2, 2005).

140 Wascher, *supra* note 105, at 52.

141 John L. Kane, *Giving Trials a Second Look*, JUDGES’ J., Fall 2004, at 29, 30.

#### IV. THE TRANSFORMATION OF JURY INSTRUCTIONS

What are the best ways of creating jury instructions that jurors will understand? First, the judiciary must take leadership and commit itself to this reform. Second, the drafters must take a “jury-centric” approach.<sup>142</sup> They must put themselves in the position of laypersons who have not been trained in the law. Given that this is a difficult task for most lawyers and judges to do, it is important that they involve laypersons at different stages of the process.

##### A. *Judicial Leadership*

##### 1. Examples from the States

The most important catalyst for change in jury instructions, particularly for a complete revamping of the instructions, is leadership from the judiciary. In Arizona, the Arizona Supreme Court, under the leadership of then Chief Justice Stanley Feldman, formed a committee to study jury reform in 1993. It requested that the committee produce “innovative recommendations for major changes”<sup>143</sup> and included committee members who had experimented with jury reforms in their own courtrooms as well as committee members who had served as jurors. The committee was chaired by then Maricopa County Trial Judge B. Michael Dann, who had initiated jury reforms in his own courtroom and had shared his findings in academic journals.<sup>144</sup> Among the committee’s recommendations were that instructions be written in plain language and be case specific. Fifteen of the committee’s fifty-five recommendations<sup>145</sup> were put into effect through supreme court rule changes, which took effect on December 1, 1995.<sup>146</sup> The key, according to Judge Dann, is “to find one or more champions on the state supreme court. Whether or not the

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142 See, e.g., B. Michael Dann, *Jurors and the Future of “Tort Reform,”* 78 CHI.-KENT L. REV. 1127 (2003) (suggesting that reforms be evaluated from a jury-centric perspective that considers whether they help jurors to understand the law and evidence in tort cases); Nancy S. Marder, *Introduction to The Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909, 918–20 (2003) (recommending a “jury-centric” approach to jury reform).

143 Dann & Logan, *supra* note 122, at 280.

144 See, e.g., Dann, *supra* note 65, at 1229.

145 See ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 (Sept. 1994) [hereinafter THE POWER OF 12], available at <http://www.supreme.state.az.us/jury/jury/jury1h.htm> (containing recommendations).

146 Dann & Logan, *supra* note 122, at 281; Pamela Manson & Rebecca Adams, *Jury Reforms Aim To Empower Panel of Peers in Arizona; Those Who Serve To Get Wider Role, Greater Voice*, ARIZ. REPUBLIC, Aug. 20, 1995, at A1.

chief justice is willing to so serve, the leaders should prevail upon the chief to appoint a statewide committee.’”<sup>147</sup>

In California, California Supreme Court Chief Justice Ronald M. George was instrumental in appointing a Task Force to draft new civil and criminal pattern instructions after a Blue Ribbon Commission had concluded that the state’s jury instructions were impenetrable to the ordinary juror. Chief Justice George had made jury reform “a top priority” and had sought reforms that would “treat jurors with more respect.”<sup>148</sup>

New York also has made huge strides in jury reform under the leadership of Chief Judge Judith Kaye, though these reforms did not initially focus on jury instructions.<sup>149</sup> Chief Judge Kaye appointed a panel, headed by Colleen McMahon, then a partner at Paul, Weiss, Rifkind, Wharton & Garrison, to “propose an overhaul of the jury system.”<sup>150</sup> In New York, many of the reforms focused on improving basic conditions for jurors, such as improving the facilities,<sup>151</sup> eliminating most of the exemptions,<sup>152</sup> increasing juror pay,<sup>153</sup> introducing some supervision of attorney-conducted voir dire in civil cases,<sup>154</sup> eliminating mandatory sequestration in felony criminal tri-

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147 *Waking Up Jurors*, *supra* note 135, at 23.

148 Anna Gorman, *Granting an Active Trial Role to Jurors*, L.A. TIMES, Oct. 5, 2001, at B2.

149 See Carter, *supra* note 2, at 43 (describing Chief Judge Judith Kaye’s step-by-step approach).

150 Richard Perez-Pena, *Judge Names Panel To Study Life on Juries*, N.Y. TIMES, Sept. 14, 1993, at B2.

151 Jan Hoffman, *Favorable Verdict for Jury Changes; Lawyers Are Unhappy. Other Signs Are Hopeful, Too*, N.Y. TIMES, Apr. 12, 1995, at B1 (“Some deliberating rooms and juror assembly halls have comfortable new chairs, lunch tables, vending machines and work carrels; one Manhattan courthouse now has a television room.”).

152 See G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 218 (1996) (recounting how New York revised its exemption policy so that “the list of exemptions, once the longest in the nation, was eliminated”); Jan Hoffman, *Judges Screen Jurors Faster than Lawyers, Study Says*, N.Y. TIMES, June 24, 1995, at 23 (“The [New York] State Legislature voted to end exemptions from jury duty for more than 20 professions, including podiatrists and embalmers as well as lawyers and doctors.”).

153 See Carrie Mason-Draffen, *Help Wanted/Queries About Worker’s Health Out of Bounds*, NEWSDAY, Dec. 15, 1996, at F10 (“The New York State daily wage for serving [on juries] rises from the current \$15 to \$27.50 as of Feb. 15[, 1996] and then climbs to \$40 in 1998.”).

154 See Hoffman, *supra* note 151 (“Among those [recommended changes], the one generating the most unhappiness from lawyers and delight from judges and jurors is a four-month experiment in several jurisdictions, including Manhattan and Nassau County, to speed jury selection. . . . [S]ome judges in the designated districts have

als,<sup>155</sup> creating an ombudservice,<sup>156</sup> and instituting “one-day, one-trial.”<sup>157</sup>

These jury reforms would not have taken place without the leadership of Chief Judge Kaye. New York court practices, from allowing attorneys complete control over voir dire in civil cases<sup>158</sup> to requiring sequestration in all felony criminal trials because the court officers depended on the overtime pay,<sup>159</sup> were so deeply entrenched and supported by special interest groups that without Chief Judge Kaye’s leadership, these changes would never have come to pass. According to one study, “there was unanimous agreement among those interviewed that [Chief Judge Judith Kaye’s] determination to reform the jury system upon being named chief judge in 1993 was the force that turned the tide. She took a very active role in crafting the proposals for change and seeing them to fruition.”<sup>160</sup> She has “written about, spoken publicly about and otherwise pushed for jury reform at every opportunity.”<sup>161</sup> For example, Chief Judge Kaye reported that she spent “two years convincing New York legislators to eliminate the 23 automatic exemptions to jury service that had been granted groups.”<sup>162</sup> According to one study, she engaged in “transformational leadership,” in which she persuaded others to “‘buy into’ the desired course of action and embrace the mandates being put forward.”<sup>163</sup> The study

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been supervising lawyers to test different levels of monitoring [during the voir dire].”).

155 Somini Sengupta, *New Law Releases Juries in New York from Sequestering*, N.Y. TIMES, May 31, 2001, at A1 (“For the first time in more than 100 years, New York jurors deliberating the fate of criminal defendants will no longer have to be sequestered overnight in state-financed hotel rooms, under the watch of armed, uniformed court officers.”).

156 See Mark Hansen, *Complaining Jurors Get a Hearing*, A.B.A. J., Sept. 1995, at 24, 24 (“The service, which is funded through the end of the year by a \$100,000 grant from two groups, grew out of a proposal last year by a court-appointed committee that recommended more than 80 ways to reform the state’s jury system.”).

157 See Hoffman, *supra* note 151 (“Since January, [1995] when many of Judge Kaye’s changes went into action, life for jurors has indeed become less painful. . . . In just about every county outside New York City, jurors are dismissed after one day unless they are picked for a trial.”).

158 See *supra* note 154 (describing greater judicial involvement in voir dire).

159 See Sengupta, *supra* note 155 (“The principal opposition [to reform] came from unions representing court officers. Their overtime pay accounts for nearly two-thirds of the \$2.5 million spent every year when jurors are put up for the night.”).

160 James P. Levine & Steven Zeidman, *The Miracle of Jury Reform in New York*, 88 JUDICATURE 178, 180 (2005).

161 Carter, *supra* note 2, at 43.

162 N.Y. Jury Reforms Bring Citizens Back to Court, REP. FOR MEMBERS (Am. Judicature Soc’y, Des Moines, Iowa), Spring 1999, at 4.

163 Levine & Zeidman, *supra* note 160, at 180.

concluded: "The moral of this remarkable story . . . is the efficacy of vigorous, enlightened judicial leadership."<sup>164</sup>

## 2. Obstacles

What these state examples show is that significant jury reform, including complete rewriting of the jury instructions, requires leadership from the judiciary, and yet, judges were identified in Part II as the main group that has resisted change under a number of different theories, including their institutional role, their acculturation aims, their skepticism of empirical studies, and their adherence to tradition. Thus, the difficulty is that the key group needed for dramatic change is the same group that resists change.

One way to alter this stasis is for a few maverick, visionary judges to take the initiative. They need to convince the chief judge of the state's supreme court, unless the chief judge is the one leading the reform, to appoint a statewide committee to make recommendations for jury reform in that state. All three states had committees appointed by the chief judge or justice, though in all three states the chief was also leading the way. Similarly, the committee has to have a mandate for major change. In New York, Chief Judge Judith Kaye wanted "an overhaul of the jury system."<sup>165</sup> In Arizona, Chief Justice Feldman charged the committee with "innovative recommendations for major changes."<sup>166</sup> In California, Chief Justice Ronald George had made jury reform a "top priority" for himself and the committee.<sup>167</sup> In all three states, the reforms were "'done at the behest of the chief judge, so you had high-level interest and very major comprehensive studies done, with a lot of recommendations.'"<sup>168</sup>

Membership on this statewide committee should include, at the very least, innovative judges and former jurors, though the committees in New York, California, and Arizona also included members of the bar and academics. In Arizona, the committee included judges who had experimented with jury innovations in their own courtrooms. Judge Dann noted, however, that the most important membership decision was the inclusion of five jurors who had recently served in lengthy and complex cases. He described their inclusion as

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<sup>164</sup> *Id.* at 184.

<sup>165</sup> See Perez-Pena, *supra* note 150.

<sup>166</sup> See Dann & Logan, *supra* note 122, at 280.

<sup>167</sup> See Gorman, *supra* note 148.

<sup>168</sup> Andrew Blum, *New Plans for Jury Improvements*, NAT'L L.J., Nov. 13, 1995, at A17 (quoting G. Thomas Munsterman, Dir. of the Ctr. for Jury Studies, Nat'l Ctr. for State Courts).

the most important organizational decision made, and it greatly influenced how the committee went about its work and arrived at the ultimate recommendations. The jurors convinced the committee of the wisdom of looking at the trial through jurors' eyes in addition to those of a judge or of a lawyer.<sup>169</sup>

### *B. Layperson Participation in Rewriting the Instructions*

Once a statewide committee has recommended that the jury instructions be rewritten in plain language, the committee that drafts the pattern instructions should be expanded to include laypersons. Of course, a pattern instruction committee could decide on its own to invite laypersons to participate or could try to draft the instructions in plain language without layperson participation, but there is likely to be reluctance to disturb the status quo or an inclination to make only modest changes in the instructions. Major change requires a jump-start; it requires, in the words of one article, *Waking Up Jurors, Shaking Up Courts*.<sup>170</sup> Laypersons could serve as this jump-start assuming there is widespread support for this initiative that began with the judiciary and included a statewide committee. Laypersons could participate at several different junctures in the rewriting of jury instructions.

#### 1. Layperson Committee Members

As described in Part II, in most states jury instructions are drafted by committees typically consisting of judges and lawyers. The pattern instructions they produce are written for appellate judges. Even when such committees have the best of intentions to make their instructions understandable,<sup>171</sup> it is difficult for them to write for audiences, such as jurors, who are untrained in the law. One way to address this challenge is to include laypersons, and especially former jurors, on these committees. They could be used as a sounding board and asked for their input as the committee drafts an instruction. The layperson members could serve as an early warning system to identify for committee members the difficulties the instruction posed for laypersons. The layperson members could point out words or phrases that they did not understand or thought that others might not understand.

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<sup>169</sup> Dann & Logan, *supra* note 122, at 281.

<sup>170</sup> *Waking Up Jurors*, *supra* note 135, at 20 (interviewing Judge B. Michael Dann on the Arizona reforms).

<sup>171</sup> See, e.g., Wascher, *supra* note 105, at 52 ("[I]t 'definitely is a goal and always has been' to make instructions clear and understandable." (quoting Thomas A. Clancy, immediate past Chair of the Ill. Supreme Court Comm. on Jury Instructions in Civil Cases)).

The committee could then return to the instruction and see if it could be worded or structured more simply while still encapsulating the law. The California Task Force included two members of the public as well as at least one linguist.<sup>172</sup>

Of course, there is always the problem that laypersons might feel inhibited about proclaiming their ignorance or that lawyers and judges might be unresponsive even after hearing the laypersons' views. Indeed, the experience in countries such as Germany where some cases are decided by panels consisting of a professional judge and two laypersons suggests that laypersons do not always stand up for their views and can be intimidated by the professionals.<sup>173</sup> However, here the laypersons would be asked to contribute their views as laypersons. Moreover, their views would be solicited and valued precisely because they do not have the training of the other professionals on the committee.

The experiments conducted by Dr. Solomon Asch in the 1950s might be an even greater cause for concern because they suggest a general tendency to be influenced by the views of the group. In Asch's experiments, he asked participants to identify which of two lines was shorter, but only after they had heard a confederate identify the longer line as the shorter one. The majority of participants agreed with the incorrect answer.<sup>174</sup> Here, where there is a difference in training, the effect that Asch found might be even more pronounced.

A new study, employing magnetic resonance imaging (MRI) scanners, which were not available when Asch did his experiments, supports Asch's finding about the power of group pressure.<sup>175</sup> This study also goes a step further than Asch's study and shows that different parts of the brain are used depending on whether the person goes along with the incorrect group answer or adheres to his or her own answer in spite of the group answer. In this study, participants were

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172 See *supra* notes 107–08 and accompanying text (describing the Task Force composition).

173 See, e.g., Stefan Machura, *Interaction Between Lay Assessors and Professional Judges in German Mixed Courts*, 72 *REVUE INTERNATIONALE DE DROIT PÉNAL* 451, 458–59, 460–62 (2001) (Fr.).

174 See Buckhout, *supra* note 68, at 28 (describing Asch's experiment).

175 See Gregory S. Berns et al., *Neurobiological Correlates of Social Conformity and Independence During Mental Rotation*, 58 *BIOLOGICAL PSYCHIATRY* 245 (2005); see also Sandra Blakeslee, *What Other People Say May Change What You See*, N.Y. TIMES, June 28, 2005, at F3 (describing the new study and noting that “social conformity showed up in the brain as activity in regions that are entirely devoted to perception. But independence of judgment—standing up for one's beliefs—showed up as activity in brain areas involved in emotion”).



shown two images of three-dimensional objects and told to rotate them mentally to determine if they were the same or different from each other. The participant was placed in a MRI machine so that his or her judgment process could be followed. However, participants made their determination only after they had heard the judgment of confederates who formed a group of which the participant was a member. In some instances, the confederates had been instructed to give an incorrect answer, and in other instances, they had been instructed to give a correct answer. When participants went along with the wrong group answer, they used a part of the brain devoted to spatial awareness. When they deviated from the wrong group answer, they used a part of their brain associated with emotions. As in the Asch experiments, many participants succumbed to group pressure. The new study went beyond the Asch experiments to suggest that the group's view can actually affect how one perceives the external world.

In applying this new study to the context of jury instruction committees, it could play out in different ways.<sup>176</sup> It could be that the laypersons would succumb to the group pressure of the professionals and say that they understood the instruction even when they did not, so that their presence on the committee did not make a significant difference. Or it could be that the lawyers and judges would succumb to the group pressure of the laypersons and earnestly struggle to rewrite the instructions until they were intelligible to the layperson members. The difference might be in the number of layperson members added to the committee. Just as one or two dissenting jurors are not enough to sway the majority,<sup>177</sup> though three or four dissenting jurors can be, it might be that if a sufficient number of laypersons are added to the committee, then they will not hesitate to speak out when they do not understand the instructions as written.

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176 This new study also has interesting ramifications for jury deliberations, where succumbing to group pressure is also a problem.

177 See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 110 (1986) (noting that the "[p]ressures to conform to the group are strong" and that "[i]t is only when a minority juror has initial support, in the form of other jurors with similar views, that the probability that a juror will sway the majority or hang the jury improves"); KASSIN & WRIGHTSMAN, *supra* note 70, at 182 ("The majority almost always wins."); Rita J. Simon, *Jury Nullification, or Prejudice and Ignorance in the Marion Barry Trial*, 20 J. CRIM. JUST. 261, 263 (1992) ("There were no instances [in the data from the University of Chicago Experimental Jury Project] in which one juror or even two held out against the other ten or eleven and then succeeded in persuading them to adopt their position.").

## 2. Empirical Testing of Laypersons' Comprehension

A second opportunity to have the benefit of laypersons' input is by using laypersons to test the instructions after they have been drafted to the committee's (including both its professional and layperson members') satisfaction. Professor Shari Diamond has expressed frustration at committees' "failure to test their proposed instructions out on ordinary people. Sometimes you are surprised by what 'mere mortals' understand.'"<sup>178</sup> At this point, committees that draft pattern jury instructions could make use of social scientists or other academics to undertake empirical testing of the draft instructions. Empirical testing could reveal problems or ambiguities that the more limited number of layperson committee members had not identified. Empirical testing would make use of a fair cross-section of the population, just as a jury venire is supposed to do.<sup>179</sup>

The testing would have to take care to avoid the two methodological problems noted in *Free v. Peters*.<sup>180</sup> First, the instructions should be given to small groups of laypersons who are allowed to discuss them and to reach some group understanding of the instructions. After all, jurors do not take a written test to prove their comprehension of the jury instructions. Each individual juror does not have to understand all of the instructions. Rather, jurors simply need to reach some level of understanding as a group. Second, the researchers need to have a control group that is given the old instructions so that it is clear that the new instructions are, in fact, easier to understand than the old ones, if in fact they are.

## 3. Obstacles

One obstacle to including laypersons on the pattern instruction committees is that these committees consist of lawyers and judges who write instructions to be used by other lawyers and judges. They are not accustomed to working with people who are untrained in the law. This would be a new experience, and given lawyers' and judges' adherence to tradition<sup>181</sup> they do not generally welcome such new experiences. However, just as when lawyers and judges initially resisted

<sup>178</sup> Wascher, *supra* note 105, at 51.

<sup>179</sup> The U.S. Supreme Court has interpreted the Sixth Amendment to the U.S. Constitution to require a venire drawn from a fair cross-section of the community. See, e.g., *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946). Congress has codified this requirement for both criminal and civil juries. See 28 U.S.C. § 1861 (2000).

<sup>180</sup> 12 F.3d 700 (7th Cir. 1993); see *supra* text accompanying notes 87–93 (discussing methodological flaws identified in *Free*).

<sup>181</sup> See *supra* Part II.D.

allowing jurors to take notes<sup>182</sup> or to submit written questions to witnesses,<sup>183</sup> once they had experience with the practices they usually responded favorably to them.<sup>184</sup> Similarly, initial resistance to working with laypersons on pattern instruction committees could give way once lawyers and judges on the committees have the experience of working with them.

A second obstacle is judges' and lawyers' skepticism of empirical studies.<sup>185</sup> Just as decades of empirical studies have failed to inspire the judiciary or the bar to rewrite the instructions, why should additional empirical studies persuade pattern instruction committees, made up of judges and lawyers, that mock jurors do or do not understand the revised instructions? One difference would be that the committees could work with the social scientists or academics in designing the empirical testing of the instructions. In this way, committee members might believe more readily that the tests do measure laypersons' grasp of the instructions. Also, because the committee members would be involved in a cooperative effort with the empiricists they might be more willing to be guided by the results of the testing.

## V. PRESENTATION OF INSTRUCTIONS

There are two problems with today's jury instructions: the language and the presentation. The preceding Parts discussed this first problem, the remaining Parts will take up this second problem.

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182 See KASSIN & WRIGHTSMAN, *supra* note 70, at 128 ("Although the Supreme Court has never directly addressed the question [of juror note-taking], it has long been a source of controversy."). Kassin and Wrightsman, writing in 1988, relied on an Administrative Office of the U.S. Courts estimate that "90 percent of the federal judges do *not* permit jurors to take notes." *Id.* They wondered about judges' "resistance" to the practice. *Id.*

183 See Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not To Ask, That Is the Question,"* 78 CHI.-KENT L. REV. 1099, 1105 (2003).

184 See, e.g., Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials*, 18 LAW & HUM. BEHAV. 121, 140 (1994) ("Both judges and attorneys were significantly more enthusiastic about notetaking if they had experience with jurors taking notes."); Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 446-52 (1985) (reporting generally favorable reactions by judges and lawyers to juror note-taking). Judges and attorneys also responded favorably to the practice of jurors asking questions of witnesses once they had experience with the practice. See Mott, *supra* note 183, at 1105 ("Some judges were initially skeptical, but after experience with questions in their courtrooms, they were pleased with the results and expressed their desire to continue after the pilot period ceased. A majority of the attorneys also responded favorably to juror questions." (footnote omitted)).

185 See *supra* Part II.C.

### A. *How Instructions Are Typically Presented*

Typically, the judge instructs the jury after the attorneys' closing argument but before the jury goes into the jury room to deliberate. At the beginning of the trial, the judge usually reads the jury several cautionary instructions. Before the jury takes a break or is dismissed for the day, the judge might remind the jury of some of these instructions, such as the admonition not to discuss the case with others, including with each other.<sup>186</sup> However, most of the instructions are delivered at the end of the trial, typically after the attorneys' closing arguments.<sup>187</sup> The judge reads the prepared instructions aloud, as a professor would deliver a lecture. In the case of jury instructions, however, the lecture can last from half an hour to several hours. Until recently, most jurisdictions did not allow jurors to take notes, including notes on the instructions.<sup>188</sup>

In some courtrooms, jurors are given an individual written copy of the instructions so that they can follow along as the judge reads the instructions aloud.<sup>189</sup> In other courtrooms, jurors are not given a written copy at all.<sup>190</sup> Yet another variation is to give the jury one written copy of the instructions to take into the jury room when it begins its deliberations.<sup>191</sup>

After the reading of the instructions, no matter how many hours it took, the jurors are not given an opportunity to ask any questions. Instead, they are led into the jury room to begin their deliberations.

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186 For example, Judge Lance Ito admonished jurors throughout the state criminal trial of O.J. Simpson as follows: "Please remember all my admonitions to you; do not discuss the case amongst yourselves, form any opinions about the case . . . ." Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. REV. 877, 930 n.233 (quoting Transcript of Proceedings at 47,792, *People v. Simpson* (Cal. Super. Ct. 1995) (No. BA097211)).

187 One of the reforms made in Arizona was to give judges the discretion to instruct jurors prior to the attorneys' closing arguments so that jurors would have the legal framework in which to place the closing arguments. See Dann & Logan, *supra* note 122, at 283 ("When jurors know the applicable law before the attorneys sum up, they are better equipped to understand and evaluate the arguments, and the attorneys are relieved of 'foretelling' the jurors what law the judge will tell them later.").

188 One book published in 1997 described the practice of juror note-taking as "widespread." JURY TRIAL INNOVATIONS, *supra* note 2, at 141. Only ten years earlier, however, an Administrative Office of the U.S. Courts' estimate had indicated that "90 percent of the federal judges do *not* permit jurors to take notes." KASSIN & WRIGHTSMAN, *supra* note 70, at 128. Thus, in little more than a decade, the practice has become far more prevalent than ever before. However, the practice is still not universal. See *supra* note 2.

189 See *supra* note 3.

190 See *supra* note 3.

191 This is the practice in Illinois courts today. See *supra* note 3.

If during the course of the deliberations the jury does have a question about the instructions, the foreperson can send a note with the question to the judge. At that point, the judge can be unresponsive,<sup>192</sup> or can deny the request.<sup>193</sup> Or the judge can respond by having the jury, the parties, and their attorneys return to the courtroom where the judge simply rereads the relevant instruction, this time perhaps more slowly or more carefully than before.<sup>194</sup> Trial judges have learned not to attempt further clarification of the instructions, even when questioned by the jury, because if they do so they risk reversal.<sup>195</sup>

*B. Explanations for Why Judges Instruct Jurors in This Manner*

One explanation for why judges deliver the instructions orally to the jurors is that this is the way it has long been done. In the past, however, instructions had been delivered more informally and briefly. According to Lawrence Friedman: "In 1776 or 1800, judges tended to talk more freely to the jury. They summarized and commented on the trial; they explained the law in simple, nontechnical language. Instructions were clear, informative summaries of the state of the law."<sup>196</sup> At the time of the founding of America, judges instructed juries that they were the finders of fact and law.<sup>197</sup> According to William Nelson's study of the Massachusetts legal system before the Revo-

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192 See, e.g., SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* 167 (2005) ("Adding insult to injury from the jurors' perspective, judges sometimes would appear to turn a cold shoulder when the jury asked them to clarify instructions or define terms such as 'mitigating.'").

193 See, e.g., Simon Romero et al., *Scrushy Jury in Deadlock; Judge Says Keep Trying*, N.Y. TIMES, June 4, 2005, at C1 (reporting that "the jury sent a note on Wednesday, asking that a portion of the trial transcript be read back to them," but it was "a request the judge denied").

194 See, e.g., Connor, *supra* note 53, at 7 ("When jurors would send out questions asking about the meaning of a concept or term, the custom was always to reread the instruction, as if the jurors would understand a second recital with the renewed dulcet tones of the judicial officer.").

195 See, e.g., Wascher, *supra* note 105, at 52, 54 (describing the response of Cook County Circuit Court Judge Stuart A. Nudelman, a past president of the Illinois Judges Association, to a jury's question on the instructions: "[H]e declined to answer the jury's question both because he was not entirely sure how to answer and because any answer might well have been 'a guarantee of the appellate court saying that, as the trial judge, I went too far and that it's the jury's job to interpret instructions.'").

196 LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 103 (3d ed. 2005).

197 See, e.g., Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939) ("The judges in Rhode Island held office not for the purpose of deciding causes, for the jury decided all questions of law and fact; but merely to preserve order, and see that the parties had a fair chance with the jury." (internal quotation marks omitted)).

lutionary War, instructions could be very confusing as each judge (and there were typically three hearing a case) offered his own instructions seriatim, as did the attorneys.<sup>198</sup>

According to treatise writers in the late 1800s, the common law practice was for judges to deliver their instructions orally. As one treatise writer explained:

In the orderly and regular progress of a cause before a jury, in courts where the common law practice prevails, after the cause has been argued by the counsel on both sides, the judge proceeds to charge the jury orally, explaining to them the nature of the action and of the defense, and the points in issue between the parties, recapitulating the evidence which has been produced upon both sides, and remarking upon it when he deems it necessary or desirable, and directing or instructing the jury on all points of law arising from the evidence . . . .<sup>199</sup>

However, the common law practice was beginning to change in some states: "This common law practice, in many of the States, has been changed by statute, so as to require the court to instruct the jury as to the law of the case only, and, either peremptorily or at the request of either party, to reduce his charge to writing."<sup>200</sup> Judges who reduced their oral instructions to writing had to indicate in the margins which instructions they actually gave and which ones they did not.<sup>201</sup> However, in some states, the court could charge the jury exclusively in writing.<sup>202</sup> In other states, judges were told that they were not to provide any clarification of the instructions once they had delivered them.<sup>203</sup> In general, judges were advised: "It was never contemplated, under

198 WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 26-27 (1975) (providing explanations for why the jury did not follow the law as given by the judge).

199 NEWELL, *supra* note 97, at 8.

200 *Id.*

201 *Id.*

202 In Iowa, for example, "[a]fter argument, the court may also, of its own motion, charge the jury, which shall be exclusively in writing. The court shall not make any oral explanation of any instruction or charge." *Id.* at 11.

203 Judges in Ohio, for example, were advised as follows:

'The court, after the argument is concluded, shall immediately charge the jury, which, or any charge given after the conclusion of the argument, shall be reduced to writing by the court, if either party request it, before the argument to the jury is commenced; and such charge, or any charge or instruction provided for in this section, when so written and given shall in no case be orally qualified, modified or in any manner explained to the jury by the court.'

*Id.* at 12.

the provision of the practice act, that the court should be required to give a vast number of instructions, amounting in the aggregate to a lengthy address; such a practice is mischievous, and ought to be discountenanced."<sup>204</sup>

The practice of having the judge reduce the instructions to writing, whether the written instructions were in addition to or a substitute for the oral instructions, seemed to be a way of constraining the judge so that he did not usurp the jury's function. In this way, appellate courts could be certain that the trial judge had not commented on the facts as well as the law,<sup>205</sup> as had been the practice of English judges, or tried to influence the jury in reaching its verdict.

With the advent of pattern jury instructions in the 1930s,<sup>206</sup> the judge prepared written instructions based on the pattern instructions and delivered them word for word to the jurors as they sat and listened. The practice of giving the jury a written copy of the instructions seems to have been lost along the way, and only recently rediscovered, and then only in some states and not in others. The judge's practice of refraining from commenting on the instructions, even when requested to do so by the jury, can be traced back to at

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204 *Id.* at 15.

205 *Id.* at 16 ("The charge of the court to the jury should be strictly confined to matters of law, and it is erroneous for the judge to tell the jury what facts are proved and what are not.").

206 Robert Nieland identified Ohio as the first state to express interest in the concept of pattern instructions and California as the first state to create pattern jury instructions. See ROBERT G. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM 6 (1979).

According to Nieland's account, the Ohio Common Pleas Judges Association expressed an interest in 1922 in having certain standardized instructions, which the Ohio State Bar Association acted upon by submitting a report with sixteen pattern instructions. However, when a book of sample instructions was published in 1927, the project was abandoned. *Id.*

In California, Judge William J. Palmer of the Superior Court in Los Angeles published an article in 1935 recommending the compilation of approved jury instructions for civil cases. *Id.* A committee undertook this endeavor, which resulted in the publication of the *BAJI* in 1938. Other states, such as Florida, Nebraska, Colorado, and Utah, eventually followed suit. *Id.* at 8.

Sales, Elwork, and Alfini identified Illinois as "the first state to produce an official volume of instructions." Sales et al., *supra* note 12, at 25. In 1957, the Illinois Judicial Conference undertook a jury instruction project, which resulted in a committee that drafted civil instructions under the auspices of the Illinois Supreme Court. Thus, the Illinois instructions had the imprimatur of the Illinois Supreme Court. Eventually, the Illinois Supreme Court adopted a rule that required these instructions to be used whenever they were applicable. Other states followed Illinois's example and have pattern instructions that must be used when applicable. *Id.* at 25-26.

least the late 1800s, according to the treatises.<sup>207</sup> Judges have adhered to this practice ever since. Undoubtedly, judges' reticence to clarify the instructions was reinforced by the use of pattern instructions. As long as judges used the pattern instructions, they were unlikely to be reversed on appeal for erroneous instructions. The pattern instructions were, after all, "approved instructions." In California, the book of pattern instructions bore the title *Book of Approved Jury Instructions*. If, however, judges deviated from the pattern instructions, even to clarify the instructions at the jury's behest, then they invited reversal on appeal.

This method of having the judge deliver the instructions as a lengthy lecture to the jury is also consistent with the traditional passive model of the juror.<sup>208</sup> According to this model, the juror should sit passively through the trial, no matter how complicated the subject matter or how lengthy the proceedings, and be able to understand and remember all that happens. According to this view, jurors can observe witnesses, see exhibits, hear testimony, listen to instructions, and retain all information, just as a sponge absorbs water. Then, when the jurors retire to the jury room, they will have total recall of what has transpired during the trial, including the judge's instructions. According to this traditional view, the way in which instructions were presented to the jury posed no problem. Until recently, this passive model went unchallenged. Judge Dann was one of the early judges to question this model and to advocate for an active model of the juror.<sup>209</sup> He drew from the writings of educators and the empirical studies of social scientists to conclude that the active model, in which jurors are engaged in the trial and permitted to ask questions, talk about the case, and organize the material, best describes how jurors actually learn.<sup>210</sup> The active model poses a challenge to the traditional way of presenting jury instructions; it suggests that there are far more effective ways to reach jurors, consistent with research that has been done on how people learn.

### C. *Advantages to the Current Mode of Presentation*

In spite of recent challenges, the current mode of presenting jury instructions does have several advantages. An advantage to having the judge read the instructions to the jury as the jurors sit in the jury box is that they are physically present, with their attention riveted on the

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207 See *supra* note 203.

208 See Dann, *supra* note 65, at 1241.

209 See *id.* at 1229–31.

210 See *id.* at 1243.



judge. In this era of multitasking, the jurors cannot be doing anything else at the same time as the judge is reading the instructions to them. Although there is no guarantee that they are paying attention, at the very least they must sit through the instructions from start to finish. If jurors were left on their own to read the instructions, they might not get beyond the first page. With the judge doing the reading, however, the jury has to hear the instructions in their entirety. The jurors might not understand all the instructions, but they are, at least, exposed to them. Furthermore, they have heard the law from the judge, a figure of authority in the courtroom. Having the judge do the reading reinforces the lesson that the law is to be respected and that the jurors are to try to follow it as best they can.

*D. Disadvantages to the Current Mode of Presentation*

The opening scene of the movie *12 Angry Men*,<sup>211</sup> in which the judge instructs the jury in a bored, monotone voice, illustrates one reason why the judge should not simply read instructions to the jury in the current manner. If the judge is bored with the reading, what message does he convey to the jurors about the case? In *12 Angry Men*, the judge revealed his view of the case in his reading of the instructions: he thought it was a slam-dunk case and that the defendant was clearly guilty. Although *12 Angry Men* is only a movie and most judges would take greater care not to reveal their own views,<sup>212</sup> one danger with the judge lecturing the jurors in this manner is that the judge will become bored; another danger is that the jurors will become bored.

The difficulty for jurors is that they must listen to a lengthy lecture about the law in a language that is foreign to them. To make matters worse, until recently, they were not permitted to take notes, and even today, they are usually not permitted to ask questions. They must listen to this lecture without the usual tools of the classroom, such as an outline or some key words on the blackboard. The organization of the lecture is unlikely to be discernible to a listener because the instructions were written to be read and studied by appellate judges. Parts of the lecture would have been useful for the jurors to hear at different points throughout the trial, but instead, they are

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211 12 ANGRY MEN (Metro Goldwyn Mayer/United Artists 1957).

212 But see Peter David Blanck et al., Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 133-36 (1985) (finding that jurors are influenced not only by what a judge says but also by the way in which he or she says it); Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1278 (1975).

given most of the information at the very end. Finally, the lecture is likely to be lengthy and delivered without any breaks. As the lecture proceeds, judges can almost predict at which point they will see jurors' eyes "glaze over."<sup>213</sup> As one judge confessed:

I remember starting out as a new judge a lifetime ago, coming to anticipate exactly where, in my recitation of the mass of instructions, jurors' eyes would roll and despair set in. I have known exactly the moment I have lost them.

Yet, as part of what I had been taught, I droned on.<sup>214</sup>

This is hardly a new phenomenon. One observer, writing in 1968, described the reading of the instructions as "[p]robably the most discouraging part of a trial."<sup>215</sup> He described the scene as follows: "The blank expressions on the faces of the citizen-jurors is pitiful; it is matched only by the bleak look on the judge as he plods through the legal terminology that he knows is making little, if any, impression on his listeners."<sup>216</sup>

Courts expect jurors to learn in ways that are quite unnatural, particularly when compared to methods used in the classroom. If students had to learn according to the rules of the jury, they would respond with frustration and disbelief, as they do in the short videotape *Order in the Classroom*.<sup>217</sup> In this videotape, set in a college classroom, the professor explains that his course will be taught according to the rules of the jury: students cannot take notes, ask questions, know the subject-matter of the course, or even discuss the material until the end of the course, at which point they must all agree on the answer for the final exam, receive the same grade, and never know if they reached the right answer. Their looks of bewilderment suggest how jurors must feel when confronted with the rules they must abide by as jurors.

The main point is that jurors, like students, do not necessarily learn best by listening to a lengthy lecture that allows for no interaction. The question then becomes in what ways can judges borrow from lessons learned in other contexts, such as the classroom and empirical studies, to alter the presentation of the instructions so that they reach jurors more effectively?

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213 As one judge explained, "'my eyes glaze over. I'm reluctant to make eye contact with the jurors because I'm embarrassed about what I'm reading to them.'" Wascher, *supra* note 105, at 52 (quoting Cook County Circuit Judge Stuart A. Nudelman).

214 Connor, *supra* note 53, at 7.

215 MARCUS GLEISSER, JURIES AND JUSTICE 228 (1968).

216 *Id.*

217 See *supra* note 7.

## VI. INNOVATIONS IN HOW JURY INSTRUCTIONS ARE PRESENTED

Even if judges continue to deliver jury instructions as a lecture, they could improve the learning experience for jurors if they altered the timing of some of the instructions and provided several tools, such as individual written copies of the instructions, an audiotape or videotape of the instructions for the deliberations, and a meaningful opportunity to ask questions.

### A. *Timing*

Even if judges still give the bulk of the instructions at the end of the trial, they can give some of the instructions earlier in the proceeding. It would be useful for judges to give jurors “preliminary jury instructions” in which they tell jurors about their role, the case, and the law so that jurors have some framework in which to place the trial that is about to unfold. These preliminary instructions should be given orally and in writing, and jurors should be told that the instructions are subject to change depending on developments at trial.

Arizona has already moved in this direction. Among its reforms were preliminary jury instructions in which judges give jurors background about the relevant substantive law or standards of proof as well as other matters that might be useful.<sup>218</sup> The goal is to “assist jurors in organizing and understanding the evidence as they hear it, improve their recall, and reduce the chances of their applying an erroneous rule to the evidence.”<sup>219</sup> Empirical studies have found that instructions at the beginning and end of the trial help jurors to focus on relevant evidence and remember it,<sup>220</sup> to follow the law,<sup>221</sup> and to

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218 ARIZ. R. CIV. P. 51(a); ARIZ. R. CRIM. P. 18.6(c); *see also* Dann & Logan, *supra* note 122, at 281.

219 Dann & Logan, *supra* note 122, at 281.

220 *See, e.g.*, Elwork et al., *supra* note 15, at 177 (finding that instructions at the beginning of the trial helped jurors to focus on relevant evidence and to remember it, and recommending that instructions be given both at the beginning and end of the trial).

221 *See, e.g.*, Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409, 425–26 (1989) (finding that preliminary instructions helped jurors to follow the law); Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. PERSONALITY & SOC. PSYCHOL. 1877, 1881, 1884–85 (1979) (finding that mock jurors who were given preliminary instructions were less likely to view the defendant as guilty than those who received no instructions or who received instructions only at the end of trial).

feel more satisfied with their jury experience.<sup>222</sup>

Another way in which timing can make a difference is if judges instruct jurors as the issue becomes relevant during the trial. For example, if a law enforcement officer is about to testify in a criminal trial, then it would be useful for the judge to instruct the jury on how the law enforcement officer's testimony is entitled to no more and no less weight than the testimony of any other witness.<sup>223</sup> The ABA's *Principles for Juries and Jury Trials* have suggested that courts move in this direction. The *Principles* call for judges to instruct jurors "[w]hen necessary to the jurors' proper understanding of the proceedings."<sup>224</sup> Preliminary instructions at the beginning of the trial, with instructions given during the trial as they are needed, will provide jurors with essential information as the trial proceeds and also mean that the instructions at the end of the trial can be shorter and therefore easier to follow.

### B. Tools

There are a number of tools that jurors should be given to accompany the judge's reading of the instructions, particularly the instructions at the end of trial. Some of these tools, such as note-taking and an individual written copy of the instructions, are basic and any teacher or professor would recognize their utility in the learning process. Some, such as an audiotape or videotape of the judge reading the instructions, depend on technology and will change as the technology changes. Finally, some, such as accompanying illustrations, have yet to be tried, but might be helpful. The goal of these and other tools is to enable judges to communicate more effectively with jurors, each of whom might learn best through a different method.

#### 1. Individual Written Copies of the Instructions

As the judge reads the jury instructions, each juror should have a written copy of the instructions that he or she can follow during the reading and then use during the deliberations. Each juror also should be allowed to take notes throughout the trial, including during the reading of the instructions. In this way, jurors can listen to the judge give the instructions, see the words on the page, and be able to note in the margins of their written copies which words they have

222 See, e.g., Heuer & Penrod, *supra* note 221, at 426 (finding that preliminary instructions increased juror satisfaction).

223 See, e.g., 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL § 7-61 (2005) (Law Enforcement Witness).

224 ABA PRINCIPLES, *supra* note 103, princ. 13.D.2.

trouble with or which concepts they think the jury should focus on during the deliberations. Whether by listening, reading, writing, or some combination, jurors will have different ways in which to grasp the information presented in the instructions.<sup>225</sup> Some people learn best by listening to a presentation, some by reading the words on the page, and some by taking notes. All of these methods will now be available to jurors. One judge, who has given each juror a written copy of the instructions for more than a decade, described the innovation as “wildly successful” and as “an inexpensive, effective way to virtually guarantee juror understanding of the law.”<sup>226</sup>

## 2. Audiotape or Videotape of the Judge’s Reading

Another tool that can help jurors to understand the instructions is an audiotape or videotape of the judge reading the instructions. This tape can be used by the jurors during their deliberations.<sup>227</sup> Although a written copy of the instructions goes far to reduce juror questions about the instructions during the deliberations,<sup>228</sup> an audiotape or videotape can help to answer juror questions without interrupting their deliberations. Should a question arise, they can simply replay that portion of the tape with the judge reading the relevant instruction. They can stop the tape and discuss the instruction and replay it as many times as necessary.

One reason that a tape, particularly a videotape, is helpful is that information is conveyed not just through words on the page, but also through intonation, facial expressions, and other body language. Thus, jurors could glean this information from a tape of the judge

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225 See, e.g., JURY TRIAL INNOVATIONS, *supra* note 2, at 19 (“[M]aterial is better remembered when it is presented in several different forms than in a single form. Having the jurors both listen to and read the instructions should capitalize on this effect.”); Mark Hansen, *Learn How They Learn: Knowing Modes of Adult Education Helps Lawyers Create Successful Presentations*, A.B.A. J., Aug. 2003, at 26, 26 (“People learn in different ways. . . . A good teacher will try to incorporate as many different learning preferences into his or her instruction as possible.”).

226 Connor, *supra* note 53, at 7.

227 Of course, the jury must be given an audio cassette player or a VCR in the jury room in order to make use of this tool. Both these devices are relatively inexpensive and still available. However, they will become harder to find when they are replaced by DVD players, and after that, the next new technology. Courts, however, are rarely on the cutting edge of technology, particularly because it is usually expensive when it is first introduced on the market.

228 See Connor, *supra* note 53, at 7. (“Every judge I have spoken to who has taken on this technique [of giving every juror a copy of the written instructions] has reported the same phenomenon: Legal questions from jurors during deliberations have stopped.”).

reading the instructions. The traditional way of answering a jury's question during the deliberations is for the jury to send a note to the judge, for the judge to call everyone back into the courtroom, and for the judge to reread the relevant instruction to the jury. One problem with this practice is that the judge never answers the jury's question. Another problem is that this practice takes time and interrupts the jury in the midst of its deliberations and may deter the jury from asking its question.<sup>229</sup> With a videotape, the jury can have the benefit of the judge's presentation, with all the subtle information conveyed by body language and tone, without disrupting its deliberation. Some lawyers and judges might object to this practice on the ground that jurors might give too much weight to this one particular instruction, but this is just as likely to happen whether the jury replays the particular instruction in the jury room or whether it hears the judge reread the particular instruction in the courtroom.

### 3. Answering Jurors' Questions

After the judge reads the instructions to the jury, but before he or she sends the jury off to deliberate, the judge should allow jurors to ask questions about the instructions. Undoubtedly, this is a risky proposition for judges. They might answer a question in a way that leads to reversal, so they would be reluctant to embrace this practice. But imagine a classroom in which students were never allowed to ask any questions, particularly after a lengthy lecture on complicated material. Their learning process would be thwarted. It might be that jurors do not have any questions,<sup>230</sup> or that they are too shy to ask them of the judge, but at least they should be given the opportunity. If the judge wants to add some limitations, the questions could be submitted in

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229 For an example of a jury that felt intimidated by the process of having to return to the courtroom to hear the judge reread a portion of the instructions anytime the jury submitted a question to the judge, see *SUNDBY*, *supra* note 192, at 49–50. One juror explained that the formal and lengthy process of having to return to the courtroom and hear the judge simply reread the relevant instruction discouraged the jury from asking questions about the instructions:

'We felt a bit intimidated because every time we asked a question, we had to file into the courtroom, they brought in the defendant, they'd call in all the attorneys, it caused such a big deal, we just tried to resolve any further disputes on our own. It was really intimidating—not that we'd allow it to get . . . in the way, but it became such a tedious process to get additional data.'

*Id.* at 50.

230 Judge Connor reported that once jurors were given a written copy of the instructions to follow as she read them aloud, they no longer sent notes to her with legal questions during the deliberations. See Connor, *supra* note 53, at 7.

writing so that the judge could review them with the attorneys before giving an answer or even explaining why he or she is not permitted to answer the question. The few states that have permitted jurors to submit written questions to the judge to be asked of witnesses have had favorable experiences with the practice.<sup>231</sup> This opportunity for jurors to ask questions about the instructions seems no less important and equally as likely to yield benefits to the jurors as asking questions of witnesses. For example, if there is a term that a juror does not understand, he or she should not have to speculate as to its meaning, but should have the judge provide the answer. At least one empirical study found that jurors who served on juries that had sent written questions to the judge during their deliberations and had received supplemental information from the judge in response achieved a better understanding of jury instructions than those who had not received such information.<sup>232</sup>

#### 4. Notebooks

One of the reforms adopted by Arizona is to allow judges to provide jurors with notebooks that contain information useful for understanding the case; these notebooks also could contain items that would be useful for understanding the instructions.<sup>233</sup> The notebooks typically contain basic information, such as a list of the parties, lawyers, and witnesses, copies of key exhibits, preliminary jury instructions, and a seating chart for the courtroom identifying the participants.<sup>234</sup> It is useful for jurors to have this basic information and to have it in one place. Judges could add a page that contains terms of art likely to be used in the instructions as well as an outline that shows the organizational structure of the instructions. These basic study guides, common to students, also would assist jurors to understand this new material.

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231 See, e.g., Mott, *supra* note 183, at 1105 (describing New Jersey's pilot program with juror questions and judges' satisfaction with the practice after they had participated in the program).

232 See Reifman et al., *supra* note 30, at 551 ("A new finding of this study is that jurors who requested help from the judge performed substantially better than those subjects who did not. When the judge responded by providing supplemental information, either in the form of written instructions or by explaining the instructions in their own words, the jurors' understanding of the instructions reached fairly high levels (up to 67%).").

233 See, e.g., ARIZ. R. CIV. P. 47(g) (authorizing the use of juror notebooks); ARIZ. R. CRIM. P. 18.6(d) (giving courts discretion to provide notebooks in criminal trials).

234 See JURY TRIAL INNOVATIONS, *supra* note 2, at 110 (suggesting contents of notebooks); THE POWER OF 12, *supra* note 145, at 79 (same).

## 5. Instructing Jurors on Deliberations

Judges tend not to instruct juries on how they should conduct their deliberations, but this is one area in which jurors have expressed the need for some guidance. Judges have shown restraint, for fear of intruding in decisions that are supposed to rest entirely with the jury. However, judges could offer general guidelines, without mandating particular procedures.

Jurors have expressed the need for an instruction on possible ways to proceed during deliberations.<sup>235</sup> One jury foreperson, Graham Burnett, a professor who eventually wrote a book about his jury experience in a murder trial in New York, expressed frustration that the court did not provide any instruction on how the jurors should proceed with their deliberations.<sup>236</sup> Federal District Court Judge Kane, who read Burnett's book, was so inspired that he drafted a deliberation instruction that he routinely gives to juries.<sup>237</sup> The instruction provides juries with basic information on how to proceed with deliberations, including the role of the foreperson, the need to listen carefully to each other, the inadvisability of an early vote, a caution that there may be differences among jurors and even points of impasse, but that patience, hard work, and respect will go a long way to overcoming these.<sup>238</sup> The judge is careful to tell jurors that he is just offering suggestions, and that they are free to structure their deliberations as they see fit, but at least his instruction provides them with extremely helpful information. The American Judicature Society, like Judge Kane, has tried to fill the gap and has drafted a deliberation instruction in the form of a brochure that it encourages judges to share with their juries.<sup>239</sup>

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235 See, e.g., Erin Emery, *The Jury That Couldn't: Scenes from a Mistrial in Teller County*, DENV. POST, July 3, 2002, at 1A (quoting a juror in a first-degree murder trial as saying, "It was really frustrating because we were not getting any help on how do you go about this, how do you approach the situation. You're supposed to decide the outcome of a man's life—blind—and that's not acceptable.").

236 See D. GRAHAM BURNETT, *A TRIAL BY JURY* 79–85 (2001).

237 See Kane, *supra* note 141, at 30–31 (providing instruction).

238 *Id.* I would go a step further and have judges advise jurors on the need for everyone to participate in the deliberations, to listen carefully to each other, and to avoid succumbing to stereotypes about fellow jurors. See, e.g., Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 606–12 (1987). For an example of jurors in a death penalty case who engaged in such categorizations of the hold-out juror, though she eventually changed her vote in both the guilt and sentencing phases, see SUNDBY, *supra* note 192, at 64–69, 85.

239 See AM. JUDICATURE SOC'Y, *BEHIND CLOSED DOORS: A GUIDE FOR JURY DELIBERATIONS* (1999) (providing general information about jury deliberations).



## 6. Other Ideas

Judges need to be willing to borrow from other settings and to use tools that have proven effective in business or in the classroom to convey difficult material like jury instructions. At a recent conference of judges, lawyers, and academics, one judge reported that when he reads the instructions to the jury, he also shows them a PowerPoint presentation, in which the key points and terms in the instructions are identified.<sup>240</sup> Although PowerPoint is hardly new to the business world, it is still relatively new to the courtroom, where it is more likely to be used by lawyers than by judges. Other lawyers and judges have suggested the use of mini-summaries, in which the lawyers briefly state what has been accomplished in the past week and what they expect to accomplish in the next week.<sup>241</sup> This tool will be familiar to any teacher or professor. Another practitioner, borrowing from psychology, recommended that some instructions could best be conveyed by illustrations.<sup>242</sup> He did not propose illustrations as a substitute for words, but simply as a supplement. In his view, some concepts could be better grasped with the aid of a simple diagram. For example, the instruction for “reasonable doubt,” which has proven difficult for judges to explain in words,<sup>243</sup> might be easier to understand if the jurors saw a diagram that conveyed the idea.<sup>244</sup> He acknowledged that

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240 *But see* Ruth Marcus, *PowerPoint: Killer App?*, WASH. POST, Aug. 30, 2005, at A17 (“PowerPoint’s failings have been outlined most vividly by Yale political scientist Edward Tufte . . . [who] argued that the program encourages ‘faux-analytical’ thinking that favors the slickly produced ‘sales pitch’ over the sober exchange of information.”).

241 *See* Kane, *supra* note 141, at 30; Stephen P. Laitinen & Jennifer Lurken, *Civil Juries and the Gordian Knot of Complex Litigation*, FOR THE DEFENSE, July 2005, at 10, 14 (“This enhanced line of communication between attorneys and jurors is ‘of paramount importance in getting jurors to understand the key points of contention in a trial.’” (quoting Arthurs, *Mini-Summation Lauded in Libel Case*, LEGAL TIMES, Feb. 1985, at 1, 23)).

242 *See* Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 LAW & PSYCHOL. REV. 67 (1998).

243 *See, e.g.,* *People v. Johnson*, 14 Cal. Rptr. 3d 780, 786 (Ct. App. 2004) (“Over a quarter of a century ago, a thoughtful Court of Appeal opinion collected cases from a number of jurisdictions on the fate of ‘innovative’ and ‘[w]ell intentioned efforts’ by trial courts ‘to “clarify” and “explain” reasonable doubt that instead created ‘confusion and uncertainty’ and led to reversals on appeal.” (quoting *People v. Garcia*, 126 Cal. Rptr. 275 (Ct. App. 1975))).

244 *See* Dattu, *supra* note 242, at 76–77; *see also* David Bruns, *Helping Jury See the Facts with Pictures*, NAT’L L.J., July 16, 2001, at B16 (“Litigators should note that a person retains 85% of information received visually, and markedly less of the information received orally.”).

this would be a radical approach for the judiciary and recommended that it be tried as a pilot program.<sup>245</sup>

The point of these tools, both the tried and the still untried, is that they would enable judges to present the instructions through a variety of methods. Although some jurors might learn best through diagrams and some through words, if the instructions are conveyed in both forms, then a larger number of jurors will understand them. When these various tools are coupled with instructions written in plain language then there is an even greater likelihood that the jurors will understand what they are supposed to be doing.

## VII. WHY DIFFERENT PRESENTATION STYLES MATTER

### A. *The Challenges of Multiculturalism*

Ours is a multicultural society. According to the most recent census, Latinos are the fastest growing minority group,<sup>246</sup> and for many Latinos English is a second language. The challenge posed by our diverse society—diverse according to race, gender, ethnicity, age, and education—is how to encourage all of these citizens to serve on the jury, and once they are there, how best to reach them and to instruct them on the law and on their task as jurors.

States have made a number of efforts to reach out and include as broad a swath of the population as possible for jury duty. There was a time, not so long ago, when jury duty was limited to white men with property, and African-American men and all women were excluded.<sup>247</sup> Even when they were allowed to serve, there were a number of practices, from discriminatory peremptory challenges<sup>248</sup> to

245 See Dattu, *supra* note 242, at 76.

246 See, e.g., Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Venues*, JUDGES' J., Fall 2004, at 17, 17 ("Latinos [are] the fastest growing ethnic community in the United States . . ."); see also John McCormick & John Keilman, *Latinos Drive Growth: Area's Non-Hispanic Whites Could Be a Minority in Decade*, CHI. TRIB., Aug. 11, 2005, § 1, at 1 ("Accelerating Hispanic population gains accounted for more than 80 percent of the Chicago region's growth since 2000, according to new census estimates . . ."); *id.* ("The Census Bureau said the 2004 racial and ethnic population estimates show Texas is the latest state where minorities have become the majority. It has joined Hawaii, New Mexico, California and the District of Columbia as places where other racial and ethnic groups outnumber non-Hispanic whites.").

247 See, e.g., Marder, *supra* note 186, at 888 & nn.42–43 (1999) (describing the early exclusion of African-American men and all women from the jury).

248 The elimination of discriminatory peremptory challenges has been the goal of the U.S. Supreme Court at least since *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a prosecutor's use of peremptories to strike African Americans from the jury

affirmative registration,<sup>249</sup> that kept them from serving as jurors. Now that these barriers have been lifted, at least on the books, they have a greater opportunity to serve than ever before.

States have reached out to these and other groups who were traditionally underrepresented on the jury in a number of ways. They have updated and supplemented the voter registration list, the list from which jurors were traditionally drawn for the venire.<sup>250</sup> They have reduced the number of exemptions,<sup>251</sup> instituted "one-day/one-trial,"<sup>252</sup> and experimented with stratified jury selection in which geographical areas that are not well represented on the jury venire receive additional questionnaires so that the number of jurors summoned from these areas will be on a par with the number of jurors summoned from other areas.<sup>253</sup> States also have tried to make

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violated the Equal Protection Clause), and its progeny. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that peremptories exercised on the basis of gender violate the Equal Protection Clause); *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that *Batson* applies to defendants as well as to the prosecution); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that *Batson* applies to civil suits); *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that peremptories exercised on the basis of race violate the Equal Protection Clause). Although the Court seemed to do some backsliding in *Purkett v. Elem*, 514 U.S. 765, 768–69 (1995) (per curiam) (holding that a race-neutral explanation given in response to a *Batson* challenge need not be "related to the particular case to be tried" (quoting *Batson*, 476 U.S. at 98)), the Court's recent decision in *Johnson v. California*, 125 S. Ct. 2410, 2417, 2419 (2005) (holding that California's standard requiring a party objecting to a peremptory to show that it "was more likely than not the product of purposeful discrimination" was inconsistent with the *Batson* framework), suggested that it was adhering to its commitment to nondiscriminatory peremptory challenges.

249 Until 1975 when the U.S. Supreme Court decided *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (holding that the systematic exclusion of women from the venire through the practice of affirmative registration violated defendant's Sixth Amendment right to a venire drawn from a fair cross section of the community), states were allowed to require affirmative registration in which women, but not men, had to register in advance if they wanted to serve as jurors. See *Hoyt v. Florida*, 368 U.S. 57 (1961) (holding that affirmative registration of women as jurors did not violate defendant's right to Due Process as guaranteed by the Fourteenth Amendment).

250 See JURY TRIAL INNOVATIONS, *supra* note 2, at 36 ("As of August 1996, 12 states use only voter registration lists, six states use only lists of licensed drivers, two states use state-unique lists, and 25 use a combined voters and drivers list. Five states add some additional lists to the voters and drivers lists.").

251 See *supra* note 152 (describing New York's elimination of its exemptions).

252 See JURY TRIAL INNOVATIONS, *supra* note 2, at 29 ("The practice is statewide in Massachusetts, Connecticut, Florida, and Colorado, and is used in most courts in New York, Arizona, North Carolina, and Texas.").

253 Although some district courts have experimented with different versions of stratified jury selection, see Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273, 275 (1996) (describing efforts by

jury duty more convenient by allowing an automatic postponement, creating an ombudservice,<sup>254</sup> providing online questionnaires and information about getting to the courthouse,<sup>255</sup> and improving facilities for jurors once they are in the courthouse.<sup>256</sup> States have increased juror pay to make jury service less of an economic hardship.<sup>257</sup> They also have initiated advertising campaigns, encouraging citizens not to ignore their jury summons,<sup>258</sup> and following up with orders to show cause and fines when jurors fail to appear.<sup>259</sup> States have even started programs in the schools so that students will have positive attitudes toward jury duty when they are of age to serve, and meanwhile they will encourage their parents to serve.<sup>260</sup> National organizations, such as the ABA's Young Lawyers' Division, have reached out to students as well. They have produced an interactive classroom curriculum entitled *We the Jury* that teaches junior and high school students about the jury.<sup>261</sup>

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district courts in Connecticut and Michigan), appellate courts have not always approved, *see In re United States of America*, 426 F.3d 1 (1st Cir. 2005) (granting a writ of mandamus and directing the district court judge not to implement those paragraphs of her order calling for new jury summonses to be mailed to residents who live in the same zip code as jury summonses returned to the court as "undeliverable" or for which no response was received); *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998) (striking down the method of stratified jury selection adopted by the Eastern District of Michigan).

254 *See supra* note 156 (describing New York's ombudservice).

255 *See, e.g.*, Marder, *supra* note 135, at 1272-73 (providing examples of states that are in the vanguard in their use of the Web and the convenience it provides to prospective jurors).

256 *See supra* note 136 (describing New York's improvements).

257 *See, e.g.*, Rob Walters et al., *Are We Getting a Jury of Our Peers?*, 68 TEX. B.J. 144, 146 (2005) (describing New York and El Paso County's increase in juror pay to boost participation rates).

258 For example, Duluth, Minnesota's advertising campaign includes the slogan "It Isn't Fair, If You're Not There," while Pittsburgh, Pennsylvania's is "Jury Service: Your Role in the Justice System." JURY TRIAL INNOVATIONS, *supra* note 2, at 26-27.

259 *See, e.g.*, Colin F. Campbell & Bob James, *Innovations in Jury Management from a Trial Court's Perspective*, JUDGES' J., Fall 2004, at 22, 25 (describing Arizona's enforcement efforts for those summoned for jury duty, including orders to show cause and up to \$500 penalties for those held in contempt).

260 One group in Washington, D.C., the Council for Court Excellence, organized a "You Decide" campaign that includes an educational package and a teacher's guide about the jury; it is now used by school systems in about twenty states. JURY TRIAL INNOVATIONS, *supra* note 2, at 27. For a recent children's book on the jury, see TERRI DEGEZELLE, *SERVING ON A JURY* (2005).

261 Morgan Morrison, *ABA-YLD Adopts TYLA's "We the Jury,"* 68 TEX. B.J. 141 (2005).

As states reach out to a broader swath of the citizenry for jury duty,<sup>262</sup> judges need to consider how best to reach this diverse population once it enters the courtroom. Although judges' presentation of jury instructions in lecture format might have made sense when the jury was more homogeneous, when instructions were shorter, and when jurors were less likely to have been literate, the presentation style makes less sense today given the diversity of the jury population and the requirement of literacy.<sup>263</sup> Today's judge needs to consider that the jury box will include jurors whose first language is not English, whose education might not extend beyond high school, or who may be a new citizen and have come from a country that did not have a jury system.

The diversity of our population should be an impetus for reconceptualizing how jury instructions are presented. The goal should be to present jury instructions in a variety of ways in order to reach every juror in the jury box. Over time, the challenge will become even greater as groups such as the ABA recommend the use of interpreters for jurors who do not speak or understand English.<sup>264</sup>

The benefits of a diverse jury are numerous, making it essential that jury instructions reach this group. Ideally, a diverse jury includes jurors with different backgrounds, perspectives, and approaches to the case.<sup>265</sup> As the jurors deliberate, they can test ideas, correct each other's mistaken assumptions,<sup>266</sup> and challenge each other's stereotypes.<sup>267</sup> A diverse jury reassures the defendant that he has been tried by a jury that has not been stacked against him by the government. A diverse jury also reassures the larger community, even if it does not

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262 Of course, some states still have a long way to go. See, e.g., Walters & Curriden, *supra* note 246, at 19 (describing the underrepresentation of Latinos on jury venires in Dallas and Houston, Texas).

263 For example, in federal courts, jurors must be able "to read, write, and understand the English language," 28 U.S.C. § 1865(b)(2) (2000), as well as "speak the English language." *Id.* § 1865(b)(3).

264 See ABA PRINCIPLES, *supra* note 103, princ. 2.A.4 ("All persons should be eligible for jury service except those who . . . [a]re not able to communicate in the English language and the court is unable to provide a satisfactory interpreter . . .").

265 See, e.g., Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 295, 317-19 (1999) (describing the benefits of diverse juries).

266 See, e.g., *Ballew v. Georgia*, 435 U.S. 223, 232-38 (1978).

267 See, e.g., Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1025 (2003) (suggesting several ways that the race of mock jurors may affect the deliberations, including the knowledge that White jurors "will eventually discuss the case with Black jurors . . . activating their concerns about prejudice and influencing their processing and interpretation of the evidence").

agree with a particular verdict that the jury has reached, that the process is aboveboard and fair.<sup>268</sup> For all of these reasons, it is worth striving to create jury instructions that can be understood by jurors with different backgrounds, training, and education.

### B. *The Challenges of the Generational Divide*

The challenge becomes even more pronounced given that we live in an age of technological and communications advances<sup>269</sup> that can separate young jurors from elderly jurors in how they have been taught and how they are accustomed to receiving and exchanging information. Instructions have to reach across this divide, particularly in this period of transition.

Young jurors have grown up with the Web, the laptop, and the cell phone. The laptop has been their mode of note-taking in school,<sup>270</sup> and text messages, e-mail, and cell phones have been their modes of communication with friends. They may be accustomed to getting their news on the Internet and presenting information using PowerPoint.<sup>271</sup> Perhaps most significantly, they are accustomed to multitasking, whether at home or in the classroom. The tools that they are comfortable with allow them to do this. As they sit in class, they can take notes on their laptop, surf the Web, and exchange text messages with classmates, much to the dismay of their teacher.<sup>272</sup>

In contrast, older jurors grew up taking notes with pen and paper in the classroom and in their jobs. They are accustomed to reading

268 See, e.g., Marder, *supra* note 265, at 316.

269 See, e.g., Robert E. Litan, *Law and Policy in the Age of the Internet*, 50 DUKE L.J. 1045, 1046 (2001) ("In just four years, the Net had attracted fifty million users, the fastest pace of adoption of any communications technology in history. . . . As of January 2000, more than seventy-two million computers from more than 220 countries were connected to the Internet.").

270 See, e.g., Lisa Guernsey, *For the New College B.M.O.C., 'M' Is for Machine*, N.Y. TIMES, Aug. 10, 2000, at G7 ("The computer has . . . become the portal through which students do everything they need to do on campus.").

271 See, e.g., John Schwartz, *Ideas & Trends; The Level of Discourse Continues To Slide*, N.Y. TIMES, Sept. 28, 2003, § 4, at 12 ("[PowerPoint] has also become so much a part of our culture that, like Kleenex and Xerox, PowerPoint has become a generic term for any bullet-ridden presentation.").

272 See Ian Ayres, *Lectures v. Laptops*, N.Y. TIMES, Mar. 20, 2001, at A25 ("At Yale, where classrooms are wired to the Internet, students can also surf the Web, send e-mail or even trade stock."); Sara Silver, *Wired Classes Give Lesson in Interest of Students; Access to Web Can Turn Off Attention*, CHI. TRIB., Mar. 12, 2001, at 6 ("'[H]aving a fully wired classroom is an unfortunate temptation [that] somehow disengages the student from what's going on in front of the classroom.'" (quoting Professor Scott Carr, UCLA)).

books and newspapers. Although many older jurors are now comfortable with e-mail<sup>273</sup> and cell phones, they are equally adept at such old-fashioned modes of communication as letters and memos.

The way that judges present instructions needs to take into account both young and old jurors and their backgrounds and training. Many of the changes suggested, such as individual written copies of instructions or audio or videotapes of the judge's reading of the instructions, do not go far enough to reach young jurors, who grew up with CNN and MSN and expect to be bombarded with a lot of information, presented rapidly and succinctly.<sup>274</sup> The cumbersome way in which instructions are now presented hardly meets these young jurors' expectations.

Just as laypersons are needed on the pattern jury instruction committees to ensure that the instructions are written in plain language, so too, they are needed to suggest ways to present instructions that would reach jurors today, particularly young jurors. The young jurors are the jurors of the twenty-first century. If we continue to adhere to modes of presentation popularized in the 1800s, in spite of the technology and communications revolutions going on outside the courthouse, then these young jurors will find the jury experience to be an alien one and they will try to avoid jury service, even though their participation is much needed. It is to these jurors that we must turn for ideas on how best to present jury instructions to meet the needs of jurors in the twenty-first century.

### CONCLUSION

Jury instructions need to be written in plain language and presented in ways that will reach jurors of the twenty-first century. Although the jury has been slow to change, looking in many ways the same as it did at the founding of this nation, jury instructions, whose language and presentation style have also remained largely unchanged, are now sorely in need of revision. Thirty years of empirical studies have made this point. Some states, such as California, have understood the lesson and have rewritten their pattern jury instructions in plain language. Other states, such as Arizona, have under-

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273 See, e.g., *Over-65 Group Takes to Web in Drove*, CHI. TRIB., Mar. 21, 2001, § 9, at 22 ("In fact, over the last year, those age 65-99 were the fastest-growing group online."); *id.* ("E-mail is the primary reason seniors use the Internet . . .") (citing a joint survey by SeniorNet and Charles Schwab & Co.).

274 See, e.g., Ian Francis, *Jury Trial: Evolution or Extinction?*, 151 NEW L.J. 414, 414 (2001) ("People are used to receiving information in short bursts via television and computer screens, with oral commentary reinforcing the visual message . . .").

stood the lesson and in addition to plain language instructions have experimented with the timing of the instructions and the use of written and oral instructions. Given the ever growing diversity of our nation, and the revolutions in technology and communication, the time is ripe for envisioning new ways to instruct jurors—young and old, educated and uneducated, English-speaking and non-English-speaking—because the vitality of the jury depends on their ongoing and informed participation.



